No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
Petitioner,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals For the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, MICHIGAN EDUCATION ASSOCIATION, AND SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief *amicus curiae* is submitted on behalf of the National Education Association ("NEA"); the Michigan Education Association ("MEA"), an affiliate of NEA; and the Service Employees International Union ("SEIU").[1]

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. MEA is the largest single public employee union in Michigan, and the third largest education association in the United States, representing more than 140,000 K-12 teachers, higher education faculty, professional education staff, educational support staff, and retired school employees throughout the State of Michigan. SEIU represents 2.1 million men and women working in health care, property services, and public services, including educators and support personnel in public schools, universities, and early education settings.

Amici are dedicated to furthering the goals and employment interests of their members, and believe that every citizen has the absolute right to participate—free of racially motivated distortions or burdens—in the political processes used to shape our nation's public educational institutions. *Amici* also

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

have a deep and abiding commitment to equal opportunity in all aspects of our society and believe that racial integration and ethnic diversity in our institutions of public education serve legitimate and compelling societal interests.

SUMMARY OF ARGUMENT

Proposal 2 creates a distinct and more onerous political process for those advocating for constitutionally permissible race-conscious admissions policies at public universities in Michigan. While those seeking different, non-race-based changes to university admissions policies—including legacy preferences or geographic set-asides—may use a variety of political channels to pursue their goals, citizens who propose that public universities consciously promote the benefits of a racially diverse student body through the kinds of programs this Court has held to be constitutionally permissible have but one option that is arduous, time consuming, and prohibitively expensive: amending the Michigan Constitution. As this Court has recognized in prior cases, this kind of racially motivated restructuring and distortion of the political process violates the Equal Protection Clause of the Fourteenth Amendment.

Prior to the enactment of Proposition 2, there existed a well-functioning, longstanding political process for determining the policies and objectives that would be pursued by public universities in Michigan, including those policies that affected admission criteria for prospective students. As is the case in many states, Michigan makes the governing bodies of its public universities directly politically accountable to its citizenry. These bodies are en-

trusted to make judgments about educational policy that go to the heart of a public education institution's mission.

Whether to consider race as a constitutionally permissible factor in admission policies is precisely the kind of educational policy judgment that has traditionally been exercised by these politically accountable bodies. As part of their mission to provide students with the skills and knowledge necessary to realize their full potential, as well as to instill in them the values on which our society rests, educational institutions may—consistent with the Fourteenth Amendment—seek to obtain the educational benefits that flow from an ethnically diverse student body. Those benefits include promoting cross-racial understanding, fostering more enlightening classroom discussion, promoting better learning outcomes, and preparing students for an increasingly diverse workforce and society.

It is clear that admissions policies in Michigan's public universities have been and will—with the exception the subjects removed by Proposition 2—continue to be part of a political process. But with particular regard to the key issue of whether race may be considered as a constitutionally-permissible factor in admissions decisions, Proposal 2 has completely restructured that process by prohibiting those who are in favor of such policies from lobbying elected officials for changes that they desire. Proposal 2 therefore imposes a special, racially motivated burden on minorities by creating two different political processes for advocating for changes in admissions criteria. Based on the precedent laid down by this Court,

Proposal 2 must be held to violate the Fourteenth Amendment, for the State has neither offered a compelling justification in support of Proposition 2 nor endeavored to argue that the measure is narrowly tailored to advance such a justification.

ARGUMENT

Proposal 2 violates the Equal Protection Clause insofar as it purports to keep one group—those advocating for constitutionally permissible race-conscious admissions policies at public universities in Michigan—from using the same multiple political channels available to others who seek different, non-race-based changes to those same admissions policies. Although a majority may generally defeat a minority's political proposals simply because it *is* the majority, Proposition 2 falls into the limited category of government action that the Equal Protection Clause forbids absent a showing that the action is narrowly tailored to advance a compelling state interest. Because race is the predominant factor that explains Proposition 2's creation of a distinct and more onerous political process, Proposition 2 is a governmental action that creates a suspect racial classification subject to strict scrutiny. And because the state has not suggested—much less proven—that Proposition 2 survives the rigors of strict scrutiny, the enactment must be held unconstitutional.

