

Nos. 11-15100, 11-15241

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**UNITED STATES COURT OF APPEALS FOR THE NINTH 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,*

v.

EDMUND G. BROWN, JR, in his official capacity as Governor of the State of  
California, and MARK YUDOF, in his official capacity as President of the  
University of California,  
*Defendants-Appellees,*

and

WARD CONNERLY and AMERICAN CIVIL RIGHTS FOUNDATION,  
*Defendants-Intervenors-Appellees.*

On Appeal from the United States District Court  
for the Northern District of California, Case No. 3:10-cv-00641-SC

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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 is an individual and not a corporation. None has any financial interest in this matter. Each is appearing in an individual capacity and does not speak for nor represent the views of the university that employs him or her.

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## INTEREST OF THE AMICI CURIAE

Pursuant to Federal Rules of Appellate Procedure 29, the undersigned social scientists and scholars submit this brief as *amici curiae* in support of plaintiffs-appellants.<sup>1</sup> *Amici curiae* 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, or are currently serving on, undergraduate and graduate admissions committees and have worked on research and policy directly related to the issues addressed in this brief. California's Proposition 209<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.

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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 the effects of Proposition 209 on this group have been most pronounced. The empirical evidence in this brief is relevant to the Court's determination of whether Proposition 209 violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

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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 ban on race-conscious admissions in 1995 called SP-1,<sup>7</sup> the University of California campuses embraced 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 policy tools for 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, and often insignificant, differences in grade point averages and standardized test scores.

Following the passage of Proposition 209,<sup>8</sup> however, underrepresented minority access to the most selective and desirable campuses immediately plummeted and has remained suppressed. This is significant because attending more prestigious institutions provides graduates with significantly increased opportunities for future success. The University of California Regents, who had

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<sup>7</sup> Standing Policy (SP) 1 and Standing Policy 2 eliminated race-conscious policies in the University of California admissions and hiring, respectively.

<sup>8</sup> The fall 1998 freshman class at the University of California was the first to reflect the ban on affirmative action established by SP-1, SP-2, and Proposition 209.

reaffirmed the university's commitment to diversity,<sup>9</sup> rescinded their own ban on race-conscious admissions in 2001, but were powerless to do anything about Proposition 209.

Constrained by Proposition 209, subsequent reforms of the University of California admissions policy 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 these facially race-neutral reforms at every turn, creating a *chilling effect* that has limited administrators' ability to experiment with alternative admissions schemes that might produce excellent freshman classes *without* placing a special burden on underrepresented minorities.

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<sup>9</sup> In 2001, the University of California Regents reaffirmed the university's commitment to diversity with the following mission statement: "[T]he University shall seek out and enroll, on each of its campuses, a student body that demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of backgrounds characteristic of California." University of California Regents, "Regents Policy 4401: Policy On Future Admissions, Employment, and Contracting (Resolution Rescinding SP-1 And SP-2), Approved May 16, 2001," last modified February 4, 2010, <http://www.universityofcalifornia.edu/regents/policies/4401.html>.

## ARGUMENT

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

When viewed in the context of rampant 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 run rampant in K-12 education,<sup>10</sup> confounding what many consider unbiased and objective measures of academic “merit” with the continuing effects of racial and socio-economic inequality in America. Public schools in California today are racially segregated and unequal. 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>11</sup> Segregated and unequal schooling

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<sup>10</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>.

<sup>11</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); Isaac Martin, Jerome Karabel, and Sean W. Jaquez, “High School Segregation and Access to the University of California,” *Educational Policy* 19, no. 2 (2005): 308-330; Robert

conditions prevent a large number of African Americans and Latina/os in California from accessing college, particularly the most elite campuses like those in the University of California (UC). These inequities make it virtually impossible for many underrepresented minorities (URMs) to compete on equal footing in the “college admissions game” with their white and Asian American counterparts, students who typically enjoy better schooling conditions and greater resources.

For these reasons, underrepresented minority applicants to the UC system, who present marginally lower GPAs and test scores than their majority counterparts, have not necessarily devoted less effort towards their studies, they do not necessarily have less academic potential, nor are they necessarily less intelligent. More often than not, these underrepresented students are trapped in relatively disadvantaged contexts and are achieving as much as their environments will allow. Traditional indicators of academic “merit” like SAT and GPA scores only measure a narrow range of the attributes many colleges and universities claim to value. They often fail to capture critical thinking skills, creativity, tenacity,

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Teranishi, Walter Allen, and Daniel Solórzano, “Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California,” *Teachers College Record* 106, no.11 (2004): 2224-2245; The Tomás Rivera Policy Institute, *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).

