No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE SOCIETY OF AMERICAN LAW TEACHERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Founded in 1973, the Society of American Law Teachers ("SALT") is the largest independent membership organization of legal academics in the United States. Over 900 law professors, deans, librarians, and administrators from over 200 law schools make up SALT's membership. Almost all active SALT members hold full-time positions in legal education.

SALT is an active proponent for educational equality at all levels. SALT organizes scholarly conferences; creates mentoring programs for minorities in academia and legal study; leads efforts to secure financial support for low-income law students; conducts and supports studies of bias in standardized testing, including the LSAT and state bar exams; and supports affirmative action to increase racial and ethnic diversity in higher education.

SALT has advocated for race-conscious admissions policies before this Court in three cases. In 1978, SALT filed a brief *amicus curiae* in support of the University of California in *Regents of the*

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[1] Pursuant to Rule 37.6, the *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to fund the preparation or submission of this brief. Blanket consents by the parties to the filing of *amicus curiae* briefs were filed with the Court.

University of California v. Bakke.[2] In 2003, SALT submitted a brief *amicus curiae* in support of the University of Michigan Law School in *Grutter v. Bollinger*.[3] Most recently, SALT supported the University of Texas with a brief *amicus curiae* in *Fisher v. University of Texas at Austin*.[4]

Core to SALT's mission is "mak[ing] the legal profession more inclusive and reflective of the rich diversity of this nation."[5] Through its research and the experience of its members in the fields of law and education, SALT has seen not only a lack of progress in the diversity of law school classes, but declining racial and ethnic diversity. To permanently turn the tide and ensure that all levels of higher education reflect the diversity of our nation's population, universities must be able to use holistic admissions processes that take into account all the factors that shape a student's life, including race.

Although this case is focused on the political process by which university admission policies are adopted, it is of special significance to SALT because the Court's ruling will directly and substantially affect the diversity and pool of college graduates applying to law school. The use of race-conscious admissions programs remain necessary to provide a

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[2] 438 U.S. 265 (1978).

[3] 539 U.S. 306 (2003).

[4] 133 S. Ct. 2411 (2013).

[5] Soc'y of Am. Law Teachers (SALT), *History of SALT*, http://www.saltlaw.org/contents/view/history (last visited Aug. 27, 2013).

pipeline of diverse students to law schools, which serve as a training ground for the nation's future leaders.

SUMMARY OF ARGUMENT

In 2003, this Court upheld in *Grutter* the use of race-conscious admissions programs in public higher education.[6] Under strict scrutiny, the Court determined that the use of such programs were necessary and narrowly tailored to serve the compelling state interest in student body diversity in Michigan's universities.[7]

Ten years later, this Court must address whether Proposal 06-02 ("Proposal 2") undermines that determination, as well as educational missions to achieve a critical mass of underrepresented minorities. The past ten years confirm that it does.

Proposal 2 is a state constitutional amendment passed by Michigan voters that prohibits Michigan's public universities from considering race as but one factor among many in admissions decisions. The exclusion of any consideration of race facilitates diminished diversity in postsecondary education. The passage of Proposal 2, and similar bans on race-conscious admissions measures in other states, has depressed minority student enrollment, particularly at the country's most selective public universities, as well as at law schools and other professional schools. Such bans

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[6] 539 U.S. at 325.

[7] *Id*. at 333-34.

ignore the importance of—and scores of studies showing the benefits of—diversity in education.

Time and experience have shown that whatever "promise" race-neutral alternatives once held has been debunked.[8] These alternatives do not adequately achieve diversity, ignore its crucial aspects, and exploit the lack of diversity. They also do nothing to alleviate the alleged harms of race-conscious measures, confirming that the use of race as a factor in admissions is narrowly tailored and necessary to effectuate the critical societal benefit of student body diversity. Given the ineffectiveness of race-neutral alternatives, universities should be permitted to avail themselves of their collective experience and expertise to determine whether—if at all—race should be a factor in admissions decisions and to tailor their admissions programs accordingly.

Proposal 2 further frustrates attempts to improve diversity in higher education by restructuring the political process. Individuals advocating for race-inclusive policies must undergo the arduous process of amending the state constitution, whereas individuals advocating for any other admissions policy change can simply petition their elected university officials. Under the prevailing doctrine set forth by this Court in *Hunter v. Erickson* and *Washington v. Seattle School District No. 1*, this slanted restructuring constitutes state action that places "*special* burdens on racial minorities within the governmental process" and makes it "*more* difficult for certain racial . . .

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[8] *See id.* at 343.

minorities [than for other members of the community] to achieve legislation that is in their interest," and thus violates the Equal Protection Clause.[9]

Proposal 2 also cannot be reconciled with the equal protection principles articulated in *Romer v. Evans*, which denounced any "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government" as a "denial of equal protection."[10] Proposal 2 targets minorities by disabling them from seeking race-conscious admissions measures to address the persistent residential and school segregation in Michigan (and in many other parts of the country).

The decision below should be upheld. Proposal 2 strips universities of the ability to use constitutionally permissible, effective, and necessary means to attain student body diversity. And, under the precedent set forth by *Hunter*, *Seattle*, and *Romer*, Proposal 2 violates the Equal Protection Clause.

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[9] *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (citing *Hunter v. Erickson*, 393 U.S. 385, 391, 395 (1969)).

[10] 517 U.S. 620, 633 (1996).

ARGUMENT

I. PROPOSAL 2 PROHIBITS UNIVERSITIES FROM USING RACE-CONSCIOUS MEASURES THAT ARE NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST IN STUDENT BODY DIVERSITY.

A. Universities Have a Compelling Interest in Attaining the Educational Benefits of a Diverse Student Body.

Diversity is and remains a compelling state interest. This Court held in *Grutter*, and reaffirmed in *Fisher*, that universities have a "compelling interest in obtaining the educational benefits that flow from a diverse student body."[11] These benefits, characterized by the Court as "substantial," include: (1) "cross-racial understanding," (2) breakdown of racial stereotypes, (3) enhanced classroom discussion, and (4) better preparation of students "for an increasingly diverse workforce and society" and "as professionals."[12]

Studies confirm the Court's conclusions regarding the educational benefits of diversity. These studies emphasize that diversity is especially useful in classroom discussions, in part because "students from different backgrounds offer different

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[11] *Grutter*, 539 U.S. at 343; *Fisher*, 133 S. Ct. at 2419 (declining to revisit *Grutter*'s holding that diversity is a compelling state interest).

