

Nos. 20-1199, 21-707

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IN THE

**Supreme Court of the United States**

STUDENTS FOR FAIR ADMISSIONS, INC.,  
*Petitioner,*

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,  
*Respondent.*

STUDENTS FOR FAIR ADMISSIONS, INC.,  
*Petitioner,*

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,  
*Respondents.*

**On Writs of Certiorari to the United States  
Courts of Appeals for the First Circuit and  
Fourth Circuits**

**BRIEF OF THE NATIONAL EDUCATION  
ASSOCIATION AND SERVICE EMPLOYEES  
INTERNATIONAL UNION AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS**

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## INTEREST OF AMICUS CURIAE

This *Amici Curiae* brief is submitted, with the consent of the parties, on behalf of the National Education Association (“NEA”) and Service Employees International Union (“SEIU”).<sup>1</sup>

NEA is a nationwide employee organization of nearly three million members, the vast majority of whom serve as educators and education support professionals in our nation’s public schools, colleges, and universities. NEA believes that “a diverse society enriches all individuals” and that “[e]ducation should foster a vibrant, pluralistic society that authentically reflects diverse populations and cultural perspectives.” NEA Resolution B-12 (2015). Similarly, NEA recognizes that “a racially diverse student population is essential for all elementary/secondary schools, colleges, and universities to promote racial equality, improve academic performance, and foster a robust exchange of ideas.” NEA Resolution B-13 (2015).

Such diversity cannot “be achieved or maintained in all cases simply by ending discriminatory practices and treating all students equally regardless of race.” *Id.* Rather, in order to “enhance equity in the education of our students,” NEA recognizes that “it may be necessary for elementary/secondary schools, colleges, and universities to take race into account in making decisions as to student admissions, assignments, and/or transfers.” *Id.* That is so because “both histori-

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<sup>1</sup> This brief is filed with the written consent of both parties. *Amici* state that no party’s counsel authored the brief in whole or in part; no party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*—contributed money that was intended to fund preparing or submitting the brief.

cal and current practices have systematically advantaged and privileged people of White European ancestry while disadvantaging and denying rights, opportunities, and equality for people of color.” NEA Resolution I-53 (2017). Only by actively pursuing “social and educational strategies fostering the eradication of institutional racism” can our society achieve “[r]acial justice in education” and “equitable opportunities and outcomes for people of all races.” NEA Resolution I-52 (2018).

SEIU is a labor union representing approximately two million working people in the United States, Puerto Rico, and Canada. Our members work in essential jobs across healthcare, building and property services, and public service. Thousands of our members are educators and thousands more are essential support workers that keep schools and colleges running. SEIU believes that workers’ struggle for economic justice is intertwined with, and inseparable from, our struggle for racial justice. Neither can be won without the other. In June 2020, our International Executive Board adopted a resolution affirming SEIU’s support for the Movement for Black Lives. At our 2016 Convention, SEIU adopted Resolution 106A, in which we committed to becoming an anti-racist organization. The Resolution acknowledges that “race has historically been one of the most powerful ways to pit working people against one another” and that “[r]acism is a key way that the wealthy few regularly structure and hijack our economy and government to benefit themselves and disadvantage the vast majority of people, including white people.” The Resolution specifically identifies racial “education . . . disparities” as a problem. SEIU believes that race-conscious school admissions policies are an important tool for

reducing such disparities and achieving an inclusive and equitable society in which all of us may flourish.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Since 2016—when the issue of race-conscious university admissions was last before the Court—our national conversation on race has shifted significantly. In 2017, torch-wielding white supremacists descended on Charlottesville, Virginia for a “Unite the Right” rally resulting in the murder of a peaceful protester and marking another rising tide of organized white supremacist violence in our country. In the summer of 2020, the murder of George Floyd by police officers sparked some of the largest racial justice protests in our nation’s history and spurred a vibrant debate about racial justice and police practices. And the continuing COVID pandemic has exacerbated and laid bare continuing deep racial inequities in access to healthcare and education and the life and death consequences of those disparities.

Today, the reality remains that race still carries great weight in our society and continues to carve out lanes of opportunity and of peril based solely on the color of one’s skin. That remains true across our society, including in our nation’s schools, where race continues to carry great weight—dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice.

One of the most effective tools for curbing these continuing inequities is to ensure racially integrated elementary and secondary schools and institutions of higher education. Such schools and classrooms not only help to overcome our nation’s deplorable legacy of slavery, segregation, and discrimination, but also—and more to the point in the present context—enable

schools to fulfill their dual mission of instilling in all students “the values on which our society rests,” *Am-bach v. Norwick*, 441 U.S. 68, 76 (1979), and providing them with the skills and knowledge necessary to realize their full potential, see *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). Education remains key to achieving economic mobility and increasing the prospects for success in society, and integrated schools and classrooms are the most successful way to ensure equal opportunity for all students. To accomplish those ends, educational institutions should be permitted to consider race and ethnicity when making educational policy judgments (ranging from school attendance zones to college admissions criteria) that affect the composition of schools and classrooms.

The societal and educational benefits of racially diverse classrooms in elementary, secondary, and higher education are well documented. A robust body of empirical research confirms that racially diverse schools and classrooms produce tangible and lasting improvements in academic achievement for all students of both majority and minority races. Classroom contact among students of different races reduces stereotypes and prejudice and has been found to be more effective in promoting tolerance and cross-racial understanding than any other pedagogical method. Classrooms with a “critical mass” of minority students help to equalize opportunity, break down stereotypes, and offer enduring benefits to a multiracial, democratic society, and its citizens.

## ARGUMENT

In 2013 and again in 2016, this Court reaffirmed that attaining a diverse student body with its concomitant educational benefits is a compelling state interest. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310–11 (2013); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 381

(2016). Recent events demonstrate that this interest is stronger than ever and that the beneficial effects of diversity in schools is even more needed in order to promote “cross-racial understanding,’ help[] to break down racial stereotypes,” precipitate “more enlightening” classroom discussion, promote better “learning outcomes” and “better prepare[] students for an increasingly diverse workforce and society.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Those interests remain compelling; nothing less than the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.) (cleaned up).

