NO. 12-682

IN THE
SUPREME COURT OF THE UNITED STATES

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

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

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

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AND THE AMERICAN CIVIL RIGHTS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by the long-time policy advisor to President Reagan and architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and he originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the ACRU's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for all parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell; and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because the ACRU is concerned to protect the equal rights of all citizens, regardless of what may socially be considered the "politically correct" views on any issue.

The American Civil Rights Institute (ACRI) is a nonprofit research and educational organization headquartered in Sacramento, California. ACRI monitors and researches laws that ban the government's use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRI devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Ward Connerly, chairman of the ballot initiative for California's Proposition 209, is a member of the Board of Directors for ACRI. ACRI has participated as *amicus curiae* in numerous cases relevant to the issue of race and racial classification, including but not limited to *Fisher v. University of Texas at Austin*, No. 11-345, 570 U.S. ___ (June 24, 2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF THE ARGUMENT

For the reasons stated by Petitioner Bill Schuette and Respondent Eric Russell, this Court's political-restructuring doctrine is not applicable in this case, and in any event should be overruled. Moreover, even if Section 26 of Article I of the Michigan Constitution ("Proposal 2") were subject to heightened scrutiny under this Court's political-restructuring cases, it would pass muster. Proposal 2 is narrowly tailored to advance the compelling state interest in guaranteeing equal treatment on the basis of race in merit-based competitions for limited state benefits.

I. Guaranteeing equal treatment by the State on the basis of race is unquestionably a compelling government interest.

This Court's cases have identified at least eight distinct harms inherent in the State's imposition of racial classifications.

First, the abolition of all state-imposed racial classifications is the central purpose and ultimate aspiration of the Fourteenth Amendment. Accordingly, the use of such classifications by the State inflicts an injury upon fundamental constitutional values.

Second, this Court's cases have frequently observed that state-imposed racial classifications pose a basic affront to the dignity of the persons classified. The Fifth and Fourteenth Amendments protect individuals, not groups, and the race-based

grouping of individuals by the State demeans individual dignity.

Third, even when used for purportedly benign purposes, racial classifications frequently mask invidious stereotypes and unconscious prejudices. This Court's cases universally call for close scrutiny of racial classifications to "ferret out" such lurking malignity.

Fourth, the imposition of racial classifications in the award of government benefits involves an inherent injustice to members of disfavored groups. Racial-preference schemes unjustly impose the costs of remedying past discrimination on individuals who have no personal responsibility for the prior wrongs.

Fifth, racial classifications inevitably stigmatize both favored and disfavored groups. Members of preferred groups suffer from the unjust stigma that they are inherently incapable of competing on an even footing. Members of disfavored groups are branded with the charge that they share responsibility for previous wrongs. These stigmatic harms threaten to entrench racial prejudices, rather than alleviate them.

Sixth, as this Court has often observed, racial classifications promote hostility among members of the various affected groups by sowing seeds of division along racial lines.

Seventh, racial classifications threaten to undermine confidence in government by injecting racialism into state and local politics, and by causing

interest groups to organize on racial lines to jockey for preferred status in racial-preference programs.

Eighth, in the specific context of selective educational programs, a burgeoning body of empirical evidence indicates that racial preferences actually harm their intended beneficiaries by systematically mismatching minority students with programs where their risk of underperformance is heightened.

The numerous harms of racial preferences are aggravated when the State injects racial considerations into competitive schemes for awarding limited benefits on the basis of merit, such as government jobs, government contracts, and admission to selective state-run universities.

Proposal 2 thus advances an unquestionably compelling government interest in guaranteeing equal treatment by the State on the basis of race in such competitive, merit-based award schemes.

II. Proposal 2 is precisely tailored to achieve its compelling interest in eliminating racial classifications in the award of government jobs, government contracts, and admission to state-run educational programs.

Proposal 2 is not overinclusive. It is precisely tailored to eliminate the State's use of racial classifications in the covered areas, because it simply bans the State's use of racial classifications in these areas. The fact that Proposal 2 also guarantees equal treatment on the bases of sex, color, ethnicity,

and national origin does not render it overinclusive. The State has similarly compelling reasons to guarantee equal treatment on those parallel grounds.

Proposal 2 is not underinclusive. This Court's cases permit the State to focus on areas of particularly grave concern without running afoul of strict scrutiny. By guaranteeing equal treatment by the State in the operation of public employment, public education, and public contracting, Proposal 2 addresses the three key areas in which state governments have most often used race along with merit as a criterion in competitive award schemes. The harms of racial classifications are greatly heightened when used in such merit-based award schemes.

There is no viable "race-neutral alternative" that would advance the State's compelling interest. Indeed, as a guarantee of race-neutrality, Proposal 2 is itself race-neutral. Moreover, there is no alternative method of prohibiting state-imposed racial classifications without mentioning race.

