

**In The
Supreme Court of the United States**

—◆—
BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE
ACTION, INTEGRATION AND IMMIGRANT
RIGHTS AND FIGHT FOR EQUALITY BY
ANY MEANS NECESSARY (BAMN), *et al.*,

AND

CHASE CANTRELL, *et al.*,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

—◆—
**BRIEF OF CIVIL RIGHTS
PROJECT/PROYECTO DERECHOS CIVILES
AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENTS CHASE CANTRELL ET AL.**

KAREN MIKSCH
Associate Professor
UNIVERSITY OF MINNESOTA
178 Pillsbury Drive S.E.
Minneapolis, MN 55455
(612) 625-3398

LILIANA M. GARCES
Counsel of Record
Assistant Professor
PENNSYLVANIA STATE UNIVERSITY
400 Rackley Building
University Park, PA 16802
(814) 865-9754
lmg340@psu.edu

RICHARD O. LEMPert
Eric Stein Distinguished University
Professor of Law & Sociology, *emeritus*
UNIVERSITY OF MICHIGAN
1510 N. Colonial Terrace
Arlington, VA 22209
(734) 736-0957

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	5
I. Race-Conscious Admissions Policies Offset Severe Racial Inequities in Education and Promote Opportunity for Racial Minority Students.....	5
II. Racially Focused Constraints on Admissions Decisions, like Proposal 2, Dramatically Reduce the Inclusion of Well-Qualified Racial Minorities Across a Number of Educational Programs.....	9
A. Prohibitions on Race-Conscious Policies Have Substantially Decreased the Enrollment of Racial and Ethnic Minorities at Selective Undergraduate Institutions.....	11
B. The Enrollment of Racial and Ethnic Minorities Has Dropped Significantly Across Graduate Fields of Study as a Result of Bans on Race-Conscious Admissions.....	15
C. The Enrollment of Racial and Ethnic Minorities Has Dropped Substantially in Professional Schools of Medicine, Law, and Business.....	17

TABLE OF CONTENTS – Continued

	Page
D. These Declines in Racial Diversity Have Taken Place Despite Myriad Race-Neutral Efforts to Maintain Diversity	22
III. Race-Conscious Admissions Policies Prevent the Isolation of Racial Minorities at Selective Colleges and Universities and Increase Their Prospects for Success	24
IV. Bans on Race-Conscious Policies in Admissions Undermine Equal Opportunity and Fair Access to Pathways to High Achievement	30
A. An Extensive Body of Social Science Research Repudiates the “Mismatch” Hypothesis	30
B. Petitioner Ignores the Educational and Career Benefits Associated with Access to Selective Colleges and Universities, like the University of Michigan, and the Particular Returns They Offer Racial Minorities.....	35
CONCLUSION.....	38

APPENDIX

<i>Figure A. Percentage of Latino and African American Students Responding “Yes” to “Exclusion” as the Type of Discrimination Experienced</i>	<i>App. 1</i>
---	---------------

TABLE OF CONTENTS – Continued

Page

Figure B. Percentage of African American and White Undergraduates Who Responded to Survey Question “Students of My Race/Ethnicity are Respected on this Campus” by Answering “Strongly Agree, Agree, or Somewhat Agree”App. 2

TABLE OF AUTHORITIES

Page

CASES

<i>Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.</i> , 701 F.3d 466 (6th Cir. 2012)	5
<i>Fisher v. Univ. of Tex.</i> , 133 S. Ct. 2411 (2013).....	<i>passim</i>
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	2, 3, 19, 20
<i>Hopwood v. Univ. of Tex.</i> , 78 F.3d 932 (5th Cir. 1996)	12, 19, 33, 34
<i>Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1</i> , 551 U.S. 701 (2007)	6
<i>Regents of Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978).....	3
<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950)	36

OTHER AUTHORITIES

Sigal Alon & Marta Tienda, <i>Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity</i> , 78 Soc. Educ. 294 (2005)	31, 35
Am. Bar Ass’n & Law Sch. Admission Council, <i>ABA-LSAC Official Guide to ABA-Approved Law Schools</i> (2005-2008, 2013)	20
Ass’n of Am. Med. Coll., <i>Table 30: Total Graduates by U.S. Medical School and Race and Ethnicity</i> (2013)	18

TABLE OF AUTHORITIES – Continued

	Page
Ben Backes, <i>Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans</i> , 47 J. Hum. Resources 435 (2012).....	13
Deirdre M. Bowen, <i>Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action</i> , 85 Ind. L.J. 1197 (2010).....	25
William Bowen et al., <i>Crossing the Finish Line: Completing College at America’s Public Universities</i> (2009)	32, 33
William G. Bowen & Derek Bok, <i>The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions</i> (1998).....	35, 36
Susan K. Brown & Charles Hirschman, <i>The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College</i> , 79 Soc. Educ. 106, 108 (2006).....	29
Devon W. Carbado & Cheryl I. Harris, <i>The New Racial Preferences</i> , 96 Cal. L. Rev. 1139 (2008).....	9
Anthony P. Carnevale & Jeff Strohl, <i>Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege</i> 37 (2013)	23

TABLE OF AUTHORITIES – Continued

	Page
Mitchell J. Chang et al., <i>Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants</i> , 82 J. Higher Educ. 564 (2011)	26
Tongshan Chang & Heather Rose, <i>A Portrait of Underrepresented Minorities at the University of California, 1994-2008</i> , in <i>Equal Opportunity in Higher Education: The Past and Future of California’s Proposition 209</i> (Eric Grodsky & Michal Kurlaender eds., 2010)	34
Jordan J. Cohen, <i>The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions</i> , 289 J. Am. Med. Ass’n 1143 (2003)	19
College Board, <i>Appendix D: Equity in Participation and Success Among Traditionally Underserved Graduates: 2002-2012</i> , <i>The 9th Annual Report to the Nation</i> (2013)	8
College Board, <i>AP Report to the Nation: Michigan Supplement 6</i> (2013)	8
College Board, <i>The 8th Annual AP Report to the Nation</i> , 16 (2012).....	7, 8
Kalena E. Cortes, <i>Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan</i> , 29 Econ. Educ. Rev. 1110 (2010)	35

TABLE OF AUTHORITIES – Continued

	Page
Stacy B. Dale & Alan B. Krueger, <i>Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data</i> , 29 (2) J. Human Resources __ (forthcoming 2014)	36
Meera E. Deo, <i>Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence</i> , Soc. Sci. Res. Network, No. 2315787 (2013)	28
Thomas J. Espenshade & Alexandria Walton Radford, <i>No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life</i> (2009).....	35
Mary J. Fischer & Douglas S. Massey, <i>The Effects of Affirmative Action in Higher Education</i> , 36 Soc. Sci. Res. 531 (2007)	32
Kendra Fox-Davis, <i>A Badge of Inferiority: One Law Student’s Story of a Racially Hostile Educational Environment</i> , 23 Nat’l Black L.J. 98 (2010).....	25
Liliana M. Garces, <i>Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment</i> , 36 Rev. of Higher Educ. 93 (2012)	15
Liliana M. Garces, <i>Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Studies</i> , 50 Am. Educ. Res. J. 251 (2013).....	16

TABLE OF AUTHORITIES – Continued

	Page
Saul Geiser & Kyra Caspary, <i>“No Show” Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002</i> , 19 <i>Educ. Pol’y</i> 396 (2005).....	29
Eric Grodsky & Michal Kurlaender, <i>The Demography of Higher Education in the Wake of Affirmative Action, in Equal Opportunity in Higher Education: The Past and Future of California’s Proposition 209</i> (Eric Grodsky & Michal Kurlaender eds., 2010)	29
Peter Hinrichs, <i>The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities</i> , 94 <i>Rev. of Econ. & Stat.</i> 712 (2012).....	13
Mark Hoekstra, <i>The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach</i> , 91 <i>Rev. of Econ. & Stat.</i> 717 (2009).....	36
Harry J. Holzer & David Neumark, <i>Affirmative Action: What Do We Know?</i> , 25 <i>J. of Pol’y Analysis & Mgmt.</i> 463, 476 (2006)	23
Jessica S. Howell, <i>Assessing the Impact of Eliminating Affirmative Action in Higher Education</i> , 28 <i>J. of Lab. Econ.</i> 113 (2010).....	24
Sylvia Hurtado & Adriana Ruiz, UCLA Higher Education Research Inst., <i>The Climate for Underrepresented Groups and Diversity on Campus</i> (2012).....	26

