No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

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

-AND-

CHASE M. CANTRELL, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS CHASE CANTRELL ET AL.

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Chase Cantrell, M.N., a minor child, by Karen Nestor, Mother and Next Friend, Karen Nestor, Mother and Next Friend of M.N., a minor child, C.U., a minor child, by Paula Uche, Mother and Next Friend, Paula Uche, Mother and Next Friend to C.U., a minor child, Joshua Kay, Sheldon Johnson, Matthew Countryman, M.R., a minor child, by Brenda Foster, Mother and Next Friend, Brenda Foster, Mother and Next Friend of M.R., a minor child, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, T.J., a minor child, by Cathy Alfaro, Guardian and Next Friend, Cathy Alfaro, Guardian and Next Friend of T.J., a minor child, S.W., a minor child, by Michael Weisberg, Father and Next Friend, Michael Weisberg, Father and Next Friend of S.W., a minor child, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C., II, a minor child, by Carolyn Carter, Mother and Next Friend, Carolyn Carter, Mother and Next Friend of M.C.C., II, a minor child, J.R., a minor child, by Matthew Robinson, Father and Next Friend, and Matthew Robinson, Father and Next Friend of J.R., a minor child (together, the "Cantrell Respondents").

In the consolidated case, there is a separate group of Respondents, which includes the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia

Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turqoise Wiseking, Brandon Flannigan, Josie Human, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young, Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 386, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmative Action Party (together, the "Coalition Respondents"). Additional defendants below are the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, Irvin D. Reid, and Lou Anna K. Simon.

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INTRODUCTION

Before Proposal 2 was enacted in November 2006, the Michigan Constitution granted plenary authority over *all* matters relating to the state's public universities, including authority to establish admissions criteria, to each university's Board of Regents. Supporters of Proposal 2 mobilized in direct reaction to this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 340, 343 (2003), holding that Michigan Law School's policy of considering race as one factor among many in a holistic, individualized review of admissions applications was constitutionally permissible. Proposal 2's supporters sought not only to repeal the constitutionally permissible race-conscious admissions policies that universities had developed in the wake of *Grutter*; instead, they sought to permanently ban such policies by embedding a prohibition against them in the state constitution and thereby changing—along explicitly racial lines—the political structure traditionally employed by the State of Michigan to make higher educational policy.

Following Proposal 2's enactment, the Boards of Regents are prohibited by the state constitution from retaining their constitutionally permissible race-conscious admissions programs or from adopting new constitutionally permissible policies. They retain plenary authority over all other matters, however, including whether to include countless other constitutionally permissible criteria in their admissions programs. Consequently, a student who believes that her family's alumni connections (or experience as a member of a Christian service group or living in Michigan's Upper Peninsula) should

receive greater weight in the admissions process can advocate to the Boards of Regents—or to the university officials to whom they have delegated authority over admissions policy—with a chance of success. In contrast, post-Proposal 2, if a student believes that the admissions process should consider how she would contribute to promoting diversity within the university community based on her experiences as an African-American woman, she has no choice but to undertake the far more onerous process of amending the state constitution to authorize again constitutionally permissible race-conscious admissions programs.

Launched by opponents of constitutionally permissible race-conscious admissions programs after they lost in *Grutter*, Proposal 2 explicitly refers to race and was unquestionably about race. It not only prohibited constitutionally permissible race-conscious admissions programs but also made it substantially more onerous for proponents of such programs to advocate their adoption successfully in the future, thereby (among other consequences) reducing the enrollment of underrepresented minorities on individual campuses. Based on overwhelming evidence, the Sixth Circuit adopted the district court's factual findings that Proposal 2 effected a significant change in the ordinary political process and that it was fundamentally about race. Relying on *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), the Sixth Circuit, sitting en banc, concluded that Proposal 2 was therefore a racial classification subject to strict scrutiny under the Equal Protection Clause and, because the state

did not advance a compelling governmental interest, was unconstitutional.

In the context of racial classifications, this Court has most often applied strict scrutiny when the government expressly classifies individuals by race and differentially allocates benefits and burdens based upon individual membership in a racial or ethnic group. *See, e.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (reviewing public university admissions program); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (reviewing programs to assign individual students to particular K-12 public schools); *Grutter*, 539 U.S. 306 (2003) (reviewing public law school admissions program); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (reviewing program to award government contracts).

But this Court also has identified a category of cases where strict scrutiny applies to governmental action that does not allocate benefits or burdens directly to individuals but rather controls how decisions related to that allocation occur. When race is "*the predominant* factor," *Bush v. Vera*, 517 U.S. 952, 959 (1996), motivating the manipulation of the political process, that change in the political process itself creates a racial classification that is subject to strict scrutiny. For example, this Court has held that redistricting decisions are subject to strict scrutiny when they disregard traditional race-neutral districting principles and otherwise are "unexplainable on grounds other than race," even when there is *no* resulting substantive harm to any individual's voting strength. *Shaw v. Reno*, 509 U.S. 630, 641-43 (1993); *see also Bush*, 517 U.S. at 958.

Likewise, strict scrutiny applied in *Hunter* and *Seattle*, which this Court subsequently characterized as "precedents involving discriminatory restructuring of governmental decisionmaking," *Romer v. Evans*, 517 U.S. 620, 625 (1996), because the challenged governmental action in those cases created uniquely onerous political processes for deciding whether to adopt constitutionally permissible race-conscious programs.

The narrow application of strict scrutiny beyond decisions that directly allocate governmental benefits and burdens reinforces the core rationale supporting this Court's conclusion that *all* racial classifications must be subject to strict scrutiny: they "delay the time when race will become a truly irrelevant, or at least insignificant, factor" in society. *Adarand*, 515 U.S. at 229. It is, of course, the political process that determines the allocation of governmental benefits and burdens, so efforts like Proposal 2 to structure the political process along overtly racial lines unmistakably mandate that race be "outcome determinative," *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting), in the way government operates and "threaten[] to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire," *Shaw*, 509 U.S. at 657. The suggestion that changing the political process along racial lines to prevent the state from taking constitutionally permissible race-conscious action is somehow justified because it may ultimately reduce the importance of race within society is irreconcilable with settled doctrine. *See, e.g.*, *Parents Involved*, 551

U.S. at 782 (Kennedy, J., concurring) ("To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.").

Because the state plainly has a compelling interest in prohibiting race-conscious action that violates the Equal Protection Clause, the political restructuring doctrine is necessarily implicated only in the limited circumstances where race-conscious governmental action is *constitutionally permissible*. Under those circumstances, the state must make a choice whether to take race into account; there is consequently a need for public discourse regarding whether or not to adopt such measures. In this case, for example, Michigan was free to maintain the race-conscious admissions program upheld in *Grutter* or to abandon it. *See, e.g.*, *Crawford v. Bd. of Educ.*, 458 U.S. 527, 539 (1982). Proposal 2, however, effected far more than a mere repeal of race-conscious legislation. While otherwise leaving intact the Boards of Regents' plenary authority over university affairs, Proposal 2 stripped the Boards' power only with respect to an inherently racial issue and entrenched that issue at a higher and more burdensome level of political decisionmaking. Although history instructs that the targeted restructuring of the political process has often been used, as here, to the disadvantage of racial minorities, this Court has cautioned that allowing *either* side of a debate to manipulate the political process for making such decisions introduces a racial divide into the political system. *See Shaw*, 509 U.S. at 650-51 ("[E]qual protection analysis is not dependent on the race of those burdened or benefited" (internal quotation marks omitted)).

Recent empirical analysis demonstrates that racial polarization was substantially greater in Michigan on the question of whether to amend the constitution to prohibit race-conscious admissions programs than on the more general question of whether affirmative action programs should be adopted. *See generally* Brief of Amici Curiae Political Scientists Donald Kinder *et al.* (hereinafter "Kinder Br.").

The political restructuring doctrine is a necessary bulwark of equal protection jurisprudence: it ensures that the debate over whether to adopt constitutionally permissible race-conscious programs does not lead to racial balkanization if one side attempts to racially gerrymander the political process to rig the outcome in its favor. It also reflects a clear and narrow rule: when *race is the predominant factor* explaining a state's decision to establish a *distinct political process*, the governmental action creates a racial classification subject to strict scrutiny. Although courts may be called upon to determine whether *race is the predominant factor* behind the governmental action and whether the action creates a *distinct political process*, those determinations are guided by tests that are amenable to commonsensical and objective application.

Accordingly, the Court should affirm the Sixth Circuit's conclusion that Proposal 2 was a distortion of the political process related to constitutionally permissible race-conscious policies and therefore a racial classification that is subject to, and fails, strict scrutiny, especially in light of Petitioner's failure even to articulate a compelling state interest.

STATEMENT

A. Background

Under its state constitution, Michigan's public universities are controlled by independent Boards of Regents, each of which has the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. Board members have always enjoyed autonomy over admissions policies, and they have delegated the responsibility to establish admissions standards, policies, and procedures to units within the institutions, including central admissions offices, schools, and colleges. Pet. App. 27a-29a; Supp. C.A. Br. of Universities 19-21. Students, faculty, and other individuals have always been free to lobby Michigan's public universities for or against the adoption of particular admissions policies. They have historically done so on numerous occasions. By the 1990s, for example, in response to decades of robust, hard-fought political debate, admissions decisions in many of Michigan's public universities' graduate and undergraduate programs included consideration of race as one of a multitude of factors. Supp. Pet. App. 270a-71a.

