No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN,
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 *AMICI CURIAE* FORMER ATTORNEYS OF THE DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION IN SUPPORT OF MICHIGAN ATTORNEY GENERAL BILL SCHUETTE

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INTEREST OF THE *AMICI CURIAE*

Each of the individuals submitting this brief as *amici curiae* has worked as a career attorney or, in one instance, a political appointee in the Department of Justice, Civil Rights Division. Accordingly, each has a significant and longstanding interest in civil-rights and voting-rights matters in general, along with a specific interest in the particular issues raised in this case.[1]

Hans A. von Spakovsky is the former Counsel to the Assistant Attorney General for Civil Rights at the Department of Justice, a former Commissioner on the Federal Election Commission, and a former member of the Virginia Advisory Board of the U.S. Commission on Civil Rights. He has extensive experience in the area of civil rights and the enforcement of Federal voting-rights law.

Karl S. "Butch" Bowers, Jr. served as Special Counsel for Voting Matters in the Civil Rights Division of the United States Department of Justice from 2007–2008. In his role, Mr. Bowers oversaw the activities of the Voting Section of the Justice

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intent to file this brief. The parties have consented to the filing of this brief, and correspondence from each counsel granting that consent is being filed with the Clerk's office along with this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made such a monetary contribution to its preparation or submission.

Department's Civil Rights Division and provided legal and policy counsel on Federal election-law matters to senior officials in the Justice Department. Mr. Bowers is also former Chairman of the South Carolina State Election Commission.

Mr. Bowers is currently in private practice with the law firm of Womble Carlyle in Columbia, South Carolina, where he focuses on public policy matters including constitutional issues, election and voting law, campaign finance law, and legislative and regulatory matters.

H. Christopher Coates served in the Voting Section of the Justice Department's Civil Rights Division from 1996 through 2009, and was Chief of the Voting Section from 2007-2009. Mr. Coates was lead attorney for the Department of Justice in numerous voting-rights cases brought on behalf of African-American, American Indian, and Hispanic voters, as well as in *United States v. Ike Brown*, the Civil Rights Division's first case filed under the Voting Rights Act challenging racial discrimination by minority election officials against white voters. In 2007 he was awarded the Walter Barnett Memorial, the Civil Rights Division's second-highest award, for excellence in advocacy.

From 1976 to 1985, Mr. Coates was a staff attorney in the American Civil Liberties Union's Voting Rights Project in Atlanta, Georgia. He was in private practice from 1985-96 in Milledgeville, Georgia, where he continued his civil-rights practice and was awarded the Thurgood Marshall Decade Award by the Georgia

NAACP, and the Environmental Justice Award by the Georgia Environmental Organization.

J. Christian Adams served as an attorney in the Voting Section of the Department of Justice's Civil Rights Division from 2005 to 2010. In that capacity, Mr. Adams brought a wide range of election cases to protect African-American, Asian, and other minorities in States throughout the south, in matters involving vote-dilution, redistricting, and other issues. Mr. Adams also litigated cases involving military voting protections and voter intimidation, including the case against the New Black Panther Party in Philadelphia, and, with Mr. Coates, successfully litigated *United States vs. Ike Brown* under the Voting Rights Act.

Prior to joining the Department of Justice, Mr. Adams served as General Counsel to the South Carolina Secretary of State, and was in private practice in Virginia. He currently is Legal Affairs Editor for PJMedia.com, and also writes for the Washington Examiner, Washington Times, and other publications.

SUMMARY OF THE ARGUMENT

The Sixth Circuit's invalidation of Michigan's constitutional ban on racial preferences in university admissions opens up a stark circuit split on issues going to the heart of both Equal Protection and democratic self-government, that this Court should address. Additionally, changed circumstances in the decades since this Court articulated the "political process" Equal Protection theory on which the Sixth Circuit relied, compel the re-examination and retirement of that doctrine.

