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, et al.,
Respondents.

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

BRIEF OF THE STATES OF ARIZONA, ALABAMA, GEORGIA, OKLAHOMA, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae, the States of Arizona, Alabama, Georgia, Oklahoma, and West Virginia (the "Amici States") have a strong interest in eradicating discrimination and fostering diversity in their public institutions by affording equal treatment to all, regardless of race, sex, color, ethnicity, or national origin. Indeed, Arizona, Michigan, California, Florida, Nebraska, New Hampshire, Oklahoma, and Washington have adopted laws that bar preferential treatment or discrimination "on the basis of race, sex, color, ethnicity or national origin" in public education, including university admissions, public employment, and public contracting. *See* Ariz. Const. art. II, § 36(A); Cal. Const. art. I, § 31; Mich. Const. art. I, §26; Neb. Const. art. I, § 30, Okla. Const. art. II, § 36A; N.H. Rev. Stat. Ann. § 187-A:16-a(I); Wash. Code Ann. § 49.60.400(1); Fla. Exec. Order 99-281. These laws are materially identical to article I, Section 26 of the Michigan Constitution (Section 26). The Sixth Circuit declared Section 26 unconstitutional under the Equal Protection Clause in *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan*, 701 F.3d 466 (6th Cir. 2012) (en banc). The Amici States have a significant interest in reversing the Sixth Circuit decision and upholding the States' prerogative to enact laws like Section 26 that are wholly consistent with the Equal Protection Clause.

In *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), this Court stated that States "can and should" look to "race-neutral alternatives" to achieve diverse student

populations in state universities. The federal system allows States to be "'laboratories for experimentation to devise various solutions where the best solution is far from clear.'" *Grutter*, 539 U.S. at 342 (Kennedy, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995)). The Amici States therefore urge the Court to hold that the so-called political structure doctrine in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982), does not prevent States from continuing the experimentation that is crucial to developing creative solutions and working toward the time when race-based college admissions policies reach their "logical end point." *Grutter*, 539 U.S. at 342.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Justice Harlan captured a fundamental American value in his dissent in *Plessy v. Ferguson*: "Our Constitution is *color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." 163 U.S. 537, 559 (1896) (emphasis added), *overruled by Brown v. Board of Education*, 347 U.S. 483 (1954). Justice Harlan also opined that "the constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Id*. at 554 (Harlan, J., dissenting).

This same principle is embodied in President John F. Kennedy's executive order that governmental decisions should be undertaken "without regard to race, creed, color or national origin." Exec. Order No.

10925, 26 Fed. Reg. 1977, sec. 301(1) (Mar. 6, 1961). President Kennedy later reiterated that "race has no place in American life or law." Pres. John F. Kennedy, Civil Rights Announcement (June 11, 1963). Reverend Dr. Martin Luther King said the same thing in the summer of 1963 in words now familiar to most Americans.

Recently, this Court struck down a student assignment plan that relied on racial classification, repeating: "'[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745-46 (2007) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995)). This Court also emphasized that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id*. at 748.

The Sixth Circuit held below that Michigan's constitutional provision prohibiting discrimination or preferences based on race in public university admissions decisions violated equal protection principles. This gets it precisely backward. The United States Constitution requires treatment of citizens as individuals and *prohibits* treatment based on the race they happen to have been born into. U.S. Const. Amend. XIV, § 1 (no person can be denied "equal protection of the laws"); *see also Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by

race or gender" and "does not violate the Equal Protection Clause in any conventional sense.").

In *Wilson*, the Ninth Circuit addressed an equal protection challenge to an initiative measure that amended the California Constitution to prohibit the State from discriminating or granting preferential treatment "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." 122 F.3d at 696 (quoting Cal. Const. art. I, § 31(a)) (Section 31). The Ninth Circuit rejected the argument that California's Section 31 denied equal protection under the political structure doctrine outlined in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982). *Wilson*, 122 F.3d at 708 ("Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and gender—must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification—such as wealth, age or disability—are at the mercy of statewide referenda.").

A bare majority of the en banc Sixth Circuit, however, expressly declined to follow the Ninth Circuit's long-standing decision in *Wilson*. *BAMN*, 701 F.3d at 486 n.8. Instead, the Sixth Circuit held that under the political structure doctrine articulated in *Hunter* and *Seattle School District*, Michigan's Section 26 deprived minority groups of equal protection because it "targets race-conscious admissions policies" and it "reallocates political power or reorders the

political process in a way that places special burdens on racial minorities." *Id.* at 485.