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.

To be sure, underrepresented minority applicants to the UC system present stellar GPAs as a group, despite the challenges that many of these students have had to overcome in their K-12 schooling contexts. 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>12</sup>

While thousands of URM applicants to UC are admitted to prestigious private universities throughout America each year,<sup>13</sup> thousands more are denied admission to the top UC campuses,<sup>14</sup> largely because of the inability to consider race as one factor in admissions, which results in an over-reliance on standardized test scores as a measure of merit.

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<sup>12</sup> University of California Office of the President, UC StatFinder, accessed October 26, 2011, <http://statfinder.ucop.edu>.

<sup>13</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); Susan A. Wilbur, “Investigating the College Destinations of University of California Freshman Admits,” in *Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, eds., Eric Grodsky and Michal Kurlaender (Cambridge, MA: Harvard Education Press, 2010), 63-82.

<sup>14</sup> Of the nearly 13,000 URMs 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>.



Yet, 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>15</sup> SAT I scores are strongly correlated with school “Academic Performance Index” (API),<sup>16</sup> parent education, family income, and the segregation and poverty levels of schools. In other words, SAT I scores are related to both the characteristics of a student’s high school, and his or her socioeconomic status (SES).<sup>17</sup> Because African Americans and Latina/os are more likely than their white and Asian American counterparts to attend low API schools and reside in the lower socioeconomic strata of society, it should come as no surprise that these groups score lower on this traditional measure of a student’s potential for academic achievement.

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<sup>15</sup> William G. Bowen, and Derek Bok, *The Shape of the River*, (Princeton: Princeton University Press, 1998); Christopher Jencks, and Meredith Phillips, eds., *The Black-White Test Score Gap* (Washington, D.C.: The Brookings Institution, 1998).

<sup>16</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>17</sup> See Saul Geiser, and Maria 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).

Another reason the SAT I fails as a valid measure of academic ability is that it measures a set of skills that are not directly influenced by innate abilities or school curriculum.<sup>18</sup> Indeed, the standardized exam does a poor job of predicting how students will actually perform after they are admitted to college. An influential 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>19</sup> This means that 87 percent of the variance in UC first-year college grades is *not* explained by how students performed on the SAT I. Nationally, according to one study, the SAT I alone predicts only about 18 percent of the variation in freshman GPA,<sup>20</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 very little difference in student performance as measured by GPA. Another study found that a 100-point increase in an SAT I score might only raise a student's

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<sup>18</sup> See Claude Steele, University of Admissions Lawsuits (n.d.), "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>19</sup> Saul Geiser, and Roger 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.

<sup>20</sup> Steele, "The Compelling Need."

predicted GPA by one-tenth of a grade point.<sup>21</sup> Thus it cannot be assumed that African Americans and Latina/os who have lower test scores, largely due to the disadvantages they face in the K-12 context, will necessarily perform worse in college than their majority counterparts who attain higher SAT I scores. Yet, in absence of race-conscious admissions, these underrepresented minorities continue to be disproportionately denied admission to the most selective UC campuses, largely due to the weight placed on standardized test scores.

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>22</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. Not only is the SAT I a weak measure in terms of gauging student academic potential, but its conflation of achievement and privilege (or the lack thereof) actually works to reproduce inequality when it is used to exclude otherwise deserving URMs.

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<sup>21</sup> Fredrick E. Vars, and William G. Bowen, "Scholastic Aptitude Test Scores, Race and Academic Performance in Selective Colleges and Universities," in *The Black-White Test Score Gap*, eds. Christopher Jencks & Meredith Phillips (Washington, D.C.: Brookings Institution Press, 1998), 457-479.

<sup>22</sup> See Geiser and Studley, "UC and the SAT."

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-threat,”<sup>23</sup> the anxiety or stress triggered by the fear that one might fulfill or be associated with a relevant stereotype. Research has found that African Americans taking standardized exams such as the SAT often experience anxiety or fear that their performance on the exam will confirm 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.

