No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,
PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL.,

AND

CHASE CANTRELL, ET AL.

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

INTRODUCTION

> "[A]ny State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."

This commonsense conclusion—that states can constitutionally reject the use of race-based preference policies in admissions—comes not from *Grutter*, *Gratz*, or *Fisher*, but from the joint plurality opinion of Justices Brennan, White, Marshall, and Blackmun in *Regents of University of California* v. *Bakke*, 438 U.S. 265, 379 (1978). In other words, even the Justices in *Bakke* who would have upheld a racial *quota* system in university admissions saw no problem with a state's decision to ban racial preferences as a means to achieve a diverse student body. Against this backdrop, Respondents and their *amici* fail to explain how Michigan citizens violated equal protection when they enacted Article 1, § 26, which requires that all applicants to the State's universities be treated equally, without regard to race or sex.

There are three flaws in Respondents' approach. First, Respondents fail to acknowledge that for purposes of an equal-protection analysis, there is a fundamental difference between enacting a new law that creates an *obstacle* to special treatment (e.g., *Hunter* v. *Erickson*, 393 U.S. 385 (1969)), and a new law that *requires* equal treatment (e.g., § 26). A law that eschews the use of race and requires equal treatment cannot be said to "discriminate" on the basis of race. And any contrary conclusion would render every equal-treatment law invalid, including the federal Fair Housing Act.

Second, even Respondents admit that "[r]ace-conscious action that does 'not lead to different treatment based on a classification that tells each [person] he or she is to be defined by race' ordinarily need not satisfy 'strict scrutiny to be found permissible.'" Cantrell Br. 29 (quoting *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring)). The logical corollary is that a law *barring* racial classifications is not itself a racial classification and need not satisfy "strict scrutiny to be found permissible."

Section 26 does not authorize some racial groups to lobby admissions officials while prohibiting others from doing so. Nor does § 26 use a race classification to advantage or disadvantage any race in the admissions process. It prohibits making a racial classification in the first place. Accordingly, there is no basis to subject § 26 to strict scrutiny, or even to apply the political-restructuring doctrine to it at all, unless Respondents can prove discriminatory purpose. And the district court granted summary judgment to the State in part because "plaintiffs cannot show that the measure was enacted with a discriminatory intent," Pet. Supp. App. 319a, a ruling Respondents have never challenged.

Third, a state constitutional amendment is an easier way to change public-university admissions practices than pursuing such changes university by university. And by arguing that Michigan's citizens can eliminate through constitutional amendment the use of alumni preferences or athletic ability but not racial preferences, it is Respondents and their *amici* who single out race for differing treatment.

As its foundation, Respondents' argument contends that 58% of Michigan voters acted with racially discriminatory animus when enacting § 26. But § 26 does not discriminate against race; it discriminates against discrimination. The Sixth Circuit should be reversed.

ARGUMENT

I. Article 1, § 26 does not violate the political-restructuring doctrine because the provision does not create political obstructions to equal treatment. Section 26 is an impediment to *special* treatment.

A distinguishing feature of *Hunter* and *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), is that both cases involved new political obstructions to equal treatment. In *Hunter*, it was the repeal of an anti-discrimination law and the new requirement that a proponent amend the city charter to enact a future anti-discrimination law. In *Seattle*, it was the repeal of a busing program adopted to provide "*equal* educational opportunity." 458 U.S. at 479 (emphasis added, quotation omitted).

In stark contrast, § 26 does not create political obstructions to *equal* treatment; § 26 is an impediment to *preferential* treatment. Section 26 does not allocate benefits based on race. Instead, § 26 bans university use of racial preferences altogether. The provision requires equal treatment rather than denying it. Put another way, § 26 does not discriminate based on race; it discriminates against discrimination—the same way strict scrutiny does.

As Michigan explained in its initial brief, Michigan Br. 23, the dizzying logic of Respondents' theory invalidates all manner of laws requiring equal treatment, including the federal Fair Housing Act. That is because any federal law requiring equal treatment (i.e., non-discrimination) would invalidate any state law that attempts to provide racial preferences within the same subject area. The same would be true of any state law as it related to a local law. See *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting) ("Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.").

