

No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL
Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION,
INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR
EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,

-AND-

CHASE M. CANTRELL, *et al.*,
Respondents.

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

**AMICI CURIAE BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION,
AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, HORACE MANN LEAGUE, AND
NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL
PRINCIPALS IN SUPPORT OF RESPONDENTS**

Patricia J. Whitten	Francisco M. Negrón, Jr.*
Jennifer A. Smith	General Counsel
Jacqueline Wernz	National Sch. Bds. Ass'n.
Franczek Radelet PC	1680 Duke Street
300 South Wacker Drive	Alexandria, VA 22314
Suite 3400	(703) 838-6722
Chicago, IL 60606	fnegron@nsba.org
(312) 986-0300	

*Counsel of Record

August 30, 2013

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF INTERESTS OF AMICI	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. SECTION 26 UNDERMINES PUBLIC SCHOOLS’ ABILITY TO ACCOMPLISH THEIR MISSION: TO EDUCATE ALL STUDENTS SUCCESSFULLY AND TO PREPARE THEM TO LIVE AND WORK IN A GLOBAL SOCIETY	4
A. Section 26 Impedes Public Schools From Creating and Maintaining a Diverse Student Population – an Important Tool Needed to Support Students’ Academic Achievement and Participation in a Democratic Society	4
B. Section 26 Harms Public Schools’ Efforts to Achieve the Important Objectives of A Diverse Workforce and Minority Contracting	9
C. Section 26 Thwarts Public Schools From Creating Diverse Learning and Workplace Environments Through Necessary and Constitutional Race-Conscious Means	12

II.	SECTION 26 CREATES CONFUSION IN THE LAW AND MAY LEAD TO ADDITIONAL LITIGATION FOR SCHOOLS.....	17
III.	SECTION 26 INTERFERES WITH COMMUNITY ENGAGEMENT CRITICAL TO THE DEMOCRATIC PROCESS FOR POLICY DECISION-MAKING BY SCHOOL BOARDS	20
	CONCLUSION	21

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<i>Adarand v. Pena</i> , 515 U.S. 200 (1995)	19
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	8
<i>Fisher v. University of Texas at Austin</i> , 133 S.Ct. 2411 (2013)	12, 13
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	12, 18, 19, 21
<i>Mississippi University for Women v. Hogan</i> , 458 U.S. 718 (1982)	19
<i>Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1 (PICS)</i> , 551 U.S. 701 (2007)	passim
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	8
<u>Statutes and Regulations</u>	
20 U.S.C. § 6311(h) (2013)	14
34 C.F.R. § 200.2(1) (2013)	14
ARIZ. CONST. art. II, § 26(A) (2010)	2
CAL. CONST. art. I, § 31 (1996)	2

FLA. EXECUTIVE ORDER, 99-281 (1996)	2
MASS. GEN. LAWS ch. 151B, § 4 (2012)	2
MICH. CONST. art. I § 26 (2006)	2
NEB. CONST. art. I, § 30 (2008)	2
N.H. REV. STAT. ANN. § 187-A:16-a(I) (2011)	2
OKLA. CONST. art. II, § 36 (2012)	2
WASH. CODE ANN. § 49.60.400(1) (1998)	2

Other Authorities

<i>Brief of Amicus Curiae of Pacific Legal Foundation, et al.</i>	4
---	---

<i>Brief of the States of Arizona, Alabama, Georgia, Oklahoma, and West Virginia as Amici Curiae Supporting Petitioner</i>	4
--	---

<i>Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, Parents Involved in Community Schools v. Seattle Sch. Dist., 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), available at http://civilrightsproject.ucla.edu/legal-developments/court-decisions/statement-of-american-social-scientists-of-research-on-school-desegregation-submitted-to-us-supreme-court/amicus_parents_v_seattle.pdf</i>	5, 6, 8
--	---------

Chicago Public Schools, “Remedial Program for M/WBE Participation in Goods, Services and Construction Contracts,” <i>available at</i> http://www.csc.cps.k12.il.us/purchasing/index.php@tab=1&id=46.htm	11
--	----

