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Insert in Chapter One, Part C.2. at page 29, immediately before Part D.:

Kerr v. Hickenlooper

U.S. Court of Appeals for the Tenth Circuit
744 F.3d 1156 (10th Cir. 2014)

CIRCUIT JUDGE LUCERO.

I

Article X, § 20 of the Colorado Constitution—better known as the Taxpayer's Bill of Rights or TABOR—was adopted by voter initiative in 1992. TABOR limits the revenue-raising power of the state and local governments by requiring "voter approval in advance for ... any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a new tax revenue gain." Colo. Const. art. X, § 20, cl. 4(a). TABOR also limits state year-to-year spending increases to "inflation plus the percentage change in state population in the prior calendar year," *id.* cl. 7(a), requires that revenue exceeding this limit "be refunded in the next fiscal year unless voters approve a revenue change," *id.* cl. 7(d), and bans any "new state real property tax or local district income tax," *id.* cl. 8(a). Like all provisions in Colorado's Constitution, TABOR may be revoked or amended only with voter approval. *Id.* art. XIX, § 2 ("[A]mendments shall be submitted to the registered electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of this constitution."); *id.* § 1 (requiring voter approval to call constitutional convention).

More than thirty citizens of Colorado—including educators, parents of school-age children, and current and former state legislators—brought this suit against Colorado Governor John Hickenlooper in May 2011. The Second Amended Substitute Complaint for Injunctive and Declaratory Relief (the "complaint") alleges that TABOR "undermines the fundamental nature of the state's Republican Form of Government" in violation of the Guarantee Clause. The complaint further alleges that TABOR violates the Colorado Enabling Act [and] the Supremacy Clause.

Governor Hickenlooper moved to dismiss the complaint. He argued that plaintiffs lacked standing and that the political question doctrine required dismissal of all claims. The district court concluded that the plaintiffs who were current state legislators possessed standing and declined to assess the standing of the remaining plaintiffs. It ruled that the political question doctrine did not bar the lawsuit, thereby allowing plaintiffs to proceed on their Guarantee Clause and Enabling Act challenges to TABOR.

Governor Hickenlooper then asked the district court to certify its order for interlocutory appeal. The district court granted his request for certification and stayed the proceedings. A previous panel of this court granted permission to appeal.

II

We review de novo the district court's rulings on standing. The plaintiffs bear the burden of establishing each element of standing. In determining whether plaintiffs have met their burden, we assume the allegations contained in the complaint are true and view them in the light most favorable to the plaintiffs. To establish Article III standing, a plaintiff must show: (1) that it has suffered a concrete and particular injury in fact that is either actual or imminent; (2) the injury is fairly traceable to the alleged actions of the defendant; and (3) the injury will likely be redressed by a favorable decision.

The district court determined that the plaintiffs who are current state legislators (the "legislator-

plaintiffs") have standing and thus declined to assess the standing of any of the other named plaintiffs. We similarly limit our review to the standing of the legislator-plaintiffs.

A

Our analysis of standing begins with injury-in-fact. [T]he Supreme Court has held that members of a state legislature may have standing to sue in order to vindicate the "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman v. Miller*, 307 U.S. 433, 438 (1939). We therefore consider the legislator-plaintiffs' claimed injury under the Supreme Court's legislative standing framework, first articulated in *Coleman* and later refined by *Raines v. Byrd*, 521 U.S. 811 (1997).

Plaintiffs claim that they have been deprived of their power over taxation and revenue. Under TABOR, the state "must have voter approval in advance for ... any new tax, tax rate increase, ... or a tax policy change directly causing a net tax revenue gain to any district," with narrow exceptions.[*3*] Colo. Const. art. X, § 20, cl. 4(a). With respect to taxing and revenue, which the plaintiffs describe as "legislative core functions," the General Assembly allegedly operates not as a legislature but as an advisory body, empowered only to recommend changes in the law to the electorate.

These allegations fall closer to the theory of vote nullification espoused in *Coleman* than to the abstract dilution theory rejected in *Raines*. Under TABOR, a vote for a tax increase is completely ineffective because the end result of a successful legislative vote in favor of a tax increase is not a change in the law.

Moreover, the case at bar does not share other characteristics highlighted by the *Raines* Court. TABOR was not passed by, and cannot be repealed by, the Colorado General Assembly. TABOR [also] denies the Colorado General Assembly the "ability to vote" on operative tax increases, and the legislator-plaintiffs cannot undo its provisions pursuant to the normal legislative process. We are not confronted with claimants who complain of nothing more than a lack of success within the legislature; plaintiffs' complaint alleges that TABOR has stripped the legislature of its rightful power.

The legislator-plaintiffs' allegations in the case before us differ in some respects from those at issue in *Coleman.* Nevertheless, we must reject Governor Hickenlooper's argument that plaintiffs' failure to identify a "specific legislative act" that TABOR has precluded is fatal to their claim. *See Raines*, 521 U.S. at 823. He argues that the legislator-plaintiffs must refer a tax increase to the voters, and have that measure rejected, before they bring suit. This argument misunderstands the alleged injury. Legislator-plaintiffs contend they have been injured because they are denied the authority to legislate with respect to tax and spending increases.[*9*] They cannot point to a specific act that would have

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[*3*] The exceptions permit "emergency taxes" when two-thirds of the legislature "declares the emergency and imposes the tax by separate recorded roll call votes," CO Const. art. X, § 20, cl. 6, and permit the suspension of the prior approval requirement "[w]hen annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments," *id.* cl. 1. None of the parties suggests these exceptions alter our analysis.

[*9*] We recognize that legislatures may permissibly be deprived of authority to legislate in certain arenas. The First Amendment, to take an obvious example, says that "Congress shall make no law" in a variety of fields. U.S. Const. amend. I. We distinguish the sorts of substantive prohibitions found in the Bill of Rights and elsewhere—"Congress shall make no law" means "there shall be no federal law"—from TABOR's alleged transformation of the state legislature from a body that makes laws to a body that recommends to the public laws increasing taxes or spending. So construed, the injury allegedly caused by TABOR is unique and unlikely to cause the federal courts to be flooded with legislators on the losing side of a vote. We are aware of a few Supreme Court cases involving requirements of municipal referenda before a decision made by a city council could go into effect. *See City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 670 (1976) (changes in land use required 55% citizen approval in referendum); *James v. Valtierra*, 402 U.S. 137, 139, 142 (1971) (construction of low-cost housing could not occur without voter referendum, noting other referenda requirements in California Constitution). In neither case was standing a contested issue, nor did any plaintiff rest a claim on the Guarantee Clause.

resulted in a tax increase because any revenue-raising bill passed by both houses of the General Assembly and signed by the governor, instead of becoming law, would merely be placed on the ballot at the next election. In other words, the legislator-plaintiffs' injury is their disempowerment rather than the failure of any specific tax increase. The state legislators before us have alleged that TABOR strips them of all power to conduct a "legislative core function" that is not constitutionally committed to another legislative body.

We ultimately agree with the district court that the legislator-plaintiffs have sufficiently alleged an injury to the "plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman*, 307 U.S. at 438, rather than relying only on an "abstract dilution of institutional legislative power," *Raines*, 521 U.S. at 826. On remand, the plaintiffs will be required to prove their allegations. But at this stage, assuming the truth of all well-pled allegations contained in the complaint, we conclude that the legislator-plaintiffs have satisfied *Coleman*'s requirements for legislative standing. We therefore hold that plaintiffs have suffered an injury in fact, and thus proceed to a brief discussion of causation and redressability.

B

[The Tenth Circuit next considered and rejected the Governor's argument that plaintiffs' alleged injuries are not caused by TABOR and are not redressable by a decision invalidating it. The Tenth Circuit also held that the doctrine of prudential standing does not bar the legislator-plaintiffs' suit.—Ed.]

III

We turn to another justiciability hurdle, the political question doctrine. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Applicability of the political question doctrine is a question of law that we review de novo.

A

As a threshold matter, we must decide if the political question doctrine categorically precludes Guarantee Clause challenges against state constitutional amendments adopted by popular vote. There is some support for this position in Supreme Court cases predating the modern articulation of the political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962). But we conclude that neither *Luther v. Borden*, 48 U.S. (7 How.) 1, (1849), nor *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), precludes merits consideration in this case.

In *Luther*, the Supreme Court was asked to resolve a dispute that would have required it to determine which of two putative governments legitimately controlled Rhode Island at the time. On the basis that the issue "ha[d] been already decided by the courts of Rhode Island," the Court held that "[u]pon such a question the courts of the United States are bound to follow the decisions of the State tribunals." 48 U.S. at 40. The Court also discussed the Guarantee Clause, labeling the issue of which government was valid as "political in its nature," vested not in the judiciary but in Congress. *Id.* at 42. "Under [the Guarantee Clause] it rests with Congress to decide what government is the established one in a State." *Id.*

Pacific States involved a fact pattern similar to the one before us, but a much broader legal challenge. Shortly after Oregon amended its state constitution to permit lawmaking by initiative and referendum, the people enacted "a law taxing certain classes of corporations." *Pac. States*, 223 U.S. at 135. A corporation affected by the new tax challenged its legitimacy, alleging that "by the adoption of the initiative and referendum, the State violates the right to a republican form of government." *Id.* at 140. "In other words," said the Court, "the propositions [of error in the complaint] each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon." *Id.* at 141. Construing the plaintiff's complaint as an attempt to overturn "not only ... the particular statute which is before us, but ... every other statute passed in

Oregon since the adoption of the initiative and referendum," *id.*, the Justices held "the issues presented, in their very essence, [to be] ... political and governmental, and embraced within the scope of powers conferred upon Congress," *id.* at 151.

Both the *Luther* and *Pacific States* claims differ from those at bar. Importantly, both cases involved wholesale attacks on the validity of a state's government rather than, as before us, a challenge to a single provision of a state constitution. *See Pac. States*, 223 U.S. at 150 (the "essentially political nature" of the question presented "is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State"). There can nevertheless be little doubt that these cases include language suggesting that Guarantee Clause litigation is categorically barred by the political question doctrine. In *Luther*, the Court stated that "Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." 48 U.S. at 42. And when the *Pacific States* Court faced the question of "whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject," it declared that the issue was "political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress." 223 U.S. at 133.

Had those been the Supreme Court's final words on the justiciability of the Guarantee Clause, a categorical approach might be proper. However, the Court in *Baker* highlighted the proposition that its prior political question cases turned on a number of "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness" and that much confusion had resulted "from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." *Baker*, 369 U.S. at 210-11. After reviewing its prior cases applying the political question doctrine, the Court explained that "several formulations which vary slightly according to the settings in which the questions arise may describe a political question." *Id.* at 217.

Baker then announced six factors that render a case non-justiciable under the political question doctrine:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. "Unless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Id.* (emphasis added).

Given the clarity of this holding, we must agree with the plaintiffs that the six tests identified in *Baker* are the exclusive bases for dismissing a case under the political question doctrine. Furthermore, the *Baker* Court explicitly rejected a categorical Guarantee Clause bar. Immediately after announcing the six political question factors, the Court addressed the argument that the case under its consideration "shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government." *Id.* at 217-18. It determined that the prior cases in which the Court had considered "Guaranty Clause claims involve those elements which define a 'political question,' " referencing the aforementioned six factors, "*and for that reason and no other,* they are nonjusticiable." *Id.* at 218. "[N]onjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization." *Id.*

The *Baker* opinion includes a lengthy discussion of *Luther*, ultimately concluding that the decision rested on four of the six previously identified factors:

> the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.

Id. at 222. A reading of *Luther* under which "the political question barrier was ... absolute" was rejected, with the Court continuing that in some circumstances a court could determine "the limits of the meaning of 'republican form,' and thus the factor of lack of criteria might fall away." *Id.* at 222 n.48. Even then, however, "there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented." *Id.* In recognizing *Luther* as standing solely for the proposition that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government," it clarified that it had consistently declined to resort to the clause as a "standard for invalidating state action." *Id.* at 223.

More recently, the Supreme Court has continued to decline interpretation of its political question doctrine precedent as categorically barring Guarantee Clause litigation. [*See New York v. United States*, 505 U.S. 144, 184 (1992) (expressing displeasure that *Luther's* "limited holding metamorphosed into the sweeping assertion that violation of the great guaranty of a republican form of government in States cannot be challenged in the courts").]

Relying on the Court's directive in *Baker* that "there should be no dismissal for non-justiciability on the ground of a political question's presence" absent one of the specifically identified factors, we reject the proposition that *Luther* and *Pacific States* brand all Guarantee Clause claims as per se non-justiciable.

B

1

Initially, we consider whether the Guarantee Clause manifests "a textually demonstrable constitutional commitment of the issue to a coordinate political department." The text of the Guarantee Clause does not mention any branch of the federal government. It commits the "United States"—which would normally be read as including the Article III courts—to the preservation of republican government in the states. The Guarantee Clause is found not in Article I or Article II, where we would expect to find it if its provisions were textually committed to another branch, but in Article IV. Moreover, two other provisions of Article IV specifically empower Congress to act, but the Guarantee Clause does not. The omission of any mention of Congress from the Guarantee Clause, despite Congress' prominence elsewhere in Article IV, indicates there is no "textually demonstrable commitment"—certainly not an inextricable one—barring our review or district court consideration of this case.

