Nos. 20-1199 & 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA, *et al.,*
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First and Fourth Circuits

BRIEF FOR 25 DIVERSE, CALIFORNIA-FOCUSED BAR ASSOCIATIONS, LAWYERS ASSOCIATIONS, CIVIL RIGHTS ORGANIZATIONS, AND COMMUNITY FOUNDATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[*]

Amici are twenty-five diverse bar associations, lawyers associations, civil rights organizations, and community foundations that are almost exclusively California-based. Given *amici*'s personal experience with Proposition 209—a 1996 California constitutional amendment that banned affirmative action—they seek to share their experience of the devastating effects that forced blindness has had on California's people, institutions, and economy.

The Asian Pacific American Bar Association of Silicon Valley empowers Asian American and Pacific Islander attorneys in Silicon Valley by fostering a community where AAPIs can network, develop professional skills, participate in community service, take positions on issues affecting AAPIs in Silicon Valley, where AAPI attorneys play a critical role in enriching our legal and civic communities by practicing in every legal field. APABA Silicon Valley has an interest in this litigation because it has long worked to advance diversity, equity, and inclusion in society generally, including in higher education, and believes that race-conscious policies or practices in college admissions processes can positively result in a more diverse and inclusive student body.

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[*] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the brief's preparation or submission. Counsel for the parties have consented to the filing of this brief.

The Asian/Pacific Bar Association of Sacramento formed to promote and protect the interests of Asian and Pacific Islander American attorneys, judges, and law students, and the AAPI communities in the greater Sacramento area. As part of its mission, ABAS fosters professional development and provides a forum to discuss current events of concern to its members. ABAS has a strong interest in preserving race-conscious admissions programs and processes in colleges and law schools across the country to maximize opportunities for growth and leadership of its members and members of the broader AAPI community, particularly those who are underrepresented in higher education and the legal profession.

Bay Area Lawyers for Individual Freedom is the nation's oldest bar association of LGBTQ+ persons. BALIF promotes the professional interests and social justice goals of its members, and the legal interests of the LGBTQ+ community at large. For over 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQ+ people and has authored and joined amicus efforts. BALIF has an interest in this litigation because one of its central goals is promoting diversity, equity, and inclusion. LGBTQ+ people, and especially LGBTQ+ people of color, have historically been marginalized and excluded in educational and professional settings. BALIF thus strongly supports policies that affirmatively promote diversity, especially those that improve the representation of historically marginalized communities.

The Black Women Lawyers Association of Los Angeles Inc. is a non-profit corporation whose mission is dedicated to charitable, educational, and community-based services. Founded because of the marked

absence of an organization which addressed the needs and concerns of African-American women in the legal profession, throughout its history, BWL members have devoted themselves to promoting diversity, equity, and inclusion in higher education. As such, BWL joins in the filing of this amicus brief in defense of affirmative action to preserve a narrow pathway for equity and opportunity for Black people in the United States.

The Black Women Lawyers Association of Northern California is an organization that provides professional, financial, educational, social, and moral support to Black women in the legal profession in Northern California. BWLNC is comprised of attorneys (and law students) from all fields and at all levels. The organization's programs range from in-depth continuing legal education panels to networking events, all designed to address the unique needs and experiences of Black women legal practitioners. BWLNC has a strong interest in promoting diversity in colleges and universities, as that increases diversity in this nation's legal industry. Moreover, BWLNC's work reflects that Black students greatly benefit from individualized race-conscious admission policies and diverse educational settings.

The California Asian Pacific American Bar Association represents the interests of APA bar organizations and more than 14,000 APA attorneys statewide to promote justice and equality. It advocates for legal and policy matters that impact the APA community. It advocates for legislative changes on a statewide level and provides support for more than thirty sister bar organizations.

The California Association of Black Lawyers serves as a statewide umbrella organization addressing issues facing Black lawyers and judges in California. From its inception, CABL has challenged inequities in the legal system and other institutions impacting the lives of Black people and other People of Color in the United States. Promoting diversity, equity, and inclusion in higher education is an essential component of CABL's mission. Therefore, CABL joins in the filing of this amicus brief in defense of affirmative action in higher education to address historic inequities and to preserve a pathway to enlightenment and economic empowerment for Black people and other People of Color in the United States.

The California La Raza Lawyers Association was founded to promote appropriate Latina/o representation in the state and federal judiciary. To this end, CLRLA actively encourages Latina/o lawyers to seek appointments on the bench and supports Latina/o lawyers through their judicial application and endorsement process. CLRLA has an interest in this brief because it believes that representation matters on the bench and that a diverse judiciary will give our communities the hope we need and desire for a better life in our state and in our country.

California ChangeLawyers is a community foundation whose mission is to build a better justice system for all Californians. ChangeLawyers empowers the next generation of lawyers, judges, and activists to create a more diverse legal profession, a fairer justice system, and a better California. ChangeLawyers believes that a state as diverse as California should have a justice system led by advocates of all ethnicities and races, instead of the mere 32% of diverse lawyers

currently. ChangeLawyers believes race-conscious, holistic admissions paves the way for a more representative student body and thus a future workforce that better reflects the state's demographics.

