No. 12-682

In the

Supreme Court of the United States

BILL SCHUETTE, Michigan Attorney General,
Petitioner,

v.

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

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS FOUNDATION, WARD CONNERLY, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

MERIEM L. HUBBARD
RALPH W. KASARDA*
JOSHUA P. THOMPSON
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mlh@pacificlegal.org
E-mail: rwk@pacificlegal.org
E-mail: jpt@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, American Civil Rights Foundation, Ward Connerly, and Center for Equal Opportunity

QUESTION PRESENTED

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE PETITION 6

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT AND OF TWO STATE SUPREME COURTS ON AN IMPORTANT MATTER OF CONSTITUTIONAL LAW 6

A. In *Coalition for Economic Equity v. Wilson,* the Ninth Circuit Upheld a California Voter Initiative Practically Identical to the Michigan Initiative Invalidated by the Sixth Circuit 6

B. In 2012, the Ninth Circuit Rejected Another Political Restructuring Challenge to Proposition 209 in *Coalition to Defend Affirmative Action v. Brown* 11

C. The Sixth Circuit's Decision Directly Conflicts with the California Supreme Court's Decision in *Coral Construction v. City & County of San Francisco* 13

TABLE OF CONTENTS—Continued

Page

D. The Sixth Circuit's Decision Conflicts with the Louisiana Supreme Court's Decision in *Louisiana Associated General Contractors, Inc. v. State of Louisiana* 15

II. THE SIXTH CIRCUIT'S DECISION PREVENTS MICHIGAN VOTERS FROM ENFORCING THE SAME UNIFORM STATEWIDE BAN ON RACIAL DISCRIMINATION AND PREFERENCES THAT HAS BEEN PASSED AND UPHELD IN OTHER STATES 19

A. The Sixth Circuit's Decision Prevents Michigan Voters from Enforcing Their Constitutional Amendment, While Voters in Other States Enforce Nearly Identical Amendments 19

B. The Sixth Circuit's Decision Conflicts with Other State Actions Prohibiting Racial Preferences in College Admissions 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 1

Associated General Contractors of California v. San Francisco Unified School District,
616 F.2d 1381 (9th Cir.), *cert. denied*,
449 U.S. 1061 (1980) 17

Becker v. Wash. State Univ., 266 P.3d 893
(Wash. Ct. App. 2011) 20

C&C Construction, Inc. v. Sacramento Mun. Util. Dist., 122 Cal. App 4th 284 (Cal. 2004) 11

Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*,
522 U.S. 963 (1997) 2, 7-11, 14-15

Coal. to Defend Affirmative Action v. Granholm,
473 F.3d 237 (6th Cir. 2006) 3

Coal. to Defend Affirmative Action v. Granholm,
501 F.3d 775 (6th Cir. 2007) 2, 7

Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.,
__ F.3d __ (6th Cir. 2012), 2012 U.S. App. LEXIS 23443 . . . . . 2-3, 6, 8, 10, 23

Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.,
652 F.3d 607 (6th Cir. 2011) 3

TABLE OF AUTHORITIES—Continued

Page

Coalition to Defend Affirmative Action v. Schwarzenneger, No. 10-641 SC, 2010 U.S. Dist. LEXIS 129736 (N.D. Cal. Dec. 8, 2010), *aff'd*, *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), *reh'g, reh'g en banc denied*, No. 11-15100 (9th Cir. May 11, 2012) 1-2, 4, 12

Coral Construction, Inc. v. City & County of San Francisco, 235 P.3d 947 (Cal. 2010) 2, 4, 11, 13-15

Crawford v. Huntington Beach Union High Sch. Dist., 98 Cal. App. 4th 1275 (Cal. 2002) 11

Dumont v. City of Seattle, 200 P.3d 764 (Wash. Ct. App. 2009) 20

Fisher v. Univ. of Texas at Austin, 631 F.3d 213 (5th Cir. 2011) 3

Gratz v. Bollinger, 539 U.S. 244 (2003) 1

Grutter v. Bollinger, 539 U.S. 306 (2003) 1, 3, 12

Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000) 11

Hunter v. Erickson, 393 U.S. 385 (1969) 4, 9-10, 19

Louisiana Associated General Contractors, Inc. v. Louisiana, 669 So. 2d 1185 (La. 1996) . . . 5, 15-17

TABLE OF AUTHORITIES—Continued

Page

NAACP v. Fla. Bd. of Regents, 822 So. 2d 1 (Fla. Dist. Ct. App. 2002), *quashed, remanded on standing issues*, 863 So. 2d 294 (Fla. 2003), *dismissed on mootness*, 876 So. 2d 636 (Fla. Dist. Ct. App. 2004) 23