Respondents argue that federal fair-housing legislation "does not effect an unconstitutional restructuring because federal law already preempts state law." Cantrell Br. 44. But that response only highlights the illogic of Respondents' position. Supremacy Clause preemption comes into play only *after* a court has determined that a federal law is valid. And if Respondents' political-restructuring argument is correct, the federal Fair Housing Act (or any analogous state law) would violate the Equal Protection Clause, meaning the state law allowing preferences would reverse-preempt the federal law requiring equal treatment. The Supremacy Clause would not save federal law that had just been declared unconstitutional. And it cannot possibly be correct that federal laws requiring equal treatment must fall—due to the Equal Protection Clause, of all things—to state or local laws mandating *unequal* treatment, i.e., preferences.

Respondents try to avoid this problem by invoking an irrelevant line of redistricting cases. Respondents assert that when race is "the predominant factor" motivating manipulation of the political process, strict scrutiny applies even when the governmental action does not allocate benefits or burdens. E.g., Cantrell Br. 3 (citing *Bush* v. *Vera*, 517 U.S. 952, 959 (1996), and *Shaw* v. *Reno*, 509 U.S. 630, 641–43 (1993)). Those cases are inapposite.

Bush was a racial gerrymandering case where the Court applied strict scrutiny to congressional redistricting legislation that was so irregular on its face that it could only rationally be viewed as an "effort to segregate races for purposes of voting." 517 U.S. at 958 (per Justice O'Connor, with the Chief Justice and one Justice concurring, and two Justices concurring in the judgment).

Contrary to the position Respondents take here, the *Bush* Court emphasized that strict scrutiny does *not* apply merely because redistricting is performed with consciousness of race. 517 U.S. at 958. Instead, a plaintiff must demonstrate that racial considerations predominated over race-neutral considerations. *Id*. at 964. And there is no evidence that such was the case with § 26, which requires race neutrality.

Similarly, *Shaw* v. *Reno* involved redistricting legislation so extremely irregular that it could be viewed rationally only as an effort to segregate race for purposes of voting. 509 U.S. at 642. Nothing in the opinion suggests the Court was abandoning the requirement that a plaintiff pursuing an equal-protection claim must prove a racial classification or discriminatory intent.

Indeed, the problem in *Shaw* was that the law at issue did exactly the opposite of what § 26 does here—it classified citizens based on race. The plaintiffs in *Shaw* alleged that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." 509 U.S. at 641–42. This Court agreed: "Classification of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and incite racial hostility." *Id.* at 643 (citations omitted). Such classification "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Id.* at 647.

This language makes clear that this Court in *Shaw* rejected racial gerrymandering because it classified individuals based on their race, which is abhorrent to the Constitution. Article I, § 26 does not do that; § 26 is a provision that requires race neutrality. And under this Court's well-established equal-protection precedent, there is no basis to invalidate a law that forbids racial preferences and instead requires equal treatment on the basis of race.

II. Article 1, § 26 does not violate the political-restructuring doctrine because Michigan voters did not enact § 26 with a discriminatory purpose, and § 26 does not embody a racial classification.

In *Seattle*, this Court applied the political-restructuring doctrine to strike down a provision of the State of Washington's constitution that allowed cross-district busing of school students for virtually any purpose except racial desegregation. In so holding, the Court explained that "purposeful discrimination is 'the condition that offends the Constitution,'" *id.* at 484 (citations omitted), and the Court articulated two prerequisites for identifying purposeful discrimination:

1. "A *racial classification*, regardless of purported motivation, is presumptively invalid . . . ." *Id.* at 485 (emphasis added, quotation omitted).

2. "[W]hen facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was *designed to accord disparate treatment on the basis of racial considerations*." *Id.* at 484–85 (emphasis added).

Accord *Crawford* v. *Bd. Of Educ.*, 458 U.S. 527, 537–38 (1982) ("even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated *only* if a discriminatory purpose can be shown") (emphasis added).

