No. 12-682

In The
Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,

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 THE STATES OF CALIFORNIA, HAWAI'I, ILLINOIS, IOWA, NEW MEXICO, OREGON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

KAMALA D. HARRIS
Attorney General
of California
SUSAN DUNCAN LEE
Acting State
Solicitor General
MARK BRECKLER
Chief Assistant
Attorney General
ANGELA SIERRA
Senior Assistant
Attorney General

ANTONETTE BENITA CORDERO*
Deputy Attorney General
300 South Spring Street,
Suite 1702
Los Angeles, California 90013
Telephone: (213) 897-2039
Fax: (213) 897-7605
Antonette.Cordero@doj.ca.gov

**Counsel of Record*

Attorneys for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

DAVID M. LOUIE
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawaii 96813

LISA MADIGAN
Attorney General of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

GARY K. KING
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street N.E.
Salem, Oregon 97301

IRVIN B. NATHAN
Attorney General for the District of Columbia
Office of the Attorney General
One Judiciary Square
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001

Additional Attorneys for Amici Curiae

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.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Interest of Amici Curiae	1
Introduction and Summary of Argument	5
Argument	8
I. Laws That Restructure The Political Process So As To Burden Only Minority Interests May Violate The Equal Protection Clause	8
II. Michigan's Section 26 Restructures The Political Process By Erecting Obstacles To Achieving Race-Conscious Admissions Policies That Do Not Exist For Other Admissions Policies	11
A. Michigan's Amendment Does Not Address Race-Related Matters In A Neutral Fashion	11
B. Section 26 Creates An Unequal Political Process That Burdens Minority Interests	13
III. Policies Can Be Of Primary Benefit To Racial Minorities For Purposes Of The Political Structure Doctrine Even Though They Provide A Benefit To All Students	15
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES

Brown v. Board of Educ., 347 U.S. 483 (1954) 3, 16

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich., 701 F.3d 466 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coalition to Defend Affirmative Action*, 133 S.Ct. 1633 (2013).....3, 5, 6

Fisher v. University of Tex. at Austin, ___ U.S. ___, 133 S.Ct. 2411 (2013).....2, 16

Grutter v. Bollinger, 539 U.S. 306 (2003) .....*passim*

Hunter v. Erickson, 393 U.S. 385 (1969).....*passim*

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).....*passim*

CONSTITUTIONAL PROVISIONS

Cal. Const. art. I, § 31(a).....4, 19

Mich. Const. art. I, § 26.....*passim*

U.S. Const. amend. XIV, § 1 .....*passim*

COURT RULES

Sup. Ct. R. 37, ¶4.....1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Richard Atkinson & Saul Geiser, *Beyond the Master Plan: The Case for Restructuring Baccalaureate Education in California,* Center for Studies in Higher Education (2010), *available at* http://cshe.berkeley.edu/publications/publications.php?id=369 .....2, 6

Anthony P. Carnevale & Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege,* Georgetown Public Policy Institute (2013) 6, 20

2012 Census, Table 18 (Resident Population by Hispanic Origin and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html.....2

2012 Census, Table 19 (Resident Population by Race and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html 2

Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum,* 29 Chicano-Latino L. Rev. 1 (2010).....21

INTEREST OF AMICI CURIAE

Amici, the States of California, Hawai'i, Illinois, Iowa, New Mexico and Oregon, as well as the District of Columbia,[1] submit this brief pursuant to Supreme Court Rule 37 in support of the respondents. Sup. Ct. R. 37, ¶4. Amici States, like all states, operate public systems of higher education. They necessarily have a significant interest in the types of restrictions that may constitutionally be imposed on their efforts to ensure that their educational institutions are truly open to all. Amici States strive to achieve a level of diversity on their campuses that will best educate and prepare students to excel in both civic and professional life following graduation. They recognize – as this Court has – that "'[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.'" *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) (*Grutter*), quoting Brief for United States as *Amicus Curiae* at 13.

It is particularly important for states with large non-White populations to ensure that students of all races have meaningful access to their public colleges and universities. California, for example, is one of the most diverse states in the Union. According to 2010 U.S. Census data, California has the largest White,

[1] For ease of reference, amici, including the District of Columbia, will be referred to collectively as "Amici States."

