

Nos. 20-1199 and 21-707

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS
OF HARVARD COLLEGE,
Respondents.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT AND FOURTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*
LEGAL INSURRECTION FOUNDATION
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Legal Insurrection Foundation (LIF)² is a Rhode Island tax-exempt not-for-profit corporation devoted, among other things, to advancing free expression and academic freedom on campuses. LIF publishes the Legal Insurrection website,³ which provides news coverage and analysis of the narrowing of viewpoint expression and the growth of ‘cancel culture’ on campuses. LIF also publishes CriticalRace.org,⁴ which documents the now-pervasive and expansive race-based educational and training mandates at colleges and universities, and how such mandates negatively impact campus free expression.

LIF has been increasingly concerned about and provided news coverage and analysis of the suppression of diversity of viewpoints on university campuses. LIF is also greatly concerned about the inconsistency between race-based admissions discrimination and the constitutional guarantee of equal protection, and the negative impact of such institutionalized racial discrimination on viewpoint diversity. While LIF supports the arguments of Petitioner as to the unlawfulness of the conduct of Respondents in

1. This brief conforms to the Court’s Rule 37, in that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* Legal Insurrection Foundation funded its preparation or submission. All parties have been notified of LIF’s intention to file this brief, and all have filed blanket consents to the filing of *amicus* briefs.

2. <https://legalinsurrectionfoundation.org/>.

3. <https://legalinsurrection.com/>.

4. <https://criticalrace.org/>.

these specific cases, LIF submits this Brief to address the specific issue that the promise of viewpoint diversity which underpinned this Court's prior acceptance of arguments to permit admissions discrimination has not materialized. The Court should overrule or modify its prior decisions.

SUMMARY OF ARGUMENT

The grand judicial experiment of excusing racial discrimination in university admissions in the hope it would promote the educational objective of diversity of viewpoint has failed, and accordingly, this Court should overrule or modify its holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003) ("*Grutter*"). Despite the Court permitting the use of race in higher education admissions, viewpoint diversity is increasingly endangered on campus. Since *Grutter*, the range of viewpoints permitted on campus, particularly on matters regarding race, has narrowed. It's time to return to the constitutional prohibition against racial discrimination without an exception for education.

ARGUMENT

- I. The use of race in admissions has not achieved the promised “robust exchange of ideas,” and cannot serve as a compelling interest capable of overcoming the right to equal protection.**
- A. Allowing discriminatory admissions was premised largely on enriching schools academically by admitting students with different viewpoints.**

This Court previously upheld the use of race in admissions based substantially on the hope that a more racially diverse student body would offer a more diverse range of viewpoints, and thereby enrich education. That is, the Court accepted that more racially diverse populations would create more diversity of opinion.

Citing Justice Powell’s analysis in *Regents of University of California v. Bakke*, Justice O’Conner’s majority opinion in *Grutter* rationalized diversity admissions as a way for universities to choose students who would “contribute the most to the ‘robust exchange of ideas’...” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).⁵ Essentially, the Court adopted Justice

5. There was no majority opinion in *Bakke*, but Justice Powell’s vote was the pivot around which the Court’s holding turned when it ordered the medical school to admit Bakke. Justice Powell rejected racial quotas as violating the Equal Protection Clause of the Fourteenth Amendment, but argued that the use of race was permissible as one of several admission criteria. *Bakke*, 438 U.S. at 320; U.S. Const. amend. XIV, § 1. “Justice Powell’s

Powell's approach of justifying racial discrimination by universities as an expression of their supposed First Amendment commitment to the robust exchange of ideas. *Grutter*, 539 at 324 (citing *Bakke*, 438 U.S. at 312-14); Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 558-59 (1998) ("Crucial to Justice Powell's conclusion in *Bakke* were two supporting determinations: first, that educational diversity was a compelling governmental interest because of its close association with First Amendment values, and second, that consideration of race as one factor in selecting the members of an academic community was a permissible means of achieving the desired educational diversity.").

