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 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 AND REVERSAL

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are Hans A. von Spakovsky, Karl S. "Butch" Bowers, Jr., H. Christopher Coates, and J. Chrisian Adams. Each of the individuals submitting this brief formerly 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]

SUMMARY OF ARGUMENT

The Sixth Circuit's use of 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) undermines the initiative process enshrined in the constitutions of more than half the States, and in this instance actively hinders Michigan's attempts to promote Equal Protection and achieve a colorblind society. Because that doctrine has outlived whatever usefulness it may have once had, this Court in addition to reversing the Sixth Circuit, should retire the "political process" doctrine.

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[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief, and correspondence from each counsel granting that consent has been filed with the Clerk's office. 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.

ARGUMENT

I. The Sixth Circuit's use of the "political process" doctrine to frustrate Equal Protection compels its abandonment.

This case stands at the confluence of two powerful streams coursing through our Nation's society and its jurisprudence: the right to Equal Protection of the laws, and foundational notions of democratic self-governance. Employing 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), the Sixth Circuit determined not that the two can flow together harmoniously, but that the latter must yield to the former, behind a groaning dam woven from strained logic and contorted meaning.

Far from being a triumph of Equal Protection, the Sixth Circuit's decision shows the degree to which the "political process" doctrine has perverted that concept – to the point where a constitutional provision designed to bar consideration of race in college admissions and other public spheres, enacted by a solid majority of Michigan voters, can itself be deemed unlawful discrimination.

Amici have dedicated large portions of their professional careers to safeguarding the voting rights of all Americans, including African-Americans, within and without the Department of Justice's Civil Rights Division. The Sixth Circuit's ruling stands as an affront to those efforts, and to all who have labored to ensure the proper, fair, free, and colorblind exercise of the franchise. Reversing the Sixth Circuit is the

obvious answer, but it is not sufficient. For giving rise to this Orwellian outcome, the *Hunter*/*Seattle* "political process" doctrine has forfeited its right to continued existence, and should be rejected once and for all.

A. The "political process" doctrine has stripped Michigan's citizenry of the ability to order their society along non-discriminatory, color-blind grounds.

A half-century ago, the Rev. Martin Luther King, Jr. came to Washington to cash a check, and relay his dream of a Nation where his children would be judged not by the color of their skin, but by the content of their character. Ten months later, this Court spoke emphatically about a crucial means of making Dr. King's dream a reality:

> [T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

That admonition is especially well-placed here, where eight judges now have countermanded the expressed will of 2.1 million Michigan voters that students be admitted to their public colleges and universities without regard to the color of their skin.

As *Reynolds* teaches, the Constitution protects the right to vote in State as well as Federal elections, and encompasses the right of all qualified voters to cast a ballot, to have those votes counted, and to not have them diluted by ballot alteration, ballot-box stuffing, racial gerrymandering, one-race primaries, or other odious means. *Id.* at 554-555 (citations omitted). "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941). This right is essential in voting for any officeholder, be it Governor, Mayor, or dogcatcher. But it becomes even more critical when the electorate of an entire State goes to the polls to decide whether to change the content of its organic governing document.

B. The doctrine here was used to short-circuit Michigan voters' decision to remove considerations of race from their college and university admissions, after recalcitrant, politically insulated decisionmakers refused to do so.

Measures that allow citizens to amend their State constitutions via referendum and initiative spread across the Nation beginning in the early 20th Century, as a key aspect of the Progressive movement. In the States, the initiative process "is necessary to implement the theory that all power of government ultimately resides in the people." *Hollingsworth v. Perry*, 570 U.S. __ (2013) (Kennedy, J., dissenting), Op. at 6, *citing Perry v. Brown*, 52 Cal. 4th 1116, 1140, 265 P.3d 1002, 1016 (2011) (discussing California's initiative provision). It is "one of the most precious

rights of our democratic process," *Perry*, 52 Cal 4th at 1140, 265 P.3d at 1016, whose advent "grew out of the dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." *Hollingsworth*, 570 U.S. at __, (Kennedy, J. dissenting), Op. at 6, *quoting Perry*, 52 Cal. 4th at 1140, 265 P.3d at 1016. "Its primary purpose, then, was to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions *that their elected public officials had refused or declined to adopt*." *Ibid* (internal quotation marks omitted) (emphasis added).

Michigan first added the initiative mechanism to its Constitution via amendment in 1913, after the Legislature passed a joint resolution and voters approved it. 2 Official Record, State of Michigan Constitutional Convention 1961 ("Official Record"), p. 2460 (remarks of Mr. Durst). It was revised and updated at the most recent Constitutional Convention, and adopted as art. XII, § 2 of the 1963 Constitution. *See* Address to the People *(What the Proposed New State Constitution Means to You)*, pp. 99-100 (August 1, 1962), *reprinted in* 2 Official Record, pp. 3406-07.

Speaking at the 1961 convention in support of a proposal that would have eased the ability to place constitutional amendments before voters via initiative, Prof. Harold Norris – a constitutional scholar, civil-rights lawyer, and then-head of the metro Detroit chapter of the ACLU – noted that the thrust of the initiative power was to give the People flexibility to adapt to changed circumstances:

> Now I notice Miss Donnelly mentioned the question of the hope and aspiration that the people of the state of Michigan will grow in numbers. And there is no question about it, they will also grow in problems. They will also grow in the number of ways in which the constitution impinges upon the life of the people and we do have to keep open the way in which the reserved power of the people may operate upon the constitution so that the constitution can be flexible in meeting the needs of our people. [2 Official Record, pg. 2462 (April 16, 1962) (remarks of Del. Norris)].

