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

BRIEF FOR THE JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of these judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

SUMMARY OF ARGUMENT

Our Constitution creates a government of limited powers, not only because the federal government may only exercise the authority expressly granted to it, but because the Constitution itself includes affirmative prohibitions on the use of those powers. Just as there is balance between the various branches and

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

levels of government, there is a balance between the proper powers of the government and the Constitutional limits on those powers. Interpreting the proper scope of those limits is essential to maintaining that balance, because a judicial expansion of the Constitution's terms robs the federal and state governments of their proper authority, whether granted by the Constitution or reserved to the States and the people via the Tenth Amendment.

The Sixth Circuit's interpretation of the political process doctrine worked just such a judicial usurpation of power. The fundamental goal of the Equal Protection Clause is spelled out in its text: ensuring to all people "the equal protection of the laws." The question presented – whether the Equal Protection Clause permits states to require equal treatment of university applicants – is answered by a tautology. The Equal Protection Clause not only permits equal treatment – it requires it. By carving out a set of cases in which the people and their elected representatives cannot give full effect to the clause's goal of equal treatment, the court below usurped the powers properly retained by the people. Ironically, by expanding one doctrine within Equal Protection Clause analysis beyond its bounds, the decision below undercuts the ability of both the federal and state governments to effect the central goal of the Equal Protection Clause itself.

The Sixth Circuit's interpretation of the political process doctrine is overly broad, going beyond what *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457

(1982) require, and disregarding later Supreme Court decisions which mandate a narrower reading of those cases to ensure the doctrine does not violate the Equal Protection Clause itself. The Sixth Circuit's interpretation of the political process doctrine calls into question a host of federal and state laws, including many laws whose aim was precisely to advance the goals of that Clause.

These broad implications do not by themselves prove that the Sixth Circuit's holding was incorrect, but they lend weight to Petitioners' legal argument demonstrating the errors of that holding. The fact that this holding would invalidate laws or constitutional amendments passed by so many federal and state legislatures and so many citizen referenda points to its novelty and disconnect with traditional Equal Protection Clause analysis. And a holding which declares that so many laws purporting to carry out the Equal Protection Clause actually *violate* that Clause should raise particular red flags.

These broad and serious implications are evidence that the decision below, which uniquely expands the political process doctrine to unconstitutionally tie the hands of both state and federal legislators, misinterprets longstanding constitutional doctrine and should be reversed.

ARGUMENT

I. The Sixth Circuit's Decision Applied an Overly Broad Interpretation of the Political Process Doctrine

The "'central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.'" *Seattle*, 485 U.S. at 484 (omission in original) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)). While "[a] racial classification, regardless of purported motivation, is presumptively invalid" under the Equal Protection Clause, *id.* at 485 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979)), facially neutral legislation is only invalid under the Clause if "the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations," *id.* at 484-85. This is because "*purposeful* discrimination is 'the condition that violates the Constitution.'" *Seattle*, 458 U.S. at 484 (1982) (emphasis added) (quoting *Personnel*, 442 U.S. at 274 (1979)).

The decision below invoked the political process doctrine originally articulated in *Hunter v. Erickson*, 393 U.S. 285 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), to hold that a law violates the Equal Protection Clause if it "(1) has a racial focus, targeting a policy or program that 'inures primarily to the benefit of the minority'; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through

that process." *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012) (citing *Seattle*, 458 U.S. at 467, 472; *Hunter*, 393 U.S. at 391). The court below concluded that Proposition 2 runs afoul of the political process doctrine because it meets these two conditions by (1) blocking admissions policies that "inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest," *id.* at 479, and (2) "reorder[ing] the political process in Michigan to place special burdens on minority interests." *Id.* at 485.

Contrary to the holding of the Sixth Circuit, the political process doctrine should only apply when the reordering of the political process is done with discriminatory intent and works to *impede*, not mandate, equal treatment. Under the proper analysis, Proposition 2 does not trigger equal protection scrutiny.

