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LEONARD GREEN, Clerk

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,  
*Defendants-Appellees/Cross-Appellants,*

and

BILL SCHEUTTE, Michigan Attorney General,  
*Intervenor-Defendant-Appellee.*

**On Appeal from the United States District Court  
for the Eastern District of Michigan at Detroit**

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**BRIEF OF CALIFORNIA SOCIAL SCIENCE RESEARCHERS  
AND ADMISSIONS EXPERTS AS *AMICI CURIAE* IN SUPPORT  
OF PLAINTIFFS-APPELLANTS**

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Each of the foregoing parties is an individual and not a corporation. None of the foregoing parties has any financial interest in this matter. Each of the foregoing parties is appearing in an individual capacity and does not speak for or represent the views of the university that employs him or her.

2) Amici Curiae are represented by Doyle O'Connor who is a member of the Court. Mr. O'Connor does not speak for or represent his employer, the State of Michigan. Mr. O'Connor served as a member of the Michigan State Board of Canvassers when the disputed ballot proposal was before that board; was a named defendant and witness in the related case *Operation King's Dream et al v Connerly, et al*, ED Mich Case No 06-12773, Sixth Circ Case Nos. 06-2144/2258; and appears on behalf of amici *pro bono*.

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## INTEREST OF THE AMICI CURIAE

Pursuant to FRAP 29, this brief in support of plaintiffs-appellants<sup>1</sup> is submitted by proposed Amici who are social scientists and scholars who have extensively studied issues related to access, diversity and race relations in K-12 and postsecondary institutions. Several amici have served on admissions committees and worked on research and policy directly related to the issues addressed in this brief. Michigan's Ballot Proposal 2—like California's Proposition 209 before it<sup>2</sup>—amended the state constitution to ban the use of race-conscious admissions at state universities. Amici have an interest in presenting to the Court the 14 years of empirical data that documents the detrimental effects California Proposition 209 has had on underrepresented minorities<sup>3</sup> in the state who seek access to the University of California (UC).

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<sup>1</sup> Pursuant to FRAP Rule 29(c)(5), counsel for amici 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 amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. Work on this brief was coordinated at the Ralph J. Bunche Center for African American Studies at UCLA, under the direction of Darnell M. Hunt, Ph.D. and Ana-Christina Ramon, Ph.D.

<sup>2</sup> California Proposition 209 was passed by voter initiative (54 percent in favor, 46 percent opposed) in 1996. But white voters carried the initiative, with 59 percent voting in favor. Only 42 percent of Asian Americans, 37 percent of Hispanics, and 18 percent of African Americans supported it.

<sup>3</sup> For the purposes of this brief, “underrepresented minorities” include African Americans, Chicana/os/Latina/os, and American Indians.

Although Proposition 209 also has constrained the access of underrepresented minorities to the University of California's transfer student,<sup>4</sup> graduate,<sup>5</sup> and faculty<sup>6</sup> ranks, this brief focuses primarily on the negative effect on freshman admissions. It pays particular attention to the case of African American students in California, since blacks constitute the largest minority group in Michigan burdened by Proposal 2. The empirical evidence in this brief is relevant to the Court's determination of whether Proposal 2 violates the Equal Protection Clause of the 14<sup>th</sup> Amendment. The evidence, which pertains to admissions to the UC, is also relevant to admissions outcomes at the flagship institutions in Michigan because of similarities in the admissions processes in the two systems and because of the educational inequality prevalent in both states.

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<sup>4</sup> Underrepresented minorities accounted for 24.1 percent of all transfer students admitted to the University of California in 2010. University of California Office of the President, "Final Summary of Freshman Applications, Admissions, and Enrollment, Fall 1989-2010," last modified March 2011, [http://www.ucop.edu/news/factsheets/flowtrc\\_10.pdf](http://www.ucop.edu/news/factsheets/flowtrc_10.pdf).

<sup>5</sup> For example, see University of California Regents, *Report of the Work Team on Graduate and Professional School Diversity: A Subcommittee of the University of California Regents Study Group on University Diversity* (Oakland: UC Regents, September 2007), iii, 2, <http://www.universityofcalifornia.edu/diversity/documents/Grad-ProfWorkTeam.pdf>.

<sup>6</sup> Underrepresented minorities accounted for only 8 percent of all University of California tenure ladder faculty in fall 2005. University of California Regents, *Report of the Work Team*.

