12-682

In The Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,
Petitioner,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
AND
CHASE CANTRELL, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE FOR RICHARD SANDER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The past decade has witnessed a profusion of careful research on the subject of racial preferences, much of it stimulated by this Court's decisions in *Grutter v. Bollinger*, 549 U.S. 306 (2003), and *Gratz v. Bollinger*, 549 U.S. 244 (2003). *Amicus curiae* has written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Schuette v. Coalition to Defend Affirmative Action, et al.*

Richard Sander, the principal author of this brief, is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Along with Stuart Taylor, Jr., he is the author of *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (Basic Books, 2012).

This brief discusses empirical issues explicitly or implicitly raised by the Sixth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

The essence of the Sixth Circuit's holding is that Michigan voters, in passing Proposal 06-2, denied racial minorities in Michigan an important benefit, and that the Proposal places unreasonably high – and therefore unconstitutional – barriers in

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[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

the path of minorities seeking to reinstitute these benefits.

In this brief, *amicus* focuses on the highly abstract nature of the Sixth Circuit's argument, and its apparent detachment from the actual circumstances in Michigan and in the United States surrounding racial preferences. In this brief, *amicus* highlights some of the facts on the ground relevant to assessing Proposal 06-2 as simply an attempt to regulate a particularly troubling social policy.

ARGUMENT

I. The University Of Michigan's Operation Of Racial Preference Programs At The time Of Proposal 06-2's Passage Raised Important Equal Protection Problems

A. Undergraduate-level Racial Preferences At The University Of Michigan Became Larger, And At Greater Expense To Socioeconomic Diversity, After *Gratz* And *Grutter*

1. In 2003, the U.S. Supreme Court evaluated the constitutionality of admissions preferences at the University of Michigan (UM). In *Gratz v. Bollinger*, it heard a challenge to UM's undergraduate admissions system, which used a point system to make admissions.[2] On a 150 point scale, with 100 points guaran-

[2] Although the admissions process changed slightly from year to year, the University explained that it "changed only the mechanics, not the substance of how race and ethnicity were considered in admissions." *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

teeing admission, underrepresented minorities (URMs) received 20 points automatically based on their race.[3] Applicants could receive up to 20 points for socioeconomic disadvantage.[4] In *Grutter v. Bollinger*, it heard a challenge to UM's law school admissions system, which used no explicit formula but gave substantial weight to the applicant's race.[5] The Supreme Court invalidated the undergraduate point system, but found the law school's "holistic" system constitutional – noting, however, that admissions systems edged towards unconstitutionality when they used race in a "mechanical" way (meaning that, for example, an admissions system treated all blacks as providing similar diversity benefits)[6], and ruling flatly unconstitutional any "racial balancing" (meaning that the size of preferences could not be calibrated for a racial group's degree of underrepresentation or overrepresentation).[7]

2. By 2006, the undergraduate admissions program had shifted to a "holistic" system, in apparent compliance with *Grutter* and *Gratz*. But the actual operation of the system showed three disturbing patterns. The implicit weight given to African-Americans had increased in 2006 relative to 1999 (a key admissions cycle in the Court's evaluation); different size preferences were used for each of four major groups (with Asians the most heavily penalized); and the weight given to socioeconomic factors had gone down from essential parity with race to

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[3] *Id.*

[4] *Id.* at 294 (Justice Souter, dissenting).

[5] *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

[6] *Id.* at 334.

[7] *Id.* at 330.

nearly zero (even as the public[8] was giving greater importance to socioeconomic diversity).[9] In other words, the lead educational institution in Michigan using racial preferences, and the one that had been directly rebuked by the Supreme Court in 2003, instituted changes in its admissions practices that seemed to fly in the face of the Supreme Court's tight restrictions on the use of racial preferences. In this context, Proposal 06-2 can be seen as an attempt to control racial preferences at a university that was determined to defy the Supreme Court.

B. Asian-American Students Have Tended To Be Those Most Heavily Disadvantaged By Admissions Systems That Rely On Racial Preferences, And Asian-Americans Are A Politically Vulnerable Group In Michigan

1. Most analyses that examine the size of racial preferences have found that African-American applicants receive the largest preference, followed by

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[8] Associated Press, *Race vs. Class: Inequality Has Shifted Debate Since Court Last Ruled on Affirmative Action*, June 16, 2013; WASH. POST, June 11, 2013; David Leonhardt, *The Liberals Against Affirmative Action*, NEW YORK TIMES, March 9, 2013.

[9] Aaron Danielson, "An Analysis of Undergraduate Admissions at the University of Michigan in 2006 and 2008," (2013 working paper, available at http://www.seaphe.org/working-papers/); Richard H. Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in Kevin McGuire, ed., NEW DIRECTIONS IN JUDICIAL POLITICS (2012); Richard H. Sander and Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (Basic Books 2012) at 212-213.

Hispanics. Non-Hispanic whites are generally penalized (i.e., are assigned a "reverse" preference), and Asian-Americans are even more penalized. Thus, Professor Thomas Espenshade and Alexandra Radford found that, at private institutions, the admissions advantage for blacks was equivalent to 310 SAT points relative to whites; 130 points for Hispanics relative to whites; and a 140 point disadvantage for Asians relative to whites.[10] The same pattern was closely paralleled in public institutions. Espenshade and Chang Y. Chung found that at elite schools, four of the five spaces lost by blacks and Hispanics when racial preferences decline would be occupied by Asians.[11]

2. In the years leading up to the Court's ruling in *Gratz v. Bollinger*, the undergraduate admissions office did not differentiate across individual racial groups; that is, all underrepresented minorities were given the same "points," as discussed above. But this changed after *Gratz*. Analyses of University of Michigan admissions data for the 2005-06 admissions cycle show distinct racial preferences across each of the four major racial groups; blacks received the largest preferences, followed by Hispanics; Asians were penalized relative to whites.[12] Thus, the University of Michigan seems to have slid toward the exact sort of racial balancing the Court warned

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[10] Thomas J. Espenshade and Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (Princeton University Press 2009) at 92.