"[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" the Court wrote, adding that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter*, 539 U.S. at 330.

opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323 (O'Connor, J.).

See also Bakke, 438 U.S. at 312 n.48⁶ and 323⁷ (Powell, J.). Justice O'Connor further explained, the “‘nation’s future depends upon leaders trained through wide exposure’ to

6. Justice Powell’s footnote 48 includes the following:

The president of Princeton University has described some of the benefits derived from a diverse student body:

“[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, ‘People do not learn very much when they are surrounded only by the likes of themselves.’”

Bakke, 438 U.S. at 312 n.48 (Powell, J.).

7. “A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.” *Bakke*, 438 U.S. at 323 (Powell, J.). Although Justice Powell imbues students’ outlook, ideas, and mores – their viewpoints – with much significance in his analysis upholding discriminatory admissions, he doesn’t include them in his list of characteristics “likely to promote beneficial educational pluralism.” *Id.* at 317. *See* Hall at 569.

the ideas and mores of students as diverse as this nation of many peoples.” *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967))).

Robust dialogue was not the Court’s only rationale for upholding diversity admissions as serving a “compelling interest.” Breaking down stereotypes by getting to know people from different backgrounds was another. Nevertheless, that, too, was premised on encountering people with different ideas. In *Fisher v. University of Texas at Austin (Fisher I)*, the Court explained:

The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is “a special concern of the First Amendment.” [*Bakke*, 438 U.S.] at 312.

Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013) (Kennedy, J.). See also *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 381-82 (2016) (*Fisher II*).⁸

8. When the *Fisher* case returned to the Court three years later, the Court identified and approved the respondent’s objectives:

On the first page of its 2004 “Proposal to Consider Race and Ethnicity in Admissions,” the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the “‘promot[ion of] cross-racial understanding,’” the preparation of a student body “‘for an increasingly diverse workforce and society,’” and the “‘cultivat[ion

“[P]reparing students for work and citizenship” is another rationale advanced by the Court. *Grutter*, 539 U.S. at 331. Education “‘sustain[s] our political and cultural heritage’ with a fundamental role in maintaining the fabric of society... This Court has long recognized that ‘education... is the very foundation of good citizenship.’” *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). *Grutter*, 539 U.S. at 331 (*citation omitted*).

Grutter also offered an argument more particular to law schools as the training ground for future political and other leaders.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational

of] a set of leaders with legitimacy in the eyes of the citizenry.’ ” Supp. App. 1a; see also *id.*, at 69a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶14) (setting forth the same goals). Later in the proposal, the University explains that it strives to provide an “academic environment” that offers a “robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.” Supp. App. 23a. All of these objectives, as a general matter, mirror the “compelling interest” this Court has approved in its prior cases.

Fisher II, 579 U.S. at 381-82.

institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” See *Sweatt v. Painter*, *supra*, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Grutter, 539 U.S. at 332-33.

B. *Grutter*’s premise has failed, as today’s university campus lacks viewpoint diversity.

Since *Bakke*, and especially since *Grutter*, the American university campus has become *less* ideologically diverse and *more* intolerant of ideas challenging campus dogmas. Furthermore, if preparing students for “citizenship” means inculcating them with the values of free speech and respect for opposing views, today’s American campus must receive a failing grade.

Surveys conducted by reputable nonpartisan organizations paint a consistent portrait of students being afraid to share their opinions, both inside and outside of class. A 2021 survey put out jointly by the College Pulse, the Foundation for Individual Rights in Education (FIRE), and RealClearEducation, found that most students self-censor at least some of the time; and that conservatives were more likely to self-censor than liberal students. After polling 37,104 students, FIRE *et al.* found:

[M]ore than 80% of students reported some amount of self-censorship, with 21% of students reporting that they did so “fairly often” or “very often” and 62% saying that they censor themselves “rarely” or “occasionally.” ... Among students who identify as liberal or who identify as neither liberal nor conservative, the rate of reporting no self-censorship was the highest, at 19%. Just 12% of respondents who identify as middle of the road reported no self-censorship, and the proportion for conservatives was only 9%.

