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,
AND

CHASE CANTRELL, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* POLITICAL SCIENTISTS GARY SEGURA, SHAUN BOWLER, TODD DONOVAN, ZOLTAN HAJNAL, RODNEY HERO, STEPHEN NICHOLSON, AND CAROLINE TOLBERT IN SUPPORT OF CHASE CANTRELL RESPONDENTS

DEREK T. HO
Counsel of Record
ALEXANDER S. EDELSON
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(dho@khhte.com)

August 30, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PROPOSAL 2 REORDERS THE POLITICAL PROCESS FOR PROPONENTS OF RACE-CONSCIOUS UNIVERSITY ADMISSIONS POLICIES IN A WAY THAT PLACES SPECIAL BURDENS ON RACIAL AND ETHNIC MINORITIES 6

A. Proponents Of Race-Conscious University Admissions Policies Face Significant Barriers In Placing On The Statewide Ballot An Initiative That Would Repeal Proposal 2 7

B. Proponents Of Race-Conscious University Admissions Policies Also Face Significant Barriers In Obtaining Majority Support For Repealing Proposal 2 11

II. STATEWIDE BALLOT MEASURES IMPOSE COMPARATIVELY GREATER BURDENS ON MINORITY INTERESTS THAN OTHER POLITICAL PROCESSES 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Hunter v. Erickson, 393 U.S. 385 (1969).............. 4, 20

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 4, 6, 20

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. amend. XIV, § 1 (Equal Protection Clause) 4

Mich. Const.:

Art. VIII, § 5 22

Art. XII:

§ 1.. 5

§ 2..5, 7, 9, 11, 12

Mich. Comp. Laws:

§ 168.282 23

§ 168.286 22

§ 168.287 22

§ 168.472a 5, 7, 9, 11

§ 168.475(2)... 10

§ 168.476(1)... 9

Sup. Ct. R. 37.6 1

OTHER MATERIALS

R. Michael Alvarez & Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration* (Sept. 1997), *available at* http://polmeth.wustl.edu/media/Paper/alvar97d.pdf 18

Arizona Sec'y of State, State of Arizona Official Canvass: 2010 General Election – November 2, 2010, *at* http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf 17

Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1 (1978) 12, 13, 14

Shaun Bowler et al., *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections* (2003) 22

Bruce E. Cain, "Voting Rights and Democratic Theory: Toward a Color-Blind Society?," *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 261 (Bernard Grofman & Chandler Davidson eds., 1992) 23

CNN.com, AmericaVotes2006 – Ballot Measures/Michigan Proposition 2/Exit Poll, *at* http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html 6, 16

Todd Donovan et al., *State and Local Politics: Institutions and Reform* (2011) 4, 9, 10, 11, 12, 14, 15, 16, 21

Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 Am. Pol. Sci. Rev. 344 (1981) 22

William H. Flanigan & Nancy H. Zingale, *Political Behavior of the American Electorate* (12th ed. 2010) 23

Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245 (1997) 4, 7, 8, 9

Elizabeth R. Gerber et al., *Minority Representation in Multimember Districts*, 92 Am. Pol. Sci. Rev. 127 (1998) 22

Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. Pol. 154 (2002) 12, 17, 18

Initiative & Referendum Institute:

Statewide Initiative Usage [Michigan Initiatives (1914-2000)], *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Michigan.pdf 12

Statewide Initiatives Since 1904-2000, *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf 13

Valdimer O. Key, Jr., *American State Politics: An Introduction* (1956) 23

William C. Kidder, *Restructuring Higher Education Opportunity? African American Degree Attainment After Michigan's Ban on Affirmative Action*, A Civil Rights Project Policy Brief (Aug. 2013) 6

Los Angeles Times:

Los Angeles Times Poll, Study #389 – Exit Poll: The General Election, November 5, 1996, *available at* http://www.latimes.com/media/acrobat/2008-10/43120439.pdf 17

Los Angeles Times Poll, Study #413 – Exit Poll: California Primary Election, June 2, 1998, *available at* http://www.latimes interactive.com/pdfarchive/stat_sheets/la-timespoll413ss.pdf.. 18

Michigan Dep't of State:

Elections in Michigan, *at* http://www.michigan.gov/sos/0,4670,7-127-1633_8722---,00.html 22-23

General Election Voter Registration/Turnout Statistics, *at* http://michigan.gov/sos/0,4670,7-127-1633_8722-29616--,00.html 10

Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 Santa Clara L.R. 1037 (2001) 21

Nebraska Sec'y of State, Nebraska Election 2008: Unofficial Election Results, *at* http://www.sos.ne.gov/elec/2008/ElectNight/general.htm... 17

Oklahoma State Election Bd., Official Results: General Election – November 6, 2012, *at* http://www.ok.gov/elections/support/12gen_seb.html 17

Rene R. Rocha et al., *Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?*, 63 Pol. Res. Q. 890 (2010).. 23

Peter Schrag, *Paradise Lost: California's Experience, America's Future* (1998).................. 13

