

Nos. 20-1199, 21-707

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

STUDENTS FOR FAIR ADMISSION, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD UNIVERSITY,
Respondent.

STUDENTS FOR FAIR ADMISSION, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS FOR THE
FIRST AND FOURTH CIRCUITS

**BRIEF FOR THE PRESIDENT AND CHANCELLORS
OF THE UNIVERSITY OF CALIFORNIA
AS AMICI CURIAE SUPPORTING RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici Curiae are the President and Chancellors of the University of California (“UC”). UC is the largest highly selective institution of higher education in the United States. Its ten campuses are located throughout California and in 2021 provided undergraduate, graduate, and professional education to more than 294,000 students. UC is led by its President and the Chancellors of each of its campuses, all of whom join this brief.²

UC is committed to serving the educational needs of the people of California, one of the most diverse populations in the Nation. UC has a “compelling interest in making sure that people from all backgrounds perceive that access to the University is possible,” and “aims to broaden and deepen both the educational experience and the scholarly environment.” The Regents of the University of California, *Regents Policy 4400: Policy on University of California Diversity Statement* (amended Sept. 16, 2010) (“*Regents Policy 4400*”).³ In support of this mission, UC “seeks to enroll, on each of its campuses, a student body that” both demonstrates “high academic achievement or exceptional personal talent” and “encompasses the broad diversity of cultural, racial, geographic, and socioeconomic backgrounds characteristic of California.” The Regents of

¹ Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² A full list of amici is included in the Appendix.

³ <https://regents.universityofcalifornia.edu/governance/policies/4400.html>.

the University of California, *Regents Policy 2102: Policy on Undergraduate Admissions* (adopted May 20, 1988) (“*Regents Policy 2102*”).⁴

UC’s experience has long been central to the national debate about race-conscious admissions policies, and it continues to be relevant to the present cases. In 1996, California voters approved Proposition 209, which amended the state constitution to prohibit race-conscious measures in college admissions. Cal. Prop. 209 (1996); Cal. Const. art. I, § 31(a). UC has since “experiment[ed] with a wide variety of alternative approaches” for promoting diversity and ensuring access for qualified students from underrepresented minority groups. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). UC is thus uniquely situated to provide empirical context that will assist the Court in its analysis of the issues in this case, as it did in prior cases addressing the consideration of race in university admissions. See Brief Amicus Curiae of the President and Chancellors of the University of California in Support of Respondents, *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (No. 11-345); Brief of the President and the Chancellors of the University of California as Amici Curiae in Support of Respondents, *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (No. 14-981).

INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty years ago, this Court explained that “the [N]ation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”

⁴ <https://regents.universityofcalifornia.edu/governance/policies/2102.html>.

Grutter, 539 U.S. at 324 (citation and internal quotation marks omitted). Just six years ago, this Court reaffirmed that *Grutter*'s insight remains as true today as it was then. *Fisher v. University of Texas at Austin*, 579 U.S. 365, 388 (2016) ("*Fisher II*"). Universities perform a critical service to the Nation by pursuing the educational benefits of a diverse student body—by maintaining campus environments that train students to appreciate diverse viewpoints, to see one another as more than mere stereotypes, and to develop the capacity to live and work together as equal members of a common community.

This Court has therefore affirmed and reaffirmed that “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.” *Fisher II*, 579 U.S. at 388; *Grutter*, 539 U.S. at 329. Consistent with that guidance, the University of California has long defined student body diversity as “integral” to its educational mission. *Regents Policy 4400*. As California’s preeminent public university system, UC’s core mission is to prepare graduates to be productive citizens and leaders of California, and to provide a path to higher education for young people from all facets of California’s increasingly diverse population. UC views student body diversity of all sorts, including racial diversity, as critical to that mission. To that end, UC has long sought to achieve meaningful representation across racial and ethnic groups at all of its campuses. *Regents Policy 4400*.

This Court has also recognized that in seeking student body diversity, universities serve as “laboratories for experimentation.” *Fisher II*, 579 U.S. at 388 (citation omitted). The Court observed that, given the wide

range of universities with different missions and degrees of selectivity, universities' experimentation would generate "valuable data" about "the manner in which different approaches to admissions may foster diversity." *Ibid.*

For the past twenty-five years, UC has served as just such a "laborator[y] for experimentation." *Ibid.* After Proposition 209 barred consideration of race in admissions decisions at public universities in California, freshmen enrollees from underrepresented minority groups dropped precipitously at UC, and dropped by 50% or more at UC's most selective campuses. Since then, UC has implemented numerous and wide-ranging race-neutral measures designed to increase diversity of all sorts, including racial diversity. Those measures run the gamut from outreach programs directed at low-income students and students from families with little college experience, to programs designed to increase UC's geographic reach, to holistic admissions policies. Those programs have enabled UC to make significant gains in its system-wide diversity. Yet despite its extensive efforts, UC struggles to enroll a student body that is sufficiently racially diverse to attain the educational benefits of diversity. The shortfall is especially apparent at UC's most selective campuses, where African American, Native American, and Latinx students are underrepresented and widely report struggling with feelings of racial isolation.

UC's decades-long experience with race-neutral approaches demonstrates that highly competitive universities may not be able to achieve the benefits of student body diversity through race-neutral measures alone. To fulfill their role of preparing successive generations of citizens to succeed in an increasingly diverse Nation, universities must retain the ability to

engage in the limited consideration of race contemplated by this Court's precedents.

ARGUMENT

I. UC's Experience Confirms the Educational Benefits of Diversity Recognized in *Grutter* and Reaffirmed in *Fisher*.

UC was founded with the purpose of making higher education broadly available to California citizens. Today, as the premier public university in the State of California, UC's core mission is to "serve the interests of the State of California" by preparing students "to participate in an increasingly complex and pluralistic society." *Regents Policy 4400*. UC has long viewed securing the educational benefits of student body diversity—including but not limited to racial diversity—as fundamental to achieving its educational mission.

