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 CANTRELL, ET AL.

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

BRIEF OF *AMICUS CURIAE* MICHIGAN CIVIL RIGHTS COMMISSION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public-university admissions decisions.

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INTEREST OF *AMICUS CURIAE*[1]

The Michigan Civil Rights Commission (MCRC) is an independent body created by Art. V, § 29 of the Michigan Constitution of 1963, for the purpose of protecting persons from discrimination and ensuring fair and equal access to employment, education, and economic opportunities.[2]

The Michigan Constitution charges MCRC with investigating alleged discrimination and "to secure the equal protection of such civil rights without such discrimination." Mich. Const. art. V, § 29. MCRC

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[1] Pursuant to U.S. Supreme Court Rule 37.6 amicus curiae affirms that no counsel for any party authored this brief in whole or in part and no counsel, party, person or entity other than amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief. This brief is being filed pursuant to U.S. Supreme Court Rule 37.3(a), all parties having filed blanket letters of consent with the Clerk of this Court.

[2] The Michigan Department of Civil Rights is the statutorily created body "responsible for executing the policies of MCRC." Mich. Comp. Laws 37.2602(a). The Michigan Attorney General would normally provide counsel and represent the Michigan Civil Rights Commission in matters before this Court (Mich. Comp. Laws 37.2602(b) provides "(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act.") However, because the Attorney General is a party, and in recognition of MCRC's constitutional independence, the Attorney General has appointed the Department's Director of Law and Policy as a Special Assistant Attorney General to represent MCRC's interests in this case. The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and do not necessarily represent the opinions of any other person or entity within Michigan's government.

enforces Michigan's two anti-discrimination statutes, the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws 37.2101 *et seq*., and the Persons with Disabilities Civil Rights Act, Mich. Comp. Laws 37.1101 *et seq*. MCRC therefore has a strong interest in ensuring Michigan's residents and visitors receive equal protection under the law.

MCRC held four public hearings in 2006 investigating allegations of fraud perpetrated by proponents of what was then Proposal 2 (and became Mich. Const. art. I, § 26). After hearing dozens of individuals testify and reviewing over five hundred affidavits, MCRC reported its findings to the Michigan Supreme Court on June 7, 2006. *Report on the Use of Fraud and Deception in the Gathering of Signatures for the Michigan Civil Rights Initiative*.[3] The report concluded that Proposal 2 reached the ballot via fraudulently obtained signatures. *Report* at 4. MCRC determined the fraud was part of "a highly coordinated, systematic strategy involving many circulators and, most importantly, thousands of voters." *Report* at 12.

MCRC's findings have been widely accepted, including by the Circuit Court below in *Operation King's Dream* v. *Connerly*:

> The record and the district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . .

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[3] Available at *http://www.michigan.gov/documents/Petition Fraudreport_162009_7.pdf*.

> By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes. [*Operation King's Dream* v. *Connerly*, 501 F.3d 584, 591 (6th Cir. 2007).]

The District Court in *Operation King's Dream* specifically recognized the role played by, and the unique interest of, MCRC during the period surrounding the vote on Proposal 2 and adoption of the provision of Michigan's Constitution now at issue:

> With the exception of the Michigan Civil Rights Commission, the record shows that the state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud raised by Plaintiffs. If the institutions established by the People of Michigan . . . had taken the allegations of voter fraud seriously, then it is quite possible that this case would not have come to federal court. [*Operation King's Dream* v. *Connerly*, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 29, 2006).]

At the direction of Michigan's Governor shortly after Proposal 2 passed, MCRC assessed the effects of adding §26 to Michigan's Constitution. *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06- 02*.[4] Among the many findings and recommendations in the March 27, 2007 report

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[4]Available at *http://www*.michigan.*gov/ documents/mdcr /FinalCommissionReport3-07_1_189266_7.pdf*

was MCRC's conclusion that §26 violated the Equal Protection Clause. "*One Michigan*" at 16.

MCRC also submitted briefs *amicus curiae* in this matter to the Sixth Circuit Court (by leave granted) during both the panel and en banc stages of its review.

INTRODUCTION AND SUMMARY OF ARGUMENT

What Petitioner urges upon this Court is not colorblindness – but color blinders, a deliberate and selective effort to shield the obvious from view.

Michigan has a long and extensive history of recognizing the need to respect and constitutionally protect the political independence of public universities and their ability to make decisions related to issues like admissions free from political influence and focused only on the interests of the academic institution and its students.

Michigan's universities, and in particular the University of Michigan, while acting in the interests of students came to the same conclusion that most of America's corporate and government leaders have reached: university students who learn in diverse student environments are better prepared for what comes next when they graduate. The schools thus put admissions policies in place that sought to ensure a broadly diverse student body by considering all the attributes of each qualified applicant, including race, and favoring applicants who offered

something to the student body as a whole that was different than what was already there.

These admissions policies do not start out with any preferences for particular attributes. A music school that, three-quarters of the way through the admissions process finds it has four oboists for every clarinetist, might look more favorably upon those in a pool of equally qualified applicants who play clarinet. If it does so, it is not because it wants to help clarinetists, nor does it have a 'preference' for clarinets. It does so because it will make its orchestras sound better. Diversity is about the whole, not the individual.

