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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, MARY SUE COLEMAN, AND LOU ANNA K. SIMON

LEONARD M. NIEHOFF
HONIGMAN MILLER SCHWARTZ AND COHN, LLP
130 S. First Street
4th Floor
Ann Arbor, Michigan 48104
lniehoff@honigman.com
(734) 418-4246
Attorney for University Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court upheld the constitutionality of the University of Michigan Law School's admissions policy, which took race into account as part of a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337. The Court concluded that the educational benefits that flow from having a diverse student body are "real" and "substantial," *id.* at 330, and that the Law School had a compelling interest in achieving such diversity. *Id.* at 329. The Court further held that the Law School had sufficiently reviewed race-neutral alternatives before the school concluded that it was necessary to consider "race as one factor among many" to assemble a truly diverse class. *Id.* at 340.

Just a few years later, in November 2006, a majority of Michigan voters approved an amendment to Michigan's Constitution, *see* Mich. Const. 1963 art. I, § 26, that prohibited admissions policies like the one upheld in *Grutter*. Section 26 raised concerns about the challenges Michigan's public universities might face in admitting diverse student bodies if they were foreclosed from all consideration of an applicant's race.

Two groups of Plaintiffs ("Plaintiffs-Respondents") filed suit in the U.S. District Court for the Eastern District of Michigan, contending that § 26 violated

the Equal Protection Clause and, more specifically, the political-restructuring doctrine.[1] One of those groups, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary ("BAMN"), included the Board of Regents of the University of Michigan and the Board of Trustees of Michigan State University ("the University Respondents"), as well as Wayne State University and the presidents of these institutions, among the named defendants.

From the beginning, the University Respondents have maintained that they are unnecessary defendants because their only involvement with § 26 has been to follow it, as they are compelled to do.[2] Moreover, they are poorly positioned to raise questions concerning the constitutionality of § 26; for example, they would lack standing to bring the Equal Protection claims advanced by Plaintiffs-Respondents. Accordingly, the University Respondents leave arguments regarding the constitutionality of § 26 to Plaintiffs-Respondents, who have standing to advance them. And they leave the defense of § 26 to

[1] The District Court consolidated the two actions. R. 12.

[2] The University Respondents asked the District Court to dismiss them as improperly joined parties but that motion was denied. R. 179 and 246. The Sixth Circuit affirmed. Pet. App. 152a-153a. The University Respondents did not seek review of that ruling here and that issue is not before the Court.

Petitioner, who, they believe, is the only proper defendant in this case.

The University Respondents are, however, uniquely well-positioned to assist the Court in understanding the distinctive nature and breadth of the authority of their governing boards, as well as some of the oversimplifications embodied in Petitioner's discussion of race-neutral alternatives. This brief will accordingly focus on two respects in which Petitioner's brief errs in its presentation to the Court regarding matters that directly implicate the expertise of the University Respondents.

First, in arguing that petitioning for changes in admissions policy does not constitute a political process, Petitioner's brief neglects to recognize the partisan political process by which the citizens of Michigan elect the members of the University Respondents' governing boards. Petitioner also incorrectly asserts that the governing boards of the University Respondents have entirely and irrevocably delegated oversight of admissions policies to faculty committees that are insulated from outside influences, an assertion that is inconsistent with the record and with Michigan law.

Second, Petitioner's brief implies that the race-conscious options afforded to universities by *Grutter* are unnecessary because race-neutral alternatives suffice for the University Respondents to admit diverse student bodies. There is no evidence in the record to support the argument with respect to the

University Respondents, and the limited evidence that does exist contradicts it.

STATEMENT OF THE CASE

The University Respondents are satisfied with part B of Petitioner's Statement of the Case. They take exception, however, to certain discrete statements made by Petitioner in part A. Consistent with Supreme Court Rule 24(2), the University Respondents provide this limited Statement of the Case to address two specific issues.

Petitioner's Statement begins as follows:

> The genesis for the Article 1, § 26 ballot initiative was a recognition that the public-university admissions process was insulated from political accountability to the public—it could not be affected by those who wanted public universities to move away from race- and sex-conscious policies.

