IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

No. A150625

RICHARD SANDER and
CALIFORNIA FIRST AMENDMENT COALITION,
Plaintiffs and Appellants,

v.

STATE BAR OF CALIFORNIA and
BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,
Defendants and Respondents,

and

DWIGHT AARONS, et al.,
Intervenor and Respondent.

On Appeal from the Superior Court of San Francisco County
(Case No. CPF08508880, Honorable Mary E. Wiss, Judge)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS AND APELLANTS

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A150625 Division: Three

Case Name: *Richard Sander, et al. v. State Bar of California, et al.*

Please check the applicable box:

☑ There are no Interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person information, if necessary.

/s/ Joshua P. Thompson Date: January 31, 2018.
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Am. Civil Rights Found. v. Berkeley Unified Sch. Dist, 172 Cal. App. 4th 207 (2009) 8

Am. Civil Rights Found. v. L.A. Unified Sch. Dist, 169 Cal. App. 4th 436 (2008) 8

Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) 8

Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996) 8

Connerly v. State Pers. Bd., 92 Cal. App. 4th 16 (2001) 18

Coral Construction, Inc. v. City & County of San Francisco, 50 Cal. 4th 315 (2010) 8

Crawford v. Huntington Beach Union High Sch. Dist., 98 Cal. App. 4th 1275 (2002) 8

Estate of Hearst, 67 Cal. App. 3d 777 (1977) 18

Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) 8, 20

Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) 8

Gratz v. Bollinger, 539 U.S. 244 (2003) 8

Grutter v. Bollinger, 539 U.S. 306 (2003) 8, 20

Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000) 8

Mack v. State Bar of California, 92 Cal. App. 4th 957 (2001) 13

Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) 8

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 8

Sander v. State Bar of Cal., 58 Cal. 4th 300 (2013) 12-13, 24

Sander v. The State Bar of California, No. CPF-08-508880, 2016 WL 6594874 (Cal. Super. Nov. 7, 2016) 12, 19

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Cal. R.Ct. 8.200(c) 7

Miscellaneous

2017 Standard Setting Study and Related Options, The State Bar of California, http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2017-PublicComment/2017-10 26

5 Reasons Not to Get a Law Degree, Money Watch, https://www.cbsnews.com/news/5-reasons-not-to-get-a-law-degree/ 10

Ayres, Ian & Brooks, Richard, *Does Affirmative Action Reduce the Number of Black Lawyers,* 57 Stan. L. Rev. 1807 (2005) 14

Barnes, Katherine Y., Essay, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 Nw. U. L. Rev. 1759 (2007) 14

California Bar Exam Results By Law School (February 2017), Above the Law, https://abovethelaw.com/2017/06/california-bar-exam-results-by-law-school-february-2017/ 10

California Supreme Court Asserts Its Authority to Determine Passing Bar Exam Grade, ABA Journal, http://www.abajournal.com/news/article/california_supreme_court_asserts_its_authority_to_determine_passing_bar_exa. 25

California Supreme Court Issues Decision On Bar Exam Cut Score, Above the Law, https://abovethelaw.com/2017/10/california-supreme-court-issues-decision-on-bar-exam-cut-score/?rf=1 26

California's Bar Exam Passage Rate Reaches 32-Year Low, Above the Law, https://abovethelaw.com/2016/11/californias-bar-exam-passage-rate-reache s-32-year-low 10

Chambers, David L., et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005) 14

Dauber, Michele Landis, *The Big Muddy*, 57 Stan. L. Rev. 1899 (2005) 14

Final Report on the 2017 Bar Exam, The State Bar of California, http://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf 25

Rothstein, Jesse & Yoon, Albert H., *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. Chi. L. Rev. 649 (2008) 14

Sander, Richard H., *A Reply to Critics*, 57 Stan. L. Rev. 1963 (2005) 14, 17

Sander, Richard H., *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) 11, 13-16

Sander, Richard, *Are Black/White Disparities in Graduation and the Bar Getting Better, or Worse?*, Empirical Legal Studies Blog (Sept. 19, 2006, 8:28 AM), http://www.elsblog.org/the_empirical_legal_studi/2006/09/sander_2_black_.html 16

