No. 13-15657

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAYA ARCE, SEAN ARCE,
KORINA ELIZA LOPEZ, LORENZO LOPEZ, Jr.,

Plaintiffs - Appellants,

MARGARITA ELENA DOMINGUEZ, NICOLAS ADRIAN DOMINGUEZ,

Intervenor-Plaintiffs - Appellants,

v.

JOHN HUPPENTHAL, Superintendent of Public Instruction; ARIZONA STATE BOARD OF EDUCATION; VICKI BALANTINE; JACOB MOORE; JOHN HAEGER; JAIME MOLERA; AMY HAMILTON; EILEEN KLEIN; GREGORY MILLER; JAMES HORTON; DIANNE ORTIZ-PARSONS; THOMAS TYREE, in their Official Capacity as a Member of the Arizona State Board of Education,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Arizona, Tucson
Honorable A. Wallace Tashima, Senior District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY AND IN SUPPORT OF NEITHER AFFIRMANCE NOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

CONSENT OF THE PARTIES

Pursuant to Fed. R. App. P. 29(a), amicus curiae Pacific Legal Foundation reports that all parties have consented to the filing of this brief. The Circuit Advisory Committee Note to Rule 29-3 states that the timely filing of an amicus curiae brief without leave of this Court is permitted if all parties consent to the filing of the brief.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

CONSENT OF THE PARTIES i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE SUPREME COURT HAS ONLY INVOKED THE POLITICAL STRUCTURE DOCTRINE IN VERY RARE CIRCUMSTANCES 4

A. The Supreme Court Derived the Political Structure Doctrine to Address Facially *Race-Neutral* Legislation That Burdened Minorities, and Left Them Vulnerable to Discrimination 6

B. The Supreme Court Has Refused to Apply the Political Structure Doctrine to Legislation Not "Aimed" at Minorities 7

C. In *Seattle*, the Supreme Court Invalidated Legislation Burdening Minorities in Their Efforts to Reimplement Equal Education Measures 9

D. States May Enact Legislation Concerning Racial Matters Without Violating the Political Structure Doctrine 11

II. THIS COURT LIMITS THE POLITICAL STRUCTURE DOCTRINE TO LAWS THAT OBSTRUCT MINORITIES FROM SEEKING PROTECTION AGAINST UNEQUAL TREATMENT 12

Page

III. APPLICATION OF THE POLITICAL STRUCTURE DOCTRINE REQUIRES PROOF OF DISCRIMINATORY INTENT 16

A. In *Valeria v. Davis*, this Court Correctly Identified the Political Structure's "Intent" Requirement 16

B. The Political Structure Doctrine Is No Longer Necessary After *Washington v. Davis* and *Arlington Heights* 20

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Page

Cases

Acosta v. Huppenthal, No. CV 10-623-TUC-AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013) 2, 23

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 1, 4-5, 13, 21

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 1

Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) 1-3, 5, 12-14

Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012) 1, 3, 12

Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466 (6th Cir. 2012) 1, 4, 24

Coral Const., Inc. v. City & Cnty. of San Francisco, 50 Cal. 4th 315 (2010) 1

Crawford v. Bd. of Educ. of the City of L.A., 17 Cal. 3d 280 (1976) 11

Crawford v. Bd. of Educ. of the City of L.A., 458 U.S. 527 (1982) 3, 5, 11-12, 15, 20

Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) 1

Gordon v. Lance, 403 U.S. 1 (1971) 3, 5, 8-9, 20

Gratz v. Bollinger, 539 U.S. 244 (2003) 1

Grutter v. Bollinger, 539 U.S. 306 (2003) 1

Hunter v. Erickson, 393 U.S. 385 (1969) 3, 5-15, 17-23

James v. Valtierra, 402 U.S. 137 (1971) 3, 5, 7-9, 20

Page

Knight v. Alabama, 458 F. Supp. 2d 1273 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir. 2007) 14-15

Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) 5

Milliken v. Bradley, 418 U.S. 717 (1974) 23

Northville Downs v. Granholm, 622 F.3d 579 (6th Cir. 2010) 16

Palmore v. Sidoti, 466 U.S. 429 (1984) 21

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) 1, 22

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 21

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 1

Reitman v. Mulkey, 387 U.S. 369 (1967) 7, 9, 18-19

Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013) 1, 4, 24

Seattle Sch. Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982) 12, 22

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 23

United States v. Carolene Products Co., 304 U.S. 144 (1938) 17

Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2002) 1, 3, 12, 14-18

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 4, 17, 20-24

Washington v. Davis, 426 U.S. 229 (1976) 5, 17, 20-21, 23

Page

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) . . . . . passim

United States Constitution

U.S. Const. amend. XIV 5, 12, 15

California Constitution

Cal. Const. art. I, § 31 12-13

§ 31(a) 13

State Statutes

Ariz. Rev. Stat. § 15-112 . . . . . 2-3, 23-24

§ 15-112(A) 2

Miscellaneous

Heriot, Gail, *Proposition 209 and the United States Constitution*, 43 Loy. L. Rev. 613 (1998) 7

IDENTITY AND INTEREST OF AMICUS CURIAE

Since 1973, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free of racial discrimination. PLF participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Of particular relevance to this case, PLF has participated in litigation specifically focusing on political structure equal protection analysis in *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc), *cert. granted sub nom., Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013) (No. 12-682); *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012) (*Brown*); *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (*Wilson*); and *Coral Const., Inc. v. City & Cnty. of San Francisco*, 50 Cal. 4th 315 (2010).

This case raises important issues of constitutional law. Amicus considers this case to be of special significance in that it concerns the application of the political structure doctrine, a rarely used form of equal protection analysis. Amicus believes

that its prior litigation experience in political structure equal protection cases enables it to provide an additional viewpoint on the issues presented in this case, which will be of assistance to this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the district court reviewed Supreme Court and Ninth Circuit precedent to determine whether the "political structure" equal protection doctrine should be invoked to invalidate Arizona Revised Statute § 15-112 (Section 15-112). The political structure doctrine "prohibit[s] states from placing decisionmaking authority over certain racial issues at higher levels of government." *Wilson*, 122 F.3d at 706. Section 15-112 prohibits Arizona school districts from providing in their programs of instruction any courses or classes that (1) promote the overthrow of the United States government; (2) promote resentment toward a race or class of people; (3) are designed primarily for pupils of a particular ethnic group; or (4) advocate ethnic solidarity instead of the treatment of pupils as individuals. Ariz. Rev. Stat. § 15-112(A).

The court below held that the political structure doctrine did not apply, because Section 15-112 "does not structurally impede the ability of minorities to use the political process to remedy racial discrimination." *Acosta v. Huppenthal*, No. CV 10-623-TUC-AWT, 2013 WL 871892, at *13 (D. Ariz. Mar. 8, 2013). Rather, it is "permissible 'state action that addresses, in neutral fashion, race related matters.'" *Id.*

(quoting *Crawford v. Bd. of Educ. of the City of L.A.*, 458 U.S. 527, 538 (1982)). Amicus takes no position on the constitutionality of Section 15-112 in general, or even whether it violates the Equal Protection Clause. Amicus provides this brief to show that the district court correctly interpreted the political structure doctrine as being limited to circumstances where the challenged law purposefully singles out minorities and impedes their ability to remedy racial discrimination.

The political structure doctrine is a form of equal protection analysis that has been used twice by the Supreme Court to invalidate laws that treated all individuals as equals, yet subtly distorted governmental processes by placing special burdens on the ability of minority groups to achieve beneficial legislation. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (*Seattle*) (invalidating state initiative that repealed desegregation measures); *Hunter v. Erickson*, 393 U.S. 385 (1969) (invalidating city charter amendment that repealed fair housing ordinance). The Supreme Court discussed, but did not apply, the political structure doctrine in *Crawford*, 458 U.S. 527, *James v. Valtierra*, 402 U.S. 137 (1971), and *Gordon v. Lance*, 403 U.S. 1 (1971). This Court considered, but did not apply, the political structure doctrine to challenged initiatives in *Brown*, *Valeria*, and *Wilson*. The Supreme Court and Ninth Circuit decisions only apply the political structure doctrine in the rare circumstance when challenged legislation has repealed laws protecting

minorities from discrimination or desegregation, and intentionally makes it more difficult for minorities to reenact the protective laws.

Although the political structure doctrine has never been explicitly overruled, the Supreme Court appears to have abandoned it in favor of the analytical approach taken in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). That case provides a more coherent framework for examining legislation that is neutral on its face, but when applied, prevents minorities from securing advantageous legislation.