Finally, Proposal 2 is the least restrictive means of advancing the State's interest in eliminating state-imposed racial classifications. A state constitutional amendment is necessary to limit state officials' power to employ racial classifications and to insulate state officials from the considerable political pressures calling for the use of racial classifications in competitive contexts.

III. Though Petitioner did not raise the argument that Proposal 2 advances a compelling state interest in the court below, this Court may prudently rule on this ground. From time to time, this Court has exercised its discretion to rule upon grounds raised only by *amici curiae*. Moreover, the argument that Proposal 2 withstands strict scrutiny was raised by an intervenor both in the district court and on appeal.

For the foregoing reasons, even if strict scrutiny were to apply, Proposal 2 would pass muster because it is precisely tailored to advance the compelling government interest in guaranteeing equal treatment by the State on the basis of race in the merit-based competitions for limited government benefits.

ARGUMENT

I. Proposal 2 Advances the State's Compelling Interest in Guaranteeing Equal Treatment on the Basis of Race in the Merit-Based Award of Limited Government Benefits.

For the reasons stated by Petitioner Bill Schuette, this Court's political-restructuring cases, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), are not applicable in this case. Brief for Petitioner, at 17-37 (June 24, 2013). Moreover, for the reasons stated by Respondent Eric Russell, the political-restructuring doctrine should be overruled. Brief for Respondent Eric Russell in Support of Petitioner, at 6-34 (June 24, 2013).

Moreover, even if Proposal 2 were subject to "the strict scrutiny applied to explicit racial classifications," *Seattle Sch. Dist. No. 1*, 458 U.S. at 485 n.28, it would pass muster. Guaranteeing equal treatment by the government on the basis of race is a compelling state interest. Proposal 2 advances this compelling interest by mandating equal treatment on the basis of race in three critical areas in which state governments allocate limited benefits to their citizens on the basis of merit: public employment, public education, and public contracting.

A. Eight grave harms, all recognized in this Court's cases, inhere in the government's use of explicit racial classifications.

"Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). This Court's cases have identified at least eight distinct "lasting harm[s]," *id.*, inherent in the government's use of racial classifications. Singly and in combination, these grave harms establish that guaranteeing equal treatment by the government on the basis of race is a compelling state interest.

1. Guaranteeing equal treatment by the States on the basis of race is the central purpose of the Fourteenth Amendment.

First, this Court's cases emphasize that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), *quoted in Grutter v. Bollinger*, 539 U.S. 306, 341 (2003). "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388

U.S. at 10; *see also Shaw*, 509 U.S. at 642. "The most avid proponents of the post-war Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'" *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954). "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

Accordingly, any imposition of racial classifications by the State does violence to the fundamental constitutional principle of racial equality. This Court's cases universally recognize that the ultimate aspiration of the Fourteenth Amendment is the complete elimination of state-imposed racial classifications. "[A]s an aspiration, Justice Harlan's axiom" of a color-blind Constitution "must command our assent." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Given this ultimate purpose, this Court's cases that permit limited race-conscious programs stress that the Fourteenth Amendment includes a "requirement that all governmental use of race must have a logical end point." *Grutter*, 539 U.S. at 342.

Eliminating the "governmental use of race," *id.*, is therefore a compelling state interest. Indeed, because of its fundamental nexus to the Fourteenth Amendment, this interest occupies a uniquely privileged position in the pantheon of our constitutional values. In 1880, this Court instructed that the Fourteenth Amendment "declar[es] that the law in the States shall be the same for the black as for the white," and that "all persons, whether colored or white, shall stand equal before the laws of the States." *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880), *quoted in Brown*, 347 U.S. at 490 n.5. This Court continues to assert this principle today. "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

2. State-imposed racial classifications pose an affront to the dignity of individuals.

This Court's cases have frequently recognized that "[o]ne 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). "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). "[E]very time

the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part); *see also Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (observing that race-based classifications have been used by governments to "destroy the dignity of the individual").

Thus, racial classifications are at odds with the Constitution's fundamental aspiration to treat each human being as an individual with unique dignity, rather than as a member of a racial category. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); *see also Adarand*, 515 U.S. at 227 (recognizing "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups").

