

**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 FOR RESPONDENTS
BOARD OF GOVERNORS OF WAYNE
STATE UNIVERSITY AND IRVIN REID**

—◆—

STEPHANIE R. SETTERINGTON
VARNUM LLP
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6466
srsettington@varnumlaw.com

*Attorney for Respondents
Board of Governors of Wayne
State University and Irvin Reid*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE.....	5
SUMMARY OF ARGUMENT	7
ARGUMENT.....	11
I. Wayne State University’s Admissions Procedures Are Part of a Political Process	11
A. Michigan Law Evidences that the Board of Governors’ Decision-Making is a Political Process.....	11
B. Wayne State University’s Code of Statutes and Bylaws Evidence the Board’s Authority Over Admissions Policy and Related Matters.....	13
C. The Public Record of the Board’s Activities Evidences the Board’s Authority Over and Engagement in Determining Admissions Policy Matters.....	16
1. The Board Votes on Recommended Changes to Established Admissions Standards	17
2. The Board Votes Upon Admission Criteria in Connection with Reviewing Proposed New Academic Programs	18

TABLE OF CONTENTS – Continued

	Page
3. The Board Is Otherwise Engaged and Instrumental in Shaping Admissions Policy.....	20
CONCLUSION	24

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bd. of Regents of the Univ. of Michigan v. Auditor General</i> , 167 Mich. 444, 132 N.W. 1037 (1911)	8, 18
<i>Board of Control of Eastern Michigan University v. Labor Mediation Board</i> , 384 Mich. 561, 184 N.W.2d 921 (1971)	12
<i>Federated Publications, Inc. v. Board of Trustees of Michigan State University</i> , 460 Mich. 75, 594 N.W.2d 491 (1999)	11
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	1, 7
<i>Hunter v. Erickson</i> , 393 U.S. 395 (1969)	1, 2, 7, 25
<i>Regents of University of Mich. v. Labor Mediation Bd.</i> , 18 Mich. App. 485, 171 N.W.2d 477 (1969)	13
<i>State Board of Agriculture v. State Administrative Board</i> , 226 Mich. 417 (1924)	11
<i>Washington v. Seattle School District</i> , 458 U.S. 457 (1982)	1, 2, 7, 25
STATUTES	
Mich. Comp. Laws § 168.282 (2013)	11
Mich. Comp. Laws § 168.286 (2013)	11

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
Bylaws of the Board of Governors, § 2.2.....	15
Bylaws of the Board of Governors, § 3.1.....	16
February 1, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: http://bog.wayne.edu/meetings/2012/02-01/ index.php	17, 21
July 25, 2007 Board of Governors Minutes of Official Proceedings, available at: http://bog. wayne.edu/meetings/2007/07-25/	23
June 27, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: http://bog.wayne.edu/meetings/2012/06-27/ index.php	20
Mich. Const. 1963 art. I, § 26	<i>passim</i>
Mich. Const. 1963 art. VIII, § 5	7, 8, 11, 15
OAG, 1979-1980, No. 5637, p. 578 (Jan. 31, 1980)	12
Wayne State University Code Annotated, § 2.12.01.....	5, 15
Wayne State University Code Annotated, § 2.22.01.....	14
Wayne State University Code Annotated, § 2.26.04.....	14
Wayne State University Code Annotated, § 2.34.01.....	13

TABLE OF AUTHORITIES – Continued

	Page
Wayne State University Code Annotated, § 2.34.03.....	13
Wayne State University Code Annotated, § 2.34.04.....	13
Wayne State University Code Annotated, § 2.34.07.....	13
Wayne State University Code Annotated, § 2.34.09.....	13, 15
Wayne State University Code Annotated, § 2.34.11.....	13
Wayne State University Code Annotated, § 2.34.12.....	13
Wayne State University Code Annotated, § 2.34.13.....	13
Wayne State University Code Annotated, § 2.43.01.....	13, 14, 15
Wayne State University Code Annotated, § 2.43.11.....	13
 RULES	
Fed. R. Evid. 201	18

INTRODUCTION

This case presents to the Court a question of great significance: whether the State of Michigan violated the Equal Protection Clause by amending its constitution to prohibit the otherwise lawful use of affirmative action in public university admissions decisions. The Board of Governors for Wayne State University and Irvin Reid (together “Respondent Wayne State University”) submit this brief to address a single but important component of the ultimate question before the Court: whether its University admissions procedures are part of a “political process” within the meaning of this Court’s decisions in *Hunter v. Erickson*, 393 U.S. 395 (1969) and *Washington v. Seattle School District*, 458 U.S. 457 (1982). Respondent Wayne State University submits that the answer to this question is “yes.”