[12] *Grutter*, 539 U.S. at 330.

viewpoints that may help with problem solving."[13] "Students across all groups were equally likely to modify their views on an important political issue due to discussions with someone from a different racial/ethnic background."[14] By being exposed to viewpoints and experiences that are entirely new to them, students report that they are pushed beyond their "unexamined world views."[15] As one student put it, "A lot of times you can kind of get caught up in your own world and . . . see things as only you see them. But when you are in a diverse environment, you can take the same set of facts and another person can see those . . . facts as being totally different."[16] Many students agree that diversity had "an overall positive effect on their educational experience in law school."[17]

Diverse law school classrooms also prepare students "to become effective 'corporate counselors and deal makers' as well as 'culturally competent

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[13] Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 78 (2011) (citing Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. Fla. J.L. & Pub. Pol'y 11, 25-26 (2003)).

[14] Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 75-S, 175-S (2012).

[15] *Id*. at 161-S.

[16] *Id*. at 162-S.

[17] *Id*. at 174-S.

leaders.'"[18] Students agree that "diversity improves abilities to work and get along with other[s] after graduation in an increasingly diverse society."[19] They also report that white students sharing a classroom with black and Hispanic students "are challenged to rethink and release racial stereotypes."[20] One law student, for example, reported that "it's good just to have different diversity for people to see that everyone can excel at the law, and . . . break down their stereotypes of Blacks and Hispanics."[21] In addition, students recognize that diversity can help them prepare to work "in a world defined by racial and other forms of diversity."[22] As put by a law student, "unless you plan to practice law in a box, you're going to be dealing with all kinds of races when you graduate. So you better have[] some of that respect or that appreciation that people can think differently."[23]

Whereas campus diversity offers substantial benefits, a lack of diversity impairs the effectiveness of a learning environment. Unfortunately, "barriers that exist in society at large" can follow students of color onto a university campus.[24] "[W]ithout a

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[18] Deo, *supra* note 13, at 80 (citing Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, A Deeper Commitment*, 52 J. Legal Educ. 491, 505 (2002)).

[19] Daye, *supra* note 14, at 174-S.

[20] *Id.* at 176-S.

[21] *Id.*

[22] *Id.* at 181-S.

[23] *Id.*

[24] Deo, *supra* note 13, at 79.

meaningful presence," students of color may feel marginalized and "disengaged from the learning process."[25] These students are less likely to participate in class, choosing "silence as a way of protecting themselves from a hostile environment in and out of the classroom."[26] These students must also combat tokenism and the challenge of being seen as a "spokesperson" for their particular identified group.[27]

When students of color are underrepresented on campus, they also face racial isolation. In the higher education context, this racial isolation "correlates with depressed academic achievement, alienation from campus life, and isolation from the campus community."[28] While a critical mass of underrepresented minorities allows for the dissolution of perceived racial "norms," racial isolation causes the opposite effect—"students of color are tokenized, treated as spokespeople for their race, and not expected to deviate from what others

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[25] *See id*. at 75 (citing Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Calif. L. Rev. 2241, 2268-69 (2000)).

[26] *Id*. at 76-78, 80-81 (quoting Carole J. Buckner, *Realizing* Grutter v. Bollinger*'s "Compelling Educational Benefits of Diversity" — Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. Rev. 877, 888 (2004)).

[27] *Id*. at 102-03.

[28] Meera E. Deo, *Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence* (Aug. 25, 2013) (forthcoming) (manuscript at 33), *available at* http://ssrn.com/abstract=2315787.

believe the racial 'norm' to be."[29] As put by one student, classroom diversity would allow others to see "greater complexities within various minority groups," and "people [would] no longer make generalizations about what groups believe."[30]

Racial isolation and the lack of diversity perpetuate a pervasive phenomenon known as stereotype threat. Due to stereotype threat, an awareness of a negative stereotype almost always negatively affects performance, causing individuals associated with the negative stereotype to perform below their potential. In one famous experiment, black students who were first asked to racially identify themselves and then complete a verbal test were found to score significantly lower than white students.[31] In contrast, when students were told that the test was about problem-solving, rather than a test of intellectual ability, the racial difference disappeared.[32] A more inclusive learning environment, fostered by a diverse student body, can mitigate stereotype threat and promote academic success.

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[29] *Id.* at 31.

[30] *Id.* at 36.

[31] Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African-Americans*, 69 J. of Personality & Soc. Psychol. 797, 808 (1995).

[32] *Id.* Since 1995, Steele's initial findings on stereotype threat have been peer-reviewed, replicated, and corroborated in over 400 studies. Michael Inzlicht & Toni Schmader, *Stereotype Threat: Theory, Process, and Application* 6 (2012).

Lack of diversity has serious learning consequences for all students—not just students of color. One of the main educational benefits of diversity, as noted in *Grutter*, is the "robust exchange of ideas."[33] These exchanges cannot happen where there is no meaningful interaction between students of different races in the classroom, and are not as likely to happen where students from underrepresented minorities do not constitute a critical mass.[34]

The educational benefits that flow from a diverse student body are profound. "[T]here is no default" in the learning environment cultivated when students are surrounded by a diverse group of classmates.[35] Campus diversity permits more engaging and eye-opening classroom discussions, breaks down stereotypes, and prepares students to be leaders in an increasingly globalized and diverse business world. A diverse classroom also prevents racial isolation and tokenism, which can hinder learning environments for all students. As recognized in *Grutter* and *Fisher* and confirmed by studies, diversity is and remains a compelling state interest.

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[33] 539 U.S. at 329.

[34] Deo, *supra* note 13, at 85.

[35] *Id*. at 99.

B. Law Schools and Other Professional Schools Charged with Developing the Country's Future Leaders Face Considerable Hurdles in Achieving Diversity.

