

No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF FOR THE PRESIDENT AND
CHANCELLORS OF THE UNIVERSITY OF
CALIFORNIA AS AMICI CURIAE IN SUPPORT
OF RESPONDENTS**

CHARLES F. ROBINSON
KAREN J. PETRULAKIS
MARGARET L. WU
ELISABETH C. YAP
UNIVERSITY OF CALIFORNIA
OFFICE OF THE
GENERAL COUNSEL
1111 Franklin Street, 8th Fl.
Oakland, CA 94607

BRADLEY S. PHILLIPS
Counsel of Record
MICHAEL J. MONGAN
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Brad.Phillips@mto.com

Counsel for Amici Curiae

(Additional Counsel on Signature Page)

August 30, 2013

TABLE OF CONTENTS

	Page
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. The UC Experience Establishes That a Prohibition on Considering Race in Admissions Impedes Public Universities from Achieving Diverse Student Bodies.....	6
A. UC and Its Admissions Process.....	6
B. Proposition 209 Dramatically Reduced Diversity on UC Campuses	9
C. The University’s Race-Neutral Admissions Initiatives Have Had Limited and Disappointing Results	14
II. A Total Prohibition of the Use of Race in Admissions and Resulting Declines in Campus Diversity Have Especially Significant Effects on Underrepresented Minorities	28
A. Declines in Campus Diversity Have Especially Affected the Experiences of Underrepresented- Minority Students	29
B. The University’s Data Belie Petitioner’s Claims That Proposition 209 Caused Academic Outcomes for African-American and Latino Students to Improve.....	31

TABLE OF CONTENTS—Continued

	Page
C. Communities Realize Particularly Significant Benefits from Diversity in Higher Education.....	34
CONCLUSION.....	38
APPENDIX	39

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Coalition for Economic Equity v. Wilson</i> , 122 F.3d 692 (9th Cir. 1997)	10
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	2
<i>Hunter v. Erickson</i> , 393 U.S. 385 (1969)	5
<i>Norfolk & Western Railway Co. v. Ayers</i> , 538 U.S. 135 (2003)	31
<i>Washington v. Seattle School District No. 1</i> , 458 U.S. 457 (1982)	5
FEDERAL RULES	
U.S. Supreme Court Rule 37.6	1
STATE CONSTITUTIONAL PROVISIONS	
CAL. CONST., art. I, § 31, subd. (a).....	10
OTHER AUTHORITIES	
<i>A Master Plan for Higher Education in California (1960-1975)</i>	8
Michelle Anderson, <i>Legal Education Reform, Diversity, and Access to Justice</i> , 61 Rutgers L.J. 1011 (2009)	37

TABLE OF AUTHORITIES—Continued

	Page
Association of American Medical Colleges, <i>Addressing Racial Disparities in Health Care</i> (2009).....	35
Association of American Medical Colleges, <i>Diversity in Medical Education</i> (2008)	36
Thomas Boston, <i>Affirmative Action and Black Entrepreneurship</i> (1999).....	38
California Department of Education, Educational Demographics Unit, <i>Graduates by Ethnicity for 2011-12</i>	1, 22, 24
California Postsecondary Education Commission, <i>Ethnicity Snapshots Table, High School Graduates</i>	22
Tongshan Chang, et al., <i>A Portrait of Underrepresented Minorities at the University of California, 1994-2008</i> , in <i>Equal Opportunity in Higher Education</i> (Eric Grodsky & Michal Kurlaender eds., 2010).....	32
Robert Fairlie et al., <i>Race and Entrepreneurial Success</i> (2008)	37, 38
Patricia Gandara, <i>A Case Study in the Loss of Affirmative Action</i> (Aug. 2012)	21

TABLE OF AUTHORITIES—Continued

	Page
Saul Geiser, et al., <i>“No Show” Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002</i> , 19 Educ. Pol’y 396 (2005)	25, 26
<i>Guidelines for Implementation of University Policy on Undergraduate Admissions</i> (last updated July 20, 2012).....	17
Sylvia Hurtado, <i>The Next Generation of Diversity and Intergroup Relations Research</i> , 61 J. Soc. Issues 595 (2005).....	28
Institute of Medicine, <i>Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care</i> (2002)	35
Stephen Keith et al., <i>Effects of Affirmative Action in Medical Schools</i> , 313 New Eng. J. Med. 1519 (1985)	35
William Kidder, <i>Misshaping the River</i> , 39 J. of College & Univ. L. 53 (2013)	26, 30, 31
Miriam Komaromy et al., <i>The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations</i> , 334 New Eng. J. Med. 1305 (1996)	35, 36
Richard Lempert et al., <i>Michigan’s Minority Graduates in Practice</i> , 25 Law & Soc. Inquiry 395 (2000)	37

TABLE OF AUTHORITIES—Continued

	Page
Mark Long, <i>College Applications and the Effect of Affirmative Action</i> , 121 J. Econometrics 319 (2004)	11
<i>New Directions for Outreach: Report of the University of California Outreach Task Force</i> (July 1997).	15
Karen Petrosi, <i>Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability</i> , 32 J. College & Univ. Law 149 (2005)	7
Presidents Council, State Universities of Michigan	7
Richard Sander, <i>An Analysis of the Effects of Proposition 209 Upon the University of California</i>	31, 32, 33
Somnath Saha et al., <i>Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools</i> , 300 JAMA 1135 (2008)	36
<i>Statement of the President, Chancellors, and Vice Presidents of the University of California</i> (July 10, 1995)	10
The Regents of the University of California, <i>Future Admissions, Employment, and Contracting Policies, Resolution Rescinding SP-1 and SP-2</i> (May 16, 2001)	10

TABLE OF AUTHORITIES—Continued

	Page
The Regents of the University of California, <i>Policy Ensuring Equal Treatment: Admissions</i> (July 20, 1995)	10, 15
The Regents of the University of California, <i>Regents Policy 2103: Policy on Undergraduate Admissions Requirements</i> (June 18, 1982, as amended Feb. 5, 2009).....	8, 16
The Regents of the University of California, <i>Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions</i> (Nov. 15, 2001).....	17
The Regents of the University of California, <i>Regents Policy 2108: Resolution Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions</i> (Jan. 20, 2011).	18
The Regents of the University of California, <i>Regents Policy 4400: Policy on University of California Diversity Statement</i> (adopted Sept. 20, 2007, as amended Sept. 15, 2010)	2, 9
<i>Top Public Schools,</i> U.S. News and World Report	7, 11, 12
United States Census Bureau, State & County QuickFacts	27
United States Census Bureau, <i>Statistical Abstract of the U.S.</i>	37

TABLE OF AUTHORITIES—Continued

	Page
University of California, <i>2011 Accountability Report</i>	26, 27
University of California, <i>2012 Accountability Report</i>	20
University of California, <i>2013 Accountability Report</i>	29, 30
University of California, <i>Application, Admissions and Enrollment of California Resident Freshman for Fall 1989 through 2012</i>	<i>passim</i>
University of California, Board of Admissions and Relations with Schools, <i>Admissions Tests and UC Principles for Admissions Testing</i> (Dec. 2009)	19
University of California, Board of Admissions and Relations with Schools, Systemwide Academic Senate, <i>Comprehensive Review in Freshman Admissions at the University of California 2003-2009</i> (May 2010)	19, 22, 26
University of California, <i>Comprehensive Review</i>	18
University of California, <i>Final Report of the Task Force on Graduate and Professional Admissions</i> (Sept. 1977)	14
University of California, Freshman, SAT Subject Tests	19

