CORPORATE DISCLOSURE STATEMENT

The Center for Individual Rights is a non-profit corporation. It has no parent or subsidiary corporations.

/s/ Michael E. Rosman
Michael E. Rosman

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Interest of Amicus Curiae And Source Of Authority To File

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in the Supreme Court of the United States. CIR has a particular interest in, and has represented clients in numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). It also represented intervening defendants in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), whose precedential value is directly challenged in this litigation, and represented the successful appellant (Eric Russell) in *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006), a case involving a Constitutional challenge to a very similar state constitutional provision.

All parties have consented to the filing of this amicus brief. By consenting to the filing of the Center for Individual Rights' amicus brief, President Yudof does not take a position on the merits of the contents of that brief.

Statement of Authorship And Funding

No counsel for a party authored this brief in whole or in part. No person other than those identified in Fed. R. App. Proc. 29(c)(5)(C) (and no party or party's counsel) contributed money to fund the preparation or submission of this brief.

Summary of Argument

Plaintiffs lack standing under Article III of the United States Constitution. The provision of the California Constitution that they challenge, Article I, Section 31 ("Section 31"), is enforced primarily by state court judges. The district court in this action cannot order defendants to do anything that will remedy plaintiffs' injuries because state court judges will continue to enforce Section 31 regardless of what the district court (or this Court) rules. As interpreters of federal constitutional law, state courts are equal to lower federal courts, and they are entitled to reach (and, here, already have reached) an independent determination on the question of Section 31's constitutionality. *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal 4th 315, 235 P.2d 947 (2010).

In addition, this independent lawsuit is barred by the judgment in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) and principles of *res judicata* and collateral estoppel. That earlier lawsuit was brought on behalf of a class of plaintiffs that includes the plaintiffs here, and thus these plaintiffs are barred from relitigating the result in what amounts to a collateral attack on *Wilson*.

Accordingly, this Court should not reach the substance of plaintiffs' arguments, but should hold that the district court lacked subject matter jurisdiction over this action, or affirm on grounds of claim preclusion. Should this Court reach the substance, it should affirm the judgment of the court below for the reasons set

forth in the district court's opinion and in the brief of intervenor appellees Connerly and the American Civil Rights Foundation ("ACRF").

Argument

I. PLAINTIFFS LACK STANDING, AND THE COURT BELOW THUS LACKED SUBJECT MATTER JURISDICTION

Article III states that federal courts have jurisdiction over various "cases" and "controversies," and the Supreme Court has held that these words require various elements of justiciability, including "standing." *United States v. Richardson*, 418 U.S. 166, 171 (1974) (holding that the constitutional requirements of standing derive from the "case or controversy" language of Article III). Standing is perhaps the most important of the requirements in Article III. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Meeting the requirements of Article III is a prerequisite to the court's subject matter jurisdiction, and, accordingly, federal courts must satisfy themselves that those requirements are met *sua sponte*. *Chapman v. Pier I Imports (U.S.), Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (en banc).

There are three core requirements for standing: injury in fact, causation, and redressability. *Allen*, 468 U.S. at 751. Plaintiffs cannot meet the second and third elements in this case, and they thus lack standing.

"The party invoking federal jurisdiction bears the burden of establishing

these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The level of evidence needed to support standing varies with the stage of proceedings. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. *Id.*

A. Injury In Fact

Although no precise definition exists that would easily resolve whether an injury meets the Article III requirement of "injury in fact," injuries that have met the requirement have been "distinct," "palpable," "not abstract," "concrete," "particularized," "actual or imminent," and "not conjectural or hypothetical." *Allen*, 468 U.S. at 751-52 (1984); *Lujan*, 504 U.S. at 560.