The Oxford Handbook of American Political Parties and Interest Groups (L. Sandy Maisel & Jeffrey M. Berry eds., 2010):

David W. Brady, "Party Coalitions in the US Congress: Intra- V. Interparty," at 358 23

Dara Z. Strolovitch & M. David Forrest, "Social and Economic Justice Movements and Organizations," at 468 15

Caroline J. Tolbert & John A. Grummel, *Revisiting the Racial Threat Hypothesis: White Voter Support for California's Proposition 209*, 3 State Pol. & Pol'y Q. 183 (2003) 14, 17

Caroline J. Tolbert & Rodney E. Hero, *Race/Ethnicity and Direct Democracy: An Analysis of California's Illegal Immigration Initiative*, 58 J. Pol. 806 (1996) 18

Caroline J. Tolbert et al., "Election Law and Rules for Using Initiatives," *in Citizens as Legislators: Direct Democracy in the United States* 27 (Shaun Bowler et al. eds., 1998) 10, 11

Caroline J. Tolbert et al., *Initiative Campaigns: Direct Democracy and Voter Mobilization*, 37 Am. Pol. Res. 155 (2009) 15

Washington Sec'y of State, Elections Div., Elections Search – Results, *at* http://www.sos.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=5&p=&p2=&y= 17

INTEREST OF *AMICI CURIAE*[1]

Amici are distinguished professors of political science who specialize in the study of American political elections and voting, especially at the state and local levels. They have engaged in extensive analysis bearing on the comparative burdens of statewide initiatives and referenda on racial and ethnic minorities. They have a strong interest in ensuring that this Court's decision rests on sound empirical data and theoretical research about the impact of Michigan Ballot Proposal 06-02 ("Proposal 2") on minority interests.

Gary Segura is professor of American politics at Stanford University. His work includes four books and more than 40 articles on political representation, with a particular focus on minority citizens. He is the co-Principal Investigator of the American National Election Study for 2010-2013, and he was elected a Fellow of the American Academy of Arts and Sciences in 2010.

Shaun Bowler is a professor of political science at the University of California – Riverside. His research includes comparative electoral systems and voting behavior both domestically and internationally. He has studied, among other things, the relationship between institutional arrangements and voter choice in California's initiative process.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represents that all parties have consented to the filing of this brief in the form of blanket consent letters filed with the Clerk.

Todd Donovan is a professor of political science at Western Washington University, where he studies and teaches on issues relating to representation and electoral systems, political behavior and electoral politics, and American state politics and policy (with an emphasis on direct democracy). Professor Donovan has written extensively on institutional reform in state and local electoral processes.

Zoltan Hajnal is a professor in the Department of Political Science at the University of California – San Diego. Professor Hajnal has written extensively on minority participation and influence on direct legislation, including California's ballot initiative process and its implications for minority interests.

Rodney Hero is a professor of political science at the University of California – Berkeley. He studies American politics and democracy, with a focus on state and local government, politics, and policy. Prior to his appointment to the faculty at Berkeley, he was chair of the political science department at the University of Notre Dame.

Stephen Nicholson is Associate Professor of Political Science at the University of California – Merced. He has published numerous books and articles addressing state and local politics, including *Voting the Agenda: Candidates, Elections, and Ballot Propositions*, published by Princeton University in 2005.

Caroline Tolbert is Professor of Political Science at the University of Iowa and the co-author of six books and more than 30 articles in peer-reviewed scholarly journals. Her research focuses on political behavior and voting, elections, and political representation. She has extensively studied and published on issues relating to state ballot initiatives.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before Proposal 2, proponents of race-conscious admissions policies at Michigan's public universities had the same avenues for pursuing change as proponents of race-neutral admissions policies.[2] They could lobby the admissions committees; petition university leadership; seek to influence university governing boards through voting, campaigning, or otherwise; or, as a last resort, initiate a statewide campaign to amend the Michigan Constitution. *See Coalition to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality By Any Means Necessary v. Regents of Univ. of Michigan*, 701 F.3d 466, 470, 480-85 (6th Cir. 2012) (*en banc*). After Proposal 2, however, proponents of race-conscious admissions policies must first repeal Proposal 2 by initiating a campaign to amend the Constitution. Only if successful can they pursue the avenues for change that were available to them before Proposal 2 was enacted and that would remain available to proponents of all other university admissions policies if Proposal 2 were upheld.

This reordering of the political process imposes a significant barrier on those who support race-conscious university admissions policies. Political science has demonstrated that it is extremely difficult to effectuate the interests of racial and ethnic minorities through statewide referenda or ballot

---

[2] This brief refers to "race-neutral admissions policies" and "race-conscious admissions policies." The former refers to policies that are neutral on their face, despite any impact or intended impact on racial or ethnic minorities. The latter refers to policies that expressly refer to racial or ethnic minorities.

initiatives.[3] Rather, history teaches that voters in States across the country more frequently have used the initiative process to enact policies that target minorities for disfavored treatment or repeal policies that are perceived to benefit minorities. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 261 (1997).