## SUMMARY OF ARGUMENT

Prior to the University of California Regents' adoption of a resolution banning race-conscious admissions in 1995, the UC used a variety of traditional affirmative action programs. These programs were designed to achieve the University of California's mission of producing future state leaders by enrolling excellent student bodies that reflected the state's increasingly diverse population. They also were effective in furthering the interests of qualified underrepresented minorities who—because of virulent K-12 inequities and the extreme segregation of schools by race and poverty in California—would have been otherwise undervalued by admissions schemes that emphasized small, often insignificant, differences in grade point averages and standardized test scores.

Following the passage of Proposition 209, however, underrepresented minorities' access to the most selective and campuses immediately plummeted and never recovered. This is significant because attending more prestigious institutions provides graduates with significantly increased opportunities for future success. In 2001, the UC Regents reaffirmed the university's commitment to diversity and<sup>7</sup> rescinded their own ban on race-conscious admissions. But they were powerless to do anything about Proposition 209.

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<sup>7</sup> Univ. of Calif. Regents, "Regents Policy 4401: Policy on Future Admissions, Employment, and Contracting, Approved May 16, 2001," last modified Feb. 4, 2010, <http://www.universityofcalifornia.edu/regents/policies/4401.html>.

Constrained by Proposition 209, subsequent reforms in admissions policies have failed to reverse a pattern in which underrepresented minorities are being disproportionately denied access to the top University of California campuses. Nonetheless, Proposition 209 advocates have challenged even facially race-neutral reforms, creating a *chilling effect* that has limited administrators' ability to experiment with alternative admissions systems that might produce excellent freshman classes *without* placing a special burden on underrepresented minorities.

## ARGUMENT

### I. THE MYTH OF MERITOCRACY: WHY "THE NUMBERS" FAIL AS OBJECTIVE MEASURES OF "MERIT."

#### A. The context of racial segregation and inequality in K-12 education.

When viewed in the context of racial inequities in K-12 education, traditional measures of academic "merit," such as standardized test scores and grade point average (GPAs), may be more accurately understood as measures of racial and economic privilege in America than as objective measures of "merit." Racial inequalities and racial segregation run rampant in K-12 education,<sup>8</sup> confounding what many consider unbiased and objective measures of academic "merit" with the continuing effects of racial and socio-economic inequality in

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<sup>8</sup> See UCLA Institute for Democracy, Education, and Access and University of California All Campus Consortium on Research for Diversity, *California Educational Opportunity Report: The Racial Opportunity Gap* (Los Angeles: UCLA/IDEA & UC/ACCORD, 2007), <http://idea.gseis.ucla.edu/publications/eor-07/StateEOR2007.pdf>.

America. In California today, on average, schools with majority white and Asian American populations have better resources, more-qualified teachers, and more college preparatory and honors courses than majority African American and Latina/o schools.<sup>9</sup> These inequities make it virtually impossible for the vast majority of underrepresented minorities (URMs) to compete on an equal footing in the “college admissions game” with their white and Asian American counterparts.

Despite the challenges that underrepresented minority applicants have overcome before applying to the UC, they actually present stellar GPAs as a group. In fact, the average GPAs of URM applicants to UC Berkeley and UCLA in 2009 were 3.79 and 3.77, respectively (compared to 3.93 and 3.91, respectively, for white applicants).<sup>10</sup> While thousands of URM applicants to UC are admitted to the UC and to prestigious private universities throughout America each year,<sup>11</sup>

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<sup>9</sup> See Ralph J. Bunche Center for African American Studies at UCLA, “Gaming the System: Inflation, Privilege, and the Under-Representation of African American Students at the University Of California,” *Bunche Research Report* 4, no.1 (Los Angeles: UCLA, Bunche Center, January 2008); Martin, Karabel, & Jaquez, “High School Segregation and Access to the University of California,” *Educational Policy* 19, no. 2 (2005): 308-330; Teranishi, Allen & Solórzano, “Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California,” *Teachers College Record* 106, no.11 (2004): 2224-2245; *Equity in Offering Advanced Placement Courses in California High Schools, 1997-2003: Gaining or Losing Ground?* (Los Angeles: University of Southern California, The Tomás Rivera Policy Institute, 2006), [http://www.trpi.org/PDFs/ap\\_2006.pdf](http://www.trpi.org/PDFs/ap_2006.pdf).

