



October 2, 2023

**Via Email**

William E. Adams  
Section of Legal Education and Admissions to the Bar  
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**Section 205 Complaint Against the University of California, Berkeley, School of Law**

Dear Mr. Adams:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Pursuant to Rules 40 to 46 of the ABA Rules of Procedure for Approval of Law Schools, we submit this complaint against the University of California, Berkeley, School of Law (“Berkeley Law”) for violating Standard 205 of the ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023.

**I. Background**

1. This complaint arises from comments by Berkeley Law School Dean Erwin Chemerinsky.

2. On June 29, 2023, journalist Chris Ruffo released a video of Dean Chemerinsky teaching a Berkeley Law School class in which he admits that the law school discriminates in its hiring of faculty members and that he would commit perjury and lie about this if examined under oath.<sup>1</sup>

3. Dean Chemerinsky later confirmed that the video was an authentic excerpt from his constitutional law class from the spring semester of 2023.<sup>2</sup>

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<sup>1</sup> Chris Ruffo (@realchrisruffo), TWITTER (Jun. 29, 2023, 6:42 PM), <https://tinyurl.com/ya4da65k>.

<sup>2</sup> Aneeta Bhole, *Recording Shows White Berkeley Law Dean Appearing to Tell Class He Illegally Discriminates Against Potential Hires to Boost Diversity — and Bragging He’ll Deny it if Deposed*, THE DAILY MAIL (Jul. 1, 2023), <https://tinyurl.com/4f9rmzhp>.

4. Dean Chemerinsky claimed that his remarks were taken out of context and that “[a]s per existing California law, the Berkeley Law School cannot and does not consider race in any of its hiring and admissions decisions.”<sup>3</sup>

5. However, Dean Chemerinsky failed to explain how his remarks could have been misconstrued or what he meant.

6. The 59-second video clip begins with Dean Chemerinsky referring to “unstated affirmative action,” explaining that this happens when a “college or university doesn’t tell anybody, doesn’t make any public statements.”

7. He then said:

I’ll give you an example from our law school, but if ever I’m deposed I’m going to deny I said this to you. When we do faculty hiring, we’re quite conscious that diversity is important to us. And we say diversity is important, it’s fine to say that, but I’m very careful when I’m at a faculty appointments committee meeting, any time somebody says, “you know we should really prefer this candidate or this candidate, ’cause this person would add diversity.” I say, don’t say that. You can think it. You can vote it, but our discussions are not privileged, so don’t ever articulate that that’s what you’re doing. Well, that works more easily with regard to faculty hiring. With regard to student admissions it becomes more difficult because of statistical measure.<sup>4</sup>

## II. Berkely Law School Violates Standard 205

8. The above-described conduct violates Standard 205.

9. Standard 205(b) states that “[a] law school shall adopt, publish, and adhere to policies that foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status.”

10. Interpretation 205-5 clarifies that “[t]he denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status if the basis of denial relied upon is an employment policy of the school that is intended to prevent the employment of individuals on the basis of race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, or military status though not purporting to do so.”

11. Standard 205’s reference to “equality of opportunity” evokes Title VII of the Civil Rights Act of 1964.

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<sup>3</sup> *Id.*

<sup>4</sup> Rufo, *supra* note 1.

12. The Supreme Court has held that civil rights laws such as Title VII prohibit racial discrimination against whites or Asians “upon the same standards as would be applicable” to African Americans. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). Title VII also prohibits discrimination based on sex. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–41 (2020). Accordingly, hiring preferences based on race, color, national origin, religion, or sex (e.g., hiring “persons of color” over whites or LGBT persons over heterosexuals) violates the law. *Accord Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161 (2023).

13. Dean Chemerinsky admitted to doing precisely what Standard 205 prohibits by favoring so-called “diverse” applicants over others.

14. Making matters worse, he also admitted to encouraging his fellow faculty members to do the same thing and to hide what they were doing.

15. Dean Chemerinsky has publicly affirmed that Berkeley Law “must continue to aggressively pursue [diversity] — in our student body, our staff, and our faculty — in terms of race, ethnicity, class, religion, gender, gender identity, sexual orientation, disability, and ideology.”<sup>5</sup>

16. An official Berkeley Law press release further explains that one of its “key priorities” is “continuing to enhance the diversity and inclusiveness of students, staff, and faculty.”<sup>6</sup>

17. Dean Chemerinsky is quoted as saying “[i]t’s essential that we be a law school that is diverse and committed to diversity.”<sup>7</sup>

18. Berkeley Law’s obsession with diversity has crossed a line into illegal conduct.

19. For example, Dean Chemerinsky has created unlawful specific “initiatives” to focus on hiring persons with the correct race, color, national origin, or sex, including one that discriminates based on national origin by focusing on “hiring Native American faculty.”<sup>8</sup>

20. Berkeley Law boasts that “[o]f the 16 faculty members hired under [Chemerinsky’s] watch, nine are people of color.”<sup>9</sup>

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<sup>5</sup> Erwin Chemerinsky & Jesse H. Choper, *From the Dean: Diversity and Inclusion at Berkeley Law*, BERKELEY LAW, (Dec. 14, 2020), <https://tinyurl.com/2cu8v5ky>.

<sup>6</sup> Andrew Cohen, *Renewed Leadership: With a Stellar Record of Success, Dean Erwin Chemerinsky Gets Reappointed*, BERKELEY LAW, (Jan. 5, 2022), <https://tinyurl.com/c3ywu4aa>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

21. If true, then Berkeley Law's hiring process and hiring pool have been engineered to favor some persons and to discriminate against others based on immutable characteristics.

22. Even ignoring Dean Chemerinsky's admissions, this hiring ratio by itself establishes that Berkeley Law has been violating the Civil Rights Act of 1964 and Standard 205.<sup>10</sup>

### **III. Conclusion**

23. ABA action is appropriate.

24. The facial illegality of the employment practices described above provides more than ample reason to believe that Berkeley Law is knowingly and intentionally violating Standard 205—and federal civil rights laws—and that will continue to do so.

Please feel free to contact me if you have any questions. Thank you in advance for your consideration.

Sincerely,

/s/ Reed D. Rubinstein

Reed D. Rubinstein  
Senior Counselor and Director of  
Oversight and Investigations  
America First Legal Foundation

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<sup>10</sup> 42 U.S.C. § 2000e-2(k).