UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,

Plaintiffs,

v.

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district,

Defendants.

Case No. 06-15024
Hon. David M. Lawson

CONSOLIDATED CASES

- and -

CHASE CANTRELL, *et al.*,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,

Defendant.

Case No. 06-15637
Hon. David M. Lawson

**THE CANTRELL PLAINTIFFS' OMNIBUS RESPONSE IN OPPOSITION TO ATTORNEY GENERAL COX'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND ERIC RUSSELL'S MOTION FOR SUMMARY JUDGMENT**

## Issue Presented

Whether the Court should deny Defendants' motions to dismiss and/or for summary judgment in their favor and enter summary judgment that Michigan Constitution Article I, § 26 ("Proposal 2") is unconstitutional.

## Controlling Authorities

Fed. R. Civ. P. 56.

U.S. Const. amend. XIV.

*Hunter v. Erickson*, 393 U.S. 385 (1969).

*Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

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## Table of Authorities

**Cases**

**Other**

Plaintiffs Chase Cantrell, *et al.* (the "Cantrell Plaintiffs") respectfully submit this response in opposition to Defendant-Intervenor Eric Russell's ("Mr. Russell") Motion For Summary Judgment and Intervening Defendant Attorney General Michael A. Cox's (the "Attorney General") Motion To Dismiss And/Or For Summary Judgment.[1]

**Preliminary Statement**

At issue in this case is whether Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment by selectively excluding from the normal political process only admissions policies that primarily benefit individuals of color. Defendants argue that summary judgment should be entered in their favor because Proposal 2 does not violate the political restructuring doctrine set forth in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). Defendants are wrong. Precisely like the laws that were struck down in *Hunter* and *Seattle*, Proposal 2 violates the Fourteenth Amendment because it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, 458 U.S. at 470. Defendants' arguments to the contrary are unavailing and the facts are not in dispute. Therefore, summary judgment should be entered for Plaintiffs – not Defendants.

*First*, the Attorney General's assertion that the Cantrell Plaintiffs lack standing is incorrect. The Cantrell Plaintiffs easily meet the standard to assert a constitutional injury under Sixth Circuit and Supreme Court caselaw: Proposal 2 directly injures them by burdening their

[1] The Attorney General and Mr. Russell hereinafter will be referred to, collectively, as "Defendants". Citations in the form "Cox Br. at __" refer to Brief In Support of Intervening Defendant Attorney General Michael A. Cox's Motion To Dismiss And/Or For Summary Judgment; citations in the form "Russell Br. at __" refer to Memorandum In Support of Defendant-Intervenor Eric Russell's Motion For Summary Judgment.

ability to secure race-conscious admissions policies; their injury is directly attributable to the enforcement of Proposal 2 for which the Attorney General is responsible; and a decision finding Proposal 2 unconstitutional would restore the Cantrell Plaintiffs' right to equality in the political process. If any party does not belong here, it is Mr. Russell, as plainly evidenced by the absence of any argument in his summary judgment brief specific to his purported personal interest in the outcome of this litigation, or meaningfully different from the legal arguments proffered by the Attorney General.

*Second*, there is no question that Proposal 2 imposes a substantial and unique political burden on individuals seeking to restore race-conscious admissions policies at the University of Michigan, Wayne State University and Michigan State University (the "Universities") by making it practically impossible to secure those policies. Indeed, Defendants do not dispute that the process of amending the Michigan Constitution by voter ballot initiative – as opposed to lobbying the Universities directly for changes to their admissions policies, the process that applies to everyone else – is lengthy, complex, difficult and expensive. Nor do Defendants dispute that race-conscious admissions policies inure primarily to the benefit of people of color. Instead, Defendants advance a litany of legal arguments as to why Proposal 2 does not violate the Equal Protection Clause – including, for example, that the outcome of this case should be dictated by a Ninth Circuit decision and the Sixth Circuit's temporary stay order which was not "on the merits" (neither of which is binding on this Court), and that the Cantrell Plaintiffs have failed to satisfy a legal standard that does not apply to *Hunter/Seattle* claims. Because each of those arguments fails, and the parties agree that the facts are not in dispute,

Defendants' motion must fail and summary judgment should instead be entered for the Cantrell Plaintiffs.

## Argument

### I. THE CANTRELL PLAINTIFFS ARE PROPER PARTIES TO THIS CASE, AND MR. RUSSELL IS NOT A PROPER PARTY.

The Attorney General suggests that the Cantrell Plaintiffs' complaint should be dismissed because the Cantrell Plaintiffs do not have standing to assert their *Hunter/Seattle* claim. (*See* Cox Br. at 9-11.) That is wrong. A plaintiff has standing to assert a constitutional injury where the injury alleged is "concrete and particularized and . . . actual or imminent," "fairly traceable to the challenged action of the defendant," and likely to be "redressed by a favorable decision." *See ACLU of Ohio v. Taft*, 385 F.3d 641, 645 (6th Cir. 2004) (internal citation and quotation marks omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). The Cantrell Plaintiffs easily meet this standard.

