May 1, 2025
IN THE SUPREME COURT
OF THE UNITED STATES

No. 2025-2026

William DeNolf, 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 female 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

WILLIAM DENOLF, Plaintiff-Appellant

vs.

OLYMPUS STATE UNIVERSITY, Defendant-Appellee

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

Before Sarah Fox, Mayuu Kashimura, and Trinity Klomparens, Circuit Judges

OPINION BY Judge Klomparens, with Judge Fox concurring:

I

Order

This case arises on appeal from a decision by the United States District Court for the Central District of Olympus. Plaintiff-Appellant, William DeNolf (hereinafter "DeNolf"), filed suit against Defendant-Appellee Olympus State University (hereinafter "OSU") claiming: (1) that the Respondent's admissions policy that gives preferential weight to female applicants violates the Equal Protection Clause of the Fourteenth Amendment, and (2) that Respondent violated his First Amendment rights when it fired him for complaints he made about its admissions policy. After a jury trial, verdicts were returned in favor of the Respondent on both counts. The District Court entered judgment in favor of the Defendant. We AFFIRM the judgment of the District Court.

II

(A)

Overview of the Facts

Plaintiff-Appellant William DeNolf appeals the decision of the District Court for the Central District of Olympus affirming the constitutionality of Respondent's preferential-admissions policy (hereinafter "the Policy" or "the Pettus-Cole Policy") and the decision of Respondent to terminate his 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. The parties have stipulated to the following facts on appeal. There are no material facts in dispute. Accordingly, all issues raised are legal. 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 five-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 business, the law, and criminal justice.

Among its many successful programs, OSU has a highly regarded and highly selective criminal justice program that awards a Master's in Criminal Justice and is widely considered the best in the nation. The program is housed in the Jackson Kelly School of Criminal Justice (hereafter "the School"). Applicants must have a college degree and a minimum of five years of work as a uniform police officer or, alternatively, an advanced professional degree in law, public administration, business, economics, or the social sciences. The Kelly School is known for producing police leadership – particularly commissioners. In fact, for the last quarter century, no less than 25% of all police chiefs and commissioners nationwide have come from the School. No other school in the country accounts for more than 5%.

The School produces graduates who work in all facets of our national security apparatus. While the vast majority find careers in law enforcement, other graduates have also held high-level positions in law, in academia, as civilian contractors, and in the military. Further, at the national level, the program has demonstrated that its graduates consistently fill critical roles in agencies directly responsible for national security, such as the FBI's Counterterrorism Division and the Department of Homeland Security. The School regularly graduates leaders who work in fields such as SWAT teams, cyber-security, border and customs, trafficking, and intelligence gathering.

Much of the School's success comes from its unique mission and the training it offers. The program provides specialized training not available at other institutions, such as advanced counterintelligence techniques and international security operations. This training affords its graduates a clear edge on the job market. The United States government has dozens of law enforcement agencies that are charged with maintaining the nation's security. The School is the only program of its kind that has formal partnerships with every one of these federal agencies. The list, which includes the ATF, CBP, DEA, DHS, DOI, DOJ, FBI, ICE, TSA, USCG, USCP, USMS, and USSS, demonstrates the program's unrivaled integration into the national security apparatus. Notably, at trial and in its briefs, the School provided ample evidence of the program's graduates consistently contributing to national security policy development and implementation at high levels of government, including at the director level, in the most important federal agencies.

An additional aspect of the School that is unique is the fact that it offers a number of programs which in are the forefront of developing and implementing new technologies crucial for national security law enforcement. Finally, the School, like the national military academies, has a specific track that, in exchange for a tuition scholarship, includes a service commitment for graduates, requiring them to work in national security or law enforcement roles for five years after graduation. Simply put, no other criminal justice program offers such a high level of respect in the law enforcement community and has such a deep involvement in advancing national security.

The School, founded in 1970, has long been committed to producing the best leaders it can, with a particular emphasis on producing graduates from with varied backgrounds and experiences. For years, it prided itself on producing such a pool without the need for or use of affirmative action programs. That said, at its founding, no women were admitted. This was intentional, as stated at the time by the first Dean of the School, Robert Riggs, "society neither needs nor desires female members of law enforcement – a view that the School shares." In the time since the 1970s, the School has changed course and now has regularly produced a greater number of female officers than the national average. These numbers in five-year intervals were as follows:

Table 1:

Percentage of White vs Non-White Students in the Kelly School

Year	White	Non-White
1970	99.00%	1%
1975	97.50%	2.50%
1980	95%	5%
1985	92%	8%
1990	82%	18%
1995	75%	25%
2000	77%	23%
2005	70%	30%
2010	62%	38%
2015	58%	42%
2020	57%	43%

Table 2:

Percentage of Male vs Female Students in the Kelly School

Year	Male	Female
1970	100%	0%
1975	100%	0%
1980	99%	1%
1985	96%	4%
1990	91%	9%
1995	90%	10%
2000	82%	18%
2005	77%	23%
2010	75%	25%
2015	85%	15%
2020	91%	9%

Table 1 shows that the School maintained a trend toward a student body of various races from 1970 to 2020. Table 2, however, shows the opposite trend. The trend toward a largely male student body runs contrary to national averages of male-female law enforcement officers among the nation's enforcement agencies and departments and, more concerning for the School, contrary to averages at other highly ranked criminal justice professional programs. Studies find that students tend to prefer to attend schools with student bodies from all walks of life. In addition, employers tend to favor workforces that offer them choices between potential employees who have different talents as well as different life experiences and perspectives. Nowhere is this need more pressing than in the areas of law enforcement and national security. As of 2024, 18% of law enforcement officers are female, and 3% of law enforcement leadership is female. The need for an increased presence of women, not just in the School, but in law enforcement[1] and in the military,[2] is significant.[3]

This trend toward a more male dominated student body coincided with drops in both applications by students with top GRE scores, students with law degrees, students with significant business

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[1] The National Policing Institute reports that:

> "Recent studies indicate that women in law enforcement tend to exhibit more personable characteristics and behaviors than men." See, for example, a few facts:
>
> Women officers are:
>
> - Less likely to use lethal force and be named in complaints against the police.
> - More likely to have high levels of interpersonal skills and use traits (such as empathy) that encourage communication and de-escalation in tense situations. (Roman, I. (2020)).
> - Consistently viewed as trusted by their local communities. (Smith, B. B. (2019)).
> - More emotionally equipped in addressing violence against women and sex crimes.