### **I. Race Continues to Influence Our Ability to Obtain a Just and Prosperous Society**

In 2003, this Court predicted optimistically that within 25 years, schools would be able to achieve racial diversity without using any racial preferences in admissions. *Grutter*, 539 U.S. at 343. Justice Ginsburg similarly hoped that “progress toward nondiscrimination and genuinely equal opportunity [would] make it safe to sunset affirmative action.” *Id.* at 346 (concurring opinion). But she recognized “the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.” *Id.* Unfortunately, that progress has not materialized. Our schools, from K-12 to higher education, still struggle to provide equitable opportunities for students of color. And racial injustice continues to plague our society.

### A. The inequitable apportionment of educational opportunities by race

Race continues to carry great weight, dividing educational opportunities inequitably, denying large swaths of our populace the opportunity to succeed, and distorting perceptions with stereotypes and prejudice.

1. Even now, a student's race is still, by itself, largely predictive of the racial composition of the elementary and secondary schools they will attend. The U.S. Census Bureau projects that, by 2045, Whites will no longer represent a majority of the U.S. populations.<sup>2</sup> By 2060, only 44.3% of the population is projected to be White—and the racial and ethnic composition of children is expected to change more quickly than for adults, with over one-third of children expected to be White in 2060 compared with over one-half of adults.<sup>3</sup>

Yet, despite this increasing diversity, our public elementary and secondary schools remain heavily segregated. In the 2019-2020 school year, the average White student attended a majority White school.<sup>4</sup> By contrast, students of color are far more likely to attend schools where the majority of students are also students of color.<sup>5</sup> Overall, while more than half of all Black (59%) and Hispanic (60%) public elementary and secondary students attended public schools in

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<sup>2</sup> U.S. Census Bureau, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060* at 7 (Feb. 2020).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> U.S. Dep't of Educ., *Racial/Ethnic Enrollment in Public Schools* (2022).

<sup>5</sup> *Id.*

which minority enrollment was at least 75%, only 6% of White students attended such schools.<sup>6</sup> Conversely, only 4% of Black students and 5% of Hispanic students attended public schools in which the enrollment was at least 75% White, while 46% of White students attended such schools.<sup>7</sup>

This extreme segregation of Black and Hispanic is increasing. From the 1990-1991 school year to the 2019-2020 school year, the enrollment for Black students in schools with a student body comprised of at least 75% Black and other racial minority students increased by nearly 15 percentage points (from 44.8% to 59%); over the same time period, the figure for Hispanic students increased by roughly 10 percentage points (from 50.9% to 60%).<sup>8</sup>

2. The trend toward higher levels of concentrated segregation for Black and Hispanic students has ramifications beyond just racial isolation. Racial differences in exposure to poverty continue to be large and have remained stable for the past 18 years.<sup>9</sup> At present, “almost all intensely segregated minority schools, but very few all-white schools, are associated with concentrated poverty.”<sup>10</sup> For example, “80% of predominately Hispanic, Black, and American Indian/Alaska Native schools have at least 75% percent of their students eligible for free or reduced-price

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Erin M. Fahle et al., *Racial Segregation and School Poverty in the United States, 1999–2016*, 12 RACE & SOC. PROB. 42, 51 (2020).

<sup>10</sup> Civil Rights Project, *E Pluribus...Separation: Deepening Double Segregation for More Students* at 27 (2012).

lunch—a proxy for poverty.”<sup>11</sup> Black children are more than twice as likely as White children to attend high poverty schools.<sup>12</sup>

Although educational research has shown the critical importance of a stable, high-quality teaching force,<sup>13</sup> high-poverty, majority-minority schools are more likely to be associated with high rates of teacher turnover and fewer experienced teachers.<sup>14</sup> For example, STEM teachers in high-minority and high-poverty schools are more likely to be new teachers or lack graduate degrees, and more likely to turn over in high-minority and high-poverty schools.<sup>15</sup> And more generally, schools with the largest numbers of low-income and minority students are much more likely than other schools to fill vacancies with substitutes or teachers who are not fully certified or are instructing classes in which they are not certified, and to expand class sizes or cancel course offerings when they cannot find teachers.<sup>16</sup> In addition, teachers in schools

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<sup>11</sup> U.S. Gov’t Accountability Office, *K-12 Education: Student Population Has Significantly Diversified, But Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines* at 14 (June 2022).

<sup>12</sup> Econ. Pol’y Inst., *Schools Are Still Segregated, and Black Children Are Paying a Price* (Feb. 12, 2020).

<sup>13</sup> Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL’Y ANALYSIS ARCHIVES 1, 31–33 (2000).

<sup>14</sup> C. Kirabo Jackson, *Student Demographics, Teacher Sorting and Teacher Quality: Evidence from the End of School Desegregation*, 27 J. LAB. ECON. 213, 247–49 (2009); U.S. Dep’t of Educ., *Data Snapshot: Teacher Equity* (March 2014)

<sup>15</sup> Tuan D. Nguyen & Christopher Redding, *Changes in the Demographics, Qualifications, and Turnover of American STEM Teachers, 1988–2012*, 4 AERA OPEN 1, 6–10 (2018).

<sup>16</sup> Desiree Carver-Thomas & Linda Darling-Hammond, *The Trouble with Teacher Turnover: How Teacher Attrition Affects*  
(continued . . .)

with a high percentage of low-income and minority students receive less funding per student for teacher salaries than their colleagues in the same school district who are in schools with fewer minority students.<sup>17</sup>

Schools with high proportions of Hispanic and Black students also invest less in school facilities compared to those attended mainly by White students. As a result, many Black and Hispanic students attend overcrowded and dilapidated schools with inadequate heating and cooling, in temporary, portable buildings or poorly maintained buildings.<sup>18</sup> There is a similar lack of investment in high-quality instructional materials and technology: schools serving primarily Black and Hispanic students have less access to these resources compared to predominantly White schools.<sup>19</sup>

Likewise, students in these high-poverty, majority-minority schools often lack adequate access to the necessary components of a high-quality education, with less access to Advanced Placement (AP) courses, gifted and talented programs, and classes in calculus,

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*Students and Schools*, 27 EDUC. POL'Y ANALYSIS ARCHIVES 1, 17 (2019).