A. The Political Process Doctrine Applies Only Where There is Discriminatory Intent

The Sixth Circuit's holding that a discriminatory intent requirement in the political process doctrine "has no basis in law," *BAMN*, 701 F.3d at 478 n.3, is itself not grounded in proper Equal Protection Clause doctrine. As both *Hunter* and *Seattle* clarify, the political process doctrine requires a finding of discriminatory intent, not merely a disparate impact on a

minority group or a judgment by certain members of that group that it negatively affects them.

In *Hunter*, the city in question did "not attempt[ ] to allocate governmental power on the basis of any general principle," *Hunter*, 393 U.S. at 395 (1969) (Harlan, J., concurring), or "aim [to] provid[e] a just framework within which the diverse political groups in our society may fairly compete. . . ." *Id.* at 393 (Harlan, J., concurring). Such laws would not have triggered constitutional scrutiny. Instead, the provision had a clearly disallowed discriminatory purpose: "making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.* at 395 (Harlan, J., concurring).

Similarly, *Seattle* explained that facially neutral legislation is only invalid if "the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." *Seattle*, 458 U.S. at 485. The initiative in *Seattle* "was effectively drawn for racial purposes," and "enacted 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration," an explanation that draws upon language from the Court's prior definition of "discriminatory purpose." *Seattle*, 458 U.S. at 471 (quoting *Personnel*, 442 U.S. at 279).[2]

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[2] *Personnel*, 442 U.S. at 272 (1979) explains that a decisionmaker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel*, 442 U.S. at 279 (footnote omitted).

To be sure, *Seattle*'s holding on the issue of discriminatory intent is confusing, because the opinion is at odds with itself. At one point, that Court protests that "a particularized inquiry into motivation" to discern discriminatory intent is not required when "the governmental action 'plainly rests on distinctions based on race.'" *Seattle*, 458 U.S. at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971). But the *Seattle* Court itself appealed to discriminatory intent to show why the legislation at issue was a "racial classification" that is "inherently suspect." *See Seattle*, 458 U.S. at 485, *see also id.* at 471 ("We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes."). The *Seattle* Court supported its conclusion that the legislation was racially based by pointing to several indicators of intent: the drafting of the initiative, statements of its proponents, and the public knowledge of the initiative's disproportionate effect on integrative busing as opposed to other types of busing. *Id.*

A reading of *Hunter* and *Seattle* that requires discriminatory intent is consistent with the Ninth Circuit's interpretation of the political process doctrine. The Ninth Circuit distinguishes "'between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.'" *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 705 (9th Cir. 1997) (quoting *Crawford v. Board of Education of the City of Los*

Angeles, 458 U.S. 527, 538 (1982)). The former is disallowed, while the latter is allowed. *Id.* A state must "reallocate political authority in a discriminatory manner," to run afoul of the doctrine. *Id.* at 706. *See also Valeria v. Davis*, 307 F.3d 1036, 1040 (9th Cir. 2002) ("*Hunter* and *Seattle* are illustrative of [the] purposeful discrimination requirement, for they both dealt with political obstructions placed in the way of minorities seeking to remedy identified patterns of racial discrimination.").

Even if *Hunter* and *Seattle* did not explicitly require discriminatory intent to invoke the political process doctrine, other cases clarify its necessity. In *Washington v. Davis*, the Supreme Court rejected an Equal Protection challenge to an employment qualifications test for Washington, D.C. police officers, even though the test disproportionately rejected minority applicants. 426 U.S. at 232-33 (1976). *Washington* explains that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Washington*, 426 U.S. at 239. *See also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) ("Our decision last Term in *Washington v. Davis* . . . made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

This interpretation of the political process doctrine is the most appropriate, because it avoids exporting influence over a law's constitutionality to outside minority groups. Under the Sixth Circuit's interpretation, courts must determine when a facially neutral law that lacks a discriminatory requirement hurts a minority group. This difficult inquiry – one that a discriminatory intent requirement renders unnecessary – necessarily involves significant input from outside groups. For example, in *BAMN*, the 6th Circuit determined that because "racial minorities lobbied for the implementation of the very policies that Proposal 2 permanently eliminates, it is beyond question that Proposal 2 targets policies that 'minorities may consider . . . [to be] in their interest.'" *BAMN*, 701 F.3d at 478-79 (alteration in original) (quoting *Seattle*, 458 U.S. at 474).