Here, Respondents cannot prevail on the second standard, because they cannot prove a discriminatory purpose. In granting the State's motion for summary judgment, the district court held that there was no material dispute of fact: "plaintiffs cannot show that the measure was enacted with a discriminatory intent." Pet. Supp. App. 319a. And Respondents have not appealed that ruling. Accordingly, the political-restructuring doctrine's applicability in this case comes down to the first standard: whether § 26 embodies a "racial classification."[1] It does not.

This Court explained what it means for a law to embody a racial classification in *Crawford*. There, California state courts interpreted the California Constitution's equal-protection clause as requiring school desegregation whether *de facto* or *de jure* in origin. 458 U.S. at 530–31. That holding resulted in a state-court order that included a busing plan based "on a racial and ethnic basis." *Id.* at 531. One year later, California voters ratified Proposition I, which limited state-court power to order busing to those instances where a federal court would order busing to remedy a violation of the U.S. Constitution's Equal Protection Clause of the Fourteenth Amendment. *Id.* at 531–32.

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[1] The Cantrell Respondents say that the district court made a "factual finding" that § 26 "is 'unexplainable on grounds other than race.'" Cantrell Br. 47–48 (quoting *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993)). But the Cantrell Respondents provide no citation for the district court's purported "factual finding," which is unsurprising given the summary-judgment context of the district court's ruling. There was no such finding.

Like Respondents in the present case, the *Crawford* plaintiffs argued that Proposition I embodied a "racial classification" and imposed a "'race-specific' burden on minorities." 458 U.S. at 536. And analogous to Respondents' argument here—that individuals may still lobby for non-race-based preferences, such as those based on alumni status—the *Crawford* plaintiffs emphasized that "other state-created rights may be vindicated by the state courts without limitation on remedies." *Id.*

Nonetheless, this Court rejected the suggestion that Proposition I imposed a "racial classification." 458 U.S. at 537. That was because Proposition I "neither says nor implies that persons are to be treated *differently* on account of their race. It simply forbids state courts to order pupil assignment or transportation in the absence of a Fourteenth Amendment violation." *Id.* (emphasis added). "Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle." *Id.* at 541.

Likewise here, Respondents argue that the "political restructuring doctrine . . . ensur[es] that the political process for making that decision is not itself skewed on the basis of race," and that Michigan voters have attempted to "selectively change the rules of the political process along racial lines." Cantrell Br. 31. But Michigan voters did not skew the political process on the basis of race or change the rules along racial lines. That suggests the law was enacted by a racially discriminatory process or has a racially discriminatory impact. Neither is true.

Section 26 does not embody a racial classification. Section 26 neither says nor implies that university applicants are to be treated *differently* on account of race; to the contrary, § 26 expressly forbids public universities to use race-based preferences in the absence of a Fourteenth Amendment violation. The law makes no racial classification that provides benefit to one class and detriment to another. *No* student can be advantaged (or disadvantaged) based on race, sex, or ethnicity.

Moreover, § 26 does not distort the political process for racial reasons, and it does not allocate government or judicial power on the basis of a discriminatory principle. Quite the opposite, § 26 bars Michigan public universities from using race for any purpose at all. Because § 26 neither embodies a racial classification nor stems from a discriminatory purpose, it cannot violate the political-process doctrine or any other equal-protection theory.

This point is driven home by Respondents' contention that § 26 "needlessly heightens the salience of race in the political process and, by doing so, 'contributes to an escalation of racial hostility and conflict.'" Cantrell Br. 32 (quotation omitted). That is surely wrong. Choosing to create a color-blind system furthers the goals of the Equal Protection Clause, even if the Clause allows some form of affirmative action. To say that a statewide law regarding affirmative action (either forbidding it or approving it) should be barred because it "contribut[es] to an escalation of racial hostility and conflict" is to say that the democratic process should not be allowed to operate on controversial issues relating to race.

