

Nos. 20-1199, 21-707

In the **Supreme Court of the United States**

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND 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 FREEDOM X AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST¹

Freedom X is a public interest law firm devoted to protecting and expanding freedom of thought, speech, and religious conscience. It represents students who challenge constraints on their political and religious activity. Freedom X and the students it represents are vitally interested in this case, as it can help ensure this Court's goal that they enjoy the "wide exposure to that robust exchange of ideas," on which democratic self-government and the discovery of truth depend. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

¹ No counsel for a party wrote this brief in whole or in part, and no party, counsel for a party, or anyone else made a monetary contribution intended to fund the preparation of submission of this brief. Counsel of record for all parties have filed blanket consent.

SUMMARY OF ARGUMENT

More than four decades ago, this Court authorized universities to consider race in admissions decisions. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). The Court did not authorize racial preferences to redress the “amorphous concept” of “‘societal discrimination,’ ” but only for the limited purpose of fostering a “wide exposure to [a] robust exchange of ideas.” *Id.* at 307, 312. Especially in recent years, the universities have amplified the use of racial preferences in admissions (and beyond). Yet the range of ideas to which students are exposed is narrower than ever. Universities’ race-preference programs have failed to achieve their prescribed purpose and this Court should bar their further use.

First, universities like defendants UNC and Harvard now use preferences for a completely different purpose—which *Bakke* forbade. Justice Powell’s opinion anticipated that “simple ethnic diversity” would be the means for achieving the end goal of a “genuine diversity” of “educational pluralism.” *Id.* at 315, 317. But through today’s Diversity, Equity, and Inclusion (DEI) policies, *Bakke*’s means have become the end; though *Bakke* barred preferences to redress societal discrimination, the goal of the “equity” that schools pursue is “address[ing] the consequences of a long history of prejudice and discriminatory treatment.”²

²NACE Annual DEI Report: Anti-Racism Actions, Appendix 4 (2020-21 Fiscal Year) (NACE Report).
<https://www.naceweb.org/uploadedfiles/files/2022/resources/2021-nace-dei-annual-report.pdf>

Race is no longer used to support the inference that an individual will enrich campus diversity; it is *per se* proof, because “diverse” has become a synonym for “nonwhite.”³ That is how NASDAQ can create a rule requiring boards to have “diverse directors.”⁴ UNC likewise refers to its “diverse faculty members” rather than its “diverse faculty,”⁵ as “diverse” describes not the faculty as a whole but only those *individuals* from specific racial backgrounds. Under this standard, a committee with ten blacks would be fully “diverse” (100 percent nonwhite), but one with five whites, three Latinos, one black, and one Asian American would be only half diverse (50 percent nonwhite). This is the antithesis of what *Bakke* prescribed.

Second, Bakke’s goal of diversity of thought is now *disfavored* as an impediment to the goal of equity. One UNC dean urged her colleagues to “revisit” the goal of viewpoint diversity due to the “fundamental conflict between efforts to promote racial equity and understandings of structural racism, and efforts to

³This brief will follow *Bakke’s* practice of capitalizing neither “white” nor “black.”

⁴NASDAQ’s Board Diversity Rule: What NASDAQ-Listed Companies Should Know, <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> (Feb. 18, 2022) (*Board Diversity Rule*).

⁵UNC Hussman School of Journalism and Media, 2019-2020 Accreditation Self-Study 4-3, https://tarheels.live/unchussmanselfstudy20192020/wp-content/uploads/sites/117/2020/09/2020-21-Accreditation-in-Journalism-FINAL-STANDARD_4.pdf (*Hussman Self-Study*).

promote diversity of thought.”⁶ In promoting such “understandings,” conformity is more efficient than diversity.

Endorsing these substantive “understandings” is now mandatory. To gain admission, a student might need to correctly answer “whether the ‘lack of minorities such as African-Americans or Latinos/Latinas among university faculty members’ is due to [a] symbolic racism, [b] institutional racism, [c] hidden racism, or [d] personal bias.”⁷ To be hired, faculty candidates are advised by UNC to describe their commitment to “diversity” by averring “academic environments often . . . fail[] to address systemic inequalities in education.”⁸ Candidates who promise to treat all students equally will not be hired,⁹ and the University of California, Berkeley

⁶Dean Susan King, Memo Re Structural Racism—Hussman School Strengths, Weaknesses and Aspirations (Aug. 1. 2020), https://www.scribd.com/document/519454353/UNC-Watermarke-d#download&from_embed (*King Memo*).