[11] Thomas J. Espenshade and Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 2 (2005).

[12] Sander, *supra* note 9; Danielson, *supra* note 9.

against, and singled out Asians for particularly unfavorable treatment.

3. There is a long tradition in the United States of enshrining fundamental rights in constitutions, as evidenced by the Fourteenth Amendment itself. This constitutional protection is particularly important for groups that have suffered from discrimination historically, and for groups that are politically weak.[13] Asian-Americans qualify under both criteria; they have suffered extensive discrimination in American history,[14] and they were, at the time of Proposal 06-2's passage, pretty clearly the politically weakest of the four major racial groups in Michigan.[15] Establishing a constitutional prohibition of racial preferences, which protects Asian-Americans from discrimination, is entirely consistent with other protections of rights in both the federal and state constitutions.

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[13] "In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Brennan, concurring).

[14]Ronald Takaki, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (Little, Brown & Company 1998); Michael Klarman, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY (Oxford University Press 2007) at 70-74 and *passim*.

[15] In 2006, 79% of Michigan's residents were non-Hispanic whites; 14% were black, 4% were Hispanic, and fewer than 3% were Asian. U.S. Bureau of the Census, Statistical Abstract of the United States: 2008, p. 23. Out of 151 Michigan legislators listed in the Library of Michigan database in 2003-2004 (2005-2006 session was unavailable) 18 were African-American, one was Hispanic, and one Asian-American. *Michigan Legislative Biography Database*, LIBRARY OF MICHIGAN, http://qa.mdoe.state.mi.us/NewLegislativeBiography/Home/SearchLegislators, 201 (last visited June 25, 2013).

C. The Increasingly Multiracial Character Of America, And The Increasing Affluence Of Minorities Receiving Preferences, Has Made Traditional "Racial" Categories A More And More Outmoded Tool For Social Policy

1. When universities began using racial preferences in the 1960s, nearly all participants thought of the access problem as one involving a single, well-identified racial group: African-Americans.[16] Over time, preference programs became more expansive, adding at various times some or all Hispanic ethnicities, American Indians, Pacific Islanders, and some or all Asian ethnicities. The rationales and social science evidence for the various rules of inclusion and exclusion have become steadily more complex over time[17], and necessarily the connection between these racial categories and the underlying types of "disadvantage" favored, or "diversity" pursued, becomes more attenuated.

2. In the United States today, by far the fastest-growing racial group is "multiracial". The number of people identifying as both black and white increased by 134% between 2000 and 2010, and the number of children identifying as multiracial increased almost 50%.[18] The overall number of people reporting their race as "two or more races" went from 6.8 million in 2000 to 9.0 million in 2010, an increase of 32 per-

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[16] Abigail and Stephen Thernstrom, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (Simon and Schuster 1999) at 389.

[17] Id; See also Deborah Ramirez, *Multicultural Empowment: It's Not Just Black and White Anymore* 57 STAN. L. REV. 5 (1995).

[18] Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, NEW YORK TIMES, March 24, 2011.

cent.[19] The existence of a large and growing multiracial population creates a host of problems and potential abuses in programs that seek to confer benefits according to racial classification.[20] By what rules is racial membership assigned? How does one prevent opportunistic behavior by self-classifying applicants?[21]

3. A study of students at Harvard Law School found that only 30% of students identifying as "African-American" at the law school actually had four African-American grandparents. The other 70% were either of mixed racial backgrounds, or were foreign students.[22] The disproportionately large presence of black immigrants among black students at elite schools is a widespread phenomenon.[23] Partly to deal with such difficulties, the U.S. Department of Education issued revised guidelines on the racial data reported by schools. [24]

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[19] Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, UNITED STATES CENSUS BUREAU (2011).

[20] *See, e.g.*, Paul Brest and Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 5 (1995).

[21] Sander & Taylor, *supra* note 9 at 185; Susan Saulny and Jacques Steinberg, *On College Forms, A Question of Race, or Races, Can Perplex*, NEW YORK TIMES, June 13, 2011.

[22] Marques J. Redd and Kritiana Freelon, BLACK GUIDE TO LIFE AT HARVARD (Harvard Black Students Association 2002).

[23] Douglas S. Massey, Margarita Mooney, Kimberly C. Torres and Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. OF EDUC. 2 (2007).

[24] *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education*, 72 FED. REG. 59,266 59,279 (2007).

4. When universities use racial preferences, a very high proportion of the non-white recipients (particularly at elite schools) are from relatively affluent and privileged backgrounds.[25] Here again, the nexus between "disadvantage" and "diversity" on the one hand, and "race" on the other, has become much weaker over time. [26]

5. For all these reasons, it is reasonable as a policy matter for voters or legislators to conclude that preferences defined by characteristics such as race are increasingly impractical and arbitrary, and therefore appropriate to eliminate.[27]

II. Racial Minorities Do Not Generally Consider The Types Of Preferences Banned By Proposal 06-2 To Be An Important Social Benefit

A. A Wide Range Of Reports On Public Opinion Find That Students And Adults Of All Racial Groups Oppose The Use Of Racial Preferences In University Admissions

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[25] Richard D. Kahlenberg, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (Basic Books 1997); Sander & Taylor, *supra* note 9 at 248-252; Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2010).