<sup>17</sup> David S. Knight, *Are School Districts Allocating Resources Equitably? The Every Student Succeeds Act, Teacher Experience Gaps, and Equitable Resource Allocation*, 33 EDUC. POL'Y 615, 639 (2019) (“Many districts actually provide less funding per student for teacher salaries in schools with the highest percentage of low-income students and student of color.”).

<sup>18</sup> U.S. Dep't of Educ., *Dear Colleague Letter* at 4 (Oct. 1, 2014).

<sup>19</sup> *Id.*

physics, algebra II, and chemistry compared to schools with fewer Hispanic and Black students.<sup>20</sup>

Nor is the problem limited to racial isolation and segregation in schools. Black, Hispanic, Native American, Asian and students of other racial minorities continue to experience discrimination in schools and in access to educational opportunities. Disparities in school discipline are a prime example. Black K-12 students are 3.8 times as likely to receive one or more out-of-school suspensions as White students, and are almost twice as likely to be expelled from school without educational services.<sup>21</sup> Black students are also more than twice as likely as White classmates to be referred to law enforcement.<sup>22</sup> These disparities in school arrests—especially for minor infractions like “disruption”—are consistent with research suggesting that bias plays a significant role in categories of discipline that are more ambiguous or subjective.<sup>23</sup> They are not the consequence of differences in rates or

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<sup>20</sup> *Id.*; U.S. Dep’t of Educ., *Data Snapshot: College and Career Readiness* at 1 (March 21, 2014).

<sup>21</sup> U.S. Dep’t of Educ., *Key Data Highlights on Equity and Opportunity Gaps In Our Nation’s Public Schools* (Oct. 28, 2016) (noting, as well, that American Indian or Alaska Native, Latino, Native Hawaiian or other Pacific Islander, and multiracial boys are also disproportionately disciplined in school, representing 15% of K-12 students but 19% of K-12 students receiving one or more out-of-school suspensions).

<sup>22</sup> *Id.*

<sup>23</sup> Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. CHILD. 1, 14–16 (2014).

types of misbehavior between Black and White students.<sup>24</sup>

And while schools tend to over-identify students of color for discipline, they are likely to under-identify them for gifted or honors programs. Black and Hispanic students are underrepresented in gifted programs by 43% and 30%, respectively.<sup>25</sup> Although some of the disparity stems from a lack of gifted programs in schools serving predominantly students of color, many students of color are “simply overlooked.”<sup>26</sup>

All told, these disparities in socioeconomic status, school and residential segregation, and bias and discrimination within schools contribute significantly to disparities in educational outcomes.<sup>27</sup> Overall, low-income neighborhoods’ schools, which have the smallest proportion of White and Asian students and the largest proportions of Hispanic and Black students, enroll more disadvantaged students, experience greater absences and disciplinary measures, have fewer experienced or certified teachers, pay teachers lower salaries, and have lower achievement and achievement growth.<sup>28</sup> Therefore, it is unsurprising

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<sup>24</sup> Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RES. 59 (2010).

<sup>25</sup> Nat’l Ass’n for Gifted Children, *Gifted and Talented: Finding and Calculating Representation Rates* (Feb. 25, 2019).

<sup>26</sup> Am. Univ. Sch. of Educ., *Identifying Gifted Students: Addressing the Lack of Diversity in Gifted Education* (Feb. 11, 2021).

<sup>27</sup> Omari Jackson & David M. Merolla, *Structural Racism as the Fundamental Cause of the Academic Achievement Gap*, 13 SOCIOLOGY COMPASS 8 (2019).

<sup>28</sup> Ann Owens & Jennifer Candipan, *Social and Spatial Inequalities of Educational Opportunity: A Portrait of Schools* (continued . . .)

that places with “more racial and racial economic school segregation . . . tend to [also] be places with larger racial achievement gaps and somewhat larger growth in racial achievement gaps.”<sup>29</sup>

3. The result of this pervasive segregation and denial of educational opportunities is all too predictable. Students who are denied these educational opportunities have poorer educational outcomes with life-long consequences for their subsequent educational and career trajectories.

One consequence of this reality is that Hispanic and Black students are far less likely to pursue higher education. Immediate college enrollment rates remain lower for Black and Hispanic children, with the Black enrollment rate decreasing between 2010 and 2019.<sup>30</sup> Black and Hispanic students who do pursue higher education are far less likely to enroll in a four-year college program: in 2011, 44.6% of Hispanic college students and 34.5% of Black college students were enrolled in 2-year colleges, compared to just 29.6% of White college students.<sup>31</sup>

4. The fact that Black and Hispanic students are more likely to attend high-poverty, racially-isolated schools, and more likely to encounter racial prejudice and discrimination that shrinks their educational opportunities, has dire consequences for their prospects

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*Serving High- and Low-Income Neighbourhoods in US Metropolitan Areas*, 56 URBAN STUDIES 3178, 3184–92 (2019).

<sup>29</sup> Sean F. Reardon et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, CEPA WORKING PAPER NO. 19.06, at 28 (2021).

<sup>30</sup> U.S. Dep’t of Educ., *Report on the Condition of Education 2021* at 22 (May 2021).

<sup>31</sup> U.S. Census Bureau, *School Enrollment in the United States: 2011* at 8 (Sept. 2013).

for success in the workforce. Black and Hispanic adults face persistently higher rates of unemployment than their White counterparts, with much of that unemployment concentrated among those with a high school diploma or less.<sup>32</sup>

The wage gap between college and high school graduates is at a historical peak.<sup>33</sup> The median weekly earnings of a bachelor's degree holder in 2020 were more than 67% higher than those of a high school graduate.<sup>34</sup> College graduates are more consistently employed than high school graduates; they also receive more generous nonwage fringe benefits, including sick and vacation pay, employer-paid health insurance, pension contributions, and safe and pleasant working conditions.<sup>35</sup> The rising relative earnings of college graduates are not just due to rising real earnings for college-educated workers, but also to falling real earnings for non-college-educated workers.<sup>36</sup> To put the point plainly, inequitable opportunities for education at the elementary and secondary level have profound and lasting negative implications for students for the rest of their lives.