⁷Devorah Goldman, *The Politicization of the MCAT*, Wash. Examiner (Apr. 8, 2018) <https://www.washingtonexaminer.com/weekly-standard/the-politicization-of-the-mcat> (*The Politicization of the MCAT*). The correct answer was [b] institutional racism. Id.

⁸<https://www.med.unc.edu/facultyaffairs/wp-content/uploads/sites/427/2021/03/Sample-DEI-Statements.pdf> (*Sample DEI Statements*).

⁹Abigail Thompson, *The University’s New Loyalty Oath: Required ‘diversity and inclusion’ statements amount to a litmus test for hiring*, Wall St. J. (Dec. 19, 2019),

rejected 76 percent of applicants on this “diversity statement” alone, without regard to their academic qualifications.¹⁰

Endorsing this view is also a prerequisite for publishing scholarly papers. When a scholarly article critically evaluated racial preferences in medical school admissions by noting, *inter alia*, the correlation between racial groups’ disparate test scores and their consequent attrition rate, the journal retracted publication and commenced an investigation as to “how a paper that is completely incompatible with the Association’s core values was published.”¹¹ “Publish or perish” is now “conform or perish.”

Third, the loss of viewpoint diversity is not an unfortunate coincidence but a result of a deliberate strategy of suppression. Schools insulate racial preferences from criticism by instructing faculty that

<https://www.wsj.com/articles/the-universitys-new-loyalty-oath-11576799749> (*The University’s New Loyalty Oath*).

¹⁰Lawrence Krauss, *How ‘Diversity’ Turned Tyrannical: What began as an effort to hire more minorities has turned into a demand for ideological engagement*, Wall. St.. J. (Oct. 21, 2021), <https://www.wsj.com/articles/diversity-tyrannical-equity-inclusion-college-marginalized-race-11634739677> (*How ‘Diversity’ Turned Tyrannical*).

¹¹American Heart Association, *Wang paper is wrong: Diversity, equity, and inclusiveness in medicine and cardiology are important and necessary* (Aug. 5, 2020), <https://newsroom.heart.org/news/wang-paper-is-wrong-diversity-equity-and-inclusiveness-in-medicine-and-cardiology-are-important-and-necessary> (*Wang paper is wrong*).

endorsing colorblindness is a “microaggression,”¹² and possibly grounds for charges of bias or harassment. *Speech First, Inc. v. Cartwright*, 2022 WL 1301853 (4th Cir., May 2, 2022). The censorship extends to other issues like immigration and abortion; the purported imperative of a “welcoming environment” for “diverse” students actually produces an unwelcoming environment for diverse viewpoints.

Fourth, unless this Court arrests these trends here, they will continue to accelerate and expand beyond the campus. If schools can abandon procedural neutrality in admitting and rejecting *students*, they can abandon it in admitting and rejecting *ideas*. And the emphasis on equity already influences public agencies in a way that threatens not only liberty but human life; the CDC initially approved a schedule of vaccine distribution that favored workers over the elderly to maximize racial “equity” in distribution, even though it would result in thousands more deaths *among all races*.¹³

¹²Josh Hedtke, *California professors instructed not to say ‘America is the land of opportunity’*, The College Fix (June 10, 2015), <https://www.thecollegefix.com/california-professors-instructed-not-to-say-america-is-the-land-of-opportunity/> (*California professors instructed not to say ‘America is the land of opportunity’*).

¹³Yascha Mounk, *Why I’m Losing Trust in the Institutions*, Persuasion Dec. 23, 2020), <https://www.persuasion.community/p/why-im-losing-trust-in-the-institutions?s=r> (*Why I’m Losing Trust in the Institutions*).

This litigation creates a paradox. Through the briefing, this Court will have the benefit of exposure to a robust exchange of ideas. But a student advocating this brief's position could be charged with a "microaggression" and even harassment or bias; a faculty candidate expressing it would face disqualification from further consideration; and a faculty member publishing it would be subject to retraction, investigation, and disinvitation from speaking on even unrelated subjects.¹⁴ This Court should reject such thought control and reaffirm the imperative of neutrality among races—and viewpoints—by barring racial favoritism on campus.