Sander, Richard, *The Stylized Critique of Mismatch*, 92 Tex. L. Rev. 1637 (2014) 15, 17

State Bar Announces Results of July 2017 California Bar Examination, The State Bar of California, http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-announces-results-of-july-2017-california-bar-examination 10, 24

Switzer, Jill, *Assessing California's Bar Exam Cut Score*, Above the Law, https://abovethelaw.com/2017/08/assessing-californias-bar-exam-cut-score/ 27

Wilkins, David B., *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915 (2005) 14

Williams, Doug, et al., *Revisiting Law School Mismatch: A Comment on Barnes* (2007, 2011), 105 Nw. U. L. Rev. 813 (2011) 15

INTRODUCTION

Pursuant to California Rule of Court 8.200(c), Pacific Legal Foundation (PLF) respectfully submits this application to appear as *amicus curiae* in support of Petitioners-Appellants Richard Sander and the First Amendment Coalition, and combined herein is the proposed brief *amicus curiae*.

APPLICATION OF PACIFIC LEGAL FOUNDATION TO APPEAR *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS AND IN SUPPORT OF REVERSAL

To the Honorable Presiding Justice:

Pursuant to California Rule of Court, Rule 8.200(c) and for the reasons set forth in this request, Pacific Legal Foundation respectfully requests permission to file the accompanying brief *amicus curiae* in support of Appellant Professor Richard Sander and the First Amendment Coalition (collectively, Sander), and in support of reversal of the Superior Court's decision.[1]

A. Identity and Interest of Pacific Legal Foundation

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of California, organized for the purpose of litigating important matters of public interest. PLF is headquartered in Sacramento, California, and has

[1] Pursuant to Rule 8.200(c)(3), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

offices in Palm Beach Gardens, Florida; Arlington, Virginia; and Bellevue, Washington. Formed in 1973, PLF believes in and supports the principles of limited government and free enterprise, the right of individuals to own and make reasonable use of their private property, and the protection of individual rights. PLF has participated in numerous cases involving racial preferences in education including *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

PLF has also participated as lead counsel in numerous cases involving racial preferences in California, including *Coral Construction, Inc. v. City & County of San Francisco*, 50 Cal. 4th 315 (2010); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996); *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002); *Am. Civil Rights Found. v. L.A. Unified Sch. Dist*, 169 Cal. App. 4th 436 (2008); and *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist*, 172 Cal. App. 4th 207 (2009).

PLF is familiar with issues presented in this case and considers it to be of special significance in that Professor Sander seeks records maintained

by the State Bar of California that would help the public evaluate the utility of granting racial preferences in law school admissions.

B. The Brief *Amicus Curiae* Will Assist the Court

Because of PLF's longstanding interest in eliminating race-based preferences in California and nationwide, it has developed significant expertise in the interplay of constitutional law, racial preferences, and education regulation. Here, PLF harnesses this considerable experience and knowledge to explain how the information sought by Professor Sander is in the public interest. The State Bar of California's bar exam data sought will help aid the public through an open discussion of the utility of racial preferences in higher education. Furthermore, the data may effectively demonstrate that thousands of students are being treated unconstitutionally by public universities across the country. Finally, the release of the requested information could help the State Bar achieve its worthy goals of increasing minority members of the bar and reducing the stigma attached to those members—all in a color-blind manner. PLF believes that its discussion of these issues will assist the Court in its decision.

PACIFIC LEGAL FOUNDATION'S BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

SUMMARY OF ARGUMENT

Since Professor Sander first proposed partnering with the State Bar of California to study the effects of racial preferences on students pursuing a

legal career, the prospects of obtaining a law license in California have grown bleaker. Law students from across the country continue to sit for the California bar exam in great numbers, but never before have they been asked to invest so much with such somber prospects of passing. The cost of law school continues to rise as the passage rates for the bar exam decline.[2] While, the most recent examination in July of 2017 yielded a comparatively higher passage rate than recent years, when combined with the rate from the previous February administration, only 42 percent of test takers successfully passed the California Bar Exam in 2017.[3]

Given the growing costs and declining passage rates, Professor Sander's proposed research is sorely needed. Previous work by Sander has called into question whether race-based admissions preferences benefit those who receive them. Nationwide, many law schools (public and private) grant race-based preferences to students from "favored" races. The bar exam data

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[2] *Compare 5 Reasons Not to Get a Law Degree*, Money Watch, https://www.cbsnews.com/news/5-reasons-not-to-get-a-law-degree/ (the average cost of three years of private law school is $102,000) *with California's Bar Exam Passage Rate Reaches 32-Year Low*, Above the Law, https://abovethelaw.com/2016/11/californias-bar-exam-passage-rate-reaches-32-year-low (showing decline in passage rates of the California bar exam).