Latino and Asian populations in the country, as well as the most American Indians/Alaskan Natives and Native Hawaiians/Pacific Islanders.[2] It also has the fifth largest Black/African-American population.[3] In California, 96% of students from underrepresented minority groups who attend college attend public institutions. Richard Atkinson & Saul Geiser, *Beyond the Master Plan: The Case for Restructuring Baccalaureate Education in California,* Center for Studies in Higher Education, 13 (2010), *available at* http://cshe.berkeley.edu/publications/publications.php?id=369.

This Court held in *Grutter*, and reaffirmed in *Fisher v. University of Texas at Austin*, that states have a compelling interest in attaining a diverse student body in public institutions of higher education. *Grutter*, 539 U.S. at 328; *Fisher v. University of Tex. at Austin,* ___ U.S. ___, 133 S.Ct. 2411, 2419 (2013) (*Fisher*). Thus, states may, if they find it necessary to obtain the benefits of a diverse student body, adopt admissions policies that consider an applicant's race in an individualized, non-dispositive manner. Amici States have an interest in seeing that such flexibility

---

[2] 2012 Census, Table 18 (Resident Population by Hispanic Origin and State: 2010) and Table 19 (Resident Population by Race and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html.

[3] 2012 Census, Table 19 (Resident Population by Race and State: 2010), *available at* http://www.census.gov/compendia/statab/cats/population.html.

in the vitally important arena of education is preserved.

Equally important, Amici States share a commitment to the notion that:

> equal protection of the laws is more than a guarantee of equal treatment under existing law. It is also a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on issues of importance to them.

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich., 701 F.3d 466, 474 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coalition to Defend Affirmative Action,* 133 S.Ct. 1633 (2013) (*Coalition*).

Amici States acknowledge the importance of ensuring that the "tools of political change" (*Coalition* at 470) are available to all on an equal basis. Education is one such tool. As far back as this Court's historic decision in *Brown v. Board of Education*, this Court recognized that "education . . . is the very foundation of good citizenship." 347 U.S. 483, 493 (1954). Public colleges and universities are the training ground for many of our Nation's leaders. *Grutter,* 539 U.S. at 332. For this reason, nowhere is it more important that our public institutions be open to all than in the context of higher education. *Id.*

Amici States recognize that only by ensuring equal access to the political process can respect for, and trust in, governmental institutions be maintained. Thus, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity if leaders are to have legitimacy in the eyes of the citizenry. *Grutter,* 539 U.S. at 332.

In addition to the shared interests of the Amici, California has a particular interest in the outcome of this case because, as in Michigan, its voters amended its Constitution to add language virtually identical to the constitutional provision at issue in this case.[4] Thus, this Court's decision in this matter will necessarily affect California.

---

[4] Article I, section 26 of the Michigan Constitution provides, in relevant part, that:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

Mich. Const. art. I, § 26.

California's Constitution similarly provides that:

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

Cal. Const. art. I, § 31(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici States submit this brief in support of the respondents to emphasize that, indeed, Michigan's constitutional amendment prohibiting race-conscious admissions policies in public universities alters the political structure in such a way as to violate the Equal Protection Clause.[5] It does so by erecting barriers to the adoption of race-conscious admissions policies that do not exist for non-racial admissions policies, such as those that allow consideration of familial legacy, athletic ability or geographic or economic diversity.

By banning admissions programs that are permissible under the United States Constitution, article I, section 26 of the Michigan Constitution ("Section 26") violates the political-structure doctrine set forth in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (*Seattle*) and *Hunter v. Erickson*, 393 U.S. 385 (1969) (*Hunter*). It imposes unique political burdens on minority interests. Under Section 26, to have a characteristic other than race or gender considered as a factor in the university admissions process one need only successfully lobby the school's admissions committee, university leadership, or the

[5] Although the Michigan constitutional amendment prohibits consideration of race or gender in admissions decisions, this brief focuses only on the prohibition of race as a diversity factor because that is the issue decided by the Sixth Circuit below. *Coalition,* 701 F.3d at 473.

school's governing board. But to have race be considered a factor would require the extraordinary step of amending the state constitution. As the Sixth Circuit accurately expressed in its well-reasoned decision below, "[t]he existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change." *Coalition,* 701 F.3d at 470.

