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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next today in Case 12-682, Schuette v. The
5 Coalition to Defend Affirmative Action.

6 Mr. Bursch.

7 ORAL ARGUMENT OF JOHN J. BURSCH

8 ON BEHALF OF THE PETITIONER

9 MR. BURSCH: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The issue in this case is whether a Michigan
12 constitutional provision requiring equal treatment
13 violates equal protection. And for two reasons, the
14 answer is no.

15 First, unlike the laws at issue in Hunter
16 and Seattle, Section 26 does not repeal an
17 antidiscrimination law. Instead, it repeals
18 preferences, and thus, it's an impediment to
19 preferential treatment, not equal treatment.

20 JUSTICE SOTOMAYOR: Holt had nothing to do
21 with an antidiscrimination law. It had to do with a
22 remedy, defacto segregation. Why isn't this identical
23 to Seattle?

24 MR. BURSCH: Justice Sotomayor, it's not
25 identical because of the remedy issue. In Seattle, they

1 were trying to create, in the court's words, equal
2 educational opportunity by imposing a remedy that would
3 result in equality in the schools.

4 JUSTICE SOTOMAYOR: You don't think that the
5 proponents of affirmative action are attempting to do
6 the same thing? One of the bill sponsors here said that
7 this constitutional amendment will bring back
8 desegregation in Michigan, and it appears to have done
9 just that.

10 MR. BURSCH: Well, there's two points to
11 that question and I'll address them both. First on the
12 merits, under Grutter, the point of preferences in
13 university admissions cannot be solely the benefit of
14 the minority because under Grutter, it's supposed to
15 benefit the campus as a whole through diversity, and
16 which we think is a laudable goal.

17 It's a forward-looking action, not a
18 backward-looking action, to remedy past discrimination.
19 And we know that because under Grutter, you can use
20 preferences whether or not there's de facto or de jure
21 segregation, simply to get the benefit.

22 But with respect to your -- your point about
23 the University of Michigan and what has or has not
24 happened here, two thoughts on that. First, we have the
25 statistics that we discuss in our reply brief where it's

1 not clear that -- that the diversity on Michigan's
2 campus has gone down. But our main point on that is --
3 is not those numbers, but the fact that there are other
4 things that the University of Michigan could be doing to
5 achieve diversity in race-neutral ways.

6 For example, we know that --

7 JUSTICE SOTOMAYOR: I -- I thought that in
8 Grutter, all of the social scientists had pointed out to
9 the fact that all of those efforts had failed. That's
10 one of the reasons why the -- I think it was a law
11 school claim in Michigan was upheld.

12 MR. BURSCH: Well, there's social science
13 evidence that goes both ways. But I want to focus on
14 the University of Michigan because there's two things
15 that they could be doing right now that would get them
16 closer to the race-neutral goal.

17 The first thing is that they could eliminate
18 alumni preferences. Other schools have done that.
19 They have not. That's certainly one way that tilts the
20 playing field away from underrepresented minorities.

21 The other one, and this is really important,
22 is the focus on socioeconomic --

23 JUSTICE SOTOMAYOR: It's always wonderful
24 for minorities that they finally get in, they finally
25 have children and now you're going to do away for that

1 preference for them. It seems that the game posts keeps
2 changing every few years for minorities.

3 MR. BURSCH: Given the makeup of Michigan's
4 alumni right now, certainly that playing field would be
5 tilted the other way.

6 The other thing that we press is
7 socioeconomic diversity. And at the University of
8 Michigan, there was a stat in "The Wall Street Journal"
9 just two days ago that if you measure that by Pell
10 grants, the number of students who are eligible for
11 those, at the University of Michigan the number of
12 students who have Pell grants is half what it is at more
13 progressive institutions like Berkeley and the
14 University of Texas at Austin.

15 So the University of Michigan could be
16 trying harder. But our point isn't to get into a debate
17 about whether preferences are a good or bad thing
18 because that's not what this case is about. The
19 question is whether the people of Michigan had the
20 choice through the democratic process to accept this
21 Court's invitation in Grutter to try race-neutral means.

22 JUSTICE GINSBURG: Mr. Bursch, could you go
23 back --

24 JUSTICE KENNEDY: Well, while you're on
25 Seattle, can you -- I have difficulty distinguishing

1 Seattle. One factual difference is that there was a
2 school board there, a directly-elected school board
3 elected for a short term of years. Here there's a board
4 of trustees.

5 Is that -- is that the distinguish -- a
6 distinguishing factor in the case in which a principal
7 distinction could be made?

8 MR. BURSCH: I think it's a distinguishing
9 factor. You know, kind of sticking with how hard is it
10 under the new political process. And I think the chart
11 that we have on page 17 of our reply brief explains that
12 it's really easier to change race-based admissions
13 policies now than it was before Section 26. And that's
14 one basis.

15 But I think the more fundamental basis is to
16 say, you know, what Seattle is about. And -- and if you
17 indulge me, I'm going to suggest that Seattle could mean
18 one of three things. One of those I think you should
19 clearly reject, and then the other two I think are --
20 are possible interpretations that you could adopt.

21 When Seattle talks about racial
22 classifications, it focuses on laws that have a racial
23 focus. Now, right out of the box, equal protection is
24 about people, not about laws, but even more
25 fundamentally, that cannot be the right test. At a

1 minimum, that part of Seattle has to go because if you
2 had a race-neutral law, like Michigan's Equal Protection
3 Clause, which forbids discrimination on the basis of
4 race or sex -- you know, it mirrors the concept of the
5 Federal clause -- that itself would be subject to strict
6 scrutiny because it has a racial focus. So we know that
7 can't be right and that's Respondent's position.

8 So that leaves you two other choices. And
9 one would be an incremental change to this political
10 restructuring doctrine; the other would be a more
11 aggressive change. The incremental change would be to
12 interpret racial classification in Seattle as meaning a
13 law that, one, repeals an antidiscrimination provision,
14 as it did in Hunter and Seattle. And two, removes that
15 issue to a higher level of the decision-making process.

16 And because Michigan's law requires equal
17 treatment, it eliminates preferences, not an
18 antidiscrimination law. That would be a way that you
19 could keep Seattle and Hunter as a viable doctrine, and
20 still rule in our favor on this case.

21 JUSTICE SOTOMAYOR: I don't see the
22 distinction. Bussing could be viewed, and was viewed,
23 to benefit only one group. It was a preference for
24 blacks to get into better schools. That's the way the
25 case was pitched, that was its justification, and to

1 integrate the society. Affirmative action has the same
2 gain. We've said that in *Fisher*, it should be to
3 diversify the population, and so it favors diversity as
4 opposed to desegregation.

5 MR. BURSCH: Right. But there's a
6 difference between favoring diversity as an abstract
7 concept on campus, which Grutter clearly allows, and
8 remedying past discrimination, which was the point of
9 the bussing in Seattle. And that's why we're really in
10 a post-Seattle world now because under --

11 JUSTICE GINSBURG: But there -- there was no
12 proof that there was any de jure segregation in Seattle.

13 MR. BURSCH: That's correct because, at the
14 time of Seattle's decision, we didn't yet have parents
15 involved, and so there wasn't a strict scrutiny test
16 that was being applied to that bussing program. And so
17 you didn't have to go as far as you would today if you
18 wanted to uphold that same bussing program.

19 But what really -- what ties this case up --

20 JUSTICE KENNEDY: But you're saying there --
21 there are three things. One, the first you reject.

22 MR. BURSCH: Yes.

23 JUSTICE KENNEDY: The law was a racial
24 focus.

25 MR. BURSCH: It can't be because of racial

1 focus.

