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.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS FOUNDATION, NATIONAL ASSOCIATION OF SCHOLARS, PROJECT 21, AND CATO INSTITUTE IN SUPPORT OF 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.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Foundation, National Association of Scholars, Project 21, and Cato Institute respectfully submit this brief amicus curiae in support of the Petitioner Bill Schuette, Michigan Attorney General.[1]

For over 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free from racial discrimination. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of Tex. at Austin*, No. 11-345, 2013 WL 3155220 (U.S. June 24, 2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) is a nonprofit research, education, and public advocacy organization. CEO devotes significant time and

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

resources to studying racial, ethnic, and gender discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. CEO has advocated for the adoption of various ballot initiatives, including Proposal 2, and has published studies providing voters with information about the impact of preferences on college and university admissions. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 2013 WL 3155220; *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701; *Grutter*, 539 U.S. 306.

The American Civil Rights Foundation (ACRF) is a nonprofit public benefit corporation, with members nationwide, including in Michigan, created to monitor and enforce laws that preclude the use of race, sex, or ethnicity in public contracting, public education, or public employment. Ward Connerly, a coauthor and sponsor of Proposal 2, which became Article I, Section 26, to the Michigan Constitution (Section 26), is a member of the Board of Directors of ACRF and President of the American Civil Rights Institute. He was chairman of the California Civil Rights Initiative Campaign which officially supported the California Civil Rights Initiative, Proposition 209, the progenitor of Section 26. ACRF has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 2013 WL 3155220; *Shelby County v. Holder*, No. 12-96, 2013 WL 3184629 (U.S. June 25, 2013).

The National Association of Scholars (NAS) is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. NAS has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 2013 WL 3155220; *Grutter*, 539 U.S. 306. NAS, CEO, ACRF, and PLF participated in this case in the court below. *See Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc).

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in this Court numerous times. *See Fisher*, 2013 WL 3155220; *Shelby County*, 2013 WL 3184629; *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's

Center for Constitutional Studies was established in 1989 to promote principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether state prohibitions against racial discrimination and preferential treatment violate the Equal Protection Clause. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 7, 2006, Michigan voters reaffirmed their commitment to the principles of equality and nondiscrimination by adopting the Michigan Civil Rights Initiative by 58% of the vote, amending their organic law, and adding Article I, Section 26, to the Michigan Constitution (Section 26). Section 26 prohibits the State, its political subdivisions, and all other governmental instrumentalities from discriminating against, or granting 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."

After Section 26 went into effect, it was immediately challenged as a violation of the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution. However, contrary to Respondents' claims, Section 26 does not implicate the political structure doctrine of the Equal Protection Clause as articulated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This rule admits no exception for affirmative action preference policies. "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry." *Grutter*, 539 U.S. at 326 (citation omitted). The language of Title VI of the 1964 Civil Rights Act is even more explicit. *See* 42 U.S.C. § 2000d (Congress forbade recipients of federal money from engaging in racial or ethnic discrimination.). *Also see* 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory.").

The *Hunter*/*Seattle* (or "political structure") doctrine does not cast doubt upon the constitutionality of Section 26. The laws declared unconstitutional in *Hunter* and *Seattle* made it more difficult for minorities to secure protections against discrimination, and they treated minorities differently within discreet policy areas—housing and school busing. Conversely, Section 26 enhances protections against discrimination and covers all Michigan government action—not just a single political issue. After Section 26 was adopted, all

of Michigan government was prohibited from discriminating against, or granting preferential treatment to, any individual on the basis of race.

To the extent that language in *Hunter* and *Seattle* can be read to disenfranchise Michigan voters on the subject of the rights guaranteed by their own state constitution, those cases must be overruled. The *Hunter*/*Seattle* doctrine provides a convoluted framework for analyzing legislation that is neutral on its face, but when applied, prevents minorities from securing advantageous legislation. Eight years after *Hunter* was decided, the Court provided a more coherent framework for that purpose in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). In light of *Arlington Heights*, *Hunter*/*Seattle* is no longer needed. Moreover, *Hunter*/*Seattle*, which has not been invoked by this Court in over thirty years, is outdated, incoherent, and unjust. Instead of moving the Country toward a time when racial preferences will meet their "logical end point," *Grutter*, 539 U.S. at 342, *Hunter*/*Seattle* seeks to enshrine racial preferences in the Constitution for all time.

Such a result would be particularly troubling in light of the experience of underrepresented minorities in California post-Proposition 209.[2] Since public

[2] In 1996, California voters passed Proposition 209, which added Article I, Section 31, to the California Constitution. Proposition 209 is nearly identical to Section 26; it contains the same prohibitions against governmental race-based discriminations and preferences. *Compare* Cal. Const. art. I, § 31 *with* Mich. Const. art. I, § 26. California's public colleges and universities have now had race-neutral admissions for over fifteen years.

universities in California began using race-neutral admissions, more underrepresented minorities have gained admission to California's public university system. And California's secondary schools have stepped up the effort to improve the academic qualifications of underrepresented minority students. Once admitted to California's public colleges and universities, underrepresented minorities are far more likely to graduate than they were before Proposition 209 took effect.

If the *Hunter*/*Seattle* doctrine is applied here, it would undermine the famous admonition that, "[t]he 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. The *Hunter*/*Seattle* doctrine does not stop discrimination. Quite the opposite—the doctrine enshrines discrimination based on race by forcing jurisdictions to continue to discriminate on that basis.

The decision below should be reversed.

