

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF *AMICI CURIAE* OF 28
UNDERGRADUATE AND GRADUATE
STUDENT ORGANIZATIONS WITHIN THE
UNIVERSITY OF CALIFORNIA IN SUPPORT
OF RESPONDENTS**

Kimberly Thomas Rapp	Monte Cooper
Oren Sellstrom	<i>Counsel of Record</i>
Cecilia Chen	Robert Rosenfeld
LAWYERS' COMMITTEE FOR	David S. Keenan
CIVIL RIGHTS	Nicholas Lenning
131 Steuart Street	Jason Wu
Suite 400	ORRICK, HERRINGTON &
San Francisco, CA 94105	SUTCLIFFE LLP
(415) 543-9697	1000 Marsh Road
	Menlo Park, CA 94025
	(650) 514-7400

Counsel for Amici Curiae

***AMICI CURIAE* 28 UNDERGRADUATE AND
GRADUATE STUDENT ORGANIZATIONS
WITHIN THE UNIVERSITY OF CALIFORNIA***

Asian Pacific American Law Journal, UCLA

Berkeley Journal of African-American Law and
Policy, UC Berkeley

Berkeley Journal of Gender, Law & Justice, UC
Berkeley

Berkeley Law Foundation – Student Leadership
Team, UC Berkeley

Black Law Students Association, UC Davis

Black Law Students Association, UC Hastings

Boalt Hall Student Association, UC Berkeley

Chicana/o Latina/o Law Review, UCLA

Coalition for Diversity at UC Davis School of Law

Diversity Action Committee, Student Body
Association of UCLA School of Law

Education & Law Society at UCLA

Filipino Law Students Association, UC Davis

Hastings Race and Poverty Law Journal, UC
Hastings

La Raza Law Students Association, UC Berkeley

La Raza Law Students Association, UC Hastings

La Raza Law Students Association, UCLA

* The missions and interests of the *Amici Curiae* (“*Amici*”) who are signatories to this brief are set out in the accompanying Appendix.

Lambda Law Students Association, UC Davis
Law Students of African Descent, UC Berkeley
Middle Eastern Law Students Association, UC
Hastings
Men of Color Alliance, UC Berkeley
National Lawyers' Guild – Berkeley Law Chapter
National Lawyers' Guild – UCLA School of Law
Chapter
Native American Law Students Association, UC
Hastings
Pilipino American Law Society, UC Hastings
RAZA Recruitment and Retention Center, UCLA
Students for Economic and Environmental Justice,
UC Berkeley
Students Helping Assure Racial Equity, Justice and
Diversity, UCLA School of Law
Women of Color Collective, UC Berkeley

QUESTION PRESENTED

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under the Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

TABLE OF CONTENTS

	<u>Page(s)</u>
<i>AMICI CURIAE</i> 28 UNDERGRADUATE AND GRADUATE STUDENT ORGANIZATIONS WITHIN THE UNIVERSITY OF CALIFORNIA.....	i
QUESTION PRESENTED	iii
TABLE OF AUTHORITIES	vi
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. POST-PROPOSITION 209 EXPERIENCES AT THE UNIVERSITY OF CALIFORNIA DEMONSTRATE WHY EQUAL PROTECTION SHOULD NOT BE INTERPRETED TO BAR CONSIDERATION OF RACIAL AND ETHNIC DIVERSITY AS A FACTOR IN ADMISSIONS.....	4
A. The California Experience Under Proposition 209 Indicates that Race- Neutral Policies Alone Have Failed to Create a Diverse Student Body.....	6
B. Strictly Race-Neutral Policies Have Had a Particularly Negative Effect on Diversity at the University of California’s Most Selective Schools.....	10
C. UC’s Race-Neutral Policies Have Not Succeeded in Remediating the Adverse Effects of Proposition 209.....	13

D. The California Experience Under Proposition 209 Provides Further Evidence that Increased Campus Diversity Helps Promote a Positive Learning Environment and that Lack of Diversity Deters Highly Qualified Students from Enrolling.....	16
1. Data from the University of California and Other Institutions Indicates that Increased Diversity Creates a Healthy Racial Climate.....	17
2. Data Indicates that Highly Qualified URM Applicants Reject the University of California in Favor of Private Universities with Affirmative Action.....	19
E. The California Experience Under Proposition 209 Shows that Race-Neutral Policies Do Not Lead to Better Outcomes for URM Students.	23
F. Data from the California Experience Under Proposition 209 Supports the University of Texas' Conclusion that Race-Conscious Measures Are a Necessary Supplement If Diversity Is to Be Achieved.....	26
CONCLUSION.....	29
APPENDIX OF <i>AMICI CURIAE</i>	App. 1

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	<i>passim</i>
<i>Hopwood v. Texas</i> , 78 F.3d 932 (5th Cir. 1996), <i>abrogated by</i> <i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	27, 28
<i>Meredith v. Fair</i> , 298 F.2d 696 (5th Cir. 1962).....	11
<i>Parents Involved in Cmty. Schs. v. Seattle Sch.</i> <i>Dist. No. 1</i> , 551 U.S. 701 (2007)	6
<i>Regents of the Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978).....	3, 4
CONSTITUTION AND RULES	
Cal. Const. art. I, § 31 (Proposition 209).....	<i>passim</i>
United States Supreme Court Rule 37.6.....	1
OTHER AUTHORITIES	
Sigal Alon & Marta Tienda, <i>Assessing the</i> <i>“Mismatch” Hypothesis: Differences in</i> <i>College Graduation Rates by Institutional</i> <i>Selectivity</i> , 78 SOC. EDUC. 294 (2005).....	25
Deirdre M. Bowen, <i>Brilliant Disguise: An</i> <i>Empirical Analysis of a Social Experiment</i> <i>Banning Affirmative Action</i> , 85 IND. L.J. 1197 (2010).....	17, 19

- Grace Carroll et al., *Those Who Got in the Door: The University of California-Berkeley's Affirmative Action Success Story*, 69 J. NEGRO EDUC. 128 (2000) 23
- Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529 (2004) 17
- Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209 (Eric Grodsky & Michal Kurlaender eds., 2010) ..24, 25
- Amy DeVaudreuil, *Review Essay, Silence at the California Law Review*, 91 CALIF. L. REV. 1183 (2003)7, 10, 11
- Education Trust, *Opportunity Adrift: Our Flagship Universities Are Straying from Their Public Mission* (2010) 11
- Ryan Fortson, *Affirmative Action, the Bell Curve, and Law School Admissions*, 24 SEATTLE U. L. REV. 1087 (2000-2001) 11
- Saul Geiser & Kyra Caspary, "No Show" *Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002*, 2 EDUC. POL. 396 (2005)..... 21

William C. Kidder, <i>Review Essay, Silence, Segregation, and Student Activism at Boalt Hall</i> , 91 CALIF. L. REV. 1167 (2003)	7, 11
William C. Kidder, <i>Misshaping the River: Proposition 209 and Lessons for the Fisher Case</i> (2012).....	<i>passim</i>
Mark C. Long, <i>Changes in the Returns to Education and College Quality</i> , 29 ECON. EDUC. REV. 338 (2010)	26
Tatiana Melguizo, <i>Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities</i> , 49 RES. HIGHER EDUC. 214 (2008).....	25
Regents of the Univ. of Cal., <i>Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2</i> (2001).....	5, 22
Cruz Reynoso & William C. Kidder, <i>Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?</i> , 27 CHICANO-LATINO L. REV. 29 (2008).....	9

