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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a state constitutional amendment violates the Equal Protection Clause by prohibiting black, Latina/o, Native American and other minority citizens from proposing through the democratic means that all other citizens may use that state university faculties and governing bodies adopt lawful, racially-conscious admissions plans in order to increase the opportunities for minority students to attend those universities?

Whether a state constitutional amendment violates the Equal Protection Clause by creating a substantive standard and an individual right of action to enforce that standard which selectively regulate and limit the state universities' ability to admit black, Latina/o, Native American and other minority students?

PARTIES TO THE PROCEEDING

The Coalition Respondents accept the listing of the parties by the Petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

OTHER

JURISDICTION

The Coalition Respondents accept the Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional provisions cited by the Petitioner, the following provisions are relevant to this case:

Article 1, Section 2 of the Michigan Constitution provides in relevant part as follows:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. . . .

Article 1, Section 26 of the Michigan Constitution provides in relevant part as follows:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

* * *

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

STATEMENT OF THE CASE

A. Introduction: the actual issues at stake.

The Coalition Respondents agree that as to admissions in higher education, there is a direct conflict between the governing decisions of the Sixth Circuit and the Ninth Circuits, agree that the issues dividing the circuits are of paramount importance, and agree with Michigan's Attorney General that this Court should grant the writ of certiorari to resolve the conflict between the Sixth Circuit's en banc decision in this case and the Ninth Circuit's decisions in *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir. 1997)

and *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

The Coalition Respondents seek review, however, not because the Sixth Circuit was wrong, but because it was right. They ask this Court to extend the protections for the right to political equality recognized by the Sixth Circuit's en banc opinion to California and the other four states that have adopted constitutional amendments identical to the one at issue here.

The Coalition Respondents emphatically disagree with the Attorney General's attempt to frame the issues presented here by characterizing Article 1, Section 26 of the Michigan Constitution ("Proposal 2") as an amendment that "prohibits discrimination," "mandates equal treatment," or "eliminates preferences."

To begin with, this case has nothing to do with a state's power to ban "discrimination." Michigan adopted a constitutional ban against discrimination on account of race and national origin in 1963. MI Const 1963, art 1 sec 2. Proposal 2 repeated that ban, but only for the purpose of creating a more acceptable appearance for its real objective. MI Const 1963, art 1, sec 26(2). There is not, and never has been, a dispute over whether Michigan's preexisting ban on discrimination was constitutionally valid.

The real objective of Proposal 2—which is a word-for-word copy of California's Proposition 209—is its ban on "granting preferential treatment to" persons on account of "race, sex, color, ethnicity, or national origin…" MI Const 1963, art 1, sec 26(2); CA Const art

1, sec 31. The framers of these proposals chose the term "preferential treatment" carefully because it appealed to prejudice. But in higher education, the term "preferences" in practice has always meant disparities in the grades and test scores, whose neutrality and predictive force have long been sharply disputed.

In legal terms, Proposal 2 and Proposition 209 assert the "theory of the color-blind Constitution," which, in higher education, has meant no departures from the grade and test score criteria for the purpose of admitting minority students.

As this Court has held on many occasions, "…as an aspiration Justice Harlan's axiom [of the color-blind Constitution] must command our assent," but "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 788 (2007)(Kennedy, J., concurring in the judgment). Despite that holding, however, the two proposals use the axiom of the color-blind Constitution as a *universal principle* to limit the *political* right of minority residents even to propose, through the procedures available to all others, the adoption of a racially-conscious admission plan and as a *universal principle* to regulate admissions at state universities including by private actions to enforce that principle.

In analyzing these proposals, we begin with the real world that the Attorney General has completely ignored. As this Court knows, and as is set forth in more detail below, Michigan's universities, like most in the nation, have adopted adjusted grade point averages

and scores on standardized tests as the baseline criteria for admissions. But over the course of decades, the universities have identified numerous factors that justify departures from those criteria. Until the passage of Proposal 2, the elected university governing boards had complete control over all admission criteria, and the state's residents could therefore add to, change, or delete any of those factors through a simple majority vote by the faculties or by the elected governing boards who supervised those faculties.

Proposal 2, like Proposition 209 before it, selectively changed that. The universities may now adopt *any* factors authorizing departures from their baseline criteria of grades and test scores for *any* purpose—*except* that they may not consider race for the purpose of admitting black, Latina/o or Native American applicants. Thus, Michigan's black, Latina/o and Native American residents may no longer even propose that the governing boards adopt the exact plan that this Court held was the only practical means by which their children could be admitted to the state's leading universities. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

The Sixth Circuit rightly decided that this selective restriction on the political rights of racial minorities—and of black, Latina/o and Native American residents in particular—violated the guarantee of political equality protected by this Court's decisions in *Hunter v Erickson*, 393 U.S. 385(1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). On that issue, *Wilson* held directly to the contrary.

