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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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CHASE CANTRELL, *et al.*,

*Plaintiffs-Appellants,*

- v. -

ATTORNEY GENERAL MICHAEL COX, *et al.*,

*Defendants-Appellees.*

On Appeal from the United States District Court  
for the Eastern District of Michigan

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**BRIEF OF PLAINTIFFS-APPELLANTS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Plaintiffs-Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Plaintiffs-Appellants are all individual students and faculty members.

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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 34(a), Plaintiffs-Appellants hereby respectfully request oral argument on the present appeal. This appeal raises important issues relating to the Cantrell Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

## **JURISDICTIONAL STATEMENT**

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. This case arises under Section One of the Fourteenth Amendment to the United States Constitution. The Cantrell Plaintiffs argue that Proposal 06-02, an amendment to Michigan's Constitution, denies them the Equal Protection of Michigan's laws.

The Court of Appeals has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1291. On March 18, 2008, the District Court issued a final order granting summary judgment to the Attorney General and dismissing all claims. On December 11, 2008, the District Court denied Plaintiffs' motion to alter or amend that judgment. On January 12, 2009, Plaintiffs filed a timely notice of appeal with the District Court.

## CITATION FORMS

RE #	Record Entry Number from the District Court Docket No. 2:06-cv-15637-DML-SDP
Consol. Order	Order Consolidating Cases, Granting Attorney General's Motion to Intervene, and Setting Dates, dated January 5, 2007
Compl.	Cantrell Plaintiffs' First Amended Complaint, dated January 17, 2007
Johnson Decl.	Declaration of Sheldon Johnson in Support of Cantrell Plaintiffs' Motion to Certify Class, dated April 30, 2007
Pls.' SJ Mot. & Ex.	Cantrell Plaintiffs' Motion for Summary Judgment, dated November 30, 2007, with attached exhibits
Pls.' Russ. Mot. & Ex.	Cantrell Plaintiffs' Motion for Summary Judgment as to Defendant-Intervenor Eric Russell, dated October 5, 2007, with attached exhibits
Tr.	Transcript of Dispositive Motions Hearing, held on February 6, 2008
3/18/08 Order	Opinion and Order Granting in Part and Denying in Part University Defendants' Motion to Dismiss, Denying Cantrell Plaintiffs' Motion for Summary Judgment, Granting Attorney General's Motion for Summary Judgment, and Dismissing Cases, dated March 18, 2008
Pls.' Mot. Alt.	Cantrell Plaintiffs' Motion to Alter or Amend Judgment, dated April 1, 2008
12/11/08 Order	Opinion and Order Denying Cantrell Plaintiffs' Motion to Alter or Amend Judgment, dated December 11, 2008

## **STATEMENT OF ISSUE FOR REVIEW**

Whether the District Court erred in granting the Attorney General's Motion for Summary Judgment by holding that Michigan's Ballot Proposal 06-02, in barring Michigan's public universities from considering race as one factor among many in admissions decisions, did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, according to principles established in Hunter v. Erickson, 393 U.S. 385 (1969) and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), since it burdened racial minorities' efforts to secure "preferential treatment" rather than protection from "unequal treatment" in the normal political process.

## **STATEMENT OF THE CASE**

This appeal seeks to restore to every citizen in Michigan the constitutionally guaranteed right to full political participation. In 2006, a majority of Michigan's voters passed Proposal 06-02 ("Proposal 2"), a state constitutional amendment prohibiting Michigan's public universities from adopting the race-conscious admissions programs upheld by the United States Supreme Court in Grutter v. Bollinger, 539 U.S. 306 (2003). As a result of that amendment, citizens – who may lobby for the consideration of any other factor in admissions – may no longer lobby for the consideration of race. After Proposal 2, race-conscious

admissions programs, which unquestionably inure primarily to the benefit of minority applicants, can only be restored through another constitutional amendment.

To be clear, this appeal does not involve the constitutionality of race-conscious admissions programs. The Supreme Court already has upheld the consideration of race as a single, non-dispositive factor in admissions decisions – and, indeed, has determined that such programs serve the compelling state interest of diversity in Michigan’s higher education classrooms. See Grutter, 539 U.S. at 333. While such programs are not constitutionally required, their implementation was the result of a hard-fought battle waged over decades through regular political channels. That outcome is not at issue in this appeal.