[2] According to the Department of Defense (DOD), in 2022, 17.5% (228,326) of the active-duty force and 21.6% 165.614 of National Guard and reserves were female. In 2021, 17.3% (231,741) of the active-duty force were female. For that same year, 21.4% (171,000) of the National Guard and reserves were female. In 2020, those same numbers were 17.2% and 21.1% respectively. These figures have climbed slowly but consistently over the last decade. The most recent figures find that in 2022, 19% of the officer corps were female, while 81% were male.

[3] According to the International Association of Police Chiefs:

> "A growing body of scientific evidence demonstrates the unique contributions of women officers. Though further research is needed, preliminary findings indicate that women officers use less force and excessive force less often and use their discretion to make fewer arrests for minor misdemeanor offenses. They search drivers less often during traffic stops—but when they do conduct a search, they are more likely to find contraband. They are named proportionately less often in complaints and lawsuits and are perceived by the communities they serve as more trustworthy and compassionate. They fire their service weapons less often. They are associated with better outcomes for victims of crime—especially victims of sexual assault.
>
> This is not to say that every woman would make an exceptional officer, nor that every man would not. This simply indicates that, in many important aspects of improving both the profession and the public safety outcomes of communities served, women officers can play a critical role. If a training program promoted these kinds of outcomes, most agencies would be implementing that training. But instead, what this suggests is the field of policing must look critically at (1) why women historically have been so underrepresented, and (2) what agencies can do to improve both the representation and experiences of women in the profession."

experiences, and female applicants.[4] Across the nation, colleges and universities saw their female application rates rise during this time period by an average of 40%, and their yields increased such that they averaged 65%-35% male-female class demographics. Many of these programs utilized some form of sex-based affirmative action policies and scholarships targeted at female applicants.[5] The School did not have such programs.

On March 26, 2022, the Kelly School's Dean, Chester Comerford, directed the Dean of Admissions, Daxton Pettus, and the Assistant Dean of Admissions, Caleb Cole, to develop a policy to attract more qualified female applicants. Subsequent to the March 26, 2022 meeting, admissions officers at the School devoted considerable time and resources trying to increase the number of women enrolled in the School. The School has stated a preference to have as much balance between men and women as possible and it admits that, in some instances, female applicants are admitted with lower grades and GRE scores than their male counterparts, but it did not utilize any fixed numerical quotas or sex balancing. Nor is there is evidence that it used sex as a stereotype or as a negative when evaluating applicants. Put another way, the School did not treat all women or men as being monolithic – as representatives for their sex. To the contrary, the School drilled deep when it considered each applicant looking past demographics. No applicant was awarded points or denied points because of demographic factors such as race, sex, ethnicity, religion, or sexual orientation. The Pettus-Cole Policy, which went into effect on July 1, 2022, afforded each applicant an individualized review that gave consideration to a range of attributes that would add to the overall makeup of each entering class, that went beyond sex. For example, life experiences, geographical factors, such as where applicants grew up or where they live, languages spoken, if they describe themselves as religious, involvement in their community, the background of their parents, athletic or artistic abilities, and prior relevant vocational experiences. The School considers letters of recommendation, the quality and significance of the candidate's prior work experience, post-graduate degrees, regional and national leadership, community involvement, and the quality of their personal statement. Applicants are welcome to discuss how their race, sex, ethnicity, religion, or sexual orientation have affected their lives and any discrimination that they have faced. Not all female applicants who were admitted chose to submit a statement along these lines – in fact, most did not. In addition, just over half of the female applicants who wrote such a statement were rejected.

The Policy had a stated goal of a 75%-25% male to female ratio for five consecutive admissions cycles. If such were achieved, the Policy would be suspended for at least five years and only renewed if: (1) the average over those five years had remained below 75%-25% or (2) if at least two-thirds of the Board of Trustees voted before five years had passed to reinstate the Policy.

The Pettus-Cole Policy employed several means aimed at increasing the size of its female application pool with the hope that enough good candidates would apply and be accepted, thus raising its enrollment numbers. These included raising its recruitment budget by 20%; targeting talented female students through the School Admissions Council's Criminal Justice Candidate Referral Service; visiting every police department within 500 miles of the School twice a year; offering 80% of all females who apply fee waivers; hosting application workshops for females

[4] The male-female ratio for 2020, 2021, and 2022 was 91%-9%, 92%-8%, and 91%-9% respectively. In that same time period, the percentage of applicants with law degrees, and significant business experiences, and female applicants all fell by an average of 30%, 20%, and 35% respectively from 2020 to 2022.

[5] Historically, the Supreme Court has used the terms sex and gender interchangeably. We will use the term sex.

only; offering female applicants who sign up for tours of the School free tickets to athletic events or Amazon.com gift cards; offering two season tickets to all female applicants who choose to attend the School (they can choose from the School's male or female basketball or volleyball teams); creating five faculty lines dedicated to hiring qualified female faculty; creating several scholarships for qualified female applicants; and offering School hoodies to the first 500 female students who apply. In addition, the School created the Preparation Program for Female College Students enrolled in OSU's criminal justice undergraduate program. This program, which is run by OSU Professor Caitlyn Smith, is funded by a $300,000 grant award from the National Female Law Enforcement Professional Association. This program was designed to reverse the trend that started around 2015, as reported in Table 2, by providing participants mentoring, assistance with preparing for admissions tests, guidance for interviews, and help with personal statements. Despite these efforts, the gap between male and female enrollment persists, and the School remains an outlier regarding female matriculation as compared to other schools regionally and nationally.