Proposal 2, however, contains yet another limit on minority rights, which the Sixth Circuit majority did not need to reach, but which *Wilson* peremptorily rejected. By definition, a selective admissions system necessarily includes numerous implicit and explicit "preferences" that the university uses to determine the character and mix of the students it admits. But Proposal 2 applies its "no preferences" standard only to those alleged preferences that benefit women and racial minorities and it creates a private right of action to enforce that prohibition, a right that has not ever been granted to any other critic of the university's standards. The proponents claim that its ban is neutral, but the only explicit consideration of race is for the purpose of admitting minority students. In practice, Proposal 2 hands the opponents of minority admissions a legal sword to wield whenever and wherever a university admits what the opponents believe are too many minority students.

The Attorney General claims that it is impossible to determine who Proposal 2 actually burdens. But in the real world, there is no doubt on that question. In 2003, the University of Michigan's attorneys told this Court that eliminating affirmative action would cause a one-third fall in minority admissions at its Law School. They were too optimistic. In six years, Proposal 2 has slashed the share of black, Latina/o and Native American students in the entering classes in Michigan's undergraduate college by one third, slashed the share of those students at the Law School by 40 to 50 percent, and slashed the share of those students at the Dental and Medical Schools by 70 percent or more.

Off. of the Registrar, Univ. of Mich., Tables 843 and 844 at http://ro.umich.edu (last visited Feb. 2, 2013).

The President and Chancellors of the University of California have informed this Court that the effects in California are even worse. The number of black students in the entering classes at UCLA and Berkeley has fallen by 50 percent while Latina/o admissions have not reached pre-209 levels despite a 25 percent increase in the percentage of Latina/os in that state's high-school graduating classes. As the UC officials informed this Court, they have found no way to reverse that precipitous fall. See Brief Amicus Curiae of the Pres. And Chancellors of the Univ. of California, *Fisher v. University of Texas*, No. 11-345, at 18-19, 31-32.

Justice Blackmun once declared that this Court "dare not" adopt the theory of the color-blind constitution. *Regents of the University of California v. Bakke*, 438 U.S. 265, 407 (1978)(Blackmun, J., dissenting). That is far truer today. Half of all of the children born in the country are racial "minorities." Already, half or more of the high-school students in numerous states are black and Latina/o. But as the nation inexorably becomes a majority-minority nation, these proposals mean that it will have far fewer black and Latina/o lawyers, doctors, and leaders in all fields than it has today.

The Attorney General claims that Michigan's citizens chose this future by approving Proposal 2 by a 58 to 42 percent margin. He neglects to tell this Court that nine out of ten black citizens cast votes against it, that two out of three white citizens cast votes for it, and that it passed solely because white voters

outnumbered minority voters by six to one. R. 222-2, Dep. of Linski, Ex. 3. Even more significantly, he offers no reason for conferring upon an electoral majority the power to deny minority citizens of the right to propose through means equal to those available to others those lawful plans that are essential if their children are to be admitted to the state's universities.

If state universities, subject to review by this Court, undeniably have the right to determine under equal procedures when and whether to adopt affirmative action programs in particular circumstances, the Sixth Circuit correctly recognized that there is no state's right to ban all officials from ever considering and all citizens from ever proposing such programs.

In fact, if the state's right proposed by Michigan's Attorney General were recognized, it would allow the states, acting one by one, to force the theory of the color-blind Constitution upon the Fourteenth Amendment itself, simply by choking off any procedure by which any official or citizen could ever assert a compelling interest.

There is no dispute that two of the original purposes of the Fourteenth Amendment were to provide a federal guarantee of political equality to the newly-free slaves in all areas except voting and to eliminate the special laws that restricted the employment, education and other rights of the new black citizens. As is set forth below, Proposal 2 and Proposition 209 have the distinction of violating both of these core, original purposes of the Fourteenth Amendment itself.

B. The factual reality that the Attorney General has ignored.

From 1863 forward, the elected Regents of the University of Michigan and, later, the elected Board of Trustees of Michigan State University and Board of Governors of Wayne State University have had full discretion to establish the admissions standards for any college or school that they have established. MI Const. 1850 art 13, secs. 6-8; MI Const. 1963, art. 8, sec. 5. They have delegated some of those tasks to faculties and university administrators, but as the Sixth Circuit concluded, the governing boards have always retained the right to approve any admission standards that the faculties might adopt. Pet. App. 27-33a.

In the early 1960s, the University of Michigan and, later, the other two state universities first adopted adjusted grade point averages and standardized test scores as their baseline criteria. From the beginning, however, all three of Michigan's constitutionally-created universities departed from those criteria in order to admit veterans, poorer and working-class students, rural students, athletes, children of alumni, children of donors and politicians, and numerous other categories of applicants.

