No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,
Respondents.

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

COALITION RESPONDENTS' BRIEF ON THE MERITS

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COUNTER-QUESTIONS PRESENTED

Whether a state constitutional amendment violates the Equal Protection Clause by prohibiting minority citizens from proposing through the procedures available to all others that public universities adopt a lawful affirmative action program so that significant numbers of qualified minority students can be admitted to those universities?

Whether a state constitutional amendment violates the Equal Protection Clause by imposing a selective, substantive standard regulating the admission of minority and women students and by creating a private right of action allowing those who claim to be aggrieved by the admission of those students in violation of the amendment to seek damages and injunctive relief in state court?

TABLE OF CONTENTS

COUNTER-QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

A. The issues at stake in this case 1

B. The proceedings below and the Sixth Circuit's decision 12

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY PROHIBITING MINORITY CITIZENS FROM PROPOSING THROUGH THE PROCEDURES AVAILABLE TO ALL OTHERS THAT PUBLIC UNIVERSITIES ADOPT LAWFUL AFFIRMATIVE ACTION PROGRAMS THAT ARE THE ONLY PRACTICAL WAY THAT SIGNIFICANT NUMBERS OF QUALIFIED BLACK, LATINA/O AND OTHER MINORITY STUDENTS MAY ATTEND MANY SCHOOLS IN THOSE UNIVERSITIES 21

A. The Fourteenth Amendment guarantees racial minorities an equal right to use the political procedures that are available to all other citizens when they seek action by the government in aid of their interests 21

B. This Court has rightly held that the racial majority may not adopt state constitutional amendments that ban racial minorities from using the political procedures available to all others to seek relief from racial inequality and exclusion because the majority objects to the substance of minorities' lawful proposals 25

C. The State has shown no compelling reason for denying minority citizens the right to petition through equal procedures for the adoption of the affirmative action programs that this Court has held are in defined circumstances the only practical way that significant numbers of black, Latina/o and other minority students may be admitted to the most selective state universities 31

1. The State may not limit the federal rights protected by *Hunter* and *Seattle* based upon a state constitutional amendment that proclaims the theory of the color-blind Constitution 31

2. The State may not deny minority citizens the right to seek the lawful consideration of race in admissions through the same procedures that all other citizens may use for securing the consideration of numerous other factors. 35

3. The Ninth Circuit and the California Supreme Court have offered no valid reason for depriving California's large black and enormous Latina/o communities of the right to fight for their children's ability to attend that state's leading universities 39

D. The Petitioner has failed to show any reason that this Court should depart from the holdings in *Hunter* and *Seattle* 42

1. The determination of admissions standards is clearly part of the political process of the State of Michigan 42

2. The Court need not speculate on the intentions of the Michigan electorate because Proposal 2 employs an open racial classification 44

3. The rapidly-changing demographic character of the nation requires the Court to follow, not abandon, the political equality guaranteed by *Hunter* and *Seattle* 46

4. The actual results of these proposals show that minority citizens have been deprived of the political right to prevent the re-segregation of higher education 47

II. PROPOSAL TWO VIOLATES THE EQUAL PROTECTION CLAUSE BY SELECTIVELY PROHIBITING THE UNIVERSITIES FROM MAKING EFFORTS TO ASSURE OPPORTUNITY AND TO ACHIEVE DIVERSITY IN THE AREAS OF RACE AND GENDER ALONE 52

CONCLUSION AND RELIEF REQUESTED 61

TABLE OF AUTHORITIES

CASES

Arthur v. City of Toledo,
782 F. 2d 565 (6th Cir. 1986) 45

Bd. of Regents of the Univ. of Michigan v. Attorney Gen.,
167 Mich. 444 (1911) 43

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347 U.S. 483 (1954) 4, 14, 17, 23, 25

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122 F. 3d 692 (9th Cir. 1997) 15, 39, 40

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539 U.S. 244 (2003) 44

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539 U.S. 306 (2003) . . . . *passim*

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24 Cal. 4th 537 (2000) 41

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393 U.S. 385 (1969) . . . . *passim*

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___ U.S. ___, 130 S.Ct. 3020 (2010) 46

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551 U.S. 701 (2007) 28, 34, 42

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163 U.S. 537 (1896) 9, 23, 33, 45

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336 U.S. 106 (1949) 53

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438 U.S. 265 (1978) 23, 33, 54

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474 U.S. 214 (1985) 54

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387 U.S. 369 (1967) 26

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517 U.S. 620 (1996) 28, 29, 30

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518 U.S. 515 (1996) 52

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170 U.S. 213 (1898) 23

STATUTES

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MCL 37.2801 . . . . 11, 53

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STATEMENT OF THE CASE

A. The issues at stake in this case

This case is about the protection of the political rights and educational futures of black, Latina/o and other minority residents under the Equal Protection Clause of the Fourteenth Amendment during the period of the greatest demographic change that the nation has ever faced.

On the one hand, Article 1, Section 26 of the Michigan State Constitution ("Proposal 2") denies to racial minorities the right to even propose that the governing boards of Michigan's public universities adopt the exact affirmative action plan that this Court held was the only way that significant numbers of black, Latina/o and other minority students could be admitted to the University of Michigan's Law School and other schools like it. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

On the other hand, in two profound and prescient decisions, this Court rightly found in the Fourteenth Amendment a mighty shield protecting the democratic rights of black, Latina/o and other minority citizens against attempts by a would-be dominant white majority to prevent minority citizens from obtaining protection against *de facto* segregation and inequality. *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).

The Sixth Circuit Court of Appeals, in a well-reasoned decision, held that *Hunter* and *Seattle*

compelled the conclusion that Proposal 2 violated the Equal Protection Clause by creating an unequal and racially discriminatory political process. Every other group in the state—including the alumni, wealthy donors, game-day boosters, powerful politicians and all the rest—whose sons and daughters already have a host of unearned advantages in the universities' admissions systems—may still lobby for and win the consideration of special factors that will further increase their children's chances of being admitted. Black, Latina/o, Native American and other under-represented minorities, however, now have no such right. They and they alone may not lobby the elected governing boards of the University of Michigan, Michigan State University and Wayne State University to obtain those changes in the universities' admissions systems that *Grutter* held were the only way that a significant number of their children could actually attend those universities.

Under Proposal 2, black, Latina/o and other minority citizens may no longer ask the universities to consider the ways that Michigan's nationally-recognized pattern of intense segregation and inequality makes it almost impossible for the universities to admit many minority students under its other admissions criteria (see infra, at 55-59). Nor may they ask the universities to consider the cultural biases in the standardized tests that allow the poorest white students to score higher on those tests than the most privileged minority students (JA 173-176, 182-187). Under Proposal 2, minorities may not fight for their children's future, and the universities must pretend that race and racism do not exist.

Like many discriminatory laws before it, Proposal 2 uses seemingly neutral language, declaring that state universities "…shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin…" MI Const 1963, art 1, s. 26(1). The prohibition of discrimination, however, has no meaning because the Michigan's Constitution had long before banned discrimination on account of race or national origin. MI Const 1963, art. 1, sec. 2. Similarly, the prohibition on "preferential treatment" was completely one-sided because the University of Michigan had never adopted an explicit special program to admit white students. As Ward Connerly made clear in the 279 pages of his book, California's Proposition 209 from which Proposal 2 was copied aimed *only* at banning the affirmative action programs that had led to the admission of minority students. Ward Connerly, Creating Equal: My Fight Against Race Preferences, 1-279 (Encounter Books, San Francisco, 2000).

By so doing, Proposal 2 hopes to reverse some of the proudest and most far-reaching achievements of the Civil Rights Movement. During the 1960s, the University of Michigan Law School had nine black graduates and no known Latina/o graduates. After the Regents established the first affirmative action program in 1970 (JA, 91-101), the Law School graduated 262 black and 41 Latina/o students in the 1970s and comparable numbers every decade thereafter (JA, 102-103). Proposal 2 has reversed that progress and driven down the number of black law graduates to levels not seen since 1969. William C. Kidder, *Restructuring Higher Education Opportunity?,* 2 (The Civil Rights Project, 2013),

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318523.

At Michigan's Law School and at all the schools that are like it, Proposal 2 is destroying *Brown's* promise of an equal and integrated education which over time will destroy *Brown's* promise at all levels. *Brown v. Bd. of Educ*., 347 U.S. 483 (1954).

Proposal 2 makes the drops in minority enrollment both inevitable and permanent. Because Proposal 2 is part of Michigan's Constitution, it may only be removed by another referendum. MI Const. 1963, art. 12, sec. 2. The cost of such a referendum campaign is prohibitive (JA, 39-51). But even if by some miracle minority communities could obtain the needed resources, they would have zero chance of winning such a referendum. Michigan's electorate is 85 percent white. In the November 2006 general election, ninety percent of Michigan's black voters cast ballots against Proposal 2, but two out of three of Michigan's white voters cast ballots for that Proposal (R. 222-2, Dep. of Linski, Ex 3, Page ID No. 4606). There is no way for minority communities to close that racial gap, and they thus have no lawful way to regain the right even to present proposals that will end their exclusion from the University of Michigan.