- Victor B. Saenz et al., *Factors Influencing Position Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1 (2007) 17
- José L. Santos et al., *Is “Race Neutral” Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. Higher Educ. 605 (2010)..... 7, 11
- Jim Sidanius et al., *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus* (2008) 5, 17
- Mario L. Small & Christopher Winship, *Black Students’ Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 SOC. SCI. RES. 1257 (2007).....25, 26
- Robert T. Teranishi & Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. NEGRO EDUC. 15 (2008) 22
- Susan A. 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).....20, 21

Univ. of Cal. Office of the President, Student
 Academic Servs., *Undergraduate Access to
 the University of California After the
 Elimination of Race-Conscious Policies*
 (2003).....*passim*

Univ. of Cal. Office of the President, Student
 Affairs, Admissions, *University of
 California: Application, Admissions and
 Enrollment of California Resident
 Freshmen for Fall 1989 through 2010*
 (2011).....7, 8, 9

Univ. of Cal., *2011 Accountability Report, Per
 Capita Gift Aid for New Freshmen, UC
 Campuses and Public AAU Institutions,
 2008-09*..... 14

Univ. of Cal., *2011 Accountability Report,
 Undergraduate Pell Grant Recipients, UC
 and Comparison Institutions, 2008-09.* 14

University of Texas at Austin, *Proposal to
 Consider Race and Ethnicity in Admissions*
 (2004).....27, 28

INTEREST OF *AMICI CURIAE*¹

Amici represent numerous graduate and undergraduate student-run organizations that operate within the University of California educational system (“UC system” or “UC”). They reflect a broad cross-section of students who populate the campuses of such well-known universities as the University of California, Berkeley (including the Berkeley School of Law), the University of California, Davis, the University of California, Los Angeles (“UCLA”), and the University of California, Hastings College of the Law.

Many of the *Amici* actively seek ways to ensure that the State of California provides and promotes educational, professional, and social opportunities for individuals of all races, genders, ethnicities, religions, and nationalities who seek to enroll in the State’s university system, particularly underrepresented racial minorities. Other of the *Amici* focus upon addressing legal and policy issues that affect specific classes of students who reflect the State of California’s broad multicultural citizenry. All of the *Amici* share as a common goal that the educational experience of all students within the UC system, whatever their background, be enriched by

¹ Pursuant to Rule 37.6, *Amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *Amici*, their members, and their counsel have made any monetary contribution to the preparation and submission of this brief. This brief is filed with the parties’ written consent, copies of which are on file with the Clerk.

the diversity of individuals enrolled within the system.

Because of their status as UC students, *Amici* are uniquely positioned to offer insights into why the University of Texas at Austin's admissions policies are constitutional under this Court's precedent, including *Grutter v. Bollinger*, 539 U.S. 306 (2003). All of the *Amici* have had their educational experiences directly impacted by the 1996 ballot initiative known as "Proposition 209," which amended California's constitution and was interpreted to prohibit the State's undergraduate and graduate universities from considering race, ethnicity, or gender as any part of the admissions process. *Amici* have experienced the full range of adverse consequences that flow from such a prohibition.

Amici thus have a strong interest in ensuring that this Court's decision in *Grutter* is reaffirmed and applied so that the admissions policies of the University of Texas at Austin are not impaired in the same way that Proposition 209 has impaired and harmed the educational experiences of *Amici* and the competitiveness of the State of California as a whole.

SUMMARY OF ARGUMENT

Nearly ten years ago, this Court cited California's experiment under the strictures of Proposition 209 in noting that race-conscious admissions policies should be periodically evaluated to determine if they "are still necessary to achieve student body diversity." *Grutter*, 539 U.S. at 342 (2003). Far from demonstrating that the time has

come for limited consideration of race in the admissions process to be abandoned, Proposition 209 has vindicated the reasoned position of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 315 (1978), affirmed by this Court in *Grutter*, that ensuring a diverse student body is a compelling state interest and that it is therefore both proper and necessary for race and ethnicity to be weighed as one of many elements in the admissions process. *Grutter*, 539 U.S. at 342 (citing *Bakke*, 438 U.S. at 315 (Powell, J.)).

Empirical evidence shows that since its enactment, Proposition 209 has severely undermined UC's constitutionally sound state interest in creating a truly diverse student body. The UC system's race-neutral admissions policies have significantly decreased the number of African American, Latino, and American Indian students at UC schools, impoverishing the educational experiences of UC students and creating campuses that are less hospitable to those underrepresented minority students² who do choose to enroll, while greatly diminishing their paths to leadership roles in society. This in turn has created a downward spiral, as many highly qualified minority students who are admitted to UC's elite schools spurn these offers in

² “[U]nderrepresented minority” or “URM” is defined by the University of California historically as pertaining to groups that have “collectively achieved eligibility for the University . . . at a rate below 12.5 percent.” These include African Americans, American Indians, and Chicano/Latinos. Univ. of Cal. Office of the President, Student Academic Servs., *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* 1 n.3 (2003).

favor of private universities with much more diverse student bodies. The resulting “brain drain” harms not just *Amici* and other UC students but the State as a whole. These negative effects have occurred despite a wide array of race-neutral steps that UC administrators have taken to maintain diversity, steps that in significant ways mirror those attempted by the University of Texas at Austin prior to adoption of its current plan.

California’s experience under Proposition 209 counsels for caution in evaluating whether the University of Texas at Austin’s policies satisfy constitutional scrutiny. Proposition 209 offers a window into understanding the harms that the University of Texas’s current admissions policies seek to *prevent*. As it advised states and campuses throughout the land to do in *Grutter*, this Court today should continue to scrutinize and take heed from the experiences of the University of California.

ARGUMENT

I. POST-PROPOSITION 209 EXPERIENCES AT THE UNIVERSITY OF CALIFORNIA DEMONSTRATE WHY EQUAL PROTECTION SHOULD NOT BE INTERPRETED TO BAR CONSIDERATION OF RACIAL AND ETHNIC DIVERSITY AS A FACTOR IN ADMISSIONS.

In issuing the *Bakke* opinion in 1978, this Court ruled that states have “a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Bakke*, 438

U.S. at 320 (Powell, J.). On the basis of that decision, many universities and colleges, including those within the state of California, continued to consider a student's race as one of many factors in college admissions.

In 1996, however, California voters passed Proposition 209, a state constitutional amendment that prohibited preferential treatment on the basis of race, sex, and ethnicity in public employment, public contracting, and public education, including the UC system.³ In response, UC abandoned any consideration of race or ethnicity in its admissions process. Since that time, the UC system has served as a laboratory for evaluating the effects of admissions policies that allow consideration of virtually every facet of a student's background, but which are barred by state law from considering the student's race or ethnicity as part of that background. In fact, this Court in *Grutter* cited California as one state which was "engaged in experimenting" with race-neutral approaches from which other state universities might "draw on the most promising aspects of these race-neutral

³ Cal. Const. art. I, § 31; see also Jim Sidanius et al., *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus* 42 (2008). The Regents of the University of California had actually adopted a similar ban on consideration of race or ethnicity in UC admissions (Resolution SP-1) a year earlier, in 1995. See *id.* That resolution has since been repealed. Regents of the Univ. of Cal., *Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2* (2001), <http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf>. For ease of reference, *Amici* here refer generally to Proposition 209, noting where relevant the earlier UC-specific ban.

alternatives as they develop.” *Grutter*, 539 U.S. at 342. Well over a decade into this “experiment,” however, what the California experience demonstrates is that tying the hands of university administrators and faculty in this fashion has significant adverse effects for students who do enroll and for the State as a whole. Thus, to the extent that the Court thought it appropriate to look to California’s race-neutral alternatives as they were developing in 2003, the Court should now consider the results, which paint a bleak picture for the ability to further the compelling interest of fostering diversity on UC campuses or achieving the broader goal for the nation’s schools “to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J, concurring).