Del. Dep’t of Educ., “District Targets and Accountability: Frequently Asked Questions,” *available at* <http://www.doe.k.12.de.us/infosuites/ddoe/DisTargAccFAQsJan2013.pdf>..... 15

Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 8 (Oct. 2012), *available at* <http://www.school-diversity.org/pdf/DiversityResearchBriefNo.8.pdf> 7

Letter from Russlyn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep’t of Educ., and Thomas Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep’t of Justice to Colleagues (Dec. 2, 2011), *available at* <http://www.2ed.gov/about/offices/list/ocr/letters/colleague-201111.html>. 13

Mich. Dep’t of Educ., “On Site Review School Study Guide Items Explanation with Examples Substantiating Implementation,” *available at* http://www.michigan.gov/documents/mde/7_-_District_Study_Guide_with_Explanations_360059_7.doc 14

NATIONAL ACADEMY OF EDUCATION, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES, *available at* <http://nepc.colorado.edu/files/Brief-NAE.pdf> 6

NATIONAL CENTER FOR EDUCATIONAL STATISTICS,
CHARACTERISTICS OF PUBLIC AND PRIVATE
ELEMENTARY AND SECONDARY SCHOOLS IN THE
UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS
AND STAFFING SURVEY (NCES-2013-312) (2013),
available at
<http://nces.ed.gov/pubs2013/2013312.pdf>..... 10

NATIONAL CENTER FOR EDUCATIONAL STATISTICS,
CHARACTERISTICS OF PUBLIC AND PRIVATE
ELEMENTARY AND SECONDARY SCHOOLS PRINCIPALS
IN THE UNITED STATES: RESULTS FROM THE 2011-12
SCHOOLS AND STAFFING SURVEY (NCES-2013-313)
(2013), *available at*
<http://nces.ed.gov/pubs2013/2013313.pdf>..... 10

NATIONAL CENTER FOR EDUCATIONAL STATISTICS,
CHARACTERISTICS OF PUBLIC AND PRIVATE
ELEMENTARY AND SECONDARY SCHOOLS TEACHERS
IN THE UNITED STATES: RESULTS FROM THE 2011-12
SCHOOLS AND STAFFING SURVEY (NCES-2013-314)
(2013), *available at*
<http://nces.ed.gov/pubs2013/2013314.pdf>..... 10

Portland Public Schools, “PPS Equity in Public
Purchasing and Contracting,” *available at*
[http://www.pps.k12.or.us/files/board/8_50_095_P.
pdf](http://www.pps.k12.or.us/files/board/8_50_095_P.pdf) 11

Press Release, Equal Employment Opportunity
Commission, EEOC Partners with Business for
Increasing Diversity (Mar. 8, 2006), *available at*
[http://www.eeoc.gov/eeoc/newsroom/release/3-8-06.
cfm](http://www.eeoc.gov/eeoc/newsroom/release/3-8-06.cfm) 9

Roslyn Arlin Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF No. 5 (Oct. 2011) *available at* <http://www.school-diversity.org/pdf/DiversityResearchBriefNo.5.pdf> 6

SABA BIREDA & ROBIN CHAIT, INCREASING TEACHER DIVERSITY: STRATEGIES TO IMPROVE THE TEACHER WORKFORCE 1 (Nov. 2011), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2011/11/pdf/chait_diversity.pdf 10

Susan Eaton, *School Racial and Economic Composition & Math and Science Achievement*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF No. 1 (Mar. 2011), *available at* <http://www.school-diversity.org/DiversityResearchBriefNo.1.pdf> 6

Susan Eaton & Gina Chirichingo, *The Impact of Racially Diverse Schools in a Democratic Society*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF No. 3 (Mar. 2011), *available at*, <http://www.school-diversity.org/pdf/DiversityResearchBriefNo.3.pdf> 8

U.S. Dep’t of Educ., Magnet Schools Assistance Program, Purpose, Program Description, *available at* <http://www2.ed.gov/programs/magnet/index.html>... 17

U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S.
DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE
ON THE VOLUNTARY USE OF RACE TO ACHIEVE
DIVERSITY AND AVOID RACIAL ISOLATION IN
ELEMENTARY AND SECONDARY SCHOOLS (2011),
available at,
<http://www2ed.gov/print/offices/list/ocr/docs/guidance-ese-201111.html>..... 13

