No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

-AND-

CHASE M. CANTRELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CHASE CANTRELL ET AL. IN OPPOSITION

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QUESTION PRESENTED

Whether a state initiative violates the Equal Protection Clause by amending a state constitution to remove from the ordinary political process of governmental decisionmaking a constitutionally permissible topic solely because it is "racial in nature."

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Chase Cantrell, M.N., a minor child, by Karen Nestor, Mother and Next Friend, Karen Nestor, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, Paula Uche, Mother and Next Friend to C.U., a minor child, Joshua Kay, Sheldon Johnson, Matthew Countryman, M.R., a minor child, by Brenda Foster, Mother and Next Friend, Brenda Foster, Mother and Next Friend of M.R., a minor child, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, Cathy Alfaro, Guardian and Next Friend of T.J., a minor child, S.W., a minor child, by Michael Weisberg, Father and Next Friend, Michael Weisberg, Father and Next Friend of S.W., a minor child, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C., II, a minor child, by Carolyn Carter, Mother and Next Friend, Carolyn Carter, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, and Matthew Robinson, Father and Next Friend of J.R., a minor child (together, the "Cantrell Respondents").

In the consolidated case, there is a separate group of Respondents, which includes the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia Brown,

Michael Gibson, Christopher Sutton, Laquay Johnson, Turqoise Wiseking, Brandon Flannigan, Josie Human, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young, Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 386, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmative Action Party (together, the "Coalition Respondents"). Additional defendants below are the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, Irvin D. Reid, and Lou Anna K. Simon.

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INTRODUCTION

By invalidating Michigan Ballot Proposal 06-02 ("Proposal 2"), the Sixth Circuit, sitting en banc, restored to every citizen in Michigan the constitutionally guaranteed right to equal and robust political participation. Proposal 2, an amendment to the Michigan Constitution passed by voters in 2006, prohibits the State and its political subdivisions from, *inter alia*, "grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education." As enacted, Proposal 2 manipulates the political process by imposing distinctively disadvantageous barriers upon proponents of permissible policies under the Fourteenth Amendment incorporating consideration of racial identity and background as part of a diverse student body. Proposal 2 slants the political process in a way that disfavors policies that would take race into account, but favors—indeed, mandates—policies that bar taking race into account. Stated more specifically, Proposal 2 rigs the political process *against* race-based policies that *favor* racial diversity so as to systemically *endorse* race-based policies that *disfavor* racial diversity by discriminatorily recalibrating the rules of governmental decisionmaking.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982), this Court acknowledged that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action," but legislation, precisely like Proposal 2, that "allocates governmental power nonneutrally, by explicitly using the *racial* nature of

a decision to determine the decisionmaking process" violates the Equal Protection Clause. *Id.* Thus, Michigan may enact a constitutional amendment that subjects *all* revisions to state universities' admissions policies to statewide ballot initiative. The Fourteenth Amendment, however, does not permit Michigan to selectively distort the decisionmaking process so that only those citizens who advocate consideration of race—as compared to those who oppose any consideration of race or those who advocate or oppose consideration of factors other than race—must clear the significant hurdle of mounting a successful campaign to amend the Michigan Constitution. Pet. App. 15a ("[T]he political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course.").

To be clear, the Sixth Circuit's ruling does not concern the constitutionality of race-conscious admissions. Such programs, if properly designed, today remain constitutionally permissible under the Fourteenth Amendment but not required. Nor does the Sixth Circuit's ruling challenge the ability to repeal such programs, once instituted. Such a repeal remains constitutionally permissible. *See Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 539 (1982). The government entities that instituted the programs may therefore repeal or modify them at anytime, and at the state level, there are ample ways to repeal or modify them without running afoul of the Fourteenth Amendment.

Proposal 2, however, is no mere repeal. The vice of Proposal 2 is that it selectively shuts off access to

the ordinary political processes for advocates of otherwise constitutionally permissible race-conscious policies—even though those ordinary political processes remain fully open and available to advocates for consideration of other non-racial factors or criteria. Proposal 2 further singles out race-conscious admissions policies for peculiarly burdensome treatment by entrenching a ban on such policies in the state constitution while leaving other admissions practices in the hands of state universities' elected or governor-appointed boards (hereinafter "Boards"), which, under Michigan law, have long enjoyed autonomy over admissions policies.

Proposal 2 effectively creates two political processes of governmental decisionmaking for higher education admissions policies: one that preserves the Boards' traditional control over whether to consider legacy status, athletics or virtually any other lawful factor in the admissions process, and another that requires a constitutional amendment before the Boards can even consider whether to adopt race-conscious admissions policies, even when such policies would pass muster under this Court's stringent Fourteenth Amendment standards. By targeting race in admissions for "peculiar and disadvantageous treatment," Proposal 2 "plainly 'rests on distinctions based on race'" and is therefore a presumptively unconstitutional "racial classification." *Seattle*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks

omitted)); *see also Hunter v. Erickson*, 393 U.S. 385, 393 (1968) ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.").