[26] As Sander and Taylor discuss in *Mismatch*, blacks at elite schools in the early 1970s roughly mirrored the socioeconomic diversity of the American population, but by the early 1990s were drawn very heavily from the most affluent quartile of the American population. Sander & Taylor, *supra* note 9 at 248.

[27] David Brooks, *Speed of Ascent*, NEW YORK TIMES, June 24, 2013.

1. Americans generally draw a clear distinction between "affirmative action" programs and "racial preferences."[28] "Affirmative action" is usually associated with efforts to insure that selection processes are fair and open to all, and that those making selections are looking broadly for talented candidates, and not simply relying on "old boy networks." "Racial preferences" have a clear and very different connotation: that one is not always choosing based on qualifications, but tipping the scale to favor candidates of a particular race.

2. In a broad survey of opinion on college campuses nationwide, several sociologists found that 71% of minority students disapproved of the use of racial or ethnic preferences in university admissions, and 62% of minority students rejected the use of relaxed admissions standards to increase minority representation.[29]

3. Public opinion polls of Americans consistently show broad opposition to racial preferences. A 2013 survey for the *Washington Post* and ABC News asked, "Do you support or oppose allowing universities to consider applicant's race as a factor in deciding which students to admit?" Among 1007 registered voters who responded, large and consistent majorities of all racial groups expressed opposition:

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[28] Sander & Taylor, *supra* note 9 at 188; WASH. POST/KAISER/HARVARD, *Racial Attitudes Survey*, March 8 – April 22, 2001, available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm (last visited June 25, 2013).

[29] Stanley Rothman, *Affirmative Action – and Reaction; Is Diversity Overrated?* NEW YORK TIMES, March 29, 2003.

79% of whites, 78% of blacks, and 68% of Hispanics.[30] An earlier *Washington Post* poll asked the question even more directly: "In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted or admitted to college, or that hiring, promotions, and college admission should be based strictly on merit and qualifications other than race or ethnicity?" Only 3% of whites, 7% of Hispanics, and 12% of blacks thought race or ethnicity should be a factor.[31]

4. In contrast, opinion polls that ask generally about "affirmative action" show a much more evenly divided public and less consensus across racial lines. For example, the NBC News and *Wall Street Journal* have conducted a joint poll for over twenty years that has asked "Is affirmative action still needed, or should it be ended?" In the early 1990s, a large majority of Americans responded that affirmative action was still needed (61%, compared to 28% who favored ending it). Support has steadily eroded since then, so that in June 2013, Americans as a whole were evenly divided on the issue (45% responding that it is still needed, and 45% responding that it should be ended). But a large (and perhaps increasing) majority of blacks (8 in 10) respond that it is still needed.[32] Plausibly, racial minorities view "affirmative action" as measures aimed at maintaining fair

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[30] Associated Press, *supra* note 8.

[31] Sander & Taylor, *supra* note 9 at 188; WASH. POST/KAISER/HARVARD, *supra* note 28.

[32] Domenico Montanaro, *NBC News/WSJ Poll: Affirmative Action Support at Historic Low*, NBCNEWS.COM, June 11, 2013, http://firstread.nbcnews.com/_news/2013/06/11/18885926-nbc-newswsj-poll-affirmative-action-support-at-historic-low?lite&ocid=msnhp&pos=3 (last visited June 25, 2013).

and equal selection processes, and are more anxious than whites to have special efforts maintained to preserve fairness.

5. Given the strong consensus across racial lines on the undesirability of racial preferences, one might reasonably ask why the voting on Proposal 06-2 (and Proposition 209) showed quite racially disparate results, with whites strongly supporting both propositions and blacks strongly opposing them. As Sander and Taylor discuss in *Mismatch*, the proponents of these measures consistently described them as bans on the use of racial preferences.[33] But opponents of the measures, who outspent proponents by over 2.5 to 1 in Michigan,[34] emphasized that the measures would ban "affirmative action."[35] Opponents also frequently characterized the measures as "racist," as "Jim Crow" measures that would reinstitute segregation in public education, or as "slamming the door on progress."[36] Such messages were pervasive in both elections, and it is thus not surprising that the actual attitudes of blacks towards racial preferences would diverge from their voting patterns on Proposal 06-2 and Proposition 209.

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[33] Sander & Taylor, *supra* note 9 at 125.

[34] National Institute on Money in State Politics, *Proposal 06-2: Ban on Affirmative Action Programs*, http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=114 (last visited June 21, 2013).

[35] *See Coalition to Defend v. Regents of Univ. of Mich.*, 701 F.3d 466, 479 (6th Cir. 2012); Sander & Taylor, supra note 9 at 125, 190.

[36] Andrew Grossman, *BAMN Clashes With MCRI Director*, MICH. DAILY, Apr. 5, 2006, available at http://www.michigandaily.com/content/bamn-clashes-mcri-director; Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*," NEW YORK TIMES, Oct. 31, 2006.