Here, plaintiffs' complaint alleges a potpourri of injuries that it attributes to Section 31. First, Section 31 "den[ies] plaintiffs the chance for an equal and integrated education." ER 39 (¶ 2). Second, Section 31 "forc[es] minority students and their supporters to sponsor an onerous and almost certainly futile statewide referendum in order to secure the adoption of lawful affirmative action programs." ER 40 (¶ 11). *See also* ER 69 (¶ 198) ("Latina/o, black and Native American residents – and they alone – must expend the considerable resources

needed for the almost certainly impossible task of persuading an electorate that is still majority white to repeal or amend Proposition 209").[1]

Finally, the complaint alleges that Section 31 "intentionally discriminates against Latina/o, black, and Native American applicants [unidentified, but presumably applicants to the University of California] in three separate, but interrelated ways," *viz.*, it (1) "prohibits the University from pursuing racial diversity" while permitting it to pursue other forms of diversity, (2) "prohibit[s] the University from considering racial inequality" while permitting it to consider other forms of inequality, and (3) "forc[es] the University to apply its normal admissions criteria in ways that capture and magnify the racial segregation and inequality in elementary and secondary education." ER 71(¶¶ 206-09). Those allegations are presumably intended to allege injury to the high school plaintiffs (and one community college plaintiff) who allege that they have applications pending at, or intend to apply to, University of California undergraduate schools (ER 46-53(¶¶ 44-70, 72, 74-75, 78)), and the college (or graduate) student plaintiffs who allege that they have applied or intend to apply to UC professional

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[1] It deserves mention that, in their brief to this Court, appellants assert that a "near majority" of all high school graduates in California are black, Native American or Latina/o (Appellants Br. 8), and that a vast majority of blacks and Latina/os, as well as a substantial majority of Asian Americans, voted against Proposition 209, the proposition whose enactment by referendum resulted in Section 31, in 1996 (Appellants Br. 21). Unless the views of those minorities have changed substantially since 1996, or the demographics of those who have not graduated from high school are far different from those of graduates, it is unclear why a referendum to repeal Section 31 would be "almost certainly" futile or impossible. *Cf.* ER 60 (¶ 139) ("difficult, if not impossible, to change").

or graduate schools (ER 52-54 (¶¶ 71, 76, 81-82, 84, 88-89, 94)). Thus, many of the plaintiffs may have alleged a sufficient "injury in fact."[2]

That being said, it seems likely that most, if not all, of their claims are now moot. UC has presumably acted upon the applications of those students whose applications were pending in February 2010, when the complaint was filed, and it likely has acted (or will act shortly) on the applications of those who were juniors intending to apply (presumably in 2011). If plaintiffs' standing were not undermined for other reasons, this Court would be obligated to investigate the

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[2] It is unlikely, though, that the 8th grade plaintiffs, ER 47, 52 (¶¶ 48, 74), the college freshmen and sophomore plaintiffs, ER 53-54 (¶¶ 77, 81, 94), and the Asian American high school plaintiffs from an L.A. magnet high school, ER 49-50 (¶¶ 58, 62), have standing. The injuries of the first two groups were too remote at the time that the case commenced. *Davis v. FEC*, 554 U.S. 724, 735 (2008) ("the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"); *McConnell v. FEC*, 540 U.S. 93, 226 (2003) (holding that U.S. Senator's injury was "too remote temporally to satisfy Article III standing" where he would not be affected by provisions of campaign finance law until his 2008 Republican primary). Those in the last group have not adequately identified any Article III injury. *Cf.* Appellants Br. 10 ("those trained for leadership will be overwhelming [sic] white and Asian American"), 12 (Latina/o and black plaintiffs "overc[ame] obstacles that are almost unknown among the white and even Asian American students who make up the majority of the UC's entereing classes"), 14 ("segregated minority schools are distinctly inferior to those with predominantly white and Asian American student bodies"), 44 (minority plaintiffs "*cannot* attain the same adjusted grade point average as most white and many Asian American applicants because they do not attend schools where the classes that would make that possible are even offered") (emphasis in original).

Similarly, the college student plaintiffs who allege little more than their race and their school, ER 53-55 (¶¶ 79-80, 83, 85-87, 90-93, 95-99), have alleged nothing more than a generalized grievance similar to the grievance that tens of thousands of similarly-situated students could make. *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

current status of these plaintiffs to determine which, if any, still have live claims.

B. Causation / Traceability[3]

The second requirement of Article III standing is a showing of a "causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent actions of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (*quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)) (ellipses and brackets as in *Lujan*).