William DeNolf is a 40-year old white male who has no children and has never been married. DeNolf grew up in an upper-middle-class neighborhood in southern Olympus, and attended public schools throughout his life. While in high school, DeNolf worked in a bookstore that specialized in books on the law. The store was owned by a friend of his family, Jason Chahyadi. DeNolf double majored in Creative Writing and Religious Studies at Kedesh College. While in college, he volunteered as a tutor and participated in undergraduate mock trial through the American Mock Trial Association. In addition, as an undergraduate, DeNolf worked part-time in the law firm Rooker-Feldman-Doctrine. He liked the job and considered a career in the law, however, after graduating in 2006, DeNolf, the son and grandson of police officers, went into law enforcement.

In 2007, DeNolf graduated from the Olympus Police Academy and became a state trooper. In 2013, after five plus years of service, DeNolf was wounded in the line of duty. He spent three months in rehabilitation and returned to duty at a desk job. While he found public service rewarding, DeNolf was bored with the desk duty and decided to try his career at the law. In 2014 DeNolf enrolled in law school at Apollo State University School of Law. Apollo State University is a regional/tier three law school. While he did well in his classes, his class rank after his first year was top 10%, DeNolf did not enjoy law school. The other students tended to view DeNolf with suspicion because of his career in law enforcement. What is more, DeNolf, who enjoyed the collaborative aspect of having a shared mission in law enforcement, found his fellow students to be "too cut throat, too privileged, and unapproachable." The final straw, came when DeNolf was late to a mock trial tryout. He was late because he had stopped to help a stranded motorist. The professor running the tryout, Alfie Sasaki, told DeNolf that what he had done was "admirable" but that "there was no place for nice guys in mock trial and suggested that he try moot court because that was where the law students who were not ruthless enough for mock trial went." On April 1, 2016, DeNolf formally withdrew from law school. He went to visit his old advisor from college, Professor Charles Noble. Professor Noble asked if DeNolf would consider a Master's Degree in Political Science which he could use for a number of purposes, among them teaching. DeNolf found the idea appealing and applied to and was accepted into the Kedesh College Master's Program. He started in the fall of 2016 and graduated with a Master's Degree in 2018. In August of 2018, DeNolf started teaching at OSU as a part-time lecturer, teaching American Constitutional Law, Criminal Law, and Judicial Process in the Department of Government and Politics.

By late 2022, DeNolf, while he enjoyed teaching, had come to realize that he missed public service and to that end he decided he wanted to pursue a career in law enforcement with the goal of being a police commissioner in a big city. In January 2023, DeNolf applied to the School for acceptance into the 2023 fall class. Generally, applicants who apply in the winter are typically less likely to be admitted than fall applicants. The Kelly School's Criminal Justice Program is the only one to which DeNolf has ever applied. DeNolf indicated a preference for the evening program so he could continue to work fulltime. Most students in the evening program work full or parttime.

On March 17, 2023, DeNolf was notified that his application had been rejected. DeNolf's GRE score of 164 verbal and 166 quantitative put him just above the 75th percentile nationally,[6] his 3.5 undergraduate GPA placed him in the top 20% of his graduating class at Kedesh College, but just below and his 3.75 graduate GPA in graduate school placed him in the top 20% of his graduating class at Kedesh College.[7] Using the Freedom of Information Act to get data from the School, DeNolf discovered that while every accepted male met or exceeded his portfolio, many of the accepted female students did not exceed his GPA or his GRE. In fact, female students were admitted with undergraduate GPAs as low as 3.25 and with GRE scores as low as 156 in verbal and 158 quantitative—but not necessarily in combination with each other. Many of the successful female applicants had better work experience than DeNolf.

The School does not deny any of the aforementioned. The School contended in the District Court, however, that the female students in question all brought soft variables and experiences, which allowed them to add to the overall quality of the incoming class in ways in which DeNolf did not. Some of the admitted female students, for example, came from impoverished backgrounds, had lived abroad, spoke languages that are frequently critical to the success of law enforcement agencies because of the populations they serve, were single parents, had started their own businesses, had been student-athletes in college, and/or had unique artistic talents. DeNolf had none of these soft variables or experiences. Thus, while sex was *a* factor in their admission (and, by extension, in DeNolf's rejection), the School argues it was not *the deciding* factor.

(C)

Freedom of Expression Facts

DeNolf is a former part-time lecturer in the Department of Government and Politics at OSU. He worked in that capacity from August 2018 to May 2023. DeNolf was hired by the Department Chair, Professor Bobbi Bronner. Professor Bronner had been DeNolf's professor at Kedesh College. In fact, it was a class with Professor Bronner that had first piqued DeNolf's interest in the law and Professor Bronner had recommended DeNolf for legal study. At Professor Bronner's initiative, the Department created classes on the judicial process and criminal law for DeNolf to teach. DeNolf also taught American Constitutional Law and a Selected Topics Class on Gender and the Law. It proved a popular class with the student body – which was 65% female. DeNolf was frequently nominated as one of the best and most popular faculty members on campus. In 2021, he was awarded the S. Borden Jeanne Award for Teaching Excellence. DeNolf enjoyed

[6] The School's 25th/median/75th percentile GRE and GPA scores for the class that matriculated in 2020 when DeNolf applied are as follows: 156/159/163 (verbal), 158/161/165 (quantitative), and 3.31/3.6/3.75 (undergraduate GPA).
[7] Graduate school GPAs are typically higher than undergraduate GPAs.

teaching and went out of his way to mentor students. This invariably meant mentoring mostly female students. DeNolf was enthusiastic about this mentoring and wrote many letters of recommendation for his students for law school – 85% of these letters were for female applicants.