2021 College Free Speech Rankings: What’s the Climate for Free Speech on America’s College Campuses? COLLEGE PULSE, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, AND REALCLEAR EDUCATION, at 3, 10-11 (September 21, 2021).⁹

FIRE also publishes an annual survey of campus speech codes. On the theory of protecting campuses from incitement, harassment, bias or hate speech, and obscenity, and of promoting tolerance, respect, and civility, universities prohibit a great deal of speech. FIRE’s 2022 report rated just 58 (12.1%) of 481 universities as having free speech, designated by a rating of “green”. 327 (68%) received a yellow rating, while 89 (18.5%) received a red rating.¹⁰ *Spotlight on SPEECH CODES 2022: The State of*

9. https://f.hubspotusercontent00.net/hubfs/5666503/2021_Campus%20Free%20Speech%20Report.pdf.

10. A red rating indicates an institution has at least one policy that both clearly and substantially restricts freedom of speech, or that it bars public access to its speech policies. A yellow rating indicates an institution “maintains policies that could be

Free Speech on Our Nation's Campuses, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION at 6 (December 8, 2021).¹¹

A Knight Foundation-Ipsos study released in January 2022 showed that 65 percent of college students agreed today's "campus climate prevents people from saying what they believe for fear of offending someone, up from 54% in 2016." *College Student Views On Free Expression and Campus Speech: A Look at Key Trends in Student Speech Views Since 2016*, KNIGHT FOUNDATION-IPSOS at 20 (January 2022).¹² Just 48 percent of all college students said they were comfortable offering dissenting opinions to ideas shared by other students or the instructor in the classroom. *Id.* at 21. Of students who identified as Republican, 71 percent felt that the campus climate chilled free speech. *Id.* at 20.

A prior Knight Foundation study, released in 2018, found that 61 percent of students agreed that the climate on their campus prevented some students from

interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict relatively narrow categories of speech." A green rating indicates a university's policies do not seriously threaten campus expression. *Spotlight on SPEECH CODES 2022: The State of Free Speech on Our Nation's Campuses*, Foundation for Individual Rights in Education, at 4 (December 8, 2021), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2022/02/11105334/fire-spotlight-on-speech-codes-2022.pdf>.

11. <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2022/02/11105334/fire-spotlight-on-speech-codes-2022.pdf>.

12. https://knightfoundation.org/wp-content/uploads/2022/01/KFX_College_2022.pdf.

expressing their views because others might take offense. That's an increase from the 54 percent who agreed with the statement in Knight's 2016 survey. Furthermore, college students believed political liberals were more able to express their views openly on campus than were political conservatives – 92 percent versus 69 percent. *Free Expression on Campus: What College Students Think About First Amendment Issues*, GALLUP/KNIGHT FOUNDATION at 2 and 15-16 (2018).¹³ The same study found, “Nearly two-thirds of students think hate speech should not be protected by the First Amendment.” *Id.* at 10.

The non-profit Heterodox Academy conducts an annual survey of the free speech climate on campus. Its Fall 2021 report, published in March 2022, found that “Overall, 60% of college students expressed reluctance to discuss at least one controversial topic (*i.e.*, politics, religion, race, sexual orientation, and gender), similar to last year’s numbers.” S. Zhou, M. Stiksma, & S. C. Zhou, *Understanding the Campus Expression Climate: Fall 2021*, HETERODOX ACADEMY at 2 (2022).¹⁴ According to its Fall 2020 report, “In 2020, 62% of sampled college students agreed the climate on their campus prevents students from saying things they believe, up from 55% in 2019.” M. Stiksma, *Understanding the Campus Expression Climate: Fall 2020*, HETERODOX ACADEMY at 3 (2021).¹⁵

13. https://knightfoundation.org/wp-content/uploads/2020/01/Knight_Foundation_Free_Expression_on_Campus_2017.pdf.

