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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner is Bill Schuette, Michigan Attorney General. Respondents are Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Denesha Richey, Stasia Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turqoise Wiseking, Brandon Flannigan, Josie Human, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawnm Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 386, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmative Action Party. Additional Plaintiffs below are Chase Cantrell, Karen Nestor, Paula Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Brenda Foster, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Cathy Alfaro, Michael Weisberg, Casey Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, Edward Kim, M.C.C. II, Carolyn Carter, and Matthew Robinson. Additional Defendants below are the Regents of the University of Michigan, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, Mary Sue Coleman, Irvin D. Reid, Lou Anna K. Simon, and Eric Russell.

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JURISDICTION

The en banc judgment of the Sixth Circuit was entered on November 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 1, § 26 of Michigan's 1963 Constitution provides:

> (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.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal 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 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.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

INTRODUCTION

In November 2006, 58% of Michigan's voters adopted a proposal that amended Michigan's Constitution to prohibit discriminating or granting preferential treatment in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. Mich. Const. art. I, § 26. The Sixth Circuit struck down § 26 as to public education, holding that a constitutional provision requiring equal treatment violates equal protection.

It is curious to say that a law that bars a state from discriminating on the basis of race or sex violates the Equal Protection Clause by discriminating on the basis of race and sex. Yet the Sixth Circuit held that § 26 violates the "political-restructuring doctrine" because an individual who supports race- or sex-conscious admissions policies cannot lobby admissions officials for that policy but must instead amend the state constitution. The Sixth Circuit was wrong.

To begin, this Court has applied the political-restructuring doctrine only to laws that impede protection against unequal treatment, never to laws that preclude *preferential* treatment. E.g., *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982). Indeed, the majority opinion in *Seattle School District* disclaimed that its holding would prevent a higher level of government from overruling a university's affirmative-action policy, explaining that admissions policies had "nothing to do with the ability of minorities to participate in the process of self-government." *Seattle School Dist.*, 458 U.S. at 480 n.23.

And if the Sixth Circuit is right that a political-restructuring claim voids a provision that eliminates discrimination and preferences, it is difficult for *any* law to require equal treatment. That is because every state and federal law elevates decisions to a higher political level. For example, the federal Fair Housing Act would be suspect because it stops homebuyers from lobbying state officials for race- and sex-based preferences. That result cannot possibly be correct.

Finally, when this Court upheld race-conscious admissions policies in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), the Court said such policies "must be limited in time," *id*. at 342, and would likely be "unnecessary" within 25 years, *id*. at 343. But under the Sixth Circuit's view, Michigan cannot pursue this option; race-conscious policies must remain until universities (or their faculty) say it is time to eliminate them.

Affirmative action has been one of the most hotly contested social issues of the past few decades. Some people support it because they believe affirmative-action policies are necessary to ensure equal opportunity and to achieve campus diversity. Others oppose it because they believe such policies deny equal treatment and perpetuate the myth that students with the same skin color, ethnic heritage, or sex share the same background and think the same way. This Court has held that race-conscious admissions policies are presumptively unconstitutional, but permissible in some narrow situations. With that backdrop, the people of Michigan concluded that not having affirmative action in higher education was the best policy for the state. Nothing in the Constitution bars the people of Michigan from making that choice.

STATEMENT OF THE CASE

A. Article 1, § 26

The genesis for the Article 1, § 26 ballot initiative was a recognition that the public-university admissions process was insulated from political accountability to the public—it could not be affected by those who wanted public universities to move away from race-and sex-conscious policies.

For example, at the University of Michigan, the tenured faculty are the primary architects of all the admissions criteria and protocols. J.A. 35. There is no process by which members of the public, prospective students, or others who are not faculty or part of the college can comment or even submit suggestions for admissions criteria. J.A. 35. The same practices are followed at the University of Michigan's Law School and Medical School; faculty members develop and adopt the admissions criteria, and there is no formal process by which the public "petitions" or submits suggestions for consideration. J.A. 11–13, 27–29.

Similarly, at Wayne State University Law School, a faculty committee develops the "Discretionary Admissions Criteria." Only the law school faculty has the authority to approve the admissions policy; it is not subject to approval by the Wayne State University Board of Governors. J.A. 21. And as the law school's dean testified, if the Wayne State Board of Governors sought to change the policy, that action "would precipitate a constitutional crisis." J.A. 22.

Lacking an ability to impact the process by which faculty committees adopt admissions policies, opponents of race- and sex-conscious policies had two options: amending the Michigan Constitution or going to court. They initially chose the latter. (Ordinary legislation was not an option. Michigan's Constitution includes a provision that the Michigan courts have consistently construed as granting autonomy to universities. E.g., *Federated Publ'ns*, *Inc.* v. *Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 497–98 (Mich. 1999) ("Legislative regulation that clearly infringes on the university's educational or financial autonomy, must, therefore, yield to the university's constitutional power.").)

Litigation initiatives resulted in the pair of 2003 decisions in which this Court invalidated the University of Michigan's point-system admissions policy, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and upheld the holistic admissions policy at the University of Michigan Law School, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). But in the wake of those decisions, reliance on race apparently increased. Statistical analyses of admissions patterns show an even heavier weight for race and a reduced weight for socioeconomic factors. In other words, race became an even more prominent admissions factor than under the point system.

The Michigan Civil Rights Initiative began a state ballot process to amend the Michigan Constitution and prohibit all race- and sex-based discrimination, including preferences, in public employment, education, and contracting. Michigan voters approved the proposal in November 2006.