*First*, the Cantrell Plaintiffs have suffered a "concrete and particularized" "actual" injury as a result of Proposal 2's enactment because Proposal 2 directly burdens their ability to secure race-conscious admissions policies, which they support.[2] *See Taft*, 385 F.3d at 645. Indeed, the Equal Protection challenge in *Hunter*, as here, was brought by an individual who

[2] As set forth in the Cantrell Plaintiffs' motion for summary judgment, Plaintiffs' Equal Protection rights are injured by Proposal 2 for an additional reason: they are no longer able to have their race considered in the University admissions process that is based on achieving diversity. Two of the named Cantrell Plaintiffs and one member of the proposed *Cantrell* class, all of whom are African-American, submitted declarations in support of the Cantrell Plaintiffs' motion for summary judgment stating that race is a fundamentally important part of their identity, and that Proposal 2 harms them by prohibiting the Universities (who otherwise consider all aspects of diversity) from considering it. (*See* Mem. of Law in Support of the Cantrell Pls.' Mot. for Summary Judgment ("Cantrell Summ. Judg. Br."), Dkt No. 203, at 9-21; *see also infra* note 8.) Thus, Proposal 2's targeted extraction of race from University admissions "imposes direct and undeniable burdens" on the Cantrell Plaintiffs' interests. *See Seattle*, 458 U.S. at 484.

would have faced a virtually impossible political hurdle had she sought to reinstate the fair housing ordinance that the challenged amendment prohibited.[3] *Hunter*, 393 U.S. at 386.

*Second*, the Cantrell Plaintiffs' constitutional injury is clearly "traceable to the challenged action of the defendant." *See Taft*, 385 F.3d at 645. The challenged action here is the enforcement of Proposal 2, for which the Attorney General is responsible. Because the Attorney General is an officer of the state with a duty to enforce state laws and the authority to "prosecute and defend all actions . . . in which the state shall be interested, or a party," the constitutional injuries inflicted by Proposal 2 are clearly attributable to him. *See* Mich. Comp. Laws § 14.28; *see also Foulks v. Ohio Dep't of Rehab. & Corr.*, 713 F.2d 1229, 1232 (6th Cir. 1983) ("[T]he courts have permitted suits challenging the legality of state action when the plaintiff names as defendant the state officer or agency instead of the state itself."). Indeed, as the Attorney General noted in his Motion to Intervene, both his constitutional duty to defend the laws of Michigan (under Mich. Const. art. 5, §§ 3, 21) and his statutory authority to intervene on behalf

[3] The Attorney General argues that the Cantrell Plaintiffs "appear to ground their injury in fact on a First Amendment academic freedom right" which "belongs to colleges and universities, not students or potential students." (Cox Br. at 9-10.) That argument misconstrues the gravamen of the Cantrell Plaintiffs' political restructuring claim (grounded in the *Hunter/Seattle* doctrine) which is that Proposal 2 imposes an impermissible political burden on the *Cantrell Plaintiffs'* ability to secure race-conscious admissions policies through the political process – not, as the Attorney General suggests, that Proposal 2 prevents the *Universities* from implementing those policies. The Attorney General further argues that "Plaintiffs are not and cannot be injured when the constitution specifically prohibits discriminatory treatment on the basis of race." (Cox Br. at 10.) That argument improperly conflates the Attorney General's merits arguments with his standing arguments – indeed, the merits of a plaintiff's claims are irrelevant to the question of her standing. *See Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 571 (6th Cir. 2005) (reversing dismissal for lack of standing because the district court "incorrectly" based its decision on an "evaluat[ion] [of] the merits" of plaintiff's claim). In any event, as discussed below, the Attorney General's arguments on the merits are unavailing. *See infra* Part II.

of the interests of Michigan's citizens (under Mich. Comp. Laws § 14.28) warranted his intervention in this case. (*See* Att'y Gen. Michael A. Cox's Mot. to Intervene, Dkt. No. 8, ¶12.)

*Third*, a decision finding Proposal 2 unconstitutional and enjoining its enforcement would redress the Cantrell Plaintiffs' injury by restoring their Fourteenth Amendment right to equality in the political process. *See Taft*, 385 F.3d at 645.

If any party does not belong here, it is Mr. Russell. For the reasons set forth in the Cantrell Plaintiffs' Motion for Summary Judgment As To Intervenor-Defendant Eric Russell, Mr. Russell has no remaining interest in this case and, as a matter of law, is no longer entitled to participate in this litigation. (*See* Dkt. No. 172.) Mr. Russell's motion for summary judgment further confirms that he is not a proper party to this action. As his brief reveals, the only interest Mr. Russell now seeks to protect is a generalized public interest in upholding the will of the voters by defending the constitutionality of Proposal 2 – an interest the Attorney General more than adequately represents. (*See id.* at 10-12.) Notably, Mr. Russell does not proffer a *single* argument that is specific to him or to his purported personal interest in the outcome of this litigation. Nor does he distinguish himself in any way from the Attorney General. Indeed, Mr. Russell's arguments are virtually identical to the Attorney General's. Accordingly, Mr. Russell's motion for summary judgment just further supports that he should be dismissed from this case. (*See* Cantrell Pls.' Mot. for Summary Judgment As To Int.-Def. Eric Russell, Dkt No. 172.)

