

**CALL IT WHAT IT IS: HOW MICHIGAN’S PUBLIC  
UNIVERSITIES PRACTICE AFFIRMATIVE ACTION FOR  
WHITE APPLICANTS**

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We are never going to reach equality in America until we achieve equality in education.

Justice Sonia Sotomayor<sup>1</sup>

## I. INTRODUCTION

In a state historically hostile to affirmative action,<sup>2</sup> it would seem ironic that Michigan's public universities use admissions policies which favor applicants of a specific ethnicity.<sup>3</sup> It is time Michiganders re-think what affirmative action means and who actually benefits from it: white applicants.<sup>4</sup>

Research has shown that considering standardized testing in college admissions favors wealthy, white applicants.<sup>5</sup> Favoring applicants related to alumni and donors clearly gives another leg-up for white students; the majority of the alumni and donor bases from public universities across Michigan are white.<sup>6</sup> This Note demonstrates how current college admission practices in Michigan's public universities constitute affirmative action for white applicants in violation of the Michigan constitution.<sup>7</sup>

Michigan adopted a constitutional amendment banning affirmative action based on race or ethnicity in public university admissions in 2006.<sup>8</sup> While this amendment appears to ban affirmative action practices for all races, it was clearly directed at policies that were used to benefit

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1. Abigail Golden-Vazquez, *Justice Sonia Sotomayor Speaks Out on Latino Identity and Civic Engagement*, ASPEN INST. (Apr. 3, 2017), <https://www.aspeninstitute.org/blog-posts/justice-sonia-sotomayor-speaks-latino-identity-civic-engagement/> [<https://web.archive.org/web/20220128162301/https://www.aspeninstitute.org/blog-posts/justice-sonia-sotomayor-speaks-latino-identity-civic-engagement/>].

2. Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES (Nov. 9, 2006), <https://www.nytimes.com/2006/11/09/us/politics/09michigan.html> [<https://web.archive.org/web/20211216152419/https://www.nytimes.com/2006/11/09/us/politics/09michigan.html>].

3. See *infra* Part III.A.1.

4. *Id.*

5. See Lauren Camera, *Test-Only Admissions Would Make Colleges More White, More Wealthy*, U.S. NEWS (June 24, 2019), <https://www.usnews.com/news/education-news/articles/2019-06-24/test-only-admissions-would-make-colleges-more-white-more-wealthy> [<https://web.archive.org/web/20220128170400/https://www.usnews.com/news/education-news/articles/2019-06-24/test-only-admissions-would-make-colleges-more-white-more-wealthy>].

6. See *infra* Part III.A.1.

7. See *infra* Part III.A.

8. Lewin, *supra* note 2.

underrepresented minorities.<sup>9</sup> While diversity-driven practices were made unconstitutional, and therefore abandoned by the public universities in the state, the current practices that directly increase the presence of white students on college campuses in Michigan still persist.<sup>10</sup>

As this Note argues that current admissions practices constitute affirmative action for white applicants and explores potential remedies, it is grounded in several truths. First, Michigan campuses are not diverse enough—more specifically, Black students are underrepresented across Michigan’s public universities.<sup>11</sup> Second, these public universities have a duty to Michiganders and their students to remedy this.<sup>12</sup> Finally, higher education admissions constitute only one, small piece of the puzzle in the fight for racial equity in Michigan.<sup>13</sup>

Part II of this Note establishes what higher education in public universities in Michigan looks like today. It also provides an overview of the current legal framework surrounding affirmative action and facially-neutral admissions policies. Further, it provides support for the importance of racially diverse campuses and the importance of affirmative action as a tool for achieving diversity on campus. Part III of this Note concludes that the current admissions policies that consider standardized testing scores and the applicant’s relationship to alumni or donors constitute affirmative action for white applicants. It then explores proposed litigation under Michigan’s constitutional ban on affirmative action and potential outcomes that could be used to increase diversity on Michigan campuses. Next, this section explores how disparate impact litigation could be another legal approach to preventing affirmative action for white students furthered by these facially-neutral admissions policies. Specifically, this section highlights how, under both litigation strategies, college campuses would likely become more diverse regardless of the success of the claims. Finally, Part IV of this Note concludes that the legitimizing effects and potential outcomes of this proposed litigation are worth the risks and should be considered as one part of the larger fight for racial equity in Michigan.

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9. *Id.*

10. *See infra* Part II.E.; *infra* Part III.A.1.

11. *See infra* Part II.A.1.

12. *See infra* Part II.D.

13. *See infra* Part III.C.

## II. BACKGROUND

*A. Demographic Information for Michigan and Michigan's Public Universities**1. Enrollment of Black Students in Michigan's Public Universities*

There are fifteen public universities in the State of Michigan.<sup>14</sup> The universities with the highest representation of Black students on campus are Wayne State University (14.6%),<sup>15</sup> Eastern Michigan University (16.2%),<sup>16</sup> and the University of Michigan–Flint (12.5%).<sup>17</sup> Western Michigan University (10.2%)<sup>18</sup> and Central Michigan University (10.9%)<sup>19</sup> round out the top five universities when ranked by representation of Black students. There are several universities falling in the 5–10% range, including Oakland University (8.4%),<sup>20</sup> Saginaw Valley State University (7.6%),<sup>21</sup> University of Michigan–Dearborn (7.9%),<sup>22</sup>

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14. *Institutional Research, Michigan Public Universities*, W. MICH. UNIV., <https://wmich.edu/institutionalresearch/peers/michiganpublic> [<https://web.archive.org/web/20220128171223/https://wmich.edu/institutionalresearch/peers/michiganpublic>] (last visited Mar. 5, 2022).

15. *Enrollment Headcount Quick Facts*, WAYNE STATE UNIV. <https://oira.wayne.edu/institutional-data/enrollment-headcount> [<https://web.archive.org/web/20220128171424/https://oira.wayne.edu/institutional-data/enrollment-headcount>] (last visited Mar. 5, 2022).

16. *Fast Facts*, E. MICH. UNIV., <https://www.emich.edu/facts/index.php> [<https://web.archive.org/web/20220128171837/https://www.emich.edu/facts/index.php>] (last visited Mar. 5, 2022).

17. *College Factual*, UNIV. OF MICH.–FLINT, <https://www.collegefactual.com/colleges/university-of-michigan-flint/student-life/diversity> [<https://web.archive.org/web/20220128172201/https://www.collegefactual.com/colleges/university-of-michigan-flint/student-life/diversity/>] (last visited Mar. 5, 2022).

18. *Western Michigan University*, DATA USA, <https://datausa.io/profile/university/western-michigan-university> [<https://web.archive.org/web/20220128172500/https://datausa.io/profile/university/western-michigan-university>] (last visited Mar. 5, 2022).

19. *Central Michigan University*, DATA USA, <https://datausa.io/profile/university/central-michigan-university> [<https://web.archive.org/web/20220128172858/https://datausa.io/profile/university/central-michigan-university>] (last visited Mar. 5, 2022).

20. *Fast Facts*, OAKLAND UNIV., <https://www.oakland.edu/Assets/Oakland/ucm/files-and-documents/pdfs/OU-Fast-Facts.pdf> [<https://web.archive.org/web/20220128184200/https://www.oakland.edu/Assets/Oakland/ucm/files-and-documents/pdfs/OU-Fast-Facts.pdf>] (last visited Mar. 5, 2022).

21. *Saginaw Valley State University*, DATA USA, <https://datausa.io/profile/university/saginaw-valley-state-university> [<https://web.archive.org/web/20220205005518/https://datausa.io/profile/university/saginaw-valley-state-university>] (last visited Mar. 5, 2022).

