No. 12-682

IN THE
Supreme Court of the United States

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Petitioner,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION ETC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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Dated: July 1, 2013

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INTEREST OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the Sixth Circuit's use of the political restructuring doctrine to propagate racial preferences in Michigan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Amici* are further concerned that the Sixth Circuit's decision unlawfully limits the right of the people to make laws by misusing an

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. Letters reflecting this blanket consent have been filed with the Clerk.

outdated constitutional doctrine, and are concerned about the corrosive effect of that decision on American society and the rule of law. Among the harms caused by the Sixth Circuit's decision are: a dangerous erosion of the people's right to democratic self-governance; the needless further enshrinement of the intellectually impoverished concept of race into law; the perpetuation of a culture of racial and ethnic politics in American public life; and the perpetuation of racial and ethnic resentment and intolerance in American society. For these reasons, *amici* urge the Court to overturn the Sixth Circuit's decision.

SUMMARY OF THE ARGUMENT

The Sixth Circuit unjustly deprived Michigan's voters of their right to ban discrimination by incorrectly invoking a constitutional doctrine that is nearly as outdated as the affirmative action policies it was invoked to support. The Sixth Circuit was able to arrive at this conclusion through a convoluted application of an outdated constitutional doctrine. This doctrine, known as "political restructuring," derives from two cases, *Hunter v. Erickson,* 393 U.S. 385 (1969) *("Hunter")* and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) ("*Seattle*"). However, rather than provide justification for the Sixth Circuit's opinion, the results in those cases show why the political restructuring doctrine cannot be applied to the Michigan law. *Hunter* and *Seattle* relied on the political reality of racial majority and minority relations in 1969 and 1982. Those realities no longer exist because of the profound demographic and

cultural changes that this nation has undergone in the intervening years.

As noted by Judge Gibbons in her dissent below, declaring that the constitution insulates racial *preferences* from the political process flies "in the face of the core equal protection principle of non-discrimination" and is "at odds with the basic meaning of the *Equal Protection Clause*, as understood and explained through decades of jurisprudence." *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 701 F.3d 466, 493-494 (6th Cir. 2012, J. Gibbons, *dissenting*) ("*Coalition*"). The decision presented a "marked departure" from precedent: the first instance of judicially mandated racial discrimination. *Id.* Furthermore, unlike the initiatives at issue in *Hunter* and *Seattle*, affirmative action today is widely unpopular among voters of all races, making this case unsuited for resolution under the political restructuring doctrine. Both the political restructuring doctrine and its application to affirmative action are judicially unjustifiable in present day America. The Court should so find.

ARGUMENT

I. CHANGED POLITICAL REALITIES MAKE THE POLITICAL RESTRUCTURING DOCTRINE OUTDATED

Political restructuring doctrine relies on an interpretation of the Equal Protection Clause to overturn state and local ballot initiatives intended to make it more difficult for "racial" minorities to

achieve political objectives. A product of the Court's 1960s civil rights jurisprudence, the doctrine was designed for a time when large "white" majorities would use the initiative process in ways that allowed them to exclude and discriminate against minority "black" populations. In 2013, those "white" majorities are not only dramatically smaller due to immigration, but have also grown more tolerant and accepting of others of different "races" due to the successes of the civil rights movement.[2] Political restructuring doctrine, a novel legal concept to begin with, has now largely outlived its usefulness.

In the days of the early civil rights movement, the racial composition of the country was largely binary, with a white majority and a black minority.[3] In 1960, the U.S. population was roughly 85% white

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[2] To avoid the use of scare quotes throughout this brief, *amici* note that the concept of distinct human "races" is an unscientific and inherently ambiguous social construct, and the need for *amici* to refer to different human "races" in a legal brief in 2013 is due only to the unfortunate historical legacy the use of the concept has left in its wake. *See* Brief of *Amici Curiae* Judicial Watch and Allied Educational Foundation, *Fisher v. University of Texas at Austin*, Case No. 11-345 (filed with U.S. Supreme Court on May 29, 2012), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/Final-11-345-JudicialWatch-Brief.pdf.

[3] *See* Laura B. Shrestha and Elayne J. Heisler, Congressional Research Serv., Report for Congress, RL34756, *The Changing Demographic Profile of the United States (*2011), ("Once, a mainly biracial society with a large white majority and relatively small black minority—and an impenetrable color line dividing these groups—the United States is now a society composed of multiple racial and ethnic groups."), available at http://www.fas.org/sgp/crs/misc/RL32701.pdf.

and 10% black, which meant that all other races combined were less than 5% of the population.[4] In 2011, after 50 years of non-discriminatory immigration policies, the U.S. population is roughly 16% Latino, 5% Asian, 13% black, and 63% white (non-Latino).[5]

Furthermore, thirty years ago America still had a recent history of deliberate discriminatory mistreatment against minorities in the political process. This history began with the institution of slavery and continued with the perpetuation of segregation laws, which lasted through the 1960s. The civil rights movement developed in this context, and its goal was to change race relations in the United States and prevent racial discrimination. In addition to the impact of the civil rights movement, changes in immigration policy starting with the Hart-Cellar Act of 1965 have since transformed American politics far beyond anything recognizable by the political restructuring doctrine courts of the past.[6]

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[4] International Encyclopedia of the Social & Behavioral Sciences, *Population Composition by Race and Ethnicity: North America*, Table 2 (2001, Elsevier Science Ltd.), available at http://as.nyu.edu/docs/IO/1043/Pop.Comp.IESBS.2001.pdf.