A. UC's Diversity Statement, last amended in 2010, explains that UC has a compelling interest in ensuring that its student body is diverse in all respects. Specifically, UC seeks a student body that reflects "the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance," including "race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, gender identity, socioeconomic status, and geographic region." *Regents Policy 4400*.

The Diversity Statement also describes the benefits flowing from diversity. First, UC has a "compelling interest in making sure that people from all backgrounds perceive that access to the University is possible for talented students." *Ibid.* "The knowledge that the University of California is open to qualified students from all groups, and thus serves all parts of the community equitably, helps sustain the social fabric of the State." *Ibid.* As the State's foremost public university

system in one of the most racially diverse States in the country, UC must be open to—and perceived as open to—applicants of *all* races to ensure that both the university and its graduates are viewed as legitimate. See *Fisher II*, 579 U.S. at 382 (a diverse student body enables universities to “cultivat[e] a set of leaders with legitimacy in the eyes of the citizenry”) (citation omitted).

Second, UC has concluded that a diverse student body “enhance[s] the ability of the University to accomplish its academic mission.” *Regents Policy 4400*. “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter*, 539 U.S. at 333. Diversity, including racial diversity, therefore enables “students and faculty [to] learn to interact effectively with each other” and “make[s] possible the full, effective use of the talents and abilities of all to foster innovation and train future leadership.” *Regents Policy 4400*; see Study Group on University Diversity, *Overview Report to The Regents 3-4* (Sept. 2007) (“*Study Group on University Diversity Report*”).⁵ Although petitioner criticizes respondents’ admissions policies on the ground that hypothetical African American applicants may have “wildly different” backgrounds and experiences (Pet. Br. 53), that is precisely the point. That wide variety of backgrounds, combined with each individual’s “experience of being a racial minority,” enriches the exchange of ideas within the university. *Grutter*, 539 U.S. at 333. Collectively, these unique experiences help students “learn there is

⁵ <https://regents.universityofcalifornia.edu/regmeet/sept07/re111attach2.pdf>.

no ‘minority viewpoint,’ but rather a variety of viewpoints among minority students.” *Id.* at 320 (citation omitted); see also *Study Group on University Diversity Report* at 3-4.

In order to attain the educational benefits of diversity, UC has committed itself “to remov[ing] barriers to” recruiting and retaining students “from historically excluded populations who are currently underrepresented.”⁶ *Regents Policy 4400*. UC dedicates significant resources to promoting all aspects of diversity, including racial diversity, through broad-ranging programs that include campus community building and retention measures that continue through graduation.

At the center of those efforts is UC’s undergraduate admissions process. UC’s Policy on Undergraduate Admissions, adopted in 1988, pursues the educational benefits of diversity by seeking “to enroll, on each of its campuses, a student body that, beyond meeting the University’s eligibility requirements, demonstrates high academic achievement or exceptional personal talent, and that encompasses the broad diversity of cultural, racial, geographic, and socioeconomic backgrounds characteristic of California.” *Regents Policy 2102*.

B. Contrary to petitioner’s contention (Pet. Br. 2), attainment of the benefits of diversity is not an “amorphous and unmeasurable” objective. The petitioner in

⁶ Historically, underrepresented minority students included those who are Latinx, African American, and Native American. Although other terms were used in prior UC reports and surveys, “Latinx” (rather than Hispanic or Latino) and “Native American” (rather than American Indian) are used herein. UC also recently expanded the definition of “underrepresented” to include Pacific Islanders, a change that is not reflected in much of the reporting and data cited in this brief.

Fisher II made that same argument, and this Court rejected it. 579 U.S. at 381-383. The Court explained that the educational benefits of diversity are necessarily qualitative, not quantitative: a university may not set demographic quotas, and therefore cannot be faulted for failing to “specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.” *Id.* at 381. And the Court characterized the objectives of improving opportunities for cross-racial understanding, alleviating racial isolation, and preparing students for a diverse workforce—the very goals that UC has articulated for itself—as “concrete and precise” rather than “amorphous.” *Ibid.*

Universities are well positioned to determine, in concrete terms, whether they have attained their diversity objectives. UC, for instance, measures its progress through rigorous study of both quantitative and qualitative data. As discussed further below, UC “evaluates its diversity outcomes in a variety of ways: current demographic characteristics and trends of its students, faculty, and staff; analysis of the academic pipeline from entry to exit; and survey data that reveal perceptions of campus climate, [and] experiences of campus life.” UC Office of the President, Institutional Research and Academic Planning, *Annual Accountability Report 2022* at 124 (“*Annual Accountability Report 2022*”).⁷ Those metrics indicate that UC has not yet achieved sufficient student body diversity, particularly at its most selective campuses. See pp. 21-29, *infra*.

⁷ <https://accountability.universityofcalifornia.edu/2022/documents/pdfs/2022-uc-accountability-report.pdf>.

II. UC's Race-Neutral Measures Have Been Inadequate to Achieve the Educational Benefits of Diversity.

Proposition 209, enacted in 1996, amended the California Constitution to prohibit the use of race in various settings, including university and college admissions. Cal. Const. art. I, § 31(a). In the wake of Proposition 209, the proportion of students from underrepresented minority groups fell dramatically throughout the UC system. UC has since implemented a number of race-neutral measures to pursue diversity while complying with Proposition 209. Those measures have improved the UC system's overall student body diversity substantially since the precipitous drop caused by Proposition 209. As petitioner observes (Pet. Br. 70, 85-86), the UC system as a whole admitted its most diverse class ever in 2021.