A. A State's Racial Gerrymander of an Existing Political Process is Subject to Strict Scrutiny Under the Equal Protection Clause

This Court's cases make clear that the Equal Protection Clause protects the ordinary mechanisms

of governmental decisionmaking against intentional efforts to rig or skew the political process against particular policies simply because of their racial subject matter.

This principle was first clearly enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969), when this Court struck down a charter amendment enacted by a white majority in Akron, Ohio that sought to sustain *de facto* segregation by requiring that fair housing ordinances be subject to a referendum vote. In striking down the amendment, this Court declared that the "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393. The rights protected by *Hunter* were defined broadly to include the right of a racial minority to equal political procedures when it sought "to enact legislation in its behalf." *Id.*

This Court reaffirmed *Hunter*'s political-restructuring rationale in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), when it struck down Initiative 350, a Washington state constitutional amendment that attempted to maintain *de facto* segregation of Seattle's schools by giving local school boards the power to use busing for any purpose *except* racial integration. Relying on *Hunter*, this Court held that the amendment violated the Equal Protection Clause because it imposed an unequal political process on those seeking to end school segregation. As this Court noted, "the practical effect of Initiative 350 is to work a reallocation of

power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. Although *Seattle* explicitly stated that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action," it clarified that when legislation "allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process," it violates the Equal Protection Clause. *Id.* at 470 (emphasis in original).

The political-restructuring doctrine laid down in *Hunter* and *Seattle* applies only in a limited set of circumstances—*viz*, those rare instances in which race is the predominant factor in the creation of a distinct and more onerous political process. Yet, the doctrine remains an essential component for the complete vindication of the rights protected by the Fourteenth Amendment. By ensuring that decisions as to the constitutionally permissible consideration of race in the provision of government services or benefits are made through an undistorted political process, the doctrine prevents one side of the debate over such policies from permanently entrenching its preferences and thereby "contributing to an escalation of racial hostility and conflict." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (internal quotation marks omitted).

B. Prior to the Enactment of Proposition 2, University Admissions Policies Were Subject to a Long Established and High-Functioning Political Process, and Determinations Concerning the Constitutionally Permissible Use of Race as a Factor in Admissions Were Properly Made by Publicly Accountable Governing Boards in the Context of the University's Educational Mission

Prior to the enactment of Proposition 2, there existed a well-functioning, longstanding political process for determining the policies and objectives that would be pursued by public universities in Michigan, including those policies that affected admission criteria for prospective students. This process has functioned effectively over the years to place in the hands of the publicly accountable governing boards the educational policy judgments over the conduct of the university, including the question of whether to engage in constitutionally permissible consideration of race as a factor in university admission.

1. As is the case in many states, Michigan makes the governing bodies of its public universities directly politically accountable to the citizens of the state. Indeed, reflecting the importance of the public universities in the state, Michigan's constitution recognizes its public universities' governing boards as separate constitutional entities that are directly responsible to the people. *See* Mich. Const. art. 8, § 5; Mich. Const. of 1908 art. 11, § 3; Mich. Const. of 1850, art. 13, §§ 8-9. By so doing, the people of Michigan chose to remove the public university system from the

direct control of the legislature and, instead, "to intrust" its operations to elected governing boards who are "directly responsible and amenable to the people." *Sterling v. Regents of the Univ. of Mich.*, 68 N.W. 253, 254 (Mich. 1896). This judgment, as the record of the state constitutional convention of 1850 reflects, was to establish a very specific political process rendering the state's institutions of higher education accountable to the citizenry of the state: "[R]egents will be distributed over every part of the state, and the public will thus obtain a knowledge of this institution . . . . They will obtain very important knowledge in regard to the establishment, and the people among whom they live will become informed as to the nature of this institution, and will become interested in it." *Id.* (quoting Mich. Const. Debates, 782 (1850)).[2]

The resulting governing boards of each university have plenary authority to change any governance policy of the university, as well as the composition and authority of the administrative units they oversee. The Michigan Constitution empowers each board with "general supervision of its institution." *See* Mich. Const. art. 8, § 5. In addition, state statutes

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[2] Michigan undoubtedly imbued its public universities with direct political accountability to the citizenry with a full understanding that those institutions would be central to the state's economy and the overall wellbeing of its citizens. *See generally* SRI International, *The Economic Impact of Michigan's Public Universities* (May 2002) (discussing the many social and economic contributions that Michigan public universities make within the state), *available at* http://www.michiganbusiness.org/cm/Files/Reports/univimpactreport.pdf.

give each board complete governing authority over the university, including the power to "enact ordinances, by-laws and regulations for the government of the university." *See* Mich. Comp. Laws. §§ 390.1-.23; *see also id.* §§ 390.101-.123; 390.641-.649. With that authority necessarily comes the power to influence changes to a wide variety of governance policies—including admissions policies.