Due to this affront to individual dignity, opinions of this Court have expressed deep discomfort with the government's adoption of criteria for defining membership in racial groups as necessary incidents of racial-classification programs. For example, in *Parents Involved*, the controlling opinion observed that a school district conducting a race-based pupil assignment program had failed to explain why "it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions," and reasoned that "[c]rude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand." 551 U.S. at 786, 798 (Kennedy, J., concurring in part and concurring in

the judgment). Likewise, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), considering the validity of the FCC's set-aside program for minority broadcasters, one dissenting opinion criticized the majority for "fail[ing] to address the difficulties, both practical and constitutional, with the task of defining members of racial groups," *id.* at 633 n.1 (Kennedy, J., dissenting), and noted that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting)). Another opinion, in *Fullilove*, noted that "[l]aws that operate on the basis of race require definitions of race," and predicted that, under race-conscious remedial programs, "our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white." *Fullilove*, 448 U.S. at 531 (Stewart, J., dissenting). The inherent indignity of such state-imposed racial definitions necessarily accompanies virtually any system of state-imposed racial classifications.

3. Even purportedly benign racial classifications frequently mask invidious purposes or subconscious prejudices.

Third, there is general agreement in this Court that even purportedly benign racial classifications often mask invidious prejudices or subconscious stereotypes, and must therefore be viewed with corresponding skepticism. "Racial classifications raise special fears that they are motivated by an

invidious purpose," and thus "searching judicial inquiry" is required to determine "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)); *see also id.* at 519 (Stevens, J., dissenting) (commenting that the prison's purportedly benign policy of race-based segregation of inmates "is based on racial stereotypes and outmoded fears" to which "[t]his Court should give no credence").

This Court's skeptical scrutiny of racial classifications arises in part from "a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 310 (1986) (Marshall, J., dissenting). After all, "[p]olicies of racial separation and preference are almost always justified as benign." *Metro Broad.*, 497 U.S. at 635 (Kennedy, J., dissenting). "It is therefore irrelevant that a system of racial preferences … may seem benign." *Fisher v. Univ. of Tex. at Austin*, No. 11-345, 570 U.S. ___, slip op. at 6 (June 24, 2013). Due to the omnipresent risk that putatively benign classifications may rest on invidious or unconscious prejudices, "[c]lose review is needed to 'ferret out classifications in reality malign, but masquerading as benign.'" *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting)) (quoting *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting)).

4. Racial classifications inflict an inherent injustice upon individuals disfavored on the irrelevant basis of race.

Fourth, "there are serious problems of justice connected with the idea of [racial] preference itself." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.), *quoted in Grutter*, 539 U.S. at 341. The allocation of benefits and burdens by the government on the basis of race, even for remedial purposes, is inherently unjust because it imposes the costs of remediation on individuals who are not personally responsible for prior discrimination. Unavoidably, "there is a measure of inequity in forcing innocent persons … to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

Needless to say, consideration of race is "in most circumstances irrelevant" to government decisions, "and therefore prohibited." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). "The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government." *Fullilove*, 448 U.S. at 519 (Stewart, J., dissenting). Reliance on such an "irrelevant" characteristic is inherently unjust to those who lack that characteristic.

To be sure, this Court has occasionally held that imposing such injustices may be permissible in

limited circumstances to achieve certain compelling ends. But this Court's opinions have remained cognizant of the inherent injustice of racial classifications. *See*, *e.g.*, *Adarand*, 515 U.S. at 270 (Souter, J., dissenting) (observing that the result of remedial racial preferences "may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct"); *id.* at 276 (Ginsburg, J., dissenting) (similar); *Wygant*, 476 U.S. at 281 (plurality opinion).

Accordingly, "it is important not to lose sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race." *Croson*, 488 U.S. at 527 (Scalia, J., concurring in the judgment); *see also id.* at 516 (Stevens, J., concurring in part and concurring in the judgment) ("Imposing a common burden on such a disparate class [of white contractors] merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.").

Moreover, the inherent injustice of racial classifications falls on members of other minority groups as well. *See*, *e.g.*, *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 17 (Thomas, J., concurring) ("There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race."); *Metro Broad.*, 497 U.S. at 633 (Kennedy, J., dissenting) ("[T]he discriminatory policies upheld

today operate to exclude the many racial and ethnic *minorities* that have not made the Commission's list.").

5. Racial classifications stigmatize both favored and disfavored races and thus entrench racial prejudices.

Fifth, state-imposed racial classifications impose stigma on individuals of both favored and disfavored races, and thus such classifications tend to entrench racial prejudices.

This Court has often recognized that racial classifications inflict stigma upon members of the favored race by implying that they are incapable of competing for selective benefits on an even footing. "Special preferences … can foster the view that members of the favored groups are inherently less able to compete on their own." *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting). Any state scheme involving racial preferences will "inevitably [be] perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." *Adarand*, 515 U.S. at 229 (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)). Racial classifications thus threaten to "stamp minorities with a badge of inferiority." *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (quoting *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment)). Again, even those of this Court's opinions that would uphold the use of racial classifications for remedial purposes have acknowledged the gravity of these

stigmatic harms. *See*, *e.g.*, *Adarand*, 515 U.S. at 249 n.5 (Stevens, J., dissenting) (agreeing that such stigmatic harms "may be more significant than many people realize").