In 2003, this Court in *Grutter*, 539 U.S. 306, upheld as constitutional the University of Michigan Law School's holistic, race-conscious admissions policy. On the same day, the Court invalidated the admissions policy of the University of Michigan's undergraduate college as not narrowly tailored to serve the State's compelling interest in obtaining the educational benefits of student-body diversity. *See Gratz v. Bollinger*, 539 U.S. 244 (2003).

Following these decisions, Michigan's public universities amended their admissions policies as needed to comply with *Grutter*. For instance, the University of Michigan's undergraduate admissions officers crafted a policy that engaged in an "individualized inquiry into the possible diversity contributions of all applicants," *Grutter*, 539 U.S. at 341, considering race along with another "50 to 80 different categories," such as personal interests and achievements, geographic location, alumni connections, athletic skills, socioeconomic status, family educational background, overcoming obstacles, work experience, and any extraordinary awards, both inside and outside the classroom, Supp. Pet. App. 283a-284a.

As Petitioner acknowledges, Pet. Br. 7, in direct response to this Court's rulings in *Gratz* and *Grutter*, opponents of race-conscious admissions programs organized to place a proposal to amend the Michigan Constitution on the November 2006 statewide ballot. The initiative, Proposal 2, sought "to amend the State Constitution to ban affirmative action programs," Pet. App. 8a, and its principal author stated that its purpose was "to prohibit programs that granted racial preferences, that is, affirmative action programs," Supp. Pet. App. 327a. Once adopted by the voters, Proposal 2 amended the Michigan Constitution to include the following provisions, entitled "Affirmative Action," in Article I:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant

> preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

Pet. App. 8a-9a (citing Mich. Const. art. I, § 26). No prior constitutional amendment in Michigan had dealt with any matter relating to university admissions or, for that matter, with anything related to higher education governance or affairs.

In December 2006, Proposal 2 took effect and generated two major changes to the admissions policies at Michigan's public universities. First, Proposal 2 mandated that Michigan's public universities remove "race, sex, color, ethnicity, or national origin" as potential factors in the admissions process even though the Boards and their designated admissions committees could continue to

consider any and all other factors. Pet. App. 9a. Second, Proposal 2 "entrenched this prohibition at the state constitutional level, thus preventing public colleges and universities or their Boards from revisiting this issue—and only this issue—without repeal or modification of [Proposal 2]." Pet. App. 9a.

B. Proceedings Below

On November 8, 2006, the day after Proposal 2 was approved, the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary ("Coalition Plaintiffs") filed suit in the United States District Court for the Eastern District of Michigan. About a month later, the Michigan Attorney General filed a motion to intervene as a defendant, which the court granted. Pet. App. 9a-10a.

On December 19, 2006, the Cantrell Plaintiffs, a group of students, faculty, and prospective applicants to Michigan's public universities, filed a separate suit in the United States District Court for the Eastern District of Michigan. Pet. App. 10a. The Cantrell Plaintiffs sought to prohibit Proposal 2's enforcement only as applied to university admissions, Pet. App. 10a, on the ground that Proposal 2 violates the Fourteenth Amendment by creating a separate and more burdensome governmental decisionmaking process for determining whether or not universities may adopt race-conscious admissions policies that satisfy the Fourteenth Amendment. The district court consolidated the two cases in January 2007. *See* Pet. App. 109a.

In reviewing Michigan law and the historical record, the district court found that "governance of a university, including the regulation of admissions criteria, is part of the political process" and that "race-conscious admissions programs developed" through this process "in the first place." Supp. Pet. 327a. After discovery and consideration of expert testimony, the court further found that, in terms of enrollment numbers, "Proposal 2's elimination of affirmative action programs will fall the heaviest on minorities," Supp. Pet. App. 316a, a finding that was borne out after Proposal 2 went into effect. Brief for Respondents the Regents of the University of Michigan *et al.* 23-25.

The district court also found "no question" that "Proposal 2 makes it more difficult" for proponents of constitutionally permissible race-conscious programs to achieve their adoption. Supp. Pet. App. 328a. Expert testimony established that the process of amending Michigan's Constitution is "lengthy, complex, difficult and expensive," J.A. 40, and ballot initiatives in Michigan can cost as much as $15 million, "with $5 million being a practical minimum," J.A. 47. Because Michigan requires "signatures from 10% of the total vote cast for all candidates" in the last gubernatorial election and has a relatively short window for gathering signatures, the cost of simply securing enough signatures to place an initiative on the ballot could approach $1 million. J.A. 44, 47-48.

Nonetheless, the district court denied the Plaintiffs' motions for summary judgment and granted the Attorney General's motion for summary judgment, stating that "the political restructuring effectuated by Proposal 2 does not offend the Equal

Protection Clause." Supp. Pet. App. 330a; *see* Pet. App. 11a-12a. The district court subsequently denied the Cantrell Plaintiffs' motion for reconsideration, and both Plaintiff groups appealed. Pet. App. 12a.

On appeal, the Sixth Circuit, sitting en banc, invalidated Proposal 2. Relying on *Seattle* and *Hunter*, the Sixth Circuit held that a political enactment denies equal protection when it (1) has a "racial focus" and (2) "reallocates political power or reorders the decisionmaking process" in a way that "places special burdens on racial minorities." Pet. App. 21a-22a.

As the Sixth Circuit recognized, it is undisputed that after Proposal 2, the *only* recourse available to a person seeking to restore the constitutionally permissible consideration of race as one factor in higher education admissions would be to mount a successful statewide electoral campaign to amend the Michigan Constitution, which, as the district court found, is "an extraordinarily expensive process and the most arduous of all the possible channels for change." Pet. App. 36a. In contrast, a Michigan citizen lobbying for or against consideration of such non-racial factors as religious group membership, legacy status, geographic origin, athletic skill or virtually any other dimension of experience or background treated as an identifying characteristic may use any number of less burdensome avenues to change or maintain admissions policies. For example, such a citizen could directly engage in discourse with the Boards, the appropriate university committees, or other university officials. *See* Pet. App. 35a. The Sixth Circuit also affirmed

the district court's finding that "the admissions policies affected by Proposal 2 are part of a political process," canvassing in detail Michigan law and relying also on briefing by University defendants "clarif[ying] their admissions practices." Pet. App. 27a-33a (internal quotation marks omitted).

As the Sixth Circuit explained, "[b]ecause less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment." Pet. App. 37a-38a. The Sixth Circuit recognized that the State of Michigan had made *no* attempt to justify Proposal 2 by advancing a putative compelling interest. Pet. App. 45a ("Likewise, because the Attorney General does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument.").

SUMMARY OF ARGUMENT

This Court has held that *all* racial classifications are subject to strict scrutiny. *See Fisher*, 133 S. Ct. at 2421. Thus, strict scrutiny applies when the government classifies "individuals by race" and differentially "allocate[s] benefits and burdens on that basis," *Parents Involved*, 551 U.S. at 783, 789 (Kennedy, J., concurring). Strict scrutiny also applies when race is "the predominant factor," *Bush*, 517 U.S. at 959, in determining how the political process is structured because this Court has recognized that the allocation of government benefits and burdens cannot be separated from the process by

which those political decisions are made. *See Bush*, 517 U.S. 952; *Shaw*, 509 U.S. 630; *Seattle*, 458 U.S. 457; *Hunter*, 393 U.S. 385. Proposal 2 falls into this second, narrower category of racial classifications because it requires a distinct and, as the district court explicitly found and the Sixth Circuit affirmed, more onerous process for deciding whether to adopt constitutionally permissible race-conscious admissions programs than the process that applies to other decisions related to admissions criteria.

This Court should affirm the Sixth Circuit's decision and decline the invitation by Petitioner and Russell to overrule the political restructuring doctrine embodied in *Hunter* and *Seattle*, for three principal reasons:

1. The political restructuring doctrine is consistent with, and a necessary component of, this Court's equal protection jurisprudence.

This Court has long recognized that the "peculiar and disadvantageous" treatment of racial matters in the political process is a racial classification subject to strict scrutiny. *See Seattle*, 458 U.S. at 485. Like decisions impacting voting rights and the redistricting of legislative boundaries, decisions to modify other facets of the political process directly impact the allocation of governmental benefits and burdens to individuals. Applying strict scrutiny to decisions that create "distinctions based on race," *id.*, within our political system is thus consistent with longstanding doctrine.

This Court has also repeatedly explained that *all* racial classifications must be subjected to strict scrutiny because treating race differently may increase the salience of race in our constitutional democracy and sanction the view that race remains outcome determinative in our political processes. *See Shaw*, 509 U.S. at 657. These risks are particularly likely when the classification directly affects the individual allocation of governmental benefits and burdens on the basis of race. But they are equally likely when the political process itself contains a distinct decisionmaking process for racial issues.

States will always have a compelling interest in prohibiting race-conscious conduct that violates the Equal Protection Clause. Changes to the political process can therefore violate the Fourteenth Amendment under the political restructuring doctrine only in the narrow circumstances in which a state has the choice whether or not to adopt a constitutionally permissible race-conscious program. In this context, the political restructuring doctrine plays an indispensable role by assuring that the process through which the state resolves that question does not needlessly heighten the focus on race as an overly salient or outcome-determinative feature of our political system.