22. *University of Michigan–Dearborn*, DATA USA, <https://datausa.io/profile/university/university-of-michigan-dearborn> [<https://web.archive.org/web/20220205005>

Ferris State University (7.8%),<sup>23</sup> Michigan State University (7.0%),<sup>24</sup> and the University of Michigan (its main campus in Ann Arbor is at five percent).<sup>25</sup> The final four universities have strikingly low representation of Black students on their campus, with Grand Valley State University at 4.2%,<sup>26</sup> Northern Michigan University at 2%,<sup>27</sup> Lake Superior State University at 1.2%,<sup>28</sup> and Michigan Technological University at only 1%.<sup>29</sup>

## 2. Demographic Information in Michigan by County

The State of Michigan is 14.1% Black/African American over all.<sup>30</sup> The location of these Black communities is concentrated in a few counties in the Lower Peninsula,<sup>31</sup> where only three counties (Wayne, Genesee, and Saginaw) have a higher representation of Black residents compared to the

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858/<https://datausa.io/profile/university/university-of-michigan-dearborn>] (last visited Mar. 5, 2022).

23. *Ferris State University*, DATA USA, <https://datausa.io/profile/university/ferris-state-university> [<https://web.archive.org/web/20220205010422/https://datausa.io/profile/university/ferris-state-university>] (last visited Mar. 5, 2022).

24. *Michigan State University*, DATA USA, <https://datausa.io/profile/university/michigan-state-university> [<https://web.archive.org/web/20220205010600/https://datausa.io/profile/university/michigan-state-university>] (last visited Mar. 5, 2022).

25. *Diversity Equity and Inclusion, Data & Reports*, UNIV. OF MICH., <https://diversity.umich.edu/data-reports> [<https://web.archive.org/web/20220205010741/https://diversity.umich.edu/data-reports/>] (last visited Mar. 5, 2022).

26. *Diversity Dashboard*, GRAND VALLEY STATE UNIV., <https://www.gvsu.edu/inclusion/diversity-dashboard-128.htm> [<https://web.archive.org/web/20220205011008/https://www.gvsu.edu/inclusion/diversity-dashboard-128.htm>] (last visited Mar. 5, 2022).

27. *Northern Michigan University Demographics & Diversity*, COLLEGESIMPLY, <https://www.collegesimply.com/colleges/michigan/northern-michigan-university/students/> [<https://web.archive.org/web/20220205193852/https://www.collegesimply.com/colleges/michigan/northern-michigan-university/students/>] (last visited Mar. 5, 2022).

28. *Lake Superior State Student Population*, UNIVSTATS, <https://www.univstats.com/colleges/lake-superior-state-university/student-population/> [<https://web.archive.org/web/20220205194012/https://www.univstats.com/colleges/lake-superior-state-university/student-population/>] (last visited Mar. 5, 2022).

29. *Diversity*, MICH. TECH UNIV., <https://www.mtu.edu/diversity/facts/enrollment/> [<https://web.archive.org/web/20220205194201/https://www.mtu.edu/diversity/facts/enrollment/>] (last visited Mar. 5, 2022).

30. *QuickFacts Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MI> [<https://web.archive.org/web/20220206181143/https://www.census.gov/quickfacts/MI>] (last visited Mar. 5, 2022).

31. *QuickFacts Michigan, Map of Black or African American Alone, Percent in Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/map/MI/RHI225219> [<https://web.archive.org/web/20220206181343/https://www.census.gov/quickfacts/fact/map/MI/RHI225219>] (last visited Mar. 5, 2022) [hereinafter *Map of Black or African American Alone*].

state overall.<sup>32</sup> Wayne County is the largest county by population in the state, and 38.8% of the residents are Black.<sup>33</sup> Wayne County is also home to both Wayne State University<sup>34</sup> and University of Michigan–Dearborn.<sup>35</sup> Genesee County is home to the University of Michigan–Flint<sup>36</sup> and 20.3% of its residents are Black.<sup>37</sup> Saginaw County, which has a similar demographic makeup with 19.3% of its residents identifying as Black/African American,<sup>38</sup> is home to Saginaw Valley State University.<sup>39</sup>

Only three other counties in Michigan have a similar representation of Black residents when compared to the state as a whole: Berrien (14.9%), Muskegon (14.1%), and Oakland (14%).<sup>40</sup> Oakland County is the only one of these counties with a public university—Oakland University.<sup>41</sup> In Macomb County, 12.2% of residents are Black.<sup>42</sup>

The remaining public universities are in counties with populations that are less Black compared to the overall demographics of Michigan. Washtenaw County, home to both the University of Michigan<sup>43</sup> and Eastern Michigan University,<sup>44</sup> is 12.3% Black or African American.<sup>45</sup>

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32. *Michigan Black Population Percentage by County*, INDEXMUNDI, <https://www.indexmundi.com/facts/united-states/quick-facts/michigan/black-population-percentage#chart> [<https://web.archive.org/web/20220206182029/https://www.indexmundi.com/facts/united-states/quick-facts/michigan/black-population-percentage>] (last visited Mar. 5, 2022) [hereinafter *Michigan Black Population Percentage by County*].

33. *Map of Black or African American Alone*, *supra* note 31.

34. *Campus Map*, WAYNE STATE UNIV., <https://maps.wayne.edu/> [<https://web.archive.org/web/20220206182703/https://maps.wayne.edu/>] (last visited Mar. 5, 2022).

35. *Maps & Directions*, UNIV. OF MICH.–DEARBORN, <https://umdearborn.edu/about/visit-campus/maps-directions> [<https://web.archive.org/web/20220206182805/https://umdearborn.edu/about/visit-campus/maps-directions>] (last visited Mar. 5, 2022).

36. *Student Involvement and Leadership*, UNIV. OF MICHIGAN–FLINT, <https://www.umflint.edu/campus-life> [<https://web.archive.org/web/20220206182851/https://www.umflint.edu/campus-life/>] (last visited May 11, 2022).

37. *Map of Black or African American Alone*, *supra* note 31.

38. *Id.*

39. *Campus Map & Virtual Tour*, SAGINAW VALLEY STATE UNIV., <https://www.svsu.edu/go/visit/maps/> [<https://web.archive.org/web/20220206183305/https://www.svsu.edu/go/visit/maps/>] (last visited May 11, 2022).

40. *Michigan Black Population Percentage by County*, *supra* note 32.

41. *Campus*, OAKLAND UNIV., [https://www.oakland.edu/Assets/Oakland/about/files-and-documents/UCM-14891\\_OUCampusMap\\_Sept2016\\_20160915090513\\_270136.pdf](https://www.oakland.edu/Assets/Oakland/about/files-and-documents/UCM-14891_OUCampusMap_Sept2016_20160915090513_270136.pdf) (last visited Mar. 5, 2022).

42. *Michigan Black Population Percentage by County*, *supra* note 32.

43. *Campus Information*, UNIV. OF MICH., <https://maps.studentlife.umich.edu/> [<https://web.archive.org/web/20220206183613/https://maps.studentlife.umich.edu/>] (last visited May 11, 2022).

44. *Campus Map and Directions*, E. MICH. UNIV., <https://www.emich.edu/map/index.php> [<https://web.archive.org/web/20220206183757/https://www.emich.edu/map/index.php>] (last visited Mar. 5, 2022).

45. *Michigan Black Population Percentage by County*, *supra* note 32.