Thus, strictly following the principle established by this Court in *Seattl*e and *Hunter*, the Sixth Circuit held that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment. Petitioner now seeks review before this Court, disputing the merits of the Sixth Circuit's equal protection analysis, but none of his critiques warrant this Court's review for the reasons set forth below.

STATEMENT[1]

Under its state constitution, Michigan's public universities are controlled by independent Boards, each of which has the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. Board members have long enjoyed autonomy over admissions policies, and they have largely delegated the responsibility to establish admissions standards, policies, and procedures to units within the institutions, including central admissions offices, schools and colleges. Students, faculty, and other individuals have always been free to lobby Michigan's public universities for or against

[1] The en banc, panel, and district court opinions set out in more detail the undisputed facts underlying this litigation. *See* Pet. App. 7a-12a; 106a-111a; Supp. Pet. App. 270a-292a.

the adoption of particular admissions policies. They have historically done so. By the 1990s, in response to decades of robust, hard-fought political debate, admissions decisions in many of Michigan's public universities' graduate and undergraduate programs included consideration of race as one of a multitude of factors.

In 2003, this Court in *Grutter v. Bollinger* upheld as constitutional the University of Michigan Law School's holistic, race-conscious admissions policy. 539 U.S. 306, 325, 334 (2003). On the same day, the Court invalidated the admissions policy of the University of Michigan's undergraduate college as not narrowly tailored to serve the State's compelling interest in obtaining the educational benefits of student-body diversity. *See Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003).

Following *Grutter* and *Gratz*, Michigan's public universities amended their admissions policies as needed to comply with *Grutter*. After *Grutter*, for instance, the University of Michigan's undergraduate admissions officers, "[i]n the context of . . . individualized inquiry into the possible diversity contributions of all applicants," *Grutter*, 539 U.S. at 341, considered race along with another "50 to 80 different categories," such as personal interests and achievements, geographic location, alumni connections, athletic skills, socioeconomic status, family educational background, overcoming obstacles, work experience and any extraordinary awards, both inside and outside the classroom. Supp. Pet. App. 283a-284a.

In response to this Court's rulings in *Gratz* and *Grutter*, a proposal to amend the Michigan Constitu-

tion was placed on the November 2006 statewide ballot. The initiative, Proposal 2, sought "to amend the State Constitution to ban affirmative action programs." *See* Notice of State Proposals for November 7, 2006 General Election, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf, at 5 (last visited Jan. 31, 2013). It passed. Proposal 2 amended the Michigan Constitution to include the following provisions, entitled "Affirmative Action," in Article I:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or with-

> in the State of Michigan not included in sub-section 1.

Pet. App. 8a-9a (citing Mich. Const. art. I, § 26).[2] No prior constitutional amendment in Michigan had ever dealt with any matter relating to university admissions or in fact with anything related to higher education governance or affairs.

In December 2006, Proposal 2 took effect and produced for the first time two significant changes to the admissions policies at Michigan's public universities. First, Michigan's public universities were required to categorically remove "race, sex, color, ethnicity, or national origin" as potential factors in the admissions process even though the Boards and their designated admissions committees could continue to consider any and all other factors. Pet. App. 9a. Second, Proposal 2 "entrenched this prohibition at the state constitutional level, thus preventing public colleges and universities or their boards from revisiting this issue—and only this issue—without repeal or modification of [Proposal 2]." Pet. App. 9a.

On November 8, 2006, the day after Proposal 2 was approved, the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary (the "Coalition Plaintiffs") filed suit in the United States District Court for the Eastern District of Michigan.

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[2] Michigan is home to fifteen public four-year universities and twenty-eight public two-year community colleges. *See* Michigan's Higher Education System, http://www.pcsum.org/Portals/0/docs/fsu_heguide2.pdf (last visited Feb. 1, 2013).

About a month later, the Michigan Attorney General filed a motion to intervene as a defendant, which the court granted. Pet. App. 10a.

On December 19, 2006, the Cantrell Plaintiffs, a group of students, faculty, and prospective applicants to Michigan's public universities, filed a separate suit in the United States District Court for the Eastern District of Michigan. Pet. App. 10a. The Cantrell Plaintiffs sought to prohibit Proposal 2's enforcement only as applied to university admissions, Pet. App. 10a, on the grounds that Proposal 2 violates the Fourteenth Amendment by impermissibly skewing and restructuring Michigan's political process insofar as it establishes a separate governmental decisionmaking process for higher education admissions policies that satisfy the Fourteenth Amendment and *favor* consideration of race (as opposed to those that *limit* consideration of race), thereby curtailing the same avenues of public discourse available for consideration of race-neutral policies and programs.