In *Hunter* and *Seattle*, the political process was manipulated to prohibit *constitutionally permissible* race-conscious programs or policies. In decisions that post-date *Hunter* and *Seattle*, this Court has held that *all* racial classifications, including those intended to benefit minorities, are subject to strict scrutiny. *See, e.g.*, *Adarand*, 515 U.S. 200. Application of the political restructuring doctrine

does not, therefore, turn on whether the state has mandated or prohibited constitutionally permissible race-conscious policies. Rather, this Court's current understanding of the Equal Protection Clause requires strict scrutiny whenever racial issues are subject to a distinct and more burdensome decisionmaking process, regardless of outcome.

The political restructuring doctrine thus applies in narrow circumstances delineated by a clear rule that enforces this Court's core equal protection principles. In the limited context of constitutionally permissible race-conscious action, when *race is the predominant factor* explaining a state's decision to establish a *distinct political process*, the governmental action creates a racial classification subject to strict scrutiny. *Race is the predominant factor* behind the creation of a distinct decisionmaking process when, as here, the creation of the separate decisionmaking process is "unexplainable on grounds other than race," *see Shaw*, 509 U.S. at 643-44 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), due to the racial character of the issue subject to the distinct process. When, as also occurred here, "race" expressly appears on the face of the political restructuring measure to define how (or to which types of action) a distinct decisionmaking process applies and nothing in the record otherwise dispels the conclusion that its application to "race" was the predominant factor behind the measure, the racial character of the issue is clear. *See Hunter*, 393 U.S. at 390-91. And a *distinct political process* exists when plenary decisionmaking authority resides at one

governmental level, *e.g.*, the Board of Regents, but the decision whether to take constitutionally permissible action with respect to race is situated at a different governmental level, *e.g.*, the state constitution, in which advocacy is necessarily substantially more burdensome. By contrast, decisions to enact (or not enact) or to repeal (or leave in place) constitutionally permissible race-conscious legislation or policies are not subject to strict scrutiny under the political restructuring doctrine because they do not create a distinct decisionmaking process.

2. The Sixth Circuit correctly concluded that Proposal 2 created a racial classification subject to strict scrutiny. Proposal 2 explicitly established a *distinct political process* for *race*-conscious admissions programs. Under Proposal 2, the Boards of Regents retain plenary authority over all other university matters, including general authority to set admissions criteria. But the specific decision whether to adopt constitutionally permissible *race*-conscious admissions programs was uprooted from that locus of political decisionmaking and entrenched at the state constitutional level. As a direct response to *Grutter* and framed by its principal author as prohibiting consideration of race in college admissions, Proposal 2 cannot be rationally explained or understood on grounds other than race.

Both Petitioner and Russell argue that Proposal 2 should not be subject to strict scrutiny because many considerations other than intent to harm minorities might lead a state to prohibit race-conscious college admission programs. But requiring plaintiffs to prove animus toward a particular racial

group as part of an equal protection claim would be incompatible with decades of this Court's precedents, including *Shaw*, *Bush*, *Adarand*, *Parents Involved*, and *Fisher*. The district court and the Sixth Circuit both found that, in addition to targeting race explicitly for different treatment, the fundamental aims of Proposal 2 were to prohibit race-conscious admissions programs *and* to create a different and more burdensome decisionmaking process to block any future effort to alter that outcome. The underlying attitudes of voters toward particular racial groups are irrelevant.

Because the state chose not even to venture to identify a compelling interest for the racial classification embodied in Proposal 2, and because Proposal 2 is not narrowly tailored even if such an interest were deemed to exist, Proposal 2 is unconstitutional. Petitioner's argument that strict scrutiny should not apply to Proposal 2 because it seeks ultimately to minimize the salience of race by prohibiting race-conscious admission programs cannot be squared with settled Fourteenth Amendment doctrine. *All* racial classifications are subject to strict scrutiny, however laudable a goal they purport to advance and even if their supporters believe the racial classification will ultimately reduce the prominence of race in society.

3. *Stare decisis* counsels against taking the dramatic step to overrule or substantially limit such longstanding precedent as *Hunter* and *Seattle*. The attacks by Petitioner and Russell on the wisdom of race-conscious admissions programs, which serve only to catalogue their continuing disagreement with

this Court's holdings in *Grutter* and *Fisher*, are irrelevant to the question presented in this case.

ARGUMENT

I. THE POLITICAL RESTRUCTURING DOCTRINE IS CONSISTENT WITH, AND A NECESSARY COMPONENT OF, THIS COURT'S EQUAL PROTECTION JURISPRUDENCE.

A. This Court Has Long Recognized That the "Peculiar and Disadvantageous" Treatment of Racial Matters in the Political Process Is a Racial Classification Subject to Strict Scrutiny.

More than a quarter century ago, this Court held that the ordinary political processes of government decisionmaking may not be intentionally skewed against particular policies because their subject matter is racial in nature. *Seattle*, 458 U.S. at 470 (holding that strict scrutiny is triggered whenever "the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process"). In *Seattle,* blacks and other citizens had achieved school board approval of a busing plan to lessen the *de facto* segregation in Seattle's schools.[1] Opponents

[1] The constitutionality of Seattle's "race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation" was not challenged, so the constitutionality of the plan was assumed.

then mounted a successful campaign to pass a statewide initiative, Initiative 350, prohibiting school boards from using busing to accomplish racial integration, while permitting the continued use of busing for all other purposes of school transportation and otherwise leaving school governance processes intact. Initiative 350 "nowhere mention[ed] 'race' or 'integration,'" but it "in fact allow[ed] school districts to bus their students 'for most, if not all,' of the nonintegrative purposes required by [the state's] educational policies." *Id.* at 471.

This Court held that Initiative 350 created a racial classification subject to strict scrutiny: "[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." *Id.* at 485 (internal quotation marks omitted); *see also id*. at 480 ("By placing power over desegregative busing at the state level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'" (quoting *Lee v. Nyquist*, 318 F. Supp. 710, 718

Seattle, 458 U.S. at 472 n.15. Unsurprisingly, Petitioner cites no authority supporting his contention that this Court's decision not to resolve a question that the parties did not raise undermines the precedent on the issue the Court did resolve. *Cf. Fisher*, 133 S. Ct. at 2421 (assuming, for purposes of decision, that *Grutter* is good law); *id.* at 2422 (Scalia, J., concurring) (concurring because petitioner did not ask Court to overturn *Grutter*).

(W.D.N.Y. 1970), *aff'd*, 403 U.S. 935 (1971))). This Court thus affirmed that a state could not selectively gerrymander the political process to impose more rigorous political burdens on those citizens seeking to promote constitutionally permissible race-conscious approaches than it imposed on those pursuing other policy agendas involving public education. *See Seattle*, 458 U.S. at 474-75; *see also id.* at 474 n.17 (noting that the constitutional evil was the creation of a "comparative structural burden" for advocating otherwise constitutionally permissible race-conscious policies within the political process).

This Court in *Seattle* relied on *Hunter*, 393 U.S. 385, which had articulated the same rule more than a decade earlier. In *Hunter*, the Court struck down an amendment to the City of Akron's charter because it explicitly established a process for deciding racial housing matters that was distinct from the process for all other housing matters. *See id.* at 389. The charter amendment provided that "[a]ny ordinance enacted by the Council of Akron which regulates the use, sale, advertising, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of *race*, color, religion, national origin or ancestry must first be approved by a majority of the electors . . . before said ordinance shall be effective." *Id.* at 387 (emphasis added). The requirement of voter approval for certain ordinances duly enacted by the city council was unique within the city charter, applying only to "laws to end housing discrimination." *Id.* at 390; *see also id.* at 391 (noting that "[t]he automatic referendum system" did not, for

example, "affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes"). The charter amendment thus forced those who sought protection from private racial or religious discrimination to run a "gauntlet" that those who sought to prevent other abuses in real estate did not have to run. *Id*. at 390.

As such, the amendment "was an explicitly racial classification treating racial housing matters differently from other . . . housing matters." *Id.* at 389; *see also id.* at 395 (Harlan, J., concurring) (observing that the amendment was a racial classification because it was not "grounded in neutral principle"); *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (distinguishing facts of case from *Hunter* "in which fair housing legislation alone was subject to an automatic referendum requirement"). "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race," the "racial classification" embodied in the charter amendment was subject to strict scrutiny under the Equal Protection Clause. *Hunter*, 393 U.S. at 391-93.

This Court thereafter relied on similar considerations in a series of cases alleging racial gerrymandering when states created majority-minority electoral districts in the wake of the 1990 Census. *See Bush*, 517 U.S. at 958-1002; *Shaw*, 509 U.S. at 642-58; *Easley v. Cromartie*, 532 U.S. 234, 241-58 (2001); *Miller v. Johnson*, 515 U.S. 900, 904-28 (1995). In those cases, the Court held that using race as the predominant factor in structuring the political process through electoral district boundaries

creates a racial classification subject to strict scrutiny under the Equal Protection Clause. The holdings in *Shaw* and *Bush* did not rest on the direct allocation of particular governmental benefits and burdens based on the race of the individuals seeking those benefits.[2] Rather, the rationale supporting application of strict scrutiny was the state's reliance on race as the predominant factor in drawing electoral district boundaries and thus in ultimately structuring the legislative process that is responsible for allocating governmental benefits and burdens to individuals.