Racial inequalities in K-12 education also work to diminish the utility of GPA as an objective measure of “merit.” At the University of California’s top campuses, a major factor in the admissions decision is the number of Advanced Placement (AP) courses an applicant has 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

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<sup>23</sup> See Steele, Claude, “Race and Schooling of Black Americans,” *The Atlantic Monthly* 269, no. 4 (1992): 68-78; Claude Steele, “A Threat in the Air, How Stereotypes Shape Intellectual Identity and Performance,” *American Psychologist* 52, no. 6 (1997): 613-629; Claude Steele, and Joshua Aronson, “Stereotype Threat and the Test Performance of Academically Successful African Americans,” in *The Black-White Test Score Gap*, eds., Christopher Jencks & Meredith Phillips (Washington, D.C.: Brookings Institution Press, 1998), 401-427.

on. This treatment of AP courses explains why many students who take them are able to earn GPAs in excess of 4.0. In fact, the *average* GPA of students admitted to UC Berkeley and UCLA has far exceeded 4.0 in recent years.

Yet, a great disparity in access to AP courses in California public high schools exists, and it runs along racial lines. 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 up just 16 percent, and African Americans only 5 percent<sup>24</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. The racial disparities only increase when we consider what private high schools have to offer and the degree to which underrepresented minorities (URMs) are less likely to gain access to these schools. In this sense, the “AP bump” rewarded in UC admissions schemes functions like affirmative action for white and Asian American applicants, as these applicants are much more likely

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<sup>24</sup> Daniel Solórzano, and Armida Ornelas, “A Critical Race Analysis of Advance Placement Classes and Selective Admissions,” *High School Journal* 87 (2004): 15-26.

than their URM counterparts to attend high schools featuring a rich menu of the courses.

## **II. PROPOSITION 209's BAN ON AFFIRMATIVE ACTION HAS WORKED TO SEVERELY DECREASE THE PRESENCE OF UNDERREPRESENTED MINORITIES AT UC BERKELEY, UCLA, AND IN GRADUATE SCHOOLS.**

Students become *eligible* for University of California admission by meeting the established minimum requirements for coursework, GPA, and standardized test scores.<sup>25</sup> These minimum requirements comprise a demanding set of criteria, as the state's Master Plan for Higher Education specifies that the UC eligibility pool shall contain only the top eighth of graduating seniors. It's important to note that most of the growth in the eligibility pool in recent years can be attributed to underrepresented minorities.<sup>26</sup> Underrepresented minority applicants to UC are

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<sup>25</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>26</sup> The California Postsecondary Education Commission reported that in 2007 the UC eligibility pool was becoming more URM heavy. That is, while white numbers in the UC eligibility pool were down 13 percent and Asian American up only 1 percent since the 2003 report, Latina/o numbers were up 18 percent and black numbers 7 percent. The California Postsecondary Education Commission, *College-Going and University Eligibility: Differences between Racial/Ethnic Groups* (Sacramento: The California Postsecondary Education

thus highly qualified, *not* students unprepared for the demands of work at top universities.

But while eligibility guarantees admission to the UC *system*, it does not guarantee admission to any of the eight campuses that currently use *selectivity* measures. Selectivity refers to an additional set of criteria that competitive campuses use to choose students for admission amongst all applicants who meet minimum UC eligibility requirements. In practice, these additional criteria specify the types of inflated numbers (i.e., GPAs and standardized test scores) that, as we argued above, K-12 inequities typically prevent URM students from amassing.

Although the UC system officially has no “flagship” campus, UC Berkeley and UCLA are generally regarded as the two most prestigious campuses, each perennially ranked in the top five of all U.S. public universities.<sup>27</sup> The majority of all UC applicants (who may apply to more than one UC campus) apply to UC Berkeley and/or UCLA because of their global reputations and the doors that

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Commission, March 2009),

<http://www.cpec.ca.gov/completereports/2009reports/09-11.pdf>.

<sup>27</sup> In 2012, *U.S. News and World Report* ranked UC Berkeley as the top public university in America, followed by UCLA and the University of Virginia, which were tied for the number 2 position. *U.S. News and World Report*, the online edition of *USNWR*, “2012 Best Colleges Ranking: Top Public Schools,” accessed October 12, 2011, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public>.

degrees from either campus are likely to open.<sup>28</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>29</sup>

**Figure 1** charts the admit rates<sup>30</sup> for underrepresented minorities at UC Berkeley and UCLA, between 1994 and 2010. The most notable feature of the chart is the abrupt drop in admit rates for URMIs at the two top-tier UC campuses between 1997 and 1998, coinciding with the implementation of the ban on race-conscious admissions.<sup>31</sup> At UC Berkeley, for example, the URM admit rate plummeted by more than half, from 46.8 percent in 1997 to 20.6 percent in 1998, while the overall admit rate declined only minimally between the years, from 33 percent to 29.9 percent. Although the corresponding drop in the URM admit rate at UCLA was less pronounced—from 40.5 percent in 1997 to 24.3 percent in 1998—it was nonetheless severe, particularly when viewed in relation to the

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<sup>28</sup> For example, see Ronald 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>.