The Charles Houston Bar Association—named after the famed civil rights attorney Charles Hamilton Houston—is the oldest Black bar association in California. For nearly seven decades, CHBA has fought for civil rights, diversity, equity, and inclusion, hewing to their namesake's precept that the law should promote fundamental social change. CHBA members include prominent lawyers and judges in the United States. CHBA is joining this amicus brief to preserve and defend affirmative action because it is necessary to address historic and systemic racism and also to preserve a pathway for Black people to earn an education and achieve the American Dream.

The Cruz Reynoso Bar Association serves Sacramento's Latino community of legal professionals committed to achieving diversity, equity, and equality in the legal field and in our society. Named after the California Supreme Court's first Latino associate justice and one of the first Latino law professors in the United States, the CRBA continues Justice Reynoso's life-long passion for education, recognizing that our society's well-being and prosperity is enhanced for all when each of us have a chance to succeed. Through community engagement, legal education, and mentorship, the CRBA's mission includes increasing opportunities for the pursuit of higher education for individuals from historically marginalized groups.

The Earl B. Gilliam Bar Association is a nonprofit founded to advance the political, economic,

educational, social, legislative, and legal interests of the Black community in San Diego County. EBGBA is committed to defending the legal and human rights of all people, promoting the administration of justice, eradicating the root causes of racism, promoting the professional and personal interests of its members, and preserving high standards of integrity, honor, and courtesy in the legal profession.

The East Bay La Raza Lawyers Association is the county bar association of Latinx lawyers in Alameda and Contra Costa counties. EBLRLA is dedicated to expanding legal access to the Latinx community, providing annual scholarships to Latinx law students, supporting Latinx attorneys with a local professional network, and advocating for increased Latinx representation in the judiciary. EBLRLA has an interest in promoting diversity in higher education because EBLRLA supports diversifying the legal profession.

Equal Justice Society is a national civil rights organization whose mission is to transform the nation's consciousness on race through law, social science, and the arts. Through litigation and advocacy, EJS combats racial and other forms of discrimination in the education system, legal system, and government. Since its founding in 2000, EJS has advocated to restore race-conscious decision-making in California. Founded on the principles of equity and fairness, EJS has a strong interest in promoting diversity in higher education, which includes preserving holistic admissions policies and decision-making processes that consider an individual's race and/or membership in an underrepresented group in the interest of inclusivity and institutional growth.

Equal Rights Advocates is a California-based national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for marginalized genders. Since its founding, ERA has combatted sex-based and other forms of discrimination in various ways including through community education and outreach and free legal assistance to individuals experiencing unfair treatment at work and in school. ERA has filed hundreds of suits and appeared as amicus curiae in numerous civil rights cases. Through its work on campuses across the state, ERA has seen the negative impact of California's affirmative action ban firsthand. ERA firmly believes that the law must protect affirmative action to ensure both diversity and equitable access to education.

Hmong Innovating Politics seeks to advance social justice and build power with Hmong youth and families through leadership development and multigenerational community organizing. HIP envisions a California of empowered communities that thrive in a socially and economically just democracy. HIP has consistently held that race-blind or race-ignorant policies ignore the unique barriers and challenges some applicants have overcome. Moreover, race-ignorant policies mask the significant disparities that exist within the AAPI community. Acknowledging and reducing educational disparities created by institutional and historical racism is essential for communities to truly thrive in a socially and economically just democracy.

The Iranian American Bar Association, Northern California Chapter educates the Iranian American community, the American public, and the government about important legal issues. IABA NorCal also helps

Iranian American lawyers succeed. IABA NorCal believes that affirmative action provides access to opportunities that have been historically gatekept from underrepresented groups in America. Promoting that access fosters more inquisitive student bodies and more representative societal leaders. For these reasons, IABA NorCal opposes any limitation on equal access to education.

The John M. Langston Bar Association of Los Angeles, Inc. has long advocated for the rights of African-Americans, including for access to the country's preeminent academic institutions. These institutions embody a marketplace of ideas, which requires the academic freedom to assemble a diverse student body. Such process should allow the consideration of race as part of a holistic assessment of each applicant. The net result would be more diverse universities, deeper and more meaningful educational experiences for all students, and ultimately, a more diverse and inclusive society. The Langston Bar Association therefore joins this filing, which is central to its mission of promoting the administration of justice and supporting educational equity and opportunity for African-Americans.

The Latino Community Foundation is California's sole philanthropic organization focused on unleashing the civic and economic power of Latinos in California. LCF has an interest in this litigation because it has witnessed the devastating effects of Proposition 209 on California communities statewide, especially on the Latino community. Since Proposition 209, Latino college enrollment has dropped dramatically. Without policies that achieve diversity in higher education, post-secondary educational attainment, and the long-

term economic mobility it carries, is out of grasp for the largest racial and ethnic group in California. LCF stands in firm opposition of any ban on higher education institutions' ability to consider race as a factor in admissions.

The Muslim Bar Association of Southern California was founded to create a community for Muslim legal professionals and law students. The Muslim community in America is among the most diverse. MBASC's members are therefore intimately familiar with the value and benefits of diversity. For this principal reason, MBASC has an interest in promoting diversity in our schools. Considering the racial, social, and economic inequities that persist in America, this goal can only be advanced by allowing educational institutions to perform highly individualized and holistic assessments in admissions decisions, which may include race as a factor.