In light of *Arlington Heights*, and the fact that the Supreme Court may further limit the political structure doctrine in *Coal. to Defend Affirmative Action*, 701 F.3d 466, *cert. granted sub nom.*, *Schuette*, 133 S. Ct. 1633, this Court should refrain from extending the doctrine to the claims presented in this case.

ARGUMENT

I

THE SUPREME COURT HAS ONLY INVOKED THE POLITICAL STRUCTURE DOCTRINE IN VERY RARE CIRCUMSTANCES

The Supreme Court has relied upon a political structure equal protection analysis to invalidate facially race-neutral voter initiatives that not only repealed antidiscrimination laws, but rigged the political process to make it more burdensome for minorities to pass protective legislation in the future. Under conventional equal protection analysis, governmental actions that classify persons by race, *Adarand*, 515

U.S. at 230, or that are facially neutral but motivated by discriminatory racial purpose, *Washington v. Davis*, 426 U.S. 229, 239 (1976), are subject to strict judicial scrutiny. Prior to *Davis*, the Court relied upon an alternative equal protection analysis—the political structure doctrine—to invalidate a facially neutral law that had been enacted by city voters to make it difficult for minorities to pass a fair housing ordinance. According to that doctrine, the Fourteenth Amendment reaches a political structure that treats all individuals as equals, yet 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. In other words, the Constitution "prohibit[s] states from placing decisionmaking authority over certain racial issues at higher levels of government." *Wilson*, 122 F.3d at 706.

The Supreme Court relied upon this political structure doctrine to invalidate laws on equal protection grounds in only two cases: *Hunter* and *Seattle*.[1] The Court refused to invalidate laws under the political structure doctrine in *Crawford*, 458 U.S. 527, *James*, 402 U.S. 137, and *Lance*, 403 U.S. 1. Together, these cases show that the Supreme Court intended the political structure doctrine to apply only when it is beyond dispute that decisionmaking authority over certain racial matters has been

[1] Without issuing an opinion, the Court summarily affirmed the judgment of a three judge panel of the U.S. District Court of New York which had invalidated a law under the political structure doctrine in *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

removed to a higher level of government "because of," and not merely "in spite of," the burdens it imposes on minorities in securing protection against discrimination and segregation.

A. The Supreme Court Derived the Political Structure Doctrine to Address Facially *Race-Neutral* Legislation That Burdened Minorities, and Left Them Vulnerable to Discrimination

The decision in *Hunter* concerned a local voter enactment that made it more difficult for minorities to obtain protection from discrimination. Since the measure adversely impacted minorities, it was viewed by the Court as an "explicitly" racial classification and invalidated under strict scrutiny. *Hunter*, 393 U.S. at 389. In *Hunter*, the Akron City Council enacted a fair housing ordinance to prevent discrimination. *Id.* at 386. A prospective African American home buyer sought protection under the ordinance after a real estate agent refused to show her homes whose owners would not sell their properties to blacks. *Id.* at 387. But the voters of Akron had not only repealed the measure, they also amended the city charter to prevent the city council from enforcing any new ordinance dealing with discrimination in housing without the approval of the majority of the city's voters. *Id.* at 386. All other ordinances became automatically effective thirty days after the Council passed them. *Id.* The charter amendment operated to prevent the city council from enacting ordinances addressing racial discrimination in housing without majority approval of the Akron voters. *Id.* at 387.

The Court invalidated the amendment because it discriminated against racial minorities by placing a special burden on them in their efforts to achieve antidiscrimination housing laws. *Hunter*, 393 U.S. at 390-91. Although the amendment was facially neutral, in reality, "the law's impact [fell] on the minority." *Id.* By repealing a local fair housing ordinance and making its re-promulgation extremely difficult for minorities, "the charter amendment in *Hunter* thwarted the City of Akron's efforts to discourage racial discrimination by private citizens." Gail Heriot, *Proposition 209 and the United States Constitution*, 43 Loy. L. Rev. 613, 632 (1998). "It therefore lent aid and encouragement to private discriminators." *Id.*; *see Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (a state may not encourage or involve the state in private discrimination).

