No. 12-682

In the

Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state violates the Equal Protection Clause by amending its constitution to prohibit both discrimination and preferential treatment on the basis of race or sex in public-university admissions decisions.

TABLE OF CONTENTS

QUESTION PRESENTED.......................................i

TABLE OF AUTHORITIES.................................... iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT...................................3

ARGUMENT 7

I. The Sixth Circuit Erred in Holding MCRI To Be a Constitutional Violation. 7

A. The Logic of *Hunter* and *Seattle School District* Can Be Applied Only to Laws That Promote Discrimination, Not Laws That Forbid It. 9

B. All Laws Work a "Political Re-Structuring" of the Kind the Sixth Circuit Condemns; That May Be Among the Reasons This Court Has Quietly Declined To Follow *Hunter* Even in Cases in Which It Arguably Could Be Applied. 12

C. The Sixth Circuit's Notion That Questions of Preferential Treatment for Racial Minorities Must Be Left At a Low Level of Government Is Contrary to Law and the Political Theory of the Nation's Founders. 16

II. Voter Initiatives Like MCRI Hold the Key to Improving the Academic Success of Under-Represented Minority Students. 22

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)....7, 8

Anderson v. Martin,
375 U.S. 399 (1964)....11

Buchanan v. Warley,
245 U.S. 60 (1917)....17

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488 U.S. 469 (1989)....12, 17

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122 F.3d 692 (9th Cir. 1997)....4, 8

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473 F.3d 237 (6th Cir. 2006)....8

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235 P.3d 947 (Cal. 2010)....4, 8

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Gratz v. Bollinger,
539 U.S. 244 (2003)....12, 22

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

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320 U.S. 81 (1943)..7

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393 U.S. 385 (1969).......................................passim

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388 U.S. 1 (1967)...7

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373 U.S. 244 (1963)..17

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438 U.S. 265 (1978)..12

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517 U.S. 620 (1996)..................................13, 14, 15

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Cal. Const. Art. I, § 31......................................passim

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Rules

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6...1

INTEREST OF AMICI CURIAE[1]

An affiliate of the National Association of Scholars, the California Association of Scholars ("CAS") is an organization devoted to higher education reform. It is committed to rational discourse as the foundation of academic life in a free and democratic society.

Many CAS members have been active in the various campaigns to pass voter initiatives that prohibit state-sponsored discrimination on the basis of race, color, sex, ethnicity or national origin—especially in the original campaign for the California Civil Rights Initiative (known as "CCRI" or "Proposition 209"), codified at Cal. Const. Art. I, § 31. Indeed, it would not be an exaggeration to say that CAS was the soil from which the idea for CCRI and its progeny sprang.

The Michigan Civil Rights Initiative, Mich. Const. Art. I, § 26 ("MCRI"), which is the subject of this lawsuit, is among CCRI's progeny. The texts of both initiatives are nearly identical. Both prohibit their respective states 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 …." Among other

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

things, they prohibit state colleges and universities from engaging in race-preferential admissions.

The experience of CAS's members puts it in a useful position to inform the Court about the legal issue presented in this case, which has been raised and resolved in CCRI's favor by both the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court of California. See *infra* at Section IA.

Moreover, CAS is in an especially useful position to inform the Court about the importance of this case. As a result of the *en banc* decision of the U.S. Court of Appeals for the Sixth Circuit, the movement to pass voter initiatives that prohibit state-sponsored discrimination of this kind has come to a near standstill. Already-existing initiatives have been placed in legal jeopardy.

This threatens to put the cause of higher education reform back several decades. There is now considerable evidence of the positive effects these initiatives have on the education of affirmative action's so-called beneficiaries. See *infra* at Section II. CCRI in particular has been the subject of significant empirical research since its passage in 1996; CAS is in an excellent position to bring this research to the Court's attention. This evidence is crucial to understanding how, for good or ill, the Court's decision in this case will strongly affect the future of American higher education and of the academic success of minority students in particular.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to advocate for

the principles of the American founding. The CCJ advances that mission through participation in the litigation of cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake.

Reason Foundation ("Reason") is a nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation ("IRF") was founded in 1993. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

SUMMARY OF ARGUMENT

Amici believe that the Petitioner's argument is in keeping with the legal profession's admirable traditions of restraint and civility. Yet, the decision below is a travesty of justice, and the task of calling it just that must fall to someone. Your ordinarily mild-mannered and forbearing *Amici* are not noted for a tendency toward hyperbole. When we call something a travesty of justice, as we do here, it is because we view it as exactly that.

