Nos. 08-1387/1389/1534; 09-1111

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), et al,

Plaintiffs-Appellants/Cross-Appellees,

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, et al,

Defendants-Appellees /Cross-Appellants,

and

BILL SCHUETTE, Michigan Attorney General,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable David M. Lawson

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE'S SUPPLEMENTAL BRIEF ON EN BANC REVIEW

Bill Schuette
Attorney General

John J. Bursch
Solicitor General
Counsel of Record

Margaret A. Nelson
Assistant Attorney General
Co-Counsel of Record
Attorneys for Intervenor Defendant-Appellee
PEET Division
P.O. Box 30736, Lansing, MI 48909
(517) 373-6434

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INTRODUCTION

> "[O]ne 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)

On November 7, 2006, Michigan voters adopted Proposal 2, which amended the Michigan Constitution to prohibit discrimination, or the granting of preferential treatment, in public education, government contracting, and public employment based on race, sex, ethnicity, or national origin. Mich. Const. Art. I, § 26.[1] Attorney General Bill Schuette agrees with Plaintiffs that diversity in educational institutions is a laudable and beneficial goal. But in adopting § 26, the People have expressed their view that race-based criteria cannot be used to achieve that goal. Because a law that prohibits preferential treatment based on race or sex does not violate the Equal Protection Clause, this Court should affirm the District Court's grant of summary judgment in favor of the Attorney General.

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[1] Plaintiffs continue to call this constitutional provision "Proposal 2." That is incorrect. Once enacted, the proposal became Art. I, § 26 of the Michigan Constitution. Accordingly, this brief will refer to the provision as § 26.

BACKGROUND

Article 1, § 26

In 2003, the U.S. Supreme Court invalidated the University of Michigan's race-based admissions preferences in *Gratz v. Bollinger*, 539 U.S. 244 (2003), but upheld the University of Michigan Law School's race-based admissions preferences in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In response, the Michigan Civil Rights Initiative began a state ballot process to amend the Michigan Constitution and prohibit all race- and sex-based preferences in public employment, education, and contracting. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary, v. Regents of the University of Michigan*, __ F.3d __, 2011 WL 2600665 (6th Cir. July 1, 2011), Slip Op. at 4–5. On November 7, 2006, Michigan voters adopted § 26 by a 58% to 42% margin. (*Id.* at 4–5.)

The empirical case for race-neutral admission policies

While upholding race-based admissions preferences in *Grutter*, the Supreme Court encouraged public universities to adopt "race-neutral alternatives as they develop." 539 U.S. at 342. That is precisely what Michigan voters did. Section 26 is nearly identical to Proposition 209,

the race-neutral policy California voters adopted in 1996. (An injunction delayed its effective date until August 1997). A brief review of Proposition 209's effect on college admissions is noteworthy.

There are nine undergraduate campuses in the University of California (UC) system.[2] In 1997, the year Proposition 209 took effect, underrepresented minorities (defined as American Indian, African American, and Chicano/Latino students) received 19.6% of freshman-admission offers (7,385 total offers). By 2010, underrepresented minorities received 28.3% of the freshman offers (16,635 total offers), a 44% improvement. Admissions offers to white students declined, from 42.6% in 1997, to 30.6% in 2010.[3] The percentage of admissions offers to underrepresented minorities was higher or the same in 2010 than

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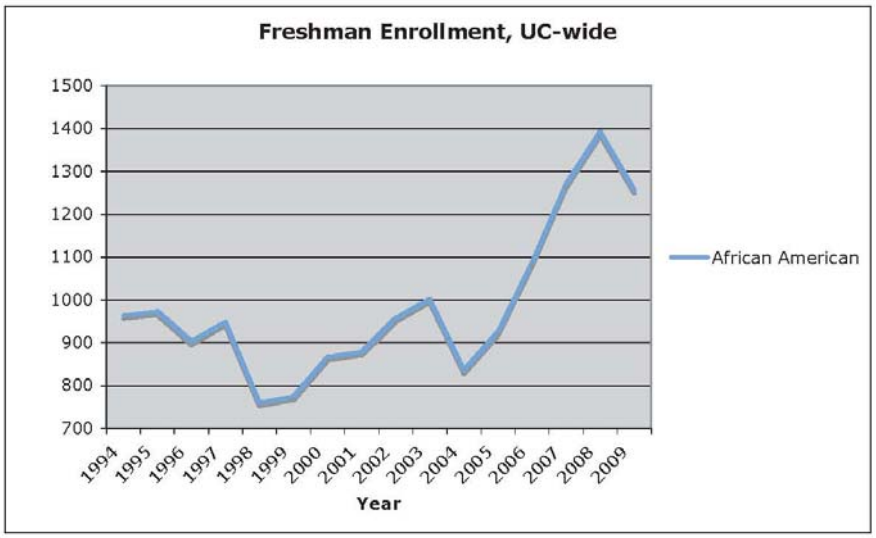
[2] UC Merced is excluded because it did not open until 1995. UC campuses dedicated solely to graduate-level courses are also excluded.

