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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE MICHIGAN REPUBLICAN PARTY AS *AMICUS CURIAE* SUPPORTING PETITIONER

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The Michigan Republican Party respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus Michigan Republican Party (the "MRP") is an unincorporated association that actively and extensively participates in campaigns, elections, and public policy debate. The MRP is a state organization of the Republican Party, and exists in large part to aid in fostering political debate and the exchange of ideas among its members and the public, and in expressing, promoting, and supporting its members' political beliefs and ideas with respect to public policy issues. An election is the cornerstone of the MRP's activities; consequently, when the results of an election are jeopardized, the MRP must act to preserve the will of the voters.

In this case, the Sixth Circuit Court of Appeals struck a portion of the Michigan Constitution approved by the majority of Michigan voters in 2006.

[1] Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received notice of the *amicus*' intention to file this brief at least 10 days prior to the due date. All parties have consented to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

But the Ninth Circuit Court of Appeals upheld California voters' approval of an essentially identical provision in their California Constitution, which has been in effect there since 1996. The MRP is interested in protecting the rights of Michigan voters to amend their state constitution and ensuring that voters in the Sixth Circuit have the same powers as voters in the Ninth Circuit.

SUMMARY OF ARGUMENT

In the 2006 general election, Michigan voters exercised their power to amend the Michigan Constitution by majority vote. Fifty-eight percent of Michigan voters approved a constitutional amendment requiring equality in public employment, education, and contracting. The Sixth Circuit's decision to find this equality amendment in violation of the Equal Protection Clause directly conflicts with the Ninth Circuit, which upheld an essentially identical voter-enacted amendment to the California Constitution. The state constitutional amendments approved by Michigan and California voters require equal protection of the laws. By striking Mich. Const. art. I, § 26, the Sixth Circuit thwarted the will of millions of Michigan voters, and deprived them of power enjoyed by voters of the Ninth Circuit. The MRP supports the petition for a writ of certiorari.

ARGUMENT

I. The Sixth Circuit Struck a Michigan Constitutional Amendment Approved and Made Law by 58% of Michigan Voters.

Michigan's Constitution begins by stating: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Mich. Const. art. I, § 1. In the Michigan Constitution, the people allocated certain portions of their inherent powers to the branches of government, but also reserved certain powers to themselves. The people reserved the right to amend their Michigan Constitution by petition and popular vote. Mich. Const. art. XII, § 2. Amendments may be proposed by petition signed by registered electors of the state equal in number to at least 10% of the total vote cast for all candidates for governor in the last preceding general election at which a governor was elected. Mich. Const. art. XII, § 2. If such a petition satisfies timing and other requirements, the proposed amendment may be placed on the ballot at the next general election. Mich. Const. art. XII, § 2. If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the Michigan Constitution. Mich. Const. art. XII, § 2.

Michigan voters exercised their amendment powers on November 7, 2006, and approved Proposal 06-02, now Mich. Const. art. I, § 26, by a 58% to 42% margin of votes. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, ___ F.3d ___, 2012 WL 5519918, *1 (6th Cir. 2012). The

majority of Michigan voters approved the following amendment to the Michigan Constitution:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. [Mich. Const. art. I, § 26(1)-(2).]

The Sixth Circuit Court of Appeals struck this voter-approved amendment, holding that its prohibition of discrimination and preferential treatment violated the Equal Protection Clause of the Fourteenth Amendment. *Coalition to Defend Affirmative Action*, 2012 WL at *1. The Sixth Circuit relied upon a "political-process doctrine" to find the amendment unconstitutional and did not use the "traditional analysis" of the Equal Protection Clause. *Id.*, 2012 WL at *15, 19. The Sixth Circuit's decision relies upon only two cases setting forth the "political-process doctrine;" Judge Griffin's dissent points out that only three other cases have ever applied this

doctrine. *Id.*, 2012 WL at *5, 41. By failing to follow the "traditional analysis" of the Equal Protection Clause, the Sixth Circuit majority did not properly find an express or implied Equal Protection violation. Justice Black's passionate dissent in *In re Winship*, 397 U.S. 358 (1970) warned the judiciary about the danger of impairing the "most fundamental individual liberty of our people – the right of each man to participate in the self-government of his society" as follows:

> Our Federal Government was set up as one of limited powers, but it was also given broad power to do all that was 'necessary and proper' to carry out its basic purpose of governing the Nation, so long as those powers were not exercised contrary to the limitations set forth in the Constitution. And the States, to the extent they are not restrained by the provisions in that document, were to be left free to govern themselves in accordance with their own views of fairness and decency. Any legislature presumably passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. The people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people in my opinion, should never be denied by this Court except

> when the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution. [397 U.S. 358, 384-85 (Black, J., dissenting).]

Justice Black's warning becomes even more important to the circumstances of the present situation since it was the people of Michigan themselves that adopted Mich. Const. art. I, § 26. The Sixth Circuit decision stripped Michigan voters of their power to mandate equality in public employment, education, and contracting.

II. In Contrast, the Ninth Circuit Court of Appeals Upheld the Constitutionality of an Essentially Identical California Constitutional Amendment Approved by the Majority of California Voters.