<sup>10</sup> Univ. of Calif. Office of the President, UC StatFinder, accessed October 26, 2011, <http://statfinder.ucop.edu>.

<sup>11</sup> See Ralph J. Bunche Center for African American Studies at UCLA, “Merit Matters: Race, Myth & UCLA Admissions: 2006 CAPAA Findings,” *Bunche Research Report* 3, no. 3 (Los Angeles: UCLA, Bunche Center, September 2006); Wilbur, “Investigating the College Destinations of University of California Freshman Admits,” in *Equal Opportunity in Higher*

thousands more are denied admission to the top UC campuses,<sup>12</sup> largely because of the UC's inability to consider race as one factor in admissions and the resulting heavy and unwarranted reliance on standardized test scores.

The marginally lower GPAs and the lower test scores presented by many underrepresented minority applicants do not show that they have devoted less effort towards their studies, have less academic potential, or are less intelligent. In fact, indicators of academic "merit" like the SAT and GPA measure only a narrow range of the attributes that colleges and universities claim to value. They fail to capture critical thinking skills, creativity, tenacity, leadership skills, and other attributes essential to student success in college and, more importantly, their efforts to make a mark on the world after graduation.

B. Standardized test scores.

Standardized test scores are a function of racial and ethnic disparities. Currently (and historically), a national test-score gap exists, with African Americans and Latina/os presenting lower scores on average than their white and Asian American counterparts.<sup>13</sup> SAT I scores are strongly correlated with school

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*Education: The Past and Future of California's Proposition 209*, eds. Grodsky & Kurlaender (Cambridge, MA: Harvard Education Press, 2010), 63-82.

<sup>12</sup> Of the nearly 13,000 URM students who applied to UCLA in 2009, for example, almost 100 percent were UC eligible but only 1,999 were admitted to the campus. University of California Office of the President, UC StatFinder, accessed October 24, 2011, <http://statfinder.ucop.edu>.

<sup>13</sup> Bowen & Bok, *The Shape of the River*, (Princeton: Princeton Univ. Press, 1998); Jencks & Phillips, eds., *The Black-White Test Score Gap* (Washington, D.C.: Brookings Institution, 1998).

“Academic Performance Index” (API),<sup>14</sup> parent education, family income, and the segregation and poverty levels of schools. In other words, SAT I scores are related to the characteristics of a student’s high school and his or her own socioeconomic status (SES).<sup>15</sup> Because African Americans and Latina/os are more likely than their white and Asian American counterparts to attend low API schools and to come from lower socioeconomic strata, they score lower on average on the SAT I.

The SAT I also fails as a valid measure of academic ability because it measures a set of skills that are not directly influenced by innate abilities or school curriculum.<sup>16</sup> The standardized exam does a poor job of predicting how students will actually perform after they are admitted to college. A study by the UC Office of the President found that the SAT I predicts only 13 percent of the variance in UC freshmen GPA.<sup>17</sup> This means that 87 percent of the variance in UC first-year college grades is *not* explained by SAT I scores. Nationally, the SAT I alone

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<sup>14</sup> API rankings range from 1 (low) to 10 (high), and show how California schools measure up against one another based on test performance. Schools with low API scores often have non-white and non-Asian majority student populations and are under-resourced.

<sup>15</sup> See Geiser & Santelices, “Validity of High School Grades in Predicting Student Success Beyond the Freshman Year: High School Records vs. Standardized Tests as Indicators of Four-Year College Outcomes,” *Research & Occasional Paper Series: CSHE*, no. 6 (Los Angeles: University of California, Berkeley, Center for Studies in Higher Education, 2007), [http://cshe.berkeley.edu/publications/docs/ROPS.GEISER\\_SAT\\_6.13.07.pdf](http://cshe.berkeley.edu/publications/docs/ROPS.GEISER_SAT_6.13.07.pdf).

<sup>16</sup> See Steele, “The Compelling Need for Diversity in Higher Education,” expert reports prepared for the *Gratz, et al. v. Bollinger, et al.* No. 97-75231 (E.D. Mich.) and *Grutter, et al. v. Bollinger, et. al.* No. 97-75928 (E.D. Mich.) (January 1999), <http://www.vpcomm.umich.edu/admissions/research/>.