At first, none of the universities recognized exceptions for the purpose of increasing minority admissions. But the results were disastrous. In the 1960s, the University of Michigan Law School graduated 3,032 white students, eight black students, and, as far is known, no Latina/o or Asian students. R. 222-19; UM Law School Graduates. The reasons for

the virtual exclusion of minority students are rooted in the reality of how adjusted grade point averages and standardized test scores operate in the real world as it existed then—and, with important changes, as it exists today.

Six decades after *Brown*, the large majority of Michigan's black, Latina/o, and Native American students attend largely segregated elementary and secondary schools. Even though the segregation is now *de facto* rather than *de jure*, these schools still have fewer and less qualified teachers; less resources and programs; non-existent counseling programs; and so on. If the colleges adjust grade point averages upward for students who took advanced placement and similar classes, the graduates from these segregated schools simply cannot fairly compete with those who attend more privileged schools.

There has been important progress, of course, and today, significant numbers of black and Latina/o students attend integrated suburban schools or central city magnet schools that offer far greater opportunities. But even for the black and Latina/o students in those schools, equality has not been achieved. In the suburban schools, they face racial isolation and, at times, hostility. On average, their families have less material and educational resources; and they, unlike their white peers, face the pervasive stigma of inequality that still harms the hearts and minds of minority students today. Even on the criteria of adjusted grade points, they face distinct obstacles in competing with their white peers.

But the difficulty on the grade point component of the admission criteria pales in comparison with the obstacles presented by the standardized tests. As Ward Connely testified in a deposition that is part of the record of this case, black students from the richest quintile of income still score lower, on average, than white students from the poorest quintiles. The reasons for that include differences in the educational programs, how the test questions are selected, language background and difficulties, the special anxiety that minority test-takers face due to negative racial stereotypes, and a host of other factors. But the end result is beyond dispute: racial minorities are at a large disadvantage on the standardized tests.

Before the 1970s, the rigid application across racial lines of the baseline criteria meant that few in Michigan's large black and small Latina/o and Native American communities had any real hope of attending the University of Michigan, however hard they worked. But in 1970, black and white students, joined by supporters across the state, spoke, rallied and stayed away from classes in order to win increased enrollment for black and other minority students. They specifically used the political procedures that Proposal 2 has now closed to persuade the Regents to adopt the University of Michigan's first affirmative action plans.

Those plans considered race and thus departed from the grade-test score criteria in order to admit minority students. They opened the doors of the universities to the qualified minority graduates of the high schools in Michigan and in the country, and soon the proud black, Latina/o and Native American graduates from Michigan's universities joined those from other state

and national universities to form the black and Latina/o leaders who are so prominent and so important today.

When those programs were challenged because they supposedly granted unlawful "preferences" to black, Latina/o and Native American applicants, *Grutter* upheld the Michigan Law School plan because it was the only practical way to further the "paramount" national interest in assuring that the path to leadership was open to qualified black, Latina/o and Native American students.

Two days after *Grutter* was decided, the supporters of Proposal 2 announced the campaign to amend the state constitution to overrule *Grutter* by adopting a copy of California's Proposition 209. As noted, Proposal 2 deprived racial minorities of equal political rights by prohibiting the governing bodies from adopting by simple majority vote any plan that granted "preferential treatment" to minority applicants. Proposal 2 also substantively banned the universities from departing from the grade-test score criteria for the purpose of admitting minority applicants and it backed up that ban by declaring its provisions "self executing," which automatically granted a private right of action for any person who claimed to be aggrieved by this asserted "preferential treatment." Significantly, no person has ever been given such a private right of action to challenge any of the myriad of other departures from grades and test scores or of the other explicit and implicit preference in the university's admissions criteria. MI Const, art 1, sec. 26(7), Ca Const, art 1, sec. 31(7).

Proposal 2 passed by the racially-polarized vote described above. Since that day, the doors have closed to many of the black, Latina/o and Native American students who had hoped to attend the Michigan's universities, including, above all, the University of Michigan. Moreover, particular national groups among Michigan's Asian and Arab populations, who have historically been excluded for reasons analogous to those set forth in *Grutter*, can no longer even propose that the universities should adopt special admissions programs for them.

The Proposals have meant that Michigan's and California's universities may consider any form of inequality and diversity in their admissions policies except the deepest form of inequality and most important and difficult type of diversity. Proposal 2 and Proposition 209 have meant that university officials must be blind to the racial inequality that is glaringly obvious in every metropolitan area in the country.