Region 9 of the National Bar Association serves Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and Guam. The NBA is the nation's oldest and largest national network of predominantly African-American attorneys and judges, representing approximately 66,000 legal minds. For nearly 100 years, the NBA has fought for racial justice, diversity, equity, and inclusion in the legal profession and higher education. Region 9 is joining this amicus brief because it is essential to preserve educational opportunities for Black People and other People of Color that will provide them with the necessary tools to overcome systemic racism and generational disenfranchisement.

The Santa Clara County Black Lawyers Association is a non-partisan membership organization that works on issues in the public interest. It does this by raising citizen awareness, advancing sound public policies, promoting the number of youth of color who pursue careers in law, and promoting justice for communities of color. It is a network of predominantly African-American attorneys and judges, representing the interests of over 100 lawyers, judges, law professors, and law students.

The Society of American Law Teachers is one of the largest independent membership organizations of legal academics in the United States. SALT has long been committed to making the legal profession more inclusive and reflective of the Nation. The issues in the present cases are of particular interest to SALT because each law school's ability to admit a strong, diverse class arises from the pool of college graduates. As California reveals, the elimination of race-conscious admissions programs demonstrably shrinks the pipeline for professional schools and civic leadership roles for candidates from historically marginalized communities. Race-conscious admissions programs must therefore be safeguarded to ensure diversity at all levels.

The Richard T. Fields Bar Association represents the interests of African-American attorneys in Riverside County and San Bernardino County. It encourages youth of color to pursue careers in law and promotes justice for communities of color. RTFBA has an interest in this litigation because its work with its education partners and community-based youth advocates has shown that students of color benefit from individualized race-conscious admissions policies and

from diverse educational settings. RTFBA opposes any cap, quota, or negative action against any Black, Indigenous, or People of Color.

The Wiley Manuel Bar Association was founded "to represent the professional interests of the legal community in Sacramento, with special emphasis on Black attorneys; to promote the administration of justice; and to make use of legal tools and Legal discipline for the advancement of the economic, political, educational, and social interest of Sacramento, especially the Black community." WMBA hereby joins this filing to protect and preserve educational opportunities for African Americans.

As California-focused organizations whose members have felt the ills of Proposition 209, *amici* have a strong interest in ensuring that this Court knows the negative impact Proposition 209 wrought in California.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For two decades, this Court has recognized not only that universities have "a compelling interest in attaining a diverse student body" but also that "attaining a diverse student body is at the heart of [their] proper institutional mission." *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003). And rightly so. Without policies that achieve diversity in higher education, our Nation will lack "leaders with legitimacy in the eyes of the citizenry" and lose "confidence in the openness and integrity of [its] educational institutions." *Id.* at 332. This is not a contingent or transitory interest, but rather one "essential" to "the dream of one Nation, indivisible." *Id.* That dream is not yet "realized." *Id.* But the

dream is also not yet lost. Across our Nation, institutions of higher learning still strive to achieve the diversity that is at the heart of their mission, their integrity, and their ability to produce leaders with public legitimacy.

Petitioner SFFA, Inc. proposes a reckless, radical operation to cut into that very heart of higher education. The surgery begins at the sensory organs, leaving educational institutions blinded to "racial or ethnic origin," even though such attributes—and the "unique experience of being a racial minority"—remain an "important element" in the "broader array of qualifications and characteristics" necessary to achieve true diversity. *Grutter*, 539 U.S. at 325, 331 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., plurality op.)). The surgery next cuts away the "long recognized" right of "a university to make its own judgments" regarding "the selection of its student body." *Id.* at 329 (quoting *Bakke*, 438 U.S. at 328 (Powell, J., plurality op.)). Continuing on, Petitioner asks the Court to slice through its own precedent and overrule *Grutter*. Only by inflicting this preliminary harm can Petitioner even reach the "heart of [higher education's] proper institutional mission," to which the carving knife would then be set to work.

Recognizing the caution and restraint this Court reasonably would show before undertaking an operation that might kill "the dream of one Nation, indivisible," Petitioner insists that what it asks is perfectly safe, since a similar operation was first performed on California. Petitioner claims that California's experience with Proposition 209 shows that somehow racial and ethnic diversity "would likely improve" if this Court barred universities from considering the racial

and ethnic diversity of their student body in the admissions process. Pet. Br. 70. To state this upside-down proposition is sufficient to refute it. Nevertheless, as is explained in the sections that follow, California's experience offers this Court not a glib assurance, but a grim warning.

Proposition 209 inflicted an immediate, palpable harm upon the interests that *Grutter* recognized. Many talented Black, Latinx, and other "members of our heterogeneous society" were denied the opportunity to "participate in the educational institutions that provide the training and education necessary to succeed in America." *Grutter*, 539 U.S. at 332-33. For example, in the three years after Proposition 209, the average enrollment rate of Black and Latinx students declined by 21.3 and 12.7%, respectively, at the University of California (UC) campuses. Peter Arcidiacano et al., *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*, at 6 (2011), http://public.econ.duke.edu/~psarcidi/prop209.pdf. As a result, "the path to leadership" became less "open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. There followed an inevitable loss of "confidence in the openness and integrity of the educational institutions," *id.*, as evidenced by the 12 to 13% decrease in *applications* from underrepresented groups the year that Proposition 209 went into effect, Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility after California's Proposition 209*, Rsch. & Occasional Paper Series: CSHE.10.2020, at 19 (2020). Taken together, "the path to leadership" became less "open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at

332. Put simply, California's universities became less diverse, not more.

That decrease in diversity in turn led to just what *Grutter* warned of: a loss of "confidence in the openness and integrity of the educational institutions," *id.*, as evidenced by the 12% to 13% decrease in *applications* from underrepresented groups the year that Proposition 209 went into effect, Bleemer, *supra*, at 19. As the Court understood in *Grutter*, the fragile diversity at California universities had provided "benefits [that] are not theoretical but real … in today's increasingly global marketplace." *Grutter*, 539 U.S. at 331. When that diversity diminished, the consequences for underrepresented-group participation in the marketplace and leadership in the State were inevitable. Members of underrepresented groups in the 24-to-34-year-old cohort, for example, earned less and were unemployed more relative to other groups in the years following Proposition 209. Bleemer, *supra,* at 3, 15-17.