I

SECTION 26 IS NOT IMPLICATED BY THE *HUNTER*/*SEATTLE* DOCTRINE

Section 26 does not violate the Equal Protection Clause under the "political structure" theory enunciated in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).[3] The measures this Court struck down in *Hunter* and *Seattle* differ significantly from Section 26. Unlike *Hunter* and *Seattle*, minorities have more

[3] Amici intentionally omit *Romer v. Evans*, 517 U.S. 620 (1996), for reasons discussed *infra*. *See* Arg. II.B.1.

protection against discrimination as a result of Section 26. Further, this increased protection against discrimination applies across all levels of Michigan government, not just discrete government functions like fair housing and school busing.

A. Section 26 Is Not Implicated by *Hunter*/*Seattle* Because It Enhances Minority Protections Against Discrimination

Unlike the laws struck down in *Hunter* and *Seattle*, Section 26 enhances minority protections against discrimination. *See* Mich. Const. art. I, § 26(1) & (2) ("The State shall not discriminate . . ."). Section 26 also enhances protections against discrimination by prohibiting government from granting *preferential* treatment on the basis of race in the operation of public education, public contracting, and public employment.[4] *Id.* This Court's decisions in *Hunter* and *Seattle* concerned enactments that made it more difficult for minorities to obtain protection from discrimination, not preferential treatment.

In *Hunter*, the Akron City Council enacted a fair housing ordinance that required equal housing opportunities for all persons, regardless of race, color,

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[4] Once Michigan voters enshrined these new laws against discrimination and preferential treatment into their constitution, it became illegal, for example, for the University of Michigan to require Asian students to outperform white students to gain admission, or for Hispanic students to have to outperform black students to gain admission. *See* Althea K. Nagai, Center for Equal Opportunity, *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Michigan*, *available at* http://www.ceousa.org/attachments/article/548/UM_UGRAD_final.pdf (last visited June 19, 2013).

or creed. 393 U.S. at 386. Nellie Hunter attempted to use that ordinance after being denied the opportunity to view prospective houses because she was African-American. But the voters of Akron had amended the city charter to require that any fair housing ordinance enacted by the city council to end housing discrimination of the basis of race must be approved by referendum prior to taking effect. *Id.* at 387. The charter amendment provided that all other housing matters regulating real estate transactions would be subject to referendum only if formally requested by 10% of the electorate. *Id.* at 390. Thus, the charter amendment in *Hunter* discriminated against racial minorities by placing a special burden on them in their efforts to secure anti-discrimination housing laws. *Id.* at 390-91.

Although the charter amendment provided "no right to discriminate in housing," the Court held that it contained "an explicitly racial classification," by treating "racial housing matters differently from other racial and housing matters." *Id.* at 389. Although the amendment was facially neutral, in reality, "the law's impact [fell] on the minority." *Id.* at 391. The amendment placed a "special burden[] on racial minorities within the governmental process." *Id.*

Similarly, in *Seattle*, the governing board of a Washington public school district adopted a plan to end *de facto* racial segregation by busing students to reduce racial imbalance in individual schools. 458 U.S. at 460-61. In response, the voters amended their state's constitution to prohibit busing for the purpose of desegregation, while still allowing busing for other purposes, such as to provide transportation for special education and to reduce overcrowding. *Id.* at 461-63,

471. Thus, the Court invalidated the state initiative on equal protection grounds under *Hunter*. "[D]espite [the initiative's] facial neutrality there [was] little doubt that the initiative was effectively drawn for racial purposes." *Seattle*, 458 U.S. at 471.

Both *Hunter* and *Seattle* necessitated the finding of an impermissible racial classification in the challenged law before the political structure doctrine was invoked. *See Seattle*, 458 U.S. at 484-86; *Hunter*, 393 U.S. at 391-92. Further, the *Seattle* Court explicitly recognized that "[t]his does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification." *Seattle*, 458 U.S. at 485 (citing *Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538 (1982)).

Section 26's ban on racial preferences is simply not enough to trigger heightened scrutiny under *Hunter*/*Seattle*, or to disenfranchise Michigan's voters on the issue of racial preferences. The clear effect of Section 26 is to prohibit the State and its political subdivisions from adopting race- and sex-based preference programs. It guarantees equal opportunity in public education, employment, and contracting. It creates no racial classifications. As the Ninth Circuit found: "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997).

The Ninth Circuit's decision in *Wilson* is particularly informative on this point. Immediately after the California Civil Rights Initiative (Proposition 209) was passed by the voters, it was challenged as violating the *Hunter*/*Seattle* doctrine.

Wilson, 122 F.3d 692. The Ninth Circuit rejected that argument. It held that Proposition 209's prohibition against preferential treatment does not impede protection against discrimination. *Id.* at 708. The *Wilson* court distinguished Proposition 209 from the challenged enactments in *Hunter* and *Seattle*, as follows:

> When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters.

Wilson, 122 F.3d at 707. Thus, the Ninth Circuit held that Proposition 209 is constitutional in all respects, even as applied to college admissions, because a prohibition on racial preferences does not offend the Constitution. *Id.* at 701.

The Ninth Circuit is not alone in upholding the constitutionality of California's Proposition 209. In 2010, the California Supreme Court, "exercising [its] independent judgment on the matter," concluded that Proposition 209 does not violate the Equal Protection Clause under the *Hunter*/*Seattle* doctrine. *Coral Construction, Inc. v. City & County of San Francisco*, 235 P.3d 947, 959 (Cal. 2010). *Coral Construction* involved a challenge to a local ordinance that required San Francisco to grant race- and sex-based contracting preferences to minority-owned businesses. In defending its race-based preference, San Francisco claimed Section 31 was unconstitutional under the *Hunter*/*Seattle* doctrine. *Coral Construction*, 235 P.3d

at 956. The California Supreme Court soundly rejected that argument in a 6-1 decision.