The district court consolidated the two cases on January 5, 2007. *See* Pet. App. 109a. After discovery, the district court denied the Cantrell Plaintiffs' motion for summary judgment and granted the Attorney General's motion for summary judgment. *See* Pet. App. 11a-12a; Supp. Pet. App. 267a-336a. The district court then denied the Cantrell Plaintiffs' motion to alter or amend its Order. Pet. App. 12a.

The Cantrell Plaintiffs appealed the district court's grant of the Attorney General's motion for summary judgment and its denial of their motion for reconsideration. Pet. App. 12a. Simultaneously, the

Coalition Plaintiffs appealed the district court's grant of the Attorney General's motion for summary judgment. Pet. App. 12a. A three-judge panel of the Sixth Circuit reversed. Pet. App. 12a, 101a-183a. Following this Court's precedent in *Seattle* and *Hunter*, the panel held Proposal 2 unconstitutional as applied to Michigan's public universities and ordered that summary judgment be entered in favor of the Plaintiffs-Appellants. Pet. App. 140a, 156a. The Sixth Circuit granted the Attorney General's petition for rehearing en banc. Pet. App. 12a.

Sitting en banc, the Sixth Circuit invalidated Proposal 2. Relying on *Seattle* and *Hunter*, the Sixth Circuit held that a political enactment denies equal protection when it (1) has a "racial focus," insofar as it targets a policy or program for selective excision from the ordinary political processes solely because, as a facial matter, it *favors* some consideration of race as a factor to be taken into account in admissions and (2) "reallocates political power or reorders the decisionmaking process" in a way that shuts off all the usual channels of discourse and debate available for similar topics not racial in nature. Pet. App. 21a-22a (citations omitted).

As the Sixth Circuit recognized, it is undisputed that after Proposal 2, the *only* recourse available to a person seeking to restore the constitutionally permissible consideration of race as one factor in higher education admissions is to mount a successful statewide electoral campaign to amend the Michigan Constitution—"an extraordinarily expensive process and the most arduous of all the possible channels for change." Pet. App. 36a. In contrast, a Michigan citizen lobbying against the consideration of race, or for

or against consideration of race-neutral factors such as legacy status, athletics or indeed any other dimension of experience or background treated as an identifying characteristic, may use any number of less burdensome avenues to change or maintain admissions policies, for example, directly engaging in discourse with the Boards or the appropriate university committees. *See* Pet. App. 35a. As the Sixth Circuit explained, "[b]ecause less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment." Pet. App. 37a-38a.

REASONS FOR DENYING THE WRIT

The petition should be denied.

First, Petitioner alleges that the Sixth Circuit made several errors in its application of *Seattle* and *Hunter* to the distinctive facts of this case. Such requests for error-correction are inappropriate grounds for granting certiorari. Moreover, many of Petitioner's critiques are highly fact-bound and entirely Michigan-specific. In any event, the Sixth Circuit's ruling is a proper application of this Court's established precedent in *Seattle* and *Hunter*. *See* Part I *infra*. Proposal 2 creates an impermissible race-based classification within the political process for governmental decisionmaking by singling out policies that favor race-conscious admissions for particularly disadvantageous treatment, compared to other pertinent elements of diversity that a University

may still decide whether to consider in admissions through the ordinary political processes.

Second, Petitioner argues that the Sixth Circuit's ruling conflicts with this Court's decision in *Grutter*. To the contrary, *Grutter* supports, rather than undermines, the Sixth Circuit's decision. *See* Part II *infra*.

Third, although the Sixth Circuit declined to follow the Ninth Circuit's decision to uphold a ballot initiative similar to Proposal 2, this very shallow split deserves further percolation. The Ninth Circuit's holding is unlikely to be persuasive outside its jurisdiction because it relies on reasoning that has been undermined by subsequent decisions of this Court in *Grutter* and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). In fact, the Ninth Circuit hedged its reasoning on the presumption that those cases would come out entirely the opposite way. *See* Part III *infra*.

