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 OF PAUL FINKELMAN AND 75 OTHER HISTORIANS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW J. PINCUS
Counsel of Record
JAMES F. TIERNEY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

Paul Finkelman is the President William McKinley Distinguished Professor of Law and Public Policy, and Senior Fellow, Government Law Center, at Albany Law School, where he specializes in American legal history, constitutional law, and race and the law. He writes on the history of Civil War-era and Reconstruction-era constitutional history.

He is joined by 75 scholars whose research has similarly addressed the history of the Civil War and Reconstruction, race, and law. Among the amici are five individuals who have won the Pulitzer Prize for History—Professors Eric Foner, Annette Gordon-Reed, Edward Larson, James McPherson, and Jack Rakove—for their writings on constitutional history, slavery, and the civil war, as well as winners of a number of other prestigious prizes and awards. The *amici* are:[1]

- Omar H. Ali, Associate Professor and Director of Graduate Studies, African American Studies, The University of North Carolina at Greensboro
- James D. Anderson, Professor of History, and Gutgsell Professor and Head of Education Policy, Organization and Leadership, University of Illinois at Urbana-Champaign
- L. Diane Barnes, Professor of History, Youngstown State University

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

- Michal R. Belknap, Earl Warren Professor of Law, California Western School of Law, and Adjunct Professor of History, University of California, San Diego
- John M. Belohlavek, Professor of History, University of South Florida
- R.B. Bernstein, Distinguished Adjunct Professor of Law, New York Law School
- Ira Berlin, Distinguished University Professor of History, University of Maryland
- David Blight, Class of 1954 Professor of American History, Yale University
- Vincent M. Bonventre, Professor of Law, Albany Law School
- Jenny Bourne, Professor and Chair of Economics, Carleton College
- Melissa L. Breger, Professor of Law, Albany Law School
- Orville Vernon Burton, Creativity Professor of Humanities, Clemson University; emeritus University Distinguished Teacher/Scholar, University Scholar, Professor of History, African American Studies, and Sociology, University of Illinois
- Henry L. Chambers, Jr., Professor of Law, University of Richmond School of Law
- J. Stephen Clark, Professor of Law, Albany Law School
- Robert J. Cottrol, Harold Paul Green Research Professor of Law, and Professor of History and Sociology, The George Washington University

- Spencer Crew, Robinson Professor of American, African American and Public History, George Mason University
- Roger Daniels, Charles Phelps Taft Professor Emeritus of History, University of Cincinnati
- Benjamin G. Davis, Associate Professor of Law, University of Toledo College of Law
- Jill Dupont, Chair and Associate Professor of History, The College of St. Scholastica
- Stephen M. Feldman, Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law, and Adjunct Professor of Political Science, University of Wyoming
- Eric Foner, DeWitt Clinton Professor of History, Columbia University
- Tim Alan Garrison, Professor of History, Portland State University
- Henry Louis Gates, Jr., Alphonse Fletcher University Professor, Harvard University
- Glenda Gilmore, Peter V. and C. Vann Woodward Professor of History, Yale University
- Annette Gordon-Reed, Charles Warren Professor of American Legal History, Harvard Law School, Professor of History, Harvard University, and Carol K. Pforzheimer Professor at the Radcliffe Institute for Advanced Study, Harvard University
- Martin J. Hershock, Dean of the College of Arts, Sciences, and Letters, and Professor of History, University of Michigan–Dearborn

- Jennifer L. Hochschild, Henry LaBarre Jayne Professor of Government, and Professor of African and African American Studies, Harvard University
- Graham Russell Hodges, George Dorland Langdon Professor of History and Africana Studies, Colgate University
- Peter Charles Hoffer, Distinguished Research Professor, Department of History, University of Georgia
- Thomas C. Holt, James Westfall Thompson Professor of American and African American History, University of Chicago
- Timothy S. Huebner, L. Palmer Brown Professor of Interdisciplinary Humanities, and Chair, Department of History, Rhodes College
- Sylvia Hurtado, Professor and Director of the Higher Research Education Institute, University of California at Los Angeles
- Garry Jennings, Director, The Madison Center, Delta State University
- Walter Johnson, Winthrop Professor of History, Professor of African and African American Studies, and Director of the Charles Warren Center, Harvard Unviersity
- Robert J. Kaczorowski, Professor of Law, Fordham University School of Law
- Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University
- Ralph Ketchum, Professor Emeritus of History and Political Science, The Maxwell School, Syracuse University

