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.,

AND

CHASE CANTRELL, ET AL.

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

REPLY BRIEF

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INTRODUCTION

Michigan Attorney General Schuette cannot say it much better than the Coalition Respondents who "[1] agree that as to admissions in higher education there is a direct conflict between the governing decisions of the Sixth Circuit and the Ninth Circuit, [2] agree that the issues dividing the circuits are of paramount importance, and [3] agree with Michigan's Attorney General that this Court should grant the writ of certiorari to resolve the conflict." Coalition Br. in Opp. 2. Those sentiments are echoed by numerous *amici*, including constitutional scholars, other states, and former attorneys of the Department of Justice Civil Rights Division.

The Cantrell Respondents' view differs. They argue that the Sixth Circuit's decision is consistent with this Court's decisions in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter* v. *Erickson*, 393 U.S. 385 (1968), and they urge the Court to let the issue presented "percolate" for some unspecified period of time. With respect to this Court's precedent, the Cantrell Respondents are wrong. In *Seattle* and *Hunter*, the Court applied the political-restructuring doctrine to laws that *condoned* discrimination. The Court has never applied the doctrine to laws that *prohibit* discrimination by requiring equal treatment. Pet. 15–19. Section 26 of Michigan's Constitution does not "impos[e] distinctively disadvantageous barriers." Cantrell Br. in Opp. 1. To the contrary, § 26 prohibits "discriminat[ion]." Mich. Const. art. I, § 26. And the fact that the en banc Sixth Circuit divided 8-7 demonstrates the deep differences of opinion over the legal issue presented.

There is also no need for further percolation. The myriad of possible viewpoints are well represented in the eight separate opinions of the en banc Sixth Circuit as well as Ninth Circuit opinions in two different cases and a California Supreme Court opinion. It would be inappropriate to allow a patchwork of laws to remain in place on such issues of significance.

More important, there is need for a quick, definitive resolution. If the Michigan Attorney General is correct, more than two million Michigan voters have been effectively disenfranchised of their choice to eliminate considerations of race in education by a one-vote-margin en banc decision. And if Respondents are correct, more than 50 million citizens are being deprived of their constitutional rights by similar provisions in Arizona, California, Florida, Oklahoma, Nebraska, New Hampshire, and Washington.

Section 26's supporters are not "appeal[ing] to prejudice," Coalition Br. in Opp. 4, nor do they "endorse race-based policies that disfavor racial diversity," Cantrell Br. in Opp. 1. Rather, they promote the idea that the government should stop the sordid business of using skin color or ethnicity as a proxy for disadvantage. Race-neutral admissions criteria like those used in Texas increase socioeconomic diversity and have resulted in improved minority-student achievement, as even Respondents admitted in the proceedings below. In short, it is not only possible to recruit a diverse, successful student body without resorting to race as an admission factor, such an approach is likely to result in higher grades and graduation rates for the minority students so selected.

Certiorari is warranted.

REPLY ARGUMENT

I. There is no serious dispute regarding the circuit split over, or the jurisprudential significance of, the issue presented.

As the Coalition Respondents explain, this case presents an "open, deep, and irreconcilable split between the Sixth and Ninth Circuits." Coalition Br. in Opp. 19. And the "issues on which the circuits are split are of surpassing importance." *Id.* at 21. "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." *Id.* at 23. The whole country would benefit from the Court's review and resolution of the issue presented. *Ibid.*

The Cantrell Respondents say the circuit split is "shallow" and "stale," suggesting that the Court should wait to weigh in. Cantrell Br. in Opp. 27. Such observations are cold comfort to the two million Michigan citizens disenfranchised by the Sixth Circuit's decision or the 38 million Californians who the Cantrell Respondents say are living under an unconstitutional admissions regime that "silence[s] debate and strip[s] the political process of its capacity to judge policy based on individualized merit." *Id.* 28. If the laws at issue are truly "in the wheelhouse of the Fourteenth Amendment" as the Cantrell Respondents claim, *ibid.*, it is difficult to understand why the Cantrell Respondents would countenance the Amendment's violation in numerous states outside the Sixth Circuit. Regardless of who is right, the issue presented is singularly important and should be resolved without delay.

