September 1, 2018

IN THE SUPREME COURT OF THE UNITED STATES

No. 2018-2019

Andrea Sommerville, Petitioner

vs.

Olympus State University, Respondent

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit.

ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1. Whether Respondent's admissions policy, which gives preferential weight to male applicants, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether Respondent violated Petitioner's right to freedom of expression under the First Amendment to the United States Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT No. 01-76318

ANDREA SOMMERVILLE, Plaintiff-Appellant

vs.

OLYMPUS STATE UNIVERSITY, Defendant-Appellee

Appeal from the United States District Court for the Central District of Olympus

Before Adofina, Schriner-Briggs, and Maury, Circuit Judges.

OPINION BY Judge Adofina, with Judge Maury concurring:

I

Order

This case arises on appeal from a decision by the United States District Court for the Central District of Olympus granting summary judgment in favor of the Defendant-Appellee, Olympus State University (hereinafter "OSU"), on the issues of equal protection and freedom of expression. Plaintiff-Appellant, Andrea Sommerville (hereinafter "Sommerville"), filed suit against Olympus State University School of Law (hereinafter the "Law School") claiming: (1) that the Law School's admissions policy that gives preferential weight to male applicants violated her right to equal protection of the law, and (2) that Olympus State University violated her First Amendment rights when it fired her for complaints she made about the Law School's admissions policy.[1] The District Court found that the Law School's policy met constitutional scrutiny and that Sommerville's speech was not protected by the First Amendment because it occurred in the course of her official duties as a lecturer at OSU. We AFFIRM the judgment of the District Court.

II

(A)

Overview of the Facts

Plaintiff-Appellant Andrea Sommerville appeals the decision of the District Court for the Central District of Olympus affirming the constitutionality of Olympus State University School of Law's preferential-admissions policy (hereinafter "the Policy") and the decision of OSU to terminate her

[1] Olympus State University and Olympus State University School of Law are the same legal entity.

employment. No claims were brought under the Olympus State Constitution or any law of the State of Olympus. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(3). Our jurisdiction rests on 28 U.S.C. § 1291. All parties have stipulated to the following facts. The parties further stipulate that no administrative or labor union remedies were required as prerequisites to bring this case. Issues not raised in this opinion are not properly before this Court. We review all questions *de novo.* The judgment of the District Court is AFFIRMED.

(B)

Equal Protection Facts

OSU is a selective public institution with a long and storied history as the flagship university of a ten-campus state system. OSU has 15,000 enrolled undergraduate students and 5,000 graduate students seeking professional/research/academic degrees in a variety of fields including the law.

The Law School is a fairly selective school with a reputation for producing a large number of lawyers who work in the public sector. The Law School is a Tier One law school that has consistently been ranked in the top 50 law schools in the United States and among the top five in its region of the country.[2] Presently, the Law School is ranked in the low forties. The Law School is located downtown in the city of Knerr, which is the capital of the state of Olympus.[3] The Law School is within walking distance of two federal court houses (both trial and appellate) and two federal office buildings that contain offices of the FBI, DOJ, ICE, DHS, and the EPA, as well as the Olympus State House, two state courthouses (both trial and appellate), and numerous state office buildings. It is a slightly longer walk or a short subway ride away from several municipal office buildings, including City Hall and a local courthouse.

The Law School has a full-time day and a full-time evening program. Both programs attract a fair number of applicants who are between the ages of 21 and 45 and who are either coming straight from college or who work for either the United States government, the state of Olympus, or the city of Knerr. 85% of evening school applicants have public or private sector work experience and 25% already have a graduate degree. On average, of those accepted to the night program, 80% have public or private sector work experience and 30%–40% have a graduate degree.

The Law School has a student body of 750 students. Its average incoming class is 275 students (100 in the night program and 175 in the day program). On average, of these 275 students, 25 drop out or transfer after the first year. Ten drop out of the night school and 15 from the day program. To obtain a yield of 275 students, the Law School admits an average of 1,000 students. There are 270 students in the evening program and 480 in the day program. In the evening program, 175 (65%) are women and 95 (35%) are men. In the day program, 288 (60%) are women and 192 (40%) are men. The Law School's closest competitor, in terms of geography and rank, is Apollo State University Law School. Apollo State University Law School also draws a sizeable number of professional students and has a student body ratio that is about 55% women to 45% men.

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[2] Law schools are divided into four tiers. Each tier contains fifty schools.

[3] Of the five law schools in Olympus, Olympus State University School of Law is ranked the highest. Apollo State University Law School is the one other law school in Knerr. It is the second ranked law school in the state and is presently ranked at the top of the Second Tier of law schools.

On average, the Law School receives about 3,500 applications each year. Application data show there was no significant drop in the overall number of applications to the Law School from 2000 to 2010. Of the typical 3,500 applicants, 2,000 were women and 1,500 were men. Of the 1,000 accepted, 600 were women and 400 were men. Of the 275 who accept and enroll, 170 (62%) were women and 105 (38%) were men. Of the 250 who graduate, 137 (55%) were women and 113 (45%) were men. This women-to-men ratio is a long-term trend that extends back to the start of the 21st century. In fact, in the years since 2000, the percentage of females who comprise the incoming student body has never dipped below 60%, and it has been as high as 70%. In 2000, for example, 550 (55%) of those admitted were women. This exceeded the 49.4% national average at that time. The percentage of women enrolled at the Law School rose to 60% by 2005 and has remained in the 60% range ever since—reaching a high of 70% in 2008 before slipping back into the 60%-65% range between 2011 and 2016. In contrast, the national percentage of women enrolled in law schools in 2005 and 2008 was 47.5% and 47.3% respectively. Starting in 2011, there has been a 40% decline in law school applications nationwide. This decline included both men and women. As a result, it became easier to get into law school for all applicants—men and women alike.