Political science research and literature thus demonstrate that political changes of the kind effectuated by Proposal 2 constitute precisely the type of reordering that the Supreme Court has held violates the Equal Protection Clause. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467, 474 (1982). Its "practical effect" is to "require[] those championing [race-conscious university admissions policies] to surmount a considerably higher hurdle than persons seeking comparable legislative action." *Id.* at 474; *see Hunter v. Erickson*, 393 U.S. 385, 391 (1969). The Sixth Circuit's decision was correct and should be affirmed. *See Coalition to Defend Affirmative Action*, 701 F.3d at 480-85.

---

[3] Initiatives and referenda are similar but distinct concepts. Direct initiatives allow citizens "to file a proposed bill with a state office . . . [,] collect signatures from voters to qualify the measure for a spot on the state ballot," and, "[i]f the initiative qualifies, voters have a direct say on approving or rejecting the proposal." Todd Donovan et al., *State and Local Politics: Institutions and Reform* 115 (2011) ("Donovan, *State and Local Politics*") (also defining indirect initiatives, which are available in Michigan with respect to statutes, but not constitutional amendments). Alternatively, "[a] referendum is a public vote on a statute or a constitutional amendment that has already been considered by a state legislature or local government." *Id.* at 113-14. For simplicity, this brief refers to both as initiatives.

ARGUMENT

Under Proposal 2, proponents of race-conscious university admissions policies first need to repeal Proposal 2 by amending the Michigan Constitution. Only if successful could they pursue the avenues for change that were available to them before Proposal 2 was enacted and that would remain available to proponents of all other university admissions policies were Proposal 2 upheld.

Amending the Michigan Constitution involves two arduous steps. First, a proposed amendment must qualify for placement on the ballot by obtaining the support of two-thirds of the Michigan House of Representatives and the Michigan Senate for an amendment proposed in the House or Senate, *see* Mich. Const. art. XII, § 1, or by filing a petition that proposes the amendment with state authorities, which requires collecting, within 180 days of filing the petition, the signatures of the number of voters equal to at least 10% of the number of votes cast for all candidates for governor in the preceding general election in which a governor was elected, *see id.* § 2; Mich. Comp. Laws § 168.472a. Second, proponents of the amendment must earn the support of a majority of electors voting on the question in a statewide election. *See* Mich. Const. art. XII, §§ 1, 2.

Part I explains how and why each step involved in repealing Proposal 2 through the initiative process would be extraordinarily and uniquely difficult, and thus why the Sixth Circuit was correct in holding that Proposal 2's reordering of the political process imposes "special burdens on racial minorities." 701 F.3d at 477. Part II explains how the political science literature addresses two of the concerns expressed by Judge Sutton in his dissent from the Sixth Circuit's *en banc* opinion.

I. PROPOSAL 2 REORDERS THE POLITICAL PROCESS FOR PROPONENTS OF RACE-CONSCIOUS UNIVERSITY ADMISSIONS POLICIES IN A WAY THAT PLACES SPECIAL BURDENS ON RACIAL AND ETHNIC MINORITIES

History, empirical research, and political science literature support the Sixth Circuit's *en banc* holding that Proposal 2 "reorders the political process in Michigan in a way that places special burdens on racial minorities." 701 F.3d at 477.[4] Proponents of the interests of racial and ethnic minorities, in comparison to the majority, face far greater obstacles to effectuating those interests through statewide ballot initiatives. In fact, statewide initiatives in the United States frequently have been used to disadvantage minorities, as in the case of Proposal 2, and they rarely, if ever, have been used to promote minorities' interests.

---

[4] Proponents of race-conscious university admissions policies are not unanimously minorities, nor are all minorities proponents of such policies. *See*, *e.g.*, William C. Kidder, *Restructuring Higher Education Opportunity? African American Degree Attainment After Michigan's Ban on Affirmative Action*, A Civil Rights Project Policy Brief at 1-2 (Aug. 2013) (discussing polling data indicating "that about 64% of whites voted in favor of Proposal 2 in November 2006, while 86% of African Americans voted against it"); *see also* CNN.com, AmericaVotes2006 – Ballot Measures/Michigan Proposition 2/Exit Poll, *at* http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html; *infra* Part I.B (discussing numerous examples of anti-minority initiatives that demonstrate racially polarized voting and anti-minority outcomes). The proper inquiry, however, is whether Proposal 2 would require "those championing [race-conscious university admissions policies] to surmount a considerably higher hurdle than persons seeking comparable legislative action." *Seattle Sch. Dist. No. 1*, 458 U.S. at 474. As explained throughout this brief, Proposal 2 certainly meets that standard.