But recognition of that achievement is tempered by two important concerns. First, UC's diversity gains have not been shared equally among all campuses—and it is diversity at the *campus* level that is most relevant to students' experiences and to UC's ability to provide the educational benefits of diversity. It is on their particular campus—in classrooms, dorms, and in extracurricular activities—that students will interact with one another. Particularly at UC's most selective campuses, feelings of racial isolation persist and hinder UC's efforts to provide the educational benefits of diversity. Second, UC's student population at many of its campuses is now starkly different, demographically speaking, from the population of California high school graduates. That raises concerns that UC is not enrolling sufficient students with diverse perspectives, and that it will not be perceived as open to, and welcoming of, *all* students across the State—which in turn threatens its legitimacy in the eyes of citizens of California.

Those two issues persist despite UC's substantial efforts since Proposition 209 to pursue the educational benefits of diversity through race-neutral programs. At the same time, UC's extensive experience with a wide range of race-neutral measures has revealed that each of these measures has limitations that prevent UC from simply increasing its reliance on each measure so as to further increase racial diversity.

A. After Proposition 209 Prohibited Consideration of Race in Admissions, Diversity Fell Dramatically Across UC's Campuses.

UC's admissions process proceeds in two stages. First, applicants must satisfy minimum eligibility requirements, including completing required courses and maintaining a minimum grade point average, to be considered for admission to the UC system. University of California, *Freshman Requirements*.⁸ Second, applicants are considered for admission to specific campuses. Although each campus's selection criteria varies, generally speaking, the campuses consider academics, leadership and talents, socioeconomic and geographic diversity, and—prior to Proposition 209—campuses also considered racial diversity. University of California, *Guidelines for Implementation of University Policy on Undergraduate Admissions 3-5* (June 2019) (“*Guidelines for Implementation*”)⁹; UC Office of the President, Student Academic Services, *Undergraduate Access to the University of California After*

⁸ <https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/>.

⁹ https://senate.universityofcalifornia.edu/_files/committees/boards/documents/guidelines-implementation-of-ug-admission-rev-7-2019.pdf.

the Elimination of Race-Conscious Policies 3 (Mar. 2003) (“*Undergraduate Access to UC*”).¹⁰

Proposition 209’s ban on race-conscious admissions policies first took effect for the freshman class that entered UC in fall 1998. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (vacating preliminary injunction against implementation).¹¹ The impact was immediate and widespread. On every UC campus, the proportion of freshman applications, admittees, and enrollees from underrepresented minority groups declined precipitously. *Undergraduate Access to UC* at 15-22; UC Office of the President, Academic Affairs, *The Impact of Proposition 209 in California* 1¹²; UC Office of the President, *Discussion Item B5: Proposition 209: Primer on UC History and Impacts* 2 (Sept. 17, 2020) (“*Proposition 209: Primer on UC History and Impacts*”).¹³

¹⁰ <https://files.eric.ed.gov/fulltext/ED476308.pdf>.

¹¹ Proposition 209 was enacted after The Regents’ adoption of Special Policy 1 (“SP-1”), a resolution prohibiting the use of “race, religion, sex, color, ethnicity, or national origin as criterion for admission to the University or to any program of study” that was set to take effect for undergraduate admissions for Fall 1998. *Undergraduate Access to UC* at 7. The Regents rescinded SP-1 in 2001, reaffirming UC’s commitment to enroll “a student body that ... encompasses the broad diversity of backgrounds characteristic of California.” The Regents of the University of California, *Regents Policy 4401: Policy on Future Admissions, Employment, and Contracting (Resolution Rescinding SP-1 and SP-2)* (May 16, 2001), <https://regents.universityofcalifornia.edu/governance/policies/4401.html>.

¹² https://www.ucop.edu/academic-affairs/_files/prop209-research-and-data-summary.pdf.

¹³ <https://regents.universityofcalifornia.edu/regmeet/sept20/b5.pdf>.

Those declines were pronounced at the most selective campuses, UCLA and UC Berkeley, which are the top public schools in the Nation.¹⁴ At both campuses, the percentage of freshman applicants who were from underrepresented minority groups dropped by several percentage points, and the percentage of admitted and enrolled freshman who were from such groups was cut in half. *Undergraduate Access to UC* at 17, 19, 22.

Proposition 209's effects on specific underrepresented minority groups as a proportion of the freshman class were particularly stark. At UCLA, African American students made up 7.13% of the freshman class in 1995, and only 3.43% in 1998. UC Office of the President, *Information Center: Undergraduate Admissions Summary* (“*UC Information Center: Undergraduate Admissions Summary*”).¹⁵ Latinx students were 21.58% of the freshman class in 1995, and only 10.45% in 1998. *Ibid.* UC Berkeley's experience was similar. While African American students were 6.32%

¹⁴ See UC Board of Admissions and Relations with Schools (“BOARS”), *Annual Report on Undergraduate Admissions Requirements and Comprehensive Review* 66 (May 2022) (“2022 BOARS Annual Report on Undergraduate Admissions”), <https://regents.universityofcalifornia.edu/regmeet/july22/a1attach1.pdf>; U.S. News and World Report, *Top Public Schools*, <https://www.usnews.com/best-colleges/rankings/national-universities/top-public>.

¹⁵ <https://www.universityofcalifornia.edu/about-us/information-center/admissions-residency-and-ethnicity>. *Undergraduate Access to UC* presents the proportion of underrepresented minority students as a total of all first-time freshman domestic students, which excludes international students. *UC Information Center: Undergraduate Admissions Summary* presents more granular data on the proportion of underrepresented minority students as a total of *all* first-time freshman undergraduate students. As a result, the data displayed will differ slightly between the two sources.

of the freshman class in 1995, they were 3.37% in 1998. *Ibid.* And while Latinx students were 15.57% of the freshman class in 1995, they were only 7.28% in 1998. *Ibid.* This was the case even though, in 1998, African American and Latinx students represented 7.5% and 31.0%, respectively, of California public high school graduates. UC Office of the President, *Information Center: Gap Analysis* (“*UC Information Center: Gap Analysis*”).¹⁶

B. UC Implemented Race-Neutral Measures to Increase Diversity Throughout the UC System.

Following Proposition 209’s enactment, UC implemented a number of race-neutral initiatives intended to increase student body diversity of all types. Those measures, while beneficial, have limitations that have prevented UC from achieving its educational objectives through those measures alone.