This Court should reject the Sixth Circuit's misapplication of the political structure doctrine. The Sixth Circuit's reasoning is flawed as reflected in *Wilson* and the California Supreme Court's decision in *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010) (holding that California's Section 31 did not violate the political structure doctrine). The Court should also reject the Sixth Circuit's reasoning because it conflicts with the principles in *Grutter*.

In *Grutter*, 539 U.S. at 342, this Court held that, under limited circumstances, some race preferences can be constitutionally permissible for a limited period of time. This Court said that the States "can and should" look to "race-neutral alternatives" to achieve diverse student populations in state universities. *Id.* Arizona, Michigan, and six other States have adopted laws that require them to implement race-neutral university admissions policies. The universities in these States, concerned with maintaining diverse student populations, have implemented race-neutral admissions policies that have nonetheless taken into account and, for the most part, achieved the universities' goal of maintaining diverse student populations.

The Sixth Circuit decision will restrict a State's ability to pass laws requiring race-neutral admissions policies, which in turn hampers the experimentation and innovation in race-neutral policies that *Grutter* sought to encourage. Although in *Grutter* this Court held that the Constitution permitted limited race-

conscious admissions policies in conventional equal protection analysis, it did not hold that such policies are required. 539 U.S. at 342. The Sixth Circuit contravened *Grutter* by holding that the political structure doctrine prohibits Michigan from amending its constitution to eliminate race-conscious policies implemented by state university admissions committees. The decision below discourages, rather than encourages, "'innovation and experimentation'" in the federal system. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

ARGUMENT

I. State Laws that Prohibit Discrimination or Preferences Based on Race, Sex, Color, Ethnicity, and National Origin Do Not Violate the Equal Protection Clause.

The Sixth Circuit determined that Section 26 violated the Equal Protection Clause by "removing the power of university officials to even *consider* using race as a factor in admissions decisions," 701 F.3d at 473, and thereby "reorder[ing] the political process in Michigan to place special burdens on minority interests," *id.* at 485. In reaching its conclusion, the court relied solely on *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).[1] *BAMN*, 701 F.3d at 473-85. This

[1] The Sixth Circuit acknowledged that traditional equal-protection analysis was foreclosed by *Grutter*. 701 F.3d at 473. In upholding Section 31, a California constitutional provision similar to Section

Court should reject the Sixth Circuit's interpretation of *Hunter* and *Seattle School District* and its application of the political process doctrine to Section 26. As the Ninth Circuit explained, "*Hunter* and *Seattle* addressed the constitutionality of political obstructions that majorities had placed in the way of minorities to achieving protection against unequal treatment." *Wilson*, 122 F.3d at 704. In contrast, and consistent with equal protection principles, Section 26 and similar state laws forbid preferential treatment to applicants for admission to public universities based on race or sex.

In *Hunter*, the plaintiff had sought enforcement of a fair housing ordinance passed by the Akron City Council that banned discrimination in the sale or lease of real property. 393 U.S. at 386-87. The plaintiff brought an equal protection challenge to the amendment to the Akron City Charter that repealed the fair housing ordinance and prevented the city council from enacting an ordinance that addressed racial discrimination in housing without the approval of a majority of Akron voters. *Id.*

This Court found in the charter amendment "an explicitly racial classification" that drew "a distinction between those groups who sought the law's protection

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26, the Ninth Circuit likewise rejected a traditional equal-protection challenge: "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender" and therefore "Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Wilson*, 122 F.3d at 702.

against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 389-90. Because the Akron amendment made it "more difficult for minorities to enact legislation in its behalf," the Court held that the Akron amendment "discriminates against minorities, and constitutes a real, substantial, and invidious denial of equal protection of the laws." *Id.* at 393.

In *Seattle School District*, this Court addressed a statewide referendum that repealed a local ordinance that had implemented a series of school desegregation measures. 458 U.S. at 460-62. In finding that the Washington referendum violated the political structure doctrine, this Court explained that "when the political process or decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race."'" *Seattle School District*, 458 U.S. at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971) (quoting *Hunter*, 393 U.S. at 391).