[3] Compare *State Bar Announces Results of July 2017 California Bar Examination*, The State Bar of California, http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-announces-results-of-july-2017-california-bar-examination *with California Bar Exam Results By Law School (February 2017)*, Above the Law, https://abovethelaw.com/2017/06/california-bar-exam-results-by-law-school-february-2017/.

maintained by the State Bar of California contains information needed to empirically test the utility of those race-based admissions preferences by law schools—something that all agree is a matter of great public importance. Not only has Professor Sander produced peer-reviewed works that question the effectiveness of race-based preferences in higher education, but his research could lead courts to recognize that a public university's use of race cannot be justified by a compelling interest in diversity.

The public's interest in these records is great. For example, in his article, *A Systematic Analysis of Affirmative Action in American Law Schools*, Professor Sander concluded that "most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences." Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367, 371 (2004). Professor Sander's research could help demonstrate that bar exams, legal instruction, or grading methods are in fact discriminatory, and that minorities would be better served if society concentrated remedial efforts on those problems. In essence, race-preference advocates would rather blindly support their beliefs than have them verified. On the other hand, if race preferences hurt minority success in law schools, as Professor Sander's research thus far demonstrates, the public's need for the information is vital. Only by understanding the problem can we prepare a solution.

In *Sander v. State Bar of Cal.*, the California Supreme Court explicitly recognized that "the public has a legitimate interest in whether different groups of applicants, based on race, sex or ethnicity, perform differently on the bar examination." 58 Cal. 4th 300, 324 (2013). While the Court found that the public has a legitimate interest in the information sought by Professor Sander, it left it up to the State Bar to decide the best specific means of disclosing that information, while preserving the privacy of individual applicants. *Sander*, 58 Cal. 4th at 327.

Instead, the Bar purposefully avoided complying with the Court's ruling by clandestinely taking their case to the California Legislature. On January 1, 2016, the State Bar was made subject to the California Public Records Act (CPRA) by urgency legislation Senate Bill 387. *Sander v. The State Bar of California*, No. CPF-08-508880, 2016 WL 6594874, at *3 (Cal. Super. Nov. 7, 2016). Senate Bill 387 also added Business and Professions Code section 6060.25, which *intentionally* provides that the type of information sought by Professor Sander and the other petitioners, "*shall be* confidential and *shall not* be disclosed pursuant to any state law, including" the CPRA. *Sander*, 2016 WL 6594874, at *3 (emphasis added). *See also* Cal. Bus. & Prof. Code § 6060.25. Fortunately for the public, in October 2017 the California Legislature again modified Business and Professions Code section 6060.25 to make access to aggregate statistical records more reasonable.

ARGUMENT

I
THE PUBLIC IMPORTANCE OF THE REQUESTED INFORMATION CANNOT BE OVERSTATED

Contrary to the position of the State Bar and its advocates in this litigation, the California Supreme Court resoundingly concluded that the information sought is a matter of great public importance.

> The public does have a legitimate interest in the activities of the State Bar in administering the bar exam and the admissions process. In particular, it seems beyond dispute that the public has a legitimate interest in whether different groups of applicants, based on race, sex or ethnicity, perform differently on the bar examination and whether any disparities in performance are the result of the admissions process or of other factors.

Sander, 58 Cal. 4th at 324.

Nonetheless, the State Bar continues to obstruct the public's right to its records. *Id*.; *see also Mack v. State Bar of California*, 92 Cal. App. 4th 957, 962 (2001) (recognizing that "both decisional law and state and federal constitutional principles have established a powerful public right of access to [state bar] records."). Because of the public's right to this information in general, and because of the great importance of the questions raised by Professor Sander, the requested data should be published.