Education's position as one of the most vital tools for political change has long been recognized. Public colleges and universities are the training ground for future leaders. *Grutter,* 539 U.S. at 332. This may be especially true for students of color, who are more likely to attend public institutions. *See Atkinson & Geiser, supra,* at 13; and research shows that access to education not only affects the student admitted or rejected; it also affects subsequent generations. Anthony P. Carnevale & Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege,* Georgetown Public Policy Institute (2013) at 7-8 and note 6. Parental education may now be the strongest predictor of a child's educational attainment and future earnings – more important even than family income. *Id.*[6]

[6] This same study finds that the likelihood that a child in the United States will exceed her parents' educational level is less than 40%, lower than in any other advanced nation. *Id.*

Given these realities, it is clear that while diversity in the public education setting benefits all students and even society at large, greater classroom integration is of particular interest to Blacks, Latinos/as and Native Americans. These are the groups who are most directly and adversely impacted by bans on consideration of race in admissions policies at public universities and colleges. When campuses are not diverse, these are the students who are generally excluded.

Yet, it is as important to remember what is not at issue in this case as it is to recognize what is. The *Hunter-Seattle* doctrine does not purport to dictate the level of government at which decisions about university admissions must be made. Amici States merely assert that the doctrine requires that decisions about whether to consider race as a factor in university admissions be made at the *same* level of government as decisions about other admissions factors.

Similarly, Amici States do not argue that the doctrine requires Michigan's educational decision-makers to adopt a race-conscious admissions policy, nor does it authorize them to adopt a policy that would be unconstitutional under this Court's ruling in *Grutter*. Rather, Amici States argue simply that decisions about whether to consider race – in the manner permitted under *Grutter* – must be made at the same level of decision-making as decisions about other admissions factors. Here, as in *Hunter,* the Michigan amendment did not simply repeal race-conscious admissions policies. It effectively rigged the political

process to prevent them from ever being re-adopted except through the burdensome mechanism of amending the state constitution.

ARGUMENT

I. Laws That Restructure The Political Process So As To Burden Only Minority Interests May Violate The Equal Protection Clause

The Equal Protection Clause provides, in relevant part, that no state shall "deny to any person . . . equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court has long recognized that the Equal Protection Clause may be violated by a restructuring of the political process so as to impose unique political burdens on racial minorities. *Seattle*, 458 U.S. 457; *Hunter*, 393 U.S. 385.

In *Hunter,* an Akron, Ohio referendum not only repealed a fair housing ordinance, but also amended the city charter to require a city-wide election to enact any ordinance to prevent housing discrimination "on the basis of race, color, religion, national origin or ancestry." *Hunter,* 393 U.S. at 387. This Court held that by imposing that additional burden in the political process, the Akron provision "discriminate[d] against minorities, and constitute[d] a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 393. This Court reasoned that the charter amendment created "an explicitly racial classification treating racial housing matters differently

from other racial and housing matters." *Id.* at 389. The charter amendment "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390. Only those laws directed at ending housing discrimination based on race, color, religion, national origin or ancestry were required to go through the referendum process. *Id.*

Although the charter amendment "on its face treat[ed] Negro and white, Jew and gentile in an identical manner," this Court recognized that, in reality, "the law's impact falls on the minority." *Hunter,* 393 U.S. at 391. Imposing this disadvantage on minority groups "by making it more difficult to enact legislation on their behalf" was as unacceptable in this Court's view as "dilute[ing] any person's vote or giv[ing] any group a smaller representation than another of comparable size." *Id.* at 393.

Thirteen years later, in *Seattle*, this Court reaffirmed the political-structure doctrine, holding that an initiative to prohibit mandatory busing to achieve racial integration of schools violated the Equal Protection Clause. *Seattle*, 458 U.S. at 470. In so holding, this Court reiterated that "[t]he Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community." *Id.* at 467. This Court recognized that the Fourteenth Amendment even reaches "'a political structure that

treats all individuals as equals,' [citations omitted], yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.*

The initiative at issue in *Seattle* provided that "'no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student.'" *Seattle*, 458 U.S. at 462. However, the initiative contained numerous broad exceptions so that it effectively prohibited only busing for the purpose of desegregation, while permitting busing for all nonracial reasons. *Id.* at 471.

This Court held that the initiative violated the Equal Protection Clause because "it use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." *Seattle*, 458 U.S. at 470. The practical effect was "a reallocation of power of the kind condemned in *Hunter*," because the initiative "remove[d] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474.