Nationally, there is a trend that more women apply to and attend law school in the United States. In 2016, 50.3% of the total number of law students in the United States were women. The same year, 51.4% of first-year law students were women and 48.6% were men. From 2000 to 2001, the percentage of women enrolled in American law schools was 49.4%, while 50.6% were men. In 1985, 60% of enrolled law students in the United States were men. In 1976, that figure was 70%. In 1969, it exceeded 90%.[4] Presently, of the nation's 200 accredited law schools, 85 have student bodies that are a majority female. Of these 85, 15 have 100 more women than men enrolled in their programs. While 115 have student bodies that are a majority male, few have student bodies of greater than 55% men and none have 100 more men than women students.

While the Law School's gender imbalance is duplicated at many other law schools around the nation, the Law School's most recent class that was admitted for Fall 2017 had a ratio of 62% women to 38% men, which is higher than average and inconsistent with most Tier One law schools.[5] This is especially true of the nation's top twenty-five law schools, most of whose incoming classes are split fairly evenly[6] between men and women.[7] Of the law schools ranked 26 to 40, ten of the incoming classes are fairly evenly split while five of the incoming classes have ratios of 55% women to 45% men. None have classes that have more than 55% of either gender.

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[4] *See American Bar Association, 2016.* The trend toward more women applying to and attending law school mirrors a national trend that began at the collegiate level. With respect to undergraduates, only 43% who enter college are men. In terms of graduation rates, for every 100 women who earn a college degree, only 73 men will do so. Further, 83% of all U.S. colleges and universities have more female than male students. *See U.S. Department of Education.*

[5] Historically, the Supreme Court has used the terms sex and gender interchangeably. To reflect the evolution of the understanding of these concepts we will use the term gender in this opinion.

[6] Fairly evenly split means women to men ratio of between 52%-48% and 50%-50%. Even if a school is fairly evenly split between women and men, each one still had a majority of one gender.

[7] One notable exception is the University of California at Berkeley, which, as of 2017, had in total 563 women enrolled and 374 men enrolled in its three classes (2018/2019/2020).

With respect to law schools ranked 41 to 50: two, including the Law School, have more than 60% women, one has more than 60% men, two have ratios of 55% women to 45% men, and five are evenly split. These data show the situation in which the Law School finds itself. Most schools in the same tier are able to attract more male students.

The Law School has argued that achieving gender balance is necessary to retain its status as a Tier One law school. The Law School is especially concerned that if its ratio of women to men continues to widen, it will negatively affect its law school ranking. This concern reflects three facts. First, most law students today view an equitable balance of men and women as crucial to a well-rounded academic experience. Second, once a school becomes decidedly one-sided in terms of gender, fewer students, male or female, find it an attractive option. Third, the ratio of men to women is a factor weighed in ranking law schools.[8] Thus, administrators at the Law School worry that top applicants, men and women alike, will question the benefits of attending a predominantly female institution and will cease to apply to and/or attend the Law School.

The Law School takes the position that having a proper gender balance is critically important to high quality education. To wit, it submits that men and women bring different experiences, perspectives, and analytical approaches to the classroom. Women and men also have different world views based on the very different histories each has experienced. An equitable ratio of women and men, thus, helps produce diversity. This, in turn, creates cross-gender understanding and helps break down stereotypes. Consequently, the discussion, the analysis, and the learning that take place in a diverse classroom have a positive impact on a student's academic experience.

Admissions officers at the Law School have devoted considerable time and resources trying to bridge this gap. These efforts include: increasing its recruitment budget by 20%; targeting talented male students through the Law School Admissions Council's (LSAC) Candidate Referral Service; visiting every undergraduate campus within 500 miles of the Law School twice a year; offering 80% of all males who apply fee waivers; hosting application workshops for males only; offering male applicants who sign up for tours of the Law School free tickets to athletic events or Amazon.com gift cards; creating several diversity scholarships for male applicants, and offering baseball caps to the first 500 male students who apply. In addition, the Law School created the Preparation Program for Male College Students. This program is funded by a $300,000 diversity grant award from the LSAC and is available to male students regardless of race or ethnicity. The program was designed to address gender imbalance by giving participants faculty mentoring, assistance with preparing for the Law School Admission Test, guidance for interviews, and helping with personal statements for law school applications. Despite these efforts, the gap persists.