1. Outreach Efforts

UC has established a number of outreach programs aimed at students from low-income families, students whose families have little or no previous experience

¹⁶ <https://www.universityofcalifornia.edu/about-us/information-center/gap-analysis>. *UC Information Center: Undergraduate Admissions Summary* uses UC’s categorization of students by race/ethnicity and the cited data presents the proportion of underrepresented minority students as a total of all first-time freshman undergraduate students. *UC Information Center: Gap Analysis* uses the Integrated Postsecondary Education Data System’s categorization, which shifts some students from particular races/ethnicities into the “Two or More Races” category, and presents the proportion of underrepresented minority students as a total of all first-time freshman domestic undergraduate students from California public high schools. As a result, the data displayed will differ slightly between the two sources.

with higher education, and students who attend an educationally disadvantaged school. *Undergraduate Access to UC* at 2, 24; *Proposition 209: Primer on UC History and Impacts* at 6. These programs once included race as a selection criteria; since Proposition 209, they are race neutral. *Ibid.* There are currently thirteen such programs, which collectively reach more than 200,000 students. UC Office of the President, *Information Center: Student Academic Preparation and Education Partnerships (SAPEP) Outcomes* (“*UC Information Center: SAPEP Outcomes*”).¹⁷ Individual campuses have also adopted their own similar initiatives.

Although UC’s outreach programs have helped it enroll more low-income students and those who will be the first in their families to graduate from college,¹⁸ they have proven less effective at enrolling students from underrepresented minority groups. Because these outreach programs primarily target economically and educationally disadvantaged students, the extent to which they are able to reach underrepresented minority students depends on changing demographic patterns. By 2020, it had become more difficult for these outreach programs to reach African

¹⁷ https://www.universityofcalifornia.edu/about-us/information-center/sapep_outcomes.

¹⁸ For fall 2019, UC admissions for program participants (68%) was higher than non-participants (62%). Similarly, yield—the number of students who accepted their offers of admission and enrolled as first-year students—also was higher for participants (60%) than non-participants (54%). *UC Information Center: SAPEP Outcomes*. More broadly, UC has been successful in enrolling low-income students and first-generation students who will be the first in their families to go to college. In Fall 2021, 33% of UC undergraduates were recipients of federal Pell Grants for “low-income” students, and 38% were first-generation students. *Annual Accountability Report 2022* at 14.

American and Native American students, even as more Latinx, Asian American, and White students benefited from them. *Proposition 209: Primer on UC History and Impacts* at 6; *Undergraduate Access to UC* at 23-24.

These outreach programs are, moreover, extremely costly: UC has spent over a half-billion dollars implementing them. *UC Information Center: SAPEP Outcomes*. But funding for these programs has declined over time, and resource constraints limit UC’s ability to expand these programs. *Ibid.*; *Undergraduate Access to UC* at 23-24.

2. Eligibility in the Local Context

Applicants to UC have long been “eligible” for admission—meaning that they are guaranteed admission to at least one UC campus, though not necessarily the campus of their choice—if their combined high-school grade point average and standardized test scores put them in the top percentage of California high school graduates. This is referred to as the “statewide” eligibility path. University of California Board of Admissions and Relations with Schools (“BOARS”), *The University of California’s Distinctive Freshman Admissions Process* 3 (Mar. 30, 2005).¹⁹

Beginning in 2001, UC implemented a new eligibility policy similar to the “Top Ten Percent” plan adopted by the University of Texas. UC Office of the

¹⁹ https://senate.universityofcalifornia.edu/_files/reports/boars.freshadmprocess02.05.pdf. UC recently eliminated the standardized testing requirement and, as a result, the statewide eligibility path no longer considers standardized test scores. *2022 BOARS Annual Report on Undergraduate Admission* at 9, 61; BOARS, *Adjustment to the Statewide Eligibility Index* (Apr. 16, 2021), https://senate.universityofcalifornia.edu/_files/reports/mg-md-statewide-index.pdf.

President, *Discussion Item A1: Eligibility in the Local Context 1* (May 12, 2021) (“*Eligibility in the Local Context*”).²⁰ Under this policy, the top 4% of eligible students in each California public high school class were designated as “Eligible in the Local Context” (“ELC”). *Ibid.* This program allowed UC to “recognize outstanding performance relative to the educational context and opportunities available at each high school” and “support[] geographic diversity.” *Ibid.* Effective in 2012, the ELC program was expanded to the top 9%, and the statewide path was reduced to the top 9% of students statewide. *Ibid.*; see also The Regents of the University of California, *Regents Policy 2103: Policy on Undergraduate Admissions Requirements* (amended Feb. 5, 2009).²¹ Eligibility through ELC or the statewide path guarantees admission to one of the nine undergraduate campuses, although such applicants are still evaluated holistically by the individual campuses and are not guaranteed their campus of choice. *2022 BOARS Annual Report on Undergraduate Admissions* at 7-8.

Although these programs have increased geographic diversity, they have not substantially increased the racial diversity of students admitted to UC, and they have had little impact at the most selective campuses. *Eligibility in the Local Context* at 4-5. At those campuses, the effect of the ELC program has been minimal, because students who qualify for ELC must compete with tens of thousands of other highly

²⁰ <https://regents.universityofcalifornia.edu/regmeet/may21/a1.pdf>.

