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 a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* CONSTITUTIONAL AND LOCAL GOVERNMENT LAW SCHOLARS MICHELLE WILDE ANDERSON, RICHARD BRIFFAULT, RICHARD THOMPSON FORD, SHEILA FOSTER, GERALD E. FRUG, DANIEL B. RODRIGUEZ, RICHARD C. SCHRAGGER, AND RICK SU IN SUPPORT OF THE CANTRELL RESPONDENTS

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[1] Letters from the parties consenting generally to the filing of briefs *amicus curiae* are on file with the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* submit this brief in their personal capacities; academic affiliations are provided only for purposes of identification.

They submit this brief in response to the suggestions by petitioner and intervenor Eric Russell that *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), should be overruled. *See* Petr. Br. 37-38; Russell Br. 8-33. Contrary to those arguments, *Hunter* and *Seattle Schools* are applications of mainstream Fourteenth Amendment principles that protect against racial discrimination in the political process. This Court should reaffirm and rely on those principles in deciding the case before it.

SUMMARY OF ARGUMENT

Michigan's Proposal 2 strips the governing boards of the state's public universities of their preexisting authority to make decisions about legally permissible race-based educational policies, while preserving their plenary authority to make all other educational decisions.[3] In holding that Proposal 2

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[3] Proposal 2 provides, in relevant part that governing boards of public colleges or universities cannot adopt affirmative action plans that would "grant preferential treatment" to individuals or groups "on the basis of race, sex, color, ethnicity, or national origin." Mich. Const. art. I, § 26. Petitioner acknowledges that Proposal 2 was a response to this Court's decision upholding the University of Michigan Law School's race-conscious affirmative action policy. See Petr. Br. 7. Although the text of Proposal 2 covers reliance on factors other than race, both of the courts below treated the Proposal as directed primarily against race-conscious affirmative action. *See* Pet. App. 26a n.4 (stating that the "history of Proposal 2 and its description on the ballot leave little doubt" that "the clear focus of the challenged amendment is race").

violated the Equal Protection Clause, the Sixth Circuit relied on this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1* (*Seattle Schools*), 458 U.S. 457 (1982). Those cases involve straightforward applications of basic equal protection principles. Under this Court's "precedents involving discriminatory restructuring of governmental decisionmaking," *Romer v. Evans*, 517 U.S. 620, 625, (1996), when a jurisdiction reconfigures its normal political process in ways that single out racial issues for distinctive disadvantage, that alteration triggers heightened scrutiny.

Hunter and *Seattle Schools* were not decided in a vacuum. They responded to a long history of political restructurings that disadvantaged minority citizens. In particular, states and localities have frequently changed the level of government at which decisions can be made in a manner that poses distinctive barriers to racial minorities. Courts, including this Court, have not hesitated to hold that race-focused manipulations of the political process violate the Equal Protection Clause.

Hunter and *Seattle Schools* remain entirely consistent with this Court's contemporary equal protection jurisprudence. In recent Terms, this Court has continued to overturn state laws that deny members of minority groups access to the same political process available to all other groups or that respond to minority political success by restructuring the process to make it more difficult for them to succeed in the future. The same analysis that governed this Court's decisions in *Hunter* and *Seattle*

Schools should therefore inform this Court's review of Michigan's Proposal 2.

ARGUMENT

In *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1* (*Seattle Schools*), 458 U.S. 457 (1982), this Court confronted a type of equal protection violation that was neither new when those cases were argued, nor ceased once the cases were decided. For nearly a century, states and localities had manipulated their political processes to stymie minority citizens' rights in contexts ranging from the drawing of political boundaries to the allocation of governmental decisionmaking authority. In *Hunter* and *Seattle Schools*, this Court properly treated Akron's and Washington State's attempts to change the process for adopting civil rights-related policies as simply a new iteration of a familiar equal protection problem.

In the years since *Hunter* and *Seattle Schools*, this Court has continued to see – and to strike down – discriminatory restructurings of the political process. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court invalidated a state constitutional amendment that removed an issue primarily affecting gay citizens from the local political process. And in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006), this Court invalidated a mid-decade redistricting that would have prevented Latino voters from electing their candidate of choice. In doing so, this Court applied the underlying principle involved in *Hunter* and *Seattle Schools*: the political process cannot be restructured in a fashion that makes it

more difficult for traditionally excluded groups and their allies to seek beneficial policies.