Minorities' chances of being admitted and their chance of winning a referendum will continue to decrease due to the enormous increase in the competition for admission at all selective schools, including the University of Michigan. Forty thousand students applied for one of the 6,000 seats in the class that would enter in September 2011. Forty-two

thousand students applied for the same number of seats in the class that entered in September 2012. Statements by Ted Spencer, Dir. Of Admissions, available at http://www.vpcomm.umich.edu/admissions/archivedocs/spencer11.html and http://www.vpcomm.umich.edu/admissions/statements/spencer12.html. The increasing competition for admission to the University of Michigan, the contraction of Michigan's other public universities, the impossibly high price of private colleges, and the knowledge that a degree from the University of Michigan opens doors that are closed to others will only decrease minority admissions and increase the polarization in the electorate.

The proponents of Proposal 2 ask this Court to uphold Proposal 2, knowing that it has re-segregated the selective colleges in Michigan and California (see infra, at 47-51), knowing that it will deny minority communities equal access to the political process, and knowing that it will allow white majorities to take from black, Latina/o and other minority citizens the equality in the political process that the Fourteenth Amendment promised to protect.

But Proposal 2 does even more: it enshrines in the Michigan Constitution the false claim that any attempt to overcome racial inequality and exclusion is an attempt to win "preferential treatment," an attempt to maintain "discrimination." By its votes, the white majority has renamed the pursuit of equality as the pursuit of inequality.

The Court's decision in this case will tell the people of America what the Court's relationship is to America's transformation into a majority-minority

nation. Michigan established pervasive de facto segregation and inequality with the same scientific precision that it used to create the assembly line. Michigan must not become the model for how to create a new, constitutionally-ratified Jim Crow.

The proponents of Proposal 2 ask this Court to transform the Fourteenth Amendment from an Amendment that requires the states to protect equality into an Amendment that allows the states to pass laws that deny equality. Such a reversal could never legitimately claim to foster a "color-blind Constitution," but rather would create a Constitution that is blind to injustice, blind to inequality, and blind to the needs and aspirations of the communities that are quickly becoming America's new majority. If "color-blind Constitution" means nothing more than the protection of white privilege, then it will be a phrase held in derision, associated with cynicism and hypocrisy, and will serve as the new legal pseudonym for separate and unequal.

The Fourteenth Amendment was proposed and ratified after the Civil War to heal the breach in America. Those who drafted, proposed and ratified it understood that the only way to heal the breach was to protect and empower the ex-slaves and to defend their rights with the arms of Union soldiers. Every right extended to the slaves was attacked by Andrew Johnson and many others as a detriment to white people, as a special privilege or preference for black people. But the Fourteenth and later Fifteenth Amendments recognized that a united and diverse America could only be built by uplifting those who had so long been held down by force, by law, and by custom.

One hundred years later, in the wake of what until that time had been the most ferocious, bloody, and costly urban riots in American history, the bipartisan body charged with investigating why the riots had occurred and what could be done to prevent future uprisings concluded, "Our nation is moving toward two societies, one black, one white, separate and unequal." Report of the National Advisory Commission on Civil Disorders, 1 (U.S. Gov't. Printing Office 1968). Dr. Martin Luther King, Jr. called that Report "a physician's warning of approaching death, with a prescription for life." H.R. Rep. No. 95-1828, pt 2 at 277 (1979). The life-saving prescription to save America was affirmative action.

Most of America failed to recognize the approaching storms that led to the explosion of discontent in 1968. To most white Americans, America seemed to be making progress on issues of race. Dr. King had built a movement powerful enough to win landmark changes in federal law, and he had an unparalleled ability to speak to and for the oppressed. Dr. King never apologized for or sugar-coated the deep discontent of the black and Latina/o communities, and he always defended and stood by those determined to fight for freedom, even if he disagreed with the tactics some chose to achieve it. Through Dr. King's words and the seemingly unstoppable civil rights movement, a section of white Americans glimpsed how America's minority communities saw and experienced America's promises of equality, democracy and justice.

In the 1960s, some sections of America's top leaders, including this Court under Chief Justice Earl Warren, heard the voices of discontent. The Court worked to

restore the Fourteenth Amendment and used its guarantee of equal protection to combat segregation and discrimination in the North and the South. In *Hunter* and then *Seattle*, the Court assured that minority citizens would have an equal right to seek the aid of government in overcoming the enormous private discrimination and de facto segregation that remained.

The Court's authority was high, because its decisions were based on reality and truth and on the Court's great optimism that the American people could change for the better. The Court recognized that it is ultimately the real lives of the American people—not the legal terms and high-sounding phrases—that alone can give the Constitution true meaning for the great majority of Americans and that defines for them whether the nation's laws are just or unjust.

America today is a nation desperately in need of decisions that express a commitment to equality and justice. America will soon be a majority-minority nation. There is no way to build a united, inclusive new America if the core values, the core political *rights* that have bound us together, even in their imperfect application, do not apply to us all. We are in a new phase of struggle for human equality, dignity and equal rights in America. The millions of immigrants, mostly Latina/o, who started their great march in 2006, are just beginning their fight to make America everyone's nation.

As they do, however, California's Proposition 209, from which Proposal 2 was copied word-for-word, is widening the gulf between Latina/o and black communities on one side—and white communities on

the other. The gap in educational opportunities means widening gaps in employment, family income, home ownership, and everything else (see infra, at 55-59).

This trend, if unchecked, will take on a whole new meaning in our nation today than it did under the old Jim Crow. In the lifetime of many who are alive today, black, Latina/o, Asian and Native Americans will be the majority of our population. America will no longer be in any sense the "white man's republic." The transformation before us will be vast, and few would say that we are ready for it.

This case is essentially about this question: Can our nation avoid the traumatic convulsions that such changes have so often wrought in human history? Can the "principles of constitutional liberty" that Justice Harlan described, *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), be a bright beacon that provides a sufficiently broad, deep and realistic framework to ease and foster this great transformation, making it an organic process in the evolution of a great democratic people? Or will that constitutional framework itself be distorted into a perverse bulwark of a decadent rearguard defense of the dying privileges of those who believe that they should be the "dominant race" in this country?" *Id.*, at 560.

This Supreme Court should not repeat the mistake of *Plessy* by turning equality over to the states and thus becoming responsible for the new Jim Crow that these laws are now creating in California, Michigan and other states. We ask that the Court consider the words of a Texan raised in the *de jure* segregation of the South. Everything that President Lyndon Johnson

said in June of 1965 to the graduating students of Howard University, just weeks before he signed the 1965 Voting Rights Act, remain both true and painfully relevant today:

> Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family you live with, and the neighborhood you live in, by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man...
>
> For Negro poverty is not white poverty. Many of the causes and many of the cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family and the nature of the individual...
>
> Freedom is the right to share, share fully and equally in American society—to vote, to hold a job, to enter a public place, to go to school. It is the right to be in every part of our national life as a person equal in dignity and promise to all others.
>
> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

> You do not take a person, who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say 'you are free to compete with all others' and still justly believe that you have been completely fair.
>
> That is, it is not enough to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.
>
> This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity, but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Speech of Lyndon B. Johnson, June 4, 1965, available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

President Johnson could not make that speech to the Regents of the University of Michigan today. If he did make it, they would be required to ignore it. If they did not ignore it, they could be sued under the private right of action that Proposal 2 has created for any student who claims to have been aggrieved by alleged "preferential treatment" given to minority applicants. MI Const. 1963, art. 1, sec. 26(6)(7); MCL 37.2801.

This Court should strike down Proposal 2 to end these attacks upon democracy and upon equality and to assure that all of the citizens of Michigan and of the Nation can again use the normal democratic procedures for establishing the admissions standards

that will play such an enormous role in determining what kind of country we will be over the next half century and more.

B. The proceedings below and the Sixth Circuit's decision.

On November 8, 2006, the day after Proposal 2 passed, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and to Fight for Equality By Any Means Necessary (BAMN) and a number of black, Latina/o and white students, applicants and citizens (jointly referred to as the "Coalition plaintiffs") filed this action in the Eastern District of Michigan against the Governor of Michigan and the governing bodies and individual presidents of Michigan's three constitutionally-established universities. The Coalition plaintiffs alleged in relevant part that Proposal 2 violated the Equal Protection Clause by imposing unequal burdens on racial minorities who sought changes in admissions policies and by the selective and judicially-enforceable substantive limitation that it imposed upon the criteria for admitting women and minority applicants (Pet. App. 9a).[1]

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[1] The Coalition plaintiffs initially challenged Proposal 2's restrictions on women applicants under both the unequal political structure and the substantive counts of their Complaint. The Coalition plaintiffs have not pursued the political structure count as to women because it raises somewhat different issues. The Coalition plaintiffs have pursued their challenge to Proposal 2's substantive limitation and special legal remedy for challenging the admission of women students because it has and it will eliminate special programs which lessen the continuing exclusion of women from fields like many sciences and engineering.

About six weeks later, a different group of faculty and students ("the Cantrell plaintiffs") filed an action in the same court alleging that Proposal 2 had imposed unequal political burdens on racial minorities in violation of the Fourteenth Amendment (Pet. App. 10a).

The Attorney General intervened to defend Proposal 2, the Governor was later dismissed by stipulation, and the two actions were consolidated. The Attorney General filed a motion for summary judgment. The District Court rejected the Coalition plaintiffs' claim that factual disputes precluded summary judgment,[2] granted the Attorney General's motion for summary judgment, and denied the Cantrell plaintiffs' cross-motion for summary judgment (Pet. Supp. App. 270a). The Coalition plaintiffs appealed immediately, and the Cantrell plaintiffs appealed after the District Court had denied their motion to alter or amend the judgment (Pet. Supp. App. 184a-193a).