2 JUSTICE KENNEDY: Okay. And the second was
3 an incremental improvement in the -- in the democratic
4 process -- or democratic responsibility?

5 MR. BURSCH: That, plus --

6 JUSTICE KENNEDY: Responsiveness, I guess.

7 MR. BURSCH: Right. That, plus repealing an
8 antidiscrimination law. I think that's a narrow way --

9 JUSTICE KENNEDY: And was there a third, did
10 you say?

11 MR. BURSCH: Well, the third way is really
12 to -- to look at racial focus and say that's wrong, and
13 maybe this whole doctrine needs to be reexamined. And
14 the way that you could do that is to look at what
15 Seattle and Hunter are really doing, which is falling
16 right into the Washington v. Davis line of cases.

17 Both of those cases could have been resolved
18 by saying, one, there's a disparate impact; and two,
19 given the facts and circumstances in 1969, Akron, Ohio
20 and 1982, Seattle, Washington, that there was
21 discriminatory animus based on race. And if you did
22 that, you could reconcile those cases with
23 Washington v. Davis and the entire line of equal
24 protection jurisprudence this Court has used since that
25 time.

1 JUSTICE GINSBURG: But the reason to claim
2 in this case, it just wasn't decided -- wasn't there a
3 racial animus, that the reason for Proposition 2 was to
4 reduce the minority population? The court of appeals
5 didn't get to that, but there was such a claim.

6 MR. BURSCH: There was a claim, but, Your
7 Honor, there was also a decision. And the district
8 court was really clear on this. Keep in mind that this
9 was a summary judgment posture, and the district court
10 concluded properly that there wasn't even a question of
11 material disputed fact with respect to intent. This is
12 at pages 317 to 319 of the supplemental appendix
13 petition.

14 And that's because the primary motivation
15 for Section 26 included so many nondiscriminatory
16 reasons, including the belief of some in Michigan that
17 preferences are themselves race discrimination. Others
18 that -- race-neutral alternatives is actually a better
19 way to achieve campus diversity that results in better
20 outcomes for underrepresented minority students. Some
21 could believe that the preferences result in mismatch,
22 as Justice Thomas is --

23 JUSTICE KENNEDY: That, it seemed to me a
24 good distinction for Hunter and Mulkey v. Reitman, which
25 the briefs don't talk much about.

Official

1 MR. BURSCH: Yes.

2 JUSTICE KENNEDY: But not necessarily a
3 distinction in Seattle because Seattle you could argue,
4 well, there are other methods that are less racially
5 divisive.

6 MR. BURSCH: And I think -- and I would like
7 to come back to Reitman because that fits into this
8 framework, too.

9 But I think if you have any question about
10 what Seattle really meant, the place to look is the
11 later decision in Cuyahoga Falls because in Cuyahoga the
12 Court specifically mentions, quote, "the evil of
13 discriminatory intent present in Seattle." That's at
14 pages 196 to '97 of the opinion.

15 And it also talks about the decisionmakers'
16 statements as evidence of discriminatory intent in the
17 Hunter case, at page 195. And so I think if you look at
18 Cuyahoga Falls, it has already done some of the work for
19 you if you are going to take the more conservative route
20 and say there's intent.

21 JUSTICE SOTOMAYOR: But I don't see how the
22 argument would be any different here. One of the main
23 sponsors of this bill said it was intended to segregate
24 again. The voters in Seattle were not all filled with
25 animus, some of them just cared about their children not

1 leaving -- not having outsiders come in. I mean,
2 there's always voters who have good intent.

3 MR. BURSCH: That's true and there is always
4 some bad apples, too. We don't dispute that point. But
5 -- but here you have a district court holding that there
6 is not even a material question of fact with respect to
7 animus, because there are so many reasons that could be
8 advanced, legitimate reasons again, about mismatch and
9 about the benefits of racial --

10 JUSTICE SOTOMAYOR: In Seattle as well. So
11 it wasn't the issue of animus that drove Seattle.

12 MR. BURSCH: I think it's much harder in
13 Seattle, Your Honor. But, you know, to fit Reitman into
14 this discussion and what I would consider the more
15 conservative way to deal with Seattle and Hunter, one
16 that would preserve those as a doctrine, is to think
17 about how Reitman would come out under that test.

18 In Reitman, of course, you had
19 antidiscrimination laws, just like in Hunter, at the
20 local level, which were then repealed by a State
21 constitutional amendment. And the political
22 restructuring doctrine had not yet been invented yet,
23 and so what the Court did is it relied on the California
24 Supreme Court's finding that there was discriminatory
25 animus in striking down those antidiscrimination laws.

1 I think that if you view Hunter and Seattle
2 similarly as cases where if you repeal an
3 antidiscrimination law, as opposed to one that requires
4 equal treatment, that's the narrow way to cabin those
5 cases and ones that -- a way that would allow those
6 cases to survive, yet to distinguish Section 26.

7 One point that we haven't discussed much is
8 the democratic process, and it's important that I
9 emphasize that, obviously, the use of race-based and
10 sex-based preferences in college education is certainly
11 one of the most hotly contested issues of our time. And
12 some believe that those preferences are necessary for
13 campus diversity. Others think that they are not
14 necessary, and in fact that we would have a much better
15 world if we moved past the discussion about race and
16 instead based it on race-neutral criteria.

17 JUSTICE GINSBURG: Mr. Bursch, can I ask you
18 to go back to the very first thing you said because I
19 didn't get your - get your point. The question, what
20 impact has the termination of affirmative action had on
21 Michigan, on the enrollment of minorities in the
22 University of Michigan? Do we have any clear picture of
23 that, what effect the repeal of affirmative action has
24 had?

25 MR. BURSCH: Yes, Justice Ginsburg, we have

1 a muddy picture. As we explain in our reply brief, the
2 first thing that we have is the actual statistics for
3 the first full year after Section 26 went into effect.
4 This is 2008.

5 And what we find is that the number of
6 underrepresented minorities as part of the entering
7 freshman class at Michigan as a percentage changed very
8 little. It went from about 10-3/4 percent to about
9 10-1/4 percent.

10 Then it gets very difficult to track,
11 because, following the U.S. Census's lead, in 2010 the
12 University of Michigan stopped requiring students to
13 check only a single box to demonstrate what their race
14 or ethnicity was and moved to a multiple checkbox
15 system.

16 And Justice Sotomayor, when you see in the
17 amici briefs that there has been a dramatic drop, for
18 example, in African American students on campus at the
19 University of Michigan, those numbers don't take into
20 account that people who before were forced to check a
21 single box now could be checking multiple boxes. And if
22 you fold in the multiple checkbox students, the number
23 of underrepresented minorities on campus actually comes
24 out higher. Now, we don't know what those numbers are
25 because you could have a student who might be white and

1 Asian and they would not be considered an
2 underrepresented minority, and they could be in there.
3 But we know that the numbers are a lot closer than when
4 you just look at single checkbox students in isolation.

5 JUSTICE SOTOMAYOR: So what do we do with
6 the statistics from California? An amici from
7 California, their attorney general, has shown, another
8 State with a similar proposition, has shown the dramatic
9 drop.

10 MR. BURSCH: Well, the statistics in
11 California across the 17 campuses in the University of
12 California system show that today the underrepresented
13 minority percentage is better on 16 out of those 17
14 campuses. It's not at Berkeley, they haven't gotten
15 there yet, but it's better on the rest.