<sup>17</sup> Geiser & Studley, “UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SAT II at the University of California,” *Educational Assessment* 8, no. 1 (2002): 1-26.



predicts only about 18 percent of the variation in freshman GPA,<sup>18</sup> which suggests that those with higher SAT I scores will not necessarily perform better in college than those with lower SAT I scores. In fact, the study found that a score difference as large as 300 points makes little difference in students' later GPAs. Another study found that a 100-point increase in an SAT I score might only raise a student's predicted GPA by one-tenth of a grade point.<sup>19</sup>

The SAT I is an even poorer predictor of college performance for African Americans than it is for the general population. For African American freshmen in the UC system, the SAT I only predicts 10 percent of the variation in their GPAs.<sup>20</sup> Thus, a whopping 90 percent of the variation in how well African Americans perform during their first year of college on a UC campus is left unexplained by their performance on the SAT I. The SAT I is a weak measure for gauging students' academic potential and its conflation of achievement and privilege (or the lack thereof) reproduces inequality by excluding otherwise deserving URMs.

Moreover, African American students are particularly vulnerable to being underestimated and mislabeled by standardized tests like the SAT. Research shows that African Americans often earn lower SAT scores due to "stereotype-

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<sup>18</sup> Steele, "The Compelling Need."

<sup>19</sup> Vars & Bowen, "Scholastic Aptitude Test Scores, Race and Academic Performance in Selective Colleges and Universities," in *The Black-White Test Score Gap*, eds. Jencks & Phillips (Washington, D.C.: Brookings Institution Press, 1998), 457-479.

<sup>20</sup> See Geiser & Studley, "UC and the SAT."

threat,”<sup>21</sup> the anxiety or stress triggered by the fear that one might fulfill or be associated with the virulent American stereotype that African Americans are intellectually inferior. This anxiety and fear, like a self-fulfilling prophecy, causes these students to falter on exams by interfering with their concentration, which in turn often results in depressed test scores.

C. Grade point averages.

Racial inequalities in K-12 education also work to diminish the utility of GPA as an objective measure of “merit.” At the UC’s top campuses, a major factor in admissions decisions is the number of Advanced Placement (AP) courses applicants have completed. Students who successfully complete AP courses are awarded an additional grade point, which means that a ‘B’ grade in an AP course, for example, would be recorded as an ‘A’ grade, and so on. Thus, many applicants earn GPAs in excess of 4.0.

Yet, there is a great racial disparity in access to AP courses in California public high schools. A recent study found that of the state’s top 50 high schools ranked by AP course offerings, whites made up 49 percent of the student population at these schools, Asian Americans made up 29 percent, Latina/os made

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<sup>21</sup> See Steele “Race and Schooling of Black Americans,” *The Atlantic Monthly* 269, no. 4 (1992): 68-78; Steele, “A Threat in the Air, How Stereotypes Shape Intellectual Identity and Performance,” *American Psychologist* 52, no. 6 (1997): 613-629; Steele & Aronson, “Stereotype Threat and the Test Performance of Academically Successful African Americans,” in *The Black-White Test Score Gap*, eds., Jencks & Phillips (Washington, D.C.: Brookings Institution Press, 1998), 401-427.

up just 16 percent, and African Americans only 5 percent<sup>22</sup>—despite the fact that these two latter groups have accounted for nearly half of all California high school graduates in recent years. In other words, whites and Asian Americans are significantly overrepresented at these AP-rich public high schools in California, while African Americans and Latina/os are woefully underrepresented. In this sense, the “AP bump” functions as affirmative action for whites and Asian Americans who have much greater access to a rich menu of AP courses.

## **II. PROPOSITION 209’S BAN ON AFFIRMATIVE ACTION HAS SEVERELY DECREASED THE ADMISSION OF UNDERREPRESENTED MINORITIES TO UC’S TOP CAMPUSES.**

Students become *eligible* for UC admission by meeting established and demanding minimum requirements for coursework, GPA, and standardized test scores.<sup>23</sup> The state’s Master Plan for Higher Education requires the UC’s eligibility pool to contain only the top eighth of graduating seniors. URM applicants in that pool have thus been found highly qualified for work at top universities.<sup>24</sup>

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<sup>22</sup> Solórzano & Ornelas, “A Critical Race Analysis of Advance Placement Classes and Selective Admissions,” *High School Journal* 87 (2004): 15-26.