Finally, there is no justification for this Court to grant certiorari to overrule *Seattle* and *Hunter*. *See* Part IV *infra*. In recent years, attempts to distort the political process by racial classification so as to cut off public debate and cleave certain topics from the ordinary political process because they are "racial in nature" have been fortunately rare, but the core doctrine articulated in *Hunter* and *Seattle* cannot be extracted without undermining the integrity of the Fourteenth Amendment and recasting its animating purpose. *Hunter* and *Seattle* are firmly grounded in the longstanding and incontrovertible rationale that "[t]he Equal Protection Clause of the Fourteenth Amendment guarantees . . . the right to

full participation in the political life of the community." *Seattle*, 458 U.S. at 467. Indeed, the core holding of *Seattle* and *Hunter* has, if anything, been strengthened in light of the course of Fourteenth Amendment jurisprudence over the past thirty years, including such decisions as *Grutter* and *Parents Involved*.

I. THE SIXTH CIRCUIT'S STRAIGHTFORWARD APPLICATION OF *SEATTLE* AND *HUNTER* DOES NOT WARRANT THIS COURT'S REVIEW.

The political restructuring doctrine proscribing racial classifications within the political process is a bedrock tenet of Fourteenth Amendment jurisprudence, originally set forth by this Court in *Hunter* and *Seattle*. The Sixth Circuit correctly applied these longstanding precedents in striking down Proposal 2.

In *Hunter*, black and white citizens of Akron, Ohio had won passage of a local ordinance outlawing racial and religious discrimination in housing. White citizens then waged a successful campaign to amend the city charter to repeal that ordinance and to prevent the adoption of any similar ordinance until it was approved in a referendum. The Court found that the charter amendment forced those who wanted protection from racial or religious discrimination to run a gauntlet that those who sought to prevent other abuses in real estate did not have to run. The Court struck down the amendment because the "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or

give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S.at 393.

Seattle reaffirmed *Hunter*. Blacks and other citizens had won school board approval of a busing plan to lessen the *de facto* segregation in Seattle's public schools. White citizens then waged a successful campaign to pass a statewide initiative prohibiting school boards from using busing to achieve racial integration, while permitting the use of busing for a number of other purposes. The Court again held that a state could not selectively gerrymander the political process to impose more onerous political burdens on those seeking to promote racial integration than it imposed on those pursuing other policy agendas. *See Seattle*, 458 U.S. at 474-75.[3]

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[3] Given the historical contexts leading up to the articulation of this principle, it is scarcely surprising that it was initially framed in part by reference to those groups most likely to be disadvantaged from the plucking out of racial topics from the political process, whether "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), or "racial minorities," *Hunter*, 393 U.S. at 391. In *Seattle*, however, the Court held that the Constitution did not permit "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467. The same is true, of course, no matter what group of persons finds itself targeted by a state law that selectively rigs the political decisionmaking process against it simply because that group seeks to advocate race-conscious policies. *Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."); *see*

Petitioner raises three critiques of the Sixth Circuit's application of *Hunter* and *Seattle* to the distinctive facts of this case. In each instance, however, the Sixth Circuit faithfully interpreted and applied these established precedents. In any event, however, these requests for mere error-correction are not sound reasons to grant the petition. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

A. Proposal 2 Has a Racial Focus.

As a threshold matter, the selective political restructuring doctrine applies here because Proposal 2 has a "racial focus." Pet. App. 26a. As the Sixth Circuit correctly ruled, Pet. App. 22a-26a, Proposal 2 surgically removes, categorically prohibits, and uniquely burdens otherwise permissible consideration of race in the ordinary political processes utilized by Michigan's elected or politically appointed Boards to fashion admissions policy at state universities. Petitioner contends that the Sixth Circuit erred in holding that Proposal 2 has a "racial focus," because it "does not burden minority interests and minority interests alone." Pet. 21. But this argument mistakes the underpinnings of the Fourteenth Amendment. Even more so in the case of Proposal 2 than with Initiative 350 in *Seattle*, for example, the stark focus is on the face of the initiative: race-conscious policies that are consistent with the Four-

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City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995); *Parents Involved,* 551 U.S. at 741-42.

teenth Amendment are explicitly and categorically deleted from the political process by the text of Proposal 2. *See Seattle*, 458 U.S. at 474.

The fact that Proposal 2 also prohibits consideration of sex—another constitutionally protected class—as a factor in the admission process does not defeat a valid claim of racially selective political restructuring, as *Hunter* and *Seattle* confirm. In *Hunter*, the challenged initiative burdened racial and non-racial minorities which, grouped together, constituted a majority of the electorate, but this Court found that the law nonetheless had a racial focus. 393 U.S. at 387, 390-91; *accord Lee v. Nyquist*, 318 F. Supp. 710, 716-17 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); *Seattle*, 458 U.S. at 472 ("[W]e may fairly assume that members of the racial majority both favored and benefited from [the] fair housing ordinance [at issue in *Hunter*]."). Moreover, "[t]he history of Proposal 2 and its description on the ballot leave little doubt" that "[h]ere, as in *Hunter*, the clear focus of the challenged amendment is race." Pet. App. 26a n.4. Of course, were it otherwise, those seeking to distort the political process in the ways proscribed by this Court in *Seattle* and *Hunter* could achieve their aim merely by strategically including more than one class of policy topics in their list of taboo areas as a subterfuge. *Id.*