²¹ <https://regents.universityofcalifornia.edu/governance/policies/2103.html>.

qualified applicants. *Id.* at 5-6 (chart showing low admissions rate for ELC applicants at UC Berkeley and UCLA).

UC, however, cannot easily expand the program to reach more underrepresented minority students. Campus capacity limitations constrain any expansion to a larger percentage of top students—yet at its present size, the ELC program primarily identifies students who would have been eligible for UC anyway. BOARS, *Impact of the New Freshman Eligibility Policy at the University of California* 4 (Nov. 2013)²²; *Eligibility in the Local Context* at 4 (noting that “[o]ver 80 percent of applicants with ELC status also meet the statewide index”). And changes to the design of the program could come at the expense of UC’s interest in admitting students who have qualities and experiences that are diverse in many respects, *Fisher II*, 579 U.S. at 386-387, as well as its interest in maintaining the selectivity of its flagship campuses.

3. Comprehensive and Holistic Review

Before 2001, UC required that a significant portion of the incoming class be admitted “solely on the basis of academic achievement,” meaning grade point average and standardized test scores. See The Regents of the University of California, *Regents Policy 2104: Policy on Comprehensive Review in Undergraduate Admissions* (Nov. 15, 2001) (“*Regents Policy 2104*”);²³ *Undergraduate Access to UC* at 5, 12-13. Beginning in 2001, the Regents removed this requirement and recommended that campuses instead evaluate applicants

²² https://senate.universityofcalifornia.edu/_files/committees/boars/Nov52013BOARSReporttoRegents-Final.pdf.

²³ <http://regents.universityofcalifornia.edu/governance/policies/2104.html>.

“using multiple measures of achievement and promise while considering the context in which each student has demonstrated academic accomplishment.” *Regents Policy 2104*. This policy, referred to as “comprehensive review,” recommended that campuses consider not only applicants’ grades and test scores, but also their life experience, neighborhood and school characteristics, qualification for the ELC and state eligibility programs, any recent and marked improvement in academic performance, outstanding performance in particular subject areas, and special talents or skills. *2022 BOARS Annual Report on Undergraduate Admissions* at 7; *Guidelines for Implementation* at 2-3. In 2011, The Regents endorsed the use of a single-score holistic review process, in which reviewers consider “each applicant’s achievement in relation to opportunities and challenges.” The Regents of the University of California, *Regents Policy 2108: Resolution Regarding Individualized Review and Holistic Evaluation in Undergraduate Admissions* (approved Jan. 20, 2011).²⁴

Comprehensive and holistic review, however, has not been sufficient to counteract the declines in diversity after Proposition 209. An early report on the effects of comprehensive review raised concerns about a “disturbing persistence of low African American admit rates.” BOARS, *Comprehensive Review in Freshman Admissions at the University of California 2003-2009* at 4 (May 2010).²⁵ Implementation of holistic review in 2011 has not reversed this trend: freshman admissions rates for African American applicants remain

²⁴ <https://regents.universityofcalifornia.edu/governance/policies/2108.html>.

²⁵ https://senate.universityofcalifornia.edu/_files/reports/HP_MGYreBOARS_CR_rpt.pdf.

well below 1995 levels. UC Office of the President, *Information Center: Freshman Admissions Summary*.²⁶ The same holds true for Latinx and Native American applicants. *Ibid.*

More than a decade later, similar outcomes persist. Although admission of students from underrepresented minority groups as a whole increased after comprehensive review was instituted, admissions and enrollment outcomes for African American and Native American students did not materially improve. See *Impact of Proposition 209* at 5; *UC Information Center: Gap Analysis* (showing admission and enrollment of African American and Native American students has remained relatively flat since 2011).

4. Use of Standardized Tests

Finally, UC has taken a series of steps to address concerns that standardized test scores are highly influenced by family education and income levels. UC initially reduced its reliance on standardized tests by instituting comprehensive review, which eliminated the recommendation that half of the class should be admitted based on GPA and standardized test scores alone. *Regents Policy 2104; Guidelines for Implementation* at 3; University of California Systemwide Academic Senate, *Report of the UC Academic Council Standardized Testing Task Force* 4, 8-9, 10-13 (Jan. 2020).²⁷ As part of this shift to comprehensive review, UC directed campuses to consider standardized test scores “in context,” meaning within the context of the

²⁶ <https://www.universityofcalifornia.edu/about-us/information-center/freshman-admissions-summary>.

²⁷ https://senate.universityofcalifornia.edu/_files/committees/sttf/sttf-report.pdf.

scores for the applicants' school and neighborhood. *Ibid.*

UC subsequently eliminated the use of standardized tests altogether. See Minutes from the May 21, 2020 Meeting of The Regents of the University of California at 26²⁸; Minutes from the Nov. 18, 2021 Meeting of The Regents of the University of California at 11.²⁹ That change took effect very recently, for the entering class of 2021. That change also coincided with the pandemic-related suspension of letter-grade requirements for admission. University of California Office of the President, *UC Admissions Requirements to Help Students, Families in Wake of COVID-19* (Apr. 1, 2020).³⁰ The impact of the elimination of standardized tests therefore is not yet clear. See *2022 BOARS Annual Report on Undergraduate Admission* at 6.

C. UC Has Not Yet Achieved Adequate Diversity to Fully Realize the Educational Benefits of Diversity, Particularly At Its Most Selective Campuses.

For nearly a quarter century, UC has made persistent, intensive efforts to improve the diversity of its student body through race-neutral programs, yet full realization of the educational benefits of diversity remains elusive. UC measures its progress toward that goal by gathering extensive data on, among other things, the outcomes of its admissions processes and

²⁸ <https://regents.universityofcalifornia.edu/minutes/2020/board5.21.pdf>.

²⁹ <https://regents.universityofcalifornia.edu/minutes/2021/board11.18.pdf>.