Broad diversity policies do not favor any particular race(s) over others, nor do they favor race any more than other attributes. They favor only whatever is different from that which already exists, and thus select from the pool of qualified applicants the particular individual that is the best addition to the class.

Applicants who felt the policies prevented their admissions sued, alleging discrimination. Those cases led to this Court's decisions in *Gratz*, finding that the automatic provision of special admissions consideration to underrepresented minorities was discrimination and violated the Equal Protection Clause, and *Grutter,* finding a broad-based diversity policy that considered <u>all</u> the ways each qualified applicant could contribute to the student body as a whole was permissible even though one of those ways is race.

Following the decisions, a ballot initiative was launched by some who were unhappy this Court found universities could continue seeking diversity without violating the Equal Protection Clause. It eventually led to Proposal 2-06 being passed and Article I, § 26 added to Michigan's Constitution. (*Amicus* MCRC will use the terms Proposal 2 and §26 interchangeably.)

Considering race as one factor among all others, in an effort to achieve a broadly diverse student body, is neither preferential treatment for, nor discrimination against, any race. It doesn't treat applicants of color differently than others, it treats all applicants the same, considering any way each might add to the student body as a whole.

In *Grutter,* this Court held that considering race in this way does not violate the Equal Protection Clause because it does not unjustifiably discriminate. Section 26 purports to ban the practice by adding a prohibition of "preferential treatment", but legal usage of the term should apply only to automatic preferences given to a particular group in a way that constitutes discrimination. Strictly interpreted, the prohibition of preferences is redundant to the prohibition on discrimination.

However, we are here today because §26 is being enforced based upon its intent to prohibit precisely what *Grutter* permitted. Thus, §26 is read to prohibit any consideration of race by universities, even as but one factor among all others in a diversity admissions program. While it may be constitutionally permissible to prohibit diversity entirely and limit admissions policies to only measurable factors

directly related to academics -- prohibiting only consideration of race is not.

Doing so treats race differently than it treats every other facet of who an individual is and how he or she is assessed for possible admission. State requirements that compel universities to treat race differently in this fashion violate the Equal Protection Clause.

Finally, even if §26 is itself found to be permissible, the process created is not. Issues involving minority interests cannot be made subject to a separate and more difficult majoritarian political process. Section 26 does so and thereby violates the Equal Protection Clause.

Two final introductory observations:

First, the benefits of diversity are not the wild imaginings of ivory tower academics, "American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter* at 330. Similar feelings about the very real importance of academic diversity are expressed by amici of "high-ranking retired officers and civilian leaders of the United States military." *Id*. at 331.

Second, too often people view this important issue as though a son, daughter or other loved one is an applicant awaiting a decision from his or her university of choice, frequently assuming they are one of the last to be admitted or denied. MCRC respectfully suggests the more appropriate viewpoint

is to assume the loved one has already been admitted. Once admitted, we all want universities to provide our loved ones the best educational environment possible. Knowing future employers prefer to hire graduates from universities with broadly diverse student bodies, we would be upset of the school didn't try to be one.

Perspective changes significantly when one's focus is on students, rather than on applicants. What better argument can there be for leaving the admissions process in the control of the universities themselves?

ARGUMENT

I. Because "preferential treatment" as a legal term should be legally defined by this Court to apply only to race specific 'affirmative' or other actions which are also "discrimination," its prohibition does not interfere with university admissions policies in which race is but one of many equal factors considered as part of an effort to achieve broadly based diversity, and neither the prohibition nor the policy violates the Equal Protection Clause.

A. Answering the question presented by this Court requires first defining the term "preferential treatment."

Proposal 2 appeared on the ballot through a campaign of deception in which its proponents repeatedly misled the public about what the

constitutional amendment would do. Defenders of §26 now seek to perpetuate this sleight of hand by blurring the definitions of, and distinctions between, critical terms and concepts including "affirmative action," "diversity," "discrimination," "reverse discrimination," and most important, "preferential treatment." This Court should not attempt to resolve this case and the question it has presented, without first providing a clear understanding of how the Court is interpreting these terms.

The question presented: "Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public university admissions decisions," is a difficult one to answer in the context of this case, and the issues it presents. As the sole question presented by this Court, its answer is also presumed determinative of whether §26 violates the Equal Protection Clause.

Amicus curiae MCRC, suggests the constitutionality of such prohibitions is entirely dependent upon the answer to a slightly different question: What does it mean to prohibit race and sex-based "preferential treatment" in public university admissions decisions?

Ironically, preferential treatment, affirmative action, and diversity, the terms at the center of this case about how we treat color, have themselves been chameleon-like. Their meanings seem to change, allowing them to appear to belong where they do not.

Supporters of what was then Proposal 2 described it differently to different audiences. It was

often described as a straightforward effort to nullify *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) and foreclose any ability for universities to consider race within a broad diversity effort. To others it was represented as 'only' forbidding affirmative action like that deemed unconstitutional in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). Whether the language entirely forbids consideration of race seemingly depended upon what a particular audience wanted to hear. Petitioner and *amicus curiae* supporting §26, now offer arguments that perpetuate this confusion.