This Court in *Grutter* recognized that "to cultivate a set of leaders with legitimacy in the eyes of its citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[36] Just as a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security,"[37] so too is diversity in the legal profession to achieving the American Bar Association's mission of "defending liberty and delivering justice."[38] These goals require student body diversity in law schools and universities, which serve as a "training ground for a large number of our Nation's leaders."[39]

But the outlook for underrepresented minorities at law schools is bleak. According to a study by Columbia University School of Law, despite steady numbers of African-Americans and Mexican-Americans applying to law schools, improving grade point averages and LSAT scores of African-

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[36] 539 U.S. at 332.

[37] *Id*. at 331.

[38] Am. Bar Ass'n, *ABA Mission and Goals*, http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Aug. 27, 2013).

[39] *Grutter*, 539 U.S. at 332.

Americans and Mexican-Americans, and growing enrollment in law schools overall, the percentage of African-Americans and Mexican-Americans making up matriculating classes nationwide has declined.[40] From 1993 to 2008, the proportion of African-Americans in an entering law school class decreased by 7.5 percent, whereas Mexican-Americans experienced a steeper decline of 11.7 percent.[41] These figures are troubling because they indicate not only that the pipeline to law schools remains closed off for certain minorities, but that it is narrowing.

The path to higher education has become more problematic in recent years. Factors that previously helped diversify the pipeline to higher education are now giving way to mounting financial pressures. For example, California's community colleges have cut student enrollment by 17 percent (485,000 students) and course offerings by 15 percent in response to recent reductions in state funding.[42] Federal financial aid grants are shrinking relative to college costs.[43] And some

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[40] Soc'y of Am. Law Teachers (SALT) & Lawyering in the Digital Age Clinic at Columbia Univ. School of Law, *A Disturbing Trend in Law School Diversity* (2009), http://blogs.law.columbia.edu/salt/.

[41] *Id.*

[42] Phil Oliff et al., *Recent State Higher Education Cuts May Harm Students and the Economy for Years to Come* 11, Center on Budget & Policy Priorities (Mar. 19, 2013), http://www.cbpp.org/files/3-19-13sfp.pdf.

[43] Paul Krugman, *Building a Caste Society*, N.Y. Times, Mar. 12, 2012, http://krugman.blogs.nytimes.com/2012/03/12/building-a-caste-society/.

universities have ended or trimmed their need-blind policies of accepting students whether or not they can afford to pay due to the high costs of maintaining such policies.[44]

These pressures underscore the continued need for race-based efforts to achieve student body diversity to ensure a continued pipeline of minorities into professional and graduate schools, and ultimately into the business world and important leadership positions. Race-conscious admissions programs assist in breaking down the barriers along the path to leadership.

C. State Bans on Race-Conscious Measures Have Had a Lasting Adverse Effect on the Enrollment Rates of Underrepresented Minorities at Elite Campuses.

Grutter recognized that enrolling a "critical mass" of "underrepresented minorities is necessary to further [the] compelling interest in securing the educational benefits of a diverse student body."[45] The Court explained that the goal of enrolling a "critical mass" of students did not transform an admissions program into a quota, even though "there is of course some relationship between numbers and achieving the benefits to be derived from a diverse

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[44] Richard Perez-Pena, *Aid Changes Raise Issue of Diversity at Colleges*, N.Y. Times, Nov. 30, 2012, http://www.nytimes.com/2012/12/01/education/elite-smaller-colleges-struggle-to-cover-financial-aid.html?pagewanted=all.

[45] 539 U.S. at 333.

student body."[46] Ensuring a "critical mass" is particularly important at flagship state universities and other elite schools because they serve a critical role in educating the country's most promising students and training them as future leaders.[47]

At flagship state university system campuses in Michigan, California, and Washington, state bans on race-conscious admissions programs have resulted in a drop in the enrollment of underrepresented minorities. While race-neutral programs have offered some success in increasing minority enrollment, they have not even reached pre-ban levels. Without the use of race-conscious admissions policies, universities effectively have a hand tied behind their back when it comes to enrolling underrepresented minority students.

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[46] *Id*. at 335-36 (quotation omitted).

[47] *See* Richard D. Kahlenberg, *A Better Affirmative Action: State Universities That Created Alternatives to Racial Preferences* 4 (Oct. 3, 2012), *available at* http://tcf.org/assets/downloads/tcf-abaa.pdf ("America's leadership class derives disproportionately from the ranks of top colleges and universities. 54 percent of America's corporate leaders and 42 percent of government leaders are graduates of just twelve institutions – Harvard, Yale, the University of Chicago, Stanford, Columbia, MIT, Cornell, Northwestern, Princeton, Johns Hopkins, the University of Pennsylvania, and Dartmouth.").

1. Freshman Enrollment of Black and Hispanic Students Declined at the University of Michigan After Proposal 2.

Proposal 2 banned the use of affirmative action based on race, ethnicity, or gender in public education in 2006.[48] Since its passage, there have been visible declines in the enrollment of black and Hispanic students at Michigan's leading university, the University of Michigan at Ann Arbor. Declines occurred at both undergraduate and graduate levels despite the adoption by the University of Michigan of a new admissions process focusing on race-neutral factors such as socioeconomic background and a student's life experiences.[49]

Before Proposal 2, 5.6 percent of enrolling freshmen were black and 4.5 percent were Hispanic.[50] As of 2012, 4.4 percent of enrolling freshmen were black and 3.7 percent were Hispanic, a decline of about 15 to 22 percent in black and Hispanic enrollment since Proposal 2's adoption (*see* Appendix, Figure 1).[51] In addition, as the

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[48] Mich. Const., art. I, § 26(a).

[49] Kahlenberg, *supra* note 47, at 52 (considering additional factors such as "Extenuating Circumstances," "Educational Environment," and "Personal Background").

[50] Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Freshman Enrollment by Geographic Location and Ethnicity for Term 1660 (Fall 2007)* (Sept. 24, 2007), http://ro.umich.edu/report/07fa856.pdf.

