No. _____

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.,

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

PETITION FOR A WRIT OF CERTIORARI

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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 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'Shawnm 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. Additional plaintiffs below are Chase Cantrell, Karen Nestor, Paula Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Brenda Foster, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Cathy Alfaro, Michael Weisberg, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C. II, Carolyn Carter, and Matthew Robinson. 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, Lou Anna K. Simon, and Eric Russell.

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JURISDICTION

The en banc judgment of the Sixth Circuit was entered on November 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 1, § 26(1) of Michigan's 1963 Constitution provides, in relevant part:

> 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.

INTRODUCTION

In the November 2006 election, 58% of Michigan's voters adopted a proposal that amended Michigan's Constitution to prohibit discrimination, or the granting of preferential treatment, in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. Mich. Const. art. I, § 26. Now, in an 8-7 decision, the en banc Sixth Circuit has struck down § 26 as to public education, holding that it violates the Equal Protection Clause for a state constitutional provision to require equal treatment.

It is exceedingly odd to say that a statute which bars a state from "discriminat[ing] . . . on the basis of race" violates the Equal Protection Clause because it discriminates on the basis of race and sex. Yet that is precisely what the en banc majority held here, in conflict with the Ninth Circuit's decision in *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997), and the California Supreme Court's decision in *Coral Construction*, *Inc.* v. *San Francisco*, 235 P.3d 947 (Cal. 2010). Michigan recognizes that affirmative action has long been controversial; some state entities use it for some programs, some do not. But until now, no court has ever held that, apart from remedying specific past discrimination, a government *must* engage in affirmative action. This Court has said just the opposite, holding that all racial classification by government entities are presumptively invalid and subject to the strictest scrutiny. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

In the face of that exacting standard, the Sixth Circuit held that § 26 violates the Equal Protection Clause by denying minorities a "fair political process." In reaching that conclusion, the court of appeals did not say that the process through which Michigan voters adopted the measure was unfair. Rather, what is "unfair" (according to the en banc majority) is that supporters of affirmative action can no longer obtain affirmative-action programs on a university-by-university basis. That conclusion cannot possibly be right.

The question presented is of immense importance. In *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), this Court suggested a 25-year window allowing race-conscious admissions programs in higher education, and it invited states to experiment with race-neutral alternatives for achieving classroom diversity. Eight states have accepted that invitation: Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington. But more than two million Michigan voters have now been disenfranchised of their choice to eliminate considerations of race in education by a one-vote-margin en banc decision that misapplies this Court's equal-protection precedents in several ways. Michigan respectfully requests that the Court grant the petition and consider whether a state's decision to require equal treatment in higher-education admissions violates equal protection.

STATEMENT OF THE CASE

A. Article 1, § 26

In 2003, this Court invalidated the University of Michigan's race-based admissions preferences in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), but upheld the University of Michigan Law School's race-based admissions preferences in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). In response, the Michigan Civil Rights Initiative began a state ballot process to amend the Michigan Constitution and prohibit all race- and sex-based discrimination, including preferences, in public employment, education, and contracting. On November 7, 2006, Michigan voters adopted § 26 by a 58% to 42% margin.

B. Proceedings below

Almost immediately following the election, a group of plaintiffs led by Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) filed suit in the United States District Court for the Eastern District of Michigan, challenging § 26's constitutionality as to public education. The District Court entered a stipulated order postponing § 26's implementation until after the next university-admissions cycle. App. 255a–259a. The Sixth Circuit, however, granted an emergency motion for a stay pending appeal, concluding there was a "strong likelihood" the preliminary injunction would be reversed on the merits. App. 235a–251a. The Sixth Circuit rejected plaintiffs' political-restructuring claim and followed the Ninth Circuit's *Wilson* decision. App. 247a.

On remand, the District Court upheld § 26 on the merits, App. 197a–223a. But a different Sixth Circuit panel reversed, in a 2-1 vote, App. 101a–183a, and the Sixth Circuit then granted en banc review, App. 265a.

