No. 12-682

IN THE

Supreme Court of the United States

BILL SCHUETTE,
MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

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

Respondents.

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

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES – Continued

STATE CONSTITUTION

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the respondents.[1]

ADL was organized in 1913 – at a time when anti-Semitism was rampant in the United States – to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Today, in its 100th year, it is one of the world's leading civil and human rights organizations, and its history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or not.

As a leading civil rights organization, ADL has vigorously supported enactment and enforcement of the Nation's major anti-discrimination laws. It is also a leader in producing educational materials and programs designed to fight hate, bias, and prejudice.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

ADL believes that each person in our country has the constitutional right to receive equal treatment under the law and that each person has the right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. ADL has often filed briefs *amicus curiae* in this Court in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the Nation's civil rights laws.[2] Its history of *amicus*

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244

(Continued…)

activity in this Court's school desegregation cases extends back to *Brown v. Board of Education*,[3] and ADL repeatedly has condemned *de facto* discrimination in the Nation's schools.

In the context presented here – a ballot initiative amending the Michigan Constitution to prohibit the State and its political subdivisions from "grant[ing] 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" ("Proposal 2") – ADL agrees with the respondents that, to the extent that the amendment is read to bar *any consideration* of race in admissions decisions by Michigan public colleges and universities, it violates the Equal Protection Clause because it removes a constitutionally permissible topic from the ordinary political process of governmental decisionmaking solely because it is "racial in nature."

(2003); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Ricci v. DeStefano*, 557 U.S. 557 (2009); and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).

[3] 347 U.S. 483 (1954).

SUMMARY OF THE ARGUMENT

1. ADL's experience in a variety of education-related settings confirms that exposure to a diverse academic community serves critical societal needs. At the same time, ADL firmly believes that the Constitution prohibits affirmative action programs from imposing quotas, assigning persons to categories based on their race, or using race as a determinative factor in making admissions decisions.

2. Although the Sixth Circuit read Proposal 2 to ban any "consideration" of race by admissions officers at public educational institutions, by its terms the ballot amendment only bars the State of Michigan (and its public colleges and universities) from "grant[ing] preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin." "Consideration of race" and "preferential treatment . . . on the basis of race" are distinct concepts which should not be conflated.

3. To the extent that Proposal 2 is read as eliminating *any consideration* of race, sex, color, ethnicity, or national origin in individualized admissions decisions by public educational institutions and entrenching that prohibition at the state constitutional level, it deprives the respondents of equal protection of the law by making the process to adopt race-conscious admissions policies more burdensome than the process to adopt other admissions policies.

ARGUMENT

I. EXPOSURE TO A DIVERSE ACADEMIC COMMUNITY SERVES CRITICAL SOCIETAL NEEDS, BUT PUBLIC INSTITUTIONS MAY NOT VIOLATE CORE EQUAL PROTECTION PRINCIPLES TO ACHIEVE DIVERSITY

Experience confirms that diverse academic environments enhance learning by exposing students to new ideas, breaking down stereotypes, and better preparing students for life in an ever-increasingly interconnected world. The benefits of diversity in higher education, however, do not permit universities to violate Equal Protection guarantees in crafting admissions policies. This Court has held that affirmative action programs must be narrowly tailored to fit the compelling government interest in diversity, and it has struck down programs that impose racial quotas, award extra points to minority applicants, and in other ways fail to meet the high test of strict scrutiny. *See Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

A. DIVERSITY IN HIGHER EDUCATION ENHANCES THE EDUCATIONAL EXPERIENCE FOR ALL STUDENTS AND BETTER PREPARES THEM FOR THE WORLD

ADL has long opposed both *de jure* and *de facto* segregation in our schools. Its premier educational initiative, the A WORLD OF DIFFERENCE® Institute (the "Institute"), brings

children of all races together to learn the values of respect and diversity, bridging racial, ethnic, and religious differences and striving to reduce the tensions that spring from them. The Institute has reached literally hundreds of thousands of teachers and peer trainers and, through them, millions of students, in an effort to eradicate bias and hate before it hardens, as well as to promote diversity and pluralism.