C. The decisions below.

The Coalition plaintiffs filed this action on the day after the November 2006 general election where Proposal 2 passed. In relevant part, they asserted that Proposal 2 violated the right to political equality protected by *Hunter* and *Seattle* and the Fourteenth Amendment's ban on special laws that created standards and remedies applicable to racial minorities alone.

A month after the election, another group of plaintiffs (the "Cantrell plaintiffs") filed suit, asserting

solely a claim of unequal political rights under *Hunter* and *Seattle*. The district court consolidated the actions, and they have been joined together ever since.

At the conclusion of discovery, the Attorney General, citing *Wilson*, filed a motion for summary judgment asserting that Proposal 2 did not violate *Hunter* and *Seattle* because minorities were not entitled to political equality when they fought for "preferences" and asserting that the special restrictions and causes of action for challenging minority admissions were consistent with the Fourteenth Amendment.

On the count of political equality, the Coalition plaintiffs opposed the Attorney General's motion on the grounds that *Wilson's* "preferences" limit to equality contradicted this Court's decisions in *Hunter* and, especially, *Seattle* and that the theory of the color-blind Constitution that underlie both the proposals and the *Wilson* opinion was inconsistent with dozens of decisions by this Court.

On that count, the Coalition plaintiffs further asserted that the standards that *Wilson* implicitly adopted for determining what was a "preference" in higher education—namely, the adjusted grade point averages and test score baselines—could not possibly be used for determining rights to political equality under the Fourteenth Amendment. In particular, they asserted, it made no sense to assert that racial minorities had the right to political equality in fighting against their exclusion from the universities, but not when they asked for departures from the standards that effectuated that exclusion. The Coalition offered

evidence on those points, asserted that there was a factual dispute on them, and asked for a trial to prove the baseline standards were not suitable for determining the limits of political equality under *Hunter* and *Seattle*. R.222, Coal. Resp. Summ. Judg., at 24-34.

On their second claim, the Coalition plaintiffs asserted that Proposal 2 applied its preference standard and its private right of action only to the admissions of women and of minorities, which violated the Fourteenth Amendment.

The Cantrell plaintiffs filed a cross motion for summary judgment that asserted that *Wilson's* preferences standard was not in accord with *Hunter* and *Seattle*.

On March 18, 2009, the district court granted the Attorney General's motion for summary judgment and denied the Cantrell plaintiffs' cross motion for summary judgment on the basis that *Hunter* and *Seattle* purportedly did not prevent an unequal structure of government when racial minorities sought an "advantage based on a racial classification." Pet. App. Supp. 329a-330a, citing *Wilson*, 122 F.3d at 707. In reaching that conclusion, the district court did not address the factual evidence offered by the Coalition plaintiffs as to the nature of the criteria being used to determine "preferences" or "advantages" and whether those criteria were appropriate for defining the rights to political equality that were and were not protected by the Fourteenth Amendment. The district court rejected the Coalition plaintiffs' claim that Proposal 2 was a special law on the grounds that there was no

evidence that the electorate harbored a racial animus when it voted for Proposal 2. Pet. App. 319a.

The Coalition plaintiffs immediately appealed to the Sixth Circuit, and the Cantrell plaintiffs appealed after the district court denied their motion to alter or amend the judgment. Pet. App. 184a-193a.

On July 1, 2011, a divided panel of the Sixth Circuit reversed the district court and struck down Proposal 2's application to University admissions on the basis that it had, indeed, created an unequal structure of government in violation of *Hunter* and *Seattle*. The panel explicitly rejected *Wilson*, calling the purported distinction between "preferences" and "discrimination" "controversial" and "obfuscating" and concluding that that limit was not consistent with *Hunter* or, especially, *Seattle*. Pet. App. 141a-147a.

Judge Gibbons dissented on the basis that admissions processes were committed to the faculties and thus not a political process at all. Pet. App. 160a-178a. She expressed sympathy with *Wilson's* "preferences" limitation, but declared that it was unnecessary to reach that issue. Pet. App. 179a-181a.

The Attorney General petitioned for and was granted en banc review. On November 15, 2012, the Sixth Circuit, sitting en banc, ruled by a vote of 8 to 7 that Proposal 2 created an unequal structure of government in higher education, in violation of *Hunter* and *Seattle*, and, as a result, found that it need not address the Coalition plaintiffs' second claim. The en banc Sixth Circuit specifically affirmed the district court's conclusion that Proposal 2 had a "racial focus,"

Pet. App. 22a-26a, found that the procedure for adopting admissions standards was a political process, Pet. App. 26a-33a, and concluded that Proposal 2 violated *Hunter* and *Seattle* because it imposed on minority residents a political burden that no other citizens had to endure when they sought changes in admissions standards that furthered their interests. Pet. App. 35a-40a. The en banc panel specifically rejected *Wilson's* "preferences" limitation on political equality because it was "fundamentally at odds with *Seattle*." Pet. App. 39a.