The en banc Sixth Circuit invalidated § 26 in an 8-7 decision.[1] Relying on the political-restructuring theory of equal protection outlined in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), the majority held that a political enactment deprives minority groups of equal protection when the enactment "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process." App. 21a–22a (citations omitted).

The majority concluded that § 26 has a racial focus, because the targeted program—race- and sex-based admissions preferences—"at bottom inures primarily to the benefit of the minority, and is designed for that purpose." App. 22a. In addition, said the majority, § 26 reordered the political process. App. 26a–38a. Whereas a Michigan citizen may "use any number of avenues to change the admissions policies on an issue outside" § 26's scope, a future amendment to the Michigan constitution is the only available recourse for a citizen seeking the adoption of race- or sex-based preferences. App. 35a–36a. Thus, while admissions committees,

[1] Judges McKeague and Kethledge recused themselves because they sit on university boards. Senior Judge Daughtrey sat en banc because she had also participated in the panel decision.

university presidents and provosts, and university boards are all "free to repeal" race- or sex-based preference programs "without any infringement on the right to equal protection in the political process," Michigan voters cannot do the same by state constitutional amendment. App. 44a.

Chief Judge Batchelder and Judges Boggs, Cook, Gibbons, Griffin, Rogers, and Sutton dissented. App. 51a–100a. Judge Gibbons wrote the primary dissent and began by noting the jurisprudential significance of the majority's conclusion: "Although it has convinced a majority of this court, plaintiffs' argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process." App. 56a–57a (Gibbons, J., dissenting). Judge Gibbons then explained how neither *Hunter* nor *Seattle School District* supported the majority's result. App. 58a–64a (Gibbons, J., dissenting). "*Hunter* considered only the political-process implications of repealing a law that required *equal* treatment[;] it cannot be read broadly to apply to the repeal of a law requiring *preferential* treatment." App. 59a (Gibbons, J., dissenting). And § 26 "is quite unlike the narrow anti-busing measure struck down in *Seattle*; it represents 'a sea change in state policy, of a kind not present in *Seattle* or any other 'political structure' case." App. 60a (Gibbons, J. dissenting).

Judge Gibbons also concluded that § 26 did not reallocate political power. App. 66a–78a (Gibbons, J., dissenting). "[T]he people of Michigan have not restructured the state's lawmaking process in the manner

prohibited by *Hunter* and *Seattle*." App. 67a (Gibbons, J., dissenting). Rather, "their vote removed admissions policy from the hands of decisionmakers [university admissions personnel] who were unelected and unaccountable to either minority or majority interests and placed it squarely in an electoral process in which all voters, both minority and majority, have a vote." *Ibid.*

Other dissenting judges raised complementary points. Judges Boggs and Sutton both observed that race- and sex-conscious programs will sometimes have the effect of discriminating against members of groups that such programs purportedly protect by effectively creating ceilings and not just floors for minorities. App. 54a–55a (Boggs, J., dissenting); App. 92a (Sutton, J., dissenting). Judge Sutton also noted that, because § 26's prohibition includes sex-based discrimination, it actually affects groups "that together account for a *majority* of Michigan's population." App. 92a (Sutton, J., dissenting) (emphasis added). He recognized that "a State does not deny equal treatment by mandating it." App. 82a. Judge Griffin urged this Court to "consign this misguided doctrine to the annals of judicial history." App. 95a (Griffin, J., dissenting). And Judge Rogers observed that "[u]nder the majority opinion, it is hard to see how any level of state government that has a subordinate level pass can pass a no-race-preference regulation, ordinance, or law. . . . Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban." App. 79a–80a (Rogers, J., dissenting).

The State of Michigan now seeks this Court's review.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for at least three reasons.