Instead, this appeal addresses the constitutionality of requiring only certain citizens – those seeking to lobby their public universities for the consideration of race – to obtain a constitutional amendment in order to be heard. It is this process that the Equal Protection Clause protects by prohibiting the majority of a state’s electorate from lodging decision-making authority over racial issues – and racial issues alone – irretrievably in its own hands. As Supreme Court precedent in the Hunter/Seattle line of cases dictates, the Equal Protection Clause prohibits a racially selective restructuring of the political decision-making process in order to “mak[e] it more difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest.” Hunter,

393 U.S. at 395; accord Seattle, 458 U.S. at 470. The result is the same whether the outcome is labeled “preferential treatment” or “equal protection.”

A related case was previously before this Court, to decide the narrow procedural issue of whether to enforce the entry of a stipulated injunction to delay Proposal 2’s effective date until after the 2006-2007 admissions cycle. See Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006).<sup>1</sup> On December 29, 2006, this Court refused to enforce that injunction, but made clear it was not addressing the merits of the case. Coal. to Defend Affirmative Action, 473 F.3d at 243 (“Let us be clear that the merits of the appeal . . . are not before this panel.”). The Cantrell Plaintiffs were not a party to that appeal.

On January 17, 2007, the Cantrell Plaintiffs, a group of students, faculty and prospective applicants to Michigan’s public universities, filed an Amended Complaint seeking to prohibit Proposal 2’s enforcement on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by impermissibly restructuring Michigan’s political process on the basis of race. (See Compl., RE #17, ¶¶ 9-27, 57-58.) On March 18,

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<sup>1</sup> On November 8, 2006, the day after Proposal 2 was enacted, a collection of interest groups and individuals, led by the Coalition to Defend Affirmative Action, brought suit against the Governor and three of Michigan’s public universities to obtain an injunction against the amendment’s enforcement. After the Attorney General moved to intervene, the District Court granted the parties “a measure of relief by entering a stipulated order temporarily enjoining Proposal 2’s implementation at Michigan’s universities.” (3/18/08 Order, RE #166, at 6.)

2008, the District Court denied the Cantrell Plaintiffs' motion for summary judgment, granted the Attorney General's motion for summary judgment, and dismissed all claims. (3/18/08 Order, RE #166, at 43-51, 55.)<sup>2</sup> The District Court found that Proposal 2 indisputably has a racial focus and makes it significantly more difficult for minorities to obtain official action in their interest from the Universities; it nonetheless denied the Cantrell Plaintiffs' Equal Protection challenge "[b]ecause the political restructuring effectuated by Proposal 2 does not . . . distanc[e] racial minority groups from the means of obtaining equal protection." (Id. at 51.) Instead, according to the District Court, Proposal 2 merely precludes "preferential treatment." (Id. at 49-50.)

Pursuant to Federal Rule of Civil Procedure 59(e), the Cantrell Plaintiffs moved the District Court to alter or amend that judgment on the basis that a distinction between precluding "preferential treatment" and "equal protection" was inconsistent both with the process-based nature of the doctrine established by

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<sup>2</sup> Although the Cantrell Plaintiffs did not name as defendants the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University (collectively, the "Universities"), the District Court consolidated the Coalition and Cantrell cases on January 5, 2007, after the Cantrell Plaintiffs filed their initial complaint. (See Consol. Order, RE #12.) The District Court then held that, as "both groups of plaintiffs claim that Proposal 2's impact on admissions amounts to a discriminatory restructuring of the political process," the Universities were proper parties to the action since "striking down that amendment would not grant the plaintiffs the relief they ultimately seek without action on the universities' part." (3/18/08 Order, RE #166, at 22.)

Hunter v. Erickson and Washington v. Seattle School District No. 1, and with the very holding in Seattle itself. (See Pls.’ Mot. Alt., RE #173.) The District Court did not amend its earlier Order (see 12/11/08 Order, RE #178), leading to the present appeal.

## STATEMENT OF FACTS

### A. The Advent of Proposal 2.

The District Court’s opinion sets out the principal facts underlying this litigation. (See 3/18/08 Order, RE #166, at 3-7.) The Universities have long enjoyed autonomy over their admissions policies and procedures. Pursuant to Michigan’s Constitution, the Universities are controlled by independent boards. Mich. Const. art. VIII, § 5. Each board enjoys the power of “general supervision of its institutions and the control and direction of all expenditures from the institution’s funds.” Id. Generally, the boards have “delegated the responsibility to establish admissions standards, policies and procedures to units within the institutions, including central admissions offices, schools and colleges.” (Pls.’ Russ. Mot., RE #102, Ex. I (Univ. Defs.’ Resp.) No. 4.)