Having failed in *Grutter* to establish that diversity in admissions policies is discrimination, Petitioner now asks this Court to simultaneously accept that the sole intent and effect of §26 is the prevention of discrimination, but that the sole way it does so is by ending the very same policies found not to be discrimination.

Petitioner's central premise, that §26 does not violate the Equal Protection Clause, but it does prohibit what *Grutter* permitted, requires placing the importance of semantic structure over that of reason and constitutional principle -- first assessing the language while ignoring its intent, and later enforcing its intent without considering what meaning the language was given. This circular reasoning illustrates an important point. This Court must begin by providing a clear legal definition of what conduct prohibiting "preferences" includes.

Section 26 does not state anything not already decided in *Grutter*, merely rewrapping a failed argument in a new and more aesthetically pleasing

package. Its purpose, however, was *Grutter*'s annulment. It is imperative that this case not be reviewed based upon an understanding of what the term has meant, only to have the provision enforced based upon what the proponents of §26 intended it to mean.

B. "Preferential treatment" occurs when a university admissions process affirmatively provides an applicant or group of applicants with a benefit based on race in a way that unlawfully discriminates against others.

In determining what it means to say it is illegal to "grant preferential treatment to…," it is helpful to note what it means to say that it is illegal to "discriminate against." Literally, the term "discriminate" means to differentiate or make a distinction,[5] but it is clearly understood that such statutory language applies only to unjustifiable discrimination, which is to say differentiating without legally sufficient justification. Nowhere is it seriously argued that any legal definition of discrimination bars all differentiating.

Similarly, a legal prohibition of preferential treatment should be read as banning only that which is determined to be illegal or unjustified. Otherwise a university theater department would be prohibited from 'preferring' race, national origin, and even sex, when casting the lead for a production of Abe Lincoln in Illinois.

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[5] see e.g., Dictionary.com, available at http://dictionary.reference.com/browse/discrimination?s=t

Black's Law Dictionary does not contain a definition for "preferential treatment." Interestingly, the term does appear under the definition of "discrimination" where, under the subheading of "reverse discrimination," it provides:

> *Reverse discrimination.* (1964) Preferential treatment of minorities, usu. through affirmative-action programs, in a way that adversely affects members of a majority group. See affirmative action." [Black's Law Dictionary (9th ed. 2009).]

In addition to making clear the association between the concepts of preferential treatment and affirmative action programs, the term's inclusion as part of the definition of reverse discrimination is particularly telling. Whatever 'preferential' treatment means, it must be a form of 'unequal' treatment.

It should be recognized that, like reverse discrimination, preferential treatment has been used to refer to discrimination against non-minorities on the basis of race. Like reverse discrimination, some may find the term a useful way of examining the fairness of affirmative action programs, but it does not provide a separate cause of action or change the standards for judicial review. Application of the Equal Protection Clause "is not dependent on the race of those burdened or benefited by a particular classification." *Gratz* at 270 (emphasis added). "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not

equal." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 289-90 (1978).

Universities are already prohibited from providing an automatic benefit, bonus, or other affirmative advantage to prospective students based upon their race. Such preferences have been held to violate the Equal Protection Clause because they are seen to unjustifiably discriminate against those not eligible to receive them. To date, the term has been directly applied, at least by this Court, in reference to affirmative and/or remedial actions and preferences that were found to be discriminatory.

"Preferential treatment" is a form of reverse discrimination. It is an affirmative act and refers to the sorts of discrimination *Gratz* prohibits. Treatment becomes legally preferential for someone or some group at the same moment it becomes discrimination against another. At core, §26's separate prohibitions of "discrimination" and "preferential treatment" are redundant.

This tautology is most clearly seen in this Court's first recognitions of the value of broad base diversity to a university education. *Bakke* made very clear that remedial actions could not be an acceptable part of an admissions process. Universities cannot and indeed "are not competent to make" the decisions necessary to launch a "remedial action" that "aids persons perceived as members of relatively victimized groups." *Bakke* at 308. Determining that absent "findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Id*. at 308-309.

It is only "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." *Id*. at 307.

C. "Preferential treatment" is best understood by looking at the difference between the kind of 'affirmative' policies found to be unjustified discrimination/preferences in *Gratz* and the broad inclusive diversity policy approved in *Grutter*.

After first finding that a separate and less rigorous, disadvantaged minority admissions process admitting minority applicants to reserved admissions spots violated the Equal Protection SClause, Justice Powell observed:

> It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the [separate admissions] program. A facial intent to discriminate, however, is evident in [that] preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements -- in the selection process. *Bakke* at 318.

Confusion between the goals and applications of 'affirmative action' and 'diversity' based admissions

policies have resulted in the temptation to apply the prohibition on preferring applicants of a particular predetermined race, to the process of preferring diverse applicants including those of different races. The first 'prefers' one race, the second 'prefers' all races.