B. Proceedings below

Immediately after the election, a group of plaintiffs led by Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) filed suit in the U.S. District Court for the Eastern District of Michigan, challenging § 26's constitutionality as to public education. The district court entered a stipulated order postponing § 26's implementation until after the next university-admissions cycle. Pet. App. 255a–259a.

The Sixth Circuit granted a motion for a stay pending appeal, concluding there was a "strong likelihood" the preliminary injunction would be reversed on the merits. Pet. App. 235a–251a. The court rejected BAMN's political-restructuring claim and followed *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692 (9th Cir. 1997), Pet. App. 247a, stating that the Equal Protection Clause "prevents official conduct discriminating on the basis of race, and on the basis of sex, not official conduct that bans 'discriminat[ion] against' or 'preferential treatment to' individuals on the basis of race or sex." Pet. App. 244a. (citations omitted).

On remand, the district court upheld § 26 on the merits, Pet. App. 197a–223a. But a second Sixth Circuit panel reversed, in a 2-1 vote, Pet. App. 101a–183a, and the Sixth Circuit then granted en banc review, Pet. App. 265a–266a. The en banc Sixth Circuit invalidated § 26 in an 8-7 decision.[1]

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[1] Judges McKeague and Kethledge recused themselves because they sit on university boards. Senior Judge Daughtrey sat en banc because she had also participated in the panel decision.

Relying on the political-restructuring theory of equal protection outlined in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), the en banc majority held that a political enactment deprives minority groups of equal protection when the enactment "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process." Pet. App. 21a–22a (citations omitted).

The majority concluded that § 26 has a racial focus, because the targeted program—race- and sex-based admissions preferences—"at bottom inures primarily to the benefit of the minority, and is designed for that purpose." Pet. App. 22a. In addition, said the majority, § 26 reordered the political process. Pet. App. 26a–38a. Whereas a Michigan citizen may "use any number of avenues to change the admissions policies on an issue outside" § 26's scope, a future amendment to the Michigan constitution is the only available recourse for a citizen seeking the adoption of race- or sex-based preferences. Pet. App. 35a–36a. Thus, while admissions committees, university presidents and provosts, and university boards are all "free to repeal" race- or sex-based preference programs "without any infringement on the right to equal protection in the political process," Michigan voters cannot do the same by state constitutional amendment. Pet. App. 44a.

Chief Judge Batchelder and Judges Boggs, Cook, Gibbons, Griffin, Rogers, and Sutton dissented. Pet. App. 51a–100a. Judge Gibbons wrote the primary dissent: "Although it has convinced a majority of this court, plaintiffs' argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process." Pet. App. 56a–57a (Gibbons, J., dissenting).

Judge Gibbons explained that neither *Hunter* nor *Seattle School District* supported the majority's result. Pet. App. 58a–64a (Gibbons, J., dissenting). "*Hunter* considered only the political-process implications of repealing a law that required *equal* treatment[;] it cannot be read broadly to apply to the repeal of a law requiring *preferential* treatment." Pet. App. 59a (Gibbons, J., dissenting). And § 26 "is quite unlike the narrow anti-busing measure struck down in *Seattle*; it represents 'a sea change in state policy, of a kind not present in *Seattle* or any other 'political structure' case." Pet. App. 60a (Gibbons, J. dissenting).

Judge Gibbons also concluded that § 26 did not reallocate political power. Pet. App. 66a–78a (Gibbons, J., dissenting). "[T]he people of Michigan['s] . . . vote removed admissions policy from the hands of decision-makers [university admissions personnel] who were unelected and unaccountable to either minority or majority interests and placed it squarely in an electoral process in which all voters, both minority and majority, have a voice." Voters did not "restructure" the political process, they "employed it." Pet. App. 67a, 78a (Gibbons, J., dissenting).

Other dissenting judges raised complementary points. Judges Boggs and Sutton both observed that race- and sex-conscious programs will sometimes have the effect of discriminating against members of groups that such programs purportedly protect by effectively creating ceilings and not just floors for minorities. Pet. App. 54a–55a (Boggs, J., dissenting); Pet. App. 92a (Sutton, J., dissenting). As a result, "various groups, sometimes defined as racial minorities, may be discriminated against." Pet. App. 54a–55a (Boggs, J., dissenting).

Judge Sutton also noted that *Seattle School District* itself undermines any argument that *Seattle* or *Hunter* dictates § 26's constitutionality. Pet. App. 93a (Sutton, J. dissenting). In *Seattle*, Justice Powell's dissent raised the concern that the majority's reasoning might cause a later court to find it unconstitutional for a higher level of government to intervene in response to an admission committee's affirmative-action plan. "No worries, the majority responded: . . . Justice Powell's hypothetical . . . had 'nothing to do with the ability of minorities to participate in the process of self-government.'" Pet. App. 93a–94 (Sutton, J. dissenting) (quoting *Seattle School Dist.*, 458 U.S. at 480 n.23).

And Judge Rogers observed that "[u]nder the majority opinion, it is hard to see how any level of state government that has a subordinate level pass can pass a no-race-preference regulation, ordinance, or law. . . . Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban." Pet. App. 79a–80a (Rogers, J., dissenting).