TABLE OF AUTHORITIES – Continued

	Page
Sylvia Hurtado et al., <i>A Model for Diverse Learning Environments: The Scholarship on Creating and Assessing Conditions for Student Success</i> , in <i>27 Higher Education: Handbook of Theory and Research</i> 41 (John C. Smart & Michael B. Paulsen eds., 2012)	26
William C. Kidder, <i>Misshaping the River: Proposition 209 and Lessons for the Fisher Case</i> , 39 J.C. & Univ. L. 53 (2013).....	21, 28, 29, 34
Alan Krueger et al., <i>Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture</i> , 8 Am. Law & Econ. Rev. 282 (2006).....	23
Michal Kurlaender & Eric Grodsky, <i>Mismatch and the Paternalistic Justification for Selective College Admissions</i> , 86 Soc. Educ. ____ (forthcoming 2013)	33, 34
Law Sch. Admission Council, <i>Top 240 ABA Applicant Feeder Schools for Fall Applicants</i> (2013).....	37
Mark C. Long, <i>College Quality and Early Adult Outcomes</i> , 27 Econ. of Educ. Rev. 588 (2008).....	35
Douglas S. Massey & Margarita Mooney, <i>The Effects of America's Three Affirmative Action Programs on Academic Performance</i> , 54 Soc. Probs. 99 (2007).....	32

TABLE OF AUTHORITIES – Continued

Page

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).....	31
Mex. Am. Legal Defense & Educ. Fund et al., <i>Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz</i> , 8 Harv. Latino L. Rev. 33 (2005)	19
<i>Michigan Proposition 2 Exit Poll</i> , CNN (2006), http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html	5
Karen Miksch, <i>Widening the River: Challenging Unequal Schools in Order to Contest Proposition 209</i> , 27 Chicano-Latino L. Rev. 111 (2008).....	7
Nat'l Acad. of Education, <i>Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases</i> 18 (Robert L. Linn & Kevin G. Welner eds., 2007).....	6
Nat'l Acad. of Sci. et al., <i>Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads</i> 20 (2011).....	16
Nat'l Sci. Foundation (NSF), <i>Top 20 Academic Institutions Awarding S&E Doctoral Degrees, By Race/Ethnicity: 2006-10</i> (2013)	37

TABLE OF AUTHORITIES – Continued

	Page
Nat'l Research Council, <i>A Data-Based Assessment of Research-Doctorate Programs in the United States</i> (2011)	37
Maria Ong et al., <i>Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics</i> , 81 Harv. Educ. Rev. 172 (2011)	26
Gary Orfield et al., <i>E Pluribus . . . Separation: Deepening Double Segregation for More Students</i> , Civ. Rts. Project 42 (2012).....	7, 8
Scott E. Page, <i>The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies</i> (2008).....	15
Nancy D. Polikoff, <i>Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law</i> (2009).....	5
Julie Renee Posselt et al., <i>Access Without Equity: Longitudinal Analyses of Institutional Stratification by Race and Ethnicity</i> , 49 Am. Educ. Res. J. 1074 (2012).....	6
Mario L. Small & Christopher Winship, <i>Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences</i> , 36 Soc. Sci. Res. 1257 (2007).....	32

TABLE OF AUTHORITIES – Continued

	Page
Ann Steinecke & Charles Terrell, <i>After Affirmative Action: Diversity at California Medical Schools</i> , 8 Ass'n of Am. Med. C. Analysis in Brief 1 (2008).....	19
Univ. of Cal., <i>2013 Accountability Report</i> (2013).....	27
Univ. of Cal. Office of the President, <i>University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2010</i> (2011)	11, 12
Univ. of Cal. Office of the President, <i>University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2012</i> (2013)	12
Univ. of Mich. Office of the Registrar, <i>Degree Reports</i> (file series #892).....	14, 16
Univ. of Mich. Office of the Registrar, <i>Degree Reports</i> (file series #894).....	18
Univ. of Mich. Office of the Registrar, <i>Degree Reports</i> (2000-2012 data)	20
Univ. of Mich. Office of the Registrar, <i>Enrollment Reports for 2010 and 2012</i>	14
Wayne St. Univ. Office of Budget, Planning, and Analysis, <i>Wayne St. Univ. Fact Book</i> (2008-2013).....	20

TABLE OF AUTHORITIES – Continued

	Page
BRIEFS	
Briefs filed in <i>Fisher v. Univ. of Tex.</i> , 133 S. Ct. 2411 (No. 11-345)	
Brief for Association of American Medical Colleges et al. as Amici Curiae Supporting Respondents.....	17
Brief for Fortune-100 Businesses et al. as Amici Curiae Supporting Respondents	18
Brief for National Black Law Students Association as Amicus Curiae Supporting Respondents.....	28
Brief of Empirical Scholars as Amici Curiae Supporting Respondents	31
Brief of Experimental Psychologists as Amici Curiae Supporting Respondents	25
Brief of Social and Organizational Psychologists as Amici Curiae Supporting Respondents	24
Brief of the American Bar Association as Amicus Curiae Supporting Respondents.....	17
Brief of American Educational Research Association et al. as Amici Curiae Supporting Respondents.....	10, 24
Brief of the American Psychological Association as Amicus Curiae Supporting Respondents.....	10

TABLE OF AUTHORITIES – Continued

	Page
Brief of the President and Chancellors of the University of California as Amicus Curiae Supporting Respondents	11, 12

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Civil Rights Project/Proyecto Derechos Civiles at the University of California, Los Angeles (“the CRP”), submits this brief as *amicus curiae* in support of Respondents.¹

The CRP is a university research center that works with scholars from across the United States to enhance understanding of matters relating to racial equality and civil rights. Since its founding in 1996, the CRP has had a special interest in equal access to higher education, and it has commissioned studies and produced books that extensively document patterns of racial inequality and barriers to access to higher education. The CRP has an interest in the accurate presentation of research relevant to the questions of law in this case. The CRP is also particularly concerned about the possible misapplication of research findings in this case and that the Court might be influenced by claims made by Petitioner and supporting *amici curiae* that are strongly contradicted by social science evidence. Therefore, the CRP

¹ All parties have filed with the Court their blanket consent for the filing of *amicus curiae* briefs in these cases. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

seeks to aid the Court by summarizing reliable research relevant to the questions of law in this case.

Since its founding, the CRP has worked to communicate to courts and other legal actors research findings that reflect the consensus of the social science community on educational practices and policies that affect, or are likely to affect, racial and ethnic inequities in education. One example: the Court's 2012-2013 term included an *amicus curiae* brief that the CRP facilitated in *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013). The brief was filed by 444 American social scientists in support of the University of Texas, at Austin. Some information provided in this brief is drawn from that *amicus* brief in response to social science based claims by Petitioner and supporting *amici* that seek to re-litigate the constitutional issues raised in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher*. Neither the CRP nor its affiliated academics saw fit to burden the Court by filing the full array of social science *amicus* briefs that were filed in *Fisher*. Where relevant, *amicus* references the social science briefs filed in *Fisher*, should the Court wish to review the research and arguments in more depth.



SUMMARY OF ARGUMENT

In this brief, the CRP does not address how social science research relates to the constitutionality of race-conscious higher education admissions policies, as the Court has already made its determination in

Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Instead, through the evidence provided in this brief, *amicus* seeks to ensure the constitutional guarantee of a fair political process under the Equal Protection Clause of the Fourteenth Amendment. Michigan's Ballot Proposal 06-02 (Proposal 2) violates constitutional principles of equal protection by the way it selectively imposes burdens on advocates of constitutionally permissible race-conscious policies, while leaving to the ordinary political process advocacy on behalf of policies that consider any and all other factors.