A. The California Experience Under Proposition 209 Indicates that Race-Neutral Policies Alone Have Failed to Create a Diverse Student Body.

Fourteen years after Proposition 209 began impacting student admissions, the University of California continues to struggle to achieve a truly diverse student body, particularly at its most selective campuses. Despite an extensive array of race-neutral approaches, the UC system has experienced “substantial declines” in underrepresented minority student enrollment.⁴

⁴ Though the UC system has seen a substantial decline in enrollment among African American, Latino, and American

Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies, *supra* note 2, at 28. For example, African American enrollment dropped dramatically at the most selective campuses—UC Berkeley and UCLA—in the wake of Proposition 209.⁵ At UC Berkeley from 1997 to 1998, African American enrollment dropped from 7.8 to 3.6% of the freshman class. *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, *supra* note 4, at 2. Similarly, at UCLA, African American enrollment dropped by almost 30% from 5.6 to 3.5% of the freshman class during the same period. *Id.* at 5. To date, on

Indian students, in 2010, Asian American student made up over 30% of freshman enrollees. Univ. of Cal. Office of the President, Student Affairs, Admissions, *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2010* 1 (2011), http://www.ucop.edu/news/factsheets/flowfrc_10.pdf. While *Amici* applaud the robust attendance of Asian American students in the UC system, this Court in *Grutter* recognized that the benefits of diversity are further enhanced “when students have the greatest possible variety of backgrounds.” *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

⁵ See William C. Kidder, *Review Essay, Silence, Segregation, and Student Activism at Boalt Hall*, 91 CALIF. L. REV. 1167, 1173 (2003) (noting the “staggeringly low” levels of minority representation in the student body at Boalt Hall after passage of Proposition 209); Amy DeVaudreuil, *Review Essay, Silence at the California Law Review*, 91 CALIF. L. REV. 1183, 1197-1200 (2003) (regarding minority representation on the law review). UC Berkeley, like UCLA, is “hyper-selective” and is only able to admit approximately one quarter of eligible applicants within a very accomplished applicant pool. José L. Santos et al., *Is “Race-Neutral” Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. Higher Educ. 605, 610 (2010).

average, African American enrollment has not recovered to pre-Proposition 209 levels. *Id.* At UC Berkeley, it has hovered between approximately 3 and 4%, far below the pre-Proposition 209 levels. *Id.* at 2.

Latino enrollment similarly decreased precipitously following the adoption of Proposition 209. At UC Berkeley from 1997 to 1998, Latino/Chicano enrollment fell from 14.5 to 7.9% of the freshman class—a 45% decline. *Id.* Latino/Chicano enrollment today remains low at the most selective campuses. For example, despite the significant increases in the number of Latino/Chicano high school graduates in California, Latino/Chicano enrollment at UC Berkeley remains below pre-Proposition 209 levels, at 12-13%. *Id.* This fact is all the more startling given the dramatic demographic shifts that have occurred in the State over the past decades. For example, the percentage of Latino high school graduates has nearly doubled over the past two decades, from 23% in 1990 to 44% in 2010. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 27-28 (2012), <http://ssrn.com/abstract=2123653> (“Kidder 2012”). Yet, despite making up almost half of all high school graduates in California, Latino students comprise less than one-fourth of UC incoming freshmen and an even smaller portion of enrollees at the more selective UC campuses.⁶

⁶ *Amici* note California’s demographic trends not to suggest that UC enrollment must mirror the state’s diversity in lockstep, but rather to place the declines in Latino enrollment in context. Some of Petitioner’s *amici* “tend to obfuscate this

Often overlooked, American Indian enrollment also remains far below pre-Proposition 209 levels. California is home to a significant portion of the American Indian population; nearly 1 out of every 6 American Indians is a California resident. Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 27 CHICANO-LATINO L. REV. 29, 30 (2008). In 1995, UC Berkeley, UCLA, and UC Davis each enrolled American Indian students in far greater numbers than the years following Proposition 209 (56, 42, and 45 respectively).⁷ *Id.* By 2005, these numbers had decreased dramatically to 11 American Indian students at UC Berkeley, 17 at UCLA, and 18 students at UC Davis—a decline of 74% across the three schools. *Id.* As of 2010, American Indian enrollment at UC Berkeley and UCLA still remained almost 50% lower than pre-Proposition 209 levels. *University of California: Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, *supra* note 4, at 2, 5. All told, there were fewer American Indian freshmen in the UC system in each and every year under Proposition 209 (1998-2010) compared to 1995, even though the overall freshmen class rose from approximately 22,000 in 1995 to a peak of 34,500 in 2008. *Id.* at 1.

important demographic driver of enrollment change when touting Prop 209.” Kidder 2012, *supra*, at 27.

⁷ The year 1995 was the “peak” of American Indian enrollment prior to SP-1 and Proposition 209.

By any measure, prohibition of the consideration of race and ethnicity in UC admissions has resulted in a dramatic decline in the number of African American, Latino, and American Indian students at UC, a state of affairs that does not bode well for the system envisioned by Petitioner.⁸

B. Strictly Race-Neutral Policies Have Had a Particularly Negative Effect on Diversity at the University of California's Most Selective Schools.

A particularly disturbing effect of Proposition 209 has been its tendency to promote, as opposed to alleviate, the imbalance in enrollment among underrepresented minorities at different UC campuses, with declines in the number of African American, Latino, and American Indian students particularly pronounced at UC's most selective schools, UC Berkeley and UCLA.

The gap between the racial and ethnic composition of California high school graduates and

⁸ Similar trends have also become apparent in UC's professional schools. Immediately following the passage of Proposition 209, the number of African American applicants dropped dramatically at the most selective UC law schools. Kidder 2012, *supra*, at 25; DeVaudreuil, *supra* note 5, at 1197-1200. Between 1996 and 1998, African American applicants to Berkeley Law and UCLA School of Law dropped by over two-fifths, and significant drops occurred at UC Davis and UC Hastings as well. Kidder 2012, *supra*, at 25. Nearly fifteen years later, despite robust outreach efforts and increasingly diverse state demographics, applications by African Americans to UC law schools have remained below pre-Proposition 209 levels. *Id.*

the makeup of the UC Berkeley student body is now greater than every flagship state public university except five, all of which are located in the Deep South⁹ and have historical legacies of *de jure* segregation.¹⁰ Furthermore, those underrepresented minorities who are enrolled in the UC system are much more likely to attend less selective schools within the system, such as UC Riverside and UC Merced.¹¹ The disparity in student body composition between UC campuses increased dramatically following the implementation of Proposition 209, suggesting that despite increasing URM numbers across the university system, the UC system's race-neutral policies are resulting in a statewide university system that is becoming more imbalanced (and therefore also arguably more segregated).¹²

⁹ Education Trust, *Opportunity Adrift: Our Flagship Universities Are Straying from Their Public Mission* 18 (2010). The more segregated institutions are the University of Alabama, the University of Georgia, Louisiana State University and Agricultural & Mechanical College, the University of Mississippi Main Campus, and the University of South Carolina-Columbia. *Id.*

¹⁰ See, e.g., *Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962).

¹¹ UC Riverside only recently stopped being able to accept all eligible UC candidates, and UC Merced is able to admit all eligible applicants. Santos, *supra*, note 5. However, UC Merced is still several times smaller than any of the other eight UC general campuses.