In *Wilson,* 122 F.3d at 696, the Ninth Circuit addressed an equal protection challenge to a California initiative measure that amended the California Constitution to prohibit the State from discriminating or granting preferential treatment "on the basis of race, sex, color, ethnicity, or nation origin in operation of public employment, public education, or public contracting," Cal. Const. art. I, § 31(a). The language of California's Section 31 mirrors Michigan's Section 26. The court framed the question as "whether a

burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws." *Id.* at 705.

The Ninth Circuit rejected the plaintiffs' argument that Section 31 violated minorities' equal protection rights under *Hunter* and *Seattle School District*. 122 F.3d at 709. The Ninth Circuit distinguished between the laws invalidated in *Hunter* and *Seattle School District*, which "reallocated political authority in a discriminatory manner" and the California initiative that this Court upheld in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which repealed "'race-related legislation or policies that were not required by the Federal Constitution in the first place.'" *Wilson*, 122 F.3d at 706 (quoting *Crawford*, 458 U.S. at 538). The court concluded that Section 31, like the law upheld in *Crawford,* is "a law that addresses in neutral fashion race-related and gender-related matters" because "[i]t does not isolate race or gender antidiscrimination laws from any specific area over which the state delegated authority to a local entity," or "treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another." *Id.* at 707.

The Ninth Circuit also concluded that Section 31 did not deny equal protection because it did not burden an individual's right to equal treatment:

> It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstruction to preferential treatment.

> While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

Id. at 708.

Thirteen years after *Wilson,* the California Supreme Court also held that Section 31 did not violate the political structure doctrine articulated in *Hunter* and *Seattle School District*: "Nothing in *Hunter* or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require." *Coral Constr., Inc. v. City of San Francisco*, 235 P.3d 947, 959 (Cal. 2010) (internal citation omitted).

Although the court accepted the City's characterization of the pupil transportation program involved in *Seattle School District* as providing race-conscious affirmative relief, the court rejected the City's argument that the case required invalidation of Section 31. *Coral Constr.,* 235 P.3d at 959-60. The court explained that although the "race-conscious pupil assignment programs repealed by Washington's voters would be presumptively unconstitutional" under *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007), this Court decided *Seattle School District* at a time when its decisions indicated that such programs were within the school districts' discretion. 235 P.3d at 959. The court also noted that the *Seattle School District* Court did not understand "the pupil assignment policies in question as providing unequal *preferences*, as opposed simply to '*equal* educational opportunity.'" *Id.* at 960 (quoting

Seattle School District, 458 U.S. at 479) (emphasis added by court) (other internal quotation marks omitted). The court concluded that "*Seattle* cannot fairly be read as holding that the political structure doctrine protects presumptively unconstitutional racial preferences, as opposed to programs intended to bring about immediate equal treatment." *Id.*

The Sixth Circuit rejected the cogent reasoning of the Ninth Circuit in *Wilson* and the California Supreme Court in *Coral Construction* when it concluded that Section 26 violates the political structure doctrine. *BAMN*, 701 F.3d at 485-87. In so doing, the Sixth Circuit misconstrues the political structure doctrine and creates precedent that is irreconcilable with *Grutter*'s recognition, 539 U.S. at 342, that "all governmental use of race must have a logical end point" and that therefore States should experiment with race-neutral alternatives to achieve diversity.

II. Upholding the Sixth Circuit Decision Would Undermine the Quest for Race-Neutral Alternatives that Achieve Diversity.

As this Court recognized in *Grutter*, "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" 539 U.S. at 341 (quoting *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984)). The Court expressed the expectation that the race-conscious law school admissions policies it approved in 2003 would have "a logical end point" and no longer be necessary in another twenty-five years. *Grutter*, 539 U.S. at 342-43. The Court in *Grutter* also approvingly cited some of the

laws prohibiting racial preferences in several States that were already experimenting with race-neutral admissions policies to achieve the compelling state interest of student body diversity. *Id.* at 342 (noting California, Florida, and Washington state laws that prohibit racial preferences in admissions).