I. *Hunter* And *Seattle Schools* Should Be Understood Against The Historical Backdrop Of Shifts In The Level Of Decisionmaking Authority That Disadvantaged Minority Groups.

This Court has long recognized that political rights are "fundamental" in that they are "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Accordingly, when this Court has confronted schemes to disadvantage minorities in the political process, it has shown "no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights." *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

On many occasions, those contrivances involved the outright exclusion of minority citizens from the political process. Some of the more infamous examples that this Court has addressed include the white primary, *see Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); the grandfather clause, *see Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); the literacy test, *see Louisiana v. United States*, 380 U.S. 145 (1965); *Schnell v. Davis*, 336 U.S. 933 (1949), *summarily aff'g*, 81 F. Supp. 872 (S.D. Ala. 1949) (three-judge court); and the poll tax, *see Harman v. Forssenius*, 380 U.S. 528 (1965).

But the history of discrimination in configuring the political process extends more broadly. This Court's decisions in *Hunter* and *Seattle Schools*

addressed a less well-known, but no less troubling, form of discrimination: responding to effective minority participation in political decisionmaking by abandoning local control and centralizing authority in fora over which minority citizens have less influence. These transfers of governmental authority have taken a number of forms.

1. There is more than a century-long history of states discriminatorily transferring decisionmaking authority from local jurisdictions where minority citizens could effectively influence the process to higher levels of government where they had less ability to participate effectively.

Even before the end of Reconstruction, southern state legislatures used their authority to remove black officials and their white allies from local offices. In Tennessee, the state legislature placed the city of Nashville in receivership in 1869 and replaced a slate of progressive Republican officials with Democrats. In Virginia, the state legislature used the same strategy to replace the Richmond city government. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2016-17 (1981) [*hereinafter 1981 Voting Rights Act Hearings*] (statement of Professor J. Morgan Kousser).

During the 1870s, the Alabama state legislature similarly abolished the criminal court in Dallas County after efforts to force a black judge to resign failed. In justifying this decision, a state legislator admitted that he "had always believed in the right of the people to select their own officers," but believed he had no other choice given that the "life, liberty and

property of the Caucasians" were threatened by "the Negro and his cohorts." *Id.* The Alabama legislature used this tactic during the late nineteenth century to remove at least nine other county commissions and city councils in areas with large black populations. Will Parker, *Still Afraid of "Negro Domination?": Why County Home Rule Limitations in the Alabama Constitution of 1901 Are Unconstitutional*, 57 Ala. L. Rev. 545, 557 (2005). Alabama further entrenched these local manipulations by ratifying a new state constitution in 1875 that gutted home rule. This shift was openly spurred by a desire to deprive majority-minority counties of the right to enact favorable legislation. *Id.* at 554-64.

North Carolina went further. In 1875, in order to minimize black political power, the state legislature gave itself the right to appoint local justices of the peace and subsequently gave those appointed officials the right to appoint *all* county commissioners. Howard N. Rabinowitz, Race Relations in the Urban South, 1865-1890, at 269 (1978). When progressive Republicans managed to return some authority to municipalities during the early 1890s, whites responded by violently removing black officeholders from the Wilmington city government and passing legislation returning control over local governments to the state. *See* 1898 Wilmington Race Riot Comm'n, Final Report 208-10 (2006), *available at* http://tinyurl.com/cantrell-wrrc.

2. A second round of racially discriminatory political restructuring occurred in response to rising minority political power during the Civil Rights Movement.

Gomillion v. Lightfoot, 364 U.S. 339 (1960), provides a textbook example. During the late 1950s, Alabama responded to increased black voter registration and political activism in the city of Tuskegee by revamping its political structure in two ways. First, it amended the state constitution to authorize legislative abolition of Macon County, where Tuskegee was located. Ala. Const. Amend. No. 132 (1957), *repealed by* Ala. Const. Amend. No. 406 (1982); *see also* Bernard Taper, Gomillion Versus Lightfoot 51 (1962). Second, it enacted a statute – Local Act 140 – that redrew Tuskegee's municipal boundaries to remove all the black voters within the city "while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341. Black voters remained subject to Tuskegee's policies under Alabama's police jurisdiction law, although they were now disenfranchised in municipal elections. *See* Ala. Code § 11-40-10; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66-75 (1978). "Though the ejected Negroes would still be able to vote in county, state, and national elections, there were not enough of them registered as voters to influence the political situation on any scene larger than the municipal one." Taper, *supra*, at 15.

