No. 12-682

In the

Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE[1]

An affiliate of the National Association of Scholars, the California Association of Scholars ("CAS") is an organization devoted to higher education reform. It is committed to rational discourse as the foundation of academic life in a free and democratic society.

Many CAS members have been active in the various campaigns to pass voter initiatives that prohibit state-sponsored discrimination on the basis of race, color, sex, ethnicity or national origin—especially in the original campaign for the California Civil Rights Initiative (known as "CCRI" or "Proposition 209"), codified at Cal. Const. Art. I, § 31. Indeed, it would not be an exaggeration to say that CAS was the soil from which the idea for CCRI and its progeny sprang.

The Michigan Civil Rights Initiative, Mich. Const. Art. I, § 26 ("MCRI"), which is the subject of this lawsuit, is among CCRI's progeny. The texts of both initiatives are nearly identical. Both prohibit their respective states from "discriminat[ing] against, or grant[ing] preferential treatment to,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice of the *Amici Curiae*'s intention to file in support of certiorari at least 10 days prior to the due date. 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*, its members, or its counsel made a monetary contribution to its preparation or submission.

any individual or group on the basis of race, sex, color, ethnicity, or national origin ...." Among other things, they prohibit state colleges and universities from engaging in race-preferential admissions.

The experience of CAS's members puts it in a useful position to inform the Court about the legal issue presented in this case, which has been raised and resolved in CCRI's favor by both the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court of California. See *infra* at Section IIIA(i).

Moreover, CAS is in an especially useful position to inform the Court about the importance of this case. As a result of the *en banc* decision of the U.S. Court of Appeals for the Sixth Circuit, the movement to pass voter initiatives that prohibit state-sponsored discrimination of this kind has come to a near standstill. Already-existing initiatives have been placed in legal jeopardy.

This threatens to put the cause of higher education reform back several decades. There is now considerable evidence of the positive effects these initiatives have on the education of affirmative action's so-called beneficiaries. See *infra* at Section IIIB. CCRI in particular has been the subject of significant empirical research since its passage in 1996; CAS is in an excellent position to bring it to the Court's attention. This evidence is crucial to understanding how, for good or ill, the Court's decision in this case will strongly affect the future of American higher education and of the academic success of minority students in particular.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Insti-

tute for the Study of Statesmanship and Political Philosophy, the mission of which is to advocate for the principles of the American founding. The CCJ advances that mission through participation in the litigation of cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake.

SUMMARY OF ARGUMENT

Amici believe that the Petition for a Writ of Certiorari is in keeping with the legal profession's admirable traditions of restraint and civility. Still, the job must fall to someone to call the *en banc* decision of the Sixth Circuit by its true name. As an association of ordinarily mild-mannered college and university professors and a center staffed by forbearing academic lawyers, *Amici* are not noted for a tendency toward hyperbole. When we call something a travesty of justice, as we do here, it is because we view it as exactly that.

In 2006, a strong majority of Michigan voters elected to adopt MCRI. These voters took to heart MCRI's core provisions concerning the need for state and local governments, including state colleges and universities, to refrain from preferential treatment on the basis of race, sex, color, ethnicity, or national origin.

The Sixth Circuit's conclusion that a provision that bans race discrimination is unconstitutionally racially discriminatory is profoundly counter-intuitive. When the same argument was made with the respect to CCRI, California's then-Attorney General Dan Lungren called it "Alice in Wonderland." George Skelton, *Making a Case that*

the People Have Spoken, Los Angeles Times (December 16, 1996). And indeed, it has been rejected twice in California. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010).

But that is only one among many problems with the Sixth Circuit's decision. For reasons *Amici* will elaborate upon at greater length below, the principal case upon which majority relies—*Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) ("*Seattle School District*")—in fact provides no support at all. See *infra* at Section IIIA. In this summary, it is enough to point out that *Seattle School District* was a 5-to-4 decision and that the one and only thing that all nine members agreed upon was that the argument adopted by the Sixth Circuit should be rejected.