There were five separate dissenting opinions by members of the en banc panel, which can be only briefly summarized here.

Judge Gibbons, delivering the main dissent, reiterated and elaborated her view that the admissions process was not a political process. Pet. App. 66a-78a. In contrast to her dissenting opinion on the panel, she reached the issues presented by *Wilson* and declared her view that racial minorities did not have the right to political equality when they fought for "preferences." Pet. App. 57a-66a.

Judge Boggs praised the principles announced by Proposal 2, lamented that it would take eight years to elect enough opponents of affirmative action to the governing boards, and declared his opinion that the majority was "far afield" from *Hunter* and *Seattle*. Pet. App. 51a-55a.

Judge Rogers joined Judge Gibbons' dissent and added that he believed that it was hard to see how any governmental institution that had a subordinate body

could pass a "no-race-preference" policy. Pet. App. 79a-80a.

Judge Sutton suggested that the 2006 vote meant that state officials could not thereafter assert that the state had a compelling interest for an affirmative action plan. Pet. App. 80a-81a. He declared that Proposal 2 "does not place 'special burdens' on racial minorities," Pet. App. 83a, then declared that he "does not doubt that Proposal 2 places a burden on the proponents of affirmative action," Pet. App. 88a, and finally declared that to the extent that Proposal 2 "disadvantages anyone," it disadvantages groups that "together account for a majority of Michigan's population." Pet. App. 92a. He repeated Judge Boggs' claim that it would take too long for those opposed to affirmative action to elect members of the governing boards, Pet. App. 86a-87a, and asserted that Michigan's electoral majority should have the right to end consideration of any affirmative action plans by the quickest and simplest means available to that majority. Pet. App. 86a-88a.

Finally, Judge Griffin joined Judge Gibbons' dissent, except insofar as she said the procedures for determining admissions were not a political process, and called on this Court to overrule the "ill-advised" "political structure" doctrine announced in *Hunter* and *Seattle*. Pet. App. 96a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A DIRECT SPLIT BETWEEN THE SIXTH AND THE NINTH CIRCUITS ON AN ISSUE OF SURPASSING NATIONAL IMPORTANCE.

A. There is an open, deep, and irreconcilable split between the Sixth and Ninth Circuits.

The split between the Sixth Circuit's decision in this case and the Ninth Circuit's decisions in *Wilson* and *Brown* could not be clearer. Michigan's Proposal 2 and California's Proposition 209 are identical. But the Sixth Circuit held that *Hunter* and *Seattle* required it to strike down Proposal 2, while *Wilson* held that *Hunter* and *Seattle* did not even apply to Proposition 209. Pet. App. 38a-41a; *Wilson,* 122 F.3d at 705-708.

Wilson held that *Hunter* and *Seattle* protected minorities' right to political equality when they fought against "discrimination," but not when they fought for "preferential treatment." *Id*., at 708. It further declared that Proposition 209 addressed race in a neutral fashion. *Id*., at 705-707, citing *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527 (1982).

The Sixth Circuit directly rejected *Wilson's* attempt to exempt the right to equality in the fight for "so-called preferences" as "fundamentally at odds with *Seattle*." Pet. App. 39a-41a. The Sixth Circuit found that Proposal 2 specifically burdened racial minorities, Pet. App. 26a-38a, and specifically rejected the claim

that it was neutral or a mere repeal of an existing program. Pet. App., 41a-45a.

In *Coalition v. Brown,* which was decided after the Sixth Circuit panel had struck down Proposal 2, many of the organizations and individuals who are plaintiffs in this action asked the Ninth Circuit panel to hold that *Wilson* did not apply in higher education. The *Brown* panel declined because it believed it had to follow *Wilson*. *Id*., 674 F. 3d at 1135. The Ninth Circuit then denied en banc review, despite the evident conflict with the Sixth Circuit's panel decision and despite the fact that the Sixth Circuit had already heard arguments en banc. The split between the Sixth and the Ninth Circuits is thus not only deep, but also irreconcilable.

The direct split between the circuits is paralleled by a split within each circuit. Seven judges dissented from the en banc opinion of the Sixth Circuit, Pet. App. 51a-100a, and five judges dissented from the denial of en banc review in *Wilson,* declaring that Proposition 209 was unconstitutional under *Hunter* and *Seattle. Wilson*, 122 F.3d at 711-718 (Schroeder, Pregerson, Norris, Tashima, Hawkins, JJ, dissenting from den of reh. en banc). Even fifteen years later, Judge Tashima, sitting as a member of the *Brown* panel, declared that he still believed that Proposition 209 violated *Hunter* and *Seattle* and that he would so rule today if he did not believe that *Wilson* required him to rule otherwise. *Coalition v. Brown*, 674 F.3d at 1136.