- Kenneth Kusmer, Professor of History, Temple University
- Edward Larson, University Professor of History, Hugh and Hazel Darling Chair in Law,
- Kate Clifford Larson, Consulting Historian at Harriet Tubman Underground Railroad State Park and Visiting Center, and Lecturer and Adjunct Faculty, Simmons College
- Benjamin N. Lawrance, Hon. Barber B. Conable, Jr. Endowed Chair of International Studies, College of Liberal Arts, Rochester Institute of Technology
- Jim Loewen, Visiting Professor of Sociology, The Catholic University of America
- Martin L. Levy, Professor of Law, Thurgood Marshall School of Law, Texas Southern University
- Tayyab Mahmud, Professor of Law and Director, Center for Global Justice, Seattle University School of Law
- David V. Mason, Associate Professor of Theatre, Rhodes College
- David McBride, Professor of African-American History and African-American Studies, Pennsylvania State University
- James M. McPherson, George Henry Davis ’86 Professor of American History Emeritus, Princeton University
- Eboni S. Nelson, Associate Professor, University of South Carolina School of Law

- Cassandra L. Newby-Alexander, Professor of History, Director, Joseph Jenkins Roberts Center for African Diaspora Studies, Norfolk State University
- Donald Nieman, Executive Vice President for Academic Affairs and Provost, Binghamton University, State University of New York
- Julie Novkov, Chair, Department of Political Science, and Professor of Political Science and Women's Studies, University at Albany, State University of New York
- James Oakes, Distinguished Professor of History, The Graduate Center, The City University of New York
- Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, and Director, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School
- Michael A. Olivas, William B. Bates Distinguished Chair in Law, Director, Institute for Higher Education Law and Governance, University of Houston Law Center
- Nancy Ota, Professor of Law, Albany Law School
- Nell Painter, Edwards Professor of American History, Emeritus, Princeton University
- John W. Quist, Professor of History, Shippensburg University
- Jack N. Rakove, William Robertson Coe Professor of History and American Studies, Professor of Political Science, Stanford University

- Frank S. Ravitch, Professor of Law and Walter H. Stowers Chair in Law and Religion, Michigan State University College of Law
- Susan M. Reverby, Marion Butler McLean Professor in the History of Ideas, and Professor of Women's and Gender Studies, Wellesley College
- Karen Robbins, Associate Professor of History, St. Bonaventure University
- Reginald L. Robinson, Professor of Law, Howard University School of Law
- Judith Kelleher Schafer, Professor of History and Law, Tulane University
- Gustav L. Seligmann, Associate Professor of History, University of North Texas
- Brooks D. Simpson, ASU Foundation Professor of History, Arizona State University
- Jeffrey Allen Smith, Assistant Professor of History, University of Hawaii–Hilo
- Rogers M. Smith, Christopher H. Browne Distinguished Professor of Political Science, University of Pennsylvania
- John Stauffer, Professor of English, American Studies, and African and African American Studies, Harvard University
- Nikki Taylor, Associate Professor of History, University of Cincinnati
- Alexander Tsesis, Professor of Law, Loyola University School of Law
- Melvin I. Urofsky, Professor of Law and Public Policy, Virginia Commonwealth University

- Xi Wang, Professor of History, Indiana University of Pennsylvania
- R. Owen Williams, President, Transylvania University
- Charles L. Zelden, Professor of History, Nova Southeastern University
- Marcia Zug, Associate Professor of Law, University of South Carolina School of Law[2]

Amici are therefore well qualified to address whether the history of the Fourteenth Amendment supports this Court's precedents holding that the Amendment precludes a state from imposing special burdens on a minority group's ability to access the political process.