B. The Actual Conduct Of Students In The Wake Of A Ban On Racial Preferences Is Consistent With The Conclusion That Minority Students Prefer To Attend Schools That Do Not Use Racial Preferences In Admissions

1. It has often been argued by proponents of racial preferences that it is vital for universities to use these to achieve something close to proportional representation of minorities on campuses, in part because otherwise minority students will feel that the campus climate is "hostile" to racial minorities. A ban on racial preferences could, in this view, set off a chain reaction – the numbers of admitted blacks and Hispanics fall, which then deters other blacks and Hispanics from applying, which then causes minority enrollment to fall further – which could quickly cause minority enrollment to approach zero.[37]

2. An opportunity to test this idea arose in California after the passage of Proposition 209. Because racial preferences at the University of California (UC) were, in fact, substantial before Proposition 209, the admissions rate for Hispanics and especially for African-Americans dropped sharply – at Berkeley and UCLA, the overall probability of admission for blacks and Hispanics fell from about 60% to 30%.[38] Yet a very careful, peer-reviewed study by David

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[37] University of California Office of the President, *The Use of Socio-Economic Status in Place of Ethnicity in Undergraduate Admissions: A Report on the Results of an Exploratory Computer Simulation* (1995); Gary Orfield and Edward Miller (eds.), CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES (Harvard University Press 1998); Sander & Taylor, *supra* note 9 at 131.

[38] Sander & Taylor, *supra* note 9 at 133.

Card and Alan Krueger found that Proposition 209 had no meaningful effect upon the propensity of highly-talented blacks to apply to UC campuses after Proposition 209, or to the University of Texas after Hopwood.[39] A broader study by Kate Antonovics and Ben Backes, which looked at the full range of application patterns to the University of California before and after Proposition 209, found some evidence of a decrease in the rate at which blacks and Hispanics with weak academic credentials sent their SAT scores to Berkeley and UCLA (a logical response, given much lower chances of admission), but also evidence of an increase in that rate for less-selective campuses.[40]

3. Even more striking, Antonovics and Sander found that blacks and Hispanics became significantly *more* likely to accept offers from UC campuses after the era of formal race-neutrality began.[41] At the four most elite UC campuses, the rate at which blacks and Hispanics accepted offers of admission rose by between 10% and 15%. This increase was particular-

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[39] David Card and Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUSTRIAL & LABOR RELATIONS REVIEW 416 (2005). Card & Krueger examined "highly-qualified" blacks because their admission chances would be minimally affected by the ban, which reduced the chances of most other blacks; students are less likely to apply when their admission chances are low.

[40] Kate Antonovics and Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses after the Affirmative Action Ban?*, 8 EDUC. FIN. AND POL'Y 2 (2013).

[41] Kate Antonovics and Richard H. Sander, *Affirmative Action Bans and the Chilling Effect*, 15 AM. L. AND ECON. REV. 1 (2012).

ly notable at the two campuses (Berkeley and UCLA) which, prior to Proposition 209, had used the largest racial preferences and had the largest post-209 drops in minority enrollment.[42]

4. We do not know exactly why minority take-up rates went up after Proposition 209, but it is certainly plausible that blacks and Hispanics were more attracted to the idea of attending a campus where they would not be stigmatized by the assumption that they had gotten in by virtue of their race.[43]

III. There Are Strong Empirical Reasons To Conclude That Racial Minorities Are Not Harmed, And Perhaps On Balance Benefited, By A Ban On Racial Preferences In Higher Education

A. Universities And Jurisdictions Covered By Bans On Racial Preferences Generally Implement Policies That Reflect Many Of The Original Goals Of Affirmative Action And Promote Diversity

1. At the University of California (which was affected by a preference ban ten years before Proposal 06-2, and which has been the subject of significant study), many UC campuses used substantial racial preferences before they were banned. In the wake of Proposition 209, nearly all campuses implemented

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[42] See Figure 8.1 in Sander & Taylor, *supra* note 9 at 138.

[43] Antonovics and Sander tested this idea and found it supported by a variety of statistical evidence. Antonovics and Sander, *supra* note 41.

changes in admissions policy that produced racial dividends – that is, which tended to favor black and Hispanic applicants without any explicit consideration of race.[44] Many of these changes also favored applicants with low socioeconomic status, so that the socioeconomic diversity of UC students increased.[45]

2. At the University of Michigan, undergraduate admissions for the 2007-08 cycle (the first full cycle covered by the Proposal 06-2 ban on racial preferences) show that, when one controls for each student's academic credentials and socioeconomic status, blacks continued to be far more likely to be admitted than Hispanics, who were more likely to be admitted than whites, and whites were significantly more likely to be admitted than Asians.[46] These differentials may reflect a continuing use of (covert) racial preferences by the University of Michigan, or they may reflect the use of racial "surrogates" which our database does not include. What is clear in either case, however, is that the University of Michigan has made significant efforts to make sure that underrepresented minorities continue to be admitted in substantial numbers ahead of other students with better academic credentials under the Proposal 06-2 regime.

3. Shortly after the passage of Proposition 209 in California, UC leaders launched task forces to design better mechanisms for identifying talented

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[44] Kate Antonovics and Ben Backes, *The Effect of Banning Affimative Action on College Admissions Rules and Student Quality (2013 working paper, available at http://econ.ucsd.edu/~kantonov/admissions_writeup_probit-2.pdf).*

[45] *Id.*

[46] Danielson, *supra* note 9.

high school students from disadvantaged schools in California.[47] The initiatives were backed by university leadership and have been generously funded. Though these programs and investments naturally took years to have a substantial impact, they eventually produced substantial dividends in increasing applications from low socioeconomic students and from students at historically weak high schools.[48] These programs help explain why black and Hispanic entry into UC schools was far higher ten years after Proposition 209 than it had ever been during the era of outright racial preferences.

4. The University of Michigan has undertaken similar efforts. Following the passage of Proposal 06-2, University of Michigan President Mary Sue Coleman appointed the University-wide Blueprints Task Force to develop strategies for sustaining and enhancing diversity. As with the UC, the Michigan Task Force developed strategies involving recruitment, precollege K-12 outreach, new aid programs, and the like, which had the effect of deepening the university's involvement in disadvantaged and minority communities in Michigan.[49]

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[47] *See, e.g.*, *New Directions for Outreach: Report of the University of California Outreach Task Force* (July 1997); Karl Pister, *UC Outreach: Systemwide Perspective and Strategic Plan* (September 1998).