On March 26, 2013, the Law School's Dean, Chester Comerford, directed the Dean of Admissions, Michael Spybee, and the Assistant Dean of Admissions, Anne Dudia, to begin the Policy of affirmative action designed to help reduce the gender gap and to increase diversity overall at the Law School. The Law School gives each applicant an individualized review and gives consideration to a range of attributes that would add to the overall diversity of each entering class,

[8] Other factors include: bar passage rate, GPA, LSAT scores, affordability, quality of facilities, faculty and administration, the degree to which alumni support the law school, journals and practicums available, quality of and opportunities available to participate in trial and appellate advocacy programs, externships and clerkships obtained by students/graduates, and the percentage of graduates who are employed.

even beyond gender. The Law School admits that in some instances male applicants are admitted with lower grades and LSAT scores than their female counterparts, but it does not employ any fixed numerical quota for men or women. The Law School considers letters of recommendation, quality of their undergraduate curriculum, life experiences, including post-graduate degrees/experiences, extracurricular involvement, and quality of the personal statement. The Law School has stated a preference to have as much balance between men and women as possible.

Sommerville is a 30-year old white female who has no children and has never been married. She earned a Bachelor's in Religious Studies from Kedesh College and a Master's in Women's Studies from Apollo State University. Sommerville taught at OSU for five years as a part-time lecturer in the Department of Women's, Gender and Sexuality Studies. Sommerville, a popular figure in the classroom, has been frequently nominated as one of the best and most prominent faculty members on campus. In 2015, she was awarded the S. Borden Jeanne Award for Teaching Excellence.

In January 2017, Sommerville applied to the Law School for acceptance into the 2017 fall class. Generally, applicants who apply in the winter are typically less likely to be admitted than fall applicants. OSU was the only law school to which Sommerville has ever applied. Sommerville indicated a preference for the evening program so she could continue to work part time. Most students in the evening program work full or part time.

On March 17, 2017, Sommerville was notified that her application had been rejected. Sommerville's fall 2016 LSAT score of 159 put her in the 77th percentile nationally,[9] her 3.5 undergraduate GPA placed her in the top 15% of her graduating class at Kedesh College, and her 3.75 graduate GPA placed her in the top 25% of her graduating class at Apollo State University.[10] At Kedesh College, Sommerville volunteered as a tutor and participated in undergraduate moot court through the American Moot Court Association. Sommerville grew up in an upper middle-class neighborhood in southern Olympus, attended public schools throughout her life, and worked part time in a local bookstore all throughout high school. Using the Freedom of Information Act to get data from the school, Sommerville discovered that while every female who was accepted met or exceeded her portfolio, many of the male students who were accepted were not equal in GPA and LSAT scores. In fact, male students were admitted with undergraduate GPAs as low as 3.0 and with LSAT scores as low as 150—but not necessarily in combination with each other.

The Law School does not deny any of the aforementioned. The Law School contended in the District Court, however, that the male students in question all brought other soft variables and experiences, in addition to gender, which allowed them to add to the diversity of the incoming class in ways in which Sommerville did not. Some of the admitted male students, for example, came from impoverished backgrounds; had traveled broadly and experienced other cultures; were single fathers; had started their own businesses; had been student-athletes in college; or brought

[9] The Law School's 25th/median/75th percentile LSAT and GPA scores for the class that matriculated in 2017 when Somerville applied are as follows: 156/161/164 and 3.31/3.6/3.75. These figures indicate the level of the Law School's selectivity.

[10] Graduate school GPAs are typically higher than undergraduate GPAs. While law schools do not include graduate school GPAs into the cumulative GPA used for admissions purposes, they do consider how well an applicant did in their graduate program when evaluating their application.

unique artistic talents. Thus, while gender was *a* factor in their admission (and by extension in Sommerville's rejection) the Law School argues it was not the *deciding* factor. Even though the Policy requires consideration of a number of factors in the admissions process, the Law School concedes that had Sommerville been a male she would have been accepted.

(C)

Freedom of Expression Facts

Sommerville is a former part-time lecturer in the Department of Women's, Gender and Sexuality Studies at OSU. She worked in that capacity from August 2012 to May 2017. Sommerville was hired by the Department Chair, Professor Bobbi Bronner. Professor Bronner had been Sommerville's professor at Kedesh College. In fact, it was a class with Professor Bronner that had first piqued Sommerville's interest in women's issues. Professor Bronner encouraged Sommerville to attend graduate school and encouraged Sommerville to apply to law school. At Professor Bronner's initiative, the Department of Women's, Gender and Sexuality Studies created a class on gender and the law for Sommerville to teach.

Sommerville taught two courses per term. She was rewarded with extra pay if she served as a faculty advisor to student groups. She was also encouraged to present papers at conferences and at other academic settings, and to publish her work in academic or commercial journals and on other public platforms such as newspapers and online professional websites. During her employment, Sommerville was eligible for travel support from OSU, as well as for a small stipend to cover costs related to research. The faculty at OSU is not unionized.

Sommerville was thrilled to work in gender studies and excited to work at an institution that has long expressed openness to new ideas and a commitment to free expression, especially in the classroom. For example, OSU had posted a statement on its website announcing its opposition to political correctness and censorship and pledged to ensure that its students not be sheltered from the reality that in life one meets people with whom one disagrees. The statement is posted online and found in the handbooks given to students and faculty, and reads as follows:

> We are committed to delivering the highest quality of education to prepare students for their post-graduate lives. In order to best prepare our students, we do not condone shielding students from controversial ideas and perspectives. Students will not be warned about speakers whose remarks may be controversial, nor will faculty be required to issue trigger warnings before exposing students to class materials. As a public university, it is our role and mission to foster the free exchange of ideas.