[T]he *Baker* Court concluded that Congress was the appropriate authority for determining "which is the lawful state government." 369 U.S. at 222. This conclusion follows logically from the Constitution's text, which makes Congress the arbiter of congressional elections. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members...."). We would not hesitate to conclude that the first *Baker* test would forbid the judiciary from choosing between two putative state governments. That is not this case, however; the legislator-plaintiffs do not challenge the representative legitimacy of Colorado's current government or the authority of its congressional delegation to serve in Washington. Looking to the "particular fact setting presented," as *Baker* directed, 369 U.S. at 222 n.28, we discern no textual commitment of the narrow issue raised by the plaintiffs to a coordinate political branch.

2

We are similarly unpersuaded that a "lack of judicially discoverable and manageable standards," precludes judicial review of this lawsuit. We are directed, by both parties and by various amici, to sources that courts have relied on for centuries to aid them in constitutional interpretation. Briefing

directs us to several of the Federalist Papers, founding-era dictionaries, records of the Constitutional Convention, and other papers of the founders. We have the authority to take judicial notice of other state constitutional provisions regulating the legislature's power to tax and spend. *See* Fed. R. Evid. 201(b). At this stage of the litigation, we must strike a delicate balance between acknowledging that repositories of judicially manageable standards exist and allowing further record development in the district court before the merits of the case are adjudicated.

3

With respect to the third *Baker* test, we conclude that resolving this case will not require the making of a "policy determination of a kind clearly for nonjudicial discretion." TABOR is a hotly contested issue in Colorado that has had a wide-ranging influence on the state's fiscal policy. But the interpretation of constitutional text—even vague constitutional text—is central to the judicial role. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judiciary to say what the law is."). We "cannot avoid [our] responsibility merely because the issues have political implications." *Zivotofsky ex rel. Zivotofsky v. Clinton*, -- U.S. --, 132 S.Ct. 1421 (2012).

We agree with the district court that this lawsuit is distinguishable from others in which courts have invoked the "policy determination" prong in *Baker*. Plaintiffs do not ask the court to balance delicate policy matters similar to market conditions, budgeting priorities, or foreign policy concerns. Instead, they seek a ruling as to whether state government under TABOR is republican in form.

If adjudicating this case required us or the district court to determine the wisdom of allocating certain traditionally legislative powers to the people, the third *Baker* factor would dictate dismissal. But deciding whether a state's form of government meets a constitutionally mandated threshold does not require any sort of "policy determination" as courts applying the *Baker* tests have understood that phrase. The case before us requires that we determine the meaning of a piece of constitutional text and then decide whether a state constitutional provision contravenes the federal command.

4

We dispense briefly with the remaining three *Baker* factors: "[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." These factors are best understood as promoting separation-of-powers principles in cases featuring prior action on an issue by a coordinate branch.

We are aware of no action taken by either Congress or the executive with respect to this litigation specifically or TABOR generally. Both the people and courts of Colorado have made pronouncements on TABOR. However, the possibility that federal judicial decisions will conflict with a state referendum or a state court decision does not implicate the political question doctrine. Such conflicts are an ordinary part of the judicial process. *See, e.g., Romer v, Evans*, 517 U.S. 620 (1996) (striking down Colorado's popularly enacted Amendment 2 as unconstitutional). TABOR's ratification by the people of Colorado was a "political decision," but it was not a decision of the sort that we must adhere to unquestioningly. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006) ("As *Baker* makes clear, the fifth factor contemplates cases of an 'emergency nature' that require 'finality in the political determination,' such as the cessation of armed conflict.").

We thus affirm the district court's conclusion that the specific Guarantee Clause claim asserted in this case is not barred by the political question doctrine.

[The Governor raised the same standing and political question challenges to the Enabling Act claim as to the Guarantee Clause claim. For the same reasons stated above, the court rejected the Governor's arguments. –Ed.]

VI

We emphasize once again that this interlocutory appeal allows us to consider only whether the

legislator-plaintiffs have established Article III standing and whether prudential standing jurisprudence or the political question doctrine precludes consideration of their Guarantee Clause and Enabling Act claims. Our answer to those questions completes our role at this stage of the proceedings.

We **AFFIRM** the standing and political question rulings of the district court and **REMAND** for further proceedings.

_____

On July 22, 2014, the Tenth Circuit denied a *Petition for Rehearing En Banc*, voting 6-4 against rehearing. A portion of the dissents from denial of rehearing follows:

*CIRCUIT JUDGE HARTZ, DISSENTING from Denial of Rehearing, *En Banc*:

I respectfully dissent from the denial of en banc review. We are bound by Supreme Court precedent to hold that the Guarantee Clause claim is nonjusticiable as a political question.

The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, §4. The claim in this case is that TABOR, an amendment to the Colorado constitution adopted by voter initiative, violates the Guarantee Clause by requiring advance voter approval of new taxes. A quite similar claim was raised in the United States Supreme Court in *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U.S. 118 (1912). Oregon had amended its constitution to allow the enactment of legislation through an initiative or referendum. One statute so enacted imposed a tax on Pacific States. The company defended against collection of the tax on the ground that the initiative process violated the Guarantee Clause. The Supreme Court held that the claim based on the Guarantee Clause was a political question and "not, therefore, within the reach of judicial power." *Id.* at 151. The provisions in the Oregon and Colorado constitutions are obviously not identical. But I am at a loss to find a principled basis on which to hold that the challenge in *Pacific States* was a political question while the challenge here is not. In both, the gist of the claim has been that the Guarantee Clause was violated by the transfer of legislative power from the legislature to the electorate.

The panel opinion attempts to distinguish *Pacific States* on the ground that it raised "a much broader legal challenge" than does this case. To support that characterization, the panel opinion quotes from a passage in the Supreme Court's opinion. The passage follows the Court's discussion of the assignments of error raised by Pacific States in its brief to the Court. The Court stated that those assignments were "reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of [the Guarantee Clause]." *Pac. States Tel. & Tel. Co.*, 223 U.S. at 137. After quoting the six propositions in Pacific States' brief, the Court wrote:

> *In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon.* This being so, the contention, if held to be sound, would necessarily affect the validity, *not only* of *the particular statute which is before us, but* of *every other statute passed in Oregon since the adoption of the initiative and referendum*. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well-founded, that there is, at one and the same time, one and the same government, which is republican in form, and not of that character.

Id. at 141 (emphasis added to language that is quoted by panel opinion). This passage set forth the Court's view of the implications of Pacific State's argument, not what was actually stated in its brief. Nowhere did the brief argue, or even suggest, that everything done by any branch of the Oregon state government was illegitimate after approval of the constitutional provision allowing initiatives and

referenda. The brief simply argued, as one would expect, that the tax was improper because the initiative process—under which the tax was enacted—was unlawful under the Guarantee Clause. Nor did the Supreme Court "[c]onstru[e] the . . . complaint as an attempt to overturn 'not only . . . the particular statute which is before us, but . . . every other statute passed in Oregon since the adoption of the initiative and referendum.'" *Kerr*, 744 F.3d at 1173 (quoting *Pacific States*, 223 U.S. at 140). Rather, it said only that if Pacific States' arguments in its brief (not the complaint) were sound, then all other legislation (even if not adopted by initiative or referendum) would also fall. In other words, the Court was saying that either Oregon had a republican form of government or it did not; if Pacific States was correct in saying that the initiative process violated the Guarantee Clause, then the whole state government came tumbling down because it was not republican in form. The Court rejected, albeit *sub silentio*, the possibility that the Court could just invalidate the one feature of the Oregon government—the initiative process—that was incompatible with a republican form of government.

One can challenge the cogency of the reasoning in *Pacific States*. Professor Tribe wrote: "Chief Justice White's decisive assumption was, to say the least, dubious: if a court found that a particular feature of state government rendered the government unrepublican, why could not the court simply declare that feature invalid?" 1 Laurence H. Tribe, American Constitutional Law § 3-13, at 369 (3d ed. 2000). But we cannot ignore Supreme Court precedent just because we think it poorly reasoned. And the Supreme Court has never questioned the holding of nonjusticiability in *Pacific States*. At most, in *New York v. United States*, 505 U.S. 144 (1992), it indicated that there may be some questions under the Clause that are justiciable. *See id.* at 184–86. Neither *New York* nor any other Supreme Court opinion since *Pacific States*, however, has cast doubt on the validity of the nonjusticiability holding of that opinion. Even *Baker v. Carr*, 369 U.S. 186 (1962), which formulated a new framework for assessing whether a claim raises a nonjusticiable political question, *see id.* at 208–37, did not call into question *Pacific States* or any other decision under the Guarantee Clause. Indeed, commenting on the possibility that the appellants might have raised a claim under the Clause, the Court said, "Of course, as we have seen, any reliance on that clause would be futile." *Id.* at 227.

Because I think it clear that Supreme Court precedent holds that the Guarantee Clause claim in this case is nonjusticiable, I vote for en banc review to correct the panel's error.

*CIRCUIT JUDGE TYMKOVICH, joined by CIRCUIT JUDGE HOLMES, DISSENTING from Denial of Rehearing, *En Banc*.

I would hear this case en banc. The panel's decision mistakenly extends the doctrine of legislative standing, as articulated in *Raines v. Byrd*, 521 U.S. 811 (1997), and contradicts Supreme Court precedent as to the non-justiciability of the Guarantee Clause, U.S. Const. art. IV, § 4. Because the issues presented in this case are of exceptional importance to the separation of powers that undergirds our constitutional structure, I would grant Governor Hickenlooper's petition.

Colorado's Taxpayers Bill of Rights (TABOR), Colo. Const. art. X, § 20, is a state constitutional provision that requires a vote of the people before new taxes can be imposed or tax rates can be increased. The legislator-plaintiffs argue that they are injured by this constitutional provision because TABOR dilutes their core legislative prerogative to increase taxes and that this injury confers Article III standing.

But many state constitutional provisions cause the same type of injury. The net result of the panel's decision ratifying standing is that *just about any policy provision codified in the state constitution would be subject to legislative standing and attack on the theory of vote dilution*.

Thus, consider the effect of this view of legislative standing:

- According to the panel's logic, state legislators would have standing to challenge the state constitution's protection of the recreational use of marijuana, Colo. Const., art. XVIII, § 16, on the theory that the provision infringes on the legislative core function of codifying the criminal law.
- Legislators would also have standing to challenge the mandatory school funding provision of

the state constitution, Colo. Const., art. IX, § 17, because it deprives them of their right to cast effective votes on appropriations and education policy. Legislators are required to divvy up funds from casino gambling to specific recreational and environmental uses under the Great Outdoors Colorado Amendment, Colo. Const., art. XXVII, § 1. They could argue this requirement injures their ability to spend the money on other pressing social issues.

- And on and on and on throughout the Colorado Constitution (and the constitutions of other Tenth Circuit states). The panel's view of legislative standing reaches well beyond Supreme Court precedent. And by remanding for further proceedings under the Guarantee Clause, the decision squarely conflicts with longstanding Supreme Court precedent that holds such inquiries are beyond the scope of federal-court review.

Political Question Doctrine

The panel's conclusion that Guarantee Clause claims are not generally barred by the political question doctrine derives from an erroneous reading of *Baker v. Carr*. *Baker* involved an equal-protection challenge to Tennessee's apportionment statute. Tennessee argued that apportionment cases, regardless of how the litigants characterized the case, can implicate no constitutional provision except the Guarantee Clause and that such claims present non-justiciable political questions. *Baker*, 369 U.S. at 209. In explaining that equal protection challenges to apportionment statutes were justiciable, the Supreme Court clarified that previous Guarantee Clause claims were considered non-justiciable not because they "touch[ed] upon matters of state governmental organization," but because such claims involve at least one of the six factors that make up the political question doctrine. *Id.* at 218. The panel reads this clarification as a rejection of the general rule that Guarantee Clause claims are non-justiciable. But nowhere in *Baker* does the Supreme Court retreat from previous cases holding that Guarantee Clause claims are non-justiciable—the Court simply explained *why* Guarantee Clause claims have always been found non-justiciable. Indeed, the Court's explanation of the non-justiciability of Guarantee Clause claims strongly suggests the Court held that such claims *always* involve political questions. *Id.* ("We shall discover that Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable.").

In addition to recognizing this general rule, the Supreme Court has already held that challenges to state-level direct democracy provisions under the Guarantee Clause are non-justiciable. In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), the Supreme Court held that a Guarantee Clause challenge to a tax increase enacted through Oregon's initiative and referendum process was non-justiciable because the Constitution confers only on Congress the power to determine whether a state government is republican in form. *Id.* at 150–51 (holding it is "the [federal] legislative duty to determine the political questions involved in deciding whether a state government republican in form exists").

The panel distinguishes *Pacific States* by arguing the lawsuit in that case was a "wholesale attack[] on the validity of a state's government rather than . . . a challenge to a single provision of a state constitution." *Kerr*, 744 F.3d at 1173 (citing *Pacific States*, 223 U.S. at 150 ("[T]he assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state.")). The panel maintains that, in contrast to *Pacific States*, the issue in this case is only whether "one provision of the Colorado Constitution brings it below a constitutionally mandated threshold." *Id.* at 1173 n.11.

I do not think this is a meaningful distinction. The Guarantee Clause presents a dichotomy: either a state government is republican in form (and thus a "valid" government) or it is not. The plaintiffs in this case have alleged that TABOR is inconsistent with the Guarantee Clause. In other words, TABOR renders the Colorado government non-republican in form.

In *Pacific States*, the Supreme Court explained the petitioners' claim called into question the validity of not only the particular tax statute adopted by referendum, but "every other statute passed in Oregon since the adoption of the initiative and referendum" because they were passed by a government not republican in form. 223 U.S. at 141. This description may have been somewhat hyperbolic,

considering the wide discretion courts have to fashion the appropriate remedy, but its logic is equally applicable to the claim in this case. Ultimately, the essence of the claims in *Pacific States* and in the case before us—that a state constitution's direct democracy provision renders the state government non-republican in form—is the same. The Court squarely held that this question is textually committed to Congress. *Id.* at 150–51.