B. The Supreme Court Has Refused to Apply the Political Structure Doctrine to Legislation Not "Aimed" at Minorities

Two years after *Hunter*, in 1971, the Court took two opportunities to provide clarification to its political structure analysis. In *James*, the Court upheld a state voter initiative that limited the ability of local governments to develop affordable housing. 402 U.S. 137. The race-neutral amendment prohibited local governments from approving low-rent housing projects unless the project was first approved by a majority of qualified electors in a community election. *Id.* at 138-39. The district court invalidated the voter initiative based on *Hunter*. *Id.* at 140. But the Supreme

Court reversed, clarifying that *Hunter* did not apply to all situations where the political structure had been altered. Voter referendums alter the political structure by removing the decisionmaking authority over a single issue from a city council or state assembly. During this direct form of democracy, "a particular group" may always be disadvantaged. *Id.* at 142. If *Hunter* applied to every such law making procedure to avoid political restructuring, "a State would not be able to require referendums on any subject unless referendums were required on all." *Id.* at 142. Even a gubernatorial veto or filibuster may "'disadvantage' any of the diverse and shifting groups that make up the American people." *Id.* Thus, only a law altering the political structure that "rests on 'distinctions based on race'" may be implicated by *Hunter*. *Id.* at 141 (citing *Hunter*, 393 U.S. at 391-92). Because the law in *James* had not been "*aimed* at a racial minority," the Court refused to apply *Hunter*'s holding. *Id.* (emphasis added).

The same year, the Court shed light on the new political structure doctrine in *Lance*, 403 U.S. 1, by again refusing to apply it. *Lance* concerned whether a West Virginia state law violated equal protection by prohibiting state subdivisions from incurring a certain level of debt without the approval of 60% of the voters. 403 U.S. at 1. The plaintiffs had been frustrated over the years at their inability to convince 60% of voters in their county to approve the issuance of bonds for public school improvements. *Id.* at 3. The West Virginia Supreme Court of Appeals held that the

60% majority requirement violated the Equal Protection Clause, because the votes of those who favored the issuance of bonds had a proportionately smaller impact on the outcome of the election. *Id.* The Supreme Court reversed the lower court's holding. *Hunter* only applied to laws that "single[d] out . . . discrete and insular minorit[ies] for special treatment." *Id.* at 5. The charter amendment in *Hunter* disadvantaged "'those who would benefit from laws barring racial, religious, or ancestral discriminations.'" *Id.* (citing *Hunter*, 393 U.S. at 391). Laws that "do not discriminate against or authorize discrimination against any identifiable class . . . do not violate the Equal Protection Clause." *Id.* at 7 (citing *Reitman*, 387 U.S. 369).

C. In *Seattle*, the Supreme Court Invalidated Legislation Burdening Minorities in Their Efforts to Reimplement Equal Education Measures

After *James* and *Lance*, the political structure doctrine did not resurface until eleven years later in *Seattle*. There the Court applied the doctrine to invalidate Washington State's educational decisionmaking structure. In *Seattle*, the governing board of a Washington public school district voluntarily adopted a plan to end *de facto* racial segregation by busing students to reduce racial imbalance in individual schools. *Seattle*, 458 U.S. at 460-61. In response, Washington voters passed an initiative amending their state constitution to prohibit school districts from requiring any student to attend a school other than the school which was nearest, or next nearest, to the student's residence. *Id.* at 462. But the initiative still allowed student assignments

and busing for other purposes, all unrelated to race, such as to provide transportation for special education and to reduce overcrowding. *Id.* at 461-62, 471.

Relying on *Hunter*, the Court held the initiative violated equal protection by "remov[ing] 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.* at 474. Following the initiative's passage, minorities favoring the elimination of *de facto* school segregation could no longer petition the local school board, but had to seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remained vested in the local school board. *Id.* By specifically exempting most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly required minorities who championed school integration to surmount a considerably higher hurdle than nonminorities seeking comparable legislative action. *Id.* This new burden restructured the state's educational decisionmaking process to differentiate "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.* at 480 (internal quotation marks and citation omitted). That differentiation obstructed minorities in their pursuit of equal educational opportunities "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483.