DeNolf taught two courses per term. He was rewarded with extra pay if he served as a faculty advisor to student groups. To that end, DeNolf assisted with the Department's Mock Trial Program. While presenting at conferences was not a requirement of his employment, OSU encouraged its lecturers, full and part-time alike, to present papers at conferences and at other academic settings. In addition, OSU encouraged its lecturers to publish their work in academic or commercial journals, and on-line public platforms, such as newspapers and professional websites. During his employment, DeNolf 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.

DeNolf was thrilled to teach law classes to undergraduates 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 is 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 2023, DeNolf taught a class on American Constitutional Law and one on Gender and the Law. In both courses, DeNolf scheduled classes on subjects including affirmative action, equal protection, sex discrimination, reverse discrimination, and the rights of traditionally disadvantaged groups. At the outset of the term, Professor Bronner informed DeNolf 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 DeNolf back, especially if DeNolf agreed to keep teaching at least one section of American Constitutional Law each semester. DeNolf agreed.

After DeNolf's application to the School was rejected, he began to complain in class about the Policy. Specifically, DeNolf complained that his right to equality had been violated. At times he called on female students to defend the Policy. DeNolf was critical of men in class who either did not agree with him or were not actively trying to end the Policy. As the term progressed, DeNolf's attitude became more vociferous, and he began to complain in settings outside his classroom. For example, DeNolf voiced his complaints in the following settings:

- At lunch with other faculty members both on and off campus;
- At two academic conferences where he presented papers. The first was at a forum on sex discrimination and the law held on OSU's campus and the second was at a professional association meeting held out of state that was funded by OSU travel support. These papers identified DeNolf as a lecturer at OSU;

- At a political rally off campus sponsored by two organizations: Men Against Discrimination (MAD) and Women for True Equality (WTE).[8] The event, held off campus, allowed men to come and share how they had been discriminated against because they are men. DeNolf was introduced at the event by MTE co-founders Grady Smith and John Littles as "a victim of OSU's female-first policy." DeNolf spoke about the evils of the Policy and shared his story. Neither DeNolf nor anyone else noted that he was employed at OSU; and
- At a political rally held on campus known as Unity Fest. Unity Fest, which was sponsored by the OSU student government, in greater detail below.

In the 2022-2023 academic year, there were a number of disturbing events 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. In addition, flyers bearing a variety of offensive slogans aimed at a variety of groups were distributed on campus by students and non-students alike.

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, sex, or sexual orientation. Unity Fest was held in April 2023 and was open to OSU employees and to students, as well as, to the local community. OSU President Jackie Zambrano gave the student government permission to host the event and recommended the inclusion of professors, including, *inter alia*, DeNolf, who was well known as a popular and dynamic lecturer who liked to write poetry about social issues.

DeNolf, who was very concerned and distraught by events that had occurred on campus, was excited about the festival. DeNolf asked several of his colleagues at OSU, including Professor Bronner, for suggestions as to which of his poems he should recite. DeNolf did so because several professors were familiar with his work. The consensus was that DeNolf should present a poem he had written about the Policy entitled "Imagine a Level Playing Field." The poem followed the lyrics and beat of John Lennon's song entitled "Imagine." It addressed society's use of affirmative action to supposedly level the playing field for all. The poem's theme was that to truly create a world that was fair for all society must forgo affirmative action. Before presenting the poem, which he sang, while playing an acoustic guitar, DeNolf blasted "the powers that be" and asserted that "affirmative action is inconsistent with true equality." He called for "an end to laws that favor people based on immutable characteristics" and called for "students to rise up and challenge inequality whatever form it takes and wherever they find it—including at OSU."

At Unity Fest, OSU student government president, Jocelyn Colpitts, and Senior Class President, Farnoz Norouzi, introduced DeNolf. Both were former students of DeNolf. Neither Colpitts nor Norouzi identified DeNolf as an employee of OSU. Colpitts stated that "I am excited to call to

[8] WTE, founded by one of DeNolf's former students, Sydney Kirsch, opposes affirmative action.

the stage one of my favorite people ever" while Norouzi called DeNolf "a true visionary, a voice for the truth, who has communicated to me the need to fight for what I believe in."[9] DeNolf went on stage, took the microphone, and introduced himself as "William DeNolf, a lecturer in the Department of Government and Politics, and a recent victim of the cruel and paternalistic system that keeps women down by convincing them that they need affirmative action to achieve equality rather than achieve it by virtue of their own merits and skills."

The next day, videos of DeNolf'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 men's rights across the country praised DeNolf for his courage, strength, and message. After Unity Fest, DeNolf did several radio interviews, each time being introduced as a lecturer at OSU. DeNolf accepted invitations to appear on both the "Rachel Maddow Show" and "Fox and Friends," where he discussed affirmative action. DeNolf, who identified as "a progressive in most every way," denied that he had a political agenda or was a male supremacist. Rather, he asserted, "I believe men and women are equal in every way, I simply want everyone to be treated equally – a level playing field." DeNolf was invited to attend various conservative conventions, as well as participate in a symposium sponsored by Students for Fair Admissions. He turned these invitations down; however, he did agree to give a TED Talk and he participated in a series of collegial debates on college campuses with supporters of affirmative action.