In his dissent, Justice Powell expressed fear that the logic of the majority's decision could lead to absurd results. Significantly, the absurd result that he envisioned is precisely what the Sixth Circuit has now embraced:

> [I]f the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that higher authority traditionally dictated admissions policies …. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder wheth-

> er—under the equal protection components of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

Seattle School District, 458 U.S. at 499 n.14 (Powell, J. dissenting, joined by three other Justices).

The majority denied Justice Powell's assertion and made it clear that their intent was emphatically not to cover laws like MCRI: "These statements evidence a basic misunderstanding of our decision …. It is evident … *that the horribles paraded by the dissent* … are entirely unrelated to this case." *Id.* at 480 n.23 (emphasis added).

Note Justice Powell's hypothetical: It is precisely what happened in this case. The "affirmative action plan" of a "state law school" "came under fire." When this Court declined to take action in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a "higher authority"—the people of Michigan—intervened. Note also that the majority rejected Powell's concerns as a "parade[ ]" of "horribles" that were "entirely unrelated to this case." No one would claim that the limiting principle behind *Seattle School District* is easy to discern from the majority opinion. But the one thing that all Justices agreed on is that it would be absurd to outlaw measures like MCRI.

What should be clear is that neither *Seattle School District* nor *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), the case upon which it was based, was intended to apply to laws that *forbid* race discrimination (as opposed to *facilitate* race discrimination). See *infra* at Section IIIA(i). Significantly, if the political re-structuring logic employed in

those cases were applied to laws that forbid race discrimination, it would likely find them all unconstitutional. See *infra* at Section IIIA(ii). The Sixth Circuit's notion that decisions regarding racial preference must be made at low governmental levels rather than in state constitutions is unsupported by law and insupportable under our legal traditions. See *infra* at Section IIIA(iii).

It would be especially unfortunate if the Sixth Circuit's decision were allowed to stand given the considerable evidence that initiatives like MCRI work to improve the academic performance and graduation rates of minority college students. They also increase the number of minority students who major in science and engineering and who go on to advanced degrees in graduate and professional school. See *infra* at Section IIIB. This is not just the wishful thinking of theoreticians. All of this happened in California following CCRI's passage. The Sixth Circuit's decision has put a cloud over one of the few bright spots in education today. *Amici* hope the cloud will be lifted as swiftly and unequivocally as possible.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred in Holding MCRI to Be a Constitutional Violation.

A. The Logic of *Hunter* and *Seattle School District* Can Be Applied Only to Laws that Promote Discrimination, Not Laws that Forbid It.

Anyone who argues that the Equal Protection Clause of the U.S. Constitution forbids voters from prohibiting the state from engaging in discrimination based on race faces an uphill battle. The "'central purpose'" of the Equal Protection Clause "'is the prevention of official conduct discriminating on the basis of race.'" *Seattle School District*, 458 U.S. at 484 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *see also Hunter*, 393 U.S. at 391 ("[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinction based on race."); *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879); *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872).

Indeed, at least four members of this Court over the past several decades—Justices Douglas, Stewart, Scalia, and Thomas—have taken the position that the Equal Protection Clause is a flat ban on race discrimination. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting);

DeFunis v. Odegaard, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). For the Sixth Circuit to be right, these justices would have to be not just wrong, but very wrong. The Constitution would have to protect specially the very thing that they believed it prohibited.

Two courts have already rejected precisely the argument the Sixth Circuit now embraces. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997); *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010).[2] Judge O'Scannlain put the point well in *Coalition for Economic Equity*: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." 122 F.3d at 709.

The core of the Sixth Circuit's decision to the contrary appears to be this: By enshrining a policy against race discrimination in a state constitution, that state is discriminating against racial minorities who might wish to lobby the state legislature, a state agency or a local government for preferential treatment. Other interest groups—veterans, public employees, etc.—can lobby a governmental entity for special treatment without restraint. But a racial group can do so only if it first successfully lobbies to repeal the state constitutional provision. Such a "political restructuring" is unconstitutional race discrimination—or so the Sixth Circuit held.