Following *Grutter*, the States of Arizona, Michigan, Nebraska, and Oklahoma used the initiative process to amend their constitutions to include prohibitions on race-based discrimination and preferential treatment in public employment, public education, and public contracting that are nearly identical to California's Proposition 209. Ariz. Const. art. II, § 36(A) (adopted 2010); Mich. Const. art. I, § 26 (adopted 2006); Neb. Const. art. I, § 30 (adopted 2008); Okla. Const. art. II, § 36A (adopted 2012). New Hampshire recently followed suit, adopting a statutory prohibition on race-based discrimination and preferential treatment in recruiting, hiring, promotion, or admission within the state college and university system. N.H. Rev. Stat. Ann. § 187-A:16-a(I) (adopted 2011). As a result of these state laws enacted both before and after *Grutter,* States have adopted race-neutral admissions policies that also seek to achieve a diverse student body.

After the California voters enacted Section 31 in 1996, which barred sex- and race-based preferences in college admissions, the California Board of Regents adopted an automatic admissions plan, known as the 4% Plan, which guaranteed that the top 4% of students from each California high school senior graduating class would be admitted if they also completed eleven specific units of college preparatory coursework. U.S. Dep't of Educ., *Race-Neutral Alternatives in*

Postsecondary Education: Innovative Approaches to Diversity (hereinafter *Race-Neutral Alternatives*) at 11 (March 2003), available at http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html. The University of California Board of Regents also adopted a "Comprehensive Review" admissions plan that evaluates socioeconomic status and supplements the 4% Plan. *Id.* at 10. Although the California University admission system is more difficult to evaluate than systems in some other states where admission criteria is less selective, California's race-neutral criteria have produced some positive results. *See* Peter Arcidiacono, Esteban Aicejo, Patrick Coate, and V. Joseph Hotz, *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California* at 27 (December 2011), available at http://www.public.econ.duke.edu/~psarcidi (concluding that minority enrollments increased in less-selective UC campuses after Section 31 was enacted, while minority enrollment decreased in more-selective UC campuses, but that Section 31 resulted in higher minority graduation rates).

Florida also adopted race-neutral admissions policies after the Governor ended the use of race, ethnicity, or gender in university admission decisions in Executive Order 99-281. *Race Neutral Alternatives, supra* at 11. Florida guarantees all public high school seniors within the top 20% of their class admission into the state university system, the "Talented 20 Program," but they still must compete to gain admission at the institution that they prefer. *Id.* Florida supplements the Talented 20 Program by consideration of socioeconomic factors. *Id.* Instead of experiencing a decline in the number of minority students enrolled after the elimination of race- and

–gender based preference and the implementation of the new admissions policies, the number of minority students increased modestly. *Id.* at 14.

In 1998, Washington voters passed an initiative that prohibited discrimination or preferential treatment "based on race, sex, color, ethnicity or national origin in public employment, education, and contracting." Wash. Code Ann. § 49.60.400(1). After the initiative went into effect, the University of Washington adopted a holistic review admissions process that considers socioeconomic factors. Richard D. Kahlenberg, *Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, 40 (2012), available at http://www.tcf.org/work/education/detail/a-better-affimative-action-state-universities-that-created-altrnatives-to/. Although African American and Hispanic admissions dropped in the first year that the University of Washington eliminated race-based admission criteria, the number of African American and Hispanic admissions in subsequent years under the holistic review admissions criteria equaled or exceeded the pre-ban admissions numbers. *Id.* at 42.

Although Texas did not choose to eliminate race-based admission policies, the Fifth Circuit held that the University of Texas's consideration of race in its admissions policy violated the Equal Protection Clause. *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996). After *Hopwood*, the University of Texas "stopped considering race in admissions and substituted a new holistic metric of a candidate's potential contribution to the University," which included a variety of factors, some of which involved the applicant's socioeconomic

background. *Fisher v. Univ. of Texas*, 570 U.S. __, slip op. at 2-3 (U.S. June 24, 2013). Texas also passed the "Top Ten Percent Law" that grants "automatic admission to any public state college, including the University [of Texas], to all students in the top 10% of their class at high schools in Texas that comply with certain standards." *Id.* at 3 (referring to Tex. Educ. Code Ann. § 51.803). The University of Texas's revised admission policy plus the Top Ten Percent Law "resulted in a more racially diverse environment" post-*Hopwood* than that which existed when race was explicitly considered. *Id.*[2]

