IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 1980-G-LPNY

Craig PATRICK, David Silk, and William Schneider, on behalf of themselves and all others similarly situated, **Appellants (Plaintiffs Below)** **v.** **THE STATE OF PLACIDIA, and Mark Johnson, in his official capacity as Attorney General of the State of Placidia** **Appellees (Defendants Below)**	**Appeal from the United States District Court for the Middle District of PLACIDIA, Sitting at Mt. Van Hoevenberg** **Lower Cause No. 1960-G-SVCO**

OPINION OF THE COURT

Herbert Brooks, Senior Judge.

I. FACTUAL BACKGROUND

This appeal is before us as an epilogue to the long-running battle over the use of race-conscious admissions policies at Placidia's public colleges and universities. The saga began during the 1960s and 1970s, when racial minorities first successfully lobbied for the adoption of such policies.

They remained largely in place until challenges in the late 1990s culminated in the Supreme Court's decisions in *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), and *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), which held that "universities cannot establish quotas for members of certain racial groups" or treat their applications as a category distinct and separate from others. *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325. But the Court allowed universities to continue "consider[ing] race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration," along with other relevant factors, a holding we do not today address or upset.

Following these decisions, interested parties mobilized to place on Placidia's November 2006 statewide ballot a proposal to amend the Placidia Constitution "to prohibit all sex-and race-

based preferences in public education, public employment, and public contracting. . . ." The initiative, commonly known as "Proposal 2," sought "to amend the State Constitution to ban affirmative action programs." Proposal 2 garnered enough support among Placidia voters to pass by a margin of 58% to 42%.

Proposal 2 amended the Placidia Constitution to include the following provisions, entitled "Affirmative action," in Article I:

> (1) The University of Placidia, Placidia State University, Calmpond University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
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> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
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> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Placidia not included in sub-section 1.

Placidia Const. art. I, § 26.

Proposal 2 took effect in December 2006 and wrought two significant changes to the admissions policies at Placidia's public colleges and universities. First, it eliminated the consideration of "race, sex, color, ethnicity, or national origin" in individualized admissions decisions, modifying policies in place for nearly a half-century. No other admissions criterion — for example, grades, athletic ability, geographic diversity, or family alumni connections — suffered the same fate. Second, Proposal 2 entrenched this prohibition at the state constitutional level, thus preventing 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 Placidia Constitution.

II. THE CONSTITUTIONAL PROVISION AND THE ISSUE

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The issue before us is:

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

The Plaintiffs, a group of concerned state university faculty members, students and potential students[1], argue that Proposal 2 violates this provision in two distinct ways. Plaintiffs argue that Proposal 2 violates the Equal Protection Clause by impermissibly classifying individuals on the basis of race (the "traditional" argument). Plaintiffs also argue that Proposal 2 violates the Equal Protection Clause by impermissibly restructuring the political process along racial lines (the "political process" argument). The District Court ruled in favor of the Defendants. We now reverse that ruling.

III. "TRADITIONAL" EQUAL PROTECTION ANALYSIS

A. The Applicability of Strict Scrutiny

Under the Fourteenth Amendment, any law (be it state statute or state constitutional measure) is subject to "strict scrutiny" if it involves a racial or other suspect classification of citizens or potentially impinges on a fundamental right. We begin our analysis by applying strict scrutiny to the Placidia state constitutional amendment. This traditional approach requires that the State must show that the governmental interest to be served by the enactment is compelling; that there is no less discriminatory means to achieve this compelling interest or objective; and, that the law is narrowly tailored to achieve the objective.

There is precedent for applying the traditional, strict scrutiny analysis to ballot initiatives and even ballot initiatives that appear to be, at least on their face, race-neutral. In *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)[2] the United States Supreme Court held that the ordinary political processes of government decision-making may not be intentionally skewed against particular policies because their subject matter is racial in nature. *Seattle*, 458 U.S. at 470 (holding that strict scrutiny is triggered whenever "the State allocates governmental power non-neutrally, by explicitly using the racial nature of a decision to determine the decision-making process"). In *Seattle*, blacks and other citizens had achieved school board approval of a busing plan to lessen the *de facto* segregation in Seattle's schools. Opponents then mounted a successful campaign to pass a statewide initiative, Initiative 350, prohibiting school boards from using busing to accomplish racial integration, while permitting the continued use of busing for all other purposes of school transportation and otherwise leaving school governance processes intact. Initiative 350 "nowhere mention[ed] 'race' or 'integration,'" but it "in fact allow[ed] school districts to bus their students 'for most, if not all,' of the non-integrative purposes required by [the state's] educational policies." *Id.* at 471.

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[1] The authority and ability of this unincorporated, representative group to pursue this action was not an issue in the court below and is not an issue before us in this case.

[2] We acknowledge that we will discuss *Washington* and *Hunter* again in the next section, on the political process portion of the argument. The discussion here, however, is to demonstrate the applicability of the traditional strict scrutiny analysis.

The Supreme Court held that Initiative 350 created a racial classification subject to strict scrutiny: "[W]hen the political process or the decision-making mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." *Id.* at 485 (internal quotation marks omitted); *see also id.* at 480 ("By placing power over desegregative busing at the state level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'" (*quoting Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970), *aff'd*, 403 U.S. 935 (1971))). The Supreme Court thus affirmed that a state could not selectively gerrymander the political process to impose more rigorous political burdens on those citizens seeking to promote constitutionally permissible race-conscious approaches than it imposed on those pursuing other policy agendas involving public education. *See Seattle*, 458 U.S. at 474-75; *see also id.* at 474 n.17 (noting that the constitutional evil was the creation of a "comparative structural burden" for advocating otherwise constitutionally permissible race-conscious policies within the political process).

The *Seattle* Court relied on *Hunter v. Erickson*, 393 U. S. 385 (1969), which had articulated the same rule more than a decade earlier. In *Hunter*, the Court struck down an amendment to the City of Akron's charter because it explicitly established a process for deciding racial housing matters that was distinct from the process for all other housing matters. *See* id. at 389. The charter amendment provided that "[a]ny ordinance enacted by the Council of Akron which regulates the use, sale, advertising, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors . . . before said ordinance shall be effective." *Id.* at 387 (emphasis added). The requirement of voter approval for certain ordinances duly enacted by the city council was unique within the city charter, applying only to "laws to end housing discrimination." *Id.* at 390; *see also id.* at 391 (noting that "[t]he automatic referendum system" did not, for example, "affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes"). The charter amendment thus forced those who sought protection from private racial or religious discrimination to run a "gauntlet" that those who sought to prevent other abuses in real estate did not have to run. *Id.* at 390.