For example, the plaintiffs in *Shaw* did not claim that the challenged reapportionment plan unconstitutionally diluted white voting strength, or even that they themselves were white. *See* 509 U.S. at 641. Instead, their claim focused on the application of race as the essential mechanism by which electoral lines were determined and government decisionmaking organized: "Racial gerrymandering, even for remedial purposes, may balkanize us into competing factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the nation continues to aspire." *Id.* at 657.

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[2] As Justice Souter observed in *Bush*, rather than "addressing any injury to members of a class subjected to differential treatment, the standard presupposition of an equal protection violation, *Shaw I* addressed a putative harm subject to complaint by any voter objecting to an untoward consideration of race in the political process." *Bush*, 517 U.S. at 1045 (Souter, J., dissenting).

Although the Court reiterated that it "never has held that race-conscious state decisionmaking is impermissible in *all* circumstances," *id.* at 642, the Court concluded in *Shaw* that the State of North Carolina's decision to enact redistricting legislation that "is so bizarre on its face that it is 'unexplainable on grounds other than race'" was subject to strict scrutiny as a racial classification, *id.* at 644 (quoting *Arlington Heights*, 429 U.S. at 266).

Likewise, in *Bush*, the Court relied on *Shaw* to apply strict scrutiny to, and ultimately void, a plan to redraw Texas electoral district lines because the plaintiffs established that race was "the predominant factor motivating the legislature's redistricting decision." 517 U.S. at 959, 970-72 (internal quotation marks and alterations omitted); *accord id.* at 996 (Kennedy, J., concurring); *id.* at 1001 (Thomas, J., concurring). The constitutional vice was not any resulting substantive harm to any individual's voting strength, but rather "the legislature's reliance on racial criteria" as the predominant factor in their redistricting efforts. *Id.* at 958. In other words, the Texas redistricting failed under the Equal Protection Clause because the "contours" of the lines drawn were "unexplainable in terms other than race," *id.* at 972, and not narrowly tailored to serve a compelling state interest, *see id.* at 976-83. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 & n.12 (2006) (Stevens, J., concurring in part and dissenting in part) (recognizing on behalf of himself and one other Justice that compliance with the Voting Rights Act can be a compelling interest in legislative redistricting); *id.* at 485 n.2 (Souter, J., concurring in

part and dissenting in part) (same, on behalf of himself and one other Justice); *id.* at 518-19 (Scalia, J., concurring in the judgment in part and dissenting in part) (same, on behalf of himself and three other Justices).

Notably, the Court in *Shaw* drew from the same body of case law addressing attempts to restrict the political power of minority groups through manipulations of the machinery of governmental power upon which the Court relied in *Hunter* and *Seattle*. *Compare Shaw*, 509 U.S. at 639-41, 644-46 (discussing *Guinn v. United States*, 238 U.S. 347 (1915), *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), *Wright v. Rockefeller*, 376 U.S. 52 (1964), *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)) *with Hunter*, 393 U.S. at 391, 393 (citing *Gomillion*, 364 U.S. 339, *Reynolds*, 377 U.S. 533, and *Avery v. Midland Cnty.*, 390 U.S. 474 (1968)), and *Seattle*, 458 U.S. at 485-86 (discussing *Hunter*'s reliance on voting rights cases).

These cases recognized that, although government can discriminate directly in the allocation of benefits and burdens based on the race of individuals, subtle changes in the political process can accomplish essentially the same ends because decisions about the allocation of governmental benefits and burdens ultimately flow from the political process. *See generally* Brief for Amici Curiae Constitutional and Local Government Scholars Michelle Wilde Anderson *et al.* in Support of the Cantrell Respondents. *Gomillion* dramatically illustrates this functional equivalence: the City of Tuskegee had been "square in shape," but the law challenged in that case "transformed it into a

strangely irregular twenty-eight-sided figure" that "deprived the petitioners of the municipal franchise and consequent rights." 364 U.S. at 341, 347. Likewise, in *Reynolds*, the Court anchored the "one person, one vote" principle on the importance of "equal representation" within our country's "representative government," thereby recognizing that election results dictate governmental decisions. 377 U.S. at 560-61.

In *Shaw*, the Court relied on the ugly history of efforts by state and local governments to limit minority access to the franchise to demonstrate that the machinery of political power can be corrupted "through the use of both subtle and blunt instruments" to limit, along racial lines, the ability of citizens to influence governmental decisions. 509 U.S. at 639-41 (internal quotation marks omitted). And in *Hunter* and *Seattle*, these historical examples illustrated an analogous means through which the political system could be manipulated along racial lines to affect the allocation of governmental benefits and burdens to individuals. *See Hunter*, 393 U.S. at 391 (holding that restructuring the political process to disadvantage advocates of programs that benefit minorities "is no more permissible than denying them the vote, on an equal basis with others"); *id.* at 392-93 (comparing political restructuring to efforts to "dilute any person's vote or give any group a smaller representation than another of comparable size"); *accord Seattle*, 458 U.S. at 486-87.

The shared reliance on this case law underscores that *Hunter* and *Seattle*, like *Shaw* and *Bush*, rest on the recognition that, because governmental decisions regarding the allocation of benefits and burdens

among individuals flow directly from the political process, using race as the predominant factor in restructuring that process is no less suspect than using race to decide directly which individuals will receive which benefits or be subject to which burdens and can be sustained only if narrowly tailored in support of a compelling state interest. That conclusion is fully consistent with this Court's longstanding principle that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" should "be subjected to more exacting judicial scrutiny." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (cited in *Seattle*, 458 U.S. at 486). *Hunter* and *Seattle* thus fit within the framework of cases that pay close attention to devices that preordain the distribution of benefits and burdens as a function of race. Unsettling those precedents would erode the foundations of the entire theory of strictly scrutinizing racial classifications.

B. Structuring the Political Process Based on Racial Considerations Is Particularly Likely To Underscore That Race Is a Significant and Outcome-Determinative Factor Within Our Political System.

The political restructuring doctrine plays an indispensible role in the limited context where states must decide whether or not to adopt constitutionally permissible race-conscious programs by ensuring that the processes through which states and their political subdivisions resolve that debate do not entrench race as a central, outcome-determinative

feature of our political system. Failing to apply strict scrutiny where the political process governing that debate is transparently restructured around race would strip equal protection doctrine of any principled coherence.

This Court has held that *all* racial classifications are subject to strict scrutiny because they pose the risk of lasting harm to our society. *See Fisher*, 133 S. Ct. at 2421 (holding that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny" (internal quotation marks omitted)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) ("[A]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

This is true even when the classifications do not differentially allocate governmental benefits and burdens among individuals. *See Shaw*, 509 U.S. at 651 ("[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally."). And even purportedly benign racial classifications receive strict scrutiny because they may "lead to a politics of racial hostility" and "endorse race-based reasoning," which contribute to "an escalation of racial hostility and conflict." *Parents Involved*, 551 U.S. at 746 (plurality opinion) (internal quotation marks and citations omitted). The most sincere belief that a racial classification will reduce racial differences in the long run is insufficient to avoid the application of strict scrutiny. *Id.* at 782 (Kennedy, J., concurring) ("To make race

matter now so that it might not matter later may entrench the very prejudices we seek to overcome.").[3]

Of course, strict scrutiny is not triggered merely because governmental action is taken "with consciousness of race." *Bush*, 517 U.S. at 958; *see also Shaw*, 509 U.S. at 642 ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."). Race-conscious action that does "not lead to different treatment based on a classification that tells each [person] he or she is to be defined by race" ordinarily need not satisfy "strict scrutiny to be found permissible." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).[4] Accordingly, the state may pursue any number of legitimate ends with race in mind without risking this harm. For example, the inclusion of race and ethnicity in the federal census, collection of such data by law enforcement or other governmental agencies, or the enactment of

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[3] Applying strict scrutiny, the question is whether the risk of societal harm from the racial classification is outweighed by the compelling governmental interest advanced by the narrowly tailored program. As *Grutter* demonstrates and *Fisher* confirms, the answer to that question may be yes in some circumstances.

[4] For this reason, efforts to promote diversity in K-12 public schools through "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race" do not require strict scrutiny, even though they involve consciousness of race. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

antidiscrimination laws designed to promote equal treatment by eradicating racial discrimination do not trigger strict scrutiny because they do not involve the differential distribution of finite governmental resources to individuals based on their race or the redesign along racial lines of the decisionmaking processes that generate such differential distribution. *See Miller v. Johnson*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."). This Court has never suggested that the mere consideration of racial demographics, much less the mere utterance of the word "race," by governmental actors risks lasting (or indeed any) harm to society so as to trigger strict scrutiny.

In contrast, the manipulation of the political process along racial lines, like the use of race at issue in *Shaw* and *Bush*, does trigger strict scrutiny. This Court has described the ultimate goal of the Fourteenth Amendment as advancing our society to a point where race structures neither individual opportunity nor the governmental decisions that ordain how such opportunity is allocated, and premised its decisions on precisely these grounds. *See, e.g.*, *Adarand*, 515 U.S. at 229 ("[I]t will delay the time when race will become a truly irrelevant, or at least insignificant, factor."); *Shaw*, 509 U.S. at 657 (identifying ultimate goal of Reconstruction amendments as creating "a political system in which race no longer matters"). *Hunter* itself rested on an understanding that "the core of the Fourteenth Amendment is the prevention of meaningful and

unjustified official distinctions based on race," 393 U.S. at 391.