¹⁴*How 'Diversity' Turned Tyrannical.*

ARGUMENT

This Court should bar universities from using race to favor or disfavor applicants, as current practice contravenes the initial rationale.

Race-conscious admissions rest on the premise that they further discourse and debate. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), citing *Bakke*, 438 U.S. 265, 313. Justice Powell’s *Bakke* opinion recalled Judge Learned Hand’s observation that “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.’” *Id.* at 312, citing *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943). Universities could legitimately pursue not “simple ethnic diversity” but a “genuine diversity” that promotes “beneficial educational pluralism.” *Bakke* at 315-16. Ethnic diversity was the means to the end goal of educational pluralism. *Bakke* at 317.

By contrast, *Bakke* expressly forbade discrimination for the purpose of remedying the “amorphous concept” of “‘societal discrimination.’” *Bakke*, 438 U.S. at 307. Only specific findings of constitutional or statutory violations can justify remedial discrimination, and none exist here. *Id.* at 307-08. But it is this forbidden remedial purpose that today’s DEI programs pursue. They are ineffective—and counterproductive—to the goal of fostering a robust exchange of ideas.

A. Current diversity programs pursue not *Bakke*'s permitted goal of educational pluralism but *Bakke*'s forbidden goal of remedying societal discrimination.

Universities' current use of preferences differs from *Bakke*'s vision; instead of using ethnic diversity to promote pluralism, schools see ethnic diversity as the goal, as it redresses societal discrimination. Both defendants have a bureaucracy pursuing the objective: the Harvard Office for Equity, Diversity, Inclusion and Belonging¹⁵ and the UNC Diversity, Equity & Inclusion Council.¹⁶ Far from emphasizing a "multitude of tongues" or seeing ethnic diversity as a means to an end, the current definition sees ethnic diversity as an end in itself. The National Association of Colleges and Employers defines diversity as referring to "group social differences such as race/ethnicity, class, gender, sexual orientation, gender preferences, country of origin, dis/ability, cultural, political, religious, or other group affiliations."¹⁷ "Equity" pursues the goal forbidden by Justice Powell, as it involves "making adjustments *to address the consequences of a long history of prejudice* and discriminatory treatment that continues and has a negative impact on Black,

¹⁵<https://edib.harvard.edu/diversity-statement-resource-guide>.

¹⁶<https://diversity.unc.edu/university-diversity-equity-and-inclusion-council>.

¹⁷NACE Report.

Brown, Indigenous, and marginalized communities.”¹⁸

The controlling *Bakke* opinion perceived race as a relevant but not necessarily determinative factor; depending on the overall mix of applicant qualities, a non-black candidate could contribute more to diversity than a black one if the former had exceptional personal talents, unique work or service experience, leadership potential, demonstrated compassion, or other qualities found among all races. *Bakke*, 438 U.S. at 317. Now, however, an individual’s status no longer *supports the inference* she will contribute to the diversity of the larger organization; it conclusively fulfills the goal.

This transformation explains the oxymoronic description of “diverse individuals.” The goal of *Bakke* was to create diverse organizations, but today individual members are themselves defined as “diverse.” For example, the Securities and Exchange Commission recently approved NASDAQ’s Board Diversity Rule.¹⁹ The Rule seeks to effect a “minimum board diversity objective” and requires listed companies either to “Have or explain why they do not have at least two *diverse directors*.” Reference to “diverse directors” indicates the expanded presence of racial minorities is not the means for achieving the goal of pluralism but the goal itself.

Defendant UNC follows this meaning of “diverse.” The dean of its journalism school distributed a memo

¹⁸*Id.*, emphasis added.

¹⁹*Board Diversity Rule*.

to faculty that reported “Our diverse faculty members, though small in number . . . are respected . . . [¶.] [W]e have only increased our numbers of diverse faculty slightly. Currently, 36% of our faculty represent diverse backgrounds.”²⁰ A self-study for accreditation later that year more directly described 14 of its 43 full-time faculty as “Nonwhite,” without regard to any other aspect of their “background.”²¹

Research conducted through the University of Central Florida (UCF) by The Institute of Diversity and Ethics in Sport demonstrates how “simple ethnic diversity” is the end goal. The organization sought to compare diversity among professional sports leagues, and contrasted the racial demographics of Major League Baseball (MLB)²² and the National Basketball Association (NBA).²³

For 2017, the data showed the following distribution:

²⁰King Memo at 2.