As such, the amendment "was an explicitly racial classification treating racial housing matters differently from other . . . housing matters." *Id.* at 389; *see also id.* at 395 (Harlan, J., concurring) (observing that the amendment was a racial classification because it was not "grounded in neutral principle"); *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (distinguishing facts of case from *Hunter* "in which fair housing legislation alone was subject to an automatic referendum requirement"). "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race," the "racial classification"

embodied in the charter amendment was subject to strict scrutiny under the Equal Protection Clause. *Hunter*, 393 U.S. at 391-93.

The Supreme Court thereafter relied on similar considerations in a series of cases alleging racial gerrymandering when states created majority-minority electoral districts in the wake of the 1990 Census. *See Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Easley v. Cromartie*, 532 U.S. 234, 241-58 (2001); *Miller v. Johnson*, 515 U.S. 900, 904-28 (1995). In those cases, the Court held that using race as the predominant factor in structuring the political process through electoral district boundaries creates a racial classification subject to strict scrutiny under the Equal Protection Clause. In *Bush*, the Court relied on *Shaw* to apply strict scrutiny to, and ultimately void, a plan to redraw Texas electoral district lines because the plaintiffs established that race was "the predominant factor motivating the legislature's redistricting decision." 517 U.S. at 959, 970-72 (internal quotation marks and alterations omitted); *accord id.* at 996 (Kennedy, J., concurring); *id.* at 1001 (Thomas, J., concurring). The Texas redistricting failed under the Equal Protection Clause because the "contours" of the lines drawn were "unexplainable in terms other than race," *id*. at 972, and not narrowly tailored to serve a compelling state interest, *see id.* at 976-83.

B. Strict Scrutiny in this Case

Having thus established that the Placidia state constitutional amendment is subject to strict scrutiny, we now apply that test. The Placidia amendment fails strict scrutiny. It disserves, rather than advances, a compelling governmental interest by prohibiting race as a consideration in university admissions.

In the early 1960s, the University of Placidia and, later, the other two state universities first adopted adjusted grade point averages and standardized test scores as their baseline criteria for admissions. From the beginning, however, all three of Placidia's constitutionally created universities departed from those criteria in order to admit veterans, poorer and working-class students, rural students, athletes, children of alumni, children of donors and politicians, and numerous other categories of applicants.

At first, none of the universities recognized exceptions for the purpose of increasing minority admissions. But the results were disastrous. In the 1960s, the University of Placidia Law School graduated 3,032 white students, eight black students, and, as far is known, no Latina/o or Asian students. The reasons for the virtual exclusion of minority students are rooted in the reality of how adjusted grade point averages and standardized test scores operate in the real world as it existed then—and, with important changes, as it exists today.

Six decades after segregation was outlawed in public schools, the large majority of Placidia's black, Latina/o, and Native American students attend largely segregated elementary and secondary schools. Even though the segregation is now *de facto* rather than *de jure*, these schools still have fewer and less qualified teachers; less resources and programs; non-existent

counseling programs; and so on. If the colleges adjust grade point averages upward for students who took advanced placement and similar classes, the graduates from these segregated schools simply cannot fairly compete with those who attend more privileged schools.

There has been important progress, of course, and today, significant numbers of black and Latina/o students attend integrated suburban schools or central city magnet schools that offer far greater opportunities. But even for the black and Latina/o students in those schools, equality has not been achieved. In the suburban schools, they face racial isolation and, at times, hostility. On average, their families have less material and educational resources; and they, unlike their white peers, face the pervasive stigma of inequality that still harms the hearts and minds of minority students today. Even on the criteria of adjusted grade points, they face distinct obstacles in competing with their white peers.

But the difficulty on the grade point component of the admission criteria pales in comparison with the obstacles presented by the standardized tests. Testimony in the court below showed black students from the richest quintile of income still score lower, on average, than white students from the poorest quintiles. The reasons for that include differences in the educational programs, how the test questions are selected, language background and difficulties, the special anxiety that minority test-takers face due to negative racial stereotypes, and a host of other factors. But the end result is beyond dispute: racial minorities are at a large disadvantage on the standardized tests.

Placidia's history not only is telling with regard to compelling interests. It is also telling as to whether Proposal 2 is narrowly tailored. Given that it is at cross purposes with the compelling interests identified here, it is no surprise that we find it not narrowly tailored as well.

Before the 1970s, the rigid application across racial lines of the baseline criteria meant that few in Placidia's large black and small Latina/o and Native American communities had any real hope of attending the University of Placidia, however hard they worked. But in 1970, black and white students, joined by supporters across the state, spoke, rallied and stayed away from classes in order to win increased enrollment for black and other minority students. They specifically used the political procedures that Proposal 2 has now closed to persuade the Regents to adopt the University of Placidia's first affirmative action plans.

Those plans considered race and thus departed from the grade-test score criteria in order to admit minority students. They opened the doors of the universities to the qualified minority graduates of the high schools in Placidia and in the country, and soon the proud black, Latina/o and Native American graduates from Placidia's universities joined those from other state and national universities to form the black and Latina/o leaders who are so prominent and so important today.

When those programs were challenged because they supposedly granted unlawful "preferences" to black, Latina/o and Native American applicants, *Grutter* upheld the Placidia

Law School plan because it was the only practical way to further the "paramount" national interest in assuring that the path to leadership was open to qualified black, Latina/o and Native American students.

Therefore, we must conclude that Placidia's state constitutional amendment is infirm under the federal constitution's guarantee of equal protection of the laws. The amendment does not serve a compelling governmental interest – and in fact does a disservice to it – and therefore is not narrowly tailored to achieve a compelling governmental objective and does not consider other, less discriminatory means to achieve the ends sought

IV. THE POLITICAL RESTRUCTURING DOCTRINE

Our traditional analysis shows the flaw in Placidia's state constitutional amendment by examining it in light of the merits of race-conscious admissions policies. But the amendment suffers from a second flaw: Proposal 2 impermissibly alters the process by which supporters of permissible race-conscious admissions policies may seek to enact those policies. In other words, 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.