The reasoning of the Sixth Circuit also differs sharply from a divided decision of the California Supreme Court upholding Proposition 209 as applied to

public contracting. *Coral Const., Inc. v. City and County of San Francisco*, 50 Cal.4th 315, 235 P.3d 947 (2010). However, the standards normally used to evaluate bids, the statutory authority of those who decide the successful bidder, and the interests and parameters for affirmative action in contracting differ greatly from the analogous aspects of admissions. There is not, therefore, necessarily a split between the holding of the en banc panel in this case and the Supreme Court of California, but the difference in reasoning provides a supplemental reason for granting the writ in this case.

B. The issues on which the circuits are split are of surpassing importance.

The issue upon which the circuits are split could not be more important.

The 39th Congress proposed and the states ratified the Fourteenth Amendment in order to provide a uniform, federally-enforceable guarantee of political equality for the newly-freed slaves in every area except voting, which was soon protected by the Fifteenth Amendment. Under any circumstances, a significant split between the circuits over the scope of the Fourteenth Amendment's guarantee of political equality is inherently of fundamental importance to the nation.

But the split is of even greater importance here because it involves education, which is the "the bedrock of equal opportunity and 'the very foundation of good citizenship," Pet. App. 15a, citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The universities, in

particular, are the "training ground for a large number of our Nation's leaders" and provide the first steps on the "the path to leadership." Pet. App. 15a, citing *Grutter*, 539 U.S. at 332. If it is vital, as *Grutter* held, to keep the path to leadership open to "qualified students of all races," it is therefore vital that the procedures made available to minority citizens be kept open so that they can propose the plans that will make it possible for their children to actually walk down that path to leadership.

If anything, the years since *Grutter* have confirmed the importance to the nation of the programs at issue here. As is even more apparent today, the nation as a whole will soon be majority-minority and already is so in many states and among the youth in many more states. But these proposals have, as noted, cut the admissions of black, Latina/o and Native American students to leading universities by one-third in Michigan and by up to one-half in California. Rising numbers of minority citizens and falling numbers of minority leaders are the route to disaster. The ability to have fair and equal procedures to decide what can be done is thus of exceptional national importance.

Four states beyond Michigan and California have adopted identical amendments. The Attorney General attempts to create the false impression that there is a groundswell of support for such proposals. While that is not true, it is true that if political leaders decide to allocate the money, they can persuade electorates in other states to adopt such proposals by the same type

of racially-polarized vote that occurred in Michigan. This Court should thus decide the issue now before the nation is put through more of those divisive campaigns.

Finally, as important as the issue involved is to the nation, it is of life-altering importance for that part of the nation that is black, Latina/o, or Native American. As *Grutter* recognized—and the experience of California and Michigan has now confirmed—many well-qualified minority students can *only* gain admission to leading universities if those universities have adopted a lawful affirmative action program. Quite simply, a split over whether a state may deny a racial minority the right to fight for the adoption of programs that will allow its youth to attend the universities is of surpassing importance.

By definition, a federal Amendment designed to provide a national guarantee of political equality must have the same meaning in Michigan as it does in California. If Proposal 2 is unconstitutional in higher education, so, too, are Proposition 209 and the identical proposals in Washington, Arizona, Oklahoma and Nebraska. The Court should grant the writ because the whole country should have benefit of the rights now protected in the four states of the Sixth Circuit.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT HAS DEPARTED FROM BINDING DECISIONS OF THIS COURT AND FROM THE FUNDAMENTAL COMMANDS OF THE FOURTEENTH AMENDMENT ITSELF.

In *Hunter*, this Court struck down an Akron, Ohio charter amendment that selectively limited the powers of the City Council by requiring it to submit any proposed fair-housing amendment to a referendum of the citizens. The Court struck down the 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 another of comparable size." *Hunter*, 393 U.S. at 393.

In *Seattle*, this Court struck down a state constitutional amendment that allowed local school boards to use busing for any purpose *except* racial integration. Again, the Court did so because the amendment required "those favoring the elimination of de facto school segregation to seek relief from the state legislature or from the statewide electorate," while "authority over all other student assignment measures, as well as over most areas of educational policy, remains vested in the local school board." *Seattle*, 458 U.S. at 474.

As the Sixth Circuit held, Proposal 2 and identical proposals elsewhere fall squarely within the holdings of both *Hunter* and *Seattle*. The proposals selectively and drastically limit the otherwise plenary academic powers of the governing boards in one area alone—the

admission of minority students. The words quoted from *Seattle* in the preceding paragraph exactly describe what Proposal 2 and Proposition 209 have done in higher education.