TABLE OF AUTHORITIES—Continued

	Page
University of California, Office of the President, <i>Health Sciences and Services</i>	7
University of California, Office of the President, Student Academic Services, <i>Undergraduate Access to the University of California After the Elimination of Race- Conscious Policies</i> (Mar. 2003)	<i>passim</i>
University of California, Mission Statement	35
University of California, <i>Report on Student Academic Preparation and Educational Partnerships (SAPEP) for the 2009-10 Academic Year</i> (Aug. 2011)	16
University of California, <i>Student Academic Preparation and Educational Partnerships (SAPEP), 2011-12 Annual Report Highlights</i> , (July 2013)	16
University of California Regents, Study Group on University Diversity, <i>Report of the Work Team on Graduate and Professional School Diversity</i> (Sept. 2007)	13, 14
<i>University of California Policy on Undergraduate Admissions</i> (adopted May 25, 1988)	2
Dean Whitla et al., <i>Educational Benefits of Diversity in Medical Schools</i> , 78 <i>Academic Medicine</i> 460 (2003).....	36

TABLE OF AUTHORITIES—Continued

Page

Susan Wilbur, *Investigating the College
Destinations of University of California
Freshman Admits*, in *Equal Opportunity in
Higher Education: The Past and Future of
California’s Proposition 209* (Eric Grodsky
& Michal Kurlaender eds., 2010).....26

INTERESTS OF AMICI CURIAE¹

Amici Curiae are the President and the ten Chancellors of the University of California (“UC”). UC is the largest highly selective institution of higher education in the United States. Its ten campuses are located throughout California and provide undergraduate, graduate, and professional education to more than 235,000 students. UC is governed by The Regents of the University of California. It is led by the President and the Chancellors of each of its campuses, all of whom join this brief.²

The University of California is committed to serving the educational needs of the people of California, the most diverse state in the nation. In 2012, California’s high-school graduates were 30.5 percent white, 46.2 percent Latino, 13.6 percent Asian or Pacific Islander, 6.7 percent African American, and 0.7 percent American Indian.³ UC’s admissions policy “seeks to enroll, on each of its campuses, a student body that, beyond meeting the University’s eligibility requirements, demonstrates high academic achievement or exceptional personal

¹ Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

² A full list of *Amici* is included in the Appendix.

³ See California Department of Education, Educational Demographics Unit, *Graduates by Ethnicity for 2011-12* (“*High School Graduates Data Set*”), <http://dq.cde.ca.gov/dataquest/GraduateReporting/GraduatesByEth.aspx?cTopic=Graduates&cChoice=StGrdbbyEt&cYear=2011-12&level=State&cType=All&cGender=B&cGroup=G12>.

talent and that encompasses the broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California.”⁴

It is the policy of the University of California that there is “a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups.”⁵ Further, the University recognizes that “[t]he knowledge that the University of California is open to qualified students from all groups, and thus serves all parts of the community equitably, helps sustain the social fabric of the State.”⁶

The University of California is central to the national debate over policies governing admission of underrepresented-minority students to public universities. In 1996, California amended its state constitution to prohibit race-conscious measures in college admissions. As this Court has recognized, that prohibition led UC to “experiment[] with a wide variety of alternative approaches” for promoting diversity and ensuring access for qualified underrepresented minorities. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Those efforts have had

⁴ *University of California Policy on Undergraduate Admissions* (adopted May 25, 1988), http://www.universityofcalifornia.edu/news/compreview/12_16/Admission_UCpolicy.pdf.

⁵ The Regents of the University of California, *Regents Policy 4400: Policy on University of California Diversity Statement* (adopted Sept. 20, 2007, as amended Sept. 15, 2010) (“*Regents Policy 4400*”), <http://policy.ucop.edu/doc/4000375/Diversity>.

⁶ *Ibid.*

disappointing results, as *Amici* explain in detail below.

UC's experience thus sheds light on the practical obstacles faced by universities that seek to promote diversity but are barred from granting preferential treatment to underrepresented racial minorities. The UC experience is highly relevant to the Court's consideration of this case, because Petitioner has held the University of California out as an example of the purported success of race-neutral admissions in achieving diversity and providing access to underrepresented minorities. *See* Pet. Br. 31-32, 34-35. In fact, as *Amici* demonstrate below, Petitioner's assertions about UC's experience cannot be squared with the facts.

SUMMARY OF ARGUMENT

More than fifteen years after Proposition 209 barred consideration of race in admissions decisions at public universities in California, the University of California still struggles to enroll a student body that encompasses the broad racial diversity of the State. The percentages of the UC student population that comprise students from underrepresented-minority groups (defined by the University as African Americans, Latinos, and American Indians) dropped sharply in the aftermath of Proposition 209, and the University still has not recovered from this precipitous decline. The long-term results of Proposition 209 are especially apparent on the most highly selective campuses, where the percentages of African-American and American Indian students are far below their pre-Proposition 209 levels, and the

percentages of Latino students have not kept pace with the explosive growth in California's Latino population. Moreover, these lower percentages persist notwithstanding the University's determined efforts to diversify its student body through race-neutral means, including massive outreach to students at the high-school level and adjustments to admissions criteria and the application-review process.

The decline in racial diversity on UC campuses has had its most significant effects on underrepresented minorities. Most fundamentally, fewer members of those groups have been able to attend UC's most selective campuses. Reports from underrepresented-minority students indicate that those who attend these less diverse campuses feel less respected than do their peers on more diverse campuses. While Petitioner asserts that Proposition 209 has improved academic outcomes for underrepresented minorities, the actual facts about UC students belie that assertion. Moreover, declines in diversity at UC deprive communities of racial minorities of significant benefits that would extend well beyond the campus population.

Members of underrepresented racial groups therefore have a special interest in advocating for the adoption of race-conscious admissions policies to increase diversity on UC campuses and at other colleges and universities. By removing the authority to address a lack of racial diversity—but *only* that one type of diversity—from the existing decisionmaking body (the Regents of the University of California), Proposition 209, like Michigan's Proposal 2, "places *special* burdens on racial minorities within the governmental process,' thereby

‘making it *more* difficult for certain racial ... minorities than for other members of the community to achieve [admissions policies] that [are] in their interest.’” See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 391, 395 (1969)) (alterations in original omitted). Proposition 209 and Proposal 2 thus disadvantage those who would benefit most from race-conscious admissions policies as against those who would benefit from admissions policies that take into account any other factor, such as socioeconomic status, place of residence, athletic ability, or relationship to an alumnus. See *Seattle*, 458 U.S. at 468 (charter amendment invalidated in *Hunter* “disadvantage[ed] those who would benefit from laws barring racial ... discrimination as against those who would bar other discriminations”).⁷

⁷ Just as it did not matter in *Seattle* that “white as well as Negro children benefit from exposure to ‘ethnic and racial diversity in the classroom’” or that “Negroes and whites may be counted among both the supporters and the opponents of [the challenged initiative],” 458 U.S. at 472, so too it does not matter here that white as well as African-American, Latino, and American-Indian students benefit from student-body diversity and may support race-conscious admissions policies. Members of certain racial groups and their communities garner especially significant benefits from such diversity, suffer particularly severe harms from its absence, and therefore are uniquely burdened by provisions such as Proposition 209 and Proposal 2.

ARGUMENT

I. The UC Experience Establishes That a Prohibition on Considering Race in Admissions Impedes Public Universities from Achieving Diverse Student Bodies.

Amici are intimately familiar with the challenges that face a large and highly selective university when it is barred from considering race in its admissions decisions. Over the more than fifteen years since California's constitutional ban on affirmative action went into effect, the University of California has experimented with a wide array of race-neutral initiatives aimed at promoting diversity. Overall, these efforts have produced disappointing results. The undergraduate student populations at UC's most selective campuses are markedly less diverse today than they were in the mid-1990s. Enrollment of racial minorities systemwide and at UC's professional and graduate schools continues to lag far behind California's population—even as the University has expanded overall enrollment on many of its campuses.