¹² Kidder, *supra* note 5, at 1173; DeVaudreuil, *supra* note 5, at 1197-2000. See also Ryan Fortson, *Affirmative Action, the Bell Curve, and Law School Admissions*, 24 SEATTLE U. L. REV. 1087, 1114-16 (2000-2001) (discussing the decreasing numbers of applications and admission of students of color compared to the increase of applications from white students).

Moreover, this imbalance in enrollments in the UC system undermines the ability to achieve a truly diverse set of university students and thus the ability to train a set of leaders from every race and ethnicity in the community. As aptly noted by this Court in *Grutter*, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” 539 U.S. at 332. Yet in California, by allowing its university system to become so deeply segregated, the pathway for underrepresented minorities to become leaders in the community has become much more difficult. While the percentage of underrepresented minorities in the UC system overall has marginally increased since its low point immediately following Proposition 209 taking effect, those students are not benefiting from the prestige and networks available to graduates of the top state institutions. And for those who do attend the top schools, the *de minimis* representation of minority viewpoints that exists in the university fails to provide the “exposure to widely diverse people, cultures, ideas, and viewpoints” that this Court in *Grutter* recognized is necessary to develop “the skills needed in today’s increasingly global marketplace.” *Id.* at 330. Thus, it is not enough that underrepresented minorities merely be placed *somewhere* in the UC system to support the claim that the system overall is sufficiently diverse, when a closer look shows that underrepresented minorities are directed away from the most selective campuses where both they and their fellow students would benefit from a more diverse student body.

C. UC's Race-Neutral Policies Have Not Succeeded in Remediating the Adverse Effects of Proposition 209.

Significant declines in the number of African American, Latino, and American Indian students occurred in the UC system despite the implementation of a number of race-neutral policies aimed at maintaining diversity. *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies*, *supra* note 2, at 2. For example, the Eligibility in the Local Context program guaranteed California students from the top 4% of their high schools admission to a UC school. *Id.* at 10. In addition, the Dual Admissions Program allowed top-performing high school students to gain eligibility to the UC system by first attending a community college. *Id.* at 12. A third program implemented Comprehensive Review for freshman applicants, offering a holistic evaluation of students on a wide range of criteria. *Id.* at 12-13. The University of California also expanded its outreach programs targeting students from low-income families, from families with little or no previous higher education experience, and from educationally disadvantaged schools. *Id.* at 23-25.

Despite a concerted effort to offer several pathways to college, UC's programs—those of one of the largest state university systems in the country, operating under the strict race-neutral regime of Proposition 209—did not have an appreciable impact on campus diversity. Admissions of educationally disadvantaged students increased little under Eligibility in the Local Context because “virtually all

of these students achieved at a level that made them UC-eligible” without the program. *Id.* at 25 (emphasis omitted). And the Dual Admissions Program led to only slight increases in the number of URM students transferring to the UC system, raising the proportion just 0.6%, from 18.6% to 19.2% of all transferees, from 1995 to 2002. *Id.* at 26.

The experience of UC in seeking to maintain access for low-income students is particularly revealing. While critics of race-conscious admissions policies suggest that socioeconomic considerations could result in greater campus diversity, data from UC does not support this theory. By all available measures, UC enrolls low-income students at rates that far outstrip most private universities and comparable public universities. Over 30% of UC undergraduates in recent years qualified as “low income” under the federal Pell Grant standard; this is twice as many low-income students as peer members of the Association of American Universities. See Univ. of Cal., *2011 Accountability Report, Undergraduate Pell Grant Recipients, UC and Comparison Institutions, 2008-09*, <http://universityofcalifornia.edu/accountability/index/3.5.1>. These numbers are in part a result of UC’s provision of generous “gift aid” (grants and scholarships) on the basis of need, again at levels far higher than its peer institutions. See Univ. of Cal., *2011 Accountability Report, Per Capita Gift Aid for New Freshmen, UC Campuses and Public AAU Institutions, 2008-09*, <http://universityofcalifornia.edu/accountability/index/3.4>.

Yet even with such significant steps to attract low-income students, UC's most elite campuses remain unable to attract meaningful proportions of URM students. Kidder 2012, *supra*, at 49. While higher percentages of URMs admitted to UC are from low-income families, *id.* at 48-49, this has not translated to appreciably greater levels of campus diversity. *See id.* at 49 (“[I]s UC’s set of comparatively optimal conditions for enrollment of low-income students enough to offset race-specific barriers associated with Prop 209? The answer, unfortunately, is that it cannot.”). In fact, given the extent of UC’s measures to attract low-income students, “the UC experience approximates an upper-bound limit on the extent to which an ensemble of class-based efforts can have as a byproduct a racially diverse undergraduate student body in the face of an affirmative action ban.” *Id.*

Though both the UC and UT systems have engaged in considerable race-neutral efforts in their admissions programs, this Court requires only that universities give “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Grutter*, 539 U.S. at 339. By the time the Court promulgated this standard, the UC system was already several years into its Proposition 209-mandated experiment with workable race-neutral approaches—and they were not working. Similarly, the University of Texas, in the wake of *Grutter*, experimented with its Top 10% Law, and only after a lengthy good-faith effort did it make the carefully deliberated decision to supplement that effort and begin to consider race as one of many competing factors.

Nearly a decade after *Grutter*, the good-faith efforts in the UC and UT systems and their results severely undermine Petitioner's position, and the Court should reject the notion that further experimentation would somehow yield a different result. As California's experience under Proposition 209 demonstrates, race-neutral policies alone are insufficient to sustain, and, in fact, severely hinder efforts to achieve a diverse student body. The results of California's "experiment" demonstrate that a race-neutral mandate like Proposition 209 produces constitutional injury, instead of a constitutional solution.

D. The California Experience Under Proposition 209 Provides Further Evidence that Increased Campus Diversity Helps Promote a Positive Learning Environment and that Lack of Diversity Deters Highly Qualified Students from Enrolling.

Data that is now available from UC and elsewhere around the country demonstrates the many and varied negative effects that flow from a lack of diversity. Studies at UC and peer institutions show that, beyond mere numbers, increased underrepresented minority enrollment leads to a better racial climate and draws highly qualified applicants to campuses. The flipside, as experienced by UC in the wake of Proposition 209, is a decrease in racial tolerance on campuses and an increase in the flight of highly qualified underrepresented minority candidates to more diverse private institutions.

1. Data from the University of California and Other Institutions Indicates that Increased Diversity Creates a Healthy Racial Climate.

Among the benefits of a diverse college campus is a more racially tolerant climate. Extensive literature illustrates the importance of a healthy racial climate on campus and the negative effects that affirmative action bans have had on minority students. See, e.g., Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198-99 (2010) (finding that minority students at schools that banned affirmative action encountered more hostility and felt more internal and external stigma than minority students at schools with affirmative action); Victor B. Saenz et al., *Factors Influencing Position Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1, 36 (2007) (finding that the presence of diverse peers helps enhance students' democratic skills and ability to negotiate differences); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529, 530 (2004) (finding that cross-racial interaction has positive effects on students' intellectual, social and civic development); Sidanius, et al., *supra* note 3, at 196-97 (noting that a landmark social sciences study of UCLA students who enrolled in the fall of 1997, who were evaluated through their graduation four to five years later, reflected that "students who had more interethnic friends and dates in college were less biased in favor

of their ingroup and less anxious interacting with members of different ethnic groups at the end of college”; moreover, “[t]hese effects hold even when controlling for other factors that make people more likely to have positive ethnic attitudes at the end of college (such as having positive ethnic attitudes at the beginning of college and having more interethnic contact prior to college entry”).