The Universities typically set their admissions criteria through informal processes. Students, faculty and other individuals have always been “free to lobby

the Universities for or against the adoption of particular admissions policies.”<sup>3</sup> (Id. No. 7.) In 1992, partially in response to decades of lobbying by African-Americans and other underrepresented minority groups for an admissions policy that would lead to the benefits of student body diversity, the University of Michigan Law School began to consider race as one of many factors in making admissions decisions. (See id. Nos. 8-9; 3/18/08 Order, RE #166, at 3-4, 13.)

The United States Supreme Court upheld the Law School’s admissions policy against constitutional challenge in Grutter v. Bollinger, 539 U.S. 306 (2003). In Grutter, the Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions,” and that the Law School’s policy “bears the hallmarks of a narrowly tailored plan.” 539 U.S. at 325, 334. (See 3/18/08 Order, RE #166, at 4.) The Law School evaluated all applicants upon a wide set of criteria, affording “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.” Grutter, 539 U.S. at 337.

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<sup>3</sup> At both the University of Michigan and Wayne State Law Schools, for example, faculty vote on admissions criteria. (See Pls.’ SJ Mot., RE #125, Ex. E (Zearfoss Dep.) at 64, 213-14; Ex. F (Wu Dep.) at 190-91.) Individuals, including students, are free to propose changes by meeting with faculty or administrators. (Id., Ex. E (Zearfoss Dep.) at 209-10; Ex. F (Wu Dep.) at 192-93.)

On the same day Grutter was decided, the Supreme Court invalidated the admissions policy of the University of Michigan's undergraduate college as insufficiently individualized, flexible or holistic – in contrast to the Law School's plan – and thus in violation of the Equal Protection Clause. See Gratz v. Bollinger, 539 U.S. 244, 275-76 (2003).

Nonetheless, the victorious plaintiff in Gratz, along with others, embarked upon a mission to place a proposal, Proposal 06-02, on Michigan's statewide ballot for November 2006 that would ban the consideration of race and gender in programs for public employment, public contracting and admission to Michigan's public schools and universities. (See 3/18/08 Order, RE #166, at 4.) “The signature-gathering phase of the initiative process generated considerable controversy.” (Id.) In a prior case, this Court found that “the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . . By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.” Operation King's Dream v. Connerly, 501 F.3d 584, 591 (6th Cir. 2007).

Nevertheless, Proposal 2 remained on the ballot and passed as a state constitutional amendment, receiving 57.9% of the vote. (3/18/08 Order, RE #166, at 5.) “Only three of Michigan's 83 counties rejected the measure; the rest approved

it.” (Id.) An exit poll conducted by Edison Research found that 70% of non-white men and 82% of non-white women voted against Proposal 2; African-American voters opposed the measure by the sizable margin of 86% to 14%. (Id. at 6; Pls.’ SJ Mot., RE #125, Ex. O at 1.)<sup>4</sup>

Proposal 2 amended the state Constitution by adding the following provisions pertinent to this appeal:

“(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, 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.

.....

(3) For the purposes of this section ‘state’ includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.”

Mich. Const. art. I, § 26.

## **B. Admissions Before and After Proposal 2.**

Following Grutter and Gratz, the Universities amended their admissions policies to comply with the Supreme Court’s instruction. (See 3/18/08

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<sup>4</sup> Although the District Court noted that “the reliability of th[is] poll has been questioned,” primarily by Defendant-Intervenor Eric Russell, no contradictory results were introduced into the Record. (3/18/08 Order, RE #166, at 6.)