[48] Sander & Taylor, *supra* note 9 at 160, 255.

[49] Kristen Jordan Shamus, *UM Will Reach Out to Keep Diversity; Group Offers Ways to Deal with Prop 2*, DETROIT FREE PRESS, March 16, 2007.

B. The Sixth Circuit Suggests That Large Racial Preferences In University Admissions Are A Vital Tool For Racial Minorities To Succeed In America.[50] But The Evidence For This Claim Is Exceedingly Thin. Indeed, Evidence That Racial Preferences Result In "Mismatch" Of Various Forms And Undermine The Success Of Minority Students Continues To Mount. Certainly No Special Constitutional Protection Should Be Based On The Insubstantial And Disputed Evidence That Racial Preferences In Universities Are Vital

1. In May 2012, *amicus* coauthored a brief[51] which, *inter alia*, summarized some of the available evidence on the effects of college and university racial preferences upon students who receive them (especially African-Americans, who tend to receive especially large preferences).

2. It is now generally conceded that large admissions preferences – whether these are based on

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[50] *Coalition*, 701 F.3d 466 at 474. "Safeguarding the guarantee that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. Moreover, universities represent that training ground for a large number of our Nation's leaders. To cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity" (internal quotes, citations, and brackets omitted).

[51] Brief for Richard H. Sander and Stuart Taylor, Jr. as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012). A few subsections below are taken directly from that brief.

race, "legacy" considerations, or other factors – cause students to receive lower grades. The median black student receiving a large admissions preference to an elite law school, for example, ends up with grades that put her at the 6th percentile of the white grade distribution – an effect that is almost entirely due to the preference itself. The GPA-lowering effect of preferences has not been as clearly documented at the undergraduate level; it is less extreme than what one observes in law school, but still very substantial. Low grades interconnect with other preference-related problems, as discussed below.

3. Dartmouth psychologist Rogers Elliott and several colleagues published a study in 1996 that found very high attrition rates from the sciences in four Ivy League schools for students admitted with large preferences.[52] Students who had weaker academic preparation than their peers were particularly vulnerable in so-called "STEM" classes (for science, engineering, technology, and math), where grading is on a rigid curve, professors often teach at a challenging pace, and material builds sequentially from one course to the next. Students with significantly weaker preparation than the median student can become overwhelmed, and consequently transfer to less rigorous majors at a high rate. This phenomenon came to be known as "science mismatch," because similar students attending less elite colleges appeared to have higher persistence rates in science. The cumulative effect is that even though black entering freshmen have levels of interest and aspira-

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[52] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier, and Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. IN HIGHER EDUC. 681 (1996).

tion in STEM fields at least as high as those of whites, they receive a very disproportionately small share of those with STEM degrees.

4. These same patterns of science mismatch have been found in a whole series of studies published over the past ten years. Frederick Smyth and John McArdle, then both psychologists at the University of Virginia, used the College and Beyond data (an extensive database created by the Mellon Foundation, with severe limitations on access, that has unusually rich variables on student abilities and experiences) to study science mismatch, and found for a large cross-section of students at strong to very elite schools, that when other academic characteristics were held constant, a student's level of mismatch was one of the strongest predictors of whether the student achieved a STEM degree.[53]

5. Scholars at Duke University documented this same tendency for students admitted with large preferences to transfer out of difficult majors (these authors found the pattern existed for economics as well as STEM majors).[54]

6. Notably, both the Duke and Virginia studies found that when one controlled for mismatch, blacks, whites, and Hispanics completed STEM majors at the same rate; in other words, poor minority perfor-

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[53] Frederick Smyth and John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. IN HIGHER EDUC. 353 (2004).

[54] Peter Arcidiacono, Esteban Aucejo, and Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 IZA J. LABOR ECON. (2012).

mance in STEM fields had little or nothing to do with race, but lots to do with mismatch.

7. Two very recent studies – too recent to complete the peer-review publication process – have found large science mismatch results at the University of California.[55]

8. These various studies have used a wide variety of methodologies and types of data. So far as we know, no one has found any of these results to be in error; nor has anyone published a peer-reviewed paper contending that science mismatch does not exist.

9. In 2003, sociologists Stephen Cole and Elinor Barber (by then deceased) published *Increasing Faculty Diversity*, a study of the minority "pipeline" problem in academia.[56] Drawing on questionnaires and other detailed data from 7,612 graduating seniors at 34 colleges, Cole and Barber found significant evidence that large racial preferences were hurting the minority pipeline to academia. Such students tended to get significantly lower grades and struggle academically, hurting their self-confidence. The idea of pursuing a doctorate to enter academia became less appealing, even among those who had started college with that ambition. Similar students

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[55] Peter Arcidiacono, Esteban Aucejo and Joseph Hotz, *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* (2013 working paper, available at http://public.econ.duke.edu/~psarcidi/); Marc Luppino and Richard H. Sander, *College Major Competitiveness and Attrition from the Sciences* (2013 working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167961).

[56] Stephen Cole and Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS (Harvard University Press 2003).

at colleges with smaller or no racial preferences were far more likely to do well, develop self-confidence, and pursue their original goals.