In his seminal article developing the "mismatch" theory, University of California at Los Angeles Professor Richard Sander questioned the foundations of racial preferences in law schools. *See* Sander, *Systematic*

Analysis, *supra*. The premise of his theory is easily grasped: "if there is a very large disparity at a school between the entering credentials of the 'median' student and the credentials of students receiving large preferences, then the credentials gap will hurt those the preferences are intended to help." Richard H. Sander, *A Reply to Critics*, 57 Stan. L. Rev. 1963, 1966 (2005).

While the premise is facially benign, it produced strong reactions from the academic legal community. These reactions questioned Professor Sander's theory on a number of different bases, from the methods to the sample size to the resulting effects. *See*, *e.g.*, Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. Chi. L. Rev. 649 (2008); Katherine Y. Barnes, Essay, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 Nw. U. L. Rev. 1759 (2007); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915 (2005); Michele Landis Dauber, *The Big Muddy*, 57 Stan. L. Rev. 1899 (2005); David L. Chambers, et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 Stan. L. Rev. 1807 (2005).

Professor Sander's research has also been defended. *See, e.g.*, Doug Williams, et al., *Revisiting Law School Mismatch: A Comment on Barnes* (2007, 2011), 105 Nw. U. L. Rev. 813 (2011); Richard Sander, *The Stylized Critique of Mismatch*, 92 Tex. L. Rev. 1637 (2014).

This discussion of racial preferences, however, was a welcome turn of events. Before Professor Sander published his article, "there ha[d] never been a comprehensive attempt to assess the relative costs and benefits of racial preferences in any field of higher education." Sander, *Systematic Analysis*, *supra*, at 368. Debate on the effectiveness of the decades-long practice of considering race in higher education allows institutions to make informed decisions about whether to continue the practice.

Professor Sander's research shed a much-needed light on the scope and effectiveness of racial preferences. His research has so far produced a wealth of information that can be used by law schools when determining whether to grant racial preferences, including:

- Large racial preferences seriously damage the academic performance of black law students, contributing to lower graduation rates and lower success on bar exams. Sander, *Systematic Analysis*, *supra*, at 440-48.
- The median black student receiving a large preference to an elite law school ends up with grades that put her in the sixth

percentile of the white-student grade distribution. *Id*. at 425-36.

- Black students entering law school are only half as likely as their white peers to become lawyers. *See* Richard Sander, *Are Black/White Disparities in Graduation and the Bar Getting Better, or Worse?*, Empirical Legal Studies Blog (Sept. 19, 2006, 8:28 AM).[4]

Despite the great impact of Professor Sander's articles that developed the mismatch theory with respect to minority law students, the data available for further research is limited. Higher education institutions are unwilling to publicly disclose their admissions criteria. "The response of law schools—and indeed, of higher education in general—was to go underground." Sander, *Systematic Analysis*, *supra*, at 383. If not for the regression analyses Professor Sander conducted on data collected by the Law School Admissions Council (LSAC), his article would have lacked the comprehensive statistics necessary to provide the public with enough evidence to analyze his conclusions. *Id*. at 414-15. But that information is itself limited. "Though the LSAC-BPS [Bar Passage Study] is a remarkable data set in many ways (sample size, breadth of schools covered, and breadth of both subjective and

[4] http://www.elsblog.org/the_empirical_legal_studi/2006/09/sander_2_black_.html.

objective measurements taken of participants), it was weakened terribly by the LSAC's decision to destroy all information linking students to individual schools." Sander, *A Reply to Critics*, *supra*, at 1966.

Professor Sander himself recognizes that "mismatch is hard to measure." Sander, *Stylized Critique of Mismatch*, *supra*, at 1644. That is, mismatch "is harder to demonstrate with blurry, inexact data than with precise data. That is part of the reason why finding better data is a high priority for mismatch scholars." *Id*. at 1645. Professor Sander further acknowledges that "second-order effects of mismatch, such as the effect of mismatch on graduation rates, are genuinely (and often in good faith) disputed[,]" and therefore, "better data are needed to measure these important distinctions [between the reasons for admitting certain students over others]." *Id*.