On November 7, 2006, the voters of the State of Michigan amended the State Constitution to prohibit Michigan’s public colleges and universities from utilizing otherwise Constitutional affirmative action programs in admissions decisions. Prior to that date, Michigan’s state universities, like other universities across the nation, had the option of utilizing narrowly tailored race-conscious admissions programs to pursue the recognized compelling state interest of achieving the educational benefits that flow from a diverse educational environment. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). Michigan’s constitutional amendment, codified as Michigan Constitution Article I, § 26 (“§ 26”) and entitled “Affirmative Action Programs,”

prohibited Michigan’s public universities and colleges from granting “any 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.” Mich. Const. 1963 art. I, § 26.

Following the enactment of § 26, two groups of plaintiffs, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary (Plaintiff-Respondent “BAMN”) and Chase Cantrell, *et al.* (Plaintiff-Respondent “Cantrell”) (together “Plaintiffs-Respondents”), filed suit, claiming that § 26 violates the Equal Protection Clause of the United States Constitution.¹ Among other arguments, the Plaintiffs-Respondents asserted that § 26 unconstitutionally reordered the political processes of the State of Michigan in a way that denies equal protection to minorities, as proscribed by this Court’s decisions in *Hunter* and *Seattle School District*.

This argument was rejected by the District Court in its consideration of summary judgment motions, and the Plaintiffs-Respondents appealed. A three-judge panel of the Sixth Circuit reversed. The Sixth Circuit then reheard the case *en banc*, and made the

¹ Plaintiff-Respondent BAMN sued not only the State of Michigan, but also Respondent Wayne State University, as well as the Regents of the University of Michigan and Board of Trustees of Michigan State University and their respective presidents (collectively “other University Respondents”).

same determination as did the three-judge panel: that § 26 was an unconstitutional reordering of the political process. Pet. App. 21a-22a. The Court concluded that § 26 has a racial focus, that university admissions policies and procedures are part of a “political process,” and that § 26 reordered that political process in a way that burdens racial minorities. Pet. App. 22a, 26a-38a.

The decision was not unanimous. Dissenting judges asserted the view that university admissions processes are not part of any “political process.” Pet. App. 66a-78a (Gibbons, J., dissenting). They based this conclusion on the premise that the universities have irrevocably delegated responsibility for such matters to non-elected faculty committees. *Id.* The Michigan Attorney General (“Petitioner”) also advanced this argument below, and cites it again to this Court.

This premise is simply untrue.

Respondent Wayne State University and the other University Respondents are uniquely situated in this case in that they are neither responsible for the enactment of § 26, nor parties who would have standing to file suit independently concerning its constitutionality.² These parties are also uniquely

² The University Respondents argued below that they were not properly joined in the case (their involvement being only that they were required to comply with the law). The District Court denied the University Respondents’ motion to dismiss,

(Continued on following page)

situated in at least one other critical respect: their ability to assist this Court in understanding the true nature of their admissions policies. The Universities need not attempt to draw general inferences from isolated depositions. Rather, they bring to the discussion a comprehensive and detailed understanding of university governance developed over a period of decades. Respondent Wayne State University believes that in a case of this moment, it is essential that this Court's opinion be predicated on an accurate factual basis concerning the Universities' processes, particularly when the record of such processes is so substantial.

While Respondent Wayne State University adopts the positions taken by the other University Respondents, we write separately as to the nature of admissions processes at Wayne State University. We do so because the public record and record below abundantly establish the active engagement of Wayne State University's Board of Governors in decision-making and oversight of admissions matters, and its ongoing exercise of authority in that area.



and this determination was not reversed on appeal. Record 179 and 246; Pet. App. 152a-153a. The issue was not appealed to this Court.

STATEMENT OF THE CASE

Respondent Wayne State University accepts Petitioner's Statement of the Case only as it pertains to the chronology of the proceedings. Petitioner's assertions as to the genesis of and motivations for § 26 are without record support, and are simply speculation. Petitioner's depiction of Wayne State University's admissions policies and practices as having been irrevocably delegated to faculty committees is also factually inaccurate. Such policies are the province of an active and engaged Board of Governors elected directly by the voters of the State of Michigan.