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

1997 on six of the eight UC campuses that had such data.[4] Preliminary data for 2011 shows the same is true for seven of the eight campuses.[5]

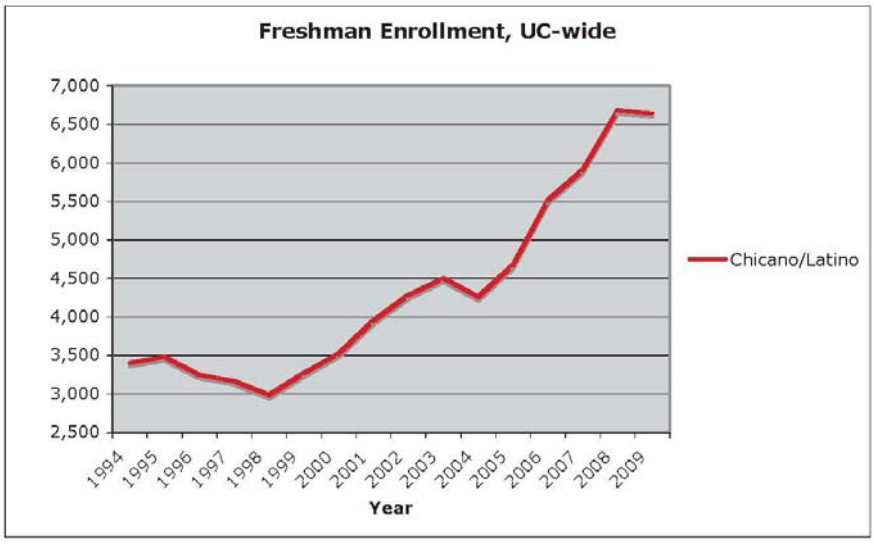
Similarly, a non-UC study showed that African American enrollment at UC campuses had returned to pre-Prop 209 levels by 2002, averaging 40% above pre-Prop 209 levels by 2007-2010. Latino enrollment at UC campuses reached a new record in 2000, and by 2008, Latino enrollment was *double* its pre-Prop 209 levels:[6]



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

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

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



In sum, since Proposition 209 became effective, minorities continued to be offered admission to the University of California system in greater numbers, without resort to racial preferences.

What's more, minority college graduation rates improved. Comparing the period 1992-94 (pre-Prop 209) to 1998-2005 (post-Prop 209), African-American four-year graduation rates improved by more than half, and six-year graduation rates by one fifth. Latinos saw similar improvements. And both African-American and Latino grand point averages increased post-Prop 209, even though minority students were taking more difficult science and engineering classes.[7]

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[7] *Id.*

Texas public universities have witnessed similar trends by adopting race-neutral polices in response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit decision that invalidated the University of Texas School of Law's use of race in admissions. In 1997, the Texas legislature enacted a law requiring the University of Texas at Austin (UT) to admit all Texas high school seniors ranked in the top 10% of their classes. By 2000, UT had returned African-American and Latino freshman-enrollment levels to those of 1996, the last year the pre-*Hopwood* policy was in effect. UT credited the race-neutral system as enabling the university "to diversify at UT Austin with talented students who succeed." The system helped "us to create a more representative student body and enroll students who perform well academically," evidenced by the fact that "minority students earned higher grade point averages . . . than in 1996 and ha[d] higher retention rates."[8]

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

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

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

(Coalition Supp. Br. at 11.) Given this concession, it is difficult to understand Plaintiffs' resistance to using a race-neutral plan like the one UT has adopted.