14. <https://heterodoxacademy.org/wp-content/uploads/2022/02/CES-Report-2022-FINAL.pdf>.

15. <https://heterodoxacademy.org/wp-content/uploads/2021/03/CES-Report-2020.pdf>.

Heterodox Academy conducted an internal survey¹⁶ of faculty members in 2020, with results similar to those of the above student surveys.

This year, the Heterodox Academy conducted an internal member survey of 445 academics. “Imagine expressing your views about a controversial issue while at work, at a time when faculty, staff, and/or other colleagues were present. To what extent would you worry about the following consequences?” To the hypothetical “My reputation would be tarnished,” 32.68 percent answered “very concerned” and 27.27 percent answered “extremely concerned.” To the hypothetical “My career would be hurt,” 24.75 percent answered “very concerned” and 28.68 percent answered “extremely concerned.” In other words, more than half the respondents consider expressing views beyond a certain consensus in an academic setting quite dangerous to their career trajectory.

John McWhorter,¹⁷ *Academics Are Really, Really Worried About Their Freedom*, THE ATLANTIC (September 1, 2020).¹⁸

16. The faculty survey itself is not publicly available, as Heterodox’s press office clarified to LIF. Email from HxA Communications (press@heterodoxacademy.org), Re: [PRESS@] Looking for faculty survey (April 27, 2022).

17. McWhorter is an associate professor of English and comparative literature at Columbia University.

18. <https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/>.

One of the factors contributing to the intolerant atmosphere on campus is the growing imbalance of partisanship among faculty. According to a 2006 study, 44.1 percent of professors identified as liberal, and just 9.3 percent as conservative. (At liberal arts schools the range jumped to 61.0 percent who identified as liberal, compared to 3.9 percent who identified as conservative.) Neil Gross and Solon Simmons, *The Social and Political Views of American Professors* (working paper), 29 (September 24, 2007).¹⁹ By contrast, in 1972, 46 percent of professors “were either left or liberal” and 28 percent identified as conservative.

Recall that in 1972, they found that 46 percent of professors were either left or liberal (about the same percentage that we find in the liberal camp, though our political orientation question does not include “left” as the leftmost response category), that 27 percent were middle of the road, and that 28 percent were conservative. Consistent with the claims of Zipp and Fenwick (who were concerned with change over a more limited time period), our findings thus suggest that, looking only at political orientation, the biggest change over the last thirty years involves not a growth in the number of professors on the far left hand side of the political spectrum, but rather a substantial defection away from the right and movement into moderate ranks.

Gross and Simmons study at 27-28.

19. https://www.researchgate.net/publication/287093322_The_social_and_political_views_of_American_college_and_university_professors.

A Cato Institute survey found that only 20 percent of students believe their university faculty have a balanced mix of political views. A majority (59%) of Republican college students believe that most faculty members are liberal. Democratic students agree that liberals greatly outnumber conservatives among faculty, but are more likely to assume faculty members are moderate. Emily Ekins, *The State of Free Speech and Tolerance in America: Attitudes about Free Speech, Campus Speech, Religious Liberty, and Tolerance of Political Expression*, CATO INSTITUTE (October 31, 2017).²⁰

A 2020 study by the National Association of Scholars found that college professors register as and donate to Democrats far more than Republicans. At elite colleges, the registration ratio was ten to one at the time of the survey. That's more than double the ratio in 1999. Mitchell Langbert and Sean Stevens, *Partisan Registration and Contributions of Faculty in Flagship Colleges*, NATIONAL ASSOCIATION OF SCHOLARS (January 17, 2020).²¹ At Respondent University of North Carolina at Chapel Hill, the ratio was twelve to one as of 2016, according to a review of the state's online public voter database. Seventeen departments had no registered Republicans at all. Alec Dent, *At UNC Chapel Hill, 17 departments have zero registered Republican professors, analysis finds*, THE COLLEGE FIX (June 20, 2016).²² In a 2016 study, Langbert,

20. <https://www.cato.org/survey-reports/state-free-speech-tolerance-america#campus-political-climate>.