[51] Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Freshman Enrollment by Geographic Location and Ethnicity for Term Fall 2012* (Sept. 24, 2012), http://ro.umich.edu/ (continued…)

enrollment of black freshmen has declined, the number of college-aged Michigan residents who are black has increased to 19 percent.[52] About 6 percent of college-aged Michigan residents are Hispanic.[53]

Proposal 2 also adversely affected diversity at the graduate level, as shown by the severe declines in the enrollment of black students at the graduate schools of the University of Michigan. Before Proposal 2, 7.2 percent of graduate students were black.[54] This number dropped to 6.7 percent after Proposal 2 went into effect in 2008 and has continued to decline to 4.9 percent in 2012.[55] At the law school, the percentage of enrolled black students decreased from 5.2 percent before Proposal 2 to 3.6 percent immediately after, and is now even lower in 2012 at 2.8 percent, a decline of nearly 50 percent.[56]

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report/12fa844.xlsx. The first class entering the University of Michigan without affirmative action was in fall 2008. Kahlenberg, *supra* note 47, at 52.

[52] Ford Fessenden & Josh Keller, *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. Times, June 24, 2013, http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html.

[53] *Id*.

[54] Office of the Registrar, Univ. of Michigan – Ann Arbor, *Ten Year Enrollment by Ethnicity, Fall 2002 – Fall 2012*, http://www.ro.umich.edu/
report/12fa837.xlsx (last visited Aug. 27, 2013).

[55] *Id*.

[56] Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Graduate Students by Ethnicity with Rackham Students Assigned According to School or College for Term 1660 (Fall*
(continued…)

The medical school has suffered similar declines in black student enrollment—falling by more than 50 percent, from 6 percent before Proposal 2 and 2.7 percent in 2012 (*see* Appendix, Figure 2).[57]

2. Campuses in California and Washington Have Experienced Similar Declines in Enrollment of Under-represented Minorities After Banning Race-Conscious Policies.

In 1996, California voters barred the University of California from using race as an admissions consideration with the passage of Proposition 209.[58] In response, the university has attempted to build a diverse student body using race-neutral alternatives, such as a percentage plan

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2007) (Sept. 24, 2007), http://ro.umich.edu/report/07fa843.pdf [hereinafter *2007 Michigan Graduate Students*]; Office of the Registrar, Univ. of Michigan – Ann Arbor, *New Graduate Students by Ethnicity with Rackham Students Assigned According to School or College for Term 1710 (Fall 2008)* (Sept. 22, 2008), http://ro.umich.edu/report/08fa843.pdf; Office of the Registrar, Univ. of Michigan – Ann Arbor, *Graduate "New Transfer" Students by Unit and Ethnicity with Rackham Students Assigned According to Field of Specialization for Term Fall 2012* (Sept. 24, 2012), http://ro.umich.edu/report/12fa843.xlsx [hereinafter *2012 Michigan Graduate Students*].

[57] *2007 Michigan Graduate Students*, *supra* note 56; *2012 Michigan Graduate Students*, *supra* note 56.

[58] Cal. Const., art. I, § 31(a). The language of Proposition 209 is identical in substance to Proposal 2.

(which guarantees admission to certain schools to students graduating at the top ranks of their high school) and economic affirmative action (which considers factors such as "low family income, first generation to attend college, need to work," and "disadvantaged social or educational environment").[59] While these alternatives have had some success for the university system as a whole, diversity at the system's flagship campuses—UC Berkeley and UCLA—has faltered.[60] At these elite UC campuses, the "share of African American and Latino new freshmen declined from 23 percent in 1997 to 14 percent in 1998 (the first year of race-blind admissions), but has since rebounded to 20 percent."[61] But enrollment at UC Berkeley and UCLA is still below pre-ban levels, even though more than 15 years have passed since Proposition 209 went into effect. This is in spite of the steady growth of the Hispanic population in California, which now represents 49 percent of college-aged California residents.[62]

Proposition 209 has also resulted in notable declines in the enrollment of underrepresented minorities in UCLA's law and medicine graduate programs. At the law school, underrepresented minority enrollment decreased from 13.6 percent in

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[59] Kahlenberg, *supra* note 47, at 33-34.

[60] *Id*. at 13, 33-36.

[61] *Id*. at 13.

[62] Fessenden & Keller, *supra* note 52.

1997 to 9.1 percent in 1998.[63] Although it has increased to 10.7 percent in 2011, this number falls well short of the enrollment level before Proposition 209.[64] Declines in the medical program were even more drastic—plunging from 29.6 percent pre-ban to 18.5 percent in 2011.[65]

In 1998, Washington voters barred public universities in Washington from considering "race, sex, color, ethnicity or national origin" in admissions.[66] Following the ban, the University of Washington, the state's flagship institution, implemented a "holistic review admissions process" that solicited information regarding "Personal Achievements and Characteristics," such as "attaining a college-preparatory education in the face of significant personal adversity, economic disadvantage, or disability," but eliminated any consideration of race.[67]

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[63] UCLA Graduate Div., *UCLA Graduate Programs Annual Report 1997-1998* Section 1-23, http://www.gdnet.ucla.edu/asis/report/ar9798entire.pdf (last visited Aug. 27, 2013); UCLA Graduate Div., *UCLA Graduate Programs Annual Report 1998-1999*, Section 1-22, http://www.gdnet.ucla.edu/asis/report/ar9899entire.pdf (last visited Aug. 27, 2013).

[64] UCLA Graduate Div., *UCLA Graduate Programs Admissions & Enrollment Report (Sections 1 and 2 of 2011-2012 Annual Report)* 46, http://www.gdnet.ucla.edu/asis/report/aer1112.pdf (last visited Aug. 27, 2013).

[65] *Id.*; *UCLA Graduate Programs Annual Report 1997-1998*, *supra* note 63, at Section 1-23.

[66] Wash. Rev. Code § 49.60.400(1).

[67] Kahlenberg, *supra* note 47, at 40.