II. *Hunter* and *Seattle* do not prevent a state from requiring equal treatment.

Respondents assert that *Hunter* and *Seattle School District* forbid the State of Michigan from singling out race, ethnicity, and sex as factors that should not be considered in university admissions. Coalition Br. in Opp. 24–28; Cantrell Br. in Opp. 12–24. In fact, the Cantrell Respondents argue that Michigan's constitutional amendment "endorse[s] race-based policies." Cantrell Br. in Opp. 1. The irony of this argument is apparent. They claim that the elimination of race-based policies is endorsing race-based policies. Cf. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). But Michigan's amendment does not endorse race-based policies; just the opposite, it stops discrimination based on race.

The Cantrell Respondents also take their position to its logical end, arguing that once politically unaccountable university personnel make the decision to consider race and ethnicity in admissions, those decision-makers are the only individuals able to change that policy unless the state completely takes over all aspects of university-admission programs by making all admissions criteria subject to statewide referenda. Cantrell Br. in Opp. 2.

That end makes no sense and exposes the logical fallacy in Respondents' argument—*all* laws effect political restructuring, so, under Respondents' theory, *no* law may require equal treatment. As Attorney General Schuette explained in the petition, if Respondents' view of *Hunter* and *Seattle* is correct,

then the Fair Housing Act of 1968 would be unconstitutional. Pet. 21. Once Congress requires equal treatment, it is no longer lawful for minority groups to lobby state and local officials for preferential treatment in housing laws. *Ibid*.

The Cantrell Respondents also emphasize that *Hunter* and *Seattle* are designed to "constitutionally protect a fair political *process* as opposed to any particular *outcome*." Cantrell Br. in Opp. 19–20. But that is true of the Equal Protection Clause as well—it forbids processes from being infected with racial considerations by preventing discrimination based on race. Preferential treatment based on race (which necessarily means discrimination against other races) does the opposite. It focuses entirely on achieving a particular outcome (here, an admissions outcome), even at the expense of making the process discriminatory.

Hunter and *Seattle School District* did not gut the Equal Protection Clause by holding that no law can require equal treatment. Pet. 15–19. And if they had, they should be overruled to the extent they prohibit a state from enacting a constitutional amendment like § 26. *Id*. at 19–21. Either way, this Court's immediate intervention is required.

III. This Court's decisions in *Grutter* and *Parents Involved* do not support the Sixth Circuit's reasoning.

The Cantrell Respondents argue that this Court's decisions in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), vindicate the Sixth Circuit. Cantrell Br. in Op. 11, 25. Not so.

Grutter upheld a race-conscious admissions policy on the narrow ground that a diverse student body can reap educational benefits. But it said nothing about whether such policies are constitutionally required. Quite the opposite, the Court encouraged universities to draw on the most promising aspects of "race-neutral" alternatives and predicted that preferences would no longer be necessary in 25 years. *Grutter*, 539 U.S. at 342–43. It is difficult to understand how this holding can be characterized as one *prohibiting* constitutional provisions like § 26 unless a state enacts a statewide admissions policy that considers "only applicants' GPA and SAT scores." Cantrell Br. in Opp. 23.

As for *Parents Involved*, it is true that the opinion did not hold all desegregation programs unconstitutional. Cantrell Br. in Opp. 25. But the opinion began with the presumption that all governmental racial classifications are invalid. 551 U.S. at 720. And it held that where schools have never segregated on the basis of race, or have removed the vestiges of past institutional discrimination, "the way to achieve a system of determining admission . . . on a nonracial basis is to stop assigning students on a racial basis." *Id*. at 747–48. Michigan has implemented that system.