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[2] In addition, the same argument was rejected by a Sixth Circuit panel when this case came up at the preliminary injunction stage. See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

In arriving at its decision, the Sixth Circuit relied on the so-called "political re-structuring" cases—*Hunter* and *Seattle School District*. Attempting to apply those cases to MCRI, it held that individual state colleges and universities are the traditional decision-makers on matters of admissions policy. Because MCRI makes it impossible for racial minorities, but not tennis players, to lobby these schools for preferential treatment, its adoption constitutes unconstitutional race discrimination.

This reflects a fundamental misunderstanding of the Constitution and MCRI. MCRI does not discriminate against racial minorities. It discriminates against *race discrimination*—just like the doctrine of strict scrutiny discriminates against race discrimination. Members of racial minorities are as free as anyone (including members of racial majorities) to lobby for preferential treatment. They just can't lobby for it based on their race, sex, etc. Nor can they be disadvantaged on those bases. MCRI is a two-way street.[3]

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[3] The Sixth Circuit apparently believes that racial minority members are already protected against discrimination in college and university admissions and hence MCRI has only downside potential for them. As Asian American applicants know only too well, this is untrue. See Thomas Espenshade & Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009) (noting large disparities between the academic credentials of Asian Americans who are offered admission to elite schools and other such applicants). Indeed, diversity admissions policies have potential downsides for all groups, including African Americans and Hispanics. Under *Grutter v. Bollinger*, 539 U.S. 306 (2003), a college or university may discriminate on the basis of race in order to reap whatever educational benefits racial diversity may have for

Hunter provides no support for the Sixth Circuit's holding, since the initiative at issue there did not prohibit state discrimination, but rather encouraged private race discrimination among private citizens. By repealing a local fair housing ordinance and making its re-promulgation difficult, the charter amendment at issue in *Hunter* thwarted the city of Akron's efforts to discourage racial discrimination by private citizens, thereby lending aid and encouragement to those private discriminators.

Seen in this light, *Hunter* resembles a less controversial case, *Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson*, this Court struck down a Louisiana law requiring that election ballots specify each candidate's race. Like the charter amendment in *Hunter*, the Louisiana statute was facially neutral, although it explicitly dealt with race. Like *Hunter*, the Louisiana statute's purpose appeared to be sinister: It appeared to be intended to facilitate voters' private racial animosity and thereby reduce the number of African Americans elected to office. In both cases, the Court's decision can be seen as an attempt to prevent states from affirma-

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its students. An institition that is largely African American (as historically black colleges and universities frequently are) is thus presumably free to discriminate in *favor* of whites and *against* African Americans. MCRI on the other hand would prevent that. Interestingly, in the area of sex, non-traditional affirmative action preferences for men have become common. See Gail Heriot & Alison Somin, *Affirmative Action for Men?: Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 Engage 14 (2011). MCRI would protect against that too—as well as against other shifts in political and constitutional fashion.

tively encouraging its citizens to engage in racial discrimination.

Seattle School District, too, involved a voter initiative that attempted to facilitate private discrimination rather than end public discrimination. The school board in that case had adopted mandatory school busing in order to alleviate the problem of racial isolation brought on by decades of private housing discrimination. The initiative in that case prohibited school districts from assigning students to a school that is not the closest (or next closest) to the student's home unless exceptional reasons applied. The exceptional reasons did not include a desire to integrate the schools or to reduce the incentives for individuals to discriminate in the sale and rental of homes. Like the initiative in *Hunter*, *Seattle School District*'s *initiative* was not a prohibition on race discrimination. To the contrary, it was intended to shore up Seattle's segregated housing patterns and thus to facilitate private discrimination and allow its effect to continue long into the future.