The *Coral Construction* court observed that *Hunter*/*Seattle* prohibits the creation of a political structure that ostensibly treats all individuals equally, yet subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. *Id.* (citing *Seattle*, 458 U.S. at 467). But the court found nothing in *Hunter* or *Seattle* that defined "beneficial legislation" to include race- or gender-based *preferences*. *Coral Construction*, 235 P.3d at 959. Following *Wilson*, the court held: "'Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment.'" *Id.* at 960 (quoting *Wilson*, 122 F.3d at 707). Instead of burdening the right to equal treatment, the court concluded that Proposition 209 directly serves the principle that "'all governmental use of race must have a logical end point.'" *Coral Construction*, 235 P.3d at 960 (citation omitted).

As these cases demonstrate, only laws that interfere with attempts to protect against *discrimination* violate the Equal Protection Clause's political structure doctrine. Because Section 26 prohibits discrimination and preferences, and thereby enhances protections against discrimination, it does not conflict with this Court's decisions in *Hunter* and *Seattle*.

B. Section 26 Is Not Implicated by *Hunter*/*Seattle* Because It Does Not Treat Racial Matters in Higher Education Differently, But Prohibits Racial Classifications in Public Employment, Education, and Contracting

This Court has never held that sweeping anti-discrimination statutes—like Section 26—are themselves racial classifications subject to strict scrutiny review under the Equal Protection Clause. *See*, *e.g.*, *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 669 (1987) (Scalia, J., dissenting) ("[I]t would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids."); *Bakke*, 438 U.S. at 286-87 (op. Powell, J.) (Title VI embodies constitutional restraints on discrimination); *id.* at 329-40 (op. Brennan, White, Marshall, and Blackmun, JJ.) (same). Unlike Title VI, Title VII, and Section 26, the laws at issue in *Hunter* and *Seattle* drew a distinction between laws that protect against racial discrimination and those that address other problems in the same policy area. *Hunter*, 393 U.S. at 390 (racial anti-discrimination laws regarding housing are subject to referendum; all other housing laws may be adopted by the city council); *Seattle*, 458 U.S. at 463 (permitting school busing for a variety of reasons, but prohibiting school busing as a remedy for *de facto* racial segregation).

Furthermore, the decisions in both *Hunter* and *Seattle* struck down laws that made it more difficult to enact laws protecting minorities from discrimination on the basis of race. *See Seattle*, 458 U.S. at 474 ("[A]uthority over all student assignment decisions," except those involving race, "as well as over most other

areas of educational policy, remains vested in the local school board."); *Hunter*, 393 U.S. at 390-91 (The automatic referendum system only applies to housing discrimination based on race and religion.). The application of the political structure doctrine focused on the fact that race was treated differently from other aspects of the general law. *See Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 390. Neither *Hunter* nor *Seattle* cast any doubt over the constitutionality of a law which treats all racial matters according to the same rule. Section 26 does precisely that.

Section 26 does not single out university admissions for special treatment, and there is no basis to read it so narrowly. *See* Mich. Const. art I, § 26(1) (prohibiting discrimination and preferential treatment by government in all public education (including primary and secondary school), contracting, and employment). The political structure doctrine is an obstacle only to reallocations of political power which treat race differently—either differently from other racial matters or differently from other matters of a specific policy area. *See Hunter*, 393 U.S. at 389 (finding equal protection violated by "an explicitly racial classification treating racial housing matters differently from other racial *and* housing matters." (emphasis added)). Section 26 does not single out race for different treatment; it prohibits discrimination and preferential treatment by the government in *all* cases.

Hunter/*Seattle* is not invoked by every law that deals with race. Concurring in *Hunter*, Justice Harlan cautioned that the Court's decision should not be read to prohibit generally applicable laws simply because they may concern racial matters. To rule otherwise would amount to questioning neutral laws which do

not have the "purpose of protecting one particular group to the detriment of all others" but "will sometimes operate in favor of one faction; sometimes in favor of another." *See Hunter*, 393 U.S. at 394 (Harlan, J., concurring). The political structure doctrine is no obstacle to laws "designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents." *Id.* at 393 (Harlan, J., concurring). The political structure doctrine must be limited to instances where problems involving racial matters are treated differently than other problems in the same area. *See Seattle*, 458 U.S. at 480. "[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Id.* at 486 (citing *Hunter*, 393 U.S. at 391).

No case has cast doubt on the constitutionality, under the political structure doctrine, of a law which—like Section 26—treats all racial matters the same by outlawing discrimination and preferential treatment by government in all cases. This should not be the first.

II

TO THE EXTENT THE *HUNTER/SEATTLE* DOCTRINE PROHIBITS SECTION 26, IT MUST BE OVERRULED

Where a conflict exists between prior precedent and the Constitution's text, the Court is bound to uphold the Constitution. *See South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J.,

dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991) (When a governing decision is unworkable, the Court is not constrained to follow precedent. *Id.* at 827 (citation omitted)). This Court's primary obligation is to interpret the text of the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). Although courts should generally be reluctant to overrule their prior decisions, the principle of *stare decisis* is not an inexorable command. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citation omitted) (*stare decisis* "[is] not a mechanical formula of adherence to the latest decision").