SUMMARY OF ARGUMENT

The history surrounding the Fourteenth Amendment demonstrates that the Amendment's Framers intended to eliminate special burdens on racial minorities' ability to seek legislative change such as the enactment of race-conscious affirmative action.

In the immediate aftermath of the Civil War, newly freed slaves found themselves unable to influence the legislatures of the former Confederate states. On one side, freedmen were bounded by Northerners, some of whom were not yet interested in granting blacks the franchise.

On the other side, freedmen who sought to persuade their neighbors and countrymen to support

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[2] Institutional affiliations are provided for identification purposes only.

their reform initiatives and policy goals faced systematic exclusion, as well as outright violence, from Southern Democrats and former Confederates hostile to the notion of black freedom—let alone self-determination. Northern blacks, most Northern white Republicans, and the small number of white Republicans and Unionists who lived in the South supported the freedmen's efforts.

That support produced the Civil Rights Act of 1866 and the Fourteenth Amendment, both of which were designed to eliminate obstacles adopted by the states to prevent freedmen from realizing their goals through state political processes. See U.S. Const. amend. XIV; Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). The Fourteenth Amendment thus includes a guarantee that minority groups will not be subject to special burdens in pursuing their interests through state legislation.

ARGUMENT

THE FOURTEENTH AMENDMENT'S HISTORY CONFIRMS THAT THE EQUAL PROTECTION CLAUSE PRECLUDES STATES FROM ERECTING SPECIAL OBSTACLES TO RACIAL MINORITIES' EFFORTS TO OBTAIN BENEFICIAL LEGISLATION.

This Court held in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), that the Fourteenth Amendment's Equal Protection Clause prohibits a state from adopting "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." 458 U.S. at

467 (internal quotation marks and citations omitted). See also *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

The en banc Sixth Circuit held in this case that Michigan's Proposal 2 violates that principle. Pet. App. 21a-22a. Petitioners argue that if that holding is correct, this Court should overrule *Seattle School District* on the ground that it incorrectly interpreted the Equal Protection Clause. See Pet. Br. 37-38.

But the history relevant to the adoption of the Fourteenth Amendment confirms the correctness of this Court's precedents. A core concern animating the proposal, passage, and ratification of the Fourteenth Amendment was ensuring that democratic majorities in the states did not hamper freedmen (as former slaves were then called) from exercising influence in governmental processes, including the consideration of legislation, in support of their rights and interests.

To understand that core concern—and why it was so important to the Congress, state legislatures, and individuals who supported the Amendment—the Court should look both to "the history leading up to the Civil War," and also to "the legal repression and brutal racial violence that took place" in the South "immediately after the Civil War ended." Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 671 (2003).

There is no "Rosetta Stone" in the "records of the Thirty-Ninth Congress" (which proposed, revised, and sent the Fourteenth Amendment to the states) that comprehensively explains the Amendment. Finkelman, 36 Akron L. Rev. at 671. It is thus critically important to focus on the "history leading up to" the drafting of the Amendment to inform its

meaning. Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 389, 390 (2004). Members of Congress had that history fresh in their minds, having "received reports of these conditions" in the South "while they were framing the Fourteenth Amendment and the Civil Rights Act of 1866." Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 Am. Hist. Rev. 45, 51 n.25 (1987). See also Alexander Tsesis, *We Shall Overcome: A History of Civil Rights and the Law* 99-105 (2008).

A. Free Blacks' Participation In The Political Process Both Before And During The Civil War.

Before the Civil War, the Northern states did not uniformly grant the franchise to freedmen; voting restrictions were widespread. "Only five states in New England allowed blacks to vote, and only seven percent of the Northern black population lived in these states." Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 Cardozo L. Rev. 2153, 2162 (1996). Free blacks could also vote in New York (but not on the same basis as whites), and could also vote for some purposes in Michigan. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 Rutgers L.J. 415, 425 (1986).