Nebraska v. Henderson, 762 N.W.2d 1 (Neb.), *cert. denied*, 557 U.S. 921 (2009) 20

Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) 1

Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 72 P.3d 151 (Wash. 2003) 20

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 1, 18

Sibley v. Board of Supervisors of Louisiana State University, 477 So. 2d 1094 (La. 1985) 16

Smith v. Univ. of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) 20

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 4, 10

State Constitutions

Ariz. Const. art. II, § 36 (2012) 21

Cal. Const. art. I, § 31 1

§ 31(a) 7, 9, 15

§ 31(f) 7

Fla. Const. art. XI, § 5(d) 23

TABLE OF AUTHORITIES—Continued

Page

La. Const. art. I, § 3 15

Mich. Const. art. I, § 26 . . . . 1-2, 4-5, 8-9, 13, 18, 23

Neb. Const. art. I, § 30 (2012) 20

Okla. Const. art. II, § 36A (2012) 21

Federal Statute

42 U.S.C. § 1981 18

State Statutes

N.H. Rev. Stat. Ann. § 21-I:52 (2012) 22

Wash. Rev. Code § 49.60.400(1) 20

Supreme Court Rules

R. 10 4

R. 10(a) 4-5, 13

R. 37.2 1

R. 37.2(a) 1

R. 37.6 1

R. 7.2 1

Miscellaneous

Crawford, Curtis, *Does Title VI of the 1964 Civil Rights Act Permit Racial Preference in Admissions by a University Receiving Federal Funds*, *available at* http://www.debatingracialpreference.org/BAKKE-Brennan+Rebuttal.htm 18

Florida Executive Order 99-281 (1999) 23

TABLE OF AUTHORITIES—Continued

Page

Graglia, Lino A., *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 Suffolk U. L. Rev. 569 (1988) 18

H.B. 623, 162d Leg. (N.H. 2011) 22

Hargrave, Lee, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 6 (1974) 15

U.S. Census Bureau, *available at* http://2010.census.gov/2010census/#/panel-1 (last visited Dec. 18, 2012) 21

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), American Civil Rights Foundation (ACRF), Ward Connerly, and Center for Equal Opportunity (CEO) respectfully submit this brief amicus curiae, in support of Petitioner, Bill Schuette, Michigan Attorney General.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases involving discrimination on the basis of race, including *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF attorneys have been involved in every Equal Protection Clause challenge to Article I, § 31 (Proposition 209), of the California Constitution, the sister initiative to Article I, § 26 (Proposal 2), to the Michigan Constitution. *See, e.g.*, *Coalition to Defend Affirmative Action v. Schwarzenneger*, No. 10-641 SC,

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

2010 U.S. Dist. LEXIS 129736 (N.D. Cal. Dec. 8, 2010), *aff'd*, *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), *reh'g, reh'g en banc denied*, No. 11-15100 (9th Cir. May 11, 2012) (*Brown*); *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996) (*Wilson I*), *rev'd*, 122 F.3d 692 (9th Cir. 1997) (*Wilson II*), *cert. denied*, 522 U.S. 963 (1997); *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947 (Cal. 2010).

ACRF is a nonprofit public benefit corporation, with members nationwide, including in Michigan, created to monitor and enforce laws that preclude the use of race, sex, or ethnicity in public contracting, public education, or public employment. Ward Connerly, a coauthor and sponsor of Proposal 2, which became Article I, § 26, to the Michigan Constitution (Proposal 2 or § 26), is a member of the Board of Directors of ACRF and President of the American Civil Rights Institute. He was chairman of the California Civil Rights Initiative Campaign which officially supported the California Civil Rights Initiative, Proposition 209, the progenitor of Proposal 2.

The Sixth Circuit recognized Ward Connerly's and ACRF's significant interest in defending Proposal 2 in several decisions below. *See Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, __ F.3d __ (6th Cir. 2012), 2012 U.S. App. LEXIS 23443, at *6 (*Coalition II*) ("Ward Connerly, a former University of California Regent who had championed a similar proposition in California . . . mobilized to place" Proposal 2 on Michigan's November, 2006, statewide ballot.); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007) (citation omitted) ("It would not be unreasonable to posit that

[Proposal 2] would not have reached the ballot without their efforts."). ACRF continues to defend Proposal 2 as amicus curiae. ACRF filed a brief amicus curiae at the district court in *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006), to support motions to dismiss and/or for summary judgment on January 18, 2008; in the Sixth Circuit where the decision was reversed, *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (*Coalition I*); and on rehearing *en banc.*, *Coalition II*.