If these harms had afflicted only one generation of Californians, that alone would be reason enough not to repeat Petitioner's operation on the Nation as a whole. But the reality is that, contrary to Petitioner's assurances, California has still not recovered. And to achieve even lesser success with diversity, educational institutions have adopted indirect solutions that this Court recognized could inflict serious harm on other aspects of their educational missions. *See Grutter*, 539 U.S. at 340 (holding that the very kind of plans that Petitioner praises "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both" by "preclud[ing] the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse,

but diverse along all the qualities valued by the university"). "[R]eal diversity" *has* "decline[d]" in the wake of Proposition 209, Pet. Br. 70, and with it declined the broad societal benefits that flow from "a diverse student body," *Grutter*, 539 U.S. at 328.

The Court's decision in *Grutter* expressed the hope that by 2028, progress on justice and equity would mean that affirmative action would "no longer be necessary to further the interest approved today." 539 U.S. at 343. Neither that future date nor that better day has yet been reached. Keeping faith with "the dream of one Nation, indivisible" means allowing institutions of higher learning to continue to strive for the "diverse student body [that] is at the heart of [their] proper institutional mission" and allowing them to do so using all "good faith" means that lie within the broad "freedom of a university to make its own judgments as to … the selection of its student body." *Id.* at 329-32 (citations omitted). The Court should not transform the law in the way Petitioner urges and should instead affirm the decisions below.

ARGUMENT

I. Petitioner acknowledges the need for, and value of, a diverse student body, and merely argues that it knows better than universities how to achieve that goal.

Looking to the deepest values and highest aspirations of our Nation, this Court recognized in *Grutter* "a compelling interest in attaining a diverse student body." 539 U.S. at 328. For all the fire it directs at *Grutter*, Petitioner does not really quarrel with this basic truth. Thus, Petitioner brags that under its preferred approach—which would reduce academic and community criteria in admissions—"white admissions would decrease, combined African-American and Hispanic admissions would rise slightly, [and] Asian-American admissions would increase." Pet. Br. 33-34, 84-85. Petitioner's own highly race-conscious advocacy demonstrates that the question is not *whether* diversity should be vigorously pursued, but rather *how* diversity should be vigorously pursued.

Petitioner's explicit recognition of the value of student-body diversity is worth emphasizing because it underlines why Petitioner's invocation of *Brown* is so inapt. When heroic civil rights advocates fought against *de jure* segregation in American education, they did not argue for the elimination of anti-Black laws on the theory that there were other, more effective ways to exclude Blacks from schools. They argued that schools should integrate Black students. Here, Petitioner argues against considering racial and ethnic diversity in admissions, but does so by claiming there are more effective ways to achieve the same demographic result, albeit by changing many other aspects of how universities admit students. Pet. Br. 33-

34. In *Brown*, the respondents attacked an evil end, while Petitioner purports to embrace the universities' end, and merely second-guesses their means.

Petitioner's presumption that it knows better than universities what is best for universities runs afoul of this Court's core principles. To be sure, *Grutter* pragmatically recognized that setting admissions policy involves "complex educational judgments in an area that lies primarily within the expertise of the university." 539 U.S. at 328; *accord Fisher v. Univ. of Tex.*, 570 U.S. 297, 310-11 (2013) (*Fisher I*); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 376-77 (2016) (*Fisher II*). But the Court also rested its deference on the notion of "academic freedom," *Grutter*, 539 U.S. at 324, explaining that American law has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition," *id.* at 329; *accord Fisher I*, 570 U.S. at 308; *Fisher II*, 579 U.S. at 376.

This Court therefore "calibrated" its scrutiny of admissions policies based on the need for universities to define their own path to excellence. *See Grutter*, 539 U.S. at 328. The Constitution requires that universities employ an approach "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 334; *accord Fisher I*, 570 U.S. at 309. In weighing those factors, each school should consult its own "experience and expertise" and its own educational mission, "consider[ing] race or ethnicity more flexibly as a 'plus' factor in the context of

individualized consideration of each and every applicant." *Grutter*, 539 U.S. at 328-29; *see also Fisher I*, 570 U.S. at 310-11; *Fisher II*, 579 U.S. at 376-77. These cases held that it is the Court's duty to exercise its special competence in safeguarding the Constitution as the Court understands it, and a university's right to exercise its special competence in pursuing academic excellence as the university understands it. *Grutter* and *Fisher* demonstrate how these respective expertises are complementary, not contradictory.

This background explains why the Court should not constitutionalize California's "experiment[]" in constraining that "flexib[ility]" and limiting that "academic freedom." *Grutter*, 539 U.S. at 328, 343; *accord Fisher I*, 570 U.S. at 308-309. Doing so would be contrary to the Nation's core values and the Court's longstanding precedent. Moreover, the results of California's experiment have not been anything like the success Petitioner describes.