A. Proponents Of Race-Conscious University Admissions Policies Face Significant Barriers In Placing On The Statewide Ballot An Initiative That Would Repeal Proposal 2

Under Proposal 2, proponents of race-conscious admissions policies face an arduous burden. Qualifying a proposed amendment to Michigan's Constitution for placement on the ballot would require, first, drafting a proposed constitutional amendment that would repeal Proposal 2, and then collecting signatures, within a period of 180 days, in an amount equal to at least 10% of the number of votes cast for all candidates for governor in the preceding general election in which a governor was elected. *See* Mich. Const. art. XII, § 2; Mich. Comp. Laws § 168.472a. This is a monumental task in any case and particularly so for proponents of initiatives that seek to improve the situation of minorities.

Political science research shows that it is exceedingly difficult to qualify for placement on statewide ballots initiatives aimed at redressing difficulties that confront minorities. This makes sense because almost by definition minority groups, unlike the majority, begin the process of assembling signatures with fewer and perhaps far fewer citizens likely to be especially concerned with the problems such initiatives seek to redress. Indeed, voters in States across the country more frequently have used the initiative process to enact policies that expressly disfavor minorities by targeting them for disfavored treatment or repealing legislatively enacted policies that explicitly benefit minority groups. *See* Gamble, 41 Am. J. Pol. Sci. at 261 ("Citizens in the political majority have repeatedly used direct democracy to put the rights of political minorities to a popular

vote. Not only that, anti-civil rights initiatives have an extraordinary record of success: voters have approved over three-quarters of these . . . .").

For example, political scientist Barbara S. Gamble evaluated 74 civil rights initiatives between 1959 and 1993 involving issues related to housing and public accommodations for racial minorities, school desegregation, gay rights, English-language laws, and AIDS policies. *See id.* at 253-54. Of them, "78% resulted in outcomes that constituted a defeat of minority interests," such as "the repeal of existing civil rights laws, the enactment of laws that prohibited legislative bodies from passing new civil rights laws, and the defeat of measures that sought to extend civil rights protections." *Id.* at 254. "All but six of the 74 initiatives, or 92%, actively sought to restrict the rights of minorities." *Id.* And "only one of the six initiatives that specifically tried to extend civil rights protection has passed since 1959." *Id.* The rate of passage for anti-minority ballot initiatives was almost two-and-a-half times the rate of passage for all referenda during this period. *Id.* Perhaps more importantly, of the 74 initiatives, 26 involved racial, ethnic, and linguistic minorities. *Id.* at 253. Of those 26, 25 were placed on the ballot by the members of the majority group. *Id.* Minority groups suffered defeat in 22 cases, or 88% of the time. *Id.*

There are numerous examples of voters approving citizen initiatives that repealed policies secured through the legislative process that were designed, at least in part, to benefit minorities. *See*, *e.g.*, *id.* at 246 ("In five issue areas – housing and public accommodations for racial minorities, school desegregation, gay rights, English language laws, and AIDS

policies – the majority has been extraordinarily successful at using the ballot box to repeal existing legislative protections and to pass laws that block elected representatives from creating new laws."); *see also id.* at 255-61 (discussing examples of anti-minority initiatives); Donovan, *State and Local Politics* 138 ("State and local ballot initiatives have been used to undo policies – such as school desegregation, protections against job and housing discrimination, and affirmative action – that minorities have secured from legislatures where they are included in the bargaining process."). Indeed, political science literature demonstrates that, with respect to "civil rights initiatives and popular referenda . . . , voters overwhelmingly favor direct legislation that repeals existing civil rights laws or precludes elected officials from making new ones." Gamble, 41 Am. J. Pol. Sci. at 248.

Two practical and logistical constraints provide additional reasons why it is difficult to qualify proposed amendments to the Michigan Constitution for placement on the statewide ballot.

First, there are significant costs associated with qualifying an amendment to the Michigan Constitution for placement on the ballot. Petitioners must collect signatures of registered voters in an amount equal to 10% of the total vote in the previous gubernatorial election – more than 320,000 signatures if the 2010 election were still the most recent – and file the signatures in the form of a petition to state authorities who "shall . . . determine . . . the validity and sufficiency of the signatures on the petition." Mich. Const. art. XII, § 2; *see also* Mich. Comp. Laws § 168.472a; *id.* § 168.476(1) ("Upon receiving notification [from the secretary of state] of the filing of the

petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. The qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid."); Michigan Dep't of State, General Election Voter Registration/Turnout Statistics, *at* http://michigan.gov/sos/0,4670,7-127-1633_8722-29616--,00.html (last visited Aug. 21, 2013) (indicating official voter turnout of more than 3.2 million for the 2010 gubernatorial election). And Michigan prohibits the filing of supplemental signatures after a petition has been filed. *See* Mich. Comp. Laws § 168.475(2).