1. The Traceability Requirement

Significantly, when challenging the constitutionality of a law, plaintiffs must allege and prove more than that they were (or will be) injured by that law. They must allege and prove that they have been (or will be) be injured by acts (or

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[3] This Circuit has recognized the close connection between the traceability requirement of Article III standing and the requirement under the Eleventh Amendment that an officer sued for prospective injunctive or declaratory relief with respect to some law have "some connection" to its enforcement. *Long v. Van de Kamp* , 961 F.2d 151, 152 (9th Cir. 1992) (holding that both the Eleventh Amendment and Article III precluded lawsuit where there was a lack of "a connection between the official sued and the enforcement of the allegedly unconstitutional statute"); *Southern Pacific Transp. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980) (two successive paragraphs discussing the "traceability" requirement of Article III and the "some connection" requirement of Eleventh Amendment). Accordingly, authorities dealing with either issue are relevant to both arguments. For the reasons set forth in this section, this lawsuit is barred by the Eleventh Amendment.

threatened acts) of the defendants they have chosen to sue. *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) ("The plaintiffs have never suggested that any act of the defendants [the Governor and Attorney General of Louisiana] has caused, will cause, or could possibly cause any injury to them. . . [A] plaintiff may not sue a state official who is without any power to enforce the complained-of statute"); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) ("[P]laintiffs lack standing to contest the statutes authorizing private rights of action . . . because the defendants cannot cause the plaintiffs injury by enforcing the private-action statutes"); *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005) (holding that plaintiff "has failed to demonstrate the necessary causal connection between its injury [the loss of some minor patients unable to obtain parental consent for abortions] and these defendants"); *Shell Oil Co. v. Noel*, 608 F.2d 208, 213 (1st Cir. 1979) (dismissing Governor and Attorney General from a challenge to a state law that precluded oil companies from discriminating in price between purchasers of petroleum products on the ground that neither the Governor nor the Attorney General had ever taken or threatened to take any action with respect to the statute in question; "If a complaint fails to allege, or plaintiff fails to prove, that defendant state officers have ever taken or threatened to take any action with respect to a state statute, then there is no 'actual controversy' within the Declaratory Judgment Act, and there is 'no case or controversy' within Article III.").

Two additional features of this requirement deserve attention. First, it is insufficient that the defendants have some theoretical way of enforcing the law. *Southern Pacific Transp. v. Brown*, 651 F.2d 613, 614 n.2 (9th Cir. 1980) (dismissing railroads' lawsuit against Oregon Attorney General challenging Oregon law restricting negotiated settlements with injured employees; although Oregon courts might hold that the Attorney General could sue railroads to enjoin violations, contention that attorney general "could or would bring a civil suit to enjoin violations is wholly speculative"); *1st Westco Corp. v. School District of Philadelphia*, 6 F.3d 108, 114-15 (3d Cir. 1993) (dismissing state officials from lawsuit challenging state law that precludes hiring non-residents for certain school construction projects; "although it is theoretically possible for the [Pennsylvania Attorney General and Secretary of Education] to have initiated suit against [plaintiffs'] interests, there is no evidence in the record to demonstrate that two of the state's highest policy officials would have filed suit to rectify a statutory residency infraction by seven construction workers in connection with a contract with a local school district"); *Shell Oil Co. v. Noel*, 608 F.2d at 213 (dismissing suit against Governor and Attorney General of Rhode Island over a state law that precluded oil companies from discriminating in price between purchasers of petroleum products where neither the Governor nor the Attorney General had ever taken or threatened to take any action with respect to the statute in question; although "not fanciful" to suppose the state courts might interpret the law to provide such enforcement powers, they "have not settled . . . those questions").

Second, there is a significant difference between *seeking* compliance with a law and *enforcing* compliance with it. In *Snoeck v. Brussa*, 153 F.3d 984 (9th Cir. 1998), plaintiffs challenged the confidentiality requirements associated with making a complaint about improper judicial conduct to the Nevada Commission on Judicial Discipline. Improper judicial conduct complaints were filed on forms provided by the Commission, which set forth the confidentiality provisions, required that the plaintiffs acknowledge that they read and understood those confidentiality provisions, and stated that plaintiffs should not discuss the allegations of the complaint. *Id.* at 985. The plaintiffs sued the members of the Commission, and its Executive Director, challenging the validity of those confidentiality requirements. This Court nonetheless dismissed the lawsuit because the Nevada Supreme Court, and not the Commission, had the ultimate power of contempt that could punish, and accordingly deter, violations of the confidentiality provisions. *Id.* at 987. Thus, although the Commissioners and their Executive Director had to accept and apply the confidentiality provisions, could advise the Nevada Supreme Court when they thought a violation had taken place, required promises to abide by the rules by those filing complaints of judicial misconduct, and gave notice to those filing complaints of those rules, they still were not sufficiently connected to the enforcement of the confidentiality provisions to warrant a challenge that sued only them.