First, the decision below created a circuit split. In *Wilson*, the en banc Ninth Circuit vacated an order enjoining Proposition 209, a proposal leading to a nearly identical constitutional amendment in California. In so ruling, the Ninth Circuit rejected the very argument the Sixth Circuit accepted here, holding that it "would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." 122 F.3d at 709 (quoting *Crawford* v. *Bd. of Ed. of the City of Los Angeles*, 458 U.S. 527, 535 (1982)). The Ninth Circuit recently affirmed its commitment to *Wilson* at the merits stage of a challenge brought by the same plaintiff here. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary* v. *Brown*, 674 F.3d 1128 (9th Cir. 2012); accord *Coral Construction, Inc.* v. *San Francisco*, 235 P.3d 947, 960 (Cal. 2010) (California Supreme Court upheld Proposition 209 on the merits). It is intolerable that California voters can pass laws guaranteeing the protection of equal treatment in higher education but Michigan voters cannot.

Second, the Sixth Circuit invalidated a state constitutional provision that 58% of Michigan voters ratified. That result turns the democratic process on its head. App. 80a–81a (Sutton, J., dissenting). The en banc majority concludes that it is impossible for the State of Michigan to do anything about a university faculty committee's decision to adopt race-based

admissions criteria. But it is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." App. 86a (Sutton, J., dissenting). Nothing in the federal Constitution "suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and sex—must be readily available at the lowest level of government." *Wilson*, 122 F.3d at 708.

Third, the Sixth Circuit's decision is wrong and conflicts with *Grutter* v. *Bollinger*, 539 U.S. 306. *Grutter*, called for a "logical end point" to "all governmental use of race" and referred approvingly to race-neutral alternative approaches to university admissions. 539 U.S. at 342. Yet the Sixth Circuit held Michigan's race-neutral proposal unconstitutional under the political-restructuring theory of the Equal Protection Clause. The political-restructuring theory applies only when a political enactment targets a policy that "inures primarily to the benefit of the minority." App. 22a. This requirement makes it a poor fit for Michigan's amendment under *Grutter*, which held that it is unconstitutional for a university to pursue a race-based admissions program that inures primarily to the benefit of minorities. 539 U.S. at 323–24.

Hunter and *Seattle School District* are distinguishable. There is a fundamental difference between overturning policies that prohibit discrimination and ending policies that require preferences. Insofar as these decisions shield preferences or unequal treatment, they should be overruled.

The en banc majority's reliance on this Court's decision in *Seattle School District* is unfounded for additional reasons. In response to Justice Powell's dissent, the majority opinion in *Seattle School* specifically disclaimed that its reasoning would have the result of barring a state law like § 26. And unlike the busing involved in *Seattle School*, § 26 eliminated preferences that purportedly "advantage" a majority of the population. Moreover, § 26 did this in an area—university admissions—that is not even part of the political process. This Court should grant the petition and reverse.

I. The Sixth Circuit's en banc decision conflicts with the Ninth Circuit and the California Supreme Court.

In holding § 26 unconstitutional, the en banc majority admittedly broke with precedent in other jurisdictions. App. 40a n.8 ("we decline to follow *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997)"). The first of those decisions was the Ninth Circuit's opinion in *Wilson*, which rejected the exact political-restructuring claim presented here.

In *Wilson*, the Ninth Circuit held that California's Proposition 209 did not reallocate political authority in a discriminatory manner. When a state prohibits race- and sex-based discrimination and preferences, it "does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity." 122 F.3d at 707. Rather, the state has "promulgated a law that addresses in neutral-fashion race-related and gender-related matters." *Id.*

The Ninth Circuit further recognized that Proposition 209 did not burden any individual's right to equal treatment. The plaintiffs challenged Proposition 209 "not as an impediment to protection against unequal treatment[,] but as an impediment to *receiving preferential treatment*." *Id*. at 708 (emphasis added). "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms." *Id*.