MCRI is in no way intended to encourage either public or private race discrimination; nor will it encourage such. Instead, it is a strong ban on state-sponsored discrimination. Neither *Hunter* nor *Seattle School District* has any application, therefore. It should be noted that no one seriously claims that the kind of race discrimination MCRI prohibits is constitutionally justified as a remedy for past discrimination. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of University of California v. Bakke*, 438 U.S. 265, 307-10 (1978) (Opinion of

Powell, J.) (rejecting societal discrimination as a permissible justification for race-preferential admissions policies).

B. All Laws Work a "Political Re-Structuring" of the Kind the Sixth Circuit Condemns; That May Be Among the Reasons this Court has Quietly Declined to Follow *Hunter* Even in Cases in which it Arguably Could Be Applied.

If MCRI works a "political re-structuring," then all laws do, no matter what level at which they are promulgated. Take, for example, the Equal Credit Opportunity Act, Pub. L. 94-239, 90 Stat. 251 (1974). Under its provisions, 15 U.S.C. sec. 1691 *et seq*., it is illegal to discriminate on the basis of race in the provision of credit. When Congress passed that law in 1974, it effectively pre-empted the Michigan legislature from passing legislation that might have required banks to give African Americans credit at a preferential rates. If African Americans in Michigan had wanted such a statute, they would have been required to first lobby to repeal the federal legislation that mandates equality.

That would not end the matter. In turn, if the Michigan legislature had enacted a mandatory one-point preferential rate, it would have pre-empted a state agency from adopting regulations requiring lenders to give African Americans a two-point preferential rate. Again, repeal would be necessary to secure the greater advantage. Indeed, since lenders traditionally set their own rates, this argument could continue to still lower levels of government. See also Gail Heriot, *California's Proposition 209*

and the United States Constitution, 43 Loy. L. Rev. 613 (1998).

In the end, one would be hard-pressed to come up with a single enactment concerning race relations that would not violate the Sixth Circuit's interpretation of *Hunter* and *Seattle School District*. Even the doctrine of strict scrutiny itself is unconstitutional under it.

It is thus no wonder that this Court has shied away from such a broad application of *Hunter*. In the most recent case that potentially concerned the issue, *Romer v. Evans*, 517 U.S. 620 (1996), this Court conspicuously avoiding reliance on *Hunter*. *Romer* concerned Colorado's Amendment 2, which repealed ordinances that prohibit discrimination based on "homosexual, lesbian or bisexual orientation" and prohibited future legislation designed to ban discrimination on that basis. In contrast to the case at bar, therefore, *Romer*'s facts were reasonably analogous to *Hunter*'s. A Colorado trial court issued a preliminary injunction against the enforcement of Amendment 2 and the Colorado Supreme Court affirmed relying on *Hunter* and *Seattle School District*. In affirming those courts, this Court explicitly stated that it was relying "on a rationale *different* from that adopted by the State Supreme Court" and cited the two cases only in describing the decisions below. *Romer,* 517 U.S. at 624 (emphasis added). Justice Kennedy, writing for the majority, instead relied upon the conclusion that "the amendment seems inexplicable by anything other than animus." *Id.* at 632.

Justice Scalia explained in his dissent why the "political landscape alternation" rationale in

Hunter would be an unsuitable foundation for the Court's decision:

> [I]t seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e. by that state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors …. Once such a law is passed, the group composed of relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection ….
>
> The same 'rational basis' (avoidance of corruption) which renders constitutional the substantive discrimination against relatives … also automatically suffices to sustain what might be called the electoral-procedural discrimination against them …. [A] law that is valid in its substances is automatically valid in its level of enactment.

Romer, 517 U.S. at 630-31 (Scalia, J., dissenting).