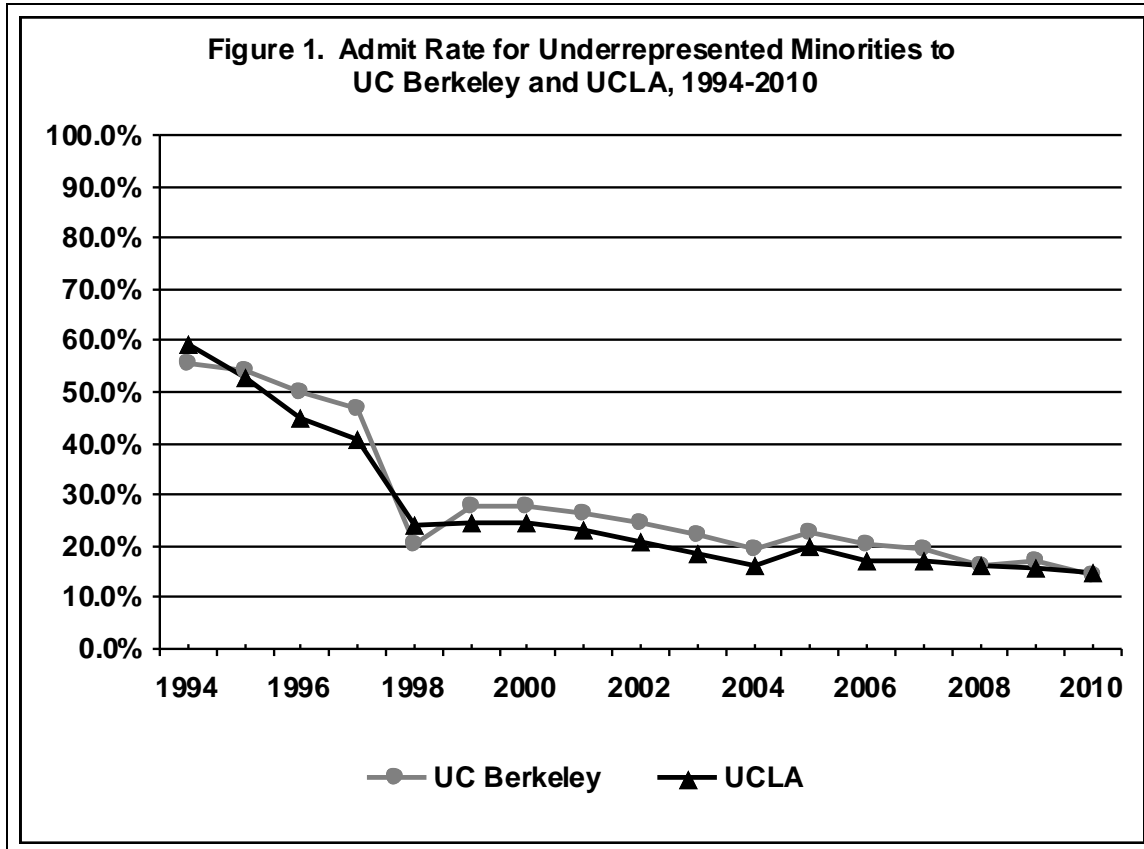
<sup>29</sup> Data from the UC Office of the President show that UC eligible black students denied admission to UCLA or UC Berkeley are particularly likely to leave the state altogether for elite private institutions. Wilbur, “College Destinations.”

<sup>30</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.

<sup>31</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).



smaller decline in the overall campus admit rate between the two years (from 37 percent in 1997 to 33.4 percent in 1998).



*Note:* Data represents all full-time freshman applicants 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).