CEO is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. It educates the American public about the prevalence of discrimination in American society. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. CEO has participated as amicus curiae in numerous cases relevant to the issues raised here, including *Coalition II*, 2012 U.S. App. LEXIS 23443; *Grutter*, 539 U.S. 306, and *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

Amici curiae consider this case to be of special significance in that it concerns the ability of voters to embrace color-blind policies and end, once and for all, state sponsored discrimination and racial classifications. Amici respectfully request that this Court grant the petition of the Michigan Attorney General for writ of certiorari, and reverse the decision of the Sixth Circuit in *Coalition II*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Few petitions for writ of certiorari concern a case as worthy of review as the one filed in this matter. Compelling reasons exist to justify review in this case that satisfy several factors listed in Supreme Court Rule 10, Considerations Governing Review on Certiorari. First, the Sixth Circuit's decision below invalidating § 26 under equal protection grounds, created an irreconcilable split in the circuits, implicating Rule 10(a). The Sixth Circuit's decision conflicts with two Ninth Circuit decisions on the same important matter, specifically, the correct application of the "political structure" equal protection theory articulated by this Court in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). In *Wilson II*, the Ninth Circuit upheld an amendment to California's Constitution, nearly identical to § 26, against an equal protection political restructuring challenge. This Court denied the challengers' petition for writ of certiorari in *Wilson II*. Recently, in *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, the Ninth Circuit affirmed the dismissal of an as-applied equal protection political restructuring challenge to California's prohibition of race-conscious college admission policies.

Second, in holding that Michigan may not amend its constitution to adopt a race neutral policy with respect to education, the Sixth Circuit decided an important federal question in a way that conflicts with decisions by the California and Louisiana supreme courts. In *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947, the California Supreme

Court held that California's statewide ban on discrimination and preferences does not violate the federal Equal Protection Clause under a political restructuring analysis. In *Louisiana Associated General Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996), the Louisiana Supreme Court held that a constitutional ban on race-conscious affirmative action does not violate the federal Equal Protection Clause. Thus, review is further warranted under Supreme Court Rule 10(a), because the Sixth Circuit's decision, with far reaching implications, conflicts with decisions of two state courts of last resort.

Finally, the Sixth Circuit's decision is likely to lead to further conflict with additional state and federal court decisions because voter initiatives prohibiting discrimination and preferences based on race in public education have passed and become law in four states besides Michigan and California: Washington (1998), Nebraska (2008), Arizona (2010), and Oklahoma (2012). Two other states have adopted a statewide position of strict racial neutrality by legislation and executive order. The New Hampshire legislature outlawed racial preferences in public college admissions in 2011, and Florida banned racial preferences in the state's higher education admission decisions by executive order in 1999.

Review is needed to resolve issues of constitutional law and public policy that are of national importance as our society becomes increasingly multi-racial. Amici respectfully request that the Court grant the petition, reverse the decision of the Sixth Circuit below, and hold that Article I, § 26, of the Michigan Constitution does not violate the Equal Protection Clause by prohibiting race- and sex-based

discrimination or preferential treatment in public university admissions decisions.

REASONS FOR GRANTING THE PETITION

I

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT AND OF TWO STATE SUPREME COURTS ON AN IMPORTANT MATTER OF CONSTITUTIONAL LAW

The critically important issue at the heart of this matter is whether states may adopt a position of strict racial neutrality in areas of public education, employment, and contracting. The Ninth Circuit and the supreme courts of California and Louisiana all say yes. But the Sixth Circuit says no, holding that the Fourteenth Amendment gives racial groups the right to pursue racial preferences. *Coalition II*, 2012 U.S. App. LEXIS 23443, at *24 n.2, *54. The Court should grant the petition to resolve the conflict about whether states may implement a uniform ban on discrimination and preferences, thereby affording their citizens greater protection than that provided by the Fourteenth Amendment.

A. In *Coalition for Economic Equity v. Wilson,* the Ninth Circuit Upheld a California Voter Initiative Practically Identical to the Michigan Initiative Invalidated by the Sixth Circuit

On November 5, 1996, California voters passed the California Civil Rights Initiative "Proposition 209" by 55% of the vote, amending the California

Constitution to prohibit the state and its subdivisions from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public contracting, and public education. Cal. Const. art. I, § 31(a). Proposition 209 defines "state" to include the public university system. Cal. Const. art. I, § 31(f). As the Sixth Circuit correctly observed, Proposal 2 and Proposition 209 are nearly identical: "Indeed, by design, Proposal 2 tracks the language of Proposition 209." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d at 780.