In short, while it is too early to say what impact § 26 will have on minority admissions and achievement at Michigan's public universities over the long run, California and Texas have shown it is possible to recruit a diverse student body without considering race as a factor, and that doing so may actually result in higher minority achievement than the race-based approach Plaintiffs advocate.

PRIOR PROCEEDINGS

This Court rejects a preliminary injunction

After Plaintiffs filed this suit, the District Court entered a stipulated order postponing § 26's implementation until after the 2006–

07 university-admissions cycle. (Slip Op. at 6.) This Court granted an emergency motion for a stay pending appeal, concluding that there was a "strong likelihood" of reversing the preliminary injunction on the merits. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250-51 (6th Cir. 2006).

In reaching that conclusion, this Court rejected Plaintiffs' political-process claim and followed the Ninth Circuit's analysis in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). *Wilson* vacated an order enjoining California's Proposition 209 and held that it "would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Id.* at 709 (quoting *Crawford v. Bd. of Ed. of the City of Los Angeles*, 458 U.S. 527, 535 (1982)).

The panel decision

After the District Court upheld § 26, the panel reversed 2-1. Relying on the political-process 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 panel majority first concluded that § 26 has a "racial focus." (Slip Op. at 15–17.) Next, the

majority decided that university admissions committees are "political" (*id.* at 18–25), despite the fact that admissions officials are not elected and, according to the trial-court record, are unaccountable to elected officials. Finally, the majority held that § 26 effected a "reordering" of the political process, placing special burdens on racial minorities. (*Id.* at 25–28.) Accordingly, § 26 "deprives the Plaintiff of equal protection of the law under a 'political process' theory." (*Id.* at 36.)

Judge Julia Smith Gibbons filed a 19-page dissent. In her view, § 26 "does not impermissibly restructure the political process in the state of Michigan to burden the ability of minorities to enact beneficial legislation." (Slip Op at 41.) She distinguished *Hunter* and *Seattle* because a university's admissions program is not a "political process[ ]." (*Id.* at 47–56.) "The Michigan voters have therefore not restricted the political process in their state by amending their state constitution; they have merely employed it." (*Id.* at 56.) Judge Gibbons also concluded that § 26 is constitutional under a traditional equal-protection analysis. (*Id.* at 58–59.)

ARGUMENT

Racial classification by government entities is presumptively invalid and subjected to the strictest judicial scrutiny. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). It is exceedingly odd, then, to say that a state constitutional provision *prohibiting* discrimination based on race or sex is itself unconstitutional because it discriminates on the basis of race and sex.

Yet, that is precisely what the panel majority held here, in conflict with the Ninth Circuit's decision in *Wilson*; the California Supreme Court's decision in *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947, 960 (Cal. 2010); and the District Court's decision in *Coalition to Defend Affirmative Action, Integration, and Immigration Rights v. Schwarzenegger*, 2010 WL 5094278 (N.D. Cal. Dec. 8, 2010). Contrary to the panel's conclusion, nothing in the federal Constitution "suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and sex—must be readily available at the lowest level of government." *Wilson*, 122 F.3d at 708.

For four reasons, the en banc Court should uphold article 1, § 26 of Michigan's Constitution. First, unlike the initiatives at issue in *Hunter* and *Seattle School District*, § 26 does not condone discriminatory practices; it condemns them. Second, unlike the initiatives at issue in *Hunter* and *Seattle School District*, § 26 does not reorder political authority, it addresses internal decision making at public universities. Third, because § 26 prohibits discrimination and preferences based on race or sex, it does not burden minority interests alone. And finally, unlike the initiatives in *Hunter* and *Seattle School District*, § 26's passage did not result from discriminatory intent.

I. Unlike the initiatives at issue in *Hunter* and *Seattle School District*, § 26 makes it more difficult to obtain unconstitutional race- and sex-based preferences.

The Supreme Court has applied the Equal Protection Clause's political-restructuring doctrine only to laws or policies that condone discrimination against minorities. *Hunter*; *Seattle School District*. The Court has never applied the doctrine to laws that *prohibit* discrimination by precluding unconstitutional, preferential treatment. There are two basic reasons why. (Although the reasons apply to any government action, they will be discussed in the context of university admissions.)