21. <https://www.nas.org/blogs/article/partisan-registration-and-contributions-of-faculty-in-flagship-colleges>.

22. <https://www.thecollegefix.com/unc-chapel-hill-16-departments-zero-registered-republican-professors-analysis-finds/>.

et al., found that there are 8.6 registered Democrats for every one Republican professor among the twenty-five law faculties at the top forty research universities. Mitchell Langbert, Anthony J. Quain & Daniel B. Klein, *Faculty Voter Registration in Economics, History, Journalism, Law and Psychology*, 13 *ECON. J. WATCH* 422 (Sept. 2016), cited in Teresa Stanton Collet, *A Catholic Perspective on Law School Diversity Requirements*, 15 *U. St. Thomas L.J.* 322, 327 n.36 (Winter 2019).

The NAS study also found that college professors overwhelmingly donate to Democratic politicians instead of Republicans, by a ratio of 95 to 1. Langbert and Stevens. A 2005 study of political contributions by law professors at twenty-one top schools found that between 1992 and 2002, just 15 percent of professors contributed wholly or predominantly to Republican candidates, while 81 percent contributed wholly or predominantly to Democrats. John McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 *GEO. L.J.* 1167, 1198 (2005), cited in Collet at 327.

A review of Federal Election Commission records revealed that at Cornell University, roughly 99.5 percent of faculty political donations for the two years prior to October 2020 went to Democrats. Alec Giufurta, Connor Greene and Milo Gringlas, *A Campus Tilted Blue: 98% of Employee, Professor Donations Go to Dems and Left-Leaning PACs*, *CORNELL DAILY SUN* (October 29, 2020).²³

Also according to an analysis of Federal Election Commission data, just 0.1% of all funds that Respondent

23. <https://cornellsun.com/2020/10/29/a-campus-tilted-blue-98-percent-of-employee-professor-donations-go-to-dems-and-left-leaning-pacs/>.

Harvard University faculty contributed to 2020 presidential candidates since 2017 went to former President Donald Trump. Less than one percent of donations from Harvard faculty went to Republican presidential candidates. Christian Schneider, *Less than one percent of donations from Harvard faculty go to Republican presidential candidates*, THE COLLEGE FIX (March 4, 2020).²⁴

There is also no shortage of anecdotal evidence that faculty feel chilled in what they say, particularly on matters of race. Columbia University Professor McWhorter described the problem:

For example, in July I tweeted that I (as well as my Bloggingheads sparring partner Glenn Loury) have been receiving missives since May almost daily from professors living in constant fear for their career because their opinions are incompatible with the current woke playbook.

McWhorter, *supra*.

Lucía Martínez Valdivia²⁵ wrote about her experience teaching a required humanities course on Western civilization after protestors branded the course as racist. For most of a year (2016-17), Martínez Valdivia taught while surrounded by signs – some obscene – condemning the course and its faculty as white supremacists, anti-black, and not open to dialogue.

24. <https://www.thecollegefix.com/less-than-one-percent-of-donations-from-harvard-faculty-go-to-republican-presidential-candidates/>.

25. Valdivia is an assistant professor of English and humanities at Reed College.

I lectured, but dealt with physical anxiety – lack of sleep, nausea, loss of appetite, inability to focus – in the weeks leading up to my lecture. Instead of walking around or standing at the lectern, as I typically do, I sat as I tried to teach students how to read the poetry of Sappho. Inadvertently, I spoke more quietly, more timidly.

Some colleagues, including people of color, immigrants and those without tenure, found it impossible to work under these conditions. The signs intimidated faculty into silence, just as intended, and these silenced professors' lectures were quietly replaced by talks from people willing and able to carry on teaching in the face of these demonstrations...

The right to speak freely is not the same as the right to rob others of their voices.