Race-conscious policies not only promote better learning environments and outcomes for all students by enhancing diversity, they also benefit racial minorities in particular by offsetting existing severe structural racial inequities in education and promoting access to educational programs that are the first step along a critical pathway to business, academic, civic, and political leadership in the United States and throughout the world. Research has consistently demonstrated that racially focused constraints on admissions, like Proposal 2, have, among other consequences, reduced the admission and enrollment of racial minorities at selective public undergraduate institutions, in graduate programs, and in training programs for the professions of medicine, law, and business. These substantial drops have occurred despite the best efforts of colleges and universities to recruit students through extensive outreach and the

consideration of race-neutral characteristics in admissions decisions, such as socioeconomic disadvantage.

Petitioner's claims that Proposal 2 does not harm racial minorities ignores the real-world consequences that a decline in campus racial diversity has for students of color, including how racially isolating environments can undermine learning and persistence. The claims by Petitioner and his supporting *amici curiae* that Proposal 2 in fact benefits racial minorities by preventing them from being admitted to selective institutions where they are academically "mismatched" and cannot compete are strongly refuted by the weight of scientific evidence. Reliable social science research consistently shows that racial minority students admitted to the most selective universities under race-conscious policies have higher completion rates than similar students enrolled in less selective institutions. Furthermore, minority students attending selective institutions are more likely than their fellow white students to be leaders in their chosen professions and in activities that aid communities of color and contribute to the well-being of the larger society. Bans on race-conscious admissions therefore harm the long-term community interests of minorities and undermine the nation's interest in reducing inequality and in preparing its citizens for life in an increasingly diverse world.



ARGUMENT

I. Race-Conscious Admissions Policies Offset Severe Racial Inequities in Education and Promote Opportunity for Racial Minority Students.

The Sixth Circuit was appropriately animated by the concern that “[s]afeguarding the guarantee ‘that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.’” *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 474 (6th Cir. 2012). Minority communities and advocates of racial equality have sought to secure policies that promote the inclusion of students historically excluded and underrepresented in selective colleges and universities. These policies include the consideration of race as one of many factors in admissions at public institutions of higher education.² Race-conscious

² Only 14% of Michigan African American voters approved Proposal 2, while 64% of white voters voted in favor. *See Michigan Proposition 2 Exit Poll*, CNN (2006), <http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html>. These data indicate that racial minorities overwhelmingly approve of race-conscious policies in admissions, but they also show that racial minorities are not all of one mind. Just as not all lesbians and gays approve of same-sex marriage (*see, e.g.*, Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (2009)), not all people of color view race-conscious admissions the same way. In neither instance, however, does a diversity of views negate the equal protection concern.

policies that meet constitutional requirements allow postsecondary institutions to offset the severe structural racial inequality in K-12 public schools and promote opportunity for racial and ethnic minorities, thereby enabling institutions to promote the educational benefits of diversity for all students.

Racial minorities disproportionately suffer from inequalities in K-12 education that close off access to selective colleges and universities.³ For example, minority students who attend minority segregated schools typically have less experienced teachers, are more likely to drop out than similar students in integrated schools, and are denied equal opportunity in many other ways.⁴ Racial minority students also

³ See, e.g., Nat'l Acad. of Education, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* 18, 31-32 (Robert L. Linn & Kevin G. Welner eds., 2007), available at http://www.naeducation.org/xpedio/groups/naedsite/documents/webpage/NAED_080863.pdf; see also Julie Renee Posselt et al., *Access Without Equity: Longitudinal Analyses of Institutional Stratification by Race and Ethnicity*, 49 Am. Educ. Res. J. 1074, 1101-03 (2012) (finding that although African American and Latino students have made strides in academic preparation, odds of selective college enrollment have declined due to racial stratification in K-12 education system).

⁴ See Nat'l Acad. of Education, *supra* note 3, at 16, 18, 20, 31-32 (reviewing all of the social science literature submitted to this Court in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) and finding reliable evidence proving that racial tracking, inexperienced teachers, and racially segregated minority schools substantially and negatively impact the academic achievement of minority students, particularly African American students).

lack equal access to rigorous college-preparatory work, such as advanced placement courses, which play an increasingly important role in selective college admissions.⁵

Race-conscious admissions policies allow institutions to address these unequal educational opportunities and consider the wide array of factors necessary for individualized assessment, such as demonstrated capacity to overcome hardships. These contextual determinations are especially important in Michigan, where African American students attend K-12 schools that are among the most segregated in the nation.⁶ In Michigan, 34% of African American K-12 students attend schools where fewer than 1% of the student body is white (second worst in the U.S.), and 53% of

⁵ College Board, *The 8th Annual AP Report to the Nation*, 16, 18-19 (2012) (finding that academically prepared underserved minority and low-income students remain underrepresented in advanced placement classrooms nationally and in Michigan); Nat'l Acad. of Education, *supra* note 3, at 16 (discussing how minority students are tracked out of college preparatory courses); Karen Miksch, *Widening the River: Challenging Unequal Schools in Order to Contest Proposition 209*, 27 *Chicano-Latino L. Rev.* 111, 113-114, 121, 125-129 (2008) (documenting the unequal access to advanced placement (AP) courses along racial lines and the use of AP in selective admissions, including at the University of Michigan).

⁶ Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, Civ. Rts. Project 42, 44-45 (2012), available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

African American children attend schools where fewer than 10% of the student body is white (third worst in the U.S.).⁷ Most notably, Michigan has the lowest “Equity and Excellence Scores” in the U.S. for African American students, a measure of how well a state enables all of its students to succeed in advanced placement courses.⁸

The consequences of Michigan’s Proposal 2 must be understood in the context of these racial inequities in public schools and the related ways constitutionally permissible race-conscious policies partially offset them and give racial and ethnic minorities more equal access to selective colleges and universities.⁹

⁷ *Id.* at 46 tbl.18.

⁸ College Board, *8th Annual AP Report to the Nation*, *supra* note 5, at 16-18. In 2012, white students in Michigan scored 109.0 on the scale, Latinos scored 77.7, Native Americans scored 57.1, and African American students scored only 16.9 on the Equity and Excellence measure. College Board, *Appendix D: Equity in Participation and Success Among Traditionally Underserved Graduates: 2002-2012*, *The 9th Annual Report to the Nation* (2013), available at <http://media.collegeboard.com/digitalServices/pdf/ap/rtn/9th-annual/9th-annual-ap-report-appendix-d.pdf>; see also College Board, *AP Report to the Nation: Michigan Supplement 6* (2013), available at <http://media.collegeboard.com/digitalServices/pdf/ap/rtn/9th-annual/9th-annual-ap-report-state-supplement-michigan.pdf>.

⁹ When properly understood in this context, and contrary to Petitioner’s claim that Proposal 2 prevents preferential treatment (Pet’r Br. 17), Proposal 2 effectively creates racial preferences because it eliminates only race-conscious admissions, leaving undisturbed the host of structures and policies that generally favor whites but disadvantage African Americans,

(Continued on following page)

II. Racially Focused Constraints on Admissions Decisions, like Proposal 2, Dramatically Reduce the Inclusion of Well-Qualified Racial Minorities Across a Number of Educational Programs.

Proposal 2 is a racially focused measure, as it selectively carves out race in admissions from other admissions criteria set through the ordinary political process, consequently reducing the enrollment of racial minorities across a number of educational programs.¹⁰ Since they were first implemented, bans on race-conscious admissions have caused a decline in the number of students of color at selective colleges and universities, in fields of graduate study, and in training programs for the professions of medicine, law, and business – all despite myriad race-neutral efforts to maintain racial and ethnic diversity. The resulting decrease in minority student populations undermines the educational experience of all students while increasing the isolation of those minority students who do gain admission. The long-term

Native Americans, and Latinos. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1200-03 (2008).