The key principles that should guide the Court are that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because there are no textual exceptions, and racial distinctions are "odious to a free people," racial classifications are always subject to strict scrutiny. *Adarand*, 515 U.S. at 214; *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses"); *Parents Involved*, 551 U.S. at 745-46. "The controlling words, we must remember, are 'equal' and 'protection.' Impediments to preferential treatment do not deny equal protection." *Wilson*, 122 F.3d at 708.

As noted *supra*, Amici do not believe Section 26 violates the Equal Protection Clause under a proper understanding of the *Hunter*/*Seattle* doctrine. Yet, if it

does, the Court should overrule the cases as inconsistent with the text of the Constitution.

A. The *Hunter/Seattle* Doctrine Is No Longer Necessary

The language of the Equal Protection Clause prohibits "official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 239 (1976), and its ultimate goal is to permanently forbid the government from discriminating on the basis of race.[5] *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *see also Adarand Constructors*, 515 U.S. at 227 (requiring strict scrutiny analysis for all governmental racial classifications). Laws not motivated by a discriminatory purpose do not violate the Equal Protection Clause solely because they have an unequal effect. *See Davis*, 426 U.S. at 239; *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause is only violated where legislation was motivated "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

A year after *Davis*, this Court decided *Arlington Heights*, 429 U.S. 252. *Arlington Heights* provides guidance on how courts are to determine when facially neutral legislation has been adopted for an unconstitutional purpose. *Id.* at 266-68 (identifying factors speak to whether facially neutral legislation violates the Equal Protection Clause). The challenged laws in *Hunter* and *Seattle* were, like *Arlington*

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[5] Thus, even if this Court subjected Section 26 to strict scrutiny, it would be constitutional as a narrowly tailored means of achieving the Equal Protection Clause's ultimate goal of equal treatment.

Heights, facially neutral, *Hunter*, 393 U.S. at 391; *Seattle*, 458 U.S. at 471, and could today be easily analyzed under that precedent. Given the continued utility of *Arlington Heights* and the scant use of *Hunter*/*Seattle*, there is good reason to suspect that the latter doctrine is no longer useful.

Hunter was decided seven years before *Arlington Heights*, but there is no reason that the amendment at issue in *Hunter* could not be recast in light of *Arlington Heights*. *Arlington Heights* identified the "impact of the official action . . . an important starting point" to determining the constitutionality of facially neutral legislation. *Id.* at 266. In *Hunter*, it was clear that the impact of the charter was going to be felt by minorities. *Hunter*, 393 U.S. at 391 ("The majority needs no protection against discrimination."). Similarly in *Hunter*, the historical background was vital to the Court's finding of a discriminatory motive. *See id.* at 391 ("It is against this background that the referendum . . . must be assessed."); *accord Arlington Heights*, 429 U.S. at 267 (noting that "historical background" may be an important evidentiary source of discriminatory intent). There is little doubt that the ordinance in *Hunter* would have been struck down under the framework established eight years later in *Arlington Heights* without the need to create the unwieldy political structure doctrine.

Even if *Seattle* had not fallen under the *Arlington Heights* framework, the case would probably have been decided differently today. In 1982, when *Seattle* was decided, state-sponsored segregated schools and court-ordered busing to remedy *de jure* discrimination was not uncommon. *See*, *e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken*

v. Bradley, 418 U.S. 717 (1974). Today, state-sponsored segregation is a distant memory. Indeed, five years ago this Court rejected an attempt by the same Seattle school district to racially balance its student body in the name of diversity. *See Parents Involved*, 551 U.S. 701.

Amici are not alone in their belief that *Seattle* is no longer good law. In upholding Proposition 209, the California Supreme Court questioned the continued validity of *Seattle*. "Today the race-conscious pupil assignment programs repealed by Washington's voters would be presumptively unconstitutional . . . . Accordingly, *Seattle* cannot fairly be read as holding that the political structure doctrine protects presumptively unconstitutional racial preferences, as opposed to programs intended to bring about immediate equal treatment." *Coral*, 235 P.3d at 959-60. In the court below, Judge Gibbons echoed the California Supreme Court:

> Today, it is plain that a racially conscious student assignment system—such as the one that the Seattle initiative attempted to make more difficult to enact—would be presumptively invalid and subject to strict scrutiny . . . . Thus, when articulating the reach of the political restructuring doctrine, *Seattle* did not consider that the underlying policy affected by the challenged enactment was presumptively invalid.

Regents of Univ. of Mich., 701 F.3d at 496-97 (en banc) (Gibbons, J., dissenting).

There is no reason to continue to adhere to the *Hunter*/*Seattle* doctrine. The harm that the *Hunter*

Court sought to prevent has been adequately addressed through the more comprehensive and coherent *Arlington Heights* framework. And *Seattle* makes little sense in light of contemporary equal protection law that presumes all racial classifications are unconstitutional.

B. Principles of *Stare Decisis* Should Not Preserve the *Hunter*/*Seattle* Doctrine

Stare decisis should give way when "such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In *Patterson*, 491 U.S. at 172-75, this Court outlined guiding principles that aid in determining whether to overrule prior precedent. Amici support the citizens' right to prohibit constitutionally suspect racial classification by their state governments. For the reasons that follow, adherence to *stare decisis* should not stand in the way of overturning the *Hunter*/*Seattle* doctrine.