A. UC and Its Admissions Process.

The University of California is the largest highly selective institution of higher education in the United States. Its ten campuses, located throughout California, provide undergraduate, graduate, and professional education to more than 235,000 students. Five of UC's campuses are ranked among

the top ten public schools in the nation.⁸ The University also operates the nation's largest health training program—including six schools of medicine—which educates over 14,000 students annually.⁹

In many respects, the University of California is comparable to Michigan's system for public higher education. Michigan's public universities serve approximately 300,000 undergraduate and graduate students.¹⁰ The University of Michigan-Ann Arbor is also among the nation's most selective and highly ranked public universities.¹¹ And the two institutions have an historical affinity, as UC's constitutionally autonomous governance structure was expressly modeled after the University of Michigan's.¹²

Applications for undergraduate admission to UC are reviewed in a two-level process. At the highest level, the University considers an applicant's qualification for admission to the University as a whole. Consistent with California's Master Plan for Higher Education, the University seeks to admit

⁸ See *Top Public Schools*, U.S. News and World Report (“*Top Public Schools*”), <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public?int=a557e6>.

⁹ University of California, Office of the President, *Health Sciences and Services*, <http://www.ucop.edu/health-sciences-services/>.

¹⁰ Presidents Council, State Universities of Michigan, <http://www.pcsun.org/>.

¹¹ See *Top Public Schools*.

¹² Karen Petrosi, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J. College & Univ. Law 149, 178-79 (2005).

freshmen from the top one-eighth (or 12.5 percent) of all graduates of California public high schools.¹³ To accomplish this goal, it promulgates minimum eligibility requirements for admission to the University. For example, applicants must have a high-school grade-point average (“GPA”) of 3.0 or higher and must have completed fifteen yearlong college preparatory courses, including courses in English, history, mathematics, laboratory science, foreign language, and art.¹⁴ Satisfying these criteria guarantees that an applicant will be considered for admission to the University at large. Applicants whose GPAs and standardized test scores put them in the top nine percent of California high-school students are guaranteed a place at UC—although not necessarily at the campus of their choice.¹⁵ These requirements for admission to the University are entirely race-neutral and have always been so.

At the same time, applicants are considered for admission to specific campuses. Applications for admission from UC-eligible students exceed the maximum enrollment capacity at most of UC’s ten campuses, several of which rank among the most

¹³ *A Master Plan for Higher Education in California (1960-1975)*, at 4, 73, <http://www.ucop.edu/acadinit/mastplan/MasterPlan1960.pdf>.

¹⁴ The Regents of the University of California, *Regents Policy 2103: Policy on Undergraduate Admissions Requirements* (June 18, 1982, as amended Feb. 5, 2009) (“*Regents Policy 2103*”), <http://regents.universityofcalifornia.edu/governance/policies/2103.html>.

¹⁵ Under the current “Eligible in the Local Context” program, discussed *infra* at pages 16-17, students who rank in the top nine percent of their public high school are also guaranteed admission to the University.

selective schools in the nation. As a result, the campuses have developed their own selection criteria, such as consideration of high-school GPA, test scores, and other indicia of academic promise. Beginning in the 1960s and until 1997, individual campuses employed criteria that included consideration of the race of an applicant. The manner in which the campuses employed race-conscious criteria varied over time and across campuses.

Although such race-conscious criteria are not allowed in the wake of Proposition 209, it remains the policy of the University of California that there is “a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students, staff, and faculty from all groups.”¹⁶ Further, the University recognizes that “[t]he knowledge that the University of California is open to qualified students from all groups, and thus serves all parts of the community equitably, helps sustain the social fabric of the State.”¹⁷

B. Proposition 209 Dramatically Reduced Diversity on UC Campuses.

Proposition 209 amended the California Constitution to provide that the State and its political subdivisions—including the University of California—“shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national

¹⁶ *Regents Policy 4400*.

¹⁷ *Ibid.*

origin in the operation of public employment, public education, or public contracting.” CAL. CONST., art. I, § 31, subd. (a).¹⁸ The fall 1998 freshman class was the first undergraduate class at UC to reflect this ban on race-conscious admissions policies. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against enforcement of Proposition 209).

The abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at the University of California.¹⁹ On every

¹⁸ Proposition 209 was enacted following The Regents’ adoption, in July 1995, of Special Policy 1 (“SP-1”), a resolution disallowing the use of “race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.” The Regents of the University of California, *Policy Ensuring Equal Treatment: Admissions* § 2 (July 20, 1995) (“SP-1”), <http://www.universityofcalifornia.edu/news/compreview/sp1.pdf>. When that resolution was being considered, the academic leadership of the University unanimously urged the continuation of the University’s 1988 admissions policy, observing that “significant numbers of potentially qualified California students are still underserved by the University.” *Statement of the President, Chancellors, and Vice Presidents of the University of California* (July 10, 1995). The Regents later rescinded SP-1. The Regents of the University of California, *Future Admissions, Employment, and Contracting Policies, Resolution Rescinding SP-1 and SP-2* (May 16, 2001), <http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf>.

¹⁹ University of California, Office of the President, Student Academic Services, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies*, at 17, 19, 22 (Mar. 2003) (“*Undergraduate Access to UC*”), <http://files.eric.ed.gov/fulltext/ED476308.pdf>. The University of

UC campus, the percentage of applicants who were underrepresented minorities declined, as did the admission rates for underrepresented-minority students and the percentage of such students among the total admitted class.²⁰ These declines were especially pronounced at the most sought-after campuses and were less severe at other campuses, which began to enroll many underrepresented minorities who would have been admitted to the more selective campuses prior to Proposition 209.

For example, at UC Berkeley, the top-ranked public school in the nation,²¹ the proportion of applicants who were underrepresented minorities fell from 18.9 percent to 16.0 percent between 1995 and 1998.²² During the same period, the admission rate

California considers students to be “underrepresented” based on their collective rates of achieving eligibility for the University. Underrepresented minorities include Latinos/Chicanos (referred to herein as “Latinos”), African Americans, and American Indians. *Id.* at 1 n.3.

²⁰ *Ibid.* See also Mark Long, *College Applications and the Effect of Affirmative Action*, 121 *J. Econometrics* 319, 320 (2004) (finding that affirmative-action bans “have widened the gap between the number of SAT score reports sent by non-minority and minority students to in-state, public colleges, particularly in California”).

²¹ *Top Public Schools.*

²² *Undergraduate Access to UC* at 17. *Amici* use 1995 as their basis for comparison with the post-Proposition 209 statistics. The incoming class of 1996 represented the first freshman class after the University restricted the use of race and ethnicity in UC admissions by adopting SP-1. While the 1998 class was the first class admitted under Proposition 209, the adoption of SP-1 led to reduced rates of applications to the University by underrepresented students in 1996 and 1997. Thus, 1995 is the

for these students plummeted from 54.6 percent to 20.2 percent.²³ And the percentage of underrepresented-minority students who enrolled at Berkeley fell by more than half: from 24.3 percent of the entering class in 1995 (807 students) to 11.2 percent in 1998 (412 students).²⁴

At UCLA, which is ranked number two among the nation's public schools,²⁵ Proposition 209 had similarly dramatic effects over this three-year period. The proportion of underrepresented-minority applicants dropped from 22.0 percent to 17.7 percent; their admission rate fell from 52.4 percent to 24.0 percent; and the percentage of the enrolled freshman class made up by underrepresented minorities declined from 30.1 percent (1,108 students) down to just 14.3 percent (597 students).²⁶

When viewed in isolation over this three-year period, each of the underrepresented-minority groups (African Americans, Latinos, and American Indians) experienced declines in its percentage of the applicant pool and the admitted pool for California-resident students on every campus. At most campuses, the percentage of these minority groups in the enrolled class also declined sharply.²⁷ The

best comparison year for measuring the effects of the change in admissions policies.