## II. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR BECAUSE PROPOSAL 2 IMPERMISSIBLY RESTRUCTURES THE POLITICAL PROCESS AND THE MATERIAL FACTS ARE NOT IN DISPUTE.

In arguing that Proposal 2 does not violate the Equal Protection Clause, Defendants fundamentally misconstrue the legal standard, rely on precedent that does not apply

here, misread *Hunter* and *Seattle*, and draw distinctions that are unavailing. For those reasons (discussed more fully below), each of their arguments fails.

**A. Defendants Misconstrue the Applicable Legal Standard.**

Defendants assert that the Cantrell Plaintiffs' Equal Protection claim under *Hunter* and *Seattle* must fail because plaintiffs "fail to plead that the passage of Proposal 2 resulted from *discriminatory intent*." (*See* Russell Br. at 10-11; *see also* Cox Br. at 21, 27.) They are wrong: Laws that restructure the political process to the detriment of racial minorities do not require "a particularized inquiry into motivation." *Seattle*, 458 U.S. at 485. As the *Seattle* Court noted, "'[a] racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Seattle*, 458 U.S. at 485 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)) (emphasis added). Indeed, the *Seattle* Court expressly distinguished Equal Protection claims that require "particularized" proof of intent from those, like the challenged laws in *Hunter* and *Seattle*, which are "presumptively invalid":

> "Appellants unquestionably are correct when they suggest that 'purposeful discrimination is the condition that offends the Constitution,' . . . for the 'central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.' *Washington v. Davis*, 426 U.S. 229, 239 (1976). Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. *We have not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. . . . And legislation of the kind challenged in Hunter similarly falls into an inherently suspect category.*"

*Id.* at 484-85 (internal citations omitted) (emphasis added).

That standard has never been altered.[4] To trigger application of the *Hunter/Seattle* doctrine, a political restructuring law need only have a "racial focus." *See id.* at 474. While evidence of discriminatory intent is, of course, one way to demonstrate "racial focus" under *Hunter* and *Seattle*, it is certainly not the only way – let alone a prerequisite. The *Seattle* Court, for example, concluded that Initiative 350 had a "racial focus" based on a finding that it addressed legislation (desegregative busing) that "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Id.* at 472. Indeed, in *Seattle*, it was "enough [to trigger the *Hunter* doctrine] that minorities may consider busing for integration to be 'legislation that is in their interest.'" *Id.* at 474.

Mr. Russell further confuses the applicable legal standard by invoking the Sixth Circuit's decision in *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986), in which the Court refused to "inquire[] into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum." *Id.* at 573-74. Yet, the portion of *Arthur* upon which Mr. Russell relies involves a challenge to a referendum *election*, not a challenge – as here – to the law that was ultimately enacted. *See id.* at 568 ("Plaintiffs-Appellants raise five issues on appeal: . . . (3) Whether the District Court's finding that plaintiffs-appellants had not

[4] Not even cases relied on by Defendants so egregiously misconstrue controlling precedent. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 703, 705-06 (9th Cir. 1997) (analyzing California prohibition on affirmative action under *Hunter* doctrine without any discussion of discriminatory intent); *Crawford v. Bd. of Educ.*, 458 U.S. 527, 537 n.14 (1982) ("The Court [in *Hunter*] considered that although the law was neutral on its face, 'the reality is that the law's impact falls on the minority.' . . . In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality.") (internal citation omitted).

demonstrated racial discrimination as a motivating factor in the referendum *votes* was clearly erroneous") (emphasis added). In upholding the vote to repeal two city ordinances, the *Arthur* Court expressly distinguished the facts at issue from *Hunter* and *Seattle*. *Id.* at 572-73 (finding that the referendum merely "repealed ordinances authorizing sewer extensions to *two, and only two*, public housing projects," and that "[n]othing prevented low-income public housing in those" or "other white neighborhoods") (emphasis added).[5] Indeed, the Court concluded that the referendum did not violate the *Hunter/Seattle* doctrine because it "did not reallocate 'the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests.'" *Id.* at 572 (quoting *Seattle*, 458 U.S. at 474). The Court then went on to consider an entirely different question: whether the District Court erred in failing to inquire "whether race was a factor in the referendum *election.*'" *Id.* at 573-74 (emphasis added). There is nothing surprising about this holding – certainly, Equal Protection challenges involving claims of intentional discrimination, including claims of discrimination by voters in an election context, require proof of discriminatory motivation or intent.[6]

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[5] The facts of *Arthur* are also easily distinguishable from the facts of this case (and Mr. Russell does not even attempt to argue otherwise). In stark contrast to the *Arthur* referendum, Proposal 2 does far more than merely revoke a city ordinance that granted authority to take a discrete action – the goal of which was easily accomplished through other means. Rather, precisely like Initiative 350 in *Seattle*, Proposal 2 not only eliminated race-conscious policies that existed prior to its enactment, but also "burdens all future attempts" to implement race-conscious admissions policies "by lodging decisionmaking authority over the question at a new and remote level of government." *Seattle*, 458 U.S. at 483.

