No. 12-682

In the Supreme Court of the United States

BILL SCHUETTE,
ATTORNEY GENERAL OF MICHIGAN,
Petitioner,

v.

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

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

BRIEF OF THE STATES OF ARIZONA, ALABAMA, GEORGIA AND OKLAHOMA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae, the States of Arizona, Alabama, Georgia and Oklahoma (the "Amici States") have a strong interest in eradicating discrimination in their public institutions and building diverse communities where all are treated equally, regardless of race, sex, color, ethnicity, or national origin. Accordingly, following this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), which suggested that States "can and should" look to "race-neutral alternatives" to achieve diverse student populations in state universities, some Amici States have adopted laws that bar them from granting preferential treatment or discriminating "on the basis of race, sex, color, ethnicity or national origin" in, inter alia, public education, including university admissions. *See* Ariz. Const. art. II, § 36(A); Neb. Const. art. I, § 30, Okla. Const. art. II, § 36A; N.H. Rev. Stat. Ann. § 187-A:16-a(I). These state laws are in all material respects identical to article I, Section 26 of the Michigan Constitution (Proposal 2), which the Sixth Circuit held violated the Equal Protection Clause in *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan*, 2012 WL 5519918, at *19 (6th Cir. Nov. 15, 2012) (en banc).

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[1] The Amici States gave notice of their intent to file this Brief to counsel for the parties on December 21, 2012. *See* Sup. Ct. R. 37(2)(a). The Amici States do not need the parties' consent to file this Brief. *See* Sup. Ct. R. 37(4).

Arizona, Michigan, and six other States—California, Florida, Nebraska, New Hampshire, Oklahoma, and Washington—have adopted laws that require them to implement race-neutral university admissions policies. One of the primary benefits of the federal system is that it allows States to be "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Grutter*, 539 U.S. at 342 (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)). The Sixth Circuit's decision in *BAMN*, which conflicts with the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (*Wilson*), threatens to chill the experimentation that is crucial to developing creative solutions and working toward the time when race-based college admissions policies reach their "logical end point." *Grutter*, 539 U.S. at 342.

While the Ninth Circuit has upheld provisions like article II, section 36 of the Arizona Constitution against equal protection challenges, the chilling effect of the Sixth Circuit's *BAMN* decision will curtail innovation and limit the experimentation this Court lauded in *Grutter* in States outside the Ninth Circuit. With far fewer state "laboratories," there will be less innovation. Consequently, development of effective race-neutral university admissions policies will be harmed. As such, Amici States have a strong interest in the Court granting the Petition for a Writ of Certiorari and reversing the Sixth Circuit's decision.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Justice Harlan captured a fundamental American value in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896): "Our Constitution is *color-blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." (Emphasis added). Justice Harlan also opined that "the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." *Id.* at 554.

President John F. Kennedy succinctly stated that "race has no place in American life or law." Pres. John F. Kennedy, Civil Rights Announcement (June 11, 1963). Reverend Dr. Martin Luther King said the same thing in the summer of 1963 in words that are familiar to most Americans.

More recently, this Court reiterated: "'[D]istinctions 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.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. One*, 551 U.S. 701, 746 (2007) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995)). This Court also emphasized that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

The Sixth Circuit held below that Michigan's constitutional provision prohibiting discrimination, or preferences, based on race in public university

admissions decisions violated equal protection principles. This gets it precisely backward. The United States Constitution commands, it does not prohibit, that citizens be treated as individuals, rather than that they be treated based on the race they happen to have been born into. U.S. Const. Amend. XIV, § 1 (no person can be denied "equal protection of the laws").

In *Grutter*, 539 U.S. at 342, this Court held that, under limited circumstances, some race preferences can be constitutionally permissible for a limited period of time. This Court said that the States "can and should" look to "race-neutral alternatives" to achieve diverse student populations in state universities. *Id.* Arizona, Michigan, and six other States have adopted laws that require them to implement race-neutral university admissions policies. As suggested by this Court in *Grutter*, Arizona looked to race-neutral alternatives to achieve diverse student populations in state universities, and these experiments achieved similar proportions of minorities in the student body, rather than the thirty percent drop in minority participation predicted by opponents of the race-neutral policies.

