

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 *AMICUS CURIAE* OF THE PRESIDENT
AND CHANCELLORS OF THE UNIVERSITY OF
CALIFORNIA IN SUPPORT OF RESPONDENTS**

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The President and Chancellors of the University of California (“UC Amici”) respectfully submit this brief *amicus curiae* in support of the Respondent, the University of Texas at Austin (“UT”).¹ UC Amici urge this Court to conclude that the UT’s undergraduate admissions policy is narrowly tailored to achieving the important educational objective of student body diversity and is not precluded by this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The University of California (“UC”) is the largest highly selective institution of higher education in the nation. It consists of ten campuses located throughout California with numerous undergraduate, graduate and professional schools and programs. In Fall 2011, UC had a total undergraduate and graduate enrollment of over 235,000 students. UC is governed by The Regents of the University of California and led by the President of the University, Mark G. Yudof, and the Chancellors of its campuses. The President and Chancellors join this brief as *amici curiae*.²

1. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs, in support of either party or of neither party, have been filed with the Clerk of the Court.

2. The names of the Chancellors joining this brief are listed in the appendix.

UC has a longstanding commitment to the educational and societal benefits that flow from a diverse student body. “Mindful of its mission as a public institution, the University of California has an historic commitment to provide places within the University for all eligible applicants who are residents of California. UC 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 talent, and that encompasses the broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California.”³

Since this Court’s landmark decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the University of California’s policies and practices have played a central role in the national debate concerning the admission of underrepresented minority students to public universities. In 1996, California became the first State in the nation to amend its state constitution to explicitly prohibit race-conscious measures in college admissions. This Court explicitly acknowledged the importance of such laws in *Grutter*, where it observed that “[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches,” and suggested that universities in other states “can and should draw on the most promising aspects of these race-neutral alternatives as they develop.”

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

539 U.S. at 342; *cf. United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[T]he States may perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear”). The University of California’s experience over the last decade and a half under a constitutional prohibition against race-conscious admissions policies sheds important light on the practical, real-world obstacles faced by universities seeking to “obtain[] the educational benefits that flow from a diverse student body.” *Grutter*, 539 U.S. at 343.

SUMMARY OF ARGUMENT

In November 1996, California became the first state in the nation to explicitly prohibit affirmative action in college admissions.⁴ In that year, the California voters enacted Article I, Section 31 of the state Constitution, widely known as Proposition 209, which provides that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” CAL. CONST. art. I, § 31(a).

Proposition 209, which took effect for undergraduate admissions in 1998, had an immediate and dramatic adverse effect on the admission and enrollment of underrepresented minority students at the University of California. In the ensuing years, the University of

4. Other states, including Washington and Michigan, later passed substantially similar laws that prohibit public universities from discriminating or granting preferences on the basis of race.

California has adopted a number of different strategies in an attempt to reverse that decline in underrepresented minority students, including expanding its outreach program to secondary schools, incorporating a broader and more comprehensive set of admissions criteria, adopting “holistic” review of applicants, decreasing the weight given to standardized tests, and admitting a specified percentage of the top graduates from each high school under an “Eligibility in the Local Context” program similar in certain respects to UT’s “Top Ten Percent” Program. To date, however, those measures have enjoyed only limited success. They have not enabled the University of California fully to reverse the precipitous decline in minority admission and enrollment that followed the enactment of Proposition 209, nor to keep pace with the growing population of underrepresented minorities in the applicant pool of qualified high school graduates. These effects have been most severe and most difficult to reverse at the University’s most highly-ranked and competitive campuses.

The University of California’s experience establishes that in California, and likely elsewhere, at present the compelling government interest in student body diversity cannot be fully realized at selective institutions without taking race into account in undergraduate admissions decisions.

ARGUMENT**THE UNIVERSITY OF TEXAS AT AUSTIN'S
UNDERGRADUATE ADMISSIONS POLICY
SHOULD BE UPHELD UNDER THIS COURT'S
EQUAL PROTECTION DECISIONS.**

This Court properly recognized in *Grutter* that public universities have a compelling interest in achieving a diverse student body, a goal that furthers a number of significant educational and societal benefits. The University of California's longstanding policies are fully consistent with that recognition. However, UC has been significantly hampered from fully achieving that goal and realizing its benefits by Proposition 209, a state constitutional amendment that prohibits the use of race-conscious admission policies. UC's extensive experience with a wide range of race-neutral admissions measures since the implementation of Proposition 209 sheds important light on the extent to which race-neutral measures realistically can be expected to achieve such results.

**A. Public Universities Have A Compelling Interest In
Achieving The Numerous Educational And Societal
Benefits Of A Diverse Student Body.**

In *Grutter*, the Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 325. The Court also recognized that an educational institution's judgment that such diversity is "essential to its educational mission" is one that warrants judicial deference. *Id.* at 328; *see also Parents Involved in Community Schools v. Seattle*

School Dist. No. 1, 551 U.S. 701, 797 (2007) (“A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.”) (Kennedy, J., concurring in part).

Grutter recognized that the interest in achieving diversity furthers a number of important educational and societal interests. First, the Court explained that the educational benefits that a diverse student body is designed to produce are both “substantial” and “real,” and mandate that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity” so as to further “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.” 539 U.S. at 331-32; *see also id.* at 332 (“All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training”). Second, the Court observed that universities and law schools “represent the training ground for a large number of our Nation’s leaders,” and opined that for leaders to have “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.” *Id.* at 332. Third, it found the University of Michigan Law School’s conclusions regarding the educational value of diversity supported by a substantial body of evidence establishing “that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” *Id.* at 330 (citations omitted). In short, the Court observed,

its conclusion that the Law School has a compelling interest in a diverse student body “is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission.” *Id.* at 329.