To further develop (or disprove) the mismatch theory, Professor Sander seeks the records at issue here from the State Bar of California. The California Bar exam data provides a wealth of information that is crucial for further development of the mismatch theory. While the debate over the mismatch theory continues in our nation's law journals, access to this data would grant both researchers and the public vital information to determine the accuracy of the theory. More importantly, it would help reveal whether racial preferences do grave harm to their intended beneficiaries.

Whether Professor Sander's research proves that race preferences in higher education are ineffective is not for this Court to decide. However, it is this Court's mandate to take into account the public interest at stake in access to the requested records. "If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." *Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977).

And on the question of the public interest at stake here, there can be little room for doubt. "[A]ffirmative action programs are matters of intense public concern." *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 29 (2001). As happened in *Hearst*, the State Bar is attempting to restrict access to records in which the public has a profound interest. Just as the public has interest in the legal proceedings inside a courtroom, so too does the public have an interest in records of the body that holds a monopoly on licensing attorneys.

Unfortunately, race-preference advocates criticize Professor Sander's research for not having an appropriate data set, while at the same time, they try at all costs to restrict his access to that data. This Court should rule for the release of the requested data.

II
THE REQUESTED DATA WOULD HELP REMOVE ANY STIGMA THAT ATTACHES TO MINORITIES RECEIVING PREFERENTIAL TREATMENT

The dehumanizing effects of racial preferences puts in context the State Bar's concern about stigma. The concern is that the data could show minorities failing to achieve success at the rates of their white and Asian peers, which could in turn stigmatize minority law students and lawyers. But the reverse is the more likely outcome: the release of the data will likely show that without mismatch, minorities would find success comparable to their white and Asian colleagues. Thus, the concern about stigma supports the *release* of the data.

A. The "Privacy" Issue Is Not the True Interest the State Bar Seeks to Protect

Notably, the State Bar's purported concern about privacy masks the true concern—the possibility of group stigmatization. For example, according to Respondents here, the "actual individuals' privacy whose data is at risk of disclosure and potential for stigmatization is of paramount consideration." Opp. at 81. The Superior Court gave this concern significant weight. In its discussion of the "private interests served by non-disclosure[,]" the lower court focused almost exclusively on witnesses who feared the "group stigmatization" that *could* result if their and other applicants' data were released. *Sander*, 2016 WL 6594874, at *9. This stigmatization could be used, according to these witnesses, "to draw broad conclusions about the

abilities of black lawyers[]" and "Latina lawyers. *Id*. (citations omitted). Similarly, another witness worried that the data could be used "to draw negative generalizations about the relative abilities of black lawyers." *Id*. (citation omitted). In concluding that the public interest in non-disclosure outweighed the public interest of disclosure, the court stated that the "public has a strong interest in maintaining and encouraging diversity in the legal profession, and in avoiding the stigmatization of individuals or groups of individuals." *Id*. at *11.

Of course, what is left unsaid in this discussion is the likelihood that *race-conscious programs themselves* lead to negative stereotypes. As Justice Clarence Thomas has noted, discrimination policies that favor minorities "stamp [minorities] with a badge of inferiority." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment). This is so because this discrimination "taints the accomplishments of all those who are admitted as a result of racial discrimination[]" as well as "the accomplishments of all those who are the same race as those admitted as a result of racial discrimination." *Fisher I*, 133 S. Ct. at 2432 (Thomas, J., concurring).

Because of race-conscious policies, then, "[w]hen [minorities] take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and

dissenting in part). And the "*question itself* is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination." *Id*. (emphasis added).

The requested information, contrary to the concerns of the court below, would go a long way toward *ending* this unfair stigmatization. That is, Professor Sander wants to use the State Bar's information to determine whether a mismatch between some students and some schools leads to poorer results—and whether those results could be avoided. Therefore, Professor Sander's research aims directly at the "stigma" concern. His research should lead to policies that will result in more minority achievement, and therefore, less "group stigmatization."