10. The Cole and Barber finding was striking in part because it was emphatically contrary to the assumptions of the authors' funders and sponsors – Ivy League presidents and foundations that passionately supported racial preferences in admissions. Yet we are unaware of any comparable research that even remotely contradicts their conclusions.[57]

11. In contrast to the essentially undisputed findings of those who have documented "science" and "academic" mismatch, similar findings showing evidence of a "law school mismatch" problem have been intensely disputed. The debate in this field was inaugurated by the 2005 study, "A Systemic Analysis of Affirmative Action in American Law Schools," (hereinafter "Systemic Analysis").[58] "Systemic Analysis" contended that students who receive large preferences into law school not only tend to do poorly academically, but appear to actually learn less than otherwise similar students attending less elite law schools, as evidenced by the latter students' much higher bar passage rates. This focus on learning – a key idea in mismatch – makes law school mismatch research particularly intriguing; but on the other hand, the data available to study law school mismatch is limited and in some important ways imprecise. These limitations in the data have led to some plausible criticisms of law school mismatch theory,[59]

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[57] Sander & Taylor, *supra* note 9 at 47.

[58] Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools,* 57 STAN. L. REV. 367 (2004).

[59] Those finding evidence of law school mismatch have been candid and vocal about the limitations of the available data.

but very strikingly, these critics never point out that studies of science and academic mismatch that do not suffer from these data limitations find very similar mismatch effects. It is also striking that while proponents of mismatch have been in the forefront of efforts to gain disclosure of better data, critics of mismatch have tended to fiercely oppose the release of such data.[60]

12. Sander has been at some pains to answer critiques of mismatch with care. Every substantive critique advanced against law school mismatch theory (aside from the general complaint about limitations in the data), when laid side by side with the substantive responses, shows that the critiques are either factually mistaken, have misreported their numbers, or rely on implausible assumptions.[61]

i. In 2012, after Sander and Taylor filed a brief[62] in *Fisher v. University of Texas* discussing mismatch (*inter alia*), several briefs (in support of the University) attacked the Sander-Taylor brief.[63]

Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005); Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools*, 10 J. OF EMPIRICAL LEGAL STUD. 2 (2013).

[60] Sander & Taylor, supra note 9 at 240-242; Memorandum from Bill Kidder to Gayle Murphy (January 19, 2007), available at http://www.seaphe.org/pdf/bar-proposal/kidder_critique.pdf.

[61] Sander, *supra* note 58; Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 DENV. U. L. REV. 889 (2010); Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools*, 10 JOURNAL OF EMPIRICAL LEGAL STUDIES 2 (2013);

[62] Brief for Richard H. Sander and Stuart Taylor, Jr., *supra* note 51.

[63] Brief for Empirical Scholars as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012). Brief for The American

The best known of these, the "Empirical Scholars Brief," was signed by a number of well-respected social scientists.[64] Notwithstanding their stature, their criticisms of mismatch theory are embarrassingly weak. The fatuity of the critiques of mismatch is well-illustrated by the following observations on the Empirical Scholars Brief. The brief made essentially four arguments:

ii. First, the Empirical Scholars Brief disclaimed any attempt to address science mismatch, academic mismatch, or the stunningly positive effects of Proposition 209 at the University of California, on the ground that most of the Sander-Taylor brief focused on law school mismatch theory.[65] In fact, about six percent of the Sander-Taylor brief dealt with law school mismatch theory.[66] The Empirical Scholars Brief thus maintained the unbroken pattern of defenders of affirmative action in completely ignoring the science mismatch and academic mismatch literature.[67]

iii. Second, the Empirical Scholars Brief noted that the theory of law school mismatch had

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Educational Research Association Et Al. As *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012); Brief for The National Black Law Students Association as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012).

[64] Brief for Empirical Scholars, *supra* note 63.

[65] "Amici therefore focus the rest of their arguments on the methodological flaws contained in Sander's and economics professor Doug Williams's law-school mismatch research (which dominate the empirical findings of the Sander-Taylor Brief)…" Brief for Empirical Scholars, *supra* note 63.

[66] Based on word count. Brief, *supra* note 51

[67] Sander & Taylor, *supra* note 9 at 38, 40, 47.

been heavily criticized, and cited 21 critiques.[68] Notably, however, the Empirical Scholars Brief cited virtually no specific arguments from these critiques,[69] since the specific arguments have been answered so decisively as to be discredited.[70]

iv. Third, the Empirical Scholars Brief suggested that there were three or four specific methodological defects in the law school mismatch literature. Each of these claims, however, was false.[71] For example, the Brief claimed that in Professor Williams' analyses of law school mismatch, he always compared whites with blacks, thus confounding "mismatch" effects with possible "race" effects. In fact, however, ***all*** of Williams' analyses are ***within-race*** analyses. None of Williams' analyses are black-white comparisons in the sense criticized by the Empirical Scholars Brief. This and other errors of the Empirical Scholars Brief are so obvious, in fact, that amicus is hopeful that at least some of the authors will retract these claims in due course.

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[68] Brief for Empirical Scholars, *supra* note 63.

