Nos. 08-1387, 08-1389, 08-1534, 09-1111

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al.*,
Plaintiffs-Appellants (08-1387), Cross-Appellees, Plaintiffs (08-1389/09-1111),

CHASE CANTRELL, *et al.*,
Plaintiffs-Appellees (08-1389), Plaintiffs-Appellants (09-1111),

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, *et al.*,
Defendants-Appellees/Cross-Appellants (08-1534), Defendants (08-1389/09-1111),

BILL SCHUETTE, Michigan Attorney General,
Intervenor-Defendant-Appellee (08-1387/09-1111),

ERIC RUSSELL
Intervenor-Defendant-Appellant (08-1389),

JENNIFER GRATZ
Proposed Intervenor-Appellant (08-1389)

Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF HISTORIANS, CONSTITUTIONAL SCHOLARS, AND SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS CHASE CANTRELL, *et al.*

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INTEREST OF *AMICI* AND AUTHORITY TO FILE

Amici curiae are 34 scholars who have devoted much of their careers to the study of the abolition movement, Reconstruction-era history, civil rights, and race relations.[1] As historians, constitutional scholars, and social scientists, *amici* have a professional interest in ensuring that this Court is fully and accurately informed about the historical context surrounding the passage and early implementation of the Fourteenth Amendment to better understand the political process discussion at issue in this case. The district court's attempt to distinguish "unequal" treatment on the basis of race from an "advantage" on the basis of race ignores the fundamental problem: Proposal 2 places a burden on racial and ethnic minorities by restructuring the political process.[2] By closing down the political process on the issue of race, Proposal 2 deprives minorities of access to the full benefits of American citizenship and is directly at odds with the purpose of the Fourteenth Amendment. *Amici* respectfully submit that there is no historical basis to support the district court's distinction and ample support in favor of the Plaintiffs' arguments.

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[1] No party's counsel authored any part of this brief nor contributed money that was intended to fund the preparation or submission of this brief. No one other than *amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29, *amici* have simultaneously filed a motion for leave to file this brief. *Amici* are listed individually in Appendix A.

[2] It places a similar burden on non-minorities who believe that the best public policy programs for the State may include various kinds of affirmative action.

ARGUMENT

I. The Reconstruction Amendments Were Intended To Provide Blacks With The Full Benefits Of American Citizenship Including Access To The Political Process.

During the last half-century or so, scholars and jurists have combed the records of the Thirty-ninth Congress seeking an answer to the question of what the Fourteenth Amendment means and what that Congress intended it to accomplish. *See* Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 389-90 (2004). Indeed, in scheduling reargument in *Brown v. Board of Education*, the Supreme Court specifically requested briefing on what Congress "contemplated or did not contemplate, understood or did not understand" as it related to segregation in public schools at the time the Fourteenth Amendment was ratified. 345 U.S. 972 (1953). *Amici* respectfully submit that to address the question before this Court today, the Court must take into account not only the words recorded in debates ratifying the Fourteenth Amendment, but rather the full scope of the goals of the Congresses that passed the Thirteenth, Fourteenth, and Fifteenth Amendments: to break down discrimination and incorporate blacks into the civic, economic, and political mainstream of American society.[3]

[3] *See Slaughter-House Cases*, 83 U.S. 36, 71-72 (1872) ("[O]n the most casual examination of the language of [the Thirteenth, Fourteenth, and Fifteenth] amendments, no one can fail to be impressed with the one pervading purpose

An understanding of the Fourteenth Amendment begins, not in Congress, but in the history leading up to that Amendment. *See* Harold M. Hyman & William M. Wiecek, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 387 (1982) (discussing influence of the Thirteenth Amendment on the Fourteenth Amendment); Michael Vorenberg, *Citizenship and the Thirteenth Amendment*, in THE PROMISES OF LIBERTY 59 (Alexander Tsesis ed., 2010). The Fourteenth Amendment's guarantee of equal protection of the laws resulted directly from Congress's affirmative efforts to secure the rights guaranteed by the Thirteenth Amendment: "Following the adoption of the Thirteenth Amendment there was 'the conviction that something more was necessary in the way of constitutional protection' . . . The statesmen accordingly 'passed through Congress the proposition for the Fourteenth Amendment.'" Joseph H. Taylor, *The Fourteenth Amendment, the Negro, and the Spirit of the Times*, 45 J. Negro Hist. 1, 27 (1960) (internal citations omitted).