[6] Mr. Russell's reliance on *Equality Foundation v. Cincinnati*, 128 F.3d 289 (6th Cir. 1997), and *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994), for the proposition that "a facially neutral provision enacted by citizen referendum violates the equal protection clause only if racial discrimination was *the only possible motivation behind the referendum results*" (Russell Br. at 13-14) is likewise misplaced. *Equality Foundation* involved a challenge to a law that, unlike

To the extent *Arthur* might be read to suggest that *Hunter* and *Seattle* require proof that "racial discrimination *was the only possible motivation behind the referendum results*" (Russell Br. at 13-14), it is wrong. As Mr. Russell acknowledges (*id.* at 14-15 n.3), the Sixth Circuit has since issued a scathing critique of the *Arthur* decision in which it noted the *Arthur* panel's misapprehension of the *Hunter* doctrine:

> "Aside from contravening Supreme Court caselaw, the decision in *Arthur* also suffers from the following flaw: It eviscerates the use of the Equal Protection Clause of the Fourteenth Amendment in the context of challenging referendums. A plaintiff will almost never be able to prove that racial bias was the 'only possible motivation' behind a referendum that otherwise furthers racial discrimination. Moreover, if 95% of the proponents of a hypothetical referendum were motivated by racial bias, the rule in *Arthur* would nonetheless require courts to give effect to the overt racial prejudice of the majority."

*Buckeye Comt'y Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 638 n.2 (6th Cir. 2001). Mr. Russell asks this court to ignore *Buckeye* because "the relevant part of [it] was unanimously reversed by the Supreme Court and has no precedential value." (Russell Br. at 14 n.3.) However, nothing in the Supreme Court's opinion reversing *Buckeye* modifies the Sixth Circuit's

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Proposal 2, "targeted no suspect or quasi-suspect class, and divested no one of any fundamental right," and therefore "should have been assessed under the most common and least rigorous equal protection norm . . . which direct[s] that challenged legislation must stand if it rationally furthers any conceivable legitimate governmental interest." *Equality Found.*, 128 F.3d at 293. It was in the context of explaining rational basis review, under which the burden on the party challenging the "rationality" of legislation "'is an extremely heavy one,'" that the Court observed: "Indeed, a reviewing court in this circuit may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum." *Id.* at 294 n.4. And in *Clarke*, plaintiffs did not even suggest that the enacted law restructured the political process to the detriment of racial minorities. Rather, their Equal Protection claim was of an entirely different sort: that the challenged law "was enacted with a discriminatory purpose." *See Clarke*, 40 F.3d at 814-15 ("Plaintiffs now contend that the district court erred in refusing to examine in isolation the motives of the electorate. . . . This error of law, plaintiffs assert, caused the district court to reach an erroneous conclusion on *the ultimate question of discriminatory purpose*.") (emphasis added).

critique of *Arthur*, and in particular, its observation that *Arthur* "contravene[ed]" *Hunter* and *Seattle*. *See City of Cuyahoga Falls v. Buckeye Comt'y Hope Found.*, 538 U.S. 188 (2003). Indeed, *Buckeye* involved a challenge to a "referendum petitioning *process* and not [to] the referendum itself – which never went into effect." *See id.* at 195.

**B. The Material Facts Are Not In Dispute And Each of Defendants' Legal Arguments Is Unavailing.**

1. The Sixth and Ninth Circuit Opinions Are Not Dispositive of this Case.

Defendants argue that the Sixth and Ninth Circuits have already rejected the Cantrell Plaintiffs' *Hunter/Seattle* political restructuring claim. (Russell Br. at 2-4; Cox Br. at 29.) Neither of those opinions is binding on this Court and, as discussed below, the arguments contained in those opinions are wrong. Thus, those opinions do not dictate the outcome of this case.

*First*, the emergency motions panel of the Sixth Circuit that preliminarily stayed the stipulated injunction entered by this Court on December 19, 2006 made "clear" that its decision was *not* "on the merits." *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243, 253 (6th Cir. 2006) ("Let us be clear that the merits of the appeal of the order granting the preliminary injunction . . . are not before this panel.").[7] Indeed, that appeal was on a different and discrete issue: whether the District Court should have stayed the enforcement of Proposal 2 until the end of the Universities' 2006-2007 admissions cycle. Despite making "clear" that it

[7] As discussed in the Cantrell Plaintiffs' summary judgment brief (Cantrell Summ. Judg. Br., Dkt. No. 203, at 5, n.2.), the Sixth Circuit's December 29 stay order should be vacated to ensure that the rights of the parties are not "prejudiced by a decision which . . . was only preliminary." *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950) (vacatur is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences"). A motion in that regard is presently pending before the Sixth Circuit.

was not deciding the merits, the panel issued an opinion – without benefit of full and deliberate briefing or any evidentiary record (no party had more than 48 hours to prepare and file papers) – that was hasty and aggressive in scope as to the underlying constitutional issues in this case. The panel devoted barely a page of its decision to the Supreme Court's political restructuring doctrine under the Fourteenth Amendment as set forth in *Hunter* and *Seattle*; in fact, the *Hunter/Seattle* doctrine was never even presented to the district court as grounds for a stay or approval of the stipulation. Perhaps as a consequence, the panel, in its few-paragraph discussion of the issue, got the Supreme Court's jurisprudence fundamentally wrong.