Michigan State University is located in Ingham County,<sup>46</sup> where 12.2% of the residents are Black/African American.<sup>47</sup> Kalamazoo County, home to Western Michigan University,<sup>48</sup> has a demographic breakdown of 11.8% of their residents identifying as Black/African American.<sup>49</sup> Lake Superior State University is located in Chippewa County,<sup>50</sup> where 6.7% of its residents identify as Black/African American.<sup>51</sup> In Mecosta County, where Ferris State University is located,<sup>52</sup> 2.9% of the residents identify as Black.<sup>53</sup> Grand Valley State University is located in Ottawa County,<sup>54</sup> where 1.9% of residents are Black,<sup>55</sup> Michigan Technological University is located in Houghton County<sup>56</sup> where only 0.9% of residents are Black,<sup>57</sup> and Northern Michigan University is located in Marquette County,<sup>58</sup> where 1.6% of residents are Black.<sup>59</sup>

### 3. Enrollment in Michigan's Public Universities by County

In 2017, of the fifteen public universities in Michigan, nine of them enrolled more students from the county where they are located compared to other Michigan counties.<sup>60</sup> For example, Lake Superior State University

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46. *Campus Life*, MICH. STATE UNIV., <https://msu.edu/campus-life> [<https://web.archive.org/web/20220206184218/https://msu.edu/campus-life>] (last visited Mar. 5, 2022).

47. *Michigan Black Population Percentage by County*, *supra* note 32.

48. *Admissions*, W. MICH. UNIV., <https://wmich.edu/admissions/visit> [<https://web.archive.org/web/20220206184352/https://wmich.edu/visit>] (last visited Mar. 5, 2022).

49. *Michigan Black Population Percentage by County*, *supra* note 32.

50. *Campus Map*, LAKE SUPERIOR STATE UNIV., <https://www.lssu.edu/campus-map/> [<https://web.archive.org/web/20220206184515/https://www.lssu.edu/campus-map/>] (last visited Mar. 5, 2022).

51. *Michigan Black Population Percentage by County*, *supra* note 32.

52. *Maps & Directions, Parking*, FERRIS STATE UNIV., <https://www.ferris.edu/HTMLS/administration/studentaffairs/RC/Maps.htm> [<https://web.archive.org/web/20220206184717/https://www.ferris.edu/administration/studentaffairs/RC/Maps.htm>] (last visited Mar. 5, 2022).

53. *Michigan Black Population Percentage by County*, *supra* note 32.

54. *Maps & Directions*, GRAND VALLEY STATE UNIV., <https://www.gvsu.edu/maps.htm> [<https://web.archive.org/web/20220206184835/https://www.gvsu.edu/maps.htm>] (last visited Mar. 5, 2022).

55. *Michigan Black Population Percentage by County*, *supra* note 32.

56. *A Tour of Michigan Tech and Beyond*, MICH. TECH UNIV., <https://www.mtu.edu/tour/campus/> [<https://web.archive.org/web/20220206184945/https://www.mtu.edu/tour/campus/>] (last visited Mar. 5, 2022).

57. *Michigan Black Population Percentage by County*, *supra* note 32.

58. *NMU Campus*, N. MICH. UNIV., <https://nmu.edu/nmucampus> [<https://web.archive.org/web/20220206185113/https://nmu.edu/nmucampus>] (last visited Mar. 5, 2022).

59. *Michigan Black Population Percentage by County*, *supra* note 32.

60. See Senate Fiscal Agency, *Study of Michigan Public University Enrollment Patterns—By County and Institution*, MICH. SENATE (Sept. 2018), <https://www.senate>.

accepts more students from Chippewa County than any other county in Michigan.<sup>61</sup> These nine universities are Lake Superior State, Michigan Tech, Northern Michigan, Oakland, Saginaw Valley, University of Michigan–Dearborn, University of Michigan–Flint, Wayne State, and Western Michigan.<sup>62</sup>

Six of the counties introduced thus far send a majority of their college students to the public university within the county.<sup>63</sup> For example, in Chippewa County, 59% of college students in the county who went to an in-state public university went to Lake Superior State University.<sup>64</sup> The other counties include Houghton County (58.5% went to Michigan Technological University),<sup>65</sup> Isabella County (65% went to Central Michigan University),<sup>66</sup> Kalamazoo County (67% went to Western Michigan University),<sup>67</sup> Marquette County (77.7% went to Northern Michigan University),<sup>68</sup> and Mecosta County (67.5% went to Ferris State University).<sup>69</sup> The remainder of the counties that contain a public university in Michigan had less than 50% of their college-bound residents enroll in the public university within the county.<sup>70</sup>

The counties with the largest populations of Black residents are sending thousands of students to Michigan's public universities.<sup>71</sup> In 2017 alone, Wayne County had 39,986 residents enrolled throughout the state,<sup>72</sup> Genesee County had 9,425,<sup>73</sup> and Saginaw had 4,408.<sup>74</sup> Berrien, Muskegon, and Oakland Counties sent 46,388 residents to Michigan's public universities in 2017 collectively.<sup>75</sup>

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michigan.gov/sfa/Publications/HiEdEnrollment/PublicUniversityEnrollmentPatterns2018.pdf [https://web.archive.org/web/20220206185209/https://www.senate.michigan.gov/sfa/Publications/HiEdEnrollment/PublicUniversityEnrollmentPatterns2018.pdf].

61. *Id.* at 114.

62. *See id.*

63. *See id.*

64. *Id.* at 32.

65. *Id.* at 46.

66. *Id.* at 52.

67. *Id.* at 54.

68. *Id.* at 67.

69. *Id.* at 69.

70. *See id.*

71. *See id.*

72. *Id.* at 97.

73. *Id.* at 40.

74. *Id.* at 88.

75. *See id.*



*B. Acceptance to Michigan's Public Universities*

All of the public universities in Michigan require applications and high school transcripts with grade point averages (GPA).<sup>76</sup> Some of the universities require an application fee, which can at times be waived depending on individual circumstances.<sup>77</sup> Several use the Common Application system, while others have individual application requirements found on their websites.<sup>78</sup> Discussed below are some of the unique requirements from each school, questions they ask on their applications, and their approach to standardized testing.

*1. Information Collected by Universities that Use the Common Application*

Nine of Michigan's public universities use the Common App for students applying to attend.<sup>79</sup> Those nine universities are Central Michigan University, Eastern Michigan University, Lake Superior State University, Michigan State University, all three campuses of the University of Michigan, Wayne State University, and Western Michigan University.<sup>80</sup> This is a free application that students use to apply to multiple colleges at once.<sup>81</sup> In the demographic section of the student's profile within the application is a question where students are asked to identify themselves; the options presented include American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and white.<sup>82</sup> The questions within this demographics section are optional, and the application indicates the answers will be "helpful to colleges."<sup>83</sup> The application also asks about where the student lives and was born, how many languages they are proficient in, and their citizenship status.<sup>84</sup>

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76. See *College Admissions Guide: Process and Prep*, THE PRINCETON REV., <https://www.princetonreview.com/college-advice/college-admissions-guide> [<https://web.archive.org/web/20220206190338/https://www.princetonreview.com/college-advice/college-admissions-guide>] (last visited Mar. 5, 2022).

77. See generally *Admissions*, GRAND VALLEY STATE UNIV., <https://www.gvsu.edu/admissions/undergraduate-application-23.htm> [<https://web.archive.org/web/20220206190519/https://www.gvsu.edu/admissions/undergraduate-application-23.htm>] (last visited Mar. 5, 2022).