In UC Amici’s view, precisely the same conclusions obtain in the context of undergraduate institutions, particularly large, selective public universities such as UT-Austin and the campuses of the University of California. Indeed, closely similar considerations have long been officially recognized in formal policies of the Board of Regents, UC’s governing body.⁵

The University of California consists of ten campuses located throughout California with numerous undergraduate, graduate and professional schools and programs.⁶ In Fall 2011, UC had a total undergraduate and graduate enrollment of over 235,000 students. UC is broadly comparable in size and importance to the University of Texas System, another of the nation’s

5. Under the California Constitution, UC is established as a public trust, to be administered by The Regents “with full powers of organization and government” CAL. CONST. art. IX, § 9. As such, the University enjoys a “unique constitutional status”: “The authority granted the Regents includes ‘full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowment of the University and the security of its funds.’” *Miklosy v. Regents of Univ. of Calif.*, 188 P.3d 629, 636-37 (Cal. 2008) (citations omitted).

6. One UC campus, UCSF, is a graduate health sciences campus that enrolls no undergraduates. Although this brief focuses primarily on undergraduate admissions, the educational value of diversity is equally important at UCSF and for all of UC’s graduate and professional schools.

largest systems of public higher education, which likewise has multiple campuses (nine universities, plus six health institutions) and a total enrollment of over 211,000 students.⁷

As the premier public university in the State of California, UC has a longstanding commitment to the educational and societal benefits that flow from a diverse student body, which are at the heart of its institutional mission. That commitment is expressed in the University's Policy on Undergraduate Admissions, which dates to 1988:

Mindful of its mission as a public institution, . . . UC 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 talent, and that *encompasses the broad diversity of cultural, racial, geographic, and socio-economic backgrounds characteristic of California.*⁸

That commitment is integral to the University's commitment to academic excellence:

Diversity can enhance the ability of the University to accomplish its academic mission. Diversity aims to broaden and deepen both the educational experience and the scholarly environment, as students and faculty learn to

7. The University of Texas System 2011: *Fast Facts*, <http://www.utsystem.edu/fastfacts>.

8. *Undergraduate Admissions Policy* (emphasis added).

interact effectively with each other, preparing them to participate in an increasingly complex and pluralistic society. . . . Educational excellence that truly incorporates diversity thus can promote mutual respect and make possible the full, effective use of the talents and abilities of all to foster innovation and train future leadership.⁹

Even more broadly, UC's commitment to diversity is closely related to its duties as a public institution:

Because the core mission of the University of California is to serve the interests of the State of California, it must seek to achieve diversity among its student bodies and among its employees. The State of California has 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. The knowledge that the University of California is open to qualified students from all groups, and thus serves all parties of the community equitably, helps sustain the social fabric of the State.¹⁰

9. 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) ("*Diversity Statement*"), <http://www.ucop.edu/ucophome/coordrev/policy/PP063006DiversityStatement.pdf>.

10. *Id.*

UC's policies are consistent with this Court's recognition in *Grutter* that institutions of higher education have genuine interests in student body diversity stemming from their educational mission and their role in society. These interests are far from mere abstractions. To the contrary, whether institutions succeed in attracting and enrolling diverse student bodies has concrete and measurable effects in the real world. In particular, whether a given institution is able to achieve a "critical mass" of underrepresented minority students has a direct relationship to whether the campus enjoys a healthy racial climate.¹¹

UC campuses, like UT, administer a biennial survey to undergraduates in which they are asked, among other things, whether they feel that students of their race/ethnicity are respected on campus. The results are striking: among racial and ethnic groups, African Americans are least likely to feel that their race is respected on campus. In many cases, students' responses to the question correlate directly with whether the representation of underrepresented minority students on campus approaches critical mass.

11. Historically the University of California has classified as "underrepresented" students from groups that collectively achieved eligibility for the University at a rate below 12.5 percent. Underrepresented minorities refer to American Indian, African American, Chicano or Latino students. University of California, Office of the President, Student Academic Services, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* (Mar. 2003) ("*Undergraduate Access to UC*") at 1 n.3, 4, http://www.ucop.edu/sas/publish/aa_final2.pdf.

Thus, in 2010, across eight UC campuses that surveyed undergraduates, from 12.9% to as many as 68.5% of African American students reported feeling that students of their race are not respected on campus (the comparable range in 2008 was from 20% to 51.9%).¹² UC Riverside, the UC campus at which the greatest percentage of African Americans felt students of their race are respected (87.1%),¹³ was also the UC campus with the greatest percentage of African American students (7.8% of the undergraduate student body).¹⁴ Similar results obtained with respect to Chicano-Latino students: UC Berkeley and UC San Diego, the two campuses with the smallest percentage of Latino students, were also the two campuses at which Latinos were least likely to feel respected (26.3% and 37.9%, respectively).¹⁵ Conversely, UC Riverside had the highest percentage of Latino students who felt that students of their ethnicity are respected (92.9%), and also had the highest proportion of Latinos in its student body

12. University of California, *2012 Accountability Report* at 80, <http://www.universityofcalifornia.edu/accountability/documents/accountabilityreport12.pdf> (“2012 Accountability Report”); *2012 Accountability Report Data Glossary and Technical Appendix*, tbl. 8.3.1, http://www.universityofcalifornia.edu/accountability/documents/accountabilityreport12_glossary_technical.pdf (“2012 Accountability Report App.”). Percentages above refer to those who strongly disagree, disagree, or somewhat disagree when asked if students of their race or ethnicity are respected on campus.