Upon passage of Proposition 209, proponents of racial preferences filed a lawsuit against the California Governor, the State Attorney General, and the University of California President, among others, because the university had taken steps "to discontinue the use of race and gender preferences in admissions." *Wilson I*, 946 F. Supp. at 1495, 1510 n.35. In their 1996 complaint for declaratory and injunctive relief, the plaintiffs invoked the "political structure" equal protection theory articulated by this Court in *Hunter,* and advanced in *Seattle*. Plaintiffs argued that Proposition 209 restructured the political process by erecting unique political hurdles for those seeking legislation intended to benefit women and minorities.[2] *Wilson I*, 946 F. Supp. at 1489-90.

---

[2] Plaintiffs in *Wilson* also alleged that Proposition 209 violated the Supremacy Clause with respect to Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. *Wilson I*, 946 F. Supp. at 1489-90. The Ninth Circuit rejected these claims. *Wilson II*, 122 F.3d at 709-11.

Wilson II examined whether Proposition 209 would restructure the political process as applied to race-conscious affirmative action programs in public contracting, public employment, and all levels of public education. *Wilson II* reviewed de novo *Wilson I's* findings, *Wilson II*, 122 F.3d at 701, which specifically included plaintiffs' claims that Proposition 209's prohibition on racial preferences would affect college admissions. *Id*. at 698.

Unlike the Sixth Circuit's analysis of § 26 in the decision below, the Ninth Circuit analyzed Proposition 209 under both a "conventional" equal protection analysis, and a "political structure" equal protection analysis. *Compare id*. at 701-02 (Ninth Circuit's "conventional" equal protection analysis), *and id*. at 703-09 (Ninth Circuit's "political structure" analysis), *with Coalition II*, 2012 U.S. App. LEXIS 23443, at *59-60 (Sixth Circuit foregoing "traditional" equal protection analysis). In its conventional equal protection analysis, *Wilson II* found that the language of Proposition 209 makes no racial classifications. "A law that prohibits the State from classifying individuals by race or gender a fortiori does not classify individuals by race or gender." 122 F. 3d. at 702. In fact, the Ninth Circuit questioned whether such a claim could even seriously be made given Proposition 209's blanket prohibition on discrimination and preferences based upon race:

> Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal

> Protection Clause teeters on the brink of incoherence.

Wilson II, 122 F.3d at 702. Plaintiffs' "conventional" equal protection claim was soundly rejected.

The Ninth Circuit then held that Proposition 209's uniform, statewide ban on racial discrimination and racial preferences does not alter the structure of government in violation of *Hunter* or *Seattle*. The court distinguished Proposition 209 from the measures invalidated in *Hunter* and *Seattle*. *Wilson II*, 122 F.3d at 701, 703-09. Those measures discriminated on the basis of race, while Proposition 209—and so, too, its sister amendment in Michigan, Proposal 2—commands equal treatment by prohibiting both discrimination and preferences on the basis of race. Cal. Const. art. I, § 31(a); *see* Mich. Const. art I, § 26 (same).

The voter referendum in *Hunter* not only repealed an antidiscrimination housing ordinance, but expressly provided that any such measure in the future had to be approved by the voters. This Court consistently described that repeal as one that burdened "those groups who sought the law's protection against racial, religious, or ancestral discriminations." 393 U.S. at 390. *See also id.* (the law burdened those "who sought protection against racial bias"); *id*. ("[o]nly laws to end housing discrimination" were implicated by the offending ordinance); *id.* at 391 (the offending ordinance "disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations"). The charter amendment invalidated in *Hunter* thus discriminated against racial minorities by placing a special burden on them in their efforts to enact antidiscrimination housing laws. *Hunter*,

393 U.S. at 390-91. The effect of the restructuring—restructuring that was explicit in the challenged amendment—was to make it more difficult for minorities "to obtain protection against unequal treatment in the housing market." *Wilson II*, 122 F.3d at 707. The Sixth Circuit's decision in *Coalition II* omits this analysis of the challenged measure in *Hunter*. *Coalition II*, 2012 U.S. App. LEXIS 23443, at *49-50.