<sup>23</sup> For the 2010 class, minimum eligibility requirements for California residents included a GPA of 3.0; completion of 15 yearlong high school “a-g” courses, a) history/social science, b) English (4 years required), c) math (3 years required), d) laboratory science (2 years required), e) foreign language (2 years required), f) visual and performing arts (1 year required), and g) college preparatory electives (1 year required). In addition, students must submit scores from the ACT With Writing *or* SAT reasoning examination *and* two SAT subject tests.

<sup>24</sup> URMs have made up most of the growth in the eligibility pool. Between 2003 and 2009, white numbers in the UC eligibility pool were down 13 percent, Asian-Americans were up by 1, blacks

But while eligibility guarantees admission to the UC *system*, it does not guarantee admission to any of the eight campuses that use *selectivity* measures to select students for admission from those who are UC eligible. In practice, these selection criteria are the inflated numbers (i.e., GPAs and standardized test scores) that, as we argued above, K-12 inequities typically prevent URMs from amassing.

The effects are most apparent at UC Berkeley and UCLA, which are generally regarded as the two most prestigious UC campuses, each perennially ranked in the top five of all U.S. public universities. The majority of all UC applicants apply to UC Berkeley and/or UCLA because of their global reputations and the doors that degrees from either campus are likely to open.<sup>25</sup> Despite the fact that most applicants to UC Berkeley and UCLA are UC eligible, the campuses each admitted only about 21 percent of their applicants in 2010.<sup>26</sup>

**Figure 1** charts the admit rates<sup>27</sup> for underrepresented minorities at UC Berkeley and UCLA, between 1994 and 2010. The most notable feature of the

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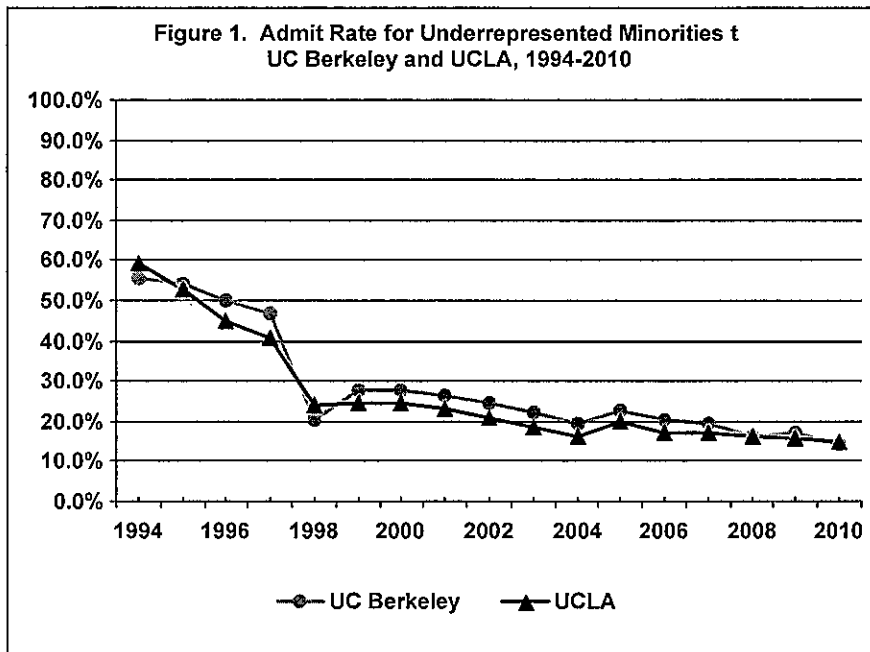
were up 7 percent, and Latina/os were up 18 percent. *College-Going and University Eligibility: Differences between Racial/Ethnic Groups* (Sacramento: The Calif. Postsecondary Educ. Commission, March 2009), <http://www.cpec.ca.gov/completereports/2009reports/09-11.pdf>.

<sup>25</sup> See Ehrenberg, "Method or Madness? Inside the *USNWR* College Rankings" (*CHERI Working Papers*, Paper 42, Cornell Higher Education Research Institute, Cornell University, Ithaca, NY, 2003), <http://digitalcommons.ilr.cornell.edu/workingpapers/42>.

<sup>26</sup> Data from the UC Office of the President show that UC eligible black students denied admission to UCLA or UC Berkeley are particularly likely to leave the state altogether for elite private institutions. Wilbur, "College Destinations."