DeNolf's message was not well received by everyone, especially by many people with connections to OSU and/or the School. The offices of OSU President Zambrano and the College of the Liberal Arts were inundated with phone calls, emails, and letters, the overwhelming majority of which disapproved of DeNolf's message and the manner in which he continued to criticize the School. A great many of these messages came from the parents of students, donors, and alumni. Several elected officials who called upon OSU to take action in defense of the female graduate students at the 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 DeNolf, appeared to endorse his point of view. Influential alumni contacting OSU included: Alexa Alvarez (social media influencer and foodie), Morgan Barragan (author of "What to do when you lock yourself out of a home you are house-sitting" and "What to do when you are in a suit at an all-day competition and you spill your entire drink in the drink holder of a rental car"), Mikayla Browne (CEO of Pink Drink and the co-founder of a clothing line named Freight Train), Stevie de La Fuente (founder and commissioner of the USA Woman's Water Polo League), Ashley Harding (an acclaimed painter) Jocelyn Soto (the richest female alumna of OSU and co-founder of Freight Train), and Emma Nelson (a trial attorney who had been voted by the state bar as "*the* attorney to be feared and admired" a record five-straight years). This group of alums, known as "the Seven," withdrew their financial donations for the following year and successfully pressured others to do the same.

On May 4, 2023, the OSU Chairman of the Board of Trustees, Zach Brewer, and the Vice-President of Finance, Ethan Finn, met with President Zambrano to discuss the impact of losing

[9] In a shared Instagram post, Colpitts and Norouzi stated that while they supported DeNolf's right to free expression and that he remained their favorite professor – "the GOAT" – they did not agree with his views and that his speech had surprised them. This was accompanied by emojis that showed a surprised face and one with a woman shrugging.

alumni donations, and how it would affect OSU's highly ranked athletic programs, especially since recruiting future student-athletes was dependent on these donations. Vice-President Finn informed President Zambrano and Chairman Brewer that total applications and those filed by women were down by 20% and 33% respectively. A second meeting, on May 8, 2023, was convened. This time President Zambrano and Vice President Finn met with the full board.[10]

On May 27, 2023, President Zambrano spoke with OSU Provost Dr. Carolina Dykes and the Dean of the College of Liberal Arts Dr. Sean Ignatuk. They agreed that DeNolf was to be fired and that Dean Ignatuk, OSU's legendary undergraduate moot court coach, would do the firing. On May 29, 2023, Dean Ignatuk, whose office had to bring in extra staff from a different office to handle all the complaints about DeNolf, met with and informed DeNolf that his contract would not be renewed – thus firing him. Dean Ignatuk did so after keeping DeNolf waiting in his outside office for 45 minutes. The non-renewal, which was opposed by Professor Bronner, was announced on OSU's website. President Zambrano contacted 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

DeNolf filed suit in federal district court claiming: (1) that Respondent's admissions policy that gives preferential weight to female applicants violated his right to equal protection of the law, and (2) that Respondent violated his First Amendment rights when it fired him for complaints he made about the admissions policy. After a jury trial, the Honorable Daryl R. Fair entered judgment in favor of the Respondent. To date, DeNolf has not enrolled in, nor has he been admitted to a graduate program in criminal justice.

At trial, the School argued that it had an overriding – even compelling -- interest in contributing to the security of the people of Olympus. It argued that its actions produce leaders for police forces nationwide and that through its actions the people of Olympus, as well as of the United States, are led by officers who are well trained in critical issues related to criminal justice.[11] Olympus joined this argument in an *amici* brief. In addition, the School called witnesses from five Fortune 500 companies who all testified that they liked to hire former law enforcement officers -- especially those who have served with people from various backgrounds.[12] These witnesses testified that they valued former law enforcement officers, especially retired officers, because these hires – male and female alike, who had earned professional degrees from programs known for their commitment to students bodies drawn from different walks of life as a general concept – were

[10] The Board includes: Chairman Brewer, and Trustees Laryn Bennett, Hannah Bruck, Dylynn Lasky Marcus Ortiz, Austin Piatt, Ella Stitzlein, Evelyn Thurman and Jeremy Zide. Its members are selected by the Governor, the University President, and the most senior member of the Board. At least three members have to be alumni of OSU and at least one had to have attended the Kelly School. There is no limit on how many can have attended OSU.

[11] 25% of the leadership of federal law enforcement and federal penitentiaries attended the Kelly School. In Olympus, and the states it borders, that figure is 75% and 60% respectively.

[12] We have received *amicus* briefs from twenty-five Fortune 500 companies all in support of Respondent. These briefs are not included in this opinion but their existence can be referenced by the parties to this case. No Fortune 500 companies argued against the Policy.

"particularly adept at working with members of the opposite sex" and "respectful of members of the opposite sex." In addition, OSU introduced evidence from five studies and five political opinion polls conducted since 2020 that indicated wide-spread support for affirmative action among the nation's top police commissioners in urban areas.[13] To that end, during the district court proceedings, the School introduced evidence from several studies conducted since 2000 that found that the percentage of rank and file members of law enforcement who reported believing that their superior officers had a proper level of respect for them and treated them fairly had increased over the years. This was true across the board among men regardless of race, ethnicity, sex, or sexual orientation. The exception was for female enlisted personnel. A plurality of female enlisted personnel (47%) reported that their superior officers had a proper level of respect for them and treated them fairly, while a large percentage (41%) answered in the negative.[14] Affirmative responses rose 5% to 10% across the board when asked about officers who were graduates of professional criminal justice programs and/or law school.

Under cross-examination by attorneys for DeNolf, two witnesses called by the School who were involved in the Policy conceded that had DeNolf been a woman he would have been accepted. These same witnesses testified that in their estimation and experience there would be fewer successful female graduates and ultimately fewer female members of police leadership were it not for affirmative action admissions policies such as the one practiced by the School. At the same trial, witnesses called by the Petitioner conceded that (1) there was no evidence that the Policy was rested on stereotypes and (2) that the School, the State of Olympus and the nation more generally have a long history of discrimination against women – especially among the ranks of law enforcement officers. A history the School and the State of Olympus sought to rectify.