78. See generally COMMON APP, <https://www.commonapp.org/> [<https://web.archive.org/web/20220206190828/https://www.commonapp.org/>] (last visited Mar. 5, 2022).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

The Common App also has an entire section dedicated to the student's family.<sup>85</sup> It asks for their parents marital status, each parents birth country, their occupation, and the highest education level for each parent.<sup>86</sup> The following section takes down all of the details of the student's educational background, including where they went to school and graduated from.<sup>87</sup> There is also a section where the student is asked if they want to alert colleges to any other information about ACT/SAT results or future tests, or the results of advanced placement or international baccalaureate testing.<sup>88</sup>

Students on the Common App are then asked to search for colleges they plan to submit their application to and each college has specific questions for the student to answer.<sup>89</sup> The University of Michigan asks about the student's family's financial information, for information about any felony adjudications, and has a detailed question section to identify any relationship with University of Michigan alumni.<sup>90</sup> The University of Michigan–Dearborn, Western Michigan University, and Lake Superior State University also have an alumni question.<sup>91</sup> Michigan State University asks specifically if the student's parents have earned a bachelor's degree.<sup>92</sup> The University of Michigan-Flint has a question specifically asking if the student is Middle Eastern or North African.<sup>93</sup> Wayne State University asks students if they have been in foster care after the age of thirteen.<sup>94</sup>

## *2. Schools Which Use Their Own Application System*

The Michigan universities that do not use the Common App include Northern Michigan University, Michigan Technological University, Ferris State University, Grand Valley State University, Saginaw Valley State University, and Oakland University.<sup>95</sup> Each of these universities instead offer the option to apply directly to their university with a unique application. Notable questions from these individual applications include a question from Michigan Technological University and Grand Valley

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85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See generally id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See generally id.*

State University asking for the applicant's relation to any alumni.<sup>96</sup> Most of these universities also ask an optional question about race/ethnicity.<sup>97</sup>

### *3. Standardized Testing Requirements for Admission to Michigan Public Universities*

The Michigan public universities can be sorted into three categories regarding their requirements for standardized test results during the admission process.<sup>98</sup> There are the universities that require them, universities where test scores are optional and only supplemental, and schools that are moving toward test-blind admissions.<sup>99</sup>

The first category of universities is the largest—schools that require ACT/SAT scores as part of their applications for admissions. The universities in this category include all three of the University of Michigan campuses, Central Michigan University, Eastern Michigan University, Michigan State University, Western Michigan University, Wayne State University, Grand Valley State University, Oakland University, and Michigan Tech.<sup>100</sup> For the 2020 and 2021 academic years, these schools have all adopted test-optional admissions because of the COVID-19 pandemic and the impact on testing availability for applicants.<sup>101</sup> However, these schools have specified this testing-optional admissions policy is only for the 2020/2021 application cycles.<sup>102</sup>

The second category is much smaller—universities that, outside of a pandemic, list test scores as optional. This includes Lake Superior State

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96. *First-Year Application*, MICH. TECH UNIV., <https://www.gomichigantech.org/freshman/> [<https://web.archive.org/web/20220206191426/https://www.gomichigantech.org/freshman/>] (last visited Mar. 5, 2022); *Application for Undergraduate Admission*, GRAND VALLEY STATE UNIV., [https://www.gvsu.edu/cms4/asset/0DBA5D42-CF6E-47EE-189D48B651FB2947/19-0354\\_undergrad\\_application\\_accessible\\_wtitle\\_ix\\_update.Pdf](https://www.gvsu.edu/cms4/asset/0DBA5D42-CF6E-47EE-189D48B651FB2947/19-0354_undergrad_application_accessible_wtitle_ix_update.Pdf) [[https://web.archive.org/web/20220206191703/https://www.gvsu.edu/cms4/asset/0DBA5D42-CF6E-47EE-189D48B651FB2947/19-0354\\_undergrad\\_application\\_accessible\\_wtitle\\_ix\\_update.pdf](https://web.archive.org/web/20220206191703/https://www.gvsu.edu/cms4/asset/0DBA5D42-CF6E-47EE-189D48B651FB2947/19-0354_undergrad_application_accessible_wtitle_ix_update.pdf)] (last visited Mar. 5, 2022).

97. *See generally id.*

98. *See generally College COVID Response Guide*, MICH. COLL. ACCESS NETWORK, <https://micollegeaccess.org/uploads//2020/07/07/college-covid-response-guide.pdf> [<https://web.archive.org/web/20220403192517/https://micollegeaccess.org/uploads//2020/07/07/college-covid-response-guide.pdf>] (last visited Nov. 15, 2020).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

University,<sup>103</sup> Saginaw Valley State University,<sup>104</sup> and Ferris State University.<sup>105</sup> Lake Superior State University lists tests scores as supplemental and indicates they will have no impact on admissions decisions.<sup>106</sup> Saginaw Valley State University, similar to the universities in category one, has stated that it is adopting a test-optional approach amid the COVID-19 pandemic.<sup>107</sup> However, unlike the other schools in category one, SVSU has stated they are seriously considering keeping this policy in the future.<sup>108</sup> In 2018, Ferris State University started a four-year pilot program where test scores are optional, in the wake of academic research showing that scores are unreliable and may prevent many qualified candidates from pursuing higher education, as is discussed below.<sup>109</sup>

The final category includes only one school: Northern Michigan University. NMU has differed from the other universities in the pandemic by adopting a test-blind policy.<sup>110</sup> This means that rather than providing students with the option to submit their scores for consideration or omitting them entirely, NMU has decided to completely ignore testing in their applications.<sup>111</sup> Northern Michigan University has also indicated that, pending approval by its Academic Senate, this will be a permanent policy.<sup>112</sup>

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103. *Admissions*, LAKE SUPERIOR STATE UNIV., <https://www.lssu.edu/admissions/how-to-apply/> [<https://web.archive.org/web/20220305172421/https://www.lssu.edu/admissions/how-to-apply/>] (last visited Nov. 14, 2020).

104. *Freshman*, SAGINAW VALLEY STATE UNIV., <https://www.svsu.edu/admissions/freshmen/> [<https://web.archive.org/web/20220305172537/https://www.svsu.edu/admissions/freshmen/>] (last visited Nov. 14, 2020).

105. *Test-Optional Admission Consideration Pilot Program*, FERRIS STATE UNIV., [https://www.ferris.edu/admissions/test-optional/homepage.htm](https://www.ferris.edu/admissions/test-optional/homepage.htm#:~:text=Ferris%20test%2Doptional%20admission%20policy,submitting%20ACT%20or%20SAT%20scores.&text=Test%20scores%20will%20still%20be,add%20value%20to%20their%20applications) [<https://web.archive.org/web/20220305172750/https://www.ferris.edu/admissions/test-optional/homepage.htm>] (last visited Nov. 15, 2020).

106. *Admissions*, LAKE SUPERIOR STATE UNIV., *supra* note 103.

107. MICH. COLL. ACCESS NETWORK, *supra* note 98.

108. *Freshman*, SAGINAW VALLEY STATE UNIV., *supra* note 104.

109. *Test-Optional Admission Consideration Pilot Program*, FERRIS STATE UNIV., *supra* note 105.

110. Gerri Daniels, *NMU Pilots 'Test-Blind' Admissions Policy*, N. MICH. UNIV. (Jun. 10, 2020), <https://news.nmu.edu/nmu-pilots-test-blind-admissions-policy> [<http://web.archive.org/web/20220205183054/https://news.nmu.edu/nmu-pilots-test-blind-admissions-policy>].

111. *Id.*

112. *Id.*

*C. Problems with Admissions Criteria*

In recent years, many colleges and universities have stopped requiring the SAT and/or ACT in their admissions criteria.<sup>113</sup> For many universities, this is a result of recent research that shows the implicit bias in these tests.<sup>114</sup> This research has demonstrated that considering only these test scores in college admissions tends to make colleges “more wealthy and a lot more white.”<sup>115</sup> Disparities among racial groups are highlighted by test results, and many universities are dropping these standardized tests as admission requirements.<sup>116</sup> The University of California made news after deciding to not require any tests for admissions across their campuses.<sup>117</sup> In Michigan, as noted above, Ferris State University began a pilot program in 2018 where standardized test results were listed as optional in its application.<sup>118</sup> The University has provided three primary justifications to support this decision: (1) the tests are not a great predictor of college readiness, (2) they favor wealthy students, and (3) “[o]ver-reliance on standardized testing . . . may deny higher education access.”<sup>119</sup>

Universities have also come under fire in the media for favoring students who are related to alumni and donors or staff.<sup>120</sup> It was recently reported that 43% of the white students at Harvard are related to donors,

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113. See Alina Tugend, *Questioning Their Fairness, a Record Number of Colleges Stop Requiring the SAT and ACT*, HECHINGER REPORT (Oct. 9, 2019), <https://hechingerreport.org/questioning-their-fairness-a-record-number-of-colleges-stop-requiring-the-sat-and-act/> [<http://web.archive.org/web/20211231155749/https://hechingerreport.org/questioning-their-fairness-a-record-number-of-colleges-stop-requiring-the-sat-and-act/>].