In the spring of 2017, Sommerville taught a small seminar on gender and the law and a large introductory survey class on gender issues. In both courses, Sommerville scheduled classes on subjects including women and professional careers, affirmative action, women and the law, and how and why women have been traditionally disadvantaged. At the outset of the term, Professor Bronner informed Sommerville that although OSU was facing budget cuts that would result in some part-time faculty not returning for the following term, her preference was to bring Sommerville back, especially if Sommerville agreed to keep teaching at least one section of the

survey class each semester.[11] Sommerville agreed.

After Sommerville's application to the Law School was rejected, she began to complain in class about the Policy. Specifically, Sommerville complained that her right to equal treatment had been violated. At times she called on male students to defend the Law School's actions and the Policy. Sommerville was critical of women in class who either did not agree with her or were not actively trying to end the Policy. As the term progressed, Sommerville's attitude became more vociferous, and she began to complain in settings outside her classroom. For example, Sommerville voiced her complaints in the following settings:

- At lunch with other faculty members both on and off campus;
- At two academic conferences where she presented papers. The first was at a forum on gender and the law held on OSU's campus and the other was at a professional association meeting held out of state that was funded by OSU travel support. These papers identified Sommerville as a lecturer at OSU[12]; and
- At two political rallies—one held off campus and the other on campus. Sommerville spoke at a rally sponsored by two organizations: Nasty Women Against Discrimination (NWAD) and Women for True Equality (WTE).[13] NWAD and WTE held the event off-campus for women to come and share their stories of how they had been discriminated against by men. Sommerville was introduced at the event by WTE founder Sydney Kirsch as "a victim of OSU's male-first policy." Sommerville spoke about the evils of the Policy and shared her personal story. Neither Sommerville nor anyone else noted that she was employed at OSU. The second rally, known as Unity Fest was sponsored by the OSU Student Government and was held on campus. Unity Fest is discussed in greater detail below.

In the 2016–2017 academic year, there was a surge of hate crimes on OSU's campus. First, two female students who wore head scarfs were assaulted by two masked men while walking back to their dormitory from the library. The assailants reportedly told the students to "go back to their own country" and called them "terrorists." Second, misogynist slogans were spray painted outside the building where the Department of Women's, Gender and Sexuality Studies is located. Third, anti-Semitic slogans were spray painted outside the campus chapter of Hillel. Fourth, two men were caught on surveillance video hanging a noose inside the Student Union, just outside the Office for Diversity. In addition, flyers bearing the slogan "We Will Not Be Replaced" were distributed on campus by males, several of whom were enrolled at OSU. Other flyers pledged to return "Jews to the Oven, Blacks to Slavery, and Women to the Bedroom and Kitchen."

The aforementioned incidents prompted the OSU student government to organize a campus event called Unity Fest to promote campus-wide unity regardless of nationality, religion, race, gender

[11] The survey class had more students and thus more grading than the seminars. Because Sommerville was not tenured or tenure-track, she did not qualify for a grading assistant.

[12] While presenting at conferences was not a requirement of her employment, OSU encouraged its lecturers to participate in such events.

[13] WTE, founded by one of Sommerville's former students, Sydney Kirsch, did not allow men to join.

identity, or sexual orientation. Unity Fest was held in April 2017 and was open to OSU employees and students, as well as the local community. WTE was among the groups assisting at the event. OSU President William DeNolf gave the student government permission to host the event and recommended the inclusion of professors, including, *inter alia*, Sommerville, who was well-known as a popular professor who liked to write poetry about social issues.

Sommerville, who was very concerned and distraught by events that had occurred on campus, was excited about the festival. Sommerville asked several of her colleagues at OSU, including Professor Bronner, for suggestions as to which of her poems she should recite. Sommerville did so because several professors were familiar with her work. The consensus of the faculty was that Sommerville should present a poem that she had written about the Policy. This poem, entitled "The Cruel Irony (Look What They've Done to Affirmative Action Ma)," was a mock letter addressed to her mother (Appendix 1). It addressed society's preference for male domination, and its theme was that affirmative action had been hijacked by men to harm those whom it was originally intended to assist. Sommerville blasted "the powers that be" and asserted that "they use their laws to keep us down because they are scared of a world where most attorneys are women." She called for "an end to laws that favor men" and called for "students to rise up and challenge sexism in whatever form it takes and wherever they find it—including at OSU."

At Unity Fest, OSU student government president, Julieta Hernandez, who was a member of WTE and a former student of Sommerville's, introduced Sommerville. Hernandez's introduction did not identify Sommerville as an employee of OSU, but instead stated she "was excited to call to the stage one of my favorite people ever—a true visionary, a voice for the truth, and a woman who has communicated to me the need to fight for what I believe in." Sommerville went on stage, took the microphone, and introduced herself as "Ms. Andrea Sommerville, a lecturer in the Department of Women's, Gender and Sexuality Studies and a victim of the corrupt system in society, both afar and close to home, that enslaves and keeps women down, regardless of their race, class, religion, or ethnicity, while at the same time favoring and lifting men up."