Petitioner's assertions regarding Wayne State University's admissions process are not based upon evidence of record as to University-wide policies, but rather on an extrapolation of the deposition testimony of a then-newly appointed dean of a single professional school within the University. Reliance upon such testimony is inapposite for several reasons. The authority of the governing boards is a matter of law. The admissions practices of professional schools differ from both graduate and undergraduate schools and colleges, which represent the overwhelming proportion of university admissions. The dean upon whose testimony Petitioner relies presided over the law school, which is only one of thirteen schools and colleges that comprise Wayne State University.³ The

³ Wayne State University Code Annotated ("WSUCA"), § 2.12.01.

law school's entering students consist entirely of those who have previously completed their baccalaureate degrees, and so are atypical of other schools and colleges at the University, except as linked by the commonly applicable policies of the Board of Governors. Most significantly, the testimony is starkly and amply contradicted by the public record, as presented in the proceedings of this case.

In contrast to the isolated and incorrectly characterized evidence upon which Petitioner relies, the record as demonstrated through Wayne State University's published governing Statutes, bylaws, and minutes of proceedings of the Board of Governors confirms that Wayne State University's Board of Governors approves and reviews admissions policy for its component schools and colleges – and does so routinely. Indeed, the requirements for undergraduate and graduate admissions are set forth in codified statutes that are enacted solely by the Board of Governors.

Finally, the Petitioner's Statement of the Case offers to this Court wholly unsupported assertions regarding the beneficial impact of § 26 on educational diversity in Michigan. Inasmuch as this litigation followed almost immediately upon the adoption of § 26, there is simply no record at all to support such assertions.



SUMMARY OF ARGUMENT

Respondent Wayne State University joins the other University Respondents in their positions regarding the nature of their admissions processes and the continuing importance of *Grutter* to the Universities' ability to achieve the benefits of a diverse student body, but advances in this brief a focused argument based on record information concerning its own admissions policies and procedures. The record of such matters confirms that the setting of admissions policy is part of a "political process" as contemplated by *Hunter* and *Seattle School District*.

This conclusion is supported first by the Constitution of the State of Michigan. The Board of Governors of Wayne State University, the Regents of the University of Michigan, and the Board of Trustees for Michigan State University are all constitutionally created entities, each vested by the Michigan Constitution with the plenary authority to control and manage its respective institution. Mich. Const. 1963 art. VIII, § 5. Michigan is one of a few states in which the governing boards are free-standing and autonomous. The members of these governing boards are elected directly by statewide vote. Governors serve eight year terms of office, with two from each University elected every two years. There is no appointed statewide board, no superior authority setting educational direction or policy. There is no intermediary. The Universities' governing boards are directly answerable to the people of the State of Michigan through the

electoral process. The governing boards are thus inherently “political.”

Each governing board elects its institution’s president and has “supervision of its institution and the control and direction of all expenditures from the institution’s funds.” *Id.* The governing boards retain broad authority over university policy. Each governing board is a “constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature.” *Bd. of Regents of the Univ. of Michigan v. Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037 (1911).

The policies of Wayne State University’s Board of Governors are maintained in the form of a statutory code (the Wayne State University Code Annotated or “WSUCA”), and confirm that the Board of Governors’ authority extends to admissions matters. Only Wayne State University’s Board of Governors may enact, amend, or rescind the statutes. The WSUCA statutes set forth the University’s undergraduate admissions standards and graduate admissions standards, as well as other matters of policy closely related to admissions.

Independently of the WSUCA, the bylaws of the Wayne State University Board of Governors reflect the Board’s authority over admissions policy matters. The bylaws establish standing committees for the purpose of reviewing and making recommendations to the Board concerning various University matters,

including an Academic Affairs Committee which is responsible for reviewing and making recommendations to the Board regarding academic and educational policies and goals. Board policy recognizes an advisory role for faculty in academic matters, primarily through a University-wide faculty body known as the “Academic Senate.”

The Board of Governors publishes detailed minutes of its meetings and decisions, and these also demonstrate the Board’s authority over and engagement in admissions policy matters. The minutes reflect the Board and its committees in action, and so answer the question of whether published policy is consistent with actual operations. They demonstrate an active and fully engaged Board, revealing a multitude of instances in which the Board has established or modified admissions criteria, voted on admissions standards as a part of its decisions whether to approve new programs, received public comment on matters of admissions policy, and has requested and received information regarding admissions policy and related matters.