On July 1, 2011, a divided panel of the Sixth Circuit reversed the District Court (Pet. App., 101a-183a). The

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[2] The Coalition plaintiffs responded to the Attorney General's claim that *Hunter* and *Seattle* did not apply to "preferences" by asserting that if the District Court accepted that claim, it nevertheless could not grant the Attorney General's motion without determining whether departures from grade point averages and test scores were actually "preferential treatment" that should be excluded from the coverage of *Hunter* and *Seattle*. The Coalition plaintiffs asserted that disputes over whether those criteria were neutral means of determining what was and what was not a preference for purposes of the Fourteenth Amendment precluded granting the Attorney General's motion for summary judgment. R. 222, Coal. Resp. Atty. Gen. Mot. For Summ. Judg., pgs. 24-25, 41 of 48.

Attorney General petitioned for and obtained en banc review. On November 15, 2012, the Sixth Circuit, sitting en banc, reversed the District Court for reasons that are nearly identical to those that the panel had given for its decision (Pet. App. 1a-100a).

The en banc Sixth Circuit began its statement of those reasons by concluding that the Circuit was "neither required nor inclined to weigh in on the constitutional status or relative merits of race-conscious admissions policies as such" (Pet. App.. 13a). Rather, it held, the issue before the Sixth Circuit was:

> …whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions—something they are specifically allowed to do under *Grutter*.
>
> Pet. App. 13a (emphasis in original).

In deciding that issue, the Sixth Circuit followed this Court's decisions in *Hunter* and *Seattle*.

"Ensuring a fair political process is nowhere more important than in education," the en banc Court held, because "[e]ducation is the bedrock of equal opportunity and 'the very foundation of good citizenship.'" Pet. App. 15a, citing *Brown,* 347 U.S. at 493. Because *Grutter* had held that the nation had a vital interest in assuring that "…the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," the en banc panel declared

that it had to "…apply the political-process doctrine with utmost rigor" (Pet. App., 15a).

The en banc Sixth Circuit then concluded that Proposal 2 had created separate and unequal political rights for minority citizens on the one hand and all others on the other hand. The minority citizen, the Circuit held, was required to "traverse [the] difficult and costly road" of winning a statewide vote to repeal Proposal 2 before "our now exhausted citizen" could reach the starting point of his neighbor who sought a legacy-related policy change simply by asking the Regents or their administrative officials to adopt it (Pet. App., 36a).

The en banc Sixth Circuit found that the determination of admissions standards was part of the political process of the State of Michigan (Pet. App., 27a-33a), and found that Proposal 2 had a racial focus because it excluded from that process only those proposals that were designed to increase the number of minority students (Pet. App., 33a-38a).

The Sixth Circuit rejected the Ninth Circuit's conclusion that this Court's decisions in *Hunter* and *Seattle* did not apply when racial minorities sought programs that the opponents had labeled as "preferences." Pet. App. at 38a-41a, citing *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692 (9th Cir. 1997). Five judges had dissented in the Ninth Circuit from the denial of hearing en banc in *Wilson*, 122 F. 3d at 711-718. The Sixth Circuit echoed and expanded upon their reasons for rejecting the *Wilson* panel's decision.

The Sixth Circuit declared that "[t]his effort to drive a wedge between the political process rights afforded when seeking anti-discrimination legislation and so-called preferential treatment is fundamentally at odds with *Seattle*" (Pet. App., 39a). The *Hunter/Seattle* doctrine, the en banc Court held, "…worked to prevent the placement of special procedural obstacles on minority objectives, whatever those objectives may be" (Pet. App., 41a). The en banc Court rejected the proposed preferences limitation on *Hunter* and *Seattle* because it attempted to impose an "*outcome*-based limitation on a *process*-based right" (Pet. App., 41a)(emphasis in original).

Proposal 2, the Sixth Circuit concluded, was not a mere repeal of an existing affirmative action program, distinguishing *Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527 (1982). If the proponents of Proposal 2 had won a decision by university officials to end affirmative action, "…there would be no equal protection concern" under the political process doctrine, but Proposal 2 not only repealed the policies but "*…took the additional step* of permanently removing the officials' power to reinstate them" by "lodging decisionmaking authority over the question at a new and remote level of government'" (Pet. App. 43a, citing *Seattle*, 453 U.S. at 483).

Finally, the en banc Sixth Circuit recognized that *Seattle* and *Hunter* might allow the state to establish a different political process for particular racial issues, if the state demonstrated a compelling state interest for doing so (Pet. App. 45a). Michigan's Attorney General, however, has never asserted such a compelling interest (Pet. App. 45a). Thus, the Circuit concluded, those

portions of Proposal 2 which affected Michigan's public institutions of higher education violated the Equal Protection Clause by imposing heavier burdens on racial minorities who seek changes in the universities' admissions policies than the minimal burdens that faced by all others who seek changes in those policies (Pet. App. 45a).

The Sixth Circuit found no need to address the Coalition plaintiffs' claim that Proposal 2's substantive standards also violated the Equal Protection Clause because it had already concluded that Proposal 2 violated the Fourteenth Amendment (Pet. App. 46a).

There were five separate opinions by the seven dissenting judges on the en banc panel. We will state and address their arguments in detail below in the course of responding to the Petitioner's restatement and elaboration of their arguments.

SUMMARY OF ARGUMENT

The Fourteenth Amendment promised the four million newly-freed slaves Equal Protection of Laws, including federal protection for equality in the processes by which the states may enact new laws and policies. That promise and almost all the promises of the Fourteenth Amendment were, however, soon forgotten as this Court and the nation ceded federal protection and allowed the southern states in particular to deny equality altogether.

Brown revived the promises of the Fourteenth Amendment and following from it, the Court began the process of restoring equality in government by its

historic one-person, one-vote decisions. Following from those decisions, the Court held in *Hunter* that a local majority could not reallocate governmental power in a way that imposed special burdens on racial minorities who are fighting for lawful measures to reduce racial discrimination in residential housing. Thirteen years later, *Seattle* reaffirmed *Hunter* by holding that a state constitutional amendment could not deprive a local school board that had power over student assignment decisions of the power to use districting and busing to lessen de facto segregation in the public schools. In *Seattle* as in *Hunter*, this Court held that the majority could not deprive a racial minority of political rights equal to those of all others because the majority objected to the substance of the minority's lawful proposals.

The Petitioner, however, here asserts that Michigan voters may deprive Michigan's nearly two million black, Latina/o and other minority citizens of the right to propose through the procedures available to all other citizens that Michigan's public universities adopt affirmative action programs that *Grutter* and now *Fisher* have held may be used in defined circumstances because they are necessary in order to admit a significant number of black, Latina/o and other minority students. *Fisher v. University of Texas at Austin*, ___ U.S. ___, 133 S. Ct. 2411 (2013). The Petitioner thus asserts that Michigan may deny racial minorities the right to fight on equal terms for the adoption of the only plans that will make it possible for meaningful numbers of qualified black, Latina/o and other minority students to actually attend the University of Michigan Law School and other schools like it.

The Petitioner says that the electoral majority may deprive racial minorities of that right because the majority objects to the substance of the minorities' proposals. As the Sixth Circuit held, Proposal 2 imposes an outcome limitation on a process-based democratic right, in direct violation of *Hunter* and *Seattle* and the democratic principles for which they stand.

Moreover, the Petitioner asserts that the validity of every affirmative action plan should be litigated twice: once to determine whether the University may adopt such a plan under *Grutter* and *Fisher* and once to determine whether racial minorities have the right even to propose that plan through the normal procedures. The same Fourteenth Amendment, however, governs what public universities may do in considering race *and* the proposals that minorities have a federally-guaranteed right to present through normal procedures under *Hunter* and *Seattle*. There is no basis for saying that black, Latina/o and other minority citizens may be deprived of the right to propose through the normal procedures the adoption of those lawful affirmative action plans that are the only practical way that significant numbers of black, Latina/o and other minority students may actually be admitted to public universities.

The Petitioner claims that the state may limit the scope of the political equality protected by *Hunter* and *Seattle* to proposals that comply with a state-proclaimed theory of the color-blind Constitution—a theory that this Court has held may not be used as a "universal" principle because it is "inconsistent…with

the history, meaning and reach of the Fourteenth Amendment," *Parents Involved*, 551 U.S. at 782, 788 (Kennedy, J., concurring).

The Petitioner's claim that Michigan may define political equality itself by that theory will destroy the Fourteenth Amendment's uniform, national definition of equality, as the states strikes will be free to set new balances that differ from those set by this Court in *Grutter* and in *Fisher*, by choking off the political procedures that may be used for proposing any plan that the state majority believes should not be considered.

Proposal 2's substantive standards for admissions also violate the Fourteenth Amendment. Not long ago, the states banned minority and women students from even applying to many public universities. Proposal 2 echoes those laws by declaring that those same two groups alone cannot receive any "preferential treatment" and by authorizing an independent cause of action that allows any person claiming to be aggrieved by "preferences" favoring either of those groups to ask a state court for damages and for injunctive relief. Proposal 2's substantive limits on the admissions of women and minority students and its special cause of action are not applicable and have never been applicable to any categories of applicants other than women and minorities.

Proposal 2 pretends to protect equality but actually imposes selective and draconian restrictions upon the political rights and educational futures of minority and women students. The Sixth Circuit's decision striking down Proposal 2 should be affirmed because Proposal

2 violates the most fundamental promises of the Fourteenth Amendment itself.