II. California's refusal to allow institutions of higher education to consider an applicant as a whole, including the applicant's race and the "unique experience of being a racial minority," has "require[d] a dramatic sacrifice of diversity" within those institutions.

In 1996, California enacted Proposition 209, which prohibited preferential treatment for individuals or groups based on "race, sex, color, ethnicity, or national origin" in university admissions, student financial aid, and state hiring. The proposition took effect in 1998, inflicting immediate and lasting harm on diversity at public universities in California.

A. Ending race-conscious admissions in California's public universities resulted in an immediate decline in diversity.

In the three years after Proposition 209 went into effect, the proposition had a catastrophic impact on enrollment for individuals from underrepresented groups such as Black and Latinx students. The average annual enrollment rate for Black students at all four-year public universities in California declined by 15%. Arcidiacano, *supra*, at 6. The average annual enrollment rate for Latinx students declined by 10.3%. *Id*. The harm was even worse at the UC campuses. Considered the crown jewels of public higher education, the UC campuses are generally the most selective of California's public universities. There, the average annual enrollment rate for Black students declined by 21.3%, and the average annual enrollment for Latinx students declined by 12.7%. *Id*.

The enrollment of students from underrepresented groups plummeted even while the overall population of citizens from underrepresented groups in California rose. For example, in 1995, 38.3% of all California high school graduates came from underrepresented groups, in contrast to just 21.0% of all new UC freshmen—meaning those groups' representation on UC campuses was barely more than half what it is among California high school graduates. Ian Wang, *Finding a Silver Lining: The Positive Impact of Looking Beyond Race Amidst the Negative Effects of Proposition 209*, 2008 BYU Educ. & L.J. 149, 156 (2008). In 2005, seven years after Proposition 209 went into effect, the disparity was 44.8% of high school graduates to 19.8% of newly admitted UC freshmen—meaning that their UC representation was now *less* than half their

representation among high school graduates. *Id*. Such underrepresentation includes not just Black, Latinx, and Native American students, but also groups such as Pacific Islanders, whose representation at UC Berkeley—for instance—is a mere *fifth* of their percentage in the California population. *See Report: Pacific Islander Students at Cal* (University of California, Berkeley, Fall 2020), at 3, https://cejce.berkeley.edu/pacific-islander. Similarly, Filipino students comprised only 3.3% of UC Berkeley enrollees in 2021, Office of Planning & Analysis, *UC Berkeley Fall Enrollment Data for New Undergraduates* (last updated Sept. 30, 2021), https://opa.berkeley.edu/uc-berkeley-fall-enrollment-data-new-undergraduates, but approximately 4.2% of Californians. Such underrepresentation is unsurprising given that many "Asian ethnic groups have below-average educational attainment or economic privilege." *See* Brief for Okla. et al as *Amici Curiae* at 1-2.

As *Grutter* anticipated, the narrowing of the path of opportunity did not go unnoticed but instead contributed to a calculable loss of hope in the community. These diminished aspirations were demonstrated by a significant decline in *applications* to the UCs from qualified Black and Latinx students. In 1998 and 1999, there was a likely 12% to 13% decrease in Black and Latinx applicants to UC schools, translating to 1,200 fewer applicants for each of those years. Bleemer, *supra*, at 19. Again, this drop ran counter to the change in California's demographics. And it ran counter to an overall increase in applications to the UCs, which reached a record high. *See* Mark Gladstone, *Applications to UC at Record Level*, Los Angeles Times (1998), https://www.latimes.com/archives/la-xpm-1998-jan-29-mn-13176-story.html.

These students deterred from applying were not somehow "unqualified" applicants abandoning quixotic applications. Instead, "most of [them] would have likely been admitted to some UC campus," and "a large number of [them were] certain to be admitted to some campus—indeed, very likely to be admitted to UC's more-selective campuses." *See* Bleemer, *supra*, at 19. As this Court understood, these deterred students simply lost "confidence in the openness and integrity of [their] educational institutions, *Grutter*, 539 U.S at 329, and gave up on applying, Bleemer, *supra*, at 19.

Meanwhile, California's public medical schools and law schools also saw a dramatic decline in admissions for underrepresented groups. From 1993 to 1996, Black students constituted 7.5% of UC law school enrollments; from 1997 to 2000, their enrollment dropped to just 2.2%. William Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 Berkeley La Raza L.J. 173, 209 (2001). In this same period, Native American enrollments fell by half, and Latinx enrollments by nearly half, from 13.4% to 7.2%. *Id*. At UC medical schools, the percentage of applicants from underrepresented groups fell by almost a third from a 1990 peak of 20% to 14% in 1998. Kevin Grumbach et al., *Underrepresented minorities and medical education in California*, Center for California Health Workforce Studies: U.C., San Francisco, at 2 (1999). The decline was particularly severe at the UC Irvine and UC San Diego medical schools, where admissions of students from underrepresented groups plummeted by 81% and 59% respectively from 1994 to 1998. *Id*. at 7-8.