In passing the Thirteenth Amendment, Congress intended not only to prohibit slavery, but to eliminate all badges and incidents of slavery as well. *See* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History In Light Of Runyon v. McCrary*, 98 Yale L. J. 565,

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found in them all . . . the security and firm establishment of . . . freedom . . . and . . . protection [of] the newly-made freeman and citizen from . . . oppression[].").

569 (1989). As Congressmen Thayer of Oregon noted, "what kind of freedom is that which is given by the amendment of the Constitution if it is confined simply to the exemption of the freedmen from sale and barter?" CONG. GLOBE, 39th Cong., 1st Sess. 1152 (Mar. 2, 1866). Indeed, "[f]reedom was much more than the absence of slavery. It was, like slavery, an evolving, enlarging matrix of both formal and customary relationships rather than a static catalogue." Hyman & Wiecek, *supra*, 391-92. Republican members of the Thirty-ninth Congress were aware of the dynamic currents swirling around emancipation and civil rights, and recognized that "if [blacks] and their white friends could not assemble, petition, or vote without official hindrance and unofficial violence, then civil rights were always in hazard." *Id.* at 399. As Senator Lyman Trumbull of Illinois said, "When slavery goes, all this system of legislation . . . goes with it." *See* CONG. GLOBE, 39th Cong., 1st Sess. 322 (Jan. 19, 1866) (discussing laws that excluded blacks from public education).

As the Reconstruction Congresses soon discovered, while most southern whites conceded that blacks were no longer the slaves of individual masters, the southern states intended to make them "slaves of society." *See* RECONSTRUCTION 1865-1877, at 38 (Richard N. Current ed., 1965). Following the ratification of the Thirteenth Amendment, many southern states enacted repressive "Black Codes," which were aimed at isolating blacks from whites. *See* William M. Wiecek,

Emancipation and Civic Status, in THE PROMISES OF LIBERTY 84-86 (Alexander Tsesis ed., 2010). Daniel C. Thompson wrote in *The Role of the Federal Courts in the Changing Status of Negroes Since World War II*, 30 J. Negro Educ. 94, 95 (1961), that the purpose of the Black Codes was "confining [blacks] to the bottom rung of the social ladder." The Black Codes reimposed the traditional incidents of slavery through labor coercion and race control and sought to get "things back as near to slavery as possible." Wiecek, *supra*, *Emancipation and Civic Status*, 84. For example, an 1865 Mississippi act used to target blacks defined vagrants as "persons who neglect their calling or employment, misspend what they earn" plus "any other idle and disorderly persons." *Id.* Moreover, the Mississippi act targeted whites and blacks who intermingled "on terms of equality." *Id.*

In December 1865, Congress authorized the Joint Committee on Reconstruction, comprised of six Senators and nine Congressmen, to investigate conditions in the South. *See* Finkelman, *supra*, 13 Temp. Pol. & Civ. Rts. L. Rev. at 400. On the committee were long-time proponents of racial equality and integration, Congressman John Bingham of Ohio, the principal author of Section 1 of the Fourteenth Amendment, and Congressman Thaddeus Stevens of Pennsylvania, a central proponent of the Amendment. *Id.* Also included were Congressman George S. Boutwell of Massachusetts and Senator Justin Morrill of

Vermont, both of whom had "been life-long opponents of slavery and both came from states that gave free blacks full legal rights, including suffrage." *Id.*

The Committee members interviewed scores of people, including former slaves, former confederate leaders and slave owners, United States Army officers, journalists, and others in the South, and produced a report of nearly 800 pages. *Id.* at 401. The Committee concluded that, given the emergence of the Black Codes, it would be unwise to "abandon" the former slaves "without securing them their rights as free men and citizens." Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. Resolution and Report of the Committee, at xiii (1866).