This stigma is especially noxious to those minority individuals who are fully qualified to receive competitive awards without the assistance of preferences. "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma…." *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting); *see also Fisher*, No. 11-345, 570 U.S. ___, slip op. at 19-20 (Thomas, J., concurring).

Moreover, such racial classifications impose a different, but equally unfair, stigma on members of the disfavored group. Classifying by race, even for preferential purposes, unjustly "stigmatizes the disadvantaged class with the unproven charge of past racial discrimination." *Croson*, 488 U.S. at 516 (Stevens, J., concurring in part and concurring in the judgment).

Thus, "[c]lassifications based on race carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493 (plurality opinion). For these reasons, this Court has often cautioned that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship

to individual worth." *Bakke*, 438 U.S. at 298 (opinion of Powell, J.). "To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment).

6. Racial classifications promote hostility and divisiveness between the affected groups.

Sixth, racial classifications promote hostility and divisiveness, rather than unity, between individuals in the affected groups. In *Parents Involved*, for example, the race-based assignment programs were invalidated in part because "[g]overnmental classifications that command people to march in different directions based on racial typologies cause new divisiveness" and "lead to corrosive discourse." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). In *Johnson v. California*, this Court noted that the segregation of inmates on racial lines threatened to "breed further hostility among prisoners and reinforce racial and ethnic divisions" by "perpetuating the notion that race matters most." 543 U.S. at 507.

"In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). "The dangers of such [racial] classifications are clear. They endorse race-based reasoning and the conception of a Nation divided

into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting); *see also id.* at 636 (Kennedy, J., dissenting) (noting that racial preferences "foster intolerance and antagonism against the entire membership of the favored classes") (quoting *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting)).

7. Racial classifications undermine confidence in government by fostering racialism in politics.

Seventh, any state-imposed system of racial classifications risks undermining confidence in government by injecting unseemly racialism into the political process. "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *see also Miller v. Johnson*, 515 U.S. 900, 912 (1995) (observing that "[r]acial classifications with respect to voting … may balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters") (quoting *Shaw*, 509 U.S. at 657).

"[R]ightly or wrongly, special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion." *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting).

This Court's cases contain specific examples of instances in which state-imposed racial classifications have injected racialism into the political process. For example, the racial assignment schemes invalidated in *Parents Involved* risked making racial classifications into "a bargaining chip in the political process," which "threaten[ed] to reduce children to racial chits valued and traded according to one school's supply and another's demand." 551 U.S. at 797-98 (Kennedy, J., concurring in part and concurring in the judgment). Similarly, the minority set-aside at issue in *Fullilove* raised concerns that the racial preferences had become an occasion for voting blocs of legislators, organized on racial lines, to seek "a piece of the action" for their members. *Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting), *quoted in Croson*, 488 U.S. at 511 (plurality opinion); *see also id.* at 536, 542. These cases illustrate the danger that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement" could become "lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Croson*, 488 U.S. at 505-06 (plurality opinion).

When politics become racialized in this manner, public confidence in government and in the constitutional ideals on which government is based inevitably suffers. Thus, in *Rice v. Cayetano*, this Court stated that "the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons

whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions." 528 U.S. 495, 517 (2000).

8. Empirical evidence indicates that racial preferences in education harm their putative beneficiaries.

Finally, a burgeoning body of empirical evidence indicates that, in the specific context of university admissions, racial-preference schemes ultimately injure their intended beneficiaries by "mismatching" them with selective programs in which they are at greater risk of underperformance. *See Fisher*, No. 11-345, 570 U.S. ___, slip op. at 17-18 (Thomas, J., concurring) (citing, *inter alia*, Brief of Richard Sander & Stuart Taylor, Jr. as *Amici Curiae* in Support of Neither Party, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. May 29, 2012)); *see generally* RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH (2012). These empirical studies indicate that "racial engineering does in fact have insidious consequences" for its putative beneficiaries. *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 17 (Thomas, J., concurring). The "substantial gap" in merit-based admissions criteria leads to a "pervasive shifting effect" in the mismatch of minority students across institutions of higher education, and the overall effect is systematic underperformance by minority students. *Id.* at 17-18. Such evidence provides further support for the compelling nature of the State's interest in eliminating racial preferences.

For all eight of the foregoing reasons, the elimination of state-imposed racial classifications is

unquestionably a compelling state interest. It is squarely within the power of the State of Michigan, and its voters, to assert that "we are just one race here. It is American." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

B. The harms caused by racial classifications are aggravated when the State uses race in merit-based competitions for limited benefits.