In 2006, a strong majority of Michigan voters elected to adopt MCRI. These voters took to heart MCRI's core provisions concerning the need for

state and local governments, including state colleges and universities, to refrain from preferential treatment on the basis of race, sex, color, ethnicity, or national origin.

The Sixth Circuit's conclusion that a provision that bans race discrimination is unconstitutionally racially discriminatory is profoundly counter-intuitive. When the same argument was made with respect to CCRI, California's then-Attorney General Dan Lungren called it "Alice in Wonderland." George Skelton, *Making a Case that the People Have Spoken*, Los Angeles Times (December 16, 1996). And indeed, it has been rejected twice in California. See *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coral Construction, Inc. v. City of San Francisco*, 235 P.3d 947 (Cal. 2010).

But that is only one among many problems with the Sixth Circuit's decision. For reasons *Amici* will elaborate upon at greater length below, the principal case upon which majority relies—*Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) ("*Seattle School District*")—in fact provides, by its own admission, no support at all. See *infra* at Section IA. In this summary, it is enough to point out that *Seattle School District* was a 5-to-4 decision and that the one and only thing that all nine members agreed upon was that the argument adopted by the Sixth Circuit should be rejected.

In his dissent, Justice Powell expressed fear that the logic of the majority's decision could lead to absurd results. Significantly, the absurd result that he envisioned is precisely what the Sixth Circuit has now embraced:

> [I]f 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 higher authority traditionally dictated admissions policies …. 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 components of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

Seattle School District, 458 U.S. at 499 n.14 (Powell, J. dissenting, joined by three other Justices).

The majority denied Justice Powell's assertion and made it clear that their intent was emphatically not to cover laws like MCRI: "These statements evidence a basic misunderstanding of our decision …. It is evident … *that the horribles paraded by the dissent* … are entirely unrelated to this case." *Id.* at 480 n.23 (specifically referencing Justice Powell's note 14, emphasis added).

Note Justice Powell's hypothetical: It is precisely what happened in this case. The "affirmative action plan" of a "state law school" "came under fire." When this Court declined to take action in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a "higher authority"—the people of Michigan—intervened. Note also that the majority rejected Powell's concerns as a "parade[ ]" of "horribles" that were "entirely unrelated to this case." No one would claim that the

limiting principle behind *Seattle School District* is easy to discern from the majority opinion. But the one thing that all Justices agreed on is that it would be absurd to outlaw measures like MCRI.

What should be clear is that neither *Seattle School District* nor *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), the case upon which it was based, was intended to apply to laws that *forbid* race discrimination (as opposed to *facilitate* race discrimination). See *infra* at Section IA. Significantly, if the political re-structuring logic employed in those cases were applied to laws that forbid race discrimination, it would likely find them all unconstitutional. See *infra* at Section IB. The Sixth Circuit's notion that decisions regarding racial preference must be made at low governmental levels rather than in state constitutions is unsupported by law and insupportable under our legal traditions. See *infra* at Section IC.

It would be especially unfortunate if the Sixth Circuit's decision were allowed to stand given the considerable evidence that initiatives like MCRI work to improve the academic performance and graduation rates of minority college students. They also increase the number of minority students who major in science and engineering and who go on to advanced degrees in graduate and professional school. See *infra* at Section II. This is not just the wishful thinking of theoreticians. All of this happened in California following CCRI's passage. The Sixth Circuit's decision has put a cloud over one of the few bright spots in education today. *Amici* hope the cloud will be lifted as swiftly and unequivocally as possible.

ARGUMENT

I. The Sixth Circuit Erred in Holding MCRI To Be a Constitutional Violation.

Anyone who argues that the Equal Protection Clause of the U.S. Constitution actually forbids voters from prohibiting their state from engaging in discrimination based on race faces an uphill battle. The "'central purpose'" of the Equal Protection Clause "'is the prevention of official conduct discriminating on the basis of race.'" *Seattle School District*, 458 U.S. at 484 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *see also Hunter*, 393 U.S. at 391 ("[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinction based on race."); *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Ex Parte Virginia*, 100 U.S. 339, 344-45 (1879); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879); *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872). This purpose is born out of both the racial equality ideal and a recognition of the destructive effect of its rejection. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society").

Indeed, at least four members of this Court over the past several decades—Justices Douglas, Stewart, Scalia, and Thomas—have taken the position

that the Equal Protection Clause is a flat ban on race discrimination. *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting); *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). For the Sixth Circuit to be right, these justices would have to be not just wrong, but very wrong. The Constitution would have to protect specially the very thing that they believed it prohibited.