Both *Hunter* and *Seattle* recognized that there might be an exception to the principles that they announced if a state demonstrated a compelling interest in support of that exception. *Hunter*, 393 U.S. at 562 (Harlan, J., concurring); *Seattle,* 458 U.S. at 485 n. 28. But neither *Wilson* nor the dissenters below stated, attempted to state, or much less proved such a compelling interest. They sidestepped the entire requirement simply by saying that "preferences" were exempt based on a linguistic analysis of the words "equal" and "protection."

At base, the *Wilson* opinion and that of the dissenters below rests on the notion that it is unfair for well-qualified minority students to be admitted with lower grade point averages and scores than rejected white applicants. But contrary to *Brown v. Board* and every case that followed it, they did not test that assumption against reality. Indeed, they took no note at all of the racial bias captured, reflected, and often exaggerated by the criteria that the universities use.

Beyond their unverified notions of fairness, *Wilson* and the dissenting judges below strain to find a legal justification for their attempt to exempt advocacy for *Grutter* plans from the protection of *Hunter* and *Seattle*. They cite decisions by this Court that the consideration of race in admissions is presumptively unlawful and must be subjected to strict scrutiny, but they fail even to recognize that this Court has long held

that those presumptions could be overcome by showing a compelling interest and that the plan in *Grutter* was lawful precisely because it fully met those tests.

Moreover, they offer no support—because there is none—for their assertion that the presumption and strict scrutiny standards that this Court has directed the *federal* courts to use in determining *which* plans are constitutional can be converted into a license for *state* action declaring that *all* such plans are *always* illegal.

Hunter and *Seattle* held that the Fourteenth Amendment did not allow the white majority to convert its beliefs, whether sincerely held or not, into amendments that prevented racial minorities from fighting through means available to all others for constitutionally-valid measures to lessen racial exclusion and inequality. The majority in Akron may have sincerely believed that a property owner should be able to sell or rent as he chose—but it could not prevent the minority from fighting for fair housing laws to end its exclusion from specific neighborhoods. Similarly, the majority in Washington may have sincerely believed in neighborhood schools—but it could not ban consideration of busing programs to end minorities' exclusions from particular schools. Finally, the majority in Michigan may sincerely believe in admissions based on grades and test scores—but it cannot ban racial minorities from the procedures available to others when they ask the governing boards to end their exclusion by departing from those criteria.

By keeping the channels of change open, *Hunter* and *Seattle*—and *Romer v. Evans*, 517 U.S. 620 (1996),

which was based on analogous principles—made possible great progress. And especially now, with more changes coming, the nation should not retreat from those principles.

In the end, the sole difference between the property-rights and neighborhood-school justifications found wanting in *Hunter* and in *Seattle* and the "color-blind" justification offered here is that the theory of the color-blind Constitution claims quasi constitutional justification because it is an "aspiration," *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in the judgment), and because a minority of Justices believe that it should serve as a universal principle today.

But in the strongest terms, this Court's majority has repeatedly held that the theory of the color-blind Constitution cannot serve as a "universal constitutional principle." *Id.* Least of all can it serve as a universal principle for defining the scope of political equality guaranteed by *Hunter*, *Seattle* and the Fourteenth Amendment, or for establishing essentially immutable standards for deciding who will have benefit of the training that makes possible so many opportunities.

The states have no right to declare that the Fourteenth Amendment itself is color-blind simply by eliminating the political procedures by which citizens can propose and officials can decide whether to recognize a compelling interest that justifies a *Grutter* plan. Especially in those states with small minority populations, it is vital to extend federal protection for the right of minority citizens to political equality in attempting to win approval for lawful programs that

will make it possible for their children to go to the state's universities. They may not win those fights—but the Fourteenth Amendment guarantees them the right to make those fights. The Court should grant review to correct a fundamental error that the Ninth Circuit has committed in denying that protection.

III. THE COURT SHOULD GRANT THE WRIT BECAUSE MICHIGAN'S PROPOSAL 2 HAS CREATED, FOR THE FIRST TIME IN MANY DECADES, A LAW THAT REGULATES AND LIMITS THE EDUCATIONAL OPPORTUNITIES OF A CLASS OF CITIZENS DEFINED BY THEIR RACE.

Wilson accepted as good coin Proposition 209's professions of equality and, on that basis, peremptorily rejected the claim that its substantive standard violated the Equal Protection Clause:

> 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, 122 F.3d at 702

Yet the question is not so simple.

In the first place, there is the question of how the court determines what is a "preference" or an "advantage." There is absolutely no basis for concluding the grade-test score baseline is a neutral standard for determining what a "preference" is. Indeed, in effectively compelling the universities to rigidly use that standard—with all its adverse effects on minority students—the amendment is actually compelling the university to perpetuate the effects of racial inequality. And a law that mandates the perpetuation of *de facto* segregation either is or is perilously close to *de jure* segregation.