ARGUMENT

I. PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY PROHIBITING MINORITY CITIZENS FROM PROPOSING THROUGH THE PROCEDURES AVAILABLE TO ALL OTHERS THAT PUBLIC UNIVERSITIES ADOPT LAWFUL AFFIRMATIVE ACTION PROGRAMS THAT ARE THE ONLY PRACTICAL WAY THAT SIGNIFICANT NUMBERS OF QUALIFIED BLACK, LATINA/O AND OTHER MINORITY STUDENTS MAY ATTEND MANY SCHOOLS IN THOSE UNIVERSITIES.

A. The Fourteenth Amendment guarantees racial minorities an equal right to use the political procedures that are available to all other citizens when they seek action by the government in aid of their interests.

The Fourteenth Amendment's historic promise of Equal Protection of the Laws meant not only substantive equality in the laws that were enacted but also equality in the procedures by which state governments enacted new laws and policies. Senator Jacob Howard, an anti-slavery lawyer from Detroit, made the promise of equality in the "rights and remedies" that black citizens would have in a "republican government" explicit when he introduced

the Fourteenth Amendment to the United States Senate on behalf of the Joint Committee of Fifteen on Reconstruction:

> [Section 1 of the Amendment] will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.

Congressional Globe, 39th Cong., 1st Sess., p. 2766.

The 39th Congress knew that those promises could not be carried out unless the federal government prevented the defeated but still ruling leaders of the South from robbing the four million new citizens of their freedom. In Senator Charles Sumner's words:

> Four million slaves have been declared to be freemen; and by whom, and by what power? By the national Government; and let me say that, as the national Government gave that freedom, it belongs to the national Government to secure it. The national Government cannot leave those men whom it has made free to the guardianship or custody or tender mercies of any other

> government. It is bound to take them into its own keeping, to surround them all by its own protecting power, and invest them with all the rights and conditions which in the exercise of its best judgment shall seem necessary to that end.

Congressional Globe, 39th Cong., 1st Sess., pp. 2335-2336

For Senators Howard and Sumner and all the others who framed the Fourteenth Amendment, the then-small University of Michigan was far from the center of their concerns. But the promise of equality in their new Amendment guaranteed to Michigan's then-small black population an equal right to attend that University *and* an equal right to propose changes in its admissions standards so that they could attend that university.

Those promises were soon rendered worthless in much of the country as the Fourteenth Amendment was "strangled in infancy by post-civil-war judicial reactionism." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978)(Powell, J.). The betrayal of the Fourteenth Amendment culminated in decisions upholding state-mandated segregation, *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the exclusion of black citizens from the political process by state constitutions which established poll taxes, literacy tests and similar devices to prevent any challenge to the system of segregation. *Williams v. Mississippi*, 170 U.S. 213 (1898).

Brown struck down the segregation laws and reopened a process that soon led to the restoration of

the promise of equality in the political process. Thus, in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court struck down the gerrymanders that the South had used to perpetuate segregation by holding that the states must assure one-person, one vote in their legislative districts. Equality in the process of government, it said, was "at the heart of Lincoln's vision of government of the people by the people [and] for the people." *Id*., at 568.

Reynolds led to *Hunter*, and *Hunter* then led to *Seattle*. In his defense of Proposal 2, the Petitioner trains his fire on *Hunter* and, especially, on *Seattle.* As set forth below, those decisions, like *Brown*, provide their own defense. The Petitioner's real target, however, is not those great decisions, but the still greater Amendment that stands behind them.

The Petitioner asserts that the Fourteenth Amendment's guarantee of political equality should be sacrificed to assure that minority students are admitted in rigid compliance with *some* of the universities' existing admissions standards, no matter how much inequality those particular standards incorporate and no matter how many exceptions others have obtained from those standards in order to facilitate *their* admission to the university.

For all the pages that have been spent by the Petitioner and his supporters, there is a fundamental question that he cannot answer. How, under the "surrounding power" of the Fourteenth Amendment, can the state enact a law that allows the alumni and everyone else to seek exceptions from its admissions system while denying to black, Latina/o and other

minority citizens, whom the Fourteenth Amendment was enacted to protect, the right to use the same process to petition for the adoption of lawful programs that are the only practical way that meaningful numbers of minority students may gain access to the state's most selective universities? How can the Fourteenth Amendment allow a state law that absolutely deprives racial minorities alone of the equal right to seek lawful modifications, adjustments and considerations in the Universities' admissions criteria?

B. This Court has rightly held that the racial majority may not adopt state constitutional amendments that ban racial minorities from using the political procedures available to all others to seek relief from racial inequality and exclusion because the majority objects to the substance of minorities' lawful proposals.

Brown inspired black, Latina/o and other minorities to fight for equality in all spheres and, at the same time, was met with massive resistance across the South. The die had been cast and in *Reynolds v. Sims*, the Court began the process of reestablishing the right of minority citizens to participate on an equal basis in the political processes of the states.

In 1967, the Court struck down an amendment approved by a large majority of California's voters that guaranteed every property owner the right to sell or rent to "such person…as he, in his absolute discretion, chooses." *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967).

The Court struck down the amendment because it provided state sanction for private discrimination and because it made it impossible for minority citizens to seek legislative action to stop that discrimination. *Id.*, at 377.

The crucial battle was then joined in Akron, Ohio. As described in *Hunter*, the Akron City Council had passed an ordinance that banned racial or religious discrimination in the sale or rental of property. Citizens opposed to that ordinance won a referendum vote that amended the City charter to repeal that ordinance and to prohibit any similar ordinance from going into effect without being approved by the citizens in a special referendum. The Court struck down the charter amendment because the "…State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than that of another of comparable size." *Hunter*, 393 U.S at 393.

Justice Harlan concurred, concluding that while a state was normally free to allocate political power according to any general principle that it saw fit to apply, when it reallocated power over racial subjects alone it bore a "far heavier burden of justification" than was normally required, because the selective reallocation necessarily made it far more difficult for racial and religious minorities to "achieve legislation that is in their interest." *Id.*, at 395 (Harlan, J., concurring).

In its critical holding, *Hunter* declared that however deeply the majority of Akron's citizens believed in the

rights of property owners, the majority could not assure that its views prevailed forever by adopting an amendment that "…disadvantage[d] [racial or religious minorities] by making it more difficult to enact legislation in [their] behalf…" *Hunter,* 393 U.S. at 393. More generally, *Hunter* held that the majority could not prevent racial and religious minorities from equal access to the normal democratic procedures *because the majority objected to the substance of the minority's lawful proposals.*

Thirteen years after *Hunter*, this Court reaffirmed in *Seattle* the same protection for the political rights of racial minorities. In that case, the local school board had adopted racial minorities' proposals to use redistricting and busing to assure that their children were able to attend better schools and to overcome some of the evils of *de facto* segregation that *Brown* had identified. Having lost the political battle in the City of Seattle, those opposed to the school board's plan won a majority in a statewide referendum that amended the state constitution to declare a binding state policy in favor of neighborhood schools and to provide that busing could only be used for specified purposes of which racial integration was not one. *Seattle,* 458 U.S. at 463.

The Court saw that the amendment's ostensibly neutral wording concealed the reality that it had removed school assignment and transportation powers from the local school boards only on racial matters. Following *Hunter*, the Court once again held that a state could not, without a compelling interest for doing so, use the "racial nature of a decision to determine the decisionmaking process" because that "…place[d]

special burdens on racial minorities within the governmental process…." *Seattle*, at 470, citing *Hunter*, at 391 (emphasis in *Seattle*). As in *Hunter*, the Court held that however deeply the majority believed in neighborhood schools, it could not deprive racial minorities of the right to propose school assignment policies that the minority believed would give its children a chance for an integrated and better education.

The Petitioner attempts to ignore *Hunter* and wrongly asserts that *Seattle*, a reiteration of *Hunter*, has been undercut by this Courts' decisions in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) and *Romer v. Evans*, 517 U.S. 620 (1996).

Parents Involved did *not*, however, affect the Seattle district's power to draw district lines, or its use of student transportation, which were the sum and substance of the amendment struck down in the first *Seattle* decision.[3] Moreover, the *Seattle* majority knew that *some* racially-conscious plans might be unlawful, but recognized that the state could not prohibit racial minorities from proposing *all* racially-conscious plans because *some* might not be lawful. *Seattle*, 458 U.S. at 474. *Parents Involved* may have adopted a new substantive standard for determining which racially-conscious policies were unlawful, but it did not affect *or claim to affect* a racial minority's right to political

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[3] Indeed, even in other areas, the Court left open the possibility of different result if the facts were different, *Id*., at 797- 798 (Kennedy, J., concurring).

equality when it presented lawful proposals to lessen racial inequality and exclusion.

Similarly, *Romer* parallels, rather than undermines, *Hunter* or *Seattle*. While *Romer* did not adopt the Colorado Supreme Court's expansion of *Hunter* and *Seattle* to cover a non-suspect class, that hardly shows that *Romer* rejected *Hunter* or *Seattle*. In fact, in striking down a Colorado constitutional amendment that banned the subdivisions of the state from adopting any laws or policies that provided legal protection to lesbians and gay men, *Romer* started, as *Hunter* and *Seattle* did, from the premise that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense." *Romer,* 517 U.S. at 633. Like *Hunter* and *Seattle*, *Romer* then examined whether the state had offered any legitimate purpose for the denial of equal political rights, but found none because Colorado's justifications were so "far removed" from the amendment's provisions that the Court concluded that the state had enacted the amendment "…not to further a proper legislative end but to make [lesbians and gay men] unequal to everyone else." *Id*., at 635.