1. The *Hunter*/*Seattle* Doctrine Has Not Kept Up With Developments in the Law

The first principle advanced by the *Patterson* Court for determining whether to adhere to past precedent concerns whether the older principle is consistent with intervening developments in the law. 491 U.S. at 173. On this score, it is important to note that the *Hunter*/*Seattle* doctrine is no longer used by courts throughout the country. In other words, the "*Hunter*/*Seattle* doctrine" ended with *Seattle*. Since that 1982 opinion, the Sixth Circuit is the only federal appellate court that has invoked the political structure

analysis. "The infrequent use of the doctrine is not surprising given its lack of a constitutional basis." *Regents of Univ. of Mich.*, 701 F.3d at 512 (en banc) (Griffin, J., dissenting).

While some commentators argue that *Romer*, 517 U.S. 620, was decided under *Hunter*/*Seattle*,[6] a close examination of the case reveals that to be untrue. The *Romer* Court did not invoke *Hunter* or *Seattle* in its opinion and, unlike *Hunter* and *Seattle*, *Romer* involved a statute that discriminated on the basis of sexual orientation, not race. *Id.* at 624. Moreover, the statute in *Romer* was facially discriminatory against "Homosexual, Lesbian or Bisexual" individuals. *Id.* Because of this facial classification on the basis of sexual orientation, the Court simply struck down the statute under rational basis scrutiny, without any need to undertake a confusing *Hunter*/*Seattle* analysis. *Id.* at 632 ("[I]t lacks a rational relationship to legitimate state interests."). That this facial discrimination occurred during the "political process" is hardly reason to analogize *Romer* to *Hunter*/*Seattle*. If, instead of sexual orientation, the amendment at issue in *Romer* explicitly denied protected status to individuals of "Chinese" decent, there would be little need for the Court to invoke *Hunter*/*Seattle* to find the statute unconstitutional. Strict scrutiny would suffice.

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[6] *See*, *e.g.*, Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 Stan. L. & Pol'y Rev. 129, 137 (1999) ("While the Supreme Court has not explicitly applied the *Hunter-Seattle* principle since 1982, *Romer v. Evans* reaffirms the insight that lies at the heart of both these cases.").

Invoking *Romer* in the context of Section 26 is particularly curious given the opening lines of that opinion:

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle.

Id. at 623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Section 26, of course, essentially enshrines in Michigan law Justice Harlan's admonition. *Id.*

In addition to the lack of any Supreme Court precedent relying on *Hunter*/*Seattle* in the past thirty years, the push by states towards color-blind government counsels against maintaining the antiquated doctrine. To date, California, Louisiana, Washington, Michigan, Arizona, Nebraska, Florida, New Hampshire, and Oklahoma all prohibit racial classifications in university admissions. *See* Cal. Const. art. I, § 31; *La. Associated Gen. Contractors, Inc. v. Louisiana*, 669 So. 2d 1185 (La. 1996) (interpreting Louisiana Constitution as banning all racial classifications); Wash. Rev. Code Ann. § 49.60.400; Ariz. Const. art. II, § 36; Neb. Const. art. I, § 30; Fla. Exec. Order No. 99-281; N.H. Rev. Stat. Ann. § 187-A:16-a; Okla Const. art. II, § 36A. And this Court has already championed the use of these race-neutral alternatives. *Grutter*, 539 U.S. at 342 (counseling universities to "draw on the most promising aspects of these race-neutral alternatives as they develop"). To

invoke *Hunter*/*Seattle* now and invalidate Section 26 would bring these "promising" race-neutral alternatives to an untimely end.

2. The *Hunter*/*Seattle* Doctrine Is Incoherent and Provides No Consistency in the Law

The second *Patterson* factor concerns whether the challenged precedent "may be a positive detriment to coherence and consistency in the law." 491 U.S. at 173 (citations omitted). *Hunter*/*Seattle*, if interpreted as the Sixth Circuit did below, fails this factor.

The argument that a state's ban on racial preferences may violate the Equal Protection Clause of the Constitution is not new. In fact, multiple courts have evaluated the argument that a ban on preferential treatment violates the constitutional guarantee of equal protection. In *Wilson*, the Ninth Circuit upheld Proposition 209 against a challenge that it violated the Equal Protection Clause. In ruling on the challenge, the court noted the absurdity of the argument:

> Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. *If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.*

Wilson, 122 F.3d at 702 (emphasis added).

The California Supreme Court reached a similar conclusion when it rejected the argument that Proposition 209 violated the Equal Protection Clause:

> [E]ven in the rare case in which racial preferences are required by equal protection as a remedy for discrimination, the governmental body adopting such remedies must undertake an extraordinary burden of justification to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. In contrast, a generally applicable rule forbidding preferences and discrimination not required by equal protection, such as section 31, *does not logically require the same justification*.

Coral, 235 P.3d at 960 (emphasis added) (citations and quotation marks omitted).

While the Sixth Circuit held Section 26 unconstitutional, five separate dissents were filed. Judge Boggs wrote: "Under these circumstances, holding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is *vastly far afield from the Supreme Court precedents*." *Regents of Univ. of Mich.*, 701 F.3d at 493 (en banc) (Boggs, J., dissenting) (emphasis added). Judge Gibbons noted:

> Essentially, the argument is one of constitutional protection for racial and gender preference—a *concept at odds with the basic meaning of the Equal Protection*

> *Clause, as understood and explained through decades of jurisprudence.*

Id. at 494 (Gibbons, J., dissenting) (emphasis added). Judge Rogers dissented only to note how the majority's opinion renders *Hunter*/*Seattle* completely undecipherable. *Id.* at 505 (Rodgers, J., dissenting) ("Whatever *Hunter* and *Seattle* hold, the Supreme Court cannot have intended such a ban."). Judge Sutton's dissent noted:

> Proposal 2 does not place 'special burdens' on racial minorities . . . . The words of the amendment place no burden on anyone, and indeed are designed to prohibit the State from burdening one racial group relative to another. All of this furthers the objectives of the Fourteenth Amendment, the same seed from which the political-process doctrine sprouted.