Pet'r's Br. 6. Petitioner's brief provides no record citation in support of this statement, *see* Sup. Ct. R. 24(1)(g), and the University Respondents are unaware of record evidence indicating that the initiators of § 26 were motivated by a belief that "the public-university admissions process was insulated from political accountability." In fact, it would be peculiar if this were their motivation, because, as is discussed within, the members of the governing boards of these institutions are elected to office, have plenary

authority over admissions, and are routinely lobbied by members of the public on matters of policy. Pet. App. 32a-33a.

Petitioner's Statement of the Case continues:

> For example, at the University of Michigan, the tenured faculty are the primary architects of all the admissions criteria and protocols. J.A. 35. There is no process by which members of the public, prospective students, or others who are not faculty or part of the college can comment or even submit suggestions for admissions criteria. J.A. 35. The same practices are followed at the University of Michigan's Law School and Medical School; faculty members develop and adopt the admissions criteria, and there is no formal process by which the public "petitions" or submits suggestions for consideration. J.A. 11-13, 27-29.

Pet'r's Br. 6. This paragraph creates an inaccurate impression in three important respects.

First, it ignores the University of Michigan's Board of Regents, which oversees admissions policy, conducts open meetings at which it receives public input, and is elected by popular vote. Pet. App. 30a-31a. Through the board, a formal process is therefore available to any citizen who wishes to lobby for changes to the institution's admissions policies. *Id.*

Second, it implies that admissions practices are uniform across all academic units at the University

of Michigan. The record does not support such a generalization. Thus, the largest admissions office at the University of Michigan—the Office of Undergraduate Admissions—is managed by the Associate Vice Provost and Executive Director of Undergraduate Admissions, who is directly appointed by the elected Regents themselves. R. 222-5 at 14; Pet. App. 29a. In contrast, at the University of Michigan Law School a faculty admissions committee appointed by the dean plays a significant role in the design and development of admissions policy. R. 205-5 at 14-15; J.A. 11-12. The one characteristic that all these academic units do share is omitted from Petitioner's description: they are all subject to the plenary authority of the popularly elected Board of Regents. Pet. App. 28a-31a.

Just as policies and procedures may vary among the academic units within an institution, so may they vary between institutions. Petitioner generalizes as though all of Michigan's public universities—which number more than a dozen and differ in numerous material respects—have policies and procedures identical to those of the University of Michigan Law School.[3] But the record is silent as to

[3] The State of Michigan has a collection of separately administered public universities rather than a centrally managed system. Its public universities include the University of Michigan (http://www.umich.edu), Michigan State University (http://www.msu.edu), Wayne State University (http://wayne.edu), Central Michigan University (http://www.cmich.edu), Eastern Michigan University (http://www.emich.edu), Ferris State University (http://www.ferris.edu), Grand Valley State University

(Continued on following page)

the vast majority of those schools, let alone the hundreds of distinct academic units within them.[4] This much, however, is clear as a matter of law: plenary authority in all of those institutions is vested in a governing board that is directly elected or that is appointed by the state's elected governor. *See* Mich. Const. 1963 art. VIII, §§ 5, 6.

Third, this paragraph in Petitioner's brief creates the impression that no mechanisms exist for providing input regarding admissions policy to the administrators and faculty committees at the University of Michigan that have a role in developing those policies. Again, this is inaccurate. Concerned parties can avail themselves of the formal methods discussed above for raising admissions-related issues with the governing board, which has final authority over such matters. Or they can approach administrators or committees using any of the countless informal

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(http://www.gvsu.edu), Lake Superior State University (http://www.lssu.edu), Michigan Technological University (http://mtu.edu), Northern Michigan University (http://www.nmu.edu), Oakland University (http://www.oakland.edu), Saginaw Valley State University (http://www.svsu.edu), and Western Michigan University (http://www.wmich.edu).

[4] This includes Michigan State University, one of the University Respondents.

methods of communication that characterize the university environment. J.A. 12-14, 28-29.[5]

SUMMARY OF ARGUMENT

The University Respondents advance two arguments:

First, the process of petitioning elected public officials like the Regents of the University of Michigan and the Trustees of Michigan State University is, by definition, a political process.