Two courts have already rejected precisely the argument the Sixth Circuit now embraces. See *Coalition for Economic Equity*, 122 F.3d at 692; *Coral Construction*, 235 P.3d at 947.[2] Judge O'Scannlain put the point well in *Coalition for Economic Equity*: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." 122 F.3d at 709. "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Id.* at 702. As this Court has previously recognized, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982).

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[2] In addition, the same argument was rejected by a Sixth Circuit panel when this case came up at the preliminary injunction stage. See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

A. The Logic of *Hunter* and *Seattle School District* Can Be Applied Only to Laws That Promote Discrimination, Not Laws That Forbid It.

The core of the Sixth Circuit's decision to the contrary appears to be this: By enshrining a policy against race discrimination in a state constitution, that state is discriminating against racial minorities who might wish to lobby the state legislature, a state agency or a local government for preferential treatment based on race. Other interest groups—veterans, public employees, etc.—can lobby a governmental entity for special treatment without restraint. But a racial group can do so only if it first successfully lobbies to repeal the state constitutional provision. Such a "political restructuring" is unconstitutional race discrimination—or so the Sixth Circuit held.

In arriving at its decision, the Sixth Circuit relied on the so-called "political re-structuring" cases—*Hunter* and *Seattle School District*. Attempting to apply those cases to MCRI, it held that individual state colleges and universities are the traditional decision-makers on matters of admissions policy. Because MCRI makes it impossible for racial minorities, but not tennis players, to lobby these schools for preferential treatment based on race, its adoption constitutes unconstitutional race discrimination.

This reflects a fundamental misunderstanding of the Constitution and MCRI. MCRI does not discriminate against racial minorities. It discriminates against *race discrimination*—just like the doctrine of strict scrutiny discriminates against

race discrimination. Members of racial minorities are as free as anyone (including members of racial majorities) to lobby for preferential treatment. They just can't lobby for it based on their race. Nor can they be disadvantaged on those bases. MCRI is a two-way street.[3]

Hunter provides no support for the Sixth Circuit's holding, since the initiative at issue there did not prohibit state discrimination, but rather encouraged private race discrimination among private citizens. By repealing a local fair housing ordinance and making its re-promulgation difficult, the

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[3] The Sixth Circuit apparently believes that racial minority members are already protected against discrimination in college and university admissions and hence MCRI has only downside potential for them. As Asian American applicants know only too well, this is untrue. See Thomas Espenshade & Alexandria Walton Radford, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009) (noting large disparities between the academic credentials of Asian Americans who are offered admission to elite schools and other such applicants). Indeed, diversity admissions policies have potential downsides for all groups, including African Americans and Hispanics. Under *Grutter*, a college or university may discriminate on the basis of race in order to reap whatever educational benefits racial diversity may have for its students. A state institution that is largely African American (as historically black colleges and universities frequently are) is thus presumably free to discriminate in *favor* of whites and *against* African Americans. MCRI on the other hand would prevent that. Interestingly, in the area of sex, non-traditional affirmative action preferences for men have become common. See Gail Heriot & Alison Somin, *Affirmative Action for Men?: Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 Engage 14 (2011). MCRI would protect against that too—as well as against other shifts in political and constitutional fashion.

charter amendment at issue in *Hunter* thwarted the city of Akron's efforts to discourage racial discrimination by private citizens, thereby lending aid and encouragement to those private discriminators.

Seen in this light, *Hunter* resembles a less controversial case, *Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson*, this Court struck down a Louisiana law requiring that election ballots specify each candidate's race. Like the charter amendment in *Hunter*, the Louisiana statute was facially neutral, although it explicitly dealt with race. Like *Hunter*, the Louisiana statute's purpose appeared to be sinister: It appeared to be intended to facilitate voters' private racial animosity and thereby reduce the number of African Americans elected to office. In both cases, the Court's decision is best viewed as an attempt to prevent states from affirmatively encouraging its citizens to engage in racial discrimination.

Seattle School District, too, involved a voter initiative that attempted to facilitate private discrimination rather than end public discrimination. The school board in that case had adopted mandatory school busing in order to alleviate the problem of racial isolation brought on by decades of private housing discrimination. The initiative in that case prohibited school districts from assigning students to a school that is not the closest (or next closest) to the student's home unless exceptional reasons applied. The exceptional reasons did not include a desire to integrate the schools or to reduce the incentives for individuals to discriminate in the sale and rental of homes. Like the initiative in *Hunter*, *Seattle School District*'s *initiative* was not a prohi-

bition on race discrimination. To the contrary, it was intended to shore up Seattle's segregated housing patterns and thus to facilitate private discrimination and allow its effect to continue long into the future.