Section 26 suffers from the same constitutional defects this Court addressed in *Hunter* and *Seattle*.

II. Michigan's Section 26 Restructures The Political Process By Erecting Obstacles To Achieving Race-Conscious Admissions Policies That Do Not Exist For Other Admissions Policies

A. Michigan's Amendment Does Not Address Race-Related Matters In A Neutral Fashion

Article I, section 26 of the Michigan Constitution provides, in relevant part, that:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

Mich. Const. art. I, § 26. It was passed in the aftermath of this Court's decision in *Grutter*, which held that narrowly-tailored race-conscious admissions criteria are constitutionally permissible. *Grutter,* 539 U.S. at 334. In *Grutter*, this Court approved the University of Michigan Law School's race-conscious admissions process. It held that such processes are constitutionally permissible when they consider race or ethnicity only as a "plus" factor in the context of individualized consideration of each applicant. *Id.* at 334. In so holding, this Court recognized that states

have a compelling interest in achieving the benefits that flow from a diverse student body at public universities. *Id.* at 343. This compelling interest enables a narrowly-tailored race-conscious admissions program to withstand the strict scrutiny to which all racial classifications are subjected because, "[a]lthough all uses of race are subject to strict scrutiny, not all are invalidated by it." *Id.* at 326-27.

In response to that ruling, Michigan voters amended their constitution to add Section 26. While Section 26 may treat all race-conscious programs similarly, what is relevant here is that it treats race differently from other permissible factors, such as an applicant's income level, place of residence or legacy status. That distinction is explicit on the face of the provision. It expressly prohibits consideration of race, but is silent as to these other potential diversity factors.

In this regard, Section 26 is no different from the charter amendment in *Hunter* or the initiative in *Seattle.* In *Hunter*, the fatal flaw with the city's charter amendment was that it applied only to housing antidiscrimination laws affecting race or religion. Thus, this Court recognized in the charter amendment "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Hunter,* 393 U.S. at 389. As this Court made clear, that explicit racial classification existed even where the charter amendment made "no distinctions among racial and religious groups." *Id.* at 390.

Similarly, the initiative in *Seattle* treated all busing to achieve racial integration the same, but it treated such busing differently from busing for non-racial purposes. Although the initiative – unlike Section 26 here – did not use the words "race" or even "integration," this Court concluded that the "racial focus of Initiative 350 . . . suffices to trigger application of the *Hunter* doctrine." *Seattle,* 458 U.S. at 474.

Section 26 likewise distinguishes based on race. Just as in *Hunter,* Section 26 creates an explicit racial classification. And just as in *Seattle*, Section 26 "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, 458 U.S. at 470. Section 26 is not merely a neutral law of general application. Rather, its racial focus brings it within the *Hunter-Seattle* doctrine.

B. Section 26 Creates An Unequal Political Process That Burdens Minority Interests

It is irrelevant that Section 26 treats all races the same on its face. What is relevant is that it treats racial issues differently from other issues in a way that disadvantages minority interests. This Court made it abundantly clear that the key consideration when applying the *Hunter-Seattle* doctrine is the equality of the *political decision-making process. Seattle,* 458 U.S. at 474, n.17 ("The evil condemned by the *Hunter* Court was not the particular political

obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests."). Of concern to this Court in both *Hunter* and *Seattle* was that the effect of the changes wrought by voters "was to redraw decisionmaking authority over racial matters – and only racial matters – in such a way as to place comparative burdens on minorities." *Id*.

By banning constitutionally-permissible admissions programs, Michigan's constitutional amendment imposes unique political burdens on racial minorities. It requires a state constitutional amendment to achieve constitutionally-permissible admissions policies that consider race as a "plus" factor, but policies considering nonracial diversity factors may be obtained by persuading the school's admissions committee, university officials, or the school's governing board. As discussed below, policies permitting the narrow consideration of race are of particular interest to racial minorities. By requiring those seeking constitutionally-permissible race-conscious admissions policies to surmount more formidable obstacles to achieve their political objectives than other groups face, Section 26 violates the political-structure doctrine under the Equal Protection Clause.