Data from UC and other institutions further demonstrates the need for a diverse student body to ensure a racially tolerant learning environment. For example, across the UC system, only 62.2% of African American students and 77.2% of Latinos reported feeling that students of their race are respected on campus. Kidder 2012, *supra*, at 6.¹³ By comparison, 72.3% of African American and 89.9% of Latino students at UT Austin reported feeling respected on campus. *Id.* Another university, which employs affirmative action, reports higher levels of African American and Latino students feeling respected, 75 and 79.6% respectively, compared to UC. *Id.*

Furthermore, studies show that affirmative action bans lead to increased negative experiences for minority students. For example, a study by Deirdre Bowen found that students attending

¹³ UC data is based on student responses to the University of California Undergraduate Experience Survey (UCUES). UT Austin and the second university data are based on student responses to the Student Experience in Research University survey (SERU). UCUES and SERU are identical surveys administered to all undergraduates. Kidder 2012, *supra*, at 4-5 & n.12.

schools with affirmative action bans were nearly twice as likely to experience overt racism compared to students who attended schools that permitted affirmative action. Bowen, *supra*, at 1221. Moreover, Bowen found that students in more diverse classrooms were “least likely to: (1) encounter overt racism from faculty and students; (2) have their qualifications questioned; (3) feel pressure to succeed because of race; and (4) feel faculty have lower expectations of them.” *Id.* at 1243. These same students were also “most likely to: (1) believe that neither faculty nor students thought minority students got into college because of affirmative action; (2) say they fit into the college population . . . ; (3) rate their ability to succeed as high; and (4) feel encouraged to speak about their career aspirations.” *Id.*

2. Data Indicates that Highly Qualified URM Applicants Reject the University of California in Favor of Private Universities with Affirmative Action.

Data further indicates that Proposition 209 has had a strong “chilling” effect on URM enrollment with highly qualified URM applicants spurning the University of California to go elsewhere. URM students in the top third¹⁴ of the University of

¹⁴ Top third refers to students offered admission to the University of California possessing academic credentials among the top one-third of all students offered admission to the UC system. This top third of students will have the best enrollment choices within the UC system and at other

California's freshman admits are increasingly more likely than non-URM students to choose a private selective university over a UC school. Kidder 2012, *supra*, at 20. In 2008, 34.4% of URM students in that cohort opted to attend a selective private university compared to 18.9% of non-URM admits—a 15.5 percentage point difference. *Id.* This is a dramatic increase from 1998 when 16.3% of URM students in the top third of the admit pool decided to attend a selective private school. *Id.* Even among students in the middle third of UC's freshman admit pool, URM admits are more likely, albeit less than their top-third peers, to decline a UC offer in favor of a selective private institution than non-URM admits. *Id.*

In particular, the “no show” rate is noticeably high for highly qualified African American students. Over half of African American admits in the top third of UC's 2005 freshman admit pool chose to attend a private selective university while only 26.1% of African American admits in this same group opted to attend a UC school. Susan A. 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, 63, 72 (Eric Grodsky & Michal Kurlaender eds., 2010).¹⁵ Overall, during a decade under Proposition 209,

institutions such as elite private universities. Kidder 2012, *supra*, at 12.

¹⁵ Of the remaining 25%, 1.9% enrolled in California State University and 3.8% enrolled in a private non-selective university. For 17.5% of the admits, their college destination was unknown. *Id.* at 72.

African Americans in the top third of the admit pool were twice as likely as UC admits overall to enroll at a private selective institution with affirmative action. Kidder 2012, *supra*, at 17-18. In fact, since Proposition 209, among UC Berkeley, UC Davis, UC San Diego, and UC Santa Barbara, there were twelve instances where *not a single one* of the African Americans in the top third of the admit pool enrolled at those campuses. *Id.* at 15.

As the State of California's efforts to train a diverse group of leaders continues to suffer, "private selective institutions have been the main beneficiary of UC's loss of top underrepresented minority admits" after Proposition 209. Saul Geiser & Kyra Caspary, "*No Show*" Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002, 2 EDUC. POL. 396, 400-01 (2005). In fact, almost half of the African American admits who declined a UC offer in 2005 enrolled at Stanford University, Harvard University, University of Southern California, or New York University. Wilbur, *supra*, at 75. The loss of these top URM admits, many of whom will go on to become the next generation of leaders, weakens UC's position as a prestigious public university that is able to prepare its students for the complexities of "today's increasingly global marketplace." *Grutter*, 539 U.S. at 330.

As the data demonstrates, highly qualified underrepresented minority admits spurned UC admission offers in greater proportions after Proposition 209. Importantly, these highly qualified students opted to attend selective private

universities with affirmative action policies—the very institutions Petitioner’s and other *amici* contend URM students shun to avoid the “stigma” of affirmative action. *See, e.g.*, Br. Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party 29.

“[N]umerous studies show that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” *Grutter*, 539 U.S. at 330 (internal quotation marks omitted). And, as noted above, campus diversity also correlates with a more racially tolerant climate. California’s experience under Proposition 209 indicates that minority students are keenly aware of these benefits and have been “voting with their feet” in rejecting UC offers of admissions in favor of more diverse institutions. *See* Robert T. Teranishi & Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. NEGRO EDUC. 15, 23 (2008) (finding that after Proposition 209 African American high school students in California felt unwelcome at the University of California and responded by altering their college search process to include campuses perceived to be “more welcoming and non-threatening”). In fact, the UC Regents specifically recognized this chilling effect when they rescinded SP-1 (the precursor to Proposition 209) in 2001, citing the fact that the resolution caused some “individuals [to] perceive that the University does not welcome their enrollment at its campuses.” *Future Admissions, Employment, and Contracting Policies—Resolution Rescinding SP-1 and SP-2*,

supra note 3, at 1. This brain drain affects not only the remaining students who do enroll at UC, but also the State as a whole, as many of these highly qualified individuals leave California in favor of more hospitable out-of-state institutions. Indeed, as one underrepresented minority graduate of UC Berkeley who was admitted prior to Proposition 209 reflected, Berkeley can “survive but not thrive without diversity.”¹⁶

E. The California Experience Under Proposition 209 Shows that Race-Neutral Policies Do Not Lead to Better Outcomes for URM Students.

Proposition 209 has not led to improved outcomes for URM students, as claimed by some of Petitioner’s *amici*. To the contrary, University of California data indicates that Proposition 209 may have actually retarded URM achievement. For example, Petitioner’s *amici* point to improved retention and graduation rates of URMs following Proposition 209, as if to imply a causal link. Yet research shows sharp increases between 1994 and 1997, the period before Proposition 209 took effect, in the two-year persistence rates¹⁷ of URM students

¹⁶ Grace Carroll et al., *Those Who Got in the Door: The University of California-Berkeley’s Affirmative Action Success Story*, 69 J. NEGRO EDUC. 128, 140 (2000) (qualitative study of African American, Chicano/Latino, and Filipino students at UC Berkeley in the 1980s and 1990s).

¹⁷ “Persistence rate” is the percentage of students who continue in school over a given period of time. Thus, two-year persistence rate is the percentage of students who continue in school over the course of two years.

system-wide and URM students at “elite” schools. Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994-2008*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA’S PROPOSITION 209, 83, 97 (Eric Grodsky & Michal Kurlaender eds., 2010). However, after Proposition 209 took effect, from 1998 to 2007, the two-year persistence rate for URM students at UC Berkeley and UCLA continued to increase but at a slower rate. *Id.* By contrast, the two-year persistence rate for URM students system-wide plateaued for several years and then declined after Proposition 209. *Id.*

Similarly, the six-year graduation rate¹⁸ for both URM students system-wide and at UC Berkeley and UCLA increased significantly from 1994 to 1997. *Id.* at 98. The graduation rates for both URM groups continued to rise from 1998 to 2003, after Proposition 209 took effect, but at a slower rate. *Id.* In fact, “about two-thirds of the [URM student] graduation rate improvement occurred *before*” Proposition 209 went into effect. *Id.* at 99 (emphasis added).