Faced with Local Act 140, this Court found it "inconceivable that guaranties imbedded in the Constitution" could be "manipulated out of existence" by being "cloaked in the garb of [political] realignment." *Gomillion*, 364 U.S. at 345 (internal quotation mark omitted). It therefore reversed the dismissal of the black voters' constitutional challenge. On remand, the district court held that Local Act 140 violated the Constitution because it

was "solely concerned" with "putting the Negro citizens out of the municipal limits so as to deprive them of their municipal vote." *Gomillion v. Rutherford*, 6 Race Rel. L. Rep. 241, 243 (M.D. Ala. 1961).

3. This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), spurred a separate wave of jurisdictional realignment. To avoid integration in even a single school district, many Southern states stripped power from local officials who planned to comply with *Brown*'s holding, whether voluntarily or in response to a court order.

A particularly striking example of this shift in decisionmaking authority involves Little Rock, Arkansas. The very day that this Court announced that it would require the Little Rock school board to comply with a federal court desegregation order, *see Aaron v. Cooper*, 358 U.S. 5 n.* (1958), the Governor signed into law a bill empowering him to close any public school or school system in the state and to keep that school or school system closed absent a new executive order countermanding the closure. *Aaron v. Cooper*, 261 F.2d 97, 99 (8th Cir. 1958). The law also stripped local school boards of their power to decide student assignment policies with respect to racial desegregation, instead requiring a special election and providing, with respect to any integration plan, that "[u]nless a majority of the qualified electors of the district voted in favor of such integration, 'no school within the district shall be integrated.'" *See id.* (quoting the Arkansas statute). Governor Orval Faubus invoked this law and immediately closed all of Little Rock's high schools. *Id.* at 99-100. Nowhere else in the state was

gubernatorial control substituted for local control. Nor was any other issue of educational policy subjected to a plebiscite. Quoting this Court's statement that the principle announced in *Brown* "can neither be nullified openly and directly" nor nullified indirectly "whether attempted ingeniously or ingenuously," the court of appeals directed the district court to issue an injunction to accomplish the previously ordered integration of Little Rock schools. *Aaron v. Cooper*, 261 F.2d at 108 (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)) (internal quotation marks omitted).

Other states acted similarly. In Virginia, for example, when Arlington tried to integrate in 1956, the Virginia General Assembly stripped the county of its right to elect a school board. Bob Smith, They Closed Their Schools 142-43 (1965). In 1958, Governor J. Lindsay Almond, Jr., expanded this tactic, closing schools in Charlottesville, Norfolk, and Warren County because they were poised to comply with federal court orders requiring desegregation. Benjamin Muse, Virginia's Massive Resistance 73-75 (1961).

In Louisiana, the state legislature went further by authorizing the Governor to close every school in the state if any one of them chose to integrate. *See Bush v. Orleans Parish Sch. Bd.*, 187 F. Supp. 42, 45 (E.D. La. 1960). When the Orleans Parish School Board announced its intention to comply with a federal court order mandating desegregation in November 1960, the Louisiana Legislature was immediately called into extraordinary session and passed a law removing four of the five school board members from office. *See Bush v. Orleans Parish*

Sch. Bd., 188 F. Supp. 916, 920-21 (E.D. La. 1960). Soon after, a district court struck down this measure "sole[ly]" designed to "deprive colored citizens of a right conferred on them by the Constitution" as a violation of the principles announced by this Court in *Gomillion*. *Id.* at 929. This Court subsequently affirmed. *Orleans Parish Sch. Bd. v. Bush*, 365 U.S. 569 (1961).

In Mississippi, in response to the massive enfranchisement promised by the Voting Rights Act of 1965, the state legislature selectively took away the authority to elect superintendents of education from eleven counties with large black populations. *Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary* 149 (1969) [*hereinafter 1969 Voting Rights Act Hearings*] (statement of Thomas E. Harris, Assoc. Gen. Counsel, AFL-CIO). Eventually, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). this Court held that these changes in government structure should have been subject to preclearance under section 5 of the Voting Rights Act of 1965 because they could involve a "discriminatory purpose or effect" with respect to voting. *Id.* at 569-70.