The Constitution of the State of Michigan vests plenary authority over University Respondents in governing boards whose members are directly elected by the citizens. Pet. App. 28a. Given the vast and complex nature of these institutions, those boards choose to delegate an array of day-to-day functions to university officers and administrators. Nevertheless, the boards retain comprehensive authority over

[5] The two passages from Petitioner's Statement of the Case discussed above are incorrect for the reasons stated. The University Respondents are unaware of any record evidence that supports a third assertion made by Petitioner in part A of the Statement of the Case. Petitioner declares that, after *Grutter*, "reliance on race apparently increased. Statistical analyses of admissions patterns show an even heavier weight for race and a reduced weight for socioeconomic factors." Pet'r's Br. 7. Petitioner does not support this statement with a reference to the Joint Appendix or to the record. *See* Sup. Ct. R. 24(1)(g).

university policy—including admissions policies. *Id.* at 30a.

The boards take that authority seriously and remain engaged in the oversight of admissions. The record shows that these boards consider, discuss, and receive reports regarding admissions issues—including the question of how to respond to the challenges posed by the passage of § 26. *Id.* at 30a. The public meetings of those boards include an open forum, during which citizens can—and do—petition the board to take certain positions on matters of university policy. R. 12/21/2011 Supp. Br. 22.

Authority over the admissions policies of the University Respondents is therefore vested in popularly elected governing boards whose members can be petitioned by citizens and that are politically answerable to the people of the State of Michigan. The Sixth Circuit sitting en banc accordingly recognized that petitioning such boards regarding university admissions policies constitutes a political process. Pet. App. 33a.

Second, the record does not support Petitioner's suggestion that the University Respondents could achieve the benefits of a diverse student body solely by adopting race-neutral plans imported from other states. Indeed, to the extent the record addresses this issue at all, it suggests the contrary.

As this Court reiterated in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), the attainment of a diverse student body is a compelling

governmental interest. A diverse learning environment "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" *Grutter*, 539 U.S. at 330 (citations omitted). It is a critical pedagogical tool by which universities impart skills essential in an increasingly global and multi-cultural marketplace. *Id.* Those skills have become no less essential in the decade following *Grutter*.

Because Plaintiffs-Respondents commenced this litigation hard on the heels of the passage of § 26, the record evidence as to the impact of this provision on the ability of the University Respondents to achieve that compelling governmental interest—and as to the effectiveness of the University Respondents' use of race-neutral alternatives—is limited. The record on this issue largely consists of deposition testimony from the admissions officers of two academic units at the University of Michigan, who, based on their experience and their study of race-neutral alternatives, predicted that § 26 would result in declines in minority enrollment within their respective schools. Nothing in the record contradicts their testimony. And Petitioner's effort to do so by going outside of the record—indeed, by going outside of Michigan to Texas and California—is unpersuasive.

Prior to the adoption of § 26, concerned individuals had the opportunity to petition the governing boards of Michigan's state universities to approve admissions policies that considered race in a constitutionally permissible manner. In deciding whether the

change in that structure violated the political-restructuring doctrine, this Court should not be distracted by claims that such policies do not matter to the goal of achieving a diverse student body and the benefits that flow from it. Nothing in the record of this case suggests that the options *Grutter* made available to public universities are less important in 2013 than they were in 2003.

ARGUMENT

I. Petitioning the elected public officials who constitute the governing boards of the University Respondents is a political process.

The Michigan Constitution vests authority over the University Respondents in governing boards whose members are popularly elected. Pet. App. 38a.[6] This structure has persisted through Michigan's Constitutions of 1850 (art. XIII, § 8), 1908 (art. XI, §§ 7, 8), and 1963 (art. VIII, §§ 5, 6). It is a central and distinctive feature of Michigan's approach to higher education.