¹⁰ Cantrell et al. Resp'ts Br. 8-10, 31-33; *see also* Regents of University of Michigan et al. Resp'ts Br. 11-18 (detailing how admissions are part of the political process in Michigan); Brief for Amicus Curiae Political Scientists in Support of Respondents (documenting the serious political obstacles in Michigan, and nationally, that racial and ethnic minorities face in the initiative process versus the ordinary political process).

community interests of minorities and whites are also threatened by these bans, as selective public universities are the most important training ground for the nation's future professionals and leaders. The comprehensive body of research documenting the educational benefits for all students of a racially and ethnically diverse student body – and the degree to which society is harmed by the precipitous decline in minority enrollment across educational sectors following the enactment of bans on race-conscious admissions – is exhaustively documented in *amicus curiae* briefs filed in support of the Respondents in *Fisher v. Univ. of Tex.*¹¹ Rather than reiterate that body of research, this brief focuses on social science literature that examines the impact of racially focused constraints on admission decisions, like Proposal 2.

¹¹ See, e.g., Brief of American Educational Research Association et al. as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html> (summarizing extensive empirical evidence of the educational benefits of a diverse student body); see also Brief of the American Psychological Association as Amicus Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html> (grounded in 79 peer-reviewed studies documenting the benefits of diversity and the harms to students and society in general when there are declines in diversity).

A. Prohibitions on Race-Conscious Policies Have Substantially Decreased the Enrollment of Racial and Ethnic Minorities at Selective Undergraduate Institutions.

Declines in racial and ethnic diversity at selective colleges were first seen in California after Proposition 209 passed (between 1997 and 1998) and enrollments of African American freshmen at the University of California, Berkeley (UC Berkeley) declined by 53% and the proportion of Latino enrollees fell by 45%.¹² In the same period, African American enrollments at the University of California, Los Angeles (UCLA) dropped by 38%, while Latino enrollments declined by 30%.¹³ Although there has

¹² Univ. of Cal. Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2010* 1, 2, 5 (2011), available at http://www.ucop.edu/news/factsheets/flowfrc_10.pdf. African American enrollment dropped from 7%, or 252 in a freshman class of 3,215 students, to 3.7%, or 122 African American students in a class of 3,333 students. Latino and Chicano student enrollment dropped from 14.6%, or 469 in a class of 3,215 students, to 7.9%, 266 in a student body of 3,333 students. *Id.*

¹³ *Id.* The enrolled African American students declined from 5.6% to 3.5% and enrolled Latino and Chicano students declined from 15.8% to 11%. See also Brief of the President and Chancellors of the University of California as Amicus Curiae Supporting Respondents at 17-19, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/ACR%20The%20President%20and%20Chancellors%20of%20the%20University%20of%20California-c.pdf> (extensively documenting the drop in

(Continued on following page)

been a modest recovery in absolute numbers since that time, neither campus has regained the diversity it had in 1995, and admissions and enrollments for African American and Latino students continue to be low at both campuses, despite myriad race-neutral efforts and the substantial growth in the proportion of Latinos among California's public high school graduates.¹⁴

In recent years, studies have moved from demonstrating correlations between bans on race-conscious admissions policies and lower minority enrollments to assessing the magnitude of the change that can be attributed to the bans. Researchers report that the bans in states like California (Proposition 209), Florida (One Florida Executive Order), Texas (while *Hopwood v. Univ. of Tex.*, 78 F.3d 932 (5th Cir. 1996)

racial and ethnic diversity at selective college campuses across the University of California system).

¹⁴ Petitioner's claim that African American and Latino student enrollment increased after Proposition 209 in California is misleading (Pet'r Br. 31). The same data source Petitioner cites to support a "40% higher" African American freshman enrollment at the University of California after Proposition 209 indicates that the University of California's overall freshman class grew 45% between 1995 and 2010 (from 21,999 to 31,897). See Univ. of Cal. Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshman For Fall 1989 Through 2012* (2013), available at <http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf>. The increase in African American and Latino enrollment during this period therefore cannot be attributed to Proposition 209, as the overall size of the freshman class also increased during this time.

was in effect), and Washington (Initiative 200) have led to a drop of about 33% in the enrollment of African American students at these states' most selective colleges and universities, and a drop of about 20% in the enrollment of Latino students.¹⁵ These selective schools are most likely to send students to the top professional and graduate school programs, meaning that the loss in minority scholars is compounded further down the educational pipeline because there are fewer highly qualified minorities who can apply to graduate programs, which also have been compelled to abandon race-conscious admissions.

Descriptive studies show that, as is true of selective colleges in other states, the University of Michigan, Ann Arbor, despite its best efforts to maintain racial diversity, experienced a sharp decline in the enrollment of students of color after Proposal 2 took

¹⁵ Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 440-47 (2012) (finding a 1.6 percentage point drop (from 5.6% to 4%) in African American student enrollment and a 2.9 percentage point drop (from 14.2% to 11.3%) for Latino student enrollment at the most selective institutions); see also Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 Rev. of Econ. & Stat. 712, 717 (2012) (finding a 1.74 percentage point decline in the enrollment of African American students and a 2.03 percentage point decline in the enrollment of Latino students at the most selective institutions in the nation – large drops, 30% and 27.5%, respectively, given the already low levels of African American (5.79%) and Latino (7.38%) students enrolled at the most selective institutions).

effect. From 2006 (the year before Proposal 2 could have affected enrollment) to 2012, the proportion of African American undergraduate students enrolled decreased by 33% and the proportion of Latino students fell by 12%, even when overall enrollment grew by 10% during that period.¹⁶ Thus, it is not surprising that, by 2012, African American baccalaureate degree attainment at the University of Michigan, Ann Arbor, had declined by more than one-third from previous decades. In the first decade of the 2000s, before post-Proposal 2 cohorts started graduating in meaningful numbers, African Americans were on average 6.9% of the bachelor's degree recipients at the University of Michigan, Ann Arbor. By 2012, African Americans represented only 4.4% of the Ann Arbor campus bachelor's degree recipients.¹⁷

¹⁶ Univ. of Mich. Office of the Registrar, *Enrollment Reports for 2010 and 2012* (the Summary in these two reports covers the 2006-2012 span), available at <http://deepblue.lib.umich.edu/handle/2027.42/96814>. Total African American enrollment dropped from 7% to just 4.7% and Latino student enrollment declined from 4.9% to 4.3%. Even when including all of the new “two or more underrepresented minority” category (added since 2010), there was an 18% reduction in the proportion of underrepresented minority undergraduates at the University of Michigan, Ann Arbor, between 2006 and 2012. *Id.*

¹⁷ Univ. of Mich. Office of the Registrar, *Degree Reports* (file series #892), available at <http://deepblue.lib.umich.edu/handle/2027.42/96801>.

B. The Enrollment of Racial and Ethnic Minorities Has Dropped Significantly Across Graduate Fields of Study as a Result of Bans on Race-Conscious Admissions.

Declines in racial and ethnic diversity after the prohibition of race-conscious policies have also affected graduate education, the gateway to the profession and many other leadership roles in U.S. society. These declines have long-term effects on faculty diversity in these fields, as doctoral training and graduate degree acquisition lead to faculty positions. The declines also have a deleterious effect on the research enterprise, as the perspectives of people from diverse backgrounds fuel the creativity and innovation needed to find answers to the nation's most persistent puzzles.¹⁸

Bans on race-conscious policies in Texas, California, Florida, and Washington have led to a 12.2% decline in the graduate enrollment of African American, Latino, and Native American students across all areas of study.¹⁹ The drop in racial diversity has been greatest in the sciences, an area within an already low number of students of color and one where

¹⁸ See, e.g., Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (2008).