Following the Sixth Circuit's use of outside minority groups as a proxy for the effect on minorities raises serious questions. No minority community is monolithic, and courts would inevitably be faced with laws which had organizations purporting to represent minority interests on both sides. The challenge of determining which are representing genuine minority interests and how to balance the weight of minority interests on both sides is an inquiry wholly unsuitable for the judicial branch. Rather than using such a proxy for minority impact, an inquiry into intent addresses the real problem of discriminatory government action.

B. The Political Process Doctrine Applies to Laws that Impede the Equal Treatment of Minority Groups, not Those that Mandate Equal Treatment

Second, a law must impede the *equal treatment* of minority groups to run afoul of the political process doctrine. Laws that mandate the equal treatment of all races effect the very essence of the Equal Protection Clause and thus must be constitutional even if they invalidate programs that allegedly "inure primarily to the benefit of" minorities. *See BAMN*, 701 F.3d at 479.

This interpretation of the political process doctrine – that a "denial of equal protection entails, at a minimum, a classification that treats individuals differently," *Wilson*, 122 F.3d at 707 (citing *Adarand Constructors v. Pena*, 515 U.S. 200, 223-24 (1995)) – is consistent with both *Hunter* and *Seattle*. *Hunter* "involved the repeal of a presumptively valid law that mandated equal treatment; it did not involve the repeal of a racial preference policy or any other law that was itself presumptively invalid." *BAMN*, 701 F.3d at 495 (Gibbons, J., dissenting) (citations omitted). *See also Wilson*, 122 F.3d at 707 ("In *Hunter*, the lawmaking procedure made it more difficult for Nellie Hunter to obtain protection against unequal treatment in the housing market."). *Seattle* involved the repeal of laws designed to combat a specific form of discrimination: the segregation of neighborhoods that resulted in the effective segregation of schools. While busing to alleviate that segregation may not have been ordered by a court, the record explains that fear

of litigation was the impetus for the busing in the first place. *See Seattle*, 458 U.S. at 460 n.2, n.3. Thus the Sixth Circuit's characterization of this busing as a benefit rather than a prophylactic measure to ensure equal treatment fails to take into account *Seattle*'s full context. *See BAMN*, 701 F.3d at 479. The racial preferences that Proposal 2 eliminated, on the other hand, amounted to a zero-sum benefit to certain races over others and were not designed to remedy past discrimination but to increase diversity.

Even if the Sixth Circuit correctly held that *Seattle* did involve group benefits, not equal treatment, subsequent Supreme Court precedent has clarified that such group benefits are not required or encouraged under the Equal Protection Clause, but are instead subject to heightened scrutiny. This mandates a narrower reading of the political process doctrine than that supplied by the Sixth Circuit.

In *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), the Supreme Court applied strict scrutiny to racial classifications in school admissions policies, and speculated that those classifications would outlive their usefulness within 25 years. These racial classifications were suspect for deviating from "'the norm of equal treatment of all racial and ethnic groups,'" *Grutter*, 539 U.S. at 342 (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion)), even though they would have, under *BAMN*'s formulation, "inure[d] primarily to the benefit" of minority groups. *See BAMN*, 701 F.3d at 477. The Supreme Court, in *Fisher v. Univ. of Texas at Austin*, reaffirmed *Grutter*, explaining that "*Grutter* made clear

that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" 570 U.S. ___, slip op. at 8 (2013) (quoting *Grutter*, 539 U.S. at 326). *Fisher* also reiterated that "[s]trict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id.* at 12.

In practice, *Grutter* and *Fisher* require a case-by-case evaluation of each instance of affirmative action, which requires that universities either win a lawsuit or ban affirmative action altogether to verify the constitutionality of their admissions policies. Despite this, the Sixth Circuit believes that Michigan voters cannot prohibit these policies that "deviat[e] from the norm of equal treatment," *BAMN*, 701 F.3d at 498 (quoting *Grutter*, 539 U.S. at 342), and must instead "contest and succeed, one-by-one, in elections or selections in all of the many individual [educational authority] jurisdictions and methods of selection" to ensure that their state's education policies follow that norm, and avoid potential legal liability. *BAMN*, 701 F.3d at 492 (Boggs, J., dissenting).