The next day, videos of Sommerville's performance went "viral" on several social media sites. A blogger named "Action Jackson" live-streamed the performance on her Facebook page, which was viewed by more than 1.5 million followers. Students around the nation and prominent activists for women's rights across the country praised Sommerville for her courage, strength, and message. After Unity Fest, Sommerville did several radio interviews, each time being introduced as a lecturer at OSU. Sommerville even accepted an invitation to appear on the Ellen Show. Unbeknownst to Sommerville, the host, Ellen DeGeneres, invited Melanie Safka, a singer-songwriter whose song "Look What They Did to My Song Ma" Sommerville had parodied, to appear on the show with Sommerville. Safka played and sang Sommerville's poem to the tune of the song, while DeGeneres and Sommerville danced. By the end of the spring, Sommerville was a well-known public figure and the phrase "Look What They've Done to Affirmative Action Ma" had become a popular hashtag across social media. Posters, t-shirts, and other merchandise featuring Sommerville performing her poem could be found on college campuses and online and were commonly seen in audiences at rallies for women's rights. An off-Broadway play entitled "The Cruel Irony" was written based on Sommerville's poem. The play was a hit, and plans were announced for productions in cities as diverse as Austin, Baltimore, Baton Rouge, Cincinnati, Corvallis, Poughkeepsie, St. Louis, Santa Fe, Seattle, Tulsa, West Lafayette, and Wichita.

Sommerville's message was not well received by everyone in the nation, especially by many people with connections to OSU or the Law School. The offices of OSU President William DeNolf and Dean Comerford were inundated with phone calls, emails, and letters, the overwhelming majority of which disapproved of Sommerville's message and the manner in which she continued to criticize the Law School. A great many of these messages came from the parents of students, groups that advocate for the rights of men, donors, and alumni. Several elected officials who called upon OSU to take action in defense of the male students at the Law School—many of whom had been "trolled" on social media and had been labeled "Affirmative Action Babies!" By and large, the persons who contacted OSU were upset that the university, by virtue of the fact that it employed Sommerville, appeared to endorse her point of view. Some influential alumni, including Governor Brianna Wilbur, Secretary of State Amethyst Jefferson-Roberts, and state legislators Ryan Manners and Wyatt Rice, withdrew their financial donations for the following year. Others told OSU that they would discontinue any future donations.

The Board of Trustees met with President DeNolf to discuss the impact of losing alumni donations, and how it would affect OSU's nationally recognized athletic programs, especially since recruiting future student-athletes was dependent on these donations. In addition, and quite significantly, the Law School reported that applications filed by men were down by 20%.

In May 2017, President DeNolf contacted the provost of OSU, Dr. Geronimo Gusmano, and instructed him to direct the Dean of the College of Liberal Arts, Dr. Charles Noble, to have Sommerville fired. That same day, Dean Noble, over the objections of Professor Bronner, informed Sommerville that her contract would not be renewed – thus firing her. The non-renewal was announced on OSU's website, and President DeNolf even took additional steps by contacting all donors, parents of current students, and alumni to inform them of OSU's actions and to apologize for any pain that they may have been subject to or any offense that they had taken.

(D)

Action of the District Court

Sommerville filed suit in federal district court claiming: (1) that Olympus State University School of Law's admissions policy that gives preferential weight to male applicants violated her right to equal protection of the law, and (2) that Olympus State University violated her First Amendment rights when it fired her for complaints she made about the Law School's admissions policy. Thereafter, the respondent moved for summary judgment. United States District Court Judge, the Honorable Daryl R. Fair, granted summary judgment in favor of Olympus State University. To date, Sommerville has not enrolled in, nor has she been admitted to a professional, research, or academic degree-seeking program.

III

Equal Protection Analysis

The issue before this Court is whether the Law School may take action to remedy the gender imbalance in its student body in an effort to promote diversity and enhance the quality of the educational experience it provides for its students. Because the diversity achieved by the Policy will enrich the education of all students, we see no obstacle to the measured approach reflected in the Policy. What is more, universities need to be able to adapt to change. See *Fisher v. Univ. of Texas at Austin II*, 579 U.S. ___, ___ (2016) finding that universities must be able "to assess whether changing demographics have undermined the need for a race-conscious policy" and to adapt their policies accordingly.

The United States Supreme Court has long held that colleges should be allowed "'some, but not complete, judicial deference'" in crafting admissions policies as they see fit. *Fisher, II*, 579 U.S. at ___ (internal citations omitted). In college and graduate school admissions, the Court has held for nearly forty years that diversity is a compelling governmental interest, which justifies special consideration in admissions. Today's case is one of first impression for this Circuit because it addresses the application of the Equal Protection Clause to preferences based on gender rather than race. While the histories on race and gender discrimination differ, the outcome must be the same.

The Court first confronted affirmative action in higher education in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case, a Court struck down a medical school affirmative action admissions program that included racial set-asides or hard quotas. Yet, a majority of the Court agreed that diversity is a compelling interest in the context of a university's admissions program. *Id.* at 314. The flaw in the University of California program was that it did not look at the individual at all, but rather substituted race as a proxy for diversity. *Id.* at 319–20. The Law School's Policy has no such flaws because it involves no rigid quota and no applicant is disqualified for consideration for a place in the Law School's incoming class. Consistent with *Bakke*, gender "may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all others." *Id.* at 317. Sensitive admissions decisions are the business of college administrators, not courts. As Justice Powell stated so eloquently in *Bakke*:

> The freedom of a university to make its own judgments as to education includes the selection of its student body . . . . "It is the business of a university to provide that atmosphere which is most conductive 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 (internal citation omitted).