¹⁹ See Liliana M. Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 *Rev. of Higher Educ.* 93, 122 (2012).

maintaining global competitiveness requires growing (not reducing) a strong, talented, and diverse workforce.²⁰ The bans in these states have led to a 26% drop in the percentage of engineering graduate students who are Latino, African American, or Native American (from 6.2% to 4.6%); a 19% decline of these populations in the natural sciences (from 7.8% to 6.3%); and a 15.7% drop in the social sciences (from 12.1% to 10.2%). In the humanities, the bans have contributed to an 11.8% decline (from 10.2% to 9%).²¹

Since Proposal 2, graduate schools at the University of Michigan, Ann Arbor, have experienced similar declines. In 2012, African American graduates earned 3.9% (22 of 568) of the doctoral degrees awarded at the university, the lowest percentage of doctoral degrees awarded to minorities since 1992-1993. These numbers represent a 50% decline from the previous decade (2002-2011), when 7.9% of domestic doctoral degree recipients were African Americans.²²

²⁰ See, e.g., Nat'l Acad. of Sci. et al., *Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads* 20 (2011), available at http://www.nap.edu/catalog.php?record_id=12984.

²¹ Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different Graduate Fields of Studies*, 50 Am. Educ. Res. J. 251, 274-75 (2013).

²² Univ. of Mich. Office of the Registrar, *supra* note 17.

C. The Enrollment of Racial and Ethnic Minorities Has Dropped Substantially in Professional Schools of Medicine, Law, and Business.

The enrollment of racial minorities also has dropped significantly at schools of medicine, law, and business since the imposition of bans on race-conscious policies. A decline in racial and ethnic diversity in these professions creates serious barriers to addressing the health needs of underserved communities and communities of color,²³ blocks the critical pathways to leadership that are essential for the nation's legal and political systems,²⁴ and compromises

²³ See, e.g., Brief for Association of American Medical Colleges et al. as Amici Curiae Supporting Respondents at 7-11, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_resp_amcu_aamc.authcheckdam.pdf (summarizing research demonstrating that racial diversity in medical schools has been shown to produce more culturally competent physicians, and to enhance the learning and cross-cultural competencies of white and other doctors, and that minority physicians are more likely than their non-minority peers to work in underserved minority populations).

²⁴ See, e.g., Brief of the American Bar Association as Amicus Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/11-345%20bsac%20The%20American%20Bar%20Association%20%282%29.pdf> (demonstrating that diverse law schools are critical to democracy and ethical professional practice).

the interests of the U.S. workforce, including major and small businesses alike.²⁵

Medicine. In the wake of Proposal 2, there has been a dramatic decline in the number of African Americans earning medical degrees in the state of Michigan. From 2004 to 2010, African Americans earned 10.3% of the MD degrees awarded in Michigan, but in 2012, this dropped to 4.8%, a decline of more than 50%. In 2010 and 2011, Wayne State ranked third in the nation in the number of MD degrees awarded to African Americans (32 and 39, respectively), but in 2012, after Proposal 2 took full effect, these numbers dropped to 13. At the University of Michigan Medical School, the percentage of African American graduates declined in 2012 by over two-thirds from the period 2004 to 2010 (from 8.7% to 2.7%).²⁶

²⁵ See, e.g., Brief for Fortune-100 Businesses et al. as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/ACR%20Fortune%20100%20and%20Other%20Leading%20American%20Businesses.pdf> (demonstrating that skills acquired through interaction with racially diverse peers have a lasting effect on individuals' preparation for employment in an increasingly diverse and global workforce).

²⁶ Ass'n of Am. Med. Coll., *Table 30: Total Graduates by U.S. Medical School and Race and Ethnicity* (2013), available at <https://www.aamc.org/download/321538/data/2012factstable30.pdf>. See also Univ. of Mich. Office of the Registrar, *Degree Reports* (file series #894), available at <http://deepblue.lib.umich.edu/handle/2027.42/96801>.

These declines track similar drops that have taken place at public medical schools in California since Proposition 209, where the percentage of entering underrepresented minorities dropped from 23.1% in 1993 to 14.3% in 1997.²⁷ The average in the decade since (16.4%) is still considerably below pre-Proposition 209 levels, even as the state's non-white population soars. Myriad race-neutral efforts in California have not reversed these trends.²⁸

Similar declines were seen in Texas from 1996 to 2003, when the Fifth Circuit's decision in *Hopwood v. Univ. of Tex.* banned state universities from considering race as a factor in admissions. 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003). In 1995, underrepresented minorities were 21.4% of first-year medical school enrollees in Texas, but this percentage dropped by one-fifth from 1997 to 2002, to an average of 17.2%.²⁹

²⁷ See Ann Steinecke & Charles Terrell, *After Affirmative Action: Diversity at California Medical Schools*, 8 Ass'n of Am. Med. C. Analysis in Brief 1 (2008), available at <https://www.aamc.org/download/102358/data/aibvol8no6.pdf>; see also Jordan J. Cohen, *The Consequences of Premature Abandonment of Affirmative Action in Medical School Admissions*, 289 J. Am. Med. Ass'n 1143, 1146-47 (2003).

²⁸ Steinecke & Terrell, *supra* note 27, at 2 (explaining that efforts included "automatic admissions for top high school students, outreach, academic enrichment, and financial aid").

²⁹ Mex. Am. Legal Defense & Educ. Fund et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, 8 Harv. Latino L. Rev. 33, 36 (2005).

Law School. In the University of Michigan Law School's post-Proposal 2 graduating classes of 2011 and 2012, African Americans were only 2.8% of graduates. This constitutes a 60% decline since the 1990s-2000s; in fact, the late 1960s was the last time there were two consecutive years with so few African American graduates at the University of Michigan Law School.³⁰ At Wayne State University Law School, only 2.6% of full-time law students were African American by 2011, compared to 8.2%-9.0% from 2003 to 2006.³¹ By 2010 and 2011, African American law students were more likely to be enrolled in Wayne State's part-time program, where students are far less likely to receive grants and scholarships.³²

Similarly, in the period that it has been without a *Grutter*-like admissions policy (1997-2011), the UC Berkeley School of Law enrolled an average of 12.5 African American students annually, only half what the annual enrollment had been (25.7) when the law school was able to consider race in its holistic

³⁰ J.A. 102-3 (1970-1999 data, with 1998 data corrected); Univ. Mich. Office of Registrar, *Degree Reports* (2000-2012 data).

³¹ Am. Bar Ass'n & Law Sch. Admission Council, *ABA-LSAC Official Guide to ABA-Approved Law Schools* (2005-2008, 2013). The data trails the edition date by two years in this series. See also Wayne St. Univ. Office of Budget, Planning, and Analysis, *Wayne St. Univ. Fact Book* (2008-2013), available at <http://www.wayne.edu/facts/index.php>.

³² Am. Bar Ass'n & Law Sch. Admission Council, *supra* note 31.

admissions plan (1970-1996).³³ A similar three-fifths drop occurred at the UCLA School of Law, despite intense recruitment efforts. A majority of the classes entering post-Proposition 209 at UCLA had fewer African American law students than *every* pre-Proposition 209 year dating back to 1967.³⁴

Business. Comparing two years (1995-1996) when the six public business schools in the University of California system could consider race in admissions to the post-Proposition 209 years (2000-2011) when they were banned from doing so, the average percentage of entering African American students dropped by 58% (a decline from 3.6% to 1.5%). Moreover, between 2000 and 2011, many of the University of California business schools had not one single African American or Native American student in their entering classes.³⁵

³³ William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & Univ. L. 53, 122-23 (2013).

³⁴ *Id.* at 122-23 (classes in 1997 to 2001, 2005, 2007 and 2011 had between 3 and 12 African American students).

³⁵ *Id.* at 118-19.

D. These Declines in Racial Diversity Have Taken Place Despite Myriad Race-Neutral Efforts to Maintain Diversity.

Petitioner's contention (Pet'r Br. 30, 34) that there are workable alternatives to race-conscious policies is unsupported by the evidence and the extensive experience of selective public universities in Michigan (Univ. Resp'ts Br. 18-25) and other states with bans like Proposal 2. Selective universities in states that bar race-conscious admissions have dedicated substantial resources, including time and money, to admitting classes that are sufficiently diverse with respect to race and ethnicity to avoid the isolation of minorities, and to enrich every student's education so that all are better prepared for success in the diverse global marketplace. Their myriad aggressive efforts have failed to produce campuses sufficiently diverse to meet these educational goals.