13. *Id.*

14. *UC 2011 Accountability Report*, tbl. 8.1.2 at 77, http://www.universityofcalifornia.edu/accountability/documents/accountabilityreport11_tables.pdf.

15. *2012 Accountability Report* at 80; *id.*, App., tbl. 8.3.1.

(30.6%).¹⁶ In short, where critical mass is not achieved, the campus racial climate is likely to be significantly less hospitable to minorities.

The concern about a welcoming climate for all racial and ethnic groups on campus is part of a broader commitment by UC and other public institutions to serve the full range of their citizenry, from all cultural, racial, ethnic, geographic, and socioeconomic backgrounds. UC Amici strongly disagree with Petitioner's contention that *any* consideration of state demographics in admissions amounts to "nothing more than 'racial balancing, which is patently unconstitutional.'" Pet. Br. at 19. That argument misconceives *Grutter*. The Court there condemned racial balancing, which it described as the practice of setting aside "some specified percentage of a particular group merely because of its race or ethnic origin." 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 307) (opinion of Powell, J.). That hardly means that a public university must blind itself to the demographic realities of the state it serves. As discussed above, the Court has acknowledged the broader educational and societal interests served by a diverse student body, including the value of ensuring that public institutions of higher education are visibly open to all persons, regardless of background; the critical role of universities in preparing individuals for leadership in our political, business and legal communities; and the increased legitimacy that such leadership enjoys when it is truly representative of all of its constituencies.

All of these interests properly permit, and indeed compel, public universities to be conscious of the

16. *UC 2011 Accountability Rep.*, tbl. 8.1.2 at 77.

demographics of the states in which they are located and from which their applicants are largely drawn. Petitioner’s cramped reading of *Grutter* as limited solely to narrow pedagogical interests is inconsistent with *Grutter* itself and with the larger realities faced by public universities such as the University of California and the University of Texas, which like public elementary and secondary schools have many compelling reasons to undertake “the important work of bringing together students of different racial, ethnic, and economic backgrounds.” *Parents Involved in Community Schools*, 551 U.S. at 798 (Kennedy, J., concurring).¹⁷

B. The University of California’s Experience Establishes That Race-Neutral Admissions Policies Cannot Guarantee Fully Diverse Student Bodies.

Grutter held that the University of Michigan Law School’s race-conscious admissions program was narrowly tailored to accomplish the compelling interest in a diverse student body. 539 U.S. at 333-43. That program did not use a quota system, but instead allowed flexible consideration of race or ethnicity only as a “plus” factor in the context of

17. The importance of universities’ admitting diverse student bodies recently was highlighted by the Census Bureau’s announcement that for the first time in the country’s history, births of minorities—including Hispanics, blacks, Asians, and those of mixed race—surpassed births of whites. Sabrina Tavernise, *Whites Account for Under Half of Births in U.S.*, THE NEW YORK TIMES (May 17, 2012). Like Texas, California is one of four “majority-minority” states (that is, states where whites no longer are the majority), a status it attained in 1999. Rebecca Trounson, *U.S. Reaches Historic Demographic Tipping Point*, LOS ANGELES TIMES (May 18, 2012).

individualized consideration of each applicant. *Id.* at 335-36. The Law School satisfied this standard by its “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” *Id.* at 337. The Court emphasized that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Id.* at 349. Rather, the Court observed, narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Id.*

Since 1998, when the state constitution prohibited any consideration of race or ethnicity in admissions decisions, the University of California has been actively engaged in precisely the sort of serious, good faith consideration and implementation of a variety of race-neutral alternatives that the Court contemplated in *Grutter*. As such, UC has extensive experience implementing race-neutral admissions policies while attempting to achieve diverse student bodies. That body of practical experience is directly germane to the Court’s inquiry here, because it bears on whether it is realistic to expect that public universities can always rely exclusively on race-neutral admissions policies as a means of achieving sufficiently diverse student bodies. The University of California’s experience thus provides this Court with an invaluable empirical test of the viability of such alternatives.

Despite numerous and varied efforts at increasing diversity on each of its campuses, UC has enjoyed

only limited success. In particular, the admission and enrollment of underrepresented minority students at a number of UC campuses still have not regained the levels that prevailed before Proposition 209 was enacted. The race-neutral measures UC has implemented in an effort to increase diversity have not enabled it to achieve a “critical mass” of certain minority students, particularly African-American students, at its most selective campuses. Nor have they enabled it to assemble a student body that fully reflects the racial and ethnic diversity of the pool of state high school applicants from which those campuses draw.