Respondents' suggestions also cannot be reconciled with *Crawford*, which makes clear that § 26 is facially neutral and does not embody a racial classification. Consider *Hunter* and *Seattle*, both of which similarly involved facially neutral laws. This Court did not strike those laws down because they embodied a racial classification; rather, the opinions in both cases relied on discriminatory intent. *Hunter* thwarted Akron's attempts to stop private racial discrimination in housing; discriminatory intent is the only logical explanation for why voters would repeal a law requiring equal treatment. *Seattle* involved an initiative that sought to facilitate private discrimination and deny equal treatment. *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) (noting "evidence of discriminatory intent" in *Seattle*).

In other words, proof "'of racially discriminatory intent or purpose is required' to show a violation of the Equal Protection Clause," *Cuyahoga*, 538 U.S. at 194, even when a neutral law has a disproportionately adverse effect on a racial minority, *Washington* v. *Davis*, 426 U.S. 229, 238–48 (1976); *Crawford*, 458 U.S. at 537–38 ("even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown").

And as explained at length in Michigan's opening brief, there are a multitude of non-discriminatory reasons justifying § 26: a belief that granting a preferential treatment to someone because of that person's race is a type of discrimination; a belief that

race-neutral admissions alternatives can be used successfully to achieve a diverse community, Schuette Br. 31; that such race-neutral alternatives result in higher minority grade-point averages and graduation rates, *id.* at 31, 33; that race-based preferences can result in mismatch that results in minority-student failure, *id.* at 32; that moving away from race-based preferences could increase socioeconomic diversity on college campuses, *id.* at 34; and that admitting more students from economically disadvantaged high schools may raise the aspirations and performance of many students at such schools, *id.* at 35.

The question is not who is right and who is wrong about whether preferences ultimately help or hurt minorities. Rather, the question is whether Michigan's citizens were motivated by discriminatory intent and no other factor when they cast their vote for § 26. And the answer to that question is an unequivocal no, as the district court concluded. Pet. Supp. App. 319a ("plaintiffs cannot show that the measure was enacted with a discriminatory intent"). And in the absence of such intent or a facial racial classification, there is no equal-protection violation.

As noted in Michigan's initial brief, there is an additional reason why *Seattle* is easily distinguishable from this case: all nine Justices in *Seattle* agreed, in a footnoted discussion, that the Court's holding would not apply to the situation where a higher authority attempted to override an admission committee's decision to develop an affirmative action plan. Schuette Br. 19 (citing *Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting), and *id.* at 480 n.23 (majority opinion)).

The Cantrell Respondents interpret these two competing footnotes differently, suggesting that the *Seattle* majority was only responding to Justice Powell's argument "that the majority's holding would prevent any other entity *within a university* from overruling an admission committee's decision to adopt race-conscious admission programs." Cantrell Br. 43. In Respondents' view, Justice Powell provided "no discussion of whether state law changed the locus of plenary decisionmaking authority for this racial issue." *Id.*

But that position is impossible to reconcile with what Justice Powell actually said in footnote 14 of his *Seattle* dissent. The footnote is *entirely* about changing the locus of political authority:

> The Court's decision intrudes deeply into normal state decisionmaking. Under its holding *the people of the State* of Washington apparently are forever barred from developing a different policy on mandatory busing where *a school district* previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional *for any higher authority* to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university system, and the

> board of regents might be powerless to intervene despite their greater authority under state law.
>
> After today's decision, it is unclear whether *the State* may set policy in any area of race relations where a *local governmental body* arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, *the State* apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas. [*Seattle*, 458 U.S. at 498 n.14 (Powell, J., dissenting) (emphasis added).]

What Justice Powell describes is exactly what is at issue here. So when the majority dismisses Justice Powell's parade of horribles as having "nothing to do with the ability of minorities to participate in the process of self-government," the *Seattle* majority is rejecting *Seattle*'s application to the facts of this case.

When pressed, even Respondents are forced to acknowledge that "[r]ace-conscious action that does 'not lead to different treatment based on a classification that tells each [person] he or she is to be defined by race' ordinarily need not satisfy 'strict scrutiny to be found permissible.'" Cantrell Br. 29 (quoting *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring)). The logical corollary is that a law *barring* racial classifications is not itself a racial

classification and need not satisfy "strict scrutiny to be found permissible." Accordingly, there is no basis to subject § 26 to strict scrutiny, or even to apply the political-restructuring doctrine to it at all.