Each governing board of the University Respondents consists of eight members who hold office for

[6] The governing boards of the University Respondents are elected. The boards of some of Michigan's public universities are appointed by the governor. *See* Mich. Const. 1963 art. VIII, §§ 5, 6.

terms of eight years. *See* Mich. Const. 1963 art. VIII, § 5. Each political party, at its fall convention, nominates two candidates for membership on the board. Mich. Comp. Laws § 168.282 (2013). Nominees to the boards are elected as part of the general state-wide election. Mich. Comp. Laws § 168.286 (2013). The governing boards are thus elected through the same kind of partisan political process as are Michigan's governor, attorney general, and secretary of state.

The constitutional structure established by article VIII affords substantial independence to Michigan's public universities. Indeed, Michigan courts have described these governing boards as a fourth arm of state government, placing them on a par with the legislative, executive, and political branches. *See Bd. of Regents of Univ. of Mich. v. Auditor Gen'l*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1961).

At the same time, these governing boards remain politically accountable. This structure places those "institution[s] in the direct and exclusive control of the people themselves," through the "constitutional bodies" that they elect. *Sterling v. Bd. of Regents of Univ. of Mich.*, 110 Mich. 369, 383, 68 N.W. 253, 258 (1896). The Michigan Supreme Court has explained the benefits of this structure:

> Obviously, it was not the intention of the framers of the Constitution to take away from the people the government of this institution. On the contrary, they designed to, and did, provide for its management and

> control by a body of eight [individuals] elected by the people at large. They recognized that [each institution] should be in [the] charge of [officers] elected for long terms, and whose sole official duty it should be to look after its interests, and who should have the opportunity to investigate its needs, and carefully deliberate and determine what things would best promote its usefulness for the benefit of the people.

Id. at 379, 68 N.W. at 256.

Like other elected officials, candidates who aspire to positions on these governing boards typically run on policy platforms—their own and their party's—for example, promoting lower tuition or higher academic standards. Over the years, some candidates for these boards have run on platforms that included a plank on admissions policy, and, specifically, on race-conscious admissions policies. Pet. App. 33a. Citizens who wish to advocate for or against such policies have historically been able to support, campaign on behalf of, and vote for candidates whose views in this respect align with their own. *Id.* at 32a.

Under the Michigan Constitution, these governing boards have plenary authority to manage their respective institutions. Mich. Const. 1963 art. VIII, §§ 5, 6; *Bd. of Regents of Univ. of Mich. v. Auditor Gen'l*, 167 Mich. 444, 450-51; 132 N.W. 1037, 1040 (1911); *Federated Pubs. v. Bd. of Trustees of Mich. State Univ.*, 460 Mich. 75, 87, 594 N.W.2d 491, 497 (1999). The boards enact bylaws, which make clear

that all university operations remain subject to their control. *See* Univ. of Mich. Bd. of Regents Bylaws, Preface, http://www.regents.umich.edu/bylaws (last visited Aug. 15, 2013); Mich. State Univ. Bd. of Trustees Bylaws, Preamble, http://trustees.msu.edu/bylaws (last visited Aug. 15, 2013).

This plenary authority includes the oversight of admissions policy. Thus, the Board of Regents of the University of Michigan directly appoints the Associate Vice Provost and Executive Director of Undergraduate Admissions. Univ. of Mich. Bd. of Regents Bylaws § 8.01. And the Board of Trustees of Michigan State University has expressly declared that it retains the authority to "determine and establish the qualifications of students for admission at any level" upon the recommendation of the President, whom the Board elects and who serves at the pleasure of the Board. Mich. State Univ. Bd. of Trustees Bylaws, art. 8.

To perform their supervisory function, the governing boards meet regularly. *See* Univ. of Mich. Bd. of Regents Bylaws § 1.01; Mich. State Univ. Bd. of Trustees Bylaws, art. 2. These meetings provide a vehicle for the boards to receive reports from the President and others and to discuss, opine on, and implement university policy. As the record shows, this has included board deliberation over the specific issue of race-conscious admissions policies. Pet. App. 30a.