MCRI is in no way intended to encourage either public or private race discrimination; nor will it encourage such. Instead, it is a strong ban on state-sponsored discrimination. Neither *Hunter* nor *Seattle School District* has any application, therefore. It should be noted that no one seriously claims that the kind of race discrimination MCRI prohibits is constitutionally justified as a remedy for past discrimination. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of University of California v. Bakke*, 438 U.S. 265, 307-10 (1978) (Opinion of Powell, J.) (rejecting societal discrimination as a permissible justification for race-preferential admissions policies).

B. All Laws Work a "Political Re-Structuring" of the Kind the Sixth Circuit Condemns; That May Be Among the Reasons This Court Has Quietly Declined To Follow *Hunter* Even in Cases in Which It Arguably Could Be Applied.

If MCRI works a "political re-structuring," then all laws do, no matter what level at which they are promulgated. Take, for example, the Equal Credit Opportunity Act, Pub. L. 94-239, 90 Stat. 251 (1974). Under its provisions, 15 U.S.C. sec. 1691 *et seq*., it is illegal to discriminate on the basis of race in the provision of credit. When Congress passed that law in 1974, it effectively pre-empted the

Michigan legislature from passing legislation that might have required banks to give African Americans credit at preferential rates. If African Americans in Michigan had wanted such a statute, they would have been required to first lobby to repeal the federal legislation that mandates equality.

That would not end the matter. In turn, if the Michigan legislature had enacted a mandatory one-point preferential rate, it would have pre-empted a state agency from adopting regulations requiring lenders to give African Americans a two-point preferential rate. Again, repeal would be necessary to secure the greater advantage. Indeed, since lenders traditionally set their own rates, this argument could continue to still lower levels of government. See also Gail Heriot, *California's Proposition 209 and the United States Constitution*, 43 Loy. L. Rev. 613 (1998) (making this same argument using fair housing laws as the example); Gail Heriot, *The University of California Under Proposition 209,* 6 Nexus 163 (2001) (symposium issue) (same).

In the end, one would be hard-pressed to come up with a single enactment concerning race relations that would not violate the Sixth Circuit's interpretation of *Hunter* and *Seattle School District*. Even the doctrine of strict scrutiny itself is unconstitutional under it.

It is thus no wonder that this Court has shied away from such a broad application of *Hunter*. In the most recent case that potentially concerned the issue, *Romer v. Evans*, 517 U.S. 620 (1996), this Court conspicuously avoided reliance on *Hunter*. *Romer* concerned Colorado's Amendment 2, which repealed ordinances that prohibit discrimination

based on "homosexual, lesbian or bisexual orientation" and prohibited future legislation designed to ban discrimination on that basis. In contrast to the case at bar, therefore, *Romer*'s facts were reasonably analogous to *Hunter*'s. A Colorado trial court issued a preliminary injunction against the enforcement of Amendment 2 and the Colorado Supreme Court affirmed relying on *Hunter* and *Seattle School District*. In affirming those courts, this Court explicitly stated that it was relying "on a rationale *different* from that adopted by the State Supreme Court" and cited the two cases only in describing the decisions below. *Romer,* 517 U.S. at 624 (emphasis added). Justice Kennedy, writing for the majority, instead relied upon the conclusion that "the amendment seems inexplicable by anything other than animus." *Id.* at 632.

Justice Scalia explained in his dissent why the "political landscape alteration" rationale in *Hunter* would be an unsuitable foundation for the Court's decision:

> [I]t seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e. by that state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors ….

> Once such a law is passed, the group composed of relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection ….
>
> The same 'rational basis' (avoidance of corruption) which renders constitutional the substantive discrimination against relatives … also automatically suffices to sustain what might be called the electoral-procedural discrimination against them …. [A] law that is valid in its substance is automatically valid in its level of enactment.

Romer, 517 U.S. at 630-31 (Scalia, J., dissenting).

The majority in *Romer* evidently took Justice Scalia's criticisms to heart, since the majority opinion relied on an animus theory rather than on *Hunter*. *Romer* thus has no application to this case. Even the originators of the political re-structuring argument against CCRI, law professors Evan Caminker and Vikram Amar, concede that an argument against the initiative based on racial animus would be inappropriate.[4]

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[4] See Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1023 (1996) ("Such a showing of invidious intent or motive behind … CCRI would, we feel, be very hard to make"). The authors cite several non-invidious reasons that could motivate a voter to support CCRI from notions of fundamental fairness to concerns for economic efficiency to a desire to avoid stigmatizing affirmative action beneficiaries.

