No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL, PETITIONER

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONER AND SUMMARY REVERSAL

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MOTION AND REQUEST FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

David Boyle (hereinafter, "Counsel") respectfully moves for leave to file the attached brief as *amicus curiae*. Petitioner has granted blanket permission to *amicae/i curiae* to write briefs. As for permission from Respondents: Counsel, between December 17th and 28th, 2012, electronically mailed four times Cantrell Respondents' counsel-of-record Karin A. DeMasi (who asked for and received a 30-day extension to file response to petition) at her e-mail address listed on the Court's 12-682 docket webpage, receiving no response at all; and then also sent an e-mail, and facsimile, to the e-mail, and fax, addresses of Robert H. Baron, the managing partner of Cravath, Swaine & Moore's litigation department, to inquire after Ms. DeMasi's non-response, and again never received a response. Similarly, Counsel e-mailed BAMN Respondents' counsel-of-record George B. Washington four times between December 24th and 31st, 2012, and received no response at all. (Counsel could find no fax number on Washington's firm's currently-under-development website.) This mysterious silence, despite Counsel's giving timely notice to aforementioned persons of his intent to file a brief, contrasts greatly with Counsel's dealings with the Michigan Attorney General's office: that office was friendly, helpful, and responsive, and sent 12-682 blanket amicus-brief-filing permission to the Court.

The interest of Counsel in this case arises from, among other things, his experience with, and previous writings about, the issue of alumni-child preferences in college admissions vis-à-vis affirmative

action. In the instant case, Petitioner's petition for a writ of certiorari is highly meritorious but does not really mention that important issue, with which Counsel's brief deals. Thus, the brief Counsel is requesting permission to file will contain more complete argument on that issue, and also on other issues of note and importance to the case.

RECOMMENDATION FOR ADDITION TO SUPREME COURT RULE 37(2)

Noting the above events re difficulty obtaining permission to write a brief, Counsel politely recommends that the Court consider adding to Supreme Court Rule 37(2), words similar to, "If petitioners give blanket consent to write *amicus curiae* briefs, they should submit notice of it with their petitions for certiorari; and respondents giving blanket consent to write *amicus curiae* briefs should send notice of it to the Court shortly thereafter." If this advice were followed, then those trying to write petitioner-side amicus briefs, like Counsel, might not have to wait in suspense to see if blanket permission from Respondents is somehow put up on the Supreme Court website at the last minute. (Counsel's computer "screen shot" of the 12-682 docket page as of 2:05 p.m. Pacific Time, January 2, 2013, shows no permission from any Respondent for writing amicus briefs. Such is the situation as of this writing, even if the 12-682 docket page later shows some permission from Respondents, today or afterwards. Thus, that leaves *very* little time, too little, for potential notice to those wanting to write petitioner-side briefs, when January 3, 2013, is the deadline for submission.)

Those wanting to write petitioner-side briefs are at a natural disadvantage when trying to submit them, compared to those wanting to write respondent-side briefs, seeing there are only 30 days from time of docketing for petitioner-side writers to do so, and seeing that problems may occur: e.g., the current lack of notice, either on the Court website or in Counsel's e-mail inbox, as to whether there is permission to write a brief or not. So, Counsel wishes to help the Court rectify this disadvantage. If Rule 37(2) were updated to encourage the fastest public notice possible of blanket permission, by either side, to write amicus briefs, fairness and justice would be served well. The Court could put up petitioner-side blanket permission on the docket page at the time of docketing. Counsel, and *amici*, should not have to wait until the last minute to see if they have permission, and to print and mail their briefs. Also, Counsel would not have to take time to write this request, nor the Court have to take time to read it, had Respondents promptly let the public or Counsel know if permission was granted or not. —Counsel humbly thanks the Court for its time and consideration.