The majority in *Romer* evidently took Justice Scalia's criticisms to heart, since the majority opin-

ion relied on an animus theory rather than *Hunter*. *Romer* thus has no application to this case. Even the originators of the political re-structuring argument against CCRI, law professors Evan Caminker and Vikram Amar, concede that an argument against the initiative based on racial animus would be inappropriate.[4]

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[4] See Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1023 (1996) ("Such a showing of invidious intent or motive behind … CCRI would, we feel, be very hard to make"). The authors cite to several non-invidious reasons that could motivate a voter to support CCRI from notions of fundamental fairness to concerns for economic efficiency to a desire to avoid stigmatizing affirmative action beneficiaries.
No fair-minded CCRI opponent argues that it was motivated primarily or even substantially by malice. While no statewide election has ever been conducted anywhere in which no voter was motivated by malice, those who supported CCRI overwhelmingly did so conscientiously. Presidential candidate Robert Dole, Governor Pete Wilson, and a host of other officeholders endorsed it, as did newspapers like the San Diego Union Tribune, the Orange County Register, UC-Berkeley's Daily Californian, UCSD's Daily Guardian, and San Diego State University's Daily Aztec. It is difficult to imagine that they were all simply spewing hatred. Indeed, CCRI could not have passed without millions of votes from women and minorities—the very persons that its opponents argued would be victimized by it.

C. The Sixth Circuit's Notion that Questions of Preferential Treatment for Racial Minorities Must be Left at a Low Level of Government is Contrary to Law.

The Sixth Circuit takes the novel position that since admissions policy-making is generally entrusted to individual state colleges and universities, the discretion to grant preferential treatment to racial minorities must also remain there. Local is evidently better under this approach. Generally, however, the nation has the opposite policy with regard to state-sponsored race discrimination. The primary authority to deal with it has resided at the highest level rather than the lowest. *See* U.S. Const. amend. XIV; *see also* Federalist No. 10 at 77 (Madison) (Rossiter ed. 1961) (arguing that an important virtue of a strong union is "its tendency to break and control the violence of faction"). The notion that the grey areas that (per *Grutter*) arguably fall just short of the Fourteenth Amendment's prohibition must be entrusted to the most local level of government is nonsensical.

II. Voter Initiatives Like MCRI Hold the Key to Improving the Academic Success of Under-Represented Minority Students.

For years, colleges and universities operated under the assumption that when they engaged in affirmative-action preferences in admissions, minority students were receiving a valuable benefit. The evidence indicates, however, that this is error. The recipients of preferences must often struggle to succeed at institutions where their entering aca-

demic credentials put them well below that institution's median. Many are worse off.

How can this be? No one should be surprised to learn that affirmative action beneficiaries tend to earn low grades at the colleges and universities that recruit them. While some students will outperform their entering academic credentials just as some students will under-perform theirs, most students perform in the general range that their entering credentials suggest. See, e.g., Richard H. Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012) ("MISMATCH"). Even affirmative action advocates concede that minority student grades are "startlingly low." See Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1807 (2005) (referring to first-year law-school grades).

What some do find surprising is that students who attend a more prestigious school on a preference (and who hence earn low grades) have been repeatedly shown to be less successful than students with precisely the same entering academic credentials who attend a school where those entering credentials put them at or somewhat above the median (and who hence earn higher grades). The so-called "beneficiaries" of affirmative action are less likely to graduate than their academic peers attending somewhat less prestigious schools. MISMATCH at 106-08. They are less likely to graduate with a degree in science and engineering. *See, e.g.*, Rogers Elliott, *et al.*, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective*

Institutions, 37 Res. Higher Ed. 681, 692-93 (1996). In law schools, they are less likely to graduate and pass the bar. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). They are less likely to aspire to become college professors. *See* Stephen Cole & Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH ACHIEVING MINORITY STUDENTS (2003).

Nevertheless, all is not lost—not yet anyway. While CCRI has been consistently opposed by university administrators, it has been a shining example of how these problems can be turned around. To begin with, CCRI greatly increased the academic performance of under-represented minority students—*i.e.* it has increased the rate at which they earn honors and decreased the rate at which they wind up in academic jeopardy.