Like the Michigan Constitution, the California Constitution reserved the right of California voters to amend their state constitution by vote. Cal. Const. art. XVIII, §§ 3-4. California voters exercised their amendment powers on November 5, 1996, and approved Proposition 209, now Cal. Const. art. I, § 31(a), by a 54% to 46% margin of votes. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 696-97 (9th Cir. 1997), cert. den., 522 U.S. 963 (1997). The majority of California voters approved the following amendment to the California Constitution, which is essentially identical to the 2006 Michigan amendment:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. [Cal. Const. art. I, § 31(a).][2]

The Ninth Circuit Court of Appeals concluded "as a matter of law, Proposition 209 does not violate the United States Constitution." *Coalition for Economic Equity*, 122 F.3d at 711. The Ninth Circuit specifically considered and rejected the analysis of the "political-process doctrine" relied upon by the Sixth Circuit. 122 F.3d at 703-709. This Court denied the Coalition's petition for writ of certiorari regarding the Ninth Circuit decision. 522 U.S. 963 (1997). Recently, the Ninth Circuit affirmed dismissal of an Equal Protection challenge to Cal. Const. art. I, § 31. *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1131-32 (9th Cir. 2012). The Ninth Circuit held that *Grutter v. Bollinger*, 539 U.S. 306 (2003) did not overrule the 1997 decision to uphold the California

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[2] Using their legislative power reserved by Wash. Const. art. II, § 1(a), on November 3, 1998, Washington voters passed Voter Initiative 200, which enacted a Washington state statute providing "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1) (1999). This voter-enacted statute (which is essentially identical to the Michigan and California amendments) remains good law in Washington.

Constitutional amendment. *Coalition to Defend Affirmative Action*, 674 F.3d at 1136.

Thus, the Ninth Circuit allows California voters to bar the state from discriminating or granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin. But in this case, the Sixth Circuit struck Michigan voters' same action as unconstitutional. The Sixth and the Ninth Circuits directly conflict with one another on a matter of utmost importance – the meaning of the Equal Protection Clause of the Fourteenth Amendment and voters' power to mandate equal treatment of individuals and groups. As it stands today, voters in the Ninth Circuit have greater power to amend their state constitutions than voters in the Sixth Circuit. Voters in the Ninth Circuit may require equal treatment while voters in the Sixth Circuit cannot. The MRP asks this Court to grant the petition for a writ of certiorari to address this circuit split on the same important matter. Sup. Ct. R. 10(a).

III. By Their Plain Language, the Amendments Approved by Michigan and California Voters Require Equal Protection of the Laws.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. This Court has established that the Equal Protection Clause's purpose and meaning is to

stop racial discrimination in the United States. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Equality has been the long-sought goal in our country. In the words of Justice Harlan, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). "Over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quotation omitted).

Because the Constitution requires equal treatment, state-made racial distinctions are inherently suspect and subject to strict scrutiny. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion of Powell, J.) (quotation omitted). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). "It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must

be strictly scrutinized.'" *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Adarand*, 515 U.S. at 224). "[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) (citation omitted).

Gender classifications are also subject to heightened judicial scrutiny. "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, 518 U.S. 515, 532 (1996) (internal footnote and citation omitted).

Given the Equal Protection Clause's requirement of equality, its purpose to stop racial discrimination, and this Court's imposition of heightened scrutiny on state-made racial or gender classifications, the Sixth Circuit's decision that a *voter-enacted* equal treatment mandate was unconstitutional is out of step with established Fourteenth Amendment jurisprudence. As this Court wrote, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982).

Under the plain language of the Fourteenth Amendment's Equal Protection Clause, a neutral

statute mandating equality on the basis of race, sex, color, ethnicity, and national origin, approved by a majority of voters, should pass constitutional muster. It is state action that distinguishes on racial grounds – not state action requiring equality – that must satisfy strict scrutiny. "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997), cert. den., 522 U.S. 963 (1997). "When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender." *Id.*, 122 F.3d at 702. "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

This Court has not mandated unequal state treatment or preference on the basis of race – a step the Sixth Circuit's decision now makes. "[I]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires." *Shaw*, 509 U.S. at 654. "*Grutter* upheld as *permissible* certain race-based affirmative action programs." *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1136 (9th Cir. 2012) (citation omitted; emphasis original). "It did not hold that such programs are

constitutionally *required*." *Id.* (citation omitted; emphasis original). *Grutter* wrote: "We are mindful . . . that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). "Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Id.*, 539 U.S. at 342.

The Sixth Circuit's decision enshrines state-made distinctions on the basis of race as required constitutional law. Chief Justice Roberts wrote that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007). Michigan and California voters exercised their voting rights to approve amendments to their state constitutions requiring equality on the basis of race, sex, color, ethnicity, and national origin.

IV. The Sixth Circuit's Decision to Strike an Amendment Approved by 58% of Michigan Voters Undermines the Democratic Process.

The Sixth Circuit's decision to strike down an equality amendment to the Michigan Constitution made law by 58% of the state's voters in a general election, in conflict with the Ninth Circuit, is at

minimum troubling to our democratic process. As the Ninth Circuit wrote when upholding the California amendment, "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy." *Coalition for Economic Equity*, 122 F.3d at 699. "Fundamental principles of democratic self-government preclude the judiciary from substituting its judgment for that of the people." *In re Proposals D&H*, 417 Mich. 409, 423, 339 N.W.2d 848, 854 (Mich. 1983). "The people are presumed to know what they want, to understand the proposition submitted to them in all of its implications, and by their approval vote to have determined that this proposal is for the public good and expresses the free opinion of a sovereign people." *Id.* (quotation omitted). The people of Michigan reserved the power to amend their Constitution by popular vote. Mich. Const. art. XII, § 2. The people of Michigan exercised that power when they enacted Mich. Const. art. I, § 26 during the 2006 general election. The MRP asks this Court to consider the Sixth Circuit's decision thwarting the will of millions of Michigan voters.

CONCLUSION

Amicus Michigan Republican Party respectfully asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: January 3, 2013

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