C. The Sixth Circuit's Notion That Questions of Preferential Treatment for Racial Minorities Must Be Left At a Low Level of Government Is Contrary to Law and the Political Theory of the Nation's Founders.

The Sixth Circuit's decision takes the novel position that since admissions policy-making is generally entrusted to individual state colleges and universities, the discretion to grant *Grutter*-style preferential treatment must also reside with them—and not with the state constitution. Of course, MCRI also bans preferential treatment in public contracting and public employment. Since municipalities generally have the authority to grant municipal contracts and sanitation districts generally hire staff, presumably the same conclu-

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No fair-minded CCRI opponent argues that it was motivated primarily or even substantially by malice. While no statewide election has ever been conducted anywhere in which no voter was motivated by malice, those who supported CCRI overwhelmingly did so conscientiously. Presidential candidate Robert Dole, Governor Pete Wilson, and a host of other officeholders endorsed it, as did newspapers like the San Diego Union Tribune, the Orange County Register, UCSD's Daily Guardian, and San Diego State University's Daily Aztec. It is difficult to imagine that they were all simply spewing hatred. Indeed, CCRI could not have passed without millions of votes from women and minorities—the very persons that its opponents argued would be victimized by it. Also among the newspapers that endorsed CCRI was UC-Berkeley's Daily Californian—although few Berkeley students heard about it. In the early hours of the morning on Election Day, CCRI opponents collected the papers from the various campus locations where they are made available for pick up and threw them out. *Daily Cal Stolen Off Racks–Prop. 209 Cited*, San Francisco Chronicle at B2 (Nov. 6, 1996).

sion would have to hold: The discretion to grant any constitutionally-permissible racial preferences would have to reside with them, not with the state constitution.

This would be an unusual argument even if race were not involved. How Michigan chooses to allocate policy-making authority among its subdivisions is ordinarily a matter for Michigan law. It is rare to suggest the Constitution has anything to say about it. Indeed, the Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively or to the people." U.S. Const., Amend X. Nowhere in the Constitution are powers reserved to state universities, municipalities or sanitation districts.

To apply the Sixth Circuit's sub-State/local approach in the context of race is, however, entirely misguided and ahistorical. While Pitchfork Ben Tillman and Bull Connor might be appreciative, the nation has generally adopted a different path. See U.S. Const. Amend XIV. Indeed, the local or agency level is often the worst place to let racial issues be decided. *See, e.g., Croson*, 488 U.S. 469; *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

For almost 150 years, it has been the policy of the American people that the primary legal authority on issues of state-sponsored race discrimination is the Fourteenth Amendment's Equal Protection Clause—part of the highest law of the land, not the lowest. It is because of the Equal Protection Clause that Jim Crow policies adopted by States, state

agencies and local governments are now consigned to the dustbin of history.

The Sixth Circuit apparently takes the position that because the Equal Protection Clause has been held not to forbid *Grutter*-style race discrimination, race-based admissions policies must now be given the "hands off" treatment by state constitutions. What a slim majority viewed as barely (and only temporarily) constitutional, and what four justices of this Court viewed as entirely unconstitutional, is thus elevated to protected status.

Under the Sixth Circuit's logic, when this Court decides that the Equal Protection Clause does *not* prohibit some racially discriminatory activity of a state subdivision, that decision effectively preempts the field at all levels except the lowest. Among the many faults of such an approach is the likelihood that it will chill the victims of race discrimination by state subdivisions from asserting their constitutional rights in court. If they lose, they may lose their right to seek redress of their grievance at a higher state level.

The Sixth Circuit's approach is particularly troubling when viewed alongside Madison's Federalist No. 10—perhaps the most significant essay on political theory in American history. In it, Madison famously explained that one of the advantages of a larger polity over a smaller one is its ability to overcome special interests (or as he called them "factions"). Madison wrote:

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed

> than its tendency to break and control the violence of faction.

Federalist No. 10 at 77 (Madison) (Rossiter ed. 1961).

"By a faction," Madison wrote, "I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* For example, at various points in Madison's own lifetime, rice planters may have virtually owned the South Carolina low country, mercantile interests may have ruled the roost in Boston, and various religious denominations may have dominated one region, state or locality or another. But no such "faction" could dominate at the national level—at least not for long. In Madison's view, only through the creation of fragile coalitions of special interests could activities manifestly contrary to the public interest be undertaken at the national level.