2. "Traceability" Cannot Be Met Here

Here, the relevant defendants are the Governor of the State of California (currently Edmund Brown) and the President of the University of California (currently Mark Yudof). (Plaintiffs originally sued the Board of Regents of the University of California as well. The court below dismissed the Board pursuant to the Eleventh Amendment, ER 26, 28, and plaintiffs' opening brief does not challenge that holding.) The complaint makes no allegations as to how these individuals enforce Section 31 in the sense just described. Rather, it simply describes their positions. ER 55(¶¶ 100-102). For that reason alone, the complaint should have been dismissed.[4]

But the flaw here goes beyond a simple pleading defect. Any substantive arguments that plaintiffs have standing in a lawsuit against these defendants would fail as well.

The Governor serves as an *ex officio* member of the Regents of the University of California, and as its president. ER 26; Cal. Const. Art. 9, § 9. The complaint does not allege how the Board of Regents as a whole has enforced Section 31, and, of course, setting policy (assuming the Board did that) is not the

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[4] The complaint obviously makes no allegations against the intervenor-defendants, who were not parties at the outset of the litigation. Any suggestion that those private parties might enforce Section 31 against anyone would be of no help to plaintiffs, since a federal lawsuit against them predicting such a state court suit would be both speculative and barred by the well–pleaded complaint rule. *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952).

same as enforcing a rule. Thus, even the body as a whole fails to qualify as a proper defendant, because one cannot sue legislative bodies for the laws or policies they pass. But even if the Regents were enforcing Section 31, it should be plain that *one* Regent alone, even its President, does not have such authority. *Grunert v. Campbell*, 248 Fed. Appx. 775, 778, 2007 WL 2436673, *2 (9th Cir. Aug. 6, 2007) (dismissing claim, on Eleventh Amendment grounds, against individual members of the Alaska Board of Fisheries that promulgated challenged regulation because "regulations cannot be promulgated by individual Board members, only by a majority of Board members officially acting as the Board."). There is no suggestion in any California law that the Governor, as President of the Regents, has any more authority over the University of California than any other Regent.[5]

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[5] The Governor appoints other Regents, after consultation with an advisory committee and subject to the approval of the California Senate. Cal. Const. Art. 9 § 9(a), (e). The California Constitution provides that the appointment of Regents should be kept free of political or sectarian influence. *Id.* § 9(f). Since Regents serve a term of twelve years (*id.*, § 9(b)), a Governor will be unlikely to appoint more than a handful of Regents in any given gubernatorial term.
A suit against a state official because that official has a limited ability to appoint others who may have a connection with the enforcement of the law being challenged is improper. *Okpalobi*, 244 F.3d at 422 (rejecting argument that the Governor and Attorney General enforce a state law limiting medical malpractice claims because they appoint members of a Board that reviews such claims to determine if they qualify for a damages cap). If it were otherwise, a Governor that appoints judges could be sued over any law that those judges enforce, even one where the Governor has no executive responsibility at all. *Shell Oil Co. v. Noel*, 608 F.2d at 211 n.2, 213 (dismissing Governor and Attorney General from a challenge to a Rhode Island law that precluded oil companies from discriminating in price between purchasers of petroleum products and permitted suit by purchasers against violators); R.I. Const. Art. 10, § 4 (governor fills judicial vacancies).

Curiously, President Yudof claims that the Governor can enforce Section 31, and is a proper defendant here. Yudof Brief 19. He does not rely on any allegations in plaintiffs' complaint, but rather (1) the Governor's general responsibility to enforce the law under Article V, Section 1 of California's Constitution, and (2) the fact that other Governors have taken steps in litigation to enforce Section 31 against other state officials. Yudof Br. 9, 19. He is wrong.