Any lingering doubt about the validity of Respondents' theory is dispelled when they try to distinguish § 26 from analogous situations. For example, Respondents say that Congress or the President could ban affirmative action at West Point and other military academies without being subject to strict scrutiny. This is so, say Respondents, because "Congress has plenary authority over the military academies and any delegated authority remains subject to ultimate congressional control. . . . The political restructuring doctrine is implicated only when the locus of plenary decisionmaking authority is changed. Modifying or withdrawing a lawful delegation of authority to a subsidiary governmental decisionmaker does not alter the locus of ultimate decisionmaking authority." Cantrell Br. 45 (citation omitted). But why should Congress' plenary authority over the military academies matter? Congress is doing in the hypothetical just what Respondents complain Michigan voters did, which is remove the issue from individual school control to centralized government control. Neither a West Point cadet nor a UM student can lobby a school official after the policy change.

In sum, Respondents' misunderstand *Seattle* to the extent they believe *Seattle* does not require proof of a racial classification or discriminatory intent. And if Respondents have properly interpreted *Seattle*, then *Seattle* should be limited or overruled.

III. Article 1, § 26 does not create a political process for changing university admissions policies that is any more difficult than the pre-§ 26 political process.

As Michigan explained in its initial brief, the reality of the university-admissions policy-setting environment bears little resemblance to a true political process, one where the polity has both access to and a meaningful ability to change public policy. For example, only the Wayne State Law School faculty has the authority to approve the admissions policy; it is not subject to approval by the Wayne State University Board of Governors. J.A. 21. And as the Law School's Dean testified, if the Board of Governors sought to change the policy, that action "would precipitate a constitutional crisis." J.A. 22.

Respondents look past this record evidence and instead try to make the case that university boards of trustees are legally empowered with overseeing all day-to-day operations at Michigan's public universities, including admissions. E.g., Bd. of Governors of Wayne State Univ. Br. 1–25; Regents of the Univ. of Mich. Br. 4–17. This proposition may be true as a theoretical matter, but it certainly is not reflected in the actual university practice.

In any event, even if one accepts Respondents' proposition, that does not alter the reality that § 26 actually had the effect of making it *easier* for interest groups to change university admissions policies. Consider the political-process hoops that an advocate had to jump through before § 26 and compare them with the process that applies now:

Before	After
• Elect at least 5 of 8 University of Michigan Trustees, no more than two at a time in statewide elections held only every other year. • Elect at least 5 of 8 Michigan State University Trustees, no more than two at a time in statewide elections held only every other year. • Elect at least 5 of 8 Wayne State University Trustees, no more than two at a time in statewide elections held only every other year. • Elect a Governor in a statewide election to appoint favorable Trustees at Michigan's dozen other public universities. • Hope, after this eight-year process, that each Board of Trustee member lives up to campaign promises and is willing to battle university faculty members for control of the admissions process.	• Obtain petition signatures equal to 10% of the total vote cast for all candidates for governor in the preceding general election. • Obtain a majority vote in a single statewide election.

So while there is a modest barrier to entry—a 10% signature requirement (a prerequisite that was satisfied by six different initiative efforts in Michigan's 2012 election cycle alone), the political process post-§ 26 requires only a single statewide vote on a single issue. In contrast, the political process pre-§ 26 was much more elaborate, requiring many statewide elections of multiple individuals over a period of many years, followed by the hope that the successfully elected officials will in fact take action.

Respondents provide examples of how Michigan can amend its Constitution without running afoul of Respondents' rule, e.g., by restructuring the admissions process so that only GPA and SAT scores matter, or transferring all authority over admissions to the state legislature or some other political body. Cantrell Br. 58–59. These proposals are so radical (and therefore unlikely to be adopted) that, as a practical matter, Respondents' position is that Michigan's citizens may not eliminate affirmative action in their state universities. That position *does* single out race, and the conclusion cannot be reconciled with *Grutter*, which recognized that affirmative-action policies are in serious tension with the Fourteenth Amendment.