16 And by going to race-neutral criteria, what
17 they discovered was that underrepresented minority
18 students have higher GPAs, that they take more
19 technology, engineering, and math classes, and they have
20 a graduation rate that is 20 to 25 percent higher than
21 it was before California's Proposition 209.

22 You can see similar effects in Texas in
23 their top 10 percent program before it was modified.
24 And not only did it have those positive impacts, but it
25 actually increased minority performance at

1 social-economically disadvantaged high schools, where
2 the students said, hey, if I can only get into the top
3 10 percent of my class, I can be in the University of
4 Texas at Austin.

5 And again, we can all agree that diversity
6 on campus is a goal that should be pursued. What the
7 California and Texas experiences have demonstrated is
8 that there are good, positive reasons why the voters
9 might want to try a race-neutral alternative.

10 JUSTICE SOTOMAYOR: So why is it okay to
11 have taken away -- not okay to have taken away the
12 decision to have bussing from the local school boards,
13 the people on the ground, but it's okay to take that
14 power away from the people on the ground here, the board
15 of regents, who are also elected like the school board
16 was in Seattle?

17 MR. BURSCH: Because as this --

18 JUSTICE SOTOMAYOR: The general population
19 has feelings about many things, but the only decision
20 that they're -- educational decision that they are
21 taking away from the board of regents is this one:
22 affirmative action. Everything else they leave within
23 the elected board of regents.

24 MR. BURSCH: You've put your finger on the
25 fulcrum of Respondents' best argument, that only race as

1 a factor alone has been removed. And there their
2 argument is exactly backwards because it's not Michigan
3 or Section 26 that single out race, it's the Equal
4 Protection Clause itself. Because, Justice Sotomayor,
5 if a student wants to lobby for an alumni preference or
6 a cello preference and put it in the State constitution,
7 strict scrutiny is never applied to that effort. But
8 when you try to get a preference based on race or not
9 based on race in the Federal -- or the State
10 constitution, strict scrutiny is always applied.

11 And so it's the Equal Protection Clause
12 which is making a differentiation between race and
13 everything else. And that's why this Court in Crawford,
14 again decided the same day as Seattle, at page 538,
15 recognized, quote, "a distinction between State action
16 that discriminates on the basis of race and State action
17 that addresses in neutral fashion race-related matters."
18 And Section 26 falls into that latter category.

19 CHIEF JUSTICE ROBERTS: You have been asked
20 several questions that refer to the ending or
21 termination of affirmative action. That's not what is
22 at issue here, is it?

23 MR. BURSCH: No, and I'm glad that you
24 brought that up, Chief Justice Roberts, because
25 affirmative action means a lot more than simply the use

1 of race or sex-based preferences in university
2 admissions.

3 The -- Article I, Section 26, only focuses
4 on this one aspect of university admissions. Now,
5 another important point to understand is that Section 26
6 is not all about university admissions. This is
7 actually a much broader law that applies not just to
8 race and ethnicity, but also to sex and other factors,
9 and that affects not just universities, but also public
10 contracting and public employment.

11 This was a broad-based law that was
12 primarily motivated by the people of Michigan's decision
13 to move past the day when we are always focused on race,
14 exactly as Grutter invited the States to do. And you
15 can -- you can see how that discussion gets mired when
16 you look at some of these statistics that we have been
17 talking about.

18 Is someone who has multiple racial boxes
19 checked more or less diverse than someone who only has
20 one box checked? Is someone who comes from outside the
21 country -- say from Mexico --

22 JUSTICE SOTOMAYOR: You've done something
23 much more. You are basically saying if -- because
24 Fisher and Grutter -- we've always applied strict
25 scrutiny.

1 MR. BURSCH: Correct.

2 JUSTICE SOTOMAYOR: All right. So it's
3 essentially a last resort, within some reason. But what
4 you are saying, if all those other measures fail, you're
5 by Constitution saying you can't go to the remedy that
6 might work.

7 MR. BURSCH: No, that's not what we are
8 saying.

9 JUSTICE SOTOMAYOR: Well, but you're -- but
10 this amendment is stopping the political process. It's
11 saying the board of regents can do everything else in
12 the field of education except this one.

13 MR. BURSCH: Well, again, it actually runs
14 the other way because equal protection is what singles
15 out race-focused measures for strict scrutiny. But what
16 we're saying is under Grutter, race preferences are
17 barely permissible. It cannot be unconstitutional for
18 the people to choose not to use them anymore, to accept
19 this Court's invitation in Grutter, to move past the
20 discussion about race and into a race-neutral future.

21 JUSTICE KENNEDY: What would you do with a
22 constitutional amendment that said pro-affirmative
23 action laws, and only those, require a three-quarters
24 vote of the State legislature?

25 MR. BURSCH: Well, under what we're going to

1 call the narrow "Save Hunter and Seattle," something
2 like that would be unconstitutional because it removes
3 an antidiscrimination provision and moves it to a higher
4 level of government.

5 Now, one of the problems with keeping that
6 doctrine is it could also work the opposite way. You
7 know, pretend that the political climate in Michigan was
8 turned on its head and that universities had agreed that
9 they were no longer going to use race or sex in
10 admissions and that it was the State electorate, either
11 in the legislature or in the constitution, which imposed
12 a Grutter plan on everyone.

13 Well, under Hunter and Seattle, that would
14 have to go because that law removes an
15 antidiscrimination provision and moves it to the higher
16 level. And so that would be one reason why you might
17 want to take the Washington v. Davis approach and
18 consider whether there's discriminatory animus based on
19 race.

20 But, you know, in either of those cases, I
21 think you can either, you know, pare down the doctrine
22 or get rid of it entirely and distinguish our case from
23 it. But the one point that I want to leave you with
24 today is that the -- the core of Respondent's arguments
25 that somehow a racial classification can be any law that

1 has a racial focus, cannot be the right test. No matter
2 what, that portion of Seattle and Hunter has to go.
3 Because equal protection is about protecting
4 individuals, not about protecting laws, and even
5 nondiscriminatory race-neutral laws that have a racial
6 focus would fall under their racial focus test.

7 You know, the hypothetical we give in our
8 briefs on that, besides a State Equal Protection Clause,
9 would be the Federal Fair Housing Act because it
10 references race, it has a racial focus, in the words of
11 Seattle and Hunter, and it has the ability of preventing
12 anyone from lobbying for preferences based on their race
13 or sex at lower levels of the government, either State
14 or local.

15 So under their theory, the Federal Fair
16 Housing Act would have to be applied under strict
17 scrutiny. And their only response to that in the brief
18 is that, well, the Supremacy Clause takes care of that
19 problem. And we all know supremacy doesn't kick in
20 until you first determine that the Federal law itself is
21 constitutional, and it wouldn't be under their theory.

22 So -- so what we're asking you to do is
23 eliminate that portion of Hunter and Seattle that
24 suggests that a law's racial focus is the sine qua non
25 of a political restructuring doctrine test and to

1 either --

2 JUSTICE GINSBURG: Mr. Bursch, isn't --

3 MR. BURSCH: Yes.

4 JUSTICE GINSBURG: -- isn't the position
5 that was taken in Seattle derived from a different view
6 of the Equal Protection Clause? I mean, strict scrutiny
7 was originally put forward as a protection for
8 minorities -- a protection for minorities against
9 hostile disadvantageous legislation. And so the view
10 then was we use strict scrutiny when the majority is
11 disadvantaging the minority. So you do, under the
12 Carolene Products view, you do focus on race and you
13 ask, is the minority being disadvantaged?