4. In the years leading up to *Hunter* and *Seattle Schools* discriminatory restructuring was not limited to avoiding *Brown*'s mandate. In the late 1960s and 1970s, Mississippi, Alabama, and Georgia each changed the way local offices were filled to frustrate the ability of minority voters to elect candidates of their choice.

On four separate occasions Mississippi attempted to change the method of filling a local office from

municipal election to state-level appointment. Each time, the Department of Justice objected under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, because of the "racially discriminatory" nature of the change. *1981 Voting Rights Act Hearings*, *supra*, at 501 (statement of Frank R. Parker, Dir., Voting Rights Project).

Alabama took a more wholesale approach and tried to make all municipal judgeships across the state into appointive rather than locally elected offices. The Department of Justice rejected this realignment under the Voting Rights Act. *1981 Voting Rights Act Hearings*, *supra,* at 815 (report of Jane Reed Cox & Abigail Turner). Similarly, a three-judge district court recognized the "potential for discrimination" in Alabama's decision to change the method for selecting the Greene County Racing Commission, the source of two-thirds of the county's budget, from appointment by locally elected legislators to gubernatorial appointment. *Hardy v. Wallace*, 603 F. Supp. 174, 179 (N.D. Ala. 1985).

Finally, Georgia similarly engaged in widespread attempts to make local elective offices appointive as soon as the prospect of a minority-supported candidate winning the position emerged. *1981 Voting Rights Act Hearings*, *supra,* at 1955 (report of Richard A. Hudlin & K. Farouk Brimah, Voter Educ. Project, Inc.).

II. This Court's Decisions In *Hunter* And *Seattle Schools* Vindicated The Principle That States Cannot Restructure The Political Process To The Disadvantage Of Racial Minorities.

This Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1* (*Seattle Schools*), 458 U.S. 457 (1982), responded to the history described in the previous section. In each case, this Court treated the challenged legislation as an impermissible response to local political gains achieved by minority citizens. By altering the political structure in ways that undermined minority citizens' ability to participate on equal terms, these changes violated the Equal Protection Clause.

1. *Hunter* concerned a restructuring of the process for enacting antidiscrimination legislation in Akron, Ohio. In 1964, the Akron City Council passed a fair housing ordinance that prohibited, among other things, racial discrimination in housing. Soon after, an initiative amended the city charter both to invalidate this ordinance and to require that any future ordinance "regulat[ing] the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property" on the basis of "race, color, religion, natural origin or ancestry" be submitted to the entire electorate, as opposed to just the city council, before going into effect. 393 U.S. at 387 (quoting the charter amendment). The charter amendment left untouched the city council's decisionmaking authority with respect to all other regulations of real property. As this Court noted, "[t]he automatic referendum system [did] not reach housing discrimination on sexual or political grounds,

or against those with children or dogs, nor [did] it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes." *Id.* at 391.

This race-specific shift of decisionmaking authority from the city council to the electorate as a whole had the effect of making it "substantially more difficult" for racial minority groups to obtain antidiscrimination legislation both in an absolute and a comparative sense. *See id.* at 390. First, under the prior regime, minority citizens could obtain beneficial legislation simply by persuading the city council of its desirability. Under the new system, by contrast, even if they succeeded in persuading the city council, they were still required to undertake the time-consuming and potentially expensive task of obtaining approval from tens of thousands of voters as well. *See id.* at 387. Second, in comparison to other groups seeking antidiscrimination protection or other housing-related benefits, *racial* minorities faced distinctive barriers. *Id.* at 391.

This Court had no trouble concluding that "in reality" the Akron charter amendment "place[d a] special burden on racial minorities within the governmental process." *Id.* Thus, this Court treated the amendment as a racial classification "subject to the most rigid scrutiny." *Id.* at 392 (internal quotation marks omitted). And it concluded that the alteration of the political process at issue in *Hunter* constituted a "real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 393.

2. *Seattle Schools* involved a Washington State initiative (Initiative 350) governing public school student assignment policies. After the Seattle school board approved a plan to voluntarily desegregate the city's schools by pairing predominantly white and predominantly minority attendance zones and busing students between them, Washington voters adopted an initiative that provided that no school board "shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." 458 U.S. at 462 (quoting Initiative 350). But Initiative 350 contained so many exceptions allowing busing for essentially any reason other than racial desegregation that it could be understood only as a prohibition on voluntary desegregation plans. *Id.* at 462-63.