Indeed, *Seattle* "conclusively answers whether a law targeting policies that seek to facilitate classroom diversity, as Proposal 2 does, has a racial focus." Pet. App. 23a. Just as constitutionally permissible programs that promote racial diversity within public schools "prepar[e] minority children for citizenship in our pluralistic society, while . . . teaching

members of the racial majority to live in harmony and mutual respect with children of minority heritage," *Seattle*, 458 U.S. at 473 (internal quotation marks and citation omitted), constitutionally permissible race-conscious admissions policies at universities "promote[] cross-racial understanding, help[] to break down racial stereotypes, and enable[] students to better understand persons of different races," *Grutter*, 539 U.S. at 330 (alteration omitted) (internal quotation marks omitted).

Thus, both the enactment at issue in *Seattle* and Proposal 2 rigged decisionmaking on race-conscious policies. As a result of Proposal 2, Michigan's public universities are able to continue considering virtually *any* aspect of students' backgrounds and experiences as part of their individualized, holistic admissions process—*except* for race. While all other citizens may continue to advocate admissions policies that advance their own interests, anyone who believes that any of Michigan's public universities should restore their prior race-conscious admissions policies may now express this belief only by seeking a state constitutional amendment.

B. Michigan Admissions Policies Are Part of the Political Process.

Petitioner next argues that the Sixth Circuit erred because admissions policies in Michigan "are not part of the political process," Pet. 23, insofar as the Boards of Michigan's public universities have delegated the responsibility of establishing admissions standards to politically unaccountable admissions committees. Not only does Petitioner's argument require an exclusively fact-bound interpreta-

tion of Michigan law that does not warrant this Court's review, but it is also erroneous.

First, such delegation does not affect whether admissions decisions should be considered part of the political process. As the Sixth Circuit explained, although "rule-making powers are delegated from the President to appointed cabinet officials . . . to civil service professionals . . . [, w]ithout question, federal rule-making is part of the political process." Pet. App. 32a.

Second, as a clear matter of state law, Petitioner's argument is belied by the Michigan Constitution, state statutes, university bylaws and current practices—which, together, empower popularly elected, politically accountable governing Boards with broad authority to alter or revoke any delegation of responsibility, including that to admissions committees. *See* Pet. App. 31a-32a (summarizing Boards' authorities). Petitioner's argument is likewise contradicted by the undisputed factual record below, which demonstrates that the democratically elected Boards regularly discuss admissions practices at their monthly public meetings. *Id.* at 30a-31a (summarizing evidence). Tellingly, Board candidates include their views on race-conscious admissions policies in their platforms.[4] Thus, the Sixth Circuit correctly

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[4] *See* Pet. App. 33a (citing League of Women Voters, 2005 General Election Voter Guide, *available at* http://www.lwvka.org/guide04/regents/html (last visited Jan. 31, 2012) (noting that a candidate for the Board of Regents pledged to "work to end so-called 'Affirmative-Action,' a racist, degrading system")).

held that admissions decisions are an integral part of Michigan's political process.

Petitioner further argues that the "political gymnastics" involved in lobbying at the university level are "far worse than simply achieving a 51% vote in a statewide referendum." Pet. 24. This argument, too, is fact-intensive, Michigan-specific, and utterly flawed. The Sixth Circuit's decision does not, as Petitioner suggests, mandate that "a state may end affirmative action in higher education only through such a Byzantine route," nor is Michigan "constitutionally barred from pursuing a simpler means of addressing the issue." Pet. 24. Rather, the Equal Protection Clause bars Michigan from "allocat[ing] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S. at 469-70. Nor may Michigan "remov[e] the authority to address a racial problem—and *only* a racial problem—from the existing decisionmaking body." *Id.* at 474. Under this Court's precedents, and the Sixth Circuit's opinion, a simpler, *race-neutral* means of addressing this issue would not run afoul of the Fourteenth Amendment.[5]

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[5] Petitioner wrongly asserts that, in *Seattle*, this Court "expressly disclaimed that the political-restructuring theory would apply in this context." Pet. 17. Petitioner cites to the *Seattle* majority's response to Justice Powell's dissent, where he wondered whether, "if the admissions committee of a state law school developed an affirmative-action plan," other public university officials with arguably "greater authority under state law" might be powerless after *Seattle* to modify it. 458 U.S. at 498 n.14 (Powell, J., dissenting). In response, however, the *Se-*

In any case, these arguments are purely factual in nature, turning on Michigan law and practices, and therefore are not a basis for this Court's review.