In *Seattle*, this Court relied upon *Hunter* to invalidate a state initiative that banned mandatory busing to desegregate schools. "[D]espite [the initiative's] facial neutrality there [was] little doubt that the initiative was effectively drawn for racial purposes." *Seattle*, 458 U.S. at 471. *Seattle* placed great weight on the fact that the "District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing." 458 U.S. at 471; *see also id.* (noting that the offending law "was enacted because of, not merely in spite of, its adverse effects upon busing for integration (internal quotations omitted)); *id.* at 474 (noting that the offending law burdened those seeking "elimination of de facto school segregation"). The Sixth Circuit claims the busing program repealed by the challenged measure in *Seattle* had a "preferential nature." *Coalition II*, 2012 U.S. App. LEXIS 23443, at *49-50. But the Ninth Circuit held that "[i]n *Seattle*, the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education." *Wilson II*, 122 F.3d at 707. Thus, to reconcile the *Hunter* and *Seattle* decisions with the Equal Protection Clause, the Ninth Circuit interprets those cases as invalidating measures that place burdens in the way of

minorities seeking protection against discrimination and equal treatment—not preferences.

Wilson II held that Proposition 209 does not impede protection against discrimination, but rather prohibits preferential treatment. *Wilson II*, 122 F.3d at 708. "The controlling words, we must remember, are 'equal' and 'protection.' " *Id.* Thus, the Ninth Circuit held that Proposition 209 is constitutional in all respects, including as applied to college admissions, because a prohibition on racial preferences does not offend the Constitution. *Id.* at 701. The Constitution itself "erects obstructions to preferential treatment by its own terms." *Id.* at 708. California appellate courts have applied Proposition 209 to numerous government programs since the Ninth Circuit decision.[3]

B. In 2012, the Ninth Circuit Rejected Another Political Restructuring Challenge to Proposition 209 in *Coalition to Defend Affirmative Action v. Brown*

The Sixth Circuit's decision below also conflicts with a recent Ninth Circuit decision that affirmed the holding of *Wilson II*. In 2010, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary filed a complaint in the District Court for the Northern District of California, alleging the same claims as those

---

[3] For example, declaratory judgments and permanent injunctions have issued against government agencies in *Coral Construction*, 235 P.3d 947; *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000); *C&C Construction, Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App 4th 284 (Cal. 2004); and *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (Cal. 2002).

dismissed in *Wilson II*. *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d at 1135. The plaintiffs argued that Proposition 209 is unconstitutional under a conventional equal protection analysis and a political restructuring analysis as applied to the repeal of race-conscious University of California admissions policies. *Id*. In affirming the decision of the district court that dismissed these newer claims, the Ninth Circuit noted that, "[o]ur prior decision in *Wilson II* dealt with and rejected both of these arguments." *Id.*

In an attempt to avoid *Wilson II*'s binding precedent, plaintiffs in *Brown* argued that *Wilson II* is irreconcilable with *Grutter*, 539 U.S. at 325, which held that a diverse student body is a compelling state interest and that the Constitution permits narrowly tailored race-based admission policies. The Ninth Circuit disagreed, finding that *Wilson II* and *Grutter*, are easily reconciled. *Brown*, 674 F.3d at 1135-36. In *Grutter*, this Court cited to race-neutral alternatives used by "'Universities in California, Florida and Washington state, where racial preferences are prohibited by state law.'" *Id*. at 1136 (quoting *Grutter*, 539 U.S. at 342). Because *Grutter* spoke only to whether race-based affirmative action programs are permitted, and not to whether they can be prohibited as was the case in *Wilson II*, "it is impossible to hold that *Grutter* overrules *Wilson II.*" *Id*.

The Ninth Circuit in *Wilson II* and *Brown*, and the Sixth Circuit in *Coalition II*, examined identical state initiatives under a *Hunter* and *Seattle* equal protection political structure analysis, but reached opposite conclusions. As a result, in the jurisdiction of the Ninth Circuit, which includes the states of Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon,

and Washington, the citizens of each state are free to amend their state constitutions to adopt policies of strict racial neutrality in the areas of public education, employment, and contracting. But voters in states within the jurisdiction of the Sixth Circuit, which includes Kentucky, Michigan, Ohio, and Tennessee, may not.

C. The Sixth Circuit's Decision Directly Conflicts with the California Supreme Court's Decision in *Coral Construction v. City & County of San Francisco*

The conflict between the federal circuits is not the only justification for review in this case under Supreme Court Rule 10(a). The Sixth Circuit's decision invalidating § 26 also conflicts with the decision of the California Supreme Court in *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947. *Coral Construction* involved a challenge to a local ordinance that required the City and County of San Francisco (San Francisco) to grant race- and sex-based preferences in the operation of public contracting to minority-owned business enterprises and women-owned business enterprises. Construction companies not entitled to San Francisco's racial preferences challenged the ordinance as violating Proposition 209. Resorting to the same arguments used by the plaintiffs in *Wilson II*, and in *Coalition II* with respect to § 26, San Francisco claimed Proposition 209 was unconstitutional under the *Hunter* and *Seattle* political structure doctrine. *Coral Construction*, 235 P.3d at 956. In 2010, the California Supreme Court "exercising [its] independent judgment on the matter," concluded in a 6-1 decision that Proposition 209 does

not violate the Equal Protection Clause under a political structure analysis. *Coral Construction*, 235 P.3d at 959.