³⁰ <https://www.universityofcalifornia.edu/press-room/uc-admissions-requirements-help-students-families-wake-covid-19>.

student experiences on each of its campuses. See *Annual Accountability Report 2022* at 124. Those metrics reveal areas in which UC has not yet achieved its educational goals.

1. At many of UC’s campuses, especially the flagship campuses, there remain stark differences between the demographics of UC’s enrolled student population and the demographics of the applicant pool that UC seeks to serve—that is, California public high school graduates. To be clear, UC does not maintain any “specified” racial targets based on the demographics of high school graduates or any other baseline. See *Fisher v. University of Texas at Austin*, 570 U.S. 297, 311 (2013) (“*Fisher I*”) (demographic targets constitute impermissible racial balancing) (citation omitted). Instead, UC looks at demographics to determine whether there are *substantial* demographic disparities of the sort that this Court has recognized can undermine a university’s ability to provide the educational benefits of diversity. See *Regents Policy 2102*.

Specifically, the Court has observed that the existence of stark demographic disparities reveals that a university is struggling “to enroll students who can offer underrepresented perspectives.” *Fisher II*, 579 U.S. at 383. In a student body with few students from underrepresented minority groups, there will be few opportunities for promoting cross-racial understanding, and students will not be exposed to diverse racial perspectives. *Grutter*, 539 U.S. at 330. In addition, because *Grutter* recognized that a university has a compelling interest in “prepar[ing] students for an increasingly diverse workforce and society,” *id.* at 330, 332 (citation omitted), *Grutter* presupposes that universities may make themselves aware of the demographics of the workforce and the community in order to determine the degree of cross-racial interaction

necessary to adequately prepare students. Finally, if the student body of a State’s flagship university—whose mission is to educate the State’s future leaders—is severely out of step with the larger applicant pool, people may conclude that the pathway to leadership is not truly open to all, thereby undermining future leaders’ “legitimacy in the eyes of the citizenry.” *Id.* at 332.

Comparing the demographics of UC’s undergraduate population with California public high school graduates for 2019 reveals stark disparities that undermine UC’s ability to provide the educational benefits of diversity. University of California, *Annual Accountability Report 2021* at 120 (“*Annual Accountability Report 2021*”);³¹ see also *UC Information Center: Gap Analysis*.³² In 2019, 52.3% of California public high school graduates identified as Latinx, 24.4% as White, 13.6% as Asian, 5.5% as African American, and 0.5% as Native American. *UC Information Center: Gap Analysis*. Total freshman enrollment across UC’s nine

³¹ <https://accountability.universityofcalifornia.edu/2021/documents/pdfs/aar-2021-report.pdf>. The *Annual Accountability Report 2021* at 120 presents high school graduation and UC application, admissions, and enrollment data from 2019. *The Annual Accountability Report 2022* at 129 presents similar data from 2020. Given the as-of-yet uncertain impact of the COVID-19 pandemic and the elimination of the standardized testing requirement on the 2020 data, the 2019 data is used here. See *Annual Accountability Report 2022* at 15.

³² The *Annual Accountability Report 2021* uses a four-year adjusted graduate count, which accounts for differences in time to graduation in order to better capture the progress of high school students from ninth grade through graduation. The *UC Information Center: Gap Analysis* uses a one-year graduate count, which reflects the actual number of students that graduated in a given year. As a result, the data displayed will differ slightly between the two sources.

undergraduate campuses did not reflect this same diversity: only 25.45% of freshmen identified as Latinx, 3.87% identified as African American, and 0.42% identified as Native American. *UC Information Center: Undergraduate Admissions Summary*.³³ At UC Berkeley, one of UC's most selective campuses, an even larger gap appears: only 15.06% of freshman identified as Latinx, 2.76% as African American, and 0.37% as Native American. *Ibid.* And similar disparities exist in the entire student body, which includes transfer students. See UC Office of the President, *Information Center: Fall Enrollment at a Glance* ("UC Information Center: Fall Enrollment at a Glance").³⁴

Recent demographic trends within UC also reflect a persistent inability to increase opportunities for cross-racial interaction. UC's race-neutral measures have not significantly increased enrollment of African American students. As of 2019, African American students' proportion of UC's freshman class was 3.87%, below their pre-Proposition 209 proportion (4.2%). *UC Information Center: Undergraduate Admissions Summary*. The proportion of African American freshmen at UC Berkeley (2.76%) and UCLA (5.98%) remained below their pre-Proposition 209 proportions (6.32%

³³ See note 15, *supra*, describing differences between the data reported by *UC Information Center: Gap Analysis* and *UC Information Center: Undergraduate Admissions Summary*.

³⁴ <https://www.universityofcalifornia.edu/about-us/information-center/fall-enrollment-glance>. *UC Information Center: Fall Enrollment at a Glance* uses UC's categorization of students by race/ethnicity and the cited data reflects the proportion of underrepresented minority students as a total of all enrolled undergraduates students. As a result, the data displayed will differ slightly from other sources that use a different categorization system or a different total population.

and 7.13%, respectively), and at UC Berkeley remained well below the proportion of African American California public high school graduates (5.5%). *Ibid.*; *UC Information Center: Gap Analysis*.

The same trends persist for UC's Native American students in the UC system generally, as well as at UC Berkeley and UCLA: by 2019, the proportion of Native American freshman (0.37% and 0.68%, respectively) remained below their pre-Proposition 209 proportions (1.82% and 1.22%, respectively), and at UC Berkeley remained below the proportion of Native American California public high-school graduates (0.5%). *UC Information Center: Undergraduate Admissions Summary*; *UC Information Center: Gap Analysis*. As of 2019, these low proportions mean that there were only 193 Native American freshmen across all nine undergraduate campuses, with only 24 Native American freshmen at UC Berkeley and 40 Native American freshmen at UCLA. *UC Information Center: Undergraduate Admissions Summary*.