First, if a college or university's student population is the product of historic discrimination, then a minority applicant already has an equal-protection right to remedial relief. There is no need for a political-restructuring-based right to preferential treatment.

Second, in the absence of any effects from historic discrimination, making race-based admissions decisions is presumptively unconstitutional. *Parents Involved*, 551 U.S. at 720. A *Grutter* plan is supposed to be a transient response to anemic academic diversity, available only until there are feasible race-neutral alternatives that would achieve diversity interests "about as well." *Grutter*, 539 U.S. at 339 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)). Plaintiffs do not allege any lingering effects from historic discrimination at Michigan's public universities. And they concede that race-neutral programs like the top "ten percent" plan in place at the University of Texas actually result in *improved* minority achievement. (Coalition Br at 11.) Accordingly, there is no basis to strike down § 26 under a political-restructuring theory.

Viewed through the *Grutter* analytical prism, it is easy to see why § 26 is fundamentally different than the laws the Supreme Court struck

down in *Hunter* and *Seattle School District*. 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.* In other words, the *Hunter* referendum expressly barred laws that themselves prohibited discrimination.

Similarly, in *Seattle School District*, a Washington public-school board adopted a busing plan to end *de facto* racial segregation. 458 U.S. at 461. The state's voters then amended 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. The *Seattle School District* referendum barred the use of busing, but only if used to combat the effects of historic discrimination.[9]

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[9] When *Seattle School District* was decided in 1982, the Supreme Court sanctioned busing as a necessary means to eliminate racially-segregated schools. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). But more recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Supreme Court held that such busing programs employ presumptively unconstitutional racial classifications and are subject to strict scrutiny. In *Grutter*, the Court also broadly called for a "logical end point" to "all

As this Court explained at the preliminary-injunction stage, the challenged enactments in both *Hunter* and *Seattle District Court* "made it more difficult for minorities to obtain *protection from discrimination* through the political process." *Granholm*, 473 F.3d at 251 (emphasis added). "[H]ere, by contrast, [§ 26] purports to make it more difficult for minorities to obtain *racial preferences* through the political process. These are fundamentally different concepts." *Id.*(emphasis added)*; accord Wilson*, 122 F.3d at 708 (plaintiffs challenge Prop 209 "not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment.").[10] The desire to ultimately eliminate discriminatory racial preferences is why the Supreme Court in *Grutter* encouraged states to move away from race-based admission policies:

> Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by

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governmental use of race," and referred to California's Proposition 209 approvingly as a step in that direction. *Grutter*, 539 U.S. at 342. The more recent cases suggest strongly that if the Supreme Court were to consider *Seattle* today, the opinion's broad language would be very different, even if the result remained the same.

[10] It is curious that the panel majority would view § 26's attempt to outlaw discrimination as "even more troubling than [the enactments] at issue in *Hunter* and *Seattle*." (Slip Op. at 26.)

> state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.

539 U.S. at 342. It is also why Justice Blackmun, author of *Seattle School District*, stated in *Crawford* (another case involving a public referendum limiting busing intended to desegregate the schools) that he could not "[r]ule for petitioners on a *Hunter* theory [because it] seemingly would mean that statutory affirmative-action or antidiscrimination programs could never be repealed." *Crawford*, 458 U.S. at 546-47 (Blackmun, J., concurring).

The troubling aspect of Plaintiffs' argument is that it has no logical end point. That is because *all* laws effect political restructuring, no matter the subject or the level at which they are enacted. Consider the Fair Housing Act of 1968. When Congress adopted that law, it prohibited the State of Michigan from adopting its own laws requiring that African-American home buyers be given preferential treatment. Unlike other discrete and insular groups, African-Americans 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 or a local government that enacted the

fair-housing legislation. In other words, if Plaintiffs are correct, then all laws prohibiting discrimination are unconstitutional.