In response to the Committee's report, Congress passed the Civil Rights Act of 1866 and the Freedmen's Bureau Act, both of which would later become the basis for the Fourteenth Amendment. Senator Trumbull, the principal drafter of the Civil Rights Act of 1866, explained that it was necessary to "give effect" to the Thirteenth Amendment's "abstract truths and principles" and to "secure to all persons within the United States practical freedom." CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). Similarly, Congress intended the Freedmen's Bureau Act to give blacks an equal opportunity to participate in the civic and economic life of the country. During debates on the Act's reauthorization, Congressmen Samuel Moulton of Illinois explained that "[t]he very object of the bill is to break down the

discrimination between whites and blacks." CONG. GLOBE, 39th Cong., 1st Sess. 632 (Feb. 3, 1866).

In ratifying the Fourteenth Amendment, Congress sought to ensure the constitutionality of these two statutes and to write them into the fabric of the Constitution so they could not be easily overturned: "The one point upon which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." Jacobus tenBroek, EQUAL UNDER LAW 201 (1965). As Congressmen, and later President, Garfield stated, "[E]very gentleman knows that [the Civil Rights Act of 1866] will cease to be a part of the law whenever . . . [the other] party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife . . . and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it." CONG. GLOBE, 39th Cong., 1st Sess. 2462 (May 8, 1866).

Congress also intended the Fourteenth Amendment to include blacks within the circle of full citizenship through a "national guarantee of equality before the law." Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 257 (1988). The Fourteenth Amendment "uprooted the caste system" and placed blacks on an equal footing with whites in the civic and economic sphere.

Howard J. Graham, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 5 (1968). As Charles Sumner stated in eulogizing Abraham Lincoln, the "demon of Caste" must be destroyed and "[t]he same national authority that destroyed Slavery must see that this other pretension is not permitted to survive." *Promises of the Declaration of Independence, and Abraham Lincoln,* in 9 THE WORKS OF CHARLES SUMNER 367, 424-25 (1874). Thus, it was clear that Fourteenth Amendment was intended to ensure that blacks would be "admitted to the rights of citizenship." CONG. GLOBE, 39th Cong., 1st Sess. 498 (Jan. 30, 1866) (statement of Rep. Van Winkle).

It was in the context of this history that the Joint Committee on Reconstruction and Congressman Bingham wrote Section I of the Fourteenth Amendment. *See* Finkelman, *supra*, 13 Temp. Pol. & Civ. Rts. L. Rev. at 409. Bingham and others in the majority on the Joint Committee believed that Congress had to protect the life, liberty, safety, political viability, and property of the former slaves, as well as their rights to have meaningful contracts. *Id.* Former slaves had to be able to protect their families in the courtroom and the voting booth, as well as in the market place so they desperately needed the protections of the Bill of Rights – fair trials by fair juries, with legal counsel to represent these largely illiterate former slaves. *Id.* They also needed to be able to speak publicly and to organize

politically, and they needed equal schooling to participate in the political process. *Id.*

Listing all of the needs former slaves might need to protect them explicitly in a constitutional amendment would have been impossible. Bingham did not try. Instead, taking John Marshall's admonitions in *McCulloch v. Maryland*, 17 U.S. 316 (1819), to heart, he used broad language to bestow broad protections that would endure for the ages and could grow and develop over time to meet new needs as they arose. His goal was to reverse the racism and violence of slavery and its immediate aftermath.

The scope of the Fourteenth Amendment's protection of citizenship becomes even more clear when viewed in light of the final element of the Reconstruction project: the Fifteenth Amendment's protection of political rights. As historians have recognized, the Fifteenth Amendment provided more than protection in the voting booth; it was an integrationist effort to bring all people together in the nation's political institutions, from the jury box to the town square. *See* Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 400 (2005) (explaining that the right to vote necessarily encompassed the right to vote as members of juries, to vote inside legislatures - and thus to run for office - and other political rights). After passing the Fifteenth Amendment, Congress paved the way for integrated juries by enacting a statute to ban discrimination in jury service on the basis of

"race, color, or previous condition of servitude" - the language of the Fifteenth Amendment itself. 18 U.S.C. § 243 (2006).