[5] *See U.S.A. QuickFacts from the U.S. Census Bureau*, State and County QuickFacts, available at http://quickfacts.census.gov/qfd/states/00000.html (visited June 22, 2013).

[6] The goal of the Civil Rights Act was to enforce non-discrimination in the way Americans interact with each other. The Hart-Cellar Act carried this non-discrimination principle into America's immigration policy. As Rep. Philip Burton (D-CA) said of the Bill: "Just as we sought to eliminate discrimina-

A review of *Hunter* and *Seattle* shows the significance of the historical backdrop. In *Hunter,* the city charter of Akron was amended so that an ordinance protecting against racial discrimination in housing could not be used by those it was meant to protect from discrimination without a citywide referendum. 393 U.S. 385 (1969). The majority electorate in *Hunter* wished to protect their right to flagrantly discriminate based on race. The plaintiff in *Hunter* was a woman who had been told by a real estate agent that she could not show her the houses on the list she had prepared for her "because all of the owners had specified they did not wish their houses shown to negroes." *Id*. at 387. What was at stake in *Hunter* was an individual's right to be protected from racial discrimination, because "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Id*. at 391.

In *Seattle*, the voters of Washington approved a statewide initiative that prevented local school districts from busing schoolchildren for desegregation purposes. The initiative at issue had been passed by 66% of the voters of Washington State and by 61% of voters in the city of Seattle. The Court found that was a case of the majority denying the needs of a minority. The 1982 *Seattle* Court held

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tion in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this nation composed of the descendants of immigrants." 111 Cong. Rec., 21749, 21783 (1965). The passage of these two laws has ushered in profound changes in the nation.

that, although people "both white as well as Negro benefit" from policies which increase students' exposure to different races, "at bottom [the policy] inures primarily to the benefit of the minority and is designed for that purpose." 458 U.S. 457, 472 (1982). As in *Hunter*, the issue was a classic civil rights-era confrontation between a small black minority population and a large white majority.

Times have changed. Due in large part to immigration following the Hart-Cellar Act of 1965, in 2012, for the first time, whites made up a minority of births in the United States.[7] 2012 was also the first year that white deaths outnumbered white births in the U.S.[8] *Hunter* was decided in 1969, only four years after the 1965 Hart-Cellar Act. *Seattle* was decided in 1982 – more than thirty years ago, when the demographic change was just starting but not yet manifested itself to the degree it has today.[9]

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[7] *Most Children Younger than 1 are Minorities, Census Bureau Reports*, Press Release, U.S. Census Bureau, May 17, 2012, available at http://www.census.gov/newsroom/releases/archives/population/cb12-90.html.

[8] Neil Shah, *More White Americans Dying Than Being Born,* Wall Street Journal, June 13, 2013, available at http://online.wsj.com/article/SB10001424127887324049504578541712247829092.html.

[9] In fact, it was in 1980 that the demographic changes related to immigration became very substantial. *See* Shrestha and Heisler, *supra* ("The net immigration rate . . . fluctuated in the low range of 1.5 to 2.4 net migrants per 1,000 resident populations between 1950 and 1979. An increasing trend has been noted since 1980, and the annual rates in the 1990s were generally in the range of 3.0 to 3.9.").

Furthermore, in the periods both before and after passage of the Civil Rights Act, this Court oversaw the broad cultural changes in a once largely segregated society, upholding the act and its enforcement in court, and preventing backlash against it from undermining its promise.[10] The success of the civil rights era has forever changed American culture and politics.[11]

Today, the concept of racial minorities and majorities as understood in 1969 and 1982 no longer exists. The political reality of the electorate in the days of the *Hunter* and *Seattle* decisions is gone. In 2013 significant populations of blacks, whites, Latinos, and Asians all must compete at the ballot box. Moreover, the smaller and shrinking white majori-

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[10] This Court's decisions influencing the success of the civil rights movement began with *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Shelley v. Kraemer*, 334 U.S. 1 (1948), which declared that courts could not enforce racially restrictive covenants. As the civil rights movement progressed, the Court continued to promote non-discrimination and racial equality with a host of cases. *See, e.g.*, *Lucy v. Adams*, 350 U.S. 1 (1955), establishing that students could not be refused admission to a public university on the basis of race; *Boyton v. Virginia,* 363 U.S. 454 (1960), which prevented racial segregation in bus terminals; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), which upheld the Civil Rights Act; *Whitus v. Georgia*, 385 U.S. 545 (1967), preventing discriminatory jury panels; and *Loving v. Virginia,* 388 U.S. 1 (1967), declaring laws against interracial marriage unconstitutional.