²¹*Hussman Self-Study*.

²²The Institute for Diversity and Ethics in Sport, The 2018 Racial and Gender Report Card: Major League Baseball (MLB Report Card), Appendix I (Apr. 12, 2018)
https://www.tidesport.org/_files/ugd/7d86e5_5b2f714ff58940a18df772ce01bed504.pdf

²³The Institute for Diversity and Ethics in Sport, The 2017 Racial and Gender Report Card: The National Basketball Association (NBA Report Card), Appendix I (June 29, 2017)
https://www.tidesport.org/_files/ugd/a4ad0c_f00f0dc9e5a2487eb6727086f6fcec30.pdf

NBA		MLB	
black	74.4	white	57.5
white	19.1	Latino	31.9
Latino	4.9	black	7.7
Asian/other	1.6	Asian/other	3.0

Which was more ethnically “diverse”?

Under the pluralistic analysis of Justice Powell’s opinion, the answer must be MLB. More of its payers were not in the dominant category; whereas 42.5 percent were not in baseball’s largest group, only 25.6 percent were not in basketball’s most populous category. Similarly, MLB’s two smaller categories combined for 10.7 percent against only 6.5 percent for the NBA’s.

But under the newer conception of diversity, the NBA was the most diverse league because “diversity” simply measures the number of “people of color.” “With people of color making up 42.5 percent of MLB players, the league has one of the best diversity scores among the four major sports . . . [¶.] With 80.7 percent of players being people of color, the NBA takes the lead among men’s sports for player diversity.”²⁴

Under this new measure of diversity, a ten-person board with ten black directors would be “fully” diverse, but a board having five whites, three

²⁴Nikole Tower, In an ethnic breakdown of sports, NBA takes lead for most diverse, *Global Sport Matters* (Dec. 12, 2018), <https://globalsportmatters.com/culture/2018/12/12/in-an-ethnic-breakdown-of-sports-nba-takes-lead-for-most-diverse/>

Latinos, one black and one Asian would be only “half” diverse. The current movement promotes not Justice Powell’s vision of diversity (a “beneficial educational pluralism”), but equity, the remedial compensation for societal discrimination, which *Bakke* forbade.

B. Inverting *Bakke*’s rationale, universities are restricting diversity of thought because they perceive it as an impediment to equity.

The current pursuit of diversity has turned the *Bakke* rationale upside down. The premise then was that racial preferences could be tolerated as a means to the desired end of diversity of thought. Now, however, the DEI movement rejects diversity of thought as an impediment to the goal of equity.

The dean of UNC’s Hussman School emphasized the mutual incompatibility of the university’s race-related ambitions and viewpoint diversity.

Ongoing Strategies to implement during the 2020-21 academic year: Revisit ‘diversity of viewpoint’ in our definition of diversity. There is a *fundamental conflict between efforts to promote racial equity and understandings of structural racism, and efforts to promote diversity of thought*. These two things cannot sit side by side without coming into conflict.²⁵

And educators have made clear it is understandings of structural racism, not diversity of thought, that will be preserved. To achieve the desired

²⁵King Memo at 8-9, emphasis added.

“understandings,” diversity of thought is less efficient than enforced conformity.

1. Students must conform to gain admission.

The drive for conformity begins before students enroll, as they must embrace prevailing ideology to gain admission. The American Association of Medical Colleges (AAMC), which operates the Medical College Admission Test (MCAT), commenced a Holistic Review Project in 2007 with the goal of “redefining what makes a good doctor.”²⁶ The purpose of the Project was to move admissions away from measuring students’ “accumulation of facts” and towards their “attitudes, values, and experiences.”²⁷ The MCAT can measure students attitudes and values by asking questions such as “whether the ‘lack of minorities such as African-Americans or Latinos/Latinas among university faculty members’ is due to [a] symbolic racism, [b] institutional racism, [c] hidden racism, or [d] personal bias.”²⁸ Another question asked whether wage disparities between males and females derived from [a] bigotry, [b] sexism, [c] racism, or [d] biological differences.²⁹

These questions prepare students well for the instruction to come. UNC’s School of Medicine, for example, created a “Task Force to Integrate Social Justice into the Curriculum,” which prescribed

²⁶*The Politicization of the MCAT.*

²⁷*Id.*

²⁸*Id.* The correct answer was [b] institutional racism.