Furthermore, the harms and risks caused by state-imposed racial classifications are particularly acute when the State uses racial classifications in merit-based, competitive schemes for the award of limited government benefits. Even in the rare circumstances where it is constitutionally permissible, "governmental classification on the immutable characteristic of race runs counter to the deep national belief that state-sanctioned benefits and burdens should bear some relationship to individual merit and responsibility." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment). This "deep national belief" in favor of awards on the basis of "individual merit and responsibility," *id.*, is particularly entrenched with respect to government benefits in limited supply that are typically awarded on the basis of merit—such as government contracts, government jobs, and admission to selective state universities.

For these reasons, in contending that certain race-based pupil assignment programs should be upheld, the principal dissent in *Parents Involved*

took pains to emphasize that "[t]his context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply." 551 U.S. at 834 (Breyer, J., dissenting). The opinion thus acknowledged racial classifications become more harmful when the government relies on race as it "seek[s] to award a scarce commodity on the basis of merit." *Id.* at 835.

Indeed, most, if not all, of the eight harms associated with racial classifications identified in this Court's opinions, discussed above, are aggravated when race is used instead of merit in awarding competitive benefits. For example, the stigma imposed on members of preferred minorities is most acute when applied to merit-based selections, because such programs most strongly imply that the members of the preferred groups "are inherently less able to compete on their own." *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting); *see supra* Part I.A.5. For very similar reasons, injecting racial criteria into merit-based selection schemes bears a heightened risk of masking unconscious prejudices that the preferred minorities do in fact require such preferences to compete. *See supra* Part I.A.3. Particularly when substituted for merit, then, racial classifications threaten to produce a vicious cycle in which the stigma imposed on preferred minorities both arises from and reinforces unconscious and paternalistic racial stereotypes.

Furthermore, such a cycle of stigma renders the affront to personal dignity imposed by racial classifications even more acute. *See supra* Part I.A.2.

Likewise, the inherent injustice of making awards based on the irrelevant characteristic of race is heightened when race is used in merit-based selection schemes, because those denied benefits have a stronger claim that they actually deserved what was granted to another because of race. *See supra* Part I.A.4. And because it involves greater stigma and more profound injustice, the risk of increased resentment, hostility, and divisiveness on racial grounds is all the greater when competitive benefits are granted and denied on the basis of race. *See supra* Part I.A.6. Again, the injection of racial preferences into competitive award schemes is most likely to promote racialization of state and local politics, as such preferences encourage groups to balkanize along racial lines and jockey for the preferred status. *See supra* Part I.A.7. Finally, the empirical evidence of harm due to mismatch of putative beneficiaries has specific application in the context of admission to selective educational programs. *See supra* Part I.A.8.

In other words, the State's interest in eliminating racial classifications is uniquely compelling in the areas in which state government allocates competitive benefits based on merit—most notably, government jobs, government contracts, and admission to state-run educational institutions.

For the foregoing reasons, Proposal 2 advances the compelling state interest of guaranteeing equal treatment on the basis of race by the State in the award of "goods or services that are normally distributed on the basis of merit and which are in

short supply." *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting).

II. Proposal 2 Is Precisely Tailored To Guarantee Equal Treatment by the State on the Basis of Race in the Key Areas Where Racial Classifications Are Most Harmful.

Proposal 2 provides that "[t]he 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." MICH. CONST. art. I, § 26(2). This provision passes muster, even under heightened scrutiny, because it is precisely tailored to advance the compelling state interest in guaranteeing equal treatment on the basis of race in the key areas of merit-based competition for limited government benefits.

This Court has repeatedly reaffirmed that strict scrutiny is not "strict in theory, but fatal in fact." *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 13 (quoting *Adarand*, 515 U.S. at 237); *Grutter*, 539 U.S. at 326. Strict scrutiny requires that the provision under scrutiny be "specifically and narrowly framed to accomplish" the compelling state interest. *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)). "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" … the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.* (quoting *Croson*, 488 U.S. at 493

(plurality opinion)) (ellipsis inserted by the *Grutter* Court). An "ill fit of means to ends" occurs when the policy is either "overinclusive" or "underinclusive." *Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting). The "fit" is also evaluated by considering whether there are "workable race-neutral alternatives that will achieve" the State's compelling interest. *Grutter*, 539 U.S. at 339; *see also Parents Involved*, 551 U.S. at 783-84 (Kennedy, J., concurring in part and concurring in the judgment) (noting that an "inquiry into less restrictive alternatives" is "demanded by the narrow tailoring analysis").

Proposal 2 satisfies all these criteria of narrow tailoring. It is neither overinclusive nor underinclusive with respect to the interest it advances, and there are no race-neutral or less restrictive alternative methods to achieve the State's interest.