Understanding this argument requires an ability to detect and follow nuance, but nuance has largely been dismissed from the debates about speech raging on college campuses. Absolutist postures and the binary reign supreme. You are pro- or anti-, radical or fascist, angel or demon. Even small differences of opinion are seized on and characterized as moral and intellectual failures, unacceptable thought crimes that cancel out anything else you might say.

No one should have to pass someone else's ideological purity test to be allowed to speak. University life – along with civic life – dies without the free exchange of ideas...

At Reed and nationwide, we have largely stayed silent, probably hoping that this extremist moment in campus politics eventually peters out. But it is wishful thinking to imagine that the conversation will change on its own. It certainly won't change if more voices representing more positions aren't added to it.

Lucía Martínez Valdivia, *Professors like me can't stay silent about this extremist moment on campuses*, WASHINGTON POST (October 27, 2017).²⁶

A recent article cited law school professors recognizing the unlively, dispirited, non-robust condition of campus debate today:

“I got into this job because I liked to play devil's advocate,” said the tenured professor, who identifies as a liberal. “I can't do that anymore. I have a family.”

26. https://www.washingtonpost.com/opinions/professors-like-me-cant-stay-silent-about-this-extremist-moment-on-campuses/2017/10/27/fd7aded2-b9b0-11e7-9e58-e6288544af98_story.html. Martínez Valdivia's op-ed provides a hyperlink to an article explaining the background dispute. The article is Colleen Flaherty, *Occupation of Hum 110*, INSIDE HIGHER ED (September 11, 2017), <https://www.insidehighered.com/news/2017/09/11/reed-college-course-lectures-canceled-after-student-protesters-interrupt-class>.

Other law professors – several of whom asked me not to identify their institution, their area of expertise, or even their state of residence – were similarly terrified.

Nadine Strossen, the first woman to head the American Civil Liberties Union and a professor at New York Law School, told me: “I massively self-censor. I assume that every single thing that is said, every facial gesture, is going to be recorded and potentially disseminated to the entire world. I feel as if I am operating in a panopticon.” ...

At a Heterodox Academy panel discussion in December 2020, Harvard Law School Professor Randall Kennedy said that, until recently, he’d thought that fears of law schools becoming illiberal – shutting down unpopular views or voices – had been overblown. “I’ve changed my mind,” said Kennedy, who, in 2013, published a book called “For Discrimination: Race, Affirmative Action, and the Law.” “I think that there really is a big problem.”

The problem has come not just from students, but from administrators, who often foment the forces they capitulate to.

Aaron Sibarium, *The Takeover of America’s Legal System*, COMMON SENSE (March 21, 2022).²⁷

27. <https://bariweiss.substack.com/p/the-takeover-of-americas-legal-system?s=r>.

The best one can say about racial discrimination in higher education admissions since *Grutter* is that it has not achieved the intended result of making campus debate more intellectually robust. That being so, the major rationale that the Court held sufficiently “compelling” to outweigh the Equal Protection Clause has failed to achieve its purpose. U.S. Const. amend. XIV, § 1.

There are reasons to believe that the focus on discriminatory admissions and growing ideological intolerance on campus are connected. Charles Adside III, *Shutting Down Speech 101: Saving Campus Free Speech from the Heckler’s Veto and the Speech Gerrymander*, 34 *BYU J. PUB. L.* 217, 222-23 (2020) (“administrators now implement policies [promoted by their diversity bureaucracy] that unintentionally counteract the educational benefits they desire to manifest on campus. ‘[U]niversity campuses have increasingly experienced,’ one think tank observed, ‘restrictions on academic freedom and the expression of controversial views by both students and faculty.’”) (*citation omitted*). *Cf.* Collet at 322-23 (arguing that many current diversity initiatives in legal education exacerbate polarization between political-cultural liberals and conservatives). LIF suggests that the line between educating for diversity and suppressing speech/imposing an ideological viewpoint is a thin one. Much campus dogmatism is spread in the name of diversity and inclusiveness, as though all “diversity” admits have the same opinion and must be protected by suppressing different opinions.