Second, the grade-test score standard is particularly inappropriate for determining "preference" because there are so many exceptions to it. In *Wilson,* where the plaintiffs challenged all aspects of Proposition 209, they pressed the general point that the state granted numerous exceptions to its standards and that granting exceptions to some groups while denying them to racial minorities was a violation of the Equal Protection Clause. Much later in its opinion, the *Wilson* panel acknowledged the force of this argument by recognizing that the practice, if proved, was discriminatory:

> If the state ever prohibited women and minorities from seeking preferences on a basis available to everyone else, such as age, disability, or veteran status, the state would violate Proposition 209's prohibition against race or gender discrimination.

Wilson, 122 F.3d at 708 n. 17

But the concession directly contradicts *Wilson's* conclusion that Proposition 209 did not violate the Equal Protection Clause, because allowing exceptions for everyone except racial minorities violates not only Proposition 209, but, far more importantly, the Equal Protection Clause.

As is set forth above, in higher education, the universities routinely use plus factors to grant exceptions from their baseline criteria in order to admit the children of alumni or of donors; applicants from poor or rural backgrounds; veterans and athletes; and so on. Under Proposal 2 and Proposition 209, the universities may continue or expand any effort to achieve diversity—except diversity by race or gender.

Indeed, the public justifications offered for these proposals demonstrate the double standard that they actually incorporate. Michigan's Attorney General, like Ward Connerly before him, asserts that admissions should be determined by "merit." But their claim that black and Latina/o students lack "merit"—a claim that appeals to the darkest sentiments—rests on the unproven assumption that grades and test scores are the sole measures of merit. Even more egregiously, the Proposals demand that "merit"—so defined—should be enforced only against minority and women applicants, who are the only applicants to whom the no-preferences standard even applies.

As Justice Jackson once said, 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). And since Proposal 2 and Proposition 209 clearly do not do that, they should be struck down for their selective substantive standards as well.

In fact, these proposals defy another of the original purposes of the Fourteenth Amendment. As the Civil War ended, the South had passed laws that "…forbade blacks from pursuing certain occupations or professions… and, in some states, even imposed special taxes on those newly-freed slaves who dared to take jobs outside farming and domestic service." H. Hyman & W. Wiecek, Equal Justice Under Law 319 (1982); Eric Foner, Reconstruction, 199-201 Harper & Row (1988). Congress passed the Civil Rights Act of 1866 to outlaw those statutes and then the Congress proposed and the states ratified the Fourteenth Amendment in order to assure that the ban on such special laws would "be forever incorporated in the Constitution of the United States." *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948).

"Forever" turned out to be three decades. *Plessy v. Ferguson*, 163 U.S. 537 (1896). In Justice Harlan's great dissent, which was a last stand in defense of the promises of Reconstruction, he rightly demanded "candor" in recognizing that the doctrine of separate but equal was designed to subjugate black citizens and that, in time, the decision in *Plessy* would be as "pernicious as the decision made by this tribunal in the *Dred Scott* case." *Id.*, at 559.

If we speak with the candor that Justice Harlan demanded, the "no-preferences" amendments have as

their overriding purpose regulating and limiting the admission of black and Latina/o applicants to the Universities of California and of Michigan. And they have succeeded in their aim: the admission of black, Latina/o and Native American students have fallen by one third or more and minority citizens have no way to reverse that terrible toll.

Indeed, at UCLA and elsewhere, the opponents of minority admissions threaten legal action if the university decides to review qualifications beyond grades and test scores or takes any other steps that might open the doors to a few more minority students. David Leonhardt, "The New Affirmative Action," New York Times, Sept. 30, 2007. They even threatened to sue when they learned the shocking fact that admissions officials had read an applicant's essay in which she discussed her Latina heritage. 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).

The Black Codes imposed criminal penalties on the newly-freed slaves who attempted to work as skilled laborers or who attempted to leave agriculture or domestic service. Proposition 209 and Proposal 2 work indirectly by imposing legal restrictions and the threat of legal actions against the universities. If the proposals have not barred all black, Latina/o and Native American students, they have put a cap on the admissions of those students that no one has devised a way to lift.

The Sixth Circuit did not reach the question whether the substantive standards and the legal remedy created by Proposal 2 violated the Equal Protection Clause. But if the Attorney General asserts, as he does, that the state can deny political equality to minority residents, then it is vital that this Court also review whether the state may impose the substantive restrictions on minority admissions contained in these two proposals.

CONCLUSION

For the reasons stated, the Coalition Respondents ask this Court to grant the writ of certiorari so that this Court may review the issues presented and extend the rights protected by the en banc Sixth Circuit decision to Arizona, California, Nebraska, Oklahoma, Washington and any other state that might adopt equivalent amendments.

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