ADL's real-world, front-line experience confirms that efforts to further diversity bear educational fruit. For example, ADL's CAMPUS OF DIFFERENCE™ program, which provides college and university students with practical, experiential, hands-on training to foster intergroup understanding and equip students to live and work successfully in a diverse world, has demonstrated that a diverse educational environment challenges all students to explore ideas, perspectives, and experiences that they might not otherwise explore, to see issues from new points of view, to rethink their own premises and prejudices, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with different perspectives.

ADL's experience with the CAMPUS OF DIFFERENCE™ program underscores what the American Council on Education[4] has recognized:

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[4] American Council on Education, *On the Importance of Diversity in Higher Education,* http://www.acenet.edu/newsroom/Documents/BoardDiversityStatement-June2012.pdf (last visited August 26, 2013).

learning in a diverse educational environment promotes personal growth by challenging stereotyped preconceptions, encouraging critical thinking, and helping students to communicate effectively with people of varied backgrounds, thereby preparing students to become good citizens in an increasingly complex, pluralistic society.

Studies confirm these findings. There is a growing body of literature demonstrating that "diverse student populations enhance educational outcomes in undergraduate and graduate higher education . . . ." *See* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 EDUC. POLICY, no. 3, 2001 at 452, 456. Specifically regarding racial diversity, "[r]esearch indicates that cross-race interaction has positive impacts on a range of important outcomes and that the greater the structural diversity of an institution, the more likely students are to engage in these types of interaction." *See* Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES, Ch. 5-11 (Mitchell Chang, et al. eds., 2003).

In addition to aiding colleges and universities in achieving these educational goals, a diverse campus environment can also create opportunities for people from diverse backgrounds, with different life experiences, to come to know one another outside the classroom as more than passing acquaintances and to develop mutual respect for one another. Informal interactions of this kind "help students develop the skills to

participate and lead in a diverse democracy." *See* Patricia Gurin, *et al.*, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. no. 3, 2002 at 330, 353. Diversity in higher education provides societal benefits beyond the university setting as well. As this Court has recognized, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003). In addition, "high-ranking retired officers and civilian leaders of the United States military assert that, 'based on [their] decades of experience,' a 'highly qualified, racially diverse officer corps…is essential to the military's ability to fulfill its principle mission to provide national security.'" *Id.* at 331.

For many of these reasons, this Court has recognized the importance of diversity in the context of higher education. *See Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007) ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. . . . The diversity interest was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.'") (citing *Grutter*, 539 U.S. at 328, 337) (internal quotations omitted); *Grutter*, 539 U.S. at 330 (explaining the "educational benefits that flow from student body diversity" and citing studies showing that student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals") (citations

omitted); *id.* at 392-93, 395 (Kennedy, J., dissenting) (explaining that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity" and approving the use of admissions policies that "giv[e] appropriate consideration to race" in the "special context" of university admissions, while rejecting the particular policies adopted by Michigan Law School).

In short, ADL's experience indicates that exposure to a diverse academic community not only reduces prejudice, but it also enriches and improves the educational experience, increases civic engagement, better prepares students for possible graduate education and career opportunities, and enhances the United States' ability to compete in a globalized economy. Embracing diversity and promoting a fully integrated society is crucial not only to the struggle to defeat discrimination, but also to the continued vitality of our Nation and our society.