The most logical interpretation of the political process doctrine is to exempt group benefits. It is beyond comprehension to argue, as in *BAMN*, that a law which impedes access to *preferential* treatment can also violate the right to *equal* protection, when equal protection itself may *require* invalidating certain forms of preferential treatment. "The *Fourteenth Amendment* . . . does not require what it barely permits."

Wilson, 122 F.3d at 709. *See also Wilson*, 122 F.3d at 708 ("The controlling words, we must remember, are 'equal' and '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."). The equal protection clause is rightly implicated "whenever the government treats any person unequally because of his or her race. . . ." *Adarand*, 515 U.S. at 229-30 (1995) (quoted by *Wilson*, 122 F.3d at 701), including when it offers minorities race-based benefits, not just when someone discriminates based upon race.

II. The Sixth Circuit's Misinterpretation of the Political Process Doctrine Will Seriously Undermine State and Federal Legislative Prerogatives

A. An Overly-Broad Understanding of the Political Process Doctrine Ties The Hands of Legislatures and Individual Citizens

Our Constitution grants certain enumerated powers to the legislature, *see* U.S. Const. art. I, and reserves the remaining powers to the States and the people, *see* U.S. Const. amend. X, notwithstanding the limitations on those powers given in the Constitution itself. Just as the branches of the government itself are carefully designed to provide checks and balances, *see* Federalist No. 51 (James Madison), and

the aggrandizement of any one branch comes "at the expense of the other," *see Buckley v. Valeo*, 424 U.S. 1, 122 (1976), so the judicial expansion of constitutional limits on government takes away properly delegated and reserved constitutional authority from the federal and state governments. The Sixth Circuit's misreading of the political process doctrine does just that.

An overly-broad reading of the political process doctrine would preclude all but the most local of policy-making if an issue implicates a minority group. This overly restricts the constitutional powers granted to Congress, including its Fourteenth Amendment right to enforce the Equal Protection Clause itself. Federal laws aimed at a minority group under the Equal Protection Clause could be constitutionally suspect under the reasoning of the Sixth Circuit if they precluded or preempted state policies that could inure to that class's benefit. This could also call into question similar state policies, because they could preclude more beneficial local policies.

Precluding all but the most local of policies effectively shuts down the state laboratories of democracy, which help achieve the best positive policy outcomes. As Justice O'Connor explains, "One of federalism's chief virtues . . . is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*,

285 U.S. 262, 311 (1932)) (Brandeis, J., dissenting). *See also DA's Office v. Osborne*, 557 U.S. 52, 79 (2009) (Alito, J., concurring) ("[DNA testing] is an area that should be . . . explored 'through the workings of normal democratic processes in the laboratories of the States.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 305, 326 (2002) (Rehnquist, C. J., dissenting)). The Sixth Circuit's interpretation shuts down these state laboratories, forcing policy-makers to govern on a more fragmented level, on subjects ranging from immigration and civil rights to tax law and education.

An overly-broad interpretation of the political process doctrine also allows unelected state and federal judges to thwart the individual right of citizens to self-governance, by potentially holding a wide range of policies to be implicated by the political process doctrine. The mere possibility of applicable legislation on particular subjects could limit the ability of citizens to employ the initiative and referendum process, or to lobby for certain kinds of state and federal legislation. It would also judicially block Members of Congress from fulfilling the quintessentially political duty of resolving complicated policy issues. *See Turner Broadcasting System*, *Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (opinion of Kennedy, J.) ("Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here") (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)); *see also Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 (1982) ("The very difficulty of these policy

considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.") (footnote omitted).

Under the Sixth Circuit's holding, federal and state legislators could be powerless to address certain issues, even where a local government has failed to take action, and their constituencies have demanded it. *See Wilson*, 122 F.3d at 709 ("[Judging whether compelling state interests have been vindicated] most certainly *is* for the people of California to decide, *not* the courts. . . . [Otherwise] judicial power would trump self-government as the general rule of our constitutional democracy.").