As in *Hunter*, this Court held that the challenged provision violated the Equal Protection Clause. Despite the formally neutral language of Initiative 350, this Court found that the initiative in fact involved a racial classification. *Id.* at 485-86 & n.29. This Court recognized that Initiative 350 involved a "reallocation of power" from the "existing decisionmaking body" to the state legislature in a way that "burden[ed] minority interests." *Id.* at 474. Before the initiative, minority parents in Seattle were able to obtain voluntary desegregation by persuading the local school board to adopt ordinary student assignment policies. But after Initiative 350, "[t]hose favoring the elimination of *de facto* school segregation" were forced to "seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment

decisions, as well as over most other areas of educational policy, remain[ed] vested in the local school board." *Id.*

III. *Hunter* And *Seattle Schools* Fit Comfortably Within Contemporary Equal Protection Doctrine And Should Govern Analysis Of Proposal 2.

This Court has long held that when the government purposefully draws racial distinctions, those distinctions are subject to heightened scrutiny under the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. 229, 241 (1976); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). There are two kinds of racial classifications. Some are express: they explicitly use racial terminology to categorize individuals or issues. Others, by contrast, are facially neutral but in fact classify individuals or issues in a racial manner. Both types of classification trigger heightened scrutiny.

In recent Terms, in the context of challenges to redistricting plans, which on their face do not classify individuals or issues at all, this Court has held that when race is "the predominant factor" explaining how the political system has been organized and race "subordinate[s] traditional" principles for allocating power, a reviewing court should apply strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).[4]

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[4] By contrast, unless "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," strict scrutiny is not triggered by the legislature's mere awareness or discussion of the racial makeup of the districts at issue. *Miller*,

This Court's decisions in *Hunter* and *Seattle Schools* reflect these contemporary principles even though they do not use precisely the same vocabulary as this Court's most recent decisions. Put in contemporary terms, *Hunter* and *Seattle Schools* held that the reorganizations of the political process undertaken by Akron and Washington State triggered strict scrutiny because racial considerations subordinated traditional principles for allocating governmental decisionmaking authority. The same analysis should also apply to Michigan's Proposal 2.

A. Proposal 2, Like The Laws At Issue In *Hunter* And *Seattle Schools*, Should Be Understood As A Racial Classification Because It Singles Out Racial Issues For Distinctively Disadvantageous Treatment In The Political Process.

1. *Hunter* and *Seattle Schools* both involved racial classifications of an issue. *Hunter* involved an express racial classification; *Seattle Schools* involved an implicit one.

The law at issue in *Hunter* expressly singled out laws that focused on "race" for differential treatment within the political process. 393 U.S. at 387. As Justice Harlan explained in his concurrence, Akron had "not attempted to allocate governmental power

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515 U.S. at 916; *see also Easley v. Cromartie*, 532 U.S. 234, 253 (2001) (refusing to apply strict scrutiny because the fact that "the legislature considered race, along with other partisan and geographic considerations … says little or nothing about whether race played a *predominant* role comparatively speaking").

on the basis of any general principle." *Id.* at 395 (Harlan, J., concurring). Having concluded that the law was a racial classification, this Court applied "the most rigid scrutiny." *See id.* at 392 (opinion for the Court) (internal quotation marks omitted).

In subsequent cases, this Court has treated *Hunter* as involving the racial classification of individuals as well as the racial classification of issues. For example, in *Gordon v. Lance*, 403 U.S. 1 (1971), this Court characterized *Hunter* as having classified an "independently identifiable group or category" of individuals. *See id.* at 5. But the same year, in *James v. Valtierra*, 402 U.S. 137 (1971), this Court described the law at issue in *Hunter* as having "created a classification based upon race because it required that laws dealing with racial housing matters" be subject to differential treatment in the political process. *Id.* at 140-41. And in *Seattle Schools* this Court treated *Hunter* as involving both when it described Akron as having "allocate[d] governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, 'places special burdens on racial minorities within the governmental process.'" 458 U.S. at 470 (emphases omitted) (quoting *Hunter*, 393 U.S. at 391).[5]

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[5] In this sense, this Court's analysis of *Hunter* dovetails with this Court's explanation in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), that heightened scrutiny is called for both when the government "restricts those political processes which can ordinarily be expected to bring

Seattle Schools also involved the racial classification of an issue, although Initiative 350 did not expressly use the term "race." As this Court explained, given all of the exceptions Initiative 350 contained, its ban on busing could be understood only as a racial classification since it restricted only busing voluntarily directed at achieving racial desegregation. When this Court concluded that the "community's political mechanisms" were modified "to place effective decisionmaking authority over a racial issue at a different level of government," *id.* at 474, it was therefore concluding that Initiative 350 involved the racial classification of an issue. The Initiative thus impermissibly restructured the political process in a manner tainted by race. *See id.* at 476-77, 487.