*Second*, the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), is, of course, not binding on this Court. The majority opinion, like Defendants here, reasons that: (1) "Proposition 209's ban on race and gender preferences" does not create an impermissible racial classification; (2) Proposition 209 does not violate the *Hunter/Seattle* doctrine because "women and minorities . . . together constitute a majority of the California electorate"; (3) Proposition 209 "'addresses, in neutral fashion, race-related matters'"; and (4) "[i]mpediments to preferential treatment do not deny equal protection." *See id.* at 702-08 (internal citation omitted). As discussed below, that reasoning – which Defendants reiterate here – is flawed. Indeed, Judge Norris, who concurred with the dissent, disagreed vigorously with the majority's conclusions:

> "It is the core holding of [*Hunter* and *Seattle*] that the state may not 'place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decisionmaking authority over the question at a new and remote level of government.' . . . Because that is precisely what Proposition 209 does, our court has no legitimate choice but to declare it unconstitutional. . . . Proposition 209 strips the state legislature and all political subdivisions such as city councils, county boards of supervisors, local school boards, and the Board of Regents of the University of

> California, of all authority to adopt racial preferences in the future. It 'lodg[es] decisionmaking authority over [affirmative action] at a new and remote level of government' – the entire electorate of California. The measure thereby deprives the proponents of affirmative action – and only the proponents of affirmative action – of the ordinary benefits of representative government."

*Id.* at 712 (Norris, J., respecting the denial of rehearing en banc) (internal citations omitted). Judge Norris's observation that "[u]nless and until the Supreme Court overrules *Hunter* and *Seattle,* California simply does not have the constitutional authority to place minority groups at a disadvantage in the political process" applies equally here in Michigan. *Id.*

2. Proposal 2, Although Facially Neutral, Embodies a Racial Classification.

The Attorney General argues that Proposal 2 does not create a racial classification "since it neither says nor implies that 'persons are to be treated differently on account of their race.'" (*See* Cox Br. at 21.) That assertion flatly ignores the Supreme Court's holding in *Seattle*. Initiative 350, like Proposal 2, was "facially neutral" as to race, but the Court nevertheless found that it created an impermissible racial classification in the political process by singling out individuals of color for a substantial and unique burden. *See Seattle*, 458 U.S. at 474 ("Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine. We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*.").

Mr. Russell similarly argues that the Cantrell Plaintiffs' reliance on *Hunter* and *Seattle* implies "that *any* effort by the state to treat racial and gender issues differently from other classifications constitutes an impermissible classification that triggers application of the *Seattle* doctrine. But . . . *Seattle* and like cases are fully consistent with a statewide ban on state-

sponsored racial discrimination."[8] (Russell Br. at 5.) That argument assumes, incorrectly, that Proposal 2 merely bans "state-sponsored racial discrimination." But Proposal 2 is far more than a discrimination ban. Proposal 2's title expressly singles out by name only one sort of law: "[a]ffirmative action programs." Mich. Const. art. I, § 26. "Affirmative action" is a term of art that obviously refers to laws that inure primarily to the benefit of individuals of color; as a historical matter, the state has never adopted "affirmative action programs" for the benefit of racial majorities and is never likely to do so. Moreover, Proposal 2 does not prohibit racial discrimination generally; indeed, racial discrimination has long been prohibited by Michigan laws enacted decades before Proposal 2. *See* 1976 Mich. Pub. Acts 453, as amended, Mich. Comp. Laws § 37.2101 *et seq.* (the "Elliott-Larsen Act")). Instead, it prohibits racial classifications in only three narrow areas of state policy-making – public education, public employment and public contracting – which are the very areas where racial classifications have been used to benefit minorities by encouraging racial diversity. In effect, therefore, Proposal 2

[8] Mr. Russell also argues that *Seattle* itself recognized "that the *Hunter* doctrine 'does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification'" (Russell Br. at 5 (quoting *Seattle*, 458 U.S. at 485)), and therefore that the majority "plainly stated that it did not in any way foreclose the ability of states to address, and repeal, the use of racial preferences by local or subsidiary governmental units through statewide efforts" (*Id.* at 5-6). But the majority did *not* suggest – as Mr. Russell does – that laws banning affirmative action programs are *always* constitutional. What the majority found "objectionable about Initiative 350 [was] the comparative burden it imposes on minority participation in the political process – that is, the racial nature of the way in which it structures the *process* of decisionmaking." *Seattle*, 458 U.S. at 480 n.23. In so stating, the majority was responding to the dissent's critique of *Seattle* for implying that "[i]f local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene." *Id.* at 498 n.14 (Powell, J., dissenting). (*See also* Russell Br. at 5-6.) As the *Seattle* majority observed, such a statement "evidence[s] a basic misunderstanding of our decision" because "the horribles paraded by the dissent" of course had "nothing to do with the ability of minorities to participate in the process of self-government" and thus were "entirely unrelated" to the *Seattle* plaintiff's political restructuring argument. *Id.* at 480 n.23. Mr. Russell's argument here evidences the same basic misunderstanding.

clearly singles out laws based on the race of the people most likely to benefit from such laws. That is precisely the type of racial classification that the Supreme Court prohibited in *Hunter* and *Seattle*. *See Seattle*, 458 U.S. at 472; *Hunter*, 393 U.S. at 390-91.[9]

3. *Hunter* and *Seattle* Are Not Limited to Cases Where the Challenged Law Protects Racial Minorities From Adverse Treatment.