D. States May Enact Legislation Concerning Racial Matters Without Violating the Political Structure Doctrine

Although *Hunter* and *Seattle* concerned local and state initiatives that dealt with racial matters, not all laws addressing racial issues trigger the political structure doctrine. In *Crawford*, the Court upheld a California constitutional amendment that, like *Seattle*, also involved school busing for integration. Prior to the amendment, the state constitution obligated school districts "to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.'" *Crawford*, 458 U.S. at 530 n.2 (citing *Crawford v. Bd. of Educ. of the City of L.A.*, 17 Cal. 3d 280, 285 (1976)). The voter initiative repealed that obligation and limited state court-ordered school busing for desegregation purposes only to those instances in which a federal court would order such a remedy to correct a violation of the federal Equal Protection Clause. The Court found no political restructuring or racial classification, and refused to apply *Hunter* to the voter initiative. The amendment "neither sa[id] nor implie[d] that persons are to be treated differently on account of their race." *Crawford*, 458 U.S. at 537. The Court explained that there was a distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Id.* at 538. "[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that [are] not required by the Federal Constitution." *Id.* The Court reiterated that "the simple repeal or

modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539 (fns. omitted) (citing *Hunter*, 393 U.S. at 390 n.5).

Thus, the Constitution is offended under *Hunter* and *Seattle* only when the majority repeals desegregation or antidiscrimination laws and rigs the political process to make it more difficult for minorities to reenact the protective legislation that was removed.

II

THIS COURT LIMITS THE POLITICAL STRUCTURE DOCTRINE TO LAWS THAT OBSTRUCT MINORITIES FROM SEEKING PROTECTION AGAINST UNEQUAL TREATMENT

Since *Seattle*, this Court refused to apply the political structure doctrine to invalidate challenged initiatives in *Brown*, *Valeria*, and *Wilson*.[2] *Brown* and *Wilson* upheld Article I, Section 31, of the California Constitution against claims that it violated the Fourteenth Amendment under both a "conventional" and "political structure" equal protection analysis. *Wilson*, 122 F.3d at 701. Section 31 prohibits the state from discriminating or granting preferences on the basis of race, sex, color,

[2] This Court relied upon the political structure doctrine when it affirmed the unconstitutionality of the challenged initiative in *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

ethnicity, or national origin in the operation of public employment, public education, or public contracting. Cal. Const. art. I, § 31(a).

Wilson held that the political structure doctrine did not apply, because Section 31 does not discriminate on the basis of race and sex, *Wilson*, 122 F.3d at 705-07, but is only an impediment to preferential treatment. *Id.* at 708. *Wilson* observed that in *Hunter*, the government obstructed equal opportunity in housing by removing only racially fair housing prerogatives from the law making procedure for all other housing matters. *Id.* at 706. Thus, the housing ordinance in *Hunter* made it more difficult for minorities "to obtain protection against unequal treatment in the housing market." *Id.* at 707. In *Seattle*, the *Wilson* court noted that the state obstructed equal education by removing only "racially desegregative prerogatives" from the lawmaking procedure for all other educational matters. *Id.* at 706. "The lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education." *Id.* at 707.

Wilson held that "for the [political structure] doctrine to apply at all, the state somehow must reallocate political authority in a discriminatory manner." *Id.* at 706. But "[e]ven a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment." 122 F.3d at 707. A denial of equal protection entails, at a minimum, a classification that treats individuals unequally. *Id.* (citing *Adarand*, 515 U.S. at 223-25). "The 'political structure' cases

do not create some paradoxical exception to this *sine qua non* of any equal protection violation." *Id.*

Accordingly, not all laws that restructure the political process violate *Hunter* and *Seattle*, as this Court reiterated in *Valeria*. That case concerned the passage of Proposition 227 in California, which replaced bilingual education with a system of "structured English immersion." *Valeria*, 307 F.3d at 1038. Plaintiffs argued that Proposition 227 unconstitutionally restructured the political process by removing decisionmaking authority over bilingual education, and only bilingual education, from the school district level to the state-wide level. *Id.* at 1039. This Court rejected the claim, because "Proposition 227 . . . does not obstruct minorities from seeking protection against unequal treatment." *Id.* at 1041.

Valeria explained that Proposition 227 was not like the challenged laws in *Hunter* and *Seattle* that removed protection from "pervasive racial discrimination in housing," or prevented the desegregation of "racially stratified school districts." *Id.* at 1041; *see Knight v. Alabama*, 458 F. Supp. 2d 1273, 1314 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir. 2007) (*Hunter* and *Seattle* involved laws that "sought to eliminate the possibility of legislation specifically tailored to remedy discrimination and segregation".) Proposition 227 did not target racial animus, but was intended to improve a pedagogically flawed educational system. *Id.* Therefore, this Court concluded that the initiative did not reallocate "'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.'" *Valeria*, 307 F.3d at 1041 (quoting *Seattle*, 458 U.S. at 474) (emphasis in original). While Proposition 227 reallocated political authority from the local to the state level, the reallocation operated solely to address an educational issue, *not* a racial one. *Knight*, 458 F. Supp. 2d at 1314.