²⁹*Id.* The correct answer was [b] sexism.

“Revis[ing] advocacy competencies for medical students.”³⁰ Instead of accumulating facts and knowledge, students will be expected to “deploy advocacy skills” on political issues that the school describes as “health realms”:

(5) achieving radical reform of the US criminal justice system;

(6) ending policies of exclusion and achieving compassionate immigration reform;

. . . .

(8) ensuring every single person’s vote counts equally.³¹

UNC students may have a First Amendment right not to advocate these positions, but apparently no comparable right to be doctors. But see *Board of Cnty Commrs., Wabaunsee Cnty, Kan v. Umbehr*, 518 U.S. 668, 674 (1996): “[Our] precedents have long since rejected Justice Holmes’ famous dictum, that a policeman ‘may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.’” *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).

³⁰John Sailer, *UNC School of Medicine’s Quiet “Diversity, Equity, and Inclusion” Revolution*, James G. Martin Center for Academic Renewal, <https://www.jamesgmartin.center/2021/11/unc-school-of-medicine-quiet-diversity-equity-and-inclusion-revolution/>

³¹*Id.*

2. Faculty applicants must conform to gain positions.

The demand for ideological conformity does not end at graduation. Nearly all advertised faculty positions require applicants to affirmatively endorse the DEI program through a “diversity statement.”³² This is the most important element of the application process; the University of California, Berkeley rejected 76 percent of applicants based solely on their diversity statements, without even looking at their research records.³³

Universities rate these statements on the viewpoint expressed; applicants who commit to “‘treating all students the same regardless of background’ . . . will score poorly” and be disqualified from further consideration.³⁴ And not all forms of diversity matter. Some of the resources UNC offers³⁵ in advising applicants preparing their statements expressly warn against writing about religious or geographic diversity.

³²*How ‘Diversity’ Turned Tyrannical.*

³³*Id.*

³⁴*The University’s New Loyalty Oath.*

³⁵Diversity Statements, The Writing Center, University of North Carolina, Chapel Hill
<https://writingcenter.unc.edu/tips-and-tools/diversity-statements/>

Focus on commonly accepted understandings of diversity and equity.

Concentrate on issues such as race, gender, social class and sexual orientation. Don't try to tone down your statement by writing about how it is hard to be a Kansan in Missouri, for example. Instead, *write about racial oppression, sexism, homophobia, transphobia, ableism or some other commonly recognized form of oppression.*³⁶

Another source confirmed this advice:

FOCUS ON COMMON UNDERSTANDINGS OF DIVERSITY

This will include ethnicity/race, class, gender, or sexual orientation. When they ask about diversity this is what they are most likely referring to and talking about other types of diversity might dilute your statement.³⁷

UNC further provides students with sample scripts for their own statement. These successful models have applicants affirm how they “have become aware of gender, race, and socioeconomic status influence

³⁶Tanya Golash-Boza, The Effective Diversity Statement, Inside Higher Ed (June 10, 2016) <https://www.insidehighered.com/advice/2016/06/10/how-write-effective-diversity-statement-essay> (boldface in original, italics added).

³⁷“The Effective Diversity Statement.” Inside Higher Ed. Retrieved November 1, 2018 from <https://www.insidehighered.com/advice/2016/06/10/how-write-effective-diversity-statement-essay>, capitals in original.

training opportunities and outcomes, and how this hinders diversification of the faculty body,” or how they will commit to “learn more about the intersectionality of race, gender, and sexual orientation in clinical care”³⁸

These scripts further direct applicants to cite the ideal of neutrality toward regarding status-based identities. “I am a firm believer that all . . . universities should strive to build communities of individuals with diverse backgrounds and life experiences, free of discrimination based on racial and ethnic origin, gender identity, sexual orientation, social economic [sic] status or religious belief.”³⁹ But the applicant must offer this ideal only to refute it as myth. “Unfortunately, academic environments often fall severely behind these goals, failing to address systemic inequalities in education, bias in hiring and mentoring relationships, and underrepresentation of women and minorities in prominent academic positions.”⁴⁰ The applicant who includes the first sentence but not the second will be disqualified from further consideration.⁴¹