5. Black, Hispanic, Native American and other students from racial minorities who have the same formal educational opportunities as White students

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<sup>32</sup> Bureau of Labor Statistics, *Labor Force Characteristics by Race and Ethnicity, 2019* (Dec. 2020).

<sup>33</sup> Fed. Reserve Bank of N.Y., *The Labor Market for Recent College Graduates* (May 11, 2022).

<sup>34</sup> Bureau of Labor Statistics, *Education Pays 2020* (June 2021); U.S. Dep't of Educ. & U.S. Dep't of Treas., *The Economic Case for Higher Education* at 1 (June 21, 2012).

<sup>35</sup> Brookings Inst., *The Polarization of Job Opportunities in the U.S. Labor Market* at 5 (April 2010).

<sup>36</sup> *Id.* at 6.

may, due to their race, still have negative educational and workforce experiences. People—even children—have been found to react to individuals differently based on their racial perceptions. For example, a study in which respondents classified Black and White faces or names while classifying positive or negative words revealed responses showing implicit preference for White over Black individuals.<sup>37</sup> Another study analyzing implicit associations in the legal domain showed that participants held implicit associations between Black and Guilty compared to White and Guilty, associations which also predicted mock-juror evaluations of ambiguous evidence.<sup>38</sup> Yet another study analyzed Craigslist ads for housing and showed that those with Black sounding names received fewer positive responses than those with White sounding names.<sup>39</sup>

Teachers also carry implicit racial biases, which contribute to greater disparities in students' test scores and disciplinary outcomes.<sup>40</sup> One study found that high-biased instructors, with greater implicit pro-White/anti-Black racial associations, were more anxious and gave less clear and engaging lessons to Black students than low-biased instructors—

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<sup>37</sup> Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RESEARCH & PRAC. 101, 105 (2002).

<sup>38</sup> Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010).

<sup>39</sup> Michael Ewens et al., *Statistical Discrimination or Prejudice? A Large Sample Field Experiment*, 96 REV. ECON. & STAT. 119, 133 (2014).

<sup>40</sup> Mark J. Chin, *Bias in the Air: A Nationwide Exploration of Teachers' Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566, 575 (2020).

resulting in lower performance on a test of the material being taught for Black but not for White students.<sup>41</sup>

These preconceptions carry through to adulthood and the workplace. In 2004, researchers studied racial discrimination in the labor market by sending fictitious resumes to employers with randomly-assigned names statistically associated with Black or White individuals. White-associated names led to 50% more callbacks for interviews—a racial gap that was uniform across occupation, industry, and employer size.<sup>42</sup>

Discrimination in the workforce reinforces persistent income gaps between races. Even with a bachelor's or higher degree, median earnings of Black and Hispanic adults remain lower than for Asian and White peers.<sup>43</sup> Black college graduates were also less likely to own a home and have a retirement account, and were more likely to have negative net worth and report difficulty meeting essential living expenses.<sup>44</sup>

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<sup>41</sup> Drew S. Jacoby-Senghor et al., *A Lesson In Bias: The Relationship Between Implicit Racial Bias and Performance in Pedagogical Contexts*, 63 J. EXPER. SOC. PSYCH. 50, 53 (2016).

<sup>42</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

<sup>43</sup> Pell Inst., *Indicators of Higher Education Equity in the United States: 2021 Historical Trend Report* at 170 (2021).

<sup>44</sup> *Id.* at 172.

**B. Recent events demonstrate that racism and discrimination are not artifacts of American history, but persist in every aspect of our society, including our schools**

Racial minorities are disadvantaged in the United States—not only by the persistence of de facto segregation in schools—but by overt racial violence and coordinated efforts to stifle recognition of the nation’s shameful history of racial oppression.

1. In 2016, the last time the Court was considering race-conscious admission in higher education, the nation was reeling from the murder of nine Black people at a church in Charleston, South Carolina by a white supremacist.<sup>45</sup> Today, our nation continues to mourn ten Black people shot at a grocery store in Buffalo, New York by yet another white supremacist.<sup>46</sup> In addition to these highly-visible acts of violence, the FBI reports that anti-Black hate crimes increased 49% between 2019 and 2020.<sup>47</sup> The FBI also reports that “[a]bout a third of the nation’s historically Black colleges and universities were targeted with bomb threats this year, along with more than a dozen houses of worship and other faith-based and academic institutions.”<sup>48</sup>

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<sup>45</sup> Debbie Elliott, *5 Years After Charleston Church Massacre, What Have We Learned?*, NPR (Jun. 17, 2020).

<sup>46</sup> Mihi Zaeri et al., “*All These Innocent Lives*”: *These Were the Victims in the Buffalo Attack*, N.Y. TIMES (May 15, 2022).

<sup>47</sup> U.S. Dep’t of Justice, *2020 Hate Crimes Statistics* (May 5, 2022).

<sup>48</sup> Audra D.S. Burch & Luke Vander Ploeg, *Buffalo Shooting Highlights Rise of Hate Crimes Against Black Americans*, N.Y. TIMES (May 16, 2022).

2. Recent efforts by state legislatures nationwide to censor classroom discussions and limit educator training on issues of systemic racism have exacerbated the problem. Rather than exposing the root causes of racial inequality in schools and equipping our educators and our students to face systemic issues, they promote a whitewashed version of our history and ignore that history's lasting impact.

Fifteen states now have laws, executive orders, or school board rules that limit the ways that educators can discuss race, force educators to present an idealized version of American history, and/or ban materials considered too divisive.<sup>49</sup> Similar restrictions have been proposed or introduced in another 25 states.<sup>50</sup> Some of these laws contain appropriate (although duplicative) prohibitions against teaching students to discriminate, e.g. by teaching that individuals from one race are superior to another.<sup>51</sup> Others forbid educators from teaching about unconscious or implicit bias or that slavery and racism are anything other than deviations from the “authentic founding principles of the United States.”<sup>52</sup> Indeed, some of these efforts have taken the form of outright book-banning. For example, Florida and Texas have banned altogether instruction on works of scholarship such as THE 1619 PROJECT.<sup>53</sup> At the school-district level, scholarship like STAMPED (FOR KIDS): RACISM, ANTI-

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<sup>49</sup> Kiara Alfonseca, *Anti-Critical Race Theory Bill Signed Into Law by Mississippi Governor*, ABC News (Mar. 15, 2022).