²³ *Id.* at 19.

²⁴ *Id.* at 22.

²⁵ *Top Public Schools.*

²⁶ *Undergraduate Access to UC* at 17, 19; see *id.* at 23.

²⁷ University of California, *Application, Admissions and Enrollment of California Resident Freshman for Fall 1989 through 2012*, at 1 (“*Application, Admissions, and Enrollment*”), <http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf>.

experience of African-American and Latino students at UC Berkeley and UCLA was particularly striking. African Americans made up 6.7 percent and 7.4 percent of the entering freshman classes at these campuses in 1995. By 1998, those numbers were cut in half, to 3.7 percent and 3.5 percent. In 1995, Latinos were 16.9 percent of the entering class at Berkeley and 22.4 percent of the entering class at UCLA. Three years later, they represented just 8.0 percent and 11.0 percent of Berkeley's and UCLA's freshman classes.²⁸

UC's undergraduate schools were not the only programs affected. In the wake of Proposition 209, underrepresented-minority "applications to and enrollments in UC professional schools declined dramatically."²⁹ UC's Study Group on Diversity reported that in 2005 underrepresented minorities were 17 percent of new medical students,³⁰ which was just below the figure of 17.4 percent in 1975 that was reported by the equivalent UC Task Force three

²⁸ *Id.* at 2, 5. These figures are for California-resident freshmen only.

²⁹ University of California Regents, Study Group on University Diversity, *Report of the Work Team on Graduate and Professional School Diversity*, at 16 (Sept. 2007) ("*Study Group on Diversity*"), <http://diversity.universityofcalifornia.edu/documents/Grad-ProfWorkTeam.pdf>; *see also id.* at 21 (reporting that "[r]ates of [under-represented minority] applicants, admitted students and newly enrolled students at UC law schools dropped following Proposition 209"); *id.* at 22 (discussing similar declines for business schools).

³⁰ *Id.* at 14.

decades earlier.³¹ The situation is even more challenging at UC Law Schools. The Study Group on Diversity reported that underrepresented minorities were 12 percent of entering law students at UC in 2005,³² whereas underrepresented minorities were 20.1 percent of UC's entering law students in 1975.³³

C. The University's Race-Neutral Admissions Initiatives Have Had Limited and Disappointing Results.

In the face of these daunting statistics, the University of California embarked on a broad and proactive effort to increase diversity on its campuses through the use of race-neutral initiatives. While this effort produced some benefits, the bottom line is that today—more than fifteen years after passage of Proposition 209—the enrollment rates for underrepresented minorities still have not rebounded at UC's most selective campuses, and the overall enrollment figures at the University have not kept pace with the demographic changes among California's graduating high-school population.

1. *Outreach Task Force*. Before Proposition 209 became effective, the University recognized that it was necessary “to take relevant actions to develop and support programs which will have the effect of increasing the eligibility rate of groups which are

³¹ University of California, *Final Report of the Task Force on Graduate and Professional Admissions*, at app. F-7 (Sept. 1977) (“*Graduate and Professional Admissions*”).

³² *Study Group on Diversity* at 14.

³³ *Graduate and Professional Admissions* at app. F-14.

‘underrepresented’ in the University’s pool of applicants as compared to their percentages in California’s graduating high-school classes.”³⁴ To accomplish this objective, it created an Outreach Task Force and charged it with developing a comprehensive approach for reversing low eligibility rates for students from underrepresented groups and addressing the challenges those students faced in gaining admission to the most selective UC campuses.³⁵

In 1997, the Outreach Task Force recommended a strategy that included: (i) developing partnerships between UC campuses and public schools aimed at improving opportunities for college preparation and fostering positive academic cultures in schools; (ii) expanding academic-development programs for K-12 students; (iii) embarking on an aggressive program of informational outreach to students, families, teachers, and counselors geared towards improving planning and preparation for college; and (iv) conducting research to identify the root cause of the lack of diversity and evaluate the effectiveness of UC’s outreach programs.³⁶

Consistent with these recommendations, the University has spent more than half of a billion dollars since 1998 to build and expand race-neutral programs aimed at educationally disadvantaged K-12

³⁴ *SP-1*.

³⁵ *See id.* § 1.

³⁶ *New Directions for Outreach: Report of the University of California Outreach Task Force*, at 3-4 (July 1997), http://www.ucop.edu/education-partnerships/_files/outreachrpt.pdf.

students, and it has substantially increased the percentage of the applicant pool who participate in such programs.³⁷ There are currently thirteen such programs, which collectively reach students at over 1,100 K-12 public schools and 112 community colleges in California.³⁸ More than 70 percent of the students in the three largest outreach programs are underrepresented minorities.³⁹ In addition to the partnership and outreach programs referenced above, these efforts included the creation of the California Professional Development Institutes to train 70,000 public school teachers a year and improve their skills in core subjects such as English and mathematics.⁴⁰

2. *Eligibility in the Local Context.* Beginning with students applying for the freshman class entering the University in 2001, UC modified its eligibility policy. The new policy provided that the top 4 percent of eligible students in each California public-high-school class were designated as “Eligible in the Local Context” (“ELC”). The ELC program was expanded to the top 9 percent of students in each public high school for the freshman class entering in 2012.⁴¹ ELC status guarantees an applicant admission to one of

³⁷ University of California, *Student Academic Preparation and Educational Partnerships (SAPEP), 2011-12 Annual Report Highlights*, at 2, 7 (July 2013), http://www.ucop.edu/education-partnerships/_files/sapep-annual-report-highlights-2012.pdf.

³⁸ *See id.* at 2.

³⁹ *See* University of California, *Report on Student Academic Preparation and Educational Partnerships (SAPEP) for the 2009-10 Academic Year*, at 8 (Aug. 2011), http://www.ucop.edu/education-partnerships/_files/sapep-funds-outcomes.pdf.

⁴⁰ *Undergraduate Access to UC* at 10.

⁴¹ *Regents Policy 2103*.

the ten campuses, space permitting, and is also one of the criteria that individual campuses must consider in evaluating each application.

3. *Comprehensive and Holistic Review*. In addition to eliminating race-conscious criteria from campus admissions processes, the Board of Regents and the faculty have revised the admissions criteria substantially in the years since Proposition 209 was implemented. In 2001, the Board of Regents abandoned a rigid requirement that more than half of the class must be admitted solely on the basis of meeting a narrow range of academic criteria and directed that the campuses should instead institute a “comprehensive review” process.⁴² Under comprehensive review, the campuses evaluate applicants “using multiple measures of achievement and promise while considering the context in which each student has demonstrated academic accomplishment.”⁴³

The comprehensive-review process was intended to allow eligible applicants to be considered for campus admission in light of a broader set of criteria, including information about each individual student’s educational and personal circumstances.⁴⁴ These

⁴² The Regents of the University of California, *Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions* (Nov. 15, 2001), <http://regents.universityofcalifornia.edu/governance/policies/2104.html>.