Order, RE #166, at 13.) Theodore Spencer, Associate Vice-Provost and Director of Undergraduate Admissions at the University of Michigan, testified that Grutter provided a “great road map of what a holistic [and thus permissible] review process should look like.” (Pls.’ SJ Mot., RE #125, Ex. D (Spencer Dep.) at 38.) Mr. Spencer explained under such a holistic approach, decisions were not based on “any one particular factor,” but rather upon a “the composite review of all the information that the student provides.” (Id.) Post-Grutter, the University of Michigan’s undergraduate admissions officers considered “50 to 80 different categories” in reviewing an application. (Id. at 35.) Along with race and ethnicity, such factors included personal interests and achievements, geographic location, alumni connections, athletic skills, socioeconomic status, family educational background, “overcoming obstacles, work experience [and] any extraordinary awards, both inside the classroom and outside the classroom.” (Id. at 34-35.)

After Proposal 2, the Universities could consider any of these factors – except for race. “It is the undisputed testimony of university officials that Proposal 2 prohibits them from considering race to any degree.” (3/18/08 Order, RE #166, at 14.) The Universities, however, “continue[] to consider various other non-academic factors,” such as those listed above. (Id.) Thus, the only resulting change to existing policies was the deletion of race as a potential factor in the admissions process. Sarah Zearfoss, Assistant Dean and Director of Admissions for the

University of Michigan Law School, testified that “the meat of [the school’s admissions] policy is the same . . . with the exception of race.” (Pls.’ SJ Mot., RE #125, Ex. E (Zearfoss Dep.) at 192.) Frank Wu, Dean of the Wayne State University Law School, acknowledged that students “could still offer a variety of viewpoints” about how to shape the school’s admissions program, “but it would be futile for them to agitate for the inclusion of race” as a factor. (Id., Ex. F (Wu Dep.) at 193.)

The uncontested evidence in the record below suggests that, as a direct result of Proposal 2, minority student populations will decrease at Michigan’s most selective public universities. (See 3/18/08 Order, RE #166, at 14-15.) Citing to the experiences of other states – including California and Texas –with similar legal prohibitions on race-conscious admissions, officials for each of the Universities testified that Proposal 2 “will depress minority enrollment,” and called it “impossible” to “achieve the same sort of racial and ethnic diversity” or enroll a “critical mass of underrepresented minorities” without considering race. (Id. at 15; Pls.’ SJ Mot., RE #125, Ex. D (Spencer Dep.) at 100-01; Ex. E (Zearfoss Dep.) at 56-57, 193; see also Ex. F (Wu Dep.) at 78-79.) Plaintiffs’ witness Jeannie Oakes, Presidential Professor in Educational Equity at UCLA and an expert in the area of students’ access to college, declared that “Michigan differs from California and Texas in ways that make it even more unlikely that race-neutral approaches would

result in the diversity required at the University of Michigan.” (3/18/08 Order, RE #166, at 16 (quoting Pls.’ SJ Mot., RE #125, Ex. M (Oakes Decl., Ex. 1 at 3-4) (filed under seal).) Indeed, even Ward Connerly, the architect of Proposal 2 and similar measures across the country, freely admitted that, following Proposal 2, “the University of Michigan would be virtually resegregated as the University of California Berkeley and UCLA have” become. (Pls.’ SJ Mot., RE #125, Ex. K (Connerly Dep.) at 120.)

**C. The Difficulty of Amending Michigan’s Constitution.**

In contrast to the informal and low-cost method of lobbying University officials to change their admissions policies, the process of amending Michigan’s Constitution is “lengthy, complex, difficult and expensive.” (*Id.*, Ex. C (Wilfore Decl.) at 2.) Kristina Wilfore, Executive Director of the Ballot Initiative Strategy Center and an expert in ballot initiative campaigns, testified that a “voter initiative campaign targeted at overturning Proposal 2” with regard to considering race in public school admissions “faces overwhelming odds.” (*Id.* ¶ 39.) Successful campaigns require “connections with a network of supporters, political capital with the major players in the relevant state, and access to significant financial resources.” (*Id.* ¶ 12.) A ballot initiative campaign may last three years and can cost as much as \$153 million. (*Id.* ¶¶ 11, 25.) Further, the initial stages “can take anywhere from six months to two years of advance work,” and successful proponents “may be

forced to spend additional funds to defend the measure from legal challenges after it has already been approved.” (Id. ¶ 15, 23).