C. The Political Restructuring Doctrine Proscribes All Racial Classifications Within the Political Process, Drawing No Distinction Between Antidiscrimination Legislation and So-Called Preferential Treatment Legislation.

Finally, Petitioner contends that the Sixth Circuit erred because the political restructuring doctrine applies "only to laws or policies that condone discrimination against minorities" rather than laws that "prohibit discrimination by precluding unconstitutional, preferential treatment." Pet. 15 (emphasis omitted). Petitioner is wrong: *Hunter* and *Seattle* permit no distinction between "the political-process rights afforded when seeking antidiscrimination legislation and so-called preferential treatment." Pet. App. 39a. Petitioner's contrary view is incompatible

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attle majority merely confirmed that its decision did not create a "vested constitutional right to local decisionmaking." *Id.* at 480 n.23. Rather, it was the "racial nature of the way in which [Initiative 350] structure[d] the *process* of decisionmaking" that the *Seattle* Court found objectionable. *Id.* Thus, "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a *race-neutral* manner." *Id.* (emphasis added). And of course, Justice Powell's scenario is not what occurred in Michigan, where Proposal 2 foreclosed any possibility of action by university officials with regard to using race—and race alone—as a factor in admissions "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483.

with those cases, which constitutionally protect a fair political *process* as opposed to any particular *outcome*. As *Seattle* held, the purpose of the political restructuring doctrine, fortified by the Court's subsequent decisions, is to ensure that a state does not wall off certain racial issues in their entirety from the ordinary political process for discourse and decisionmaking.

Furthermore, *Seattle*'s facts foreclose Petitioner's argument and demonstrate that the political-process doctrine does not apply only to laws that "condone discrimination against minorities." Pet. 15. Indeed, "[t]he only way to find the *Hunter*/*Seattle* doctrine inapplicable to the enactment of preferential treatment is to adopt a strained reading that ignores the preferential nature of the legislation at issue in *Seattle*, and inaccurately recast it as anti-discrimination legislation." Pet. App. 39a. Petitioner does just that. Pet. 16-17 ("The *Seattle School District* referendum barred the use of busing, but only if used to combat the effects of historic discrimination."). While not a basis for this Court's review in any case, Petitioner's efforts to modify *Seattle*'s facts to support this purported distinction fail.

In *Seattle*, this Court struck down a statewide initiative that banned an inter-district busing program aimed at integrating Seattle's elementary and secondary schools, even though the busing program was not constitutionally mandated to remedy *de jure* segregation. *See* 458 U.S. at 461-64; *see also Parents Involved*, 551 U.S. at 720 (noting that the public schools in Seattle School District No. 1 were never "segregated by law" nor "subject to court-ordered desegregation"). The inter-district busing program was

thus an "ameliorative measure, and not a response to discrimination." Pet. App. 39a. "Because prohibiting integration (when it is not constitutionally mandated) is not tantamount to discrimination . . . the Court in *Seattle* did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure equal treatment." Pet. App. 39a-40a (internal quotation marks omitted).

Petitioner inaccurately attempts to recategorize the enactment at issue in *Seattle* as one which "made it more difficult for minorities to lobby for protection from discrimination." Pet. 17 (emphasis omitted). Yet, in applying the political restructuring doctrine to an obstacle impeding a policy intended to promote non-remedial voluntary integration, the *Seattle* Court drew no distinction between the equal protection rights at stake in seeking antidiscrimination legislation and those at stake in seeking what Petitioner characterizes as preferential treatment. *Cf. Romer v. Evans,* 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER DECISION OF THIS COURT.

Petitioner also contends that "the Sixth Circuit's decision . . . conflicts with *Grutter*." Pet. 9. Once again Petitioner seeks mere error correction in the application of this Court's precedents and, once again, Petitioner's legal analysis is flawed.

In *Grutter*, this Court allowed universities to "consider[] race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration," a holding that the Sixth Circuit did not "address or upset." Pet. App. 7a. Indeed, as the Sixth Circuit expressly recognized, this case is *not* about the "constitutional status or relative merits of race-conscious admissions policies." Pet. App. 13a. The narrow question before the Sixth Circuit was whether Proposal 2 violates the Equal Protection Clause by distorting the political process to toughen the rules of engagement solely because the constitutionally permissible subject matter *favored racial diversity*. *Grutter* did not remotely touch, let alone address, that issue.