Twenty-five years later in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld a special admissions law school program. There, the University of Michigan Law School had no point system but looked to assemble a "critical mass" in each entering class, which would ensure diversity of the class as a whole. *Id.* at 318. While the characteristics comprising this critical mass varied annually depending on the applicant pool, every file was reviewed holistically. *Id.* at 337. This ensured that diversity could take many forms and that no person was excluded from consideration. The lessons from these decisions are clear. First, ensuring the diversity of college admissions remains a compelling governmental interest, which can justify an affirmative action

program. Second, such an affirmative action program must be set up to achieve meaningful diversity, not simply a statistical closing of a perceived gap. In many ways, this was the original message from *Bakke*, and it remains unchanged to this day.

The dissent relies on the plurality opinion in *Frontiero v Richardson*, 411 U.S. 677 (1973) and argues that the Policy should be subject to strict scrutiny. This is incorrect. *See, e.g., Michael M. v. Superior Ct*, 450 U.S. 464, 468 (1981) ("[W]e have not held that gender-based classifications are 'inherently suspect,' and thus we do not apply so-called 'strict scrutiny' to those classifications."); *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996) ("The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin. . . ."). A review of Supreme Court precedent finds that the proper test for sex and/or gender classifications is intermediate scrutiny. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) ("For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'") (internal citation omitted). This is true of gender-based discrimination in college admissions. In fact, in its most recent gender-based discrimination in a college admissions case, the Court warned against "equating gender classifications, for all purposes, to classifications based on race or national origin." *Virginia*, 518 U.S. at 532. The dissent to this opinion fails to heed this warning.

Under the correct approach, "a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification." *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). To pass, the state must demonstrate an important governmental interest which is substantially related to achieving this objective. The Law School's Policy clears these hurdles. The state had met its burden. The Court has held that diversity is a compelling interest, and it clears the bar required here. *Bakke*, 438 U.S. at 314. The Policy will undoubtedly increase the number of men in each entering class and thus is substantially related to closing the gender gap. Accordingly, the state has met its burden because the approach does not require that the Policy be "drawn as precisely as it might have been . . . but [rather] whether the line chosen [by the Law School] . . . is within constitutional limitations." *Michael M.* 450 U.S. at 473. We find that the Policy before us today is within such constitutional boundaries. The Law School did not create any barrier that she could not overcome. There are plenty of other law schools in Olympus to attend. Sommerville's decision to only apply to one law school was of her own doing.

IV

First Amendment Analysis

The second issue before this Court is whether OSU violated Sommerville's right to freedom of expression under the First Amendment to the United States Constitution when it fired her. A threshold issue implicit in Sommerville's claim is the assertion that *Garcetti v. Ceballos*, 547 U.S. 410 (2006) does not apply to speech made pursuant to academic freedom. This is the first case in this Circuit to pose this issue. This Circuit is not, however, the first circuit to entertain this issue. We hold today that *Garcetti* does apply and that OSU did not violate the First Amendment.

Our analysis begins with *Pickering v. Bd of Educ.*, 391 U.S. 563 (1968). In that case, the Supreme Court held that speech about public matters—even by public employees—is presumed to be protected by the First Amendment unless it is potentially harmful or injurious to the efficiency of public work. *Id.* at 568. This reflects the fact that speech about matters of a public concern "occupies 'the highest rung of the hierarchy [sic] of First Amendment values.'" *Connick v. Myers,* 461 U.S. 138, 145 (1983) (internal citation omitted). In *Connick,* the Court defined such matters as those that can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 146. The fact that speech concerns a public issue does not automatically insulate it from disciplinary actions. *See Rankin v. McPherson*, 483 U.S. 378, 388–92 (1987). A key factor in deciding free expression cases involving employee dismissals is determining the extent to which the comments address public concerns and the extent to which the general public was exposed to the speech in question. *Id.* at 389. Considerable deference is owed to employers in such case. Taken together, *Pickering* and *Connick,* protect speech where: (1) the speaker is speaking as a private person, (2) the speech relates to a matter of public concern, and (3) the speaker's interests outweigh those of the state. In essence, this approach instructs courts to determine where the speech occurred—namely, did it occur in the workplace—and whether it concerned a subject matter relevant to the employee's employment. *Garcetti*, 547 U.S. 410, 420–21 (2006). *Garcetti* clarified that the First Amendment does not protect speech about public issues that is made pursuant to a public employee's official duties. *Id.* at 421. This clarification relating to whether the speech that gave way to the controversy in *Garcetti* was made pursuant to a public employee's official duties is the key to this analysis and to deciding subsequent cases, such as the one brought by Sommerville. Sommerville's case adds a wrinkle that distinguishes it from existing Supreme Court precedent—namely, that it implicates speech by an academic who claims that her speech is protected by the doctrine of academic freedom. *Garcetti* did not reach matters related to academic freedom and in fact explicitly left that issue unresolved. *Id.* at 425.