ARGUMENT

I. The Sixth Circuit's ruling creates a square and irreconcilable conflict with the Ninth Circuit and California Supreme Court interpretations of identical constitutional language.

Article I, § 26 of the Michigan Constitution, adopted by voters in 2006, replicates nearly verbatim a provision adopted by California voters a decade earlier, and upheld by both the Ninth Circuit and the California Supreme Court against "political process" Equal Protection challenges. Yet the Sixth Circuit now has found Michigan's version repugnant to Equal Protection, and acknowledged the stark contrast with both of those courts. Pet. App. 40a n.8. Moreover, the court's decision came in an *en banc* opinion (by the barest of majorities), eliminating any chance of self-correction. The disagreement between these courts, on such a question of fundamental national importance, certainly merits review. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003).

Article I, § 31 of the California Constitution, proposed as the California Civil Rights Initiative, states in pertinent part:

> **§ 31. Affirmative action**
>
> **(a)** 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.
>
> * * *
>
> **(f)** For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.....

It was adopted by a 54-46 margin of nearly 9 million California voters on November 5, 1996, and became the subject of litigation the next day.

Article I, § 26 of Michigan's Constitution, proposed as the Michigan Civil Rights Initiative, provides in relevant part:

> Sec. 26. (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.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1....

Article I, § 26 was adopted on November 7, 2006 by a 58-42 margin of nearly 4 million Michigan voters. It, too, was challenged in court the next day.

The Ninth Circuit rejected the challenge to California's constitutional ban on race- and gender-based preferences under the "political process" doctrine of *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (1997). More recently, the California Supreme Court did the same. *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947 (Cal. 2010). In the Ninth Circuit's view, the provision passed constitutional muster for the simple reason that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Wilson*, 122 F.3d at 706, *quoting Crawford v. Board of Ed. of the City of Los Angeles*, 458 U.S. 527, 538 (1982).

> *Hunter* and *Seattle*, in [plaintiffs'] view, foreclose the authority of states to withdraw local jurisdiction to enact race and gender preferences unless the state also withdraws local jurisdiction to enact preferences based on any other criteria. Such an extraordinary position hardly follows from *Hunter* and *Seattle*. [*Id*].

But the Sixth Circuit now has found that "extraordinary position" in fact is *compelled* by *Hunter* and *Seattle*. In that court's view, Michigan's constitutional ban on preferences fails precisely because it does not outlaw preferences based on other criteria. The centrality of that notion to its analysis is evidenced by the opening lines of the en banc opinion:

> A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admission policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution – a lengthy, expensive and arduous process – to repeal the consequences of Proposal 2. The existence of such a comparative structural burden

> undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change. We therefore REVERSE the judgment of the district court on this issue and find Proposal 2 unconstitutional....Pet. App. 6a.

In the Sixth Circuit's view, Article I, § 26 "targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in a way that places special burdens on racial minorities." Pet. App. 22a, *citing Seattle*, 458 U.S. at 467, 472 and *Hunter*, 393 U.S. at 391. In its view, Michigan's voters have "rigged the game" against racial minorities. Pet. App. 16a.

But the Ninth Circuit noted that a constitutional prohibition on special treatment hardly constitutes a stacking of the deck:

> The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms. *Wilson*, 122 F.3d at 708 (footnote omitted).

Leaving aside for now which view of the Equal Protection clause is correct, the Ninth and Sixth Circuits cannot both be right. Either a State's electorate is entitled to amend its Constitution to outlaw race and gender preferences in public higher education, or it is not.