The decline in URM presence at UC Berkeley and UCLA that coincides with the ban on race-conscious admissions is particularly troubling because of the negative impact on the graduate school pipeline. Attending institutions with the global reputations of a UC Berkeley or UCLA confer significant advantages on

those seeking admission to top graduate programs. According to one report, URM's accounted for just 13 percent of new graduate and professional enrollment at UC in fall 2005.<sup>32</sup> The report also found that "African American/black graduate students at UC are represented at proportions lower than those at our comparable institutions." Focusing on UC professional schools, the report concluded that "[e]nrollments of URM's in UC professional school programs substantially declined following SP-1 and Proposition 209."

In fact, 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. The declines for UCLA's law school, while not as severe, were significant: the African American share declined 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>33</sup> By 2009, the admit rate for URM's at UCLA's law school had fallen to only 10.9 percent, compared to 18.2 percent for all applicants.<sup>34</sup> Clearly, racial disparities in access to UC

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<sup>32</sup> University of California Regents, *Report of the Work Team*.

<sup>33</sup> William C. 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>34</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>.

graduate and professional programs are exacerbated by restricting freshmen URM's access to the system's top-tier campuses.

### **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.**

In the aftermath of Proposition 209, administrators at the University of California (UC) have been under constant surveillance by supporters of the ban on race-conscious admissions. Consequently, reforms that have resulted in only minor improvements to underrepresented minority (URM) access were met immediately with charges that administrators had illegally used race in admissions decisions, which often discouraged administrators from experimenting with other reforms that might produce excellent freshman classes *without* placing a unique burden on URM's.

In 2002, for example, the UC implemented "comprehensive review" "to improve the quality and fairness of admissions decisions at the University of California."<sup>35</sup> These new systemwide admissions guidelines, which are still in effect, were designed to consider a full range of student accomplishments (e.g., leadership, community service, and artistic, musical, or athletic talent), while also

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<sup>35</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).

considering a student's experiences and personal circumstances. In other words, though traditional indicators of academic achievement continue to drive UC admissions decisions, students are no longer admitted to UC *solely* on the basis of grades and standardized test scores, as was standard practice at some campuses<sup>36</sup> and for a subset of applicants (typically those with the very highest GPAs and test scores).

As per Proposition 209's mandate, comprehensive review *does not* consider an applicant's race as a factor in admissions. Consequently, while this reform of UC admissions policy moderately decreased the rate at which URMs were being turned away from the top UC campuses following the ban, it did *not* return URM access to pre-Proposition 209 numbers. But there *were* relatively small fluctuations in URM admissions to UC Berkeley and UCLA between 2002 and 2010, and any increases were immediately challenged by Proposition 209 advocates as evidence that either the campuses were lowering their standards

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<sup>36</sup> The UC Regents have delegated to the faculty the authority to establish UC admissions standards and policies. Each UC campus sends a representative to the Board on Admissions and Relations with Schools (BOARS), the system-wide body that sets these overarching admissions principles. In turn, each campus has a corresponding faculty committee that sets campus-specific admissions policies and practices that must adhere to the overarching principles established by BOARS, such as comprehensive review.

(despite the fact that the mean GPAs and standardized test scores of admitted students continued to increase<sup>37</sup>) or illegally practicing race-conscious admissions.

In 2004, for example, UC Regent John Moores charged that UC Berkeley was “admitting ‘underrepresented minorities’ with very low SAT scores while rejecting many applicants with high SAT scores.”<sup>38</sup> This charge refocused attention on a single measure of merit in UC admissions, standardized test scores, despite the fact that, as we show above, these tests both disadvantage URM applicants and do a relatively poor job of predicting college performance. The charge also cautioned administrators from further experimenting with other reforms that might address some of the problems associated with the system’s continued, heavy reliance on traditional indicators of merit.

The elimination of race-conscious admissions has been particularly harmful for African American applicants to the top campuses. In 2006, for example, 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.<sup>39</sup> When black

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<sup>37</sup> At UCLA, these means for admitted students increased between 2002 and 2010. University of California Office of the President, UC StatFinder, accessed October 27, 2011, <http://statfinder.ucop.edu>.

<sup>38</sup> John Moores, “On My Mind: College Capers,” *Forbes*, March 29, 2004, <http://www.forbes.com/forbes/2004/0329/040.html>.

<sup>39</sup> Reliable racial statistics do not exist for UCLA prior to 1973.

scholarship athletes were subtracted from that number, less than 25 members of the state's largest freshman class<sup>40</sup> were projected to be black males. That year, only 11.9 percent of black applicants to UCLA were presented with admissions offers—a rate that was less than half the campus's overall admit rate of 25.8 percent.