[13] These studies and polls found that:

1) Having variety in leadership was good for morale.
2) A majority of rank and file police officers reported that if a police force was diverse they were more likely to make a career in law enforcement. This was especially true of women (70%), non-whites (78%), and non-white males (63%).
3) 65% of law enforcement in general reported "wanting law enforcement to be fair to all."
4) A majority of female rank and file officers like the experience of serving under leaders who are from similar backgrounds— this is because think they will be treated fairly and less likely to unnecessarily be put at risk.
5) The general public that views law enforcement as "fair" and "caring for them" rose when persons being surveyed were informed that some police forces practice affirmative action.
6) A majority of police officers report appreciating having fellow police officers from diverse backgrounds as a resource from which to draw advice insofar as making leadership decisions goes.
7) Women and minorities report being inspired by women and minorities who had advanced to being commissioners, chiefs, and captains. This is true of younger members of law enforcement.
8) 73% of police officers who have gone into politics/business report being better prepared by virtue of serving with law enforcement employees from diverse backgrounds.

[14] The choices were yes (47%), no (41%), or uncertain/don't know (12%).

III

Equal Protection Analysis

A

The United States Supreme Court has long held that colleges should be allowed a degree of deference when making academic decisions such as who to admit. *Grutter v. Bollinger*, 539 U.S. 306 (2003). But such deference is not absolute. As the Chief Justice wrote in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 217 (2023): "[u]niversities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review." Our mission as circuit judges requires that we test classifications at some heightened form of scrutiny. The correct test for sex-based classifications is intermediate scrutiny which OSU satisfies. *United States v. Virginia*, 518 U.S. 515, 524 (1996). That said, for reasons we will identify and elaborate upon, the policy challenged here passes both strict and intermediate scrutiny.

B

The Equal Protection Clause of the Fourteenth Amendment forbids any state to deny any person within in its jurisdiction the equal protection of the law. While fundamental, the right of equality enjoyed by the people is not absolute. Government classifications that in outcome benefit one sex over the other can prevail, even under some form of heightened scrutiny, when state interests and means satisfy the applicable standard of balancing review. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979).

The issue before this Court is whether the School may take action to increase female enrollment in its student body in an effort to (1) contribute to the security of persons in Olympus and around the nation who are led by law enforcement officials who have trained at the School, (2) enhance the quality of the educational experience it provides for its students, and (3) mitigate the effects of past acts of discrimination against women specifically in the field of law enforcement, as well as in Olympus and in the nation more generally. Because these interests rise to the level of compelling and the means are narrowly tailored without relying on any quotas or set asides, we see no obstacle to the measured approach reflected in the Policy.

C

Under intermediate scrutiny, "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); *See also Feeney*, 442 U.S. at 273 (1979) (finding the state must offer "'an exceedingly persuasive justification.'"). To pass, the state must demonstrate an important governmental interest which is substantially related to achieving this objective. It must do so in a manner that is holistic and it must offer every application the same consideration. *Grutter*, 539 U.S. at 337. We find it significant that unlike with race, nothing in the most recent case law forbids professional schools, when building their student bodies, to seek to increase the number of admitted male or female students so long as they do in a manner that seeks to achieve more than a

mere statistical closing of a perceived gap. *See Students for Fair Admissions, Inc.* 600 U.S. at 213 (2023) (finding that classifying by race for the purpose of diversity at both public and private universities violates the Equal Protection Clause).

It is true that racial diversity may not be an interest sufficient to justify classifying by race for most colleges and universities. But that is race and this is sex. Put simply, the fact that racial diversity may not be sufficient does not cabin off the ability of the state to classify by sex on its face. In fact, in *Students for Fair Admissions, Inc.,* the Court, in a footnote, explicitly left open whether the nation's five military service academies may take action to remedy imbalance both in its student body and among the nation's officer corps in an effort to achieve several objectives including promoting racial and ethnic diversity, producing better, more well-rounded leaders, remediating past acts of discrimination against women and minorities, and enhancing the quality of the educational experience it provides for its students. *Id.,* 600 U.S. at 214, n. 4 (2023). A federal district in Maryland has recently upheld the use of affirmative action at the United States Naval Academy. *See Students for Fair Admissions, Inc. v. The United States Naval Academy,* 707 F. Supp. 3d 486 (Maryland District, 2024). That opinion, which did not address sex, found persuasive the Academy's argument that:

> it uses race and ethnicity in these four limited circumstances "only to further the military's distinct operational interest in developing a diverse officer corps that enables the military to meet its critical national security mission, by enhancing cohesion and readiness, assisting recruitment and retention, and ensuring domestic and international legitimacy." (internal citation omitted).

Id., at 498.[15]

The School makes a similar argument – namely that drawing the nation's law enforcement leadership from a pool of applicants that includes candidates of different talents and abilities from all walks of life is essential to meeting law enforcement's critical mission of serving and protecting its population, property, and institutions. The military mission and that of law enforcement are not identical. But, the School contends that its mission and interests are very much in line with those of the service academies. Given the close ties to the law enforcement and counterterrorism communities, the School has important interests that are distinct from the arguments made by traditional civilian universities, those unconnected to the same interests that the military service academies serve, which the Supreme Court rejected.

Further, even if there are differences between the military and law enforcement, this fact does not foreclose the argument that OSU, supported by the state as *amici*, makes, nor does it mean that the means adopted here are not substantially related to an important state interest. In addition, the

[15] It is true that the Department of Defense under the current Administration has acted to discontinue the practice of race, ethnic, or sex based admissions goals for the military academies. This fact, while worthy of mention, is of no moment here. First, because the United States is not a party to the case and, as a result, its actions do not change the legal threshold. Second, because the United States did not submit an *amici* brief for either side in this case, so our analysis is not affected by its views. Third, the fact that an administration changes policy direction has no bearing on what the Supreme Court or any court has ruled in a prior decision. In fact, administrations regularly change polices when they come into power, but constitutional principles – what is valid and what is not – do not change with them. The change, while interesting no doubt, and likely to be a subject of debate in some circles, is not dispositive.