⁴³ *Ibid.*

⁴⁴ See generally *Guidelines for Implementation of University Policy on Undergraduate Admissions*, at 2 (last updated July 20, 2012) (“[M]erit should be assessed in terms of the full range of an applicant’s academic and personal achievements and likely contribution to the campus community, viewed in the context of

criteria include not only a student's GPA and standardized test scores, but also her academic accomplishments viewed in the context of her life experience, neighborhood characteristics, qualification for the ELC program, the quality of the student's academic performance relative to the opportunities available in her high school, any recent and marked improvement in academic performance, the nature of the courses taken by the student, outstanding performance in particular areas or fields, and special talents or skills.⁴⁵ To implement this policy, the University has created sophisticated tools such as "read sheets," which display an applicant's quantitative data (but not any information about the applicant's race or ethnicity) and compare them with data for other applicants from throughout the State and from the same high school.

In 2011, the Board of Regents extended the concept of comprehensive review by encouraging campuses to use a single holistic score in evaluating applicants.⁴⁶ This approach eliminates the use of

the opportunities and challenges that the applicant has faced."), http://www.ucop.edu/student-affairs/_files/GUIDELINES_FOR_IMPLEMENTATION_OF_UNIVERSITY_POLICY_on_UG_ADM_Revised_July2012.pdf; *ibid.* ("Campus policies should reflect continued commitment to the goal of enrolling classes that exhibit academic excellence as well as diversity of talents and abilities, personal experience, and backgrounds.").

⁴⁵ University of California, *Comprehensive Review*, <http://admission.universityofcalifornia.edu/counselors/freshman/comprehensive-review/>.

⁴⁶ The Regents of the University of California, *Regents Policy 2108: Resolution Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions* (Jan. 20, 2011),

fixed weights for specific criteria and allows reviewers to exercise more judgment in evaluating an applicant's achievements and potential for academic success. Individual applications are read and scored by multiple independent readers, and those with significant score disparities receive further attention to ensure a fair result.⁴⁷

4. *Use of Standardized Tests.* The University also has sought to reduce its reliance on standardized tests in admissions, a policy shift based in part on evidence that scores on aptitude tests were highly influenced by family education and income levels.⁴⁸ Indeed, out of concern that requiring numerous standardized tests beyond the SAT or ACT might discourage students from educationally disadvantaged families from applying, the University eventually dropped its requirement for SAT-II subject tests altogether.⁴⁹

5. *Results of UC's Race-Neutral Initiatives.* Notwithstanding these robust and well funded

<http://regents.universityofcalifornia.edu/governance/policies/2108.html>.

⁴⁷ See generally UC Board of Admissions and Relations with Schools, Systemwide Academic Senate, *Comprehensive Review in Freshman Admissions at the University of California 2003-2009*, at 27-29 (May 2010) (“*BOARS Comprehensive Review Report*”), http://senate.universityofcalifornia.edu/reports/HP_MGYreBOARS_CR_rpt.pdf.

⁴⁸ See BOARS, *Admissions Tests and UC Principles for Admissions Testing*, at 3-4, 10-11 & n.6, 12, 18 (Dec. 2009), http://senate.universityofcalifornia.edu/committees/boars/boars.testingrpt.toRegents_000.pdf.

⁴⁹ See University of California, Freshman, SAT Subject Tests, <http://admission.universityofcalifornia.edu/freshman/requirements/examination-requirement/SAT-subject-tests/>.

initiatives, the University has struggled to achieve sufficient levels of diversity in its student populations, even as it has expanded substantially and added thousands of new undergraduate seats.

To be sure, the University's race-neutral initiatives have produced some benefits. The expanded outreach efforts, for example, have helped to drive up the University's enrollment of low-income students and students who will be the first in their families to graduate from college.⁵⁰ Students of all ethnicities have taken advantage of these initiatives. This means, however, that they are necessarily less effective at changing the racial and ethnic composition of the University's student body than policies that target only underrepresented minorities.⁵¹

The Eligibility in the Local Context program has succeeded in increasing applications from students at

⁵⁰ The primary measure of the proportion of "low-income" students is the percentage of undergraduate recipients of federal Pell Grants. In 2010-11, 39 percent of UC undergraduates qualified to receive Pell Grants. That is twice as high as the proportion of Pell Grant-recipients at UC's peer public institutions, and *three or four times* the rate at Ivy League colleges such as Yale (13 percent) and Harvard (10 percent). University of California, *2012 Accountability Report*, at 28, <http://accountability.universityofcalifornia.edu/documents/accountabilityreport12.pdf>; University of California, *2012 Accountability Report, Data Glossary and Technical Appendix*, Table 3.5.1, http://accountability.universityofcalifornia.edu/documents/accountabilityreport12_glossary_technical.pdf. The percentage of enrolled students for whom neither parent is a college graduate increased from 36 percent in 1999-2000 to 42 percent in 2007-08. *See id.*, Table 2.6.1.

⁵¹ *Undergraduate Access to UC* at 23-24.

California high schools that have traditionally sent only a small number of students to the University. But, as a result of the racial and ethnic make-up of California's high schools, this shift has not substantially increased the diversity of the pool of students who are admitted to the University.⁵² The ELC program also does not offer a solution for improving diversity at campuses such as UC Berkeley and UCLA because, while it guarantees admission to the University, it does not guarantee admission to any individual campus. For these highly selective campuses, students from underprivileged schools who qualify for ELC still must compete with tens of thousands of other highly qualified applicants.

Despite the changes to the admissions criteria and the manner of reviewing applications, admission and enrollment data in the years since approval of Proposition 209 reflect a persistent inability to meet the University's diversity goals through race-neutral means. At the University level, the percentages of African Americans and American Indians in the enrolled pool of California residents in 2012 (4.3 percent and 0.6 percent, respectively) remained lower than the corresponding percentages in 1995.⁵³ A faculty committee recently found that admission rates for African Americans remain "far below" those for the racial groups with the highest admit rates on each campus and concluded that "[t]he

⁵² See Patricia Gandara, *A Case Study in the Loss of Affirmative Action*, at 13-14 (Aug. 2012), <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action>.

⁵³ *Application, Admissions, and Enrollment* at 1.

Comprehensive Review process alone is not sufficient to overcome the disadvantages that African Americans face in their educational opportunity.”⁵⁴

For Latinos, the percentage of the admitted pool of California residents systemwide increased during this period (from 15.8 to 27.1 percent), as did the percentage of the enrolled pool (from 15.6 to 26.5 percent).⁵⁵ But these bare figures must be considered in light of the explosive growth in California’s Latino student population during the same period: from 1995 to 2012, the percentage of public high-school graduates who were Latino jumped from 30.0 to 46.2 percent.⁵⁶ In other words, the growth in the number of Latino students, while substantial, is still far lower than one would expect based on the number of Latino high-school graduates in California.

The failure of these race-neutral initiatives to accomplish the University’s diversity goals is most apparent at the University’s highly selective campuses. For example, UC Berkeley has experienced dramatic declines in the percentages of its enrolled class that comprise African Americans and American Indians. The freshman class that entered Berkeley in 1995 included 202 African Americans (6.7 percent) and 56 American Indians (1.8 percent). The freshmen class that entered the University in the most recent academic year includes

⁵⁴ *BOARS Comprehensive Review Report* at 25.

⁵⁵ *Application, Admissions, and Enrollment* at 1.