The fact that Proposition 227 impacted Hispanic/Latino students more than students of any other race was not controlling. *See Valeria*, 307 F.3d at 1042 (the mere fact that Proposition 227 proponents specifically identified Hispanic/Latino students during the initiative's campaign did not "create a colorable equal protection political structure claim"). As this Court noted, the Fourteenth Amendment does not prevent states from addressing race-related matters in neutral fashion. *Id.* (citing *Crawford*, 458 U.S. at 538). Reallocation of political power offends equal protection only when the racial implications of the underlying issue determine the newly formed decisionmaking process. *Id.* (citing *Seattle*, 458 U.S. at 470).

Valeria refused to apply the political structure doctrine merely because Proposition 227 "affect[ed] a program that inures primarily to the benefit of racial minorities." *Id.* After reviewing the *Hunter* and *Seattle* decisions, this Court concluded that those cases stood for the "simple proposition that strict scrutiny applies if an initiative creates an outright racial classification, or if a facially neutral initiative was driven by the racial nature of its subject matter." *Id.* (citing *Seattle*, 458 U.S.

at 471); *see Northville Downs v. Granholm*, 622 F.3d 579, 588 (6th Cir. 2010) ("[B]y its terms, *Hunter* confronted a constitutionally impermissible classification on the basis of race that is not present here."). Given Proposition 227's facial neutrality, and the lack of evidence that it was motivated by racial considerations, this Court held that Proposition 227's reallocation of political authority over bilingual education did not offend the Equal Protection Clause. *Valeria*, 307 F.3d at 1042.

This Court has never invoked the political structure doctrine to invalidate laws that did not encourage segregation or private discrimination, and it should not extend the doctrine to do so here.

III

APPLICATION OF THE POLITICAL STRUCTURE DOCTRINE REQUIRES PROOF OF DISCRIMINATORY INTENT

A. In *Valeria v. Davis*, this Court Correctly Identified the Political Structure's "Intent" Requirement

In *Valeria*, this Court recognized the intent requirement within the political structure doctrine: "Be it an overt racial classification or a context of discernible racial animus, constitutional 'political structure' analysis resembles 'conventional' equal protection analysis in that demonstrable evidence of purposeful racial discrimination is required." *Valeria*, 307 F.3d at 1040. That requirement stems from the fact that only "purposeful discrimination is the condition that offends the

Constitution." *Seattle*, 458 U.S. at 484 (quotation marks and citations omitted). Thus, before invalidating the facially race-neutral laws in *Davis*, 426 U.S. 229, and *Arlington Heights*, 429 U.S. 252, the Supreme Court first found that those suspect laws had been enacted for a discriminatory purpose. Following suit, this Court in *Valeria* concluded that evidence of purposeful discrimination is required even when courts conduct political structure equal protection analysis. *Valeria*, 307 F.3d at 1040.

That conclusion may at first appear to contradict *Seattle*, which described the laws invalidated under the political structure doctrine as those not requiring "a *particularized* inquiry into motivation." *Seattle*, 458 U.S. at 485 (emphasis added). But in *Seattle*, a searching inquiry into discriminatory intent was unnecessary, the Court explained, because the political structure doctrine invalidates laws that repeal "in explicitly racial terms with legislation designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented." *Id.* at 485. Unlike the laws in *Davis* and *Arlington Heights*, which were "facially unrelated to race," the laws repealed by the discriminatory initiatives in *Hunter* and *Seattle* were specifically designed to overcome the "'special condition' of prejudice." *Id.* at 486 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)). The voters in Akron and Washington removed laws that had guaranteed racial minorities

fair housing and equal educational opportunities, purposefully leaving them vulnerable to discriminatory conduct.

