IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Before the *en banc* Court)

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

Plaintiffs-Appellants/Cross-Appellees,

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, et al,
Defendants-Appellees/Cross-Appellants,

and

BILL SCHUETTE Michigan Attorney General,
Intervenor-Defendant-Appellee.

Nos. 08-1387/1389/1534; 09-1111

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 06-15024 – Hon. David M. Lawson

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS OF THE DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION IN SUPPORT OF ATTORNEY GENERAL

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Dated: January 3, 2012

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Sixth Circuit Case Nos: 08-1387/1389/1534; 09-1111

Case Name: *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), et al, v. Regents of the University of Michigan, et al*

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Pursuant to Fed. R. App. P. 26.1 and 6th Cir. R. 26.1, ***Amicus Curiae*** make the following disclosures:

Name of *amici curiae*, each of whom is an individual:

Hans von Spakovsky
J. Christian Adams
Karl S. "Butch" Bowers, Jr.
H. Christopher Coates

Amici curiae make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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AMICI CURIAE'S IDENTITIES, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

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 United States 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.

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 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.

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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.

Amici curiae with this brief are submitting a motion seeking leave to file it.

STATEMENT REGARDING AUTHORSHIP AND FUNDING

In accordance with Fed. R. App. P. 29(c)(5), *amici curiae* state that:

- No party's counsel authored this brief in whole or in part;
- No party or party's counsel contributed money that was intended to fund this brief's preparation or submission; and
- No person (other than *amici curiae* or their counsel) contributed money intended to fund this brief's preparation or submission.

ARGUMENT

I. Article I, § 26 advances, rather than violates, Equal Protection.

One-third of the way through the 25-year shelf life envisioned for the constitutionally dubious practice of race-based university admissions, *Grutter v. Bollinger*, 539 U.S. 306 (2003), plaintiffs seek not to bury that regime, but permanently enshrine it in amber. Wielding the "political process" argument of *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), they ask this Court to supplant the People of Michigan as the ultimate source of authority over admissions to the State's public universities, and undo the electorate's overwhelming adoption of colorblindness and equality of opportunity as Michigan's governing standard. But even assuming the continued vitality of *Hunter* and *Seattle* and the "political process" mode of Equal Protection analysis, those cases in no way invalidate § 26.

A. Article I, § 26's bar on the use of racial preferences is squarely consistent with traditional Equal Protection Clause analysis.

Plaintiffs' claims readily fail without the benefit of *Hunter/Seattle*'s "political process" argument. As discussed in the only portion of the now-vacated panel ruling to have analyzed the issue, § 26 easily passes traditional Equal Protection analysis. *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 645-646 (6th Cir. 2011) (Gibbons, J., dissenting), *vacated and reh'g en banc granted*, __ F.3d __, 2011 U.S. App. LEXIS 18875 (6th Cir. 9/9/11)

(Order). "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Id.* at 645, *quoting Washington v. Davis*, 426 U.S. 229, 239 (1976). The Fourteenth Amendment bars such official conduct because "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997), *citing Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

This case demonstrates that starkly. Were plaintiffs to prevail, the faculty of any of Michigan's public universities could set admissions standards under which two high-school seniors, applying for the final incoming spot, succeed or fail in that quest based solely on their race, irrespective of their qualifications as individuals. Certainly, "equal protection of the laws" no longer countenances State officials standing in the schoolhouse door, deciding who gets in and who goes home based on skin color.

The Equal Protection Clause's ultimate goal is to do away with all governmentally imposed race discrimination, because racial distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Wilson*, 122 F.3d at 701, *citing Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) and *Shaw v. Reno*, 509 U.S. 630, 643 (1993). 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 completely rejects plaintiffs' promotion of perpetual racial preference 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).

B. Article I, § 26 runs afoul of neither *Hunter* nor *Seattle*, since prior to its adoption, admissions decisionmaking was controlled exclusively by politically unaccountable faculty.

Plaintiffs argue that § 26 "den[ies] racial minorities access to the political procedures open to all other citizens," Supp. Brf. of Coalition Plaintiffs, pg. 12, and "specifically excludes from the ordinary political process issues of special pertinence to racial minorities," Supp. Brf. of Cantrell Plaintiffs, pg. 18. Neither assertion is true, and neither can withstand scrutiny.