While it is impossible to say whether URM retention and graduation rates would have continued to improve at the same rate but for Proposition 209, this data refutes the notion that race-neutral admissions policies led to dramatic

¹⁸ “Graduation rate” refers to the percentage of students who graduate within a given period of time. Hence, a six-year graduate rate is the percentage of students who graduate within six years.

improvement in URM graduation and retention rates. Indeed, “[a] longer view shows that Proposition 209 added little to the momentum URM students already had going back at least to 1995.” *Id.* at 99.

Similarly, some of Petitioner’s and other *amici* suggest that race-neutral approaches actually benefit URMs because URMs are better “matched” to less selective institutions. *See, e.g.*, Br. Amici Curiae for Sander & Taylor 5. However, numerous studies have found that URM students graduate at higher rates when they attend selective institutions. *See, e.g.*, Sigal Alon & Marta Tienda, *Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294, 309 (2005) (rebutting the “mismatch” hypothesis by finding that minorities’ likelihood of graduation increased as selectivity of institution attended rose); Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 RES. HIGHER EDUC. 214, 217 (2008) (finding that minority students who were admitted to highly selective institutions under affirmative action policies were more likely to graduate). Notably, a study by Mario Small and Christopher Winship found that selectivity of college was the *only* factor that had a statistically significant effect on African American graduation rates. Mario L. Small & Christopher Winship, *Black Students’ Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 SOC. SCI. RES. 1257, 1272 (2007). Small and Winship determined that not only did selectivity increase the

probability of graduation for African American students, it helped African American students more than white students. *Id.*

Ultimately, higher graduation rates of URM students from selective institutions lead to higher returns in the labor market. A study by Mark C. Long looking at cohorts of students from the 1970s to the 1990s found “increasing labor market returns to both years of education and college quality.” Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 *ECON. EDUC. REV.* 338, 346 (2010). Attending a higher quality college increases the likelihood of graduating and increases earning power, particularly among African Americans and Latinos. *Id.* It follows that an admissions system that prohibits the consideration of race and ethnicity—like that in the University of California—leads to harms far beyond a less diverse campus, with the student body, the community, and the State’s economy also bearing the brunt of such policies.

F. Data from the California Experience Under Proposition 209 Supports the University of Texas’ Conclusion that Race-Conscious Measures Are a Necessary Supplement If Diversity Is to Be Achieved.

The race-neutral policies that the University of California implemented in the wake of Proposition 209 in significant ways mirror those that the University of Texas has tried. The results in California, as outlined above, strongly support UT’s

conclusion that race-conscious measures are a necessary supplement if campus diversity is to be achieved.

Following the Fifth Circuit Court of Appeal's decision in *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996), which banned affirmative action programs until this Court's decision in *Grutter*, UT implemented three race neutral programs "to achieve racial and ethnic diversity:" the Texas "Top 10% Law," holistic evaluation of individual applications, and the Longhorn Opportunity Scholarships program,¹⁹ the latter of which awarded scholarships to students in economically disadvantaged and underserved communities. The Top 10% Law, which is somewhat analogous to UC's Eligibility in the Local Context program, guarantees the top 10% of each Texas high school class admission to a Texas state-funded university.

As the UC system experienced after Proposition 209, race-neutral measures at UT failed to compensate for the student body diversity lost after the ban on affirmative action. UT Austin noted that with the implementation of holistic review for freshman applications, African American and Latino freshmen declined in numbers and percentages. UT Proposal at 30. Although the Top 10% Law increased Latino student enrollment at UT Austin, African American student enrollment remained below the number prior to *Hopwood*, only increasing

¹⁹ University of Texas at Austin, *Proposal to Consider Race and Ethnicity in Admissions* 23 (2004), http://www.utexas.edu/student/admissions/about/admission_proposal.pdf (the "UT Proposal").

by nine students the year the law took effect. *Id.* Finally, while the Longhorn Opportunity Scholarships program did contribute somewhat to diversity at UT Austin, the increase in actual numbers of minorities was achieved by enlarging the entering class size, which the University noted was unsustainable because it was “already the largest single-campus institution of higher education in the United States.” *Id.* at 31-32. Despite these efforts to compensate for the ban on race-conscious measures, UT still had more classrooms with no or only one African American or Latino student in the Fall of 2002 than there had been in the Fall of 1996. *Id.* at 33.

After the Court’s 2003 decision in *Grutter*, abrogating *Hopwood*, UT implemented a policy intended to comply with *Grutter* while allowing UT to continue to prepare a diverse set of leaders,²⁰ based in part on UT’s concern that “racial and ethnic minority group members continue to be underrepresented in many of the occupations that require a college degree.”²¹ Proponents of the new race-conscious measures noted that “[t]he use of race-neutral policies and programs [following the *Hopwood* decision] has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin.” UT Proposal at 25.

The University of Texas has far surpassed the standard set by the University of Michigan Law School in *Grutter* in terms of its serious good-faith

²⁰ UT Proposal at 1.

²¹ *Id.*

consideration of workable race-neutral alternatives. For five years, the University of Texas implemented a race-neutral percentage plan before coming to the reasoned and research-supported conclusion that this program could not produce the levels of diversity necessary to achieve educational benefits.²² Following this Court's 2003 decision in *Grutter*, the University of Texas made the considered determination that the Top 10% Law, while making significant progress, could not produce campus diversity without being supplemented by a race-conscious program allowing for individualized evaluations. The University of Texas has amply demonstrated its effort to use race-neutral alternatives without resorting to race-conscious evaluations. Upon determining that race-conscious measures were necessary, UT left the Top 10% Law in place and simply added a race-conscious supplement.

California's experience under Proposition 209 offers further confirmation that UT's assessment was correct: that limited race-conscious measures are a necessary supplement to further the compelling interest in creating a diverse student body.

CONCLUSION

Equal protection is not synonymous with neutrality. The empirical evidence presented here

²² The State of Texas established the race-neutral "Top 10%" Law that went into effect in 1998. By 2003, the program was well-established and considerable empirical evidence regarding its successes and failures were available.

reflects not only that race-neutral policies fail to produce a diverse student body, but in fact have a negative effect on enrollment of underrepresented minorities while undermining the learning environment for those students who remain.

Though the Court in *Grutter* required only good-faith consideration of race-neutral alternatives in pursuit of a diverse student body, the University of California, by virtue of Proposition 209, was already and continues to be engaged in efforts that far exceed good faith, yet those efforts are simply not enough. Good faith would not require a menu of plans and pathways and exhaustive research, but of necessity that is precisely what the University of California has done. Neither the Petitioner nor this Court need speculate as to what a state university system would look like under the Petitioner's ideal. Based on the University of California example, the Petitioner and the Court can reasonably anticipate a university system that is more segregated, where pathways to leadership for underrepresented minorities are severely narrowed, and where racial isolation and hostility are more prevalent.

Taken together, the data and the policy implications that can be derived from the University of California's experience under Proposition 209 demonstrate that racial and ethnic diversity are necessary components of a thoughtful admissions plan. *Amici* urge the Court to once again look to the University of California to understand the limits of relying upon good-faith race-neutral efforts alone and to reject Petitioner's efforts to potentially impose those failed restrictions throughout the land.