The Sixth Circuit decision will hamper the States' ability to pass laws requiring race-neutral admissions policies, which in turn will hamper the experimentation and innovation in race-neutral policies that *Grutter* sought to encourage. Although in *Grutter* this Court held that the Constitution permitted limited race-conscious admissions policies in conventional equal protection analysis, it did not hold that such policies are required. 539 U.S. at 342. The Sixth Circuit's holding below that the political process

doctrine prohibits Michigan from amending its constitution to eliminate race-conscious policies implemented by state university admissions committees therefore conflicts with *Grutter*. And the Sixth Circuit decision is contrary to this Court's encouragement of innovation and experimentation in the federal system. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

The Sixth Circuit decision below also conflicts with the Ninth Circuit's decision in *Wilson* that upheld California's constitutional provision barring state entities from using race and gender preferences. 122 F.3d at 707. The Ninth Circuit found that "[a] denial of equal protection entails, at a minimum, a classification that treats individuals unequally" and that the "'political structure' cases do not create some paradoxical exception to this *sine qua non* of any equal protection violation." *Id.* If this Court does not resolve the conflict, at a minimum, the States in the Sixth Circuit will be prohibited from adopting constitutional provisions that eliminate existing race-based admissions policies. But the Sixth Circuit's rationale in *BAMN* is not limited to constitutional provisions or university admissions policies. The decision therefore creates uncertainty about the constitutionality of any law that purports to eliminate preferences for race, sex, color, ethnicity, or national origin that a more local rule or policy previously had provided. This Court should grant review to provide certainty and guidance to States who wish to adopt race-neutral classifications to achieve diversity and avoid perpetuating unconstitutional classifications.

ARGUMENT

I. Federalism Allows States to Benefit from Continued Experimentation and Innovation that Achieve Student Body Diversity Using Neutral Admissions Policies.

As this Court recognized in *Grutter*, "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). The Court expressed the expectation that the race-conscious law school admissions policies it approved in 2003 would have "a logical end point" and no longer be necessary in another twenty-five years. *Grutter*, 539 U.S. at 342-43. The Court in *Grutter* also approvingly noted several States (whose laws prohibited racial preferences) that were already experimenting with race-neutral admissions policies to achieve the compelling state interest of student body diversity. *Id.* at 342.

At the time, Arizona was not among the experimenters. Arizona State University's Sandra Day O'Connor College of Law (ASU) had used race and ethnicity as positive factors in admissions decisions since *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and submitted an amicus brief supporting the similar University of Michigan Law School policy that this Court upheld in *Grutter*. Brief for the Arizona State University College of Law as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398328 at *6 (U.S. Feb. 18, 2003) (ASU Amicus).

In its Amicus Brief, ASU represented that using its race- and ethnicity-conscious admissions policy, between twenty-three and thirty-five percent of enrolled students in the five preceding academic years self-identified as either Hispanic, American Indian, African-American, or Asian-American. *Id.* at *8. ASU also posited that if it had not considered race or ethnicity and based admission solely on applicants' grades and Law School Admissions Test (LSAT) scores, minority enrollment would have ranged from only four to eight percent in those same five years. *Id.* at *10-*11. ASU declined to use race- and ethnicity-neutral admissions policies that other States were trying and argued that only positive consideration of race and ethnicity could yield a racially and ethnically diverse law school class. *Id.* at *13.

ASU's prediction has not proven to be correct. In November 2010, Arizona voters passed Proposition 107, which amended the Arizona Constitution, just as Michigan voters amended their constitution in 2006, to prohibit programs that grant "preferential treatment to or discriminate against 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." *Compare* Ariz. Const. art. II, § 36 *with* Mich. Const. art. I, § 26. Since Proposition 107 became Arizona law, ASU and Arizona's other public law school, the University of Arizona's James E. Rogers College of Law, no longer consider race or ethnicity in admissions decisions. Stephanie.Snyder, *A Year After Preferential Treatment Ban, Little Change on State Campuses* (May 5, 2012) http://azcapitoltimes.com/news/2012/05/03/a-year-after-preferential-treatment-ban-little-change-on-state%E2%80%99s-campuses.