Several of our sister circuits have decided similar cases. We are guided by their decisions. The Seventh Circuit in *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713 (7th Cir. 2016), dismissed an action brought by a public-school teacher who was disciplined for language that he used while conducting a lesson on racism. *Id.* at 714–15. The teacher had made clear that he was "speaking as a teacher—that is to say, as an employee—not as a citizen." *Id.* at 715. The Second Circuit arrived at a similar conclusion in *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198 (2d Cir. 2010) (holding that a public-school teacher's filing of a grievance against school officials for lack of discipline in the classroom "was in furtherance of one of his core duties as a public-school teacher . . . and [thus] had no relevant analogue to citizen speech"). Of significance is *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009). In *Gorum,* the Third Circuit did not reject the notion that *Garcetti* may not apply to academic freedom, *id.* at 186, so much as it found that academic freedom does not protect speech of a personal nature. 561 F.3d at 186–87. *See also Urofsky v. Gilmore,* 216 F.3d 401, 412 (4th Cir. 2000) (en banc) ("The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs."). We find convincing the fact that compelled the Third Circuit to conclude that Gorum's actions were not protected by the First Amendment—the expression was not "speech related to scholarship or teaching." *Id.* at 186. This is analogous to the case at hand. We are persuaded that our colleagues in the Second, Third, and Seventh Circuits are correct inasmuch as *Garcetti* applies to cases involving facts such as the present case.

The judgment of the District Court is AFFIRMED.

Schriner-Briggs, Circuit Judge Dissenting:

I

Equal Protection Analysis

Government programs that draw distinctions based on immutable characteristic are inherently suspect and in the interest of ensuring fairness to all citizens must be found unconstitutional. Under equal protection case law, "[t]he burden of justification is demanding and it rests entirely on the State." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). See *Kirchberg v. Feenstra*, 450 U.S. 455, 463 n. 7 (1981) (finding that "[t]he burden . . . is on those defending the discrimination to make out the claimed justification. . . ." (internal citation omitted). Olympus has not met this burden.

The majority quotes *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), approvingly; however, it misses the central point of that decision. *Bakke* struck down the special admissions program at issue in that case, but the Court also speculated about what types of programs may survive. There, the key element that doomed the California program was that it focused solely on race to the exclusion of all other factors. *Id.* at 319–20. The key line of thought from that decision was the concept that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307. Substitute gender for race and you have the exact program or policy that the Law School has enacted and which the majority mistakenly affirms today.

In *Bakke*, given the history of racism in the United States that the Board of Regents was trying to overcome and the low number/percentage of minority doctors, the University of California had a much greater need for such a program than the Law School presents. Yet the Court rejected its claim, holding that "without . . . findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Id.* at 308–09. Sexism is wrong – a stain to be removed from the larger body politic. But to equate the plight of racial minorities (which were a paucity of the applicant pool) with that of women (which make up the majority now and nearly half in other years) is to turn logic on its head. Simply put, the Law School cannot justify the harm it has inflicted on Sommerville. The Law School asserts a general need for a more balanced student body but provides no evidence as to why this is necessary or how it improves the education of other students.

The majority, in my view, applies the wrong test. The correct test for affirmative action cases—including those involving gender classifications—should be strict scrutiny. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003). I am persuaded by Justice Brennan's argument in *Frontiero v. Richardson* that strict scrutiny should be the correct test for gender discrimination. *See* 411 U.S. 677, 682 (1973) (plurality) (finding "implicit support" for the argument that classifications based on gender are "inherently suspect and therefore be subjected to close judicial scrutiny").

Applying strict scrutiny to the case at hand, the Policy fails. First, diversity may well be a compelling interest, but OSU has not shown why in this instance that would be true. There is no evidence of a history of discrimination against men by the Law School to remedy, and no individual has ever been denied admission based on their gender prior to the creation of this odious

policy. Rather than solving a problem, OSU has created new problems instead. A school's recognized compelling interest in diversity in education "'is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,' that can justify the use of race." *Grutter*, 539 U.S. at 324–25 (quoting *Bakke*, 438 U.S. at 315). Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Grutter*, 539 U.S. at 324–25 (quoting *Bakke*, 438 U.S. at 315). Even if it could clear that hurdle, the Policy in question today simply is not necessary to achieve that objective. There are many ways to attract male students beyond the discriminatory practices employed here. A school, for instance, might utilize enhanced recruitment techniques, advertise in male dominated media markets, or reach out to alumni, to name but a few. Such methods might accomplish similar results. The existence of such alternatives is enough to sink the Policy.

In the end, this Policy defies logic. For centuries, women have been subjected to the most significant forms of discrimination. This limited their opportunities in the workplace and in education. In the last forty years, significant progress has been made to the point where women are achieving record levels and rates of education. Now that parity has come into view and women are beginning to take advantage of the opportunities presently available, the state steps in to limit them once again. Whether the state is acting with good intentions is beside the point. The Law School has not shown how the Policy will increase diversity in its enrolled classes if males are self-selecting out of entering into higher education. Further, any increase in male enrollments will come at the price of lost opportunities for women. It is as if we have come full circle.

For the same reasons discussed above, even if intermediate scrutiny is the correct test, the Law School lacks the required "exceedingly persuasive justification" required to sustain its decision to classify by gender. *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001); *see also id.* at 74–78 (O'Connor, J., dissenting). The Policy is unconstitutional. The District Court should be reversed.