First, the Supreme Court has made it plain that the general authority to enforce the law (as in Article V, Section 1) is inadequate under the Eleventh Amendment (and thus, it seems likely, inadequate to meet the traceability requirement of Article III standing):

> "If, because [the Governor and Attorney General] were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That . . . is a mode which cannot be applied to the states of the Union . . . . "

Ex Parte Young, 209 U.S. 123, 157 (1908) (*quoting Fitts v. McGhee*, 172 U.S. 516, 530 (1899). *See also Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) ("A governor's 'general executive power' is not a basis for jurisdiction in most circumstances. . . . If a governor's general executive power

provided a sufficient connection to a state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant"); *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (dismissing Governor from lawsuit was proper because there was no "realistic potential" that his "general power to enforce the law of the State would have been applied" in this case (internal citations omitted)); *Gras v. Stevens*, 415 F. Supp. 1148, 1151-52 (S.D.N.Y. 1976) (3-judge court) (Friendly, J.) (Governor's authority under state law to take care that the laws are faithfully executed was insufficient to render him an appropriate defendant in a case challenging a state law governing divorce procedures; "this would extend *Ex Parte Young* beyond anything which the Supreme Court intended or has subsequently held").

Second, neither of the two cases Yudof cites to support the Governor's so-called authority to enforce Section 31 through litigation actually assessed whether the Governor had any. Yudof Br. 9 (*citing Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 700 (9th Cir. 1997) and *Connerly v. State Pers. Bd.*, 92 Cal App. 4th 16, 27 (2001)). *Compare People ex rel. Dep't of Conservation v. El Dorado County*, 36 Cal. 4th 971, 987, 116 P.3d 567, 573, 36 Cal. Rptr. 3d 109, 116 (2005) (noting that state official needed to have some "special interest" to have standing to seek a writ of mandate). That a past Governor once claimed such authority is hardly sufficient to prove that it actually exists. Moreover, the cases Yudof cites have nothing to do with the University of California. Even if the Governor had

some litigation authority against other officials in executive agencies, that would not mean that he has litigation authority against the Regents (or anyone else associated with the University of California) to enforce the provisions of Section 31 against *them*.

Finally, even if Yudof were correct that the Governor has adequate authority to enforce Section 31 *in theory*, that would still not overcome the problem that *this Governor* apparently does not even believe that Section 31 is constitutional (in the face of binding precedent from both this Court and the California Supreme Court).[6] Thus, it is most unlikely that the current officeholder will enforce Section 31 against anyone, and that, by itself, defeats any claim of traceability. *See* discussion *supra* at 9. (Yudof misleadingly cites *Shell Oil v. Noel*, 608 F.2d 208 (1st Cir. 1979) for the proposition that the "Governor and Attorney General were state officials who could be sued . . . because those officials had authority to enforce the law by suing those who violate it." Yudof Br. 19. The First Circuit actually held just the opposite, *viz.*, that the litigating authority of the Governor and Attorney General were too speculative, and that the suit against them should be dismissed on the ground that there was no Article III case or controversy with them. *See also Shell Oil*, 608 F.2d at 211 ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every

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[6] The Governor's brief so arguing is improper and should be stricken. Having failed to cross-appeal from the judgment below, he cannot seek its modification or reversal. *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1042 (9th Cir. 1992).

action attacking the constitutionality of a state statute.")).

As to Yudof himself, the complaint does not allege (and there is no other suggestion) that the UC President enforces compliance with Section 31, for example, by affecting the employment relationship between the University and those who operate admissions at the individual universities within the UC system.

Indeed, the Governor (in his capacity as a Regent) and the UC President are barely rule makers, at least in this area; they, after all, did not pass Section 31. They are much more rule compliers, against whom a lawsuit might conceivably be brought if they required or encouraged violations of Section 31. *See* ER 59 (¶ 130) ("*Until the passage of Proposition 209 in 1996*, however, the Regents had full power over all aspects of the admission policy . . . .") (emphasis added). Indeed, they seem analogous to the Seattle school district in *Washington v. Seattle School Dist. No. 1*, 438 U.S. 457 (1982), the case on which appellants rely so heavily. That school district, of course, was not the *defendant* in that case, but rather the plaintiff.