SUMMARY OF ARGUMENT

Article 1, § 26 does not violate equal protection. A law that infringes equal protection classifies a group and then treats that group differently without adequate justification. But § 26 does not single out groups for differing treatment; quite the opposite, it *prohibits* public universities from classifying applicants by race or sex and treating them differently. So § 26 "does not violate the Equal Protection Clause in any conventional sense," *Coalition for Economic Equity* v. *Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that California's nearly-identical constitutional amendment did not violate the Equal Protection Clause under a political-restructuring theory).

The question then becomes whether § 26 violates the political-restructuring doctrine this Court articulated in *Hunter* v. *Erickson*, 393 U.S. (1969), and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982). For three basic reasons, it does not.

1. *Hunter* and *Seattle School District* involved laws that created political obstructions to equal treatment. Section 26 is an impediment to achieving *special* treatment. A state law that restructures the political process only violates equal protection if it burdens the right to equal treatment; § 26 does not. That is why the *Seattle* majority refuted the suggestion that its holding would make it unconstitutional for a higher level of government to end an affirmative-action program that an admissions committee had created. *Seattle School Dist.*, 458 U.S. at 480 n.23 (responding to Justice Powell's dissent, which raised the concern that a court might someday apply the majority's reasoning the way the en banc Sixth Circuit did here).

2. Section 26 does not reallocate the political structure in Michigan. The trial-court record established that the governing boards of Michigan's public universities "have fully delegated the responsibility for establishing admission standards to several program-specific administrative units within each institution, which set admissions criteria through informal processes that can include a faculty vote." Pet. App. 68a (Gibbons, J., dissenting). These academic processes are not equivalent to political processes, and the Constitution does not require admissions decisions to be made only at the lowest level of government.

3. Under a political-restructuring analysis, a reallocation of political decisions violates equal-protection principles only if there is evidence of purposeful racial discrimination. *Seattle School Dist.*, 458 U.S. at 484–85; see also *Washington* v. *Davis*, 426 U.S. 229, 238–48 (1976). Given the myriad of non-discriminatory reasons that support the abolishment of race- and sex-conscious admissions programs, it is not possible to say that § 26's purposely discriminates. And to the extent § 26 "burdens" certain groups, the groups so encumbered are a majority of Michigan's electorate.

In sum, *Hunter* and *Seattle School District* do not support the invalidation of a state constitutional provision that Michigan voters ratified in the reasonable belief that not having affirmative action in higher education was the best policy for the state. It is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." Pet. App. 86a (Sutton, J., dissenting).

ARGUMENT

I. Section 26 does not violate the Equal Protection Clause when assessed under a "traditional" analysis.

The Equal Protection Clause's central purpose is to prevent "official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Accordingly, this Court applies strict scrutiny to "all racial classifications" and to "laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." *Adarand Constructors*, *Inc.* v. *Pena*, 515 U.S. 200, 227, 213 (1995); *Davis*, 426 U.S. at 239–42.

Section 26 does not classify on the basis of race. Just the opposite, the provision "*prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Wilson*, 122 F.3d at 702; accord *Coral Constr.*, *Inc.* v. *City & County of San Francisco*, 235 P.3d 947, 959 (2010); Pet. App. 78a (Gibbons, J. dissenting); Supp. Pet. App. 313a (the district court concluded that § 26 is "facially neutral").

Nor was § 26 motivated by a racially discriminatory purpose. To begin, this Court has never "inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the *only* possible motivation behind the referendum results." *Arthur* v. *City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986). In part, this is due to the realities of a secret ballot: "[s]ince a court cannot ask voters how they voted or why they voted that way, a

court has no way of ascertaining what motivated the electorate." *Id*. Also, if "courts could always inquire into the motivation of voters even when the electorate has an otherwise valid reason for its decision, a municipality could never reject a low-income public housing project because proponents of the project could always introduce race as an issue in the referendum election." *Id*. at 574.

So was it possible for Michigan voters supporting § 26 to have been motivated by any reason other than racial discrimination? The district court said yes. "Based on the evidence presented, the Court cannot say that the only purpose of [§ 26] is to discriminate against minorities." Supp. Pet. App. 317a. The court cited testimony from one of the ballot organizers that "he was motivated to eliminate affirmative action programs because he thinks they are harmful to minorities." *Id*. The court also cited testimony from another organizer who "appears to have been motivated by the desire to gain admission to the University of Michigan herself without having to yield to a minority candidate who would take her place with the benefit of a racial preference." *Id*.

There were undoubtedly other voters motivated by a belief that it is harmful to perpetuate stereotype-reinforcing assumptions. See, e.g., *Time to scrap affirmative action*, THE ECONOMIST, Apr. 27, 2013, at 11, 11 (although "colleges benefit from a diversity of ideas, to use skin colour as a proxy for this implies that all black people and all Chinese people view the world in a similar way. That suggests a bleak view of the human imagination."). And still others who desired a shift to more socioeconomic-based admissions policies.

See, e.g., Bill Keller, *Affirmative Reaction*, N.Y. TIMES, June 9, 2013 ("Racial preferences don't help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor."). Indeed, it is the multiplicity of viewpoints regarding affirmative action which "illustrate that racial discrimination is not the only rationale behind" § 26. Supp. Pet. App. 318a.

The district court also could not find a discriminatory intent based on the factors this Court articulated in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977). The ballot proposal's history did "not suggest discriminatory intent." Supp. Pet. App. 318a. And the public arguments made in support of § 26 "did not appeal to racism or amount to a call for segregation; rather, they attempted to appeal to the public's belief in fairness and just treatment." *Id.* "To impugn the motives of 58% of Michigan's electorate, in the absence of extraordinary circumstances which do not exist here, simply is not warranted on this record." Supp. Pet. App. 319a.