The *Wilson* case was decided at the preliminary-injunction stage. But the Ninth Circuit recognizes the decision is binding on the merits question as well. In a recent case filed by the same plaintiff here, the court held that *Wilson* precluded an equal-protection challenge to Proposition 209 on the merits. *Coalition to Defend Affirmative Action* v. *Brown*, 674 F.3d 1128, 1131 (9th Cir. 2012); accord *id*. at 1136 (Tashima, J., concurring in part) ("although I continue to believe now, as I did when the case was decided, that *Wilson II* was wrongly decided," "Plaintiffs' challenge to Proposition 209 is foreclosed.").

The en banc majority's decision separately conflicts with the 2010 decision of the California Supreme Court in *Coral Construction*. Although that case involved public contracting, rather than university admissions, the result was the same as in *Wilson*: "Nothing in *Hunter* or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require." 235 P.3d at 959. "Instead of burdening the right to equal treatment, [Proposition 209] directly serves the principle that 'all governmental use of race must have a logical end point.'" *Id*. at 960.

The end result of these conflicting decisions is that citizens in California and six other states can demand equal treatment in their state constitutions while Michigan voters cannot. And allowing the split to percolate is untenable; delay either disenfranchises millions of Michigan citizens, or it violates the equal-protection rights of millions of citizens in seven other states. This Court's intervention is necessary to remedy this anomaly.

II. The public importance of the question presented counsels in favor of review.

The Sixth Circuit's 8-7 decision to invalidate § 26 implicates three principles of jurisprudential significance: equal opportunity in education, the importance of citizen initiatives (especially amendments to state constitutions), and the structuring of political processes.

First, education is the bedrock of equal opportunity. That is why the "diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity." *Grutter*, 539 U.S. at 331; accord *id.* at 331–32 (it is a "paramount government objective" to ensure equal access to schools) (quoting Br. for United States as *Amicus Curiae* 13). Public universities in seven other states have successfully pursued the goal of equal access without resorting to racial preferences, and both federal and state courts have upheld that policy choice;

there is no reason why Michigan voters should be denied the same privilege.[2]

Second, this case involves a constitutional amendment enacted by public initiative. As the Ninth Circuit explained, if a court "relies on an erroneous legal premise [to strike down a public initiative], the decision operates to thwart the will of the people in the most literal sense." *Wilson*, 122 F.3d at 699. What the people of the state "willed to do is frustrated on the basis of principles that the people of the United States neither ordained nor established." *Id*. "A system which permits [the courts] to block with the stroke of a pen what [millions of] residents voted to enact as law tests the integrity of our constitutional democracy." *Id*.

The same is true here. Using an equal-protection theory rejected by every federal and state court to consider it, the Sixth Circuit en banc majority struck down a constitutional amendment approved by more than two Michigan million voters. Within our federalist system, it is no small matter for a federal court to strike down a properly enacted state constitutional provision. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . allows States to respond,

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[2] This Court's recent grant of the petition in *Fisher* v. *University of Texas at Austin*, No. 11-345, does not diminish the need for review here. In briefing and again at oral argument, the parties in *Fisher* expressly disclaimed the position that the Court should overturn *Grutter* and eliminate all race-based preferences in public-university admissions. Rather, the parties in *Fisher* have framed that case as one involving *Grutter*'s application to the University of Texas at Austin's admissions program. This case presents the different issue whether a state has the right to accept this Court's invitation in *Grutter* to bring an end to all race-based preferences.

through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."). That is why the United States Constitution generally does not meddle in the way that states choose to structure their government. See *Sailors* v. *Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 109 (1967). Given the special respect that should be accorded to state constitutional provisions, certiorari is appropriate to review their annulment.

Third, the en banc majority's political-restructuring theory has the effect of elevating local authority over state authority. There is no question that Michigan's public universities could themselves do away with race-based admissions criteria in favor of race-neutral criteria; the majority says as much. App. 44a. But once universities adopt race-based criteria, the en banc majority says it is impossible for the State of Michigan to do anything about it. It is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." App. 86a (Sutton, J., dissenting). This case presents an ideal vehicle for the Court to revisit the political-restructuring theory of equal protection and its application to state constitutional amendments.