<sup>50</sup> *Id.*

<sup>51</sup> Nat'l Educ. Ass'n, *Teach Truth: Know Your Rights FAQ* (Jun. 2, 2022).

<sup>52</sup> Tex. Educ. Code § 28.0022(a)(4)(A)(viii).

<sup>53</sup> *Id.* § 28.0022(a)(4)(C); Fla. Admin. Code R. 6A-1.094124(3)(b).

RACISM, AND YOU; novels like *THE BLUEST EYE* and *THE HATE U GIVE*; and children’s books about Ruby Bridges have all been targeted by activists and removed from classes and libraries.<sup>54</sup> Moreover, in many states, the statutes are vague but violations can carry severe consequences for the school district or even the individual teacher. Uncertainty about what these laws require is already having a chilling effect.<sup>55</sup>

Proponents of these laws claim that teaching students about systemic racism will make individual students feel guilty or uncomfortable, or will lead them to believe that all White people are racist due to the history of White racist oppression and their present positions of privilege within American society. But it is far more common for students to learn from texts that ignore our country’s history of racism.<sup>56</sup> Examining U.S. history textbooks for fifth graders, one teacher found that none of the books mentioned

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<sup>54</sup> Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (June 28, 2022).

<sup>55</sup> Kalyn Belsha et al., *Not Getting Into It: How Critical Race Theory Laws Are Cutting Short Classroom Conversations*, CHALKBEAT (Dec. 17, 2021); Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021).

<sup>56</sup> Derrick P. Alridge, *The Limits of Master Narratives in History Textbooks: An Analysis of Representations of Martin Luther King, Jr.*, 108 TEACHERS COLL. REC. 662, 680 (2006) (concluding that textbooks’ treatment of Martin Luther King, Jr. presented “a sanitized, noncontroversial, oversimplified view of perhaps one of America’s most radical and controversial leaders”); Elavie Ndura, *ESL and Cultural Bias: An Analysis of Elementary Through High School Textbooks in the Western United States of America*, 17 J. LANGUAGE CULTURE & CURRICULUM 143, 146 (2004) (finding that major ESL textbooks contain three forms of bias: stereotyping, invisibility, and unreality).

that 12 of the first 18 U.S. presidents owned slaves.<sup>57</sup> The textbooks described actions of Native tribes as “violent” without using similar descriptors for the Spaniards who “conquered them.”<sup>58</sup> A *New York Times* analysis of the most popular social studies books in California and Texas revealed significant differences, including that California textbooks explain the history of redlining and restrictive covenants that are absent from the Texas versions of the same textbooks.<sup>59</sup>

By limiting students’ engagement with issues of racial equity and access to different perspectives, these censorship efforts hinder the development of cultural competence critical for living in an increasingly diverse society. The impact of censorship is particularly acute due to racial segregation in public schools.

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In sum, ours is not a color-blind society, and race still matters. When it comes to public elementary and secondary education, White, Black, Hispanic, Native American and students of other races do not, in the aggregate, have equal opportunities. This lack of equal opportunities hampers the ability of many students to succeed in higher education and the workforce. In light of this inescapable fact, the mission of public elementary, secondary, and higher education cannot be fulfilled without affirmative efforts to achieve racially diverse classrooms. Such racial diversity in the classroom, as we now show, contributes

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Dana Goldstein, *Two States. Eight Textbooks. Two American Stories*, *N.Y. Times* (Jan. 12, 2020).

significantly to the fulfillment of the public educational mission.

## II. Racially Diverse Schools Provide Educational and Social Benefits to All

As grim as this portrait of persistent racial disparity and de facto segregation may be, there are solutions that we, as a society, can pursue. An impressive body of empirical research has shown that fostering racially diverse classrooms is a fundamental and necessary step in closing racial achievement gaps and promoting productive intergroup relations in society at large.

A. Even when one controls for parental income, education, and other measures of socioeconomic status, there are persistent racial gaps in achievement and other educational outcomes.<sup>60</sup> These gaps—particularly in student test scores—have narrowed during periods coinciding with greater school integration;<sup>61</sup> conversely, the more recent period of stagnation in progress toward narrowing these gaps corresponds with a period when desegregation has effectively stalled or been reversed.<sup>62</sup>

A great deal of social science research documents the influence of segregation on disparities in mathematics achievement, where racial gaps persist irre-

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<sup>60</sup> Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 998 (2010).

<sup>61</sup> *Id.* at 1010 (citing Mark Berends & Roberto V. Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-Year Perspective*, 112 TEACHERS COLL. REC. 978, 988–91 (2010)).

<sup>62</sup> *Id.*

spective of socioeconomic factors.<sup>63</sup> As a whole, this body of research unambiguously finds that racial diversity in classrooms positively affects Black students' math achievement,<sup>64</sup> and, conversely, that racial segregation negatively affects it.<sup>65</sup> This research also provides strong evidence that segregation undermines mathematics achievement among Hispanics and moderately strong evidence that attending diverse schools fosters it.<sup>66</sup> Indeed, these studies even provide strong evidence that racial isolation negatively affects the achievement of Whites and that attending diverse schools does not harm their mathematics achievement.<sup>67</sup> Together, these findings provide consistent and unambiguous evidence that math learning in a racially diverse classroom is positively related to outcomes for most students—irrespective of the student's age, race, or socioeconomic status.<sup>68</sup>

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<sup>63</sup> *Id.* at 998.

<sup>64</sup> *Id.* at 1032 & n.150 (collecting studies). See also Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. RES. ON ADOLESCENCE 109, 123, 125–26 (1997) (finding that Black and White 11th graders had the highest achievement levels at racially balanced schools and that school racial composition exerted a more powerful influence on Black student performance than it did on White student performance).

<sup>65</sup> Mickelson & Bottia, *supra* note 60, at 1032 & n.151 (collecting studies); Berends & Peñaloza, *supra* note 61, at 992–93.

<sup>66</sup> Mickelson & Bottia, *supra* note 60, at 1034 & nn.162–63 (collecting studies).

<sup>67</sup> *Id.* at 1033–34 & nn.156–60 (collecting studies); see also Gray-Little & Carols, *supra* note 64, at 123, 125–26.