January 2, 2013 Respectfully submitted,

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioner and Summary Reversal in Case 12-682 ("*BAMN*").[2] Amicus has actively addressed issues of alumni-child preferences in college admissions vis-à-vis affirmative action, *see, e.g.*, his amicus brief in *Fisher v. University of Texas at Austin*,[3] *passim*, and his recent Detroit News opinion article *It's time to end alumni preferences*.[4] Amicus also noted in his *Fisher* brief, *supra*, that "Just because affirmative action is *allowed*, that does not mean it is *mandatory*, and that the will of the State's people, if the people oppose affirmative action . . . means nothing[.]" *Id.* at 26. He reiterates that here.

SUMMARY OF ARGUMENT

Amicus supports certiorari in *BAMN* so that summary reversal of the Sixth Circuit opinion can promptly ensue, since the Court essentially decided the issue-at-hand in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and in *Washington v. Seattle School*

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Petitioner's amicus-brief blanket permission is on record with the Court, though Amicus has not heard back from Respondents.

[2] *Bill Schuette, Att'y Gen. of Mich., v. Coal. to Defend Aff. Action, Integration and Immigrant Rts. and Fight for Equal. by Any Means Necessary (BAMN), et al.*, Nos. 08-1387, 08-1534, 08-1389, 09-1111, 2012 U.S. App. LEXIS 23443 (6th Cir. Nov. 15, 2012) (en banc), *pet. for cert. pending* (U.S. Dec. 4, 2012).

[3] 631 F.3d 213 (5th Cir. 2011) (*cert. granted*, 80 U.S.L.W. 3475) (U.S. Feb. 21, 2012) (No. 11-345).

[4] Nov. 15, 2012, http://www.detroitnews.com/article/20121115/OPINION01/211150337.

District No. 1 ("*Seattle*"), 458 U.S. 457 (1982), as well.[5] This being so, unneeded *déjà vu* would violate judicial economy, and summary reversal is just.

ARGUMENT

The essential argument in the *BAMN* Sixth Circuit opinion, *see* 2012 U.S. App. LEXIS 23443 at *4-5, *44-46, is that because it might now be harder to advocate affirmative action in Michigan than to advocate legacy preferences in colleges (and just *who* is trying to *inaugurate* legacy preferences right now? A strange hypothetical), following the 2006 vote of Michiganders in "Proposal 2", 58%-42%, to amend their constitution (adding Section 26 to Article I) to end publicly-granted race and other (e.g., gender) preferences: this is, at least re public education, an unfair political constraint which violates the Fourteenth Amendment's Equal Protection Clause. But this is a grossly strained argument which has excited derision from many sources, as maybe it should.

First, we shall look at *Grutter* to see whether that landmark ruling addresses the issue. It does. Justice Sandra Day O'Connor mentions in her opinion, "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law . . . . Cf. *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ('[T]he States may perform

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[5] By the way, *BAMN*'s eponymous Respondents have previously pled to the Court re Proposal 2, *see, e.g.*, The Ctr. for Individual Rts., *U.S. Supreme Court denies BAMN's motion*, http://www.cir-usa.org/releases/90.html (last updated Jan. 19, 2007) (mentioning the Court's denying BAMN's motion to reinstate injunction against enforcing Proposal 2), and now seek another try.

their role as laboratories for experimentation to devise various solutions[.]')" *Grutter*, *supra*, at 342.

Where is the slightest hint, in the passage just quoted, that affirmative action cannot be "prohibited by state law", *id.*? And Justice O'Connor makes clear that the *States* are laboratories: which dispels the idea that subparts of the State, such as universities, can perform "laboratory experiments" when not just the legislature, but the permanent primary sovereign, the People, have amended a State's central legal charter, its Constitution, to prohibit such experimentation. So the Court has already long since decided, or confirmed, in *Grutter*, that a State's banning race preference is proper and constitutional.