The Petitioner’s argument to the contrary conflates policy control and delegation, decision-making and implementation. The Board of Governors does not directly decide whether this person or that should be admitted to a particular course of study, just as it does not ordinarily make decisions as to whether this individual or that should be hired for entry-level employment, or whether this textbook or that will best serve a particular curriculum. Universities are far too

large and far too complex to manage affairs at so retail a level. Rather, the Board of Governors makes the policy by which such decisions are to be made (while soliciting the input of faculty and others in the process), delegates implementation to others, and oversees the process.

The Sixth Circuit, in recognition of the nature of this relationship, determined that admissions policy decision-making at the universities is part of a political process, and that § 26 impermissibly reordered this process by removing the opportunity for persons to petition the universities' governing boards for racially focused changes to university admissions policy, and placing the venue for consideration of such matters at the most remote and fixed level of the political process, the Michigan Constitution. Pet. App. 21a-26a. To the extent this holding rests on whether the University Respondents are engaged in a "political process" in setting admissions policy, Wayne State University believes it is supported by a correct understanding of the record.



ARGUMENT

I. Wayne State University's Admissions Procedures Are Part of a Political Process.

A. Michigan Law Evidences that the Board of Governors' Decision-Making is a Political Process.

The Constitution of the State of Michigan provides the members of the governing boards of Wayne State University, the University of Michigan, and Michigan State University and their respective successors in office each constitute a "body corporate." Mich. Const. 1963 art. VIII, § 5. Each board consists of eight members directly elected by the people of the State of Michigan in statewide elections. *Id.* Once elected, the members of the governing boards sit for rotating eight-year terms, with two seats open for election every two years. *See generally*, Mich. Comp. Laws §§ 168.282, 168.286 (2013). Each board elects its institution's president and has "supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. 1963 art. VIII, § 5.

The courts of the State of Michigan have long recognized that this constitutional grant of autonomy vests the governing boards of the state's universities with "the absolute management of the University, and the exclusive control of all funds received for its use." *State Board of Agriculture v. State Administrative Board*, 226 Mich. 417, 424 (1924). The courts have "jealously guarded" these powers from legislative interference. *Federated Publications, Inc. v.*

Board of Trustees of Michigan State University, 460 Mich. 75, 594 N.W.2d 491 (1999); *Board of Control of Eastern Michigan University v. Labor Mediation Board*, 384 Mich. 561, 565, 184 N.W.2d 921 (1971). As the Office of the Michigan Attorney General has itself acknowledged, the governing boards' authority extends specifically to admissions matters. See OAG, 1979-1980, No. 5637, p. 578 (Jan. 31, 1980)⁴ ("It is therefore my opinion that the governing board of a state university has the discretion to determine the prerequisites for admission to a medical school course in eye enucleation.").

Michigan's constitutional structure for the governing boards of its public universities is uncommon.⁵ The independence afforded to the governing boards has contributed greatly to the success of Michigan's public universities. Their constitutional autonomy affords them a measure of insulation from short-term political winds while their direct election ensures that the boards are accountable to the people of the State of Michigan.

There can be no more fundamentally political structure than one in which policy makers are selected or removed by popular election. Indeed, Michigan

⁴ Also available at <http://www.ag.state.mi.us/opinion/datafiles/1980s/op05637.htm> (last accessed August 20, 2013).

⁵ While the more common structure is a statewide "system" comprised of several universities, leading institutions typically exercise very considerable autonomy in governance.

courts have acknowledged the political nature of the governing boards. *Regents of University of Mich. v. Labor Mediation Bd.*, 18 Mich. App. 485, 171 N.W.2d 477 (1969) (Michigan university regents are a “constitutional body politic”).

B. Wayne State University’s Code of Statutes and Bylaws Evidence the Board’s Authority Over Admissions Policy and Related Matters.