The Brief of *Amicus Curiae* of the President and Chancellors of the University of California in Support of Respondents in *Fisher*³⁶ document California's experience, which establishes that race-neutral admissions policies – including the consideration of socioeconomic status as a factor in admissions and targeted outreach to low-income students – have not made up for declines in racial diversity at the most selective institutions in the state since considering

³⁶ Brief for Univ. of Cal., *supra* note 13.

race as a factor in admissions was banned. The experience of the University of California's most selective institutions is supported by numerous studies, which find that considering parental income or social background without also considering race has led to or would lead to the enrollment of substantially fewer students of color in selective schools than does the consideration of race among the many factors that make for a strong student body.³⁷

The results of California's experience are further supported by statistical analyses that simulate the impact of replacing race-conscious admissions policies with other efforts to attract more minority students, such as greater attention to wealth and income and

³⁷ See, e.g., Anthony P. Carnevale & Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 37 (2013), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf> ("While politically attractive, the direct substitution of class for race-based preferences does not yield the same numbers of African-American and Hispanic candidates as a more direct reliance on race-based admissions."); see also Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. of Pol'y Analysis & Mgmt. 463, 476 (2006) ("the presence of minorities among all low-income students in the United States, and especially among those graduating from high school with sufficient grades and test scores to be admitted to college, would be too small to generate a level of minority representation anywhere close to its current level"); Alan Krueger et al., *Race, Income and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 Am. Law & Econ. Rev. 282, 309 (2006) ("The correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity.").

increased recruitment and support programs. The studies find that even the most effective recruitment and retention policies fail to restore the number of students of color at the most selective four-year institutions to the level that would be achieved by the holistic consideration of race in admissions.³⁸

III. Race-Conscious Admissions Policies Prevent the Isolation of Racial Minorities at Selective Colleges and Universities and Increase Their Prospects for Success.

Petitioner erroneously argues (Pet'r Br. 32, 35) that bans on race-conscious policies do not harm minorities. This argument ignores the real-world consequences that a decline in campus racial diversity has for students of color admitted to selective universities, including feelings of social isolation and perceptions of a hostile racial climate, both of which can undermine their learning and persistence.³⁹

³⁸ Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. of Lab. Econ. 113, 152-54 (2010).

³⁹ See, e.g., Brief of American Educational Research Association, *supra* note 11, at 18-24 (summarizing evidence demonstrating harms associated with tokenism, racial isolation, and stereotyping, with particular attention to the harms in the science, technology, engineering, and mathematics fields); see also Brief of Social and Organizational Psychologists as Amici Curiae Supporting Respondents at 9-12, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_resp_amcu_

(Continued on following page)

Research reveals that banning race-conscious policies can create more racially hostile environments and increase stigmatization of the minorities on campus, even though they will have been admitted on the same basis as their majority peers.⁴⁰ For example, an African American student from the UCLA School of Law – one of fifteen in a post-Proposition 209 class of about 300 students – described the law school environment as stigmatizing, racially isolating, and alienating, and reported that she constantly had to fight racial stereotypes and counter the view that she was unqualified, even though she was admitted after California’s ban on race-conscious admissions.⁴¹

Too often the effect of increased racial isolation on campus and associated perceptions and tensions is

sop.authcheckdam.pdf (summarizing evidence that solo status, isolation, and poor racial climate can undermine academic performance and persistence); Brief of Experimental Psychologists as Amici Curiae Supporting Respondents at 21-25, *Fisher*, available at <http://www.utexas.edu/vp/irla/Documents/ACR%20Experimental%20Psychologists.pdf> (explaining that isolation exacerbates stereotype threat and leads to underperformance by minority students).

⁴⁰ See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199, 1220-25 (2010).

⁴¹ Kendra Fox-Davis, *A Badge of Inferiority: One Law Student’s Story of a Racially Hostile Educational Environment*, 23 Nat’l Black L.J. 98, 99, 114-16 (2010) (describing the experience of being one of fifteen African American students out of 300 in her first-year class and one of four African American students in a property law class taught by a professor who advocated the mismatch hypothesis, as creating an environment in which she felt her “race was on trial”).

manifested in a person failing to perform up to his or her academic potential. We see this, for example, in the science, technology, engineering, and mathematics (STEM) fields.⁴² We also see it in the effects racial isolation has on learning and graduation rates. Studies show that students of color who experience racial isolation do worse academically, have lower self-esteem, and have poorer career prospects, partly as a result of the stress of being a minority in a racially isolating environment.⁴³

Furthermore, survey data from 31 institutions across the country show that when diversity is low, racial stereotypes are reinforced and discrimination increases.⁴⁴ Minority students are also likely to feel

⁴² See, e.g., Mitchell J. Chang et al., *Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants*, 82 J. Higher Educ. 564 (2011).

⁴³ See Sylvia Hurtado et al., *A Model for Diverse Learning Environments: The Scholarship on Creating and Assessing Conditions for Student Success*, in 27 *Higher Education: Handbook of Theory and Research* 41, 57, 102 (John C. Smart & Michael B. Paulsen eds., 2012) (synthesizing research linking campus climate and retention); see also Maria Ong et al., *Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics*, 81 Harv. Educ. Rev. 172 (2011) (demonstrating that racially isolated settings are a leading barrier for women of color in STEM fields to persist to graduation).

⁴⁴ Sylvia Hurtado & Adriana Ruiz, UCLA Higher Education Research Inst., *The Climate for Underrepresented Groups and Diversity on Campus* (2012), available at <http://www.heri.ucla.edu/>

(Continued on following page)

excluded from campus events and activities. *See infra*, App. Figure A. Although African American students are not the predominant minority on any of the campuses studied, the data indicate that they feel more included where there is a diverse campus environment. Higher percentages of African American and Latino students on campus also significantly reduce Latino students' feelings of isolation. *Id.*

Similar surveys at leading American research universities show that African Americans perceive campus racial climates to be less welcoming at institutions that are prohibited from considering race in their admissions policies and have low levels of diversity as a result. Survey data for the years 2008-2012 at the University of California show that fewer than two-thirds of the school's African American students reported feeling respected, and the figures are even lower at UC Berkeley and UCLA.⁴⁵ The results for the University of Michigan, Ann Arbor, after Proposal 2 (66%) are almost the same as in California, despite the university's substantial efforts to improve the racial climate on campus. *See infra*, App. Figure B. By contrast, at the University of Texas

briefs/urmbriefreport.pdf (studying climate survey data, including 490 African American students and 3,488 Latino students).

⁴⁵ Univ. of Cal., *2013 Accountability Report* (2013), <http://accountability.universityofcalifornia.edu/index/8.3.1>. Among the African American students surveyed at UC Berkeley in 2008, 2010, and 2012, only 57%, 55%, and 49% felt respected over the three survey years, while at UCLA the figures were 56%, 62%, and 55% for the three administrations. *Id.*

at Austin and other Association of American Universities institutions with race-conscious admissions policies and/or higher proportions of African Americans in the student body, about three-quarters of African Americans feel that students of their race are respected.⁴⁶

A recent study found that minority students at the University of Michigan Law School experienced detrimental consequences after Proposal 2. A survey of 505 students (47% of the Michigan Law School student body), the vast majority of whom entered the law school after Proposal 2 was in effect, indicates that almost half of African American students (47%) do not perceive the campus as one that is supportive of diversity, whereas almost all white students (84%) do.⁴⁷

These studies, and a number of other studies summarized in *amicus curiae* briefs filed in support of the Respondents in *Fisher*,⁴⁸ contradict claims by

⁴⁶ Kidder, *supra* note 33, at 61-64; Univ. of Cal., *2013 Accountability report*, *supra* note 45; University of Michigan, Ann Arbor, data provided upon request. Each of these institutions used the same survey, called “UCUES” at the University of California and “SERU” at the other institutions. The two unnamed Association of American Universities institutions include one public and one private university, neither of which is in Michigan.