Take, for example, the case of the University of California at San Diego ("UCSD")—a highly selective institution, but not quite as selective as the UC's Berkeley campus. *Amici* have firm data on UCSD. In 1997, only one African-American student at UCSD had a freshman-year GPA of 3.5 or better—a single African-American honor student in a freshman class of 3,268. In contrast, 20 percent of the white students had such a GPA. Failure rates were similarly skewed. Fully 15 percent of African-American students and 17 percent of American Indian students at UCSD were in academic jeopardy (defined as a GPA of less than 2.0), while only 4 percent of white students were. Other under-represented minority students hovered close to

the line.[5] *See* Gail Heriot, *The Politics of Admissions in California,* 14 Academic Questions 29 (2001).

This was not because there were no other African-American students capable of doing honors work at UCSD. The problem was that such students were often at Stanford or Berkeley, where often they were not receiving honors. Similarly, white students were not magically immune from failure. But those who were at high risk for it had not been admitted in the first place. Instead, they were at less competitive schools where their performance was more likely to be acceptable. *Id.*

Then came CCRI. CCRI went into effect in time to affect the undergraduate admissions decisions for the entering class of 1998, causing Berkeley's offers of admission to African Americans, Hispanics and American Indians to go from 23.1 percent of the total offers to 10.4 percent. *Id.*

Of course, the minority students who would have attended Berkeley in the past had not simply vanished. They had been accepted to somewhat less highly ranked campuses–often UCLA and UCSD–based on their own academic record rather than race. In turn, students who previously would have been admitted to UCLA or UCSD on a preference had usually been admitted to schools somewhat less competitive UC campuses. UC-Riverside and UC-Santa Cruz both posted impressive gains

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[5] Since UCSD didn't keep separate statistics for those minority students who needed a preference in order to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular.

in minority admissions. At Riverside, for example, Black and Latino student admissions shot up by 42 percent and 31 percent respectively. UCSD reported mixed results. Black enrollment there was down 19 percent, but Filipino and Latino enrollment was up by 10 percent and 23 percent. *Id.*

At UCSD, the performance of Black students improved dramatically. No longer were African-American honor students a rarity. Instead, a full 20 percent of the African-American freshmen were able to boast a freshman-year GPA of 3.5 or better. That was higher than the rate for Asians (16 percent) and extremely close to that for whites that year (22 percent). Suddenly African-American students found themselves on a campus where achieving academic success was not just a "white thing" or an "Asian thing." *Id.*

The sudden collapse in minority failure rate was even more impressive. Once racial preferences were eliminated, the difference between racial groups all but evaporated at UCSD, with Black and American Indian rate falling to 6 percent. Consequently, average GPAs all but converged. UCSD's internal academic performance report announced that while overall performance has remained static, "underrepresented students admitted to UCSD in 1998 substantially outperformed their 1997 counterparts" and "the majority/majority performance gap observed in past studies was narrowed considerably." *Id.*

"Narrowed" was understatement. The report found that for the first time "no substantial GPA differences based on race/ethnicity." A discreet footnote makes it clear that the report's author

knew exactly how this happened: 1998 was the first year of color-blind admissions. *Id.*

Granted, UCSD had twelve fewer African-American freshmen in the first year of CCRI's implementation, forced as it was to reject students who did not meet its regular academic standards. But it also had seven fewer African-American students with a failing GPA at the end of that year. Meanwhile, those twelve students probably attended a school where their chances of success were greater. *Id.*

Some argued that CCRI would discourage qualified minorities from even applying to the UC system. But the evidence shows just the opposite. African-American and Hispanic students with competitive academic credentials were actually *more* likely to apply to the UC once CCRI went into effect. *See* David Card & Alan Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 416 Indus. Lab. Rel. Rev. 58 (2005); *see also* MISMATCH at 131-42 (arguing that Card & Krueger's methodology may have *understated* CCRI's "warming effect" on applications by competitive minority students).