The Sixth Circuit also distorted *Grutter* in defining admissions preferences as "minority objectives," i.e. "*legislation that is in their interest*." Pet. App. 39a-41a & n.8, *quoting Seattle*, 458 U.S. 474 (emphasis added by Sixth Circuit). To the Sixth Circuit, a central issue in the *Hunter/Seattle* analysis "is whether *racial minorities* are forced to surmount procedural hurdles in reaching *their objectives* over which other groups do not have to leap." Pet. App. 41a (emphasis added). But *Grutter* upheld a race-conscious admissions policy precisely under the theory that such things benefit society as a whole – and reaffirmed that setting aside a numerical quota solely for the benefit of a particular racial or ethnic group would be "patently unconstitutional." 539 U.S. at 329-333, *citing, inter alia*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Opinion of Powell, J.). Given that a system of racial or gender preferences simply cannot be deemed an objective solely of, or something benefitting, a single group, a statewide electorate's decision to do away with it cannot be invalidated on the basis that "minority objectives" are being attacked.

Prudentially, this Court has advised that before reviewing the constitutionality of a State initiative, a Federal court should ask, "Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (citation omitted). Given the

Sixth Circuit's divergence from the decisions of the California Supreme Court and Ninth Circuit refusing to invalidate functionally identical language under the "political process" doctrine, the answer to that preliminary inquiry plainly is, yes. The petition should be granted.

II. The Court should retire the "political process" doctrine.

The challenge to Michigan's constitutional guarantee of equal treatment readily fails without the benefit of *Hunter*/*Seattle*'s "political process" argument, since Article I, § 26 easily passes traditional Equal Protection analysis. Pet. App. 78a (Gibbons, J., dissenting); *see also Wilson*, 122 F.3d at 701-702; *Coral Construction*, 235 P.3d at 957. *Hunter* and *Seattle* thus are necessary preconditions to the Sixth Circuit's analysis, and while its misapplication of them permits this Court simply to reverse, circumstances suggest it also is time to revisit *Hunter* and *Seattle*.

Hunter was issued only five years after passage of the 1964 Civil Rights Act; *Seattle* barely a decade later. Both predate by at least 20 years the Court's decision in *Grutter*, a ruling that not only led directly to the California and Michigan Civil Rights Initiatives, but sparked confusion over what effect, if any, the *Hunter*/*Seattle* "political process" doctrine has or should have in the area of university admissions.

In reviewing Equal Protection challenges, "[c]ontext matters." *Grutter*, 539 U.S. at 327. And the substantial changes to the Nation's demographic and political makeup post-*Seattle* provide backdrop that

should be considered in determining the "political process" doctrine's continued validity. *Amici* have dedicated large portions of their professional careers to safeguarding the voting rights of all Americans, including African-Americans, and it is noteworthy that, three decades after *Seattle*, an electorate consisting of 77.5-percent non-Hispanic whites, and only 12 percent blacks, has elected and now re-elected a black President. *See* U.S. CENSUS BUREAU, *Hispanic Voter Turnout Reaches Record High for Congressional Election*, available at http://www.census.gov/newsroom/releases/archives/voting/cb11-164.html (accessed January 1, 2013). Whatever need there may have been for the "political process" doctrine in 1969 or 1982, today it has become a shopworn, paternalistic vestige, serving only as a tool with which the elites of the grievance industry may continue their self-serving, socially corrosive plunder.

Racial line-drawing was at the very heart of Jim Crow, the dark period in our Nation's history in which similarly situated individuals were subjected to the most odious, unjust treatment due solely to their race. Traditional Equal Protection analysis rejects the perpetual enshrinement of preferences as merely the flip side of that debased coin, and would dispose of it using the most fundamental of analytical frameworks: two wrongs don't make a right. *See*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J., concurring) ("The way to stop discrimination based on race is to stop discriminating based on race"), *Id.* at 780-781 (Thomas, J., concurring) ("If our history has taught us anything it has taught us to beware of elites bearing racial theories"), *citing Dred Scott v. Sandford*, 60 U.S. 393

(1857). As the Sixth Circuit opinion demonstrates, the only thing propping up that continued line-drawing in the public-university admissions context – and only in the four States of that Circuit – is the "political process" doctrine. This Court should re-examine and retire it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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