In light of the above facts, it is not possible to say that Respondents have carried their burden of demonstrating that § 26 increased the political burden on any individual or group seeking to lobby for different admission standards. This reality provides a separate and independent reason for upholding § 26.

IV. Response to Respondents' and *amici*'s remaining arguments

Once it is clear that § 26 (1) does not embody a racial classification, (2) is not a result of a discriminatory purpose, (3) does not create a bar to equal treatment (but rather requires it), and (4) makes the political process for amending university-admission policies easier, not harder, there is very little over which to argue. That said, a few additional points advanced by Respondents are worth addressing.

First, the Sixth Circuit *en banc* majority correctly held that a political-restructuring claim requires proof that an enactment like § 26 that targets a "policy or program that 'inures primarily to the benefit of the minority, *and is designed for that purpose*.'" Pet. App. 22a (citing *Seattle*, 458 U.S. at 467, 472) (emphasis added). As Michigan explained in its initial brief, that is a prerequisite Respondents cannot satisfy here, because the type of admissions policy for which Respondents would like to lobby—a *Grutter* plan—cannot be designed to benefit primarily a minority individual or group; it must be a policy that advances the educational benefit of the entire student body. *Grutter* v. *Bollinger*, 539 U.S. 306, 330–33 (2003).

Respondents have no answer to that problem, so they abandon the Sixth Circuit's approach and argue that the political-restructuring doctrine is not limited to programs that inure primarily to the benefit of the minority: "The Court's observations in *Hunter* and *Seattle* that the program affected by the restructuring of the political process 'inure[d] to the benefit of the minority,' and that the restructuring

thus 'place[d] special burden on racial minorities,' were empirically accurate based on the record in each case and *do not limit the political restructuring doctrine's application*." Cantrell Br. 34 (emphasis added, quotations omitted).

Respondents' argument is a striking departure from this Court's political-restructuring precedent. E.g., *Seattle*, 458 U.S. at 471–72 ("It is beyond dispute, then, that the initiative was enacted because of, not merely in spite of, its adverse effects upon busing for integration [because] . . . desegregation of the public schools, like the Akron open housing ordinance, at bottom insures primarily to the benefit of the minority, and is designed for that purpose.") (citations omitted). And the fact that Respondents feel it necessary to disavow this Court's core language in *Seattle* demonstrates that Respondents cannot prevail in this case unless the Court is willing to expand the political-restructuring doctrine well beyond its present form.

<u>Second</u>, Respondents distinguish *Crawford* as a case involving "the simple repeal or modification of desegregation or antidiscrimination laws." Cantrell Br. 42. But *Crawford* was much more than that. As explained above, the California constitutional amendment changed the political process by prohibiting state courts from ordering busing to desegregate the schools except in the circumstance where the Fourteenth Amendment required it. Yet this Court upheld the amendment because it did not classify based on race, did not exhibit discriminatory intent, and did not eliminate equal treatment.

Third, the Coalition Respondents make the separate argument that § 26 violates equal-protection principles by prohibiting public universities from assuring opportunity and achieving diversity. Coalition Br. 52–61. But the Coalition Respondents cite no authority for this proposition, and no court (including the Sixth Circuit *en banc* majority) has ever endorsed it. This Court should not be the first.

Finally, the University of Michigan asserts—with no record or statistical support other than the self-serving testimony of its own officials—that it cannot possibly achieve the benefits of a diverse student body solely by adopting a race-neutral admission plan. (Regents of the Univ. of Mich. Br. 18–25.) This point is irrelevant to the legal question of whether § 26 violates the political-restructuring doctrine. But it is also difficult to understand in light of the University's own published admissions statistics, numbers which are noticeably absent from the University's brief.

In a press release recounting the makeup of the University's first freshman class post § 26 (the freshman class entering in 2008), the University noted that the percentage of underrepresented minorities ("African Americans," "Hispanic Americans," and "Native Americans") in the class was "relatively unchanged" at 10.47%, versus 10.85% for the class entering in 2007.[2]

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[2] http://ns.umich.edu/new/releases/6609.