Moreover, the panel's opinion does not expressly find that there are "judicially discoverable and manageable standards" for resolving the case; it simply assures the reader that judicially manageable standards *might* emerge at a future stage of litigation. The panel gives no support for its conclusion besides a comparison to *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Supreme Court was able to determine the meaning and scope of the Second Amendment based on a detailed historical inquiry. The panel is confident that the parties will be able to produce materials that will allow for a similar inquiry into the meaning of the Guarantee Clause.

But the requirement that there be "judicially discoverable and manageable standards" is driven by more than concerns about the difficulty of a historical inquiry. Instead, this *Baker* factor requires a court to determine whether it can decide a legal issue in a way that is "principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). The majority gives us nothing besides a mere assurance that the Guarantee Clause contains standards allowing for a principled and rational application that remain to be found. But the panel's failure to at least hint at what the relevant standards are for Guarantee Clause litigation deprives the litigants and district court of necessary guidance as to how these claims are to be adjudicated. The sharp dichotomy in the Guarantee Clause between republican and non-republican forms of government is all the more reason for concern in this case. The judicial line-drawing that will be required to determine whether a direct democracy provision renders a state government non-republican in form leads me to doubt that a court can decide this case in a way that is "principled, rational, and based upon reasoned distinctions."

Because the panel's opinion is inconsistent with Supreme Court precedent on legislative standing and the non-justiciability of the Guarantee Clause, I would have granted the Governor's petition for rehearing en banc.

*CIRCUIT JUDGE GORSUCH, DISSENTING from Denial of Rehearing *En Banc*.

Everyone knows that before a federal court may decide a dispute "judicially manageable standards" must exist for doing so. Federal judges aren't free to intervene in any old dispute and rule any way they wish. Legislatures may act in ways that are "inconsistent, illogical, and ad hoc." *Vieth v. Jubelirer*, 541 U.S. 276, 278 (2004) (plurality opinion). But the "judicial Power" extended by Article III, §1 to the federal courts imposes on us the duty to act "in the manner traditional for English and American courts." *Id.* And "[o]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*" — or, put differently, federal courts must be able to proceed in a "principled, rational, and . . . reasoned" fashion. *Id.* Unless judicially manageable standards for decision exist, we have no business intervening. *Id.*

Where are the judicially manageable standards for deciding this case? The burden of showing such standards exist usually presents a plaintiff with little trouble. Most cases in federal court — whether arising under congressional legislation or the common law or sounding in equity — come with ample principles and precedents for us to apply in a reasoned way, even if those principles and precedents don't always dictate a single right answer. But in our case the plaintiffs make a rather novel claim: they contend that Colorado's government is not a republican one — and so violates the Guarantee Clause—because tax increases proposed by the legislature must also be approved by the public. Where are the legal principles for deciding a claim like *that*?

The plaintiffs don't say. They don't suggest, for example, that the Clause requires all decisions about legislation to be made by elected representatives rather than the public. Neither do they contend that the Clause is offended only when all legislative decisions are made by direct democracy. If the Constitution could be said to contain one or the other of these rules — either forbidding any

experiment with direct democracy or forbidding only the total loss of a representative legislature — we might have a principled basis for deciding the case. The former rule of decision might require judgment for the plaintiffs; the latter, for the defendants. But the plaintiffs in our case disclaim either such standard. They seem to acknowledge that *some* direct democracy is consistent with republican government, insisting only and instead that the kind *here* runs afoul of the Constitution.

In one sense, this shortcoming may be unimportant. On remand, after all, the district court remains very likely to dismiss this case — eventually — either for lack of manageable standards or on the merits. The plaintiffs' failure for so long to identify any legal standards for deciding their own case pretty strongly suggests there aren't any — or that what standards the Guarantee Clause may contain won't prove favorable to them. Indeed, this hypothesis is fully borne out by the scholarly literature on the Clause's text and original meaning. Much of which suggests that the Clause may rule out a state monarchy, a smaller amount of which suggests the Clause may rule out a complete direct democracy, but none of which credibly suggests a limited dose of direct democracy of the sort at issue here is constitutionally problematic.[*2*] Indeed, to hold for plaintiffs in this case would require a court to entertain the fantasy that more than half the states (27 in all) lack a republican government.

The situation we confront in this case is more than a little reminiscent of the one the Supreme Court faced in *Vieth*, where the plaintiffs sought to challenge a political gerrymander as unconstitutional. There, 18 years of experimenting by various courts failed to yield any sure standards for litigating those sorts of cases. Here, we encounter an arguably longer history of failed efforts to develop standards for litigating Guarantee Clause cases involving individual citizen initiatives — one extending into the nineteenth century. There, the plaintiffs sought to identify and defend as workable their own set of legal standards at the motion to dismiss stage, but the Court found those efforts unavailing and affirmed the dismissal of the complaint. Here, the plaintiffs haven't even *attempted* to identify workable legal standards for adjudicating their case despite many opportunities over many years. If the law's promise of treating like cases alike is to mean something, this case should be put to bed now as *Vieth*'s was then, rather than being destined to drag on forlornly to the same inevitable end. I respectfully dissent.

Who has it right? Is Judge Tymkovich correct that the district court must navigate a slippery and dangerous slope? IS Judge Gorsuch correct that, if the district court finds that TABOR violates the Republican Guarantee clause, then it is necessarily true that "more than half the states (27 in all) lack a republican government." What are the unique aspects, if any of TABOR?

[*2*] *See, e.g.*, Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 811 n.19 (2002); G. Edward White, *Reading the Guarantee Clause*, 65 U. Colo. L. Rev. 787, 803-06 (1994); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 749-52, 761-73 (1994); Jonathan Toren, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & Liberty 371, 374-92, 392-99 (2007); Brief for Amici Independence Institute and Cato Institute 12-26.

Insert in Chapter Seven, Part C.2. after John Doe No. 1 v. Reed at page 329:

Chula Vista Citizens for Jobs and Fair Competition v. Norris

U.S. Court of Appeals for the Ninth Circuit
755 F.3d 671 (9th Cir. 2014)

CIRCUIT JUDGE O'SCANNLAIN.

We must decide whether associations have a First Amendment right to serve as official proponents of local ballot initiatives and the extent to which the same Amendment protects the anonymity of initiative proponents.

I

A

This case arises from a political battle concerning labor unions. Chula Vista Citizens for Jobs and Fair Competition ("Chula Vista Citizens"), an unincorporated association, and Associated Builders and Contractors of San Diego, Inc., an incorporated association of construction-related businesses ("the Associations"), sought to place an initiative on the Chula Vista municipal ballot. As described by the title of the initiative, the proposed measure "mandat[ed] that the City or Redevelopment Agency not fund or contract for public works projects where there [was] a requirement to use only union employees." The City of Chula Vista requires that initiative proponents be electors ("the elector requirement"), which excludes non-natural persons from serving as official proponents. Faced with this obstacle, Chula Vista Citizens asked two of its members, Lori Kneebone and Larry Breitfelder, to serve as proponents in place of the Associations. They agreed.

Section 903 of the Chula Vista Charter incorporates the provisions of the California Elections Code that govern initiatives and referenda "so far as such provisions of the Election Code are not in conflict with [the] Charter." The code establishes several requirements that official proponents must meet to qualify an initiative. First, proponents must file a notice of intent to circulate an initiative petition for signatures, and such notice must be signed by at least one but not more than three proponents. Cal. Elec. Code § 9202(a) (the "notice-filing requirement"). Defendant Donna Norris, as the City Clerk, receives and processes these filings. Proponents must include the written text of the initiative and may include a 500–word statement of "reasons for the proposed petition." *Id.* The City Attorney then provides a title and summary of the measure to the proponents. *Id.* § 9203.

Because the City has a newspaper of general circulation, the proponents must publish the notice of intent, title, and summary in such newspaper and submit proof of publication to the City Clerk. *Id.* § 9205(a) (the "publication requirement"). Only at that point can the proponents begin circulating their petition for signatures. *Id.* § 9207.

The initiative petition is typically divided into "sections" to facilitate gathering signatures. *See id.* § 9201. Each section of the petition must "bear a copy of the notice of intention and the title and summary prepared by the city attorney." *Id.* § 9207. Because § 9202(a) requires proponents to sign the notice, the effect of § 9207 is that the identities of official proponents are disclosed to would-be signatories of the petition (the "petition-proponent disclosure requirement"). Proponents have 180 days to file the signed petitions with the City Clerk bearing the requisite number of signatures. *Id.* § 9208. The City Clerk informs the proponents whether they have gathered enough valid signatures to qualify the initiative for the ballot. Whether the initiative appears on the ballot or immediately becomes law depends on the number of signatures gathered and the actions taken by the City Council.

Kneebone and Breitfelder made two attempts to qualify the initiative for the ballot. The first attempt ("First Petition") began on August 28, 2008, with the filing of the notice of intent. Kneebone and Breitfelder later submitted 23,285 signatures to Norris after having complied with all the requirements except one: They had not included their names on the notice that appeared on the circulated petitions. Instead, as Kneebone and Breitfelder later informed Norris, they printed the following statement at the end of each circulated petition: "Paid for by Chula Vista Citizens for Jobs and Fair Competition, major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition." On November 12, 2008, Norris rejected the First Petition for failure to include the proponents' signatures on the notice accompanying the circulated petitions.

The Associations again asked Kneebone and Breitfelder to serve as proponents, which the pair again agreed to do. The second attempt ("Second Petition") began with the notice filing on March 13, 2009. It complied with all requirements—including the requirement that circulated petitions bear the proponents' signatures—appeared on the June 8, 2010 municipal election ballot, and was approved by voters.

B

On April 28, 2009, after Norris rejected their First Petition but before qualifying the Second Petition, the plaintiffs brought this 42 U.S.C. § 1983 suit in the Southern District of California seeking declaratory and injunctive relief. The complaint alleged that the elector and petition proponent disclosure requirements, both facially and as applied, violate the First Amendment. On June 4, the plaintiffs moved for a preliminary injunction and for an expedited hearing. Because provisions of the state election code were at issue, the State of California intervened as a defendant.

Both sides filed motions for summary judgment. The district court granted summary judgment to Norris and her codefendants on March 22, 2010. It entered its judgment on April 10, and plaintiffs timely appealed.

II

[The Court rejected defendants' request that the court abstain from deciding the merits of the case because (defendants argued) doing so would require the court to resolve a contested issue of state law. *See Railraod Commission v. Pullman Co.*, 312 U.S. 496 (1941). The court also rejected defendants' argument that the case was moot. –Ed.]

III

We begin with the threshold issue of whether the elector requirement implicates the First Amendment.

B

To know whether the elector requirement abridges the freedom of speech, it is important to identify precisely what sort of infringement the requirement allegedly commits. The Associations list several activities performed by official proponents that they contend are protected speech:

> [B]eing a proponent involves core political activity beyond ministerial acts of signing and filing things. A "proponent" begins with an idea about an issue, creates the text of an initiative to implement that idea, does the necessary publication of notices to qualify it, circulates petitions and/or arranges with others to do so, and advocates for the initiative.

The Associations' listing of these ostensibly expressive activities implies that associations are prohibited from engaging in them. But the Associations' actions in this case belies that implication. As stated in their complaint, the Associations "decided to propose the Initiative." "Chula Vista Citizens filed *its* required Clerk's Version" of the initiative text, just as "Chula Vista Citizens published the Newspaper Version," for which "[n]either Ms. Kneebone nor Mr. Breitfelder paid any money." "Chula Vista Citizens hired The La Jolla Group to circulate the Petition in the City," and, as the district court pointed out, the Associations were free to advocate for the initiative's qualification and

enactment. In short, the Associations were able to participate in all of the activities they mention.

However, the Associations were dependent on Kneebone and Breitfelder as official proponents in order to engage in these activities. That is the gravamen of their alleged injury. The Associations believe the elector requirement violates the Free Speech Clause because, in their words, "speech-by-proxy is not a constitutionally permissible alternative because it does not allow associations *themselves* to speak." The Associations would rather have the legal authority to engage in these activities without relying on natural persons to serve as proxies, and that requires them to be official proponents.

What the Associations seek, then, is the legal authority attaching to the status of an official proponent, and this amounts to a claim that serving as an official proponent is a form of "speech" protected by the First Amendment.

C

We must next determine the nature of the legal authority of official proponents. The Associations do not dispute that the initiative power is a legislative power. And rightly so. As the California Supreme Court has said, the initiative process "represents an exercise by the people of their reserved power to legislate." *Builders Ass'n v. Superior Court*, 529 P.2d 582, 586 (Cal. 1974).

Norris argues that the distinct role of proponents is to introduce legislation: "[T]he legal acts of a Proponent are acts of legislating, exercising the inherent, reserved power of citizens to legislate for the entity in which they reside." Under this theory, because the initiative process is a lawmaking one, the activities that commence that process are analogous to the introduction of legislation. At least two California appellate courts support this description of the initiative process. *San Francisco Forty–Niners v. Nishioka* said the following:

> The initiative petition with its notice of intention is not a handbill or campaign flyer—it is an official election document subject to various restrictions by the Elections Code, including reasonable content requirements of truth. It is the constitutionally and legislatively sanctioned method by which an election is obtained on a given initiative proposal.