In November 2010, Arizona voters passed Proposition 107, which amended the Arizona Constitution, just as Michigan voters amended their constitution in 2006, to prohibit programs that grant "preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." *Compare* Ariz. Const. art. II, § 36 *with* Mich. Const. art. I, § 26. Since Proposition 107 became Arizona law, Arizona State University's Sandra Day O'Connor College of Law (ASU) and Arizona's other public law school, the University of Arizona's James E. Rogers College of Law, no longer consider race or ethnicity in

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[2] After this Court decided *Grutter,* the University of Texas "adopted a third admissions program, the 2004 Program in which the University reverted to explicit consideration of race." *Fisher*, slip op. at 3. The Petitioner in *Fisher* challenged the 2004 Plan. This Court vacated the court of appeals' judgment upholding the 2004 Plan and remanded the case "so that the admissions process can be considered and judged under a correct analysis." *Id.* at 13.

admissions decisions. Stephanie Snyder, *A Year After Preferential Treatment Ban, Little Change on State Campuses* (May 5, 2012) http://AzCapitolTimes.com/news/2012/05/03/a-year-after-preferential-treatment-ban-little-change-on-state's-campuses.

Instead, at the University of Arizona law school after Proposition 107, admission depends on "many. . . factors," including grades and LSAT scores, but also "the applicant's educational experiences, grade trends, graduate study, significant or extracurricular activities, unique educational or occupational experiences, substantial community service, socioeconomic background, educational, and personal challenges." http://www.law.arizona.edu.Admissions/application_process.cfm. Similarly at ASU, law school admissions committees evaluate such qualitative factors as "the rigor of the undergraduate course of study, graduate study, demonstrated commitment to public service, work experience, leadership experience, extracurricular or community activities, history of overcoming economic or other disadvantage, personal experiences with discrimination, overcoming disability, geographic diversity, diversity of experience and background, maturity, ability to communicate, foreign language proficiency, honors and awards, service in the Armed Forces, publications, and exceptional personal talents." http://www.law.asu.edu/admissions/Admissions/HowToApply.aspx.

In the first classes admitted after Proposition 107, both Arizona law schools "saw about a 3 percent drop in minority enrollment." Snyder, *supra* at 8. That small drop was well within the range of minority enrollment percentages achieved when ASU gave

preferences in admissions to race and ethnicity—and far less than the thirty percent drop that ASU predicted would result if such preferences were no longer allowed. Brief for the Arizona State University College of Law as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398328 at *8 (U.S. Feb. 18, 2003).

The experience of California, Florida, Texas, and Arizona shows that public universities can achieve diverse student bodies without the race- and ethnicity-conscious admissions policies prohibited by state law. As stated in a Proposition 107 frequently-asked-questions sheet issued by the University of Arizona, "Proposition 107 does not prevent the University from using legally permissible means to create a diverse and high quality student body and educational environment. The University will continue to pursue diversity using factors that are race and gender neutral." University of Arizona, Office of the President, Proposition 107 FAQ, available at http://www.president.arizona.edu/node/661.

The state-specific experimentation in law school admissions policy that *Grutter* endorsed, and that several States have chosen to engage in, is a virtue of our federal system of government. As this Court has repeatedly recognized, "the federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364 (quoting

Gregory, 501 U.S. at 458). The Sixth Circuit's en banc decision undermines these federalism values and, if not overruled, will chill local experimentation and innovation that advances equal protection in university admissions.

Moreover, due to the Sixth's Circuit's reliance on the political process doctrine, States wishing to implement race-neutral policies in college admission decisions face uncertainty about how to do so constitutionally. In *Grutter*, the Court envisioned that twenty-five years after its decision, "the use of racial preferences will no longer be necessary to further the interest approved" in the decision. 539 U.S. at 343. Yet the Sixth Circuit decision seems to require that only the body that implemented a race preference can eliminate that preference. *See BAMN*, 701 F.3d at 487. Under the Sixth Circuit's reasoning, States that wish to experiment with race-neutral policies will not be able to so as part of a cohesive, statewide plan. Instead, such programs would need to be implemented in a piecemeal fashion, school by school. As such, even if there is sufficient political support for a statewide ban on race-based preference, and the time when such preferences comport with equal protection has come to its end, it will be up to individual public colleges and universities to end preferential treatment based on race. This Court could not have intended that its political structure cases would so hamper the States' authority to adopt uniform race-neutral policies.

CONCLUSION

This Court should reverse the Sixth Circuit decision.

Respectfully submitted this 1st day of July, 2013.

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