U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S.
DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE
ON THE VOLUNTARY USE OF RACE TO ACHIEVE
DIVERSITY IN POSTSECONDARY EDUCATION (2011),
available at,
<http://www2ed.gov/print/offices/list/ocr/docs/guidance-pse-201111.html>..... 13-14

STATEMENT OF INTERESTS OF *AMICI*¹

The National School Boards Association is a not-for-profit organization of state associations of school boards. Through its members, NSBA represents approximately 13,800 school districts across the United States that serve more than 50 million public school students.

The American Association of School Administrators represents more than 13,000 educational leaders, including chief executive officers, superintendents, and senior level school administrators, in the United States and throughout the world.

The Horace Mann League seeks to perpetuate the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States.

The National Association of Elementary School Principals represents elementary school (K-8) and middle school principals nationwide and advocates on their behalf on key education issues.

Amici represent elementary and secondary public education organizations committed to the success of all students, upon which their futures in the workplace and as citizens will be shaped. With a

¹ Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. In accordance with Supreme Court Rule 37.3, counsel for both parties have granted consent to this brief, and the requisite consent letters have been filed with the Clerk of this Court.

recognition of the vital role of diversity in the lives of students, these organizations seek to ensure that public school leaders have the flexibility to adopt and implement within constitutional parameters, policies that foster diversity in public schools and educational excellence for all students.

SUMMARY OF THE ARGUMENT

If this Court upholds Article I, Section 26 of the Michigan Constitution (“Section 26”), Michigan’s primary and secondary public schools will be prevented from taking research-based, otherwise constitutional measures to meet the needs of all students for a diverse learning environment. Section 26 is not limited to prohibiting the use of race in higher education. It includes broad prohibitions against reliance on race by “the state.” MICH. CONST. art. I, § 26 (2006) (“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.”). The state is defined to include any “school district . . . of or within the State of Michigan.” *Id.* That prohibition is identical to those currently found in eight other states. CAL. CONST. art. I, § 31 (adopted 1996); Fla. Executive Order, 99-281 (issued 1996); WASH. CODE ANN. § 49.60.400(1) (adopted 1998); ARIZ. CONST. art. II, § 26(A) (adopted 2010); NEB. CONST. art. I, § 30 (adopted 2008); OKLA. CONST. art. II, § 36 (adopted 2012); N.H. REV. STAT. ANN. § 187-A:16-a(I) (adopted 2011); MASS. GEN. LAWS ch. 151B, § 4 (adopted 2012).

Amici urge this Court to consider carefully the detrimental impact that Section 26 and similar provisions have on public schools. Section 26 directly undermines the ability of public schools to educate all students to be successful participants in a global society. Under this amendment public schools will be severely restricted in creating and maintaining diverse student enrollments that serve the educational needs of all students. If Section 26 is upheld, students will be deprived of learning in an environment where they are taught, mentored and encouraged by a diverse staff who reflect the society in which students must be prepared to live and work. The amendment will also call into question other necessarily race-conscious actions by public schools that target the academic needs of certain subgroups of students.

This amendment wears a guise of non-discrimination, but in reality threatens to limit the discretion of school leaders that this Court has clearly stated is available to school boards under the Equal Protection Clause. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701 (2007). These decisions granted school boards the authority under certain limited circumstances to adopt race-conscious policies that promote diversity in schools for educational reasons. The Michigan amendment's nullification of this school board authority directly imperils the local governance of public education and will result in innumerable legal disputes that unduly burden public schools and drain resources away from classrooms and into the legal system.

ARGUMENT

I. SECTION 26 UNDERMINES PUBLIC SCHOOLS' ABILITY TO ACCOMPLISH THEIR MISSION: TO EDUCATE ALL STUDENTS SUCCESSFULLY AND TO PREPARE THEM TO LIVE AND WORK IN A GLOBAL SOCIETY.

A. Section 26 Impedes Public Schools From Creating and Maintaining a Diverse Student Population – an Important Tool Needed to Support Students' Academic Achievement and Participation in a Democratic Society.