1. The University of California’s Admissions Standards And Policies.

Admission to the University of California is a two-step process: qualification for admission to the University as a whole and, once that is accomplished, admission to individual campuses. The Master Plan for Higher Education of the State of California provides that the University of California should educate freshmen from the “top one-eighth” (12.5 per cent) of all graduates of California public high schools.¹⁸ To identify these students, the University of California promulgates minimum *eligibility* requirements that both specify a floor of preparation needed to pursue study at UC and also function as an entitlement: any high school graduate who meets these requirements is guaranteed a place at UC—although not necessarily at the campus nor in the major of his or her choice. At the same time, because demand for admission exceeds enrollment capacity at most UC campuses, the campuses over the years have developed

18. *A Master Plan for Higher Education in California*, at 4, 73, <http://www.ucop.edu/acadinit/mastplan/MasterPlan1960.pdf>.

selection criteria (such as consideration of high school grade point average, test scores, and other evidence of academic promise) to choose which UC-eligible applicants they will admit. These criteria function as a second, and generally more demanding, set of requirements that applicants to most of the campuses must meet.

Students become *eligible* for admission to the University of California *system* by meeting established minimum requirements for coursework and grade point average (GPA) and submitting standardized test scores. Effective for the fall 2012 entering class, for example, minimum eligibility requirements for California residents included a GPA of 3.0 or better (weighted by honors/Advanced Placement bonus points); completion of 15 yearlong college preparatory courses, including courses in history/social science, English, math, laboratory science, foreign language, visual and performing arts, and college preparatory electives; and submission of scores from the ACT with Writing or SAT Reasoning Test.¹⁹

The University's minimum eligibility criteria, which determine who is admitted to the University as a whole, have always been entirely race-neutral. From the 1960s through 1997, as part of the process of determining admission to a specific campus, individual campuses employed race-conscious criteria, the nature and degree of which varied. That changed beginning in the 1998-99 academic year, following the implementation of Proposition 209.

19. *Regents Policy 2103: Policy on Undergraduate Admissions Requirements* (June 18, 1982, as amended Feb. 5, 2009), <http://www.universityofcalifornia.edu/regents/policies/2103.html>.

2. The Adoption of Proposition 209 and Its Immediate Effects on Minority Admission and Enrollment Rates at the University of California.

In the November 1996 election, California voters approved Proposition 209, which added article I, Section 31 to the California Constitution.²⁰ Article I, section 31 declares that the state, including its political subdivisions, “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” (CAL. CONST., art. I, § 31, subd. (a).) The fall 1998 freshman class at the University of California was the first to reflect the ban on affirmative action established by Proposition 209. *See Coalition for Economic Equity v.*

20. 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 (SP-1)* (July 20, 1995), <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>.

Wilson, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against enforcement).²¹

In the immediate aftermath of Proposition 209 becoming effective, the rates at which underrepresented minority students applied to, were admitted to, and enrolled at the University of California fell, often by very significant percentages, at every UC campus. In 1998, the first year in which race-neutral admission policies were implemented at UC, admission rates (*i.e.*, the percentage of applicants admitted) for underrepresented minority students and the proportion that these students represented of the total admitted class fell for UC as a system and on every campus.

At the most selective campuses, these declines were steep. “The year after section 31 passed, the number of African American, Latino, and Native American freshmen at UCLA and U.C. Berkeley dropped by over 50%.” *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012).²² At UC Berkeley, for

21. Proposition 209 also prohibits preferential treatment based on race or ethnicity in graduate admissions and in employment.

22. The discussion in this brief focuses on these two campuses, which admit the lowest percentage of freshman applicants in the UC system. The interest recognized by this Court in ensuring that “the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity” (*Grutter*, 539 U.S. at 332) is particularly acute at these campuses, which are ranked among the top undergraduate institutions nationally. *See 2012 Best Colleges*, U.S. NEWS AND WORLD REPORT (UC Berkeley and UCLA ranked #1 and #2 among public colleges and universities and #21 and #25 among national universities), <http://colleges.usnews.rankingsandreviews.com/best-colleges>.

example, the admit rate for underrepresented minority students fell from 54.6 percent in 1995 to only 20.2 percent in 1998; at UCLA, the corresponding figures were 52.4 percent in 1995 and 24.0 percent in 1998.²³ The net result was a dramatic drop in the number and proportion of underrepresented minority freshmen. Thus, while in 1995 UC Berkeley had enrolled 807 underrepresented minority freshmen, or 24.3 percent of the entering class, by 1998 it could count only 412, representing 11.2 percent of the class; at UCLA, the number of entering underrepresented minority freshmen dropped from 1,108 to 597 over the same period, from 30.1 percent to only 14.3 percent of the entering class.²⁴

African American enrollments were especially hard hit. At UC Berkeley, African Americans fell from 6.7 percent of the entering class in 1995 to only 3.7 percent in 1998; at UCLA, similarly, African Americans were 7.4 percent of the entering class in 1995, and only 3.5 percent in 1998.²⁵ The enrollment of Chicano and Latino students at those campuses also dropped sharply: at Berkeley, from 16.9 percent in 1995 to 8 percent in 1998; at UCLA, from 22.4 percent to 11 percent over the same period.²⁶

23. *Undergraduate Access to UC* at 15, 18-19 & Table 5.

24. *Id.* at 18, 19, 22 & Tables 4 and 5.

25. University of California, *Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2011* (“1989-2011 Admissions”), http://www.ucop.edu/news/factsheets/flowfrc_11.pdf.