B. The State Bar's Interest in Increasing Diversity in the Legal Profession Involves the Collection, Study, and Publication of the Information Sought by Sander

The State Bar's refusal to release the requested information runs counter to its own practice with respect to similar information. For example, the State Bar, as part of its "Access to Justice" program, "works to support diversity among judges and lawyers so that the justice system reflects our multicultural state."[5] The State Bar promotes diversity through its Council

[5] http://www.calbar.ca.gov/Access-to-Justice.

on Access and Fairness, the California Partnership Law Academies, the 2+2+3 Pathway to Law initiative, and its Commission on Judicial Nominees Evaluation.[6]

The 2+2+3 Pathway to Law initiative is "designed to enhance opportunities in the legal profession for diverse populations."[7] According to its website, while "racial or ethnic minorities comprise 60 percent of the California population, only 20 percent of the state's lawyers are minorities."[8]

In its Strategic Plan, the Judicial Branch of California has identified as "Goal I" "Access, Fairness, and Diversity."[9] The Council on Access and Fairness advises the State Bar's Board of Trustees "on advancing State Bar diversity strategies and goals."[10] The Council's areas of focus include "College/Law School/Bar Exam."[11] Anyone interested in serving as a member of this council "must have the ability to" "[c]reate mechanisms to measure change in the diversity of the legal profession over time."[12]

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[6] http://www.calbar.ca.gov/About-Us/Our-Mission/Promoting-Diversity.

[7] https://www.scc.losrios.edu/administrationofjustice/223-program/.

[8] https://www.scc.losrios.edu/administrationofjustice/223-program/.

[9] http://www.courts.ca.gov/4629.htm.

[10] http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Council-on-Access-and-Fairness.

[11] http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Council-on-Access-and-Fairness.

[12] http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commisions/Council-on-Access-and-Fairness.

Further, among this Council's Publications and Resources[13] is a "Diversity Pipeline Task Force—Courts Working Group: Final Report and Recommendations—February 15, 2007".[14] This task force recommended that the State Bar help implement Government Code § 12011.5(n), which *required* the Governor to disclose, among other things, "the aggregate statewide demographic data provided by all judicial applicants relative to ethnicity and gender." The current version of this statute still *requires* the Governor to release, for example, "[d]emographic data relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation as provided by all judicial applicants, both as to those judicial applicants who have been and those who have not been submitted to the State Bar for evaluation." Cal. Gov't Code § 12011.5(n)(A)(ii) (2015). Further, the designated agency of the State Bar responsible for evaluation of judicial candidates" is required to "collect *and release*" similar information. *Id*. § 12011.5(n)(B) (emphasis added).

Thus, as the California Supreme Court recognized in this litigation, the State Bar itself publishes some of the very information that it now insists cannot be released:

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[13] http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Council-on-Access-and-Fairness/Publications-Resources.

[14] http://www.calbar.ca.gov/portals/0/documents/caf/2007_Courts-Working-Report.pdf.

> [T]he State Bar itself regularly publishes statistical reports on bar exam passage rates, broken down by race, gender, and law school attended, in a form that does not identify individual applicants. Thus, in practice, the State Bar does not interpret its rule as requiring that deidentified information from applicant records be kept completely confidential.

Sander, 58 Cal. 4th at 311-12.

Ultimately, the State Bar recognizes the importance of studying data that reflects the racial make-up of law students, lawyers, and judges. Its obstruction in response to Professor Sander's request is thus all the more disappointing. This Court should reaffirm that the public—and not just the government—has a right to public information touching on matters of great public concern.

III
THE REQUESTED RECORDS CONTINUE TO ADDRESS MATTERS OF PRESSING PUBLIC CONCERN

The importance of student success in law school and on the bar exam has not abated since 2006, when Professor Sander first sought the records from the state bar. Despite a recent uptick,[15] the prospects for passing the California Bar Exam are at a thirty-year low. This situation has not escaped notice by the California Supreme Court and California Legislature, both of which have attempted separate efforts to address the problem. It is against

[15] *See State Bar Announces Results of July 2017 California Bar Examination*, The State Bar of California, http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-announces-results-of-july-2017-california-bar-examination.

this backdrop that the State Bar has continued efforts to evade releasing anonymous information on law school applicant demographics and subsequent bar passage rates. Now, more than ever, responsible access to these records is vital to both improving overall bar passage rates in California and ensuring that each individual applicant has an equal opportunity to pursue her chosen career.