14 If that were the view, then I suppose we
15 would not be looking at this, well, the criterion is
16 race and wherever the disadvantage falls, whether a
17 majority or minority, it's just the same. That wasn't
18 the original idea of when strict scrutiny is
19 appropriate. So if we were faithful to that notion,
20 that it is -- measures a disadvantage the -- the
21 minority that get strict scrutiny.

22 MR. BURSCH: Well, two thoughts on that,
23 Justice Ginsburg. First, under Grutter, this Court made
24 crystal clear that a Grutter plan is not about which
25 minority group is being advantaged or disadvantaged.

1 It's supposed to benefit the campus as a whole. And to
2 the extent the claim is that preferences benefit certain
3 classes of minorities and not others, you know, for
4 example, it benefits African Americans and Latinos, but
5 not Asians, even though they're both discrete and
6 insular underrepresented groups, that -- then it fails
7 under Grutter. It can only be something that benefits
8 everybody.

9 But more fundamentally, going back to your
10 question about the origin of the doctrine, I think it's
11 really important to understand why we have Hunter
12 because Hunter, remember, was decided before
13 Washington v. Davis. And when you look at the face of
14 the law in Akron, Ohio in Hunter, there's nothing in
15 there that would trigger strict scrutiny. And so this
16 Court was searching for another way to -- to strike down
17 a law that removed an antidiscrimination provision and
18 made it more difficult to reenact at the higher level of
19 the political process. It needed something to fix that.

20 And our point is you can either construe it
21 to do exactly that, that only antidiscrimination laws
22 being struck down and moved to a higher level can
23 satisfy a political restructuring doctrine, or you can
24 look at it differently. You can say, Now that we've got
25 Washington v. Davis and we all know what the intent was

1 in Akron, that that is a simpler way to address this --
2 this problem and we really don't need the political
3 restructuring doctrine at all anymore.

4 But the reason why we had the doctrine in
5 Hunter is because strict scrutiny did not apply.

6 JUSTICE GINSBURG: You said that the
7 district court found it was clear that there was no --
8 there was no discriminatory intent, but that wasn't
9 reviewed on appeal.

10 MR. BURSCH: No, it was not. But it wasn't
11 a finding. It was actually more than that. It was at
12 the summary judgment stage. The district court
13 correctly concluded there wasn't even a question of
14 disputed material fact as to whether intent was the
15 primary motivation of the electorate.

16 Unless there are any further questions, I
17 will reserve the balance of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Rosenbaum.

20 ORAL ARGUMENT OF MARK D. ROSENBAUM

21 ON BEHALF OF THE CANTRELL RESPONDENTS

22 MR. ROSENBAUM: Mr. Chief Justice, and may
23 it please the Court:

24 Let me begin, Justice Kennedy, with the
25 questions you raise and then come to the question that

1 Chief Justice Roberts raised.

2 To begin, Justice Kennedy, there's no way to
3 distinguish the Seattle case from this case nor the
4 Hunter case. Both those cases have to be overruled.
5 Here is why the Seattle case is -- is identical to this
6 case. Both issues -- both cases involve
7 constitutionally permissible plans which had as their
8 objective obtaining diversity on campuses. Seattle was
9 a K through 12 case. This case is a higher education
10 case. But in both instances, the objective was to
11 obtain diversity. No constitutional mandate to relieve
12 past discrimination.

13 Rather, in fact, as the Court said, Seattle,
14 Tacoma, and WASCO were attempting to deal with de facto
15 segregation.

16 JUSTICE ALITO: Is that an accurate
17 description of Seattle? I thought that in Seattle,
18 before the school board adopted the bussing plan, the
19 city was threatened with lawsuits by the Department of
20 Justice, by the Federal government, and by private
21 plaintiffs, claiming that the -- the previous pupil
22 assignment plan was -- involved de jure segregation.
23 Isn't that -- isn't that correct?

24 MR. ROSENBAUM: That's correct with respect
25 to at least one of the districts, Justice Alito. But in

1 terms of the program itself, there's no dispute that it
2 was done pursuant to a plan for de facto segregation.
3 Moreover, the question you asked, Justice Kennedy --

4 JUSTICE ALITO: I don't understand the
5 answer to that question. As to Seattle itself, is it
6 not the case that they were threatened with litigation?

7 MR. ROSENBAUM: Yes, but there'd been no
8 finding, Justice Alito, of de jure segregation.

9 JUSTICE ALITO: And isn't it correct that
10 the district court found that there was de jure
11 segregation?

12 MR. ROSENBAUM: That is not correct.

13 JUSTICE ALITO: No?

14 MR. ROSENBAUM: There was -- there was no
15 finding whatsoever that there had been de jure
16 segregation and that there was a constitutional
17 imperative to correct that desegregation. It was an
18 absolutely identical situation.

19 And regarding the accountability, Your Honor
20 is correct that in Seattle what we were dealing with was
21 an elected school board and here, as the Michigan brief
22 says, as the Wayne State brief says, as the court
23 specifically found at pages 326A and 327A of the record,
24 this is a political process in which the regents were
25 elected, have at all times maintained plenary authority

1 over the admissions process itself, and that --

2 JUSTICE KENNEDY: Well, there are two
3 things. Number one is it delegated to the faculty. And
4 number two, they're election -- they're elected only
5 rarely and in staggered terms.

6 MR. ROSENBAUM: That -- that -- that is no
7 question that that's correct, Your Honor. But the --
8 the ordinary process itself is a politically accountable
9 process. That's what the district court found when it
10 looked at how the system worked. And in fact --

11 CHIEF JUSTICE ROBERTS: What if the -- what
12 if the -- the board delegated to the various
13 universities the authority to develop their own
14 admissions programs?

15 MR. ROSENBAUM: It couldn't alter -- I'm
16 sorry, Chief Roberts.

17 CHIEF JUSTICE ROBERTS: I'm sorry, they did.
18 And then after several years they decided, you know, we
19 don't like the way it's working. They're adopting too
20 many racial preference programs, we're going to revoke
21 the delegation.

22 MR. ROSENBAUM: Absolutely fine.

23 CHIEF JUSTICE ROBERTS: Why is that any --
24 any different?

25 MR. ROSENBAUM: Because the difference is

1 that in the Seattle case, in this case, and in the
2 Hunter case, what's going on is a change from the
3 ordinary political process, which Your Honor perfectly
4 described. They can change it today. They can go to
5 a -- an affirmative action plan today, repeal it
6 tomorrow, come back.

7 CHIEF JUSTICE ROBERTS: So if there were a
8 provision in the Michigan Constitution that says the
9 board of regents is authorized to enact these programs,
10 in other words delegated from the people in the
11 Constitution to the board, and then the people change
12 the delegation by saying, no, it's no longer -- we're no
13 longer going to leave that up to the board, we're going
14 to make the decision ourselves in the Constitution, how
15 is that any different?

16 MR. ROSENBAUM: It is different, Your Honor,
17 because of the racial nature of the decision. Under
18 their theory, under their theory, the people of the
19 State -- of a State could amend their constitution, put
20 in the legislature two rooms, one for racial matters,
21 one for all other sorts of matters, and say to any
22 entrant who wants to enter that first room, you may do
23 so, but first you have to pay an exorbitant cover charge
24 and then you have to mount multiple stairs -- climb
25 flights of stairs just to begin the process of enacting

1 constitutionally permissible legislation.

2 Or think about it in a desegregation case.

3 A student comes in -- two students come into the
4 admissions committee. One says -- and the admissions
5 committee says, we have one question for you. One
6 question for you since you're here to talk about a
7 legitimate -- a legitimate factor in pursuit of
8 diversity.