Section 31 does provide for enforcement of its prohibitions without any reference to the Governor or the UC President. Specifically, Section 31(g) states that "[t]he remedies available for violation of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California law." Here, that

existing law is the Unruh Civil Rights Act. Cal. Civ. Code § 51 (2007). *Nicole M. v. Martinez Unified School Dist.*, 964 F. Supp. 1369, 1388 (N.D. Cal. 1997) (Unruh Act applies to public schools). Section 52(c) of California's Civil Code provides that the Attorney General, district or city attorneys, and a "person aggrieved" may bring a civil action against those engaged in violation of the rights provided by the Unruh Act; and so, too, among state officials, it is primarily the Attorney General who has the theoretical right to enforce Section 31 against colleges and universities.

Finally, it deserves mention that if the defendants here did have the authority to enforce Section 31, they could not enforce it against plaintiffs (who are not the state actors that Section 31 regulates). Rather, their authority to enforce, if it existed, would be because they have a means of enforcing compliance with Section 31 by some third parties, relevant state actors such as the administrators of the admissions systems at individual UC institutions. Accordingly, an analysis of traceability would be governed by the Court's oft-quoted admonition in *Lujan v. Defenders of Wildlife*:

> When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed [to show standing]. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction-and perhaps on the response of others as well.

Lujan, 504 U.S. at 562 (emphasis in original).

C. Redressability

Even if plaintiffs could meet the requirement of "traceability" as to one of the current defendants, their case should still be dismissed because they cannot meet the third requirement of Article III standing, redressability.

To meet the redressability requirement, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (*quoting* Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38, 43 (1976)). Here, the plaintiffs seek "injunctive and declaratory relief restraining the defendants from enforcing Proposition 209 insofar as it applies to the admission, education and graduation of students at the University of California." ER 70; ER 72-73 (similar).

Conspicuously, plaintiffs do not ask for an injunction *requiring* defendants to order anyone to make race-conscious decisions in admission. Thus, this case is much different from the situation in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992), where the plaintiffs argued that the low number of judges in the Superior Court for Los Angeles County violated the Constitution and sought an order that in essence would have required the defendants to appoint more (in contravention of state law).

The relief plaintiffs seek against the defendants, requiring them to refrain from enforcing Section 31, will do plaintiffs no good at all. Even if defendants were now ordering or suing administrative personnel at the University of California to comply with Section 31, and were restrained from doing so in the future pursuant to an injunction issued by the court below, those administrators likely would give no more weight to plaintiffs' requests/demands for race-conscious treatment than they are doing now. The Attorney General and other state officials would be readily available to sue any UC administrators that deviated from Section 31's mandate in California state court. More importantly, any person aggrieved – *e.g.*, those who would fail to receive the benefits of Section 31's requirements in the admissions process of any UC college – could also sue those administrators in state court. In such lawsuits, state judges would stand ready to enforce Section 31 in state court. No sensible college or university administrators would change their behavior as a consequence of any judgment by the district court against these defendants.

In the court below, plaintiffs suggested that the state court system was just a "supplemental" means of enforcement of Section 31, as reflected by the absence of lawsuits in the state courts challenging admissions programs as violative of Section 31. This just gets the cause and effect relationship backwards. University officials are complying with Section 31 precisely because of the threat of treble damages and attorneys' fees (Cal. Civil Code § 52(a)) that might be imposed

against them in lawsuits brought by aggrieved persons. Neither the Governor nor the UC President can change those incentives.

The Tenth Circuit opinion in *Nova Health* is both on point and instructive. The plaintiff in that case was an abortion provider challenging an Oklahoma statute that provided that anyone who performed an abortion on a minor without parental consent or knowledge would be liable for the cost of any medical treatment that the minor might require in the future because of the abortion. *Nova Health*, 416 F.3d at 1153. Plaintiff claimed to have turned away business from potential minor patients because of the law. *Id.* at 1155. The plaintiff sued various state officials responsible for certain state medical institutions on the ground that those institutions might sue plaintiff for the medical treatment that they would be asked to give to minors who had previously obtained an abortion from plaintiff. *Id.* at 1153-54.