To account for invalid and duplicative signatures, initiative sponsors "need to obtain substantially more than the actual required number of signatures, typically by a 25% to 50% margin." Caroline J. Tolbert et al., "Election Law and Rules for Using Initiatives," *in Citizens as Legislators: Direct Democracy in the United States* 27, 37 (Shaun Bowler et al. eds., 1998) ("Tolbert, *Election Law*"); *see* Donovan, *State and Local Politics* 128 (noting, while discussing California's signature requirements, that "a large percentage of signatures will surely be found to be invalid"). The vast majority of petition efforts thus require initiative sponsors to hire paid petition circulators, at significant expense. *See* Donovan, *State and Local Politics* 127 ("In many states, it is difficult to place a measure on the ballot unless professional

petition firms are paid to collect some or all the signatures required for qualification."); Tolbert, *Election Law* 35 ("In the past two decades, virtually all successful drives have relied, at least predominantly, on professional circulation firms."). It should come as no surprise then that "wealthy groups (unions, corporations, business organizations, professional associations, and trade groups) and wealthy individuals play a prominent, if not dominant, role in affecting what gets put to a public vote." Donovan, *State and Local Politics* 128; *see also* Tolbert, *Election Law* 35 ("Qualifying an initiative for the statewide ballot is thus no longer so much a measure of general citizen interest as it is a test of fundraising ability.") (internal quotation marks and citation omitted).

Second, in order for proponents of race-conscious admissions policies to repeal Proposal 2, they would need to meet strict time requirements associated with collecting signatures. Michigan allows petitioners only 180 days to collect the requisite number of signatures. *See* Mich. Const. art. XII, § 2; Mich. Comp. Laws § 168.472a. Proponents of race-neutral policies, however, could take as long as they want to pursue the other avenues of change available to them. The arduous task of placing a repeal of Proposal 2 on the ballot thus imposes significant barriers to proponents of race-conscious admissions policies.

B. Proponents Of Race-Conscious University Admissions Policies Also Face Significant Barriers In Obtaining Majority Support For Repealing Proposal 2

Proposal 2 also puts proponents of race-conscious admissions policies at significant political disadvantage in generating the votes of "a majority of the electors

voting on the question," which is required to enact the amendment into law. Mich. Const. art. XII, § 2.

As a preliminary matter, amending the Michigan Constitution in any way – relating to minority rights or not – is rare. The Initiative & Referendum Institute at the University of Southern California ("IRI") – a non-profit that has compiled information on roughly 2,000 initiatives since 1904 – found that, between 1914 and 2000, only 60 statewide initiatives were placed on the Michigan ballot, and only 20 passed. *See* IRI, Statewide Initiative Usage [Michigan Initiatives (1914-2000)], *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Michigan.pdf.

Moreover, obtaining voter support for initiatives designed to improve the situation for racial and ethnic minorities and that expressly address issues relating to those minorities is particularly difficult. Political science research on statewide ballot initiatives demonstrates that the problem of minority disadvantage is especially acute with respect to racially focused initiatives: Racial and ethnic minorities – especially Latinos – more often than not lose when ballot measures explicitly target minorities, while they fare less poorly when ballot measures do not explicitly target minorities. *See* Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. Pol. 154, 156, 165-72, 174 (2002); *see also* Donovan, *State and Local Politics* 138 ("[O]n issues dealing with racial and ethnic matters, studies show that racial and ethnic minorities do end up more on the losing side of the popular vote."); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54

Wash. L. Rev. 1, 28 (1978) ("Justice Black's declaration that referenda demonstrate devotion to democracy rather than to bias, discrimination, or prejudice, is in fact almost the opposite of the truth when the issue submitted to the voters suggests, even subtly, that majority interests can be furthered by the sacrifice of minority rights."). It is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favor racial or ethnic minority groups. The IRI's comprehensive survey of statewide initiatives between 1904 and 2000 in all States that allow initiatives reveals very few initiatives that could be said to expand rather than restrict minority rights. *See* IRI, Statewide Initiatives Since 1904-2000, *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf.

One explanation for the difficulty in gaining majority support for pro-minority ballot measures that expressly address issues relating to racial or ethnic minorities is that singling out racially divisive issues dilutes minority voting strength by isolating minority voters from potential electoral allies. *See* Bell, 54 Wash. L. Rev. at 23 ("[R]eferenda and initiatives expose blacks to harm not only because referenda serve to enact racially hostile measures, but also because Blacks are isolated from their class allies and thus have diminished electoral strength."). Indeed, statewide ballot initiatives often are exploited as lightning rods for attacks on disfavored minority groups. *See* Peter Schrag, *Paradise Lost: California's Experience, America's Future* 225-26 (1998) (referring to the "demagogic potential of the intiative"); Bell, 54 Wash. L. Rev. at 19 ("Appeals to prejudice, oversimplifi-

cation of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."); *see generally id.* at 18 ("The emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them."). Ballot initatives that explicitly address racial issues disadvantage minority groups because they impair the ability of those groups to form effective coalitions with non-minorities.