In politically competitive Michigan, “with expensive media markets and a large number of initiatives vying for voters’ attention on any given ballot,” the amendment process is “particularly onerous, expensive and burdensome when compared to other states.” (Id. ¶¶ 27, 29.) Placing a constitutional amendment on the state ballot requires gathering signatures totaling “not less than eight percent . . . of the total votes cast for all candidates for governor at the last preceding general election.” Mich. Const. art. II, § 9. As of 2007, “a petition seeking to place an initiative to amend Michigan’s Constitution on the next statewide election ballot [would] require more than 380,000 signatures” (Pls.’ SJ Mot., RE #125, Ex. A (Cox Resp.) No. 17), if not substantially more than that as any “invalid signatures are eliminated through a verification process” (id., Ex. B (Granholm Resp.) No. 24).<sup>5</sup> An initiative’s early signature-gathering and public-relations phases alone can cost between \$5 million and \$15 million. (Id., Ex. C (Wilfore Decl.) ¶¶ 30-31.)

Proponents of initiatives that would benefit minority groups, such as race-conscious admissions policies, face greater obstacles in this process due to the “unique problems associated with pro-affirmative action ballot initiatives and

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<sup>5</sup> This signature verification system is meant to combat “fraud and deception.” Connerly, 501 F.3d at 591.

minority protection measures generally,” which do not reduce to “simple messages.” (Id. ¶¶ 34, 36.) Since “[o]verturning any recently passed measure requires more efforts . . . than seeking to approve a new measure,” moreover, “it is extremely unlikely that groups supporting affirmative action would commit any significant resources to a new measure in Michigan.” (Id. ¶ 38.)

### SUMMARY OF ARGUMENT

This appeal raises the question of when a state’s selective exclusion of racial issues – and only those issues – from the normal political and administrative agenda denies the equal protection of that state’s laws to members of the detrimentally affected racial groups, and thus violates the Fourteenth Amendment of the United States Constitution. The selective exclusion of issues with a racial focus from states’ ordinary decision-making processes is governed not by ordinary Equal Protection principles, but by the standards set forth in Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). “These cases yield a simple but central principle”: A state may not “allocate[] governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decision-making process.” Seattle, 458 U.S. at 469-70. Such selective restructuring of the political process, “by lodging decisionmaking authority over the question at a new and remote level of government,” violates the Equal Protection Clause. Id. at 483.

The Cantrell Plaintiffs respectfully disagree with the District Court on a single point of law: whether there exists a constitutionally grounded distinction between laws that impede minorities' efforts to obtain "equal protection" and those that preclude what the District Court labeled "preferential treatment" as a means to limit the Hunter/Seattle principle. There does not. Any such claimed distinction would eviscerate these holdings, which safeguard a fair political process rather than a particular political outcome. Indeed, an asserted difference between precluding "equal protection" and "preferential treatment" finds no support in either case, or their progeny.<sup>6</sup> See, e.g., Romer v. Evans, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense.")

Properly applied, the Hunter/Seattle doctrine exposes Proposal 2 as a discriminatory law that suspends the rules of political engagement in Michigan by categorically banning policies primarily benefiting people of color, rendering it functionally impossible for those policies to be restored. Under a Proposal 2 regime, a constitutionally permissible and perfectly legal higher education admissions policy, designed to assemble a broadly diverse "mix of students with

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<sup>6</sup> Nor can the District Court's ruling be reconciled with the Supreme Court's decisions in Grutter v. Bollinger or Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007). (See infra Part B.2.)

varying backgrounds and experiences who will respect and learn from each other,” Grutter, 539 U.S. at 314 (internal quotation marks omitted), must yield to a system, enacted by the majority, that singles out and penalizes those applicants – and solely those applicants – for whom race is inseparable from their personal identities.

### **STANDARD OF REVIEW**

This Court “review[s] de novo the district court’s grant of summary judgment.” Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 431 (6th Cir. 2008) (citing Lenscrafters, Inc. v. Robinson, 403 F.3d 798, 802 (6th Cir. 2005)). In particular, a state law’s constitutionality “is a question of law which this Court reviews de novo.” Id. (citing Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n., 459 F.3d 676, 680 (6th Cir. 2006)).