Id. at 506 (Sutton, J., dissenting). Perhaps the most forceful dissent came from Judge Griffin, who urged this Court to overrule the *Hunter*/*Seattle* doctrine. "Today's decision is the antithesis of the Equal Protection Clause of the Fourteenth Amendment . . . . I urge the Supreme Court to consign this misguided doctrine to the annals of judicial history." *Id.* at 511-12 (Griffin, J., dissenting).

3. *Hunter*/*Seattle* Is Inconsistent With a Sense of Justice

The last *Patterson* factor concerns whether the challenged precedent, having been "tested by experience," proves to be "inconsistent with the sense of justice or with the social welfare" and, in particular, "with our society's deep commitment to the eradication

of discrimination based on a person's race or the color of his or her skin." 491 U.S. at 174 (citation omitted). *Hunter*/*Seattle* fails any test that turns on "the sense of justice" or "the eradication of discrimination."

Hunter/*Seattle*, as interpreted by the Sixth Circuit, has mandated, not eradicated, racial discrimination and preferential treatment. Were this Court to uphold the Sixth Circuit decision striking down Section 26, other state experiments with race-neutral admissions policies would be immediately challenged. *See supra* Arg. II.B.1 (listing states that have adopted race-neutral admissions policies). "[F]or the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process." *Regents of Univ. of Mich.*, 701 F.3d at 494 (en banc) (Gibbons, J., dissenting). Adherence to the *Hunter*/*Seattle* doctrine would forever frustrate society's goal of a discrimination-free government.

None of the *Patterson* factors counsel in favor of preserving the *Hunter*/*Seattle* doctrine, and overturning it would not raise the same reliance concerns that were present in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, this Court was concerned with whether overturning the limitation on state power first enunciated in *Roe v. Wade*, 410 U.S. 113 (1973), would injure individuals "who have relied upon it or [cause] significant damage to the stability of the society governed by it." 505 U.S. at 855. "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Id.* The nature of race-based preferences simply does not create such significant reliance interests.

Under the lower court's rationale, race-based admissions preferences are designed for the benefit of minorities. 701 F.3d at 485 (en banc). Only those individuals from underrepresented minority groups who would not otherwise gain acceptance can be said to have "relied" on those preferences. Yet, it is quite perverse to uphold a doctrine that discourages achievement in secondary school, simply because those individuals may then "rely" upon it for admission to select colleges and universities. In *Casey*, the Court recognized that the women relied upon the availability of abortion in order to "participate equally in the economic and social life of the Nation." 505 U.S. at 856. But this is not the case with race-based admissions preferences. As demonstrated below, in the absence of such preferences, underrepresented minorities in California have improved their academic credentials, and have gained admittance to California's public colleges and universities in record numbers. *See infra* Arg. III.

No government institution is required to institute race-based preferences, yet *Hunter*/*Seattle* prevents institutions from repealing them. In *Grutter*, this Court recognized that "all race-conscious admissions programs have a termination point." 539 U.S. at 342. Yet, if *Hunter*/*Seattle* remains, there will be no stopping point for racial preferences—they will be required by the Constitution. Under the Court's *stare decisis* principles, the flawed *Hunter*/*Seattle* doctrine should be overruled. The sooner the aberrational doctrine is explicitly rooted out of the law, the better the purposes of *stare decisis*—stability, coherence, justice, and predictability—will be served.

III

UNDERREPRESENTED MINORITIES DO NOT NEED RACIAL PREFERENCES TO SUCCEED IN HIGHER EDUCATION

This Court's opinion in *Grutter* endorsed universities' limited use of racial preferences to secure "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The *Grutter* Court, however, was quick to warn public universities that race-conscious action should only be considered after race-neutral options prove ineffective. *Id.* at 339 (holding that the Equal Protection Clause requires public universities to give "serious, good faith consideration of workable race-neutral alternatives").

Despite this Court's guidance, in the wake of *Grutter*, public universities read the opinion not as a warning to curtail their use of race, but rather as a blueprint for creating a student body with their preferred racial composition. The extent of racial preferences utilized by public universities is widespread and generally conceded even by those who advocate in favor of them. *See*, *e.g.*, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 26-27 (1998) ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."); Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, Inside

Higher Ed. (Nov. 12, 2009).[7] Indeed, as study after study by Amicus Center for Equal Opportunity has shown, public universities continue to use race to favor preferred minorities and turn away applicants for admission of disfavored races.[8]

This continued use of racial preferences by public universities is not universal: including the Michigan ban at issue in this case, nine states prohibit their public universities from considering a student applicant's race in admissions. *See supra* Arg. II.B.2 (noting the states that have banned racial preferences in university admissions). With the adoption of Proposition 209 in 1996, California became the first state to ban racial preferences in university admissions. *See* Cal. Const. art. I, § 31. Thus, for over fifteen years the underrepresented minority students in the nation's most populous state have had to seek

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[7] *Available at* http://www.insidehighered.com/views/2009/11/12/radford (last visited June 19, 2013).