B. PUBLIC INSTITUTIONS MAY NOT VIOLATE CORE EQUAL PROTECTION PRINCIPLES TO ACHIEVE DIVERSITY

ADL's staunch commitment to diversity has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. While ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has *opposed* virtually all of the non-remedial racial classifications that have been challenged in this Court, including racial preferences and quotas in affirmative action

programs, arguing that they discriminate on the basis of impermissible characteristics and thus violate the core value of equal protection. *See* ADL amicus filings cited in fn. 2, *supra*. ADL's longstanding position has been that affirmative action programs are invalid when they impose quotas, use race as a determinative factor in making admissions decisions, use race as a proxy for diversity, or act in a manner that assigns persons to categories based on their race.[5]

Affirmative action programs can, however, be structured in a manner that will not violate equal protection principles. When implemented properly, such programs provide educational

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[5] *See, e.g.*, Brief Amicus Curiae of Anti-Defamation League in Support of Neither Party at 15, 18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (arguing that the University of Michigan's admissions policies "den[ied] to non-minority applicants the individualized consideration that is at the core of equal protection"); Brief Amici Curiae of Anti-Defamation League of B'nai B'rith, et al. at 6, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (taking the position that the University of California was not entitled to "utilize race as the determinative factor in the admission and exclusion of candidates for its medical school at Davis"); Brief of Anti-Defamation League of B'nai B'rith as Amicus Curiae at 22, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (arguing that the University of Washington Law School violated the Fourteenth Amendment by instituting a policy "that amounted to the establishment of a quota, no matter what 'cloak of language' was . . . used by the Law School to disguise the fact from itself as well as from others").

benefits to all students by facilitating a more diverse student body. So long as a public college or university's admissions process is flexible enough that it considers *all* pertinent elements of diversity, rather than using race as a proxy for diversity, the consideration of race as one factor among many does not violate the Equal Protection Clause.[6]

II. "CONSIDERATION" OF RACE AND "PREFERENTIAL TREATMENT" ON THE BASIS OF RACE ARE DISTINCT CONCEPTS WHICH SHOULD NOT BE CONFLATED

Both the Sixth Circuit's *en banc* and panel decisions interpreted Proposal 2 as "eliminat[ing] the *consideration* of 'race, sex, color, ethnicity, or national origin' in individualized admissions decisions." *See Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 701 F.3d 466, 471 (6th Cir. 2012) (*en banc*) (emphasis added); *Coalition to Defend Affirmative Action v. Regents of University of Michigan*, 652 F.3d 607,

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[6] Applying these principles, ADL recently submitted a brief in support of the University of Texas at Austin in *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013). In ADL's view, the record in that case demonstrated that the university took an applicant's race into account only as part of a holistic review of applicants in which race was never a determinative factor in making an admissions decision, and, as such, ADL believed that the university's consideration of race as part of the admissions process was consistent with equal protection principles.

611 (6th Cir. 2011) (same). A plain language reading of Proposal 2, however, suggests that it does not bar the "consideration" of race. Instead, it bars the State of Michigan (and its public colleges and universities) from "discriminat[ing] against, or grant[ing] *preferential treatment* to, any individual or group on the basis of race, sex, color, ethnicity, or national origin . . . ." MICH. CONST. art. I, § 26 (emphasis added). ADL respectfully submits that the Sixth Circuit erred by failing to recognize a difference – supported by this Court's decisions – between "consideration" of race and "preferential treatment" on the basis of race. To the extent that this Court finds that the Sixth Circuit erred in failing to consider the difference between consideration of race and preferential treatment based on race, this case should be remanded to give the Sixth Circuit the opportunity to determine the scope of Proposal 2's ban on "preferential treatment" and the legal consequences thereof.

A. THERE IS A DISTINCTION BETWEEN THE CONSIDERATION OF RACE AS ONE FACTOR IN A HOLISTIC REVIEW OF A STUDENT'S APPLICATION AND THE CONFERRAL OF PREFERENTIAL TREATMENT ON THE BASIS OF RACE

There is a distinction between affirmative action programs that confer preferential treatment on the basis of race and programs that consider race as one of many non-determinative factors in a holistic approach to admissions decisions. This Court has struck down affirmative action programs that confer preferences based on race –

such as quotas and programs that provide extra points to minority applicants – while upholding programs that take race into consideration as one of many non-determinative factors in a holistic review of a student's application. *See, e.g. Grutter*, 539 U.S. at 334 ("[U]niversities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, *consider* race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant.") (emphasis added and citations omitted).