II

First Amendment Analysis

As I read the record, the applicable post-*Garcetti* circuit rulings are *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014), and *Adams v. Trs. of the Univ. of N.C. Wilmington*, 640 F.3d 550 (4th Cir. 2011). In *Demers*, the Ninth Circuit held that "*Garcetti* does not apply to speech related to scholarship or teaching." 746 F.3d at 406 (internal citation and quotations omitted). Instead, it found that "such speech is governed by *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)." *Id.* The Fourth Circuit had arrived at the same conclusion in *Adams*, finding that "*Garcetti* would not apply in the academic context of a public university." 640 F.3d at 560–64. *Adams* asked:

> (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and

> (3) whether the employee's speech was a substantial factor in the employee's [adverse employment] decision.

Id. at 560–61 (internal citation omitted). In my opinion, this should be the approach this Circuit undertakes in cases such as the one before us today. Such an application would compel us to rule in favor of Sommerville. The facts show that Sommerville spoke both on-line and face-to-face as a private person about important public issues that affected her directly and not in her official capacity as an employee of OSU. As such, her speech is protected under *Pickering.* The Court has long recognized that speech on matters of public concern can be protected even when uttered at a place of employment. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983) (speech by assistant district attorney); *Rankin v. McPherson*, 483 U.S. 378 (1987) (speech by employee at county constable office). When Sommerville spoke in her official capacity as a lecturer, she did so in within a class setting that addressed a subject relevant to the broader subject matter and with the protection afforded by academic freedom—a freedom that is vital to the health and survival of our democracy. *See Urofsky v. Gilmore*, 216 F.3d 426, 435 (4th Cir. 2000) (*en banc*) (Wilkinson, C.J., dissenting) (asserting in an academic freedom dispute that "the threat to the expression of one sector of society will soon enough become a danger to the liberty of all.") I am persuaded that the Fourth and Ninth Circuits' approach to *Garcetti* should guide us.

Sommerville's speech was why she was dismissed. Because her speech did not relate to or concern any department or OSU policy it is distinguishable from *Connick* and *Garcetti.* If we allow employers to punish such speech with reckless abandon who is next, and on what basis will speech be repressed? I am confident that my brethren and sistren would not seek my impeachment or discipline for remarks in a dissent or in conference. But there are those in government and business who equate criticism with treason and they will be emboldened if we allow society to take the wrong path. One need only consider movements on both the left and right to punish professors who may express views with which they disagree in class or online in their professional work to appreciate the threat that faces us in cases such as the present one. It goes far beyond Sommerville and OSU. We must never forget the warning penned by the Nobel Laureate Bob Dylan in his song *My Back Pages.*

In a soldier's stance, I aimed my hand
At the mongrel dogs who teach
Fearing not that I'd become my enemy
In the instant that I preach
My pathway led by confusion boats
Mutiny from stern to bow
Ah, but I was so much older then
I'm younger than that now

For the aforementioned reasons, I respectfully DISSENT.

Appendix I

"Look What They've Done to Affirmative Action Ma (with Apologies to Melanie)"

Affirmative Action, Affirmative Action.

Look what they've done to Affirmative Action.

The sons of bitches.

Women worked to gain its assistance.

Betty, Shirley, and Susan B.

Gloria, Bella, and Notorious RBG.

When it was created the men jeered and hissed.

"Diversity, diversity, diversity, what a crock," they sneered.

A sham, they said. So unfair to men.

The "weaker sex" they called us.

Now, the men all demand Affirmative Action, Affirmative Action, Affirmative Action

Look what they've done to Affirmative Action.

The sons of bitches.

Women worked to gain its assistance.

Betty, Shirley, and Susan B.

Gloria, Bella, and Notorious RBG.

The Policy is perverse. A travesty even.

Now the men say OSU needs to be more diverse.

They want Affirmative Action.

I ask you now, who is the weaker sex?

Affirmative Action, Affirmative Action

Women worked to gain its assistance.

Betty, Shirley, and Susan B.

Gloria, Bella, and Notorious RBG.

Oh, Mamma,

Look what they've done to Affirmative Action.

The sons of bitches.

Women worked to gain its assistance.

I wish I could pretend it ain't so.

I wish I could say it ain't so.

I wish I never heard of the Policy

Oh, Mamma look what they've done to Affirmative Action.

They've twisted it, they've poked at it, they've changed it.

The sonsabitches.

Oh Maman, regarde ce qu'on a fait à la discrimination positive

On l'a tordue, on l'a piquée, on l'a tout changée.

Les salauds

Affirmative Action, Affirmative Action

Women worked to gain its assistance.

Betty, Shirley, and Susan B.

Gloria, Bella, and Notorious RBG.

And, my Mamma. She worked to bring about change, to make things fair.

Oh, Mamma, what can I say to you.

Oh Sisters, what can I can I say to you, except those sons of bitches.

Look what they've done to Affirmative Action.

They've turned it all upside down.

It's a world gone mad.

Oh Mamma, look what they've done to Affirmative Action.

Oh Maman, qu'est-ce que je pourrais te dire ?

Mes sœurs, qu'est-ce que je pourrais vous dire ? Sauf, ces salauds

Regarde ce qu'on a fait à la discrimination positive.

Ils l'ont tout bouleverseé.

Le monde est devenu fou.

Maman, regarde ce qu'on a fait à la discrimination positive.

Table of Cases Cited

Fourteenth Amendment Cases

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First Amendment Cases