26. *Id.* The number of Native American students enrolling as freshmen at those campuses also fell sharply over the same period, from 56 to 13 at Berkeley and 42 to 14 at UCLA. *Id.*

3. The University Adopts Various Measures To Reverse The Decline In Minority Admission and Enrollment.

Beginning after the implementation of Proposition 209 and continuing to the present, the University of California has taken a variety of actions to strengthen K-12 education, enhance student preparation for higher education, and implement other race-neutral initiatives designed to enhance its ability to attract, admit, and enroll an undergraduate student body that is both academically well prepared and reflective of the broad diversity of California.

a. Outreach Task Force

When it first adopted SP-1 in 1996, the Board of Regents found that “it is in the best interest of the University to take relevant actions to develop and support programs which will have the effect of increasing the eligibility rate of groups which are ‘underrepresented’ in the University’s pool of applicants as compared to their percentages in California’s graduating high school classes.” It directed the formation of a task force on academic outreach, the goal of which was to develop proposals for new directions and increased funding to increase the eligibility rate of economically disadvantaged and other applicants.²⁷

In response to this mandate, the University formed an Outreach Task Force to develop a comprehensive

27. The Regents of the University of California, *Policy Ensuring Equal Treatment: Admissions (SP-1)* § 2 (July 20, 1995), <http://www.universityofcalifornia.edu/news/compreview/sp1.pdf>.

approach to both low eligibility rates for students from underrepresented groups and the challenges those applicants faced in being admitted to the University's most selective campuses. The Outreach Task Force's report, issued in 1997, recommended a four-point strategy: enhancement and expansion of academic development programs for K-12 students; development of partnerships between UC campuses and selected regional schools to help improve opportunities for college preparation and to foster a school culture that promotes academic success and high educational standards; expansion of informational outreach to students, families, teachers, and counselors to improve planning and preparation for college; and University research and evaluation to identify the root causes of educational disparity within California's school system and to guide the University's outreach work.²⁸

In response to these recommendations, the University dramatically expanded its outreach efforts beginning in 1998. In the years since completion of the report of the Outreach Task Force, UC has spent tens of millions of dollars to expand programs that improve college preparation levels for educationally disadvantaged students. Those efforts included an expansion of existing campus programs that work with individual students to increase academic preparation and motivate students to seek higher education; the establishment of the School/University Partnership Program, through which UC campuses partnered with K-12 schools; and the development of the California Professional Development Institutes, an initiative to train 70,000 teachers annually

28. *New Directions for Outreach: Report of the University of California Outreach Taskforce* (July 1997), <http://www.ucop.edu/edpartners/documents/archived/outreachrpt.pdf>.

and to improve teacher quality in core areas of the State's standards-based curriculum.²⁹

Consistent with Proposition 209, UC's outreach programs operate in a race-neutral fashion.³⁰ To be eligible for these programs, applicants must be from low-income families or those with little or no previous experience with higher education, or attend a school that is educationally disadvantaged.³¹ These efforts are partially responsible for the University's very high enrollment of low-income students and those who will be the first in their families to graduate from college.³²

29. *Undergraduate Access to UC* at 9-10.

30. While Proposition 209 has been interpreted to prohibit certain mandatory outreach programs, not all forms of outreach are unlawful. The California Supreme Court has found that "the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1085 (Cal. 2000).

31. *Undergraduate Access to UC* at 24.

32. In 2009-10, 35% of UC undergraduates were recipients of federal Pell Grants, *i.e.*, they qualified as "low-income" students by the widely accepted federal definition (the figure increased to 39% in 2010-11). That is nearly double the rate at UC's peer institutions that are members of the Association of American Universities (20% at public universities and 16% at privates), and far higher than the rate at Ivy League colleges such as Harvard (10%) and Yale (13%). *2012 Accountability Report* at 28; *id.*, App., tbl. 3.5.1. As the minority enrollment figures discussed below make clear, policies that increase the enrollment of low-income students do not serve as an effective "proxy" for race and ethnicity.

b. Eligibility in the Local Context

Following the adoption of Proposition 209, elected officials as well as some University faculty called on the University to adopt a “percent plan” somewhat analogous to the Top Ten Percent Plan implemented in Texas following the *Hopwood* decision.³³ Accordingly, effective for students entering the University in 2001, the Board of Regents modified its existing eligibility policy to add a “top 4 percent” program, under which the top 4 percent of the eligible students in each California public high school were designated as Eligible in the Local Context (“ELC”). Effective for students entering UC as freshmen for fall 2012, the Board of Regents expanded the ELC program to the top 9 percent of eligible California high school graduates. Unlike the Texas Ten Percent Plan, ELC guarantees admission only to a campus with available space in the UC system, rather than to an applicant’s campus of choice.³⁴

ELC students are identified based on a review of the transcripts of the top students in California’s high schools. (ELC is not available to out-of-state applicants.) To be eligible for consideration, such students are required to complete the entire course pattern mandated by UC, achieve a minimum GPA of 3.0, and take the full battery of UC-required admission tests.

33. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (invalidating University of Texas School of Law’s use of racial preferences in admissions).

34. *Policy on Undergraduate Admissions Requirements*.