And there are few "political barriers" to voting Section 26 (or the part of it regarding public education) back out of Michigan's Constitution. *See, e.g.*, Ballotpedia,[6] revealing, *see id.*, that Proposal 2's opponents spent over 2 and ½ times as much money as proponents did. With that lavish funding, there may still be plenty of resources left to overturn Proposal 2 the regular way: by popular vote, not by the courts.[7]

See U.S. Const. art. IV, § 4, "The United States shall guarantee to every State . . . a Republican Form of Government", *id.*, i.e., a democratic republic where the people reign. But the Sixth Circuit opinion largely precludes majoritarian democracy. The Court would set bad precedent either by upholding it, or by treating it seriously enough to grant oral argument.

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[6] *Michigan Civil Rights Amendment, Proposal 2 (2006)*, http://ballotpedia.org/wiki/index.php/Michigan_Civil_Rights_Amendment,_Proposal_2_(2006) (as of Nov. 16, 2012, at 19:47 GMT).

[7] Amicus is for affirmative action, and would not mind seeing Proposal 2 ended…but only by the will of Michigan's people.

And when the law is clear, summary reversal may be meet, *see, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U. S. ____ (2012) (per curiam) (summarily reversing obsolete Montana political-speech controls).

The law here has seemed quite clear for three decades, *see Seattle* (June 30, 1982), *supra*, calling it "evident" that divisions of power among administrative bodies over affirmative action "have nothing to do with the ability of minorities to participate in the process of self-government", 458 U.S. at 480 n.23 (Blackmun, J.).[8] And *see*, also from June 30, 1982, and from the same Justice, *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, offering the Kafkaesque scenario, "[R]uling for petitioners[, who lost,] on a *Hunter* [*v. Erickson*, 393 U.S. 385 (1969), i.e., political-process] theory seemingly would mean that statutory affirmative-action . . . programs never could be repealed[.]" *Crawford*, *supra*, at 546-47 (Blackmun, J., joined by Brennan, J., concurring). "Kafkaesque" may not help Respondents' case much.

As well, if *BAMN* is seen as a frivolous defense of affirmative action, it may needlessly cause *Fisher* to be decided against affirmative action, by an "unpleasant cousin" effect.[9] So that the Court may have

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[8] So, political-rights cases like *Seattle* are still good law and need not be revisited; they can be kept "in the bag" in case some draconian affirmative-action ban comes one day, e.g., poll-taxing the ban's opponents. Proposal 2 has no such evil feature.

[9] Moreover, *BAMN* may also taint the struggle for voter rights. Respondents' baseless "political powerlessness" claims, if the Court reviews *BAMN* any longer than it has to, may embarrass, by unwanted association, the more legitimate claims in *Shelby County v. Holder* (679 F.3d 848 (D.C. Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3264) (U.S. Nov. 9, 2012) (No. 12-96)) re, *see id.*, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c). Fortunately, *BAMN* may not need long consideration.

more time and resource to consider the momentous issues in *Fisher*, summary reversal in *BAMN* would be wise, lest that nexus of confusion from the Sixth Circuit excessively absorb the Court's attention.

Around the time of the Whiskey Rebellion, George Washington noted, "If the laws are to be trampled upon with impunity, and a minority . . . . is to dictate to the majority, there is an end put, at one stroke, to republican government."[10] While last month's *BAMN* decision may not literally let a minority dictate to a majority, it does void the will of the majority, in highly inappropriate fashion. And although *BAMN* plaintiffs may mean well, a thirst for social justice cannot justify ignoring law and common sense. To overturn Proposal 2 "by any means necessary" does not comport with our great Nation's rule of law.

CONCLUSION

Amicus respectfully asks the Court to grant certiorari to reverse summarily the court of appeals' judgment, so upholding *Grutter* and *Seattle*; and humbly thanks the Court for its time and consideration.

January 2, 2013 Respectfully submitted,

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[10] *George Washington: A National Treasure* (Smithsonian Inst.), http://georgewashington.si.edu/life/chrono_ presidential.html.