Racial quotas that set aside a number of seats for minority applicants, thereby barring applicants who are not members of a minority group from consideration for those seats, confer preferential treatment based on race. As Justice Powell explained in reference to the medical school's admissions process at issue in *Bakke*, such a quota system "*prefers* the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class." *Bakke*, 438 U.S. at 305 (emphasis added). Similarly, admissions practices that award points to members of minority groups without providing individualized consideration confer preferential treatment based on race. Under such an admissions system, students who belong to a particular racial group would automatically receive points unavailable to others, giving them an advantage.

By contrast, admissions practices that take race into consideration as one non-determinative factor among many in a holistic review of prospective students' applications do not necessarily confer preferential treatment based on race. Unlike admissions practices that provide points based on race, a program that considers race as one of many factors in a holistic review "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Grutter*, 539 U.S. at 337. In distinguishing between affirmative action programs that are constitutional and those that are not, "[t]he importance of this individualized consideration in the context of race-conscious admissions is paramount." *Id.* at 337 (citation omitted). This Court has explained it thus:

> [S]o long as a race-conscious admissions program uses race as a 'plus' factor in the context of *individualized consideration*, a rejected applicant 'will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname…His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Grutter, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318) (emphasis added).

In *Bakke* this Court considered whether admissions programs that take race into consideration as one of many factors are "simply a subtle and more sophisticated – but no less

effective – means of according racial preference" than the racial quotas at issue in that case. 438 U.S. at 318. The Court resoundingly rejected that suggestion, concluding that quota systems evince "[a] facial intent to discriminate," whereas "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." *Id.*

In a holistic review of individual applicants, in which the university takes into account all factors, giving each student the opportunity to demonstrate how his or her unique experiences will enhance the university's learning environment, students of all races, ethnicities, and backgrounds can compete fairly with one another. An admissions policy like the one at issue in *Grutter*, which considered race as only one non-determinative factor in a holistic review of students' applications, "can (and does) select non-minority applicants who have greater potential to enhance student body diversity over underrepresented minorities." 539 U.S. at 341. In other words, "[d]iversity does not 'prefer' anyone. . . . Diversity works to benefit all students, even if it might result in some applicants with lower SAT scores being admitted over those who did better on the test. A university does not predetermine who might be preferred by an admissions process seeking a racially diverse student body any more than the music school predicts which year violinists will have poor test scores." *See* Teresa A. Bingman & Daniel M. Levy, *More Fair to Whom?: Winners and Losers Post Proposal 2*, 91 MICH. B.J. 24, 28 (Jan. 2012). The Court has found these admissions practices to be constitutional. *See Fisher,* 133 S.Ct. at 2419.

With the limited exception of programs designed to remedy past institutional discrimination, admissions practices that confer preferential treatment based on race, including quotas and systems that award extra points to members of minority groups, have been found unconstitutional.[7] This Court has "never approved preferential classifications in the absence of proved constitutional or statutory violations." *Bakke*, U.S. 438 at 301-02. Simply put, "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307 (citations omitted). *See also Grutter*, 539 U.S. at 341 (finding "that 'there are serious problems of justice connected with the idea of preference itself'") (quoting *Bakke*, 438 U.S. at 298).

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[7] This Court has found the conferral of preferential treatment based on race to be constitutional only in the limited circumstance wherein a particular public institution has deliberately excluded minorities in the past. *See, e.g.*, *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 451 (1986) ("courts may utilize certain kinds of *racial preferences* to remedy past discrimination . . . ") (emphasis added and citation omitted); *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions.") (citation omitted).