Then a strange thing happened. Beginning with the class of 2010 freshmen, the University allowed incoming students to check multiple boxes representing each student's applicable race category.[3] And for reasons that are unclear, the *amici* use the enrollment percentages for only those students who identified *single* races/ethnicities (e.g. "African American," "Hispanic American")—as though a student's decision to check the multi-racial box brings no diversity to campus.

For example, the *amici* brief of the Society of American Law Teachers in Support of Respondents reports that in the 2012 entering class, only 8.1% of enrolling freshmen were "African American" or "Hispanic American," a number the Teachers say is 15 to 22% below pre-§ 26 figures. (Society *Amici* Br. 16 & Appendix.) But when the students who checked "Two or More" racial boxes are included, that number jumps to 11.07%,[4] a figure which is actually *higher* than the pre-§ 26 percentage (10.85%) for underrepresented minority students. And the 11.07% figure does not even include (1) categories of other traditionally underrepresented students, e.g., "Native Americans," (2) students whose race or ethnicity is "Unknown," or (3) students who are "Non-Resident Aliens." So the figure touted by Respondents' *amici* excludes students from Mexico, who apparently cannot bring racial or ethnic diversity to campus like students who live in the United States and identify themselves as "Hispanic Americans."

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[3] http://sitemaker.umich.edu/obpinfo/files/umaa_freshprofmaxfa12update.pdf.

[4] http://ro.umich.edu/report/12fa844.xlsx ([271+228+184]/6171).

But just sticking with the check-box categories "African American," "Hispanic American," and "Two or More," the percentage of enrolling freshmen selecting these boxes exceeded the pre-§ 26 under-represented-minority-student enrollment percentage (10.85%) every single year since the University started this new way of tracking student racial identity: 2010—11.83%,[5] 2011—11.81%,[6] and 2012—11.07%. So the publicly available statistics, muddled as they are, do not appear to support the precipitous drop in minority enrollment § 26 opponents claim.

It is also difficult to know how the University would fare under a plan that placed greater emphasis on finishing near the top of a high school class or on a disadvantaged socioeconomic status. Many high schools located in the City of Detroit are both poor and predominantly African American. Yet the record reflects that in the 2005 admission year, the University did not offer a single admission to any student in 14 poor and highly segregated (African American majority) Detroit high schools. Coalition Resp. Br., Ex. J., Miller Decl. at 9. Is it really the case that there wasn't a single qualified student at any of these 14 high schools to whom the University could make an admission offer? The State has no way to know, but it is difficult to take the University's assertion seriously when such practices come to light.

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[5] http://ro.umich.edu/report/10fa844.xls ([283+275+211]/6496).

[6] http://ro.umich.edu/report/11fa844.xlsx ([276+267+195]/6251).

The larger point is that Michigan citizens have chosen to get out of the sordid business of categorizing individuals by race and sex. The people of Michigan do not want their public-university officials debating whether a multi-racial student adds ethnic or racial diversity, whether a "Hispanic American" lessens racial isolation and stereotypes on campus to a greater degree than a foreign-born Latino student, or whether Cubans should be discounted entirely as adding any underrepresented diversity because "Cubans are Republicans." Schuette Br. 27 (quoting *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting)). Michigan's citizens have pursued a "race-neutral alternative[ ]." *Grutter*, 539 U.S. at 342.

* * *

Respondents agree that "[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." Cantrell Br. 4–5 (quoting *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring)). That is why the only "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. Section 26 tries to embrace that principle as well as this Court's invitation in *Grutter* to experiment with race-neutral alternatives to the historic practice of checkbox diversity. 539 U.S. at 342.

Michigan appreciates that there are many differing views about the benefits and detriments of race-conscious admissions programs. But its citizens resolved the debate as a matter of policy when they adopted § 26. There is nothing unconstitutional about making that legitimate choice.

CONCLUSION

The court of appeals should be reversed.

Respectfully submitted,

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