[69] *Id.*

[70] Most authors of these critiques have generally made no substantive reply to scholarly responses. Specifically there has been no further defense of the critiques advanced by Ian Ayres, Richard Brooks, Jesse Rothstein, Albert Yoon, David Wilkins, or Mitu Gulati; Katherine Barnes has specifically acknowledged that her original findings were in error. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, a Lesson, and an Update*, 105 NW. U. L. REV. 2 (2011)

[71] Tellingly, the Empirical Scholars Brief treats the work of this Sander and of Doug Williams as essentially interchangeable, even though Sander and Williams use very different methodologies.

v. Fourth, the Empirical Scholars Brief, filed in August 2012, argued that the literature on law school mismatch theory has not "proven" that these effects occur, because the research is not based on the sort of methods that scientists would usually require for convincing proof – such as, for example, a randomized scientific experiment. This is an interesting point, and probably the point that persuaded most of the distinguished signatories to the brief to join it. Many social scientists justly deplore the tendency of some members of the tribe to extravagantly overclaim the power or generalizability of their findings. And it would undoubtedly be a good thing if more randomized experiments were conducted (though the extraordinary cost of randomized social experiments ensures that they will remain comparatively rare). But the literature on mismatch cited in this brief is not generally guilty of this sort of overclaiming. Most of the work is, in fact, quite modest in its claims. And those who have advanced more general arguments about mismatch have tended to focus on the following points: (i) most recent research on mismatch in higher education have found evidence that it exists; (ii) the research that finds evidence of mismatch tends, on the whole, to be considerably more careful than the research that claims mismatch does not exist; (iii) universities have tended to ignore this research and have been notoriously unwilling to seriously engage the mismatch hypothesis or to make available more and better data with which to test it; and therefore (iv) courts and voters should be highly skeptical of the benefits of racial preferences, and should not defer to the judgment of higher education leaders on this issue.

13. Developments over the past year have provided some verdict on the debate over law school mismatch theory. The detailed Williams analysis of law school mismatch, which finds evidence consistent with law school mismatch theory from a wide range of empirical tests, was derided by the Emprical Scholars Brief, but was published in June 2013 by the *Journal of Empirical Legal Studies*, one of the leading peer-reviewed journals in the field of legal empiricism.[72] There are now several peer-reviewed studies that have found evidence of law school mismatch.[73] In contrast we know of no critique of law school mismatch theory which has been published in a peer-reviewed journal.

C. The University Of California Experience With Proposition 209, And Other Related Research, Suggests That The Effects Of A Ban On Racial Preferences Are Beneficial To Black And Hispanic Students

1. The brief filed by Sander and Taylor in *Fisher* documented how blacks and Hispanics have fared at the University of California since the passage of Proposition 209.[74] The elimination (or scaling back) of racial preferences certainly reduced admissions

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[72] Williams, *supra* note 58.

[73] Doug Williams, Richard H. Sander, Marc Luppino, and Roger Bolus, *Revisiting Law School Mismatch: A Comment on* Barnes *(2007,2011)*, 105 NW. U. L. REV. 2 (2011); Sander, *supra* note 57; Williams, *supra* note 59; Richard H. Sander and Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. OF EMPIRICAL LEGAL STUD. 4 (2012).

[74] Brief, *supra* note 51.

rates for blacks and Hispanics at UC campuses, especially at the most elite campuses. But the result of this was to redistribute blacks and Hispanics to less elite UC campuses where their academic preparation levels were closer to those of their classmates. Simultaneously, the university launched new efforts to help disadvantaged high school students (predominantly underrepresented minorities) to prepare for college and take the courses required for UC admission. The result was a surge in black and Hispanic enrollment after 2000 that continues to this day at UC, and an even greater surge in graduation rates, science degree completion rates, and improvements in minority GPAs and time-to-degrees.[75]

2. There are many factors behind the improvement in minority outcomes at UC campuses since the passage of Proposition 209, and it is difficult to know – especially with the limited data made available by UC officials – how much a reduction in mismatch can be credited with the results. But it is plain that outcomes have dramatically improved, and there has been a steady stream of careful, dispassionate research finding that mismatch effects existed at the university and that minority students at UC benefit in important ways when they are less mismatched.[76]

3. There have also been useful studies of the broad effects of preference bans across many states. Peter Hinrichs found that minority college completion rates were essentially unaffected by statewide bans on the use of preferences.[77] Ben Backes reached

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[75] Sander & Taylor, supra note 8 at 146-150.

[76] For example, Arcidiacono, Aucejo, & Hotz, *supra* note 54; Luppino & Sander, *supra* note 54.

[77] Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demo-*

a similar conclusion.[78] The available evidence suggests that (a) reductions in access to college as a result of bans on preferences are minimal, and (b) any reductions are offset, or much more than offset, by improvements in minority college completion rates as a result of less mismatch.

IV. While The Sixth Circuit Suggests That Policies On Racial Preferences Should Be Set At The University Level, There Are Strong Reasons Not To Defer To Universities On This Matter

A. Though Universities Often Justify Racial Preferences Through Their Effect On The "Diversity" Climate Of The School, There Is In Fact A Tension Between Policy And Objective That Universities Have Failed To Address

1. A series of careful studies have found that "mismatch" is not simply an academic phenomenon. If a university relies primarily upon large racial preferences to achieve diversity, then this undermines cross-racial interactions. One reason for this is that students tend to form friendships with other students who are similar to them academically. When academic success on a campus correlates

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graphic Composition of Universities, 94 THE REV. OF ECON. AND STAT. 3 (2012).

[78] Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment?*, 47 J. OF HUMAN RESOURCES 2 (2012).

strongly with race, this directly undermines key diversity goals of the university.[79]

B. Universities Have Not Dealt With Evidence Of Problems Of Racial Preferences In Honest And Constructive Ways. This Can Partly Be Explained By Special Pressures Under Which Universities Labor; But In Any Case The Evidence Strongly Suggests That Universities Cannot Deal Honestly With The Evidence On The Side-effects And Inadequacies Of Racial Preferences, And Should Not Be Deferred To In Regulating Them

1. Acreditation agencies have become very aggressive in imposing national racial diversity standards upon individual institutions. The most well-known example, by no means unique, is the George Mason Law School, which was forced to reinstitute large racial preferences to avoid losing accreditation from the American Bar Association.[80] Thus, even universities that conclude that racial preferences have harmful side-effects have been effectively bullied by accreditation agencies into maintaining practices they privately disavow.