⁵⁶ *High School Graduates Data Set*; California Postsecondary Education Commission, *Ethnicity Snapshots Table, High School Graduates* (“*Ethnicity Snapshots Table*”), http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=4&Rpt=AtoG_HS.

just 129 African Americans (4.2 percent) and 25 American Indians (0.8 percent). Notwithstanding that the percentage of Latino high-school graduates increased by more than half between 1995 and 2012, their percentage of the admitted pool at UC Berkeley actually declined slightly in this period, and their percentage of the enrolled class did not reach even 1995 levels until 2012.⁵⁷

Similarly, at UCLA, the percentage of the admitted pool that is African American dropped from 6.7 percent in 1995 to 3.7 percent in 2012, while the proportion of African Americans in the enrolled freshman class dropped from 7.4 to 4.2 percent. American Indians saw their percentage of the admitted pool fall from 1.1 to 0.7 percent and their percentage of the enrolled freshman class decline from 1.2 to 0.5 percent. The results for Latino students appear better at first glance: the percentage of Latino students in the admitted pool inched up from 20.1 percent in 1995 to 20.6 percent in 2012; and their percentage of the enrolled freshman class increased from 22.4 to 24.9 percent.⁵⁸ But these numbers hardly signify improvements, given that during this period the proportion of high-school graduates who were Latino rose from 30.0 to 46.2 percent.

Petitioner nonetheless mistakenly portrays the University's race-neutral effort to increase diversity as an unqualified success. *See* Pet. Br. 31. He asserts,

⁵⁷ *Application, Admissions, and Enrollment* at 2. All data are for California resident freshmen only.

⁵⁸ *Id.* at 5. Again, these data are for California resident freshmen only.

for example, that “[b]y 2002, African-American enrollment at [the University of California] returned to pre-Prop 209 levels, and from 2007 to 2010 averaged 40% higher.” *Ibid.* This is merely a parlor trick. The *absolute number* of African-American students enrolled at UC may have returned to pre-Proposition 209 levels by 2002, but in that same period the University added 8,000 new seats to its freshman class (including one new campus). So the *percentage* of African Americans in the total enrolled pool actually declined by more than a quarter, from 4.3 percent in 1995 to 3.1 percent in 2002. And, contrary to Petitioner’s claim, this percentage has remained below pre-Proposition 209 levels.⁵⁹

Petitioner similarly touts the “doubl[ing]” of the number of African-American enrollees at UC Irvine since Proposition 209. Pet. Br. 34. He neglects to mention, however, either (i) that UC Irvine increased the size of its freshman class by more than 1,500 students in this period or (ii) that the proportion of African Americans in the enrolled class has never exceeded 3.5 percent in recent years—at a time when African Americans account for nearly 7 percent of California high-school graduates.⁶⁰

Petitioner also highlights the overall increase in Latino enrollment at UC, *see* Pet. Br. 31, but does not mention that the numbers failed to keep pace with the skyrocketing growth of the Latino population in California.

⁵⁹ *Application, Admissions, and Enrollment* at 1.

⁶⁰ *Id.* at 4 (data are for California resident freshmen); *High School Graduates Data Set*.

Finally, Petitioner asserts that Proposition 209 had a “warming effect” on the propensity of African-American and Latino students “to accept an admissions offer from and enroll at Berkeley.” Pet. Br. 35. But this argument is belied by the hard numbers. In 1997, for the last freshman class that entered UC Berkeley before Proposition 209 went into effect, 46.2 percent of the African-American students who were offered admission enrolled.⁶¹ In the most recent four years for which data are available, that proportion has ranged between 37.8 percent and 42.7 percent.⁶² In short, the temperature does not appear to have increased at all—and certainly not enough to bring the number of African-American students at UC Berkeley anywhere near pre-Proposition 209 levels. Similarly, the percentage of Latino students who accepted their offers of admission to UC Berkeley was 37.6 in 1997 (and 40.1 percent the year before); in the most recent four years, the percentage bounced between 36.6 and 38.3.⁶³ Several studies show that the most accomplished African-American and Latino students in UC’s pool of admitted students disproportionately choose to enroll at elite private universities with affirmative action, including Stanford, the University of Southern California, and Ivy League institutions, and the limited data available suggest this challenge worsened for UC after Proposition 209.⁶⁴

⁶¹ *Application, Admissions, and Enrollment* at 2. Data are for California resident freshmen only.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Saul Geiser, et al., “No Show” Study: *College Destinations of University of California Applicants and Admits Who Did Not*

6. *UC's Graduate Programs.* This brief focuses primarily on undergraduate admissions and enrollment, as does Petitioner's, but it is important to note that the University's graduate and professional schools have also struggled to enroll diverse classes in the wake of Proposition 209.

UC's business schools, which play a crucial role in educating California's economic leaders, are consistently unable to enroll racially and ethnically diverse classes. Systemwide, the proportion of underrepresented minorities enrolled in the University's business schools in the fall of 2012 (5.3 percent)⁶⁵ was less than half of the national average for comparable institutions (12.8 percent)⁶⁶—even though most of those comparable institutions are located in states with far less diverse populations. The figures were particularly bleak for African Americans, who represented just 1.3 percent of enrolled business students in 2012-13.⁶⁷ Indeed,

Enroll, 1997-2002, 19 *Educ. Pol'y* 396 (2005); William Kidder, *Misshaping the River*, 39 *J. of College & Univ. L.* 53, 75-83 (2013) ("*Misshaping the River*"). See also Susan Wilbur, *Investigating the College Destinations of University of California Freshman Admits*, in *Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, at 63-66, 72, 76 (Eric Grodsky & Michal Kurlaender eds., 2010) ("*Equal Opportunity in Higher Education*"); *BOARS Comprehensive Review Report* at 19, 82-83.

⁶⁵ Internal UC Data.

⁶⁶ University of California, *2011 Accountability Report*, at 118 ("*2011 Accountability Report*"), <http://accountability.universityofcalifornia.edu/documents/accountabilityreport11.pdf>. Enrollment figures from fall of 2012 are from internal UC data sources.

⁶⁷ Internal UC data.

during five of the last seven academic years, one or more of UC's six business schools enrolled no African-American students at all.⁶⁸

The University's six medical schools, which are part of the largest health training program in the nation, face similar challenges. The proportion of underrepresented minorities at these schools is a fraction of their percentage of the state population. In 2012-13, for example, 5.2 percent of the University's medical students were African Americans, 0.5 percent were American Indians, and 12.0 percent were Latino.⁶⁹ The percentages at the University's four law schools were only slightly higher.⁷⁰ This is in a state where African Americans make up 6.6 percent of the population, American Indians 1.7 percent, and Latinos 38.2 percent.⁷¹ In certain years during the ten years ending in 2011, the medical schools at UC Irvine, UCLA, and UC San Diego and the law school at UC Irvine have not had a single African-American student.⁷²

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Internal UC data sources show that in the 2012-2013 academic year, the aggregate enrollment percentages at UC law schools were 4.0 percent for African Americans, 1.4 percent for American Indians, and 10.3 percent for Latinos.

⁷¹ U.S. Census Bureau, *State & County QuickFacts, California*, <http://quickfacts.census.gov/qfd/states/06000.html>.

⁷² *2011 Accountability Report, Data Tables*, at 108-09, http://accountability.universityofcalifornia.edu/documents/accountabilityreport11_tables.pdf.

II. A Total Prohibition of the Use of Race in Admissions and Resulting Declines in Campus Diversity Have Especially Significant Effects on Underrepresented Minorities.

It is the position of *Amici* that a diverse student body advances the educational mission of a university and confers broad benefits on the society at large. *See* Brief *Amicus Curiae* of the President and Chancellors of the University of California in Support of Respondents, *Fisher v. Univ. of Texas at Austin*, No. 11-345, at 5-13. Indeed, abundant research confirms that diversity in higher education benefits all students.⁷³ At the same time, however, UC's experience since Proposition 209 indicates that underrepresented racial minorities realize especially significant benefits from the use of race in admissions and the resulting increases in campus diversity and have suffered the most from post-Proposition 209 losses in campus diversity. Indeed, one of Petitioner's central factual assertions—that Proposition 209 caused academic outcomes for African-American and Latino students to improve at UC—is belied by UC's actual data. Further, research shows that not just students but also communities of underrepresented racial minorities realize particularly significant benefits from the use of race in university admissions and resulting diversity.