III. The Sixth Circuit en banc majority erred in holding § 26 unconstitutional.

A. *Hunter* and *Seattle School District* do not prohibit a state from requiring equal treatment in university admissions.

This Court has applied the political-restructuring doctrine only to laws or policies that condone discrimination against minorities. E.g., *Hunter*; *Seattle School District*. The Court has never applied the doctrine to laws that *prohibit* discrimination by precluding unconstitutional, preferential treatment. There are two fundamental reasons why. (Although the reasons apply to any government action, they will be discussed in the context of university admissions.)

First, if a college or university's student population is the product of historic discrimination, then a minority applicant already has an equal-protection right to remedial relief. In fact, § 26 even preserves existing state remedies for discrimination. Mich. Const. art. I, § 26(6) ("The remedies available for violations of this section shall be the same . . . as are otherwise available for violations of Michigan anti-discrimination law."). Thus, there is no need for a political-restructuring-based right to preferential treatment to remedy historic discrimination.

Second, except where necessary to remedy the effects from historic discrimination, making race-based admissions decisions is presumptively unconstitutional. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). A *Grutter* plan is supposed to be an optional, transient response to

anemic academic diversity, available only until there are feasible race-neutral alternatives that would achieve diversity interests "about as well." *Grutter*, 539 U.S. at 339 (quoting *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)). Plaintiffs do not allege any lingering effects from historic discrimination at Michigan's public universities. And they conceded below that race-neutral programs like the top "ten percent" plan in place at the University of Texas actually result in *improved* minority achievement. (Coalition Sixth Cir. Supp. Br 11.) Accordingly, there is no basis to strike down § 26 under a political-restructuring theory.

Viewed through the *Grutter* analytical prism, it is easy to see why § 26 is fundamentally different from the laws this Court struck down in *Hunter* and *Seattle School District*. In *Hunter*, an Akron, Ohio realtor refused to show homes to an African-American buyer, and the buyer sued the city to compel enforcement of its fair-housing ordinance, 393 U.S. at 387. But the city's voters had repealed the ordinance and amended the city charter to require a referendum before adopting any new fair-housing ordinance. *Id.* In other words, the *Hunter* referendum expressly barred laws that themselves prohibited discrimination.

Similarly, in *Seattle School District*, a Washington public-school board adopted a busing plan to end *de facto* racial segregation. 458 U.S. at 461. The state's voters then amended the state's constitution to allow school busing for most any reason, but to prohibit busing if used to desegregate the schools. *Id.*, at 461-64. The *Seattle School District* referendum barred the use of busing, but only if used to combat the effects of

historic discrimination. So the challenged enactments in both *Hunter* and *Seattle School District* made it more difficult for minorities to lobby for *protection* from discrimination; here, § 26 makes it more difficult to lobby for racial *preferences*. These are very different concepts. *Wilson*, 122 F.3d at 708 ("It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights under political obstructions to preferential treatment.").

If there is any doubt that *Seattle School District* should not apply here, it is answered by an exchange between the majority and dissenting opinions in that case. Justice Powell warned in dissent that the *Seattle* majority opinion could be read to mean "that, 'if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies.'" 458 U.S. at 499 n.14 (Powell, J., dissenting). The *Seattle* majority rejected Justice Powell's concern as "'entirely unrelated to this case' because [admissions policies] had 'nothing to do with the ability of minorities to participate in the process of self-government.'" *Id*. at 480 n.23.

In sum, *Seattle School District* Court expressly disclaimed that the political-restructuring theory would apply in this context. And *Grutter* recognizes that racial-preference programs deviate from the equal treatment mandated by the Equal Protection Clause, 539 U.S. at 342 ("[R]ace-conscious admission programs . . . [are a] deviation from the norm of equal treatment

of all racial and ethnic groups."). Given those premises, it makes little sense to extend the political-restructuring doctrine to the circumstances presented here, where Michigan voters adopted an equal-treatment requirement.