Along with the authority granted by the Michigan Constitution and Michigan statutes, the governance documents for each public university in Michigan establish that their governing boards have the power to revise admissions policies as they see fit. Accordingly, the Bylaws of the University of Michigan provide that "[t]he faculty of each school and college shall from time to time recommend to the Board for approval . . . requirements for admission and graduation."[3] Similarly, the Bylaws of Michigan State University's Board of Trustees provide, "Upon the recommendation of the President the Board may determine and establish the qualifications of students for admission at any level . . . ."[4] So too, Wayne State's University Statutes establish the admission standards for graduates and undergraduates.[5]

Not surprisingly, these publicly elected boards have been responsive to public influences, and have been particularly influenced by the opinions of stu-

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[3] Sec. 5.03, *available at* http://www.regents.umich.edu/bylaws/bylaws.pdf.

[4] Art. 8, *available at* http://www.trustees.msu.edu/bylaws.

[5] *See* WSU Statutes 2.34.09, 2.34.12, *available at* http://bog.wayne.edu/code.

dents and faculty. Because they are popularly elected, candidates for positions on these boards routinely include their views about a number of university-related policies when they are seeking office. Indeed, board candidates regularly include their views on race-conscious admissions policies in their platforms when running for election.[6] Once elected, board members have the authority to amend the governing documents and policies of the applicable public university by way of changing any of the delegations of authority to the various committees that make university policy, including admissions policies.

2. It is the mission of educational institutions like the public universities in Michigan to provide students with the skills and knowledge necessary to realize their full potential, *see Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972), as well as to instill in them "the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). The fostering of a diverse student body though admission criteria is a central feature of that mission because, particularly in this era of ever-expanding globalization, nothing less than the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (citation and

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

internal quotation marks omitted). As this Court has recognized, racial diversity in higher education promotes "'cross-racial understanding,' helps to break down racial stereotypes," precipitates "more enlightening" classroom discussion, promotes better "learning outcomes," and "better prepares students for an increasingly diverse workforce and society." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

Thus, while this Court has been unyielding in its insistence that any use of racial classifications in such decisions must satisfy "strict scrutiny," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995), so as to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), this Court has been equally clear that diversity in schools and classes, including racial and ethnic diversity, is "a goal important enough" to warrant consideration of race in making such decisions. *Parents Involved*, 551 U.S. at 722 (recognizing that the government can have a "compelling" interest in "student body diversity" at the higher education level); *id.* at 782 (recognizing that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue") (Kennedy, J., concurring); *Grutter*, 539 U.S. at 325; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417-19 (2013).

A public university's interest in "obtaining the educational benefits that flow from an ethnically diverse

student body," *Bakke*, 438 U.S. at 306, is as compelling today as it was when this Court decided *Bakke* and *Grutter*. Because of the changing demographics of American society, the ability of an individual to function in a racially and ethnically diverse environment is increasingly important. By 2025, the year in which children who are entering first grade this year will graduate from high school, over half of all children will be Black, Hispanic, American Indian, Native Hawaiian, or multiracial, and over 42% of the overall population will be descended from these historically minority racial and ethnic groups.[7] These demographic shifts reflect an ongoing trend in which "[t]he country as a whole and the workforce in particular is becoming more, not less [racially] diverse."[8]

Yet, at the same time that American society is becoming more racially diverse, the nation's schools remain highly segregated. A student's race is, by itself, largely predictive of the racial composition of the elementary and secondary schools he or she will attend. The most serious segregation affects Black and Hispanic students: "in both of these populations about two of every five students attend intensely seg-

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[7] U.S. Dep't of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES 7 (July 2010); U.S. Census Bureau, *An Older and More Diverse Nation by Midcentury* (Aug. 14, 2008), *available at* http://www.census.gov/newsroom/releases/archives/population/cb08-123.html.