### **ARGUMENT**

As the District Court recognized, “[t]he lesson of the Hunter/Seattle line of cases is that the [Equal Protection] Clause,” in addition to barring invidious classifications, “protects equal access to the political process against different sorts of discrimination.” (3/18/08 Order, RE #166, at 44.) Precisely like the laws struck down by the Supreme Court 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. In Hunter and Seattle, as in

this case, the laws at issue force their targeted policies' primary beneficiaries –i.e., citizens of color – to run a “gauntlet” of popular approval that other citizens and laws are spared. See Hunter, 393 U.S. at 390-91.<sup>7</sup>

In Hunter, an amendment to the city charter of Akron, Ohio required that all ordinances regulating real estate transactions “on the basis of race, color, religion, national origin or ancestry” be approved by referendum before they could become effective, whereas other ordinances were subject to a referendum only in limited circumstances. 393 U.S. at 387, 390. Although the Supreme Court recognized that “the law, on its face, treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority” and thus the amendment “place[d] special burdens on racial minorities within the governmental process.” Id. at 391. Because the Fourteenth Amendment forbids states to “disadvantage any particular group by making it more difficult to enact legislation in its behalf,” the Court concluded that the charter amendment constituted “a real, substantial, and invidious denial of the equal protection of the laws.” Id. at 393.

Seattle involved a challenge to “Initiative 350,” a Washington state ballot measure that prohibited any school board from “directly or indirectly

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<sup>7</sup> For a fuller overview of both Hunter and Seattle, the Cantrell Plaintiffs respectfully refer this Court to the District Court’s March 18, 2008 Order. (See 3/18/08 Order, RE #166, at 44-47.)

requir[ing] any student to attend a school other than” one in the student’s neighborhood. 458 U.S. at 462. The amendment’s many exceptions, however, effectively allowed for busing for any reason other than to promote racial integration. Accordingly, proponents of integration had to seek relief from the statewide electorate or the legislature, a hurdle that proponents of all other educational policies were spared. Id. Thus, the Supreme Court reasoned that “despite its facial neutrality, there is little doubt that the initiative was effectively drawn for racial purposes,” due to its “adverse effects upon busing for integration,” a policy that “inures primarily to the benefit of the minority” student community. Id. at 471-72 (internal quotation marks omitted); see also id. at 474 (“[T]he practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in Hunter.”). Since Initiative 350 “remove[d] 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,” the state constitutional amendment violated the Equal Protection Clause. Id. at 474.

In both cases, the Court looked no further than (1) whether the law in question had a “racial focus,” and (2) whether it required those championing legislation “inur[ing] primarily to the benefit of the minority” to “surmount a

considerably higher hurdle than [those] seeking comparable legislative action.”<sup>8</sup>

Seattle, 458 U.S. at 470-74; see also Hunter, 393 U.S. at 390-91; Romer, 517 U.S. at 632 (applying Hunter and Seattle to invalidate a state constitutional amendment that “impos[ed] a broad and undifferentiated disability on a single named group”).

Although the District Court correctly found that Proposal 2 satisfies both of these conditions, as discussed below, the District Court added a third and highly circular element: that, to violate the Equal Protection Clause, the political restructuring at issue must “distanc[e] racial minority groups from the means of obtaining equal protection.” (3/18/08 Order, RE #166, at 51.) Since this added condition finds no support in controlling precedent, and since Proposal 2 runs afoul of both traditional prongs of the Hunter/Seattle test, the Cantrell Plaintiffs have made out a prima facie Equal Protection violation. Thus, the District Court’s grant of Summary Judgment for the Attorney General must be reversed.

**A. Proposal 2 Restructures the Political Process by Lodging Decision-making Authority Over the Question of Race-Conscious Admissions at a New and Remote Level of Government.**

1. The District Court correctly found that Proposal 2 has a racial focus.

As the District Court correctly found, “there can be no question that Proposal 2 has a racial focus.” (3/18/08 Order, RE #166, at 47.) For a challenged

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<sup>8</sup> In the words of the Attorney General: “In order for the Plaintiffs to prevail on this Hunter claim, they must establish essentially two elements.” (Tr., RE #165, at 5-6.)

enactment to have a racial focus, “it is enough that minorities may consider [the subject matter] to be ‘legislation that is in their interest’” and that “inure[s] primarily to the[ir] benefit.” Seattle, 458 U.S. at 472-74 (quoting Hunter, 393 U.S. at 395 (Harlan, J., concurring)). Laws that are “effectively drawn for racial purposes” will also be deemed to have a racial focus. Seattle, 458 U.S. at 471 (striking down initiative that was “carefully tailored to interfere only with desegregative busing”); see also Hunter, 393 U.S. at 395 (invalidating law that had “the clear purpose of making it more difficult for certain racial and religious minorities” to further their political aims); Lee v. Nyquist, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) (finding unconstitutional a law that was “destined to bring an end to New York’s strong prointegration policy”), aff’d, 402 U.S. 935 (1971).