California can never undo these consequences. The statistical evidence shows that for a generation of underrepresented "race[s] and ethnicit[ies]," no "path to leadership" was "visibly open," and as a result, "talented and qualified individuals" abandoned that path. *Grutter*, 539 U.S. at 332. One hopes that some fraction of them found their way back. But others surely did not. And that is not the only irreparable harm. "[L]egitimacy in the eyes of the citizenry," *id.*, like other things that really matter in the health of a Nation, is far harder to build than it is to destroy. A generation of Californians from long-disadvantaged groups saw the power of the law as being used to deny them educational opportunities. One hopes that that generation's children were still taught to believe in "the dream of one Nation, indivisible," *id.*; but some surely learned harder lessons. Losses, like gains, compound with time.

B. Despite the high investment California's public universities have made to increase diversity through indirect means, the level of diversity achieved through race-conscious admissions has never been fully recovered.

Petitioner is right that California's public universities responded to this catastrophic decline through alternative means for increasing student-body diversity. But *Grutter* was right that the cost of these indirect approaches is high. 539 U.S. at 340. In simple dollar terms, the UC schools spent an additional *$60 million* on direct recruiting aimed at improving outreach to underrepresented groups. *See* Patricia Grander, *California: A Case Study in the Loss of Affirmative Action*, Civ. Rts. Project/Proyecto Derechos, Civiles, at 10-11 (Aug. 2012). They engaged in targeted recruitment

efforts, and they attempted to institute a "percent plan," wherein all high school students in the top 4% of their high school classes would be automatically admitted. *See id*. at 11-13. Next, pressured by litigation, the UC schools stopped requiring ACT or SAT scores for admission. *See* Scott Jaschik, *U of California Gets More Diverse Without SATs*, Inside Higher Ed (July 26, 2021), https://www.insidehighered.com/admissions/article/2021/07/26/u-california-admits-more-diverse-freshman-class-without-sats. These approaches offer something, but they impose real costs and are not enough in comparison to a holistic, individualized approach that can take into consideration racial and ethnic diversity. *See Grutter*, 539 U.S. at 306.

The limits of these approaches can be seen in their inability to bring about the level of diversity that would have been achieved through a full assessment of applicants that could consider race and ethnicity. By 2010, despite a 50% *increase* in Latinx applicants as compared to 1995, UC Berkeley and UCLA showed a 75% *decrease* in Latinx enrollment. *See* Grander, *supra*, at 8. Black students at these institutions experienced a decline in both applications *and* admissions during the same period. *Id*. And Pacific Islanders, Southeast Asians, and Filipinos applied to UC Berkeley at "below their proportion of the state population." *Asian Americans and Pacific Islanders in California: How Higher Education Diversity Benefits Our Communities*, Asian Americans Advancing Justice (Mar. 2014) at 3, https://archive.advancingjustice-la.org/sites/default/files/Advancing%20Justice%20-%20AAPI%20Higher%20Ed%20Diversity.pdf.

By 2013, hard-working students from underrepresented groups made up approximately 55% of

Californian high school graduates but merely 22% of enrollees at UCLA and UC Berkeley. William C. Kidder & Patricia Gandara, *Two decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts*, Measuring the Power of Learning, at 19 (Oct. 2015). Time has shown that investments in recruiting and changes in admissions criteria could not close these galling disparities.

California's shortfall in talented students admitted from underrepresented groups continues to this day. By 2018, the representation of Black students enrolled at any California State University was *half* of their representation in 1997 (dropping from 8% to 4%). *See* Thomas Peele & Daniel J. Willis, *Dropping Affirmative Action Had Huge Impact on California's Public Universities*, EDSource (Oct. 2020), https://edsource.org/2020/dropping-affirmative-action-had-huge-impact-on-californias-public-universities/642437. The representation of Native American students enrolled in any California State University fell by five-sixths (from 1.23% in 1995 to just 0.2% in 2018). *Id*. And in 2019, Latinx students represented 52% of the high school graduating class but only 29% of the freshmen enrolled in any UC school. *Id*. Even in 2021—when the UC schools dropped the requirement for SAT or ACT scores, after being sued over the tests' discriminatory impact, and admitted its highest proportion of students from underrepresented groups yet—Latinx students were still far underrepresented in the incoming class (at 37%). *See* Jaschik, *supra*.

In sum, California's experience shows that universities still cannot "attain[] a diverse student body" without considering the diversity of the students who would compose that body. *See Grutter*, 539 U.S. at 328.

California's alternative approaches have "require[d] a dramatic sacrifice of diversity," while imposing additional costs and constraints on the admissions process. *Id.* at 340. Even though California has the most diverse high school graduating classes in the Nation, its universities fall far short of that diversity. If Petitioner is right that California shows what its proposal would do to universities around the Nation, then the Californian experience should be a warning, not an advertisement.

III. The "dramatic sacrifice of diversity" imposed and perpetuated by Proposition 209 created a cascade of harms, including a less fruitful academic environment, a less inclusive workforce, and a diminished respect for the institutions in California.

Because a diverse student body improves academic thought, economic strength, and democratic legitimacy, *see Grutter*, 539 U.S. at 332-33, the loss of student diversity causes downstream harms in these same areas. Those harms are felt broadly by all of society, and specifically by those groups who are underrepresented along the path to success. Whether looking at California's overall economic health or the diminution of businesses owned by underrepresented groups, the ills spawned by Proposition 209 reveal that California's "experiment" with race-neutral alternatives has thus far failed.