Madison was no political naïf. He knew that special interests could do some serious damage to the public interest at the national level too. But doing so would take a great deal of effort. Back at the local level, it might be accomplished all too easily.

Federalist No. 10 did not specifically address race or ethnicity. Nevertheless, they are perhaps the most noxious forms of special interest—not just in this country but around the world. It is thus fortunate that they are a special concern of the Equal Protection Clause. *Cf. Strauder*, 100 U.S. at 307-08

(stating that race is the special concern of the Fourteenth Amendment).

Too often in American history political bosses have been able to operate a racial and ethnic spoils system at the local level and sometimes at higher levels too. See Steven P. Erie, RAINBOW'S END: IRISH AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840-1985 (1990). The Equal Protection Clause, at least as it was interpreted then, was often insufficient to put them under control. Instead, reforms of these urban political machines were often imposed from the state level. See, e.g., Michael H. Ebner & Eugene M. Tobin, eds., THE AGE OF URBAN REFORM: NEW PERSPECTIVES ON THE PROGRESSIVE ERA (1977). MCRI fits into this tradition.

Michigan is surely a large polity within the meaning of Federalist No. 10; the University of Michigan is a small one. It is worth pointing out that Michigan has roughly twice the population today that the United States had in 1790. Special interests can dominate in Michigan's numerous city councils, faculty senates, county boards and administrative agencies, but they cannot dominate the initiative process except with great effort—greater than that necessary to dominate the legislature. As a result, the process has functioned for a century as a useful counterweight to the considerable power of elected and appointed public officials.

One of the virtues of the process is the fact it cannot be easily or quickly employed, and hence is difficult to enlist in the cause of passion or parochial interest. According to the Initiative and Referendum Institute at the University of Southern Cali-

fornia, between the years 1914 and 2000, only 60 statewide initiatives were placed on the Michigan ballot, and only 20 passed.[5] The state constitution prescribes the formula for determining how many signatures are necessary for constitutional amendments as "10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected." Mich. Const. Art. XII, sec. 2. Signatures must be collected in person by signature gatherers, submitted at least 120 days prior to the election and verified by the appropriate state agency. *Id.* All in all, the process has been a vehicle for sober and dispassionate reform.[6] *Amici* regard its record as better

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[5] See Initiative and Referendum Inst., Statewide Initiative Usage [Mich. 1914-2000], available at http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Michigan.pdf.

[6] This is not to say that MCRI's opposition was always sober and dispassionate. See, e.g. Editorial, *From the Daily: Embarrassment*, The Michigan Daily (October 31, 2006) (condemning the tactics of Respondent Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary as "alienating and inflammatory," including "pull[ing] more than 1,000 middle and high school students out of class to bus them in for the rally," some of whom engaged in "spitting and yelling" at opponents); Associated Press, *Election Board Fails to Put Affirmative Action Issue on Ballot*, The Michigan Daily (Dec. 14, 2005) (describing out-of-control crowd of 250 high school students, brought in by Respondent Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary, who overturned a table at a public meeting of the Board of State Canvassers while surging towards the board members and chanting "'They say Jim Crow, we say hell no!'"). But these tactics were not

than that of the Michigan legislature—and it is difficult to argue that it is not at least as good.

II. Voter Initiatives Like MCRI Hold the Key to Improving the Academic Success of Under-Represented Minority Students.

For years, colleges and universities operated under the assumption that when they engaged in affirmative-action preferences in admissions, minority students were receiving a valuable benefit. The evidence indicates, however, that this is error. The recipients of preferences must often struggle to succeed at institutions where their entering academic credentials put them well below that institution's median. Many are worse off.

How can this be? No one should be surprised to learn that affirmative action beneficiaries tend to earn low grades at the colleges and universities that recruit them. While some students will outperform their entering academic credentials just as some students will under-perform theirs, most students perform in the general range that their entering credentials suggest. See, e.g., Gail Heriot, *The Sad Irony of Affirmative Action*, 14 National Affairs 78 (Winter 2013); Richard H. Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012) ("MISMATCH"). Even affirmative action advocates concede that minority student grades are "startlingly low." See Ian

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unique to the initiative context. See Jordan Schrader, *BAMN Defends Purpose*, The Michigan Daily (Feb. 11, 2002) (reporting tactics in connection with *Grutter* and *Gratz* litigation).

Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807, 1807 (2005) (referring to first-year law-school grades).