114. *Id.*

115. See Camera, *supra* note 5.

116. See Kim Elsesser, *Lawsuit Claims SAT And ACT Are Biased—Here’s What Research Says*, FORBES (Dec. 11, 2019, 3:58 PM), <https://www.forbes.com/sites/kimelsesser/2019/12/11/lawsuit-claims-sat-and-act-are-biased-heres-what-research-says/#ac846d53c429> [<https://web.archive.org/web/20220131231621/https://www.forbes.com/sites/kimelsesser/2019/12/11/lawsuit-claims-sat-and-act-are-biased-heres-what-research-says/?sh=2e7ceb943c42>].

117. Shawn Hubler, *Why is the SAT Falling Out of Favor?*, N.Y. TIMES (May 15, 2021), <https://www.nytimes.com/2020/05/23/us/SAT-ACT-abolish-debate-california.html> [<https://web.archive.org/web/20220105205014/https://www.nytimes.com/2020/05/23/us/SAT-ACT-abolish-debate-california.html>].

118. *Test-Optional Admission Consideration Pilot Program*, FERRIS STATE UNIV., *supra* note 105.

119. *Id.*

120. Daniella Silva, *Study on Harvard Finds 43 Percent of White Students are Legacy, Athletes, Related to Donors or Staff*, NBC NEWS (Sept. 30, 2019, 1:04 PM), <https://www.nbcnews.com/news/us-news/study-harvard-finds-43-percent-white-students-are-legacy-athletes-n1060361> [<https://web.archive.org/web/20220124220737/https://www.nbcnews.com/news/us-news/study-harvard-finds-43-percent-white-students-are-legacy-athletes-n1060361>].

staff, alumni, or were athletes.<sup>121</sup> The University of Michigan provides on its frequently asked questions page that “[l]egacy status is not a preference in the admissions process but does serve as context.”<sup>122</sup> This FAQ indicates that the university considers this information to determine which students are more likely to enroll if accepted.<sup>123</sup> At the University of Michigan, an overwhelming majority of alumni are white.<sup>124</sup>

#### *D. Value of Racially Diverse Campuses*

Even as racial minorities continue to be underrepresented on Michigan campuses,<sup>125</sup> there is research that indicates that diversity is important for the educational process.<sup>126</sup> The results of a University of California Berkeley study found that student development benefitted both from cross-racial interactions as well as being in an environment that encouraged those interactions.<sup>127</sup> Research has established that “actual experience that students have with diverse peers” plays a vital role in preparing students to be active participants in a democracy in a multicultural world.<sup>128</sup> Further, diversity-focused and race-conscious

121. *Id.*

122. *Frequently Asked Questions*, UNIV. OF MICH., <https://admissions.umich.edu/assets/docs/FAQs-EA.pdf> [<https://web.archive.org/web/20211123102912/https://admissions.umich.edu/assets/docs/FAQs-EA.pdf>].

123. *Id.*

124. See Online Exhibits, *Ann Arbor Historical Notes, Population, and Enrollment*, UNIV. OF MICH. LIBR., <https://apps.lib.umich.edu/online-exhibits/exhibits/show/history-of-race-at-um/ann-arbor-and-race/ann-arbor-historical-notes--po> [<https://web.archive.org/web/20220205223730/https://apps.lib.umich.edu/online-exhibits/exhibits/show/history-of-race-at-um/ann-arbor-and-race/ann-arbor-historical-notes--po>] (last visited Mar. 5, 2022).

125. See *supra* Part II.A.1.

126. See *On the Importance of Diversity in Higher Education*, AM. COUNCIL ON EDUC., <https://www.acenet.edu/Documents/BoardDiversityStatement-June2012.pdf> [<https://web.archive.org/web/20220115022340/https://www.acenet.edu/Documents/BoardDiversityStatement-June2012.pdf>] (last visited Feb. 7, 2022); see also Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell J. Chang et al. eds., 2003).

127. Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 *J. HIGHER EDUC.* 430, 448–49 (2006), [https://www.jstor.org/stable/pdf/3838696.pdf?refreqid=excelsior%3Ad4b9ee1879b26319899b278f83c1ee5c&ab\\_segments=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/3838696.pdf?refreqid=excelsior%3Ad4b9ee1879b26319899b278f83c1ee5c&ab_segments=&origin=&acceptTC=1) [[https://web.archive.org/web/20220515195743/https://www.jstor.org/stable/3838696?refreqid=excelsior%3Ad4b9ee1879b26319899b278f83c1ee5c&ab\\_segments=&origin=&acceptTC=1](https://web.archive.org/web/20220515195743/https://www.jstor.org/stable/3838696?refreqid=excelsior%3Ad4b9ee1879b26319899b278f83c1ee5c&ab_segments=&origin=&acceptTC=1)].

128. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 *J. SOC. ISSUES* 17, 32 (2004), <https://spssi-onlinelibrary-wiley-com.proxy.lib.wayne.edu/doi/pdfdirect/10.1111/j.0022-4537.2004.00097.x> [<https://web.archive.org/doi/pdfdirect/10.1111/j.0022-4537.2004.00097.x>].

policies in admissions are a key step toward education equity.<sup>129</sup> Admissions policies that both consider the systemic barriers that students of color face while applying to college and attempt to remedy the institutional disadvantages such students face help more students of color access higher education.<sup>130</sup> Finally, research suggests that students of color with access to top-tier education through these programs perform similarly to their white, high-income counterparts.<sup>131</sup>

*E. Current Legal Framework: Michigan's Constitutional Ban on Affirmative Action*

In 1978, the U.S. Supreme Court held in *Regents of the University of California v. Bakke* that while race may be considered in admissions policies, racial quotas are unconstitutional.<sup>132</sup> A few decades later, in 2003, two Michigan cases made their way to the U.S. Supreme Court. In one, *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's policy of favoring underrepresented minority groups.<sup>133</sup> In *Grutter*, the Court found that the policy to favor these underrepresented minority groups did not violate the Fourteenth Amendment so long as each applicant is considered as an individual and race is not the only factor considered.<sup>134</sup> On the same day, the Supreme Court decided *Gratz v. Bollinger*, in which the Court struck down the University of Michigan's undergraduate policy that awarded more points to minority applicants.<sup>135</sup>

Public pushback after *Grutter* led to amendment of the Michigan Constitution.<sup>136</sup> This amendment, presented to voters in 2006 as Proposal 2, or the Michigan Civil Rights Initiative, was passed and the constitution was amended to ban affirmative action in public education.<sup>137</sup> The

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org/web/20220515195923/https://login.proxy.lib.wayne.edu/login?qurl=https://spssi.onlinelibrary.wiley.com%2fdoi%2f10.1111%2fj.0022-4537.2004.00097.x].

129. See Connor Maxwell & Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, CTR. FOR AMERICAN PROGRESS (Oct. 1, 2019), <https://www.americanprogress.org/issues/race/news/2019/10/01/471085/5-reasons-support-affirmative-action-college-admissions/> [https://web.archive.org/web/20220204132831/https://www.americanprogress.org/article/5-reasons-support-affirmative-action-college-admissions/].

130. *Id.*

131. *Id.*

132. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1987).

133. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

134. See *id.* at 334.

135. *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

136. See Lewin, *supra* note 2.

137. *Id.*; *2006 Proposal 2*, UNIV. OF MICH., <https://diversity.umich.edu/about/history/legal-matters/2006-proposal-2/> [https://web.archive.org/web/20220403193800/https://diversity.umich.edu/ABOUT/HISTORY/LEGAL-MATTERS/2006-PROPOSAL-2/] (last visited May 15, 2022).