One such measure that invoked the need for flexibility was *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which this Court approved – though plainly did not *mandate* – the University of Michigan Law School's self-proclaimed "highly individualized, holistic" review process that considered an individual's race as a factor in admissions. But one person's holism is another's smokescreen and sophistry, and proponents of race-neutral admissions properly reacted to *Grutter* by gathering enough signatures to place Proposal 2 on the statewide November 2006 ballot, via the initiative mechanism of art. XII, § 2. It passed overwhelmingly, by a 58-42 margin among nearly 4 million voters. Thus, while this Court in *Grutter* voiced its expectation that by 2028, "the use of racial preferences will no longer be necessary to further the interest approved today," 539 U.S. at 343, the People of Michigan, through the initiative process, brought their State to that point 22 years ahead of schedule.

The direct line from *Grutter* through MICH. CONST., art. XII, § 2, to the Sixth Circuit's ruling shows the fundamental flaw in the "political process" doctrine that warrants its burial. As applied by the Sixth Circuit, the doctrine finds Michigan's electorate guilty of acting unlawfully by reordering the State's political structure to place at a more remote and inaccessible level, decision-making over the use of race in college admissions. But that runs flatly counter to the factual and historical record. As Petitioner's brief shows, pp. 24-28, public university admissions in Michigan simply are not "political processes" as *Seattle* uses that term. To the contrary, those who control them are shielded from the electorate by a virtually impregnable web of elected partisan trustees (with staggered terms) and unelected deans, department heads, committees, and administrators – who hold no real authority over the faculty, anyway. *See also*, Pet. App. 86a-87a (Sutton, J., dissenting). In throwing open the doors of the faculty lounge and removing from politically unaccountable functionaries the ability to parcel out spoils to favored groups (and freeze out disfavored groups), the People of Michigan showed that amending their constitution is a *more*, not less, accessible means of political change in this area. Through the ballot box, they wielded the initiative power in exactly the manner its framers intended:

> ...I do feel very strongly that if we are going to have a responsive government we are going to have to give the people back home the opportunity, not to put legislative matters into the constitution but to act as a sort of check and balance to an unresponsive legislature. [2

> Official Record, pg. 2463 (April 16, 1962) (remarks of Del. Snyder].

Speaking against another (ultimately rejected) provision that would have required constitutional amendments proposed via initiative to pass by a 3/5 vote of the electorate, another delegate to the 1961 convention sounded a similar theme. He called the initiative power

> ...one of the great institutions developed in the progressive era. I think that the history of its use in the state of Michigan has been good and, as long as we cannot be assured of a completely representative and responsible legislative body, it seems to be doubly necessary. [2 Official Record, pg. 2470 (April 16, 1962) (remarks of Del. Pollock].

Post-*Grutter*, the People of Michigan were faced with something worse than an unresponsive and irresponsible legislature: unresponsive and irresponsible university admissions bureaucrats. Some of them actively malevolent to Dr. King's noble vision of America, yet hiding behind a cloak of "highly individualized, holistic" applicant review. And absent constitutional amendment it would stay that way, since a camel could pass through the eye of a needle more easily than the average Michigander can influence the admission criteria of his or her public universities. Indeed, the only people who could possibly view amendment of Michigan's constitution as a *more difficult* route to such change are those who enjoy grossly disproportionate influence over admissions decision-makers – that they would preserve, in some

cases, by any means necessary. Yet, as applied by the Sixth Circuit, the "political process" doctrine ignores all that, and transforms a measure designed to ensure Equal Protection and fair access, into one that denies both. It is the "political process" doctrine that must go, not art. I, § 26.

The challenge to Michigan's constitutional guarantee of equal treatment readily fails without the benefit of *Hunter*/*Seattle*'s "political process" argument, since art. I, § 26 easily passes traditional Equal Protection analysis. Pet. App. 78a (Gibbons, J., dissenting); *see also Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701-702 (9th Cir. 1997); *Coral Construction, Inc. v. San Francisco*, 235 P.3d 947, 957 (Cal. 2010). It would be bad enough if this Court's jurisprudence were wrongly invoked to undo the valid electoral decision of the tiniest burgh or remotest village. But where it acts to frustrate the overwhelming will of millions of residents statewide who cared enough about race-neutral college admissions, public employment and the like to go to the polls and amend their constitution, the deprivation is even greater.

"The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around." *Hollingsworth*, 570 U.S. at __ (Kennedy, J., dissenting). "Freedom resides first in the people without need of a grant from government." *Ibid*. In telling Michigan's 10 million residents they are not allowed to determine for themselves, by going to the polls and amending their own constitution, that public university seats, public jobs, public contracts, and the like will be distributed without regard to one's

race, the Sixth Circuit has made a mockery of that notion. And the *Hunter*/*Seattle* "political process" doctrine is the tool it used.

If ever the doctrine had any use, this case shows it has surely outlived it. It should be scrapped.

CONCLUSION

The court of appeals should be reversed, and the "political process" doctrine of *Hunter* and *Seattle* overruled.

Respectfully submitted,

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