After the ban on race-conscious programs, the university experienced a serious decline in the enrollment of black and Hispanic students, respectively 30 percent and 26 percent.[68] Although the numbers have since rebounded, they still fall below the steadily growing numbers of black and Hispanic college-aged Washington residents.[69] The gap between Hispanic college-aged residents and those being admitted to the University of Washington is especially large—16 percent versus 7 percent.[70]

D. Race-Neutral Measures Do Not Adequately Achieve Diversity.

Race-neutral admissions programs, such as income-based affirmative action and percentage programs, are predicated on using socioeconomic status and class rank as proxies for race to build a diverse student body. But studies have shown that the use of such proxies have limited success and moreover fail to improve racial diversity because they do not directly address the unique factors and barriers faced by underrepresented minorities.

While income-based and race-based policies can have some "overlapping effects," they are not the

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[68] Linnea Nissa Limbach, After Initiative 200: Trends in Minority Undergraduate Admissions & Emerging Trends in Race-Neutral Policies to Attain Diversity 58 (2008) (unpublished degree project), *available at* http://www.caa.wa.gov/archives/documents/AfterI-200.pdf.

[69] Fessenden & Keller, *supra* note 52.

[70] *Id*.

same and do not produce the same results.[71] Moreover, income-based policies alone cannot effectively achieve racial and ethnic diversity at universities. "While African Americans and Hispanics are overrepresented among the poor, whites still constitute the majority of families . . . ."[72] Accordingly, low-income minority students still would have to be chosen disproportionately from the pool of low socioeconomic status students in order to achieve a critical mass.[73]

Further, inequality in educational opportunity among blacks and Hispanics cannot be completely accounted for by socioeconomic status or by the quality of schools they have attended.[74] "The view that race should not matter . . . relies solely on a procedural standard of equal treatment rather than a broader standard that considers actual roadblocks impeding the opportunity to learn in minority

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[71] Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* 153, *in* America's Untapped Resource: Low-Income Students in Higher Education (Richard D. Kahlenberg ed., 2004), *available at* http://tcf.org/assets/downloads/tcf-carnrose.pdf.

[72] *Id.*.

[73] Carnevale & Rose, *supra* note 71, at 153; Nikole Hannah-Jones, *A Challenge to the Idea That Income Can Integrate America's Campuses*, The Atlantic Wire, June 24, 2013, http://www.theatlanticwire.com/politics/2013/06/supreme-court-affirmative-action-class-income/66541/ ("[C]olleges would have to recruit seven to eight poor white students to get one black or Latino student.").

[74] Carnevale & Rose, *supra* note 71, at 132.

communities or the racial distribution of degrees from prestigious colleges."[75]

With respect to the effect of socioeconomic status on college preparation, "[p]overty does not produce an equal opportunity burden across racial lines."[76] According to U.S. Census data, the typical low-income white American lives in a neighborhood where roughly one in ten families are poor.[77] The children of these low-income families therefore have access to middle-class schools with the same teachers and curriculum that are offered to their wealthier neighbors. Affluent blacks and Hispanics (with an income over $75,000), however, "have a poorer neighborhood profile than the average for whites."[78] Because of this, most black children attend schools "where two-thirds of their classmates are poor and resources and college prep courses are limited"—irrespective of their family's income.[79] Numerous studies demonstrate that these differences in the quality of neighborhoods and schools help to explain why white and Asian students account for 84 percent of low-income students that are considered high achievers—the same students who would be snapping up spots at

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[75] *Id*. at 135.

[76] Hannah-Jones, *supra* note 73.

[77] John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* 5 (July 2011), *available at* http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf.

[78] *Id*. at 6.

[79] Hannah-Jones, *supra* note 73.

elite colleges using income-based admissions preferences.[80]

Furthermore, when it comes to economic disadvantage, "race seems to add power to the negative effects of low-income status and degrade the positive effects of income and educational improvements."[81] Racial minorities are "disproportionately harmed by increasing income inequality because they are often trapped in jobless enclaves and low-wage job sectors that make them more vulnerable to any kind of social or economic threat."[82]

Socioeconomic-based admissions policies also fail to take into account general racial stigma. Black students, for example, report experiencing discrimination at higher rates than white students, which range from "everyday microassaults, general assessments of discrimination in the work environment, to specific incidents of racial discrimination such as receiving poorer service than others, being discouraged to pursue educational

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[80] *Id.* (citing Caroline M. Hoxby & Christopher Avery, *Low-Income High-Achieving Students Miss Out on Attending Selective Colleges*, http://www.brookings.edu/about/projects/bpea/latest-conference/2013-spring-selective-colleges-income-diversity-hoxby).

[81] Anthony P. Carnevale & Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 37 (July 2013), *available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf.

[82] *Id.*

goals, and being stopped by police."[83] The effects of these experiences on a student's ability to prepare for college are not taken into account using only income-based methods. Race-conscious measures, on the other hand, implicitly recognize that race—and any associated stigma that comes with it—may be a relevant factor in a student's preparedness for college.

Percentage plans are similarly inadequate (and, in some states and for some schools, simply not available or workable).[84] While the presumption has been that percentage plans, by guaranteeing admission to students that are in a certain top percentage of their high school class, produce a proportion of underrepresented minorities that more accurately reflects the general population, experience has shown they do not.[85] The enrollment of black students has decreased, and the enrollment of Hispanic students has either decreased or remained the same.[86] These studies conclude that percentage plans have "fallen well short of creating diverse flagship campuses of the states they are intended to serve."[87]

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[83] Daye, *supra* note 14, at 124-S.

[84] Unlike California and Texas, Michigan has not adopted a percentage plan that guarantees admission to high school students in the top ranks in their class. And no workable solution exists to implement percentage plans at the graduate and professional school level.

[85] Limbach, *supra* note 68, at 71-72.

[86] *Id*.

[87] *Id*. at 72.

Further, although percentage plans purport to be race-neutral, they require high levels of residential and school segregation to succeed. For example, the Texas Top Ten Percent Plan is able to build some levels of racial and ethnic diversity by capitalizing on pockets of segregation that exist in the state.[88] Black and Hispanic students who qualify for automatic admission in Texas disproportionately attend schools where minority students make up a significant majority.[89] This also prevents the University from admitting a mix of minority students, from different backgrounds, which break down racial stereotypes—part of the educational benefit of diversity articulated in Grutter.