Moreover, empirical research confirms that public opinion towards minority groups erodes when ballot measures explicitly address minority interests. *See, e.g.*, Donovan, *State and Local Politics* 140 ("By targeting a minority group with an initiative, for example, public attitudes about the group (or about policies that benefit the group) can be changed, with mass opinion becoming less tolerant of the targeted minority group."). Indeed, political science research also indicates a racial threat or backlash in support of ending race-conscious public policies. A 2003 study of voting on California's Proposition 209 – which, like Proposal 2, amended the state constitution to prevent state public institutions from considering race, ethnicity, or gender – found that white support for the initiative was higher in neighborhoods with larger Latino, African-American, and Asian-American populations, even after controlling for other factors, than among whites living in more homogeneous areas. *See generally* Caroline J. Tolbert & John A. Grummel, *Revisiting the Racial Threat Hypothesis: White Voter Support for California's Proposition 209*, 3 State Pol. & Pol'y Q. 183, 183, 191, 196 (2003).

Minority-focused ballot initiatives also disadvantage racial and ethnic minority groups because, like collecting signatures, campaigning for a majority of votes can be expensive and resource-consuming, and "organizations advocating on behalf of marginalized groups remain . . . outmoneyed by corporate, business, and professional organizations." Dara Z. Strolovitch & M. David Forrest, "Social and Economic Justice Movements and Organizations," *in The Oxford Handbook of American Political Parties and Interest Groups* 468, 471 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) ("*Oxford Handbook*"). For example, "[i]n the 2002 elections, almost $9 per capita was spent on initiative campaigns in Arizona, more than the amount spent on any single candidate race – congressional or statewide. Oregon followed with almost $3.5 spent on initiatives for every state resident, with Colorado and Utah tied at almost $2 per capita, and California $1.50 per capita. In the 2004 presidential elections, Oregon topped the list with $8.98 on ballot initiative expenditures per capita, followed by Nevada ($6.65) and California ($5.95)." Caroline J. Tolbert et al., *Initiative Campaigns: Direct Democracy and Voter Mobilization*, 37 Am. Pol. Res. 155, 161 (2009). The 2004 "figures were higher than spending per capita in the presidential election for those states." *Id.* at 158.[5] "In 2006, nearly $525 million was spent on 73 ballot initiative campaigns in 18 states. In several states, more money was spent on ballot initiative campaigns than for all other races for political office combined." Donovan, *State and Local Politics* 129 (noting that "proponents and

---

[5] In California, "[m]ore money was spent per capita on initiatives . . . than any of the other major candidate races in the state." Tolbert, 37 Am. Pol. Res. at 161.

opponents of eight initiatives on the November ballot [in California alone] spent more than $300 million in an effort to qualify the measures and sway voters on the merits of their arguments"). And, "[i]n 2008, over $800 million was spent nationally on state-level initiative and referendum campaigns, more money than was spent on Barack Obama's presidential campaign." *Id.* (footnote omitted).[6]

Accordingly, ballot initiatives designed to improve the situation for racial and ethnic minorities that explicitly refer to those minorities are extremely difficult for minorities to win, and they tend to diminish minorities' electoral strength on other issues as well. In fact, there are numerous examples of racially polarized voting on minority-related initiatives that resulted in outcomes disadvantaging minorities.

- Proposal 2 exit polling demonstrated racially polarized voting that is consistent with the theoretical and empirical evidence discussed above. Sixty-four percent of whites voted in favor of the Proposal, while 86% of African-Americans voted against it.[7]
- Proposition 209 in California's 1996 election, which eliminated affirmative action programs in public education, hiring, and contracting, was supported by 63% of white voters, who

---

[6] The literature cited does not disaggregate costs associated with qualifying questions for placement on ballots, addressed *supra* in Part I.A, and costs associated with generating the requisite votes after a question has qualified for the ballot. Presumably it refers to the sum of those costs.

[7] *See* CNN.com, AmericaVotes2006 – Ballot Measures/ Michigan Proposition 2/Exit Poll, *at* http://www.cnn.com/ ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html.

constituted 74% of voters, and opposed by 74% of black voters, who constituted 7% of voters.[8] It passed by a margin of 54%-46%.[9]

- Voters in Washington (through Initiative 200 in 1998), Nebraska (through Initiative 424 in 2008), Arizona (through Proposition 107 in 2010), and Oklahoma (through State Question 759 in 2012) passed similar initiatives by wide margins – approximately 16.4%, 16%, 19%, and 18.4%, respectively.[10]
- Proposition 227 in California's 1998 election, which sought to limit bilingual education programs, resulted in similar polarization. Exit polls showed that 67% of white voters supported

---

[8] *See* Hajnal, 64 J. Pol. at 155, 159, 170; Los Angeles Times, Los Angeles Times Poll, Study #389 – Exit Poll: The General Election, November 5, 1996, at 6 ("L.A. Times Poll"), *available at* http://www.latimes.com/media/acrobat/2008-10/43120439.pdf; *see also* Tolbert & Grummel, 3 State Pol. & Pol'y Q. at 196 ("Surveys indicate that nearly two-thirds of white Californians voting on Proposition 209 supported it and that white Californians continue to support ending affirmative action, while a majority of every other racial and ethnic group opposed the proposition.").

[9] *See* L.A. Times Poll, at 1, 6.