The ELC program has been successful in increasing interest and applications from students at high schools that traditionally sent few students to the University. However, because the State of California has few if any high schools with student bodies composed entirely of minorities, it has not substantially increased the diversity of the pool of students considered eligible for UC.³⁵ Moreover, because ELC addresses only overall Systemwide eligibility and ELC students still must compete against tens of thousands of other well qualified students for admission to individual campuses, it has had limited effect on admissions at the system's most selective campuses, such as UC Berkeley and UCLA.³⁶

35. Although the expansion of ELC to 9 percent in 2012 was designed to increase the diversity of the ELC pool, preliminary indications suggest this was not successful. For Fall 2012, the UC system received applications from more than 93,000 Californians, roughly one-third of whom qualified as ELC. Preliminary analyses indicate that approximately 35 percent of the ELC applicants were underrepresented minorities. This is slightly less diverse than the overall California resident applicant pool to UC, which included roughly 37 percent underrepresented minorities. University of California Office of Institutional Research, internal analysis, Fall 2012.

36. For the Fall 2012 admissions cycle (the first in which ELC was extended to 9 percent of high school graduates), preliminary data indicate that UC Berkeley received applications from nearly 19,000 applicants who qualified for ELC—more than twice the number of California residents admitted (roughly 9,400). More than 80 percent of the total California students admitted to Berkeley qualified as ELC. But this left more than 11,000 ELC applicants who were denied. Numbers at UCLA were similar: more than 22,000 of UCLA's 52,000 California resident applicants qualified for ELC. Roughly 85 percent of UCLA's California admits were ELC, but this still left more than 14,000 who were

c. Comprehensive and Holistic Review

In the years following the implementation of Proposition 209, the Board of Regents and faculty also have made significant changes in the processes and criteria governing admission at the campus level. On November 15, 2001, effective for students entering UC in Fall 2002, the Board of Regents directed the campuses to institute a “comprehensive review process” by which all undergraduate students applying to UC campuses are evaluated for admission using “multiple measures of achievement and promise while considering the context in which each student has demonstrated academic achievement.”³⁷

Comprehensive review was intended to broaden the criteria for evaluating eligible applicants and to eliminate the historic practice of setting aside a particular proportion of the admitted class for students meeting a narrow range of academic criteria, thereby allowing all eligible applicants to be evaluated on an individualized basis in light of a broader set of criteria, including contextual information about students’ educational and personal circumstances.³⁸ It is consistent with this Court’s

denied. *Id.* These figures demonstrate in part why a “10% plan” such as Texas’s, which guarantees admission to a specific campus, would not work in California. The numbers are simply too large to accommodate at a campus such as Berkeley or UCLA.

37. *Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions* (Nov. 15, 2001), <http://www.universityofcalifornia.edu/regents/policies/2104.html>.

38. UC Board of Admissions and Relations with Schools, Systemwide Academic Senate, *Comprehensive Review in*

direction in *Grutter*, which approved the University of Michigan Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." 539 U.S. at 337.

The University adopted Guidelines setting forth eight guiding principles for comprehensive review and listing fourteen broad selection criteria for application by the campuses.³⁹ Among those principles were that "merit 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 the opportunities and challenges that the applicant has faced"; and that "[c]ampus 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." The selection criteria, in addition to academic grade point average and standardized test scores, included qualification for the ELC program; the quality of academic performance relative to the educational opportunities available in the applicant's secondary school; academic accomplishments in light of the applicant's life experiences and special circumstances such as disabilities, low family income, first generation

Freshman Admissions at the University of California 2003-2009 ("BOARS Comprehensive Review Report") at 3, 5 (May 2010), http://www.universityofcalifornia.edu/senate/reports/HP_MGYreBOARS_CR_rpt.pdf.

39. *Guidelines for Implementation of University Policy on Undergraduate Admissions*, <http://www.ucop.edu/sas/adguides.html>.

to attend college, disadvantaged social or educational environment, difficult personal and family situations or circumstances, and refugee or veteran status.

The University has devoted substantial resources to creating tools that allow consideration of these factors even in a very large applicant pool, including the development of systemwide “read sheets” that display quantitative data such as grades, test scores, and numbers of courses taken as percentiles where an individual is rated against all applicants to UC, all applicants to the individual campus, and all applicants to UC and the campus from the student’s individual high school. The read sheet also provides contextual information about each applicant’s high school—for example, the number of applicants to UC, average test scores, socioeconomic data about the student body (*e.g.*, average family income, numbers of students who qualify for state and federal welfare programs), numbers of uncredentialed teachers, numbers of honors and Advanced Placement courses offered, etc. Read sheets are prepared electronically for every applicant and distributed to each campus to which the applicant has applied.

On January 20, 2011, the Board of Regents enacted a Resolution extending the concept of comprehensive review to encourage use of a single holistic score in evaluating applicants.⁴⁰ Holistic review, which had been pioneered at Berkeley beginning in 1999 and was later adopted by

40. *Regents Policy 2108: Policy Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions* (Jan. 20, 2011), <http://www.universityofcalifornia.edu/regents/policies/2108.html>.

UCLA,⁴¹ eliminates the use of fixed weights for specific criteria and allows admissions readers greater use of judgment in evaluating the totality of an applicant's achievements and potential. Individual applications are read and scored by multiple independent readers and significant score disparities are referred to additional more senior readers for adjudication.

d. Use of Standardized Tests

Another initiative taken by the University of California in an attempt to increase the diversity of its entering classes on a race-neutral basis was to reduce its reliance on standardized tests. Since the late 1960s, the University's eligibility requirements included the submission of scores from four standardized admissions tests: the Scholastic Aptitude Test (SAT) I or ACT, and three SAT II achievement tests in specific subject areas. Over time, however, the University's use of standardized admissions tests and the tests themselves evolved away from a preference for "aptitude" testing, based in part on evidence that scores on aptitude-type tests were highly influenced by family education and income levels.⁴²

41. See *BOARS Comprehensive Review Report* at 27-28 (describing use of single-score holistic review processes at UC Berkeley and UCLA).