We return to familiar ground: the Equal Protection Clause "guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner." *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 467, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). But the Equal Protection Clause reaches even further, prohibiting "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.* (internal quotation marks and citation omitted). "[T]he 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." *Hunter v. Erickson*, 393 U.S. 385, 393, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969).

A. Burdens on the Political Process

The Supreme Court's statements in *Hunter* and *Seattle* emphasize that equal protection of the laws is more than a guarantee of equal treatment under existing law. It is also a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on issues of importance to them. In effect, the political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course. Ensuring the fairness of the political

process is particularly important because an electoral minority is disadvantaged by definition in its attempts to pass legislation; this is especially true of "discrete and insular minorities," who face unique additional hurdles. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

Ensuring a fair political process is nowhere more important than in education. Education is the bedrock of equal opportunity and "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Safeguarding the guarantee "that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." *Grutter*, 539 U.S. at 331-32, 123 S.Ct. 2325 (internal quotation marks omitted). Moreover, universities "represent the training ground for a large number of our Nation's leaders. . . . [T]o cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332, 123 S.Ct. 2325 (citation omitted). Therefore, in the high-stakes context of education, we must apply the political-process doctrine with the utmost rigor.

Of course, the Constitution does not protect minorities from political defeat: Politics necessarily produces winners and losers. We must therefore have some way to differentiate between the constitutional and the impermissible.

Hunter and *Seattle*, discussed in the previous section, provide just that. They set the benchmark for when the majority has not only won, but has rigged the game to reproduce its success indefinitely. In *Hunter*, the referendum halted operation of the existing fair housing ordinance, and more importantly for our purposes, erected a barrier to any similar ordinance in the future. *Hunter*, 393 U.S. at 389-90, 89 S.Ct. 557. The Supreme Court found that the disparity between the process for enacting a future fair housing ordinance and the process for enacting any other housing ordinance "place[d] special burden[s] on racial minorities within the governmental process" by making it "substantially more difficult to secure enactment" of legislation that would be to their benefit. *Id.* at 390-91, 89 S.Ct. 557. While the enactment "treat[ed] Negro and white, Jew and gentile in an identical manner," the Court found that "the reality is that the law's impact falls on the minority." *Id.* at 391, 89 S.Ct. 557. That the law had been enacted via a popular referendum did not save it from working "a real, substantial, and invidious denial of the equal protection of the laws." *Id.* at 393, 89 S.Ct. 557.

In *Seattle*, though the initiative was framed as a general ban on mandatory busing, its myriad exceptions made its real effect the elimination of school reassignments for racial purposes only, except where a court ordered such reassignments to remedy unconstitutional segregation. *Id.* at 462-63, 102 S.Ct. 3187. Initiative 350 made it on the Washington ballot and passed by a substantial margin. *Id.* at 463, 102 S.Ct. 3187. The Court found that Initiative 350, like the Akron city charter amendment, violated the Equal Protection Clause. As the Court explained, Initiative 350 did more than merely repeal the busing program:

> The initiative removes the authority to address a racial problem — and only a racial problem — from the existing decision-making body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the state-wide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. . . . As in *Hunter*, then, the community's political mechanisms are modified to place effective decision-making authority over a racial issue at a different level of government.

Id. By removing authority over busing for racial purposes from the school board and placing it at a more remote level of government, Initiative 350 required "those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action," and disadvantaged "those who would benefit from laws barring *de facto* desegregation as against those who . . . would otherwise regulate student assignment decisions." *Id.* at 474-75, 102 S.Ct. 3187 (alteration in original) (internal quotation marks omitted). Accordingly, the Court held that Initiative 350 violated the Equal Protection Clause. *Id.* at 470, 102 S.Ct. 3187.

In sum, *Hunter* and *Seattle* require us to examine an enactment that changes the governmental decision-making process for legislation with a racial focus to determine if it improperly manipulates the channels for change. *Seattle*, 458 U.S. at 470, 485, 102 S.Ct. 3187; *Hunter*, 393 U.S. at 391, 89 S.Ct. 557; cf. Carolene Prods., 304 U.S. at 152 n. 4, 58 S.Ct. 778 (noting that more exacting judicial scrutiny is required when the majority curtails "the operation of those political processes ordinarily to be relied upon to protect minorities"). To the extent that it does, we must strike down the enactment absent a compelling state interest.

B. Application in this Case

Hunter and *Seattle* thus expounded the rule that an enactment deprives minority groups of the equal protection of the laws when it: (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority"; and (2) reallocates political power or reorders the decision-making process in a way that places special burdens on a minority group's ability to achieve its goals through that process. *See Seattle*, 458 U.S. at 467, 472, 102 S.Ct. 3187; *Hunter*, 393 U.S. at 391, 89 S.Ct. 557. Applying this rule here, we conclude that Proposal 2 targets a program that "inures primarily to the benefit of the minority" and reorders the political process in Placidia in a way that places special burdens on racial minorities.

The first prong of the *Hunter*/*Seattle* test requires us to determine whether Proposal 2 has a "racial focus." *Seattle*, 458 U.S. at 474, 102 S.Ct. 3187. This inquiry turns on whether the targeted policy or program, here holistic race-conscious admissions policies at public colleges and universities, "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Id.* at 472, 102 S.Ct. 3187. The targeted policy need not be for the sole benefit of minorities, for "it is enough that minorities may consider [the now burdened policy] to be

'legislation that is in their interest.'" *Id.* at 474, 102 S.Ct. 3187 (quoting *Hunter*, 393 U.S. at 395, 89 S.Ct. 557 (Harlan, J., concurring)).

Seattle conclusively answers whether a law targeting policies that seek to facilitate classroom diversity, as Proposal 2 does, has a racial focus. In *Seattle*, the Court observed that programs intended to promote school diversity and further the education of minority children enable these students to "achieve their full measure of success." *Id.* at 472-73, 102 S.Ct. 3187. Such programs do so through "preparing minority children for citizenship in our pluralistic society, while . . . teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Id.* at 473, 102 S.Ct. 3187 (internal quotation marks and citation omitted). Accordingly, the Court noted that "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority. . . ." *Id.* at 472, 102 S.Ct. 3187. Because minorities could "consider busing for integration to be legislation that is in their interest," the Court concluded that Initiative 350's effective re-peal of such programs had a racial focus sufficient to "trigger application of the *Hunter* doctrine." *Id.* at 474, 102 S.Ct. 3187.