Defendants claim that "*Hunter* and *Seattle* apply only where the political restructuring in question makes it more difficult for the challenging minority to receive *protection from adverse treatment*," and not here, where "the minority . . . seek[s] *unequal* protection, in the form of racially *preferential* treatment." (Russell Br. at 7-8; *see also* Cox Br. at 26, 28.) That is not the law and is inconsistent with the facts of *Seattle*. The restructuring principle in *Hunter* and *Seattle* does not depend whatsoever on the nature of the legislation rendered more difficult to achieve by the challenged enactment, so long as racial minorities consider it "to be 'legislation that is in their interest.'" *Seattle*, 458 U.S. at 474; *see also Coal. for Econ. Equity*, 122 F.3d at 713-14 (Norris, J., respecting the denial of rehearing en banc) ("The relevant inquiry under *Hunter* and *Seattle* is simply to ask whether legislation is *beneficial to minorities*. . . . Nowhere has the Court suggested that the *Hunter-Seattle* doctrine permits judges to rely upon their own subjective impressions as to whether a particular measure aimed at benefiting minorities is also an effective means of securing equality, or whether the social costs associated with that measure are worth the potential benefits."). Of course, Initiative 350 in

[9] Moreover, Proposal 2 actually *creates* an impermissible race-based classification by distinguishing between race and all other pertinent elements of diversity that a university may permissibly consider in the admissions process. As a result, students of color are particularly disadvantaged in an admissions process that nullifies an important aspect of their identity. (*See* Cantrell Summ. Judg. Br., Dkt No. 203, at 9-21.)

*Seattle* had nothing to do with "protection from discrimination," but rather concerned busing for voluntary desegregation – legislation "inur[ing] to the benefit of the minority." *Seattle*, 458 U.S. at 472; *see also Coal. for Econ. Equity*, 122 F.3d at 714 (Norris, J., respecting the denial of rehearing en banc) ("Indeed, the panel's distinction between antidiscrimination laws and race-based remedial programs is squarely rejected by *Seattle*. . . . Of course, the very busing program that gave rise to the case was itself a controversial, race-based remedial program."). And while Defendants' distinction may describe the facts of *Hunter*, it was irrelevant to the holding. *See Hunter*, 393 U.S. at 392-93 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.") (citations omitted).

In any event, the premise of this argument is flawed. The race-conscious admissions programs used by the Universities prior to Proposal 2 did *not* grant "racially preferential treatment"; "bonus" points were outlawed by the Supreme Court in *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Id.* at 271, 275-76 (striking down admissions policy that "automatically distribute[d] 20 points to every single applicant from an 'underrepresented minority' group"); *see also Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) ("Unlike the program at issue in [*Gratz*], the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity."). The admissions policies employed by the Universities prior to Proposal 2 were of the type that the *Grutter* Court expressly permitted in order to further the "compelling interest in securing the educational benefits of a diverse student body": flexible, multi-faceted and race-conscious. *See id.* at 332-33, 337 (upholding policies that "afford[] individualized consideration to applicants of all races" while "adequately ensur[ing] that all

factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions"). If anything, *Grutter* makes the case against Proposal 2 constitutionally stronger than the case against the measures invalidated in either *Hunter* or *Seattle* – the interests subject to the political restructuring in those earlier cases were important interests for individuals to champion, but had not been accorded status as a *compelling* state interest.

4. Proposal 2 Did Not "Merely Repeal" Race-Conscious University Admissions Programs.

Defendants argue that Proposal 2 should not be struck down under *Hunter* and *Seattle* because "the people of Michigan chose to 'repeal' the State's ability to grant preferential treatment to classes of citizens based on their race and sex." (Cox Br. at 17-21; *see also* Russell Br. at 4-6) In effect, Defendants assert that Proposal 2 is just like Proposition I in *Crawford*, an amendment to the California constitution that overrode California Supreme Court caselaw holding that the state constitution not only *permitted* but *required* state school boards "to take reasonable steps to alleviate segregation in the public schools." *See Crawford*, 458 U.S. at 530-36 & n.12 (noting that "[i]n this respect this case differs from the situation presented in [*Seattle*]").

*Crawford* is inapposite. Unlike Proposal 2, Proposition I did not fundamentally alter the political process for racial minorities by *prospectively* prohibiting any unit of state and local government, including state university officers, from *ever* adopting policies allowing the consideration of race. (*See* Resp. To Pls. Chase Cantrell, Et Al.'s Modified First Request For Admissions To Gov. Jennifer Granholm, Dkt No. 203-4, No. 21 (admitting that now, "any individual or group who believes that any of the Universities should restore its prior admissions

policies and their use of race or gender" may seek such a change "only by seeking a state constitutional amendment").) Proposition I in no way limited the freedom of local government or the state legislature to remedy segregation by any method they chose. *Crawford*, 458 U.S. at 535-36 & 536 n.12 (noting that Proposition I "only limits *state courts when enforcing the State Constitution*" (emphasis added) and "would not bar . . . state *statutes* requiring busing for desegregation or for any other purpose") (emphasis in original).