[8] Julie F. Mead, *Conscious Use of Race As a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 134-35 (2002).

regated schools."[9] The trend toward higher levels of concentrated segregation for Black and Hispanic students has ramifications beyond the mere fact of racial isolation. Nearly nine times out of ten, segregated schools with high percentages of students of color are also high poverty schools.[10] The result of this pervasive segregation is all too predictable. Students who attend high-poverty, minority-segregated primary and secondary schools have poorer educational outcomes and are often not as well equipped to enter institutions of higher education or the workforce.[11] Not only are these inequities growing worse

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[9] Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12 (Jan. 2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

[10] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 16 (2005), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf.

[11] U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2012 240 (June 2009) (In 2010, the dropout rate was 15.1% for Hispanic students and 8.0% for Black students, as compared to 5.1% for White students.); U.S. Dep't of Educ., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS, 121 (July 2010) (In 2008, about 44% of White 18 to 24-year-olds were enrolled in colleges and universities, as compared to 32% of Blacks and 26% of Hispanics in the same age cohort.); U.S. Census Bureau, *School Enrollment in the United States: 2008* 14 (June 2011), *available at* http://www.census.gov/prod/2011pubs/p20-564.pdf (in 2008, 45% of Hispanic college students and 36% of

nationally,[12] but Michigan is falling even further behind other states. Along with New York and Illinois, Michigan consistently ranks as one of most segregated states for Black students.[13] Moreover, college completion rates among Black students in the state are dropping: between 2002 and 2010, the rate for four-year public colleges fell by 5.1%, and the rate for two-year colleges fell by 8.5%.[14]

In the face of this grim portrait of enduring racial disparity and *de facto* segregation, educational institutions confront a choice. They can ignore the persistent inequalities in the education systems that segregate students by race, depriving all students of an education enriched by exposure to diversity. Or, they can take that reality into account in some limited and

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Black college students were enrolled in 2-year colleges, while just 28% of White college students were enrolled in such programs).

[12] THE CONDITION OF EDUCATION 2012, *supra* note 11, 114-15 (Between 1980 and 2011, the gap between Blacks and Whites in the percentage of 25- to 29-year-olds who had attained a bachelor's degree or higher increased by 6 percentage points, from 13% to 19%; and the gap between Whites and Hispanics increased by 9 percentage points, from 17% to 26%.).

[13] *See* Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students* 44 (2012) (noting that more than a third of Black students in the state attend schools where less than 1% of the student body is white), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students.

[14] *See* Chronicle of Higher Educ., College Completion – Michigan, *available at* http://collegecompletion.chronicle.com/state/#state=mi&sector=public_four/.

measured way by, for example, considering racial and ethnic background as one of many factors used in admitting a truly diverse student body.

The decision whether or not to enact admission policies that promote racial diversity is inseparable from the underlying mission of educational institutions. A substantial body of empirical evidence indicates that learning in a racially diverse setting furthers students' cognitive and intellectual development, thus providing an important educational benefit to students of every race. Diverse classrooms also teach students to judge others as individuals, rather than according to stereotypes and prejudices. These benefits provide a powerful catalyst toward integration over the course of a student's lifetime.

Over the past two decades, social science research has become increasingly sophisticated in its ability to isolate and identify the educational detriments of segregation and the concomitant benefits of integration. As a whole, this body of research unambiguously finds that racial diversity in classrooms positively affects minority students' math and verbal achievement, and, conversely, that racial segregation negatively affects their performance.[15] These findings provide consistent and unambiguous evidence that

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[15] Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 1032-34 & nn.150-156 (Mar. 2010) (collecting studies). *See also* Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. RES. ON ADOLESCENCE 109, 123, 125-26 (1997); Geoffrey Borman &

learning in a racially diverse classroom is positively related to outcomes for most students—irrespective of the student's age, race, or socioeconomic status.

Beyond the well-documented educational benefits of racially diverse classrooms, there are broad societal benefits to be realized from the interracial contact that comes with diverse classroom environments. Racial isolation breeds stereotypes and prejudice, whereas "equal status contact between majority and minority groups in the pursuit of common goals" is a critical ingredient in improving relations between members of those groups, especially if such contact "is of a sort that leads to the perception of common interests and common humanity between the members of the two groups."[16] Interracial cooperative contact among students of different races in our public schools has repeatedly been linked with increased levels of tolerance for children of other races, and increased likelihood that children of different races will become and remain friends.[17]

Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. REC. 1201, 1236-39 (2010); James Benson & Geoffrey Borman, *Family, Neighborhood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children?*, 112 TEACHERS COLL. REC. 1338, 1371, 1374-75 (2010).