<sup>27</sup> The admit rate for any group is defined as the total number of applicants in the group, divided by the number of applicants from the group that are admitted. Unless otherwise stated, statistics refer to in-state applicants. Charted data in Figure 1 represent all full-time freshman applicants

chart is the abrupt drop in admit rates for URM students at the two top-tier UC campuses between 1997 and 1998, coinciding with the implementation of the ban on race-conscious admissions.<sup>28</sup>



The decline in URM presence at UC Berkeley and UCLA also has a sharply negative impact on the graduate school pipeline because of the advantages the graduates of those schools have when seeking admission to top graduate programs. According to one report, URM students accounted for just 13 percent of new graduate and professional enrollment at UC in fall 2005.<sup>29</sup> The report also found

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who are California residents entering the fall quarter. *Source:* University of California Office of the President, “Final Summary of Freshman Applications, Admissions, and Enrollment, Fall 1989-2010,” last modified March 2011, [http://www.ucop.edu/news/factsheets/flowtrc\\_10.pdf](http://www.ucop.edu/news/factsheets/flowtrc_10.pdf).

<sup>28</sup> Admit rates actually began to drop prior to the full implementation of the ban in 1998 due to the *chilling effect* of the UC Regents’ adoption of SP-1 in 1995 (see Argument III).

<sup>29</sup> University of California Regents, *Report of the Work Team*.

that “African American/black graduate students at UC are represented at proportions lower than those at our comparable institutions.” The report similarly concluded that “[e]nrollments of URM students in UC professional school programs substantially declined following SP-1 and Proposition 209.”

Indeed, between 1996 and 1997, the African American share of enrollment at UC Berkeley’s law school plummeted from 7.6 percent to just 0.4 percent, while the Latina/o share was halved, from 10.6 percent to 5.2 percent. At UCLA’s law school, the African American share fell from 6.2 percent in 1996 to just 2.6 percent in 1997, and the Latina/o share declined from 14.7 percent to 10.2 percent.<sup>30</sup> By 2009, the admit rate for URM students at UCLA’s law school had fallen to 10.9 percent, compared to 18.2 percent for all applicants.<sup>31</sup>

### **III. PROPOSITION 209’S BAN ON AFFIRMATIVE ACTION HAS CREATED A “CHILLING EFFECT” ON THE IMPLEMENTATION OF REFORMS THAT MIGHT FURTHER THE INTERESTS OF UNDERREPRESENTED MINORITIES.**

After Proposition 209 went into effect, UC administrators have been under constant surveillance by supporters of the ban on race-conscious admissions. They have charged that reforms resulting in only minor improvements to underrepresented minority access demonstrate that administrators have illegally

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<sup>30</sup> Kidder, “The Struggle for Access from *Sweatt* to *Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000,” *Harvard BlackLetter Law Journal* 19 (Spring, 2003): 1-42.

<sup>31</sup> UCLA Graduate Division, *Graduate Programs Annual Report, 2009-2010* (Los Angeles: UCLA Graduate Division, 2010), <http://www.gdnet.ucla.edu/asis/report/arentire.pdf>.

used race in admissions decisions. As a result, they have discouraged administrators from experimenting with additional reforms that might produce excellent freshman classes *without* placing a unique burden on URM.

In 2002, for example, the UC implemented “comprehensive review” “to improve the quality and fairness of admissions decisions at the University of California.”<sup>32</sup> These new system-wide admissions guidelines were designed to consider a full range of student accomplishments (e.g., leadership, community service, and artistic talent), while also considering a student’s experiences and personal circumstances. In other words, though traditional indicators of academic achievement continue to drive UC admissions decisions, students were no longer admitted to UC *solely* on the basis of grades and standardized test scores.

Because comprehensive review *did not* consider an applicant’s race as a factor in admissions, it did *not* return URM access to pre-Proposition 209 numbers, even though it did moderately decrease the rate at which URMs were being turned away from top UC campuses. But the supporters of Proposition 209 charged that the campuses were lowering their standards (despite the continued increase in the mean GPAs and standardized test scores of admitted students<sup>33</sup>) or illegally

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<sup>32</sup> University of California Office of Strategic Communications, “Facts about the University of California: Comprehensive Review Progress Report,” news release, October 2003, [http://www.ucop.edu/news/factsheets/2002/compr\\_review.pdf](http://www.ucop.edu/news/factsheets/2002/compr_review.pdf).