75 Cal.App.4th 637 (Ct. App. 1999). *Widders v. Furchtenicht* stated that the legislative process begins once a petition is circulated for signatures: "An initiative is put before the people when they are asked to sign a petition to place it on the ballot...." 167 Cal.App.4th 769 (Ct.App.2008). If the activities involved in qualifying an initiative for the ballot start the legislative process, then official proponents exercise part of the legislative power.

The Associations resist this characterization. They distinguish between *placing* an initiative on the ballot (which they concede is a legislative function) and *asking electors* to place an initiative on the ballot (which they contend is a nonlegislative act). At oral argument, the Associations analogized initiative proponents to lobbyists: The official proponents come to the legislators (i.e., the electors) with a proposal and ask the legislators to introduce a bill (i.e., sign the petition to place the initiative on the ballot).

The problem with the Associations' proffered distinction is that the incidental role the Associations assign to official proponents is inconsistent with the responsibilities conferred on official proponents by the California Elections Code. As the California Supreme Court has said, "[O]fficial proponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the measure." *Perry v. Brown*, 265 P.3d 1002, 1017-18 (Cal. 2011). Official proponents determine when the process will begin by filing the relevant documents, craft the text of the initiative that will be put before the people, ensure that the people know that the initiative process has commenced, and exercise a measure of control over the arguments in favor of the initiative to which the people will be exposed. Thus, the California Elections Code "place[s] an obligation upon the official proponents of an initiative measure to manage and supervise the process by which signatures for the initiative petition are obtained." *Id.* at 1017. If public officials

refuse to defend a successful initiative in court, official proponents may "intervene or [ ] participate as real parties in interest in a judicial proceeding to assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure." *Id.* at 1025. *But see Hollingsworth v. Perry*, 133 S.Ct. 2652, 2663-67 (2013) (holding that official proponents of California's Proposition 8 lacked Article III standing in federal court). These rights and responsibilities are hardly consistent with the Associations' minimalist characterization of official proponents.

Perhaps most tellingly, unlike a lobbyist's suggestion to a legislator, qualifying an initiative for the ballot is a *necessary* step for the people to exercise the initiative power. In this critical respect, it is more like introducing legislation. Thus, by seeking the legal authority of official proponents, the Associations seek the legislative power of setting the initiative process in motion.

D

We turn now to the question of whether serving as an official proponent, as we have described that status, is an aspect of the freedom of speech protected by the First Amendment.

The Associations rely primarily on *Meyer v. Grant*, 486 U.S. 414 (1988). In *Grant,* Colorado forbade initiative proponents from employing paid petition circulators to gather signatures. The Court held that "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421. Thus, it applied exacting scrutiny to the challenged ban.

As the district court astutely observed, *Grant* held that "*advocation* and *circulation*" of a petition is protected by the First Amendment, but no one disputed the legal status of the initiative proponents in *Grant.* Whether the *activities* of an official proponent are protected by the freedom of speech is a distinct question from whether *serving as* an official proponent (that is, having the legal authority attaching to official proponents) has the same protection. Thus, the issue presented by the Associations is unanswered by *Grant.* Indeed, it is one that neither the Supreme Court nor our circuit has decided.

The Supreme Court has, however, addressed an analogous situation to the one presented in this case. In *Nevada Commission on Ethics v. Carrigan,* a state ethics law required public officers to recuse themselves from voting on matters in which they might reasonably be said to have a conflict of interest. 131 S.Ct. 2343, 2346 (2011). Carrigan challenged the law, asserting that the First Amendment protected his right to vote in the city council.

The Supreme Court held that "restrictions upon legislators' voting are not restrictions upon legislators' protected speech." *Id.*at 2350. Importantly, the Court cited the legislative nature of voting as the reason for its decision: "The Nevada Supreme Court thought a legislator's vote to be protected speech because voting 'is a core legislative function.' We disagree, for the same reason." *Id.*at 2347. The Court elaborated on this rationale: "[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.*at 2350. The Court went further and stated that "the act of voting [in a legislature] symbolizes nothing." *Id.* Even if the legislative act of voting were expressive, the Court reasoned, the challenge would still fail because "[t]his Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Id.* at 2351.

Carrigan establishes that the legal authority attaching to a legislative office is not an aspect of the freedom of speech protected by the First Amendment. The Associations seek the legislative authority that comes with serving as official proponents. Following *Carrigan,* we conclude that serving as an official proponent is not an aspect of speech within the meaning of the First Amendment.

E

The Associations seem to think that because official proponents have authority to engage in expressive activities, such as the power to write the 500–word statement of reasons, the freedom of

speech requires that they be permitted to be official proponents. But from the premise that certain activities are expressive, it does not follow that the *legal authority* to engage in such activities is part of the freedom of speech. This case presents that threshold issue: If serving as an official proponent is not part of the freedom of speech, then the expressive nature of official proponents' activities is irrelevant.

A contrary conclusion would produce absurd results. If the mere fact that an activity is expressive meant that there was a First Amendment right to engage in that activity, irrespective of the context in which the activity occurs, then the First Amendment would protect the right of any voter to participate in the debates of the state legislature. After all, such debates are highly expressive in nature. Yet, no one would maintain that the First Amendment prohibits limiting participation in such debates to members of the state legislature. Similarly, the exercise of an official proponents' authority, if expressive in nature, can be limited to those who qualify as official proponents. The First Amendment does not require that associations be allowed to share in the legislative power simply because the *exercise* of such power might be expressive.

The Supreme Court made this clear in *Carrigan.* In addition to upholding Nevada's recusal law, the Court also upheld the recusal provision's prohibition on advocacy. Because the recusal law was constitutional with respect to legislative voting on conflicted legislation, then it surely must also be the case, the Court reasoned, that the provision restricting who might advocate on that legislation was equally constitutional as a reasonable time, place, and manner restriction. As the Supreme Court observed, "Legislative sessions would become massive town-hall meetings if those who had a right to speak were not limited to those who had a right to vote." So too here, any limit that the elector requirement might place on expression incidentally is a reasonable time, place, and manner restriction resulting from the initial, constitutional limitation on whom the people have designated to serve in this official role.

As the Court emphasized in *Carrigan, Doe v. Reed* is consistent with *Carrigan's* holding and it is consistent with the analysis here. Whereas *Carrigan* concerned whether the *legal authority* to exercise legislative power is protected by the freedom of speech, *Doe* concerned the extent to which the *exercise* of legislative power is protected.[*6*] *Doe* did not analyze restrictions on who could sign initiative petitions; it discussed whether the signing of a petition was expressive.[*7*] *Doe*, 561 U.S. at 194-96. The Associations in this case seek the *legal authority* to exercise legislative power, which is why the analysis is governed by *Carrigan.* Kneebone and Breitfelder, by contrast, undoubtedly have such authority, but they seek to exercise it in a certain way. Their challenge is governed by *Doe.*[*8*] *See infra* Part IV.

The challenge to the elector requirement asks whether the freedom of speech requires the people to delegate legislative power to associations, and *Carrigan* answers that it does not.

[*6*] The concurrence claims that this manner of reconciling *Carrigan* and *Doe* departs from Supreme Court precedent, implying that its own approach is well-established in the U.S. Reports. Yet, other than the Supreme Court's brief paragraph distinguishing *Carrigan* from *Doe, see Carrigan*, 131 S.Ct. at 2351, no federal court has described how *Carrigan* and *Doe* interact. Thus, *any* effort in this regard will break new ground, including that of the concurrence.

[*7*] The concurrence is, therefore, quite wrong when it asserts that *Doe* controls the elector requirement analysis. The key question with regard to the elector requirement is whether California's decision not to delegate legislative authority to associations violates the freedom of speech. *Doe* has nothing to say about that question.

[*8*] This distinction between the *legal authority* to exercise legislative power and the *exercise* of such power explains why the dissent errs when it treats the challenges to the elector and petition-proponent disclosure requirements identically. Only if we ignore *Doe's* clear instruction, as the dissent would do, can we conclude that the legislative character of initiative petitions strips proponents of First Amendment protection.

IV

In their challenge to the petition-proponent disclosure requirement, Kneebone and Breitfelder contend that the compelled disclosure of their identities at the point of contact with signatories violates the freedom of speech.

A

The Supreme Court has never held that there is some "freewheeling right" to anonymity in the Constitution. *Doe*, 561 U.S. at 218 n.4 (Stevens, J., concurring in part and concurring in judgment). Rather, the Court has said that the "decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). In the compelled disclosure context, the abridgment of the freedom of speech consists not in a violation of some amorphous "right to anonymity"; it consists in the "direct regulation of the content of speech," *id.* at 345, or in the burden such disclosures place on speech by, for example, deterring the speaker from speaking, *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). Our own precedent has followed this basic framework. *See ACLU v. Heller*, 378 F.3d 979, 987 (9th Cir. 2004) (describing the constitutional injury of compelled disclosure as the "direct regulation of the content of political speech").

We have never held that the content of a ballot initiative petition is part of an official proponent's freedom of speech. The Supreme Court has recognized that the content of political handbills, *McIntyre*, 514 U.S. at 337-47, the speech of initiative petition circulators, *Buckley v. ACLF*, 525 U.S. 182, 197-200, and the signatures of initiative petition signatories, *Doe*, 561 U.S. at 194-196, are protected speech, and thus the compelled disclosure of the speaker's identity to the public constitutes a burden on such speech or a direct regulation thereof. But initiative petitions are official election documents, and the Court has not had occasion to consider whether the content of such documents constitutes protected speech.

However, because the parties to this litigation agree that the petition-proponent disclosure requirement is a regulation of political speech, we need not resolve that question. We will assume—without deciding—that an official proponent's decision to disclose his identity on the face of an initiative petition constitutes political speech, and under *McIntyre,* the compelled disclosure of such information is "a direct regulation of the content of speech" subject to First Amendment scrutiny. *McIntyre*, 514 U.S. at 345.

B

Of course, we must determine which standard of review governs our analysis of the petition-proponent disclosure requirement's constitutionality.[*12*]

The Supreme Court has "a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.'" *Doe*, 561 U.S. at 196. "That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* The "'strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' " *Id.* Like the case before us, *Doe* considered the constitutionality of a law requiring the disclosure of identifying information—in that case, the identities of petition signatories. The Court applied exacting scrutiny and upheld the law.

C

It remains for us to determine whether the petition-proponent disclosure requirement survives exacting

[*12*] Kneebone and Breitfelder bring both as-applied and facial challenges to the petition-proponent disclosure requirement. The nature of their argument, however, is a facial challenge: They claim that the requirement violates the freedom of speech no matter the identities or circumstances of the official proponents.

scrutiny. In addressing this question, it is important to bear in mind that the statutory scheme, as incorporated by the City Charter, requires proponents to disclose their identities at three distinct moments in the initiative process: the filing of a signed notice with the City Clerk, the publication of the notice in a newspaper of general circulation, and the inclusion of the notice on each section of the circulated initiative petitions. Kneebone and Breitfelder only challenge the last requirement.

The Supreme Court has described exacting scrutiny as a "strict test." As *Buckley* made clear, it is not enough for the state to have "some legitimate governmental interest"; the Court "also ha[s] insisted that there be a ... 'substantial relation' between the governmental interest and the information required to be disclosed." 424 U.S. at 64. Moreover, it is the *government's* burden to "show that its interests ... are substantial, that those interests are furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes on political speech." Thus, the mere assertion of a connection between a vague interest and a disclosure requirement is insufficient.

California asserts two interests in the petition-proponent disclosure requirement: (1) informing electors of an official proponent's identity, and (2) "preserving the integrity of the electoral process." Quoting *Doe,* the state claims that the latter interest "extends more generally to promoting transparency and accountability in the electoral process." *Doe*, 561 U.S. at 198. The district court relied on both interests in sustaining the petition-proponent disclosure requirement.

1

California contends that the public has a right to know the identities of official proponents because an initiative is analogous to the introduction of legislation, and therefore "it is no different from the requirement that every bill in the California Legislature be introduced by a member of the Legislature." California believes that "[l]egislation is inherently a public act, regardless of the forum in which it takes place." The district court agreed, relying on two of our cases that stressed the need for voters to know the identities of those participating in initiative campaigns. *See Human Life of Wash., Inc. v. Brunsickle*, 624 F.3d 990 (9th Cir. 2010); *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

Even assuming that this interest is sufficiently important to satisfy exacting scrutiny, California must demonstrate that the interest bears a substantial relation to the petition-proponent disclosure requirement. Kneebone and Breitfelder argue that because proponents must disclose their identities at two distinct moments before circulating a petition, any member of the public who wishes to learn the identities of official proponents can do so, and there is no need for disclosure on the face of the petition. California also cites the notice-filing and publication requirements, but it argues that these prior disclosures cut the other way: "[B]y the time proponents' names are printed on initiative petitions, their identities are already known—the impact on proponents' privacy is negligible because their names have already been published in a newspaper of general circulation."

The precedents of the Supreme Court and this circuit have emphasized the importance of anonymity at the point of contact with voters. *McIntyre v. Ohio Elections Commission* established that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." 514 U.S. at 342. In the realm of political speech, anonymity is important because it "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." *Id.* The Court therefore applied exacting scrutiny and struck down an Ohio statute requiring authors of any "form of general publication which is designed ... to influence the voters in any election" to disclose their identities. *Id.* at 338 n. 3, 345–46.