42. *Undergraduate Access to UC* at 13; BOARS, *Admissions Tests and UC Principles for Admissions Testing* (Dec. 2009) at 3-4, 10-11 & n.6, 12, 18 (discussing evidence that lower test scores are associated with socio-economic disadvantage and estimating that a disproportionately low percentage of Chicano/Latino and African American students who complete UC's course requirements take the SAT-II Subject tests), http://www.universityofcalifornia.edu/senate/reports/hp2mgy_boars-testing_010609.pdf.

In February 2001, then-UC President Richard Atkinson called for the elimination of the SAT Reasoning Test requirement to increase inclusiveness and fairness and to avoid controversial notions of aptitude. In response, the College Board revised the SAT-Reasoning Test (SAT-R) to eliminate objectionable question types and to incorporate the writing component previously administered in the SAT-II Subject tests, while ACT Inc. similarly developed the ACT-with-Writing. The University maintained the SAT/ACT requirement, but reduced the number of required subject tests from three to two.⁴³ Out of concern that requiring any additional tests beyond the SAT or ACT might discourage students from educationally disadvantaged families, the University eventually dropped the subject test requirement entirely. Beginning with applicants for Fall 2012, the University no longer requires applicants to submit SAT Subject test scores for eligibility.

C. The Limited And Disappointing Results of The University's Race-Neutral Admissions Initiatives.

While these and other measures have enjoyed some limited success, particularly at UC's less selective campuses, the unfortunate reality is that the University's experience continues to support the conclusion it reached a number of years ago: "in a highly selective institution, implementing race-neutral policies leads to a substantial decline in the proportion of entering students who are African American, American Indian, and Latino."⁴⁴ Similarly, a recent assessment by the Board of Admissions and Relations with Schools ("BOARS") of the Academic

43. *Undergraduate Access to UC* at 13-14.

44. *Id.* at 1, 28.

Senate concluded that while comprehensive review in freshman admissions is “capturing talent and diversity and helping UC continue to serve as an engine of social mobility for students with promise from modest backgrounds,” the University continues to fall short in its admission of underrepresented minority students, particularly African American and Chicano/Latino students. In particular, that report identified a “disturbing persistence of low African American admit rates across UC campuses, which now is affecting the educational climate.”⁴⁵

The shortfall is most apparent when one considers the admission rates for African American students at UC Berkeley and UCLA, the University’s most selective campuses. Between 1995 and 2009, African Americans consistently represented between 7 and 8 percent of new high school graduates in California.⁴⁶ In 1995, African

45. *BOARS Comprehensive Review Report* at 3, 5, 7. A similar conclusion was reached by the Study Group on University Diversity, which was established in 2006 to “undertake a holistic study of the long-term impact of Proposition 209 on the University’s ability to serve the State and fulfill its mission as the leading public university in one of the nation’s most diverse states.” Study Group on University Diversity, *Overview Report to The Regents* at 2 (Sept. 2007), <http://diversity.universityofcalifornia.edu/documents/diversityreport0907.pdf>. It concluded: “Relative to the increasing diversity of California’s students, we are losing ground. Furthermore, gains in undergraduate diversity have been concentrated at a few campuses and underrepresented students have significantly lower admission rates on virtually all of our campuses.” *Id.* at 5.

46. CAL. POSTSECONDARY EDUC. COMM’N, ETHNICITY SNAPSHOTS TABLE: BLACKS AS A PERCENT OF TOTAL, 1995-2009, http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=2&Rpt=Grad_HS. The figure was 6.9 percent in 2008 and 6.8 percent in 2009. *Id.*

American students represented 7.3 percent of admitted freshmen at UC Berkeley, but by 1998, following the implementation of Proposition 209, that figure had dropped to only 3.2 percent. In 2010 and 2011, it was only 3.9 percent—still barely half the pre-Proposition 209 figure—and preliminary data for Fall 2012 place the percentage at 3.5 percent.⁴⁷ Similar results obtain at UCLA, where African American students represented 6.7 percent of admits in 1995, but only 3.0 percent in 1998, 3.8 percent in 2010, 3.6 percent in 2011, and 3.8 percent in 2012 (preliminary).⁴⁸ Thus, admission rates for African American students at these campuses have not recovered from their post-Proposition 209 decline, but instead have stagnated at lower levels. Systemwide, the faculty BOARS committee recently found that admission rates for African Americans remain “far below” those for the groups with the highest admit rates on each campus, and concluded that “[t]he Comprehensive Review process alone is not sufficient to overcome the disadvantages that African Americans face in their educational opportunity.”⁴⁹

Although the results for Latino/Chicano students have been appreciably better, they have been driven largely by the growth of Latinos in the state’s high school graduating classes, the racial and ethnic diversity of which continue to increase rapidly. Thus, in 1995, Chicano and Latino students represented 18.5 percent of admits at

47. *1989-2011 Admissions*; UC, Office of the President, *California freshman admissions for fall 2012*, Table 3, http://www.ucop.edu/news/factsheets/2012/fall_2012_admissions_table3.pdf (“*Fall 2012 Admissions*”). Enrollment rates are closely similar to these admissions figures.