9 Here's the question, do you want to talk
10 about your race, your race in the context of other
11 factors? And if the answer is yes, that student is
12 shown the door, told go raise between 5 and \$15 million,
13 repeal Prop 2 and then you can come back to make -- make
14 the case.

15 Whereas the student who says, no, I've just
16 got another legitimate factor, maybe geography. Maybe
17 alumni confections -- connections, whatever that is,
18 that person is permitted to make the case. It is a
19 racial distinction.

20 Now, Chief Justice Roberts, you're certainly
21 onto something in terms of are there race-neutral
22 methods to get this done? Of course there are. The
23 State constitution itself could be altered so that a
24 different committee or a different set of individuals
25 could -- could make the decision that they don't like

1 the way the regents are doing it.

2 Or they could do it the old-fashioned way,
3 the way that the politically accountable system works,
4 which is to say, we are going to work at these
5 universities, that's how affirmative action involving
6 race happened in the first place. That's at pages 270
7 to 271A and 282A to 293A. They worked for years to make
8 that happen.

9 JUSTICE ALITO: Well, I thought the whole
10 purpose of strict scrutiny was to say that if you want
11 to talk about race, you have a much higher hurdle to
12 climb than if you want to talk about something else.

13 Now, you can argue that strict scrutiny
14 should only apply to minorities and not to students who
15 are not minorities, but I thought the Court decided that
16 a long time ago.

17 MR. ROSENBAUM: Exactly.

18 JUSTICE ALITO: So I don't know why that's a
19 hard question that you asked about the student who says,
20 I want to talk about race. What if it's a white student
21 who comes in and says, I want to talk about race. I'm
22 white and therefore you should admit me, you should give
23 me preference. The State can't say, no, we don't want
24 to hear that?

25 MR. ROSENBAUM: The State can say, we don't

1 want to hear that, whether it comes from a white person
2 or a black person or whomever, if in fact, they are not
3 doing it on a race-specific basis.

4 You're exactly right, of course, about
5 strict scrutiny. And the programs in this case, indeed,
6 the only programs in this case that are effective, are
7 those that have passed strict scrutiny --

8 JUSTICE ALITO: Well, I don't understand
9 your answer then. If the student -- one student comes
10 in and says I want to talk about how well I play the
11 cello, all right, we'll listen to that. I want to come
12 in and talk about why I as a white person should get a
13 preference. You have to listen to that because you're
14 listening to the -- to the talk about the cello, too?

15 MR. ROSENBAUM: You do, Your Honor, when the
16 program has passed the strict scrutiny test that we're
17 talking about. And that's the only sort of program that
18 is at issue in this case. Of course you're correct. If
19 it is a Gratz type program, if it's unconstitutional, if
20 it's a quota system, you don't have to listen to anybody
21 talk about race. But we are only dealing with
22 constitutionally permissible programs. Why it is
23 impossible, impossible to distinguish Seattle?

24 And this argument about Hunter, page -- page
25 389 of the Hunter decision is the reason Hunter was

1 decided. It's not a Washington v. Davis case.

2 JUSTICE KENNEDY: Well, I'm not sure I
3 understood the answer you gave to the Chief Justice's
4 hypothetical. Maybe I misunderstood the hypothetical.

5 Suppose the board of regents have a rule,
6 it's written, it's a rule, that the faculty makes a
7 determination on whether there should be affirmative
8 action.

9 MR. ROSENBAUM: Yes.

10 JUSTICE KENNEDY: Five -- and the faculty
11 votes for affirmative action. Three years later, the
12 board of trustees said we're abolishing the rule, we're
13 doing that ourselves. Violation?

14 MR. ROSENBAUM: Assuming that the regents
15 say that's fine, no problem whatsoever, no problem
16 whatsoever. That's the ordinary political process.

17 JUSTICE KENNEDY: So the -- so the regents
18 can take it away from the faculty?

19 MR. ROSENBAUM: The regents have plenary --

20 JUSTICE KENNEDY: But can the legislature
21 take it away from the regents?

22 MR. ROSENBAUM: Not under the Michigan
23 Constitution because the Michigan Constitution --

24 JUSTICE KENNEDY: No, no. Hypothetical
25 case.

1 MR. ROSENBAUM: Okay. Under -- who's got
2 the authority here? The -- the legislature can take it
3 away. That's not a problem in a -- in a situation where
4 that's part of the ordinary process.

5 JUSTICE KENNEDY: But then the voters can't
6 take it away. At what point is it that your objection
7 takes force? I just don't understand -- I just don't
8 understand --

9 MR. ROSENBAUM: Where there is --

10 JUSTICE KENNEDY: -- the declension here --

11 MR. ROSENBAUM: My apologies, Your Honor.

12 JUSTICE KENNEDY: Or the crescendo, whatever
13 you call it.

14 (Laughter.)

15 MR. ROSENBAUM: Both are music to my ears.

16 The point, Justice Kennedy, is that the --
17 the people of the State have multiple options available
18 to them if they don't like the way the universities are
19 operating. But the one option they don't have is to
20 treat racial matters different from all other matters.

21 The example that you gave --

22 JUSTICE KENNEDY: That applies in the Chief
23 Justice's hypothetical or my revision of it as between
24 the board of regents and the faculty, or between the
25 faculty and the legislature.

1 MR. ROSENBAUM: Exactly. And the problem --
2 the problem that the restructuring process gets at
3 because of the particular concern that this Court has
4 shown with respect to the political process, that the
5 political process itself not become outcome
6 determinative. That the political process itself be a
7 place where we can air these discussions, but not create
8 it in a separate and unequal way to make the -- to
9 actually make the decision itself through the process.
10 So --

11 JUSTICE KENNEDY: Why is -- why is the
12 faculty administration, a faculty decision, any less
13 outcome determinative than what the voters would say?
14 I -- I think there would be people that might disagree
15 with your empirical assumption.

16 MR. ROSENBAUM: Then I'm not explaining it
17 clearly. The first -- the -- when the faculty makes the
18 decision, Justice Kennedy, that's part of the ordinary
19 political process. Nobody's allowed to win all the
20 time. No one has to win all the time. No one has to
21 lose all the time. Whatever it is, it is. That's the
22 ordinary political process. That's how we use the
23 political process.

24 The problem with -- with mounting a racial
25 classification within the Constitution itself is that

1 then -- that takes the ordinary political process to the
2 extraordinary political process. That's --

3 CHIEF JUSTICE ROBERTS: So I mean, you could
4 say that the whole point of something like the Equal
5 Protection Clause is to take race off the table. Is it
6 unreasonable for the State to say, look, race is a
7 lightning rod. We've been told we can have affirmative
8 action programs that do not take race into account.
9 Socioeconomic diversity, elimination of alumni
10 preferences, all of these things. It is very expensive.
11 Whenever we have a racial classification, we're
12 immediately sued. So why don't we say we want you to do
13 everything you can without having racial preferences.

14 Now, if the litigation determines that we're
15 required to have racial preferences, this statute has an
16 exception and -- and allows that. But starting out, we
17 want to take race off the table and try to achieve
18 diversity without racial preferences.

19 MR. ROSENBAUM: The problem, Your Honor, as
20 this Court stated as recently as last term in the Fisher
21 case, is that under the Equal Protection Clause race is
22 not all the way off the table. And the problem with
23 Proposal 2 is that the substance and the message that it
24 communicates is that because of the separate and unequal
25 political track that is created with respect to the

1 extraordinary steps that have to be taken, the message
2 is that even where race is being utilized as one of many
3 factors in a constitutionally permissible way, the
4 message that is being communicated is that all uses of
5 race are illegitimate, all uses of race are -- are off
6 the table, that "race" itself is a dirty word.