III. Policies Can Be Of Primary Benefit To Racial Minorities For Purposes Of The Political Structure Doctrine, Even Though They Provide A Benefit To All Students

The *Hunter-Seattle* doctrine applies when the practical effect of the law in question is to remove the authority to address a racial issue "from the existing decision-making body, in such a way as to burden minority interests," making it "more difficult for the minority to enact legislation on its behalf." *Seattle*, 458 U.S. at 474; *Hunter*, 393 U.S. at 393. Petitioner argues that Section 26 cannot fulfill this criterion because race-conscious admissions policies are only constitutionally permissible if their purpose is to benefit *all* students, not just minority interests. Brief for Petitioner at 22-23. Petitioner is wrong for two reasons.

First, contrary to Petitioner's assertion, *Grutter* did not hold that "'obtaining the educational benefits that flow from a diverse student body'" is the "one and only" compelling state interest that can justify a race-conscious admissions policy. Brief for Petitioner at 22. While achieving the benefits of student body diversity is the only compelling state interest that this Court has so far specifically sanctioned in the context of higher education, this Court has never held that such an interest is the *only* one that can justify race-conscious policies. In fact, as Justice Ginsburg explained, *Grutter* did not require this Court to reconsider "whether interests other than 'student body diversity,' [citation] rank as sufficiently important to

justify a race-conscious government program." *Grutter,* 539 U.S. at 346, n.* (Ginsburg, J., concurring). This Court's recent decision reaffirming *Grutter* also did not address that question. *Fisher,* 133 S.Ct. at 2419.

Second – and more importantly – even if one assumes that achieving the benefits of a diverse student body for all students is the only state interest that can justify considering race in the admissions process, it does not follow that the *Hunter-Seattle* doctrine is inapplicable here. Policies that benefit all may be of particular interest to certain groups, just as policies that benefit certain groups may be of interest to all. This is particularly true where the goal at issue involves racial diversity in education, or, as referred to at the pre-college level, integration.[7] *Seattle,* 458 U.S. at 472 ("desegregation of public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose"). And it is settled "that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine." *Id.* at 473 (footnote omitted).

As this Court recognized in *Grutter,* White, as well as non-White, students – and, indeed, society as a whole – profit from a multi-racial educational

[7] This Court warned more than half a century ago that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.*, 347 U.S. at 493.

environment. *Grutter,* 539 U.S. at 330-33. But the broader gains in large part flow from, and, in fact, reflect, the benefits derived by students of color. This Court has recognized that where the environment where students of color are likely to find themselves as adults is "largely shaped by members of different racial and cultural groups," students of color "can achieve their full measure of success only if they learn to function in – and are fully accepted by – the larger community." *Seattle,* 458 U.S. at 473. This Court expressed the hope that attending ethnically diverse schools would help to accomplish this goal, not only by preparing non-White students "'for citizenship in our pluralistic society,'" but also by "teaching members of the racial majority 'to live in harmony and mutual respect' with [students] of minority heritage." *Id.* (citations omitted).

Many of the substantial benefits of diversity hailed by this Court in *Grutter,* while benefitting all students and society in general, clearly have their greatest impact on people of color. For example, this Court acknowledged that student body diversity promotes cross-racial understanding, breaks down racial stereotypes, and enables better understanding of different races. *Grutter,* 539 U.S. at 330. Although all students may share in these valuable effects of diversity, we may fairly assume that, at bottom, these impacts inure primarily to the benefit of Black, Latino/a and Native American students.

No one would argue, for example, that separate schools for White and Black school children *equally*

discriminated against both, though the school assignment of both were restricted based on race. Undoubtedly, anti-miscegenation laws primarily targeted people of color even though they also prohibited the White member of the couple from marrying the person of his or her choice. It follows, then, that laws abolishing these racist practices inured primarily to the benefit of non-White school children and prospective brides and grooms, even though their White counterparts also benefited.

In *Seattle,* this Court acknowledged that both Whites and Blacks supported and opposed the Washington busing initiative and easily accepted that both White and Black children benefit from exposure to ethnic and racial diversity in the classroom. *Seattle,* 458 U.S. at 472. But this Court said that neither of these factors provided a basis to distinguish *Hunter*, because "we may fairly assume that members of the racial majority both favored and benefited from" the fair housing ordinance invalidated in that case. *Id.*

Thus, while majority and minority students alike profit from campus environments that more realistically reflect the pluralistic society in which they live, it must be recognized that opening up the nation's institutions of higher learning to students from historically underrepresented racial and ethnic groups is of particular interest to those groups.