[8] CEO's studies assess the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of admission at a university for members of different ethnic and racial groups, holding other qualifications constant. *See*, *e.g.*, Center for Equal Opportunity, *Racial and Ethnic Preferences in Admission to the University of Oklahoma*, *available at* http://www.ceousa.org/attachments/article/624/Oklahoma_Study.pdf (last visited June 19, 2013); Althea K. Nagai, Center for Equal Opportunity, *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, *available at* http://www.ceousa.org/attachments/article/545/U.Wisc.law.pdf (last visited June 19, 2013); Althea K. Nagai, Center for Equal Opportunity, *Racial and Ethnic Preferences in Undergraduate Admissions at Two Ohio Public Universities*, *available at* http://www.ceousa.org/attachments/article/547/OHIO3.7.pdf (last visited June 19, 2013).

admission to California's public universities without relying on racial preferences.

California's long experiment with race-neutral admissions has shown that underrepresented minorities do not need racial preferences to succeed. To the contrary, California has demonstrated that blacks and Hispanics are succeeding under a system that refuses to consider their skin color in admissions. Moreover, racial diversity at California's public universities has not suffered under race-neutral admissions. By looking at a broad range of educational outcome measures, it is clear that following adoption of Proposition 209, California's K-12 public schools began focusing their attention on improving minority students' preparation for college rather than relying on racial preferences.

A. Offers of Admission to Underrepresented Minority Students Have Risen at University of California Post-Proposition 209

The University of California (UC) system consists of nine undergraduate campuses.[9] The UC schools tracked the offers for admission by race and/or ethnicity to the University of California from 1997 through 2012. These data show:

- University-wide, underrepresented minorities (defined as American Indian, African-American, and Hispanic/Latino students) constituted 18.8% of the students (7,605 total offers) to whom

[9] Due to the newness of the Merced campus, it is not included in much of the data set forth in this brief. Campuses dedicated solely to graduate level courses are also not included.

admission was offered as freshmen in 1997.[10] By 2012, underrepresented minorities received 30.5% of the freshmen offers of admission (19,085 total offers), an increase of 11,480 offers of admission to underrepresented minority students. Meanwhile, offers of admission to white students declined from 44.2% in 1997 to 28.1% in 2012.[11]

- From 1997 to 2013, the percentage of offers of admission that were extended to under-represented minorities significantly increased on seven of the eight UC campuses.[12]
- Nearly every UC campus increased—both in raw numbers and percentage of offers—offers of admission to underrepresented minorities. Only UC-Berkeley has decreased its offers of admission to underrepresented minorities—from 25.2% of all offers of admission in 1997 to 22.0% in 2013.

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[10] While Proposition 209 was passed in 1996, an injunction delayed its effective date until August of 1997. *See Wilson*, 122 F.3d at 697, 711.

[11] Univ. of Cal., Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 through 2012*, *available at* http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf (last visited June 19, 2013).

[12] *Compare* Univ. of Cal., Office of the President, *New California Freshmen Admit Offers by Race/Ethnicity Fall 1997 through 2008*, *available at* http://www.ucop.edu/news/factsheets/2008/fall_2008_admissions_table_4.pdf (last visited June 19, 2013), *with* Univ. of Cal., Office of the President, *Percent Change in CALIFORNIA Resident Freshman ADMIT Counts by Campus and Race/Ethnicity Fall 2011, 2012, and 2013*, *available at* http://www.ucop.edu/news/factsheets/2013/fall_2013_admissions_table3.pdf (last visited June 19, 2013).

However, in 1998, the year after Proposition 209 took effect, UC-Berkeley's offers of admission fell from 25.2% to 12.1%. It has steadily increased since then to the 22.0% of 2013. *See supra* Note 12. The university-wide rise in the number of underrepresented minorities who are offered admission as freshmen to the University of California and the rise in the percentage of freshmen from underrepresented minority groups refute any claim that, under Proposition 209, minorities have suffered devastating decreases in admissions from which they have yet to recover.

B. Underrepresented Minority California High School Graduates Are More Likely to Be Admitted to a California University Post-Proposition 209

The University of California's Eligibility and Admissions Study Group prepared a report under the direction of UC President Robert C. Dynes entitled *Analysis of Undergraduate Admissions to University of California Campuses by Race and Ethnicity* (Mar. 2004) (UC Undergraduate Race Analysis Report).[13] Additionally, the California Postsecondary Education Commission (CPEC) produces "Ethnicity Snapshot Tables" regarding High School Graduates and First Time Freshmen at UC.[14] The UC Undergraduate Race

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[13] *Available at* http://www.universityofcalifornia.edu/news/compreview/0308_meeting/Data_release_summary_FINAL_Mar_8_20041_with_data.pdf (last visited June 20, 2013).

[14] Ethnicity Snapshot Tables—High School Graduates; and First Time Freshman at UC, *available at* http://www.cpec.ca.gov/StudentData/EthSnapshotMenu.asp (last visited June 20, 2013).

Analysis Report shows the gap between the percentage of minorities graduating from high school and the percentage of minorities as newly enrolled UC freshmen were increasing in the years immediately preceding the adoption of Proposition 209. In contrast, the CPEC report shows that after Proposition 209, the gap between the percentage of minorities graduating from California high schools and the percentage of minorities newly enrolled UC freshmen has decreased:

- In 1999, 3.4% of California African-American high school graduates enrolled at UC. In 2009, that percentage had increased to 4.8%. 496 more California African-American high school graduates enrolled at UC in 2009 compared to 1999.
- In 1999, 3.3% of California Latino high school graduates enrolled at UC. In 2009, that percentage increased to 4.4%. 3,715 more California Latino high school graduates enrolled at UC in 2009 compared to 1999.