At Wayne State University, the Board of Governors’ policies are designated as “statutes” and are codified in the WSUCA. R. 12/23/2011 Supp. Br. 5-6. The WSUCA contains many provisions addressing and setting admissions standards and related criteria. These include policies governing undergraduate admissions (WSUCA § 2.34.09), graduate admissions (WSUCA 2.34.12), transfer students (WSUCA § 2.34.04), undergraduate student retention (WSUCA § 2.34.13), undergraduate probation (WSUCA § 2.34.11), grading policy (WSUCA § 2.34.07), financial aid (WSUCA § 2.34.01), undergraduate general education requirements (WSUCA § 2.43.03), and requirements for a baccalaureate degree (WSUCA § 2.43.11). R. 12/23/2011 Supp. Br. 6. The Board has expressly reserved solely to itself the authority to establish and terminate degrees and to establish the principal requirements for earning degrees, while delegating to the president operational program decisions. (WSUCA §§ 2.43.01.010,

020.) R. 12/23/2011 Supp. Br. 6-7. Amendments to WSUCA are accomplished by vote of the Board. *Id.*

Petitioner argues that matters of admissions policy have been irrevocably delegated to faculty committees, and thus removed from the political process. Pet'r's Br. 24-25. On the contrary, Wayne State University's statutes reflect that, while faculty serves an important advisory role in recommending educational policy, they do not control admissions.

The Board of Governors recognizes both a Graduate Council (WSUCA § 2.22.01) and an Academic Senate (WSUCA § 2.26.04), and through these bodies receives valuable advice on matters of educational policy. R. 12/23/2011 Supp. Br. 7. The advisory nature of these bodies is reflected explicitly in statutes governing their existence. For example, the statute pertaining to the Academic Senate states: "The Senate may consider matters referred to it by the President, by other councils, or upon its own initiative, and may make recommendations with reference thereto to the President and/or such other councils, and pursuant to the procedures herein set forth, to this Board." (WSUCA § 2.26.04.120).⁶

The WSUCA statutes further specify that the Board delegates responsibility for admissions matters, not to committees, but to the President, who is

⁶ See http://bog.wayne.edu/code2_26_04.php (last visited August 19, 2013).

by the Michigan Constitution an *ex officio* member of the Board without vote. Mich. Const. 1963 art. VIII, § 5. “After consultation with the College or School, the President or his/her designee is authorized to establish specific admissions standards for degree programs.” (WSUCA § 2.34.09.090). R. 12/23/2011 Supp. Br. 7. To the extent admissions committees have a role in establishing admissions practices at the school or college level, it is only by subdelegation of Board authority from the President:

“The Board of Governors authorizes the President to subdelegate the authority vested in him/her by this statute. No authority whatever is vested in any person to exercise any of the authority granted by the Board of Governors except pursuant to a specific subdelegation by the President.”

(WSUCA § 2.43.01.040). R. 12/23/2011 Supp. Br. 7. The President being elected by and answerable to the Board, and the Board retaining the authority to amend the statutes and bylaws, the Board does not relinquish authority by virtue of any such subdelegation. *Id.*⁷

As evidenced by its bylaws, the Board of Governors has structured itself to optimize its continuing engagement in University affairs, including admissions

⁷ The Wayne State University statutes and Board of Governors bylaws specify the President’s relationship to the Board. *See* WSUCA § 2.12.01.020; *see also* Bylaws of the Board of Governors, § 2.2. R. 12/23/2011 Supp. Br. 7.

and other academic matters. The bylaws establish standing committees for the purpose of reviewing and making recommendations to the Board concerning various University matters. Bylaws of the Board of Governors, § 3.1. R. 12/23/2011 Supp. Br. 8. The Board's Academic Affairs Committee is responsible for reviewing and making recommendations to the Board regarding academic and educational policies and goals. *Id.* The Board's Student Affairs Committee is responsible for reviewing and making recommendations to the Board regarding student matters. *Id.*⁸ These committees are key vehicles for the Board's exercise of authority over and involvement in admissions-related matters.

C. The Public Record of the Board's Activities Evidences the Board's Authority Over and Engagement in Determining Admissions Policy Matters.

As shown by Board and Committee Minutes, the Board of Governors, through its Academic Affairs Committee and its Student Affairs Committee, engages in robust and regular review of administrative actions involving admissions policy and related matters. The minutes reflect that the Board votes on changes to admissions criteria, that it approves admissions criteria as a part of its consideration and

⁸ The Board also maintains standing committees for budget and finance, and for personnel. R. 12/23/2011 Supp. Br. 8.

voting on the establishment of new academic programs, and that the Board is otherwise actively and regularly involved in shaping matters directly involving or related to student admissions.