Those meetings also allow the governing boards of the University Respondents to hear the thoughts, concerns, and requests of members of the public. To

this end, time is reserved at open board meetings for public comment. *See* Univ. of Mich. Bd. of Regents Public Comments Policy, http://www.regents.umich.edu/meetings/addressing.html (last visited Aug. 15, 2013); Mich. State Univ. Bd. of Trustees Policy for Addressing Bd., http://trustees.msu.edu/meetings/public-participation.html (last visited Aug. 15, 2013). Public comment has historically influenced board decisions with respect to matters of policy and continues to do so.[7]

Despite these settled principles of law and undisputed facts, Petitioner's brief marginalizes the authority and involvement of these governing boards with respect to admissions policies. *See* Pet'r's Br. 6, 13, 24-25. Petitioner argues that (1) the governing boards have fully and irrevocably delegated admissions issues to faculty committees and (2) members of the public have no mechanism for providing input to those committees. From these premises, Petitioner

[7] For example, at its July, 2013 meeting, the Board of Regents of the University of Michigan approved changes in the guidelines that address how students can qualify for in-state tuition. Members of the public spoke in support of the changes, and members of the governing board specifically acknowledged the role that public input played in the policy change. *See* Rick Fitzgerald, *Regents approve clearer, simpler guidelines for granting in-state tuition*, Univ. Record Online (July 22, 2013), http://ur.umich.edu/1213/Jul22_13/4747-regents-approve-clearer.

concludes that decision-making about admissions policy is not part of a political process.[8]

The law and the record show that Petitioner's premises and conclusion are wrong. Indeed, as the Sixth Circuit sitting en banc concluded, Petitioner's argument can only be advanced if one "look[s] the other way," Pet. App. 27a, and pays no attention to "the Michigan Constitution, state statutes, and the universities' bylaws and current practices," *id.* at 31a.

As the Sixth Circuit correctly recognized, "power in a large university, a vast and highly complex institution, must be delegated." *Id.* at 30a. But the record is clear that this delegation is neither complete nor irrevocable. As noted above, the boards retain plenary authority over all matters of university governance—including admissions. They consider, discuss, and pass upon questions of admissions policy at the highest levels. *Id.* And, to the extent that, through their bylaws, the governing boards delegate particular responsibilities to administrators or others, it is important to remember that board bylaws can be—and routinely are—changed. Pet. App. 29a-31a.

The record further establishes that formal mechanisms exist for the public to try to influence policies regarding admissions or any other university business. They can do so through the formal processes of

[8] Petitioner's argument closely tracks the argument set forth by Judge Gibbons in her dissent from the en banc decision of the Sixth Circuit. Pet. App. 68a-69a.

electoral politics, campaigning and voting for governing board candidates with whom they agree. And they can do so by personally and directly addressing the governing board, which holds plenary power over such policies.[9]

Granted, there is no *formal* process for providing input to every administrator or faculty committee that helps shape admissions policy—just as there is no *formal* process for providing input to every subaltern or committee that is given a task by the legislature or the governor. But the record is clear that individuals have *informal* ways of providing input to those university administrators and faculty committees. J.A. 12-14, 28-29.[10]

For all of these reasons, petitioning the governing boards of the University Respondents constitutes a political process.

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[9] Of course, as with any elected official, less formal opportunities for lobbying (correspondence, e-mail and the like) exist as well.

[10] Petitioner's argument also wrongly assumes that delegation and political accountability are mutually exclusive. As the Sixth Circuit observed, elected officials in the executive branch remain politically accountable even where, as in the administrative law context, they delegate expansive rule-making powers. *See* Pet. App. 32a.

II. The record does not support Petitioner's suggestion that the University Respondents can achieve the benefits of a diverse student body solely by adopting race-neutral plans imported from other states.

This case does not raise questions as to whether the University Respondents have a compelling interest in achieving the educational benefits that flow from student body diversity. This Court has recognized that a diverse learning environment fosters cross-racial understanding, breaks down stereotypes, and imparts skills that are essential in today's global and multi-cultural marketplace. *Grutter*, 539 U.S. at 330. As institutions that send their graduates to every corner of the world, the University Respondents have a compelling interest in ensuring that their students have the opportunity to learn in such an environment.