But even where free blacks could not pursue their civil, political, and economic interests by voting in elections, they could and did speak up for themselves—asking for or insisting on receiving more rights. Free blacks could (and did) "agitate, petition, publish their views in newspapers and pamphlets, hold public meetings, and in many other

ways seek to persuade the white majority that they deserved better." Finkelman, 17 Rutgers L.J. at 480. In antebellum debates, these voices formed an integral part of the abolitionist chorus that framed the nation as being at the crossroads—whether it would become a more free republic, or remain a captive of the Slave Power.

Midway through the war, President Lincoln and his generals came to understand that "slavery was incompatible with both a free country and the smooth operation of military forces suppressing the rebellion." Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 Sup. Ct. Rev. 349, 376-77. With "military victory likely" and other perceived necessary preconditions for emancipation satisfied (*id*. at 386), Lincoln freed slaves in unoccupied rebel states or portions of rebel states (see Emancipation Proclamation, No. 17, 12 Stat. 1268 (Jan. 1, 1863)).

Before the end of the war, free blacks in the North and the South alike began to participate in political debate, arguing strongly that suffrage rights were a critical next step beyond presidential and constitutional emancipation. See Wang, 17 Cardozo L. Rev. at 2171 (describing an 1863 convention of free blacks in Kansas, and a 1864 delegation from New Orleans to meet with politicians in Washington D.C.). Delegates to a "national black convention" in 1864 "established a National Equal Rights League" that sought to pursue "abolition, equality before the law, and suffrage." Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 27 (1988).

These and other efforts to persuade Republicans and other sympathetic Northern politicians began to

reap some dividends: "Joined by white abolitionists and Republicans, African-Americans won repeal of discriminatory laws in California and Illinois, convinced Massachusetts legislators to ban discrimination in public accommodations, and launched an all-out effort for the ballot." Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 Cardozo L. Rev. 2115, 2120 (1996).[3] And more broadly, the arguments that free blacks were making began to resonate strongly with Republican lawmakers (see Wang, 17 Cardozo L. Rev. at 2171), including those Radical Republicans who would later be instrumental in proposing and sending the Fourteenth Amendment to the states.

B. Post-War Obstacles To Blacks' Participation In Political Debate In The Former Confederacy.

As the fog of the war began to clear, freedmen were optimistic about the possibility of throwing off the yoke of slavery. Across the former Confederacy blacks "held mass meetings and religious services unrestrained by white surveillance" and the "innumerable regulations" imposed by the Southern slave codes. Foner, *Reconstruction* at 79. And nearly ten percent of the victorious Union army was black. See Finkelman, 36 Akron L. Rev. at 680.

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[3] Significantly, even though freedmen began making political gains, Northern voters were not yet keen on extending suffrage to freedmen. They opposed the idea for a number of reasons, including federalism, concerns about stirring up support for women's suffrage, and a perceived lack of sophistication among newly freed former slaves. See, *e.g.*, Wang, 17 Cardozo L. Rev. at 2171.

Many black former Union Army and Navy veterans in particular would reasonably have assumed that in consideration for their service, they would attain new civil and political rights. More broadly, they anticipated that emancipation would entail not only the right not to serve a master, but also the logically connected rights of political autonomy and self-government. See Steven F. Miller *et al.*, *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners during Presidential Reconstruction, 1865-1867*, 70 Chi.-Kent L. Rev. 1059, 1059 (1995).

But the conditions under which President Johnson offered amnesty and readmission to the Union created significant obstacles to achieving that result. Amnesty was available to most former Confederates who swore allegiance to the Union (see Proclamation No. 37, 13 Stat. 758 (1865)), and President Johnson established minimal conditions under which the former rebel states would be eligible for readmission to the union (see, *e.g.*, Proclamation No. 38, 13 Stat. 760 (1865)). Although Southern whites had to "conced[e] that blacks were no longer the slaves of individual masters," they "intended to make [freedmen] the slave of society." Finkelman, 36 Akron L. Rev. at 681 (internal quotation marks omitted).