⁴⁷ Meera E. Deo, *Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence*, Soc. Sci. Res. Network, No. 2315787 at 31-33 (2013), <http://ssrn.com/abstract=2315787>.

⁴⁸ *See, e.g.*, Brief for National Black Law Students Association as Amicus Curiae Supporting Respondents at 20-23, *Fisher*, (Continued on following page)

Petitioner's *amici* that minorities would feel more welcome on campuses that do not practice race-conscious admissions. In fact, studies have shown that policies banning the consideration of race in admissions can have a "discouragement effect" on minority students, creating the perception that students of color are not welcome or valued at the institution.⁴⁹ For instance, the most accomplished African American and Latino students admitted to the University of California are more likely to spurn offers from UC Berkeley or UCLA in favor of highly selective private universities where race-conscious policies are permissible.⁵⁰

133 S. Ct. 2411 (No. 11-345), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_resp_amcu_nblsa.authcheckdam.pdf (summarizing additional studies showing that the consideration of race in admissions helps reduce racial stigma, not produce it).

⁴⁹ See Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 Soc. Educ. 106, 108, 119 (2006).

⁵⁰ Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, in *Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, at 33, 48 (Eric Grodsky & Michal Kurlaender eds., 2010) (finding that African American freshmen shifted from the University of California to private universities after Proposition 209). Other studies further contradict Petitioner's claim of a "warming effect" after a ban on race-conscious affirmative action (Pet'r Br. 35). See Kidder, *supra* note 33, at 71-85; Saul Geiser & Kyra Caspary, "No Show" Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997-2002, 19 Educ. Pol'y 396 (2005)

(Continued on following page)

IV. Bans on Race-Conscious Policies in Admissions Undermine Equal Opportunity and Fair Access to Pathways to High Achievement.

Significant benefits of race-conscious admissions policies are lost by bans like the one enacted by Proposal 2. These include ensuring equal opportunity and fair access to the host of benefits associated with attending highly selective institutions, including pathways to high achievement. Petitioner’s claim that race-conscious policies produce more harm than benefits for racial minorities ignore this evidence and rely instead on claims that run counter to the weight of the scientific evidence.

A. An Extensive Body of Social Science Research Repudiates the “Mismatch” Hypothesis.

Petitioner’s argument that race-conscious policies result in an academic “mismatch” (Pet’r Br. 32) – that is, depression of the graduation rates and academic achievement of students of color because they attend schools where most other students have stronger credentials – is contradicted by the social science evidence. Moreover, the few studies that purport to provide empirical evidence in support of mismatch

(finding that African American and/or underrepresented minorities disproportionately chose to enroll at highly selective private universities after Proposition 209).

claims have been rejected by eminent methodologists for flaws in their designs and analysis.⁵¹ A broad array of scholars and the overwhelming bulk of the relevant research present findings inconsistent with the mismatch hypothesis. This literature includes peer-reviewed studies and well-received books by eminent social scientists that look broadly at selective public and private universities or nationally representative samples and employ a range of empirical methods, including those that control for unmeasured variables. The take-away message from numerous scholars echoes the conclusion of Alon and Tienda that “the mismatch hypothesis is empirically groundless for black and Hispanic” students.⁵² The research consistently finds that when minority students are enrolled at selective colleges they have a higher probability of attaining a bachelor’s degree,⁵³ and that institutional selectivity increases the probability of

⁵¹ The methodological flaws in the studies cited by Petitioner and supporting *amici* are extensively addressed in Brief of Empirical Scholars as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/ACR%20Empirical%20Scholars.pdf>.

⁵² Sigal Alon & Marta Tienda, *Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. Educ. 294, 309 (2005) (explaining that “affirmative action practices both broaden educational opportunities for minority students and enable minority students to realize their full potential”).

⁵³ Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 Res. Higher Educ. 214, 232 (2008).

graduation for African American students in particular.⁵⁴

Bowen, Chingos, and McPherson, for example, in *Crossing the Finish Line*, analyzed the freshman class entering in 1999 at 21 public flagship universities, including the University of Michigan, plus the public university systems in four states.⁵⁵ The authors found that African American and Latino students with the same high school grade point average or SAT scores graduated at higher rates if they attended more selective institutions.⁵⁶ They found that Latinos tend to “undermatch” by disproportionately enrolling in less selective schools than they are eligible to attend,⁵⁷ which depresses their graduation rates and future economic prospects. This massive study

⁵⁴ Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 Soc. Sci. Res. 1257, 1272 (2007); see also Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 Soc. Sci. Res. 531, 544 (2007) (examining freshmen at 28 selective colleges and universities and finding that estimates provided no evidence for the mismatch hypothesis); see also Douglas S. Massey & Margarita Mooney, *The Effects of America's Three Affirmative Action Programs on Academic Performance*, 54 Soc. Probs. 99, 111, 113 (2007) (finding no empirical evidence supporting the mismatch hypothesis and that for minority students race-conscious admission does not appear to impact grades but does appear to lower the odds of dropping out).

⁵⁵ William Bowen et al., *Crossing the Finish Line: Completing College at America's Public Universities*, xvii, 12-16 (2009).

⁵⁶ *Id.* at 106-08, 208-16, 313-14 n.7.

⁵⁷ *Id.* at 106-08, 208-16.

concluded that there was “no support whatsoever for [the mismatch] hypothesis” and that students “are generally well advised to enroll at one of the most challenging universities that will accept them.”⁵⁸

A second group of studies looks at what happened in California after Proposition 209 and in Texas when the Fifth Circuit’s ruling in *Hopwood* was in effect, and they too find no support for the mismatch hypothesis. A particularly revealing study took advantage of a rare “natural experiment” created by an unfortunate budget situation at the University of California in 2004. Researchers examined how a group of students who initially were denied admission to University of California campuses but were later admitted ended up, over the next four years, performing as well as their peers who had been preferred admits because they had better academic credentials.⁵⁹ The authors found “that mismatch has

⁵⁸ *Id.* at 227-28.

⁵⁹ Michal Kurlaender & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions*, 86 Soc. Educ. ___ (forthcoming 2013), available at <http://www.ssc.wisc.edu/cde/cdewp/2013-06.pdf>. Initially, budget cuts caused the University of California system to scale back admissions to a group of eligible, but less academically competitive students, who were made the promise of later admission after two years at a community college. When funding was partly restored in the summer of 2004, this group of “guaranteed transfer offer” students at UC Berkeley, UCLA and UC San Diego were offered automatic admission. The authors considered this group to be “mismatched” in that they were the most marginal students admitted to the University of California and had been originally

(Continued on following page)

no reliable or substantively notable bearing on grades, rates of credit accumulation, or persistence.”⁶⁰

Another study of graduation rates at the University of California in the years before and after Proposition 209 (entering freshmen from 1994 to 2003) found little evidence that underrepresented minority graduation rates at the University of California improved, all things considered, once race-conscious policies were banned.⁶¹

In addition, the predictions of the mismatch theory have not held up. If the theory were accurate, one would expect that, after race-conscious admissions policies were banned in Texas due to the *Hopwood* ruling, graduation rates for minority students would increase because they would be “better matched” to other students at less competitive

denied admission. The authors assessed the outcomes that would be expected of “mismatched” students had they not been admitted to these competitive schools but instead attended less competitive University of California campuses.

⁶⁰ *Id.* at 24.

⁶¹ 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*, at 83, 99 (Eric Grodsky & Michal Kurlaender eds., 2010); see also Kidder, *supra* note 33, at 106-08 (reviewing the same data).

institutions. However, the data show that graduation rates for minorities decreased rather than increased.⁶²

B. Petitioner Ignores the Educational and Career Benefits Associated with Access to Selective Colleges and Universities, like the University of Michigan, and the Particular Returns They Offer Racial Minorities.

Petitioner and supporting *amici* dismiss the benefits to minorities of being able to enroll in larger numbers at highly selective institutions like the University of Michigan, Ann Arbor, which is associated with a host of long-term benefits – for all students but for African American and Latino students in particular. These benefits include higher rates of degree completion,⁶³ increased attendance and likelihood of success in graduate and professional schools,⁶⁴

⁶² Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 *Econ. Educ. Rev.* 1110 (2010).