Michigan Constitution now declares that any “public college or university. . . 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 operation of public education.<sup>138</sup> This has prevented the public universities in Michigan from considering the race or ethnicity of their applicants when making admission decisions.<sup>139</sup>

The amendment was quickly met with legal pushback by supporters of affirmative action.<sup>140</sup> However, the U.S. Supreme Court upheld the constitutional ban on affirmative action in 2014 in *Schuette v. Coalition to Defend Affirmative Action*.<sup>141</sup> In *Schuette*, the Court held that the Fourteenth Amendment’s Equal Protection Clause does not prevent states from banning affirmative action in education.<sup>142</sup> More recently, an amicus brief by the University of Michigan asserts that the ban has had devastating effects on campus diversity through a sharp decrease in enrolled minority students since it took effect.<sup>143</sup>

#### *F. Current Legal Framework: Disparate Impact Claims*

The disparate impact doctrine is another relevant framework to the college admissions criteria in Michigan’s public universities.<sup>144</sup> A disparate impact claim would involve considering the discriminatory impacts of these facially neutral admissions policies.<sup>145</sup> The Michigan Court of Appeals held that a disparate impact claim is viable under Michigan law.<sup>146</sup> Finally, it is likely that the Michigan Supreme Court

138. MICH. CONST. art. I, § 26, cl. 1.

139. *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 298–99 (2014).

140. Lewin, *supra* note 2.

141. *See* 572 U.S. 291, 314 (2014).

142. *See id.*

143. Brief for the Univ. of Mich. as Amicus Curiae Supporting Respondents at 26–27, *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (No. 14-981); *see also* Anemona Hartocollis, *As Justices Weigh Affirmative Action, Michigan Offers an Alternative*, N.Y. TIMES (Jan. 4, 2016), <https://www.nytimes.com/2016/01/05/us/affirmative-action-supreme-court-michigan.html> [<https://web.archive.org/web/20201108163251/http://www.nytimes.com/2016/01/05/us/affirmative-action-supreme-court-michigan.html>].

144. *See generally* Michael G. Perez, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467 (2004).

145. *See e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

146. *See Farmington Educ. Ass’n v. Farmington Sch. Dist.*, 133 Mich. App. 566, 351 N.W.2d 242 (1984). The Michigan Supreme Court has referenced the holding in *Farmington*, indicating that under Michigan’s Civil Rights Act, a plaintiff could bring a disparate impact claim. *See Lytle v. Malady*, 458 Mich. 153, 177, 579 N.W.2d 906, 916 n.26 (1998).



would follow the U.S. Supreme Court's lead with respect to this doctrine.<sup>147</sup>

### III. ANALYSIS

This Note is grounded in evidence that affirmative action is one way for minority students to achieve education equity and that a diverse campus is beneficial for the entire student body.<sup>148</sup> Based on the above background information, this Note will explore what potential litigation could look like under Michigan's ban on affirmative action or under a disparate impact analysis. First, it will explore a potential claim that current practices constitute affirmative action for white students in violation of Michigan's constitution. It will then discuss possible outcomes of litigation under the ban and what those outcomes would mean for universities attempting to increase diversity in admissions moving forward. Next, it will explore a disparate impact claim, and the likely outcomes and impacts of such litigation. Finally, this Note recognizes that litigation plays only a small role in a larger movement for education equity in Michigan.

#### *A. Claim Against Michigan Universities for Violating the Ban on Affirmative Action*

##### *1. Current Admissions Practices Are Affirmative Action for White Applicants*

Based on the information discussed above, Michigan's public universities' current admissions policies constitute affirmative action for white applicants. Similar to practices used in other states to increase the presence of underrepresented minorities on campus,<sup>149</sup> the practices used in Michigan work to increase the representation of white students on Michigan campuses. This is apparent given that all the student bodies of Michigan's universities are disproportionately white compared to the state

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147. *Haynie v. State*, 468 Mich. 302, 325, 664 N.W.2d 129, 149 (2003) (J. Cavanagh, dissenting) (“[O]ur courts have recognized both disparate-treatment and disparate-impact actions identical to those articulated by the United States Supreme Court.”); *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

148. Maxwell & Garcia, *supra* note 129.

149. *See* Eboni Nelson, *Colleges Need Affirmative Action—But It Can Be Expanded*, THE CONVERSATION (Aug. 21, 2017, 6:57 AM), <https://theconversation.com/colleges-need-affirmative-action-but-it-can-be-expanded-82633> [<https://web.archive.org/web/20220126091855/https://theconversation.com/colleges-need-affirmative-action-but-it-can-be-expanded-82633>].

overall and to the counties in which they sit.<sup>150</sup> Even Wayne State University, with the highest representation of Black students on campus in Michigan, falls short when compared to the racial breakdown of Wayne County.<sup>151</sup> At Wayne State, roughly thirty-seven percent of students come from Wayne County,<sup>152</sup> a county that is roughly forty percent Black.<sup>153</sup> However, less than fifteen percent of the students on Wayne State's campus are Black.<sup>154</sup> Indeed, Wayne State is located in one of the Blackest cities in the United States—Detroit—and still has a campus that is made up of eighty-five percent non-Black students.<sup>155</sup>

While the admissions policies that consider relationship to alumni, relationship to donors, and standardized test scores are facially neutral, evidence shows they can be used as a proxy for race.<sup>156</sup> This is similar to facially neutral affirmative action practices that universities use to increase diversity,<sup>157</sup> but instead these considerations work to *decrease* racial diversity on campus.<sup>158</sup> Factors like relationship to donors or alumni and standardized test scores resemble other factors that universities consider in admission as proxy for race, such as socio-economic status, which high school an applicant graduated from, and GPA or class rank.<sup>159</sup>

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150. See *supra* Part II.A.1–2.

151. *Id.*

152. See Senate Fiscal Agency, *supra* note 60.

153. *Wayne County, MI, Race and Ethnicity*, DATA USA, <https://datausa.io/profile/geo/wayne-county-mi#demographics> [<https://web.archive.org/web/20210908232643/https://datausa.io/profile/geo/wayne-county-mi>] (last visited Feb. 7, 2022).

154. *Enrollment Headcount Quick Facts*, WAYNE STATE UNIV., *supra* note 15.

155. Terrell Jermaine Starr, *Detroit: Why The D is the Blackest City of All Time*, THE ROOT (Feb. 26, 2019, 9:00 AM), <https://www.theroot.com/detroit-why-the-d-is-the-blackest-city-of-all-time-1832881152> [<https://web.archive.org/web/20210728172416/https://www.theroot.com/detroit-why-the-d-is-the-blackest-city-of-all-time-1832881152>]; *Id.*

156. See Katherine Hu, *The Real Affirmative Action Dominating Admission to Elite Colleges Benefits Privileged White Kids*, L.A. TIMES (Aug. 27, 2020, 4:00 AM), <https://www.latimes.com/opinion/story/2020-08-27/affirmative-action-yale-harvard-admissions-legacies> [<https://web.archive.org/web/20220204201106/https://www.latimes.com/opinion/story/2020-08-27/affirmative-action-yale-harvard-admissions-legacies>].

157. See Richard Rothstein, *Should Race-Based Affirmative Action Be Replaced by Race-Neutral Preferences for Low-Income Students? The Discussion Continues*, WORKING ECON. BLOG (Aug. 4, 2014, 11:43 AM), <https://www.epi.org/blog/race-based-affirmative-action-replaced-race/> [<https://web.archive.org/web/20220403195442/https://www.epi.org/blog/race-based-affirmative-action-replaced-race/>].