<sup>33</sup> At UCLA, these means for admitted students increased between 2002 and 2010. UC Office of the President, UC StatFinder, accessed October 27, 2011, <http://statfinder.ucop.edu>.

practicing race-conscious admissions. In 2004, for example, UC Regent John Moores accused UC Berkeley of “admitting ‘underrepresented minorities’ with very low SAT scores while rejecting many applicants with high SAT scores.”<sup>34</sup> His charge cautioned administrators against experimenting with reforms that might lessen the system’s continued, heavy reliance on that criterion.

By 2006, a front-page *Los Angeles Times* article reported the “startling statistic” that less than 100 African Americans were expected to enroll in a 2006 UCLA freshman class of about 5000 students—a low not seen since *at least* 1973. When black scholarship athletes were subtracted from that number, less than 25 members of UCLA’s freshman class were projected to be black males. That year, only 11.9 percent of black applicants to UCLA were presented with admissions offers—a rate less than half the campus’s overall admit rate of 25.8 percent.

Subsequently, UCLA implemented “holistic review” for the fall 2007 freshmen class. Modeled after the existing UC Berkeley system, the new, labor-intensive process required multiple readers to review academic records, personal essays, high school contextual information and every other aspect of the file in order to assign a single “holistic” score.<sup>35</sup> But this new admissions system

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<sup>34</sup>—Moores, “On My Mind: College Capers,” *Forbes*, March 29, 2004, <http://www.forbes.com/forbes/2004/0329/040.html>.

<sup>35</sup> While UCLA’s prior admissions model involved multiple readers per file, it divided up each file into parts that were read in assembly line fashion. That is, no one reader had access to an entire file, and high school contextual variables played a smaller role in the assessment of merit.



contributed to a 100 percent increase in black freshmen enrolling at UCLA in 2007 (over the 33-year low of less than 100 black freshmen in 2006).

When the small increase was known, former UC Regent Ward Connerly immediately charged that:

One of three things must be happening. Black kids have either gotten extremely smart or extremely competitive in a way they weren't five or six years ago, or there's been a deliberate, carefully orchestrated effort by a lot of admissions people to conspire to increase those numbers, or they've found a proxy for race.<sup>36</sup>

UCLA professor Tim Groseclose then speculated that URM might be gaining an unfair advantage by signaling their ethnicity in the personal essays in their applications.<sup>37</sup> These incendiary accusations stigmatized incoming black freshmen—who had a stellar mean GPA of 3.97—and led UCLA to commission an independent audit of its reformed admissions process.

Despite the huge controversy, the post-209 admission reforms have had at best a modest effect on URM access. **Figure 1** shows that URM admit rates continued to decline at UCLA and UC Berkeley throughout the first decade of the 2000s, reaching lows of 14.2 percent and 14.7 percent, respectively, in 2010. By contrast, overall admit rates for UC Berkeley and UCLA were considerably larger in 2010—21.0 percent and 21.2 percent, respectively. In 2010, the 13.8 percent

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<sup>36</sup> Trounson & Paddock, "UCLA Sees an Increase in Black Student Admissions," *Los Angeles Times*, April 6, 2007, <http://articles.latimes.com/2007/apr/06/local/me-admit6>.

<sup>37</sup> Mehta, "UCLA Accused of Illegal Admitting Practices," *Los Angeles Times*, August 30, 2008, <http://articles.latimes.com/2008/aug/30/local/me-ucla30>.

admit rate for African American applicants to UCLA was the lowest among all ethnic groups. Only 376 of the 2,729 black applicants were admitted to UCLA and only 177 enrolled. At Berkeley, the admit rate for black students was 12.9 percent, which meant just 291 African American admits and 110 enrollees in 2010—less than half the numbers admitted in 1997, the last year of affirmative action.

In short, the ban on race-conscious admissions has eliminated the means that would *directly* provide underrepresented minorities greater access to the state’s most prestigious public institutions and created a chilling effect on attempts to implement any admissions reforms based on more inclusive notions of “merit.”

### CONCLUSION

California Proposition 209—which is identical in content and intent to Michigan Proposal 2—clearly has a “racial focus, targeting a program that ‘inures primarily to the benefit of the minority.’” For 14 years, the admission of qualified African American, Latino and Native American students to the top UC campuses has dropped significantly, and those students have no means to end that exclusion.

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 4,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than half the length allowed for the appellants' principal brief under Fed. R. App. P. 32(a)(7)(B).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

## **CERTIFICATE OF SERVICE**

I certify that on November 7, 2011, this substitute brief was submitted to the Court via email for service upon served on all parties or their counsel.

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