Equally strange, Plaintiffs' political-restructuring theory has the effect of elevating local authority over state authority. There is no question that Michigan's public universities could themselves do away with race-based admissions criteria in favor of race-neutral criteria. But once they adopt race-based criteria, Plaintiffs say it is impossible for the State of Michigan to do anything about it. This is precisely the concern that Justice Powell forcefully made in *Seattle School District*:

> Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race-specific program that arguably benefits racial minorities. Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. *It is a strange notion—alien to our system—that local governmental bodies can forever preempt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.*

458 U.S. at 494-95 (Powell, J., dissenting) (emphasis added). It is precisely this alien notion that Plaintiffs seek to engraft on the law of this Circuit.

In sum, *Hunter* and *Seattle School District* do not prohibit a state from requiring equal treatment. Accordingly, those cases do not stand in the way of the People's adoption of § 26. Section 26 is more akin to the "repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Granholm*, 473 F.3d at 251 (quoting *Crawford*, 458 U.S. at 538). Such an action "does not violate the Equal Protection Clause." *Id.*

II. Section 26 does not reallocate the political structure in the State of Michigan.

The underpinning of *Hunter* and *Seattle* was the Supreme Court's objection to a state's impermissible attempt to reallocate political authority. E.g., *Seattle*, 458 U.S. at 470. But § 26 does not reallocate political authority with respect to university admissions. 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." (Slip Op. at 49 (Gibbons, J, dissenting).) As a result, the "faculty are the primary architects of all the admissions criteria and protocols," and there is no "system in place to review or alter admissions policies at a level above a vote of the faculty." (*Id.*) Thus, the "evidence reveals that the academic processes at work in state university admissions in Michigan are not 'political processes' in the manner contemplated in *Seattle*." (*Id.* at 52.)

For example, at the Wayne State University Law School, a faculty committee develops the "Discretionary Admissions Criteria" and the ultimate decision to adopt or change admissions criteria rests with the faculty. Students who are not on the student board, prospective students, and the public are not eligible to vote on admissions criteria. (R 201, Def. Cox's Mem. in Support of Mot. to Dismiss; R 205, Exs. to Cox Mot., Ex 1, Wu Dep., pp. 8, 30-32, 188-91.)

Similarly, the faculty is the primary architect of undergraduate admissions criteria and protocols at the University of Michigan. 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 submit

suggestions for admissions criteria. (R 201, Def. Cox's Mem. in Support of Mot. to Dismiss; R 205, Exs. to Cox Mot., Ex 2, Spender Dep., pp. 225, 234-35.)

The University of Michigan's Law School and Medical School follow the same practices. The faculty develops and adopts the admissions criteria, and there is no formal process by which the public "petitions" or submits suggestions for consideration. (R 201, Def. Cox's Mem. in Support of Mot. to Dismiss; R 205, Exs. to Cox Mot., Ex 3, Zeafross Dep., pp. 13-14, 208-13; Ex. R, Ruiz Dep., pp. 13-17, 85-86, 89-94.)

Thus, the selection criteria and methodology for reviewing and adopting changes to the admissions process, and criteria that universities use in selecting students, is not itself a political process, but an academic process. The mere fact that the process takes place at a public university does not make it a "political process" for purposes of *Hunter* and *Seattle School District*.

III. Section 26 does not burden minority interests and minority interests alone.

Both *Hunter* and *Seattle* involved initiatives targeted solely at minorities (those attempting to buy houses, and those benefitting from a racially integrated public-school system, respectively). But as this Court noted in its injunction-stage decision on the stay motion, § 26 "does not burden minority interests and minority interests alone." *Granholm*, 473 F.3d at 250. That is because the "classes burdened by the law according to plaintiffs—women and minorities—make up a *majority* of the Michigan population." *Id.* at 251 (emphasis added). The majority "needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Id.* (quoting *Hunter*, 393 U.S. at 391). "Unlike the *Hunter* line of cases, then, [§ 26] does not single out minority interests for this alleged burden but extends it to a majority of the people of the State." (*Id.*) The Ninth Circuit also accepted this premise in its analysis of California's Proposition 209. *Wilson*, 122 F.3d at 705 ("It would seem to make 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.").