158. See Scott Jaschik, *Michigan Doesn't Consider Legacy Status, Except When It Does*, INSIDE HIGHER ED (March 25, 2019), <https://www.insidehighered.com/admissions/article/2019/03/25/u-michigan-says-it-doesnt-consider-legacy-status-admissions-some> [<https://web.archive.org/web/20210624181319/https://www.insidehighered.com/admissions/article/2019/03/25/u-michigan-says-it-doesnt-consider-legacy-status-admissions-some>].

159. Nelson, *supra* note 149.

## 2. *Opportunity for Litigation*

These admissions practices constitute affirmative action for white applicants in violation of Article I Section 26 of the Michigan Constitution and would thus serve as the foundation for a claim against the public universities in Michigan.<sup>160</sup> For the purpose of this discussion, a claim against the University of Michigan Ann Arbor will be used as an example since that university considers prospective students' relationships to donors and alumni as well as standardized test scores when making admissions decisions.<sup>161</sup>

While the constitutional ban on affirmative action has previously been challenged, there has been no claim against a university in Michigan for violation of the ban.<sup>162</sup> A claimant suing the University of Michigan would argue that because alumni relations, donor relations, and high standardized test scores are factors that disproportionately benefit prospective white students, when the University considers these criteria in admissions it gives preferential treatment to white students. This violates Article I Section 26.<sup>163</sup>

## 3. *Potential Outcomes*

One possible outcome of this proposed litigation is that the court will find that the University of Michigan violates Article I Section 26 of the Michigan Constitution when it considers an applicant's relationship with alumni or a donor or her standardized testing scores. This outcome would require the court to find a violation based on the impact of facially neutral policies, an analysis the Michigan Supreme Court has not yet considered.<sup>164</sup> Although federal doctrine has recently upheld affirmative action practices at universities using race-conscious admissions policies that pass strict scrutiny,<sup>165</sup> Michigan's constitutional ban is stricter than that found in federal doctrine. If the Michigan Supreme Court is persuaded that these policies are so closely tied to race such that universities treat them as proxies for race in making admission decisions, the court could find this violates Article I section 26 on its face.

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160. MICH. CONST. art. I, § 26.

161. Jaschik, *supra* note 158.

162. This assertion is based on a search of legal databases, which returned zero cases citing Article I § 26 in a claim against a Michigan university.

163. MICH. CONST. art. I, § 26.

164. *See generally* Farmington Educ. Ass'n v. Farmington Sch. Dist., 133 Mich. App. 566, 351 N.W.2d 242 (1984).

165. *See* Fisher v. Univ. of Texas, 570 U.S. 297 (2013).

Another possible outcome of this litigation is that the Michigan Supreme Court finds no constitutional violation. The court could reach this conclusion because these admissions practices, while essentially a proxy for race, are facially neutral. The constitutional ban prohibits universities from considering race in admissions decisions, and the University will likely argue that it is not considering race when using these factors in making admissions decisions. It seems more likely that the Michigan Supreme Court will find no violation here because these admissions factors appear racially neutral and do not violate the constitution on its face.

#### *4. How Either Outcome Can Help Colleges Increase Diversity on Campus*

Both the above potential outcomes could help increase diversity on college campuses. If the court rules that the University has violated the constitutional ban on affirmative action, it could order colleges and universities to stop using practices that inherently favor white students. Alternatively, if the court finds that there is no constitutional violation where admissions policies are facially neutral, this would create helpful precedent for schools looking for ways to accept more Black students on campus.

The first potential outcome discussed above—that current admissions practices implicitly favoring white applicants violate the constitutional ban on affirmative action—could result in direct changes to current admissions practices. A ruling finding a constitutional violation could lead to the end of practices that favor white students in college admissions. By removing these policies that favor white students, the playing field would begin to level for students who are systematically disfavored by those policies.<sup>166</sup> As discussed in Section C below, this potential remedy is only one piece of a much larger movement.<sup>167</sup> Even if a court found that these admissions policies violate the constitutional ban and ordered a remedy, there are many systematic barriers that Black students would continue to face in the application process and on campus.<sup>168</sup> This is not to say that this litigation is not worth pursuing but rather to recognize that this is not an end-all-be-all solution to racism in Michigan's higher education system.

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166. See generally Camera, *supra* note 5.

167. *Infra* Section III.C.

168. Madeline St. Amour, *What Happens Before College Matters*, INSIDE HIGHER ED (Oct. 20, 2020), <https://www.insidehighered.com/news/2020/10/20/black-students-need-changes-policies-and-structures-beyond-higher-education> [<https://web.archive.org/web/20220201040137/https://www.insidehighered.com/news/2020/10/20/black-students-need-changes-policies-and-structures-beyond-higher-education>].

Alternatively, helpful precedent could be set if the court were to rule that there is no violation of the ban on affirmative action because the practices are facially neutral as to race. This precedent could insulate and protect universities who want to increase diversity on campus by using facially-neutral proxies for race. For example, Wayne State University recently introduced the Heart of Detroit Tuition pledge which grants free tuition for any graduating Detroit students.<sup>169</sup> Policies like those favorably considering graduates from certain high schools or zip codes could be used to increase diversity through admissions without violating the constitutional ban on affirmative action. Further, colleges in the Metro Detroit area could point to their legitimate interest in wanting to enroll more Detroiters as evidence that their policy is race-neutral, while universities around the state could build relationships with majority-Black high schools without providing race as an explicit reason.

Bringing litigation against Michigan universities for their admissions policies under the claim that their current practices are affirmative action for white students therefore presents one legal avenue for increasing diversity on college campuses across Michigan.

#### *B. Applying a Disparate Impact Analysis*

In addition to the above proposed litigation, a claimant could bring an alternative claim using a disparate impact analysis.<sup>170</sup> This claim is based on the fact that public universities in Michigan are using facially-neutral policies that impact students differently based on their race, leading to the preference of white students in college admissions.<sup>171</sup> Similar to the two potential litigation outcomes discussed above, bringing this claim could lead to universities increasing diversity on their campuses regardless of the claim's success. First, if the claim were successful the court could order the current facially neutral policies to be discontinued because of the disparate impact they have in favor of white students. Alternatively, the court could find that there is no disparate impact or refuse to apply a disparate impact analysis at all, which could create useful precedent for universities seeking to increase racial diversity on their campus.

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169. *Heart of Detroit Tuition Pledge*, WAYNE STATE UNIV., <https://wayne.edu/heart-of-detroit> [<https://web.archive.org/web/20220206211800/https://wayne.edu/heart-of-detroit>] (last visited Feb. 7, 2022).

170. See generally Perez, *supra* note 144.

171. See *supra* Part III.A.1.

*1. Universities Could Use the Outcome of This Claim to Increase Diversity on Campus, Regardless of the Success of the Claim*

First, the Michigan Supreme Court could find that the current policies, though facially neutral, have a racially disparate impact in favor of white students.<sup>172</sup> To remedy this, the court could instruct the universities to stop using these criteria in their admissions. This would increase diversity on campus by removing admissions policies that disparately impact applicants by creating affirmative action for the white students who apply.<sup>173</sup>

Alternatively, universities could use the results of this litigation to protect their policies that seek to increase diversity on their campus even if a disparate impact claim were unsuccessful or if the court refused to allow a disparate impact claim under Michigan law. These results, which may at first appear unsuccessful, could actually protect Michigan universities looking to use facially-neutral, race-conscious policies to increase the amount of underrepresented racial minorities on campus.<sup>174</sup> Similar to the policies discussed in the litigation outcomes section above, this would create precedent that, in turn, could shield these universities from disparate impact litigation for facially-neutral policies that work to increase the representation of Black students on their campus.<sup>175</sup>

A disparate impact claim against universities for their facially neutral, but racially impactful policies could lead to increased racial diversity on Michigan campuses regardless of the initial claim's success.