Nor does this case directly implicate questions about the academic merit, practical workability, or empirical success of various race-neutral alternatives to race-conscious admissions policies. Those questions are properly considered and addressed in a case in which this Court must determine whether the specific admissions policy of a specific institution passes muster under the narrow-tailoring prong of strict scrutiny. As the Court observed in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* at 327. Thus, in *Bakke*, *Grutter*, and *Fisher* the Court focused

on the program and institution before it and engaged in a particularized and nuanced analysis.

Nevertheless, Petitioner's brief touches repeatedly and emphatically on the issue of race-neutral alternatives. Petitioner focuses on the Texas Top Ten Percent Plan as a method for achieving a diverse student body.[11] Pet'r's Br. 17, 32-33. Petitioner also cites statistics regarding the experience of the University of California system under Proposal 209 to suggest that diversity can be achieved without considering race. Pet'r's Br. 31-32. The flaws in Petitioner's broad-brush analysis are sufficiently significant that the University Respondents cannot leave them unaddressed. Still, mindful of the limited relevance of these issues to the question before the Court, the University Respondents will respond only to those aspects of Petitioner's argument that are most inapt to them and to higher education in Michigan generally.

The overarching problem with Petitioner's arguments as to race-neutral alternatives and statistics is that they address in a simplistic and generalized way issues that are complex and institution-specific—and often academic-unit-specific. Petitioner addresses

[11] "[T]he Top Ten Percent Law grants automatic admission to any public state college [in Texas,] including the University [of Texas, Austin], to all students in the top 10% of their class at high schools in Texas that comply with certain standards." *Fisher*, 133 S. Ct. at 2416.

both of these issues as though the University of Michigan Law School, the Michigan State University College of Human Medicine, the Department of Music at the University of Texas at Arlington, and the School of Business Administration at the University of California-Irvine were identical academic units within identical institutions recruiting from identical applicant pools in order to serve identical visions of diversity in furtherance of identical educational missions. If context is restored to the conversation, and attention is directed back to the University Respondents, then the flaws in both of Petitioner's arguments become glaringly evident.

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Petitioner's arguments in favor of percentage plans apply poorly to the University Respondents for a number of reasons.[12] At best, such plans are a workable alternative only for academic units that admit students directly from high school. *Grutter*, 539 U.S. at 340 (a percentage plan would not "work for graduate and professional schools"). Some of the most highly competitive academic units within the University Respondents, however, are professional schools, graduate schools, and undergraduate programs that admit students in their junior year. With respect to the University Respondents, percentage plans therefore do not help the goal of admitting a diverse

[12] For a catalog of the difficulties with such plans, *see* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1817-24 (2004).

student body precisely where that goal faces some of its greatest challenges.

Nor are such plans workable for undergraduate academic units that place a heavy emphasis on a particular talent that may not correspond to a percentage ranking. The University Respondents have programs in art, architecture, design, music, theater, and dance that are internationally acclaimed.[13] Those programs obviously could not admit students based exclusively on high school class standing.

Percentage plans also create incentives that fit poorly with the pedagogical goals of the University Respondents. Such plans encourage students to take a pass on anything—a leadership opportunity, a challenging course or teacher, or a chance to do meaningful volunteer work—that might compromise their class rank. Percentage plans thus reward

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[13] For example, the Michigan State University College of Music attracts students from 35 states and 23 countries and is "nationally and internationally acknowledged to be among the best in several areas of performance and music education." *See* Michigan State University College of Music, http://music.msu.edu/about/ (last visited Aug. 15, 2013). The University of Michigan School of Music, Theatre, and Dance is a "highly selective" school with demanding audition requirements and a host of distinguished alumni. *See* University of Michigan School of Music, Theatre, and Dance, Prospective Undergraduate Students, http://www.music.umich.edu/prospective_students/admissions/ug/ugadmissions.htm (last visited Aug. 15, 2013) and UM Musical Theatre Department News of Graduates, http://www.music.umich.edu/departments/mustheatre/alumni.htm (last visited Aug. 15, 2013).

students for limiting their experiences and for taking a one-dimensional view of their life and education. In contrast, many of the academic units within the University Respondents seek students with a wide array of interests, experiences, and perspectives, because, in their informed judgment, those are the "students who will contribute the most to the robust exchange of ideas."[14] *Grutter*, 539 U.S. at 324 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

Finally, as the Court noted in *Grutter*, percentage plans preclude a university "from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340. The University Respondents believe that, for a multitude of educational reasons, it is important for them to retain, in deciding whom to admit, the flexibility necessary to consider a wide array of factors, such as test scores, awards, enrollment in advanced placement courses, the competitiveness of the high school environment, socioeconomic status, and a demonstrated capacity to overcome hardships.