In *Coral Construction*, San Francisco argued that with the passage of Proposition 209, minority groups seeking race- or gender-based preferences in public education, employment, and contracting must first overcome the obstacle of amending the state constitution, while groups that seek preferences on other bases (e.g., disability or veteran status) need not. *Coral Construction*, 235 P.3d at 958. The court, according "great weight" to the Ninth Circuit's decision in *Wilson II*, found that the "political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender, and other similar classifications." *Coral Construction*, 235 P.3d at 958 (citing *Wilson II*, 122 F.3d at 708-09). The court found nothing in *Hunter* or *Seattle* that defined "beneficial legislation" to include race- or gender-based preferences. *Coral Construction*, 235 P.3d at 959. Following the Ninth Circuit's decision in *Wilson II*, the court held: "'Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment.'" *Id.* at 960 (quoting *Wilson II*, 122 F.3d at 707). But instead of burdening the right to equal treatment, the court concluded that Proposition 209 directly serves the principle that "all governmental use of race must have a logical end point." *Coral Construction*, 235 P.3d at 960.

Thus, the California Supreme Court stands with the Ninth Circuit in holding that the political structure doctrine does not invalidate a state's constitutional provision which declares that the state, including its

political subdivisions, "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a); *Coral Construction*, 235 P.3d at 953.

D. The Sixth Circuit's Decision Conflicts with the Louisiana Supreme Court's Decision in *Louisiana Associated General Contractors, Inc. v. State of Louisiana*

The Sixth Circuit's decision also merits review because it conflicts with the Louisiana Supreme Court's decision in *Louisiana Associated General Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (*La. AGC*), to the extent it prevents the State of Michigan from amending its constitution to ban all forms of government racial discrimination.

Louisiana's current constitution was adopted at a constitutional convention in 1974, and ratified by the voters of Louisiana on April 20, 1974. The Louisiana equal protection clause does not contain the same language as the federal Equal Protection Clause. Article I, § 3, of the Louisiana Constitution provides in pertinent part that "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations." La. Const. art. I, § 3. In other words, like California, government classifications based on race are absolutely prohibited in Louisiana. *La. AGC*, 669 So. 2d at 1197 (citing Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 6 (1974); *see Wilson II*, 122 F.3d at 702 ("Rather than classifying individuals by race or

gender, Proposition 209 prohibits [California] from classifying individuals by race or gender.").

In *La. AGC*, the Louisiana Supreme Court reiterated its holding from *Sibley v. Board of Supervisors of Louisiana State University*, 477 So. 2d 1094 (La. 1985), "that when a law discriminates against a person by classifying him or her on the basis of race, it shall be repudiated completely, regardless of the justification behind the racial discrimination." 669 So. 2d at 1198. *La. AGC* further explained that the 1974 constitutional provision prohibits state race-conscious affirmative action programs. A program that "does not discriminate against anyone, but only discriminates in favor of certain races to remedy past discrimination" is prohibited. *Id*. at 1199 n.12. Under the Louisiana Constitution, racial preferences are forbidden, because "discrimination in favor of one race is necessarily discrimination against members of another race. . . ." *Id*. The court explained that "the Framers and citizens of this state" insured "the evils of past discrimination would not recur by providing that there can never be any discrimination against minorities." *Id*. This is "a protection minorities do not have under the strict scrutiny of federal equal protection analysis." *Id*.

The Louisiana Supreme Court rejects the notion that the state has a constitutional duty under the Fourteenth Amendment to engage in race-preference programs to cure the effects of past discrimination. "Our review of the jurisprudence convinces us the United States Supreme Court has never interpreted the Fourteenth Amendment to require discrimination on the basis of race for any reason whatsoever." *Id*. at 1199. The *La AGC* court concluded that "although a

state has the authority to participate in race preference programs under the Fourteenth Amendment, that same provision does not mandate that it do so." *Id.*

Thus, according to the Louisiana Supreme Court, "a state constitution which prohibits a state from enacting [race preference programs] is not in violation of the Fourteenth Amendment." *Id.* at 1199 (citing *Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381, 1386, 1387-88 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980). The Sixth Circuit's contrary holding, that Michigan's statewide constitutional ban on race discrimination and race preference programs is unconstitutional, leads to the absurd situation where Louisiana and California may ban race preference programs, but Michigan may not.