What some do find surprising is that students who attend a more prestigious school on a preference (and who hence earn low grades) have been repeatedly shown to be less successful than students with precisely the same entering academic credentials who attend a school where those entering credentials put them at or somewhat above the median (and who hence earn higher grades). The so-called "beneficiaries" of affirmative action are less likely to graduate than their academic peers attending somewhat less prestigious schools. MISMATCH at 106-08. They are less likely to graduate with a degree in science and engineering. *See, e.g.*, Rogers Elliott, *et al.*, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681, 692-93 (1996). In law schools, they are less likely to graduate and pass the bar. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). They are less likely to aspire to become college professors. *See* Stephen Cole & Elinor Barber, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH ACHIEVING MINORITY STUDENTS (2003).

Nevertheless, all is not lost—not yet anyway. While CCRI has been consistently opposed by university administrators, it has been a shining example of how these problems can be turned around. To begin with, CCRI greatly increased the academic performance of under-represented minority stu-

dents—*i.e.* it has increased the rate at which they earn honors and decreased the rate at which they wind up in academic jeopardy.

Take, for example, the case of the University of California at San Diego ("UCSD")—a highly selective institution, but not quite as selective as the UC's Berkeley campus. *Amici* have firm data on UCSD. In 1997, only one African-American student at UCSD had a freshman-year GPA of 3.5 or better—a single African-American honor student in a freshman class of 3,268. In contrast, 20 percent of the white students had such a GPA. Failure rates were similarly skewed. Fully 15 percent of African-American students and 17 percent of American Indian students at UCSD were in academic jeopardy (defined as a GPA of less than 2.0), while only 4 percent of white students were. Other under-represented minority students hovered close to the line.[7] *See* Gail Heriot, *The Politics of Admissions in California,* 14 Academic Questions 29 (2001).

This was not because there were no other African-American students capable of doing honors work at UCSD. The problem was that such students were often at Stanford or Berkeley, where often they were not receiving honors. Similarly, white students were not magically immune from failure. But those who were at high risk for it had not been admitted in the first place. Instead, they

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[7] Since UCSD didn't keep separate statistics for those minority students who needed a preference in order to be admitted and those who would have been admitted regardless, it is impossible to say exactly how high the failure rate was for preference beneficiaries in particular.

were at less competitive schools where their performance was more likely to be acceptable. *Id.*

Then came CCRI. CCRI went into effect in time to affect the undergraduate admissions decisions for the entering class of 1998, causing Berkeley's offers of admission to African Americans, Hispanics and American Indians to go from 23.1 percent of the total offers to 10.4 percent. *Id.*

Of course, the minority students who would have attended Berkeley in the past had not simply vanished. They had been accepted to somewhat less highly ranked campuses–often UCLA and UCSD–based on their own academic record rather than race. In turn, students who previously would have been admitted to UCLA or UCSD on a preference had usually been admitted to somewhat less competitive UC campuses. UC-Riverside and UC-Santa Cruz both posted impressive gains in minority admissions. At Riverside, for example, Black and Latino student admissions shot up by 42 percent and 31 percent respectively. UCSD reported mixed results. Black enrollment there was down 19 percent, but Filipino and Latino enrollment was up by 10 percent and 23 percent. *Id.*

At UCSD, the performance of Black students improved dramatically. No longer were African-American honor students a rarity. Instead, a full 20 percent of the African-American freshmen were able to boast a freshman-year GPA of 3.5 or better. That was higher than the rate for Asians (16 percent) and extremely close to that for whites that year (22 percent). Suddenly African-American students found themselves on a campus where achiev-

ing academic success was not just a “white thing” or an “Asian thing.” *Id.*

The sudden collapse in minority failure rate was even more impressive. Once racial preferences were eliminated, the difference between racial groups all but evaporated at UCSD, with Black and American Indian rate falling to 6 percent. Consequently, average GPAs converged. UCSD’s internal academic performance report announced that while overall performance has remained static, “underrepresented students admitted to UCSD in 1998 substantially outperformed their 1997 counterparts” and “the majority/majority performance gap observed in past studies was narrowed considerably.” *Id.*

“Narrowed” was an understatement. The report found that for the first time “no substantial GPA differences based on race/ethnicity.” A discreet footnote makes it clear that the report’s author knew exactly how this happened: 1998 was the first year of color-blind admissions. *Id.*

Granted, UCSD had twelve fewer African-American freshmen in the first year of CCRI's implementation, forced as it was to reject students who did not meet its regular academic standards. But it also had seven fewer African-American students with a failing GPA at the end of that year. Meanwhile, those twelve students probably attended a school where their chances of success were greater. *Id.*

Some argued that CCRI would discourage qualified minorities from even applying to the UC system. But the evidence shows just the opposite. Af-

rican-American and Hispanic students with competitive academic credentials were actually *more* likely to apply to the UC once CCRI went into effect. *See* David Card & Alan Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 416 Indus. Lab. Rel. Rev. 58 (2005); *see also* MISMATCH at 131-42 (arguing that Card & Krueger's methodology may have *understated* CCRI's "warming effect" on applications by competitive minority students).