In many of these cases, the judgment of these state legislatures and United States Congresses was that their provisions – laws that lacked a discriminatory purpose and "allocat[ed] government power on the basis of [a] general principle," *Hunter*, 393 U.S. at 395 (Harlan, J., concurring) – were required by the Equal Protection Clause, not opposed to it. The appropriate requirement of discriminatory intent would clarify that such laws, even those that restructure the political process, do not violate the Equal Protection Clause.

B. The Decision Below Calls into Question a Host of Federal and State Laws[3]

The Sixth Circuit's broad ruling would have far-reaching consequences for a wide variety of federal, state, and local laws. It would call into question any elimination of a racial preference that had been previously established by a more local rule; a state could not override a county's rule, and the federal government could not override a state law. *See BAMN*, 701 F.3d at 505 (Rogers, J., dissenting) ("Under the majority opinion, it is hard to see how any level of state government that has a subordinate level can pass a no-race-preference regulation, ordinance, or law."). It would also endorse a disparate impact standard for Equal Protection Clause doctrine that could "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Washington*, 426 U.S. 229, 248 (1976) (footnote omitted).

Notably, the Sixth Circuit's rationale would not be cabined to racial preferences, but would extend to other suspect and quasi-suspect classes under the Equal Protection Clause, such as sex, ethnicity,

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[3] *Amicus* takes no position on these laws either as a policy matter or as a constitutional matter, beyond observing that they should not violate the Equal Protection Clause's political process doctrine, but would do so under the interpretation adopted by the Sixth Circuit.

national origin, or religion. Just as distinctions based upon both race and sex must withstand some form of heightened scrutiny under traditional Equal Protection Clause analysis, they must withstand the same scrutiny under the Clause's political process analysis. No analysis in either *BAMN*, *Hunter* and *Seattle* provides indication to the contrary.

In particular, the Sixth Circuit's interpretation could invalidate various federal civil rights laws, as long as they mandate a level playing field for members of a suspect class, such as race. While these federal civil rights laws prohibit discrimination in a particular field, they also prohibit special benefits. They would be unconstitutional under the Sixth Circuit's interpretation for prohibiting lower political bodies, including cities or states, from offering benefits based upon that suspect class. This would violate the political process doctrine by making it more difficult for class members to secure programs that inure to their benefit, by forcing members of that class to lobby the federal (rather than the state or local) government to change the laws. This would implicate numerous federal civil rights laws. *See* Equal Credit Opportunity Act, Pub. L. No. 94-239, 90 Stat. 251 (1974) (mandates level playing field in provision of credit); Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601-3631 (1968) (same, housing); Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq. (1964) (same, employment). It would also implicate numerous state-level civil rights laws, including fair housing laws and anti-discrimination employment laws,

for prohibiting cities and counties from offering preferential treatment to members of a suspect class.

The Sixth Circuit's reasoning would also invalidate seven other state affirmative action bans, which are legally indistinguishable from Michigan's. *See* Ariz. Const. art. II, § 36 (requiring a level playing field "for 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."); Neb. Const. art. I, § 30 (same); Okla. Const. art. II, § 36A (same); Cal. Ballot Proposition 209 (1996) (same); Florida Governor's Executive Order 99-281, "Executive Order Regarding Diversity" (1999) ("[Prohibits] the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education, effective immediately."); N.H. Rev. Stat. Ann. § 21-I:52 (2012) (prohibits "preferential treatment or discrimination in recruiting, hiring, or promotion based on race, sex, sexual orientation, national origin, religion, or religious beliefs."); Wash. Rev. Code § 49.60.400(1) (1998) (requiring a level playing field "for 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.").

Additionally, the Sixth Circuit's interpretation of the law would implicate the 37 state-level Blaine

Amendments,[4] which prohibit religious schools from receiving state funding, and generally prohibit school vouchers for religious schools. These laws could make it more difficult for religious adherents – who qualify as members of a suspect class – to receive provisions that "inure" to their benefit, i.e., state funding for their private schools. In order to receive such benefits members of religious groups would have to amend the state constitution, instead of pass state legislation implementing vouchers.