Affirmative action focuses on a particular group. It posits that the group's underrepresentation in the student body is the result of current or past discrimination. It concludes that the appropriate remedy is to try to affirmatively place members of the group where they would have been, if not for discrimination. The school selects the more deserving, not the better, applicant.

Diversity focuses on the student body as a whole. It recognizes that what each student will get out of the process depends in part on who the other members of the class are. It sees the student body as a team.

A university could base all admissions decisions upon nothing but a standardized test score. Admitting applicants based upon the one criterion alone would certainly result in a student body that is qualified – but few if any would argue universities should be required to do so. It is recognized this would not be in the best interests of the university or its admitted students.

Universities also factor in numerous other 'non-academic' considerations. A legacy applicant might be given favorable consideration, as might an athlete. This is done for the benefit of the school, not the student. Diversity is similarly not done to benefit

the applicant, but rather to benefit all others in the student body.

D. A university's primary responsibility is to its student body and a policy that benefits all students, (especially one providing the greatest benefits to students belonging to well represented racial groups), should not be considered discriminatory simply because it also benefits minority applicants.

Implied throughout the various arguments in support of Proposal 2 and §26, is the deliberate deception that promoting "diversity" is synonymous with granting a "preference" to one group in particular. Equating the terms requires an assumption that diversity efforts will invariably aid the same groups time after time. Diversity in admissions must really be a preference for African-Americans, it is argued, "Come on, just look at it."

The never stated, but necessarily implied and patently false, assumption underpinning any argument that diversity is 'unfair' because it "prefers" African-Americans is that the playing field is level. Worse, the underlying premise that it will always benefit African-Americans is either a belief that they could not compete on a level playing field (racist), or that society will never level the playing field (fatalist), neither of which this Court should countenance.

MCRC asserts that no matter how hard we might want to pretend otherwise, it is only because the playing field is not level, that certain minority

groups are predictably underrepresented. Were our educational system truly equal, standardized testing completely fair, historical discrimination's effects properly addressed, and societal prejudices eliminated, diversity efforts would not be seen to "prefer" African-Americans any more than diversity could now be said to "prefer" clarinetists over oboists. Simply put, the belief that diversity in university admissions policies will always benefit the same group(s) is racially prejudiced, because it relies upon the false premise that these groups have been provided equal opportunities but are somehow intellectually inferior.

The fact that diversity efforts may in some respects have predictable implications is not the result of either the purpose or process of the diversity efforts themselves.

Predictability should not be confused with preference, and efforts to do so should be rejected by this Court. Condemning predictability as representing a "preference" is factually inaccurate, deliberately misleading. It punishes those who have been denied equal opportunities, exacerbating previous discrimination by discounting as irrelevant both its cause and effect.

A university's primary focus should be the academic interests of its students. It should select for admission those applicants who will make the student body the best it can be with this primary focus in mind. A university that pursues diversity in the interests of providing its white student majority with better educational opportunities cannot be said

to be ignoring the interests of whites generally, only of putting the interests of students before applicants.

Diversity efforts are not undertaken in order to benefit minority applicants and prohibiting diversity because it has that effect denies equal protection.

A university that seeks diversity by considering a broad array of qualifications and characteristics of which race is "but a single though important element" does not run afoul of the Equal Protection Clause.

> This kind of broad [diversity] program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. [*Bakke* at 318.]

Legal prohibitions of preferential treatment should only be applied to "preferences" that legally discriminate. So long as they are, they do not violate the Equal Protection Clause.

II. Prohibiting universities from considering race while also permitting them to consider all other facets of the broad diversity that best serves the educational interests of all students, especially where the other factors to be considered themselves have disparate racial impact, discriminates against students for whom race is part of the diversity they could bring to the student body; it treats race differently than all other factors including religion; and it violates the Equal Protection Clause.

A. While we may believe color-blindness is a laudable goal and that a person's race shouldn't matter . . . at present, race does matter and using the Equal Protection Clause as a vehicle to impose color-blinders on universities is unconscionable.

If Petitioner succeeds in persuading this Court to expand the term "preferential treatment," permitting the *Grutter* decision to be read as holding the diversity admissions policy at issue was not discriminatory - but was preferential treatment, then §26 and similar prohibitions would prohibit schools from considering race as part of a diversity policy. However, because §26 selectively prohibits only race and sex for different treatment, it would still violate the Equal Protection Clause. The prohibition read this broadly unconstitutionally discriminates against minority applicants because it denies them the opportunity to be evaluated in the same holistic way as everyone else.

Race matters.

Maybe it shouldn't. Maybe someday it won't. But, today, race matters.

One cannot credibly argue that the color of one's skin makes no difference - that who a person is, how they perceive the world around them, how the world treats them, are completely unrelated to the color of their skin.

Race affects how others view us, and thus how they interact with us. As a result it affects our experiences. How could it not then affect how we view others?

Is it possible to think about Trayvon Martin, Henry Lewis Gates, Amadou Diallo, the Jena 6, OJ Simpson, or Rodney King without recognizing that skin color has something to do with how we perceive events around us, with how others view us, with who we are and how we view ourselves?