[16] Gordon W. Allport, THE NATURE OF PREJUDICE 281 (1954).

[17] Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. SOC. ISSUES 45, 53, 59 (1985) (concluding, based on review of nineteen studies, "that when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships").

Classroom diversity offers enduring benefits to a multiethnic, democratic society, and its citizens. Students who learn to interact with individuals of other races in school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of the other race[s] than did adults … who had attended segregated schools."[18] They are also more likely as adults to interact with individuals of other races than are students educated in racially homogeneous schools.[19]

Based on their review of the myriad of benefits of diversity, including racial diversity, Michigan's public universities had, prior to the enactment of Proposition 2, permitted admissions policies that utilized race as a constitutionally permissible factor in the admissions process. *See*, *e.g.*, Brief for Respondents at 2-12, *Grutter*, 539 U.S. 306 (No. 02-241) (describing the genesis and operation of the University of Michigan Law School's admissions policy that used race as constitutionally permissible factor in evaluating prospective student applications).

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[18] Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. BLACK STUDIES 267, 269 (1989) (discussing results of desegregation at the elementary and secondary school level based on national survey of 12,686 individuals).

[19] *See*, *e.g.*, Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1990).

Their decisions to do so were subject to the established political processes that govern every facet of the universities' administration, including their admissions policies.

C. Proposition 2 Violates the Equal Protection Clause by Restructuring a Functioning Political Process to Create a Separate and More Onerous Process Based on Explicitly Racial Considerations

It is clear from the foregoing that admissions policies in Michigan's public universities have been and will—with the exception of the subjects removed by Proposition 2—continue to be part of a political process. But with particular regard to the key issue of whether race may be considered as a constitutionally permissible factor in admissions decisions, Proposal 2 has completely restructured the political process by prohibiting those who are in favor of such policies from lobbying elected officials for changes that they desire.

Proposal 2 therefore imposes a special, racially motivated burden for minorities by creating two different political processes for advocating for changes in admissions criteria. Because members of the governing boards of Michigan's public universities are elected, citizens are free to advocate for changes or enhancements to admissions criteria by using political pressure to influence the board members' decisions and by electing their preferred board member candidates. Indeed, board members regularly state their positions with respect to admissions policies in their campaign materials. Thus, with respect to all admissions factors with the distinct exception of

race, the boards' traditional control over the admissions process is preserved. For example, the University of Michigan has long departed from baseline admissions criteria, such as GPA and SAT scores, for a variety of purposes, including taking into account factors such as legacy status, geographic background, athletic ability, and many other lawful factors. But under Proposal 2, proponents of including constitutionally permissible consideration of race in admissions have been excluded from these long-established political processes for influencing the conduct of the state's institutions of higher education and instead must pass a constitutional amendment—an extraordinary burden—before the Board could even contemplate such policies.

Given that result, it is evident that Proposal 2 rests "on distinctions based on race" and targets those distinctions for "peculiar and disadvantageous treatment." *Seattle*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race.") (emphasis in original) (internal quotation marks omitted); *see also Hunter*, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.").

The results of this racial gerrymandering have been dramatic. Since Proposal 2 was adopted, racial

diversity in the state's higher education institutions has dropped significantly.[20] For example, in 1994, 8.7% of total enrollment at the University of Michigan were African-American students.[21] But since the passage of Proposal 2, African-American, Latino, and Native American students in the entering undergraduate classes already have dropped by one third.[22] Graduate student enrollment in the law, dental, and medical schools has seen even larger drops in underrepresented minority enrollment.[23] By 2011, the percentage of African-American students made up only

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[20] Similarly, one need only look at the effects of California's Proposal 209, that statute on which Michigan's Proposal 2 is modeled, to see the reality of the place of race-conscious admissions policies in American education today. Since the passage of Proposition 209, the percentage of underrepresented minority students enrolled in the University of California system has declined significantly, especially at the system's most selective and prestigious schools. From 1995 to 2002, the percentage of underrepresented minority freshmen out of all freshmen enrolled has decreased on five of eight UC campuses, and the two flagship campuses—UC Berkeley and UCLA—experienced the steepest declines of underrepresented minority freshmen enrollment, with both campuses experiencing a 56% decrease from 1995 levels. *See* Ian Wang, *Finding a Silver Lining: Positive Impact of Looking Beyond Race Amidst the Negative Effects of Proposal 209*, 2008 BYU EDUC. & L.J. 149, 157-58 & nn. 51-52 (2008).