Subsequently, UCLA implemented “holistic review” for the fall 2007 freshmen class, a reform of its prior comprehensive review admissions process, which emphasized evaluating student academic achievement more explicitly within the context of individual opportunities and challenges. Modeled after the admissions scheme already in place at UC Berkeley, the new process at UCLA was more labor intensive and costly than the one it replaced, as multiple readers were each now required to review every aspect of an applicant's file—academic records, personal essays, records of personal achievement, and high school contextual information—in order to rate the applicant's merit with a single “holistic” score.<sup>41</sup>

But because UCLA's new admissions scheme contributed to a 100 percent increase in the number of black freshmen enrolling in 2007 (over the 33-year low of less than 100 black freshmen in 2006), critics immediately cried foul. “One of

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<sup>40</sup> UCLA has the largest enrollment of any California college campus, public or private.

<sup>41</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.

three things must be happening,” quipped former UC Regent Ward Connerly. “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>42</sup> Meanwhile, UCLA political science professor Tim Groseclose speculated that URMs might be gaining an unfair advantage by signaling their ethnicity in the personal essay portion of the application.<sup>43</sup> These incendiary public accusations stigmatized incoming black freshmen<sup>44</sup>—who had posted a stellar mean GPA of 3.97—and prompted UCLA to commission an independent audit of its reformed admissions process with only two years of data. The forthcoming conclusions will undoubtedly spark political debate.

Despite the huge controversy surrounding UC admissions reforms following the ban on affirmative action, the overall effect on URM access has been modest at best. In fact, **Figure 1** above shows that URM admit rates continued to decline at

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<sup>42</sup> Rebecca Trounson, and Richard 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>43</sup> Seema Mehta, “UCLA Accused of Illegal Admitting Practices,” *Los Angeles Times*, August 30, 2008, <http://articles.latimes.com/2008/aug/30/local/me-ucla30>.

<sup>44</sup> Support group meetings were held throughout the fall of 2007 for black students who wondered if they had made the right decision by choosing UCLA over the many other selective institutions that had offered them admission.

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. Again, the impact was most severe for black applicants. In 2010, the admit rate for African American applicants to UCLA was the lowest among all ethnic groups, 13.8 percent. Only 376 of the 2,729 black applicants to UCLA were admitted that year, and just 177 enrolled. The corresponding figures for UC Berkeley were even lower. The campus’s black admit rate of 12.9 percent translated into just 291 African Americans admits and 110 enrollees in 2010. The system’s most prestigious campus had welcomed more than twice as many black freshmen in 1997, the last year of affirmative action.

In short, the ban on race-conscious admissions—in addition to eliminating policy tools that would *directly* provide underrepresented minorities greater access to the state’s most prestigious public institutions—has created a chilling effect on the reform efforts of university administrators, who might otherwise implement admissions reforms based on more inclusive notions of “merit.”

## CONCLUSION

California Proposition 209 clearly has a “racial focus, targeting a program that ‘inures primarily to the benefit of the minority.’” Fourteen years of empirical evidence concerning minority access to the University of California documents the



substantial burden that the ban on race-conscious admissions has placed on racial minorities. There has been a significant drop in the admission of qualified African American, Latino and Native American students to the top UC campuses and the ban has removed any recourse these students had for directly remedying the situation.

Respectfully submitted,

Dated: January 6, 2012

s/ Winifred V. Kao  
WINIFRED V. KAO  
Counsel for *Amici*

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of FRAP 29(d) and 32, because it contains 5460 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii), uses 14-point font, and is proportionately spaced.

Dated: January 6, 2012

s/ Winifred V. Kao  
WINIFRED V. KAO

## **CERTIFICATE OF SERVICE**

I, Winifred Kao, declare that I am employed with the Asian Law Caucus, whose address is 55 Columbus Avenue, San Francisco, CA 94111. I am over the age of eighteen years and am not a party to this action. I hereby certify that on January 6, 2012, I electronically filed the attached:

**MOTION OF CALIFORNIA SOCIAL SCIENCE RESEARCHERS  
AND ADMISSIONS EXPERTS FOR LEAVE TO LATE FILE *AMICI  
CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS APPELLANTS; and**

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

in this action with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also sent true and correct copies of the aforementioned documents in sealed envelopes with the postage fully prepaid, for collection and mailing through the United State Postal Service, following ordinary business practices, to:

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I declare under penalty of perjury that the above is true and correct.

s/ Winifred V. Kao