When properly viewed in the full context of the Reconstruction, it becomes clear that Congress intended the Fourteenth Amendment to include blacks and other minorities in the full benefits of American citizenship and to preserve equal access to their rights as free men despite any obstacles that the southern states – or anyone else – might create. *See* Foner, *supra*, at 251-60.

II. By Altering The Political Process To Place Unique Burdens On The Use Of Race-Conscious Admissions Policies, Proposal 2 Unconstitutionally Deprives Racial Minorities Of The Full Benefits Of Citizenship Protected By The Fourteenth Amendment.

With this historical background in mind, there simply is no basis to conclude that the Fourteenth Amendment's protections end at the district court's distinction between "unequal" and "advantageous" uses of race. As the Panel correctly recognized, Proposal 2 creates a hurdle to political access and the exercise of citizenship of the "highest possible order." *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 624 (6th Cir. 2011). The fact remains, and the district court clearly held, that "Proposal 2's ban against 'grant[ing] preferential treatment to[ ] any individual or group on the basis of race' can mean nothing less than barring affirmative action programs. . . . [T]o suppose that races other than minority races would feel the impact of such a restriction defies logic and contemporary reality." *Coalition to Defend Affirmative Action v.*

Regents of the Univ. of Mich., 539 F. Supp. 2d 924, 955-56 (E.D. Mich. 2008). By altering the political structure to place a burden on individuals seeking to implement race-conscious programs, Proposal 2 simply acts as a new means of depriving racial minorities of the benefits of the civic, economic, and political mainstream of American society.

Although the Reconstruction Congresses did not consider affirmative action as it is known today, there is no question that they understood and embraced race-conscious programs. *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 430-31 (1997) (discussing Reconstruction-era race-conscious programs). In fact, the Reconstruction Congresses deemed access to education especially important, and although they did not mandate race-conscious programs, they took numerous race-conscious steps to provide educational opportunities to blacks. On March 2, 1867, less than a year after passing the Fourteenth Amendment, Congress passed a charter incorporating Howard University - an ambitious race-conscious effort to establish a higher education institution in the nation's capital. Over its lifetime, the Freedmen's Bureau, funded by Congress, spent an estimated $500,000 on Howard University, totaling nearly five percent of the Bureau's total budget. *See* Dwight O. W. Holmes, *Fifty Years of Howard University: Part I*, 3 J. Negro Hist. 128, 136 (1918). During this period, the Freedmen's Bureau provided direct financial assistance to other ambitious race-conscious education programs in the

South such as Berea College and Maryville College. *See* Scott Blakeman, *Night Comes to Berea College: The Day Law and African American Reaction*, 70 Filson Club Hist. Q. 3, 26 n.45 (1996).

To contend that altering the political process to remove a so-called "advantage" from racial minorities is somehow constitutionally permissible has no basis in the history of the Fourteenth Amendment or any of the Reconstruction-era legislation. Indeed, under the Fourteenth Amendment "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *See Hunter v. Erickson*, 393 U.S. 385, 393 (1969). Accordingly, Michigan's Proposal 2 cannot stand.

CONCLUSION

For the foregoing reasons, as well as arguments advanced by Plaintiffs-Appellants, *amici curiae* respectfully urge this Court to reverse the District Court's grant of summary judgment, and consistent with the history and purpose of the Fourteenth Amendment, invalidate Proposal 2 as applied to the consideration of race in admissions to Michigan's public universities.

November 23, 2011

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 2,844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief similarly complies with Fed. R. App. P. 29(d) because it is no more than one half of the maximum length allowed by the Court's September 28, 2011 Order limiting the parties' supplemental briefs to 25 pages. This brief also complies with Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

Dated: November 23, 2011

/s/ Barry Levenstam

CERTIFICATE OF SERVICE

I hereby certify that, on the 23rd day of November, 2011, I electronically filed the foregoing by using the CM/ECF system, which will send a notice of electronic filing to ECF registered participants.

/s/ Barry Levenstam