Section 26 and similar mandates will impede the efforts of public primary and secondary schools to prepare American students to compete in the twenty-first century.² A compelling body of research shows that race-conscious means may be necessary to achieve racial and ethnic student diversity in public schools. Alternatives that look to socio-economic status simply are not as successful in

² Although certain briefs in support of Petitioner cite research suggesting that race-neutral alternatives can successfully achieve diversity in the higher education realm, that research does not address the potential impact of a ban on race-conscious preferences in primary and secondary education. See, e.g., *Brief Amicus Curiae of Pacific Legal Foundation, et al.*, at 28-36; *Brief of the States of Arizona, Alabama, Georgia, Oklahoma, and West Virginia as Amici Curiae Supporting Petitioner*, at 11-18.

achieving racial and ethnic diversity in primary and secondary public education.³ In some cases, a school facing re-segregation may find that race-based considerations are the only way to achieve diversity. Yet under Section 26 and related provisions in other states, public schools facing re-emerging *de facto* segregation are precluded from using race-conscious alternatives to increase diversity in the learning environment, no matter how necessary those means may be to achieve diversity and no matter how narrowly tailored the use of race is.

³ Research shows that race-conscious means are necessary to achieve racial and ethnic diversity in elementary and secondary public schools and that race-neutral alternatives would not be as successful. As explained and supported by research in the *Brief of 553 Social Scientists as Amici Curiae in Support of Respondents*, at 3, *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), available at http://civilrightsproject.ucla.edu/legal-developments/court-decisions/statement-of-american-social-scientists-of-research-on-school-desegregation-submitted-to-us-supreme-court/amicus_parents_v_seattle.pdf:

[R]ace-conscious student assignment policies are necessary to maintain racially integrated schools. Evidence shows that choice assignment policies that do not consider race as a factor in student assignments tend to result in racially homogeneous schools or lead to greater segregation; race-neutral policies that rely on socioeconomic status are not as effective in attaining racial diversity; and school districts that have eliminated race as a consideration in student assignment policies have experienced resegregation and the harmful consequences associated with racially isolated schools.

The resulting inability to use even narrowly tailored race-conscious methods to increase diversity in public schools will hinder schools' ability to provide students the academic background necessary to compete in the global marketplace. The negative impact of racial and ethnic homogeneity on student achievement—especially for minority students—is stark.⁴ Students who attend racially diverse schools achieve higher test scores and better grades, are more likely to graduate from high school and are more likely to attend and graduate from college as compared to their counterparts who attend schools with high concentrations of minority and low-income students.⁵

⁴ For a comprehensive discussion and analysis of the research showing the importance of integrated schools in preparing students academically to achieve throughout their lives, see the *Brief of 553 Social Scientists*, at 7-9 and related appendix. See also NATIONAL ACADEMY OF EDUCATION, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES, at 20, available at <http://nepc.colorado.edu/files/Brief-NAE.pdf>; Susan Eaton, *School Racial and Economic Composition & Math and Science Achievement*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 1, Oct. 2010, updated Mar. 2011, available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo1.pdf>; Roslyn Arlin Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 5, Oct. 2011, available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf>.

⁵ Mickelson, *School Integration and K-12 Educational Outcomes: A Quick Synthesis of Social Science Evidence*, *supra* n. 4.

In *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, 551 U.S. 701 (2007), a majority of the Justices recognized that fostering diversity as an educational goal and avoiding racial isolation are compelling interests for school districts. *Id.* at 783, 797 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 838-42 (Breyer, J., dissenting). A majority of the Court affirmed that “[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity” *Id.* at 797-98 (Kennedy, J., concurring).

As Justice Kennedy recognized in *PICS*, a lack of diversity in the student body can prevent “equal educational opportunity” for students who are isolated in schools with students from the same racial and ethnic background. *Id.* at 788. Research establishes that the benefits of diversity inure to non-minority students as well, by providing better learning outcomes and social and psychological advantages that increase their productivity in an increasingly pluralistic workplace.⁶ By preventing public schools from using a legitimate means of addressing re-segregation when it is identified,

⁶ Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 8, Oct. 2012, available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf>.