CPEC also produces "Ethnicity Snapshot Tables" regarding High School Graduates and First Time Freshmen at the California State University (CSU) system. The data from these tables also demonstrate how underpresented minority students have succeeded in post-Proposition 209 California throughout the CSU system.

- In 1999, 9.9% of California African-American high school graduates enrolled at CSU. In 2009, that percentage had increased to 11.2%. 747 more California African-American high school graduates enrolled at CSU in 2009 compared to 1999.

- In 1999, 7.9% of California Latino high school graduates enrolled at CSU. In 2009, that percentage increased to 11.2%. 10,090 more California Latino high school graduates enrolled at CSU in 2009 compared to 1999.

Since Proposition 209 became effective in 1997, minorities continue to seek and be offered admission to the University of California and California State University. Prior to Proposition 209, the trend in California was towards fewer underrepresented minority high school graduates gaining admission to the UC. Since Proposition 209 was enforced, however, that trend has reversed. If an individual from an underrepresented minority graduates from a California high school today, she is more likely to be admitted to both UC and CSU, than before California prohibited its university system from considering her race.

C. The Graduation Rates for Underrepresented Minority Students in California Have Risen Appreciably Post-Proposition 209

The UC Berkeley campus, frequently cited by Respondents as the campus where Proposition 209 has perpetrated the most harm on underrepresented minority students, provides detailed data on the graduation rates of its students.[15] This data show:

- The six-year graduation rate for African Americans who entered UC Berkeley in 2006—the most recent year with available data—was 77%.

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[15] *See* University of California, Berkeley, *Undergraduate Students: New Freshmen 6 Year Graduation Rates*, *available at* http://diversity.berkeley.edu/undergraduate-students-new-freshmen-6-year-graduation-rates (last visited June 20, 2013).

This is an increase of 12% from the 65% six-year graduation rate for those who entered in 1996, and whose college preparation was undertaken before Proposition 209 was adopted.[16]

- For Hispanic students who entered in 1996, 73% graduated within six years. For those who entered in 2006, 81% had graduated in six years—an increase of 8%.

The higher graduation rates for minority students at UC Berkeley follows a greater trend across all UC schools. In a forthcoming paper, four Duke University Economics professors analyzed the effects of Proposition 209 on minority graduation rates across all California universities and colleges. *See* Peter Arcidiacono et al., *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*, Princeton Univ. Applied Microeconomics Seminar (Working Paper, Mar. 2012).[17] The paper demonstrates:

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[16] The 77% figure is the highest six-year graduation rate for African-American students at UC Berkeley since 1991. Conversely, the 65% six-year graduation rate in 1996 was a relatively *high* aberration for African-American students entering UC Berkeley before Proposition 209. For example, the six-year graduation rate for African-American students entering UC Berkeley in 1994 was a depressing 58%.

[17] *Available at* https://www.princeton.edu/economics/seminar-schedule-by-prog/applied_micros-s12/Prop_209_Paper_03-31-12.pdf (last visited June 20, 2013). The professors analyzed data from the Integrated Postsecondary Education Data System which includes "information on all post secondary institutions that participate in Title IV federal student financial aid programs, such as Pell Grants or Stafford Loans." *Id.* at 4.

- The on-time graduation rate of African-Americans at all California public universities and colleges increased 23.1% after Proposition 209 went into effect. The six-year graduation rate for African-Americans increased 9.3%. *Id.* at 9.
- The on-time graduation rate of Hispanic students at all California public universities and colleges increased 23.8% after Proposition 209 went into effect. The six-year graduation rate for Hispanic students increased 6.4%. *Id.*
- After controlling for a variety of factors, a 3.1% increase in the graduation rate of all underrepresented minority students at California's public colleges and universities is attributable to Proposition 209 "matching" students to universities where they are more academically fit. *Id.* at 22.

California's most selective public university—UC Berkeley—has experienced a dramatic increase in the graduation rate of Latinos and African-Americans since Proposition 209 went into effect. But Berkeley is not alone. A minority student enrolling at any one of California's public higher education institutions is much more likely to graduate today than she was fifteen years ago. And this increase is directly attributable to the effect that Proposition 209 has had on matching students to institutions where they are more likely to succeed academically.

All too often, universities that utilize racial preferences are quick to report their inflated admissions statistics, while remaining silent in the discussion of graduation rates. "All that counts as far as these schools are concerned is what the freshman

class looks like. They don't care what the senior class looks like." Jason L. Riley, *Abigail Thernstrom: The Good News About Race in America*, Wall St. J., May 18, 2012.[18] The importance of Proposition 209 (and Michigan's Section 26) on the success of underrepresented minorities cannot be understated. As more studies show the negative impact that racial preferences have on underrepresented minority students' academic success, this Court should not prevent states from constitutionalizing race-neutral admissions policies.

CONCLUSION

Our nation is increasingly multiethnic and multiracial, and individual Americans are more and more likely to be multiethnic and multiracial. In such a nation, it is dangerous to allow the inevitably divisive racial and ethnic discrimination by public institutions to become entrenched in the Constitution.

[18] *Available at* http://online.wsj.com/article/SB10001424052702304723304577369913528826798.html (last visited June 20, 2013).

For the foregoing reasons, Amici respectfully request that this Court reverse the decision below.

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Respectfully submitted,

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