In August 2021, two college professors, Dorian S. Abbot and Iván Marinovic,²⁸ published a warning about the corrosive impact of diversity on universities' intellectual atmosphere.

Nearly every decision taken on campus, from admissions, to faculty hiring, to course content, to teaching methods, is made through the lens of DEI. This regime was imposed from the top and has never been adequately debated. In the current climate it cannot be openly debated: the emotions around DEI are so strong that self-censorship among dissenting faculty is nearly universal... DEI violates the ethical and legal principle of equal treatment... DEI compromises the university's mission. The core business of the university is the search for truth. A university's intellectual environment depends fundamentally on its commitment to hiring the most talented and best trained minds: any departure from this commitment must come at the expense of academic excellence, and ultimately will compromise the university's contribution to society.

Dorian S. Abbot and Iván Marinovic, *The Diversity Problem on Campus*, NEWSWEEK (August 12, 2021).²⁹

28. Abbot is an associate professor of geophysics at the University of Chicago. Marinovic is an associate professor of accounting at Stanford Graduate School of Business.

29. <https://www.newsweek.com/diversity-problem-campus-opinion-1618419>. As if to prove Abbot's and Marinovic's point, Massachusetts Institute of Technology canceled its invitation

Professor Sergiu Klainerman³⁰ argues that Princeton’s anti-racism efforts amount to ideological reeducation.

All modern ideologies that invoke social justice, including the kind embraced by [Princeton President Christopher] Eisgruber, appear to envision societies in which group inequalities are not to be tolerated. Of course, achieving anything close to uniformity requires strong, top-down measures of redistribution and reeducation – that is to say, indoctrination – as well as the punishment of dissent and marginalization of dissenters. All of these “socially just” practices are naturally incompatible with free speech...

Well, to cure Princeton of racism, we need, of course, a large and energetic group of Diversity, Equity and Inclusion (DEI) bureaucrats whose main functions are to monitor every possible manifestation of racism and other -isms, however small or unlikely, and, more importantly, to reeducate students, faculty, and fellow administrators through a battery of invasive anti-racist, anti-sexist, anti-colonialist, and anti-Western programs, turning the long-

to Abbot to speak on campus after the above article appeared, reportedly because he criticized affirmative action and diversity programs. Michael Powell, *M.I.T.’s Choice of Lecturer Ignited Criticism. So Did Its Decision to Cancel*, NEW YORK TIMES (October 20, 2021), <https://www.nytimes.com/2021/10/20/us/dorian-abbot-mit.html>.

30. Klainerman is a mathematics professor at Princeton University.

standing ideal of the university as a sheltering home for free inquiry on its head in order to produce something more like a very expensive reeducation camp for the children of American elites, and for the people whose job it is to cure them. (A few years ago, it should be said, Eisgruber promised not to impose mandatory DEI training programs. A DEI-infused orientation is now mandatory for all freshmen, but we still hope he will otherwise keep his promise.)

Sergiu Klainerman, *Princeton's Mixed-Up President Discards Free Speech and Demonizes Its Defenders*, TABLET MAGAZINE (April 11, 2022).³¹ Klainerman proceeds to detail Princeton's (mis-) treatment of a fellow Princeton professor, Joshua Katz, whom Princeton had vilified for "race-baiting, disguised as free speech" after he expressed opposition to a July 4, 2020 letter to Princeton leadership demanding race-conscious admissions, faculty hiring, and so on. *Faculty Letter* (July 4, 2020);³² Joshua T. Katz, *A Declaration of Independence by a Princeton Professor*, QUILLETTE (July 8, 2020);³³ *Faculty and Free Speech Entry, Race and Free Speech Chapter, To BE KNOWN AND HEARD*.³⁴

31. <https://www.tabletmag.com/sections/news/articles/princetons-president-discards-free-speech-demonizes-defenders>.