IV. Race-neutral admissions can improve both campus diversity and minority academic success.

The Coalition Respondents say that constitutional amendments like Proposition 209 and § 26 "have meant that university officials must be blind to the racial inequality that is glaringly obvious in every metropolitan area in the country." Coalition Br. in Opp. 13. But just the opposite is true. Universities in other states have used new approaches (like the Texas 10% plan) that achieve diverse student populations while offering greater opportunity to economically disadvantaged students and resulting in higher minority-student achievement. The Coalition Respondents below conceded the effectiveness of the Texas program, and it cannot be disputed that new admissions policies in California have resulted in higher minority-student grade point averages and graduation rates even while those students take more demanding science and engineering classes than pre-Proposition 209.

Start with Texas public universities, which were forced to adopt race-neutral polices in response to *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit decision that invalidated the University of Texas School of Law's use of race in admissions. In 1997, the Texas legislature enacted a law requiring the University of Texas at Austin (UT) to admit all Texas high school seniors ranked in the top 10% of their classes. By 2000, UT had returned African-American and Latino freshman-enrollment levels to those of

1996, the last year the pre-*Hopwood* policy was in effect.[1]

UT credited the race-neutral system as enabling the university "to diversify at UT Austin with talented students who succeed." The system helped "us to create a more representative student body and enroll students who perform well academically," evidenced by the fact that "minority students earned higher grade point averages . . . than in 1996 and ha[d] higher retention rates."[2]

Ironically, while continuing to insist that race-based admissions criteria are essential to minority academic achievement, Plaintiffs in this case tacitly conceded the success of UT's race-neutral system:

> The University of Texas, for example, recently discovered that students admitted from small rural and large urban high schools under the top "ten percent" plan achieved higher grades at UT than students admitted under other criteria . . . . [Coalition En Banc Supp. Br. 11.]

Now consider California. There are nine undergraduate campuses in the University of California (UC) system.[3] In 1997, the year Proposition 209 took effect, underrepresented minorities (defined as American

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[1] Faulkner, The "Top 10 Percent Law" is Working for Texas (Oct. 19, 2000), available at http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html.

[2] *Id*.

[3] UC Merced is excluded because it did not open until 1995. UC campuses dedicated solely to graduate-level courses are also excluded.

Indian, African American, and Chicano/Latino) received 19.6% of freshman-admission offers (7,385 total). By 2010, underrepresented minorities received 28.3% of the freshman offers (16,635 total), a 44% improvement. Admissions offers to white students declined, from 42.6% in 1997, to 30.6% in 2010.[4] The percentage of offers to underrepresented minorities was higher or the same in 2010 than 1997 on six of the eight UC campuses that had such data.[5] Data for 2011 shows the same is true for seven of the eight.[6]

Similarly, a non-UC study showed that African American enrollment at UC campuses had returned to pre-Prop 209 levels by 2002, averaging 40% above pre-Prop 209 levels by 2007-2010. Latino enrollment at UC campuses reached a new record in 2000, and by 2008, Latino enrollment was *double* its pre-Prop 209 levels:[7]