1. The Board Votes on Recommended Changes to Established Admissions Standards.

On several occasions, the Board has voted on proposed changes to program-specific admissions criteria. For example:

- On April 30, 2008, the Board voted on a recommendation to revise guidelines for establishment of honors curricula, including admissions criteria. R. 12/23/2011 Supp. Br. 9.
- On August 4, 2010, the Board voted on a recommendation to modify the honor point criteria for graduate admission. *Id.*
- On September 29, 2010, the Board voted on a recommendation to modify the maximum number of transfer credits that the University would allow in certain cases where articulation agreements rendered modification appropriate. *Id.* R. 12/23/2011 Supp. Br. 9-10.
- On February 1, 2012, the Board voted to approve recommended changes to the statute on undergraduate admissions.⁹ At that time,

⁹ See February 1, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://bog.wayne.edu/meetings/2012/02-01/index.php> (last visited August 8, 2013).

the Board also established an oversight advisory group, to “. . . assure positive, effective, and successful implementation of programs involving enrollment, admission, retention and completion and to assure that those programs fulfill WSU’s urban mission.”¹⁰

Decisions to modify established admission-related criteria are clearly subject to Board review and are not isolated from the Board’s influence or authority.

2. The Board Votes Upon Admission Criteria in Connection with Reviewing Proposed New Academic Programs.

The Board regularly reviews and passes upon admissions requirements in the course of voting on broader issues, such as the implementation of new

¹⁰ This Board action occurred following the submission of briefs to the Sixth Circuit below. Because Respondent Wayne State University and the other University Respondents are constitutionally-created entities, and the status of their governing boards has been recognized as “the highest form of juristic person known to the law . . . which, within the scope of its functions is co-ordinate with and equal to that of the legislature,” Pet. App. 28A, quoting *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 167 Mich. 444, 132 N.W. 1037, 1039 (Mich. 1911), the Court may take notice of their statutes, bylaws, and proceedings as legislative facts, similar to the manner in which the Court could consider the enactment of a legislative body. See Fed. R. Evid. 201, Notes of Advisory Committee. If the Court deems necessary, it can and should take notice of them as adjudicative facts. Fed. R. Evid. 201(b)(2).

academic programs at the University. While not exhaustive of the many times the Board has been called to approve or modify academic programs between 2005 and the present, representative examples include:

- On January 19, 2005, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Doctor of Physical Therapy program. R. 12/23/2011 Supp. Br. 10.
- On June 8, 2005, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Master of Science in Alternative Energy Technologies program. R. 12/23/2011 Supp. Br. 10-11.
- On January 13, 2008, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Master of Arts program with a major in Marriage and Family Psychology. R. 12/23/2011 Supp. Br. 11.
- On April 20, 2011, the Board considered proposed admission requirements in connection with a vote whether to institute a proposed Graduate Certificate Program in Complementary Therapies in Health Care. *Id.*
- On June 27, 2012, the Board considered proposed admission requirements in connection with a vote whether to approve a proposed

J.D./M.S. in Criminal Justice Joint Degree Program.¹¹

3. The Board Is Otherwise Engaged and Instrumental in Shaping Admissions Policy.

In a university as large and complex as Wayne State University, the Board necessarily delegates operational detail to others. The Board pays close and detailed attention to the progress and outcome of such engagement, and Board committees are actively and routinely engaged with regard to admissions-related matters. Such involvement has taken place on a longstanding basis. Examples include the Board's consideration of: (1) the relationship between alternative admissions programs and retention;¹² (2) alternative admissions policies;¹³ (3) the potential impact of modifying admissions criteria for the Honors Program on diversity;¹⁴ (4) the need to enhance provisional admissions programs and monitor general admissions standards to improve retention;¹⁵ (5) potential modifications to curricula of certain programs to allow

¹¹ See June 27, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://bog.wayne.edu/meetings/2012/06-27/index.php> (last visited August 20, 2013).

¹² R. 12/23/2011 Supp. Br. 12.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ R. 12/23/2011 Supp. Br. 13.

for the acceptance of a higher number of applicants;¹⁶ (6) the number of high school graduates applying for admission to particular programs;¹⁷ and (7) regular review of a multitude of additional issues related to student admissions, enrollment, and retention, which occurs at numerous board meetings every academic year.¹⁸

The Board regularly receives public comment at such meetings, further underscoring that its decision making remains part of a political process.¹⁹ This active and robust engagement, continuing over a period of years, demonstrates that the Wayne State University Board of Governors has not “completely and irrevocably delegated away” its authority over this important area of University operations.