The Court extended *McIntyre's* holding in *ACLF.* In that case, the Court applied exacting scrutiny to invalidate a Colorado requirement that petition circulators wear badges disclosing their identities at the point of contact with signatories, and it contrasted this invalid rule with the requirement that those same circulators submit affidavits to the state containing their names, addresses, and signatures: "Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated

from the moment the circulator speaks." 525 U.S. at 198. The Court saw this separation in time as important because revealing one's identity at the point of contact with signatories "operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned." *Id.* at 199.

The Court observed that, when a circulator makes contact, "the circulator must endeavor to persuade electors to sign the petition," *id.,* a concern expressed in *McIntyre's* statement that "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity," 514 U.S. at 342. For that reason, *ACLF* held that "the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." 525 U.S. at 199. By contrast, the affidavit requirement was "responsive to the State's concern" for providing the identifying information to the public, but it did so without interfering with the point of contact. *Id.* at 198. Thus, there was not a sufficient governmental interest to justify the badge requirement.

Our decision in *WIN v. Rippie* followed a similar chain of reasoning. WIN challenged a Washington law that compelled the disclosure of petition circulators' identities, addresses, and compensation before and after an election. These disclosures were "routinely filed during the circulation period," which we said created a chilling effect on speech. *WIN*, 213 F.3d at 1138-39. Applying exacting scrutiny, we struck down the disclosure requirement. Central to our holding was our judgment that the "interest in educating voters through campaign finance disclosure is more adequately served by a panoply of the State's other requirements that have not been challenged." *Id.* at 1139. Like *ACLF, WIN* illustrates that, where alternative means of furthering the state's interest are available, it will be very difficult for a compelled disclosure law to survive exacting scrutiny.

Heller remains our clearest articulation of the principles underlying *McIntyre, ACLF,* and *WIN*. In *Heller,* we invalidated a Nevada law that required "certain groups or entities publishing any material or information relating to an election, candidate or any question on a ballot to reveal *on the publication* the names and addresses of the publications' financial sponsors." 378 F.3d at 981. Our holding rested on "[t]he constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" that we said "has been noted and relied upon both by the Supreme Court and by this Circuit." *Id.* at 991. We said *ACLF* stands for the following proposition: "[I]t is not just *that* a speaker's identity is revealed, but *how* and *when* that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech." *Id.* (emphasis added). For that reason, "requiring a publisher to reveal her identity on her election-related communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money." *Id.* at 992. Because the Nevada law required the speaker to disclose her identity on the face of the election-related communication, we held the state's asserted interests were inadequate to justify the burden on speech.

In all of these precedents, the Supreme Court and this circuit have taken the view that "[t]he injury to speech is heightened" when speakers are compelled to disclose their identities "at the same time they deliver their political message." *ACLF*, 525 U.S. at 199. Such is the case here, where the petition-proponent disclosure requirement forces official proponents to reveal their identities on the face of the petition. Forced disclosures of this kind are "significant encroachments on First Amendment rights." *Buckley*, 424 U.S. at 64.

These precedents also make clear that, where there are alternative methods of meeting the government's asserted interests, the government's task of justifying a compelled disclosure law becomes much more onerous. California contends that voters have an interest in knowing the identities of official proponents, but such identities are already disclosed on two occasions before petition circulation can begin. Proponents must disclose their identities to the City Clerk when they file the notice of intent, and the Clerk must provide copies of the notice to "any person upon request." Additionally, there is the publication requirement. Voters who wish to know the identities of official proponents need only make a trip to the City Clerk's office or search for the publication of the petition in their newspapers of general circulation.

Like *ACLF* and *McIntrye,* the statutory scheme here "compels personal name identification at the precise moment when the [speaker's] interest in anonymity is greatest." *ACLF*, 525 U.S. at 199. Like *Heller,* the disclosure requirement in this case implicates the "constitutionally determinative distinction between on-publication identity disclosure requirements and [before-or-] after-the-fact reporting requirements." 378 F.3d at 991. Like *ACLF* and *WIN,* there are alternative means of disclosure that are "responsive to the [public's] concern" in knowing the identities of those involved in the initiative process. *ACLF*, 525 U.S. at 198. Under these circumstances, the informational interest does not bear a substantial relation to the petition-proponent disclosure requirement and fails exacting scrutiny.

California also asserts an interest in maintaining the integrity of the electoral process. *Doe* sustained a Washington disclosure law on the basis of a similar interest and we will assume that the same interest is sufficiently important for purposes of this case.

California provides no explanation for how its interest in the integrity of the electoral process relates to the petition-proponent disclosure requirement. It simply asserts the interest. The district court elaborated on the nature of this interest: "By requiring a proponent's name to appear on the circulated copy of the ballot initiative, the local voters who consider the initiative may recognize whether the proponent qualifies as an elector." The district court appeared to be saying that an anti-fraud interest underlay the petition-proponent disclosure requirement, an interest the Supreme Court found sufficiently important in *Doe.*

If the state is concerned about fraudulent proponents, as the district court suspected, it can protect against that possibility using the unchallenged disclosure requirements. At each of these stages, elections officials or the interested public can verify proponents' qualifications. In *Doe,* Washington demonstrated that the existence of measures other than the disclosure requirement at issue did not alleviate the possibility of fraud and voter error. *See, e.g.,* 561 U.S. at 198 (pointing out that "the secretary's verification and canvassing will not catch all invalid signatures"). It is California's burden to show that the alternative methods of satisfying its anti-fraud goal are insufficient. Not only has it failed to carry its burden; it has not even attempted to do so.

California claims that, as was the case with Washington in *Doe,* its "interest in preserving electoral integrity is not limited to combating fraud." 562 U.S. at 198. Rather, the interest "extends more generally to promoting transparency and accountability in the electoral process." *Id.* California has not shown how the petition-proponent disclosure requirement serves that interest or why the alternative disclosure requirements are inadequate, relying instead on the bare pronouncement of its interest. That is insufficient to satisfy exacting scrutiny.

E

The petition-proponent disclosure requirement is unconstitutional. Unlike the challenge to the elector requirement, none of the parties assert that the petition-proponent disclosure requirement exists apart from the state elections code. Thus, §§ 9201 and 9207 of the California Elections Code are invalid to the extent that they require official initiative proponents to identify themselves on the face of initiative petitions.

V

We affirm the district court's grant of summary judgment to the defendants as to the elector requirement, but we reverse its grant of summary judgment to the defendants as to the petition-proponent disclosure requirement. We therefore reverse the district court's denial of summary judgment to the plaintiffs as to the petition-proponent disclosure requirement and remand so that it can enter an injunction consistent with this opinion. The parties shall bear their own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

CIRCUIT JUDGE GRABER, CONCURRING in part and DISSENTING in part:

Two groups of Plaintiffs mount challenges to two restrictions that the people of California have placed

on their initiative process: (1) the requirement that official proponents be electors, that is, individual voters; and (2) the requirement that each petition section list the name of at least one official proponent. I agree with the majority opinion that the case is properly before us, and I concur in Part III, which holds that the elector requirement passes constitutional muster. I write separately to dissent from Part IV. The majority opinion properly recognizes in Part III that the role of an official proponent of an initiative petition in California is like that of a legislator. But the majority fails to apply this analogy equally to Part IV. Following the analogy of official proponent as legislator to its logical end, the disclosure requirement survives any level of review.

The overarching question begins and ends with the role of the official proponent within the California lawmaking process. Although the California Constitution does not describe the full contours of the official proponent's role, the California legislature has fleshed it out in a series of statutes.

Under the California Elections Code, an official proponent enjoys a special relationship to the initiative that continues long after the advocacy process is complete. *See, e.g.,* Cal. Elec. Code §§ 9202, 9205, 9207. In particular, official proponents: (1) bear the obligation "to manage and supervise the process by which signatures for the initiative petition are obtained"; (2) "control the arguments in favor of an initiative measure," including by serving as gatekeeper for all ballot arguments, providing arguments afforded priority status on the ballot, controlling all rebuttal ballot arguments, and retaining the ability to withdraw ballot arguments at any time; and (3) are allowed to intervene, both before and after the initiative is passed, in litigation affecting the initiated statute, and to appeal state court rulings adverse to the initiative's validity. *Perry v. Brown*, 265 P.3d 1002, 1017-18 (Cal. 2000). In addition to having special duties beyond those of ordinary supporters of an initiative, "the official proponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the measure," *Id.* at 1017-18, and the California Supreme Court has equated the role of a proponent to that of an elected legislator to whom the people have delegated lawmaking power.[*2*] It is the distinct character of this role that informs the First Amendment analysis for both challenges.

The Individual Plaintiffs mount a facial challenge to only the requirement that each section of the petition bear a copy of the Notice of Intent to Circulate Petition. They contend that this content-based restriction, affecting the text of the petition, impermissibly chills core political speech by forcing speakers to disclose their identities at the point of contact with potential signatories. Because this disclosure is required at the point of contact with voters, the Individual Plaintiffs urge us to review the disclosure regime with strict scrutiny. Following *Doe* and *Citizens United,* I would apply exacting scrutiny to the disclosure regime.

The government maintains that the disclosure requirement is a reasonable regulation of the initiative process that serves two sufficiently important state interests: (1) to preserve the integrity of the initiative process; and (2) to inform signatories "as to who is formally proposing the legislation."[*3*] Because I find the state's interest in preserving the integrity of the electoral process sufficiently

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[*2*] In fact, California law gives an official proponent more authority than a legislator who, despite having sponsored and championed a piece of legislation through the California legislature, would not have a right to intervene in court on behalf of the legislation after it had been codified. *See Perry*, 265 P.3d at 1021 (noting that legislators would not be afforded the ability to intervene on behalf of a law that they had sponsored, before holding that official proponents could so intervene). The United States Supreme Court has held that an official proponent under California law is not equivalent to an elected, public official for Article III purposes under the Federal Constitution. *Hollingsworth*, 133 S.Ct. at 2662. The California Supreme Court, however, retains supreme authority to define the role of an official proponent under state law. *See, e.g*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986).

[*3*] I do not reach the question whether the people's informational interest is sufficiently important, because I would hold that the government's interest in preserving the integrity of the electoral process alone is sufficiently important to sustain the minimal burden on official proponents.

important, indeed compelling, and substantially related to a narrowly tailored disclosure regime, I would find the regime constitutional under any level of scrutiny.

The Supreme Court has consistently recognized that the government's interest in preserving the integrity of the electoral process is sufficiently important to survive exacting scrutiny. *Doe*, 130 S.Ct. at 2819. "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Id.* The government's interest in preserving the integrity of elections is especially strong in the context of fraud, but the interest "is not limited to combating fraud" and "also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is 'essential to the proper functioning of a democracy.'" *Id.*

In the federal context, "[t]he public nature of federal lawmaking is constitutionally required." *Id.* at 2834 (Scalia, J., dissenting) (quoting U.S. Const. art. I, § 5, cl. 3: "'Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy[.]'"). The lawmaking process is kept transparent for good reason: Knowing the identities of lawmakers and their actions plays an important role in allowing the public to evaluate officials and hold them accountable. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15.

Similarly, the local government has an "essential" interest in preserving an electoral process in which members of the California public who are considering whether to sign an initiative petition know for whom they are expressing support as the official proponent when they sign a petition—and to whom they will delegate certain lawmaking duties if the petition is successful. The government's interest in supporting the integrity of the electoral process by providing the public with the identity of an official proponent is not directed solely at preventing fraud. The electoral process would be degraded if potential signers have no way of knowing whether their signatures are delegating lawmaking duties to a desirable proponent for the initiative, who will present arguments on behalf of the initiative and defend the initiative in a manner with which the signers agree. As noted, in California official proponents play a central role, both during the lawmaking process and after their initiative is enacted. An ineffective official proponent: (1) could fail to manage and supervise the initiative process; (2) could fail to file the petition with the state; (3) could make poor choices regarding arguments and statements for the ballot; (4) would receive priority status for even the weakest arguments on the ballot; (5) could fail to mount, or could withdraw from the ballot, the better arguments; and (6) could fail to defend the initiative in court proceedings.

On issues of public importance, potential signers could face multiple initiatives on the same topic. In order to make an informed decision about which of the initiatives to support, potential signers would need to know the differences in content among the various initiatives. But the voters would also need to know the identities of the official proponents for each initiative so that the voters could evaluate how those official proponents would present the important public issue at hand. Because the official proponent serves an important role in the lawmaking process and is delegated duties in the lawmaking process far beyond that of an advocate, the government has an essential interest in preserving an electoral process that allows voters to know to whom they are delegating lawmaking power when signing a particular petition.

This "essential" interest clearly outweighs the minor actual burden, if any, on the official proponents who must disclose their identities. The role that these individuals wish to fill is itself a *public legislative role* that is akin to the role of an elected legislator. The voluntary undertaking of a California proponent's role entails other duties (beyond the initial filing) that require disclosure of the official proponent's identity, for example, monitoring the integrity of the petition-circulation process, crafting arguments for the ballot, and intervening in court proceedings. Other circuits have recognized that candidates for public office *have no First Amendment interest in anonymity* by virtue of their voluntary undertaking of a public role. Similarly, the role sought by these individuals is one that

necessarily requires public disclosure of identity.