A. Proposal 2 is not overinclusive, because it forbids only the precise evil it is intended to prevent.

Proposal 2 advances the compelling interest in guaranteeing equal treatment by the State on the basis of race precisely by guaranteeing equal treatment by the State on the basis of race. *See* MICH. CONST. art. I, § 26. Thus, Proposal 2 is not overinclusive with respect to the State's interest in eliminating state-imposed racial classifications.

To be sure, Proposal 2 prohibits governmental discrimination and preferential treatment on the

basis of "sex, color, ethnicity, or national origin," as well as "race." *Id.* art. I, § 26(2). But the inclusion of these related prohibitions does not render Proposal 2 "overinclusive" in any relevant sense. In equal protection cases, overinclusiveness is problematic when it betokens the "reflexive or unthinking use of a suspect classification," *Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting), or when it raises the "possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)). Proposal 2's symmetric prohibitions against discrimination on the basis of sex, color, ethnicity, and national origin raise no such concerns. Quite the contrary, the Proposal's guarantee of equal treatment on the basis of factors other than race belies any notion that citizens were motivated by "illegitimate racial prejudice or stereotype" in passing the constitutional amendment. *See id.*

Moreover, most or all of the compelling reasons to prohibit governmental discrimination on the basis of race detailed above, *see supra* Part I.A, apply equally to these other protected categories. Thus, far from being "overinclusive" for banning these other forms of state-sponsored discrimination, Proposal 2 is precisely drawn to advance the State's compelling interest of guaranteeing equal treatment by the government on the basis of race, and it is equally precisely drawn to advance the compelling state interests in guaranteeing equal treatment on the other specified grounds as well.

In addition, Proposal 2 does not place state law at odds with federal law by prohibiting any race-conscious remedial programs mandated by the Fourteenth Amendment. In a dwindling category of cases, race-conscious remedies are mandatory under the Equal Protection Clause to dismantle recalcitrant regimes of *de jure* segregation. *See generally Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19-20 (1971). But Proposal 2 specifically exempts any such existing court-ordered remedial programs. MICH. CONST. art. I, § 26(9). In this case, there is no allegation that other programs in the State of Michigan may reasonably be expected to become the subject of future mandatory race-conscious desegregation orders, so Proposal 2 presents no plausible risk of becoming overinclusive on such grounds.

B. Proposal 2 is not underinclusive, because it addresses the key areas in which state governments inject racial classifications into merit-based award programs.

Likewise, the fact that Proposal 2 does not prohibit *all* use of racial classifications by the State does not render it fatally underinclusive. By targeting "the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply," *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting), Proposal 2 enshrines its guarantee of equal treatment in the key areas where racial classifications are both commonly used by state governments and uniquely harmful.

As discussed above, racial classifications are particularly noxious when used in areas where the State "seek[s] to award a scarce commodity on the basis of merit." *Id.* at 835. And this Court's cases establish that, in advancing a compelling government interest, the State may focus on a particularly urgent or problematic subset of the targeted harm, without running afoul of strict scrutiny.

There was broad agreement on this principle in *R. A. V. v. St. Paul*, 505 U.S. 377 (1992), which invalidated a municipal ordinance that banned race- and religion-based fighting words as an impermissible content-based regulation of speech. *Id.* at 380. The Court's opinion stated that content discrimination within categories of unprotected speech is permissible "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388; *see also id.* ("[T]he Federal Government can criminalize only those threats of violence that are directed against the President … since the reasons why threats of violence are outside the First Amendment … *have special force* when applied to the person of the President." (emphasis added)). The concurring opinion of Justice Stevens, though disagreeing with the Court on the point of application, asserted the same principle: "Conduct that creates special risks or causes special harms may be prohibited by special rules." *Id.* at 416 (Stevens, J., concurring in the judgment); *see also id.* at 433-34.

Similarly, in *Burson v. Freeman*, this Court upheld a state statute prohibiting political canvassing within 100 feet of a polling place on election day. 504 U.S. 191 (1992). Concluding that the provision withstood strict scrutiny, the plurality opinion rejected the argument that the statute was underinclusive because it failed to prohibit non-political speech in the same area: "We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive…. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Id.* at 207 (plurality opinion) (Blackmun, J.), *quoted in part in R. A. V.*, 505 U.S. at 434 (Stevens, J., concurring in the judgment).