Race matters. It may no longer determine outcomes the way it did before the many successes of the civil rights movement, but it continues to effect experience.

"The freedom of a university to make its own judgments as to education includes the selection of its student body." *Grutter* at 329, quoting *Bakke* at 312.

The University of Michigan Law School policy at issue in *Grutter* was intended to "assembl[e] a class that is both exceptionally academically qualified and

broadly diverse," *Grutter* at 329, using 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 noted the policy

> makes clear "there are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic--e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions . . . describing the ways in which the applicant will contribute to the life and diversity of the Law School. [*Id*. at 338-339 (citations omitted).]

Defenders of §26 instead suggest it should remain proper for a university to consider the uniqueness of those who have overcome a personal adversity -- unless it has to do with race. That it should be permissible for a graduate school to consider that an applicant from a northern state attended an undergraduate school in the south, but

illegal to equally factor that another applicant was one of only a few white students attending an historically black college in his or her own state. Equal protection does not allow for such divergent treatment.

The U of M Law School admissions policy in *Grutter* focused upon each prospective student's "academic ability coupled with a flexible assessment of their talents, experiences, and potential." *Grutter*, 539 U.S. at 319. Prohibiting any consideration of race would prevent universities from even considering instances where evidence shows the grades black students receive in white suburban schools reflect cultural or testing biases or even outright prejudice. The rule against consideration of race thus prevents full assessment of even academic ability.

Certainly, race standing alone does not establish the existence or non-existence of adversities or disadvantages. However, keeping race entirely off the table denies minority students the ability to have their unique experiences equally considered.

B. Many of the 'race-neutral' diversity considerations universities will continue to employ aren't racially neutral, they tacitly favor some racial groups over others and schools cannot be prohibited from recognizing such unintended discriminatory affect.

A university prohibited from considering race as part of its diversity policy will continue to seek diversity in other ways, because diversity is not

about any one characteristic. Applicants may stand out based on athletics, legacy, religion, debate team membership, musical ability, attending certain select schools, and hosts of other 'plus' factors. While each factor may be appropriate when looked at in concert with all the others including race, excluding race from the picture actually prevents neutrality.

Athletics presents many such examples. Looking beyond just the "major" sports, one can quickly see how such preferences benefit the advantaged. A university's consideration of diverse sports might include lacrosse enthusiasts, fencers, equestrians, gymnasts, archers, or skiers each of which are likely to have disparate racial impact. Many such sports require club membership and/or expensive equipment. Even sports like competitive swimming or skating require relatively exclusive access to a pool/rink. Local school cuts may make art, music, and theater programs less available to some than others.

While universities do, and should be permitted to, consider each of the above as possible factors when looking at a prospective student, each also provides a tacit racial advantage that favors the historically privileged at the expense of racial minorities. Permitting universities to look at every factor, including race, enables them to look at each individual in a race-neutral (though race-conscious) way. It creates an overall balance even though individual considerations may have disparate impacts on others. It also recognizes the relative uniqueness of a white student who plays an

American-Indian flute, or an African-American woman who plays ice hockey.

Allowing such "race-neutral" policies to remain in place in spite of their disparate negative impact on applicants of color, while also making color the only characteristic that cannot be considered at all, denies equal protection.

C. Implementing race-neutral methods in order to obtain racial diversity is not only of questionable integrity, it attains racial diversity at the expense of the broad diversity that better serves all students, and it sacrifices academic quality.

Those seeking to outlaw any consideration of race in university admissions procedures argue that universities can achieve racial diversity by other means. They suggest that implementation of Texas-style 10% rules, other "percentage plus" rules, consideration of economic or geographic status, or some other race neutral means should be implemented for the express purpose of achieving a diverse student body.

MCRC finds repugnant any suggestion the United States Supreme Court should condone university admissions policies chosen specifically <u>because</u> they are discriminatory (or at least disparate) in operation, simply because the policies are facially neutral. In addition to the offensive intellectual and moral dishonesty of condoning by ruse what is pretended to be prohibited by rule, "these alternatives would require a dramatic

sacrifice of diversity, the academic quality of all admitted students, or both." *Grutter*, 539 U.S. at 340.

Defenders of §26 are unconcerned that a university which adopts a particular facially neutral policy (like a 10% plan), would do so only for the purpose of achieving racial diversity. They do not acknowledge that seats filled in this manner make it impossible for the university to consider many other valuable diversity elements, or that they harm academic quality. A 10% plan may be good public policy, but it does not select applicants based on the interests of the school or student body. It is more akin affirmative action than diversity.

Most tellingly, when arguing for such race-neutral ways to achieve racial diversity, defenders of 26 ignore how it places the focus on elements unrelated to a university's academic environment. Indeed, many who argue against diversity being an admissions factor seem to regard any lowering of a university's overall academic standards as a victory for their cause and refuse to recognize it as a loss for the university or its student body. They have become so concerned with whether they will be admitted they have forgotten why they want to be admitted, which presumably has something to do with the quality of the institution and the educational experience it provides to its students.