In holding that the plaintiff could not meet the requirement of redressability, the court stated that "the record cannot support a conclusion that a judgment enjoining *only these defendants* from filing suit to recover damages . . . would redress [plaintiff's] injury." *Id.* at 1158-59 (emphasis in original). Specifically, the court noted:

> Even if these defendants were enjoined from seeking damages against [plaintiff], there would still be a multitude of other prospective litigants who could potentially sue [plaintiff] under th[e] act. Most

> significantly, a judgment in [plaintiff's] favor would do nothing to prevent lawsuits against [plaintiff] by the minor patients who actually require subsequent medical care, or by any doctors or non-defendant hospitals and medical clinics who may treat them.

Id. at 1159.

In addressing plaintiff's argument that a favorable declaratory judgment might deter others from suing, the Tenth Circuit characterized it as "entirely speculative" and further noted that "it overlooks the principle that it must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly." *Id.*

If anything, plaintiffs here have a weaker case for redressability than the plaintiff in *Nova Health.* In that case, the state courts had not yet independently assessed the constitutionality of the state statute in question. Here, the California Supreme Court has, in *Coral Construction*, and the lower state courts in California would be bound by that decision, not anything the district court here might decide.

State courts and lower federal courts are equal expositors of federal law, including federal constitutional law. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) ("state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States'"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) ("Interpretation of federal law is

the proprietary concern of state, as well as federal, courts"); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located"); *R.W.T. v. Dalton*, 712 F.2d 1225, 1223 (8th Cir. 1983) ("'Federal courts (except for the Supreme Court) are not superior to state courts, or higher in any theoretical order of precedence.'") (*quoting* Richard S. Arnold, *State Power To Enjoin Federal Court Proceedings*, 51 Va. L. Rev. 59, 71 (1965)), abrogated on other grounds, *Kaiser Aluminum & Chemical Corp. v. Bonjourno*, 494 U.S. 827 (1990); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) (citing various authorities to the effect that state courts are coordinate courts with lower federal courts, on an equal footing in their exposition of federal law); David L. Shapiro, *State Courts And Federal Declaratory Judgments*, 74 Northwestern L. Rev. 759, 774 (1979) ("The concept that state and lower federal courts are coordinate courts on issues of federal law is one that, in my view, is deeply rooted in the federal system").

Here, state judges in the State of California, the officials ultimately responsible for the enforcement of Section 31, would not be bound by any ruling of the district court (or this Court) in this case. *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal 4th 315, 329-30, 235 P.2d 947, 958 (2010) ("lower federal courts' decisions do not bind us"). And although an opinion from

the U.S. Supreme Court would bind state courts in California on matters of federal law, the principle that standing is determined by the facts existing at the outset of a lawsuit precludes resort to that consideration in determining standing. *Davis v. FEC*, 554 U.S. 724, 735 (2008) ("the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"); *Lujan*, 504 U.S. at 571 n.5 (plurality op.) (rejecting argument that redressability was met because non-party agencies would follow ruling of the Supreme Court; "Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.").

In short, a judgment by the district court in this case would be nothing more than advice to the state courts of California. Those courts do not need such advice. *Snoeck v. Brussa*, 153 F.3d 984, 988 (9th Cir. 1998) ("If the federal courts were to take this case, however, and rule on the merits of the controversy it would be no more than an advisory opinion. The Nevada Supreme Court does not need our advice whatever it might be. The remedy plaintiffs seek . . . lies not with the federal courts, but with the State of Nevada.").

II. THIS ACTION IS BARRED BY *RES JUDICATA* AND COLLATERAL ESTOPPEL

This action is also barred by another pre-merits obstacle, *viz.*, the principles of *res judicata* (or claim preclusion) and collateral estoppel (or issue preclusion). (Since the action in the court below was dismissed on a Rule 12(b)(6) motion, none of the defendants have filed an answer in this case yet. Accordingly, none have yet raised these defenses, although they obviously have not waived them, and could raise them were a remand in order. Under these circumstances, this Court may consider the matter *sua sponte*. *Cf. Nash v. Bowen*, 869 F.2d 675, 679 (2d Cir. 1989) ("Although the district court did not rule on this point [concerning the preclusive effect of an earlier decision], it would seem that we are not precluded from doing so.") (citing authorities).)