3. Faculty must conform to publish and speak.

The suppression of dissenting thought continues even after faculty are hired. Dr. Norman C. Wang published an article in the *Journal of the American*

³⁸*Sample DEI Statements.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*The University’s New Loyalty Oath.*

Heart Association that critically evaluated DEI admissions policies.⁴² He observed the extraordinary disparity in qualifications among admitted students; almost half the black students admitted to medical school had MCAT scores under 27, whereas only about 4 percent of Asian admittees scored so low.⁴³ These figures correlated with attrition; more than seven times as many black graduates ceased practicing within a decade as their Asian counterparts.⁴⁴ See *Grutter*, 539 U.S. 306, 372 (Thomas, J. dissenting): “The Law School tantalizes unprepared students with the promise of a . . . degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”

The American Heart Association responded forcefully, not with “more speech,” as Justice Brandeis prescribed, but “enforced silence,” by retracting the article’s publication. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring). Rather than address the paper’s merits, the AHA “denounce[d] the views expressed in the article and regrets its role in enabling those views to be promoted.”⁴⁵ The statement faulted the article’s

⁴²Norman C. Wang, *Diversity, Inclusion, and Equity: Evolution of the Race and Ethnicity Considerations for the Cardiology Workforce in the United States of America From 1969 to 2019*, Journal of the American Heart Assn., <https://www.ahajournals.org/doi/epdf/10.1161/JAHA.120.015959>

⁴³*Id.* at 13, Figure 4.

⁴⁴*Id.* at 10, Table 4.

⁴⁵*Wang paper is wrong.*

“factual accuracy” and “deliberate misinformation” though it did not cite any specific error.⁴⁶ Retraction was insufficient; the AHA “launched a formal investigation to better understand how a paper that is *completely incompatible with the Association’s core values* was published.”⁴⁷

Not only speech but speakers are cancelled for diverging from the prevailing ideology. Geophysicist Dorian Abbot expressed concern that “In the current climate [DEI] cannot be openly debated: the emotions around DEI are so strong that self-censorship among dissenting faculty is nearly universal,” and cited a study showing 43 percent of doctoral students “would endorse a campaign to dismiss a hypothetical scholar who found that racial and gender diversity reduces the effectiveness of an organization.”⁴⁸ Perfectly proving Abbot’s point, MIT promptly disinvited him from presenting a scheduled lecture on *climate science*.⁴⁹

Justice Powell would have celebrated Wang and Abbot for exposing their audiences to reasoned

⁴⁶*Id.*

⁴⁷*Id.*, emphasis added.

⁴⁸Dorian S. Abbot & Ivan Marinovic, *The Diversity Problem on Campus*, Newsweek (Aug. 12, 2021) <https://www.newsweek.com/diversity-problem-campus-opinion-1618419>, citing Eric Kaufmann, *Academic Freedom in Crisis: Punishment, Political Discrimination, and Self-Censorship* (Executive Report), Center for the Study of Partisanship and Ideology 13 (Mar. 1, 2021) <https://cspicenter.org/wp-content/uploads/2021/03/ESummary.pdf>.

⁴⁹*How ‘Diversity’ Turned Tyrannical.*

argument on the controversy, and embodying diversity of thought. The retaliatory reaction to their work establishes, however, that the current goal is “simple ethnic diversity.” *Bakke*’s goal of “genuine” diversity of thought is not just less important but ultimately “incompatible” with this new goal. The quest for diversity in academia does not merely fail to promote “wide exposure to that robust exchange of ideas” on which the “Nation’s future depends.” *Bakke*, 438 U.S. 265, 312. It subverts it.

C. The suppression of ideas is not a coincidence but the inevitable consequence of DEI policies.

This decreasing diversity of thought is not a coincidence but a causal result of DEI goals. The third part of the acronym, inclusion, is deployed to suppress disfavored opinions on the theory that they impede “an inclusive learning environment.”⁵⁰ For example, the University of California warned faculty against engaging in “microaggressions,” which included objections to affirmative action.⁵¹ Professors stating “I believe the most qualified person should get the job,” “America is the land of opportunity,” or “Everyone can succeed in this society, if they work hard enough,” would erroneously advance “the Myth of Meritocracy” by “assert[ing] that race or gender does not play a role in life successes, and it would wrongly promote “Color Blindness” to state “There is

⁵⁰*California professors instructed not to say ‘America is the land of opportunity’.*

⁵¹*Id.*

only one race, the human race.”⁵² Such warnings purposely deter a robust exchange of ideas.