The political restructuring doctrine vindicates that core equal protection principle in the limited contexts where race-conscious action is constitutionally permissible by ensuring that the political process for making that decision is not itself skewed on the basis of race.[5] In such circumstances, the state has a choice whether or not to take race-conscious action, so there will always be a need for public discourse regarding the enactment of such measures. Because ours is a democratic system, this Court's recognition that race-conscious action can be constitutionally permissible necessitates that the decision whether to take such action must be made through the political process. Allowing one side of the debate to selectively change the rules of the political process along racial lines to make it substantially more likely that its preferred outcome will prevail in perpetuity would demonstrate with inescapable clarity that race remains a uniquely central feature of our "political system." *Shaw*, 509 U.S. 657.

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[5] Russell observes that the Equal Protection Clause protects individuals, not groups. Russell Br. at 15-17. Exactly so. A distinct decisionmaking process makes it more difficult for one side of the debate over whether to adopt a constitutionally permissible race-conscious program to advocate successfully for its position, so a racialized restructuring injures either the proponents or opponents of the program. As *Shaw* recognized, the race of those impacted by conduct that underscores the importance of race in our political process is not relevant. *See* 509 U.S. at 641 (emphasizing plaintiffs did not "even claim to be white").

On the other hand, states plainly have a compelling interest in prohibiting racial classifications that violate equal protection. Any change to the political process to prohibit unconstitutional conduct is therefore justified and cannot cause any societal harm because any distinction based on race that it would reinforce merely repeats the Fourteenth Amendment. Petitioner makes a superficially plausible observation that it is "curious to say that a law that bars a state from discriminating on the basis of race or sex violates the Equal Protection Clause by discriminating on the basis of race and sex." Pet Br. 4. But that completely misses the point. State actions that discriminate on the basis of race or sex are substantively unconstitutional absent adequate justification without regard to the political restructuring doctrine. Petitioner glaringly leaves out the language of Proposal 2 that the Cantrell Respondents challenge: its prohibition on racial "preferences." The political restructuring doctrine is implicated in this case only because Proposal 2 *also* prohibits state universities in Michigan from adopting precisely the kinds of race-conscious admissions programs that this Court upheld in *Grutter*. Indeed, that was its explicit purpose.

Contrary to Petitioner's assertion, therefore, Proposal 2 is *not* a race-neutral enactment designed to further the goals of the Equal Protection Clause. Just the opposite. By creating a two-tier system of political decisionmaking, Proposal 2 needlessly heightens the salience of race in the political process and, by so doing, "contribut[es] to an escalation of racial hostility and conflict." *Parents Involved*, 551

U.S. at 746 (plurality opinion) (internal quotation marks omitted). This concern is far from theoretical. Empirical analysis of public polling and voting polarization data demonstrates that Proposal 2 engendered racial polarization that was unprecedented in Michigan. *See generally* Kinder Br. (finding, to a high degree of statistical certainty, that Proposal 2 caused racial polarization to an unprecedented degree, whether compared to the most racially contentious issues of the past several decades or to the division over the underlying question of whether affirmative action is desirable policy).

C. The Political Restructuring Doctrine Applies to *All* Manipulations of the Political Process That Cannot Be Explained on Grounds Other Than Race.

Because all racial classifications are constitutionally suspect, *see, e.g.*, *Adarand*, 515 U.S. at 227, the political restructuring doctrine focuses on the manner in which racial issues are resolved rather than the outcome of that political debate. Accordingly, had Proposal 2 been written to *mandate* permanent race-conscious admissions policies and embed that admission criterion in the state's constitution while otherwise leaving the Boards of Regents' plenary authority intact, the measure would also be subject to strict scrutiny as a suspect restructuring of the political process along racial lines. That the group with the deck stacked against it would have been the one that *opposes* race-conscious admissions programs would not affect the application of strict scrutiny (although a different set

of interests might lead to a different result in applying strict scrutiny).

The Court's observations in *Hunter* and *Seattle* that the programs affected by the restructuring of the political process "inure[d] primarily to the benefit of the minority," *Seattle*, 458 U.S. at 472, and that the restructuring thus "place[d] special burden on racial minorities," *Hunter*, 393 U.S. at 391, were empirically accurate based on the record in each case and do not limit the political restructuring doctrine's application, in light of *Croson* and *Adarand*.[6]

The Akron city council passed a fair housing ordinance because African-American citizens were experiencing overt racial discrimination, *see Hunter*, 393 U.S. at 386, and the Seattle schools experiencing the most dire crowding and racial isolation were predominantly located in minority neighborhoods, *see Seattle*, 458 U.S. at 464. The Court recognized the broader benefits of the race-conscious legislation in these contexts, *see id.* at 472 ("And it should be equally clear that white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom." (internal quotation marks omitted)), but the record in each case also demonstrated that members of the racial minority

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[6] Russell makes much of the Court's observation that "[t]he majority needs no protection against discrimination," *Hunter*, 393 U.S. at 391 (quoted in *Seattle*, 458 U.S. at 468). Russell Br. 19-20. The political restructuring doctrine, however, does not depend on this observation and applies to *all* racial classifications in a straightforward manner.

had a distinct interest in whether the race-conscious legislation was enacted.[7]

As such, it was unsurprising that the record in each case reflected the reality that members of minority groups generally supported and had been integral to securing the enactment of the policies affected by the political restructuring. *Cf. Carolene Prods.*, 304 U.S. at 152 n.4 (holding that changes to the political process that harm "discrete and insular minorities" should be of particular concern under the Equal Protection Clause) (cited in *Seattle*, 458 U.S. at 486). The Court nonetheless made clear that these findings did *not* rest on an assumption that racial identity dictates individual beliefs or that the views held by members of a racial group are monolithic. *See Seattle*, 458 U.S. at 472 (stating that "the proponents of mandatory integration cannot be classified by race" and "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350"); *id.* ("[W]e may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance [at issue in *Hunter*].").

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[7] Petitioner's argument that "a *Grutter* policy" cannot benefit "*all* students" while also benefiting "primarily a minority group," Pet. Br. 22, is simply wrong, as he plainly admits by conceding that representation of certain minority groups *increased* after universities changed their policies to comply with *Grutter*, Pet. Br. 7. In any event, this argument is beside the point because the political restructuring doctrine applies to all racial classifications.

The Court's focus in *Hunter* and *Seattle* on the distinct harm to minorities of government action that, in fact, distinctly affected those minorities does not vitiate the doctrine articulated in those cases, just as the recognition in early voting rights cases that the challenged actions were motivated by the desire to prevent racial minorities from participating equally in our political system did not prompt the Court to revisit or revise these decisions in *Shaw* and its progeny. *See Shaw*, 509 U.S. at 639-41, 644-46 (relying on cases that emerged from our Nation's history of pervasive discrimination that uniquely harmed African-Americans to conclude that the majority-minority districts at issue were unconstitutional).

D. The Political Restructuring Doctrine Entails Straightforward Factual Inquiries and Is Integral to a Coherent Equal Protection Doctrine.

The political restructuring doctrine provides a clear test for determining whether strict scrutiny applies. When *race is the predominant factor* explaining a decision by the state or its political subdivision to establish a *distinct political process*, the governmental action creates a racial classification subject to strict scrutiny. *See, e.g.*, *Seattle*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks omitted)). Each aspect of this test, in turn, involves a straightforward factual inquiry.

1. *Race as Predominant Factor. Race is the predominant factor* behind the creation of a distinct decisionmaking process when, as here, the creation of the separate decisionmaking process is "unexplainable on grounds other than race," *see Shaw*, 509 U.S. at 644, 647 (internal quotation marks omitted), due to the racial character of the issue subject to the distinct process. This inquiry is guided by *Arlington Heights*, 429 U.S. 252, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and *Washington v. Davis*, 426 U.S. 229 (1976). The Court in *Seattle* observed that, although Initiative 350 nowhere mentioned "'race' or 'integration,'" the various exceptions built into the statute reflected that it had been "carefully tailored to interfere only with desegregative busing." 458 U.S. at 471. The Court concluded that it was "beyond reasonable dispute" that "the initiative was enacted 'because of, not merely in spite of, its adverse effects upon' busing for [racial] integration." *Id.* (quoting *Feeney*, 442 U.S. at 279) (internal quotation marks omitted).

When, as also occurred here, "race" expressly appears on the face of the political restructuring measure to define how (or to which types of action) a distinct decisionmaking process applies and nothing in the record otherwise dispels the conclusion that its application to "race" was the predominant factor behind the measure, the racial character of the issue is clear. *See Hunter*, 393 U.S. at 390. In *Hunter*, there was "an explicitly racial classification treating racial housing matters differently" from other matters, *id.* at 389, because the charter amendment, by its terms, applied to housing laws that prohibit

discrimination based on race, *see id.* at 390. The record confirmed that this explicit reference to "race" to identify which antidiscrimination measures were subject to the distinct decisionmaking process defined the measure's primary purpose: to prevent measures to combat racial discrimination by private actors from becoming law. *See id.* at 391-92. An explicit reference to "race" on the face of measure is strong evidence that race is the predominant factor behind the change to the political process.