Both *Hunter* and *Seattle* make clear that the mere repeal of a racial preference does not violate the Equal Protection Clause. *Hunter*, 393 U.S. at 390

n.5 ("we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment"); *Seattle*, 458 U.S. at 483 ("the simple repeal or modification of desegregation or antidiscrimination laws, without more, has never been viewed as embodying a presumptively invalid racial classification"), *quoting Crawford v. Los Angeles Board of Ed.*, 458 U.S. 527, 539 (1982). Rather, a measure violates Equal Protection when it "lodges decisionmaking authority over the question at a new *and more remote* level of government," in such a way as to burden minority interests. *Seattle*, 458 U.S. at 474 (emphasis added).

As Judge Gibbons pointed out in her partial dissent to the now-vacated panel opinion, the unifying theme of both *Hunter* and *Seattle* is that impermissible "political restructuring" takes place when the relevant lawmaking authority is moved "from a local legislative body to the 'more complex government structure' of the city- or state-wide general electorate," in the process placing a "comparative structural burden" on the political achievement of minority interests. 652 F.3d at 637(Gibbons, J., dissenting) (citations omitted). Thus, in *Hunter*, prior to the charter amendment, Akron voters wishing to outlaw race-based housing discrimination needed only to convince the handful of elected city officials to pass such an ordinance. After, they had to travel the more burdensome route of a citywide referendum. Similarly, in *Seattle*, desegregation proponents originally needed only to convince local school-board members to pass such a measure; after,

they had to convince the voters of the entire State to permit such a plan – an especially onerous burden given that the measure would not apply statewide, but rather only in one local area. In both cases, the political path racial minorities had to traverse was made more difficult because the challenged enactment moved the locus of decision-making to a *more remote, less accessible* level.

Here, in contrast, there was no similar relocation of the decisionmaking process to a more remote, less accessible level – quite the contrary. Prior to § 26's adoption, the locus of decisionmaking for public-university admissions was completely cut off from Michigan's citizenry, save for those whom the faculty allowed to address it. It remains so today, except for matters of race, sex, color, ethnicity, or national origin. Michigan's Constitution establishes the University of Michigan, Michigan State University and Wayne State University as essentially a fourth branch of government, co-ordinate with and equal to the legislature. *Federated Publications, Inc. v. Bd. of Trustees of Michigan St. Univ.*, 594 N.W.2d 491, 496 n.8 (Mich. 1999) (citation omitted). Each has a governing board with broad supervisory powers over management and control from which the legislature is expressly limited, giving each board broad plenary authority over its institution, subject only to health and safety laws. *Id.* at 497 (citations omitted); *see also* 1979-1980 Op. Att'y Gen. 578.

Prior to voter adoption of § 26, the governing boards exercised that plenary authority in a way that placed decisionmaking regarding admissions effectively beyond the reach of Michigan's citizenry. Thus, the elected governing board of each institution established a set of bylaws, which in turn vested responsibility for setting student admission policies in various school administrators, alone or in conjunction with the faculty and the board. 652 F.3d at 638-639 (Gibbons, J., dissenting). Admissions standards in that way were fully delegated to administrative units within each institution that set admissions criteria through informal processes that placed power for substantive changes with the faculty. *Id.* at 639. Thus, as even plaintiffs admit, "faculty are the primary architects of all the admissions criteria and protocols," Cantrell Plaintiffs' Reply Brief to panel at 20, n. 11, and there is no system in place to review or alter admissions policies, above the faculty level. 652 F.3d at 639-640 (Gibbons, J., dissenting).

The notion that that framework represented some halcyon era of direct democracy regarding admissions policies, brought to an end by § 26's removal of that process beyond the reach of racial minorities, does not square with reality. Prior to § 26, nobody (other than faculty), of *any* race, had any sway over university admissions policies. While the public could attend faculty meetings at which admissions standards were discussed – and could speak, provided they gave advance notice – the faculty committees were under no obligation to respond or

even consider the comments. *See,* 652 F.3d at 642 (Gibbons, J., dissenting), *citing* Zearfoss Dep., pp. 209-210; Wu Dep., pg. 190. As Wayne State's law-school dean testified, not even Wayne's Board of Governors could approve or disapprove the law school's policies, and if it attempted to interfere with faculty in their exercise of that authority "it would precipitate a constitutional crisis," 652 F.3d at 639-640 (Gibbons, J., dissenting), *citing* Wu Dep. at 191 – a veritable tweed revolution. Article I, § 26 thus did not erect a political hurdle, in contrast to both *Hunter* and *Seattle*. To the contrary, it made it easier for private citizens of any race to affect change in university policies. Compared to the total exclusion of the public from faculty decision-making, the task of amending Michigan's Constitution via statewide initiative is considerably less burdensome.