The disingenuous use of race neutral programs to achieve diversity is antithetical to the academic purpose for creating diversity in the first place. Asserting that the benefits of racial diversity can be achieved by economics or geography requires presupposing that all African-Americans, or all

members of other underrepresented minority groups, are interchangeable.

The *Grutter* opinion highlights the testimony of one of the trial experts who explained that; "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students." *Grutter*, at 320. Similarly, admitting a dozen black applicants from the same disadvantaged inner-city school system would provide numerical minority representation, but not the broad diversity this Court approved of in *Bakke, Grutter* and most recently in *Fisher v. Univ. of Texas at Austin,* __ U.S. __, 133 S. Ct. 2411 (2013).

Supporters of §26 often question why a black applicant with rich parents living in a suburban school district should be looked at differently than the white applicant living next door. The question oversimplifies the breadth of diversity by offering too few factors about the applicants, and no indication of what the rest of the admissions class looks like. The fact an applicant is black cannot by itself justify his or her admission, but is it less relevant to academic diversity than the fact that a third neighbor collects butterflies? Is it significant that one had ancestors on the Mayflower, but not that the other's arrived on a slave ship?

Which applicant could offer a unique perspective to class discussions on ethnic profiling? Even the most privileged of African-Americans have an American experience that is different than that of their white neighbors.

III. A public referendum creating a separate and more difficult political process that requires majority votes only on policies that relate to minority interests violates equal protection.

Adding Article I, § 26 to the Michigan Constitution created two separate and unequal political processes for those wishing to bring about a change in a public university's admissions policy: 1) a very difficult and costly process in areas involving minority interests, and 2) a less difficult and far less costly process for those seeking change in any other area (including the suspect class of religion).

"But when the political process or the decision making 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." *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485-86 (1982), and *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969) (internal citation and quotation marks omitted). The *Hunter* and *Seattle* cases, in particular, establish the doctrine that providing a separate and unequal political process for changing policy distinctions based on race is constitutionally impermissible.

Petitioner does not dispute that §26 creates an almost impossibly difficult and purely majoritarian political process that applies only to those former powers of university boards related to admissions decisions from which minorities might benefit. They

instead rely on unfounded semantic distinctions to suggest that the elected boards from which the power was taken were not "political."

Nor does Petitioner dispute that §26 was intended to end a process that voters believed benefited minorities. They instead argue that because it prohibits favoring one race, instead of prohibiting disfavoring another, the provision shouldn't be considered racial.

Even if this Court determines that there is a legal difference between providing 'special treatment' to A based on a preference for A's race, and denying equal treatment to B based on B's race, it should reject the idea that only the latter is "racially conscious legislation." (*Seattle* at 485.)

The *Hunter*, *Seattle* doctrine should not be read so narrowly that its general principle is forgotten. It does not limit the voter's ability to change policy. The principle is not concerned with any particular political process or how it applies to general areas of law like university governance; it merely holds that a single process must be equally applied across the spectrum of the general area of law. Nor does the doctrine limit what burden may be placed upon voters to make future changes; it only prohibits "comparative burdens on minority interests." *Seattle* at 477 (emphasis added).

The semantic nit-picking of *Hunter*, *Seattle* and similar cases should not be permitted to cast aside the fundamental principle that the political process for racially conscious legislation cannot be both separate and equal protection.

A. Might doesn't always make right, and proponents of §26 should not be permitted to circumvent all substantive legal review by using the referendum (majority vote) process to determine equal protection (minority) related policy.

In *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington Seattle School District No. 1*, 458 U.S. 457 (1982), this Court disallowed legislation that, like Proposal 2, in a racially conscious way placed political hurdles in the way of some which did not exist for others. In particular, *Hunter* recognized that courts have a special duty to insulate minority rights from majority rule:

> In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process." [*Hunter* at 486, citing *San Antonio Independent School Dist*. v. *Rodriguez*, 411 U.S. 1, 28 (1973), (emphasis added).]

MCRC submits that it is precisely this judicial responsibility to safeguard minority interests by protecting them from the majoritarian political process that faces this Court in the present case.

The importance of not just preserving but also respecting the judicial safeguards that shield the constitutional interests of minorities from what, in more extreme circumstances, is referred to as the

'tyranny of the majority,' highlights an under-noticed but particularly pernicious effect of the political process used here by supporters of §26. While any law that expressly changes how public universities deal with individuals "on the basis of race, sex, color, ethnicity or national origin" would be expected to be subject to strict scrutiny on judicial review, Petitioner is arguing that review of §26 should be limited to asking "was it possible for Michigan voters supporting §26 to have been motivated by any reason other than racial discrimination?" (Petitioner's brief at 15).

To be clear, Amicus MCRC, does not suggest that the people cannot or do not "retain for themselves the power over certain subjects" including the governance of public universities, only that doing so "furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Seattle* at 476, citing *Hunter* at 392.