In a different context, the Supreme Court has expressed skepticism that an informational interest can sustain regimes that compel disclosure of the identity of an advocate at the point of contact with voters, or signatories in the initiative context. [Judge Graber cited *Buckley v. ACLF* and *McIntyre*. – Ed.] But this doctrine does not apply here for two reasons. First, the statute is directed toward the government's interest in preserving the integrity of elections, an interest that the Supreme Court has recognized as sufficient to support mandated disclosure of identity. *Doe*, 130 S.Ct. at 2820. Second, the proponent of a California initiative is asking voters to allow her to *serve an official public role* and to allow her to act on the voters' behalf in the legislative process, not just recounting an idea as an advocate, and a petition is an official legislative form, not a pamphlet or advocacy document. *See Timmons*, 520 U.S. at 363 (holding that the First Amendment does not provide "a right to use the ballot itself to send a particularized message"). Here, the disclosure regime seeks to disclose the identity not of an *advocate,* but of an individual who serves as an *official proponent* and representative of the signers in the lawmaking process—a role akin to a candidate for office and recognized explicitly as distinct from that of an advocate under California law. *See Perry*, 265 P.3d at 1017-18 (holding that "the official proponents of an initiative measure are recognized as having a distinct role—involving both authority and responsibilities that differ from other supporters of the measure"). The government's interest in alerting potential signatories to the official proponent's identity, as a representative of the initiative, is markedly different than the interests at stake in *McIntyre, Citizens United,* and *ACLF*—that is, knowing the identity of a mere advocate in order to evaluate an argument.

The Individual Plaintiffs respond that the state's interest is satisfied, or lessened, by two other required points of disclosure—at the points of application and publication in a newspaper of general circulation. That argument fails to recognize that the signing of a petition in this context is not simply agreeing to the content of an initiative; it also is an expression of support for *that particular official proponent.* If the name of the official proponent is not printed on the petition, every elector who is considering whether to sign would be required to match the petition with public records or newspaper publications in order to glean whom the elector is designating as the official proponent. The two earlier points of disclosure identified by the Individual Plaintiffs would provide no identifying information whatsoever to an elector who is approached on the street with a petition; the elector would lack sufficient information to allow for an informed decision whether to sign. Such a disclosure scheme clearly would fail to satisfy the government's interest in any meaningful or realistic sense.

By analogy, if ballots listed only the platforms of candidates for an office, but not the candidates' names, undoubtedly we would not find it sufficient that voters were able to access the names and platforms of candidates from public records or from local media in order to guide voting choices. We do not permit federal candidates for public office to remain anonymous at the point of contact with voters, nor do we force voters to support federal candidates without knowing the candidates' identities. So too here, we should uphold the decision by the citizens of Chula Vista to prohibit anonymous candidates for an official legislative role.

Finally, the Supreme Court has allowed those resisting disclosure to mount a successful First Amendment challenge where "they can show a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Doe*, 130 S. Ct. at 2820. The Individual Plaintiffs, however, have provided no evidence that shows a likelihood of harassment, and they have effectively conceded that they experienced no harassment in response to their service as official proponents to Chula Vista Measure G. Moreover, given the public role that an official proponent serves in the lawmaking process, some public pressure must be expected in order to hold that official proponent accountable to a good faith performance of his duties. Accordingly, Plaintiffs have failed to show that the compelled disclosure would subject them to threats, harassment, or unreasonable reprisals from government officials or the public.

In sum, I would hold that the disclosure regime survives exacting scrutiny because it is substantially related and narrowly tailored to the government's interest in preserving the integrity and transparency

of the electoral process by providing voters with the identity of the official proponent. Accordingly, I respectfully dissent from Part IV. I would affirm the judgment in full.

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On October 7, 2014, the Ninth Circuit ordered that *Chula Vista Citizens* be reheard *en banc*.

The Ninth Circuit Judges who decided *Chula Vista* spent a significant amount of time discussing the difference between compelled identity disclosure that occurs at the time of contact with potential petition signatories and disclosure that occurs to the government (like the secretary of state's office) at an earlier or later time. Plaintiffs argue that anonymity is important to protect their identities and to force electors to consider the ideas behind an initiative without the cue of who supports the initiative. Do you agree that these are both important interests? How would you balance them against the electors' interest in having more information?

Insert in Chapter Eight, Part C.3. at page 368, immediately after the following language: "Coalition to Defend Affirmative Action, Integration and Immigrant Rights By Any Means Necessary v. Regents of the University of Michigan, 701 F.3d 466, 477 (6th Cir. 2012). Do you agree with that statement of the rule?"

Schuette v. Coalition to Defend Affirmative Action

Supreme Court of the United States
134 S.Ct. 1623 (2014)

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join.

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In 2003 the Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The undergraduate admissions plan was addressed in *Gratz v. Bollinger*, 539 U.S. 244 (2003). The law school admission plan was addressed in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Each admissions process permitted the explicit consideration of an applicant's race. In *Gratz*, the Court invalidated the undergraduate plan as a violation of the Equal Protection Clause. In *Grutter*, the Court found no constitutional flaw in the law school admission plan's more limited use of race-based preferences.

In response to the Court's decision in *Gratz*, the university revised its undergraduate admissions process, but the revision still allowed limited use of race-based preferences. After a statewide debate on the question of racial preferences in the context of governmental decisionmaking, the voters, in 2006, adopted an amendment to the State Constitution prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, § 26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

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

Section 26 was challenged in two cases. Among the plaintiffs in the suits were the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means

Necessary (BAMN); students; faculty; and prospective applicants to Michigan public universities. The named defendants included then-Governor Jennifer Granholm, the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. The Michigan Attorney General was granted leave to intervene as a defendant. The United States District Court for the Eastern District of Michigan consolidated the cases.

In 2008, the District Court granted summary judgment to Michigan, thus upholding Proposal 2. A panel of the United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment. Judge Gibbons dissented from that holding. The panel majority held that Proposal 2 had violated the principles elaborated by this Court in *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457 (1982, and in the cases that *Seattle* relied upon.

The Court of Appeals, sitting en banc, agreed with the panel decision. 701 F.3d 466 (6th Cir. 2012). The majority opinion determined that *Seattle* "mirrors the [case] before us." *Id.* at 475. Seven judges dissented in a number of opinions. The Court granted certiorari.

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.

This Court has noted that some States have decided to prohibit race-conscious admissions policies. In *Grutter*, the Court noted: "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." 539 U.S. at 342. In this way, *Grutter* acknowledged the significance of a dialogue regarding this contested and complex policy question among and within States. While this case arises in Michigan, the decision by the State's voters reflects in part the national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education. See, *e.g., Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir. 1997).

In Michigan, the State Constitution invests independent boards of trustees with plenary authority over public universities, including admissions policies. Although the members of the boards are elected, some evidence in the record suggests they delegated authority over admissions policy to the faculty. But whether the boards or the faculty set the specific policy, Michigan's public universities did consider race as a factor in admissions decisions before 2006.

In holding § 26 invalid in the context of student admissions at state universities, the Court of Appeals relied in primary part on *Seattle,* which it deemed to control the case. But that determination extends *Seattle*'s holding in a case presenting quite different issues to reach a conclusion that is mistaken here. Before explaining this further, it is necessary to consider the relevant cases that preceded *Seattle* and the background against which *Seattle* itself arose.

Though it has not been prominent in the arguments of the parties, this Court's decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967), is a proper beginning point for discussing the controlling decisions. In *Mulkey*, voters amended the California Constitution to prohibit any state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis. Two different cases gave rise to *Mulkey*. In one a couple could not rent an apartment, and in the other a couple were evicted from their apartment. Those adverse actions were on account of race. In both cases the complaining parties were barred, on account of race, from invoking the protection of California's

statutes; and, as a result, they were unable to lease residential property. This Court concluded that the state constitutional provision was a denial of equal protection. The Court agreed with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice. The Court noted the "immediate design and intent" of the amendment was to "establis[h] a purported constitutional right to privately discriminate." *Id.* at 374. The Court agreed that the amendment "expressly authorized and constitutionalized the private right to discriminate." *Id.* at 376. The effect of the state constitutional amendment was to "significantly encourage and involve the State in private racial discriminations." *Id. at 381.* In a dissent joined by three other Justices, Justice Harlan disagreed with the majority's holding. The dissent reasoned that California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination. *Id.* at 389. That dissenting voice did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury.

The next precedent of relevance, *Hunter v. Erickson*, 393 U.S. 385 (1969), is central to the arguments the respondents make in the instant case. In *Hunter*, the Court for the first time elaborated what the Court of Appeals here styled the "political process" doctrine. There, the Akron City Council found that the citizens of Akron consisted of "'people of different race[s], ... many of whom live in circumscribed and segregated areas, under sub-standard unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.'" *Id.* at 391. To address the problem, Akron enacted a fair housing ordinance to prohibit that sort of discrimination. In response, voters amended the city charter to overturn the ordinance and to require that any additional antidiscrimination housing ordinance be approved by referendum. But most other ordinances "regulating the real property market" were not subject to those threshold requirements. *Id. at 390.* The plaintiff, a black woman in Akron, Ohio, alleged that her real estate agent could not show her certain residences because the owners had specified they would not sell to black persons.

Central to the Court's reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in "'unhealthful, unsafe, unsanitary and overcrowded conditions.'" *Id.* at 391. The Court stated: "It is against this background that the referendum required by [the charter amendment] must be assessed." *Id.* Akron attempted to characterize the charter amendment "simply as a public decision to move slowly in the delicate area of race relations" and as a means "to allow the people of Akron to participate" in the decision. *Id.* at 392. The Court rejected Akron's flawed "justifications for its discrimination," justifications that by their own terms had the effect of acknowledging the targeted nature of the charter amendment. *Id.* The Court noted, furthermore, that the charter amendment was unnecessary as a general means of public control over the city council; for the people of Akron already were empowered to overturn ordinances by referendum. The Court found that the city charter amendment, by singling out antidiscrimination ordinances, "places special burden on racial minorities within the governmental process," thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority. *Id.* at 391. Justice Harlan filed a concurrence. He argued the city charter amendment "has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395. But without regard to the sentence just quoted, *Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities. The facts in *Hunter* established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.

Seattle is the third case of principal relevance here. There, the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools. Voters who opposed the school board's busing plan passed a state initiative that barred busing to desegregate. The Court first determined that, although "white as well as Negro children benefit from" diversity, the school board's plan "inures primarily to the benefit of the minority." 458 U.S. at 472. The Court next found that "the practical effect" of the state initiative was to "remov[e] the authority to address a racial

problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests" because advocates of busing "now must seek relief from the state legislature, or from the statewide electorate." *Id.* at 474. The Court therefore found that the initiative had "explicitly us[ed] the racial nature of a decision to determine the decisionmaking process." *Id.* at 470.

Seattle is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*. Although there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies that "permitted white students to transfer out of black schools while restricting the transfer of black students into white schools." *Parents Involved in Community Schools v. Seattle School Dist. No.* 1, 551 U.S. 701, 807-808 (BREYER, J., dissenting). In 1977, the National Association for the Advancement of Colored People (NAACP) filed a complaint with the Office for Civil Rights, a federal agency. The NAACP alleged that the school board had maintained a system of *de jure* segregation. Specifically, the complaint alleged "that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e.g.,* certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts." *Id.* at 810. As part of a settlement with the Office for Civil Rights, the school board implemented the "Seattle Plan," which used busing and mandatory reassignments between elementary schools to reduce racial imbalance and which was the subject of the state initiative at issue in *Seattle*. *See id.* at 807-812.

As this Court held in *Parents Involved*, the school board's purported remedial action would not be permissible today absent a showing of *de jure* segregation. *Id.* at 720-721. That holding prompted Justice BREYER to observe in dissent, as noted above, that one permissible reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools. In all events we must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." 458 U.S. at 472, n. 15. In other words the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and *Seattle* must be understood on that basis. *Seattle* involved a state initiative that "was carefully tailored to interfere only with desegregative busing." *Id.* at 471. The *Seattle* Court, accepting the validity of the school board's busing remedy as a predicate to its analysis of the constitutional question, found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit.

The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case. The Court there seized upon the statement in Justice Harlan's concurrence in *Hunter* that the procedural change in that case had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 385 U.S. at 395. That language, taken in the context of the facts in *Hunter*, is best read simply to describe the necessity for finding an equal protection violation where specific injuries from hostile discrimination were at issue. The *Seattle* Court, however, used the language from the *Hunter* concurrence to establish a new and far-reaching rationale. *Seattle* stated that where a government policy "inures primarily to the benefit of the minority" and "minorities ... consider" the policy to be " 'in their interest,' " then any state action that "place[s] effective decisionmaking authority over" that policy "at a different level of government" must be reviewed under strict scrutiny. 458 U.S. at 472. In essence, according to the broad reading of *Seattle*, any state action with a "racial focus" that makes it "more difficult for certain racial minorities than for other groups" to "achieve legislation that is in their interest" is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.

The broad rationale that the Court of Appeals adopted goes beyond the necessary holding and the meaning of the precedents said to support it; and in the instant case neither the formulation of the general rule just set forth nor the precedents cited to authenticate it suffice to invalidate Proposal 2. The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence. To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling. The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.

In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control, as the Court of Appeals held it did in this case. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. But in a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend. Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.

Even assuming these initial steps could be taken in a manner consistent with a sound analytic and judicial framework, the court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standards, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Thus could racial antagonisms and conflict tend to arise in the context of judicial decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race. This risk is inherent in adopting the *Seattle* formulation.

There would be no apparent limiting standards defining what public policies should be included in what *Seattle* called policies that "inur[e] primarily to the benefit of the minority" and that "minorities ... consider" to be " 'in their interest.' " 458 U.S. at 472. Those who seek to represent the interests of particular racial groups could attempt to advance those aims by demanding an equal protection ruling that any number of matters be foreclosed from voter review or participation. In a nation in which governmental policies are wide ranging, those who seek to limit voter participation might be tempted, were this Court to adopt the *Seattle* formulation, to urge that a group they choose to define by race or racial stereotypes are advantaged or disadvantaged by any number of laws or decisions. Tax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects. Racial division would be validated, not discouraged, were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force.

Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted. The constitutional validity of some of those choices regarding racial preferences is not at issue here. The holding in the instant case is simply that the

courts may not disempower the voters from choosing which path to follow. In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on race are avoided, not invited. And if these factors are to be interjected, surely it ought not to be at the invitation or insistence of the courts.

One response to these concerns may be that objections to the larger consequences of the *Seattle* formulation need not be confronted in this case, for here race was an undoubted subject of the ballot issue. But a number of problems raised by *Seattle*, such as racial definitions, still apply. And this principal flaw in the ruling of the Court of Appeals does remain: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools. Here there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.

It should also be noted that the judgment of the Court of Appeals in this case of necessity calls into question other long-settled rulings on similar state policies. The California Supreme Court has held that a California constitutional amendment prohibiting racial preferences in public contracting does not violate the rule set down by *Seattle*. *Coral Constr., Inc. v. City and County of San Francisco*, 235 P.3d 947 (2010). The Court of Appeals for the Ninth Circuit has held that the same amendment, which also barred racial preferences in public education, does not violate the Equal Protection Clause. *Wilson*, 122 F.3d 692 (1997). If the Court were to affirm the essential rationale of the Court of Appeals in the instant case, those holdings would be invalidated, or at least would be put in serious question. The Court, by affirming the judgment now before it, in essence would announce a finding that the past 15 years of state public debate on this issue have been improper. And were the argument made that *Coral* might still stand because it involved racial preferences in public contracting while this case concerns racial preferences in university admissions, the implication would be that the constitutionality of laws forbidding racial preferences depends on the policy interest at stake, the concern that, as already explained, the voters deem it wise to avoid because of its divisive potential. The instant case presents the question involved in *Coral* and but not involved in *Mulkey*, *Hunter*, and *Seattle*. That question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.

By approving Proposal 2 and thereby adding § 26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system, States respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times. Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. The mandate for segregated schools, *Brown v Board of Education*, 347 U.S. 483 (1954); a wrongful invasion of the home, *Silverman v. United States*, 365 U.S. 505 (1961); or punishing a protester whose views offend others, *Texas v. Johnson*, 491 U.S. 397 (1989); and scores of other examples teach that individual liberty has constitutional protection, and that liberty's full extent and meaning may remain yet to be discovered and affirmed. Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control;

or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. As already noted, those were the circumstances that the Court found present in *Mulkey*, *Hunter* and *Seattle*. But those circumstances are not present here.

For reasons already discussed, *Mulkey*, *Hunter* and *Seattle* are not precedents that stand for the conclusion that Michigan's voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

The judgment of the Court of Appeals for the Sixth Circuit is REVERSED.

It is so ordered.

*JUSTICE KAGAN took no part in the consideration or decision of this case.

*JUSTICE SCALIA, with whom JUSTICE THOMAS joins, CONCURRING in the judgment.

It has come to this. Called upon to explore the jurisprudential twilight zone between two errant lines of precedent, we confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself. "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Grutter v. Bollinger*, 539 U.S. 306 (2003) (SCALIA, J., concurring in part and dissenting in part). It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously *offend* it.

Even taking this Court's sorry line of race-based-admissions cases as a given, I find the question presented only slightly less strange: Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits? Reacting to those race-based-admissions decisions, some States—whether deterred by the prospect of costly litigation; aware that *Grutter*'s bell may soon toll, see 539 U.S. at 343; or simply opposed in principle to the notion of "benign" racial discrimination—have gotten out of the racial-preferences business altogether. And with our express encouragement: "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaging in experimenting with a wide variety of alternative approaches. Universities in other States can *and should* draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* at 342 (emphasis added). Respondents seem to think this admonition was merely in jest. The experiment, they maintain, is not only over; it never rightly began. Neither the people of the States nor their legislatures ever had the option of directing subordinate public-university officials to cease considering the race of applicants, since that would deny members of those minority groups the option of enacting a policy designed to further their interest, thus denying them the equal protection of the laws. Never mind that it is hotly disputed whether the practice of race-based admissions is *ever* in a racial minority's interest. *Cf. id.* at 371-373 (THOMAS, J., concurring in part and dissenting in part). And never mind that, were a public university to stake its defense of a race-based-admissions policy on the ground that it was *designed* to benefit primarily minorities (as opposed to all students, regardless of color, by enhancing diversity), *we would hold the policy unconstitutional*. *See id.* at 322-325.

But the battleground for this case is not the constitutionality of race-based admissions—at least, not quite. Rather, it is the so-called political-process doctrine, derived from this Court's opinions in *Seattle*, 458 U.S. 457 (1982), and *Hunter*, 393 U.S. 385 (1969). I agree with those parts of the plurality opinion that repudiate this doctrine. But I do not agree with its reinterpretation of *Seattle* and *Hunter*, which makes them stand in part for the cloudy and doctrinally anomalous proposition that whenever state action poses "the serious risk ... of causing specific injuries on account of race," it denies equal protection. I would instead reaffirm that the "ordinary principles of our law [and] of our democratic heritage" require "plaintiffs alleging equal protection violations" stemming from facially neutral acts to "prove intent and causation and not merely the existence of racial disparity." *Freeman v. Pitts*, 503 U.S. 467 (1992) (SCALIA, J., concurring). I would further hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution. Section 26 of the Michigan Constitution (formerly Proposal 2) rightly stands.

I

A

The political-process doctrine has its roots in two of our cases[, *Hunter* and *Seattle*.] The first question in *Seattle* was whether the subject matter of Initiative 350 was a "'racial' issue," triggering *Hunter* and its process doctrine. 458 U.S. at 471-472. It was "undoubtedly ... true" that whites and blacks were "counted among both the supporters and the opponents of Initiative 350." *Id.* at 472. It was "equally clear" that both white and black children benefitted from desegregated schools. Nonetheless, we concluded that desegregation "inures *primarily* to the benefit of the minority, and is designed for that purpose." *Id.* (emphasis added). In any event, it was "enough that minorities may consider busing for integration to be 'legislation that is in their interest.' " *Id.* at 474.

So we proceeded to the heart of the political-process analysis. We held Initiative 350 unconstitutional, since it removed "the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* Although school boards in Washington retained authority over *other* student-assignment issues and over most matters of educational policy generally, under Initiative 350, minorities favoring race-based busing would have to "surmount a considerably higher hurdle" than the mere petitioning of a local assembly: They "now must seek relief from the state legislature, or from the statewide electorate," a "different level of government." *Id.*

The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case. In those cases, one level of government exercised borrowed authority over an apparently "racial issue," until a higher level of government called the loan. So too here. In those cases, we deemed the revocation an equal-protection violation *regardless* of whether it facially classified according to race or reflected an invidious purpose to discriminate. Here, the Court of Appeals did the same.

The plurality sees it differently. Though it, too, disavows the political-process-doctrine basis on which *Hunter* and *Seattle* were decided, it does not take the next step of overruling those cases. Rather, it reinterprets them beyond recognition. *Hunter*, the plurality suggests, was a case in which the challenged act had "target[ed] racial minorities." Maybe, but the *Hunter* Court neither found that to be so nor considered it relevant, bypassing the question of intent entirely, satisfied that its newly minted political-process theory sufficed to invalidate the charter amendment.

As for *Seattle*, what was *really* going on, according to the plurality, was that Initiative 350 had the consequence (if not the purpose) of preserving the harms effected by prior *de jure* segregation. Thus, "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." That conclusion is derived not from the opinion but from recently discovered evidence that the city of Seattle had been a cause of its schools' racial imbalance all along: "Although there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies." That the district's effort to end racial imbalance had been stymied by Initiative 350 meant that the people, by passing it, somehow had become complicit in Seattle's equal-protection-denying status quo, whether they knew it or not. Hence, there was in *Seattle* a government-furthered "infliction of a specific"—and, presumably, constitutional—"injury."

Once again this describes what our opinion in *Seattle* might have been, but assuredly not what it was. The opinion assumes throughout that Seattle's schools suffered at most from *de facto* segregation—that is, segregation not the "product ... of state action but of private choices," having no "constitutional implications," *Freeman*, 503 U.S. at 495-496. Nor did it anywhere state that the current racial imbalance was the (judicially remediable) effect of prior *de jure* segregation. Absence of *de jure* segregation or the effects of *de jure* segregation was a necessary premise of the *Seattle* opinion. That is what made the issue of busing and pupil reassignment a matter of political choice rather than judicial mandate. And precisely *because* it was a question for the political branches to decide, the manner—which is to say, the *process*—of its resolution implicated the Court's new process theory. The opinion itself says this: "[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved though the political process. For present purposes, it is enough [to hold reallocation of that political decision to a higher level unconstitutional] that minorities may consider busing for integration to be legislation that is in their interest." 458 U.S. at 474.

B

Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, *Hunter* and *Seattle* should be overruled.

*JUSTICE BREYER, CONCURRING in the judgment.

Michigan has amended its Constitution to forbid state universities and colleges to "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." MI Const., Art. I, § 26. We here focus on the prohibition of "grant[ing] ... preferential treatment ... on the basis of race ... in ... public education." I agree with the plurality that the amendment is consistent with the Federal Equal Protection Clause. U.S. Const., Amdt. 14. But I believe this for different reasons.

First, we do not address the amendment insofar as it forbids the use of race-conscious admissions programs designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination. Application of the amendment in that context would present different questions which may demand different answers. Rather, we here address the amendment only as it applies to, and forbids, programs that, as in *Grutter*, rest upon "one justification": using "race in the admissions process" solely in order to "obtai[n] the educational benefits that flow from a diverse student body," 539 U.S. 306, 328 (2003).

Second, dissenting in *Parents Involved in Community Schools*, 551 U.S. 791 (2007), I explained why I believe race-conscious programs of this kind are constitutional, whether implemented by law schools, universities, high schools, or elementary schools. I concluded that the Constitution does not "authorize judges" either to forbid or to require the adoption of diversity-seeking race-conscious "solutions" (of the kind at issue here) to such serious problems as "how best to administer America's schools" to help "create a society that includes all Americans." *Id.,* at 862, 127 S.Ct. 2738.

I continue to believe that the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution. The serious educational problems that faced Americans at the time this Court decided *Grutter* endure. [Justice Breyer cited numerous studies on the topic. –Ed.]

The Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs.

Third, cases such as *Hunter* and *Seattle* reflect an important principle, namely, that an individual's ability to participate meaningfully in the political process should be independent of his race. Although racial minorities, like other political minorities, will not always succeed at the polls, they must have the same opportunity as others to secure through the ballot box policies that reflect their preferences. In my view, however, neither *Hunter* nor *Seattle* applies here. And the parties do not here suggest that the amendment violates the Equal Protection Clause if not under the *Hunter-Seattle* doctrine.

Hunter and *Seattle* involved efforts to manipulate the political process in a way not here at issue. Both cases involved a restructuring of the political process that changed the political level at which policies were enacted. In *Hunter*, decisionmaking was moved from the elected city council to the local electorate at large. And in *Seattle*, decisionmaking by an elected school board was replaced with decisionmaking by the state legislature and electorate at large.

This case, in contrast, does not involve a reordering of the *political* process; it does not in fact involve the movement of decisionmaking from one political level to another. Rather, here, Michigan law delegated broad policymaking authority to elected university boards, but those boards delegated admissions-related decisionmaking authority to unelected university faculty members and administrators. Although the boards unquestionably retained the *power* to set policy regarding race-conscious admissions, in *fact* faculty members and administrators set the race-conscious admissions policies in question. (It is often true that elected bodies—including, for example, school boards, city councils, and state legislatures—have the power to enact policies, but in fact delegate that power to

administrators.) Although at limited times the university boards were advised of the content of their race-conscious admissions policies, to my knowledge no board voted to accept or reject any of those policies. Thus, unelected faculty members and administrators, not voters or their elected representatives, adopted the race-conscious admissions programs affected by Michigan's constitutional amendment. The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.

Why does this matter? For one thing, considered conceptually, the doctrine set forth in *Hunter* and *Seattle* does not easily fit this case. In those cases minorities had participated in the political process and they had won. The majority's subsequent reordering of the political process repealed the minority's successes and made it more difficult for the minority to succeed in the future. The majority thereby diminished the minority's ability to participate meaningfully in the electoral process. But one cannot as easily characterize the movement of the decisionmaking mechanism at issue here—from an administrative process to an electoral process—as diminishing the minority's ability to participate meaningfully in the *political* process. There is no prior electoral process in which the minority participated.

Finally, the principle that underlies *Hunter* and *Seattle* runs up against a competing principle, discussed above. This competing principle favors decisionmaking though the democratic process. Just as this principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do so.
As I have said, my discussion here is limited to circumstances in which decisionmaking is moved from an unelected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court.

*JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, DISSENTING.

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. This case implicates one such limit: the guarantee of equal protection of the laws. Although that guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self-government. That right is the bedrock of our democracy, for it preserves all other rights.

Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process. At first, the majority acted with an open, invidious purpose. Notwithstanding the command of the Fifteenth Amendment, certain States shut racial minorities out of the political process altogether by withholding the right to vote. This Court intervened to preserve that right. The majority tried again, replacing outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering. The Court was not fooled; it invalidated those measures, too. The majority persisted. This time, although it allowed the minority access to the political process, the majority changed the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose, the Court reaffirmed the right of minority members of our society to participate meaningfully and equally in the political process.