7 JUSTICE SCALIA: Why -- why doesn't the
8 Fourth Amendment violate the rule you're saying -- or
9 the 14th Amendment violate the rule that you're
10 proposing? I mean, I'm -- I'm a minority and I want
11 laws that favor my minority. Not just in university;
12 everywhere. My goodness, I can't have that through the
13 normal legislative process. I have to get a
14 constitutional amendment to do it, right?

15 MR. ROSENBAUM: That is correct, Your Honor.

16 JUSTICE SCALIA: Well, so I guess -- I guess
17 that on this subject of equal treatment of the races, we
18 can eliminate racism just at the -- at the legislative
19 level, can't we?

20 MR. ROSENBAUM: Your Honor, the underlying
21 basis of the entire strict scrutiny doctrine in the 14th
22 Amendment is to preclude the government, preclude the
23 Legislative and Executive Branch, from making those
24 determinations as absolute determinations.

25 The 14th Amendment sets the standards and

1 the criteria by which we measure that. Of course you're
2 correct. That's what the 14th Amendment does. It sets
3 what the rules are in terms of how race is utilized.
4 But what the Grutter case said --

5 JUSTICE SCALIA: And you can't change those
6 rules by normal legislation, correct?

7 MR. ROSENBAUM: That is correct.

8 JUSTICE SCALIA: So if you're a minority
9 that wants favored treatment, you're just out of luck.

10 MR. ROSENBAUM: You have to use the ordinary
11 political process. And that's all we're saying.

12 JUSTICE SCALIA: No, but the constitutional
13 amendment is not the ordinary political process.

14 MR. ROSENBAUM: But the const...-- but the fact that
15 it's a State constitutional amendment underscores my
16 argument, which is that -- that in order for the -- for
17 a -- the minority or any individual, and white,
18 minority, whatever -- whatever the individual is, to say
19 I want the same rule book, I want the same playing
20 field, the problem with Proposal 2 is that it creates
21 two playing fields.

22 JUSTICE ALITO: If Proposal 2 had been in
23 the Michigan Constitution before any affirmative action
24 program was adopted, would the result be the same?

25 MR. ROSENBAUM: It would, Your Honor,

1 because -- because it would be building in this
2 explicitly facial racial classification into the State
3 Constitution. The problem are the separate and unequal
4 systems that are being used to deal with race. And
5 separate and unequal, under the 14th Amendment,
6 shouldn't come within ten feet of race.

7 JUSTICE SCALIA: It's not a racial
8 classification. You should not refer to it that way.

9 MR. ROSENBAUM: It is a racial --

10 JUSTICE SCALIA: It's the prohibition of
11 racial classifications.

12 MR. ROSENBAUM: No, Your Honor.

13 JUSTICE SCALIA: Every prohibition of racial
14 classification is itself a racial classification?

15 MR. ROSENBAUM: No, Your Honor. The problem
16 with Proposal 2 is that it is -- just as in Hunter, just
17 as in Hunter -- it is an explicitly facial racial
18 classification. It singles out race for different
19 treatment.

20 My goodness, this was borne -- this campaign
21 started three days after Grutter itself. The author
22 said the purpose of it was to get rid of racial
23 preferences.

24 JUSTICE SCALIA: Well, if that's how you're
25 using racial classification, I thought it meant, you

1 know, it's directed at blacks or Asians --

2 MR. ROSENBAUM: No.

3 JUSTICE SCALIA: -- or -- no. In that
4 sense, the 14th Amendment itself is a racial
5 classification, right?

6 MR. ROSENBAUM: Well, it sets the
7 standard --

8 JUSTICE SCALIA: In that sense, the 14th
9 Amendment itself is a racial classification, no?

10 MR. ROSENBAUM: I don't agree with that,
11 Your Honor, because I'm measuring it as a racial
12 classification by the 14th Amendment. And that comes
13 back to Justice Ginsburg's argument.

14 His argument, his revisionist history of
15 Hunter, his -- was -- was about motive. But, Your
16 Honor, that had nothing to do with the problem in this
17 case. When the Court looked -- when the district court
18 looked -- may I finish my answer, Chief Justice Roberts?

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. ROSENBAUM: When the court looked at
21 this particular issue, the concern was the way that it
22 racially divided the political process itself. What he
23 is saying is that, well, there may be all sorts of
24 motives. That's a rational basis test, and that has
25 nothing to do with the racial classification.

1 The definition I'm using, Justice Scalia, is
2 this Court's definition of a racial classification, for
3 which all sorts trigger strict scrutiny. Thank you very
4 much.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Ms. Driver?

7 ORAL ARGUMENT OF SHANTA DRIVER
8 ON BEHALF OF THE COALITION TO DEFEND AFFIRMATIVE ACTION
9 RESPONDENTS

10 MS. DRIVER: Mr. Chief Justice, and may it
11 please the Court:

12 We ask this Court to uphold the Sixth
13 Circuit decision to reaffirm the doctrine that's
14 expressed in Hunter-Seattle, and to bring the 14th
15 Amendment back to its original purpose and meaning,
16 which is to protect minority rights against a white
17 majority, which did not occur in this case.

18 JUSTICE SCALIA: My goodness, I thought
19 we've -- we've held that the 14th Amendment protects all
20 races. I mean, that was the argument in the early
21 years, that it protected only -- only the blacks. But I
22 thought we rejected that. You -- you say now that we
23 have to proceed as though its purpose is not to protect
24 whites, only to protect minorities?

25 MS. DRIVER: I think it is -- it's a measure

1 that's an antidiscrimination measure.

2 JUSTICE SCALIA: Right.

3 MS. DRIVER: And it's a measure in which the
4 question of discrimination is determined not just by --
5 by power, by who has privilege in this society, and
6 those minorities that are oppressed, be they religious
7 or racial, need protection from a more privileged
8 majority.

9 JUSTICE SCALIA: And unless that exists, the
10 14th Amendment is not violated, is that right? So if
11 you have a banding together of various minority groups
12 who discriminate against -- against whites, that's okay?

13 MS. DRIVER: I think that --

14 JUSTICE SCALIA: Do you have any case of
15 ours that propounds that view of the 14th Amendment,
16 that it protects only minorities? Any case?

17 MS. DRIVER: No case of yours.

18 JUSTICE BREYER: Some people think that
19 there is a difference between the plus and the minus.
20 Some judges differ on that point. Some agree sort of
21 with you, and some agree sort of not. All right? Let's
22 think of those who agree sort of, and then I have a
23 question. And you know this area better than I.

24 So think of Grutter. Grutter permits
25 affirmative action. Think of the earlier cases. They

1 permitted affirmative action where it was overcome, the
2 effects of past discrimination, but probably not
3 otherwise.

4 Now, that's what I want to know. Are there
5 areas, other than education, where affirmative action
6 would not be forbidden to achieve a goal other than
7 overcoming the effects? Have you got the question? And
8 does an answer come to mind?

9 MS. DRIVER: I think that affirmative action
10 programs could -- could be permissible under employment.
11 For instance --

12 JUSTICE BREYER: Okay. So there are a set.

13 MS. DRIVER: That's right.

14 JUSTICE BREYER: Fine. If there are a set,
15 what I -- what I'd like you to explain, if -- if you can
16 take a minute, is think of how a city is set up. There
17 are a vast number of administrators. There are a vast
18 number of programs. It could be an administrator
19 somewhere says he'd like to give a preference, maybe for
20 good reason. But then the city council votes no. Or
21 because there are other ways of doing it, by, you know,
22 first come, first served or some other criteria that
23 doesn't use race.