Notably, § 26 does not prohibit racial minorities (or any other discrete and insular group) from advocating or urging colleges and universities to create practices promoting diversity within the admissions process without regard to race. Such nondiscriminatory polices are entirely consistent with § 26, and as Plaintiffs tacitly concede, may lead to better long-term results than race-based admissions criteria. (Coalition Supp. Br. at 11 (noting that students admitted under the University of Texas top "ten percent" plan achieved higher grades than students admitted under other criteria).)

IV. Section 26 is constitutional because its passage did not result from a discriminatory intent or purpose.

Even under a political-structure analysis, reallocation of political decision-making violates equal-protection principles only where there is evidence of purposeful racial discrimination, similar to a conventional equal-protection analysis. *Seattle School District*, 458 U.S. at 484-85; *Valieria v. Davis*, 307 F.3d 1036, 1040 (9th Cir. 2002). As the Supreme Court has stated, "proof of racially discriminatory intent or purpose is

required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 194 (2003). Thus, both *Hunter* and *Seattle School District* relied on findings of "discriminatory intent," *id.* at 196, 197, and this Court has confirmed that an initiative violates equal-protection principles only if racial discrimination was "the only possible rationale" behind the initiative's passage. *Arthur v. Toledo*, 78 F.2d 565, 573–74 (6th Cir. 1986).[11]

Here, the District Court could not say "that the only purpose of [§ 26] is to discriminate against minorities," since its sponsor and leading proponent both posited nondiscriminatory purposes for the amendment: to eliminate preferential treatment based on race and sex. *Coalition to Defend Affirmative Action v. Regents of the University of*

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[11] The panel majority, citing *Seattle School District*, said proof of discriminatory intent is not required. (Slip Op. at 21.) But that was because *Seattle School District*, though involving an initiative that was facially neutral, actually involved racial classifications, which is not the case here. See *Seattle School District*, 458 U.S. at 471 (the challenged initiative "was effectively drawn for racial purposes" and was enacted "'because of,' not merely 'in spite of,' its adverse effects upon busing for integration."). Accord *City of Cuyahoga Falls*, 538 U.S. at 196, 197 (observing that both *Hunter* and *Seattle School District* relied on findings of "discriminatory intent in a challenge to an [ ] enacted initiative").

Michigan, 539 F. Supp. 2d 924, 951–52 (E.D. Mich. 2008). The language and purpose of § 26 is to eliminate discrimination and preferential treatment in public contracting, public employment, and public education.

There is no evidence that purposeful discrimination was the only rationale motivating § 26's passage; rather, the Amendment is designed to *eliminate* discrimination. For this independent reason, Plaintiffs' political-process claim fails.

CONCLUSION AND RELIEF REQUESTED

Under *Grutter*, race-conscious measures must have a "logical end point" and be "limited in time." 539 U.S. at 271-72. By adopting § 26, Michigan's voters determined that the logical end point for classifying individuals based on race or sex is now. The Supreme Court has never held that a state constitution violates the federal Equal Protection Clause by prohibiting discrimination based on race or sex; this Court should decline Plaintiffs' invitation to do so.

Accordingly, Attorney General Bill Schuette respectfully requests that this Court affirm the District Court and uphold the constitutional validity of article 1, § 26 of Michigan's Constitution.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ John J. Bursch
Solicitor General
Counsel of Record
BurschJ@michigan.gov

Margaret A. Nelson
Assistant Attorney General
Co-Counsel of Record
Attorneys for Intervenor Defendant-Appellee
P.O. Box 30736, Lansing, MI 48909
(517) 373-6434
NelsonM9@michigan.gov

Dated: December 22, 2011

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Page Limitation, Typeface Requirements, and Type Style Requirements

1. This SUPPLEMENTAL BRIEF ON EN BANC REVIEW complies with the page limitation of Fed. R. App. P. 32(7)(A) because the petition does not exceed 30 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Century Schoolbook.

/s/ John J. Bursch
Solicitor General
Counsel of Record
Attorney for Intervenor Defendant-Appellee
P.O. Box 30736
Lansing, MI 48909
(517) 373-3826
burschj@michigan.gov

CERTIFICATE OF SERVICE

I certify that on December 22, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ John J. Bursch
Solicitor General
Counsel of Record
Attorney for Intervenor Defendant-Appellee
P.O. Box 30736
Lansing, MI 48909
(517) 373-3826
burschj@michigan.gov