Romer differed from *Hunter* and *Seattle* in that it required only a "legitimate" state purpose, not a compelling one, but that is because the class at issue in *Romer* was not suspect while the classes at issue in *Hunter* and *Seattle* clearly were. *Romer* also differed from *Hunter* and *Seattle* in that the amendment at issue in that case denied the existing citizens of local subdivisions and students at state universities the right to seek protection against the discrimination that

they were suffering, while *Hunter* and *Seattle* denied minorities the right to seek protection against their outright exclusion from particular areas or schools. That, however, is a difference without a distinction.

Hunter, *Seattle* and *Romer* all protected the political rights of minorities to advance proposals that were, at the time, unpopular. All three decisions made it possible for the minority to win protection for some of its legitimate interests and, overtime, to win the majority's support for that protection. Not only minorities, but the nation as a whole, made enormous progress because of those decisions, and with the challenges facing us now, there is no reason that this Court should abandon those decisions.

In striking down Proposal 2, the Sixth Circuit rightly summarized the rights of the majority and of the minority under the Fourteenth Amendment. The majority, if it truly is a majority, may persuade Regents to reject an affirmative action plan, or may elect new Regents if the ones now serving do not follow its will. The majority may not, however, "[rig] the game to reproduce its success indefinitely" by ending the minority's rights to use the political process to win the adoption of such plans in the future (Pet. App., 16a).

The Petitioner's central argument directly contradicts the principles of *Hunter*, *Seattle,* and the Fourteenth Amendment. The Petitioner asserts that an electoral majority may burden and essentially eliminate the racial minorities' *right* to petition for the adoption of lawful proposals to lessen the exclusion of minority students from state universities because the

majority objects to the *substance* of the minority's proposals. Pet. Br., at 17-22, 30-36. As the Sixth Circuit rightly held, the Petitioner seeks to impose an outcome-based limitation on a process-based right—a result that converts the *right* of a minority to fight for lawful proposals that it sees as necessary to lessen inequality into a *privilege* that the majority may dole out based upon its views of the merits of the racial minority's proposals. Pet. App. 13a.

C. The State has shown no compelling reason for denying minority citizens the right to petition through equal procedures for the adoption of the affirmative action programs that this Court has held are in defined circumstances the only way that significant numbers of black, Latina/o and other minority students may be admitted to the most selective state universities.

1. The State may not limit the federal rights protected by *Hunter* and *Seattle* based upon a state constitutional amendment that proclaims the theory of the color-blind Constitution.

As the Sixth Circuit further rightly observed, the particular outcome-based limitation that the Petitioner offers to justify truncating the political rights of black, Latina/o and other minority citizens is an attempt to take a "second bite" at *Grutter* and, now, at *Fisher* (Pet. App. 13a). On the basis of the *same* arguments against

affirmative action that this Court rejected in *Grutter* and in *Fisher*, the Petitioner asserts that the validity of every affirmative action program in higher education must be litigated twice: once to determine whether the university has the right to adopt such a plan and once to determine whether the majority may prohibit the minority from ever proposing that the university adopt such a plan. As the Fourteenth Amendment aimed above all at prohibiting state attempts to deny the *right* of minority citizens to equality, there can be no argument that the right of minority citizens to propose affirmative action programs through normal procedures by which the universities adopt admissions standards is governed by a standard that is narrower than the one that governs the right of the university to adopt such a plan.

The Court's holdings in *Fisher* and *Grutter* make clear why the right of the university to adopt an affirmative action plan and the right of minority citizens to propose that plan must be judged by the same standards. In *Grutter* and in *Fisher*, this Court held a state university could consider race in admissions if it was "necessary" to do so in order to admit significant numbers of black, Latina/o and other minority students. *Fisher*, 133 S. Ct. at 2420. By definition, therefore, racial minorities have a surpassing interest in being able to propose through the normal procedures that the universities actually adopt such plans because that is the only way that significant numbers of black, Latina/o and other minority students can actually attend those schools.

In arguing that a different standard should govern the rights of minorities to propose and the right of the

university to adopt affirmative action plans, the Petitioner does *not* rely upon the normal right of a state university "…to determine of itself on academic grounds …who may be admitted to study," or on the corollary right of the university to determine, within constitutional limits, whether it should adopt an affirmative action plan in particular circumstances. *Bakke*, 438 U.S. at 312 (Powell, J.).

On the contrary, he asserts that the state may bar state universities from considering such plans no matter what the circumstances may be. In so doing, the Petitioner asserts that the state can define by its own laws the scope of the political equality that is guaranteed to racial minorities by the Fourteenth Amendment. Just as Louisiana once claimed the right to define *equality* by the "usages, customs, traditions" of its people, *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896), the Petitioner now claims that Michigan has the right to define the scope of the *political equality* protected by *Hunter* and *Seattle* on the basis of a state-conducted referendum.

The Petitioner proposes that the rights of minority citizens be limited by a state-declared version of the theory of the color-blind Constitution. As this Court knows, however, the framers of the Fourteenth Amendment and this Court have repeatedly declared that that theory is inconsistent with the Fourteenth Amendment. The 39th Congress adopted the Freedmen's Bureau and many other racially-conscious measures because it recognized that special programs, including above all special educational programs, were the only way to assure equality in the conditions that slavery had left behind. Eric Schnapper, *Affirmative*

Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985).

Likewise, this Court held in *Grutter* and in *Fisher* that the theory of the color-blind Constitution does *not* govern admissions standards. More generally, this Court has held that the theory of the color-blind Constitution is "inconsistent…with the history, meaning and reach of the Fourteenth Amendment." See *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring). "In the real world"—that is in the world created by three centuries of denying equal rights—that theory cannot be used as a "universal constitutional principle." *Id.*, at 788.

Petitioner proposes that Michigan may adopt a state definition of the political equality that is inconsistent with the Fourteenth Amendment. No decision by this Court even suggests that a state has the power to circumscribe the equality protected by that Amendment by that state's own peculiar standards.

The Petitioner claims that the Sixth Circuit's decision to strike down Proposal 2 did "real damage to the democratic process" (Pet. Br., at 27). On the contrary, leaving Proposal 2 standing would convert racial minorities' right to political equality into a privilege that the majority may withdraw as it sees fit. Even more fundamentally, it would convert the *national* definition of equality that was at the heart of the Fourteenth Amendment into a local option.

Under the Petitioner's view, a state can reject or modify the balances that this Court struck in *Grutter*

and *Fisher* between the universities' and the nation's compelling need to assure diversity and what this Court saw as the harms arising from the consideration of race in admissions. One by one, the states may adopt new balances and new standards that restrict or eliminate the right of minority citizens to propose that the universities adopt programs that comply with this Court's decisions. This Court's decisions would become increasingly irrelevant, and the states would be free to define "preferential treatment" in any way they wanted.

The nation has gone down the state's-rights path before, and it must not do so again in the crucial area of higher education at the exact moment that the nation is becoming a majority minority nation and at the exact moment that the need for training new black, Latina/o and other minority leaders is assuming ever-greater urgency.

2. The State may not deny minority citizens the right to seek the lawful consideration of race in admissions through the same procedures that all other citizens may use for securing the consideration of numerous other factors.

The Petitioner asserts that Proposal 2 should be sustained because it "only" limits what he calls "preferences" or "special treatment" (Pet. Br., at 17-24). The Petitioner *assumes* that the University's admission criteria are neutral and wrongly *ignores* the *reality* that the universities have long recognized that they do not have, and probably never have had, a single, universal,

all-purpose, and purportedly neutral system for determining merit, promise, effort or any similar quality.

For that reason, numerous groups of citizens have proposed that the universities adopt special considerations and special factors that take account of various forms of inequality and that serve many other lawful purposes. Far from promoting fairness or equality, Proposal 2 prevents racial minorities from seeking the same sort of modifications, exceptions and considerations that every other group—including the alumni—has obtained and can continue to obtain under the structure that Proposal 2 has established.

Even a brief review of the University of Michigan's actual policies reveals the inequality that Proposal 2 has created. In one of its earliest admissions systems—the famous certificate system—the University admitted any graduate of a high school that the University had certified. However, in the small towns and rural areas where so many citizens then lived, there were no such high schools, and so the University maintained an examination system that allowed students from those areas to be admitted without a diploma. Harold S. Wechsler, *The Qualified Student: A History of Selective College Admission in America*, 19, 23-29 (John Wiley & Sons, Inc. NY, 1977).

Decades later, the universities granted an exception, a "preference," to veterans returning from the First and Second World Wars by relieving them of the need to have certain courses that they could not have taken because of their military service. *Proceedings of the Univ. Michigan Regents, 1917-1920*,

498 (Jan. 1919); *Proceedings*, 1945-1948, 192 (Jan. 1946). See also John Aubrey Douglass, *The Conditions for Admission: Access, Equity, and the Social Contract of Public Universities*, 41-42 (Stanford Univ. Press 2007).