While Amicus MCRC believes they would be horribly misguided to do so, Michigan voters could take the power to set public university admissions policy away from the independent boards that now have it. It would arguably even be permissible to use the referendum process to prohibit <u>all</u> diversity considerations and strictly limit the admissions process to only items that directly relate to an applicant's past academic performance. What is not permissible, and what this Court must not find to be permissible, is separating race or other minority

interests from the process that applies to everything else.

At its core, the doctrine established by *Hunter* and *Seattle* recognizes that the power to change the law, and the political process that enables it, is part of the people's protection against bad laws. Whatever protection is provided by the political process that applies to changing laws in a general area, the same process should apply to changing only those parts of the general law affecting minority interests. The protection cannot otherwise be equal.

B. By usurping the power to determine a university policy that had previously been politically vested in university governing boards, §26 reallocates Michigan's political structure for university governance.

Petitioner begins their "Statement of the Case" by noting: "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." They then disingenuously argue that adoption of §26 wasn't about reallocating the political structure in Michigan. The first of these statements accurately describes the frustration that motivated supporters of §26 to change the existing political structure; the second should be rejected.

Laid bare, Petitioner's argument is that passage of §26 did not reallocate Michigan's political

structure because the process governing admissions prior to the referendum's passage wasn't political enough. Thus, Petitioner says, §26 'merely' moved control of that portion of university admissions dealing with race (and sex, color, ethnicity, or national origin) from a 'non-political' process to a political one.

Arguing that the governance of admissions policy in Michigan is non-political requires denying both that unused power is reserved not relinquished, and that this power is in fact used.

First, as noted by the Circuit Court, even if it were true that university boards had abstained from any involvement in admissions, Petitioner "provides no authority to support his contention that an unused power is a power abandoned." *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary* v. *Regents of Univ. of Michigan*, en banc opinion, 701 F.3d 466, 482 (6th Cir. 2012).

More to the point, the university boards' powers are not unused. Nothing is offered to refute the Circuit Court's findings that the boards continue to exercise ultimate authority in spite of having delegated the bulk of the decision-making to appointed bodies, that the university boards exercise this authority "with some frequency," and that "the elected boards of Michigan's public universities can, and do, change their respective admissions policies, making the policies themselves part of the political process." (*Coalition to Defend*, en banc opinion, at 482-3).

Most critically, Petitioner's characterization of the power to govern admissions as non-political ignores the extensive and explicitly political history of university governance in Michigan. The insulated political decision-making of universities and their admissions processes is the direct result of a very political process which deliberately reallocated these powers.

The process Petitioner now describes as being non-political because it is insulated from the traditional legislative process did not always exist. The history of control over Michigan's public universities was detailed by the Michigan Supreme Court in *Federated Publications Inc.* v. *Bd. of Trustees of Michigan State Universit*y, 460 Mich. 75, 594 N.W.2d 491 (Mich. 1999):

> Long ago, the Legislature controlled and managed our first public university, The University of Michigan. This experiment failed, prompting extensive debate regarding the future of the university at the Constitutional Convention of 1850. Const 1850, art 13, § 8 emerged from these debates, divesting the Legislature of its power to regulate the university and placing control in an elected board." [*Id. at 496* (internal citations omitted).]

"The University of Michigan thrived under the leadership of its board of regents." *Id.* Insulation from the legislative process proved so successful that, "(r)ecognizing the importance of an independent governing board in managing state colleges and universities," the constitution of 1908 extended the

same political independence to what is now Michigan State University. Wayne State University gained the same political independence by constitutional amendment in 1959. Eventually, pursuant to the Constitution of 1963, Michigan's other public universities were granted similar self-determination, but through appointed rather than elected boards. *Id*. at 498.

The need for politically independent boards was discussed in more detail (and more contemporaneously) by the Michigan Supreme Court in *Sterling* v. *Regents of the Univ. of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896). The Court described the deliberate creation of an independent political body and the intent to "place it beyond mere political influence." *Id*. at 254.

The Court, citing a select legislative committee report observed that; "When legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed." *Id*. at 255. This fluctuation was clearly seen as a major part of the problem, and much attention is paid to the need to place governance into the hands of a body with the "oneness of purpose and singleness of aim" who "chosen for their supposed fitness for that very office, and who, having become acquainted with their duties, can and are disposed to pursue a steady course." [*Ibid.*]

Contrary to Petitioner's present characterization, the 1850 framers had no intent to remove university governance from the political process altogether, only to insulate it from political volatility by placing it in

a more insulated, long-serving, and specifically institution-focused group of elected officials.

> 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 men elected by the people at large. They recognized the necessity that it should be in charge of men elected for long terms, and whose sole official duty it should be to look after its interests. [*Id.* at 256.]

Michigan, since 1850, has consciously and deliberately reserved the power to govern public universities to bodies that while political in structure and ultimately responsible to the people, are also carefully isolated from both the whims of change and the influence of those who have interests other than those of the specific institution at heart. Section 26 removes only a very small slice of this political power from control of the dedicated university boards. Furthermore, it treats the interests of each university as identical (though again for only this sliver of decision-making), as all other decisions are still to be left to the individual boards.