CCRI's critics have been loath to admit it, but the big news following CCRI's implementation was skyrocketing minority graduation rates. As Sander & Taylor reported:

> Minority graduation rates rose rapidly in the years after [CCRI], and on-time (four-year) graduation rates rose even faster. For the six classes of black freshman who entered UC

> schools in the years before race-neutrality (i.e., the freshman classes of 1992 through 1997), the overall four-year graduation rate was 22 percent. For the six years after [CCRI's] implementation the black four-year graduation rate was 38 percent. Thus, even though the number of black freshman in the UC system fell almost 20 percent from 1997 to 1998, the number of black freshman who obtained their degrees in four years barely dipped for this class,[6] and the entering class of 2000, four years later, a record number of blacks graduating on time.

MISMATCH at 146.

Not all of this astonishing increase is provably traceable to CCRI. But Duke University researchers have found that about 20% of the overall increases in graduation rates of UC minority students is. And if CCRI had been implemented with greater rigor, it would have contributed even more. *See* Peter Arcidiacono, *et al.*, *Affirmative Action and University Fit: Evidence from Proposition 209*, Nat'l Bur. of Eco. Res. Working Paper No. 18523 (November 1, 2012). In a world in which steps forward in education, when they occur at all, are rare and incremental, that is a stunning victory.

And it is not just grade-point averages and graduation rates. Between 1997 and 2003, the number of African-American and Hispanic students graduating with a degree in science or engineering

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[6] Note that the black students who didn't attend the UC once race preferences were eliminated almost certainly attended another college or university. Their numbers should be added to the total, which would bring the number of total black graduates higher.

rose by about 50%. Not unrelatedly, the number of African-American and Hispanic students majoring in ethnic studies and communications fell by 20%. MISMATCH at 150-54. Academic self-confidence was growing among minority students.

Note the Triple Crown: (1) Grade-point averages of under-represented minority students and (2) graduation rates of such students were improving at the same time that (3) they were increasingly majoring in science and engineering. Ordinarily, these three goals would be difficult to achieve at the same time. For example, grading curves are traditionally lower in science and engineering departments than they are in the rest of the university, so it is remarkable that grade-point averages would be going up alongside increases in the number of science and engineering majors. Combine those victories with an increase in graduation rates. When graduation rates increase it is generally because some weaker students, who might have dropped out in an earlier time, are managing to make it to the end. One would thus expect increasing graduation rates to have a depressive effect on grade-point averages and/or on the proportion of students majoring in science and engineering. But instead improvements were made in all three areas. It is as if Ford had come up with a new automobile that was both more luxurious and better on gasoline mileage—and cheaper too.

Why is all this evidence being ignored by affirmative action advocates? Perhaps Leo Tolstoy has some wisdom to impart on this subject:

> I know that most men, including those at ease with problems of the greatest complexi-

> ty, can seldom accept even the simplest and most obvious truth if it be such as would oblige them to admit the falsity of conclusions which they have delighted in explaining to colleagues, which they have proudly taught to others, and which they have woven, thread by thread, into the fabric of their lives.

MISMATCH at x (quoting Leo Tolstoy).

To be sure, over the years since then, the UC has developed techniques that allow it to circumvent CCRI in part while still enabling it to argue publicly that it is in compliance. As a result, its benefits have been diluted somewhat. But it has not eliminated them. A long as CCRI remains the law, there is reason for optimism. Students in Michigan should not be denied the same opportunities that MCRI offers to them.

CONCLUSION

The "parade[ ]" of "horribles" scoffed at by the majority in *Seattle School District* is alive and well and marching over the rights of Michigan voters. *Id.* at 480 n.23. At a time that nearly all Americans earnestly wish to increase the likelihood that students from under-represented racial minorities will be academically successful, this ugly and ill-informed parade is reducing that likelihood. Amici urge this Court to grant the Petition and reverse.

Respectfully submitted,

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