The University of Michigan and Michigan State University offer this Court "clarifications" regarding the governance structure of their "vast and highly complex institutions." Supp. Brief of University of Michigan and Michigan State University ("Michigan/MSU Supp. Brief"), pp. 17-20. But they provide little in the way of new information – and nothing that undercuts Judge Gibbons' analysis of their structure, 652 F.3d at 637-640 (Gibbons, J., dissenting), or her conclusion that, despite each board's superficial retention of "plenary authority" over its institution, "the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the universities." *Id.* at 640. While the

Universities intone that they "take seriously their constitutional charge of institutional oversight," Michigan/MSU Supp. Brf., pg. 21, the fact is that when it comes to admissions policies, the faculty run the show and are "islands unto themselves," accountable to no one.

Presumably to support the notion that the public can meaningfully impact admissions processes via the governing boards, the Universities point to a lone instance when a Michigan alumna addressed admissions-policy issues during the public comment portion of a 2008 Board of Regents' meeting. Michigan/MSU Supp. Brf., pg. 20 n.12. But far more reflective of the realities of the tripartite governing board-faculty-public relationship is the 2007-08 public uproar resulting from the University of Michigan Press' distribution of a British publisher's book criticized as being anti-Israel. Faced with vocal demands from various groups and individuals that the University cut ties with the publisher, Pluto Press, the Regents took no action. Instead, Regents Deitch, Newman, and Richner wrote to the Faculty Executive Board that runs the Press, imploring it to revisit its ties to Pluto:

> *We are writing to express our grave disappointment over the decision of the Faculty Executive Board of the University of Michigan Press ("Press") to continue the Distribution Agreement with Pluto Press. We urge reconsideration of that decision prior to the upcoming November 30 deadline for a termination effective June 30, 2008....*
>
> *We note that "The Regents of the University of Michigan" are the contracting party on all University contracts. Therefore, the Board has the power to terminate such contracts. We have elected*

> *not to do so out of respect for your committee. Nevertheless, we feel so strongly about this decision and its negative ramifications for the University that we felt obligated to write lest the public conclude that our silence reflects agreement with the decision.*
>
> * * *
>
> *Should your Board elect not to end all of its distribution agreements, we urge that you adopt a policy requiring that the Press only enter into distribution agreements with publishers whose standards of review are no less rigorous than that of the Press itself. Moreover, we insist that the Press itself, or an appropriate scholarly peer review panel, review works of potential authors prior to being accepted for publication to ensure the academic quality, integrity, and contribution of an individual's work.*
>
> *Thank you for considering these views. We will continue to monitor this situation through the office of the Provost.*

[Minutes of 11/15/07 Regents' meeting, pp. 19-20, available at http://www.regents.umich.edu/meetings/12-07/12-2007-I-Minutes.pdf (accessed Dec. 29, 2011)]. Ultimately, the University Press cut ties with Pluto – but not until a year later, and the decision was made by the Faculty Executive Board, not the Regents. *See* Scott Jaschik, *Michigan Severs Ties to Controversial Publisher*, Inside Higher Ed, June 18, 2008, available at http://www.insidehighered.com/news/2008/06/18/pluto (accessed Dec. 29, 2011).

Thus, what plaintiffs tout as "the informal and low-cost" method of lobbying the Boards or the admissions committees to change admissions policies, Supp. Brief of Cantrell Plaintiffs, pg. 7, more accurately could be called "completely ineffective," "pointless," or "futile." Though Michigan Regents claimed the

authority to terminate the Press-Pluto contract, and faced intense calls from the public to do so, they refrained from that action "out of respect for [the faculty] committee." Judge Gibbons' assessment of how Michigan's universities work in practice is correct: faculty committees are the tail that wag the dog.