[21] *See* Univ. of Mich. Office of the President, *The Michigan Mandate: A Seven-Year Progress Report, 1987-1994* 2 (Nov. 1995), *available at* http://milproj.dc.umich.edu/Michigan_Mandate/pdf/Michigan-Mandate-Progress.pdf.

[22] *See* Univ. of Mich. Office of the Registrar, *Ethnicity Reports*, Table 844, *available at* http://www.ro.umich.edu/enrollment/ethnicity.php.

[23] *See id.* at Table 843.

4.77% of the student body despite the fact that they comprised 16.16 % of four-year high school graduates in the state that year.[24]

The Petitioner's contention that Proposal 2 does not have a "racial focus," because it "does not burden minority interests and minority interests alone" is without merit. Although Proposal 2 also prohibits consideration of sex as a factor in the admission process, this inclusion does not invalidate the Respondent's claim of selective political restructuring based on race. In *Hunter*, the initiative burdened both racial and non-racial minorities but this Court still found that the law had a racial focus. *See* 393 U.S. at 387, 390-91. And, as the Sixth Circuit noted, "[t]he history of Proposal 2 and its description on the ballot leave little doubt" that "[h]ere, as in *Hunter*, the clear focus of the challenged amendment is race." *See* Pet. App. 26a n.4.

As it now stands, Michigan's public universities can consider virtually every aspect of an applicant's background *except for race*. Under Proposal 2, citizens can continue to campaign for admissions policies that advance their own interests without undertaking the enormous burden of seeking a state constitutional amendment. Without having to undertake

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[24] *See* Univ. of Mich. Office of the Registrar, *Total Enrollment Overview* (Fall 2011), *available at* http://www.ro.umich.edu/report/11enrollmentoverview.pdf; Mich. Ctr. for Educ. Performance & Information, *2011 Cohort Four-Year*, *2010 Cohort Five-Year and 2009 Six-Year Graduation and Dropout Rates including Subgroups*, *available at* http://www.michigan.gov/cepi/0,1607,7-113-21423_30451_51357---,00.html.

the enormous burden of passing a statewide constitutional amendment, those who advocate consideration of legacy status, residency in the Upper Peninsula, or other non-racial characteristics as factors in admissions policies are free to lobby the universities' governing boards and vote for governance board candidates who have stated their position in favor or against particular admission policies.

Based on the teachings of *Hunter* and *Seattle*, Proposal 2 violates the Fourteenth Amendment because it restructures the decision-making process in a way that requires a ballot initiative only for those citizens who want race to be considered as part of university admissions policies. This restructuring effectively closes the ordinary and longstanding political processes for influencing the admissions policies to the state's higher education institutions to any citizen who believes that race and diversity are important considerations in university admissions. Proposal 2 nullifies any use of the regular political processes available to others to advocate for race-conscious admissions policies.

Indeed, Proposal 2 is precisely the type of legislation that *Hunter* and *Seattle* prohibit, because it not only removes race-conscious admissions policies from the political process, but it also makes it nearly impossible for advocates to restore these policies through ordinary political means. *See Seattle*, 458 U.S. at 470. Instead of lobbying school administrators and members of the boards for each university, Proposal 2 requires that proponents of race-conscious admissions policies persuade the entire state of Michigan to amend the state constitution in order

to have those policies considered. This requirement presents a significantly higher hurdle for minorities seeking to advocate for their interests.

The State has not offered any compelling justification in support of Proposition 2. Nor has it endeavored to argue that Proposition 2 is "narrowly tailored" to achieve such an interest. *Adarand*, 515 U.S. at 227. That being the case, Proposition 2 cannot survive the Respondents' Equal Protection challenge.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit—which strikes down Proposal 2 insofar as it applies to constitutionally-permissible consideration of race as a factor in university admission criteria—should be affirmed.

Respectfully submitted,

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