Given the district court's factual findings, which the record supports, § 26 is not subject to heightened review. And under a rational-basis review, § 26 is justified for many of the reasons noted above. While both sides of the affirmative-action debate have policy arguments to advance, it was not irrational for a majority of Michigan's voters to end race- and sex-conscious admissions practices.

II. Section 26 does not violate the political-restructuring doctrine.

A. *Hunter* and *Seattle School District* do not prohibit a ban on preferences.

Race-conscious admissions are presumptively unconstitutional except when necessary to remedy the effects from historic discrimination. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). A *Grutter* plan is supposed to be an optional, transient response to anemic campus diversity, available only when "no workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher* v. *Univ. of Texas at Austin*, 570 U.S. __, slip op. at 11 (2013).

Plaintiffs do not allege any lingering effects from historic discrimination at Michigan's public universities. And they conceded that race-neutral programs like the top 10% plan in place at the University of Texas can actually result in *improved* minority achievement. Coalition Sixth Cir. Supp. Br. 11. So in a context where equal-protection principles tolerate race- or sex-based admissions criteria on a limited basis, the question is whether *Hunter* and *Seattle School District* prohibit a state categorically from eliminating the use of such criteria. The answer is no, because neither *Hunter* nor *Seattle School District* involved a policy that prohibited preferential treatment. In fact, the *Seattle School District* majority disclaimed that its reasoning would apply to prevent a higher level of government from intervening when a university admissions committee adopts an affirmative action policy. See *Seattle School Dist.*, 458 U.S. at 480 n.23.

In *Hunter*, an Akron, Ohio realtor refused to show homes to an African-American buyer, and the buyer sued the city to compel enforcement of its fair-housing ordinance. 393 U.S. at 387. But the city's voters had repealed the ordinance and amended the city charter to require a referendum before adopting any new fair-housing ordinance. *Id*. So the *Hunter* referendum barred laws that merely required equal treatment in the sale and lease of real estate; nothing in this Court's opinion striking down the charter amendment suggested that the case involved preferences.

In *Seattle School District*, a Washington public-school board adopted a busing plan to end *de facto* racial segregation in the Seattle schools. 458 U.S. at 461. The state's voters responded by amending the state's constitution to allow school busing for most any reason, but to prohibit busing if used to desegregate the schools. *Id*. at 461–64. In striking down the constitutional amendment, this Court recognized that before Initiative 350, the local school authorities employed desegregative busing to solve problems related to the denial of "*equal* educational opportunity." *Id*. at 479 (emphasis added, quotation omitted). This is because "the segregated housing patterns in Seattle ha[d] created racially imbalanced schools." *Id*. at 460. Such racially divided schools, even if created through *de facto* segregation, would provide unequal opportunities to racial and ethnic minorities. See *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.").

Again, nothing in the *Seattle School District* opinion says anything about providing unequal preferences. And the opinion itself distinguishes § 26. In his *Seattle* dissent, Justice Powell warned that the majority opinion could be read to mean that "if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies." 458 U.S. at 498 n.14 (Powell, J., dissenting). The *Seattle* majority dismissed Justice Powell's concern as "entirely unrelated to this case" because admissions policies had "nothing to do with the ability of minorities to participate in the process of self-government." *Id.* at 480 n.23. So even the *Seattle School District* majority did not view the opinion as controlling the outcome in a case like this one. Pet. App. 94a (Sutton, J., dissenting) ("I am . . . hard-pressed to understand how anyone can insist our hands are tied in today's case" by *Seattle*.).

Seattle School District is also distinguishable based on its historical context. When this Court decided the case in 1982, the assignment of public-school students to achieve racial balancing fell "within the broad discretionary powers of school authorities" to formulate "educational policy" and to "prepare students to live in a pluralistic society." *Swann* v. *Bd. of Educ.*, 402 U.S. 1, 16 (1971). Although Justice Powell's dissent argued that using racial considerations to effect pupil assignment was "presumptively invalid" and requires an "extraordinary justification," *Seattle School Dist.*, 458 U.S. at 491 n.6 (Powell, J., dissenting), the majority did not respond to that argument.

But today, school busing programs that employ racial classifications are presumptively unconstitutional and subject to strict scrutiny. *Parents Involved*, 551 U.S. at 720. So it is not at all clear that *Seattle School District* would be decided the same way today. As post-*Seattle School District* decisions have recognized, it is a gross exaggeration for school officials to assume that a student thinks a certain way, represents certain views, or behaves in a stereotypical fashion due solely to skin color, race, ethnic heritage, or sex. Citizens may reasonably believe that an individual is not a "representative" of his or her "group," the very kind of stereotype-reinforcing approach that § 26 rejected. After all, "one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000). In fact, the very endeavor of categorizing students into discrete racial and ethnic groups is becoming an increasingly outmoded, dubious way of identifying people. See, e.g., 2010 U.S. Census Form (providing 57 possible multiple race combinations, not considering Latino).[2]

At bottom, § 26 makes it more difficult for individual students to receive special treatment—a preference. And this Court has never applied the political-restructuring doctrine to protect against obstructions to preferential treatment. Such a holding would unnecessarily expand the political-restructuring doctrine, and it would also conflict with the spirit of *Grutter*.