If a race-neutral policy is implemented with the intent of fostering campus diversity, the question thus arises whether it can truly be "race-neutral." In her dissent in *Fisher*, Justice Ginsberg recognized that Texas's Top Ten Percent Plan and race-blind holistic review of each application "was adopted with racially segregated neighborhoods and schools front and center stage."[90] She noted that "[i]t is race

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[88] *See* Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 315 and 341 (2006).

[89] *Id.*; *see also* Carnevale & Strohl, *supra* note 81, at 38 ("The Texas 10-percent solution . . . allows substantial racial diversity in the Texas postsecondary system because it is predicated on continued racial and economic segregation in particular areas and high school.").

[90] *Fisher*, 133 S. Ct. at 2433 (Ginsberg, J., dissenting).

consciousness, not blindness to race, that drives such plans."[91]

"Race-neutral" considerations simply camouflage race-conscious policies and attempt—ineffectively—to achieve the same goal of enrolling a critical mass of underrepresented minorities at institutions of higher learning.[92] Although not ideal, race-conscious admissions policies remain the most effective means to achieve this end, especially at elite universities.

E. Race-Conscious Measures Do Not Harm Minority Students.

Petitioner and other opponents of race-conscious admissions programs argue that such programs set up their intended beneficiaries for failure because they create a "mismatch" between the skill of the student and the abilities required for success at selective universities.[93] Under the so-called mismatch theory, mismatch occurs when a student underperforms because he is granted admission at a school for which he is not academically suited, *i.e.*, that student's grade point average or standardized test score falls below the

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[91] *Id.* ("[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious.")

[92] Hannah-Jones, *supra* note 73 ("We want to figure out ways to get race without using race—if it weren't so tragic it would be funny.").

[93] *See* Pet'r Br. 32.

school's average.[94] Recent studies have shown the contrary, rebutting notions that race-conscious measures harm their intended beneficiaries.

A study on University of California students shows that, although mismatch may occur, supposedly mismatched students perform just as well as their better-prepared peers, and better than their counterparts at less selective schools.[95] Lesser-qualified students at UC Berkeley, UCLA, and UC San Diego earned "nearly identical" grade point averages to their peers with higher records of achievement, and further were more likely to stay in college than other students with similar academic records who went to less competitive campuses.[96] Moreover, the study did not find significant differences when looking at students' race or ethnicity.[97]

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[94] *Id.*; Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1605-08 (1999).

[95] Michal Kurlaender & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions* 16-18, 20-21, (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, CDE Working Paper No. 2013-06, May 2013), *available at* http://www.ssc.wisc.edu/cde/cdewp/2013-06.pdf. Under a special arrangement in 2004, certain students were denied admission to UC Berkeley, UCLA, and UC San Diego, but were promised admission at a later date if they transferred from a community college. After a change in circumstances, these deferred students were granted immediate admission, which created a large group of potential "mismatch" students to study academic performance. *Id.* at 9-10.

[96] *Id.* at 16-18, 20-21.

[97] *Id.* at 21.

In starker contrast, a study on the Top Ten Percent Plan in Texas demonstrates that when lower-ranked minority students "cascade[] down" into less selective schools, both freshmen retention and graduation rates decline.[98] Whereas mismatch theory would have predicted higher retention and graduation rates for students attending schools where they are better "matched," these results demonstrate the converse.

Those that "flow up" to more selective schools, however, reap substantial benefits. Another study concluded that African-American and Hispanic students with above-average standardized test scores that attend selective schools are nearly twice as likely to graduate as those who attend two- and four-year open-enrollment colleges.[99] Students attending selective schools enjoy higher graduation rates in part because those schools spend two to almost five times as much on instruction per student as open-enrollment schools.[100]

These studies show that there are clear advantages associated with attending a more selective school, despite any mismatch. Although minority students may disproportionately start behind the block at selective schools, they nonetheless thrive or perform the same as their better-prepared peers and achieve better outcomes

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[98] Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan*, 29 Econ. Educ. Rev. 1110, 1111 and 1122 (2010).

[99] Carnevale & Strohl, *supra* note 81, at 27.

[100] *Id*. at 24.

than had they attended a less selective school. Contrary to critics' fears of harm due to mismatch, race-conscious admissions programs expand educational opportunities for minority students and place them on paths to realizing their full potential.

F. Elected University Officials Have the Experience and Expertise to Determine Whether Race Should Be a Factor at All as Part of a Holistic Admissions Process.

The Sixth Circuit's decision should be upheld because it is consistent with *Grutter* and preserves the ability of universities struggling to achieve diversity to consider race as a factor in individualized, holistic admissions decisions. Although courts are the final arbiter as to the necessity and narrow tailoring of race-conscious admissions programs, the experience and expertise of university officials in building student bodies can—and should—be taken into account.[101] Their personal observations of student body diversity (or the lack thereof), study and awareness of the various measures being employed to address diversity, and familiarity with financial, demographic, or political constraints faced by universities place university officials in a prime position to assess whether race should be a consideration at all in admissions decisions.

"Critical mass" takes on a different meaning depending on the school, the state, and the time. For

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[101] *See Fisher*, 133 S. Ct. at 2420.

some, it may mean experimenting with race-neutral alternatives. For others, it may mean using a race-conscious program because race-neutral alternatives do not exist or work. Universities must have the flexibility to adjust their admissions programs within constitutional limits and consider all kinds of diversity, including race.

G. The Termination of Race-Conscious Measures Is Premature.

In *Grutter*, this Court noted that "[i]t has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased."[102] The Court then expressed a hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[103] This passage from *Grutter* is aspirational; the reality is that the country simply is not there yet.

The experiences of Michigan, California, and Washington demonstrate that race-conscious measures play a critical role in helping universities to build and maintain a diverse student body and remain necessary to further a compelling state interest. For universities to enroll underrepresented minorities in critical numbers, race-conscious

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[102] *Grutter*, 539 U.S. at 343.

[103] *Id.*

admissions policies still serve as the most effective means to achieve that end.

II. PROPOSAL 2 IMPERMISSIBLY ALTERS THE POLITICAL STRUCTURE IN MICHIGAN AND PRECLUDES ONLY MINORITIES FROM USING THE POLITICAL PROCESS TO OBTAIN REMEDIAL MEASURES.