<sup>68</sup> Mickelson & Bottia, *supra* note 60, at 1043; see also Xiaoxia A. Newton, *End-of-High-School Mathematics Attainment: How Did Students Get There?*, 112 TEACHERS COLL. REC. 1064, 1087–88 (2010).

As noted earlier, schools in which students of minority races are segregated are frequently high-poverty schools with fewer resources and funding than majority White schools, which research shows leads to a negative impact on students' reading and verbal achievement. For example, one recent study found that attending a highly segregated, majority Black school has a "profound" negative effect on a student's verbal achievement, "above and beyond" the effects of a student's own poverty level or racial group.<sup>69</sup> Another study found that, as a majority-minority school became more and more segregated, average monthly reading gains among first-graders slowed by two-thirds, with the negative association between classroom composition and reading growth being strongest for Black students.<sup>70</sup>

Integrated schools, by contrast, promote creativity, motivation, deeper learning, critical thinking, and problem-solving skills.<sup>71</sup> These school environments are also more effective than segregated ones in helping students graduate. For example, a study of public school students in Cleveland showed that Black, Hispanic, and White students had lower drop-out rates when attending diverse high schools—and that this

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<sup>69</sup> Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. REC. 1201, 1236–39 (2010).

<sup>70</sup> James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?*, 112 TEACHERS COLL. REC. 1338, 1371, 1374–75 (2010).

<sup>71</sup> Century Found., *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms* at 1–2 (Apr. 29, 2019).

effect intensified if the students were exposed to diverse school environments before high school.<sup>72</sup> In other words, a diverse school environment “turn[s] the average high school into an institution that cushions more effectively the negative effects of intensifying non-school problems on graduation chances.”<sup>73</sup>

Similar results hold for diverse environments in higher education. Studies show that admission to selective institutions results in stronger academic performance for students of colors who benefited from affirmative action.<sup>74</sup>

The impact of integrated schooling is significant and long-lasting. A study followed the life trajectories of children born between 1945 and 1968 until 2013 and found that Black students who attended desegre-

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<sup>72</sup> Argun Saatcioglu, *Disentangling School- and Student-Level Effects of Desegregation and Resegregation on the Dropout Problem in Urban High Schools: Evidence From the Cleveland Municipal School District, 1977–1998*, 112 TEACHERS COLL. REC. 1391, 1419, 1427 (2010).

<sup>73</sup> *Id.* at 1429.

<sup>74</sup> Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOC. SCI. RESEARCH 531, 544 (2007) (finding that students of color benefiting from affirmative action earned higher grades and left school at lower rates than others); Mario L. Small & Christopher Winship, *Black Students’ Graduation From Elite Colleges: Institutional Characteristics And Between-Institution Differences*, 36 SOC. SCI. RESEARCH 1257, 1272 (2007) (finding that an institution’s selectivity increased the probability of graduation for Black students); Stacy B. Dale & Alan B. Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data*, 49 J. HUMAN RES. 323, 350 (2014) (finding that “students from disadvantaged family backgrounds . . . experience a greater benefit from attending a college with a higher average SAT score than do those from more advantaged family background”).

gated schools were more likely to graduate from high school, go to college, and earn a degree than those who attended segregated schools.<sup>75</sup> They also made more money: five years of integrated schooling increased earnings by 15%.<sup>76</sup> Black students who attended integrated schools were also less likely to be incarcerated and were healthier as adults.<sup>77</sup> Notably, attending a racially diverse school had no negative effect on White students.<sup>78</sup>

Overall, the research on the impact of racial diversity in schools demonstrates that if we are to have a society in which children of all races are allowed to realize their academic and intellectual potential, that goal can only be reached by permitting policies that foster racial diversity in elementary, secondary, and higher education.

2. Beyond the well-documented educational benefits of racially diverse classrooms, there are broad societal benefits to be realized from the interracial contact that comes with diverse classroom environments. The theory that interracial contact reduces racial stereotypes and prejudice was first articulated by Gordon W. Allport in his seminal work, *THE NATURE OF PREJUDICE*. Allport posited that racial isolation breeds stereotypes and prejudice, and that “equal status contact between majority and minority groups in the pursuit of common goals” is a critical ingredient in improving relations between members of those groups, especially if such contact “is of a sort that

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<sup>75</sup> Nat’l Inst. of Econ. Res., *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* at 2, 18–20 (Sept. 2015).

<sup>76</sup> *Id.* at 20–21.

<sup>77</sup> *Id.* at 2, 22–23.

<sup>78</sup> *Id.* at 2, 18.

leads to the perception of common interests and common humanity between the members of the two groups.”<sup>79</sup>

Subsequent empirical research has repeatedly and consistently confirmed the common-sense conclusion that interracial contact can combat stereotypes and prejudice and make individuals more comfortable relating to members of other racial groups.<sup>80</sup> This body of evidence makes plain, however, that the conditions of contact are critical to its impact. In the first place, contact that occurs during key periods of personal development—for example, in a student’s formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed.<sup>81</sup>

So too, contact with a broad spectrum of different people of other races is more effective in breaking down racist and prejudicial attitudes than contact with just a few individuals of another race, because it forces people to “de-categorize” those with whom they are dealing and to treat them as individuals rather

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<sup>79</sup> Gordon W. Allport, *THE NATURE OF PREJUDICE* 281 (1954).

<sup>80</sup> Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *GEO. L. J.* 1, 19, 23–24 (2000) (“[The [contact] hypothesis has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.”).