The white supremacists who obtained amnesty were able to use newly called state constitutional conventions and other legal reforms to implement obstacles to blacks' participation in the political process. See Miller, 70 Chi.-Kent L. Rev. at 1060-61. Blacks' petitions to the 1865 constitutional convention in South Carolina, for example, were uniformly "tabled * * * without being read," while

petitions two months later to the state legislature were rejected on grounds that the grievances should have been raised at "the constitutional convention" that had rejected them. Thomas Holt, *Black over White: Negro Political Leadership in South Carolina during Reconstruction* 22 (1977). Because blacks lacked the franchise, these additional limits on their political influence provided white supremacists the opportunity to impose disabilities on the newly freed black citizens.

These disabilities included the infamous "Black Codes," which stripped blacks of rights to contract, to hold property, to rent in certain locations, or otherwise to live and work as free and independent people. See Finkelman, 36 Akron L. Rev. at 682-84; see also Miller, 70 Chi.-Kent L. Rev. at 1061 ("Less dramatic but equally significant were myriad revisions in state criminal codes, domestic relations laws, municipal licensing regulations, and tax policies—changes that, although often couched in racially neutral language, were intended to apply primarily or exclusively to the former slaves.").

Moreover, the Black Codes were aimed specifically at blacks' participation in governmental processes. One frequently-adopted provision restricted blacks' ability to testify in court, a disability that imposed significant limitations on blacks' personal security and their exercise of civil rights.

For example, Alabama's code of 1865-66, declared that "all freedmen, free negroes, and mulattoes" had "the right to be sue and be sued, plead and be impleaded." Act of Dec. 9, 1865, No. 86, § 1, 1865-66 Ala. Acts 98. Although that law (and others like it) granted a civil right—access to the courts—

unavailable to slaves and free blacks in the antebellum South, the right was dangerously incomplete, for it permitted blacks to testify "only in cases in which freedmen, free negroes, and mulattoes are parties, either as plaintiff or defendant." *Ibid.*; see also, *e.g.*, Act of Nov. 25, 1865, ch. IV, § 4, 1865 Miss. Laws 83; Act of Dec. 15, 1865, tit. 31, § 3, 1865-66 Ga. Laws 239; Act of Feb. 20, 1866, ch. 24, § 1, 1865-66 Va. Acts 89-90.

These laws did not permit blacks to testify in cases between whites, and thereby posed a grave threat to their civil rights: "southern vigilantes could kill a white Republican or a white teacher of blacks in front of black witnesses, and those witnesses could not testify at the trial." Finkelman, 36 Akron L. Rev. at 684.[4] The testimony laws imposed a real burden on blacks by deterring support of white allies, who had suffrage rights and louder political voices.

These threats were no abstract concern. Racial violence in the South was endemic in the immediate aftermath of the Civil War. Congress took note, authorizing a Joint Committee on Reconstruction to investigate racial violence. Among its members was Congressman John Bingham, the principal drafter of Section 1 of the Fourteenth Amendment. See Finkelman, 36 Akron L. Rev. at 686; Tsesis, *We Shall Overcome* at 109-12.

The Committee took testimony from across the South, and its Report described systematic "violence

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[4] The geographic distribution of these unequal laws was nothing new. Unlike in the North, where "all but four northern states by 1860" had given blacks this "most important due process right—to testify in court *without racial restrictions*, * * * only in Louisiana" could antebellum free blacks exercise that right. Finkelman, 17 Rutgers L.J. at 451 (emphasis added).

and denial of rights": "[b]lacks disappeared, were beaten, maimed, and killed. Legislatures passed laws to prevent them from owning land, moving to towns, voting, testifying in all court cases, or in any other way asserting and protecting their rights as free people." Finkelman, 36 Akron L. Rev. at 690; see generally H.R. Joint Committee on Reconstruction, 39th Cong., *Report of the Joint Committee on Reconstruction* (1st Sess. 1866).