School argued below that it was motivated in part to mitigate the effects of past acts of discrimination against women – an argument we find exceedingly persuasive.

The School asserts that having law enforcement leadership from different walks of life enhances operational effectiveness and improves cultural competence and community trust, all of which are critical for preventing and responding to threats such as terrorism and violent extremism. By training future leaders in federal law enforcement and in state police forces, the program contributes to the nation's ability to respond to national and international security threats. As the preeminent institution for training leaders in the field, the mission of the School is greatly impacted by a lack of people from different backgrounds, different talents, and different life experiences.

The facts presented at trial show that there is a trend toward women pursuing careers in law enforcement. This trend is not reflected to date by the enrollment and application numbers associated with the School. That need not be perpetual. It is perfectly within the School's prerogative to choose to join in this trend both so as to improve its overall ranking, as well as to improve the education it provides to its students as well as their employment opportunities -- male and female alike. There is a great need for women in police leadership to help ensure that more talented women seek careers in law enforcement and to ensure that female police officers choose to make long-term careers of police work. Such benefits society and makes us more secure and safe. Simply put, we need more talented people in law enforcement – men and women alike. The School has chosen to help prepare those who will lead us and provide a safer and more secure state. Providing leaders who will help bring us security is a compelling interest. *Id.*, at 503.

Of additional note is our history of discrimination against women in law enforcement as well as more generally in society. This is true in Olympus where in the past women were kept out of law enforcement by *both de facto* and *de jurie* measures. Governments can work to undue and address such discrimination. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). The School, and Olympus, have both deemed this an issue they wish to address. Why this is the case is not the issue, as we need not agree with actions the parties take – but rather we just judge the constitutionality here of such decisions. While the motivation may not be the same, we should allow the School and the state to take action to assist one sex in entering certain careers and/or the work force in general. There is no reason this needs to be restricted to one sex. The Policy will undoubtedly increase the number of women in each entering class and thus is substantially related to increasing the size of the female student body and ultimately improving the quality of the student body and its faculty and the reputation of the School. The School did not create any barrier that DeNolf could not overcome. The means are substantially related, not to mention narrowly tailored, to advancing that objective. There are other graduate schools that offer degrees in criminal justice to attend. DeNolf's decision to only apply to one graduate program and to react as he did was of his own doing. We find that the state has carried its burden and affirm the decision of the trial court.

D

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.*, *Virginia*, 518 U.S. at 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-based classifications is intermediate scrutiny. This determination

includes sex-based discrimination in college admissions. In fact, in its most recent sex-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. That said, we are of the mind that even if strict scrutiny were to be applied OSU would prevail.

E

A final point merits attention. The Court has warned that "[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Feeney, 442 U.S. at 273.* That is not the case here. If anything, the opposite is true. The facts raised here are more akin to those of *Ballard*, 419 U.S. at 508. In that case, the Court rejected a due process claim challenging a policy that attempted to compensate female naval officers for lost pay opportunities. There, as here, the policy in question did not rest on generalizations about the sexes, but rather legislated on legitimate grounds. *Id.*, at 508. We find that the Policy before us today is within such constitutional boundaries.

IV

First Amendment Analysis

The second issue before this Court is whether OSU violated DeNolf's right to freedom of expression under the First Amendment to the United States Constitution when it fired him. A threshold issue implicit in DeNolf'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 address this matter. 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).[16] 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. *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

[16] We note this case is one of *public employee* speech. Accordingly, the familiar *Pickering* standard (and progeny) applies. We do not consider heightened scrutiny (such as strict scrutiny), which is applicable only for non-employee public forum political speech (a situation not before us on the Record, and, which was neither argued at the lower court, nor to this Court, thereby waiving such an argument on appeal). Thus, arguments calling for the application of strict scrutiny to the second certified question are not preserved and are not before this court or the Supreme Court.

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 DeNolf. DeNolf's case adds a wrinkle that distinguishes it from existing Supreme Court precedent—namely, that it implicates speech by an academic who claims that his speech is protected by the doctrine of academic freedom. *Garcetti* did not reach on 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 has held that *Garcetti* applies to a number of scenarios. Most on point is *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to a dispute arising from a university professor's claim that his employer, the University of Wisconsin-Milwaukee, had retaliated against him after he criticized the university itself). In its decision, the Seventh Circuit found that *Garcetti* applied because "Renken made his complaints regarding the University's use of NSF funds pursuant to his official duties as a University professor." *Id.*, 541 F.3d at 775. The Second Circuit has arrived at a similar conclusion vis-à-vis whether *Garcetti* applies to teachers. See *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* does 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*) (noting "[t]he 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.") and *Heim v. Daniel*, 81 F.4th 212, 234 (2d Cir. 2023) (finding that while *Garcetti* does not attach to cases of academic freedom a university may still prevail under the balancing prescribed in *Pickering*). 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* and/or *Pickering* can be applied to cases involving facts such as the present case – especially where job duties are "not required by, or included in, the employee's job description, or in response to a request by the employer." *Weintraub*, 593 F.3d at 203.

The judgment of the District Court is AFFIRMED.

Judge Kashimura Dissenting:

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. The Supreme Court has recently declared that "the prohibition against racial discrimination is 'leveled at the thing not the name.'" *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 230-231 (2023) (Citation omitted). Under equal protection case law, "[t]he burden of justification is demanding and it rests entirely on the State." *United States 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). The School has not met this burden.

The majority, in my view, applies the wrong test. The correct test for affirmative action cases—including those involving sex classifications—should be strict scrutiny. I am persuaded by Justice Brennan's argument in *Frontiero v. Richardson* that strict scrutiny should be the correct test for sex discrimination. 411 U.S. 677, 682 (1973) (plurality) (finding "implicit support" for the argument that classifications based on sex are "inherently suspect and therefore be subjected to close judicial scrutiny"). Sexism, and sex discrimination, are wrong – they are stains to be removed from the larger body politic. But the government must resort to them to achieve its objectives. After all, two wrongs do not equal a right.