The requirement that the underlying issue must be racial in nature explains the Court's conclusion in *James v. Valtierra*, 402 U.S. 137, 141 (1971), that the political restructuring doctrine did not apply to a state initiative that required a jurisdiction-wide referendum for approval of any low-rent public housing project. This state initiative did not facially single out race, *see id.* (noting the initiative required "referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority"), and the record did "not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority," *id.*

The federalism principles invoked by Petitioner, Pet. Br. 28, and by Russell, Russell Br. 22-24, are therefore not implicated in the narrow circumstances in which the political restructuring doctrine applies. States *generally* retain broad authority to structure their political systems (and to use initiative or referendum processes to do so), but it is axiomatic that "these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." *Hunter*, 393 U.S. at 392; *accord Gomillion*, 364 U.S. at 342-47

(distinguishing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)). States remain the laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The political restructuring doctrine does not dictate whether states may govern by popular initiative or legislation. States remain "free to vest" plenary decisionmaking authority over an issue at the state level or within the various political subdivisions that they create. *Seattle*, 458 U.S. at 480 n.23. States are prohibited only from building "unjustified official distinctions based on race," *Hunter*, 393 U.S. at 391, into the political system itself, in violation of the Fourteenth Amendment.

Petitioner's suggestion that the political restructuring doctrine applies only to antidiscrimination laws and not to race-conscious "preferences," Pet. Br. 17-24, is doctrinally untenable and factually incorrect. The desegregation plan in *Seattle* was adopted to remedy *de facto* segregation, 458 U.S. at 472 n.15, and, like race-conscious college admissions programs, was therefore not constitutionally mandated.[8] States generally have no constitutional *obligation* to remedy injuries caused by private actors, although they may choose to do so through constitutionally permissible means. *Cf. Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (stating that the Constitution does not mandate "that state and local school authorities

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[8] Because the fair housing ordinance in *Hunter* regulated *private* conduct, 393 U.S. at 386-87, it also was not constitutionally mandated.

must accept the status quo of racial isolation in schools" caused by *de facto* segregation). Any benefit conferred by a constitutionally permissible (but not constitutionally mandated) race-conscious initiative could therefore be viewed as "preferential." Petitioner's argument confuses non-mandatory efforts to promote equality in our society with programs adopted to remedy violations of constitutional equal protection. Petitioner's purported distinction is particularly incoherent when viewed in light of the core equal protection interest advanced by the political restructuring doctrine: reducing the prominence of race as a decisive factor in our political system. Creating a different political process for racial issues violates that principle, regardless of the label affixed to it. Unsurprisingly, Petitioner cites no decision from this Court recognizing that this purported distinction exists.

2. *Distinct Political Process*. A *distinct political process* exists when plenary decisionmaking authority resides at one governmental level, but the decision whether to take constitutionally permissible action with respect to race is moved to a different governmental level in which advocacy is necessarily more burdensome. In *Seattle*, the Court observed that Initiative 350 left "authority over all but one" aspect of deciding "what programs would most appropriately fill a school district's educational needs" in the "hands of the local board," placing only the "power over desegregative busing at the state

level." 458 U.S. at 479-80.[9] Likewise, in *Hunter*, passage of an ordinance by the City Council generally "sufficed unless the electors themselves invoked the general referendum provisions of the city

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[9] The Court repeatedly emphasized that this was the central (though limited) principle of its holding. *See Seattle*, 458 U.S. at 474 ("[T]he community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government."); *id.* ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body. . . . Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other school assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board."); *id.* at 474 n.17 (noting that "the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only racial matters"); *id.* at 480 ("By placing power over desegregative busing at the State level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'" (quoting *Lee*, 318 F. Supp. at 718)); *id.* at 480 n.23 ("[W]hat we find objectionable about Initiative 350 is . . . the racial nature of the way in which it structures the *process* of decisionmaking."); *id.* at 485-86 ("[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks omitted)); *id.* at 485 n.29 ("It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan."); *id.* at 487 ("It would be equally questionable for a community to require that laws or ordinances designed to ameliorate race relations . . . be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure." (internal quotation marks and citations omitted)).

charter." 393 U.S. at 390. But as a result of the charter amendment, "approval of the City Council was not enough" for "those who sought protection against racial bias." *Id.* They had to secure passage of a charter amendment before they could even advocate for such an ordinance. *See id.*

Hence, mere decisions whether to enact or repeal constitutionally permissible race-conscious statutes or policies are not subject to strict scrutiny under the political restructuring doctrine because they do not create a *distinct political process* and, in fact, are made within the ordinary political process. Only this distinction can explain the different outcomes in *Seattle* and *Crawford v. Board of Education*, 458 U.S. 527 (1982), decided on the same day. In *Crawford*, the Court held that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539; *accord Seattle*, 458 U.S. at 485 ("This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification.").

The Court in *Crawford* contrasted the "mere repeal" of a statute requiring race-conscious policies with the racialized restructuring of the political process at issue in *Hunter* and *Seattle*. *Crawford*, 458 U.S. at 540-41. The latter represents a racial classification for purposes of the Equal Protection Clause because such restructuring "distorts the political process for racial reasons" and "allocates governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541; *see also id.* at 546 (Blackmun, J., concurring) ("The Court always

has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws."); *accord Seattle*, 458 U.S. at 485 ("But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (internal quotation marks omitted)).

Petitioner misreads *Seattle* when he argues that the majority in *Seattle* conceded that the political restructuring doctrine does not apply to race-conscious college admissions. Pet. Br. 17. The majority was responding to the dissent's argument that the majority's holding would prevent any other entity *within a university* from overruling an admission committee's decision to adopt race-conscious admissions programs, with no discussion of whether state law changed the locus of plenary decisionmaking authority for this racial issue. *See* 458 U.S. at 480 n.23; *id.* at 498 n.14 (Powell, J. dissenting). The majority observed that this hypothetical had "nothing to do with" the political process immediately after it reiterated that its holding applied only to the "comparative burden" of creating distinct decisionmaking processes for racial issues. *See id.* at 480 n.23. Moving decisionmaking down the hall or to a different office in the university does not necessarily change the level of political decisionmaking; rather, the relevant factual inquiry under the doctrine is whether the plenary—or ultimate—decisionmaking authority was altered. Here, the district court conducted just such an

inquiry and found that Proposal 2 shifted the locus of the plenary authority over whether to adopt race-conscious admissions programs. The hypothetical that the Court in *Seattle* said was not implicated by the political restructuring doctrine is thus entirely different from the factual findings at issue here.

3. *Application of the political restructuring doctrine*. The following hypotheticals underscore that the political restructuring doctrine can be applied consistently and in a straightforward fashion. The first two hypotheticals respond to Petitioner's arguments and demonstrate that Petitioner's arguments reflect a caricature or misunderstanding of the doctrine.

- Would federal fair housing legislation that preempts state or local ordinances violate the political restructuring doctrine? *See* Pet. Br. 5. **No.** Such legislation does not effect an unconstitutional restructuring because federal law already preempts state law under Article VI, assuming Congress is acting in an area of enumerated power. Any change in the locus of decisionmaking caused by federal legislation is a function of our preexisting constitutional system of federalism and therefore is not constitutionally problematic.

- Would a state law prohibiting localities from giving preferential credit terms to minorities as a group violate the political restructuring doctrine? *See* Pet. Br. 23-24. **No**. The prohibited conduct would be unconstitutional absent any tailored remedial justification for such preferential credit or flexibility in its

application. *See Adarand*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507-08. Given the state's compelling interest in prohibiting conduct that is unconstitutional, the law would satisfy strict scrutiny. *See* Section I.B, *supra*. For the same reason, a state referendum solely prohibiting official discrimination on the basis of race would survive strict scrutiny.

- If Congress, by statute, or the President, by executive order, decided to ban affirmative action at West Point and the other military academies, would such action be subject to strict scrutiny under the political restructuring doctrine? **No.** Congress has plenary authority over the military academies and any delegated authority remains subject to ultimate congressional control. The same is true of federal agencies, whose authority extends only as far as the statutes creating them specify. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it . . . ."). The political restructuring doctrine is implicated only when the locus of plenary decisionmaking authority is changed. Modifying or withdrawing a lawful delegation of authority to a subsidiary governmental decisionmaker does not alter the locus of ultimate decisionmaking authority. *See supra* pp. 40-41.[10]

[10] The same analysis would apply to state legislatures. If they have plenary authority to establish the jurisdiction of

- Would a state constitutional amendment defining the state analogue to the Equal Protection Clause to include disparate-impact discrimination only for the suspect classification of race (*i.e.*, prohibiting a broader swath of discriminatory activity than is required by the federal Equal Protection Clause but only with respect to racial discrimination) be subject to strict scrutiny under the political restructuring doctrine? **Yes**, because it creates a distinct decisionmaking process and explicitly applies that process only to race, but doing so might well satisfy strict scrutiny. For the same reason, a state constitutional amendment prohibiting any level of state government from adopting a disparate-impact standard for race discrimination would be subject to strict scrutiny. On the other hand, a provision that applies a disparate-impact standard (or prohibits any level of state government from adopting a disparate-impact standard) for *all* suspect classifications likely would not trigger strict scrutiny because such a provision does not explicitly single out race, and it is unlikely that litigants could prove that race was the

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agencies or subsidiary political bodies, legislation on a racial issue would not change the *ultimate* decisionmaking authority, which remains with the legislature. But if the state constitution grants political subdivisions plenary constitutional authority over certain issues (as Michigan's constitution does for the Boards of Regents), legislation that removes or curtails a political subdivision's decisionmaking authority on a racial issue would trigger strict scrutiny.

predominant factor behind a change that applies to all suspect classifications.

II. PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE UNDER THE POLITICAL RESTRUCTURING DOCTRINE.

A. Proposal 2 Created a Racial Classification.

1. *Race as Predominant Factor.* Contrary to Petitioner's position, race-conscious admissions programs, and changes to the decisionmaking process related to such programs, are unquestionably about race. Diversity in higher education is a compelling governmental interest because it provides broad "educational benefits" to individuals of all races and benefits society at large. *Grutter*, 539 U.S. at 330. Constitutionally permissible race-conscious admissions programs advance this compelling interest, however, by increasing admissions for individuals from underrepresented groups and by providing increased opportunity for students of different races to interact in the educational process. Proposal 2 altered the ordinary political process for deciding whether or not public universities would adopt such programs. As in *Hunter* and *Seattle*, the racial nature of the topic was the predominant factor—indeed, the *only* salient factor—driving the decision to create a distinct political decisionmaking process for only certain aspects of university operations. The record amply supports the district court's factual finding, affirmed by the Sixth Circuit, that the decision to alter the ordinary political process for adopting university admissions programs

in Michigan is "unexplainable on grounds other than race," *Shaw*, 509 U.S. at 643.

Like the amendment to the city charter in *Hunter*, Proposal 2 on its face constructed a distinct and more onerous decisionmaking process governing adoption of "[a]ffirmative [a]ction" programs. Pet. App. 8a-9a (citing Mich. Const. art. I, § 26). The text of the Michigan initiative explicitly partitions the political process on the basis of "race," Pet. App. 8a. This explicit reference to race in the text of the amendment was reinforced by the principal drafter of Proposal 2, who stated that it was designed "to prohibit programs that granted racial preferences, that is, affirmative action programs," Supp. Pet. App. 327a. Just as Initiative 350 was a calculated response to the Seattle School Board's adoption of a racial desegregation program, *see Seattle*, 458 U.S. at 471-72, the campaign to place Proposal 2 on the Michigan ballot began almost immediately after this Court's holding in *Grutter* that the State may utilize race-conscious admissions programs for its colleges and universities. And also like Initiative 350, *see Seattle*, 458 U.S. at 479-80, Proposal 2 lacked any historical antecedent in Michigan: *No* prior constitutional amendment in Michigan had dealt with university admissions or with anything relating to higher education governance or affairs.

The inclusion in Proposal 2's text of "sex" and "national origin," in addition to "race," does not alter the conclusion that Proposal 2 was predominantly racial in nature. The charter amendment in *Hunter*, for example, applied to any fair housing ordinance prohibiting discrimination based on "race, color, religion, national origin or ancestry," 393 U.S.

at 387, yet the Court concluded that it created a "meaningful and unjustified official distinction[] based on race," *id.* at 391. Governmental action need not rest "solely" on race to be constitutionally suspect. *Arlington Heights*, 429 U.S. at 265; *see also Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (holding that an additional purpose behind a constitutional provision would "not render nugatory" the impermissible racial motivation). Rather, strict scrutiny is triggered when race is "the predominant factor" motivating the decision, *Bush*, 517 U.S. at 959 (internal quotation marks omitted).[11] As demonstrated above, race—and not the other characteristics included in the text of Proposal 2—was the motivating factor behind Proposal 2's enactment. *See* Pet. App. 26a n.4 ("Here, as in *Hunter*, the clear focus of the challenged amendment is race. The history of Proposal 2 and its description on the ballot leave little doubt.").

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[11] Petitioner's related argument that Proposal 2 is not constitutionally suspect because it disadvantages a majority of Michigan's population, Pet. Br. 26, is misplaced. The political restructuring doctrine's application is dependent on the *racial* nature of the issue subject to the distinct decisionmaking process, not whether members of one race or another are disadvantaged by that change. *See* Section I.C *supra*. After all, the majority-minority legislative districts created in *Shaw* were unconstitutional because race was the predominant factor behind the decision to draw them, without regard to the underlying voting strength of voters in any district or within the state as a whole. In any event, the charter amendment in *Hunter* removed fair housing protections that distinctly benefited various religious and ethnic minority groups that, grouped together, would likely represent a majority of the electorate.

Petitioner's argument that Proposal 2 should not be subject to strict scrutiny because there is no evidence that it was intended to harm minorities conflates purposeful discrimination with ill will toward a particular racial group. Pet. Br. 38 ("It is that crucial factor—animus, or discriminatory intent—that the Sixth Circuit en banc majority did not find in *Seattle School District*'s test."). This Court has made clear, however, that racial animus is not a required element of an equal protection claim: strict scrutiny applies where the racial classification is apparent on its face *or* a facially neutral decision is unexplainable on grounds other than race. *Feeney*, 442 U.S. at 272. There was, for example, no evidence in *Shaw* or *Bush* that the state legislature intended to harm white voters (or minority voters) when it drew the majority-minority legislative districts, just as there was no evidence that the University of Michigan intended to harm white applicants (or minority applicants) in *Gratz*. Petitioner's suggestion that this Court's decision in *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that the challenged initiative violated the Equal Protection Clause because it was "inexplicable by anything but animus"), somehow makes ill will toward a particular group a *necessary* element of an equal protection claim confuses necessity with sufficiency and is incompatible with decades of this Court's precedents.

For his part, Russell asserts that the political restructuring doctrine is incompatible with *Washington v. Davis* and *Arlington Heights*, premised on the conclusory assertion that the record does not establish a "discriminatory purpose."

Russell Br. 15. The district court and Sixth Circuit, however, both found that the fundamental purposes of Proposal 2 were to prohibit race-conscious admissions programs (which advance the compelling interest of promoting diversity by *increasing the likelihood* that some minority applicants are admitted) *and* to create a different and more burdensome decisionmaking process for any future effort to alter that outcome. Pet. App. 21a-22a; Supp. Pet. App. 328a. Moreover, like the amendment to the city charter at issue in *Hunter*, the text of Proposal 2 explicitly references "race" while establishing a different and more onerous decisionmaking process.

The enactment of Proposal 2 is thus "unexplainable on grounds other than race," *Shaw*, 509 U.S. at 643 (internal quotation marks omitted), and, like *Shaw* and *Bush*, satisfies the requirement in *Washington v. Davis* for purposeful conduct. Purpose may, but need not, include negative feelings toward an individual or group because of race. After all, even purportedly benign racial classifications are subject to strict scrutiny, *Croson*, 488 U.S. at 494, and a racial classification need not burden one race more than another to be deemed purposeful, *see Shaw*, 509 U.S. at 651. Establishing purpose requires only demonstrating that race is the predominant factor motivating the action. *See Bush*, 517 U.S. at 959.

2. *Distinct Political Process.* The elected Boards of Regents retain plenary authority over all university matters, including general authority to set admissions criteria. But Proposal 2 removed the decision whether or not to adopt constitutionally

permissible *race*-conscious admissions programs from that locus of political decisionmaking and embedded it at the constitutional level.

Except for Proposal 2, the Michigan Constitution includes no other provisions that create an exception to the ordinary operation of the state's colleges, universities and graduate schools. Pursuant to Article VIII, § 5 of the state constitution, Michigan's public universities are controlled by independent Boards of Regents, each of which has the power of "general supervision of its institution and control and direction of all expenditures from the institution's funds." Michigan statutes implement this constitutional provision by vesting full governing authority in the Boards of Regents, encompassing the power to enact by-laws and regulations to promote and achieve the university's educational mission. *See* Mich. Comp. Laws Ann. §§ 390.3-.5 (West 2011). Regents have *always* exercised autonomy over admissions policies, and they have historically delegated responsibility to establish admissions standards, policies and procedures to units within the institutions, including central admissions offices, schools and colleges.

As the district court held and the Sixth Circuit affirmed, Pet. App. 31a; Supp. Pet. 327a, the Boards of Regents are political bodies under state law. Regents are popularly elected or appointed by the elected governor, and thus politically accountable. For more than a century, the Michigan Supreme Court has described the Boards of Regents as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-

ordinate with and equal to that of the Legislature." *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1040 (Mich. 1911). To fulfill this role, the governing Boards hold regular public meetings, at which they receive reports from the President, Provost, and other university officials and take public comment. Pet. App. 30a-31a; Supp. C.A. Br. of Universities 21-22.

Race-conscious admissions programs have played important roles within the political dynamics of the Boards of Regents. Public meetings have specifically dealt with issues of policy regarding affirmative action in admissions. Pet. App. 30a-31a; Supp. C.A. Br. of Universities 21-23. Elections for positions as Regents have specifically focused on the positions of candidates as to race-conscious university admissions, and some candidates have in fact included their views on race-conscious admissions policies as part of their campaign platforms. Pet. App. 32a-33a (citing League of Women Voters 2005 General Election Voter Guide, *available at* http://www.lwvka.org/guide04/regents.html (last visited May 22, 2012) (noting that a candidate for the Board of Regents pledged to "work to end so-called 'Affirmative Action,' a racist, degrading system").[12]

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[12] The Boards' delegation of power to establish admissions standards does not diminish the Boards' plenary power over that aspect of university operations; Michigan law clearly authorizes them to revoke that delegation at any time or to override decisions made by the delegee. Nor does the delegation of power from an elected body to an unelected body

Proposal 2 thus constructs a distinct political process for making decisions related to higher education policy. It preserves the traditional control exercised by state universities' elected or governor-appointed boards as to all matters exclusive of the admissions process, and, as to admissions, continues to preserve the authority of the Boards of Regents to determine whether to "grant preferential treatment" based on legacy status, athletics, or most other factors or group identities other than race. However, it introduces a new requirement that a statewide constitutional amendment must be passed before the Boards can even consider whether to adopt *race*-conscious admissions policies that meet this Court's stringent Fourteenth Amendment standards (including the exact admission policy that this Court held was constitutionally permissible in *Grutter*).