⁷³ *See, e.g.*, Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 *J. Soc. Issues* 595 (2005) (reviewing extensive prior research and reporting findings of new longitudinal study).

A. Declines in Campus Diversity Have Especially Affected the Experiences of Underrepresented-Minority Students.

Every two years, UC administers a broad survey of its undergraduate population. The survey asks students, among other things, whether they agree with the statement that “[s]tudents of my race/ethnicity are respected on this campus.”⁷⁴ The responses to this question vary widely by campus. At the University’s most diverse campuses, UC Riverside and UC Merced,⁷⁵ African-American and Latino students report feeling respected at levels that are substantially above the University-wide average.⁷⁶ By contrast, at UC San Diego and UC Berkeley, where the percentages of African-American

⁷⁴ University of California, *2013 Accountability Report*, Indicator 8.3.1 (“*2013 Accountability Report*”), <http://accountability.universityofcalifornia.edu/index.php?in=8.3.1&source=uw>.

⁷⁵ At UC Riverside, African Americans are 7.4 percent and Latinos 33.2 percent of the undergraduate population; at UC Merced, the percentages are 8.3 and 36.5, respectively. Internal UC Data.

⁷⁶ Only 13.0 percent of African Americans at UC Riverside felt that members of their race were not respected, compared with an average of 33.6 percent for African Americans systemwide. And just 4.8 percent of Latinos perceived a lack of respect on the Riverside campus, whereas the systemwide figure was 14.8 percent. *2013 Accountability Report*, Indicator 8.3.1. At UC Merced, the percentages were just 9.5 for African Americans and 2.9 for Latinos. Internal UC Data.

and Latino students are much lower,⁷⁷ substantially higher percentages of these students report feeling that students of their race are not respected.⁷⁸ These survey data suggest that underrepresented minorities are less likely to have a positive view of their campus climate and to feel that they are respected when they represent a disproportionately small sliver of the student population.⁷⁹

At the same time as many underrepresented minorities are voicing concerns about their campus climates, data show that underrepresented minorities “are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites/Asian Americans has gradually widened under Prop 209.”⁸⁰ This suggests that there may be a

⁷⁷ The student body at UC San Diego is 1.9 percent African American and 15.6 percent Latino; at UC Berkeley, the percentages are 3.5 and 12.5, respectively. Internal UC Data.

⁷⁸ At UC San Diego, 51.5 percent of African Americans and 19.1 percent of Latinos felt that they were not respected. At UC Berkeley, the percentages were 47.5 and 21.8. *2013 Accountability Report*, Indicator 8.3.1. *See generally Misshaping the River* at 56-69 (analyzing data and comparing with evidence of more positive racial climates in institutions with greater diversity).

⁷⁹ In contrast to the impact on underrepresented-minority students, the survey shows that the percentage of white students who feel disrespected at Riverside, Merced, San Diego, and Berkeley is 8.0 percent, 5.9 percent, 9.1 percent, and 6.2 percent, respectively, and does not appear to relate significantly to the diversity of the campus. The equivalent percentages for Asian-American students on these campuses are 5.7 percent, 4.1 percent, 9.0 percent, and 7.1 percent, respectively. *2013 Accountability Report*, Indicator 8.3.1 (statistics for UC Merced are from internal UC data sources).

⁸⁰ *Misshaping the River* at 56; *see id.* at 71-83.

compounding effect at work, with declines in diversity due to Proposition 209 making certain campuses less attractive to underrepresented minorities, who then decide to study elsewhere, even further diminishing diversity on those campuses.

B. The University's Data Belie Petitioner's Claims That Proposition 209 Caused Academic Outcomes for African-American and Latino Students to Improve.

Petitioner relies extensively on an unpublished draft paper—which was not peer-reviewed—contending that “Prop 209 has had an overwhelmingly positive effect on the education blacks and Hispanics receive at the University of California.”⁸¹ Even if it were otherwise appropriate for the Court to consider this inchoate analysis, the paper is a textbook example of the dangers of mistaking correlation for causation. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 173 (2003) (“Correlation is not causation.”).

Relying on this draft paper, Petitioner highlights increases in four-and six-year graduation rates for African-American and Latino students by comparing the period before Proposition 209 to the period after it. *See* Pet. Br. 31. But that is only half of the story. The very data set on which Petitioner relies makes

⁸¹ Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California*, at 1 (“*Effects of Proposition 209*”), <http://www.seaphe.org/pdf/analysisoftheeffectsofproposition209.pdf>; *see* Pet. Br. 31.

clear that graduation rates have steadily increased for *all* UC students over the past two decades, a trend that began long before Proposition 209 was on the books,⁸² and one that has been fueled by the increasing prestige and selectivity of the UC system. The data also show that underrepresented minorities experienced greater gains in graduation rates in the period *before* Proposition 209 than in the period after it.⁸³

For example, the four-year graduation rate for African Americans showed a 75 percent increase between 1992 and 1997 (before Proposition 209) and only a 40 percent increase between 1997 and 2005 (after Proposition 209).⁸⁴ The same holds true for Latinos, whose four-year graduation rate grew by 55 percent between 1992 and 1997, but just 41 percent between 1997 and 2005.⁸⁵ Moreover, the data on which Petitioner relies establish that graduation rates for African-American and Latino students continue to lag far behind those for all other students in the years after Proposition 209. In 2005, for example, the four-year graduation rate was 42.1

⁸² *Effects of Proposition 209* at 4-6.

⁸³ Tongshan Chang et al., *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, in *Equal Opportunity in Higher Education*, at 83, 99 (reviewing UC graduation rates 1994 to 2003 and concluding that “Proposition 209 added little to the momentum URM students already had going back to at least 1995. About two-thirds of the graduation rate improvement occurred before students were subject to the Proposition 209 admissions requirement.”).

⁸⁴ *Effects of Proposition 209* at 4. The data in this paragraph correspond to the entering cohort for the referenced year.

⁸⁵ *Ibid.*

percent for African Americans, 47.4 percent for Latinos, and 62.8 percent for all other students.⁸⁶ The same trends are reflected in the five-year and six-year graduation rates.⁸⁷

Similarly, Petitioner reports that African-American and Latino GPAs “increased post-Prop 209, even while minority students enrolled in more difficult science and engineering classes.” Pet. Br. 31. Petitioner identifies no data that support the assertion regarding science and engineering classes. And the data regarding GPAs show a pattern similar to the graduation data discussed above: the GPAs of African-American and Latino students have inched up during a period when the average GPA has increased for *all* students; average GPAs for African-American and Latino students still do not, however, keep pace with those of white and Asian-American students.⁸⁸

⁸⁶ *Ibid.*

⁸⁷ *See id.* at 5 (showing that the five-year graduation rate increased by 30.0 percent for African Americans and 15.7 percent for Latinos between 1992 and 1997, but only increased by 10.8 percent for African Americans and 7.6 percent for Latinos between 1997 and 2004); *id.* at 6 (showing that the six-year graduation rate for African Americans increased by 15.4 percent for African Americans between 1992 and 1997, but only increased by 5.8 percent for African Americans between 1997 and 2003; for Latinos, the rate increased by 7.3 percent in the former period and actually decreased slightly in the latter period); *id.* at 5-6 (showing that five- and six-year graduation rates for African Americans and Latinos lag the corresponding rates for “all other” students by double-digit percentages).