Olympus State University, as with supporters of affirmative action admissions programs more generally, may have admirable goals. But such are not enough. OSU has crossed the line from acceptable to unacceptable. As the Nobel Laureate Bob Dylan has reminded us, "to live outside the law you must be honest." The School has not heeded his wisdom. The Policy is outside the law and its various rationalizations do little to change that fact. What is more, the School asserts a general need for a more balanced crop of law enforcement leadership, not necessarily a more balanced student body, but provides no evidence as to why this is compelling or how it improves the education of its students let alone law enforcement leadership or the nation's security. Are we really to believe that our nation's law enforcement personnel do a better job of keeping us safe or that they will not perform their missions because of the demographics of who graduates from OSU or who comprises its ranks. I find such claims dubious at best and disingenuous at worst.

A highly selective criminal justice program, such as the one offered at the School, serves a very important function. But even a program that educates a high number of future police chiefs and federal law enforcement leadership does not qualify for the service academy exception referenced in *Students for Fair Admissions, Inc.*, 600 U.S. at 214, n. 4 (2023). While such a program may be prestigious and important for law enforcement, it lacks several key characteristics that distinguish military service academies. First, it has no direct connection to national security: While law enforcement is crucial for public safety, it does not have the same direct link to national defense as military academies. Second, unlike service academies, criminal justice programs are not under direct federal control or supervision.

It is important to note that the legal landscape surrounding race-conscious admissions is still evolving, and that the full implications of the military academy exception remain to be seen.

However, to be compliant with Supreme Court precedent, any institution seeking to use race or sex as a factor in admissions should face significant legal scrutiny and must demonstrate a compelling government interest that cannot be achieved through race or sex-neutral means.

Applying strict scrutiny to the case at hand, the Policy fails. OSU lacks a compelling state interest. While the nation and Olympus do have a history of sex discrimination, more of the same will not solve that problem – one that is in the rear window. We have or have had female judges and justices, governors, mayors, cabinet secretaries, a speaker of the house (twice), and a vice president. Rather than solving a problem, the School has created new problems. Even if the School proffered a compelled interest, which it has not, its means do not advance that interest in a manner that is narrowly tailored. Put simply, OSU could have pursued a course of action that was less restrictive. There are many ways to attract female students beyond the discriminatory practices employed here. The School, for instance, might utilize enhanced recruitment techniques, advertise in female dominated media markets, or aggressively recruit female candidates, to name but a few. Such methods might accomplish similar results. The existence of such alternatives undercuts the argument that the Policy is least restrictive and thus not narrowly tailored.

To satisfy strict scrutiny the state needs more than inferences and hunches — it needs facts and evidence that its chosen means will successfully solve the problem the state identities. *Id.*, at 217. After a trial and an appeal to this body, it is evident to me that the Government cannot justify the harm it has inflicted on Petitioner. For me this failure is fatal.

In the alternative, if the Policy is tested at intermediate scrutiny, it meets the same fate as it does at strict scrutiny. Intermediate scrutiny requires means that are substantially related to an important interest. *United States v. Virginia*, 518 U.S. at 524 (1996). Under this test, the state needs to advance an "exceedingly persuasive justification" required to sustain its decision to classify by sex. *Id*. Whether this is a third tier of intermediate scrutiny or a general description of the test itself is unclear. *Id*. at 596 (Scalia J., Dissenting). What is clear is that such a justification must be genuine as opposed to *post-hoc*. *Id.*, at 533 (majority opinion). I do not doubt that the School is sincere in its intentions or that it believes that security will be improved. But that does equate to an exceedingly persuasive justification. For that reason, intermediate scrutiny is not satisfied. The Policy is unconstitutional. The District Court should be reversed.

First Amendment Analysis

As I see it, the most applicable post-*Garcetti* circuit rulings are *Heim v. Daniel*, 81 F.4th 212 (2d Cir. 2023), *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). *Heim* found that "*Garcetti* does not bind [the Second Circuit in academic freedom cases] . . . . In other words, *Garcetti* leaves undisturbed our own pre-*Garcetti* authority in cases involving scholarship and teaching by professors at public universities." 81 F.4th at 226. 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, we should we should follow *Adams.* Such a path would compel us to rule in favor of DeNolf. The facts show that DeNolf spoke both online and face-to-face as a private person about important public issues that affected him directly and not in his official capacity as an employee of OSU. As such, his 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 DeNolf spoke in his official capacity as a lecturer, he 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 it vital to our 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 approaches taken by the Fourth and Ninth Circuits approach to *Garcetti* should guide us.

DeNolf's speech was why he was dismissed. Because his speech did not relate to or concern any OSU policy and it has a citizen's analogue, 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 colleagues on this court 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 today. It goes far beyond DeNolf and OSU. We must never forget the warning penned by 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

The Policy is unconstitutional. The District Court should be reversed.

Appendix I

Imagine an Equal World (with apologies to John Lennon)

Imagine there’s true equality

It's easy if you try

No glass ceilings

Above us only sky

Imagine a level playing field for all

Imagine there's no quotas

It isn't hard to do

Nothing to set aside for

And no targets too

Imagine all the people living life equally

You may say I'm a dreamer

But I'm not the only one

I hope someday you'll join us

And the world will be fair for all

Imagine achieving critical mass

I wonder if you can

No need for non-neutral programs

A fair world for all

Imagine all the people being treated equally

You may say I'm a dreamer

But I'm not the only one

I hope someday you'll join us

And the world will be fair for all

Table of Cases Cited

Fourteenth Amendment Cases

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First Amendment Cases