Although Latinx students make up an increasing proportion of freshmen, growing from 15.05% to 25.45% between 1995 and 2019, that percentage falls well below their total share of California public high school graduates (52.3%). *Ibid.*; *UC Information Center: Gap Analysis*. Again, the shortfall for Latinx students is starkest at the highly competitive UC Berkeley and UCLA: in 2019, Latinx students made up only 15.06% and 20.63% of freshmen, respectively. *UC Information Center: Undergraduate Admissions Summary*.³⁵ Those numbers are concerning because many

³⁵ The proportion of Latinx freshmen at UC Berkeley was slightly higher in 2020 and 2021, but still low, at 21.38% and 18.93%, respectively. *Ibid.*

Latinx students on those two campuses report not feeling that their race is respected on campus, see pp. 27-29, *infra*, and because the numbers raise concerns that California citizens will view UC's most selective campuses as not fully open to all.

In sum, despite UC's institution of numerous race-neutral measures to increase diversity over the past 25 years, and despite significant improvements over that period, UC still struggles "to enroll students who can offer underrepresented perspectives," *Fisher II*, 579 U.S. at 383, even as California itself becomes more and more diverse, see *UC Information Center: Gap Analysis* (showing increase in share of California public high school graduates from underrepresented minority groups).

2. UC also assesses students' experiences on campus in order to evaluate whether it is achieving its objective of fostering a scholarly environment of "mutual respect" for diverse viewpoints. *Regents Policy 4400*. These assessments leave no doubt that UC's challenges enrolling a meaningful number of students from underrepresented racial groups, particularly at its most selective institutions, have had concrete adverse effects on the campus climate.

Low percentages of students from underrepresented minority groups in the student population translate into small absolute numbers on campus generally and in the smaller settings in which students interact, with adverse consequences for the experiences of all UC students. Many students from underrepresented minority groups, particularly those at UC's most selective campuses, will often find themselves the sole student of their race and/or ethnicity in a class. For example, in 2021, UC Berkeley's entering freshman class of 6,931 students included only 258 African American

students (3.72%) and only 27 Native American students (0.39%), and the total undergraduate student body of 31,814 students included only 1,204 African American students (3.8%) and only 137 Native students (0.4%). *UC Information Center: Undergraduate Admissions Summary*; *UC Information Center: Fall Enrollment at a Glance*. Given that a significant majority of undergraduate classes offered at UC Berkeley have fewer than 50 students, simple mathematics dictate that African American and Native American students will often be the only student of their race in their courses. UC Berkeley Office of Planning and Analysis, *Our Berkeley: Class Size*.³⁶ As this Court has recognized, that can lead to feelings of racial isolation and concerns about being treated as a “token” diverse voice—and it reduces all students’ opportunity to engage with diverse viewpoints. See *Grutter*, 539 U.S. at 333; *Fisher II*, 579 U.S. at 384.

To evaluate the campus environment in more detail, UC administers a biennial survey to undergraduates in which they are asked, among other things, whether they feel that students of their race and/or ethnicity are respected on campus and whether they feel that they belong on campus. See *Annual Accountability Report 2022* at 124, 136. The 2020 results confirm that the failure to achieve meaningful representation of students from different backgrounds has a significant impact on student experiences. Among racial and ethnic groups in UC’s student body, African American students are least likely to feel that their race/ethnicity is respected or that they belong on campus. *Ibid.* In Spring 2020, across nine UC campuses that surveyed undergraduates, from 38% to as few as 20% of

³⁶ <https://pages.github.berkeley.edu/OPA/our-berkeley/class-size.html>.

African American students reported feeling that students of their race/ethnicity were respected on campus. *Id.* at 136 (graph showing students who agree or strongly agree with the statement “Students of my race/ethnicity are respected on this campus”); see also UC Office of the President, *Information Center: University of California Undergraduate Experience Survey (UCUES) Data Tables, 2020*³⁷ (providing more granular data on responses). Similarly, from 49% to as few as 26% of African American students reported feeling that they belonged at the university. *Annual Accountability Report 2022* at 136 (graph showing students who agree or strongly agree with the statement “I feel I belong at this university”).

These responses largely correlate with the number of African American undergraduate students on campus for academic year starting in Fall 2019. At the campuses with the lowest proportions of African American students, UC Berkeley (3.5%) and UC San Diego (2.8%), only 20% and 22%, respectively, of African American students felt students of their race/ethnicity were respected on campus. Meanwhile, at the campus with the highest proportion of African American students, UC Merced (6.6%), 36% felt students of their race/ethnicity were respected. Compare *UC Information Center: Fall Enrollment at a Glance*, with *Annual Accountability Report 2022* at 136.

Similar results obtained with respect to Latinx students. At the campuses with the lowest proportion on Latinx students, UC Berkeley (15.5%), UC San Diego (21.2%), and UCLA (21.4%), Latinx students were less likely to feel respected (38%, 46%, and 43%, respectively), and less likely to feel that they belonged at the

³⁷ <https://www.universityofcalifornia.edu/about-us/information-center/ucues-data-tables-2020>.

university (45%, 41%, and 50%, respectively). Compare *UC Information Center: Fall Enrollment at a Glance*, with *Annual Accountability Report 2022* at 136. Conversely, UC Merced and UC Riverside, which had the highest percentage of Latinx students who felt that students of their ethnicity were respected (77% and 70%, respectively) and the highest percentage who felt that they belonged at the university (63% and 58%, respectively), also had the highest proportion of Latinx students (53.9% and 39.9%, respectively). Compare *Information Center: Fall Enrollment at a Glance*, with *Annual Accountability Report 2022* at 136.