Similarly, UCF committed to provide a “safe and welcoming living and learning community” for its students. *Speech First, Inc. v. Cartwright*, 2022 WL 1301853 at *4 (4th Cir., May 2, 2022). This goal in practice enables universities to tilt the playing field of debate by favoring the expression of some viewpoints and effectively prohibiting the expression of others. Students could violate the school’s discriminatory-harassment policy by engaging in “verbal acts” that “may have a negative psychological, emotional, or physical impact” on another. *Id.* at *3. Speech could also run afoul of the school’s anti-bias policy by “creating an unsafe, negative, unwelcoming environment.” *Id.* One student who wished to engage in “robust intellectual debate” feared expressing opposition to illegal immigration or affirmative action, lest the university charge him with “discriminatory-harassment” or “bias-related-incidents.” *Id.* at *1.

Criticism of race-based preferences might well feel unwelcoming to a student admitted with lower objective qualifications, and support for immigration regulations might have the same effect on students who had not entered the U.S. legally. Counsel for UCF candidly admitted he was uncertain whether a student’s contention that “unbridled open immigration is a danger to America” would violate

⁵²*Id.*, see also Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, *American Psychologist* Vol. 62, No. 4., 271, 276 (May-June 2007)

the policy against discriminatory-harassment. *Speech First*, 2022 WL 1301853 at *8. Policing speech through such “protection” skews debate, as only members of protected classes can be victims of harassment. *Id.* at *2. Accordingly, harassment or bias charges could be brought against those who opposed unlimited immigration (but not those who favored it), or those who opposed race-based preferences (but not their proponents). As one court explained in striking down a similar professional rule against harassment, “the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends.” *Greenberg v. Haggerty*, 491 F.Supp.3d 12, 32 (E.D. Pa. 2020).

But discovering truth, not protecting feelings, is a university’s core mission. *Speech First*, 2022 WL 1301853 at *14 (Marcus, J. concurring.) “ ‘Education should not be intended to make people comfortable, it is meant to make them think.’ ” *Id.*, citing Report of the Committee On Freedom of Expression, Univ. of Chicago (2015) (quoting President Hanna Holborn Gray). When universities prioritize substantive “understandings of structural racism” so that publications “incompatible” with those understandings are censored, and they brand opposition to affirmative action a “microaggression,” a narrower range of debate is inevitable.

D. Preference for favored individuals will tend to enable preference for favored ideas.

Once schools abandon neutral principles in evaluating applicants, they can abandon neutral principles in evaluating ideas. Institutions can act as umpire, neutrally treating all university applicants and speakers, or they can more aggressively choose winners and losers. The seventeenth century works of Thomas Hobbes and John Locke demonstrated how regulation of societal rewards and regulation of speech would rise or fall together. Hobbes' sovereign was not a neutral umpire, but decided who would prevail in both the marketplace of goods and the marketplace of ideas. Individuals' rights to property depended absolutely on governmental favor.

Before accepting the civil yoke no one had a property right in anything; all things were common to all men. Tell me, then, where this property came to you from, if not the commonwealth?
Your Dominion therefore and *your property are as extensive as the commonwealth wishes* and lasts for just so long.

Thomas Hobbes, *De Cive*, ch. XII, ¶ 7, emphasis added.

The same authority for regulating property also justified regulating speech, so the Hobbesian sovereign was the “judge of what opinions and doctrines are averse, and what conducing, to peace . . . and *what men are to be trusted withal*. . . .

Thomas Hobbes, *Leviathan*, ch. XVIII, ¶ 9, emphasis added.