B. PROPOSAL 2 CAN BE INTERPRETED AS BANNING PREFERENTIAL TREATMENT BASED ON RACE, RATHER THAN AS BANNING ALL CONSIDERATION OF RACE IN ADMISSIONS DECISIONS

Both the Sixth Circuit's *en banc* and panel decisions interpreted Proposal 2 as "eliminat[ing] the *consideration* of 'race, sex, color, ethnicity, or national origin' in individualized admissions decisions." *See Coalition*, 701 F.3d at 471 (emphasis added); *Coalition*, 652 F.3d at 611 (same). The Sixth Circuit appears to have made that assumption because Proposal 2 was created by activists who had previously opposed any consideration of race in admissions decisions. *See Coalition*, 701 F.3d at 471 (citing the fact that Proposal 2 was championed by "Jennifer Gratz, the lead plaintiff in *Gratz*"); *Coalition*, 652 F.3d at 610 (same).[8] The Sixth Circuit concluded that this case constituted "the latest chapter in the battle over the use of *race-conscious* admissions policies at Michigan's public colleges and universities," *Coalition*, 652 F.3d at 610 (emphasis added). *See*

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[8] *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting) ("inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters").

also Coalition, 701 F.3d at 470 (asserting that "[t]hese appeals are before us as an epilogue to the long-running battle over the use of *race-conscious* admissions policies at Michigan's public colleges and universities") (emphasis added).

The only evidence cited by the Sixth Circuit in support of its characterization of Proposal 2 as barring admissions policies that take race into consideration is the "Notice of State Proposals for November 7, 2006 General Election," which, according to the Sixth Circuit, characterized Proposal 2 "as a proposal 'to amend the State Constitution to ban affirmative action programs.'" *Coalition*, 701 F.3d at 471; *Coalition*, 652 F.3d at 610-11. However, the Sixth Circuit's citation of that notice was imprecise and potentially misleading. The notice in question made clear that Proposal 2 was – consistent with its language – a "proposal to amend the State Constitution to ban affirmative action programs *that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes*." *See* Notice of State Proposals for November 7, 2006 General Election, http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf, at 5 (last visited Aug. 27, 2013) (emphasis added). In other words, the notice in question made clear that Proposal 2 did *not* ban all forms of affirmative action – it only banned forms of affirmative action that "give preferential treatment."

A plain language reading of the statute supports the conclusion that Proposal 2 did not ban all forms of affirmative action, but rather only those forms of affirmative action that afford

preferential treatment to applicants based on race. By its terms, Proposal 2 bars the state and its state universities from "grant[ing] preferential treatment to any individual or group on the basis of race." MICH. CONST. art. I, § 26. On its face, it does not bar affirmative action programs that consider race but do not confer preferential treatment on the basis of race. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 72 P.3d 151, 163, 164, 166 (Wash. 2003) (*en banc*) (state constitutional ban on "preferential treatment" barred only "programs that promote a less qualified applicant over a more qualified applicant" and did not prevent the state from engaging in certain "race conscious" decision-making; rejecting plaintiff's argument that ballot initiative's language barring "preferential treatment . . . on the basis of race . . . in the operation of public education" operated to "bar any consideration of race whatsoever" because, *inter alia*, the plaintiff "would have us read the initiative as if the words 'shall not discriminate against, or grant preferential treatment to any individual or group on the basis of' did not exist, and instead substitute the word 'consider'").[9]

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[9] *See generally Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring) (citing the "venerable principle that if the language of a statute is clear, that language must be given effect"); *Bishop v. Linkway Stores, Inc.*, 655 S.W.2d 426, 428-29 (Ark. 1983) (refusing to construe a state constitutional amendment enacted by Arkansas voters through a referendum "to mean anything other than what it says" because "when a constitutional amendment or a statute is plain and unambiguous, there is no room left for judicial

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The Sixth Circuit assumed that Proposal 2 barred the use of all affirmative action programs, but "[w]hether an affirmative action program constitutes a preference is an assertion that has to be proved, not assumed." *See* Kimberle Crenshaw, *Playing Race Cards: Constructing A Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 211 (1999-2000); *see also* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1091 & n.46 (2009) (explaining that, as a general matter, "state anti-affirmative action laws do not impose an absolute ban on race-conscious action" and noting, in reference to the State of Michigan ballot initiative at issue here, that "[r]ace-based affirmative action is arguably permissible under [Proposal 2] so long as it does not constitute 'discrimination' or 'preferential treatment'") (citation omitted).