A. *Hunter* and *Seattle* Are Controlling Precedents.

The political-restructuring doctrine, as set forth by this Court in *Hunter* and *Seattle*, remains a fundamental part of equal protection jurisprudence.

The political restructuring doctrine rests on the premise 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."[104] Although "laws structuring political institutions or allocating political power according to 'neutral principles' . . . are not subject to equal protection attack" because they "make it more difficult for *every* group in the community to enact comparable laws," laws that "allocate[] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" can be challenged under the Equal

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[104] *Seattle*, 458 U.S. at 468 (quoting *Hunter*, 393 U.S. at 393).

Protection Clause.[105] The Equal Protection Clause prohibits "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[106] *Hunter* and *Seattle* both found that facially neutral enactments violated the Equal Protection Clause by impermissibly changing the political structure.

In *Hunter*, this Court held that a city charter amendment that required the approval of a majority of electors before any ordinance regulating real property transactions "on the basis of race, color, religion, national origin or ancestry" could take effect violated the Equal Protection Clause.[107] The city charter amendment had a clear racial focus and "place[d] a special burden on racial minorities within the governmental process" by mandating additional procedural hurdles for proposed ordinances addressing "racial housing matters" that were not required for other housing matters.[108]

In *Seattle*, this Court reaffirmed the principles of *Hunter* when it struck down a state constitutional amendment prohibiting racially integrative busing.[109] The Court had "little doubt that the initiative was effectively drawn for racial purposes,"

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[105] *Id.* at 470.

[106] *Id.* at 467 (quotations and citation omitted).

[107] *Hunter*, 393 U.S. at 387, 391-93.

[108] *Id.* at 389-91.

[109] *Seattle*, 458 U.S. at 470-71.

with the goal of targeting busing only for integrative purposes.[110] Under the amendment, individuals seeking to implement a busing policy for non-racial purposes—or almost any other educational policy, for that matter—could continue to lobby the school board to adopt such measures. But individuals seeking race-related educational policies, such as busing or reassignments to end *de facto* segregation, would need to first "seek relief from the state legislature, or from the statewide electorate" to repeal the constitutional amendment.[111] The Court invalidated the amendment because "it use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities."[112]

Hunter and *Seattle* are squarely applicable here. Like the charter amendment in *Hunter* and the constitutional amendment in *Seattle*, Proposal 2 is focused on race: it "deal[s] in explicitly racial terms with policies "designed to benefit minorities 'as minorities.'"[113] It further requires those championing race-conscious admissions programs that "inure[] primarily to the benefit of the minority" to "surmount a considerably higher hurdle than persons seeking comparable legislative action."[114]

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[110] *Id.* at 463-71.

[111] *Id.* at 474.

[112] *Id.* at 470.

[113] *Id.* at 485.

[114] *Id.* at 472-74.

Petitioner's argument, and the Ninth Circuit's holding in *Coalition for Economic Equity v. Wilson*, that the political restructuring doctrine applies only to denials of "equal protection" and not to bans on "preferential treatment"[115] insists upon a distinction that is unsupported by *Hunter* and *Seattle*. Indeed, the legislation at issue in *Seattle* was not directed at prohibiting discrimination, but instead prohibited, similar to Proposal 2, voluntary programs that benefited minorities. Attempts to characterize race-conscious admissions policies as "preferences" is nothing more than a linguistic distraction from the actual issue: whether a change in the political structure singles out measures that are racially focused for "peculiar and disadvantageous treatment."[116]

B. Proposal 2 Imposes Unique and Substantial Burdens on Minorities and Excludes Them from a Political Process Available to All Other Groups.

The focus and impact of Proposal 2 on racial minorities is undeniable. Although Proposal 2 is facially neutral, Proposal 2 was "drawn for racial purposes."[117] The proponents of Proposal 2 expressly sought "to amend the State Constitution to ban

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[115] *See* Pet'r Br. 20; *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997).

[116] *Seattle*, 458 U.S. at 485.

[117] *See id.* at 471.

affirmative action programs"[118]—programs that Petitioner concedes primarily benefit minorities.[119]

And the reality is that "the law's impact falls on the minority."[120] Proposal 2 interferes with the political process and places nearly insurmountable burdens on minorities seeking legislation that is in their interest. Individuals who seek to change admissions policies on an issue other than race (or other factors banned by Proposal 2) can contact the admissions committees or the administrative authorities of the university, or support the election of a board candidate who will revise the admissions policies. The option of seeking an amendment of the Michigan Constitution remains only as a last resort. But individuals who wish to have admissions policies revised to consider race as a factor have only one option under Proposal 2: to seek a constitutional amendment. They must launch the expensive and arduous process of first getting the Michigan legislature or a sufficient number of voters to put the issue on the ballot, and then win majority support in a statewide election—no easy feat for racial minorities who make up only a small part of the electorate. Only if the constitutional amendment succeeds can the process of lobbying the admissions committee or the school administration begin for those seeking race-conscious admissions policies.

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[118] Notice of State Proposals for November 7, 2006 General Election 5, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf.

[119] Pet'r Br. 22.

[120] *Hunter*, 393 U.S. at 391.

Meanwhile, university officials remain free to evaluate and use admissions policies that consider, for instance, an applicant's legacy status, economic status, social stature, athletic ability, personal hobbies, or almost any other factor. But any attempt to build diversity by considering race as part of a holistic admissions process is blocked by the need to first amend the state constitution—a "considerably higher hurdle" for minorities.[121] Under this disjointed process, schools can build "diversity" in almost all areas except race.

Under *Hunter* and *Seattle*, Michigan cannot "explicitly us[e] the *racial* nature of a decision to determine the decisionmaking process."[122] As the Sixth Circuit correctly concluded below, Proposal 2 violates the Equal Protection Clause: it "reorders the political process in Michigan in a way that places special burdens on racial minorities," who are most likely to seek race-conscious admissions.[123] Proposal 2 "plainly differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area" of education.[124]

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[121] *See Seattle*, 458 U.S. at 474-75.

[122] *Id.* at 470.