Eventually, the massive growth in enrollment forced the universities to abandon the old certificate system by adding first grade-point averages and then, over many objections, standardized test scores to their admission criteria. Douglass, at 84-87, 90, 99-100. By all accounts, these criteria do not fully or accurately capture an applicant's promise or potential, and, as many have recognized, they confer a distinct advantage to wealthier students from the best suburban schools (see infra, at 55-59). Thus, the University of Michigan, like almost all major universities, now grants an exception, a "preference," to applicants from less privileged backgrounds by directing its admissions officials to consider an applicant's low income and his or her family's educational background in deciding whether to admit that applicant (JA, 299-306).

Indeed, if one reads the current undergraduate admissions policy of the University of Michigan, it is full of exceptions and "preferences" for the children of alumni and of donors, athletes, residents of particular areas, and many others (JA, 299-306).

In 1970, when black, Latina/o and other minority students asked the University to consider *their* circumstances, they broke no new ground in the form of their demands. They rightly asked the university to consider the pervasive racial discrimination, inequality and segregation that *they* faced, just as the university

had earlier considered the realities that the small farmers, the veterans, and the low-income students faced. Similarly, they asked the university to assure diversity by race just as it had assured diversity along many other axes.

Of course, the Fourteenth Amendment makes the consideration of race different. But that is the point. The standards, the balances for considering race are established by that Amendment and thus by this Court. In denying racial minorities the political right to seek the diversity and the opportunity that this Court has held lawful in *Grutter* and *Fisher*, Proposal 2 has established a state standard that denies to racial minorities the right to petition for the consideration of race in admissions, even though this Court has held that such consideration can in defined circumstances serve compelling purposes under the Fourteenth Amendment.

Depriving racial minorities of the right to seek the consideration of race in the university's admission system under *all* circumstances while allowing all others to seek any modification or departure or consideration under *any* circumstances is not the color-blind Constitution, nor still less, the Fourteenth Amendment. It is *inequality* that is prohibited by the Fourteenth Amendment.

3. The Ninth Circuit and the California Supreme Court have offered no valid reasons for depriving California's large black and enormous Latina/o communities of the right to fight for their children's ability to attend that state's leading universities.

The only precedents supporting the Petitioner's claims are the decisions of the Ninth Circuit and of the California Supreme Court sustaining Proposition 209. The Ninth Circuit, however, wrongly claims that Proposition 209 restates the requirements of the Fourteenth Amendment, while the California Supreme Court wrongly claims that the state has the right to revise the Fourteenth Amendment.

The Ninth Circuit rejected a challenge to all aspects of Proposition 209 on the stated grounds that "[t]he alleged 'equal protection' burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes." *Wilson*, at 708. The dissenting judges in the Sixth Circuit echoed the same claim by declaring that "…a state does not deny equal treatment by mandating it" or by declaring that the Sixth Circuit majority's decision is the "antithesis of the Equal Protection Clause." (Pet. App. 82a, 94a, Sutton, J., and Griffin, J., respectively, dissenting).

These statements are incorrect. The burdens imposed by Proposal 2 and Proposition 209 are *not* the same as those imposed by the Fourteenth Amendment. The Fourteenth Amendment requires a federal court to strictly scrutinize the consideration of race and to

approve it only when it was necessary to do so in order to further a compelling interest. *Fisher*, 133 S. Ct. at 2421. Proposal 2 and Proposition 209, however, declare that racial minorities may *never* ask the universities to consider race—no matter how compelling the need for it may be and no matter how absent the alternatives may be.

The dissenters and the Ninth Circuit panel also seek support for their claim that these proposals further the purposes of the Fourteenth Amendment in the strict scrutiny standard that this Court adopted. They claim that because "racially conscious admissions policies are subject to the most exacting judicial scrutiny," the states therefore have a license to essentially eliminate minority citizens' right even to propose that such plans be adopted. Pet. App. 63a (Gibbons, J, dissenting) and *Wilson*, 122 F. 3d at 708.

There is no basis for that assertion either. Strict scrutiny is a standard used by the federal courts to "smoke out" the illegitimate uses of race, *Grutter*, 539 U.S. at 326, not a license for state laws declaring that compelling interests do not exist and may not be addressed. The Ninth Circuit and the dissenters below have wrongly converted a standard used by the federal courts to supervise the use of race under a *Constitution that is not color-blind*, into a license for state action declaring that the Constitution is color-blind within that state's borders.

Unlike the Ninth Circuit, the Supreme Court of California explicitly stated that Proposition 209 intended to reverse this Court's decisions and to restore

what the California Court believed to be the proper interpretation of the Fourteenth Amendment:

> …the voters [of California] intended to reinstitute the interpretation of the [federal] Civil Rights Act and equal protection that predated …*Bakke*…viz., an interpretation reflecting the philosophy that 'however it is rationalized a preference to any group constitutes inherent inequality' [and that] preferences, for any purpose, are anathema to the very process of democracy.

Hi-Voltage Wire Works, Inc . v. City of San Jose, 24 Cal. 4th 537, 561 (2000)(Brown, J.).

If there is *any* power that the voters of California may not assert, however, it is the power to "reinstate" the interpretations of the Fourteenth Amendment that this Court has rejected. Similarly, if there is *any* power that the voters of California may not assert, it is the power to use *their* interpretation of the Constitution to limit the political rights that the Fourteenth Amendment *guarantees* to minority citizens.

The Fourteenth Amendment establishes a uniform *national definition of equality*, and it promises federal protection for the right to fight *through equal political procedures* for programs that are lawful *under that federal definition of equality.* If the theory of the color-blind Constitution is "inconsistent… with the history, meaning and reach of the Fourteenth Amendment," and if that theory may not serve as a "universal constitutional principle," then the state's-rights version of that theory cannot possibly serve as the universal

constitutional principle limiting the scope of the political equality protected by *Hunter* and *Seattle*. *Parents Involved*, 551 U.S. at 782, 788 (Kennedy, J., concurring).

D. The Petitioner has failed to show any other reason that this Court should overrule, limit or depart from *Hunter* and *Seattle* in order to sustain Proposal 2.

1. The determination of admissions standards is clearly part of the political process of the State of Michigan.

We respond briefly to three other arguments that the Petitioner has offered in support of his claim that Proposal 2 can limit the rights protected by *Hunter* and *Seattle*, and we then briefly outline the real effects that these proposals have had.

Like the dissenters below, the Petitioner claims that the Fourteenth Amendment does not apply to the process by which the University of Michigan adopts its admissions standards because three current or former admissions officers and one former Dean were unaware of the Regents' authority over admissions (Pet. Br., at 24-26; Pet. App. 72a-74a). Three successive constitutions of the State of Michigan, however, conferred *full* power over *all* of the operations on the Regents and on the other governing boards. Const 1850, art 13, secs. 6-8; MI Const 1908, art 11, sec. 3-5; MI Const 1963, art 8, sec. 5. The Michigan Supreme Court has held that the board of Regents is "the

highest form of juristic person known to the law…which, within the scope of its functions, is *coordinate with and equal to that of the legislature*." *Bd. of Regents of the Univ. of Michigan v. Attorney Gen.,* 167 Mich. 444, 450 (1911)(emphasis added). The testimony of four officials cannot take such authority away from the Regents or from the other governing boards.

Moreover, no party has produced any document demonstrating that the Regents or the other governing bodies have *ever* delegated final authority over admissions to any other body, including any faculty. Indeed, the Regents' current By-laws explicitly state: "The faculty of each school and college shall from time to time *recommend to the Board for approval*…requirements for admission and graduation." Bylaws of Univ. Of Michigan Regents, Sec. 5.03, *www.regents.umich.edu/bylaws/bylaws.pdf* (emphasis added). See also Bylaws of the MSU's Trustees, Arts. 7, 8, at http://trustees.msu.edu/bylaws/ http://trustees.msu.edu/bylaws/ index.html, and the Statutes of Wayne State's Board of Governors. WSU Statutes, 2.34.09, 2.34.12, at bog.wayne.edu/code.

Moreover, the Regents' have specifically asserted their plenary power over the admissions policies for minority students. The Regents first established affirmative action by a specific resolution applicable to all units (JA, 91-101). For decades thereafter, the Regents and the President modified the affirmative action programs (R. 222-16, R. 222-17, Rep. Dr. James Anderson, Page ID Nos. 4164-4197, 4420-4438). When those policies were challenged, the President and the Regents, not the faculties, were named as respondents

and defended those policies in this Court. See *Grutter* and *Gratz v. Bollinger,* 539 U.S. 244 (2003).

The Regents' power is so clear that there are no concerns here like the hypothetical ones that Justice Powell expressed in a footnote in his *Seattle* dissent. See *Seattle*, 458 U.S. at 498 n. 14 (Powell, J., dissenting). The Regents' constitutional authority, its By-laws and its practice make clear that no rogue faculty or admissions officers could implement an affirmative action plan and then claim that the Regents could not change it because that would involve a higher level of government.

The Regents have always had *full* power over admissions; Proposal 2 has stripped them of that power *only* in the areas of the admission of racial minorities. Only racial minorities must win a vote to amend the Constitution before they may even present their proposals to the Regents. The violation of *Hunter* and *Seattle* is presented here in an almost chemically-pure form.

2. The Court need not speculate on the intentions of the Michigan electorate because Proposal 2 employs an open racial classification.