The logic of the Court's decision in *Seattle* applies with equal force here. Proposal 2 targets race-conscious admissions policies that "promote[]'cross-racial understanding,' help[] to break down racial stereotypes, and 'enable[] students to better understand persons of different races.'" *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (alteration omitted) (internal quotation marks and citation omitted). Just as an integrative busing program is designed to improve racial minorities' representation at certain public schools, see *Seattle*, 458 U.S. at 461, 102 S.Ct. 3187, race-conscious admissions policies are designed to increase racial minorities' representation at institutions of higher education, see, e.g., *Grutter*, 539 U.S. at 316, 328-33, 123 S.Ct. 2325; *Gratz*, 539 U.S. at 253-56, 123 S.Ct. 2411. There is no material difference between the enactment in *Seattle* and Proposal 2, as both targeted policies that benefit minorities by enhancing their educational opportunities and promoting classroom diversity. Further, given that racial minorities lobbied for the implementation of the very policies that Proposal 2 permanently eliminates, it is beyond question that Proposal 2 targets policies that "minorities may consider . . . [to be] in their interest." *Seattle*, 458 U.S. at 474, 102 S.Ct. 3187. Therefore, Proposal 2 has a racial focus because race-conscious admissions policies at Placidia's public colleges and universities "inure[] primarily to the benefit of the minority, and [are] designed for that purpose." *Id.* at 472, 102 S.Ct. 3187.

Seattle not only mandates our conclusion that Proposal 2 is racially focused, but it also dispels any notion that the benefit race-conscious admissions policies may confer on the majority undercuts its "racial focus." Although it is true that increased representation of racial minorities in higher education benefits all students, *see Grutter*, 539 U.S. at 327-33, 123 S.Ct. 2325; *Seattle*, 458 U.S. at 472-73, 102 S.Ct. 3187, the Supreme Court has made clear that these policies still have a racial focus. In *Seattle*, the Court recognized that it is "clear that white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom." *Seattle*, 458 U.S. at 472, 102 S.Ct. 3187 (internal quotation marks omitted). But the *Seattle* Court found

that the wider benefits of the busing plan did not serve to distinguish *Hunter*, "for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance." *Id.* By the same token, the wider benefits of race-conscious admissions policies do not undermine the conclusion that such admissions policies "inure[] primarily to the benefit of the minority. . . ." *Id.*

Nor do policy arguments attacking the wisdom of race-conscious admissions programs preclude our finding that these programs "inure[] primarily to the benefit of the minority." *Id.* Critics of affirmative action maintain that race-conscious admissions policies actually harm minorities by stigmatizing minority students admitted into high-caliber institutions through a perception that they lack sufficient qualifications; by impeding the academic success of minority students admitted to institutions they are not qualified to attend; and by impairing the admissions prospects of traditionally higher-performing minority groups, such as Asian-Americans. But the controversy surrounding the policies that Proposal 2 targets is irrelevant as to whether Proposal 2 itself has a racial focus; rather, this controversy is a "matter[] to be resolved through the political process." *Id.* at 474, 102 S.Ct. 3187 ("It is undeniable that busing for integration . . . engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process."). As in *Seattle*, "it is enough that minorities may consider [the repealed policy] to be 'legislation that is in their interest.'" *Id.* (quoting *Hunter*, 393 U.S. at 395, 89 S.Ct. 557 (Harlan, J., concurring)).

We find that the holistic race-conscious admissions policies now barred by Proposal 2 inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest. Indeed, we need not look further than the approved ballot language — characterizing Proposal 2 as an amendment "to ban affirmative action programs" — to confirm that this legislation targets race-conscious admissions policies and, insofar as it prohibits consideration of applicants' race in admissions decisions, that it has a racial focus.

The second prong of the *Hunter*/*Seattle* test asks us to determine whether Proposal 2 reallocates political power or reorders the political process in a way that places special burdens on racial minorities. *See Seattle*, 458 U.S. at 467, 102 S.Ct. 3187; *Hunter*, 393 U.S. at 391, 89 S.Ct. 557. We must first resolve (1) whether the affected admissions procedures lie within the "political process," and then (2) whether Proposal 2 works a "reordering" of this political process in a way that imposes "special burdens" on racial minorities.

The breadth of Proposal 2's influence on a "political process" turns on the role the popularly elected governing boards of the universities play in setting admissions procedures. The key question is whether the boards had the power to alter the universities' admissions policies prior to the enactment of Proposal 2. If the boards had that power and could influence the use (or nonuse) of race-conscious admissions policies, then Proposal 2's stripping of that power works a reordering of the political process because minorities can no longer seek to enact a type of

legislation that is in their interest at the board level. But if board members lacked such power, because policy decisions are actually under the control of politically unaccountable faculty members or admissions committees, then Proposal 2's effect on the political process is negligible.

The Placidia Constitution establishes three public universities — the University of Placidia, Placidia State University, and Calmpond University — and grants control of each to a governing board. Placidia Const. art. VIII, § 5; *see also id.* § 6 (allowing the establishment of other institutions of higher learning, such as Placidia's other public colleges and universities, and affording their governing boards similar control). These boards have the same role: to run, with plenary authority, their respective institutions. *Id.* art. VIII, § 5-6;

The University of Placidia's bylaws delegate the day-to-day management of undergraduate admissions to the associate vice provost and executive director of undergraduate admissions. *See* Univ. of Placidia Bylaws § 8.01. Although the board delegates this responsibility, it continues to exercise ultimate decision-making authority because it directly appoints the associate vice provost and executive director of undergraduate admissions, id., and because it retains the power to revoke or alter the admissions framework, id. § 14.03, 14.04. Nothing prevents the board from adopting an entirely new framework for admissions decisions if it is so inclined. *See* Placidia Const. art. VIII, § 5; Placidia Comp. Laws § 390.3.6; Univ. of Placidia Bylaws § 8.01. Indeed, that the board can revise its bylaws is not a mere theoretical possibility, but a reality that occurs with some frequency. Since 2008, the University of Placidia's Board of Regents has revised more than two dozen of its bylaws, two of which fall within Chapter VIII, the section regulating admissions practices. Thus, the elected boards of Placidia's public universities can, and do, change their respective admissions policies, making the policies themselves part of the political process.