Section 26 and similar laws will leave students less prepared, both academically and socially, to compete in the global marketplace.

The inability to use race to achieve student diversity will also inhibit public schools from fulfilling their duty to prepare all students to live and work as citizens of an increasingly pluralistic and connected world. As this Court made clear in *Brown v. Board of Education*, education “is the very foundation of good citizenship” and “is . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” 347 U.S. 483, 493 (1954). In *Plyler v. Doe*, the Court elaborated that public schooling “has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage.” 457 U.S. 202 (1982). Schools are thus expected to help students learn to navigate what is an increasingly pluralistic society, both at home and in the world at large. Social science research makes clear that racially and ethnically integrated schools better achieve that goal by promoting cross-racial understanding, reducing prejudice, and furthering social cohesion.⁷ These benefits inure to more than

⁷ For a comprehensive discussion and analysis of the research showing the importance of integrated schools on instilling democratic values in students, see the *Brief of 553 Social Scientists*, at 9, App. 23-24. See also Susan Eaton & Gina Chirichingo, *The Impact of Racially Diverse Schools in a Democratic Society*, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 3, Oct. 2010, updated Mar. 2011, available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo3.pdf>.

minority students; students who attend diverse public schools develop stronger democratic ideals from a diverse student population. Schools that slip back into segregation because of an outright ban on race-conscious measures to achieve diversity will be stifled in their goal of teaching students of all races and ethnicities to live in a global society. Their students will miss out on the daily opportunities for gaining cross-cultural understanding, tolerance, and social cohesion that a diverse student body presents.

B. Section 26 Harms Public Schools' Efforts to Achieve the Important Objectives of A Diverse Workforce and Minority Contracting

The efforts by public schools to prepare American students to compete in the global marketplace will also be impaired by Section 26 and similar mandates because those provisions will stymie efforts by schools to achieve diversity in staffing and contracting. Although the need to achieve greater numbers of minority employees and contractors is not unique to public schools,⁸ the interest is even more compelling in an institution

⁸ The Equal Employment Opportunity Commission and Department of Justice have encouraged business and employers of all types to be creative and act affirmatively in recruiting, hiring, and employment practices to achieve greater numbers of minority applicants and employees. *See* Press Release, Equal Employment Opportunity Commission, EEOC Partners with Business to Build Best Practices for Increasing Diversity (Mar. 8, 2006), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-8-06.cfm>.

charged with teaching and inculcating values in children. As U.S. Secretary of Education Arne Duncan has emphasized, there is a serious concern that in public schools, “teachers don’t reflect the great diversity of our nation’s young people.”⁹ A 2011-12 study shows that although minority students make up 45.6 percent of the public school population, with the majority of those minority students coming from Black and Hispanic backgrounds, only 16.9 percent of public school principals are Black or Hispanic, and only 14.4 percent of public school teachers are Black or Hispanic.¹⁰ Especially in schools with diverse

⁹ See SABA BIREDA AND ROBIN CHAIT, INCREASING TEACHER DIVERSITY: STRATEGIES TO IMPROVE THE TEACHER WORKFORCE 1 (Nov. 2011) (citing Brian Lehrer Show, “Education Reform, Secretary Arne Duncan Weighs In” (2010)), available at http://www.americanprogress.org/wp-content/uploads/issues/2011/11/pdf/chait_diversity.pdf.

¹⁰ See NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES-2013-312) (2013), available at <http://nces.ed.gov/pubs2013/2013312.pdf>; NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOL PRINCIPALS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES-2013-313) (2013), available at <http://nces.ed.gov/pubs2013/2013313.pdf>; NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOL TEACHERS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES 2013-314) (2013), available at <http://nces.ed.gov/pubs2013/2013314.pdf>.

student populations, providing role models of diverse backgrounds for students in the school environment is important to “provide real-life examples to minority students of future career paths.” Moreover, as the research bears out, “teachers of color have demonstrated success in increasing academic achievement for engaging students of similar backgrounds.”¹¹ Recommendations on how to achieve greater diversity in the staffs of public schools include the use of programs and activities specifically aimed at and benefitting minority applicants.¹²

With respect to contracting, public school districts across the country recognize that underutilization of businesses owned by people of color perpetuates inequalities among students as well as the broader community.¹³ Such districts have created programs under which a certain percentage of their contracts and other business awards go to minority owned businesses.¹⁴ Because programs aimed at helping minority individuals and

¹¹ Bireda, *supra* note 9

¹² *Id.* at 3 (recognizing the need for statewide initiatives to fund teacher preparation programs aimed at both low-income *and* minority teachers).