*C. Potential Weaknesses*

There are several risks and weaknesses to these approaches, however. Historic racism in Michigan makes it likely that any actions helping people of color will be scrutinized more heavily than policies that favor white applicants.<sup>176</sup> Throughout Michigan's history, affirmative action has been heavily associated with the civil rights movement and increasing the representation of Black students on Michigan's college campuses.<sup>177</sup>

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172. *See id.* See generally Perez, *supra* note 144.

173. *See supra*, Parts III.A.I., II.C.

174. *See supra*, Part III.A.IV; *see also* Alan Wendler Hersh, *Keep it Quiet: How Facially Neutral Affirmative Action Passes Constitutional Scrutiny*, 2011 ILL. L. REV. 1885 (2011).

175. *See id.*

176. James D. Anderson, *Past Discrimination and Diversity: A Historical Context for Understanding Race and Affirmative Action*, 76 J. NEGRO ED. 204 (2007).

177. Hartocollis, *supra* note 143.

Michigan has a history of adversity to such affirmative action initiatives,<sup>178</sup> and attitudes are unlikely to change simply by pointing out that current practices act as affirmative action for white students.

Based on affirmative action cases brought before the constitutional ban, along with the rhetoric and politics leading to the ban—which was passed by popular vote—it is likely that precedent protecting race-neutral, but racially impactful policies could be ignored.<sup>179</sup> While using precedent to protect practices that increase diversity through race-neutral policies works in theory, there is significant history of disfavoring any practices that benefit minorities in college admissions in Michigan.<sup>180</sup> This means that even with the precedent, Michigan universities attempting to increase diversity may still be susceptible to litigation by white students denied admission who think they were denied because of practices aimed at increasing diversity.<sup>181</sup>

Finally, outright affirmative action is stronger and more likely to be successful than facially neutral practices for increasing diversity through admissions.<sup>182</sup> For example, there is evidence that previous attempts to use income as a proxy for race failed to increase the number of Black students by admitting more poor, white students.<sup>183</sup>

#### *D. Need for Systems Thinking Approach*

This proposed legal strategy to either change admissions policies or protect policies aimed at increasing racial diversity on campus is a narrow remedy in a larger, broken system. Earlier intervention in the education system,<sup>184</sup> solving income and resource inequality,<sup>185</sup> remedying

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178. Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), <https://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html> [<https://web.archive.org/web/20220207200220/https://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html>].

179. Michigan Civil Rights Commission, “*One Michigan*” at the Crossroads: An Assessment of the Impact of Proposal 06-02, UNIV. OF MICH. (Mar. 7, 2007), [https://diversity.umich.edu/wp-content/uploads/2015/10/FinalCommissionReport3-07\\_1\\_189266\\_7.pdf](https://diversity.umich.edu/wp-content/uploads/2015/10/FinalCommissionReport3-07_1_189266_7.pdf) [[https://web.archive.org/web/20210617060115/https://diversity.umich.edu/wp-content/uploads/2015/10/FinalCommissionReport3-07\\_1\\_189266\\_7.pdf](https://web.archive.org/web/20210617060115/https://diversity.umich.edu/wp-content/uploads/2015/10/FinalCommissionReport3-07_1_189266_7.pdf)].

180. *Id.*

181. This concept is similar to the complaint filed in *Fisher v. Texas*, 570 U.S. 297 (2013).

182. Maxwell & Garcia, *supra* note 129; Nelson, *supra* note 149.

183. Maxwell & Garcia, *supra* note 129.

184. Amour, *supra* note 168.

185. Jared Wadley, *Past, Present Forces Keep Racial Wealth Gaps from Closing*, MICH. NEWS (Mar. 21, 2019), <https://news.umich.edu/past-present-forces-keep-racial-wealth-gaps-from-closing/> [<https://web.archive.org/web/20220207200250/https://news.umich.edu/past-present-forces-keep-racial-wealth-gaps-from-closing/>].

opportunity deserts,<sup>186</sup> and taking a systems approach<sup>187</sup> are all necessary steps to end the inequities that many Black students face before even arriving on college campuses or before they even begin their college applications.

In Michigan, especially, education inequities cannot be solved in a vacuum. Changing admissions policies to increase diversity should be considered one step in a larger movement for the uplifting of Black Michiganders. These approaches are insignificant if not considered in conjunction within the broader movement for equality and liberation. This Note does not assume that litigation is the best or most effective mode of change in the fight for education equity in Michigan.<sup>188</sup> However, if considered as part of the broader framework, the proposed litigation could help reshape how Michiganders think about affirmative action on our college campuses and move toward more diverse college campuses.

#### IV. CONCLUSION

Michigan's public universities are not doing enough to increase the representation of racial minorities on their campuses. Their hands are tied when it comes to affirmative action, but there is clearly room for facially neutral, race-conscious policies. These changes are necessary, not only for the benefit of their own student bodies, but for Michigan overall as we move toward a more racially just state.

This Note has demonstrated how current admission practices used by Michigan's public universities work to effectively increase the representation of white students on campus. By considering standardized test scores or relationship to donors and alumni, current policies give preference to groups of students that are statistically likely to be white, and statistically unlikely to be Black.

Michigan's constitution bans this type of racial affirmative action in college admissions. Litigation against a Michigan public university could shed light on these biased practices and their effects and could potentially provide a remedy. This proposed litigation could lead to precedent that prevents affirmative action for white students, which would be one small

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186. See Peter J. Hammer, *Detroit 1967 and Today: Spatial Racism and Ongoing Cycles of Oppression, in 1967, in DETROIT 1967: ORIGINS, IMPACTS, LEGACIES* (J. Stone, ed) (2017), pp. 1–8.

187. John A. Powell et al., *Systems Thinking and Race: Workshop Summary*, 12–21 (June 2011), [https://belonging.berkeley.edu/sites/default/files/TCE\\_Star\\_WP\\_Training%20material%20Final%20Flint.pdf](https://belonging.berkeley.edu/sites/default/files/TCE_Star_WP_Training%20material%20Final%20Flint.pdf) [<https://web.archive.org/web/20220206212440/https://news.umich.edu/past-present-forces-keep-racial-wealth-gaps-from-closing/>].

188. See generally KEEANGA-YAMAHTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 153–90 (2016).



step towards equity in college admissions. Alternatively, it could create precedent that strengthens and protects policies that are facially neutral but race conscious. These new policies, such as giving preference for applicants from certain high schools or zip codes, could then be used to increase racial diversity on college campuses.

In addition to the positive impacts that are likely to result from litigation under Michigan's constitutional ban on affirmative action, a disparate impact claim yields similar results. Regardless of the success of this proposed litigation, steps could be taken as a result that would increase racial diversity on college campuses in Michigan.

It is important to note that this proposed litigation is not without risks. It seems that Michigan's white population is hostile to diversity-focused policies. This proposed remedy also puts the burden on applicants of color to change the system that is working to exclude and oppress them. Further, college admissions is only one area that impacts students of color on Michigan's college campuses and is only one small piece of a larger picture of racial justice in the state.<sup>189</sup> This litigation should be led by, and focused on, the communities it seeks to benefit. Finally, this is a narrow and specific remedy for one small piece of the overall system of racial injustice and oppression in this state. Litigation, if not paired with other system reforms, will not be as effective.

This Note, at the very least, tries to make one thing clear. It is time we call out college admissions practices for what they really are—another systematic tool working to exclude Black Michiganders and uphold systems of white supremacy which unduly benefit white Michiganders. Based on the information laid out above, it may be true that in trying to abolish tools like affirmative action, which are used to increase diversity and dismantle oppressive systems, Michiganders may have instead placed a tool to increase diversity directly into our constitution. It is time to rethink affirmative action, and to enforce Michigan's constitutional ban to prevent its colleges and universities from using affirmative action for white applicants.

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189. St. Amour, *supra* note 168.