Grutter provides two additional reasons for rejecting the en banc majority's analysis. To begin, and as noted above, a key component of *Grutter*'s holding was that a narrowly tailored, race-conscious admissions policy "must be limited in time." 539 U.S. at 342. After all, a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Id.* at 341–42 (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)).

In discussing this concept, the Court noted that universities in California, Florida, and Washington State, "where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches." *Id.* at 342. Accordingly, the Court encouraged universities in other states to draw on the most promising aspects of such "race-neutral alternatives." *Id.* The Court emphasized its expectation that "25 years from now [2028], the use of racial preferences will no longer be necessary to further the [diversity-in-education] interest approved today." *Id.* at 343. Yet the Sixth Circuit en banc majority has now held unconstitutional precisely what this Court described as salutary. What was merely permitted is now required.

Equally problematic, the en banc majority's reasoning cannot be reconciled with *Grutter*'s core holding. The *Grutter* majority made clear that a

narrowly tailored, race-conscious admissions policy could be implemented for one and only one compelling interest: "obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. This is not a policy that benefits primarily a minority group; it is a policy that benefits *all* students. *Id.* at 330–33 (describing the "substantial" educational benefits to all students brought about by a diverse student body). And that fact is fatal to plaintiffs' political-restructuring claim. As even the en banc majority acknowledges, to prove a *prima facie* political-restructuring claim, a plaintiff must show that an enactment targets "a policy or program that 'inures *primarily to the benefit of the minority*.'" App. 22a (emphasis added). Accord *Seattle Sch. Dist.*, 458 U.S. at 472.

So if § 26 targets a policy that benefits primarily a minority group, the policy violates *Grutter*, making it unnecessary to reach the political-restructuring issue. Conversely, if § 26 targets a policy that benefits all students, plaintiffs cannot assert a political-restructuring claim. Either way, § 26 is constitutional.

B. If the en banc majority is right that *Seattle School District* shields policies requiring unequal treatment, it should be overruled.

To the extent that this Court reads *Seattle School District* to prohibit state constitutional amendments like those in California, Florida, Michigan, and other states, that case should be overruled. The people and the states should have the option of eliminating the use of race-based preferences in higher education.

When *Seattle School District* was decided in 1982, this Court sanctioned busing as a necessary means to eliminate racially segregated schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). But more recently, in *Parents Involved*, this Court held that such busing programs employ presumptively unconstitutional racial classifications and are subject to strict scrutiny. 551 U.S. at 720. "[T]he circumstance that racially conscious admissions policies are subject to the most exacting judicial scrutiny and limited in time—legal realities that the *Seattle* Court neither confronted nor factored into its decision—counsels heavily against applying the political restructuring doctrine to" Michigan's enactment of § 26. App. 63a (Gibbons, J., dissenting).

As post-*Seattle School District* decisions have recognized, it is a gross exaggeration for school officials to assume that a student thinks a certain way, represents certain views, or behaves in a stereotypical fashion due solely to skin color, race, or ethnic heritage. The people may reasonably believe that an individual is not a "representative" of his or her racial or ethnic group and embrace the principle that we should all be judged by the content of our character rather than the color of our skin. "[O]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000).

Michigan citizens may—consistent with the Equal Protection Clause—no longer wish to measure every person to categorize them into a neat assignment of

race or ethnicity. The time for these kinds of categorizations is passing. In sum, the rationale that motivated the outcome in *Seattle School District* does not apply to a state's attempt to prohibit discrimination in university admissions.

Finally, the en banc majority's position has no logical end point. *All* laws effect political restructuring. Consider the Fair Housing Act of 1968. When Congress adopted that law, it prohibited the State of Michigan from adopting its own laws requiring that African-American home buyers be given preferential treatment. Unlike other discrete and insular groups, African-Americans were unable to lobby for preferential treatment at the state or local level unless they first succeeded in repealing the federal law. The same would be true if it was the state that enacted the fair-housing legislation—the state law would need to be repealed before local legislation creating preferential treatment could be sought. In other words, if the en banc majority is correct, then virtually all laws of general applicability prohibiting discrimination are unconstitutional.