That Michigan voters would remove any portion of political power from the carefully structured, independent, and narrowly focused university boards is unwise. That the unabashed purpose of §26 is specifically to forbid consideration of what the university boards and this Court agree is a compelling state interest in diversity, proves the wisdom of the framers of Michigan's 1850

Constitution who created the universities' independent and narrowly focused political governance structure. Most significant, because the sliver of decision-making separated from all others is "racially conscious" and may otherwise have inured to the benefit of minority applicants, it is contrary the *Seattle* and *Hunter* decisions and it violates the equal protections guaranteed by the Fourteenth Amendment.

C. The argument that the principles of *Hunter* and *Seattle* do not prohibit a ban on preferences is based upon semantic distinction rather than actual difference.

The inherent weakness in this argument offered by supporters of §26 can be seen from the very outset of Petitioner's brief to this Court: "To begin, this Court has applied the political restructuring doctrine only to laws that impede protection against unequal treatment, never to laws that preclude preferential treatment." Petitioner's brief at 4. "Preferential treatment" may not be defined, but it defies reason to maintain it can occur without also being "unequal treatment."

Petitioner provides no legal justification for distinguishing acts of "preference for" one person from acts in "discrimination against" another. In *Seattle* this Court was similarly faced with referendum proponents who tried to distinguish their case from the *Hunter* decision based upon the specific way in which race was implicated. Nothing in the *Seattle* opinion suggests its application should be limited to the specific way "Referendum 503"

implicated race. To the contrary, *Seattle* flatly rejects the relevance of such factual contortions and determines that the *Hunter* doctrine is not about legislative drafting specifics; "It is the State's race-conscious restructuring of its decision making process that is impermissible" *Seattle* at 477, *fn* 29.

A close look at *Seattle* reveals that, although the word "preferences" was not used, the purposes of the referenda there and here are actually quite similar. In *Seattle*, schools sought to implement bussing in order to achieve the classroom diversity social segregation prevented. Unable to stop the bussing by any other means, a referendum was offered that purported to authorize bussing, but then limited it to any purpose other than desegregation. This Court had little difficulty seeing past the effort to distinguish political barriers erected to blocking anti-discrimination laws from similar barriers blocking anti-discrimination remedies:

> Certainly, a state requirement that "desegregation or antidiscrimination laws," and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. [*Id*. at 486-87, citing *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527, 539 (2008), emphasis added.]

Similarly, it is not constitutionally significant that §26 purports to prohibit preferences. Pursuant to §26 "the decision-making mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment," and thus "plainly rests on distinctions based on race." [*Seattle* at 485 (citations and quotation marks deleted.)]

D. Passage of Proposal 2 does not merely set the procedural hurdles higher for changing admissions policy in areas involving minority interests; it sets them at a level its proponents found impossible to reach without "deception and fraud".

Amicus MCRC, reminds this Court that Proposal 2 fraudulently obtained its place on the ballot. As such, the facts here are more compelling than even those requiring invalidation of legislation in *Hunter* and *Seattle* themselves.

Laying aside that the issue here is about minority interests, the one arguable saving grace of allowing university admissions policy to be changed by voter referendum would be the idea that the same referendum process would always be available to those wishing to change back. However, any suggestion by Petitioner that §26 met the burden it imposes on others is patently false.

The Sixth Circuit Court determined that "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception" and that the

initiative "found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes." *Operation King's Dream at* 591 (referring in part to the findings of the Michigan Civil Rights Commission). Thus supporters of Proposal 2 now offer as the solution for those pursuing minority interests exactly the political process that even with substantial financing from outside the State of Michigan they were unable to meet without resorting to "fraud and deception."

Permitting a majority vote to erect a barrier for those seeking change in the way universities evaluate minority applicants violates the very concept of equal protection. That the barrier was erected through fraudulent means, and that it may now be impossible to remove by those unwilling to resort to fraud, underscores the need for judicial intervention.

CONCLUSION

Interpreted as drafted, Michigan Constitution, Article 1, §26's prohibition of preferential treatment does nothing to change the law as the term should not be applied to diversity admissions programs.

Interpreted as intended, Michigan Constitution, Article 1, §26 prevents minority applicants from being assessed in the same "holistic" manner considered as other applicants. It denies universities the academic freedom to create a student body that is in the best interests of the university itself or of its students, thereby denying those students the benefits of diversity. It requires universities to treat race differently than all other considerations about what make applicants unique individuals, and it violates the Equal Protection Clause.

Most dangerously, §26 creates a separate and very unequal political process for amending only university admissions policies, and specifically only those parts affecting minority interests. Allowing majority rule to reset minority rights in this manner is inconstant with not only the letter, but also the very spirit, of equal protection.

This Court should, by providing a clear definition for "preferential treatment," determine either that §26 merely restates existing federal equal protection law and thus does not violate the Equal Protection Clause. However, if this Court concludes a ban on preferential treatment is broader than a ban on discrimination then it should find §26 violates the Equal Protection Clause because it compels universities to discriminate by not considering the

attributes of minority applicants in the same holistic way as others it, and/or because it used majority rule to erect political roadblocks that apply only to issues and policies involving minority interests.

Respectfully submitted,

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