Telling evidence that board members can influence admissions policies — bringing such policies within the political process — is that these policies can, and do, shape the campaigns of candidates seeking election to one of the boards. As the boards are popularly elected, citizens concerned with race-conscious admissions policies may lobby for candidates who will act in accordance with their views — whatever they are. Board candidates have, and certainly will continue, to include their views on race-conscious admissions policies in their platforms.

Next, we examine whether Proposal 2 reordered the political process in a way that places special burdens on racial minorities. The Supreme Court has found that both implicit and explicit reordering violates the Fourteenth Amendment. *See Seattle*, 458 U.S. at 474, 102 S.Ct. 3187; *Hunter*, 393 U.S. at 387, 390, 89 S.Ct. 557. The *Seattle* Court then clarified what sort of reordering contravenes the political-process doctrine: "[t]he evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests." *Id.* at 474 n. 17, 89 S.Ct. 557 (emphasis added). In both *Hunter* and

Seattle, "the effect of the challenged action was to redraw decision-making authority over racial matters — and only over racial matters — in such a way as to place comparative burdens on minorities." *Id.* (emphasis added). Thus, any "comparative structural burden," be it local or statewide or national, satisfies the reordering prong of the *Hunter*/*Seattle* test. *Id.*

The comparative structural burden we face here is every bit as troubling as those in *Hunter* and *Seattle* because Proposal 2 creates the highest possible hurdle. This comparative structural burden is most apparent in tracing the channels for change available to a citizen promoting any policy unmodified by Proposal 2 and those available to a citizen promoting constitutionally permissible race-conscious admissions policies.

An interested Placidia citizen may use any number of avenues to change the admissions policies on an issue outside the scope of Proposal 2. For instance, a citizen interested in admissions policies benefitting legacy applicants — sons and daughters of alumni of the university — may lobby the admissions committees directly, through written or in-person communication. He may petition higher administrative authorities at the university, such as the dean of admissions, the president of the university, or the university's board. He may 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. And he may campaign for an amendment to the Placidia Constitution.

Each of these methods, respectively, becomes more expensive, lengthy, and complex. Because Proposal 2 entrenched the ban on all race-conscious admissions policies at the highest level, this last resort — the campaign for a constitutional amendment — is the sole recourse available to a Placidia citizen who supports enacting such policies. That citizen must now begin by convincing the Placidia electorate to amend its constitution — an extraordinarily expensive process and the most arduous of all the possible channels for change. Just to place a proposed constitutional amendment repealing Proposal 2 on the ballot would require either the support of two-thirds of both the Placidia House of Representatives and Senate, see Placidia Const. art. XII, § 1, or the signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election, see id. art. XII, § 2. Once on the ballot, the proposed amendment must then earn the support of a majority of the voting electorate to undo Proposal 2's categorical ban. *See* id. art. XII, § 1-2.

Only after traversing this difficult and costly road would our now-exhausted citizen reach the starting point of his neighbor who sought a legacy-related admissions policy change. After this successful constitutional amendment campaign, the citizen could finally approach the university — by petitioning the admissions committees or higher administrative authorities — to request the adoption of race-conscious admissions policies. By amending the Placidia 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 Placidia's universities and lodged it at the most remote level of Placidia's government, the state

constitution. As with the unconstitutional enactment in *Hunter*, proponents of race-conscious admissions policies now have to obtain the approval of the Placidia electorate and, if successful, admissions units or other university powers — whereas proponents of other non-universal admissions factors need only garner the support of the latter. *See Seattle*, 458 U.S. at 468, 474, 102 S.Ct. 3187.

The "simple but central principle" of *Hunter* and *Seattle* is that the Equal Protection Clause prohibits requiring racial minorities to surmount more formidable obstacles than those faced by other groups to achieve their political objectives. *See* id. at 469-70, 102 S.Ct. 3187. A state may not "allocate[] governmental power non-neutrally, by explicitly using the racial nature of a decision to determine the decision-making process." *Id.* at 470, 102 S.Ct. 3187. As the Supreme Court has recognized, such special procedural barriers to minority interests discriminate against racial minorities just as surely as — and more insidiously than — substantive legal barriers challenged under the traditional equal protection rubric. *See* id. at 467, 102 S.Ct. 3187 ("[T]he Fourteenth Amendment also reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.") (internal quotation marks and citations omitted). Because less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decisions, Placidia cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment. We thus conclude that Proposal 2 reorders the political process in Placidia to place special burdens on minority interests.

V. CONCLUSION

We therefore REVERSE the judgment of the District Court and REMAND this case for further proceedings.

Eruzione, J. concurs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. 1980-G-LPNY

Craig PATRICK, David Silk, and William Schneider, on behalf of themselves and all others similarly situated, **Plaintiffs – Appellants** **v.** **THE STATE OF PLACIDIA, and Mark Johnson, in his official capacity as Attorney General of the State of Placidia** **Defendants – Appellees**	**Appeal from the United States District Court for the Middle District of PLACIDIA, Sitting at Mt. Van Hoevenberg**

DISSENTING OPINION

James Craig, Judge.

I. INTRODUCTION

It is curious to say that a law that bars a state from discriminating on the basis of race or sex violates the Equal Protection Clause by discriminating on the basis of race and sex. Yet the majority holds that § 26 violates the traditional equal protection analysis as well as the "political-restructuring doctrine" because an individual who supports race- or sex-conscious admissions policies cannot lobby admissions officials for that policy but must instead amend the state constitution. Both of these conclusions are wrong.

Affirmative action has been one of the most hotly contested social issues of the past few decades. Some people support it because they believe affirmative action policies are necessary to ensure equal opportunity and to achieve campus diversity. Others oppose it because they believe such policies deny equal treatment and perpetuate the myth that students with the same skin color, ethnic heritage, or sex share the same background and think the same way. The Supreme Court has held that race-conscious admissions policies are presumptively unconstitutional, but permissible in some narrow situations. With that backdrop, the people of Placidia concluded that not having affirmative action in higher education was the best policy for the state. Nothing in the Constitution bars the people of Placidia from making that choice.