2. This Court's recent decisions reinforce the conclusion that racial classifications can occur even when no individual has been singled out for differential treatment on account of his or her race. *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, provide the best example of this point. *See also Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996). In those cases, this Court did not require plaintiffs to prove that they personally had been assigned to a district on the basis of their race. (Indeed, even individuals who had moved into a district after the boundaries had been drawn could presumably have brought suit.) Nor did this Court require that the plaintiffs prove that their votes had

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about repeal of undesirable legislation" and when it targets "discrete and insular minorities."

been rendered meaningless or that their elected representatives had not served them adequately. Rather, it required only that race have played the predominant role in the decision of where to draw political boundaries. When race predominates in a governmental decisionmaking process, individuals are denied the right "to compete on an equal footing," *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). *See United States v. Hays*, 515 U.S. 737, 744-45 (1995) (relying on *Northeastern Florida Contractors* to explain that the injury recognized in *Shaw* is distinct from the denial of any tangible benefit).

3. Like *Hunter* and *Seattle Schools*, Michigan's Proposal 2 involves the racial classification of an issue. It expressly singles out educational policy decisions that involve race for differential treatment in the political process.[6] While the governing boards of Michigan's three public universities retain control over all other educational decisions, Proposal 2 strips them of their ability to make constitutionally permissible decisions involving race. *See* Pet. App. 31a-37a. Proposal 2 thereby changes the level at which race-related educational decisions – and no other educational decisions – are made by transferring them away from an expert body of university administrators capable of making and refinining "considered judgments[s]" about racial diversity and admissions policies, *see Grutter v.*

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[6] *See supra* n. 3.

Bollinger, 539 U.S. 306, 387-88 (2003) (Kennedy, J., dissenting), and turning them into policies controlled by plebiscite. In so doing, the amendment requires advocates of permissible race-conscious policies to appeal to the statewide electorate, while permitting advocates of all other policies to pursue a less onerous path. It thus creates, for racial issues and racial issues alone, a decisionmaking process far different from Michigan's ordinary process for educational decisions, one that threatens to make race a more, rather than a less, salient issue.

At first glance, it may seem that a measure such as Proposal 2 eliminates race from the political process by taking race-conscious policies off the table. In reality, however, Proposal 2 threatens to exacerbate racial resentment. Questions about the fairness of Michigan's university admissions processes will not go away. When the University of Michigan's Board of Regents debates whether legacy status will play a greater role in admissions from one year to the next, or to what extent a family member's employment with the university might improve an applicant's chances, *see* Pet. App. 35a, it is entirely foreseeable that members of the public will also raise concerns about racial diversity within the incoming class. But if they take these concerns to the Board of Regents, they will be told that the Board lacks the authority to respond to *their* concerns, although it retains that authority with respect to everyone else's.

Proposal 2 thus substitutes the prospect of up-or-down popular judgments on discrete admissions proposals for deliberative discussion about the role of race in the educational process. Under Proposal 2, an advocate for constitutionally permissible policies to

consider race as one factor in university admissions could not approach the Board with any hope of success. Instead, for the simple reason that their preferred policy involves the legitimate use of race, advocates would have to appeal to the state's entire electorate. Pet. App. 36a-37a.

An example based on California's experience with an initiative similar to Proposal 2 illustrates this point. Consider two different admissions policy proposals. The first seeks to increase legacy presence in the student body by holding more family-oriented alumni events. The second seeks to increase racial diversity in the student body by conducting outreach sessions at inner city high schools with high minority student populations. Supporters of the first proposal need only attend governing board meetings and persuade the board members to adopt their preferred policy. By contrast, it is quite plausible that underrepresented minorities supporting the second proposal would be precluded from using this path. *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1085 (Cal. 2000) (interpreting a California initiative whose language mirrors Proposal 2 as barring such efforts). Thus Proposal 2 would presumably force supporters of minority outreach either to abandon their efforts – a troubling result given the proven success of such programs, *see* David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. Times (Mar. 16, 2013), http://tinyurl.com/cantrell-minority-outreach – or to undertake an expensive effort to convince the entire electorate to change the Michigan Constitution.