That is crucial for these purposes, because *Hunter* and *Seattle* bar only the relocation of political decisionmaking to a "new and more remote level of government." 457 U.S. at 483. Given the cloistered natured of faculty decisionmaking regarding admissions, Michiganders' decision to vest one portion of that power in the State Constitution is in fact movement in the opposite direction, toward a *less* remote, *more* accessible level of government. It is not the reordering of political authority, nor does it place a "comparative structural burden" on racial minorities. And plaintiffs cannot complain that faculty predisposition to sympathize with them and adopt race-conscious admission policies renders § 26 unconstitutional. While *Hunter* and *Seattle* outline the constitutional limits on structural burdens placed upon minority groups' ability to achieve beneficial legislation, "they do not guarantee that racial minorities will win every political battle." 652 F.3d at 636 (Gibbons, J., dissenting), *citing Seattle*, 458 U.S. at 467, 484.

Wilson identified the fundamental flaw in the Orwellian attempt to redefine a measure *requiring* equal treatment, into one that *deprives* certain groups of it:

> 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)].

Analyzed against a proper framing of *Seattle* and *Hunter*, § 26 does not violate Equal Protection as to Michigan's university admissions. Rather, it restores Equal Protection as an operative principle.

C. Plaintiffs would permanently enshrine racial preferences in Michigan university admissions beyond the reach of anyone ever to alter, contrary even to *Grutter*.

Grutter noted that the extraordinary practice it was sanctioning was permissible in part because it would be of only temporary duration:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. [*Grutter*, 539 U.S. at 343].

But if plaintiffs prevail, racial preferences in Michigan will live on indefinitely. While plaintiffs profess not to challenge "the ability to repeal such programs through the ordinary political process [since] such a repeal would be constitutionally permissible," Supp. Brief of Cantrell Plaintiffs, pg. 2, that is *exactly* what they are challenging. A constitutional amendment such as § 26

effectively is the only way to repeal racial preferences in university admissions, since the alternate route not only is so cumbersome as to be impractical, but could not achieve the desired goal: even if the electorate voted in a board majority favoring an end to preferences, and that majority adopted new bylaws and replaced administrators opposed to equal treatment, unaccountable faculty still would ultimately control the process. And legitimate issues of academic freedom would stand in the way of their wholesale replacement.

Interviewed on the eve of *Grutter*'s release, one of the chief architects and defenders of the "holistic" law-school policy at issue conceded that a measure such as § 26 would be a proper means of citizen control over their universities:

> **BILL MOYERS:** The opponents of affirmative action have said that if the court were to decide in your favor, and against them, they would then go to the states, to try to wage a campaign to pass Constitutional amendments outlawing it at the state level forever.
>
> **LEE BOLLINGER:** Right. *And of course, they're free to do that.* And that's what happened in California, with Proposition 209 in the mid-1990's. The Constitution of California was amended to prohibit race as a factor in admissions into public universities.
>
> So, even if the court does say, as I predict or hope it will, that race can be considered, as it has been, *it's still open to legislatures or to individual universities, to decide not to do that.* ["Bill Moyers Interviews Lee Bollinger, June 20, 2003," available at http://www.pbs.org/now/transcript/transcript_bollinger.html (accessed Dec. 5, 2011) (emphasis added)].

Under plaintiffs' view, however, it is *not* open to legislatures or universities "to decide not to do that." Nor are voters free to amend their Constitution.

"Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). Plaintiffs would have this Court restore and perpetuate "preferment by race," via the divisive system of racial spoils that Michigan's voters decided to end. Art. I, § 26 is not an Equal Protection problem, but rather, the remedy.

CONCLUSION

For the foregoing reasons, *amici curiae* request that the district court be affirmed.

Respectfully submitted,

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Dated: January 3, 2012

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief *amici curiae* complies with the 13-page limit for such briefs set by Fed. R. App. P. 29(d), and

2. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as incorporated by Fed. R. App. P. 29(c)(7), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

/s/ Michael F. Smith
Michael F. Smith

Dated: January 3, 2012

CERTIFICATE OF FILING AND SERVICE

As directed by the Court's En Banc Coordinator, I hereby certify that the filing and service of this paper (including the Disclosures of Corporate Affiliations and Financial Interest it contains) will be made on all parties of record by the Coordinator.

Respectfully submitted,

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