CCRI's critics have been loath to admit it, but the big news following CCRI's implementation was skyrocketing minority graduation rates. As Sander & Taylor reported:

> Minority graduation rates rose rapidly in the years after [CCRI], and on-time (four-year) graduation rates rose even faster. For the six classes of black freshman who entered UC schools in the years before race-neutrality (i.e., the freshman classes of 1992 through 1997), the overall four-year graduation rate was 22 percent. For the six years after [CCRI's] implementation the black four-year graduation rate was 38 percent. Thus, even though the number of black freshman in the UC system fell almost 20 percent from 1997 to 1998, the number of black freshman who obtained their degrees in four years barely dipped for this class,[8] and the en-

[8] Note that the black students who didn't attend the UC once race preferences were eliminated almost certainly attended another college or university. Their numbers should be added to the total, which would bring the number of total black graduates higher.

> tering class of 2000, four years later, a record number of blacks graduating on time.

MISMATCH at 146.

Not all of this astonishing increase is provably traceable to CCRI. But Duke University researchers have found that about 20% of the overall increases in graduation rates of UC minority students is. And if CCRI had been implemented with greater rigor, it would have contributed even more. *See* Peter Arcidiacono, *et al.*, *Affirmative Action and University Fit: Evidence from Proposition 209*, Nat'l Bur. of Econ. Res. Working Paper No. 18523 (November 1, 2012). In a world in which steps forward in education, when they occur at all, are rare and incremental, that is a stunning victory.

And it is not just grade-point averages and graduation rates. Between 1997 and 2003, the number of African-American and Hispanic students graduating with a degree in science or engineering rose by about 50%. Not unrelatedly, the number of African-American and Hispanic students majoring in ethnic studies and communications fell by 20%. MISMATCH at 150-54. Academic self-confidence was growing among minority students.

Note the Triple Crown: (1) Grade-point averages of under-represented minority students and (2) graduation rates of such students were improving at the same time that (3) they were increasingly majoring in science and engineering. Ordinarily, these three goals would be difficult to achieve at the same time. For example, grading curves are traditionally lower in science and engineering departments than they are in the rest of the universi-

ty, so it is remarkable that grade-point averages would be going up alongside increases in the number of science and engineering majors. Combine those victories with an increase in graduation rates. When graduation rates increase it is generally because some weaker students, who might have dropped out in an earlier time, are managing to make it to the end. One would thus expect increasing graduation rates to have a depressive effect on grade-point averages and/or on the proportion of students majoring in science and engineering. But instead improvements were made in all three areas. It is as if Ford had come up with a new automobile that was both more luxurious and better on gasoline mileage—and cheaper too.

Why is all this evidence being ignored by affirmative action advocates? Perhaps Leo Tolstoy has some wisdom to impart on this subject:

> I know that most men, including those at ease with problems of the greatest complexity, can seldom accept even the simplest and most obvious truth if it be such as would oblige them to admit the falsity of conclusions which they have delighted in explaining to colleagues, which they have proudly taught to others, and which they have woven, thread by thread, into the fabric of their lives.

MISMATCH at x (quoting Leo Tolstoy).

To be sure, over the years since then, the UC has developed techniques that allow it to circumvent CCRI in part while still enabling it to argue publicly that it is in compliance. As a result, its

benefits have been diluted somewhat. But it has not eliminated them. As long as CCRI remains the law, there is reason for optimism. Students in Michigan should not be denied the same opportunities that MCRI offers to them.

CONCLUSION

The "parade[ ]" of "horribles" scoffed at by the majority in *Seattle School District* is alive and well and marching over the rights of Michigan voters. *Id.* at 480 n.23. At a time that nearly all Americans earnestly wish to increase the likelihood that students from under-represented racial minorities will be academically successful, this ugly and ill-informed parade is reducing that likelihood. *Amici* urge this Court to reverse.

Respectfully submitted,

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