4. Subjecting educational decisions to radically different political processes depending on whether or

not they involve racial issues triggers the same concerns that prompted this Court to find a violation of the Equal Protection Clause in *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer,* this Court found a Colorado constitutional amendment unconstitutional because it denied to gay, lesbian, and bisexual individuals "safeguards that others enjoy or *may seek* without constraint." *Id.* at 631 (emphasis added). The constraint imposed on gay people in *Romer* mirrors the constraint imposed on members of racial minorities by Proposal 2: rather than being able to appeal to local governments for policy changes, gay people were forced to "enlist[] the citizenry of Colorado to amend the State Constitution." *Id.* So too with members of racial minority groups in Michigan.

Proposal 2 should be seen for what it is: a decision by Michigan to subject laws involving the constitutionally permissible use of race, and only the permissible use of race, to distinctive disadvantages within its educational decisionmaking process. Such a decision constitutes a racial classification of an issue and thus should trigger strict scrutiny.

B. Proposal 2, Like The Laws At Issue In *Hunter* And *Seattle Schools*, Also Triggers Strict Scrutiny Because It Responds To A Minority Group's Success In Achieving Beneficial Policies By Restructuring The Process To Make Future Success More Difficult.

Not only did the challenged amendments in *Hunter* and *Seattle Schools* classify issues on the basis of race, but they did so with the intent to make

it more difficult for minority citizens and their allies to obtain future success within the political process. Because a similar motivation is the predominant factor explaining the passage of Proposal 2, it too triggers strict scrutiny.

1. Even when a law does not constitute a facial racial classification, strict scrutiny is triggered when the state "select[s] or reaffirm[s] a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). This Court has acknowledged that a discriminatory purpose must frequently be inferred from "such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In particular, the "historical background of the decision," including the "specific sequence of events leading up to the challenged decision," is a probative evidentiary source. *Id.* at 267. Additionally, this Court has noted that governmental action involving "[d]epartures from the normal procedural sequence" is often suggestive of "improper purposes." *Id.*

2. This Court has long expressed special concern when realignments of the political process occur in response to a minority group's effective exercise of political power and impose new barriers to future minority success. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (condemning "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote"); *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) (condemning states that

"came up with new ways to discriminate as soon as existing ones were struck down").

League of United Latin American Citizens v. Perry (*LULAC*), 548 U.S. 399 (2006), provides an especially powerful recent example of this longstanding principle. There, this Court confronted a mid-decade Texas congressional redistricting plan that divided a cohesive Latino community by removing about 100,000 Latinos from a preexisting district. *Id.* at 439. Justice Kennedy's opinion for the Court pointed to the fact that the redistricting was undertaken just as "Latino voters were poised to elect their candidate of choice." *Id.* at 438. As he explained, the mid-decade redistricting "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active." *Id.* at 439. "In essence, the State took away the Latinos' opportunity because Latinos were about to exercise it." *Id.* at 440. Thus, this Court concluded that the plan "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.*[7]

3. *Hunter* and *Seattle Schools* are earlier embodiments of this still-vital principle.

In *Hunter*, this Court's decision reflected its understanding that the charter amendment was

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[7] Because the Court held that the plan violated Section 2 of the Voting Rights Act, *see LULAC*, 548 U.S. at 442, it was unnecessary to reach the question whether the plan also violated the Constitution.

directed at undercutting minority success in achieving beneficial legislation. First, this Court identified the substantial disproportionality of the amendment's impact on minority groups: "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." *Id.* at 391 (opinion of the Court).

This Court also looked to the historical background and sequence of events leading up to the passage of the Akron city charter amendment. *Id.* at 386-88. It found particular significance in the fact that the Akron city council specifically identified the existence of racial discrimination in housing, implemented a fair housing ordinance to address it, and was subsequently reversed by the amendment. *See id.* at 391. The amendment, however, went beyond simply reversing the fair housing ordinance, by also prospectively requiring that future non-discrimination housing proposals be subjected to a more burdensome political process. *See id.* at 389-90 & n.5. Accordingly, as Justice Harlan explained in his concurrence, the city charter amendment had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (Harlan, J., concurring).