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[14] For example, the Michigan State University College of Human Medicine considers numerous "non-academic" factors as part of its "mission-based, holistic assessment" of applicants. *See* Michigan State University College of Human Medicine, Office of Admissions, http://mdadmissions.msu.edu/applicants/competitive.php (last visited Aug. 15, 2013).

In sum, nothing in the record of this case suggests that percentage plans are a workable alternative for the University Respondents. In fact, the limited record that does exist on this point is to the contrary. For example, Theodore Spencer, Associate Vice Provost and Executive Director of Undergraduate Admissions at the University of Michigan, testified that a ten percent plan would result in the admission of some students who were not adequately prepared for the demands of such an academically demanding environment. *See* R. 222-5 at 156.

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Petitioner's recitation of statistics from the University of California system with respect to the purported effects of Proposal 209 is similarly inapposite.[15] Granted, statistics regarding the effects of § 26 on the University Respondents are not part of the record. As noted above, this litigation was filed shortly after the passage of § 26, so the impact of this provision—and the viability of the use of race-neutral alternatives —could not be known with certainty.

There is, however, some record evidence on this issue. For example, University of Michigan undergraduate admissions director Spencer, a nationally prominent figure in the field of higher education

[15] The University Respondents leave to the Plaintiffs-Respondents and amici the task of analyzing Petitioner's claims about how the California public university system has fared with respect to diversity.

admissions, testified that he anticipated undergraduate minority enrollment would decline at his institution in light of § 26 and that he was unaware of any race-neutral strategy that would remedy that decline. J.A. 230, 233; R. 222-5 at 119.[16]

Petitioner's brief ignores this testimony. Instead, Petitioner imports statistics from outside the record—and outside the State of Michigan—about the University of California system. Pet'r's Br. 31-32. Petitioner could have just as easily cited non-record but publicly available data about the University Respondents. This, however, would have told a story different and more complicated than Petitioner represents. To take just one example, between 2004 and 2006, the numbers of entering African American freshmen at the University of Michigan ranged from a low of 330 to a high of 443; in contrast, from 2007 to 2009, after the passage of § 26, entering African American freshmen ranged from a low of 289 to a high of 374. *See* Univ. of Mich., Office of Budget and Planning, Common Data Set, http://sitemaker.umich.edu/obpinfo/common_data_set (last visited Aug. 15, 2013).

[16] Similarly, Sarah Zearfoss, Assistant Dean for Admissions at the University of Michigan Law School, testified that she thought it would be "extremely likely" that there would be "fewer minorities in the entering class" at the Law School because of § 26. R. 222-4 at 113. No depositions were taken of admissions officers from Michigan State University.

In sum, nothing in the record supports Petitioner's suggestion that the University Respondents can achieve the benefits of a diverse student body solely by importing race-neutral plans from other states. And Petitioner's departure from the record to try to prove the point is wholly unpersuasive.

CONCLUSION

For the reasons stated above, the University Respondents respectfully request that this Court (a) recognize that petitioning the governing boards of the University Respondents constitutes a political process and (b) disregard, as outside the record, Petitioner's arguments with respect to the alleged viability of race-neutral methods for achieving a diverse student body at the University Respondents' institutions.

Respectfully submitted,

LEONARD M. NIEHOFF
HONIGMAN MILLER SCHWARTZ AND COHN, LLP
130 S. First Street
4th Floor
Ann Arbor, Michigan 48104
lniehoff@honigman.com
(734) 418-4246
Attorney for University Respondents