48. *Id.*

49. *BOARS Comprehensive Review Report* at 25.

UC Berkeley, a figure that dropped to only 8.5 percent in 1998. In 2010, Latino/Chicano students at UC Berkeley had increased to 14.8 percent of the admitted pool, a figure that grew to 17.2 percent in 2011 and 17.8 percent in 2012.⁵⁰ Between 1995 and 2009, however, Latino/Chicano students went from 30 percent to fully 41 percent of California's high school graduates.⁵¹ That is, Latino/Chicano admissions at UC Berkeley have not yet fully recovered to their levels of more than 15 years ago, during a period when the population of Latino high school graduates has increased by more than 25 percent. Thus, the increase in both the percentages and absolute numbers of admitted Latino students at UC campuses masks a growing gap between those numbers and their numbers in the available statewide pool of eligible, qualified applicants.

These figures are troubling, because they call into serious question whether it is currently feasible without the careful and limited application of race-conscious measures to achieve the level of diversity of underrepresented minority students that this Court has recognized as a legitimate objective in the context of higher education. Certainly, most UC campuses have found themselves unable to cross that threshold with respect to African American students, despite the extensive history summarized above of race-neutral measures intended to achieve that objective. In 2011, there were only 130 African American students in an entering freshman class of 4,443

50. *1989-2011 Admissions; Fall 2012 Admissions*, Table 3.

51. CAL. POSTSECONDARY EDUC. COMM'N, ETHNICITY SNAPSHOTS TABLE, HIGH SCHOOL GRADUATES: LATINO AS A PERCENT OF TOTAL, 1995-2009, http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=4&Rpt=Grad_HS.

at UC Berkeley, and 224 of 5,825 at UCLA.⁵² Thus, there is a high likelihood that each of those students would find himself or herself the only African American student in nearly all of his or her classes, and subject to the isolation that diversity is intended in part to avoid. *See Grutter*, 539 U.S. at 318 (describing testimony that admitting a “critical mass” of minorities requires a “meaningful number” that “encourages underrepresented minority students to participate in the classroom and not feel isolated”).⁵³ With African American students numbering only about four out of every hundred entering freshmen, that scenario is inescapable except perhaps in the very largest introductory lecture courses.⁵⁴

These limited numbers of underrepresented minority students in UC’s undergraduate population are evident at the professional school level as well. In particular, business schools, which play an influential role in shaping tomorrow’s business leaders, have very low proportions of underrepresented minorities, and UC’s business schools compare poorly in that respect to similar programs nationally. Systemwide, UC enrolled fewer minority students in business (4.5 percent) than did comparable

52. *2012 Accountability Report*, App., tbl. 8.2.1.

53. Given these figures, UC Amici do not believe that critical mass has been achieved, whether that threshold is measured on a campus-wide, department or program-wide, or classroom-by-classroom basis.

54. In 2011-12, more than 90 percent of all undergraduate class sections at UC Berkeley numbered less than 100 students. UC Berkeley, Office of Planning & Analysis, *Common Data Set 2011-12*, <http://opa.berkeley.edu/statistics/cds/2011-2012.pdf>.

programs nationally (12.8 percent).⁵⁵ In California, where an estimated 46.4 percent of the 2011 population is Latino/Hispanic, African American and American Indian,⁵⁶ recent entering classes of MBA students at UC campuses have averaged only one to two percent African American and three to four percent Latino students.⁵⁷ Indeed, during ten of the last eleven academic years, two or more of UC's six business schools enrolled *zero* African Americans.⁵⁸ While law school enrollment figures are somewhat more encouraging, and vary from school to school and year to year, UC law schools face similar challenges. Entering law school classes in recent years have averaged only three to four percent African American, with one UC law school in 2009-10 reporting only ten African American students in a student body of over 600, considerably below the numbers in the years immediately before Proposition 209.⁵⁹

These results threaten seriously to undermine the University of California's ability to discharge its role as "the training ground for a large number of our Nation's leaders." *Grutter*, 539 U.S. at 332.⁶⁰ As a University

55. *2012 Accountability Report* at 90; *id.*, App., tbl. 8.7.1.

56. U.S. CENSUS, STATE & COUNTY QUICK FACTS, CALIFORNIA (2011), <http://quickfacts.census.gov/qfd/states/06000.html>.

57. *2011 Accountability Report*, tbl. 8.7.1, at 102.

58. *Id.* at 104-05.

59. *Id.* at 103, 107-08.

60. Over the years, scores of the State's and the Nation's political, legal, and business leaders have graduated from UC Berkeley and UCLA, including Chief Justice Earl Warren, current and former governors, Congressmen, judges, and a host of others.

report recently concluded, “the enrollment percentage of underrepresented minorities . . . has exhibited little or no progress at UC’s business schools. This clearly limits the University’s ability to contribute to a diverse leadership cadre for California.”⁶¹

Notable among them are many prominent minorities, including Los Angeles Mayor Antonio Villaraigosa, former Los Angeles mayor Tom Bradley, D.C. Circuit judge (and former California Supreme Court Justice) Janice Rogers Brown, and diplomat and Nobel laureate Ralph J. Bunche, among others.

61. *Study Group on University Diversity* at 5.

CONCLUSION

The University of California's experience over a decade and one-half suggests that the limited and judicious application of race-conscious admissions measures remains necessary, at least under current circumstances, if the compelling interest in a diverse student body is to be fully realized. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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