In 1848, the relevant local authority, the Boston School Board, decided that race should be used in making assignments in the Boston public schools. *See Roberts v. City of Boston*, 59 Mass. 198, 208-09 (1849). They excluded and segregated black students. However, in 1855 the ultimate political authority, the legislature of Massachusetts, established the general principle against racial discrimination in educational choices. The legislature was lauded for that choice. *See generally J. Morgan Kousser, "The Supremacy of Equal Rights": The Struggle against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 Nw. U.L. Rev. 941, 943 & nn. 8-9 (1988).

Over 100 years later, various Placidia local and subordinate state authorities began to implement policies of racial discrimination in decisions on, inter alia, educational admissions. The Supreme Court of the United States held that such actions were permissible, but certainly not that they were compelled. *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Subsequently, the ultimate state political authority, the People of Placidia, voted to establish the same principle that Massachusetts did in 1855. This is the same principle embodied in President Kennedy's Executive Order 10925 of 1961 — that governmental decisions should be undertaken "without regard to race, creed, color or national origin." 26 Fed. Reg. 1977, sec. 301(1) (Mar. 8, 1961). Indeed, the very term "affirmative action" comes from that presidential order.

II. "TRADITIONAL" EQUAL PROTECTION ANALYSIS

The Equal Protection Clause's central purpose is to prevent "official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Accordingly, the Supreme Court applies strict scrutiny to "all racial classifications" and to "laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 213 (1995); Davis, 426 U.S. at 239–42. Section 26 does not classify on the basis of race. Just the opposite, the provision "prohibits the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender a fortiori does not classify individuals by race or gender." Wilson, 122 F.3d at 702; *accord Coral Constr., Inc. v. City & County of San Francisco*, 235 P.3d 947, 959 (2010).

A. The Applicability of Strict Scrutiny

I disagree that strict scrutiny is called for in this case. The provision of section 26 should be judged under the lesser standard of rational review.

First, § 26 was not motivated by a racially discriminatory purpose. To begin, the Supreme Court has never "inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results." *Arthur v. City of Toledo*, 782 F.2d 565, 573 (6th Cir. 1986). In part, this is due to the realities of a secret ballot: "[s]ince a court

cannot ask voters how they voted or why they voted that way, a court has no way of ascertaining what motivated the electorate." *Id.* Also, if "courts could always inquire into the motivation of voters even when the electorate has an otherwise valid reason for its decision, a municipality could never reject a low-income public housing project because proponents of the project could always introduce race as an issue in the referendum election." *Id.* at 574.

So was it possible for Placidia voters supporting § 26 to have been motivated by any reason other than racial discrimination? The court below said yes. "Based on the evidence presented, the Court cannot say that the only purpose of [§ 26] is to discriminate against minorities." The court cited testimony from one of the ballot organizers that "he was motivated to eliminate affirmative action programs because he thinks they are harmful to minorities." *Id.* The court also cited testimony from another organizer who "appears to have been motivated by the desire to gain admission to the University of Placidia herself without having to yield to a minority candidate who would take her place with the benefit of a racial preference." *Id.*

There were undoubtedly other voters motivated by a belief that it is harmful to perpetuate stereotype reinforcing assumptions. *See*, e.g., *Time to scrap affirmative action, THE ECONOMIST*, Apr. 27, 2013, at 11 (although "colleges benefit from a diversity of ideas, to use skin colour as a proxy for this implies that all black people and all Chinese people view the world in a similar way. That suggests a bleak view of the human imagination."). And still others desired a shift to more socioeconomic-based admissions policies. *See*, e.g., Bill Keller, *Affirmative Reaction, N.Y. TIMES*, June 9, 2013 ("Racial preferences don't help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor."). Indeed, it is the multiplicity of viewpoints regarding affirmative action which "illustrate that racial discrimination is not the only rationale behind" § 26.

The court below could not find a discriminatory intent based on the factors the Supreme Court articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977). The ballot proposal's history did "not suggest discriminatory intent." And the public arguments made in support of § 26 "did not appeal to racism or amount to a call for segregation; rather, they attempted to appeal to the public's belief in fairness and just treatment." *Id.* "To impugn the motives of 58% of Placidia's electorate, in the absence of extraordinary circumstances which do not exist here, simply is not warranted on this record."

Due to these factual findings, which the record supports, § 26 is not subject to heightened review. And under a more relaxed, rational-basis review, § 26 is justified for many of the reasons noted above. While both sides of the affirmative-action debate have policy arguments to advance, it was not irrational for a majority of Placidia's voters to end race- and sex-conscious admissions practices.

B. Rational Review Applied

Whether one agrees politically with Placidia's state constitutional decision or disagrees, it seems that there can be little doubt that substantial rational reasons justified it. First, universities have experienced success without race- and sex-based preferences. California's public universities have used race-neutral admissions policies since 1998, following the passage of Proposition 209. California weighed socioeconomic status more heavily and also addressed pipeline issues, seeking to assist minority and low-income students in becoming college-ready. Richard Pérez-Peña, *In California, Early Push for College Diversity*, *N.Y. TIMES*, May 8, 2013, at A1. And in 2001, the Regents approved a plan that essentially admitted the top 4% of California graduating seniors, though it applied to only some University of California campuses.

By 2002, African-American enrollment at California's public universities returned to pre-Prop 209 levels, and from 2007 to 2010 averaged 40% higher. Latino enrollment established a system record in 2000 and doubled its pre-Prop 209 levels by 2008.

Comparing the period 1992 to 1994 (pre-Prop 209) with 1998 to 2005 (post-Prop 209), African-American four year college graduation rates improved by more than half, six-year graduation rates by one-fifth; Latinos experienced similar improvements. And African-American and Latino grade-point averages increased post-Prop 209, even while minority students enrolled in more difficult science and engineering classes.

The record level in African-American and Latino college-graduation rates in California is consistent with studies documenting that large race-based preferences can sometimes harm minority students by creating an academic "mismatch," where underprepared students must compete with far better prepared classmates. "[A]s a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." Fisher, 570 U.S., slip op. at 18 (Thomas, J., concurring). This hurts mismatched students' self-confidence and may result in less learning. Id. But mismatch can be remedied when schools replace stereotype-reinforcing admissions policies with alternatives. See generally 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).