In *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), this Court rejected a challenge to Section 31. As the brief of the Intervenors-Defendants-Appellees demonstrates, plaintiffs here make the same arguments that were rejected in *Wilson*. *E.g.*, Connerly-ACRF Br. 7-10. The plaintiffs in that case brought it as a class action, and the district court certified a class of

> all persons or entities who, on account of race, sex, color, ethnicity, or national origin, are *or will be* adversely affected by Proposition 209's prohibition of affirmative action programs operated by the State of California, any state or municipal agency, or any other political subdivision or governmental instrumentality of the State of California.

Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, 1490 n.5 (N.D. Cal. 1996) (emphasis added); *Coalition for Economic Equity v. Wilson*, 1996 WL 691962, *1 n.1 (N.D. Cal. Nov. 27, 1996).

When a class is defined to include future members, those members are bound by the judgment of the court. *NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731, 741 (9th Cir. 1984) ("A judgment on behalf of a class binds all person belonging to the class and all those who subsequently come into the class"); *County of Suffolk v. Long Island Lighting Co.*, 14 F. Supp. 2d 260, 266 (E.D.N.Y. 1998) ("All party-members, including absent members and future members, are equally bound by the strictures of [a] class action judgment."). (An exception to this rule would exist if plaintiffs here were not adequately represented in *Wilson* (*Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 n.6 (9th Cir. 2000)), but the complaint in this action makes no allegation that these plaintiffs were inadequately represented there, nor have plaintiffs' filings here or in the district court made any such suggestion.) Here, plaintiffs in this action were plainly to be included in the definition of the class defined in *Wilson*. The same holds true for the organizational plaintiffs; they do not allege any first-party injury in the complaint and, accordingly, must be basing their standing on that of their members. Those members are bound by the *Wilson* judgment.

Collateral estoppel precludes relitigation of the same issues in a subsequent lawsuit. Connerly and ACRF's discussion of *Wilson* demonstrates that collateral

estoppel precludes plaintiffs' suit here. The principle of *res judicata* precludes a subsequent lawsuit not only on the grounds that were put forward in the prior lawsuit, but by any grounds that could have been made. *Western Systems, Inc. v. Ulloa*, 958 F.2d 864, 868 (9th Cir. 1992). This rule also applies to plaintiffs' complaint; to the extent their theories were not set forth in *Wilson*, they could have been.

Accordingly, if plaintiffs believe (as they apparently do) that legal or factual circumstances warrant a different result from the result this Court reached in *Wilson*, they were obligated to intervene in that action and seek a modification or vacatur of the judgment there. This separate lawsuit is barred by preclusion principles.

III. THE COURT BELOW PROPERLY DISMISSED THE COMPLAINT

Finally, the court below correctly dismissed the complaint in this action. The reasons that the complaint does not state a claim for relief are set forth in the brief of appellees Connerly and ACRF. CIR will not repeat those arguments here, but note just one additional point. Appellants seem to emphasize the failure of this Court in *Wilson* to address the Supreme Court's *Bakke* decision. Appellants' Br. 33-34. It is hard to believe that a consideration of that case in *Wilson* would have led to a different result; four Justices in *Bakke* expressed a view entirely consistent with the result in *Wilson*, and none of the others expressed any disagreement with that view. *Regents of the University of California v. Bakke*, 438 U.S. 265, 379

(1978) (Brennan, J, concurring and dissenting) ("[A]ny State, including California, . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program").

Conclusion

For the foregoing reasons, this Court should dismiss this appeal on the ground that the district court lacked jurisdiction. Alternatively, this Court should affirm the judgment of the lower court on preclusion grounds or on the substantive grounds set forth in the brief of appellees Connerly and ACRF.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionately spaced (Times New Roman 14-point), and contains 6951 words exclusive of tables, this certificate, the cover, and the proof of service.

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Certificate Of Service And Filing

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 11-15100, 11-15241

I, Michael E. Rosman, certify that this brief is identical to the version submitted electronically on [date] Jul 15, 2011.

Date Jul 19, 2011

Signature s/ Michael E. Rosman

(either manual signature or "s/" plus typed name is acceptable)