¹³ *See, e.g.*, Portland Public Schools, “PPS Equity in Public Purchasing and Contracting,” available at http://www.pps.k12.or.us/files/board/8_50_095_P.pdf.

¹⁴ *See, e.g.*, Chicago Public Schools, “Remedial Program for M/WBE Participation in Goods, Services and Construction Contracts,” available at <http://www.csc.cps.k12.il.us/purchasing/index.php@tab=1&id=46.htm>.

businesses garner employment and contracts from public schools are preferences for minorities, Section 26 and similar provisions would prevent public employers like school districts from engaging in these types of best practices that they already have deemed to be necessary to achieve their compelling goal of providing a diverse workforce as role models for students.

C. Section 26 Thwarts Public Schools From Creating Diverse Learning and Workplace Environments Through Necessary and Constitutional Race-Conscious Means

In order to provide diverse learning and workplace environments for students, school districts may need to consider race in certain constitutionally permissible ways. Yet Section 26 and similar provisions in other states, read in their broadest sense, interfere with that important work by prohibiting any race-conscious action. While proponents argue that Section 26 merely prohibits discrimination on the basis of race, it and similar provisions in other states actually prohibit any reliance on race. This undermines *PICS*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013), by denying educational institutions the discretion to use race in constitutionally permissible ways.

In *PICS*, *Grutter*, and recently *Fisher*, the Court affirmed that school districts, colleges, and universities may seek to attain the educational benefits associated with a diverse student body

through the consideration of race as one of many diversity factors. Indeed, in *PICS* the Court clarified that school districts should “continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds” through a “nuanced, individual evaluation of school needs and student characteristics that might include race as a component.” *PICS*, 551 U.S. at 707 (Kennedy, J., concurring). Just two months ago, in *Fisher*, this Court reaffirmed that institutions of higher education may consider race as one of several factors in seeking to achieve the educational benefits of diversity. 133 S.Ct. 2411.

The United States Departments of Education and Justice issued joint guidance documents in December 2011 for elementary and secondary schools and for higher education institutions, explaining how they can voluntarily consider race “to further compelling interests in achieving diversity and avoiding racial isolation.”¹⁵ Educational

¹⁵ Letter from Russlyn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep’t of Educ., and Thomas Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep’t of Justice to Colleagues (Dec. 2, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.html>; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), available at <http://www2ed.gov/print/about/offices/list/ocr/docs/guidance-ese-201111.html>; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (2011), available at <http://www2ed.gov/print/about/offices/list/ocr/docs/guidance-pse-201111.html>.

institutions have relied on this advice in crafting legally permissible policies pursuant to this Court's decisions. Section 26 would void these carefully designed and entirely legitimate and constitutional policies.

In addition to the discretionary use of race in crafting student assignment policies, school districts are also required to consider student race in a number of situations. Congress and the legislatures of states require public schools to disaggregate data according to certain subgroups, including race and ethnicity, and to address the critical educational needs of underachieving subgroups to improve their academic performance.¹⁶ Indeed, Michigan's State Department of Education requires school districts to collect and use disaggregated data for instructional planning.¹⁷ That analysis and response inevitably

¹⁶ See 20 U.S.C. § 6311(h) (2013) (requiring disaggregation of data, including by race and ethnicity, and requiring annual improvement in subgroups (AYP)); 34 C.F.R. § 200.2(1) (requiring assessment results to be disaggregated by "[e]ach major racial and ethnic group."). See also, e.g., Missouri School Improvement Plan (requiring annual review of performance data disaggregated on, among other subgroups, race/ethnicity in order to effectively monitor student academic achievement and dropout/persistence to graduation rates).

