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P R O C E E D I N G S

(1:00 p.m.)

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

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

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

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

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

MR. BURSCH: Justice Sotomayor, it's not 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 alumnae 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 alumnae right now, certainly that playing field would be  
5 tilted the other way.

6 The other thing that we practice 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 have 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 there is such a 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.

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 -- 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: It didn't?

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 alumnae  
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 -- 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 --

1 or in a way that is racially focused, and creates a  
2 political process that 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 are 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

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 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 -- 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.

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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