Respectfully submitted,

Kimberly Thomas Rapp
Oren Sellstrom
Cecilia Chen
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
131 Steuart Street
Suite 400
San Francisco, CA 94105
(415) 543-9697

Monte Cooper
Counsel of Record
Robert Rosenfeld
David S. Keenan
Nicholas Lenning
Jason Wu
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 514-7400
mcooper@orrick.com

Counsel for Amici Curiae

APPENDIX

Organization Name	Organization Mission
Asian Pacific American Law Journal, UCLA	The Asian Pacific American Law Journal (APALJ) focuses exclusively on the legal, social and political issues affecting Asian Pacific American communities. APALJ plays an important role by providing a forum for legal scholars, practitioners and students to communicate about emerging concerns and by disseminating these writings to the general population. We work hard to reach out to the community and initiate discourse on APA issues. APALJ members are involved in the entire journal publication process including selection, substantive editing, and cite-checking of all articles and comments. In addition to publishing law journals, APALJ hosts symposiums and live-speaker series.
Berkeley Journal of African-American Law and Policy, UC Berkeley	<i>BJALP</i> is dedicated to addressing legal and policy issues that affect the African-American community and people of color in general. <i>BJALP</i> deals with such matters as constitutional law, criminal

App. 2

Organization Name	Organization Mission
	justice, civil rights, African-American participation in the political process, the death penalty, fair housing, economic development in the African-American community, African and Caribbean immigration to the United States, health issues that affect African Americans, as well as issues affecting Africa and the African Diaspora.
Berkeley Journal of Gender, Law & Justice, UC Berkeley	The <i>Berkeley Journal of Gender, Law & Justice</i> , a continuation of <i>Berkeley Women's Law Journal</i> , was founded in 1984 by a group of students at the University of California, Berkeley School of Law who came together with a vision of "preserving our voices of diversity and maintaining our commitment to social change within the often-stifling confines of a law school environment."
Berkeley Law Foundation - Student Leadership Team, UC Berkeley	The Berkeley Law Foundation (BLF) is an income-sharing organization comprised of Boalt students and alumni who are dedicated to providing legal services to historically underserved communities. Started in 1976 by Boalt students, BLF was

Organization Name	Organization Mission
	<p>the first organization of its kind in the nation.</p> <p>The BLF's primary goal is funding public interest law through summer fellowships for current Boalt students and year-long fellowships for law graduates and new attorneys from around the country. Our grants enable the recipients to work on innovative and critical projects that provide desperately needed legal services to communities all around the nation.</p> <p>Besides providing crucial funding for legal services, BLF works to ensure diversity in legal education and the profession. To this end, BLF created the Phoenix Fellowship, which provides several outstanding Boalt students of color funding to do public interest legal work.</p>
<p>Black Law Students Association, UC Davis</p>	<p>UC Davis BLSA is dedicated to increasing the number of lawyers to serve the unique problems and needs of the Black community.</p> <p>UC Davis BLSA works to recruit and retain the number of Black law students at King Hall; to</p>

App. 4

Organization Name	Organization Mission
	<p>encourage and foster professional competence; and to create a positive force of change within our community.</p> <p>To fulfill these goals, UC Davis BLSA sponsors several programs and outreach events. We work in conjunction with various student groups, the King Hall Outreach Office, and professional organizations to create a supportive community for students of color at King Hall.</p>
<p>Black Law Students Association, UC Hastings</p>	<p>To articulate and promote the professional needs and goals of Black law students; to foster and encourage professional competence; to provide an environment which will promote unity and camaraderie; to bring about change within the legal system in order to make it responsive to the needs of the Black community; to create and maintain active relationships between BLSA and the larger law student community; and to cultivate relationships with Black law students and Black attorneys.</p>
<p>Boalt Hall Student</p>	<p>The Boalt Hall Student Association (BHSA), the law</p>

App. 5

Organization Name	Organization Mission
Association, UC Berkeley	<p>school's student government organization, is composed of all registered law students. BHSA organizes activities of general law school interest and helps new students adjust to life at Boalt Hall by sponsoring social, athletic and law-related events. The BHSA council represents student interests in curriculum planning, admissions policy, faculty hiring, administration of the library, professional placement, and many other areas; the council also appoints student representatives to faculty-student committees. In addition, BHSA allocates funds to each of the student groups at Boalt Hall.</p>
Chicana/o Latina/o Law Review, UCLA	<p>Over the last 30 years, the Chicana/o-Latina/o Law Review (CLLR) has provided an essential forum for the discussion of central issues affecting the Latino community that "mainstream" law journals continue to ignore. In publishing Volume One, the Review introduced to the nation the first legal journal that recognized how common law, statutes, legislative</p>

Organization Name	Organization Mission
	<p>policy, and politically popular propositions impact the Latino community. Since 1972, the Review has established a reputation for publishing strong scholarly work on affirmative action and education, Spanish and Mexican land grants, environmental justice, language rights, and immigration reform. The United States Court of Appeals for the Ninth Circuit, United States District Court for the Middle District of Pennsylvania, Nevada Supreme Court and New Jersey Superior Court have cited the Review as persuasive authority.</p>
<p>Coalition for Diversity at UC Davis School of Law</p>	<p>The Coalition for Diversity exists to increase the numbers of traditionally underrepresented students at King Hall through recruitment efforts that include pre-law workshops, mentorship programs, and admitted student receptions. The Coalition also works towards retention by collaborating with student groups and administration in creating a diversity-friendly environment where all identities are valued and able to develop.</p>

App. 7

Organization Name	Organization Mission
	<p>Our overall mission is to create an atmosphere of solidarity at King Hall in a way that improves the quality of education and diversity of the legal field. All are welcome to join.</p>
<p>Diversity Action Committee, Student Body Association of UCLA School of Law</p>	<p>The Diversity Action Committee (DAC) will be responsible for actively identifying diversity-related issues, problems, or concerns affecting the UCLA Law School Community, and the broader UCLA community, and developing action plans, implementing strategies or interventions to resolve such problems, issues, or concerns, and to inform and educate the UCLAW community. For the purposes of this section, “diversity-related issues, problems, or concerns” means any issues, problems, or concerns that arise from conditions affecting historically under-represented groups, including, but not limited to discrimination, oppression, malice, mistreatment, disproportional treatment, and/or hostility towards any member of the UCLA Law School Community,</p>

App. 8

Organization Name	Organization Mission
	<p>whether intentional or unintentional, that affects race, gender, disability, creed, religion, national origin, sexual orientation, familial status or political affiliation. Because diversity-related issues, problems, and concerns are often the result of institutional, structural and systemic realities, rather than intentional actions, this definition is in no way intended to limit the scope of “diversity-related issues, problems, or concerns” to those that are the direct result of intentional discrimination, mistreatment, or other expression of animus. Nor is this definition intended to be exclusive of other issues, problems, or concerns which are deemed by the DAC, the SBA Representative Council, the SBA Executive Board, other members of the Law School Community to require the attention of the DAC. (From the SBA Bylaws.)</p>
<p>Education & Law Society at UCLA</p>	<p>The mission of the Education and Law Society (Ed Law) is to strengthen UCLA Law students’ commitment to achieving</p>