¹⁷ As the Michigan Department of Education explains in guidance to school districts, school districts must "have a system for managing data and information in order to inform decisions to improve student achievement," including data based on student race/ethnicity. Mich. Dep't of Educ., "On Site Review School Study Guide Items Explanation with Examples Substantiating Implementation," at 17, available at http://www.michigan.gov/documents/mde/7__District_Study_Guide_with_Explanations_360059_7.doc.

requires considering students based on their races and ethnicities, and tailoring educational programs, strategies and other interventions to the needs of certain student groups. By necessity, school district responses often involve targeted services for members of the subgroup that is underperforming. For example, a school may direct resources (tutors, smaller class sizes/extra staffing, extended day services, summer school classes, counselors, pupil personnel workers, cultural liaisons, cultural proficiency programs, extra classes, mentors, take-home computers) to schools in which more subgroup members are located.¹⁸

The broad prohibitions of Section 26 and similar provisions could call into question these school district efforts to respond to the educational needs identified by the mandatory disaggregation of achievement data by various subgroups, including race and ethnicity. Any response that a school district might make to data showing that students of a particular race or ethnicity need additional support to succeed arguably would be deemed a preference based on race or ethnicity and could be challenged under provisions like Section 26. These provisions thus may render the collection of disaggregated data meaningless to school district efforts to help all students achieve. Schools would be prevented from using the data to address proactively specific,

¹⁸ See, e.g., Del. Dep't of Educ., "District Targets and Accountability: Frequently Asked Questions," at 2 Question 4 (referencing "targeting resources towards specific underperforming groups of students"), available at <http://www.doe.k12.de.us/infosuites/ddoe/DisTargAccFAQsJan2013.pdf>.

identified student needs, as Section 26 could be interpreted to preclude even very limited uses of race in providing the targeted assistance necessary to the academic success of certain minority students. The purported non-discrimination mandate of Section 26 could, in fact, stop schools from addressing inequities in educational opportunities that keep many children from succeeding at school.

Although Section 26 provides that it “does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state,” it is not clear that the exception allows public primary and secondary schools to continue responding effectively to achievement data disaggregated by race or ethnicity. Specifically, it is not clear that a school district’s failure to respond to the identified needs of racial subgroups would directly lead to a loss of federal funds.

Provisions such as Section 26 may also prevent public schools from addressing the needs of minority students through race-conscious programs, even when those programs are already recognized by federal law. Section 26 provides that “[t]his section does not invalidate any court order or consent decree that is in force as of the effective date of this section.” But Section 26 does not include an exception for the use of certain race-conscious tools by school districts that are not enacted pursuant to a court-ordered desegregation plan or consent decree. Yet federal law recognizes that even schools that are not under an order or consent decree may use certain race-conscious tools to address subgroup educational needs. For example, consider the

Magnet Schools Assistance program, which “provides grants to eligible local educational agencies to establish and operate magnet schools that are operated under a court-ordered or federally approved voluntary desegregation plan. These grants assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students.”¹⁹ Section 26 and related provisions call into question whether such programs that have already been established and funded could continue to operate.

II. SECTION 26 CREATES CONFUSION IN THE LAW AND MAY LEAD TO ADDITIONAL LITIGATION FOR SCHOOLS.

Section 26 and related provisions from other states will have a number of other unintended, negative consequences for public schools, including innumerable legal disputes that will require public funds to address. Consider the dueling constitutional standards applicable to distinctions based on race versus those based on gender. Section 26 and related provisions prohibit the use of race, color, ethnicity, and national origin by public schools. Decisions by public schools on those bases are judged under the standard of strict scrutiny under the precedents of this Court. To survive strict scrutiny, a school

¹⁹ U.S. Dep’t of Educ., Magnet Schools Assistance Program, Purpose, Program Description, available at <http://www2.ed.gov/programs/magnet/index.html>.

district that considers race in making individual student assignment decisions must show that the use of race is narrowly tailored to achieve a compelling governmental interest. *PICS*, 551 U.S. at 720.