[11] Some view Barack Obama's election and reelection as the culmination of the civil rights movement. *See, e.g.* Glenn Eskew, *Barack Obama, John Lewis, and the Legacy of the Civil Rights Struggle*, 56 American Studies Journal (2012), available at http://www.asjournal.org/archive/56/208.html.

ties of 2013 have been successfully transformed by the civil rights movement and no longer favor racial exclusion and discrimination. The political restructuring doctrine should therefore be laid to rest alongside America's binary racial history.

II. POLITICAL RESTRUCTURING DOCTRINE CANNOT BE APPLIED TO AFFIRMATIVE ACTION

Even if the political restructuring doctrine had not been rendered obsolete by intervening changes in American society, it could still not be applied to the Michigan ballot initiative in this case. Political restructuring doctrine relies heavily on the idea of protecting minorities from unjust ballot initiatives passed by the majority. As *Hunter* eloquently states: "The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 390. *Hunter's* foundational premise, therefore, is that as long as a majority wants to stop racial discrimination it can do so with a referendum. Here, the Sixth Circuit has said that a majority of people may *not* pass a referendum that prevents state actors from using racial discrimination. This turns *Hunter* on its head. As the lower court's dissent said, "the equal protection clause cannot both prohibit racial discrimination and prohibit laws banning racial discrimination." *Coalition*, 701 F.3d 466, 494 (6th Cir. 2012).

Furthermore, the political restructuring doctrine has only been applied to cases where popula-

tions vote their racial group interests alone. This assumption is no longer true for popular initiatives on affirmative action, if it ever was. The broad public dislike of affirmative action is spread evenly among America's racial groups:

> The wide opposition to affirmative action in college admissions spans partisan and racial divides. Nearly eight in 10 whites and African Americans and almost seven in 10 Hispanics oppose allowing universities to use race as a factor.[12]

Support for affirmative action is now at an historic low.[13] Accordingly, affirmative action politics today are not about racial rent-seeking, but about overwhelming majorities of *all* Americans united in rejecting a poor public policy choice. Absent a vote based on pure prejudice and animosity against a minority group, it is radically dangerous for federal courts to take away the people's right to govern themselves by legislating at the ballot box:

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[12] Scott Clement, *Wide majority opposes race-based college admissions programs, Post-ABC poll finds*, Washington Post, June 11, 2013, available at http://www.washingtonpost.com/politics/poll-majority-opposes-race-based-college-admissions-programs/2013/06/11/4aee6cf8-d2b9-11e2-8cbe-1bcbee06f8f8_story.html.

[13] *Id.* (a June 2013 poll found "[a]bout 45 percent said the [affirmative action] programs are a good idea, while the same number said they have gone too far and now discriminate against whites, *marking the first time in more than two decades that supporters did not outnumber opponents*.") (italics added).

> Support for direct democracy draws on the idea that popular self-rule is an important part of what it means for a society to be free. . . Direct democracy is also associated with the hope or expectation that voters will be more active, informed, and responsible – as citizens and as people – when important decisions are in their hands.[14]

The reasons for affirmative action's declining popularity today should be obvious to all but the most partisan observers. In the 1970s, the case could plausibly be made that affirmative action was temporarily desirable to remedy immediate past discrimination against blacks. Preferential policies of any kind are far more justified when aimed at helping people who have actually faced severe discrimination *in their own lifetimes*.[15] Even this Court has recognized the relevance of proximity in time to past injustices, holding that race-conscious admis-

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[14] Maimon Schwarzschild, *Voter Initiatives and American Federalism: Putting Direct Democracy in its Place*, Maimon Schwarzschild, Public Law and Legal Theory Research Paper Series, University of San Diego School of Law, pp. 2-3 (Fall 2003).

[15] *See* President Lyndon Johnson's Commencement Address at Howard University, "To Fulfill These Rights," June 4, 1965, ("You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."), available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

sions will probably be completely unconstitutional 15 years from now. *Grutter v. Bollinger*, 539 U.S. 306, 341-342 (2003). Whatever discrimination blacks and Latinos face today, any attempt to compare it to the discrimination faced by blacks in the 1950s and 1960s is a shameful trivialization of history.

CONCLUSION

Political restructuring doctrine is as outdated as affirmative action. Neither should be allowed to fall back on the other as a means of perpetuating itself in an era neither was designed for. The Sixth Circuit should be reversed, and the decision of the voters of Michigan to end affirmative action should stand.

Respectfully submitted,

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July 1, 2013