⁸⁸ For example, the average freshman GPA for white students across the University ranged from 2.96 to 2.99 in the years between 1992 and 1995. In the period between 2008 and 2011,

In short, Petitioner’s assertions about academic outcomes for underrepresented minority students in the years following Proposition 209 simply are not supported by the numbers.

C. Communities Realize Particularly Significant Benefits from Diversity in Higher Education.

The major benefits for underrepresented minorities of diversity in higher education extend far beyond the campus. Diversity on campus also confers benefits on communities that comprise primarily underrepresented minorities. These communities often suffer from an acute shortage of important professional services. Increasing the number of underrepresented minorities in graduate and professional schools promises to help address such shortages—and even to improve the services that these communities receive from professionals who are not themselves minorities. This is consistent with the University of California’s mission of providing public service and “creat[ing] an educated workforce that keeps the California economy competitive.”⁸⁹

The field of health services offers a prime illustration of the tangible benefits of increased diversity in higher education for underserved

this figure ranged from 3.17 to 3.18. By contrast, for African Americans, the range was 2.45 to 2.56 in the former period, and 2.68 to 2.76 in the latter period; for Latinos, average GPAs ranged from 2.58 to 2.61 in the former period, and were stuck at 2.71 in the latter period. Internal UC Data.

⁸⁹ University of California, Mission Statement, <http://www.universityofcalifornia.edu/aboutuc/mission.html>.

communities. Communities with high proportions of African-American or Latino residents are “four times as likely as others to have a shortage of physicians, regardless of community income.”⁹⁰ Minorities in these communities suffer medical outcomes that are significantly worse, on average, than those experienced by white patients.⁹¹

Improving diversity in medical education is a proven method of ameliorating the shortage of physicians in minority communities. Physicians who are underrepresented minorities are several times more likely to serve patients from their own racial group than are their white counterparts, and they are nearly twice as likely to practice within a health-manpower shortage area.⁹² Similarly, research scientists who are underrepresented minorities are more likely than white scientists to devote their

⁹⁰ Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 *New Eng. J. Med.* 1305, 1305 (1996) (“Komaromy”).

⁹¹ See, e.g., Association of American Medical Colleges, *Addressing Racial Disparities in Health Care* (2009) (discussing racial gulf in medical care), <https://members.aamc.org/eweb/upload/Addressing%20Racial%20Disparaties.pdf>; Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (2002) (documenting disparities), <http://www.iom.edu/Reports/2002/Unequal-Treatment-Confronting-Racial-and-Ethnic-Disparities-in-Health-Care.aspx>.

⁹² See Stephen Keith et al., *Effects of Affirmative Action in Medical Schools*, 313 *New Eng. J. Med.* 1519 (1985); see also Komaromy at 1305 (concluding that “[b]lack physicians practiced in areas where the percentage of black residents was nearly five times as high, on average, as in areas where other physicians practiced”).

careers to studying diseases that disproportionately affect minority communities.⁹³

Greater diversity in medical school classes even tends to improve the quality of care received by underrepresented-minority patients from *white* physicians. White medical students report that they are prepared to care for individuals from minority racial groups at far higher percentages if they attend a school where a large percentage of their fellow students are underrepresented minorities.⁹⁴ Similarly, medical students of all races report that having a diverse student body at their medical school increases their concerns about competently treating a diverse population.⁹⁵

Medical services are but one example. Underrepresented minorities are more likely to be low-income than whites⁹⁶ and thus are more likely to

⁹³ See Association of American Medical Colleges, *Diversity in Medical Education*, at 11 (2008), <https://members.aamc.org/eweb/upload/Diversity%20in%20Medical%20Education%20Facts%20and%20Fig%202008.pdf>.

⁹⁴ Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools*, 300 JAMA 1135, 1139 (2008).

⁹⁵ See Dean Whitley et al., *Educational Benefits of Diversity in Medical Schools*, 78 Academic Medicine 460, 464-65 (2003).

⁹⁶ See U.S. Census Bureau, Statistical Abstract of the U.S., Table 697, *Money Income of Families—Median Income by Race and Hispanic Origin in Current and Constant (2009) Dollars: 1990 to 2009* (reporting median family income of \$62,545 for white families, \$75,027 for Asian and Pacific Islander families, \$38,409 for black families, and \$39,730 for Hispanic families), <http://www.census.gov/compendia/statab/2012/tables/12s0697.pdf>.

have limited access to legal services.⁹⁷ Upon graduating from law school, underrepresented minorities are more likely to take jobs in government or other public-service or public-interest fields,⁹⁸ jobs which are often associated with serving low-income clients.

Similarly, unemployment is higher in minority communities than in the country at large,⁹⁹ and underrepresented minorities “are substantially less likely to own a business than are white and Asian Americans.”¹⁰⁰ One factor that contributes to this phenomenon is racial disparities in education.¹⁰¹ To the extent that improved access to a high-quality college education fosters successful entrepreneurship by underrepresented minorities, it can confer substantial economic benefits on their communities. To take just one example, a survey of African-

⁹⁷ See, e.g., Michelle Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 Rutgers L.J. 1011, 1016 (2009) (noting that there are more than twelve times as many lawyers delivering civil legal assistance to the general population than to low-income persons).

⁹⁸ See Richard Lempert et al., *Michigan’s Minority Graduates in Practice*, 25 Law & Soc. Inquiry 395, 401 (2000).

⁹⁹ U.S. Census Bureau, Statistical Abstract of the U.S., Table 627, *Unemployed and Unemployment Rates by Educational Attainment, Sex, Race, and Hispanic Origin: 2000 to 2010* (reporting 2010 unemployment rates of 7.5 percent for whites, 6.8 percent for Asians, 13.4 percent for blacks, and 10.8 percent for Hispanics), <http://www.census.gov/compendia/statab/2012/tables/12s0627.pdf>.

¹⁰⁰ Robert Fairlie et al., *Race and Entrepreneurial Success* 9 (2008).

¹⁰¹ *Id.* at 3.

American-owned businesses in Atlanta projected that 82 percent of the jobs created by these businesses went to African Americans from that community.¹⁰²

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

CHARLES F. ROBINSON
KAREN J. PETRULAKIS
MARGARET L. WU
ELISABETH C. YAP
UNIVERSITY OF CALIFORNIA
OFFICE OF THE
GENERAL COUNSEL
1111 Franklin Street, 8th Fl.
Oakland, CA 94607

BRADLEY S. PHILLIPS
Counsel of Record
MICHAEL J. MONGAN
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Brad.Phillips@mto.com

CHRISTOPHER M. PATTI
Chief Campus Counsel
OFFICE OF LEGAL AFFAIRS
200 California Hall #1500
Berkeley, CA 94720
(510) 642-7122

KEVIN S. REED
*Vice Chancellor-Legal
Affairs and Associate
General Counsel*
2135 Murphy Hall
405 Hilgard Avenue
Los Angeles, CA 90095
(310) 206-1355

¹⁰² Thomas Boston, *Affirmative Action and Black Entrepreneurship* 49 (1999).

APPENDIX

List of Amici Curiae

Mark Yudof, President, University of California

Nicholas B. Dirks, Chancellor, Berkeley

Linda P.B. Katehi, Chancellor, Davis

Michael V. Drake, Chancellor, Irvine

Gene D. Block, Chancellor, Los Angeles

Dorothy Leland, Chancellor, Merced

Kim A. Wilcox, Chancellor, Riverside

Pradeep K. Khosla, Chancellor, San Diego

Susan Desmond-Hellmann, Chancellor, San
Francisco

Henry T. Yang, Chancellor, Santa Barbara

George Blumenthal, Chancellor, Santa Cruz