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[2] See http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

Grutter recognized that racial-preference programs stand in a precarious position because they deviate from the equal treatment mandated by the Equal Protection Clause, 539 U.S. at 342 ("[R]ace-conscious admission programs . . . [are a] deviation from the norm of equal treatment of all racial and ethnic groups."). There is a difference "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford* v. *Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538 (1982). The former is unconstitutional while the latter is not. And when a "state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or [sex], it has promulgated a law that addresses in neutral fashion race-related and [sex]-related matter." *Wilson*, 122 F.3d at 707. Thus, a key component of *Grutter*'s holding was that a narrowly tailored, race-conscious admissions policy "must be limited in time." 539 U.S. at 342. After all, a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Id.* at 341–42 (quotation omitted)

The *Grutter* Court noted that universities in California, Florida, and Washington State, "where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches." *Id.* at 342. And the Court encouraged universities to draw on the most promising aspects of such "race-neutral alternatives," *id.*, and emphasized its expectation that "25 years from now [2028], the use of racial preferences will no longer be necessary to further the [diversity-in-education] interest approved today." *Id.* at 343.

Nothing in *Grutter* suggests that a state cannot achieve that salutary goal (the phase-out of race-conscious admissions programs) early by enacting a law or amending the state constitution. Indeed, "it is hard to see how any level of state government that has a subordinate level can pass a no-race-preference regulation, ordinance or law. . . . Whatever *Hunter* and *Seattle* [*School District*] hold, [this] Court cannot have intended such a plan." Pet. App. 79a–80a (Rogers, J., dissenting).

Of course, a separate problem with the political-restructuring doctrine's application here is the doctrine's requirement that the underlying law or policy have a "racial focus." *Seattle School Dist.*, 458 U.S. at 474. In other words, does a race-conscious admissions policy, "at bottom inure[ ] primarily to the benefit of the minority, and is [it] designed for that purpose"? *Id.* at 472.

Plaintiffs have to answer that question "yes." But that contradicts the key underpinning of *Grutter*. The *Grutter* majority made clear that a narrowly tailored, race-conscious admissions policy could be implemented for one and only one compelling interest: "obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. The Court rejected alternative justifications, such as reducing the "historic deficit" of minorities in higher education, remedying societal discrimination, or attempting to increase a professional minority pipeline. That means a *Grutter* policy cannot benefit primarily a minority group; it must be a policy that benefits *all* students. *Id.* at 330–33 (describing the "substantial" educational benefits to all students brought about by a diverse student body).

And this is where race-conscious admissions policies run into trouble. If § 26 targets a policy that benefits primarily a minority group, the policy violates *Grutter*, making it unnecessary to reach the political-restructuring issue. Conversely, if § 26 targets a policy that benefits all students, Plaintiffs cannot assert a political-restructuring claim. A *Grutter* plan and a political-restructuring theory are incompatible.

In addition, Plaintiffs' theory leads to the awkward result that many laws requiring equal treatment could fall under a political-restructuring claim. Consider the Fair Housing Act of 1968. When Congress adopted that law, it had the effect of preempting any state law requiring that minority home buyers be given preferential treatment and preventing states from adopting such a law. 42 U.S.C. § 3604(b) (prohibiting discrimination in housing transactions "because of race, color, religion, sex, familial status, or national origin"). Unlike other discrete and insular groups, minority home buyers were unable to lobby for preferential treatment at the state or local level unless they first succeeded in repealing the federal law. The same would be true if it was the state that enacted the fair-housing legislation—the state law would need to be repealed before local legislation creating preferential treatment could be sought.

Similarly, when Congress enacted the Equal Credit Act, Pub. L. 94-239, 90 Stat. 251 (1974), that law had the effect of preempting any existing laws and preventing the enactment of any new laws that required lenders to grant minority borrowers credit at a preferential rate. 15 U.S.C. § 1691(a) (prohibiting discrimination in credit transactions "on the basis of

race, color, religious, national origin, sex or marital status, or age"). Individuals who might have benefitted from and thus desired such a policy would not have been able to lobby their state officials; they would have been forced to first repeal the federal statute requiring equal treatment.

It gets worse. Imagine a state statute that required lenders to grant credit to minority borrowers at a preferential rate, say half a point below prime. Such a law would have the effect of preventing minority borrowers from lobbying their local officials for a one- or two-point reduction. Under Plaintiffs' theory, the state law would have to fall. So, if Plaintiffs are correct, then many laws of general applicability prohibiting discrimination—or even granting a preference—are unconstitutional. That result cannot possibly be a correct reading of *Hunter* and *Seattle School District*.

B. Admissions policies are not part of the political process.

A second, independent problem with the en banc majority's analysis is that "the academic processes at work in state university admissions in Michigan are not 'political processes' in the manner contemplated in *Seattle*." Pet. App. 72a (Gibbons, J., dissenting). "Unlike the Seattle School Board and the Akron City Council, the various Michigan university admissions committees and faculty members are unelected." *Id.* And although Michigan universities are generally governed by either an elected or Governor-appointed board of trustees, Pet. App. 28a, the record evidence shows that admissions decisions are made by unaccountable faculty members.

Judge Gibbons summarized that record as follows:

> As they currently stand, the faculty admission committees are islands unto themselves, vested with the full authority to set admissions policy for their respective university programs. . . . [T]he testimony of the law school dean demonstrates that, whatever the formal legal structure, the faculty committees set admissions policies without significant review by the boards—thus insulating them from the political pressures the boards themselves face. [Pet. App. 72a (Gibbons, J., dissenting).]