An analysis of the textual context of Proposal 2 also supports the interpretation that Proposal 2 only bans affirmative action programs that grant preferential treatment based on race. Proposal 2 groups "public education" in a list alongside "public employment" and "public contracting," thereby suggesting that these terms have something in common. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) ("When several nouns or verbs or adjectives or adverbs – any words – are associated in a context suggesting that the words

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construction, and neither the exigencies of a case, nor a resort to extrinsic facts will be permitted to alter the meaning of the language used").

have something in common, they should be assigned a permissible meaning that makes them similar. The [*noscitur a sociis*] canon especially holds that 'words grouped in a list should be given related meanings.'") (citation omitted). But this Court has recognized diversity as a compelling government interest, and permitted consideration of race to achieve diversity, only in "the unique setting of higher education." *See Gratz*, 539 U.S. at 271; *Parents Involved*, 551 U.S. at 721-22 ("The specific interest found compelling in *Grutter* was student body diversity 'in the context of higher education.'"). The fact that the reach of Proposal 2 extends well beyond the educational context suggests that it was not directed at barring the types of diversity-oriented affirmative action programs that this Court has permitted in the unique context of higher education. *See, e.g.*, *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1757, 1760 (2013) (interpreting a statutory term in light of its "statutory neighbors" and ruling that the term imposed a requirement "akin to that which accompanies application of the other terms in the same statutory phrase," citing *noscitur a sociis*).[10]

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[10] It is not entirely clear what (if anything) is barred by Proposal 2 that would not already be prohibited under this Court's precedents. This Court has permitted forms of affirmative action that give preferential treatment on the basis of race only in a very limited remedial context, what a plurality of the Court has referred to as an "extreme case." *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509 (1989); *see also id.* at 504-05 (permitting states to use racial preferences only when they "possess evidence that their

(Continued…)

The Sixth Circuit failed even to entertain the possibility that Proposal 2 should be interpreted to bar "preferential treatment" but not to bar all consideration of race in admissions decisions. *See, e.g.*, *Coalition*, 701 F.3d at 473 ("the sole issue before us is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions") (emphasis in original). For that reason, the case should be remanded to the Sixth Circuit so that it can determine in the first instance the scope of Proposal 2 and the legal consequences thereof. *See, e.g.*, *Fisher*, 133 S.Ct. at 2421 ("fairness to the litigants and the courts that heard the case requires that [the case] be remanded" so

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own spending practices are exacerbating a pattern of prior discrimination" and when they can "identify that discrimination, public or private, with some specificity;" "past societal discrimination alone can[not] serve as the basis for rigid racial preferences") (internal citations omitted). To the extent that the impact of Proposal 2 is to attempt to ban remedial affirmative action programs in that "extreme case," such a ban would raise grave constitutional concerns because it could prevent states from eradicating discrimination. *See, e.g.*, *id.* at 519 (Kennedy, J., concurring in part and concurring in judgment) (a race-conscious remedy "may be the *only adequate remedy* after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause") (emphasis added); *United States v. Paradise*, 480 U.S. 149, 174 (1987) (plurality opinion) (remedial affirmative action programs are "*necessary* to eliminate the effects of . . . past discrimination") (emphasis added).

that those courts can apply the correct mode of analysis in the first instance); *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 130 S.Ct. 2971, 2995 n.28 (2010) ("When the lower courts have failed to address an argument that deserved their attention, our usual practice is to remand for further consideration, not to seize the opportunity to decide the question ourselves."); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily 'do not decide in the first instance issues not decided below.'") (citations omitted).