[10] *See* Washington Sec'y of State, Elections Div., Elections Search – Results, *at* http://www.sos.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=5&p=&p2=&y= (last visited Aug. 21, 2013); Nebraska Sec'y of State, Nebraska Election 2008: Unofficial Election Results, *at* http://www.sos.ne.gov/elec/2008/ElectNight/general.htm (last visited Aug. 21, 2013); Arizona Sec'y of State, State of Arizona Official Canvass: 2010 General Election – November 2, 2010, *at* http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf (last visited Aug. 21, 2013); Oklahoma State Election Bd., Official Results: General Election – November 6, 2012, *at* http://www.ok.gov/elections/support/12gen_seb.html (last visited Aug. 21, 2013).

the initiative, while 63% of Latino voters opposed it. Support by white voters caused the Proposition to pass by a 61%-39% margin, despite opposition from minority groups.[11]

- Proposition 187 in California's 1994 election, which limited illegal immigrants' access to public services, generated support from 59% of white voters, who amounted to 81% of the electorate, while 75% of Hispanics voted against it; it passed by a 59%-41% margin.[12]

At bottom, political science demonstrates that, "on the whole, members of minority groups are indeed less likely than whites to prevail on . . . minority-targeted initiatives." Hajnal, 64 J. Pol. at 171. Because of racially polarized voting and sentiments triggered by minority-focused ballot initiatives, Proposal 2's requirement that proponents of race-conscious admissions policies first prevail in a minority-focused initiative process imposes enormous political burdens on racial and ethnic minority groups and those seeking to advance the interests of those groups – a burden that proponents of other admissions policies do not bear, despite the fact that some of their proposals, such as legacy admissions,

---

[11] *See* Los Angeles Times, Los Angeles Times Poll, Study #413 – Exit Poll: California Primary Election, June 2, 1998, at 1, 5, *available at* http://www.latimesinteractive.com/pdfarchive/stat_sheets/la-timespoll413ss.pdf.

[12] *See* R. Michael Alvarez & Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration* 1, 7 (Sept. 1997), *available at* http://polmeth.wustl.edu/media/Paper/alvar97d.pdf; Caroline J. Tolbert & Rodney E. Hero, *Race/Ethnicity and Direct Democracy: An Analysis of California's Illegal Immigration Initiative*, 58 J. Pol. 806, 806, 808, 809 (1996).

are more likely to advantage members of the majority than racial or ethnic minorities.

II. STATEWIDE BALLOT MEASURES IMPOSE COMPARATIVELY GREATER BURDENS ON MINORITY INTERESTS THAN OTHER POLITICAL PROCESSES

Judge Sutton, dissenting from the Sixth Circuit's *en banc* opinion, emphasized two points. First, he argued that Proposal 2 does not impose a significant burden because state constitutions are "*too easy* to change." 701 F.3d at 507. Second, he expressed doubt that any empirical study demonstrates that passing a ballot initiative, which requires "a single 10% petition drive and a single 51% popular vote," is "more difficult for proponents of change than [electing all new members to the university boards of Michigan, Michigan State, and Wayne State, which would require winning] twenty-four statewide elections (among others) for twenty-four individuals over an eight-year period." *Id.* at 508. Political science research undermines each point.

With respect to Judge Sutton's first point, proponents of initiatives to amend the Michigan Constitution face numerous obstacles, including significant costs to qualify their proposals for statewide ballots and generate a majority of voter support. *See supra* Part I. Michigan's Constitution rarely has been amended through the initiative process. *See supra* Part I.B. And it is particularly difficult to amend state constitutions to enact pro-minority initiatives. As Part I demonstrates, the playing field for proponents of minority-focused initiatives that seek to improve the situation of minorities is tilted against them; it was much easier for those who oppose race-conscious university admissions policies to pass

Proposal 2 than it would be for proponents of those policies to repeal it. *See Seattle Sch. Dist. No. 1*, 458 U.S. at 484 ("'If a governmental institution is to be fair, one group cannot always be expected to win'; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.") (quoting *Hunter*, 393 U.S. at 394 (Harlan, J., concurring)).

With respect to Judge Sutton's second point, the relevant inquiry is not whether it is more difficult for proponents of change to win statewide elections of university board members than it is to pass a minority-focused intiative that would repeal Proposal 2. Proposal 2 requires proponents of race-conscious admissions policies to do *both* to achieve their policy goals. Only after repealing Proposal 2 can they seek to elect board members who favor race-conscious admissions policies or pursue the other avenues for change that were available to them before Proposal 2 and that would remain available to proponents of race-neutral admissions policies were Proposal 2 upheld.[13] The problem with Proposal 2 is that it requires proponents of race-conscious admissions policies to overcome an extremely onerous obstacle as a prerequisite to pursuing their policy objectives through other avenues of change.