Locke, by contrast, posited a natural right to property that existed independent of governmental favor, and had intrinsic measure. “The measure of property, nature has well set, by the extent of men’s labour . . . [¶] whatsoever he tilled and reaped, laid up and made use of . . . was his peculiar right.” John Locke, *Second Treatise of Government* ¶¶ 36, 38. Locke connected a person’s interest in his property to his interest in his ideas, which influenced James Madison’s conceptualization of the First Amendment.⁵³

It was in justifying self-defense that Locke connected the arbitrary deprivation of liberty to the arbitrary deprivation of life: “I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away [my life].”⁵⁴ A more contemporary connection appeared when the government needed to set priorities in vaccinating the public. The CDC’s Advisory Committee on Immunization Practices initially decided to give priority to 87 million

⁵³John O. McGinnis, *The Once and Future Property-based Vision of the First Amendment*, 63 U. Chi. L. Rev 49, 64-65 (1996), quoting 14 *The Papers of James Madison* 266-68 (Robert A. Rutland eds.) (Virginia 1983): “[Property] embraces every thing to which a man may attach a value and have a right In the former sense, a man’s land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them.”

⁵⁴Locke, *Second Treatise of Government*, ¶ 18.

workers, including film crews and bankers, over the elderly, because “racial and ethnic minority groups are underrepresented among adults > 65.”⁵⁵ Making the vulnerable elderly wait for vaccines would lead to thousands more deaths, for both blacks and whites.⁵⁶ “[T]he CDC was effectively about to recommend that a greater *number* of African-Americans die so that the *share* of African-Americans who receive the vaccine is slightly higher. . . . [even though] prioritizing essential workers in the name of equality would likely kill more people in *all* relevant demographic groups.”⁵⁷

Though the CDC abandoned this plan, several jurisdictions later opted for more direct race-based preferences. Vermont gave vaccine booster priority to the elderly, people with pre-existing medical conditions or high-exposure employment—and anyone who was “Black, indigenous, or a person of color (BIPOC)” or lived with someone who was.⁵⁸ New York City similarly decided to weigh race in distributing potentially life-saving medicine for the purpose of “explicitly advancing racial equity and social justice.”⁵⁹

⁵⁵*Why I’m Losing Trust in the Institutions.*

⁵⁶*Id.*

⁵⁷*Id.*, emphasis in original.

⁵⁸Daniel Ortner, *Racial discrimination in vaccine administration undermines public health*, The Hill (Oct. 26, 2021), <https://thehill.com/opinion/healthcare/578394-racial-discriminati-on-in-vaccine-administration-undermines-public-health/>

⁵⁹Jon Levine, *NYC will consider race when distributing life-saving COVID treatments*, N.Y. Post (Jan. 1, 2022),

What happens on campus never stays on campus.

It is time to end universities' use of racial preferences. This Court expressed optimism that preferences would not be needed by 2028 in *Grutter*, 539 U.S. 306, 343, but their function has since expanded. They now shape not just who attends law school but who is called on in class,⁶⁰ who edits the law review,⁶¹ and whose article will be published in it.⁶² Abolishing racial preferences, not maintaining them, will best serve the goal of achieving the “genuine” diversity of thought on which our “nation’s future depends.” *Bakke*, 438 U.S. 265, 313.

<https://nypost.com/2022/01/01/nyc-considering-race-in-distributing-life-saving-covid-treatment/>

⁶⁰Frederick M. Hess & Grant Addison, *Anti-Racist: I Will Always Call on My Black Women Students First*, Natl. Review (Oct. 27, 2017),

<https://www.nationalreview.com/2017/10/stephanie-mckellops-progressive-stacking-racial-discrimination-classrooms-under-guise/>

⁶¹Vikram David Amar and Jason Mazzone, *How do Grutter and Fisher Bear on the Question Whether Law Reviews Can Take Race and Gender Into Account in Selecting Members (and Also Articles)? Part Two in a Series*, Verdict (Feb. 22, 2019),

<https://verdict.justia.com/2019/02/22/how-do-grutter-and-fisher-bear-on-the-question-whether-law-reviews-can-take-race-and-gender-into-account-in-selecting-members-and-also-articles>

⁶²*Id.*

CONCLUSION

This Court should discard *Bakke's* diversity ground for racial preferences because it has failed under its own terms. This Court deemed “simple ethnic diversity” a permissible means to the goal of “genuine diversity” of thought, but the means have now become the new goal, and the old goal is disfavored. Preferences achieve what *Bakke* considered an illegitimate purpose, redress for societal discrimination, and what *Bakke* deemed a legitimate purpose, diversity of thought, preferences do not achieve—and effectively subvert, mostly by design.

Racial preferences are not compatible with a robust exchange of ideas. This Court must choose one or the other.

Respectfully submitted,

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