III. TO THE EXTENT THAT THE COURT READS PROPOSAL 2 TO ENTRENCH IN THE STATE CONSTITUTION A BAN ON ANY CONSIDERATION OF RACE, IT IS UNCONSTITUTIONAL

Although ADL believes that the Sixth Circuit erred by conflating "consideration" of race with "preferential treatment" on the basis of race (*see supra* Sec. II), to the extent that the Court interprets Proposal 2's ban on "preferential treatment" to bar any consideration of race by public colleges and universities, the Sixth Circuit's determination that Proposal 2 violates the Equal Protection Clause should be affirmed.

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain[s] open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

Romer v. Evans, 517 U.S. 620, 633 (1996). Proposal 2, by "entrench[ing] [its] prohibition at the state constitutional level . . . prevent[s] public colleges and universities or their boards from revisiting this issue — and only this issue — without repeal or modification of article I, section 26 of the Michigan Constitution." *Coalition*, 701 F.3d at 471-72, 474.

As the Court made clear in *Hunter v. Erickson*, 393 U.S. 385, 393 (1969), "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size" (citations omitted). The Equal Protection concerns raised by *Hunter* are implicated whenever laws "differentiate[] between the treatment of problems involving racial matters and that afforded other problems in the same area." *See Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) (three-judge court)), *summarily aff'd*, 402 U.S. 935 (1971); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 480 (1982) ("By placing power over desegregative busing at the state level, . . . Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'") (citing *Lee*, 318 F. Supp. at 718). For these reasons, the court in *Lee* determined that a statute that "denie[d] appointed officials the power to implement non-voluntary programs for the improvement of racial balance" violated the Equal Protection Clause because the statute "treat[ed] educational matters involving racial criteria differently from other educational matters." *See Lee*, 718 F. Supp. at 715, 719.

So too here, Proposal 2 (to the extent that it is interpreted to bar any consideration of race) treats educational matters involving racial criteria differently from other educational matters. Prior to the enactment of Proposal 2, a citizen who wanted Michigan public educational institutions to change their admissions criteria could "lobby the admissions committees directly, . . . petition higher administrative authorities at the university, such as the dean of admissions, the president of the university, or the university's board[,] . . . seek to affect the election — through voting, campaigning, or other means — of any one of the eight board members whom the individual believes will champion his cause and revise admissions policies accordingly[,] [or] . . . campaign for an amendment to the Michigan Constitution." *Coalition*, 701 F.3d at 484. After the enactment of Proposal 2, however, all of those methods to attempt to change public educational institutions' admissions criteria remain possible for proposed changes that do not relate to race, but "race-conscious admissions policies" may only be changed through the most "expensive, lengthy, and complex" of those methods, an amendment to the State Constitution. *See id.* As such, "[b]y amending the Michigan Constitution to prohibit university admissions units from using even modest race-conscious admissions policies, Proposal 2 thus removed the authority to institute any such policy from Michigan's universities and lodged it at the most remote level of Michigan's government, the state constitution." *See id.*

To the extent that Proposal 2 is interpreted to entrench in the state constitution a ban on the use of even modest race-conscious admissions

policies by public colleges and universities, it violates the Equal Protection Clause.

* * *

CONCLUSION

For the foregoing reasons, insofar as Proposal 2 by its terms bans "preferential treatment" on the basis of race, not "consideration" of race, the Court should remand this case to the Sixth Circuit and should not reach the issue of whether a state may, consistent with the Equal Protection Clause's political-process doctrine, enshrine in its state constitution a ban on the consideration of race by public educational institutions. However, to the extent that the Court interprets Proposal 2 to bar all race-conscious admissions policies by public educational institutions, Proposal 2 deprived the respondents of equal protection of the law by making it more burdensome to change admissions policies that are racial in nature than to change other admissions policies, and the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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