C. Section 26 does not disadvantage groups that account for a minority of Michigan's population, if it can be determined who is "disadvantaged" at all.

Both *Hunter* and *Seattle* involved initiatives targeted solely at minorities: those attempting to buy houses, and those benefitting from a racially integrated public-school system, respectively. But § 26 does not burden minority interests and minority interests alone. Because § 26's prohibits discrimination that is sex- as

well as race-based, "[t]o the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Michigan's population." App. 92a (Sutton, J., dissenting). It "make[s] little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." *Ibid*. (quoting *Wilson*, 122 F.3d at 704).

Compounding the problem, it is not even clear which discrete group § 26 "helps and hurts, or when each group will be affected." App. 92a (Sutton, J., dissenting). Given the reality that "female high school students increasingly outperform their male classmates," it is entirely possible that a sex-based preference program would favor men, rather than women. *Ibid*. And the overrepresentation of certain minority groups (such as Asian and Jewish students) within higher-education institutions necessarily means that preference programs have the perverse effect of benefitting some minority groups at the expense of others. App. 54a–55a (Boggs, J., dissenting).[3]

[3] This problem is exacerbated by admissions politics. In *Grutter*, Justice Kennedy shed a light on this problem with a shocking admission from the University of Michigan's former Law School Dean. "He testified that faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans." 539 U.S. at 393 (Kennedy, J., dissenting).

In sum, it is not at all clear that preference programs accomplish the goals their supporters claim. And to the extent § 26 can be characterized as "disadvantaging" certain defined groups, those groups constitute a majority of Michigan's population.

D. Admissions policies are not part of the political process.

A final problem with the en banc majority's analysis is that "the academic processes at work in state university admissions in Michigan are not 'political processes' in the manner contemplated in *Seattle*." App. 72a (Gibbons, J., dissenting). "Unlike the Seattle School Board and the Akron City Council, the various Michigan university admissions committees and faculty members are unelected." *Ibid*. And although the en banc majority is correct that Michigan universities are generally governed by either an elected or Governor-appointed board of trustees, App. 28a, the majority skirts the record evidence that admissions decisions are made by unaccountable faculty members.

Judge Gibbons summarized that record as follows:

> As they currently stand, the faculty admission committees are islands unto themselves, vested with the full authority to set admissions policy for their respective university programs. . . . [T]he testimony of the law school dean demonstrates that, whatever the formal legal structure, the faculty committees set admissions policies without significant review by the boards—thus insulating them from the political pressures the boards themselves face. [App. 72a (Gibbons, J., dissenting).]

To the extent it is even possible to hold such committees "politically accountable," the political gymnastics involved are far worse than simply achieving a 51% vote in a statewide referendum. As Judge Sutton explained, a Michigan citizen seeking to implement § 26's policy through the "political process" would have to elect a majority of Michigan, Michigan State, and Wayne State's eight-member boards of trustees (which would take an eight-year process spanning at least three statewide election cycles) willing to abolish preference programs, then hope that the trustees would stand up to the faculty committees which believe that they alone have exclusive control over the admissions process. App. 86a–87a (Sutton, J., dissenting). And anyone wishing to change admissions policies at Michigan's other public universities "faces an equally elaborate process." *Ibid.* (citations omitted).

It makes no sense, in terms of state political process, to say that the only way a state can eliminate affirmative action in its universities is to go through an eight-year election process involving the election of at least 15 different board members (just with respect to Michigan's three largest state universities), who might not even control the faculty committees that make admissions policies and who are elected based on many competing educational issues. Nothing in the Constitution suggests that Michigan is constitutionally barred from pursuing a simpler means of addressing the issue. And it is a remarkable intrusion on state processes to say that a state may end affirmative action in higher education only through such a Byzantine route.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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