Similarly, in *Seattle Schools*, this Court found that "there [was] little doubt that the initiative was effectively drawn for racial purposes." 458 U.S. at 471. As this Court explained, "the notion of school board responsibility for local educational programs is [one that is] firmly rooted." *Id.* at 478. Indeed, even the statement in favor of the initiative on the

Washington ballot itself emphasized the importance of "local control of schools" generally. *Voters and Candidates Pamphlet* 4 (1978).

As with the charter amendment in *Hunter*, Washington's Initiative 350 directly overrode an existing program adopted for the benefit of minorities. Indeed, this Court noted that the initiative was drafted and passed precisely to do so: "[T]he text of the initiative was carefully tailored to interfere only with desegregative busing. Proponents of the initiative candidly represented that there would be no loss of school district flexibility other than in busing for desegregation purposes.'" *Seattle Schools*, 458 U.S. at 471 (footnote omitted) (internal quotation mark omitted).

In light of the fact that Washington had revamped its ordinary political structure to "impose[] comparative burdens on minority interests," *id.* at 477, this Court found that it was "beyond reasonable dispute" that the initiative "was enacted 'because of, not merely in spite of, its adverse effects upon' busing for integration." *Id.* at 471 (quoting *Feeney*, 442 U.S. at 279) (some internal quotation marks omitted).[8]

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[8] Also significant to this Court's finding of a discriminatory purpose was the fact that the initiative went beyond merely reversing course on a matter of racial policy – it cemented that reversal by subjecting all further consideration of desegregative busing to a different political process. Without that "reallocation of power," *Seattle Schools*, 458 U.S. at 474, the simple repeal of a preexisting voluntary desegregation plan would not necessarily have involved a racially discriminatory purpose, as this Court's decision in *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982), shows. There, this Court distinguished a California

4. Michigan's Proposal 2 similarly reflects a purposeful effort to make it more difficult for minority citizens to achieve beneficial government programs. Article VIII, section 5 of the Michigan Constitution normally confides decisions about educational policy to the governing boards of the state's universities. Proposal 2 upsets this conventional balance only with respect to permissible race-conscious affirmative action programs.

The decisions by Michigan's public universities to adopt, revise, and maintain constitutionally permissible race-conscious affirmative action policies were not uncontroversial. Those policies are in significant part the product of sustained public debate and minority "lobb[ying] for the adoption of such policies." Pet. App. 7a; 123a. Moreover, Proposal 2 was a direct response to this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), upholding the University of Michigan Law School's affirmative action policy and providing a roadmap for continued race-conscious affirmative actions by the state's institutions of higher education. Pet. App. 7a.

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proposition that repealed desegregative busing without changing the level of government at which decisions would be made because the repeal did not "distort[] the political process for racial reasons" or "allocate[] governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541. Similarly, a decision by the University of Michigan Board of Regents simply to forgo an otherwise permissible race-based affirmative action policy would not itself violate the Equal Protection Clause; it would simply reflect ordinary government decisionmaking.

Just as in *Hunter* and *Seattle Schools*, Proposal 2 "involved more than a 'mere repeal'" of the University of Michigan's affirmative action policy, *Crawford*, 458 U.S. at 541. As with Washington's Initiative 350, Proposal 2 intentionally reorganized the political process to the detriment of racial minorities by singling out a policy that benefited them for "peculiar and disadvantageous treatment," *Seattle Schools*, 458 U.S. at 485.

To be sure, members of minority groups are not the only individuals who support race-conscious affirmative action programs, nor are they the only individuals who benefit from them. But the benefit they receive goes beyond the educational benefit of increased diversity that all students may receive; almost by definition, constitutionally permissible race-conscious affirmative action plans result in the admission of some students who would not be selected absent some consideration of race. In any case, those facts do not undercut the conclusion that Proposal 2 imposes a disproportionate burden on members of racial minority groups. After all, in *Seattle Schools*, this Court observed that "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350" and that "white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom," 458 U.S. at 472 (internal quotation marks omitted). Yet this Court still found the initiative infected by a discriminatory purpose.

Thus, this Court's decisions from *Gomillion* through *Hunter* and *Seattle Schools* to *LULAC* support the conclusion that Proposal 2, by intentionally subjecting racial minority groups to

distinctive obstacles in the political process, constitutes a racial classification that triggers strict scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 30, 2013