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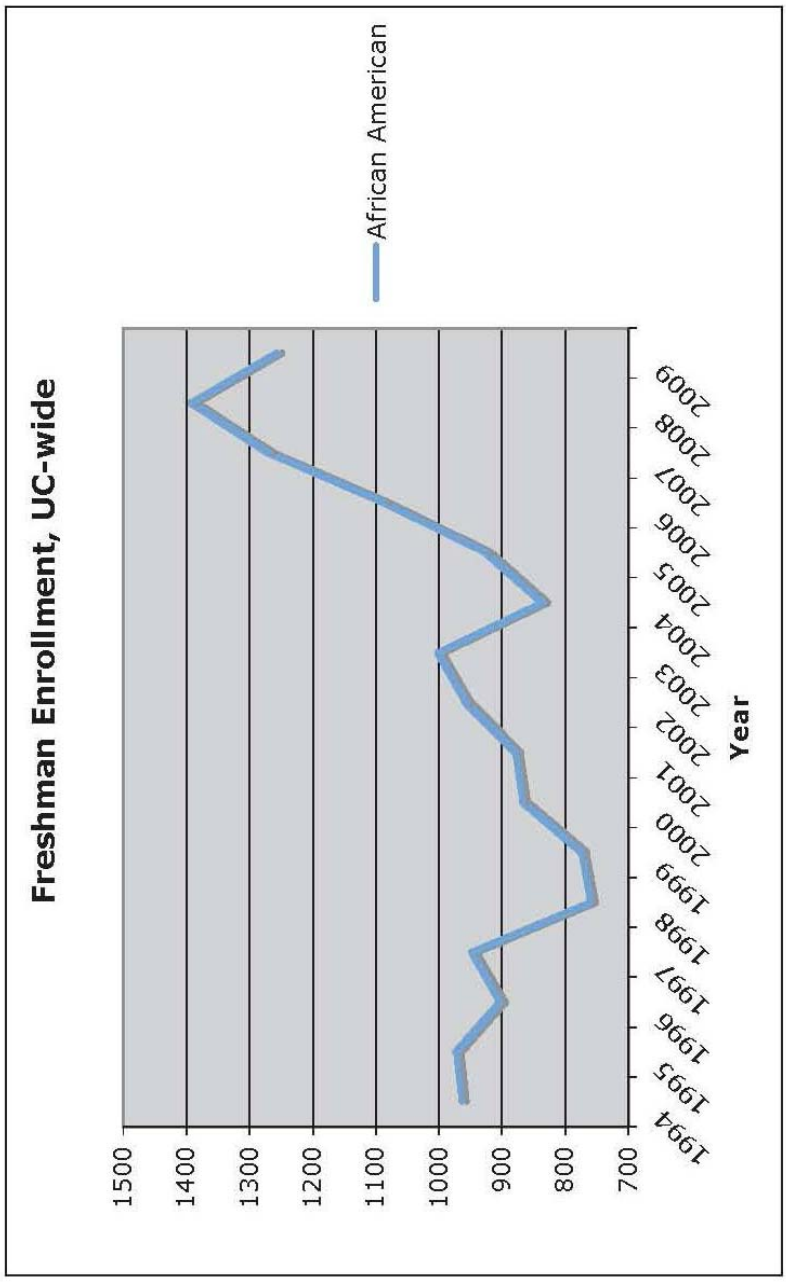
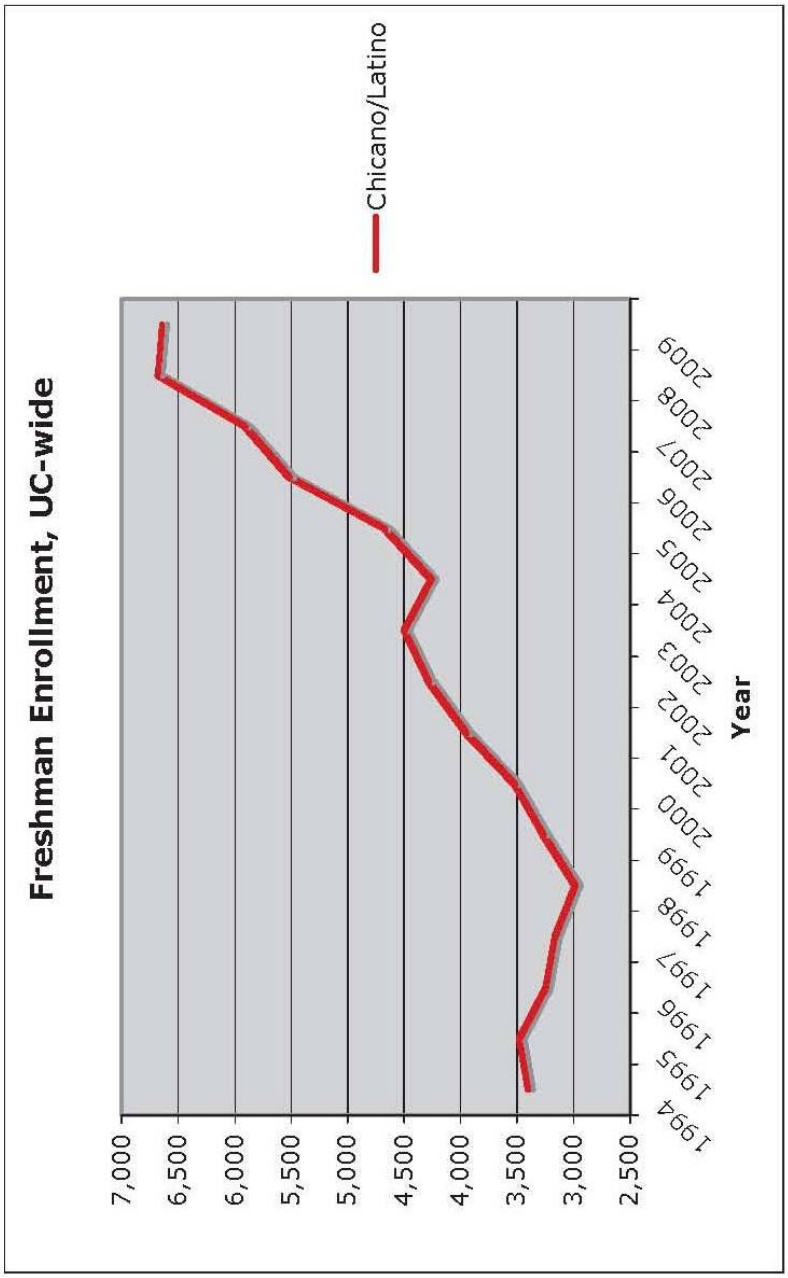
[4] Univ. of Cal. Office of the President, California Freshman Admissions for Fall 2008 (UC 2008 Admissions), Table 4, available at http://www.ucop.edu/news/factsheets/fall2008adm.html; Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2010 (UC 2010 Admissions), Table 3, available at http://www.ucop/edu/news/factsheets/fall2010adm.html; Univ. of Cal., Office of the President, New California Freshman Admits Fall 1997, 1998, 1999, and 2000, Table A, available at http://www.ucop/edu/ucophome/commserv/preadm_a400.pdf.