To the extent it is even possible to hold such committees "politically accountable," the political gymnastics involved are far worse than simply achieving a 51% vote in a statewide referendum. As Judge Sutton explained, a Michigan citizen seeking to implement § 26's policy through the "political process" would have to elect a majority of Michigan, Michigan State, and Wayne State's eight-member boards of trustees (which would take an eight-year process spanning at least three statewide election cycles) willing to abolish preference programs, then hope that the trustees would stand up to the faculty committees that believe that they alone have exclusive control over the admissions process. Pet. App. 86a–87a (Sutton, J., dissenting). And anyone wishing to change admissions policies at Michigan's other public universities "faces an equally elaborate process." *Id.* (citations omitted).

It makes no sense to say that the federal constitution limits a state's means of eliminating affirmative action in its universities to an eight-year election process involving the election of at least 15

different board members (just with respect to Michigan's three largest state universities), who might not even control the faculty committees that make admissions policies, and who are elected by partisan ballot based on many competing educational issues. Nothing in the Constitution suggests that Michigan is barred from pursuing a simpler means of addressing the issue. And it is a remarkable intrusion on the state's processes to say that it may end affirmative action in higher education only through a Byzantine route with no guaranteed result.

Moreover, § 26 does not even disadvantage groups that account for a minority of Michigan's population (if it can be determined who is "disadvantaged" at all). Both *Hunter* and *Seattle* involved initiatives targeted solely at minorities attempting to buy houses, and those benefitting from a racially integrated public-school system, respectively. But § 26 does not burden minority interests and minority interests alone. Because § 26 prohibits discrimination that is sex-, ethnicity-, and national origin- as well as race-based, "[t]o the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Michigan's population." App. 92a (Sutton, J., dissenting). It "make[s] little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." *Id*. (quoting *Wilson*, 122 F.3d at 704).

Compounding the problem, it is not even clear which discrete group § 26 "helps and hurts, or when each group will be affected." App. 92a (Sutton, J., dissenting). Given the reality that "female high school

students increasingly outperform their male classmates," it is entirely possible that a sex-based preference program would favor men, rather than women. *Id*. And the overrepresentation of certain minority groups (such as Asian students) within higher-education institutions necessarily means that preference programs have the perverse effect of benefitting some minority groups at the expense of others. App. 54a–55a (Boggs, J., dissenting).[3] It is not at all clear who race- and sex-conscious admissions programs "disadvantage." And to the extent § 26 can be characterized as "disadvantaging" any groups, those groups constitute a majority of Michigan's population.

Plaintiffs' theory also does real damage to the democratic process. As the Ninth Circuit explained in upholding Proposition 209, if a court "relies on an erroneous legal premise [to strike down a public initiative], the decision operates to thwart the will of the people in the most literal sense." *Wilson*, 122 F.3d at 699. "A system which permits [the courts] to block with the stroke of a pen what [millions of] residents voted to enact as law tests the integrity of our constitutional democracy." *Id*.

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[3] This problem is exacerbated by admissions politics. In *Grutter*, Justice Kennedy shed light on this problem with a troubling admission from the University of Michigan's former Law School Dean. "He testified that faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans." 539 U.S. at 393 (Kennedy, J., dissenting).

Within our federalist system, it is no small matter for a federal court to strike down a properly enacted state constitutional provision. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."). That is why the United States Constitution generally does not meddle in the way that states choose to structure their government. See *Sailors* v. *Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 109–10 (1967). Given the special respect that should be accorded to state constitutional provisions, the Court should be especially cautious before extending the political-restructuring doctrine in the manner Plaintiffs urge.

Plaintiffs' theory also has the strange effect of elevating local over state authority. Michigan's public universities could themselves do away with race-based admissions criteria in favor of race-neutral criteria, as even the Sixth Circuit concedes. Pet. App. 44a ("admissions committees, the universities' presidents and provosts, and the universities' boards remain free to repeal [race-conscious admissions policies], without any infringement on the right to equal protection in the political process"). But once universities adopt race-based criteria, Plaintiffs say it is impossible for the State of Michigan to do anything about it. It is "surely the case that the Fourteenth Amendment does not dictate the level of government at which a State must enact a statewide ban on race discrimination." App. 86a (Sutton, J., dissenting).

C. Section 26 did not result from a discriminatory intent or purpose.

Even under a political-restructuring analysis, reallocation of political decision-making violates equal-protection principles only when there is a "racial classification," 458 U.S. at 485, or evidence of purposeful racial discrimination. *Seattle School Dist.*, 458 U.S. at 484–85 ("[P]urposeful discrimination is the condition that offends the Constitution. . . . Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislature in some sense was designed to accord separate treatment on the basis of racial considerations.") (citations and internal quotation marks omitted).

Unlike *Seattle*, where the government categorized students based on race so it could bus them to specific schools in government-prescribed proportions, there is no classification here; students of any race or sex are treated the same. Accordingly, proof "of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003) (internal citations omitted), even when a neutral law has a disproportionately adverse effect on a racial minority, *Washington* v. *Davis*, 426 U.S. at 238–48.

Hunter and *Seattle School District* exemplify this principle. In *Hunter*, the city charter amendment prevented the city council from requiring equal treatment and eliminating racial discrimination in residential real estate transactions. And in *Seattle School District*, the constitutional initiative prevented

school boards from ensuring equal educational opportunity. Both cases relied on findings of "discriminatory intent in a challenge to an [ ] enacted initiative." *Cuyahoga*, 538 U.S. at 196, 197.