<sup>81</sup> David S. Crystal et al., *It Is Who You Know That Counts: Intergroup Contact and Judgments About Race-Based Exclusion*, 26 *BRIT. J. DEV. PSYCH.* 51, 63–66 (2008) (“[T]he data showed that students with high contact were, overall, more likely than students with low contact to perceive wrongfulness in race-based exclusion.”).

than simply as members of a particular racial group.<sup>82</sup> This finding highlights the importance of having a “critical mass” of minority students. A “variety of viewpoints among minority students” helps to break down racial stereotypes, and “nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.” *Grutter*, 539 U.S. at 319–20 (cleaned up). This requires a sufficiently diverse group of experiences and perspectives within minority groups in order to counteract racial stereotypes and achieve the educational benefits of diversity. A recent study of Black male college students noted that the Black students “recognized that members of other racial/ethnic groups might perceive the Black student population as a monolithic group” but that they themselves “were quite cognizant of the characteristics and experiences that made them unique and distinctive from each other.”<sup>83</sup>

Finally, in order for racial stereotypes to be effectively countered, contact must be among individuals of equal status, lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.<sup>84</sup> The interactions of diverse students in higher education satisfies this requirement. As this Court recognized in *Grutter*, the benefits that accrue from stu-

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<sup>82</sup> Loris Vezzali, *Increasing Outgroup Trust, Reducing In-frahumanization, and Enhancing Future Contact Intentions Via Imagined Intergroup Contact*, 48 J. EXPER. SOC. PSYCH. 437 (2012).

<sup>83</sup> Shaun R. Harper & Andrew H. Nichols, *Are They Not All the Same? Racial Heterogeneity Among Black Male Undergraduates*, 49 J. COLL. STUDENT DEV. 204 (May/ June 2008).

<sup>84</sup> Thomas F. Pettigrew, *Future Directions for Intergroup Contact Theory and Research*, 32 INT’L J. INTERCULTURAL REL. 187, 192 (2008).

dent-body diversity in higher education are “not theoretical but real.” 539 U.S. at 330. Such diversity fosters the ability to relate to other people, cultures, and viewpoints, which in turn holds tremendous value for our economy, military, and society at large. *Id.* at 330-33.

Given these findings, it is not surprising that students’ exposure to greater diversity is associated with increases in racial understanding, cultural awareness and appreciation, engagement with social and political issues, and openness to diversity and challenge.<sup>85</sup> Interracial cooperative contact among students of different races in our public schools has repeatedly been linked with increased levels of tolerance for children of other races and increased likelihood that children of different races will become and remain friends.<sup>86</sup> Such one-on-one contact has been found to be reliably effective in reducing intergroup bias amongst children.<sup>87</sup> Moreover, such contact has been linked to the formation of “close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,” and which social scientists have long viewed as one of most potent agents for promoting racial tolerance.<sup>88</sup>

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<sup>85</sup> Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST 126, 136 (Mitchell J. Chang et al. eds., 2003).

<sup>86</sup> Elise Cappella et al., *The Hidden Role of Teachers: Child and Classroom Predictors of Change in Interracial Friendships*, 37 J. EARLY ADOLESCENCE 1093, 1111 (2017).

<sup>87</sup> Allison L. Skinner & Andrew N. Meltzoff, *Childhood Experiences and Intergroup Biases among Children*, 13 SOC. ISSUES & POL’Y REV. 211, 226 (2019).

<sup>88</sup> Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. SOC. ISSUES 45, 55, 59 (1985).

In the end, this process—far from resulting in racial balkanization—leads to precisely the opposite result. Cooperative interaction between different groups “induces members [of different groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their categorized representations from us and them to a more inclusive we.”<sup>89</sup>

3. Teaching elementary and secondary school students to treat people as individuals and to identify common ground is of great consequence to their intellectual development. Heterogeneous groups—including groups that differ only with respect to the race of the participants—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between diverse individuals.<sup>90</sup> Reflecting that reality, high school students who are asked whether or not racial and ethnic diversity has enhanced their educational experience respond in the affirmative in overwhelming numbers.<sup>91</sup> Schools that create a strong norm of respect for diversity were associated with all students’ positive experiences of the school climate.<sup>92</sup> Students of all races also reported

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<sup>89</sup> Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 693 (1990).

<sup>90</sup> Katherine W. Phillips, *How Diversity Works*, 311 SCI. AM. 42, 44–46 (Oct. 2014).

<sup>91</sup> Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 132 (Gary Orfield ed., 2001).

<sup>92</sup> Adam Voight, et al., *The Racial School Climate Gap: Within-School Disparities in Students’ Experiences of Safety, Support, and Connectedness*, 56 AM. J. CMTY. PSYCHOL. 252, 255 (2015).

less social vulnerability, more positive perceptions of teachers' fair and equal treatment of all ethnic groups, and more favorable attitudes toward ethnic out-groups with increased diversity.<sup>93</sup>

Interactions with diverse viewpoints has a positive net influence on the development of critical thinking skills for White students.<sup>94</sup> Diverse interactions are positively related to college students' gains in leadership skills, psychological well-being, intellectual engagement, and intercultural effectiveness.<sup>95</sup> Interactions with diverse viewpoints also prepare students for citizenship in an increasingly diverse society.<sup>96</sup>

4. Classroom diversity has broader and more enduring benefits for a multiethnic, democratic society, and its citizens. Long term, students who learn to interact with individuals of other races in elementary and secondary school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of [an]other race than d[o] adults . . . [who] attended segregated

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<sup>93</sup> Jaana Juvonen et al., *When and How Do Students Benefit From Ethnic Diversity in Middle School?*, 89 CHILD DEV. 1268, 1278 (2018).

<sup>94</sup> Chad Loes et al., *Effects of Diversity Experiences on Critical Thinking Skills: Who Benefits?*, 83 J. HIGHER EDUC. 1, 17 (2012).

<sup>95</sup> Nicholas A. Bowman, *How Much Diversity is Enough? The Curvilinear Relationship Between College Diversity Interactions and First-Year Student Outcomes*, 54 RES. HIGHER EDUC. 874, 886 (2013).

<sup>96</sup> Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 28 (2004).

schools.”<sup>97</sup> They are also more likely as adults to interact with individuals of other races than are students educated in racially homogeneous schools.<sup>98</sup> In addition, racially diverse schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of other races in later life—which they attribute in large part to their school experiences.<sup>99</sup>

Conversely, researchers have found that early racial isolation, especially in schools, is significantly associated with a later expressed desire to live around people of the same race.<sup>100</sup> One study found that attending a segregated, predominantly Black school was influential in choosing to live in a predominantly Black neighborhood, indicating that more diverse public schools “may lead in the long run to more integrated neighborhoods over time.”<sup>101</sup> Yet another

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<sup>97</sup> Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. BLACK STUDIES 267, 269 (1989); Kristie J.R. Phillips al., *Integrated Schools, Integrated Futures? A Case Study of School Desegregation in Jefferson County, Kentucky*, in FROM THE COURTROOM TO THE CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION 239–70 (Claire E. Smrekar & Ellen B. Goldring, eds. 2009).