Finally, this distinct process is more burdensome. The district court found that there "is no question" that requiring a constitutional amendment before "the State and its political subdivisions" can adopt race-conscious admissions programs "makes it more difficult" for those who support race-conscious programs to advocate successfully. Supp. Pet. App. 328a. The Sixth Circuit agreed with this factual finding. Pet. App. 35a-37a. The record amply supported this finding and established that a statewide initiative to

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make that power, when ultimately exercised, non-political. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (referring to the United States Sentencing Commission, operating under delegated authority, as performing work of a "significantly political nature").

amend the Michigan Constitution is more onerous that the alternatives that existed before Proposal 2's enactment, Supp. Pet. App. 281a-82a; *see also* Pet. App. 36a; *see generally* Brief of Amici Curiae Political Scientists Gary Segura *et al.* in Support of Chase Cantrell Respondents.

Following Proposal 2's enactment, the only relevant decisionmaker for whether or not to adopt race-conscious admissions programs is the electorate, and the only mechanism available is a statewide initiative campaign. Yet before even beginning to advocate meaningfully before the electorate, supporters of race-conscious admissions programs must secure signatures from 10% of the total vote cast in the last gubernatorial election within a relatively short signature-gathering window or secure support from two-thirds of both houses of the state legislature. J.A. 44-45, 47-48; Mich. Const. art. XII, § 2. Success is contingent upon having millions of dollars in campaign funds. J.A. 47. In contrast, individuals who wish to advocate for other admissions criteria can pursue the informal and low-cost alternatives of lobbying university officials and speaking at admissions committee meetings, lobbying individual Regents or speaking at public meetings of the Regents, or attempting to affect elections of individual Regents to influence that body. Petitioner's reliance on Judge Sutton's en banc dissent in the Sixth Circuit to argue that amending the state constitution is less burdensome than advocating within the political process that ordinarily applies to issues affecting the state's universities simply ignores the factual findings made by the district court, and Petitioner cites no basis for

reversing those findings under appropriate legal standards, *see Easley*, 532 U.S. at 242 (holding appellate courts review trial court's factual findings "only for 'clear error'").

B. Proposal 2 Does Not Advance a Compelling Interest.

The State of Michigan never identified before the district court or the Sixth Circuit any compelling state interest that Proposal 2 serves, much less is needed to achieve. Pet. 45a. Having failed to do so below, Petitioner has waived this issue. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

If the Court concludes that this issue is not waived, it should remand so the district court and Sixth Circuit can address this fact-specific issue in the first instance. *See, e.g.*, *Adarand*, 515 U.S. at 238-39. But if the Court believes it appropriate to decide the issue, it should hold that, even had the state attempted to advance a compelling state interest, no such interest exists.

As this Court held in *Grutter*, 539 U.S. at 334, 343, "the educational benefits that flow from a diverse student body" constitute a compelling state interest in the specific context of admissions policy in higher education, justifying use of race in a "flexible, nonmechanical way" as part of a "truly individualized consideration" of each and every applicant. The Court has never suggested, let alone held, that eradication of a compelling state interest can itself promote a compelling state interest.

Petitioner nonetheless attempts to avoid the application of strict scrutiny to Proposal 2 because he and others believe that it will ultimately reduce the relevance of race within society. This Court, however, has long held that state action drawing racial classifications is not excused from strict scrutiny simply because its ultimate aim may be laudable. *See Croson*, 488 U.S. at 493 (holding that there is "simply no way of determining what classifications are 'benign' or 'remedial'" without applying strict scrutiny to all racial classifications). Utilizing an approach that will itself increase the salience of race within our political system—and embeds the fact that a racial question necessitates a decisionmaking process distinct from other similar matters for all to see in the state constitution—cannot be justified because its supporters believe it will, on net, reduce the salience of race in society. *See Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring). As Justice Kennedy has reminded us, we make no "analytical leap forward" by assuming that if race's role in society is a problem, "race is the instrument with which to solve it." *Id.* at 797. The empirical consequences of Proposal 2, and the extreme and unprecedented racial polarization that it engendered, demonstrate forcefully why this justification cannot be accepted. *See generally* Kinder Br.

C. Proposal 2 Is Not Narrowly Tailored.

Other avenues to effect political change are available to those opposing the consideration of constitutionally permissible consideration of race as a factor in admissions. These avenues are either facially race neutral or do not balkanize the political

process by making race a predominant factor behind the establishment of a unique governmental decisionmaking process.

- Opponents of race-conscious admissions policies may advocate against such policies to members of the Boards of Regents or to the appropriate committees to which the Boards of Regents have delegated their plenary authority. Opponents may also elect new members of the Board of Regents committed to oppose race-conscious policies. These approaches focus on resolving the issue within the political process without establishing a distinct process for resolving racial issues, and thus do not unnecessarily underscore that race is a relevant feature of our political system.

- Michigan may amend its state constitution without establishing a racial classification within its political processes. This might include, for example, amending the constitution to allow admissions policies that considered only applicants' GPA and SAT scores, in effect preventing adoption of *any* individualized, holistic, multi-factor review policies that pass muster under *Grutter*, but doing so by prohibiting consideration of any factors but those enumerated in the state constitution. In contrast to changing the locus of decisionmaking selectively, this approach minimizes the focus on race as a singular feature of our political system by removing *all* authority for setting admissions criteria from the Boards of Regents. Because such an approach "remove[s] authority from local"

decisionmakers and "vest[s] all decisionmaking power in state officials" with respect to admissions criteria, *Seattle*, 458 U.S. at 480 n.23, it would implicate the political restructuring doctrine only if plaintiffs could prove that race was the "predominant factor" behind the change, *Bush*, 517 U.S. at 959 (internal quotation marks omitted); *cf. Valtierra*, 402 U.S. at 141.

- Michigan may amend the state constitution to transfer all authority over admissions policies from the Boards of Regents to the state legislature or some other political body. A state does not create a distinct political process for a racial issue by placing plenary authority over all aspects of college admissions in a different political body that a majority of citizens believes is better suited to resolve political questions or would be more responsive to the public. Vesting plenary authority over *all* admissions issues in a different political body thus does not make race an outcome-determinative feature of our political system.

Each of these approaches would achieve the end of removing race as a factor in higher education admissions. Petitioner has not demonstrated, and cannot demonstrate, that "available, workable race-neutral alternatives do not suffice," *Fisher*, 133 S. Ct. at 2420.

III. *STARE DECISIS* COUNSELS AGAINST THE DRAMATIC STEP OF OVERRULING OR SUBSTANTIALLY LIMITING THE POLITICAL RESTRUCTURING DOCTRINE.

Petitioner and Russell suggest that if the political restructuring doctrine poses a barrier to Proposal 2, the doctrine should be overruled. All of the relevant factors that this Court has identified for deciding whether to adhere to the principle of *stare decisis* counsel against taking the extreme measure of overturning such long-standing precedent.

First, the political restructuring doctrine "has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable." *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (internal citation omitted). Courts are fully capable of conducting the factual inquiry necessary to assess whether a government action merely references race or is instead a constitutionally suspect race-based political restructuring.

Second, the political restructuring doctrine is not just consistent with, but serves as a necessary component of, the Court's current equal protection jurisprudence. Overruling *Hunter* and *Seattle* would call into question numerous cases in which this Court has relied on the societal harm caused when governmental action emphasized the importance of race as a distinct characteristic in our political system. *See* Sections I.B & II.A, *supra*. Far from being "a remnant of abandoned doctrine," *Casey*, 505 U.S. at 855, the political restructuring doctrine

continues to have "significant application [and] justification" within the Court's broader equal protection jurisprudence, *id.*

Finally, Russell's assertion that the limited number of cases involving the political restructuring doctrine demonstrates that it is unnecessary to vindicate Fourteenth Amendment interests, Russell Br. 31-33, implies that the only way that reliance exists is where state governments persistently flaunt this Court's precedents. It is equally likely, if not far more likely, that the opposite is true: states and localities have attempted to change the political decisionmaking process along such overtly racial lines so rarely over the last half century because it is clear that doing so would violate the Equal Protection Clause.

At bottom, Petitioner and Russell recycle arguments used to oppose the holdings in the Court's most recent affirmative action decisions, where it declined to rule that race-conscious admissions programs are per se unconstitutional, *see Fisher*, 133 S. Ct. at 2421; *Grutter*, 539 U.S. at 343. Yet Petitioner's and Russell's assertions that race-conscious admissions are unnecessary and bad policy, Pet Br. 21-23, 31-36; Russell Br. 29-30 & n.5, are irrelevant because the constitutionality of race-conscious admissions programs is not at issue here, as Petitioner conceded up until now. *See* Pet. 13 n.2. The political restructuring doctrine prohibits only creating a distinct political decisionmaking process to govern whether to adopt *constitutionally permissible* race-conscious programs, *not* the ultimate decision whether or not to do so.

CONCLUSION

For the reasons stated above, the court of appeals should be affirmed.

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