A. Proposition 209 has harmed California's economy and participants within that economy from underrepresented groups.

Evidence confirms *Grutter*'s proposition that the elimination of affirmative action, and the resulting decline in "exposure to widely diverse people, cultures,

ideas, and viewpoints," deprives students of what "[m]ajor American businesses have made clear" are "skills needed in today's increasingly global marketplace." 539 U.S. at 330. In November 2016, following thorough study and analysis, the Department of Education issued a nearly-100-page report entitled *Advancing Diversity and Inclusion in Higher Education*. The Department determined that "student body diversity in institutions of higher education is important not only for improving the economic and educational opportunities for students of color, but also for the social, academic, and societal benefits that diversity presents for all students and communities." *Id.* at 5. For instance, "[d]iverse learning environments help students sharpen their critical thinking and analytical skills, [and] prepare students to succeed in an increasingly diverse and interconnected world." *Id.*

The Department of Education's findings were not some outlier, but instead are consistent with many studies showing that groups made up of people with diverse perspectives and experiences consistently reach better results than do homogenous groups. *See, e.g.*, David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harv. Bus. Rev. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter. Researchers from Carnegie Mellon University, Union College, and MIT conducted a study that found that "the general ability of the group to perform a wide variety of tasks" is a better predictor of success than the average or maximum intelligence of its individual members. Anita Williams Woolley et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups*, 330 Science 686, 687-88 (Oct. 29, 2010). It also found that higher social sensitivity, relatively equal speaking time, and the

presence of females were correlated with increased performance. *Id.* at 688. A diverse group contains diverse perspectives, which leads to innovation. And, unsurprisingly, when the diversity of California's schools declined, California's economy suffered accordingly.

That suffering was felt most acutely by those excluded from higher education. After Proposition 209, fewer California high school graduates from underrepresented groups earned a bachelor's degree or a graduate degree. *See* Bleemer*, supra*, at 3, 13-14. Predictably, that meant that in the 24-to-34-year-old cohort in the years following Proposition 209, the wage gap and unemployment rate grew disproportionately for members of underrepresented groups. *Id.* at 3, 15-17. That consequence makes sense. Students who are able to obtain high-quality degrees have lower levels of unemployment. William C. Kidder, *Proposition 16 and a Brighter Future for All Californians*, Civ. Rts. Project, at 1 (Oct. 2020), https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/a-brighter-future-for-all-californians-a-synthesis-of-research-on-affirmative-action/Kidder-CRP-Prop-16-pol-brf-UC-Ed-FINAL-Oct-25-2020.pdf. Conversely, when students from underrepresented groups are excluded from top schools, they suffer academically and have lower degree completion rates, making them less competitive candidates in the job market. Bleemer, *supra*, at 13. "Prop 209 caused [underrepresented minority] workers' wages to persistently decline by an average of $1,800 (0.05 log points), or $2,400 (0.04 log points) in their early 30s. As late as age 34, there is no evidence that the average wages of [underrepresented] applicants impacted by Prop 209 recover to their earlier levels." *Id.* at 15.

This is not just a matter of staying out of poverty; it is also a matter of rising into the middle class or joining the ranks of "California's high-earning workers." *Id.* at 17. One study looked at cohorts of underrepresented applicants from the years just before Proposition 209 went into effect (1996 to 1997) and just after (1998 to 2002) to see whether they had managed to break into the upper middle class. Those in the latter cohort were less likely to earn $100,000 within 12 to 16 years after submitting their applications than those in the former cohort. *Id.* So too was there a decline in the number of members of underrepresented groups earning over $100,000; and that group saw an aggregate decline in their wages as well, compared to the cohort who applied before Proposition 209. *Id.* at 17 & n.60.

B. Proposition 209 has led to a less diverse workforce and greater disparity within that workforce.

Proposition 209 did not merely exert a dampening effect on wages; it also excluded industrious members of underrepresented groups from participating equally in important areas of the economy. This can be seen dramatically in the legal profession and in small-business ownership.

Twenty-five years after Proposition 209, California's "attorney population does not reflect its diversity." Carolina Almarante et al., *Report Card on the Diversity of California's Legal Profession* ("State Bar Paper"), The State Bar of Cal., at 4 (July 20, 2020), https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf. "White attorneys account for nearly 70% of California's active

licensed attorney population, while people of color constitute 60% of the state's population." *Id.* "Latinos, in particular, are underrepresented among California attorneys in comparison to their representation statewide: this group comprises 36% of the state's population yet accounts for a mere 7% of all of California's licensed active attorneys." *Id.* Even within the government and non-profit sectors—which are the most diverse—"women and people of color remain underrepresented at leadership levels." The State Bar of California, *Diversity, Equity, & Inclusion Plan: 2021-2022*, at 13 (Mar. 15, 2021), https://www.calbar.ca.gov/Portals/0/documents/reports/Diversity-Equity-Inclusion-Plan-Report-2021-2022.pdf. As *Grutter* teaches, 539 U.S. at 332, and as the California State Bar recognizes, State Bar Paper at 12, the lack of diversity within leadership is particularly harmful.