Freed blacks fought back against these restrictions, seeking to persuade their neighbors to enact beneficial legislation and policies. Those freedmen who were "educated and literate," and others who were "formally untutored but distinguished by property holding, workplace skill, religious standing, or rhetorical ability," gained the attention of their communities and served in local and regional conventions. Miller, 70 Chi.-Kent L. Rev. at 1063; see generally Howard N. Rabinowitz, ed., *Southern Black Leaders of the Reconstruction Era* (1982); Holt, *Black over White*, *supra*; cf. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 241 (1998) ("[T]he exclusion of blacks from formal political rights like voting underscored the importance of their participation in other organizations, like churches, that could help gather the voice of the community.").[5]

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[5] A good number of these men—and they were mostly all men, in contrast with the structure of slave culture in which men and women were equally powerless (see Foner, *Reconstruction* at 85-87)—would later go on to participate in "the flowering of African-American politics during Radical Reconstruction," owing to their experiences giving voice to their communities during presidential Reconstruction (Miller, 70 Chi.-Kent L. Rev. at 1063). Black advocates' growing

These efforts were part and parcel with a "broader theme" of blacks' "quest for independence from white control, for autonomy both as individuals and as members of a community itself being transformed as a result of emanicipation." Eric Foner, *Rights and the Constitution in Black Life during the Civil War and Reconstruction*, 74 J. Am. Hist. 863, 870 (Dec. 1987). As Foner explains, "[a]chieving a measure of political power seemed indispensible to attaining the other goals of the black community, including access to the South's economic resources, equal treatment in the courts, and protection against violence." *Id*. at 871-72.

Violence was often aimed at those blacks who sought to engage governmental processes, including legislative reform: for example, "twice in 1865, [whites] assaulted peaceful black meetings, one a gathering to select delegates to a statewide black convention, the second a meeting of a black 'secret society' addressed by a speaker from the state capital." Foner, *Reconstruction* at 120. Whites viewed the exercise of political activity by freedmen and their allies as an existential threat: "To white observers schooled in slave society, black men and women convening in secret evoked the specter of servile insurrection." Miller, 70 Chi.-Kent L. Rev. at 1072.

Thus, not only did the Black Codes threaten to undo the hard-fought victory in the War, but they carried an additional insult through the "political process that had allowed them to be enacted." Miller, 70 Chi.-Kent L. Rev. at 1062. Freedmen bristled at

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"sophistication" allowed freedmen "a stronger voice in party affairs." Nieman, 17 Cardozo L. Rev. at 2130.

the fact that the former rebels "who had fought to destroy the Union" were back at the helm of state and local politics, while loyal blacks (including former Union soldiers and sailors) "were denied a voice in electing the men who governed them and enacted the laws they had to obey." *Ibid*.

The freedmen turned, instead, to the national government—embarking on an informal process of persuading policymakers in Washington D.C. and in sympathetic, Republican-controlled Northern states' legislatures. The freedmen's goal was twofold: first, achieving beneficial legislation that would improve the lot of the often indigent former slaves; and second, alleviating the special burdens that the states had imposed on black civil and political rights—including by extending the franchise to blacks.

During Presidential Reconstruction, for example, freedmen petitioned "President Johnson directly, hoping he would give their rights and aspirations as much consideration as those of amnestied traitors." Miller, 70 Chi.-Kent L. Rev. at 1062. When Johnson paid them no heed, they appealed to the legislature. To that end, "as Congress convened its first postwar session in December 1865, northern blacks sent a handful of lobbyists to Washington to press legislators for a federal guarantee of equality." Nieman, 17 Cardozo L. Rev. at 2121 (citing *Black Men Intend to Help Themselves*, N.Y. Times, Dec. 11, 1865, at 8). Blacks also attended debates about civil rights at the U.S. Capitol, "where Republican lawmakers had" opened "the spectators' galleries" to them. *Id*. at 2124-25.

The freedmen's presence in the halls of power in Washington helped bring into sharp relief the way in

which freedmen were subject to a political system in the States in which they had few civil rights and, with rare exceptions even in the North, no formal role to play.

C. Congress Was Aware Of And Responded To The Obstacles To Freed Blacks' Ability To Obtain Appropriate Legislative Relief In The States.

The freedmen's inability to petition state legislatures effectively, combined with their advocacy before the national government, was a key factor leading to enactment of the Civil Rights Act of 1866, with its unambiguous intent to "destroy" all the discriminatory measures that the Southern states had implemented since the war. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (statement of Sen. Lyman Trumbull).