This case involves this last chapter of discrimination: A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial

minorities.[*1*] Prior to the enactment of the constitutional initiative at issue here, all of the admissions policies of Michigan's public colleges and universities—including race-sensitive admissions policies—were in the hands of each institution's governing board. The members of those boards are nominated by political parties and elected by the citizenry in statewide elections. After over a century of being shut out of Michigan's institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity. And this Court twice blessed such efforts—first in *Bakke* and again in *Grutter*, a case that itself concerned a Michigan admissions policy.

In the wake of *Grutter*, some voters in Michigan set out to eliminate the use of race-sensitive admissions policies. Those voters were of course free to pursue this end in any number of ways. For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire to abolish race-sensitive admissions policies. When this Court holds that the Constitution permits a particular policy, nothing prevents a majority of a State's voters from choosing not to adopt that policy. Our system of government encourages—and indeed, depends on—that type of democratic action.

But instead, the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities. They did so in the 2006 election by amending the Michigan Constitution to enact Art. I, § 26, which provides in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

As a result of § 26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else. A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant's legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby the Board, or by voting for and supporting Board candidates who share her position. The same options are available to a citizen who wants the Board to adopt admissions policies that consider athleticism, geography, area of study, and so on. The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity. For that policy alone, the citizens of Michigan must undertake the daunting task of amending the State Constitution.

Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else. This Court has held that the Fourteenth Amendment does not tolerate "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467. Such restructuring, the Court explained, "is no more permissible than denying [the minority] the [right to] vote, on an equal basis with others." *Hunter*, 393 U.S. at 391 (1969). In those cases—*Hunter* and *Seattle*—the Court recognized what is now known as the "political-process doctrine": When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny.

[*1*] I of course do not mean to suggest that Michigan's voters acted with anything like the invidious intent of those who historically stymied the rights of racial minorities. But like earlier chapters of political restructuring, the Michigan amendment at issue in this case changed the rules of the political process to the disadvantage of minority members of our society.

Today, disregarding *stare decisis,* a majority of the Court effectively discards those precedents. The plurality does so, it tells us, because the freedom actually secured by the Constitution is the freedom of self-government—because the majority of Michigan citizens "exercised their privilege to enact laws as a basic exercise of their democratic power." It would be "demeaning to the democratic process," the plurality concludes, to disturb that decision in any way. This logic embraces majority rule without an important constitutional limit.

The plurality's decision fundamentally misunderstands the nature of the injustice worked by § 26. This case is not, as the plurality imagines, about "who may resolve" the debate over the use of race in higher education admissions. I agree wholeheartedly that nothing vests the resolution of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather, this case is about *how* the debate over the use of race-sensitive admissions policies may be resolved—that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.

Like the plurality, I have faith that our citizenry will continue to learn from this Nation's regrettable history; that it will strive to move beyond those injustices towards a future of equality. And I, too, believe in the importance of public discourse on matters of public policy. But I part ways with the plurality when it suggests that judicial intervention in this case "impede[s]" rather than "advance[s]" the democratic process and the ultimate hope of equality. I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent.

I

For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in, and so it is one we must address with candor. Because the political-process doctrine is best understood against the backdrop of this history, I will briefly trace its course. [Justice Sotomayor then set forth examples and discussion of government efforts to disenfranchise and disadvantage minority participation in the political process. –Ed.]

B

Hunter and *Seattle* vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority's right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority," *Seattle,* 458 U.S. at 472*;* and (2) alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process. A faithful application of the doctrine resoundingly resolves this case in respondents' favor.

1

Section 26 has a "racial focus." That is clear from its text, which prohibits Michigan's public colleges and universities from "grant[ing] preferential treatment to any individual or group on the basis of race." MI Const., Art. I, § 26. Like desegregation of public schools, race-sensitive admissions policies "inur[e] primarily to the benefit of the minority," as they are designed to increase minorities' access to institutions of higher education.

Petitioner argues that race-sensitive admissions policies cannot "inur[e] primarily to the benefit of the minority," as the Court has upheld such policies only insofar as they further "the educational benefits

that flow from a diverse student body," *Grutter*, 539 U.S. at 343. But there is no conflict between this Court's pronouncement in *Grutter* and the common-sense reality that race-sensitive admissions policies benefit minorities. Rather, race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups. In other words, constitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities. There is nothing mutually exclusive about the two. *Cf. Seattle*, 458 U.S. at 472 (concluding that the desegregation plan had a racial focus even though "white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom' ").

It is worth emphasizing, moreover, that § 26 is relevant only to admissions policies that have survived strict scrutiny under *Grutter*; other policies, under this Court's rulings, would be forbidden with or without § 26. A *Grutter*-compliant admissions policy must use race flexibly, not maintain a quota; must be limited in time; and must be employed only after "serious, good faith consideration of workable race-neutral alternatives," 539 U.S. at 339. The policies banned by § 26 meet all these requirements and thus already constitute the least restrictive ways to advance Michigan's compelling interest in diversity in higher education.

2

Section 26 restructures the political process in Michigan in a manner that places unique burdens on racial minorities. It establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity.

Long before the enactment of § 26, the Michigan Constitution granted plenary authority over all matters relating to Michigan's public universities, including admissions criteria, to each university's eight-member governing board. The boards have the "power to enact ordinances, by-laws and regulations for the government of the university." MI C.L. Ann. § 390.5. They are "'constitutional corporation[s] of independent authority, which, within the scope of [their] functions, [are] co-ordinate with and equal to ... the legislature.'" *Federated Publications, Inc. v. Board of Trustees of Mich. State Univ.,* 594 N.W.2d 491, 496, n.8 (1999).

The boards are indisputably a part of the political process in Michigan. Each political party nominates two candidates for membership to each board, and board members are elected to 8–year terms in the general statewide election. Prior to § 26, board candidates frequently included their views on race-sensitive admissions in their campaigns. For example, in 2005, one candidate pledged to "work to end so-called 'Affirmative–Action,' a racist, degrading system." See League of Women Voters, 2005 General Election Voter Guide, online at http://www.lwvka.org/guide04/regents/html (all Internet materials as visited Apr. 18, 2014, and available in Clerk of Court's case file).

Before the enactment of § 26, Michigan's political structure permitted both supporters and opponents of race-sensitive admissions policies to vote for their candidates of choice and to lobby the elected and politically accountable boards. Section 26 reconfigured that structure. After § 26, the boards retain plenary authority over all admissions criteria *except* for race-sensitive admissions policies. To change admissions policies on this one issue, a Michigan citizen must instead amend the Michigan Constitution. That is no small task. To place a proposed constitutional amendment on the ballot requires either the support of two-thirds of both Houses of the Michigan Legislature or a vast number of signatures from Michigan voters—10 percent of the total number of votes cast in the preceding gubernatorial election. Since more than 3.2 million votes were cast in the 2010 election for Governor, more than 320,000 signatures are currently needed to win a ballot spot. And the costs of qualifying an amendment are significant.

Michigan's Constitution has only rarely been amended through the initiative process. Between 1914 and 2000, voters have placed only 60 statewide initiatives on the Michigan ballot, of which only 20 have passed. Minority groups face an especially uphill battle. *See* T. Donovan, C. Mooney, & D. Smith, State and Local Politics: Institutions and Reform 106 (2012) ("[O]n issues dealing with racial

and ethnic matters, studies show that racial and ethnic minorities do end up more on the losing side of the popular vote"). In fact, it is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favor racial or ethnic minority groups.[*6*]

This is the onerous task that § 26 forces a Michigan citizen to complete in order to change the admissions policies of Michigan's public colleges and universities with respect to racial sensitivity. While substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained. The effect of § 26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.

Such reordering of the political process contravenes *Hunter* and *Seattle*. Where, as here, the majority alters the political process to the detriment of a racial minority, the governmental action is subject to strict scrutiny. *See id.* at 485, n.28. Michigan does not assert that § 26 satisfies a compelling state interest. That should settle the matter.

C

1

III

The political-process doctrine not only resolves this case as a matter of *stare decisis*; it is correct as a matter of first principles.

A

Under our Constitution, majority rule is not without limit. Our system of government is predicated on an equilibrium between the notion that a majority of citizens may determine governmental policy through legislation enacted by their elected representatives, and the overriding principle that there are nonetheless some things the Constitution forbids even a majority of citizens to do. The political-process doctrine, grounded in the Fourteenth Amendment, is a central check on majority rule.

The Fourteenth Amendment instructs that all who act for the government may not "deny to any person ... the equal protection of the laws." We often think of equal protection as a guarantee that the government will apply the law in an equal fashion—that it will not intentionally discriminate against minority groups. But equal protection of the laws means more than that; it also secures the right of all citizens to participate meaningfully and equally in the process through which laws are created.

Few rights are as fundamental as the right to participate meaningfully and equally in the process of government. That right is the bedrock of our democracy, recognized from its very inception.

This should come as no surprise. The political process is the channel of change. It is the means by which citizens may both obtain desirable legislation and repeal undesirable legislation. Of course, we do not expect minority members of our society to obtain every single result they seek through the political process—not, at least, when their views conflict with those of the majority. The minority plainly does not have a right to prevail over majority groups in any given political contest. But the

[*6*] In the face of this overwhelming evidence, Justice SCALIA claims that it is actually easier, not harder, for minorities to effectuate change at the constitutional amendment level than at the board level. This claim minimizes just how difficult it is to amend the State Constitution. It is also incorrect in its premise that minorities must elect an entirely new slate of board members in order to effectuate change at the board level. Justice SCALIA overlooks the fact that minorities need not elect any new board members in order to effect change; they may instead seek to persuade existing board members to adopt changes in their interests.

minority does have a right to play by the same rules as the majority. It is this right that *Hunter* and *Seattle* so boldly vindicated.

This right was hardly novel at the time of *Hunter* and *Seattle*. For example, this Court focused on the vital importance of safeguarding minority groups' access to the political process in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), a case that predated *Hunter* by 30 years. In a now-famous footnote, the Court explained that while ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups. Citing cases involving restrictions on the right to vote, restraints on the dissemination of information, interferences with political organizations, and prohibition of peaceable assembly, the Court recognized that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" could be worthy of "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Id.* at 152, n.4. The Court also noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*

The values identified in *Carolene Products* lie at the heart of the political-process doctrine. Indeed, *Seattle* explicitly relied on *Carolene Products*. *See* 458 U.S. at 486 ("[W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities' "). These values are central tenets of our equal protection jurisprudence.

Our cases recognize at least three features of the right to meaningful participation in the political process. Two of them, thankfully, are uncontroversial. First, every eligible citizen has a right to vote. Second, the majority may not make it more difficult for the minority to exercise the right to vote. This, too, is widely accepted. After all, the Court has invalidated grandfather clauses, good character requirements, poll taxes, and gerrymandering provisions. The third feature, the one the plurality dismantles today, is that a majority may not reconfigure the existing political process in a manner that creates a two-tiered system of political change, subjecting laws designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws. This is the political-process doctrine of *Hunter* and *Seattle*.

My colleagues would stop at the second. The plurality embraces the freedom of "self-government" without limits. And Justice SCALIA values a "near-limitless" notion of state sovereignty. The wrong sought to be corrected by the political-process doctrine, they say, is not one that should concern us and is in any event beyond the reach of the Fourteenth Amendment. As they see it, the Court's role in protecting the political process ends once we have removed certain barriers to the minority's participation in that process. Then, they say, we must sit back and let the majority rule without the key constitutional limit recognized in *Hunter* and *Seattle*.

To accept the first two features of the right to meaningful participation in the political process, while renouncing the third, paves the way for the majority to do what it has done time and again throughout our Nation's history: afford the minority the opportunity to participate, yet manipulate the ground rules so as to ensure the minority's defeat. This is entirely at odds with our idea of equality under the law.

To reiterate, none of this is to say that the political-process doctrine prohibits the exercise of democratic self-government. Nothing prevents a majority of citizens from pursuing or obtaining its preferred outcome in a political contest. Here, for instance, I agree with the plurality that Michiganders who were unhappy with *Grutter* were free to pursue an end to race-sensitive admissions policies in their State. They were free to elect governing boards that opposed race-sensitive admissions policies or, through public discourse and dialogue, to lobby the existing boards toward that end. They were also free to remove from the boards the authority to make any decisions with respect to admissions policies, as opposed to only decisions concerning race-sensitive admissions policies.

But what the majority could not do, consistent with the Constitution, is change the ground rules of the political process in a manner that makes it more difficult for racial minorities alone to achieve their goals. In doing so, the majority effectively rigs the contest to guarantee a particular outcome. That is the very wrong the political-process doctrine seeks to remedy. The doctrine "hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course." *BAMN v. Regents of Univ. of Michigan*, 701 F.3d 466, 474 (6th Cir. 2012).

Justice Scalia (writing for Justice Thomas) and Justice Sotomayor (writing for Justice Ginsburg) concluded that the political process doctrine of *Hunter-Seattle* applied and that *Seattle*, in particular, was on point. Scalia and Thomas reached a different result only because they would have expressly overruled *Hunter* and *Seattle*. All four of these justices concluded that Justice Kennedy (writing for Chief Justice Roberts and Justice Alito) did not recognize those cases for the plain principles for which they stand, but instead (as described by Justice Scalia) "reinterpret[ed] them beyond recognition." Justice Breyer (writing only for himself) seems to agree with the interpretation of *Hunter-Seattle* held by Justices Scalia, Thomas, Sotomayor and Ginsburg, but the distinguished those cases from *Schuette*.

Who has it right? What is left, if anything of the *Hunter-Seattle* political process doctrine and when will it apply?