[123] *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN) v. Regents of Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012).

[124] *See Seattle*, 458 U.S. at 479-80 (quotation omitted).

C. Proposal 2 Forecloses the Ability of a Certain Class of Citizens to Seek Protective Remedies.

Under equal protection principles set forth in *Romer*, and informed by *Hunter* and *Seattle*, Proposal 2 should be struck down for removing the ability of a specific group to seek certain remedies under the law. In *Romer*, Colorado had amended its constitution by referendum to ban non-discrimination ordinances that prohibit discrimination based on sexual orientation.[125] The Court struck down the amendment, rejecting arguments, similar to those made by Petitioner here, that the amendment "does no more than deny homosexuals special rights" and put them "in the same position as all other persons."[126] The amendment went beyond merely "depriv[ing] homosexuals of special rights"; rather, it placed "a special disability upon those persons alone" by requiring them to "enlist[] the citizenry of Colorado to amend the State Constitution" to obtain specific protections against discrimination.[127]

Proposal 2 similarly "nullifies specific legal protections for [a] targeted class" and places a "special disability" on minorities who seek remedial measures for the lack of racial integration in Michigan's public education system.[128] Segregation

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[125] 517 U.S. at 624.

[126] *Id.* at 626.

[127] *Id.* at 631.

[128] *See id.* at 627-29.

at all levels of education plagues Michigan to this day. Due to continued racial segregation geographically and within the public school system, many of Michigan's students—regardless of race—have lived in segregated neighborhoods or attended poorly integrated public schools. Based on 2012 census data, blacks or African-Americans make up 14.3 percent of Michigan's population. Native-Americans comprise 0.7 percent, while Hispanic or Latino residents represent 4.6 percent and Asians make up 2.6 percent.[129] Yet parts of Michigan are still highly segregated. In Detroit, for example, over 82 percent of the city's population is African-American—a marked increase from the 40 percent they represented decades ago, and an increase even from the levels of the 1990s.[130] Not surprisingly, Michigan's public schools have long suffered from a lack of racial integration, as this Court and others have recognized.[131] The Detroit City School District—a predominantly African-American district—had a graduation rate of just 58.42 percent

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[129] U.S. Census Bureau, *State & County QuickFacts for Michigan* (June 27, 2013), http://quickfacts.census.gov/qfd/states/26000.html.

[130] U.S. Census Bureau, *Detroit (City) QuickFacts* (June 27, 2013), http://quickfacts.census.gov/qfd/states/26/2622000.html; *see* R. Farley et al., *Detroit Divided* 4 (2000) (noting that "African Americans make up only one-fifth of metropolitan Detroit's population" according to 1992 study).

[131] *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (noting pervasive segregation in Detroit schools); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1055-57 (6th Cir. 1977) (affirming district court's finding that board of education for Michigan's capital, Lansing, practiced segregation in elementary schools), *cert. denied*, 434 U.S. 997 (1977).

in 2007, compared to 75.45 percent for Michigan as a whole.[132] Proposal 2 deprives universities of the ability to use race-conscious remedial measures to address the persistent segregation in primary and secondary schools and its effects on diversity in higher education.

The impact of Proposal 2 on minority rights is so significant that a United Nations committee has noted that voter referenda such as Proposal 2 prevent the United States from satisfying its obligations under international law. The International Convention on the Elimination of All Forms of Racial Discrimination requires signatories to adopt "special measures" when circumstances warrant as a "tool to eliminate the persistent disparities in the enjoyment of human rights and fundamental freedoms and ensure the adequate development and protection of members of racial [and] ethnic . . . minorities."[133] Although the United States "committed to using all the tools at its disposal to address disparities in outcomes . . . that disproportionately impact members of racial and

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[132] *See* Ctr. for Educ. Performance & Info., *State of Michigan 2007 4-Year Cohort Graduation and Dropout Rate Report* 6, 20, http://www.michigan.gov/documents/cepi/2007_MI_Grad-Drop_Rate_246517_7.pdf.

[133] U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶ 15, U.N. Doc. CERD/C/USA/CO/6 (Mar. 5, 2008).

ethnic minorities," that commitment will ring hollow so long as laws such as Proposal 2 remain in place.[134]

At its core, Proposal 2, like the unconstitutional amendment in *Romer*, is a "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government"—a law that "is itself a denial of equal protection of the laws in the most literal sense."[135]

CONCLUSION

Proposal 2 undermines the compelling interest that educational institutions have in achieving student body diversity, and imposes impermissible burdens on racial minorities seeking beneficial admissions programs. Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[134] *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, ¶¶ 16, 33 (June 12, 2013), *available at* http://www.state.gov/documents/organization/210817.pdf.

[135] 517 U.S. at 633.

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APPENDIX

APPENDIX

Figure 1

Black and Hispanic Freshman Enrollment at the University of Michigan at Ann Arbor Before and After Proposal 2

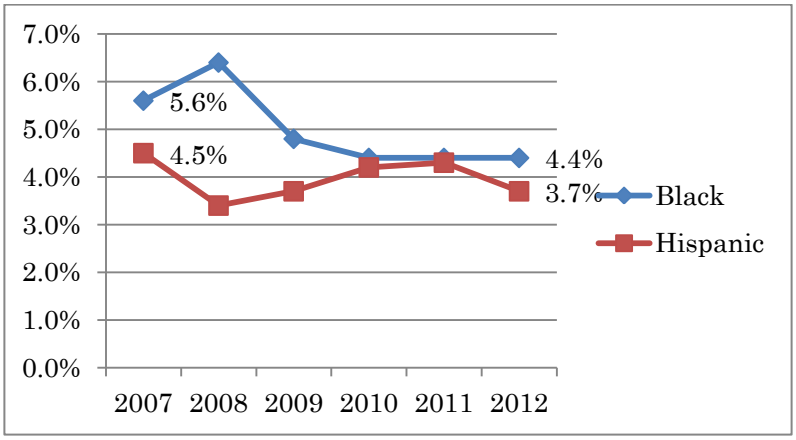

Figure 2

Black New Student Enrollment in Graduate Programs at the University of Michigan at Ann Arbor Before and After Proposal 2