That same Congress also proposed, drafted, and passed the Fourteenth Amendment. The Amendment was designed in part to provide constitutional authority for the Civil Rights Act of 1866.[6] But it was also the product of a compromise of moderate and Radical Republican forces in Congress. Some were ready to support extending suffrage to freedmen,

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[6] It is canonical history that one of the goals of the Fourteenth Amendment was to annul permanently the Black Codes, which the Civil Rights Act was similarly intended to ban. See, *e.g.,* Finkelman, 13 Temp. Pol. & Civ. Rts. L. Rev. at 400; Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 Nw. U. L. Rev. 142, 150-51 (1984); Cong. Globe, 39th Cong., 1st Sess., 340 (1866) (statement of Sen. Henry Wilson) (explaining this was one of the goals of the Civil Rights Act of 1866, which became Section 1 of the Fourteenth Amendment); see also Amar, *The Bill of Rights* at 162.

while many others were hesitant. See note 3, *supra*. When the Civil Rights Act of 1866 had not extended the franchise to blacks, for example, "[t]he fact that most Northern states still withheld suffrage from blacks was certainly on the minds of many Republicans." Wang, 17 Cardozo L. Rev. at 2190.

Accordingly, in framing the Fourteenth Amendment, Congress distinguished between the "political" rights of suffrage and "civil" rights expressly protected by the Amendment, which included more indirect methods of seeking beneficial policies and reforms. This distinction was not without its critics: "The essential reason that Radical Republicans criticized the Fourteenth Amendment as too moderate was its failure to provide the same protection for voting rights as for civil rights." Kaczorowski, 92 Am. Hist. Rev. at 49.

In the final days of the Thirty-Ninth Congress's debates on the Fourteenth Amendment in the summer of 1866, word reached Washington of extensive mob violence in Memphis. Scores of blacks, many of whom were recently discharged Union soldiers, were killed by white ex-Confederates. Representative Thaddeus Stevens, an important framer of the Fourteenth Amendment and probably the most powerful Republican leader in the House of Representatives, "denounced the 'atrocity' during the final House debate on the Amendment." Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 569 (1991). Congress dispatched an investigatory committee, which issued a report submitted "six weeks after final congressional approval of the Fourteenth Amendment" (*id.* at 570)—too late to influence Congress, but with plenty

of time to lend support for broader efforts to bring justice to the freedmen through ratification of the Amendment.

The report noted, for example, that "it was impossible for a colored man in Memphis to get justice against a white man." 39th Cong., *Reports of the Committees of the House of Representatives, Report No. 101* 30 (1st Sess. 1866). The Memphis Riots and similar riots in New Orleans were fresh and prominent on the minds of the Congress that proposed the Fourteenth Amendment. And the violence further undermined Republican support for Andrew Johnson's Reconstruction policies—what historians call Presidential Reconstruction—giving legislators and the public alike reason to think that more drastic measures were needed to secure blacks' ability to influence Southern state governments.

The Radical Republicans secured massive electoral victories in 1866, as voters decisively rejected the influence of resurgent ex-Confederates and Johnson's program of Presidential Reconstruction—all while simultaneously expressing support for freedmen's rights. The Radical Republicans extended the Fourteenth Amendment's mantle of civil rights to political rights in the Reconstruction Acts. See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (1867); Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867); Act of July 19, 1867, ch. 30, 15 Stat. 14 (1867); Act of Mar. 11, 1868, ch. 25, 15 Stat. 41 (1868). In these laws, Congress instituted military districts across the former Confederacy, and required those states to ratify the Fourteenth Amendment and grant voting rights to freedmen—even before the Fifteenth Amendment mandated such rights. See U.S. Const. amend. XV. The Army's primary role was

to ensure that the Southern states implemented suffrage and other Reconstruction efforts to protect minority participation in the political process. See generally Foner, *Reconstruction* at 266-67.