The Petitioner asserts that this Court should sustain Proposal 2 unless the respondents can establish that "…racial discrimination was the only possible motivation behind the referendum results," which he says is not the case here because the electorate could have been motivated by the numerous purportedly beneficent motives that he lists. Pet. Br.,

at 14, citing *Arthur v. City of Toledo*, 782 F. 2d 565, 573 (6th Cir. 1986).

The claim that the Respondents must show the subjective motivations of the voters is simply a claim that *Hunter* and *Seattle* should be overruled because no one could ever show the subjective motivations of millions of citizens who cast secret ballots.

Alternatively, the Petitioner proposes that the courts determine after-the-fact whether a particular restriction on a racial minority's political rights was motivated by racial animus or by a good-faith belief in the nature of the restriction it enacted. But that opens the door to judicial second-guessing of motives and again converts a racial minority's *right* to propose lawful measures to lessen inequality into a privilege which the judiciary may withhold or confer based on *its* assessment of the voters' motives.

There is neither need nor justification for such standards here. Proposal 2 employs an open racial classification. As in *Hunter* and *Seattle*, the ostensibly neutral wording barely conceals the fact that in higher education, these proposals are solely aimed at proposals for racially-conscious admissions plans. In all their literature, the supporters of Proposition 209 and Proposal 2 have made that abundantly clear. As Justice Harlan said of the neutral wording of Louisiana's Jim Crow law, "no one [should] be so wanting in candor" as to assert that these proposals do "…not discriminate against either race, but prescribe a rule applicable alike to white and colored citizens," *Plessy*, at 556-557 (Harlan, J., dissenting).

In *Hunter* and in *Seattle*, this Court held that the burden on the political equality of racial minorities imposed by the amendments at issued carried a heavy presumption against them, a presumption that could only be overcome by showing a compelling reason for them. No such showing has been made or even attempted here. Proposal 2 violates the Fourteenth Amendment by denying core political rights to black, Latina/o and other minority citizens for no reason other than the racial majority's disagreement with the substance of the minority's lawful proposals.

3. The rapidly-changing demographic character of the nation requires the Court to follow not abandon the political equality guaranteed by *Hunter* and *Seattle*.

The Petitioner and others have suggested that the profound demographic change that is now occurring has rendered *Hunter* and *Seattle* obsolete. That assertion reveals a lack of knowledge about the history and the purpose of the Fourteenth Amendment.

In 1866, the 39th Congress's overriding concern was the ongoing legal and extra-legal attempts to deny equality in the eleven states of the Confederacy. According to the 1860 Census, however, slaves comprised nearly half the population in Alabama, Florida, Georgia, and Louisiana, and *more* than half of the population in Mississippi and South Carolina. *McDonald v. City of Chicago, Ill.*, ___ U.S. ___, 130 S.Ct. 3020, 3080 (2010)(Thomas, J., concurring). The 39th Congress thus understood that the need to protect

"minority" rights did not end when some arithmetic threshold was crossed.

For the same reasons, the need to protect the rights of racial "minorities" cannot be abandoned today. Many states, including Michigan, will probably never be "majority minority." In other states, where the population is or soon will be "majority minority," the electorate will be majority white for many years to come because of the age, citizenship and the economic status of Latina/os in particular. Finally, in every state, the wealthiest segments of the population, who exert such a disproportionate influence on the universities and on political life, will be majority white for far longer than that.

Especially in a period of great racial change, it is vital that the protections for minority rights contained in the Fourteenth Amendment and in *Hunter* and *Seattle* be maintained, not abandoned, especially in higher education which will exert such a profound influence on the nation and its leadership for many years to come.

4. The actual results of these proposals show that minority citizens have been deprived of the political right to prevent the re-segregation of higher education.

Grutter recognized that the nation's selective universities train a disproportionate share of the future leaders in all fields, and thus held that the nation had a vital interest in assuring that the path to those universities be kept "visibly open to talented and

qualified individuals of every race and ethnicity." *Id.*, 539 U.S. at 332.

According to all studies, however, that path is closing as those universities, which were first opened by affirmative action, are becoming *increasingly* re-segregated in the face of rising economic and racial inequality and the cutbacks on affirmative action:

> White students are increasingly concentrated, relative to population share, in the nation's 468 most well-funded, selective four year colleges and universities, while African American and Hispanic students are more and more concentrated in the 3,250 least well-funded, open-access, two-and four-year colleges."

Anthony P. Carnevale and Jeff Strohl, Separate and Unequal, at 7 (Georgetown Public Policy Institute: July 2013).

Proposal 2, Proposition 209, the four similar proposals in other states, and the similar proposals that would pass if this Court sustains Proposal 2 will close that path even further, thus vastly accelerating the re-segregation that is now occurring.

In Michigan, Proposal 2 has already shown the effects that such proposals will have. The number of black graduates from the state's public medical schools dropped from between 44 to 68 per year in 2004-2011 to only 27 in 2012. William C. Kidder, *Restructuring Higher Education Opportunity?*, at 2. By 2012, the percentage of black graduates at the University of Michigan Law School was the lowest it had been since

1969, while doctoral and master's degrees had declined to levels not seen in twenty years. *Id.*, at 1. There are similar effects in the undergraduate colleges, although precise data is not available in a form that is judicially noticeable because of the government-mandated change in 2009 in the way data on the racial nature of the student body had to be collected.

However, the University of California has collected data by a common system since the last affirmative action class in 1996. Its data shows the results of the forced experiment on a grand scale on what happens when selective schools cannot consider race in their admissions systems.

There are now almost no black students and only a few Latina/o students in the University of California's business and law schools. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, J.C. & U.L. 53 (2013). At the UC's world-famous colleges at Los Angeles and Berkeley, which serve as a gateway to the leading graduate and professional schools across the country, the admission of black students has fallen by one third to one half in the fifteen years from 1996 to 2011:

Percent of African Americans Among California Resident Admissions

Yr.	UC. Berkeley	UCLA
1996	6.0	7.1
2001	4.1	3.6
2006	3.6	2.1
2011	3.9	3.6

Source: www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf

There has effectively been a one-third fall in Latina/o admissions at UCLA and Berkeley, once the one third increase in the share of Latina/o students in that state's high-school graduating classes is taken into account:

Freshman Admissions of California Resident Chicano/Latina/o students

Yr.	UC Berkeley	UCLA	% Latina/os H.s. Grads.
1996	16.5	16.9	30.4
2001	12.5	12.7	32.9
2006	16.8	12.8	35.7
2011	17.2	17.3	40.1*

*2009 data. Actual percentage for 2011 is expected to be significantly higher but is not yet available.

Source: www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf (admission data); http://www.cpec.ca.gov/StudentData/EthSnapshotGraph.asp (California high school graduate data).

The University of California has adopted many programs to counter these trends, but the limits of those programs are shown in the data above.

If anything, the data understates the effects. The dramatic drops in the admission of black and Latina/o students means dreams dashed not only for those rejected, but for their families and for the communities whose best and brightest have effectively been told that they need not even apply.

The question in this case is not what admission policies should be adopted, *but rather whether some citizens can be excluded from the process by which those standards are adopted.* In Michigan, two million black and Latina/o residents are now prevented from presenting those proposals that are essential if their children are to attend the state's best universities. In California, 2.5 million black residents and 14.5 million Latina/o residents are prevented from even presenting those same proposals.

The country is becoming majority minority at the same time that the selective universities are becoming increasingly segregated. Over time, those trends will create a new form of separate and unequal. As the history of the South shows, political systems that

exclude huge numbers of citizens from the political process are neither democratic nor stable. In the face of the greatest demographic change in our history, we cannot again make the mistake of allowing the wholesale exclusion of millions of citizens from the political process.

Hunter, *Seattle*, and the Fourteenth Amendment guarantee to minority citizens equal rights in the procedures by which the government establishes its own policies. Above all, that is crucial for those great avenues of opportunity named the University of Michigan and the University of California. Proposal 2 and Proposition 209 have deprived minority citizens of the political means through which they could present proposals to gain access to those universities for significant numbers of minority students. This Court should strike down Proposal 2 in higher education because denying minority citizens the right to fight for their future and for the future of this country violates the most fundamental principles of the Fourteenth Amendment.

II. PROPOSAL TWO VIOLATES THE EQUAL PROTECTION CLAUSE BY SELECTIVELY PROHIBITING THE UNIVERSITIES FROM ATTEMPTS TO ASSURE OPPORTUNITY AND TO ACHIEVE DIVERSITY ONLY IN THE AREAS OF RACE OR GENDER.

Just as the states once barred minority students and women from their public universities, *United States v. Virginia*, 518 U.S. 515 (1996), Proposal 2 has now enacted special substantive standards and judicial remedies to regulate the admissions of those two

categories of students. In reality, Proposal 2's ban on "preferential treatment" applies only to the admissions of those students, as does the special cause of action that it has enacted. MI Const 1963, art. 1, sec. 26. The Michigan Constitution does *not* prevent "preferences," however that term may be defined, and has never prohibited "preferences" for any other groups of applicants.

Similarly, for the first time in Michigan history, Proposal 2 has created a cause of action through which opponents of affirmative action may seek damages and injunctive relief if they believe that the universities have granted "preferential treatment" to minority applicants or to women. MI Const. 1963, art. 1, sec. 26(6), (7); MCL 37.2801. No constitutional provision or statute has ever before authorized private actions to challenge the admission of any other groups of students.

Proposal 2's substantive limit and the private right of action that it created are absolutely selective. Proposal 2 not only violates, but defies, Justice Jackson's declaration that there is "…no more effective practical guaranty against arbitrary and unreasonable government [action] than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949)(Jackson, J., concurring).