Instead, at the University of Arizona law school after Proposition 107, admission depends on "many. . . factors," including grades and LSAT scores, but also "the applicant's educational experiences, grade trends, graduate study, significant or extracurricular activities, unique educational or occupational experiences, substantial community service, socioeconomic background, educational, and personal challenges." http://www.law.arizona.edu/Admissions/application_process.cfm. Similarly at ASU, law school admissions committees evaluate such qualitative factors as "the rigor of the undergraduate course of study, graduate study, demonstrated commitment to public service, work experience, leadership experience, extracurricular or community activities, history of overcoming economic or other disadvantage, personal experiences with discrimination, overcoming disability, geographic diversity, diversity of experience and background, maturity, ability to communicate, foreign language proficiency, honors and awards, service in the Armed Forces, publications, and exceptional personal talents." http://www.law.asu.edu/admissions/Admissions/ HowToApply.aspx.

In the first classes admitted after Proposition 107, both Arizona "law schools saw about a 3 percent drop in minority enrollment." Snyder, *supra*. That small drop was well within the range of minority enrollment percentages achieved when ASU gave preferences in admissions to race and ethnicity—and far less than the thirty percent drop that ASU predicted would result if such preferences were no longer allowed. ASU Amicus, 2003 WL 398328 at *10.

Arizona's recent experience shows that its public universities can achieve diverse student bodies without recourse to the race- and ethnicity-conscious admissions policies prohibited by state law. As stated in a Proposition 107 frequently-asked-questions sheet issued by the University of Arizona, "Proposition 107 does not prevent the University from using legally permissible means to create a diverse and high quality student body and educational environment. The University will continue to pursue diversity using factors that are race and gender neutral." University of Arizona, Office of the President, Proposition 107 FAQ, available at http://www.president.arizona.edu/node/661.

The state-specific experimentation in law school admissions policy that *Grutter* endorsed, and that Arizona recently chose to engage in, is a virtue of our federal system of government. As this Court has repeatedly recognized, "the federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364 (quoting *Gregory*, 501 U.S. at 458). The Sixth Circuit's en banc decision is contrary to these federalism values and, if not overruled, will chill local experimentation and innovation that advances equal protection in university admissions. This Court should accept review of the Sixth Circuit's decision.

II. The Conflict Between the Sixth Circuit's *BAMN* Decision and the Ninth Circuit's *Wilson* Decision Harms the Innovation in Race-Neutral Policies that this Court Heralded in *Grutter* and Creates Uncertainty About the Breadth of the Political-Process Doctrine.

As the Petition for a Writ of Certiorari explains, the Sixth Circuit's *BAMN* decision conflicts with the Ninth Circuit's decision in *Wilson*. Petition at 8, 10-11. In April 2012, the Ninth Circuit confirmed that its 1997 decision in *Wilson* is the law of the circuit. *Coalition to Defend Aff. Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary v. Brown*, 674 F.3d 1128, 1135 (9th Cir. 2012).

In *Wilson*, the Ninth Circuit considered an equal protection challenge to California's Proposition 209, an initiative measure that amended the California Constitution to prohibit the State from discriminating or granting preferential treatment "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). The court found no violation of the Equal Protection Clause using the "conventional" equal protection analysis. *Wilson*, 122 F.3d at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense."). Moreover, the Ninth Circuit rejected the argument that Proposition 209 denied equal protection under the "political structure" analysis. *Id.* at 708 ("Nothing in the

Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and gender—must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification—such as wealth, age or disability—are at the mercy of statewide referenda.").

Like California's Proposition 209, Michigan's Proposal 2 was a constitutional amendment adopted by voter initiative. The constitutional provision uses the same language, barring discrimination and preferential treatment "on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. art. I, § 26(1).