Furthermore, three popularly enacted state ballot initiatives that ban bilingual education could be constitutionally suspect. The bans, which decide the issue on a statewide level instead of the school district level, obstruct minorities' efforts to promote school programs that certain minority groups deem to be in their benefit, which would be sufficient to trigger strict scrutiny, if the Sixth Circuit's interpretation is correct. *See* Ariz. Proposition 203 (2000); Cal. Proposition 227 (1998); Mass. Question 2 (2002). A more limited interpretation of the political process doctrine would allow for bilingual education bans. *See Valeria*, 307 F.3d 1036 (9th Cir. 2002) (dismissing a political process doctrine challenge to California's bilingual education ban). As *Valeria* explained, the ban did "not obstruct minorities from seeking protection against unequal treatment" and was not "motivated by racial animus." *Valeria*, 307 F.3d at 1041. Under

[4] *See* Blaine Amendments – Beckett Fund, http://www.becketfund.org/blaineamendments/ (last visited June 28, 2013).

the Sixth Circuit's reasoning however, both considerations would be constitutionally irrelevant, thus almost certainly subjecting a bilingual education ban to strict scrutiny, lack of discriminatory intent notwithstanding.

Finally, state constitutions that set special limits on property taxes could also fall under constitutional scrutiny under the Sixth Circuit's interpretation of the political process doctrine. By definition, constitutional property tax caps alter the political decision-making structure, making it more difficult to raise property tax rates. Some minority groups such as the NAACP deem this to be against their interest because property is held disproportionately by whites. For example, in 2011 Hazel Dukes, President of the NAACP New York State Conference wrote New York Governor Andrew Cuomo asking him to oppose "any type of property tax cap," the passage of which "would be reversing the trend of the gains we have made in education in our state" and "exacerbate the achievement gap."[5] Accordingly, under the Sixth Circuit's interpretation of the political process doctrine, a number of state constitutional provisions, legislation and ballot initiatives that limit property taxes would fall under scrutiny. *See*, *e.g.*, Ala. Const., § 214 (limits the property state tax rate to 6 ½ mills); Cal. Const. art.

[5] Letter from Hazel Dukes, President of the NAACP New York State Conference, to New York Governor Andrew Cuomo (May 9, 2011), http://www.scribd.com/fullscreen/55377684?access_key=key-1tl1qio328vlw350beue&allow_share=true.

13A (various rate limitations on state and local property taxes); Colo. Const. art. X, § 11 (limits the state property tax rate, in general, to 4 mills); Ga. Const. art. VII, § 1 (limits the state property tax rate to ¼th mill); Idaho Const. art. VII, § 9 (limits the state property tax rate, in general, to 10 mills); Ind. Const. art. 10, § 1 (various rate limitations on local property taxes); Ky. Const. § 157 (various rate limitations on city and county property taxes); La. Const. art. VII, § 19 (limits state property tax rate to 5 ¾ mills); Mich. Const. art. IX, § 6 (various rate limitations on state and local property taxes); Mo. Const. art. X, § 8 (limits property taxes to $0.10 on $100); Neb. Const. art. IX § 5 (limits county property tax rate, in general, to $0.50 on $100); N.Y. Const. art. VIII, § 10 (various rate limitations on city, county, village, or school district property taxes); N.D. Const. art. X, § 10 (limits state property tax rate to 1 mill); Ohio Const. art. XII, § 2 (limits the state and local property tax rate, in general to 1%); Okla. Const. art. X, § 8 (various rate and rate increase limitations on state and local property taxes); Or. Const. art. XI, § 11 (various rate limitations on state and local property taxes); Tex. Const. art. XIII, § 1-e (banning state property taxes); Wash. Const. art. VII, § 2 (various rate limitations on state and local property taxes); W. Va. Const. art. X, § 1 (various rate limitations on state and local property taxes).

CONCLUSION

For the foregoing reasons the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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