So also here, for the reasons stated above, *see supra* Part I.B, the people of Michigan were entitled to conclude that government-imposed racial discrimination "creates special risks or causes special harms," *R. A. V.*, 505 U.S. at 416 (Stevens, J., concurring in the judgment), in the specific context of "decid[ing] who will receive goods or services that are normally distributed on the basis of merit and which are in short supply," *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting). By banning discrimination and preferential treatment "in the operation of public employment, public education, or public contracting," MICH. CONST. art. I, § 26(2), Proposal 2 correctly identifies three key areas in which its interest in prohibiting racial preferences in the award of competitive benefits "ha[s] special force." *R. A. V.*, 505 U.S. at 388. Simple review of this Court's cases confirms that public employment,

public education, and public contracting are the key areas in which state governments have frequently sought to superimpose racial preferences upon the merit-based allocation of benefits in limited supply. *See*, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (public education); *Grutter*, 539 U.S. 306 (public education); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993) (public contracting); *Croson*, 488 U.S. 469 (public contracting); *Wygant*, 476 U.S. 267 (public employment); *Bakke*, 438 U.S. 265 (public education). No other area of state-awarded competitive benefits poses repeat dangers of similar nature and scope.

To be sure, at the enactment of Proposal 2, the threat of governmental racial preferences was most acute in the area of public education, since this Court had recently affirmed the use of race in the University of Michigan Law School's admission programs. *Grutter*, 539 U.S. 306. But the State's voters were not required to wait for comparable racial-preference schemes to be enacted in public employment or public contracting before addressing those areas as well. Any such requirement "would necessitate that a State's political system sustain some level of damage before" the Michigan electorate "could take corrective action." *Burson*, 504 U.S. at 209 (plurality opinion). Rather, the people of Michigan were "permitted to respond … with foresight rather than reactively." *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

C. No "race-neutral alternative" is available because any such alternative would, by definition, fail to address the compelling interest advanced by Proposal 2.

As noted above, in the equal protection context, narrow tailoring typically requires "consideration of the use of race-neutral means." *Croson*, 488 U.S. at 507. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but it does require "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339; *see also Fisher*, No. 11-345, 570 U.S. ___, slip op. at 11.

As an initial matter, it makes little sense to speak of "race-neutral alternatives" to Proposal 2, *id.*, because Proposal 2 is itself a provision that guarantees race neutrality. *See* MICH. CONST. art. I, § 26. In a fundamental sense, Proposal 2 is the most race-neutral of alternatives for the State.

To the extent that Proposal 2 might nevertheless be considered "race-conscious" because it bans racial discrimination and preferences, there are no race-neutral (or, more properly, race-silent) alternative means to advance the State's interest. In fact, the task of envisioning a provision of state law that would prohibit the State's use of race without mentioning the State's use of race confounds the imagination of *amici* and their counsel.

D. Amending the state constitution was the least restrictive means of advancing Proposal 2's compelling interest, because enacting such a policy at any lower level of government would gravely undermine its effectiveness.

For similar reasons, Proposal 2 is also the least restrictive means of achieving the State's goal of committing state officials to race neutrality in the areas of public employment, public education, and public contracting. It is clear that no less restrictive means exists that "could promote the substantial interest about as well." *Fisher*, 570 U.S. ___, slip op. at 11 (quoting *Wygant*, 476 U.S. at 280 n.6). In particular, there is no method of effecting Proposal 2's goal that is less burdensome on minority participation in the political process, which is the putative burden that this Brief assumes (strictly *arguendo*) triggers strict scrutiny in this case. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 & n.28 (1982).

As a state constitutional amendment, Proposal 2 ties the hands of state officials and eliminates any prospect of enacting racial classifications through the State's political processes. Accordingly, it both binds state actors and insulates them from the often-powerful political forces that call for the use of racial classifications in public employment, education, and contracting. The only way to effectuate Proposal 2's policy in a manner less burdensome on minority political interests would be to require that the policy be adopted at some lower level of state government, through the actions of elected or appointed state

officials. But Proposal 2 reflects the judgment of the State's electorate that state officials and political processes cannot be trusted to remain race-neutral on their own. Consequently, any policy enacted at a lower level of state government would not constitute a "less restrictive alternative" to achieve the same compelling state interest of Proposal 2. *Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring in part and concurring in the judgment). Such alternatives would not "promote" the compelling interest "about as well," *Fisher*, No. 11-345, 570 U.S. ___, slip op. at 11. Rather, they would largely defeat the purpose of Proposal 2.

The decision below erred, therefore, when it treated as a constitutional evil the fact that Proposal 2 "alters the process by which supporters of permissible race-conscious admissions policies may seek to enact those policies." *Coal. To Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 473 (6th Cir. 2012) (en banc). Given the compelling interest in eliminating such "race-conscious … policies," *id.*, this alteration should be viewed as a constitutional benefit. The point of Proposal 2 is to ensure that no such "supporters of permissible race-conscious … policies" will ever *succeed* in "seek[ing] to enact those policies," *id.*, short of passing their own constitutional amendment. As discussed above, the State has a compelling government interest in eradicating such "permissible race-conscious … policies." *Id.* The only method of doing so with even comparable

effectiveness is the method by which Michigan has done so—by amending its state constitution.