A bare majority of the en banc Sixth Circuit, however, expressly declined to follow the Ninth Circuit's long-standing decision in *Wilson*. *BAMN*, 2012 WL 5519918, at *44 n.8. Instead, the Sixth Circuit held that under the political process doctrine outlined in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), Michigan's Proposal 2 deprived minority groups of equal protection because it "targets race-conscious admissions policies" and it "reallocates political power or reorders the political process in a way that places special burdens on racial minorities." 2012 WL 5519918, at *9, *10-*15.

The conflict between Sixth Circuit's decision below and the Ninth Circuit's decision in *Wilson* creates uncertainty for States with prohibitions on race-based

preferential treatment similar to Michigan's Proposal 2. This uncertainty also chills other States from engaging in the experimentation that this Court promoted in *Grutter*.

After the Ninth Circuit upheld Proposition 209 in *Wilson*, several other States adopted similar provisions. In 1998, Washington voters approved an initiative containing the same operative language as the California law. Wash. Code Ann. § 49.60.400(1). In 1999, Florida's Governor issued an executive order announcing a similar policy and directing the promulgation of rules that, inter alia, barred race-based preferences in state university admissions. Fla. Exec. Order 99-281. This Court cited these three laws with approval in *Grutter*, 539 U.S. at 342.

Following *Grutter*, Arizona and several other States—Michigan, Nebraska, and Oklahoma—used the initiative process to amend their respective constitutions to include prohibitions on race-based discrimination and preferential treatment in public employment, public education, and public contracting that are nearly identical to California's Proposition 209. Ariz. Const. art. II, § 36 (adopted 2010); Mich. Const. art. I, § 26 (adopted 2006); Neb. Const. art. I, § 30 (adopted 2008); Okla. Const. art. II, § 36A (adopted 2012). New Hampshire recently followed suit, adopting a statutory prohibition on race-based discrimination and preferential treatment in recruiting, hiring, promotion, or admission within the state college and university system. N.H. Rev. Stat. Ann. § 187-A:16-a(I) (adopted 2011). There are no reported decisions regarding the constitutionality of the Arizona, Florida, Nebraska, New Hampshire,

Oklahoma, or Washington laws, and it does not appear that any of them have been challenged on equal protection grounds.

In view of the Sixth Circuit's en banc decision in *BAMN*, the experimentation and innovation in race-neutral university admissions policies that the above-described state laws require are likely to be hampered. Neither the First, Eighth, Tenth, nor Eleventh Circuits have considered an equal protection challenge to these state laws. Therefore, courts addressing challenges to the New Hampshire, Nebraska, Oklahoma, and Florida laws are in the difficult position of deciding whether to follow the Ninth Circuit or the Sixth Circuit.

Moreover, due to the Sixth's Circuit's reliance on the political-process doctrine, States wishing to implement race-neutral policies in college admission decisions face uncertainty about how to do so constitutionally. In *Grutter*, the Court envisioned that twenty-five years after its decision, "the use of racial preferences will no longer be necessary to further the interest approved" in the decision. 539 U.S. at 343. Yet the *BAMN* decision seems to require that only the body that implemented a race preference can eliminate that preference. *See BAMN*, 2012 WL 5519918, at *18. Under the reasoning in *BAMN*, States that wish to experiment with race-neutral policies will not be able to so as part of a cohesive, statewide plan. Instead, such programs would need to be implemented in a piecemeal fashion, school by school. As such, even if there is sufficient political support for a statewide ban on race-based preferences, and the time when such preferences comport with equal protection has come to its end, it will be up to individual public colleges and

universities to end preferential treatment based on race. The Court could not have intended that its political-process cases would so hamper the States' authority to adopt uniform race-neutral policies.

Absent certainty about the constitutionality of existing laws prohibiting race-based preferences, or the permissible means to introduce race-neutral policies, other States may refrain from experimenting with race-neutral university admissions policies. With fewer experiments, there will be fewer innovations upon which all States can draw to work toward the goal set in *Grutter* to reach the "logical end point" of race-based decision making in public university admissions. 539 U.S. at 342. Accordingly, this Court should grant the Petition to resolve the conflict in the circuits and provide States the certainty they need to serve as laboratories for solving the difficult problem of fostering diverse student bodies through race-neutral admissions policies.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 3rd day of January, 2013.

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