The factual postures of *Hunter* and *Seattle* are illustrative of the purposeful discrimination requirement identified by this Court, for they both dealt with political obstructions placed in the way of minorities seeking to remedy identified patterns of racial discrimination. *Valeria*, 307 F.3d at 1040. Indeed, both the *Hunter* and *Seattle* courts did make inquiries into intent. In his concurrence in *Hunter*, Justice Harlan specifically observed that "the city of Akron has not attempted to allocate governmental power on the basis of any general principle." *Hunter*, 393 U.S. at 395 (Harlan, J., concurring). Rather, the provision "has the *clear purpose* of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* (emphasis added).

To the *Hunter* court, the discriminatory intent of the challenged initiative was clear in comparison to the initiative it had invalidated two years earlier in *Reitman*, 387 U.S. 369. In *Reitman*, a California voter initiative amended the state constitution by declaring that private citizens had the right to sell, lease, or rent real property to any person they chose. *Id.* at 371. The Court considered the initiative's "immediate objective," its "ultimate effect," its "historical context," and the "conditions existing prior to its enactment," and found that its purpose was not just to repeal an existing law forbidding private racial discriminations. *Id.* at 373. Rather, it was intended to

authorize, and did authorize, racial discrimination in the housing market. *Id.* at 380-81. Unlike *Reitman*, the discriminatory purpose behind the challenged charter amendment in *Hunter* was obvious. The *Hunter* court found it "need not rest on *Reitman* to decide this case." *Hunter*, 393 U.S. at 389.

The Supreme Court was even more forthright in discerning the purpose of the challenged initiative in *Seattle* when it unambiguously declared that it was "beyond reasonable dispute" that the initiative had been enacted "'because of,' not merely 'in spite of,' its adverse effects upon busing." *Seattle*, 458 U.S. at 471 (citation omitted). In other words, the law's "racial purpose," "racial nature," and "racial focus" was directed at preventing the full integration of black students in public school systems by prohibiting busing for racial purposes. *Id.* at 471-74. "[D]espite [the initiative's] facial neutrality there [was] little doubt that the initiative was effectively drawn for racial purposes." *Seattle*, 458 U.S. at 471. The Court said that although the laws challenged in *Hunter* and *Seattle* were facially race-neutral, they attempted to repeal laws that had been designed to benefit minorities "as minorities." *Seattle*, 458 U.S. at 485. The electorate chose to strip minorities of protective legislation, leaving them vulnerable to discrimination.

In both *Hunter* and *Seattle* there was an underlying, though not overtly stated, assumption that one had to but barely scratch the surface of the challenged law to expose its racially discriminatory purpose. The only possible consequence of the

initiative challenged in *Hunter* was to perpetuate the unequal treatment of minorities in housing. Similarly, by specifically prohibiting only busing for desegregation, the sole result of the initiative challenged in *Seattle* would have been to deny minority students equal educational opportunities. Ultimately in *Hunter* and *Seattle*, any distinction between the impact of the legislation and the legislative purpose to discriminate on the basis of race merge. It is beyond reasonable dispute that the impact on minorities in those cases was not an unintended consequence of the legislation. Rather, the impact—discrimination on the basis of race—was the purpose.

Though the plaintiffs sought relief under the political structure doctrine in *Crawford*, *James*, and *Lance*, the Supreme Court has never applied political structure equal protection analysis to invalidate laws that did not involve purposeful "race-conscious restructuring of [the] decisionmaking process." *Seattle*, 458 U.S. at 485 n.29. Accordingly, this Court should continue to limit its application of the political structure doctrine to situations where the reallocation of political decisionmaking has been motivated by purposeful racial discrimination.

B. The Political Structure Doctrine Is No Longer Necessary After *Washington v. Davis* and *Arlington Heights*

The language of the Equal Protection Clause prohibits "official conduct discriminating on the basis of race," *Davis*, 426 U.S. at 239, and its ultimate goal is to permanently forbid the government from discriminating on the basis of race.

Palmore v. Sidoti, 466 U.S. 429, 432 (1984); *see also Adarand*, 515 U.S. at 227 (requiring strict scrutiny analysis for all governmental racial classifications). Laws not motivated by a discriminatory purpose do not violate the Equal Protection Clause solely because they have an unequal effect. *See Davis*, 426 U.S. at 239; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (The Equal Protection Clause is only violated where legislation was motivated "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

A year after *Davis*, the Supreme Court decided *Arlington Heights*, 429 U.S. at 252. *Arlington Heights* provides guidance on how courts are to determine when facially neutral legislation has been adopted for an unconstitutional purpose. *Id.* at 266-68 (identifying factors that may indicate whether facially neutral legislation violates the Equal Protection Clause). The challenged laws in *Hunter* and *Seattle* were, like the law in *Arlington Heights*, facially neutral, *Hunter*, 393 U.S. at 391; *Seattle*, 458 U.S. at 471, and today could be analyzed under that precedent. Given the continued utility of *Arlington Heights* and the scant use of the political structure doctrine, there is good reason to suspect that the latter doctrine is no longer viable.