Petitioner further argues that the Sixth Circuit's decision conflicts with this Court's dicta in *Grutter* presuming that race-conscious admissions policies "must be limited in time." Pet. 18 (quoting *Grutter*, 539 U.S. at 342). Petitioner asserts that after the Sixth Circuit's decision, "[w]hat was merely permitted is now required." Pet. 18. Petitioner either misunderstands or misstates the Sixth Circuit's holding. The Sixth Circuit neither requires race-conscious admissions policies in Michigan, nor prevents their repeal. *See infra* Part IV. All that its decision does is to keep open the usual and otherwise available channels of political decisionmaking and discourse to debate the pluses and minuses of treating racial background and experience in the same way as universities value (or do not value) other backgrounds and experiences in the course of identifying and selecting a diverse student body. Nor does the Sixth Circuit's decision prevent Michigan from "experi-

menting with a wide variety of [race-neutral] alternative approaches," Pet. 18 (quoting *Grutter*, 539 U.S. at 342), such as, for example a statewide initiative replacing multi-factor, individualized review policies passing muster under *Grutter* with admissions policies that consider only applicants' GPA and SAT scores. And the governing Boards can certainly institute, repeal and modify admissions policies an programs as they always have.

Finally, Petitioner contends that the Sixth Circuit's decision conflicts with *Grutter*, which he claims "held that it is unconstitutional for a university to pursue a race-based admissions program that inures primarily to the benefit of minorities." Pet. 9. That was not the holding of *Grutter*. This Court did not address whether race-conscious admissions policies "inure primarily to the benefit of minorities," or have a "racial focus," for purposes of a political-restructuring claim. Rather, the Court held that public colleges and universities have a compelling interest in "obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343. And while it is certainly true that increased representation of racial minorities in higher education benefits all students, *see Grutter*, 539 U.S. at 327-33; *Seattle*, 458 U.S. at 472-73, this Court has made clear that this fact does not undermine a political restructuring claim, as Petitioner erroneously suggests. Pet. 19.

For example, in *Seattle*, this Court recognized that although "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," *Seattle*, 458 U.S. at 472 (internal quotation marks omitted), it was reasonable to assume

"that members of the racial majority both favored and benefited from [the] Akron[] fair housing ordinance" at issue in *Hunter*. *Id.* Moreover, the Sixth Circuit's conclusion that race-conscious admissions policies have a "racial focus" does not render such policies unconstitutional under *Grutter*. *See* 539 U.S. at 328 (internal quotation marks omitted). Petitioner's assertion to the contrary misses the meaning of *Grutter* altogether.[6]

III. FURTHER PERCOLATION IN THE COURTS OF APPEALS IS WARRANTED TO ADDRESS THE SHALLOW, AND STALE, SPLIT BETWEEN THE SIXTH AND NINTH CIRCUITS.

Petitioner is correct, Pet. 10, that the Sixth Circuit declined to follow the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), but it would be premature for this Court to resolve this split. No other court of appeals has yet addressed this issue, and this Court would benefit from further percolation insofar as the Ninth Circuit's ruling likely will be of limited persuasive value outside of its jurisdiction.

As the Sixth Circuit correctly recognized, *Wilson* is "incompatible" with this Court's more recent decision in *Grutter*. Pet. App. 40a n.8. *Wilson* is equally incompatible with *Parents Involved*, which also postdated *Wilson*. In *Wilson*, the Ninth Circuit upheld a

[6] As Petitioner acknowledges, "[t]his case presents a different issue" from what is at stake in *Fisher v. University of Texas at Austin*, No. 11-345, which is currently pending on this Court's docket. Pet. 13 n.2.

California ballot initiative similar to Proposal 2 by manufacturing an exception to the *Hunter*/*Seattle* doctrine for "impediment[s] to receiving preferential treatment," such as race-conscious admissions policies. 122 F.3d at 706-09. For the Ninth Circuit, the critical distinction was that the race-conscious admissions policies banned by the California ballot initiative are "inherently invidious" whereas the desegregation programs at issue in *Seattle* simply provided equal protection against discrimination. *Wilson*, 122 F.3d at 707 n.16.

As discussed in Part I.C *supra* and explained in more depth by the Sixth Circuit, this distinction is an erroneous application of *Hunter* and *Seattle*. Equally significant, this distinction is untenable after *Grutter* and *Parents Involved*. *Grutter* established that narrowly tailored race-conscious admissions programs are not always inherently invidious. *See* 539 U.S. at 334-44. By contrast, consideration of individual students' race in the voluntary busing program at issue in *Seattle* was more than just equal protection from discrimination. *See* Pet. App. 39a ("The only way to find the *Hunter*/*Seattle* doctrine inapplicable to the enactment of preferential treatment is to adopt a strained reading that ignores the preferential nature of the legislation at issue in *Seattle* . . . ."). The Sixth Circuit's reasoning also is consistent with *Parents Involved*, in which this Court held that not all desegregation programs are constitutionally permissible. 551 U.S. at 722-48. And while the error of the *Wilson* court's distinction may not have been obvious in 1997, *Parents Involved* and *Grutter* plainly expose its flaws.