Furthermore, the argument that Proposal 2 passes strict scrutiny assumes, *arguendo*, that Proposal 2 triggers strict scrutiny because it restructures the state political process in a manner that impermissibly burdens minority interests. *See Seattle Sch. Dist. No. 1,* 458 U.S. at 485 & n.28. To hold that Proposal 2 fails strict scrutiny for the same reason—because it putatively restructures the state political process in a way that disfavors minority interests—would be to hold that to trigger strict scrutiny is to fail strict scrutiny. Any such holding would be fundamentally at odds with this Court's repeated assurance that strict scrutiny is *not* "strict in theory, but fatal in fact." *Fisher*, 570 U.S. ___, slip op. at 13 (quoting *Adarand*, 515 U.S. at 237).

As a practical matter, therefore, there were no "less restrictive" alternatives available to the people of Michigan to pursue the compelling interest in guaranteeing equal treatment on the basis of race in the three key areas of merit-based distribution of limited benefits. *See Coal. To Defend Affirmative Action*, 701 F.3d at 506 (Sutton, J., dissenting) ("What else at any rate could the people of Michigan have done?").

For the foregoing reasons, Proposal 2 is narrowly tailored to advance the compelling interest it serves.

III. This Court May Reverse the Judgment Below on the Basis of a Purely Legal Ground Not Raised by the Petitioner.

In the court below, Petitioner did not "assert that Proposal 2 satisfies a compelling state interest," and the en banc decision below thus did "not consider this argument." *Coal. To Defend Affirmative Action*, 701 F.3d at 489. To be sure, for prudential reasons, this Court is reluctant to consider arguments that have not been raised by the parties or passed upon by the lower court. *See*, *e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 n.4 (2013); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981). But this Court clearly has authority to decide a case on a legal ground raised by *amici* rather than the parties. *See*, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961); *see also Allen v. Hardy*, 478 U.S. 255, 262 (1986) (Marshall, J., dissenting) (noting that the Court addressed a question that had "not been addressed by lower courts in this case or any other"); *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 & n.6 (1971) (noting that this Court's Rule 23(c)(1) "does not limit our power to decide important questions not raised by the parties").

This Court's reluctance to consider arguments raised only by *amici*, not the parties, arises from concerns of prudential and "equitable dimension." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 441 (1990) (Marshall, J., dissenting). In this case, several factors indicate that this Court may prudently and equitably resolve this case by holding that Proposal 2 withstands strict scrutiny. First, the

question whether Proposal 2 withstands strict scrutiny is fairly included within the scope of the question presented for review—namely, "[w]hether 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." Brief for Petitioner, at i (June 24, 2013).

Second, though the en banc decision under review declined to reach this question, intervenor Eric Russell argued in both the district court and the court of appeals that Proposal 2 would withstand strict scrutiny. *See Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 631 & n.11 (6th Cir. 2011); Brief for Respondent Eric Russell in Support of Petitioner, at 1-2 (June 24, 2013) (noting that Eric Russell "argued that even if Proposal 2 were subject to strict scrutiny, it would meet that standard"). Indeed, unlike the en banc opinion, the panel opinion of the court below addressed Russell's argument, albeit briefly. *Coal. To Defend Affirmative Action*, 652 F.3d at 631 n.11. This is not a case, therefore, where there is "need to ensure that each party has fair notice of the arguments to which he must respond." *Richmond*, 496 U.S. at 441 (Marshall, J., dissenting). Rather, the argument in question "is not foreign to the parties," *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion), since it was raised by a party and was addressed and decided by the lower court at the panel stage. In such circumstances, this Court may prudently rule on alternative legal grounds raised by *amici curiae*. *See Mapp*, 367 U.S. at 646 n.3, 654-55 (reconsidering and overruling *Wolf v. Colorado*, 338

U.S. 25 (1949), even though "appellant … did not insist that *Wolf* be overruled," but "*amicus curiae* … did urge the Court to overrule *Wolf*"); *Blonder-Tongue*, 402 U.S. at 320 & n.6 (similar).

Third, this Court prefers to rely on simpler grounds for decision, when possible, to avoid thorny constitutional questions. *See, e.g., Gomez v. United States*, 490 U.S. 858, 864 (1989). To the extent that this Court may find that the application or continued validity of the political-restructuring cases presents vexing questions, the fact that Proposal 2 clearly withstands strict scrutiny presents a valid alternative ground for reversal.

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"The Equal Protection Clause is not incoherent." *Parents Involved*, 551 U.S. at 856 (Breyer, J., dissenting). "It 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). Proposal 2 advances the compelling state interest of guaranteeing equal treatment on the basis of race, and it is precisely tailored to do so. Even if strict scrutiny were to apply, Proposal 2 would pass muster.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the judgment of the court below.

Respectfully submitted,

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