Courts should not interpret the Fourteenth Amendment to prevent voters from prohibiting all government discrimination. In terms of procedure and structure, making it more difficult to engage in such discrimination and preferential treatment is the purpose of the Fourteenth Amendment. The very existence of the Equal Protection Clause shows that that this is precisely the sort of discrimination that must not be left to everyday politics, and the voters in Michigan agreed. The United States has seen institutionalized discrimination in favor of whites replaced by institutionalized discrimination against whites (and Asians) in less than a generation, and racial spoils will always be attractive to politicians and other state and local actors. Thus, the Equal Protection Clause itself is clear that racial

classifications are certainly not a subject to be left to politics as usual.

Furthermore, § 26, and measures like it, vindicate the purpose of federal law as well. The people of the United States guaranteed "the equal protection of the laws" in 1868 with the passage of the Fourteenth Amendment, and Congress forbade any recipient of federal money from engaging in racial or ethnic discrimination in 1964 with the passage of the Civil Rights Act. Congress also clearly banned such discrimination in 1866, 1870, and 1991, with the various enactments of 42 U.S.C. § 1981. Congress can hardly make any of these laws clearer. *See Bakke*, 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part); *see also* Lino A. Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 Suffolk U. L. Rev. 569 (1988); Curtis Crawford, *Does Title VI of the 1964 Civil Rights Act Permit Racial Preference in Admissions by a University Receiving Federal Funds*.[4] Certain courts have been repeat offenders in thwarting the constitutional and statutory mandates of equality. In particular, it is only by ignoring the plain text of federal laws prohibiting discrimination that the courts made it necessary to pass § 26 in the first place.

---

[4] *Available at* http://www.debatingracialpreference.org/BAKKE-Brennan+Rebuttal.htm.

II

THE SIXTH CIRCUIT'S DECISION PREVENTS MICHIGAN VOTERS FROM ENFORCING THE SAME UNIFORM STATEWIDE BAN ON RACIAL DISCRIMINATION AND PREFERENCES THAT HAS BEEN PASSED AND UPHELD IN OTHER STATES

The Sixth Circuit's decision prohibits Michigan voters from enforcing an amendment to their state constitution, even though identical amendments are being enforced by voters in other states. Currently, in addition to California and Louisiana, described *supra*, voters from four other states have amended their state constitutions to "adopt[] a position of strict neutrality." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring). Two other states have passed legislation prohibiting racial preferences in college admissions. Review by this Court is thus necessary to prevent widespread voter disillusionment, hopelessness, apathy, and eventual anger caused by inconsistent judicial decisions on nationally important issues of constitutional law and public policy.

A. The Sixth Circuit's Decision Prevents Michigan Voters from Enforcing Their Constitutional Amendment, While Voters in Other States Enforce Nearly Identical Amendments

On November 3, 1998, the people of the State of Washington passed Initiative Measure 200 by 58% of the vote. Measure 200 declares that "the state shall

not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1). The application of this new law has been discussed in at least four appellate decisions, none of which doubted the provision's constitutionality. *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1192 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 72 P.3d 151 (Wash. 2003); *Becker v. Wash. State Univ.*, 266 P.3d 893 (Wash. Ct. App. 2011); *Dumont v. City of Seattle*, 200 P.3d 764 (Wash. Ct. App. 2009).

In November of 2008, Nebraska voters passed the Nebraska Civil Rights Initiative 424, which amended the state constitution to prohibit the state from discriminating against, or granting preferential treatment to, "any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Neb. Const. art . I, § 30 (2012). It passed with 58% of the vote. The Nebraska Supreme Court mentioned this amendment with approval in *Nebraska v. Henderson*, 762 N.W.2d 1, 15 (Neb.), *cert. denied*, 557 U.S. 921 (2009).

On November 2, 2010, Arizona voters approved the Arizona Civil Rights Initiative, Proposition 107, which amended the state constitution to prohibit the state from "grant[ing] preferential treatment to or discriminat[ing] against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education

or public contracting." Ariz. Const. art. II, § 36 (2012). Proposition 107 passed with 60% of the vote.

The most recent state Civil Rights Initiative passed by 59% of the voters in Oklahoma. On November 6, 2012, the Oklahoma electorate passed State Question 759, which like all of the initiatives previously mentioned, declares that "the state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting."[5] Okla. Const. art. II, § 36A (2012).