<sup>98</sup> See, e.g., Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiracial Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1990).

<sup>99</sup> Kurlaender & Yun, *supra* note 91, at 111, 124–25, 130.

<sup>100</sup> Jomills Henry Braddock II & Amaryllis Del Carmen Gonzalez, *Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations*, 112 TEACHERS COLL. REC. 1631, 1649–51 (2010).

<sup>101</sup> Pat Rubio Goldsmith, *Learning Apart, Living Apart: How the Racial and Ethnic Segregation of Schools and Colleges* (continued . . .)

study shows strong associations between high levels of school segregation and later racial isolation in workplaces—a result that held over the long term.<sup>102</sup>

5. As the foregoing studies explain, racially diverse classrooms produce long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks, and occupations. Equally to the point, they demonstrate that by closing the door on racial diversity in schools, we open the door to further racial prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.

Indeed, those are the effects that have generally followed bans on race-conscious admissions processes, which have significantly hurt underrepresented minorities' access to higher education and long-term earning potential. California's Proposition 209, which banned race-based affirmative action at California public universities, significantly reduced the enrollment of Black, Latino, and Native American students in California public universities between 1996 and 2018.<sup>103</sup> Longitudinal research shows that the end of affirmative action caused underrepresented minority freshman applicants to enter lower-quality colleges, with the effect of causing their degree attainment to decline overall and in the STEM field, without any

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*Perpetuates Residential Segregation*, 112 TEACHERS COLL. REC. 1602, 1626–27 (2010).

<sup>102</sup> Elizabeth Stearns, *Long-Term Correlates of High School Racial Composition: Perpetuation Theory Reexamined*, 112 TEACHERS COLL. REC. 1654, 1670–74 (2010).

<sup>103</sup> Thomas Peele & Daniel J. Willis, *Dropping Affirmative Action Had Huge Impact on California's Public Universities*, ED-SOURCE (Oct. 29, 2020).

effect on their performance in challenging courses.<sup>104</sup> Those applicants' average wages in their twenties and thirties also declined.<sup>105</sup> However, non-minority applicants—whose more selective university enrollment increased—experienced relatively small long-run educational or wage effects after Proposition 209.<sup>106</sup>

Bans on race-conscious admissions in various states also impacted graduate school enrollment, leading to a decline in the first-time matriculation of students who are underrepresented students of color in medical schools<sup>107</sup> and other graduate education programs<sup>108</sup> — hindering states' ability to train a diverse professional workforce to meet the needs of a multicultural populace.

Bans on the use of race-conscious admissions policies have impacts beyond the admissions process— influencing colleges' and universities' abilities to meet the needs of a diverse student body. A study on the effect of Michigan's Proposal 2, a 2006 ballot initiative creating a state constitutional ban on race-conscious college admissions policies in Michigan, found “a detrimental influence on the work that is

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<sup>104</sup> Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q. J. ECON. 115 (2022).

<sup>105</sup> *Id.* at 155.

<sup>106</sup> *Id.* at 156.

<sup>107</sup> Liliana M. Garces & David Mickey-Pabello, *Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Student of Color Matriculation in Medical Schools*, 86 J. HIGHER EDUC. 264 (2015).

<sup>108</sup> Liliana M. Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 REV. HIGHER EDUC. 93 (2012).

critical to the success of students of color on campus, such as campus-level administrators' ability to meaningfully engage and address the ways in which race and racism influence the experience of students."<sup>109</sup> Rather than minimizing difficult conversations on race, Proposal 2 made it even more difficult to talk about race and structural factors contributing to education inequities and led to feelings of isolation and marginalization amongst Black students.<sup>110</sup> Lower levels of diversity and bans on the use of affirmative action at California public universities were similarly associated with a more negative racial climate for Black and Hispanic students.<sup>111</sup> Race-conscious admissions bans also create negative perceptions of the school's climate, hindering outreach and recruitment and further impeding diversity efforts.<sup>112</sup>

Moreover, efforts to bolster minority representation through means other than the use of affirmative action—such as percentage plans, focus on socioeconomic factors, or increased outreach and recruitment—have been shown to be inadequate alternatives for increasing minority representation in higher education. Minority enrollment at public universities in California, Texas, and Washington declined following state bans on race-conscious admissions processes, despite the use of alternative strategies, including

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<sup>109</sup> Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-Level Administrators Understand a Prohibition on Race-Conscious Postsecondary Admissions Policies*, 52 AM. EDUC. RES. J. 828, 849 (2015).

<sup>110</sup> *Id.* at 850–51.

<sup>111</sup> William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 123 (2013).

<sup>112</sup> *Id.*

top percent programs, class-based affirmative action, and targeted recruitment.<sup>113</sup> In California, the state and University of California system also implemented a significant needs-based financial aid program which failed to yield adequate diversity, illustrating how costly and inefficient race-neutral alternatives are as substitutes for affirmative action.<sup>114</sup>

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The sum of the matter is this: if we are to “hasten the day when ‘we are just one race,’” *Adarand Constructors*, 515 U.S. at 275 (Ginsburg, J., dissenting), we must ensure that our children are educated in the racially diverse settings that equalize opportunity and produce significant societal and educational benefits. Accordingly, educational institutions—at the elementary, secondary, and higher education levels—should be allowed to give some consideration to race in order to achieve such diversity. This is not an “illegitimate use[] of race,” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), but rather is fully justified under the standard of strict scrutiny by society’s compelling interest in the education of all of its children.

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<sup>113</sup> Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 PUB. ADMIN. REV. 315, 326 (2007).

<sup>114</sup> William C. Kidder & Patricia Gándara, *Two Decades After the Affirmative Action Ban: Evaluating the University of California’s Race-Neutral Efforts*, ETS WHITE PAPER at 33 (2016).

**CONCLUSION**

The judgments of the courts of appeals—which uphold Respondents’ limited consideration of race as one of many factors in making admissions decisions—should be affirmed.

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