That preliminary obstacle is particularly onerous because, as explained above, it is significantly more

---

[13] It is theoretically conceivable that proponents of race-conscious admissions policies could attempt to repeal Proposal 2 with a constitutional amendment that requires affirmative action, but that is highly unrealistic given the demonstrated tendency of statewide ballot initiatives to be used as a tool to disadvantage racial minorities and other minority groups. *See supra* Part I.

difficult for minorities to achieve their interests through statewide ballot initiatives than through other democratic processes. *See also*, *e.g.*, Donovan, *State and Local Politics* 138 ("Recent scholarly research shows that the initiative process is sometimes prone to produce laws that disadvantage relatively powerless minorities – and probably is more likely than legislatures to do so.") (internal quotation marks omitted); *see also* Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 Santa Clara L.R. 1037, 1056-57 (2001) ("Racial minorities, illegal immigrants, homosexuals, and criminal defendants have been exposed to the electorate's momentary passions as Californians have adopted a large number of initiatives that represent Populist backlash against representative government's efforts to protect or promote the interests of racial or other minorities.") (footnotes omitted).

In fact, minority groups have been more effective in effectuating change in university policies through more informal methods, such as lobbying the respective boards. For example, as the district court in this case concluded, the universities' policies of considering race as one of many factors in admissions was the product of decades of lobbying effort. *See Coalition to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality By Any Means Necessary v. Regents of Univ. of Michigan*, 539 F. Supp. 2d 924, 930-31, 935-36 (E.D. Mich. 2008). While lobbying board members remains open to those advocating race-neutral changes to university admissions policies, Proposal 2 forecloses this important avenue of political advocacy exclusively for those who seek consideration of race in university admissions.

Two structural features of Michigan's system for electing boards at the State's three flagship public universities bolster racial and ethnic minorities' ability to effectuate change through the electoral process relative to the initiative process.

First, board members are selected through a "modified at-large" electoral process in which both the first- and second-place candidates are elected. *See* Mich. Const. art. VIII, § 5; Mich. Comp. Laws §§ 168.286, 168.287. That electoral format has been shown to produce greater minority representation (and thus greater representation of minority interests) than winner-take-all, at-large elections, in which a single candidate must obtain a plurality of the vote to be elected for a single position. *See* Elizabeth R. Gerber et al., *Minority Representation in Multimember Districts*, 92 Am. Pol. Sci. Rev. 127, 128-30, 139-42 (1998); Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 Am. Pol. Sci. Rev. 344, 347-52 (1981); Shaun Bowler et al., *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections* 1-2, 95-98, 105-06 (2003). Accordingly, in multi-candidate elections, electoral success is possible with lower vote totals. Other things equal, such election formats are thus beneficial to minority candidates. In fact, in several elections in recent years, second-place candidates were elected to the University of Michigan, Michigan State University, and Wayne State University boards with less than 25% of the vote, which would not be possible in a single-member election or in a statewide referendum. *See* Michigan Dep't of State, Elections in Michigan, *at* http://www.michigan.

gov/sos/0,4670,7-127-1633_8722---,00.html (last visited Aug. 21, 2013).

Second, the fact that board members are nominated on a partisan basis, *see* Mich. Comp. Laws § 168.282, makes it easier, relative to the initiative process, for proponents of race-conscious admissions policies to seek change through board-member elections. Political parties are, by their nature, coalitions of various groups. *See generally*, *e.g.*, David W. Brady, "Party Coalitions in the US Congress: Intra- V. Interparty," *in Oxford Handbook* 358-76. As a general matter, these groups in a party nominate candidates with shared goals and from various elements of the party to secure nominations for various offices. *See generally* Valdimer O. Key, Jr., *American State Politics: An Introduction* 198-99 (1956).

Accordingly, because African-American voters are a core component of the contemporary Democratic Party coalition, *see* William H. Flanigan & Nancy H. Zingale, *Political Behavior of the American Electorate* 111-12 (12th ed. 2010), local and state Democratic parties regularly have nominated and elected African-American candidates, *see generally* Rene R. Rocha et al., *Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?*, 63 Pol. Res. Q. 890 (2010). As a result, racial minorities have had more success in legislative settings than statewide initiatives. *See* Bruce E. Cain, "Voting Rights and Democratic Theory: Toward a Color-Blind Society?," *in Controversies in Minority Voting: The Voting Rights Act in Perspective* 261, 274-75 (Bernard Grofman & Chandler Davidson eds., 1992); *supra* Part I.A.

Moreover, Judge Sutton's argument proves too much. To the extent citizen views about appropriate

admissions policies can be effectuated through the election of university board members, voters in Michigan do not need to erect constitutional barriers to affirmative action to effectuate their concerns.

In sum, political science does not support Judge Sutton's contention that it would be as easy or easier for proponents of race-conscious admissions policies to prevail in a statewide ballot initiative than to accomplish their policy goals through elections of members of university boards. To the contrary, years of empirical research demonstrate that statewide ballot initiatives pose serious obstacles to minority interests that are not present with respect to ordinary political processes such as elections for public officials.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DEREK T. HO
Counsel of Record
ALEXANDER S. EDELSON
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(dho@khhte.com)

August 30, 2013