The justice system raises in a particularly stark way the concerns with legitimacy recognized by *Grutter*. The same groups that are dramatically *under*represented among attorneys and judges are dramatically *over*represented among criminal defendants. *Compare* "Profile of the Legal Profession," American Bar Association (2021) at 13, https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf, *with* Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2022,* Prison Policy Initiative (May 14, 2022). This disparity has undoubtedly contributed to the criminal justice system's declining "legitimacy in the eyes of the citizenry," *Grutter*, 539 U.S. at 332, and particularly those citizens belonging to underrepresented groups: 70% of Whites report at least "some" confidence; 64% of Blacks report "very little" confidence or "none" at all. *See* Jeffrey Jones, *Black, White Adults' Confidence*

Diverges Most on Police, Gallup (Aug. 12, 2020), https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx. Indeed, California's Judicial Council and Judiciary Committee have concluded as much. *See* Administrative Office of the Courts, *Pathways to Achieving Judicial Diversity in the California Courts* ("Judicial Council Paper"), Judicial Council of California (Dec. 2010) at vii, 3; *How Can California Increase the Diversity of the Legal Profession and the Judiciary?* ("Judiciary Committee Paper"), Staff of the Assembly Judiciary Committee (May 2019) at 2-3, https://www.courts.ca.gov/documents/BTB25-4L-01.pdf.

Given the "unique" experiences that come from being a minority in society, *Grutter*, 539 U.S. at 333, the disparity has also undermined the system's effectiveness. As those who oversee the legal system in California have all recognized, diversity among lawyers improves the quality of legal representation and decisionmaking. *See* Judicial Council Paper at 4-5; Judiciary Committee Paper at 3-4; State Bar Paper at 12. Moreover, improving diversity in the legal profession starts a virtuous cycle, for it improves engagement and retention for lawyers from underrepresented groups.

Similar disenfranchisement can be seen in small businesses, a key component in the strength of America's middle class and the health of its economy. Although the evidence is confounded by the fact that Proposition 209 also created separate government-contracting barriers for minority- and women-owned businesses, there is no disputing that these businesses withered in the proposition's wake. *See generally* Tim Lohrentz, *The Impact of Proposition 209 on California's MWBEs: One Billion in Contract Dollars Lost*

Annually by Businesses Owned by Women and People of Color Due to Proposition 209, Equal Just. Soc'y, at 5–6 (Aug. 2015), https://equaljusticesociety.org/wp-content/uploads/2019/10/ejs-impact-prop-209-mwbes .pdf; Monique W. Morris et al., *Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises*, Discrimination Res. Ctr., at 2 (Aug. 2006), https://www.law.berkeley.edu/files/thcsj/Free _to_Compete.pdf. According to government data, California has 4.2 million small businesses, but only 222,000 of them are owned by Black Californians and only 904,000 by Latinx Californians, in contrast to almost 2.9 million owned by White Californians. *See* U.S. Small Bus. Admin. Off. of Advoc., "2021 Small Business Profile: California," at 1, 3, https://cdn.advocacy.sba.gov/wp-content/uploads/2021 /08/30141145/ Small-Business-Economic-Profile-CA .pdf. When only businesses with employees are considered, the disparity is even more dramatic: there are 448,000 such White-owned businesses (about 63% of the total), 71,000 Latinx-owned businesses (about 10%), and 13,000 Black-owned businesses (about 2%). *Id.* This is a striking disparity with the State's demographics: 35.2% White, 40.2% Latinx, 6.5% Black. *See* https://www.census.gov/quickfacts/CA.

Time has told that Proposition 209 no more improved diversity and strength in the law or the marketplace than it has improved diversity and strength in higher learning. To the contrary, the decline of diversity in universities has led, as *Grutter* recognized, to a loss of the benefits of diversity in society as a whole.

C. The Proposition 209 experiment confirms that race-neutral alternatives are insufficient to achieve the undeniably compelling interest in attaining a diverse training ground for future leaders.

In sum, Proposition 209 has failed. That failure is manifested not only in the less-diverse composition of the student body and second-best admissions policies, but also in the resulting loss of "benefits [that] are not theoretical but real," evidenced by economic decline and tarnished legitimacy. *See Grutter*, 539 U.S. at 330. Under Proposition 209, "the path to leadership [is not] visibly open to talented and qualified individuals of every race and ethnicity," foreclosing a "necessary" component of "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry." *Id.* at 332. Put otherwise, the harm fell not just on students and universities, nor even just on "American businesses" and American leadership, but also on American values. *Id.* at 330-31.

Proposition 209 has, however, succeeded in one sense: demonstrating the benefits of using the States "as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Grutter*, 539 U.S. at 342 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). "[T]he dream of one Nation, indivisible," *id.* at 343, is far more likely to be achieved through experimentation in fifty States, federated, than by Petitioner's approach of imposing a uniform race-blind policy from the top down. Continued experimentation is the key to achieving the Court's aspiration of a just and equitable society in which race-conscious admissions would no longer be necessary. *Id.* at 343.

As California's experience shows, adequate "race-neutral alternatives" have not yet been found to achieve the compelling interest in a diverse student body as defined by each academic institution. *Grutter*, 539 U.S. at 333, 339-43. Accordingly, an admissions policy that conducts an individualized review of each applicant and considers each applicant as a whole, including the applicant's race and the "unique experience of being a racial minority," remains narrowly tailored. *Id.* at 333, 339-43. This Court should allow institutions of higher education to strive for the "diverse student body [that] is at the heart of [their] proper institutional mission," and to do so using all "good faith" means that lie within the broad "freedom of a university to make its own judgments as to … the selection of its student body." *Id.* at 329.

CONCLUSION

For all these reasons, the Court should affirm the decisions below.

Respectfully submitted.

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