Petitioner’s conclusion that admissions policy is set by program-specific faculty admissions committees which are not politically accountable to the people of Michigan relies entirely upon the deposition

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ A non-exhaustive review of Board meeting records indicates that the Board addresses issues related to student admission, enrollment, and/or retention on an average of three or more Board meetings per academic year. R. 12/23/2011 Supp. Br. 14.

¹⁹ See February 1, 2012 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://bog.wayne.edu/meetings/2012/02-01/index.php> (last visited August 8, 2013) (public comment received concerning proposed change to undergraduate admission criteria).

testimony of Assistant Dean Zearfoss of the University of Michigan Law School, and of Dean Wu of Wayne State University's law school, individuals not charged with knowledge of their respective Board's processes, and who testified with limited knowledge and experience outside of their immediate frame of reference. Indeed, Dean Wu testified over counsel's objection that he was not competent to answer legal questions as to University admissions policy. J.A. 22. The Board of Governors' authority over admissions policy is a question of law. Even were this not the case, the Dean's competence as a factual witness did not extend to any admissions processes apart from the University's law school.²⁰ Dean Wu neither had nor purported to have knowledge as to admissions policy at any other school or college at Wayne State University, much less the admissions processes of the other University Respondents.

While faculty consultation is certainly involved in admissions decisions, it is simply not the case that the respective universities' governing bodies have so fully delegated their authority over admissions

²⁰ The reliance upon this objectionable testimony is particularly troublesome in light of the fact that as a professional school, the law school's admissions policies are not readily analogized to admissions policies applicable to either graduate or undergraduate admissions. The law school's admissions, in contrast to the vast majority of admissions that occur through other schools and colleges of Wayne State University, consist entirely of students who have previously completed baccalaureate degrees.

matters to groups within the university as to make their own engagement peripheral to the process. Both by policy and practice, it is well borne out that Wayne State University's Board of Governors retains authority over, and remains actively involved in, matters relating to student admissions.

This is illustrated even in Board decisions specific to the law school at Wayne State University. In 2007, the Board reduced out-of-state tuition for law school students to 110 percent of in-state tuition. The purpose, as articulated by the Board, was to "recruit and enroll a more geographically diverse class."²¹

Petitioner's argument fails to differentiate decision-making from implementation. The Board does not and should not review applications from the many thousands of individuals who apply for admission to Wayne State University every year. That extraordinarily detailed process is subdelegated, in part to administrators, in part to faculty groups. Whether this student or that satisfies the criteria for admission is important often requires a careful and individualized review of grade point, test scores, essays, and the like. No more does the Board determine which text best serves to teach a particular curriculum, or determine what equipment best allows the administration to care for some aspect of

²¹ See July 25, 2007 Board of Governors Minutes of Official Proceedings, available at: <http://bog.wayne.edu/meetings/2007/07-25/> (last visited August 10, 2013).

the physical plant, or any of a myriad of important but essentially local determinations that cumulatively go into the day-to-day operations of a large and sophisticated educational institution. The Board's Constitutionally-committed role is to establish and oversee the policies and processes by which such determinations are to be made, consulting and receiving advice in doing so.

Wayne State University respectfully submits that the factual predicate upon which the Petitioner relies, that admissions policy decisions are made by unaccountable faculty members, is absent. The Board's codified written authority, taken together with numerous examples of the Board's exercise of such authority, are far more reliable indicators of the processes in place at the University than is the limited and misapplied testimony upon which Petitioner relies. The Sixth Circuit correctly noted that one would need to "look the other way" in order to draw the conclusion Petitioner requests on this issue. Pet. App. 27a.



CONCLUSION

Respondent Wayne State University respectfully requests that this Court, in the course of deciding the broader constitutional question presented by this case, find that the University Respondents' admissions procedures are part of a "political process" as

contemplated by this Court's decisions in *Hunter* and *Seattle School District*.

Respectfully submitted,

Dated: August 22, 2013

STEPHANIE R. SETTERINGTON
VARNUM LLP
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6466
srsettington@varnumlaw.com

Attorney for Respondents
Board of Governors of Wayne
State University and Irvin Reid