Indeed, *Seattle* distinguished *itself* from *Crawford* by noting that "[i]t is the State's restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan." *Seattle*, 458 U.S. at 486 n.29. Like Initiative 350, Proposal 2 is not a "simple repeal" of existing race-conscious admissions programs; indeed, it "forbids all institutions of representative government from enacting race- or gender-based affirmative action programs – and only those programs – *in the future*." *See Coal. for Econ. Equity*, 122 F.3d at 716 (Norris, J., respecting the denial of rehearing en banc). Advocates of race-conscious admissions policies may no longer appeal even to the state legislature for such policies – the normal course of opposing state action and participating in government; instead, "[t]hey must take their case directly to the voters of [Michigan]" through a lengthy, expensive and cumbersome ballot initiative process. *See id.* at 713. As Judge Norris correctly recognized in *Coalition for Economic Equity*, "[a] measure that places permanent political obstacles in the way of minority-oriented legislation violates the *Hunter-Seattle* doctrine and cannot fit itself within the 'mere repeal' doctrine of *Crawford*." *Id.* at 716.

5. The Inclusion of Gender in Proposal 2 Does Not Mitigate its Unconstitutionality.

The Attorney General asserts that Proposal 2 "does not create an unequal political burden on minorities or women" because the burdened classes "'make up a majority of the Michigan population.'"[10] (Cox Br. at 26 (internal citation omitted).) This argument is absurd.[11] As an initial matter, it assumes, without any basis, that the interests of minorities and women are one and the same – that minorities, for example, automatically would seek programs beneficial to women and vice versa. Beyond the absence of any empirical support for this claim, the rights implicated, as in all Fourteenth Amendment race cases, are personal to individuals, and thus, to members of separate minority groups. *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 289 (1978) ("It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.'") (quoting *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948)).

Moreover, the fact that Proposal 2 is more broad-sweeping in its reach than either Initiative 350 in *Seattle* or the Akron ordinance in *Hunter* does not annul the constitutional violation; if anything, it multiplies the restructuring problem in that members of *both*

[10] Only the Attorney General directs this argument to the Cantrell Plaintiffs' claim. Mr. Russell directs this argument only to the Coalition Plaintiffs' gender-based *Hunter* claim, and not to their race-based *Hunter* claim or the Cantrell Plaintiffs' single (race-based) *Hunter* claim. (*See* Russell Br. at 11-13 (arguing that the Coalition Plaintiffs' "gender-based *Hunter* claim is legally meritless").)

[11] Indeed, Judge Norris in *Coalition for Economic Equity* found this argument absurd on its face. 122 F.3d at 716 (Norris, J., respecting the denial of rehearing en banc) ("In other words, the panel transforms racial minorities into a numerical majority by lumping them together with women. . . . To borrow the panel's (uncited) paraphrase of Justice Scalia, 'if merely stating this alleged 'equal protection' [argument] does not suffice to refute it, our constitutional jurisprudence' has gone very far astray.") (internal citations omitted).

constitutionally suspect groups (women and racial minorities) must "surmount a considerably higher hurdle" politically. *See Seattle,* 458 U.S. at 474; *see also Hunter v. Underwood,* 471 U.S. 222, 232 (1985) (finding that an additional purpose to discriminate against a group not subject to strict scrutiny "would not render nugatory the purpose to discriminate against all blacks").

6. It Is Irrelevant For Purposes Of The Equal Protection Analysis Under *Hunter* and *Seattle* That Proposal 2 Leaves Racial Minorities Free To Support Policies and Programs Other Than Race-Conscious Admissions Policies.

The Attorney General suggests that Proposal 2 does not violate the *Hunter/Seattle* doctrine because it "does not prohibit racial minorities and women from suggesting or urging colleges and universities to create practices promoting diversity." (Cox Br. at 27.) That argument ignores the fact that "practices promoting diversity" which do not include race-conscious admissions policies will not (and cannot) promote *racial* diversity. Indeed, every witness who testified on this topic – including proponents of Proposal 2 – confirmed that without race-conscious admissions policies, robust enrollment of students of color in Michigan's public universities will be virtually impossible to maintain. (*See* Cantrell Summ. Judg. Br., Dkt. No. 203, at 15-18; *see also* Jeannie Oakes, "The Viability of Race-Neutral Approaches for Achieving Diversity at the University of Michigan", Dkt. No. 206.) And as the Supreme Court has repeatedly recognized, diversity without race is not genuine diversity. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1,* 127 S.Ct. 2738, 2757 (2007) (describing the admission of a "'meaningful number'" of students of color as "necessary to achieve a genuinely diverse student body"); *Grutter,* 539 U.S. at 322 (framing the central question of the case as "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of *race* in selecting applicants for admission to public universities") (emphasis added).