24 Are all of those unlawful? Every one? Do
25 you have to leave it up to the -- no matter what the

1 subject, no matter what the -- or are you going to draw
2 a line somewhere? Is there a line that you could draw
3 that would take your case on the right side from your
4 point of view, but would say we're not giving power to
5 every administrator in the city to decide on his own
6 whether to use racial preferences without a possibility
7 of a higher-up veto --

8 MS. DRIVER: I think --

9 JUSTICE BREYER: -- which I don't think you
10 want to say, but maybe you do.

11 MS. DRIVER: No. I think these are very
12 fact-based determinations. And so somebody could make a
13 decision that they wanted to use what you're calling
14 racial preferences. And that could mean a range of
15 things, and that could be subject to a veto higher up.
16 Yeah, I agree with you.

17 JUSTICE BREYER: So what's the line? Is
18 there any line that you can say, look here. We were
19 trying to be very helpful, and all of a sudden they put
20 this thing on the ballot, you can't even get it through.
21 Okay? That's your basic point.

22 But -- but if you think of -- you have to
23 write something, and that something has tremendous
24 effect all over the place. So what kind of line is
25 there, in your opinion?

1 MS. DRIVER: I think Hunter-Seattle provides
2 the line. I think it says that if you have a law that
3 has a racial focus, and that law, part of proving that
4 it has a racial focus, is that it takes a benefit that
5 inures to minorities and it removes that benefit and it
6 restructures the political process and places a special
7 burden on minorities to re-ascertain that right, yeah, I
8 think that's a proper rule. Because it's -- it's --

9 JUSTICE ALITO: Can I -- can I come back to
10 the question that the Chief Justice and Justice Kennedy
11 were asking before? Essentially, it's their question.
12 Let's say that the -- the decision about admissions
13 criteria across the board is basically delegated to the
14 faculty. All right? And the faculty adopts some sort
15 of affirmative action plan. And now that is overruled
16 in favor of a colorblind approach at various levels
17 going up the ladder.

18 So maybe it's overruled by the -- the dean
19 of -- by a dean, or maybe it's overruled by the
20 president of the university. Maybe it's overruled by
21 the regents. Maybe, if State laws allowed, it's -- it's
22 overruled by an executive department of the State.
23 Maybe it's overruled by the legislature through ordinary
24 legislation. Maybe it's overruled through a
25 constitutional amendment.

1 At what point does the political
2 restructuring doctrine kick in?

3 MS. DRIVER: I think in this case, the
4 difference between what other groups can do in order to
5 get preferential treatment for their sons and daughters
6 and what racial minorities are subject to, the level of
7 distinction places such a high burden on minorities.

8 JUSTICE ALITO: Well, that really -- that
9 really isn't responsive to my question. Let's say
10 exactly what was done here is done at all of these
11 levels. At what point does the doctrine kick in? When
12 it goes from the faculty to the dean? From the dean to
13 the president, et cetera, et cetera? Where does this
14 apply?

15 MS. DRIVER: I think it depends on where it
16 is that minorities face a heavier and special burden.

17 JUSTICE SOTOMAYOR: It can't be that because
18 the normal political process imposes burdens on
19 different groups. I thought the line was a very simple
20 one, which is if the normal academic decision-making is
21 in the dean, the faculty, at whatever level, as long as
22 the normal right to control is being exercised, then
23 that person could change the decision.

24 So if they delegate most admissions
25 decisions, as I understand from the record, to the

1 faculty, but they still regularly, besides race, veto
2 some of those decisions, and race is now one of them,
3 then the Board of Regents can do that normally. So
4 could the president, if that's the way it's normally
5 done.

6 It's when the process is -- political
7 process has changed specifically and only for race, as a
8 constitutional amendment here was intended to do, that
9 the political doctrine is violated. Have I restated?

10 MS. DRIVER: You have, you restated it very
11 well, and I agree with you in principle.

12 JUSTICE KENNEDY: But I still don't
13 understand your answer to Justice Alito's question.
14 Suppose the dean has authority in the bylaws of the
15 university to reverse what the faculty does, but you
16 have a dean who just does not like affirmative action.
17 He is dead against it. And he makes the decision to
18 reverse the faculty. Do you have a remedy?

19 MS. DRIVER: I don't think it -- I don't
20 think Hunter-Seattle applies.

21 JUSTICE KENNEDY: All right. Then you have
22 Justice Alito's question. Then it's the president of
23 the university, and then it's the legislature.

24 MS. DRIVER: I think you need two things. I
25 think you need the decision making -- the decision

1 making body. If the University of Michigan regents
2 decided tomorrow to eliminate affirmative action
3 programs and there was no Prop 2, they have the legal
4 right to do that. They are the decision-making body.

5 And minorities still could go and lobby the
6 regents, still could go and talk about the questions of
7 racial equality difference --

8 JUSTICE ALITO: But would that be true --
9 I'm sorry. Would that be true if they had never gotten
10 involved in admissions criteria before? They have the
11 authority, but they left that to the university
12 officials.

13 MS. DRIVER: I think if they have the
14 plenary authority to do that, yeah, I think that, again,
15 if they wanted to eliminate affirmative action programs
16 and they had that plenary authority and it was
17 guaranteed by the Michigan State Constitution and it had
18 existed for 150 years, and they chose to enter this
19 area, I think --

20 JUSTICE ALITO: I don't see how that is
21 consistent with Justice Sotomayor's answer to my
22 question. Don't the people of Michigan have -- don't
23 the people of Michigan have plenary authority?

24 MS. DRIVER: In this case, the particular --
25 it's -- they are applying that plenary authority in --

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1 or in a way that is racially focused, and creates a
2 political process that disadvantage...-is disadvantageous to minorities.

3 JUSTICE BREYER: I'm not saying instead of
4 political process. Don't let me put words in your
5 mouth. Think what you think here.

6 You say where the authority is divided in a
7 certain way, and that is true under the constitution of
8 the State. So the State government lacks the power.
9 And then you have to take the power from the people and
10 change the constitution, and when you do that in respect
11 to a benefit. Then, in respect to benefits,
12 Washington -- you know, Seattle and Hunter kick in.
13 See, where you're not dealing with past discrimination.

14 MS. DRIVER: This was -- what we're talking
15 about in terms of affirmative action are
16 constitutionally permissible programs that were shown to
17 this Court to be the only way to achieve racial
18 diversity and integration at the University of Michigan.

19 And whether you -- whether you explain that
20 by looking at the reality of the inequality in education
21 for black and white Michigan or whatever it is that you
22 come up with that requires that, the university has
23 shown that this is the only way to achieve diversity in
24 which racial diversity is a part of the -- is a part of
25 the quotient.

1 And so to take away that right from the
2 university and from the regents -- and I just want to go
3 back to one of the questions that was answered. If you
4 look at the law schools, the medical schools, the
5 professional schools now in the State of Michigan,
6 there's been a precipitous drop in underrepresented
7 minority enrollment in those schools. We are going back
8 to the resegregation of those schools because of the
9 elimination of affirmative action.

10 CHIEF JUSTICE ROBERTS: To what extent -- to
11 what extent does your argument depend -- I thought both
12 Hunter and Seattle speak in these terms -- that the
13 policies that are more difficult to enact are beneficial
14 for the minority group?