Here, Proposal 2’s ban on “grant[ing] preferential treatment to[] any individual or group on the basis of race” could only have been designed to eliminate race-conscious admissions policies, which inure primarily to the benefit of applicants of color. (See 3/18/08 Order, RE #166, at 47.) Notably, Proposal 2’s so-called “anti-discrimination” provisions are superfluous in light of existing statutory law, as Michigan has had strong anti-discrimination measures in effect for over thirty years. See Elliot-Larsen Civil Rights Act of 1976, as amended, Mich. Comp. Laws §§ 37.2101-.2804.

Furthermore, communities of color have long considered race-conscious admissions policies to be in their interest. Beginning in the 1960s, “African Americans and other underrepresented minorities,” among others, “lobbied for the adoption of admissions policies [which] allowed for the consideration of race” and “sought to increase minority presence at the Universities.” (Pls’ Russ. Mot., RE #102, Ex. I (Univ. Defs.’ Resp.) Nos. 8, 9). Since that time, race-conscious admissions policies have maintained their critical importance to underrepresented communities. One of the Cantrell Plaintiffs, for example, has declared that he “would not have applied to the University of Michigan” had Proposal 2 been in effect when he was a senior in high school “because [he] had no desire to go to a school that lacked a critical mass of students of color.” (Johnson Decl., RE #53, ¶ 2.) An exit poll conducted by Edison Research found that 70% of non-white men and 82% of non-white women voted against Proposal 2, as did 86% of African-American voters. (Pls.’ SJ Mot., RE #125, Ex. O at 1.) Representatives of each of the Universities, moreover, testified that the amendment “will depress minority enrollment.”<sup>9</sup> (See 3/18/08 Order, RE #166, at 15; Pls.’ SJ Mot., RE #125,

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<sup>9</sup> Drawing on experiences with similar laws in California and Texas, uncontested expert testimony in the Record establishes that race-neutral policies such as “percent plans” or using socioeconomic status will not achieve racial diversity to nearly the same extent as race-conscious policies, sharpening Proposal 2’s negative impact on minority enrollment. (See Pls.’ SJ Mot., RE #125, Ex. L (Bowen Decl.); see also 3/18/08 Order, RE #166, at 14-17.)

Ex. D (Spencer Dep.) at 100-01; Ex. E (Zearfoss Dep.) at 56-57, 193; Ex. F (Wu Dep.) at 78-79.)

Fairly examined, Proposal 2 lacks any purpose in the area of higher education other than to eliminate and prevent constitutionally permissible race-conscious admissions policies.<sup>10</sup> Indeed, Proposal 2 was “characterized by the Michigan Attorney General at oral argument in this case as an anti-affirmative action measure.” (3/18/08 Order at 4; see Tr., RE #165, at 15-16.) The ballot argument drafted by the proponents of Proposal 2 flatly stated that race-conscious affirmative action “practices are WRONG and it is time that we got rid of them.” (Pls.’ SJ. Mot., RE #125, Ex. P (2006 Voter Guide) at 30.) One such listed practice, inaccurate in light of the Supreme Court’s decisions in Grutter and Gratz, was awarding “extra points in college admissions.” (Id.)

2. The District Court correctly found that the process of amending Michigan’s constitution is more onerous than seeking a policy change by lobbying the Universities directly.

The Cantrell Plaintiffs also agree with the District Court’s conclusion “that Proposal 2 makes it more difficult for minorities to obtain official action that is in their interest.” (3/18/08 Order, RE #166, at 49.) Prior to Proposal 2’s effective

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<sup>10</sup> “To that extent, the related argument that racial minorities plus women constitute a majority of the population, and therefore Proposal 2 does not discriminate against minorities, likewise borders on nonsense.” (3/18/08 Order, RE #166, at 47-48 (citing the Ninth Circuit’s rejection of this premise in Coalition for Economic Equity v. Wilson, 122 F.3d 692, 705 (9th Cir. 1997).)

date, proponents of affirmative action could, and successfully did, lobby University officials to adopt race-conscious admissions programs. Proposal 2 leaves the Universities' admissions processes unaltered, with the critical and intentional exception that they no longer are free to maintain or adopt policies that include the consideration of an applicant's race. By denying racial minorities the "right to ask university officials to take into consideration certain [i.e., racial] factors when they decide how to constitute an admissions class" (id.), Proposal 2 surgically removes race-conscious admissions policies from the ordinary political process, effectively silencing their proponents. By contrast, Proposal 2 in no way affects the ability of students or other individuals to lobby for the Universities to consider any other factor in the admissions process.