The Attorney General also argues that Proposal 2 leaves racial minorities "free to support nondiscrimination policies." (Cox Br. at 27.) That is irrelevant. The fact that Proposal 2 leaves Michigan's nondiscrimination legislation intact does not negate the political restructuring effect of its ban on race-conscious policies in critical areas such as higher education admissions. In fact, because Proposal 2's "nondiscrimination" provisions are redundant of the Elliott-Larsen Act which was enacted long before the passage of Proposal 2, its only real effect is to end (and prevent the future implementation of) race-conscious admissions. (*See* Def.-Intervenor Att. Gen. Michael Cox's Resp. To Cantrell Pls.' Requests For Admission, Dkt No. 203-3, at No. 24 (admitting that "Proposal 2's ban on race preferences has eliminated state and local race-conscious affirmative action efforts in education that existed prior to Proposal 2").)

7. The Universities' Admissions Process Clearly Triggers Application of the *Hunter/Seattle* Doctrine.

The Attorney General argues that the Supreme Court's political restructuring doctrine does not apply to Proposal 2 because "the university admissions process is not a political process as contemplated in the *Hunter* line of cases." (*See* Cox Br. at 28.) To support that argument, the Attorney General points out, for example, that the faculty at Wayne State University Law School and the University of Michigan's LS&A and Engineering Colleges are primarily responsible for designing, changing and adopting admissions policies and criteria. (*See id.*) The Attorney General also notes that certain non-faculty members are not "eligible to vote on admissions criteria" at Wayne State University Law School, and that there is no formal process in place at the University of Michigan undergraduate college "by which members of the public, prospective students or others who are not faculty or part of the college, can comment or submit suggestions for admissions criteria." (*Id.*) Those observations are irrelevant.

As an initial matter, the Universities' admissions process is a quintessentially political process: the Universities draw their power directly from the Michigan Constitution and therefore are state actors themselves. Mich. Const. art. VIII, § 5 (granting each University's governing board the power of "general supervision of its institution"); *Federated Publ'ns, Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491, 497 (Mich. 1999) (noting that the Michigan Constitution "grants the [Universities'] governing boards authority over 'the absolute management of the University'" and that "'[Michigan's] Legislature may not interfere with the [governing boards'] management and control'") (internal citations omitted). Prior to Proposal 2, each admitting unit at each University had autonomy over its own admissions processes, including the power to consider and implement any change suggested by students, faculty or citizens. (University RFA Resp. Nos. 36, 44, Dkt. No. 172-11 ("[P]rior to the enactment of Proposal 2, any individual or group who believed that any Admitting Unit . . . should amend its admissions policies to benefit applicants based on any factor . . . could petition that Admitting Unit for such a change.").) Indeed, race-conscious admissions policies were first implemented at the University of Michigan directly in response to the demands of the Black Action Movement, a minority activist group. (*See* Ltr. of Feb. 9, 1970 from H. W. Hildebrandt (enclosing list of student demands), Dkt No. 203-21.) Moreover, the Attorney General himself concedes that at Wayne State University Law School, certain designated students may vote on admissions criteria and "the public may attend meetings at which admissions criteria are discussed and may comment if they . . . submit[] a card requesting that opportunity." (Cox Br. at 28.)

In any event, the form and scope of the political process at issue in an Equal Protection challenge under *Hunter* and *Seattle* is irrelevant to the political restructuring analysis

so long as the challenged law "places [a] special burden on racial minorities within the governmental process." *See Hunter*, 393 U.S. at 391; *see also Seattle*, 458 U.S. at 477 ("[I]t is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests.").[12] Thus, the only relevant question for purposes of applying *Hunter* and *Seattle* is whether the challenged law "allocates governmental power nonneutrally" so as to "mak[e] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *See Seattle*, 458 U.S. at 470 (quoting *Hunter*, 393 U.S. at 395). Proposal 2 clearly does. (*See* Cantrell Summ. Judg. Br., Dkt. No. 203, at Part II.B.)

[12] Indeed, Initiative 350 was struck down in *Seattle* because it removed power over desegregative busing to the "state level" but left the local school boards with "the responsibility to devise and tailor educational programs to suit" all other local needs. *See id.* at 477-80 ("By placing power over desegregative busing at the state level, then, Initiative 350 plainly 'differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.'") (quoting *Lee v. Nyquist*, 318 F. Supp. 710, 718 (D.C.N.Y. 1970). Similarly, Proposal 2 leaves the autonomy of the Universities' admitting units unaltered, with the critical exception that they are no longer free to maintain or adopt admissions policies that consider race.

**Conclusion**

For the foregoing reasons, the Cantrell Plaintiffs respectfully request that this Court deny Mr. Russell's Motion For Summary Judgment and the Attorney General's Motion To Dismiss And/Or For Summary Judgment, and enter summary judgment in their favor.

January 7, 2008

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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| | Case 06-15024<br>Hon. David M. Lawson |
| COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>JENNIFER GRANHOLM, et al.,<br><br>Defendants. | **CONSOLIDATED CASES**<br><br>CERTIFICATE OF SERVICE |
| | Case 06-15637<br>Hon. David M. Lawson |

KARIN A. DEMASI hereby certifies the following under the penalty of perjury:

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