Texas was compelled to follow California's lead, though it adopted a different approach. In response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit Court of Appeals' invalidation of the University of Texas School of Law's use of race in admissions, the Texas Legislature enacted a 1997 law requiring the University of Texas at Austin (UT) to admit all Texas high-school seniors ranked in the top 10% of their classes. By 2000, UT had already returned African-American and Latino freshman- enrollment levels to those of 1996, the last year the pre-*Hopwood* policy was in effect. In a widely circulated editorial published in October

2000, UT's President credited the race-neutral system as enabling the university "to diversify at UT Austin with talented students who succeed." The system helped "us to create a more representative student body and enroll students who perform well academically," evidenced by the fact that "minority students earned higher grade point averages . . . than in 1996 and ha[d] higher retention rates."

The University of Texas, for example, recently discovered that students admitted from small rural and large urban high schools under the top "ten percent" plan achieved higher grades at UT than students admitted under other criteria. Also, there is a campus diversity problem in that universities tend to under-recruit students from low income households. And "[r]acial preferences don't help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor." Bill Keller, *Affirmative Reaction, N.Y. TIMES*, June 9, 2013 (online).

In other words, a greater emphasis on recruiting students from low-income households inevitably improves minority-student enrollment. When comparing the percentage of minority students among the high-achieving, low-income group to high-achieving students generally, both African-American students (5.7% to 1.5%) and Latino students (7.6% to 4.7%) are more prevalent in the low-income group than in the general population. Thus, at the University of California's Irvine campus, for example, the number of students "who are the first in their families to attend college has risen dramatically, and black and Hispanic enrollment has roughly doubled" after Prop 209. Keller, *Affirmative Reaction*. Accord Kahlenberg, *A Better Affirmative Action*. The takeaway is that a minority student from a low-income household and living in an underperforming school system is far more likely to be recruited and admitted under a program that focuses on a class-based admission formula than a race-based policy. And "enrolling students from poor and working-class backgrounds is likely to increase [campus] ideological diversity" as well. Keller, *Affirmative Reaction*.

There are other cascading effects for disadvantaged students. Evidence from Texas suggests that "the lure of assured admission and a few college scholarships significantly raised the aspirations and performance of students" in disadvantaged high schools. Id.11 That excitement manifested itself: "Attendance was up, college applications were up, test scores were up, [and] enrollment in advanced courses was up." Id. Third, supporters of race- and sex-conscious admissions policies argue that such policies are necessary to persuade minority students that they are welcome, and that eliminating such policies has a "chilling effect." But research based on Prop 209 suggests that minority applications among those likely to be admitted did not fall after elimination of race conscious policies, David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants?*, 58 *INDUS. & LABOR RELATIONS REV.* 416 (2005), and there was a modest (~15%) "warming effect" on African-American and Latino student propensity to accept an admissions offer from and enroll at Berkeley, which previously used the largest preferences. Kate L. Antonovics & Richard H.

Sander, *Affirmative Action Bans and the "Chilling Effect,"* 15 *AM. LAW & ECON. R.* 252 (2013).

This outcome should not be a surprise. A survey of some 140 colleges and universities across the nation, involving 1600 students, discovered that 71% of minority students rejected the use of race- or ethnic-based admissions preferences, and 62% disapproved of relaxed academic standards as a policy to increase minority-student representation. Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?* 15 *INT'L J. PUB. OPINION RES.* 8 (2003). See also David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, *N.Y. TIMES*, Mar. 16, 2013.

In sum, sociological and academic reasons justified voters' decision to end race-conscious admissions, and that is precisely the path that Placidia's citizens chose for their own public universities. I would apply a relaxed standard of review and find that § 26 easily passes it.

III. THE POLITICAL RESTRUCTURING DOCTRINE

I also take issue with the majority's conclusion that the Placidia constitutional amendment is procedurally defective under the political restructuring doctrine.

Let us set the legal and political context here first: race-conscious admissions are presumptively unconstitutional except when necessary to remedy the effects from historic discrimination. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). A *Grutter* plan is supposed to be an optional, transient response to anemic campus diversity, available only when "no workable race neutral alternatives would produce the educational benefits of diversity." *Fisher v. Univ. of Texas at Austin*, 570 U.S., slip op. at 11 (2013).

Here, Plaintiffs do not allege any lingering effects from historic discrimination at Placidia's public universities. And they conceded that race-neutral programs like the top 10% plan in place at the University of Texas can actually result in improved minority achievement. So in a context where equal-protection principles tolerate race or sex-based admissions criteria on a limited basis, the question is whether *Hunter* and *Seattle School District* prohibit a state categorically from eliminating the use of such criteria. The answer is no, because neither *Hunter* nor *Seattle School District* involved a policy that prohibited preferential treatment. In fact, the *Seattle School District* majority disclaimed that its reasoning would apply to prevent a higher level of government from intervening when a university admissions committee adopts an affirmative action policy. *See Seattle School Dist.*, 458 U.S. at 480 n.23.

A. *Seattle* and *Hunter* Should Not Be Expanded

The application of the political restructuring doctrine is therefore not justified. The majority is unwarrantedly expanding *Seattle* and *Hunter* when in fact they should be constricted.

Today, school busing programs that employ racial classifications are presumptively unconstitutional and subject to strict scrutiny. *Parents Involved*, 551 U.S. at 720. So it is not at all clear that *Seattle* School District would be decided the same way today. As post-*Seattle* School District decisions have recognized, it is a gross exaggeration for school officials to assume that a student thinks a certain way, represents certain views, or behaves in a stereotypical fashion due solely to skin color, race, ethnic heritage, or sex. Citizens may reasonably believe that an individual is not a "representative" of his or her "group," the very kind of stereotype-reinforcing approach that § 26 rejected. After all, "one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). In fact, the very endeavor of categorizing students into discrete racial and ethnic groups is becoming an increasingly outmoded, dubious way of identifying people. *See*, e.g., 2010 U.S. Census Form (providing 57 possible multiple race combinations, not considering Latino).

At bottom, § 26 makes it more difficult for individual students to receive special treatment—a preference. And the Supreme Court has never applied the political-restructuring doctrine to protect against obstructions to preferential treatment. Such a holding would unnecessarily expand the political-restructuring doctrine.