During this short-lived period of Radical Reconstruction, black activists around the country found their efforts at exerting influence outside the electoral system had begun to pay dividends. Black suffrage imposed by the Reconstruction Acts and enforced by the Army created opportunities for activists to stand for and win election to local, state, and even national offices. See Foner, *Reconstruction* at 281-94. And the effects permeated into the communities: "Under Republican rule," with blacks and their allies more firmly entrenched in state and local offices, "arrests and prosecutions of African-Americans for vagrancy were almost unknown. This denied planters and farmers one of the tools they had relied on during the early years of Reconstruction to compel blacks to enter into contracts on terms favorable to employers." Nieman, 17 Cardozo L. Rev. at 2131.

Sympathetic Congresses also undertook efforts to improve directly black communities' opportunities for advancement. It was widely understood that equal protection of civil rights entailed steps that would ensure freedmen could pursue economic independence: "Bingham and others in the majority on the Joint Committee [on Reconstruction] understood that they had to protect the life, liberty, safety, freedom, political viability, and property, of the former slaves." Finkelman, 13 Temp. Pol. & Civ. Rts. L. Rev. at 409. And in turn, increased educational opportunities provided a primary means by which freedmen and their children could improve

their station—giving them tools not only to prosper in the market, but also in the marketplace of ideas (and thereby to become more effective political advocates of their interests). Freedmen "needed to be able to express themselves in public and to organize politically. They needed equal schooling to participate in the political process." *Ibid*.

To that end, Reconstruction Congresses implemented race-conscious education reforms that were calculated to improve educational opportunities for blacks. In 1867, a year before the Fourteenth Amendment was ratified, Congress chartered Howard University, which was then "open to all races" yet was required by the Freedmen's Bureau as a condition of receiving federal aid to make "special provision for freedmen." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 782 (1985); see also Dwight O.W. Holmes, *Fifty Years of Howard University: Part I*, 3 J. Negro Hist. 128, 136 (1918) (recounting that the Freedmen's Bureau paid approximately $500,000 to Howard). Congress promoted race-conscious programs in other colleges as well. See Scott Blakeman, *Night Comes to Berea College: The Day Law and African American Reaction*, 70 Filson Club Hist. Q. 3, 26 n.45 (1996).

What is more, the same Congress that approved the Fourteenth Amendment funded an array of additional race-conscious educational initiatives through the Freedmen's Bureau bills. See, *e.g.*, Act of July 16, 1866, ch. 200, 14 Stat. 173 (1866). As W.E.B. Du Bois wrote, "[t]he greatest success of the Freedmen's Bureau lay in the planting of the free school among Negroes, and in the idea of free elementary education among all classes in the

South." W.E.B. Du Bois, "The Freedmen's Bureau," 81 *The Atlantic*, Mar. 1901, at 361. This history of freedmen's education in the Reconstruction area therefore confirms the notion that among other evils, Congress was attempting to address in the Fourteenth Amendment the disparity of power caused by unequal access to economic opportunity and to the public square.

To be sure, blacks' political, economic, and educational gains during this era were short lived. As Du Bois wrote, "[t]he slave went free; stood a brief moment in the sun; then moved back again toward slavery." W.E.B. Du Bois, *Black Reconstruction in America, 1860-1880* 30 (Simon and Schuster 1999) (1935). The political crisis in 1876 over the contested Presidential election resulted in victory for Rutherford B. Hayes and the Republicans' withdrawal of support for Reconstruction. The compromise resulted in "a decisive retreat" from a model "of a powerful national state protecting the fundamental rights of American citizens." Foner, *Reconstruction* at 582.

Nevertheless, the Congress that proposed the Fourteenth Amendment and the people who ratified it in 1868 were very much aware of the systematic exclusion of black voters. They knew full well about the violence frequently directed at blacks who advocated on behalf of freedmen's rights. And they were familiar with the other, more subtle means used to prevent the freedmen's concerns—in particular promotion of race-conscious affirmative assistance of the type enacted at the federal level—from consideration by state legislatures. These special burdens on racial minorities' advocacy efforts

therefore were among the principal evils against which the Fourteenth Amendment was directed.

Because this Court's interpretation of the Amendment's Equal Protection Clause in *Hunter* and *Seattle School District* is fully consistent with this history, the Court should reaffirm, rather than overrule, those precedents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
JAMES F. TIERNEY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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