In determining the electorate's intent, it is not enough to point to racially animated views of isolated voters. The "bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." *Metro. Hous. Dev. Corp.* v. *Vill. of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977). So a court should not inquire into the electorate's individual motivations; it should look to see whether the referendum discriminates facially or, though facially neutral, engenders discrimination based on an obvious racial classification. E.g., *Seattle School Dist.*, 458 U.S. at 471 ("despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes").

Here, the district court could not say "that the only purpose of [§ 26] is to discriminate against minorities," because the proposal's sponsor and leading proponent both posited nondiscriminatory purposes: to eliminate preferential treatment based on race and sex. Pet. App. 78a (Gibbons, J. dissenting). And an abundance of careful social-science research examining alternatives to race- and sex-conscious admissions policies shows that a voter could have reasonably concluded that there were better alternatives. See generally Richard K. Kahlenberg, *A Better Affirmative Action*, available at http://tcf.org/assets/downloads/tcf-abaa.pdf.

First, universities have experienced success without race- and sex-based preferences. California's public universities have used race-neutral admissions policies since 1998, following the passage of Proposition 209. California weighed socioeconomic status more heavily and also addressed pipeline issues, seeking to assist minority and low-income students in becoming college-ready. Richard Pérez-Peña, *In California*, *Early Push for College Diversity*, N.Y. TIMES, May 8, 2013, at A1. And in 2001, the Regents approved a plan that essentially admitted the top 4% of California graduating seniors, though it applied to only some University of California campuses.

By 2002, African-American enrollment at California's public universities returned to pre-Prop 209 levels, and from 2007 to 2010 averaged 40% higher. Latino enrollment established a system record in 2000 and doubled its pre-Prop 209 levels by 2008.[4] Comparing the period 1992 to 1994 (pre-Prop 209) with 1998 to 2005 (post-Prop 209), African-American four-year college graduation rates improved by more than half, six-year graduation rates by one-fifth; Latinos experienced similar improvements.[5] And African-American and Latino grade-point averages increased post-Prop 209, even while minority students enrolled in more difficult science and engineering classes.[6]

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[4] *UC Application*, *Admissions*, *and Enrollment of California Resident Freshmen for Fall 1989 through 2010*, at http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.

[5] Richard Sander, *An Analysis of the Effects of Proposition 209 Upon the University of California*, available at http://www.seaphe.org/pdf/analysisoftheeffectsofproposition209.pdf.

[6] *Id*.

The record level in African-American and Latino college-graduation rates in California is consistent with studies documenting that large race-based preferences can sometimes harm minority students by creating an academic "mismatch," where under-prepared students must compete with far better-prepared classmates. "[A]s a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher*, 570 U.S. _, slip op. at 18 (Thomas, J., concurring). This hurts mismatched students' self-confidence and may result in less learning. *Id.* But mismatch can be remedied when schools replace stereotype-reinforcing admissions policies with alternatives. See generally Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher* v. *University of Texas*, No. 11-345 (filed May 29, 2012), at 2–14; Richard H. Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012).

Texas was compelled to follow California's lead, though it adopted a different approach. In response to *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit Court of Appeals' invalidation of the University of Texas School of Law's use of race in admissions, the Texas Legislature enacted a 1997 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 already returned African-American and Latino freshman-enrollment levels to those of 1996, the last year the pre-*Hopwood* policy was in effect.[7] In a widely circulated editorial published in October 2000, UT's President 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."[8] Indeed, Plaintiffs in this case have tacitly conceded the academic 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.]

Second, there is a campus diversity problem in that universities tend to under-recruit students from low-income households.[9] And ""[r]acial preferences don't

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[7] Larry R. Faulkner, Editorial, *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.

[8] *Id*.

[9] Caroline M. Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low Income Students* (2013), available at http://www.brookings.edu/~/ media/ projects/bpea/spring%202013/2013a_hoxby.pdf (among students with grades and test scores in the top 4% of the high school Class of 2008, 34% from the poorest household-income quartile attended the nation's most selective colleges versus 78% of the wealthiest).

help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor." Bill Keller, *Affirmative Reaction*, N.Y. TIMES, June 9, 2013 (online).

In other words, a greater emphasis on recruiting students from low-income households inevitably improves minority-student enrollment. When comparing the percentage of minority students among the high-achieving, low-income group to high-achieving students generally, both African-American students (5.7% to 1.5%) and Latino students (7.6% to 4.7%) are more prevalent in the low-income group than in the general population.[10] Thus, at the University of California's Irvine campus, for example, the number of students "who are the first in their families to attend college has risen dramatically, and black and Hispanic enrollment has roughly doubled" after Prop 209. Keller, *Affirmative Reaction*. Accord Kahlenberg, *A Better Affirmative Action*. The takeaway is that a minority student from a low-income household and living in an underperforming school system is far more likely to be recruited and admitted under a program that focuses on a class-based admission formula than a race-based policy. And "enrolling students from poor and working-class backgrounds is likely to increase [campus] ideological diversity" as well. Keller, *Affirmative Reaction*.