The voters in Michigan and in the states mentioned above were entirely correct that, in the 21st century, the government *must* ban government discrimination on the basis of skin color. The 2010 U.S. Census shows that America is more and more a multiracial and multiethnic country.[6] Over one in four Americans now claim they are something other than white, and Latinos are the largest minority group. Both blacks and whites are the slowest growing populations. Since the last census, the Latino population has grown by 43.0%, and the Asian population has grown by 43.3%. The black population has grown by only 12.3%, and the white population by

---

[5] Not all attempts to implement statewide bans on racial preferences have been successful. The Colorado Civil Rights Initiative, Amendment 46, was narrowly defeated with 51% of the vote in November 2008. It is significant that the outcome of that election was settled by the voters, and not by court intervention.

[6] U.S. Census Bureau, *available at* http://2010.census.gov/2010census/#/panel-1 (last visited Dec. 18, 2012).

only 5.7%. The number of Americans who identify themselves as belonging to "two or more races" has grown by 32.0%.

In such a country governed by documents grounded in fundamental principles of equality, it is not permissible for the government to classify and sort people on the basis of race, and to treat its citizens differently—some better, some worse—depending on which box is checked on the census form. In the United States, the only viable racial policy is one where the government plays no favorites. Anything else leads to division, strife, and balkanization.

B. The Sixth Circuit's Decision Conflicts with Other State Actions Prohibiting Racial Preferences in College Admissions

The Sixth Circuits' decision to invalidate § 26 denies Michigan voters the opportunity to adopt a statewide policy of strict racial neutrality, even though other states have accomplished this through legislation or executive order. During the 2011 session, the New Hampshire legislature passed House Bill 623, "[a]n Act prohibiting preferences in recruiting, hiring, promotion, or admission by state agencies, the university system, the community college system, and the postsecondary education commission." H.B. 623, 162d Leg. (N.H. 2011). The amendment provides: "There shall be no preferential treatment or discrimination in recruiting, hiring, or promotion based on race, sex, sexual orientation, national origin, religion, or religious beliefs." N.H. Rev. Stat. Ann. § 21-I:52 (2012). This legislation removes the authority of local governments to deal with racial

matters, and allows New Hampshire to adopt statewide race-neutral college admission policies.

In November, 1999, Florida Governor Jeb Bush signed Executive Order 99-281, the "One Florida Initiative," ending the use of race/ethnicity or gender in the state's employment, contracting, and higher education admission decisions. *NAACP v. Fla. Bd. of Regents*, 822 So. 2d 1, 2 (Fla. Dist. Ct. App. 2002), *quashed, remanded on standing issues*, 863 So. 2d 294 (Fla. 2003), *dismissed on mootness*, 876 So. 2d 636 (Fla. Dist. Ct. App. 2004). Section 3 of the Executive Order is titled "Non-Discrimination in Higher Education." In paragraph (b) of that section, the governor "requested that the Board of Regents implement a policy prohibiting the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education, effective immediately." *Id.* To comply with the governor's request, the Board of Regents adopted amendments to its rules in 2000, setting general requirements for student admissions, admission requirements for entering freshmen, and admission requirements for entering or transferring graduate and professional students. 876 So. 2d at 2. The Board of Education approved the amendments on February 22, 2000. The Board of Governors, which replaced the Board of Regents, came into existence on January 7, 2003, Fla. Const. art. XI, § 5(d), and adopted all of the race-neutral rules established by the Regents. 876 So. 2d at 639.

The Sixth Circuit would no doubt classify the above legislation as political restructuring in violation of the Fourteenth Amendment. *See Coalition II*, 2012 U.S. App. LEXIS 23443, at *56 (calling Michigan's § 26

the "reallocation of decisionmaking authority at a 'new and remote level of government'"). Section 26 would also have prohibited government discrimination and preferences based on race, but the Sixth Circuit has taken the extreme position that a state ban on unequal treatment denies members of certain races equal protection of the laws.

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, American Civil Rights Foundation, Ward Connerly, and Center for Equal Opportunity respectfully request that this Court grant the petition for a writ of certiorari.

DATED: January, 2013.

Respectfully submitted,

MERIEM L. HUBBARD
RALPH W. KASARDA*
JOSHUA P. THOMPSON
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mlh@pacificlegal.org
E-mail: rwk@pacificlegal.org
E-mail: jpt@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, American Civil Rights Foundation, Ward Connerly and Center for Equal Opportunity