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[79] Peter Arcidiacono, Shakeeb Khan, and Jacob Vigdor, *Representation versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?* 95 J. OF PUB. ECON. 1 (2011); Arcidiacono, Aucejo, & Spenner, *supra* note 53.

[80] See Sander & Taylor, *supra* note at 217-232; Robert Zelnick, *Accreditation and Affirmative Action*, (2008 working paper, available at http://www.seaphe.org/pdf/zelnick-accreditation.pdf).

2. The political climate on many campuses makes careful deliberation on the effects and use of racial preferences a very rare thing. For example, the United States Commission on Civil Rights has in recent years issued two extensive and thoughtful reports on, respectively, law school mismatch (in 2007) and science mismatch (in 2010).[81] To our knowledge, there has been no deliberative response to either of these reports from higher education. So far as college and university administrators are concerned, these reports might as well never have existed. This suggests a degree of insularity and arrogance on the issue of racial preferences that certainly legitimizes voter action on the issue.

3. The University of California has, as an official entity, showed no ability or willingness to acknowledge or even carefully study the effects of operating under a "no racial preference" regime. Instead, it appears to be constrained by considerations of political correctness to ritualistically denounce the effects of Proposition 209, regardless of the actual facts.[82] Recently, for example, the University (specifically, its president and chancellors) submitted a brief to this Court in *Fisher*,[83] attempting to persuade the Court that the university had

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[81] United States Commission on Civil Rights, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, Briefing Report (2007); United States Commission on Civil Rights, ENCOURAGING MINORITY STUDENTS TO PURSUE SCIENCE, TECHNOLOGY, ENGINEERING AND MATH CAREERS, Briefing Report (2010).

[82] This problem is documented in detail in Sander & Taylor, *supra* note 9 at 131-142, 155-174.

[83] Brief for The President and Chancellors of the University of California as *Amici Curiae*, *Fisher v. University of Texas* 570 U.S. ___ (2012).

been gravely harmed by a ban on racial preferences. In making this case, it relied exclusively on data about minority admissions, lingering in detail on declines in minority enrollment at elite schools. The University's brief made no mention of the (apparently undisputed, but ignored) facts discussed in Part III, *supra*, above: that overall minority enrollments have grown sharply in the years since Proposition 209 and have been at record levels for years; that the degree of racial integration across UC campuses increased after Proposition 209; that socioeconomic diversity at the university has increased; that minority graduation rates have risen dramatically; that the university is producing far more minorities with bachelor degrees, and many more minority scientists, than at any time in its history.

4. The University of California has shown no interest or willingness to carefully examine how student outcomes at the university changed before and after the implementation of Proposition 209. It has refused to make confidential administrative data available to independent scholars (with appropriate guarantees of confidentiality); it has ignored many public records requests and yielded to others only after long resistance, and only with the imposition of limits in the data far beyond what are needed to protect student confidentiality. It has shown no interest in the results of published, peer-reviewed research documenting beneficial effects from the end of racial preferences. [84]

5. Events at Duke University in the winter of 2012 illustrate the inability of universities to honestly discuss and assess the operation and utility of

[84] Sander & Taylor, *supra* note 9 at 155

racial preferences.[85] Three distinguished professors at Duke completed a draft study in the spring of 2011,[86] which examined the reasons why Hispanics and especially blacks at Duke tended to have lower academic performance, and tended over their undergraduate careers to migrate from more academically challenging majors (STEM fields and economics) to majors that tended, at least, to grade students more leniently. Strikingly, they found that mismatch-like effects could explain all of the racial differences – in other words, race itself had no effect on the differences, only the large preferences used by the university. The study initially attracted no attention at Duke, but when the *Chronicle of Higher Education* wrote about the study in January 2012,[87] an uproar ensued on campus, with students staging protests and faculty denouncing the study's findings. In January 2012, the President of Duke delivered a special address that attacked the study for being insensitive to racial issues at Duke, and suggested that it was inappropriate for professors to do research that could be used in a Supreme Court brief! Through all of the upheaval, no one identified a single specific flaw in the study, or even a single phrase in the carefully worded study that was insensitive. The problem, in the university's eyes, was apparently that such research should occur at all. (A few months after these events, the study was accepted for publication by a peer-reviewed journal in labor

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[85] See Sander & Taylor, *supra* note 9 at 176-178, for a detailed discussion of the events at Duke recounted here.

[86] Arcidiacono, Aucejo, & Spenner, *supra* note 54

[87] Peter Schmidt, *Study Disputes Claims That Preferentially Admitted Students Catch Up*, THE CHRONICLE OF HIGHER EDUCATION, January 10, 2012.

economics.) Events similar to these, though usually on a smaller scale, are familiar to students and professors throughout academia.[88]

6. To the extent that the use of preferences has been measured, the data shows that since the Supreme Court's decision in *Grutter*, racial preferences have been larger and more mechanical. There is no sign of any university deciding to phase out preferences of its own accord. The only instances where universities end racial preferences is when outside institutions – voters, legislatures, governors, or courts – force them to give them up.

CONCLUSION

The Court below made many empirical assumptions about the use and effects of racial preferences which are contradicted by the empirical evidence. To the extent these errors bear on the merits of the case, the judgment of the Sixth Circuit should be reversed.

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[88] Robert Maranto, Richard E. Redding, Frederick M. Hess (eds.), THE POLITICALLY CORRECT UNIVERSITY: PROBLEMS, SCOPE, AND REFORMS (AEI Press 2009).