This is even more self-evident when one considers the drastic impact that bans on constitutionally-permissible race-conscious admissions policies have

had on the admissions of Black and Latino/a students. California, as the first state in the country to explicitly prohibit affirmative action in college admissions, is an instructive example. In 1996, California voters, like those in Michigan, chose to prohibit the state from considering race in its efforts to achieve diversity in public education by adding Article I, section 31(a) to the state constitution. The impacts to Black and Latino/a students were immediate and dramatic. Brief of Amicus Curiae, President and Chancellors of the University of California in Support of Respondents (UC Amicus Brief), filed with this Court in *Fisher,* 133 S.Ct. 2411, at 3. Officials of the University of California have described California's experience as follows:

> In the immediate aftermath of Proposition 209 becoming effective, the rates at which underrepresented minority students applied to, were admitted to, and enrolled at the University of California fell, often by very significant percentages, at every UC campus. In 1998, the first year in which race-neutral admission policies were implemented at UC, admission rates (*i.e.*, the percentage of applicants admitted) for underrepresented minority students and the proportion that these students represented of the total admitted class fell for UC as a system and on every campus.

UC Amicus Brief at 18. And despite "numerous and varied efforts at increasing diversity on each of its campuses, UC has enjoyed only limited success." *Id.*

at 14-15. Admission and enrollment of Black and Latino/a students at a number of UC campuses, particularly at the UC's most selective campuses, still have not returned to the levels that existed before California imposed its ban. *Id.*[8]

Given the significant impact that affirmative action bans have on Black and Latino/a university enrollment, it is undeniable that adoption of appropriate race-conscious policies would inure primarily to the benefit of racial minorities, notwithstanding their contribution to the rest of society, as well. While we may wish to deny it, "race unfortunately still matters." *Grutter,* 539 U.S. at 333; see also *id.* at 345 (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."). Although diversity refers to a number of social, political, and cultural factors, including "class, national origin, sexual orientation, geographic region,

---

[8] A recent study of the 468 most selective schools in the country, as determined by the aggregation of the three top tiers of Barron's Admissions Competitiveness, found that Whites were even more overrepresented in 2009 than they were in 1995 at these schools. Carnevale & Strohl, *supra*, at 10, 49-50 (App. B). In 1995, Whites made up 68% of the population aged 18 to 24, and 77% of freshman enrollment at the most selective colleges and universities. *Id.* By 2009, their percentage of 18 to 24-year-olds had fallen to 62% but their percentage of the enrollment at the most selective schools had decreased only to 75%. *Id.* Thus, in 1995, Whites were 9% overrepresented, but by 2009 they were 13% overrepresented. *Id.*

political affiliation, religion, ability/disability and age," race, like gender, has "a distinct, significant and foundational role in shaping experiences in the U.S." Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum,* 29 Chicano-Latino L. Rev. 1, 3 (2010) (footnote omitted).

Section 26 is not, therefore, insulated from review under the *Hunter-Seattle* doctrine simply because non-minorities may both support and benefit from race-conscious policies that make public universities more diverse. To the contrary, the obstacles it erects in the path of those wishing to implement constitutionally-permissible race-conscious admissions policies "burden minority interests" (*Hunter,* 393 U.S. 393) by making it more difficult to adopt policies of particular benefit to Black, Latino/a, and Native American students.

CONCLUSION

For the reasons stated above, Amici States respectfully urge this Court to affirm the en banc decision of the Sixth Circuit below.

Dated: August 30, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Acting State Solicitor General
MARK BRECKLER
Chief Assistant
Attorney General
ANGELA SIERRA
Senior Assistant
Attorney General
ANTONETTE BENITA CORDERO*
Deputy Attorney General

**Counsel of Record*

DAVID M. LOUIE
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawaii 96813

LISA MADIGAN
Attorney General of Illinois
100 W. Randolph Street,
12th Floor
Chicago, Illinois 60601

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

GARY K. KING
Attorney General of
New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street N.E.
Salem, Oregon 97301

IRVIN B. NATHAN
Attorney General for the
District of Columbia
Office of the Attorney General
One Judiciary Square
441 4th Street N.W.
Suite 600 South
Washington, D.C. 20001

Attorneys for Amici Curiae