[5] UC 2008 Admissions, Table 4, and UC 2010 Admissions, Table 3.

[6] Univ. of Cal., Office of the President, California Freshman Admissions for Fall 2011 (UC 2011 Admissions), Table 3, available at http://www.Ucop.edu/news/factsheets/fall2011adm.html.

[7] Richard Sander, An Analysis of the Effects of Proposition 209 Upon the University of California, available at http://www.seaphe.org/ working-papers/.


Freshman Enrollment, UC-wide
African American
1500
1400
1300
1200
1100
1000
900
800
700
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year


Freshman Enrollment, UC-wide
Chicano/Latino
7,000
6,500
6,000
5,500
5,000
4,500
4,000
3,500
3,000
2,500
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
Year

In sum, since Proposition 209 became effective in 1997, minorities continued to be offered admission to the University of California system in greater numbers, without resort to racial preferences. What's more, minority students' college graduation rates improved. Comparing the period 1992–1994 (pre-Prop 209) to 1998–2005 (post-Prop 209), African-American four-year graduation rates improved by more than half, and six-year graduation rates by one fifth. Latinos saw similar improvements. And both African-American and Latino grade point averages increased post-Prop 209, even though minority students were taking more difficult science and engineering classes.[8]

In short, Texas and California have shown it is possible to recruit a diverse student body without considering race as a factor, and that doing so may result in higher minority achievement than the race-based approach Respondents advocate.

The Coalition Defendants are also wrong when they say that compelling universities to "rigidly" use a grade-test score baseline compels the university "to perpetuate the effects of racial inequality." Coalition Br. in Opp. 29. To begin, nothing in § 26 or similar laws prohibits universities from looking at factors other than grades and test scores.

More important, such laws have had the opposite effect alleged. Laws like § 26 compel universities to stop using race as a proxy and instead adopt initiatives like the Texas 10% plan. The result is higher enrollment from the pool of top talent at our nation's most

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[8] *Id.*

poverty-stricken, inner-city high schools—institutions where historical discrimination has resulted in high concentrations of minority students. As noted above, those students have thrived in the university setting. Far from "mandat[ing] the perpetuation of *de facto* segregation," *id*. 32, laws like § 26 can ultimately promote upward socioeconomic mobility and equality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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