32. https://docs.google.com/forms/d/e/1FAIpQLSfPmfeDKBi25_7rUTKkhZ3cyMICQicp05ReVaeBpEdYUCkyIA/viewform.

33. <https://quillette.com/2020/07/08/a-declaration-of-independence-by-a-princeton-professor/>.

34. <http://knownandheard.princeton.edu/race-and-free-speech>.

Klainerman characterizes DEI bureaucrats as imposing a “battery of invasive anti-racist, anti-sexist, anti-colonialist, and anti-Western programs” and thereby converting universities from “home(s) for free inquiry” into “very expensive reeducation camp(s).” Klainerman, *supra*. He also notes that his formal complaint about Professor Katz’s treatment was rejected by Princeton’s Vice Provost for Institutional Equity and Diversity, on arguments he characterized as “absurd”. *Id.*

A Heritage Foundation report issued in December 2021 concluded that university diversity staffers were themselves spreading anti-Semitism. Jay Greene, Ph.D. and James Paul, *Inclusion Delusion: The Antisemitism of Diversity, Equity, and Inclusion Staff at Universities*, HERITAGE FOUNDATION (December 8, 2021), *passim*.³⁵

Training students that they are not permitted to say things that may offend their universities’ concept of diversity is the opposite of training them to engage respectfully with others on matters of public interest. *Adside* at 225. “As a result [of university speech-inhibiting policies], students are left unprepared for self-government or healthy political debate. This climate thwarts the First Amendment’s original design.” *Id.* at 274 (2020). This is the very opposite of “preparing students for work and citizenship,” as the Court envisioned in *Grutter*. *Grutter*, 539 U.S. at 331.

As for *Grutter*’s assumption that race-conscious admissions confer legitimacy on law schools – which are not involved in the current consolidated cases before the

35. <https://www.heritage.org/sites/default/files/2021-12/BG3676.pdf>.

Court – the argument is strained at best. The Court’s rationale appears to have been that institutions of higher education must be allowed to discriminate in order to give the appearance that they do not discriminate. This is the tail wagging the dog. Even if the argument might have provided a compelling interest in the immediate aftermath of legalized discrimination, the country is many years beyond that. Were legalized discrimination allowed to stand on this basis, it would be an exception swallowing the rule that all are entitled to equal protection of the law. This is an additional reason to overrule *Grutter*.

C. The use of race in admissions can no longer be justified, and the Court should end its experiment to the contrary.

Rather than becoming more robust, campus debates today are increasingly dogmatic and intolerant, particularly on the subject of race and related issues like anti-racism training. Universities are no longer the “marketplace of ideas.” *Keyishian*, 385 U.S. at 603, and the fault for this lies at least partly with the *Grutter* holding itself. *Cf.* Hall at 599 (“The clumsiness of relying on the proxy of race or gender in contexts in which more immediate attention to ideas is possible suggests again that the modern academy is not actually interested in the ‘robust exchange of ideas’ when it uses race and gender in this way, but is simply interested in racial or gender diversity.”). The presumption that discriminatory admissions necessarily make for lively campus debate is a fallacy, and cannot provide a rationale for violating the Equal Protection Clause. If indeed the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation

of many peoples,” *Grutter*, 539 U.S. at 324, then *Grutter* must be overruled.

Otherwise, the Court is left with the bare-bones rationale that race by itself is a satisfactory reason for treating applicants differently. That it has already foreclosed. *Grutter*, 539 U.S. at 324-25 (citing *Bakke*, 438 U.S. at 313-15 (Powell, J.)). As Chief Justice Roberts wrote in his opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

CONCLUSION

For the foregoing reasons, this Honorable Court should overrule *Grutter* and hold that the use of race in admissions violates the constitutional guarantee that all persons are entitled to equal protection of the laws.

Respectfully submitted,

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36. William A. Jacobson also is a Clinical Professor of Law at Cornell Law School, but is submitting this brief solely in his capacity as President of and Counsel for LIF.