In addition, Plaintiffs' theory leads to the awkward result that many laws requiring equal treatment could fall under a political-restructuring claim. Consider the Fair Housing Act of 1968. When Congress adopted that law, it had the effect of preempting any state law requiring that minority home buyers be given preferential treatment and preventing states from adopting such a law. 42 U.S.C. § 3604(b) (prohibiting discrimination in housing transactions "because of race, color, religion, sex, familial status, or national origin"). Unlike other discrete and insular groups, minority home buyers were unable to lobby for preferential treatment at the state or local level unless they first succeeded in repealing the federal law. The same would be true if it was the state that enacted the fair-housing legislation—the state law would need to be repealed before local legislation creating preferential treatment could be sought.

Similarly, when Congress enacted the Equal Credit Act, Pub. L. 94-239, 90 Stat. 251 (1974), that law had the effect of preempting any existing laws and preventing the enactment of any new laws that required lenders to grant minority borrowers credit at a preferential rate. 15 U.S.C. § 1691(a) (prohibiting discrimination in credit transactions "on the basis of race, color, religious, national origin, sex or marital status, or age"). Individuals who might have benefitted from and thus desired such a policy would not have been able to lobby their state officials; they would have been forced to first repeal the federal statute requiring equal treatment.

It gets worse. Imagine a state statute that required lenders to grant credit to minority borrowers at a preferential rate, say half a point below prime. Such a law would have the effect of preventing minority borrowers from lobbying their local officials for a one or two-point reduction. Under Plaintiffs' theory, the state law would have to fall. So, if Plaintiffs are correct,

then many laws of general applicability prohibiting discrimination—or even granting a preference—are unconstitutional. That result cannot possibly be a correct reading of *Hunter* and *Seattle* School District.

In sum, this just is not a political restructuring case. Sociological and academic reasons justified voters' decision to end race-conscious admissions, and that is precisely the path that Placidia's citizens chose for their own public universities. Where § 26's language and purpose is to eliminate, not foster, discrimination, it is not possible to conclude that § 26 reallocated "the authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests." *Seattle* School Dist., 458 U.S. at 474. So while § 26 has obvious racial implications, its facial neutrality—and the facially neutral justifications for its enactment—counsels strongly against a conclusion that § 26 violates equal protection. Cf. *Fisher*, 570 U.S., slip op. at 6 ("It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny . . . . Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect.") (emphasis added, quotations omitted.)

B. <u>This is Not a "Political" Case at All</u>

A second, independent problem with the majority's analysis is that the academic processes at work in state university admissions in Placidia are not "political processes" in the manner contemplated in *Seattle*. The various Placidia university admissions committees and faculty members are unelected. And although Placidia universities are generally governed by either an elected or Governor-appointed board of trustees, the record evidence shows that admissions decisions are made by unaccountable faculty members. The court below found:

> As they currently stand, the faculty admission committees are islands unto themselves, vested with the full authority to set admissions policy for their respective university programs. . . . [T]he testimony of the law school dean demonstrates that, whatever the formal legal structure, the faculty committees set admissions policies without significant review by the boards—thus insulating them from the political pressures the boards themselves face.

But let us delve deeper. To the extent it is even possible to hold such committees "politically accountable," the political gymnastics involved are far worse than simply achieving a 51% vote in a statewide referendum. A Placidia citizen seeking to implement § 26's policy through the political process would have to elect a majority of Placidia, Placidia State, and Calmpond's eight-member boards of trustees (which would take an eight-year process spanning at least three statewide election cycles) willing to abolish preference programs, then hope that the trustees would stand up to the faculty committees that believe that they alone have exclusive

control over the admissions process. And anyone wishing to change admissions policies at Placidia's other public universities faces an equally elaborate process.

It makes no sense to say that the federal constitution limits a state's means of eliminating affirmative action in its universities to an eight-year election process involving the election of at least 15 different board members (just with respect to Placidia's three largest state universities), who might not even control the faculty committees that make admissions policies, and who are elected by partisan ballot based on many competing educational issues. Nothing in the Constitution suggests that Placidia is barred from pursuing a simpler means of addressing the issue. And it is a remarkable intrusion on the state's processes to say that it may end affirmative action in higher education only through a Byzantine route with no guaranteed result.

Moreover, § 26 does not even disadvantage groups that account for a minority of Placidia's population (if it can be determined who is "disadvantaged" at all). In both *Hunter* and *Seattle* there were initiatives targeted solely at minorities attempting to buy houses, and those benefitting from a racially integrated public school system, respectively. Here, § 26 does not burden minority interests and minority interests alone. Because § 26 prohibits discrimination that is sex-, ethnicity-, and national origin- as well as race-based, to the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Placidia's population.

So, it makes little sense to apply "political structure" equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate.

Additionally, when we speak in terms of political "winners" and "losers" (as the majority does), it is not even clear which discrete group § 26 "helps and hurts, or when each group will be affected." Given the reality that "female high school students increasingly outperform their male classmates," it is entirely possible that a sex-based preference program would favor men, rather than women. And the overrepresentation of certain minority groups (such as Asian students) within higher-education institutions necessarily means that preference programs have the perverse effect of benefitting some minority groups at the expense of others. It is not at all clear who race- and sex-conscious admissions programs "disadvantage." And to the extent § 26 can be characterized as "disadvantaging" any groups, those groups constitute a majority of Placidia's population.

IV. CONCLUSION

I cannot agree that the majority's decision is correct, either as a matter of general constitutional law or as an accurate interpretation of the Supreme Court precedents. I therefore respectfully DISSENT.

IN THE UNITED STATES SUPREME COURT

NO. US4SR3/US4F2

THE STATE OF PLACIDIA, and Mark Johnson, in his official capacity as Attorney General of the State of Placidia **PETITIONERS** **(Defendants and Appellees below)** **v.** **Craig PATRICK, David Silk, and William Schneider, on behalf of themselves and all others similarly situated,** **RESPONDENTS** **(Plaintiffs and Appellants below)**	**Appeal from the United States Court of Appeals for the Fourteenth Circuit, Sitting at Intervales Skihill**

ORDER GRANTING CERTIORARI

The petition of the Defendant – Appellees – Petitioners (State of Placidia) for an order of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED. Oral argument shall be conducted on October 26, 2013, in Crawfordsville, Indiana. The argument shall be confined to the following issues:

> Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public-university admissions decisions under either: (a) the traditional equal protection analysis or (b) the political restructuring doctrine.

Petitioners shall be entitled to open and close the argument.

FOR THE COURT

Tretiak Tikhonov

Tretiak Tikhonov, Clerk of the Court