⁶³ See, e.g., Alon & Tienda, *supra* note 52, at 296 (demonstrating persistence to degree and graduation rates); Mark C. Long, *College Quality and Early Adult Outcomes*, 27 *Econ. of Educ. Rev.* 588, 597-98 (2008) (reporting increases in bachelor's degree attainment).

⁶⁴ William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 160-73 (1998); Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 257-62 (2009).

entry into leadership positions,⁶⁵ and higher earnings.⁶⁶ Moreover, some of these benefits appear to be exclusive to minority students.⁶⁷

Addressing the value of attending the state's leading law school in *Sweatt v. Painter*, the Court unanimously stated that the impact on applicants was unquestionable:

[T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.

339 U.S. 629, 634 (1950). Today, the insight underlying the Court's observation in *Sweatt* endures. In the National Research Council's respected data-driven

⁶⁵ Bowen & Bok, *supra* note 64, at 155-66, 257-58.

⁶⁶ See, e.g., Stacy B. Dale & Alan B. Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data*, 29 (2) J. Human Resources __ (forthcoming 2014), available at <http://www.nber.org/papers/w17159>; Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 Rev. of Econ. & Stat. 717, 718 (2009).

⁶⁷ Dale & Krueger, *supra* note 66, at 25 (examining post-graduation outcomes and finding that, for minorities but not for whites, higher earnings resulted from attendance at more selective institutions).

assessment of graduate programs, *A Data-Based Assessment of Research-Doctorate Programs in the United States* (2011), the University of Michigan had a total of 66 ranked programs, more than even Harvard, Yale, and UC Berkeley.

Race-conscious policies in admissions help ensure access to these programs precisely where it matters the most, as the most selective colleges and universities have a very disproportionate impact on preparing students for the professions. The University of Michigan was ranked the number-one “elite” university in the U.S. (and third overall) in terms of the number of STEM doctorate degrees it awarded to African Americans in 2006-2010,⁶⁸ which corresponds to the cohorts admitted before Proposal 2. Similarly, in the legal profession, the University of Michigan, Ann Arbor, produced nearly as many applicants to U.S. law schools (3,672) in the past five years as the combined total (3,750) for the four other Michigan public universities included in America’s top 240 law school feeder institutions.⁶⁹ By closing off pathways of opportunity for racial minorities to attend selective institutions like the University of Michigan, Proposal

⁶⁸ Nat’l Sci. Foundation (NSF), *Top 20 Academic Institutions Awarding S&E Doctoral Degrees, By Race/Ethnicity: 2006-10* tbls.7-16 (2013), available at <http://www.nsf.gov/statistics/wmpd/2013/pdf/tab7-16.pdf>. The same NSF table for 2004-08 indicates that the University of Michigan ranked second in the U.S. in STEM doctorates awarded to African Americans.

⁶⁹ Law Sch. Admission Council, *Top 240 ABA Applicant Feeder Schools for Fall Applicants* (2013), available at [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/top-240-feeder-schools.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/top-240-feeder-schools.pdf).

2 imposes a particular harm on the long-term community interests of minorities and undermines the nation's interest in reducing inequality and in training its citizens for life in an increasingly multiracial society.



CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals judgment striking down Proposal 2 as unconstitutional.

Respectfully submitted,

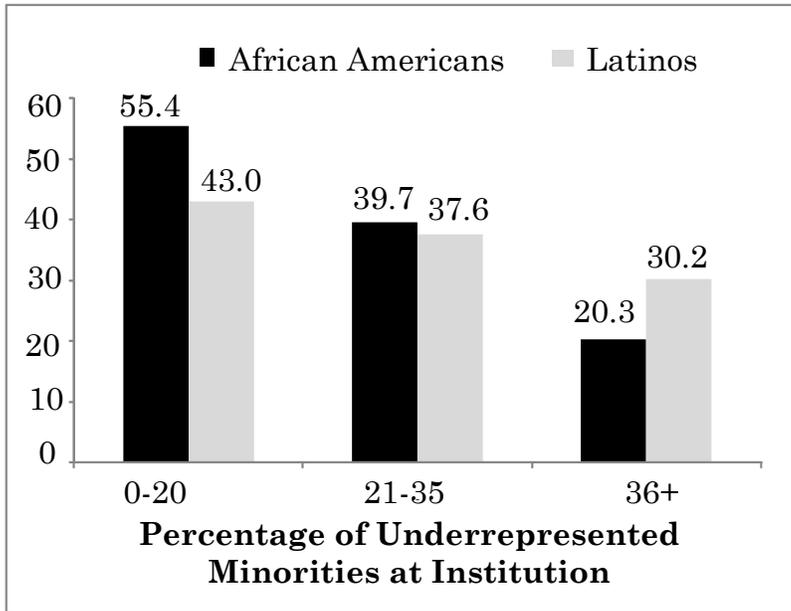
LILIANA M. GARCES
Counsel of Record
 Assistant Professor
 PENNSYLVANIA STATE UNIVERSITY
 400 Rackley Building
 University Park, PA 16802
 (814) 865-9754
 lmg340@psu.edu

KAREN MIKSCH
 Associate Professor
 UNIVERSITY OF MINNESOTA
 178 Pillsbury Drive S.E.
 Minneapolis, MN 55455
 (612) 625-3398

RICHARD O. LEMPert
 Eric Stein Distinguished University
 Professor of Law & Sociology, *emeritus*
 UNIVERSITY OF MICHIGAN
 1510 N. Colonial Terrace
 Arlington, VA 22059
 (734) 736-0957

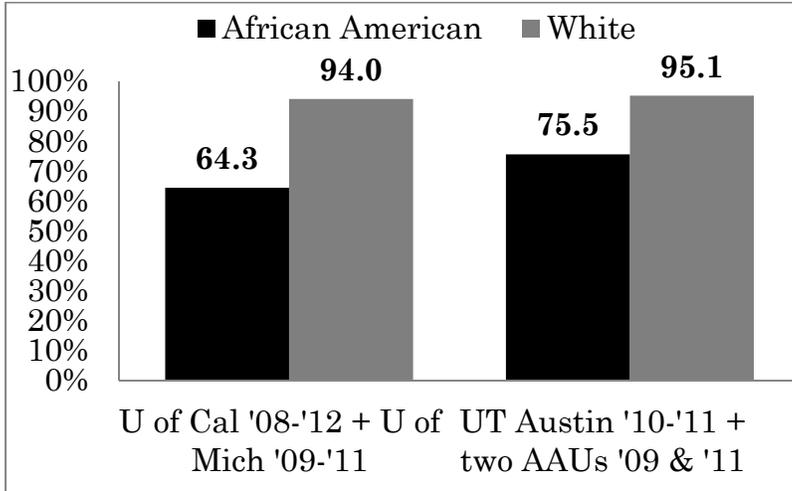
August 30, 2013

Figure A. Percentage of Latino and African American Students Responding “Yes” to “Exclusion” as the Type of Discrimination Experienced.



Data source: Diverse Learning Environment Survey, 2010 and 2011, HERI, UCLA. Based on 31 institutions across the country.

Figure B. Percentage of African American and White Undergraduates Who Responded to Survey Question “Students of My Race/Ethnicity are Respected on this Campus” by Answering “Strongly Agree, Agree, or Somewhat Agree.”¹



¹ For data sources, *see supra* notes 45 and 46 and accompanying text. The dark bar on the left combines results from 2,338 African American students who responded to surveys at the University of California in 2008, 2010, and 2012, and at the University of Michigan, Ann Arbor, in 2009, 2010, and 2011. The dark bar on the right combines results from 820 African American students who responded to the same survey at the University of Texas, at Austin in 2010 and 2011, and at two unnamed Association of American Universities institutions that had race-conscious policies and/or a student body that was 5% or more African American. For white students, the bar on the left reflects responses from a total of 30,976 students, and the bar on the right reflects responses from 8,037 students.