15 MS. DRIVER: The -- -- say that -- I'm
16 sorry. Can you repeat --

17 CHIEF JUSTICE ROBERTS: To what extent does
18 your argument depend upon the assumption that the
19 programs that you say are now more difficult to enact
20 are beneficial to the minority group?

21 MS. DRIVER: I think it's an important
22 component part. Because I think it's in the benefit to
23 the minority group that it's especially important --

24 CHIEF JUSTICE ROBERTS: Well, why do you --

25 MS. DRIVER: -- that the political process

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1 be on a level field.

2 CHIEF JUSTICE ROBERTS: Right. What if the
3 question of whether it's a benefit to the minority group
4 is more open to debate, whether it's through the
5 mismatch theory that Taylor and Sander I guess have
6 adopted, or other theories? Do we have to assume in
7 your favor that these definitely are beneficial to
8 particular minority groups?

9 MS. DRIVER: Certainly the minority voters
10 of Michigan believe them to be because 90 percent of
11 black voters in Michigan voted against Prop 2. And I
12 think that that's a clear indication of the popularity
13 of these programs and the perceived benefit of these
14 programs.

15 CHIEF JUSTICE ROBERTS: There's a difference- There may be a
16 difference between popularity and benefit. In other
17 words, you want us to assume that the programs are
18 beneficial to a minority group?

19 MS. DRIVER: Yes. And they are beneficial
20 to minority groups. They may -- they may serve to
21 provide benefits for the population beyond minority
22 groups, but they are a benefit if they --

23 JUSTICE SCALIA: Your opponent says
24 otherwise. He says that minority students have taken
25 tougher courses, they have been better qualified to be

1 admitted, and all sorts of other benefits. So it's
2 certainly a debatable question.

3 MS. DRIVER: It's a debatable question in
4 another forum in a different case, and in fact I think
5 that case was the Grutter case.

6 This case isn't about -- isn't just about
7 whether or not affirmative action benefits minorities.
8 It's also the restructuring of the political process and
9 the special burden that's placed on minorities. It's
10 not -- if you want to go back to debating the - you know, whether
11 affirmative action --

12 JUSTICE SCALIA: You're changing your
13 answer, then. Your answer to the Chief was it does
14 depend and now you are saying it doesn't depend on
15 whether it benefits minorities at all, it's just whether
16 it places a -- a greater burden on minorities to change
17 it. Which is it?

18 MS. DRIVER: No, I --

19 JUSTICE SCALIA: One or the other?

20 MS. DRIVER: I think it's a two-part test.
21 I think the first, the first thing that you look at is,
22 is there a racial focus to the law, and is the benefit
23 that's been taken away something that inures to
24 minorities. And I think the second part of the test,
25 and that's why I think Seattle/Hunter is such a narrow

1 doctrine, is whether there also has been a restructuring
2 of the political process and a special burden placed on
3 minorities. It requires both.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Bursch, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF JOHN J. BURSCH
7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice.
9 I'm going to start with a sentence from
10 Crawford, decided the same day as Seattle, where this
11 Court defined what a racial classification is.

12 "A racial classification either says or
13 implies that persons are to be treated differently on
14 account of race." It doesn't say anything about laws
15 with or without a racial focus. And we think that is
16 the test that ultimately should come out of the decision
17 in this case.

18 Now, my friends on the other side disagree
19 with that. Because if that's the test Section 26 is
20 constitutional. And so they draw this false dichotomy
21 between laws that involve race and laws that don't
22 involve race. We will put them in two separate chambers
23 of the legislature and charge a fee if you want to talk
24 about -- about race.

25 And we know that can't be right because of,

1 Chief Justice Roberts, your observation that the whole
2 point of equal protection is to take race off the table
3 when everyone is being treated the same. That's why
4 they can't --

5 JUSTICE GINSBURG: You quoted -- you quoted
6 from Crawford.

7 MR. BURSCH: Yes.

8 JUSTICE GINSBURG: And there is an opposing
9 quote in Seattle itself on page, what is it, 486?

10 MR. BURSCH: Yes.

11 JUSTICE GINSBURG: "When the State's
12 allocation of power places unusual burdens on the
13 ability of racial groups to enact legislation designed
14 to overcome the special condition of prejudice, the
15 governmental action seriously curtails the operation of
16 those political processes ordinarily to be relied on to
17 protect minorities."

18 And it quotes Carolene Products. So -- and
19 then the following sentence is: "In the most direct
20 sense, this implicates the judiciary's special role, not
21 of treating the individuals as individuals, but the
22 judiciary's special role in safeguarding the interests
23 of those groups that are relegated to a position of
24 political powerlessness."

25 So the rationale of Seattle is that notion

1 that we can't put hurdles in the way of a disadvantaged
2 minority.

3 MR. BURSCH: Justice Ginsburg, there is two
4 problems with that. First, that's where the
5 Respondent's theory most closely knocks up against
6 Grutter. Because you are right, under Seattle and
7 Hunter you've got to have a policy designed for the
8 purpose of primarily benefitting the minority. But if
9 that's the policy, it violates Grutter, which is
10 supposed to benefit everyone. But the bigger problem is
11 if you treat a --

12 JUSTICE SOTOMAYOR: Diversity does, but when
13 you take away a tool for diversity that's what Seattle
14 is saying is wrong.

15 MR. BURSCH: Right, but the bigger
16 problem --

17 JUSTICE SOTOMAYOR: You can't take the tool
18 away simply because it may include race as a factor,
19 simply because you are changing the playing field.

20 MR. BURSCH: But Justice Sotomayor, the
21 biggest problem with Respondents' test, with applying
22 the literal language of Seattle, is that as I said, the
23 Federal Fair Housing Act, the Equal Credit Act, a State
24 equal protection law that mentions race, all of these
25 things fall in the category of laws dealing with race.

1 Some are discriminatory.

2 JUSTICE ALITO: Seattle and this case both
3 involve constitutional -- Seattle and this case both
4 involve constitutional amendments. So why can't the
5 law -- the law be drawn -- the line be drawn there? If
6 you change the allocation of power in one of these less
7 substantial ways, that's one thing, but when you require
8 a constitutional amendment that's really a big deal.

9 MR. BURSCH: Because that would still
10 invalidate the Michigan Equal Protection Clause which
11 has a racial focus that says you cannot discriminate
12 based on race or sex, and yet no one would argue it
13 should be subject to strict scrutiny.

14 JUSTICE BREYER: That's the benefit to a
15 minority group. But what I'm thinking is go read the
16 cases. You yourself seem to say these cases seem to
17 apply alike to the benefits or to the discrimination
18 against it. I mean, there is lots of language in
19 Seattle.

20 MR. BURSCH: Right. Here--here--

21 JUSTICE BREYER: You come -- now, suppose
22 you take that and say, all right, it was meant in
23 context, but the context includes constitutional
24 amendments. Because with the constitutional amendment
25 you are restructuring. Now, you would lose on that

1 theory, but there would be a limitation on the extent to
2 which the people have the right to move powers around.

3 MR. BURSCH: Justice Breyer, the limitation
4 has to be not only that, but also that you are repealing
5 an antidiscrimination law, not an equal treatment law.
6 Or again, otherwise the State equal protection clause
7 has to fall. So to the extent that I am right, that is
8 a way that you can narrow Hunter and Seattle, and
9 section 26 has to survive. If I am wrong about that,
10 then respectfully Seattle and Hunter should be
11 overruled. Either way, it does not violate equal
12 protection to require equal treatment. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel,
14 counsel. The case is submitted.

15 (Whereupon at 2:00 p.m., the case in the
16 above-entitled matter was submitted.)

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