A. The California Supreme Court Recognizes that Dismal Bar Passage Rates Are a Matter of Pressing Public Concern

In 2017, the California Supreme Court called on the State Bar to perform a "thorough and expedited study" focused on all issues affecting California's bar passage rate.[16] The Court also took the unprecedented step of asserting its authority to set the required score for passage.[17]

The State Bar performed two of four planned studies.[18] The first, "Recent Performance Changes on the California Bar," focused on bar exam passage rates of the previous eight years.[19] The second, "Standard Setting Study," formed the basis for the "Final Report on the 2017 California Bar

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[16] *See Final Report on the 2017 Bar Exam*, The State Bar of California, http://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf.

[17] *California Supreme Court Asserts Its Authority to Determine Passing Bar Exam Grade*, ABA Journal, http://www.abajournal.com/news/article/california_supreme_court_asserts_its_authority_to_determine_passing_bar_exa.

[18] *See id.*

[19] *Id.*

Exam Standard Setting Study," and was later presented to the Court on September 14, 2017.[20] Based on the Standard Setting Study, two options were presented to the Committee of Bar Examiners for consideration and later issued for public comment: Whether to retain the current passage score for the July 2017 examination administration, or to impose a slight reduction pending the completion of the other two planned studies.[21]

Ultimately, the California Supreme Court declined to adjust the passage score.[22] But in its letter to the State Bar announcing its decision, the Court specifically noted that examination of the very type of information sought by Professor Sander in this case be could vital to remedying the situation:

> The court also encourages the State Bar and all California law schools to work cooperatively together and with others in examining (1) whether *student metrics*, law school curricula and teaching techniques, and *other factors* might account for the recent decline in bar exam pass rates; (2) how such data *might inform efforts* to improve academic instruction for the benefit of law students preparing for licensure and practice . . . [and] whether *potential improvements* in law school admission, education, and graduation standards and in State Bar testing for licensure, combined with effective regulatory oversight of legal education, could raise bar exam pass rates

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[20] *Id.*

[21] *2017 Standard Setting Study and Related Options*, The State Bar of California, http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2017-PublicComment/2017-10.

[22] *California Supreme Court Issues Decision On Bar Exam Cut Score*, Above the Law, https://abovethelaw.com/2017/10/california-supreme-court-issues-decision-on-bar-exam-cut-score/?rf=1.

> and thereby reduce financial hardship for exam takers, and boost the availability of competent and effective attorneys *across all demographics* and for all Californians. *News Release*, California Courts Newsroom (emphasis added).[23]

For its part, the State Bar appeared to recognize that a change in the passing score could have an effect on the number of minorities who would pass the bar exam. In August 2017, the State Bar sent an email to bar members and those who had recently sat for examination, soliciting feedback.[24] The survey included a question asking respondents to rank the importance of "[i]ncreasing diversity of attorneys from different backgrounds," as a relevant factor in determining an appropriate bar-passage score.[25] In short, the California Supreme Court and the State Bar recognize the importance of studying the effects of a low bar-passage rate has on minority representation among members of the bar. The information sought by Professor Sander here directly addresses these concerns.

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[23] https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam.

[24] Jill Switzer, *Assessing California's Bar Exam Cut Score*, Above the Law https://abovethelaw.com/2017/08/assessing-californias-bar-exam-cut-score/.

[25] *Id.*

CONCLUSION

For these reasons, the decision of the lower court should be reversed.

DATED: January 31, 2018.

Respectfully submitted,

JOSHUA P. THOMPSON

By /s/ Joshua P. Thompson

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS AND APPELLANTS is proportionately spaced, has a typeface of 13 points or more, and contains 4,571 words.

DATED: January 31, 2018.

/s/ Joshua P. Thompson
JOSHUA P. THOMPSON

DECLARATION OF SERVICE

I, Joshua P. Thompson, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On January 31, 2018, a true copy of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS AND APPELLANTS was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 31st day of January, 2018, at Sacramento, California.

/s/ Joshua P. Thompson
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