Proposal 2's ban on "preferences" has already led the universities to abandon the explicit consideration of race and gender which has resulted in the sharp drop in the admissions of black and Latina/o students

described above. Moreover, far from decreasing stigma, as the supporters of these Proposals claimed they would do, Proposal 2 and Proposition 209 have provided legal sanction to the charges of inferiority by declaring that all minority applicants must be specially scrutinized to ensure that they merit admission and by declaring that the admissions officials cannot be trusted to make those decisions without the special supervision by the state courts. The charge of "preferences" has become the charge of "illegal preferences," the stigma continues, and the hunt for various allegedly disguised "preferences" proceeds.

Thus, after Proposition 209 resulted in an entering class of 4,000 at UCLA that had only 25 black men who were not scholarship athletes, the UCLA adopted "holistic" admissions—and the opponents threatened lawsuits for granting preferences in violation of Proposition 209. David Leonhardt, "The New Affirmative Action," New York Times, Sept. 30, 2007.

Similarly, when an opponent of affirmative action learned that admissions officials at UCLA had read an applicant's essay in which she referred to her Latina heritage, he leveled the charge of preferential treatment in violation of Proposition 209. Tim Groseclose, "Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Coverup," available at mages.ocregister.com/newsimages/news/2008/08/CUARSGrosecloseResignationReport.pdf (last visited October 24, 2011).

Neither Proposal 2 nor Proposition 209 define what they mean by "preferential treatment," leaving that task to the state courts under state standards. As this

Court has held, however, the courts lack standards by which they can evaluate the substance of academic decisions, and judicial attempts to formulate such standards endanger the university's interest, recognized by the First Amendment, "…to determine for itself on academic grounds …who may be admitted to study." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985), citing *Bakke*, 438 U.S. at 312 (Powell, J.). Even more importantly, because this particular law limits the admission of racial minorities and women, it endangers the students' and the nation's paramount interest under the Fourteenth Amendment in assuring that the path to leadership remains open to qualified students of all races and genders. *Grutter*, 539 U.S. at 331-332.

The proposed definition of "preference" offered by the proponents of Proposal 2 and Proposition 209 increases the dangers and makes clear the double standard that is at the heart of these proposals. Ward Connerly defined "preferential treatment" as the admission of black, Latina/o and other minority applicants with lower grades and test scores than rejected white applicants. Connerly, *Creating Equal*, at 121-124, 134. Barbara Grutter used the same definition before this Court, *Grutter*, at 320-321, and the main campaign statement in support of Proposal 2 used the same definition to proclaim that the University of Michigan had given "preferential treatment" to minority applicants. Althea K. Nagai, Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan, 1 (Center for Equal Opportunity, 2006).

Even as admissions criteria, however, the grade-test score criteria have never been accepted as neutral measures of merit or fitness. The inventor of the SAT test later repudiated it because he recognized that the test measured many variables, "…including schooling, family background, familiarity with English, and everything else, relevant and irrelevant." Nicolas Lemann, *The Big Test*, 34 (Farrar, Straus and Giroux, NY, 1999). Similarly, from the 1930s forward college officials have engaged in an "endless debate over whether intelligence test scores, high school average, or some other indicator best predicted success in college." Wechsler, at 247-248.

The debate over whether and to what degree the tests reflect educational inequality or undervalue the educational achievements of minority students has not ended and will probably never end. See, e.g, William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055, 1073-1081 (2001). For minority and women applicants alone, however, Proposal 2 has transferred that debate from the admissions offices and university governing bodies, where it belongs, to the courts, where it does not belong.

Finally, the proponents' proposed grade/test score definition of "preferential treatment" makes concrete the double standard that is inherent in Proposal 2's selective ban on "preferential treatment." Thus, the University of Michigan can and does take account of the fact that applicants from the highest income group scored about 100 points higher on the SAT test than those from the lowest income group and that applicants

whose parents had a college degree scored 130 points higher than those whose parents lacked a high school diploma (JA, 198-199). Without fear of a lawsuit, the University of Michigan requires its admissions officials to assess the applicants' grade point average and test scores in light of parental income, parental education and similar factors (JA, 301).

Proposal 2, however, flatly prohibits the University from doing the same for black, Latina/o and other minority students even if it acts in complete compliance with *Grutter* and *Fisher*. It requires the University to ignore racial inequality and to do nothing special to assure opportunity for minority students. The existing conditions make clear, however, that special programs are far more necessary to assure opportunity and diversity by race than they are by class.

Taking Michigan as an example, Dr. Gary Orfield described why that is so. Two-thirds of Michigan's black students attend schools where 90 percent or more of the students are black or Latina/o. Those schools are centers of concentrated poverty unlike that present in any school serving poor white students anywhere in the country. As vividly described by Dr. Orfield—and as can be seen by anyone who simply inspects segregated, inner-city schools—the education these schools provide is distinctly separate and unequal:

> …There are many fewer teachers who choose to go work in schools of this sort. Most teachers who start in schools that are segregated leave faster. The curriculum that is offered is more limited. The probability that the teacher will be trained in their field is much more limited. The

> level of competition is less. The respect for the institution on the outside world is less. The connections to colleges are less. There are more children with health problems… The population is much more unstable. Many segregated schools have a vast turnover of students every year and there's tremendous instability as far as students go and faculty go. It's a different world in every respect.

JA, 116-117; 123-125.

But it is not only those schools where racial inequality prevails. One third of Michigan's black students has escaped from those schools and attends one of a few urban magnet schools or a suburban school that has some degree of integration. The magnet schools are the pride of the cities in which they exist, and they offer students a chance to gain admission to a school like the University of Michigan. The magnet schools do not, however, provide a range of courses and experiences that are equal to those of the better suburban districts (JA, 147-149).

Similarly, the suburban schools that black students attend provide many with a chance of going to a school like Michigan, but nowhere near an equal chance. Many of those suburban schools are in the process of being re-segregated, with the educational opportunities declining at the same time as the black students arrive (JA 126, 128-131, 149-150). Even in those few stable, integrated schools that the most fortunate black students attend, the black students face isolation and sometimes hostility as well as tracking and stereotypes

that can profoundly affect the education that they receive (JA, 128-129).

Nor is education the only arena in which black students face inequality. Even taking the middle classes, from which the Universities draw most of their students of all races, the black middle-class family has on average less educational history, less wealth, and less residential stability than a white family with similar income—and it is more likely to be headed by single parent and more likely to be affected by the tragedies that disproportionately arise in the urban centers (JA, 127).

Michigan's Latina/o students, who are fewer in number than black students, face *all* of those difficulties *plus*, in many cases, the inequalities caused by differences in language and in citizenship rights (JA, 140-141).

These inequalities necessarily translate into differences as measured by adjusted grade point averages and standardized test scores. Thus, on the SAT tests conducted the year that Proposal 2 went into effect, white test takers had about a 100 point advantage over black test takers on all three components of the SAT test and a 75 point advantage over Mexican Americans test-takers on those same components (JA, 185-186, 192, 194).

If those disparities appear comparable to those caused by income, the appearance is misleading because the Educational Testing Service does not provide data by race and income. Bob Laird, the former admissions director at the University of

California at Berkeley, and Ward Connerly agree, however, that the vast data compiled by the University of California show that white students from the lowest income brackets had mean test scores that were above those of black and Chicano students from the highest income brackets (JA, 174; R. 222-2, Dep. of Connerly, 101-102, Page ID 4224).

These facts reveal the double standard that is at the heart of Proposal 2. The University may consider income and numerous associated factors in order to assure opportunity for students whose parents had a lower income, but even if the University complies with every requirement of the Fourteenth Amendment, it cannot use the same means to assure opportunity for black or Latina/o students.

Far from being a law to promote equality, Proposal 2 is a special law that denies opportunity to black and Latina/o students. Where the Black Codes once made it unlawful for black citizens to "pursu[e] certain occupations or professions (e.g. skilled artisans, merchants, physicians…," *Goodman v. Lukens Steel*, 482 U.S. 656, 672-673 (1987), Proposal 2 makes it far more difficult for black citizens to enter law, medicine and other professions because they can no longer obtain the training that will enable them to enter those professions.

The State and its electorate may regulate the universities that they have established, but they must do so by constitutionally-valid means. If Michigan had adopted a law that required all admissions to be by "merit"—however elusive a definition of that term is—the selective aspect of Proposal 2 would at least be

gone. Michigan, however, could not do that because of the educational disaster and the political firestorm that would result. If, however, Michigan is not willing to ban all the special programs and considerations that it has adopted, it cannot impose a *selective*, judicially-enforceable and absolutely undefined ban on "preferential treatment" for black, Latina/o and other minority students and, as to particular programs, for women as well.

The universities may, or may not, adopt particular programs on educational grounds. This law, however, allows Michigan's public universities to take special steps to provide opportunities for everyone *except* racial minorities and to achieve diversity in every way *except* racial diversity. The *selective* nature of the substantive ban on "preferential treatment" and the private right of action to enforce that ban betray what the Fourteenth Amendment has stood for since the day it was ratified 145 years ago, and, for that reason, this Court should strike down Proposal 2 in higher education.

CONCLUSION

For the reasons stated, the Coalition plaintiffs ask this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit striking down Article 1, Section 26 of the 1963 Constitution of the State of Michigan in higher education because it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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