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[10] *Id.*

There are other cascading effects for disadvantaged students. Evidence from Texas suggests that "the lure of assured admission and a few college scholarships significantly raised the aspirations and performance of students" in disadvantaged high schools. *Id.*[11] That excitement manifested itself: "Attendance was up, college applications were up, test scores were up, [and] enrollment in advanced courses was up." *Id.*

Third, supporters of race- and sex-conscious admissions policies argue that such policies are necessary to persuade minority students that they are welcome, and that eliminating such policies has a "chilling effect." But research based on Prop 209 suggests that minority applications among those likely to be admitted did not fall after elimination of race-conscious policies, David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants?*, 58 INDUS. & LABOR RELATIONS REV. 416 (2005), and there was a modest (~15%) "warming effect" on African-American and Latino student propensity to accept an admissions offer from and enroll at Berkeley, which previously used the largest preferences. Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the "Chilling Effect,"* 15 AM. LAW & ECON. R. 252 (2013).

This outcome should not be a surprise. A survey of some 140 colleges and universities across the nation, involving 1600 students, discovered that 71% of minority students rejected the use of race- or ethnic-based admissions preferences, and 62% disapproved of

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[11] Citing Thurston Domina, *How Higher Ed Can Fix K-12* (Oct. 12, 2007), available at http://www.insidehighered.com/views/2007/10/12/domina.

relaxed academic standards as a policy to increase minority-student representation. Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8 (2003). See also David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. TIMES, Mar. 16, 2013.

In sum, sociological and academic reasons justified voters' decision to end race-conscious admissions, and that is precisely the path that Michigan's citizens chose for their own public universities. Where § 26's language and purpose is to eliminate, not foster, discrimination, it is not possible to conclude that § 26 reallocated "the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Seattle School Dist.*, 458 U.S. at 474. So while § 26 has obvious racial implications, its facial neutrality—and the facially neutral justifications for its enactment—counsels strongly against a conclusion that § 26 violates equal protection. Cf. *Fisher*, 570 U.S. ___, slip op. at 6 ("It is therefore irrelevant that a system of racial preferences in admissions may seem benign. *Any* racial classification must meet strict scrutiny . . . . Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.") (emphasis added, quotations omitted.)

III. If this Court interprets *Seattle School District* as shielding policies requiring unequal treatment, then it should overrule *Seattle School District*.

Michigan citizens may—consistent with the Equal Protection Clause—no longer wish to categorize every person into a neat assignment of race, sex, or ethnicity. The time for these kinds of categorizations is passing, just as this Court predicted. And as explained above, it is difficult to see how *Seattle School District* prevents Michigan citizens from adopting a state-wide policy that prohibits race- and sex-based classifications.

If this Court concludes that *Seattle School District* does invalidate § 26, then *Seattle School District* should be overruled. Its ongoing significance is already waning. Consider *Romer* v. *Evans*, 517 U.S. 620 (1996), in which this Court struck down a Colorado constitutional amendment that repealed an ordinance prohibiting discrimination based on sexual orientation. In its essentials, *Romer* was on all fours with *Hunter* and *Seattle School District*, because the Colorado amendment was an impediment to protection against unequal treatment. In fact, the Colorado state courts enjoined the amendment on just that basis, relying on *Hunter* and *Seattle School District*.

But this Court's decision striking down the amendment relied "on a rationale different from that adopted by the State Supreme Court." *Romer*, 517 U.S. at 624. Citing *Hunter* and *Seattle School District* only in describing the lower-court decisions, the opinion relied on the fact that "the amendment seems inexplicable by anything other than animus." *Id.* at 632.

It is that crucial factor—animus, or discriminatory intent—that the Sixth Circuit en banc majority did not find in *Seattle School District*'s test. Instead, the majority reduced the political-restructuring test to a two part inquiry: (1) whether the policy or program targeted had a "racial focus" that inured "primarily to the benefit of the minority," and (2) "reallocate[d] political power . . . in a way that places special burdens on a minority group's ability to achieve its goals through that process." Pet. App. 21a–22a (citations omitted). If that is an accurate description of *Seattle*, it cannot be squared with this Court's holding in *Washington* v. *Davis* that it is not possible to have an equal-protection violation in the absence of a racial classification or disparate treatment paired with discriminatory intent. *Davis*, 426 U.S. at 239–42. And as explained above, the district court found no racial classification or discriminatory intent in § 26.

In assessing the modern-day validity of *Seattle School District*, then, the Court must ask itself whether *Seattle School District* may survive if it strikes down provisions that guarantee race neutrality and ensure non-discrimination. The elimination of discrimination and preferences based on race, sex, or ethnicity—the requirement of equal treatment—should never contradict Equal Protection. And if *Seattle School District* is interpreted as though it did reach that result, it should be overruled.

* * *

Plaintiffs say that § 26's supporters are "appeal-[ing] to prejudice" and "endorse race-based policies that disfavor racial diversity." Cantrell Br. in Opp. 4, 1. That is not true. The voters who supported § 26 cannot

be so easily categorized, because their views represent a myriad of legitimate reasons why it is time to end race-conscious admissions policies.

Section 26's supporters do not deny that there may be countervailing reasons for keeping race-based admissions policies. But debate and difference of opinion are the harbingers of the democratic process. The issue is whether the Constitution prohibited § 26's supporters from deciding that bringing an end to affirmative-action policies in higher education was the best policy for Michigan. And the answer to that question is a resounding no. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. Accordingly, this Court should uphold Michigan's desire to require its public universities to recruit diverse student bodies without resort to race or sex.

CONCLUSION

The court of appeals should be reversed.

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