Indeed, the outcome in *PICS* shows that this is a high bar and will prevent schools from unconstitutional uses of race, making provisions like Section 26 unnecessary. This Court held that the two school districts in *PICS* failed to demonstrate that their use of individual students' race was narrowly tailored to meet their goals. *Id.* at 722-25. In making that determination, the Court generally applied the four-prong narrow tailoring test from *Grutter*. That test assesses whether an educational institution has considered workable race-neutral alternatives; whether its plan provides for flexible and individualized review of students; whether it has minimized undue burdens on other students; and whether its plan is limited in time and subject to periodic review. *See Grutter*, 539 U.S. at 334-43.

This strict scrutiny requirement constrains school districts. It requires “the most exact connection between justification and classification.” *PICS*, 551 U.S. at 720. *PICS* also reaffirmed that when a district chooses to take into account the race of individual students when providing benefits or imposing burdens, it must meet the strict scrutiny standard, demonstrating that its plan is narrowly tailored to meet the compelling interest in achieving diversity or avoiding racial isolation in schools. *Id.* at 787. The Court has repeatedly emphasized, however, that the application of strict scrutiny, in and of itself, is “‘not fatal in fact.’” *Grutter*, 539 U.S. at 327

(quoting *Adarand v. Peña*, 515 U.S. 200, 237 (1995)). Schools may adopt approaches that consider the race of individual students if they do so in a manner that closely fits their goals of achieving diversity or avoiding racial isolation and includes race no more than necessary to meet those ends. *See Grutter*, 539 U.S. at 333-34. Although the *PICS* decision limited the permissible uses of race only in the K-12 context, Justice Kennedy's majority opinion in *Fisher* echoes his concurring opinion in *PICS* and his dissenting opinion in *Grutter* with regard to the issue of narrow tailoring by stressing that race neutrality should be part of the strict scrutiny analysis, regardless of the context.

However, Section 26 and other provisions also prohibit public schools from granting preferences to any group based on *gender*. Gender-based decisions are reviewed under a lower, intermediate level of scrutiny. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Yet Section 26 conflates the constitutional standards applicable to distinctions based on race and those based on gender by providing a sweeping prohibition of both types of decisions. School districts are without any guidance as to how to navigate the clear distinction in the case law between decisions based on race, color, ethnicity, and national origin, on the one hand, and gender, on the other, in light of the mandates of provisions such as Section 26. This will lead to significant financial burdens on school districts as they are forced to litigate these confusing issues. The blending of standards will also create problems for the courts regarding what standard of judicial review must be given to claims under Section 26.

III. SECTION 26 INTERFERES WITH COMMUNITY ENGAGEMENT CRITICAL TO THE DEMOCRATIC PROCESS FOR POLICY DECISION-MAKING BY SCHOOL BOARDS

Section 26 and similar state laws unnecessarily restrict the very local governance and community discretion that this Court has recognized are retained by schools in working toward the permissible goal of achieving diversity. Decisions about the educational need for diversity policies are matters of local control that require a properly functioning democratic process. Section 26 interferes with the proper operation of elected school boards in setting education policy through community engagement and public accountability.

This community self-determination is a fundamental part of the history of American public schools, and is even more important in this area where different approaches may be required based on the “nuanced, individual evaluation of school needs and student characteristics,” which this Court has indicated is required. *PICS*, 551 U.S. at 790 (Kennedy, J., concurring). “Those entrusted with directing our public schools must be allowed to bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to [determine educational goals and to] achieve the compelling interest they face” *Id.* at 798. School districts must be allowed to experiment at the local level with constitutionally sound ways of achieving the compelling interest of diversity in

public schools, within the strict framework explained in *Grutter* and *PICS*.

CONCLUSION

Amici urge this Court to uphold the lower court decision invalidating Section 26 and thereby protect the discretion of public schools to adopt and implement policies that promote diversity and avert racial isolation—goals critical to the education of the youth of this country.

Respectfully Submitted,

Patricia J. Whitten
Jennifer A. Smith
Jacqueline Wernz
Franczek Radelet
300 South Wacker Dr.
Suite 3400
Chicago, Il 60606
(312) 986-0300

Francisco M. Negrón, Jr.*
National Sch. Bds. Ass'n
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

*Counsel of Record

August 30, 2013