App. 9

Organization Name	Organization Mission
	<p>educational equity by providing: (1) resources for coursework, advocacy, research, and careers related to education and the law; (2) forums for discussing educational issues with legal practitioners, professors, and colleagues; and (3) volunteer opportunities that directly impact students in underserved areas.</p>
<p>Filipino Law Students Association, UC Davis</p>	<p>The purpose of the Filipino Law Students Association is to educate the Law School community and UC Davis about legal issues affecting Filipinos and Filipino Americans.</p>
<p>Hastings Race and Poverty Law Journal, UC Hastings</p>	<p>The <i>Hastings Race and Poverty Law Journal</i> is committed to promoting and inspiring discourse in the legal community regarding issues of race, poverty, social justice, and the law. This Journal is committed to addressing disparities in the legal system. We will create an avenue for compelling dialogue on the subject of the growing marginalization of racial minorities and the economically disadvantaged. It is our hope that the legal theories addressed</p>

Organization Name	Organization Mission
	<p>in this Journal will prove useful in remedying the structural inequalities facing our communities.</p>
<p>La Raza Law Students Association, UC Berkeley</p>	<p>La Raza Law Students Association seeks to empower Latina/o students. By studying law with <i>conocimiento</i>, we learn how to shape the law to enhance our diverse communities' cultural, economic, political, social, and spiritual vitality.</p> <p>La Raza Law Students Association facilitates members' diverse legal interests by maintaining an inclusive environment where members can engage deeply their studies and each other. We develop and enact projects that provide opportunities for members to develop their leadership abilities and to serve local Latina/o communities like the Fruitvale District in Oakland.</p> <p>Drawing upon <i>el poder de la comunidad</i>, La Raza Law Students Association manifests solidarity with other progressive individuals and organizations who seek to transform social conditions in the United States y</p>

Organization Name	Organization Mission
	<p>el mundo. Together we realize the bright hope de la humanidad. Por La Raza habla el espiritu.</p>
<p>La Raza Law Students Association, UC Hastings</p>	<p>La Raza is an inter-ethnic, multi-cultural law student organization dedicated to promoting diversity in the classroom and the legal profession. Though individually we have different backgrounds and perspectives, collectively we share the same vision of success for Latin@s in the legal community.</p>
<p>La Raza Law Students Association, UCLA</p>	<p>La Raza's primary focus is to recruit, support, and graduate Raza students. We advocate for training that prepares students to meet the needs of the legally underserved, particularly in the Latino/a community.</p> <p>La Raza provides academic support for Raza students, serves as an organizing force around Raza political issues, and creates a social atmosphere that promotes Raza culture and experience.</p>
<p>Lambda Law Students Association, UC</p>	<p>The King Hall Lambda Law Students Association is composed of lesbian, gay, bisexual, transgender (LGBT) and allied</p>

Organization Name	Organization Mission
Davis	<p>students, faculty and staff at King Hall. Lambda’s mission is community, education and activism. To that end, Lambda sponsors events that raise awareness of LGBT legal issues on campus and in the community. The group also provides a supportive space for LGBT students at King Hall through academic and professional support programs and a variety of social opportunities. Lambda additionally strives to attract and retain LGBT law students.</p>
<p>Law Students of African Descent, UC Berkeley</p>	<p>Finding its roots in the African American Association of the early 1960s, Law Students of African Descent (LSAD) is now at the heart of the Black community at Berkeley School of Law. The purpose of the organization is to articulate and promote the needs of Black law students at Boalt.</p> <p>With this purpose in mind, our mission is threefold:</p> <p>(1) To facilitate the successful completion of the Juris Doctor program at Boalt Hall for every</p>

Organization Name	Organization Mission
	<p>Black student at Boalt;</p> <p>(2) To solidify LSAD's place in Boalt Hall as an institution; and</p> <p>(3) To promote LSAD's influence and social responsibility through conscious advocacy and community outreach.</p> <p>In the wake of Proposition 209, LSAD actively participates in the recruitment and retention of Black law students.</p> <p>Additionally, as an active member of the National Black Law Students Association, LSAD is committed to forming lasting relationships with its Black alumni, members of the Black legal community, and the Black community as a whole.</p>
<p>Middle Eastern Law Students Association, UC Hastings</p>	<p>To facilitate awareness of Middle Eastern issues and promote the interests of Middle Eastern law students.</p>
<p>Men of Color Alliance, UC Berkeley</p>	<p>The Men of Color Alliance (MOCA) provides a supportive space for African American, Asian & Pacific Islander American, Latino, Native American, and other people who identify as men of color at</p>

Organization Name	Organization Mission
	<p>Berkeley Law. Through cultural, social, professional, educational and/or community service programs, MOCA will create a community to support these men of color, thereby enriching their educational experience at Berkeley Law School.</p> <p>The organization aims to provide a community for men of color to matriculate into and succeed at Berkeley Law. MOCA also serves as a support and mentorship network, linking current students to each other and to Berkeley Law alumni.</p>
<p>National Lawyers' Guild - Berkeley Law Chapter</p>	<p>The National Lawyers Guild is an organization dedicated to uniting lawyers and legal workers in the fight for civil rights and social justice. Guild attorneys, law students, legal workers, and jailhouse lawyers share a progressive social and political perspective that is reflected in the preamble to the Guild's constitution, which holds that human rights are more sacred than property rights.</p>
<p>National Lawyers' Guild – UCLA School of</p>	<p>The National Lawyers Guild is an organization dedicated to uniting lawyers and legal</p>

Organization Name	Organization Mission
Law Chapter	workers in the fight for civil rights and social justice. Guild attorneys, law students, legal workers, and jailhouse lawyers share a progressive social and political perspective that is reflected in the preamble to the Guild's constitution, which holds that human rights are more sacred than property rights.
Native American Law Students Association, UC Hastings	To provide students with opportunities to learn about Native American affairs; to promote awareness to Native American culture; to provide supportive resources for members' participation in cultural and community related activities; to make professional connections within these fields; and to bring together students who share similar interests and goals.
Pilipino American Law Society, UC Hastings	To address legal and social issues relevant to the Pilipino-American community. We welcome all individuals, regardless of ethnic background, who are interested in Pilipino-American issues and increasing cultural diversity in the legal profession.

Organization Name	Organization Mission
<p>RAZA Recruitment and Retention Center, UCLA</p>	<p>Since its establishment in 1976, in conjunction with the efforts and dedication of student volunteers and interns, the RAZA Recruitment and Retention Center continues its mission of proactively increasing the status of the Raza community professionally, socially, and politically, both on and off campus.</p>
<p>Students for Economic and Environmental Justice, UC Berkeley</p>	<p>Law Students for Environmental & Economic Justice (SEEJ) is dedicated to the just distribution of environmental benefits to, and the amelioration of environmental harms concentrated in, communities of color and low-income communities. We are committed to the strategic use of legal tools to strengthen grassroots organizing and to build community power.</p>
<p>Students Helping Assure Racial Equity, Justice and Diversity (S.H.A.R.E.J.D.)</p>	<p>Students Helping Assure Racial Equity, Justice & Diversity, S.H.A.R.E. J.D., is a coalition of student groups dedicated to increasing diversity at the UCLA School of Law. As part of our efforts we are collecting testimonials from affected</p>

Organization Name	Organization Mission
	<p>individuals detailing their experiences at the law school. We are particularly interested in comments you have heard, how you have been perceived, the degree to which you felt a part of the community, and your general experiences at UCLA School of Law.</p>
<p>Women of Color Collective, UC Berkeley</p>	<p>The Women of Color Collective (WOCC) provides a supportive space for African American, Asian & Pacific Islander American, Latina, Native American, and other women and trans people of color at Berkeley Law.</p> <p>Through cultural, social, professional, educational and community service programs, the WOCC will advance the needs of women and trans people of color, thereby enriching the educational experience at Berkeley Law.</p>