A separate survey conducted by UC Berkeley—one of UC’s most selective campuses and one which has one of the lowest rates of enrollment of students from underrepresented minority groups—revealed similar outcomes. It found that “minoritized and marginalized communities at UC Berkeley continue to report experiencing discomfort with the campus climate.” UC Berkeley Office of the Chancellor, *My Experience Survey 2019: Campus Findings and Recommendations 2* (2019).³⁸ African American, Native American, and Pacific Islanders reported experiencing exclusionary behaviors—“being stared at; fearing for one’s personal safety; experiencing hostile/offensive behaviors; and being singled out as a spokesperson for one’s group”—at twice the rate of students from other backgrounds. *Id.* at 11.

In sum, UC’s demographic data and survey results confirm that particularly at UC’s most selective campuses, the full educational benefits of diversity have yet to be attained. Alleviating racial isolation is still a

³⁸ <https://myexperience.berkeley.edu/sites/default/files/myexperiencesurvey2019-final.pdf>.

concern, as is the need to provide a campus environment that prepares all students to exchange ideas in a pluralistic society. See *Grutter*, 539 U.S. at 332-333. Of course, UC seeks to address the issues revealed by its campus surveys through many mechanisms, including retention programs, counseling, mentoring, and community building. See, e.g., *Accountability Report 2022* at 125-128; *My Experience Survey 2019: Campus Findings and Recommendations* at 3, 15. But the correlation between underrepresentation on campus and more prevalent feelings of racial isolation indicates that increasing representation of students from underrepresented minority groups is an important part of the equation. UC's significant investment in race-neutral measures has not yet enabled the University to enroll classes that contain sufficiently broad diversity to fully realize the educational benefits of diversity. See *Fisher II*, 579 U.S. at 385 (finding it significant that “the University [of Texas] spent seven years attempting to achieve its compelling interest using race-neutral holistic review” and “[n]one of th[o]se efforts succeeded”).

3. UC's experience disproves petitioner's unsupported assertion that increased diversity in “universities in California” proves that race-neutral alternatives are always sufficient to achieve the educational benefits of diversity. Pet. Br. 85-86. Such a sweeping assertion about diversity in the UC system as a whole ignores that UC has multiple campuses throughout California—and that it is *campus-level* student body diversity that determines a student's college educational experience. See *Regents Policy 2102*. Each campus has a distinct student body, provides distinct educational experiences, and has its own admissions process and degree of selectivity. UC's experience demonstrates that the race-neutral measures which it has

diligently pursued for 25 years have been inadequate to meaningfully increase student-body diversity, and that the problem is most acute at its most selective campuses.

Petitioner's own amici inadvertently reinforce the point. The amicus brief submitted by Oklahoma and 18 other States highlights Oklahoma's experience, asserting that since Oklahoma banned consideration of race in college admissions in 2012, "there has been no long-term severe decline in minority admissions at the University of Oklahoma." Oklahoma Amicus Br. 10. But that assertion elides critical differences in enrollment trends among underrepresented groups, with enrollment of African American students decreasing since 2012. *Ibid.* And whatever may be said of the University of Oklahoma system as a whole, African American and Native American enrollment has dropped sharply at the Norman campus—Oklahoma's flagship and most selective campus. By 2019, enrollment of African American freshmen at the Norman campus had dropped from 5.1% of the class to 3.7% and enrollment of Native American freshmen had dropped from 3.8% to 3.0%. University of Oklahoma Institutional Research & Reporting, *First-Time Freshman Analysis Fall 2013*, at 2, Table 1: University of Oklahoma – Norman Campus (Oct. 2013)³⁹; University of Oklahoma Institutional Research & Reporting, *First-Time Freshman Analysis Fall 2019*, at 2, Table 1 University of Oklahoma – Norman Campus (Sept. 2019).⁴⁰

³⁹ <https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/First%20Time%20Freshman%20Analysis%20Fall%202013.pdf>.

⁴⁰ https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/FTF_Analysis_Fall_2019_revised%2010-15-20.pdf.

Oklahoma’s flagship campus thus has faced some of the same challenges that UC has faced since Proposition 209.

In all events, petitioner’s and Oklahoma’s emphasis on purportedly satisfactory demographic results at a few university systems ignores critical realities. As this Court has repeatedly emphasized, “demographics alone” do not determine whether a university has achieved sufficient student body diversity to fulfill its educational mission. *Fisher II*, 579 U.S. at 383. Instead, that question is informed by myriad circumstances unique to each university, including its objectives, size, history, resources, and relationship to the community it serves. And in view of the vast heterogeneity among universities, measures that successfully increase diversity at one institution may not work for another. *Grutter*, 539 U.S. at 340. *Fisher II* therefore permits universities to serve as “laboratories for experimentation” to determine what methods enable them to achieve the educational benefits of diversity. UC’s experience demonstrates that for some universities—particularly the very selective institutions—race-neutral measures may prove insufficient, necessitating that the university engage in limited consideration of race.

As this Court reaffirmed in *Fisher II*, such consideration remains justified by universities’ compelling interest in achieving the educational benefits of diversity—in bringing together young adults from all walks of life, who have had varying experiences informed by their localities, socioeconomic background, upbringing, and race, and instilling in them a capacity to appreciate each other’s viewpoints. While “[t]he enduring hope is that race should not matter; the reality is that too often it does.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007)

(Kennedy, J., concurring). In a Nation where race matters, universities must maintain campus environments that enable them to teach their students to see each other as more than mere stereotypes. Succeeding at that endeavor is crucial to preparing the next generation to be effective citizens and leaders in an increasingly diverse Nation.

CONCLUSION

The judgment of the court of appeals should be affirmed in *Students for Fair Admission, Inc. v. President & Fellows of Harvard College*, No. 20-1199, and the judgment of the district court should be affirmed in *Students for Fair Admission, Inc. v. University of North Carolina*, No. 21-707.

August 1, 2022

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