More recently, in *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), a panel of the Ninth Circuit rejected another challenge to the California ballot initiative at issue in *Wilson*. Yet, as the Sixth Circuit recognized, the *Brown* decision "offered only conclusory support for the precedential decision in *Wilson*." Pet. App. 40a-41a n.8. While the Ninth Circuit in *Brown* rejected the contention that *Grutter* "overrules" *Wilson*, it failed to grapple with and recognize the extent to which *Grutter* and *Parents Involved* undermine the core distinction underlying *Wilson*. *See Brown*, 674 F.3d at 1136. Instead, the *Brown* panel simply parroted the erroneous distinction in *Wilson* in support of its "bottom line" that its prior decision "remains the law of the circuit," and, therefore, that it would be inappropriate for a panel to overrule it. *Id.*

Notwithstanding Petitioner's argument to the contrary, the California Supreme Court's decision in *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947 (Cal. 2010), does not augment the case for granting certiorari. *See* Pet. 11. Like *Brown*, *Coral Construction* simply follows *Wilson* in wrongly concluding that "[i]mpediments to preferential treatment do not deny equal protection" and therefore are not subject to the *Hunter*/*Seattle* doctrine. *See Coral Construction*, 235 P.3d at 959 (quoting *Wilson*, 122 F.3d at 708). The California Supreme Court entirely failed to address the impact of this Court's more recent decisions in *Parents Involved* and *Grutter*.[7]

[7] And contrary to the assertion of some of Petitioner's amici, the Sixth Circuit's decision does not conflict with the Louisi-

Because there is at most a very shallow and likely stale split on the question presented, this Court should await further percolation in the lower courts regarding application of existing and well-settled Fourteenth Amendment jurisprudence in the distinctive, and ultimately narrow, context at issue here.

IV. THERE IS NO JUSTIFICATION FOR GRANTING CERTIORARI TO RECONSIDER *SEATTLE*.

Petitioner argues that to the extent this Court reads *Seattle* as prohibiting state constitutional amendments such as Proposal 2, this Court should grant certiorari to overrule *Seattle* because "[t]he people and the states should have the option of eliminating the use of race-based preferences in higher education." Pet. 19.

Petitioner's argument reflects once more a fundamental misunderstanding of what is at issue here. As the Sixth Circuit correctly recognized, this case does not present "a second bite at *Gratz* and *Grutter*,"

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ana Supreme Court's decision in *Louisiana Associated General Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996). *See* Br. Amicus Curiae of Pacific Legal Foundation et al. 15-17. That decision held that a state constitutional prohibition against race-conscious programs, as applied in the context of minority contracting programs, does not violate the Fourteenth Amendment. *Id.* at 1199. But the Louisiana Supreme Court did not consider the issue before the Sixth Circuit—whether such a state constitutional provision would violate this Court's precedents in *Seattle* and *Hunter* to the extent that it is applied in the higher education context to distort the State's ordinary processes for formulating admissions policy.

Pet. App. 13a. The issue is not whether "Michigan citizens may . . . no longer wish to measure every person to categorize them into a neat assignment of race or ethnicity," Pet. 20-21. As discussed above, the citizens of Michigan may choose any constitutionally permissible admissions policies for any of their public colleges and universities and then modify or repeal them as they assess the results. *See Crawford*, 458 U.S. at 539.

Proposal 2, however, is not merely a one-time repeal of permissible race-conscious admissions programs. As discussed, Proposal 2 gerrymanders the political process, relegating the topic of race-conscious admissions to a separate, distant, and far more cumbersome playing field—one that is unplayable for all practicable purposes—so as to silence debate and strip the political process of its capacity to judge policy based on individualized merit. Proscriptions on such racial classifications are in the wheelhouse of the Fourteenth Amendment.

The *Hunter/Seattle* doctrine is entirely consistent with a long line of Fourteenth Amendment cases holding that strict scrutiny is triggered when government action "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *Seattle*, 458 U.S. at 485-86 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)); *see also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting that "[d]epartures from the normal procedural sequence also might afford evidence" of an Equal Protection violation); *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (requiring heightened justification under Title VII for a public employer's racially selec-

tive restructuring of its promotion process). The Fourteenth Amendment thus prohibits not only the direct disenfranchisement of minorities, but also the deliberate and selective exclusion of consideration of otherwise permissible policies with a racial focus from the usual political process.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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