Hunter was decided seven years before *Arlington Heights*, but the amendment at issue in *Hunter* could easily be analyzed under the approach of *Arlington Heights*. *Arlington Heights* identified the "impact of the official action . . . [as] an important starting point" to determining the constitutionality of facially neutral legislation. *Id.*

at 266 (citation omitted). In *Hunter*, it was clear that the impact of the charter would affect minorities. *Hunter*, 393 U.S. at 391 ("The majority needs no protection against discrimination."). Similarly in *Hunter*, the historical background was vital to the Court's finding of a discriminatory motive. *See id.* at 391 ("It is against this background that the referendum . . . must be assessed."); *accord Arlington Heights*, 429 U.S. at 267 (noting that "historical background" may be an important evidentiary source of discriminatory intent). There is little doubt that the ordinance in *Hunter* would have been struck down under the framework established eight years later in *Arlington Heights* without resort to the unwieldy political structure doctrine.

In *Seattle*, this Court was well aware of the district court's finding in that case that "a racially discriminatory purpose was one of the factors which caused [the challenged initiative] to be adopted." *Seattle Sch. Dist. No. 1*, 633 F.2d at 1341-42. Though this Court found it unnecessary to discuss the lower court's holding that the initiative "was motivated by a discriminatory purpose," it noted at the outset: "[The challenged initiative] was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments."[3] *Id.* at 1343 (citation omitted).

[3] Had *Seattle* been decided today, it is possible the case would have been decided differently. Five years ago the Supreme Court rejected an attempt by the same Seattle school district to racially balance its student body in the name of diversity. *See Parents Involved*, 551 U.S. 701. In 1982, however, state-sponsored segregated (continued...)

In light of the widely used equal protection analysis from *Davis* and *Arlington Heights*, courts have no reason to adhere to the political structure doctrine. The harm that *Hunter* and *Seattle* sought to prevent could have been adequately addressed through the more comprehensive and coherent *Arlington Heights* framework. The court below conducted an inquiry into discriminatory intent, *Acosta*, 2013 WL 871892, at *14, listing five factors for consideration from *Arlington Heights*: (1) whether the historical background of the decision "reveals a series of official actions taken for invidious purposes"; (2) whether the sequence of events leading up to the challenged decision reveals discriminatory intent; (3) whether there were departures from the normal procedural sequence; (4) whether the factors usually considered important by the decisionmaker "strongly favor" a decision contrary to the one reached; and (5) the legislative or administrative history. *Id.* (citing *Arlington Heights*, 429 U.S. at 265-68). While Amicus takes no position on the lower court's holding, it is worth noting that the court's political structure analysis was likely unnecessary in light of its detailed intent analysis. *Compare Acosta*, 2013 WL 871892, at *13 (court's inquiry into Section 15-112's legislative history and purpose for the political structure analysis), *with id.* at *14-*15 (court's detailed

[3] (...continued)
schools and court-ordered busing to remedy *de jure* discrimination was not uncommon. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974).

analysis of *Arlington Heights* factors for discriminatory intent inquiry, including Section 15-112's historical background and legislative history, and the events leading up to Superintendent Huppenthal's actions).

Moreover, the Supreme Court is likely to address the continued viability of the political structure doctrine in *Coal. to Defend Affirmative Action*, 701 F.3d 466, *cert. granted sub nom.*, *Schuette*, 133 S. Ct. 1633. Thus, it would be prudent for this Court to refrain from extending the doctrine at this time and avoid a ruling that could very well be inconsistent with the Supreme Court's decision in that case.

CONCLUSION

For the reasons stated above, Amicus respectfully requests that the Court affirm the district court's holding that the political structure doctrine does not apply to this case. Amicus takes no position as to the constitutionality of Ariz. Rev. Stat. § 15-112.

DATED: November 25, 2013.

Respectfully submitted,

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