Not only did Proposal 2 require the Universities to end their race-conscious admissions policies, but it also makes it difficult, if not impossible, for proponents to restore these policies in the future. Hence, like the charter amendment in Hunter and the constitutional amendments in Seattle and Romer, Proposal 2 places decision-making over an issue primarily benefiting a minority group "at a new and remote level of government." Seattle, 458 U.S. at 483. With Proposal 2 in effect, groups that would like to see race-conscious admission programs implemented must lobby the entire voting population of Michigan to enact a constitutional amendment – in the unlikely event that the majority would soon

reverse course. Since persuading an entire electorate is far more onerous than seeking a policy change by lobbying University admissions officers, an avenue which remains open for all non-racial issues, minorities face a “considerably higher hurdle than [those] seeking comparable legislative action.” Seattle, 458 U.S. at 474.

As discussed above, a “voter initiative campaign targeted at overturning Proposal 2” with regard to considering race in public school admissions “faces overwhelming odds.” (Pls.’ SJ Mot., RE #125, Ex. C (Wilfore Decl.) ¶ 39.) The process of amending Michigan’s Constitution is “lengthy, complex, difficult and expensive.” (Id. at 2.) In Michigan, “with expensive media markets and a particularly large number of initiatives vying for voters’ attention on any given ballot,” the amendment process is “particularly onerous, expensive and burdensome when compared to other states,” and can take many years and cost many millions of dollars. (Id. ¶¶ 11, 25, 29.) Given the difficulty in overturning any recently passed measure, let alone one that “found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes,” Connerly, 501 F.3d at 591, “it is extremely unlikely that groups supporting affirmative action would commit any significant resources to a new measure in Michigan” (Pls.’ SJ Mot., RE #125, Ex. C (Wilfore Decl.) ¶ 38).

**B. The District Court, in Granting Summary Judgment for the Attorney General, Relied Upon an Erroneous and Unjustified Distinction Between Actions that Preclude “Equal Protection” and Those that Preclude “Preferential Treatment.”**

A single issue stands between the Cantrell Plaintiffs and full agreement with the District Court: namely, the District Court’s view that the Hunter/Seattle principle admits of a distinction “between laws that protect against unequal treatment on the basis of race and those that seek advantageous treatment on the basis of race.” (3/18/08 Order, RE #166, at 49.) The District Court’s purported distinction is incompatible with the Hunter/Seattle principle, which constitutionally protects a fair political process, as opposed to any particular political outcome. Nothing in either case endorses the claimed exception to the rule. In fact, had this “exception” been recognized after Hunter, the Supreme Court would have decided Seattle differently.

1. The District Court’s proffered distinction between precluding “preferential treatment” and withholding “equal protection” is inconsistent with the process-based nature of the Hunter/Seattle doctrine.

Ordinarily, a court will not subject a law to heightened scrutiny absent a suspect classification or proof of racially discriminatory intent. See, e.g., Washington v. Davis, 426 U.S. 229, 239-41 (1976). As the District Court correctly noted, however, “[t]he lesson of the Hunter/Seattle line of cases is that the [Equal Protection] Clause also protects equal access to the political process against

different sorts of discrimination.” (3/18/08 Order, RE #166, at 44 (emphasis added).) In these cases, a conventional Equal Protection analysis would be misplaced. Indeed, “the idea that a political restructuring claim must be based on purposeful discrimination finds no support in the cases.” (3/18/08 Order, RE #166, at 48.) As discussed previously, Hunter and Seattle require only that the challenged law have a “racial focus,” in that it excludes from the ordinary political process issues that are obviously of special relevance to members of a particular racial group.

The immateriality of the “discriminatory purpose” requirement flows directly from the process-based injury that the Hunter/Seattle line of cases is designed to remedy. When a law carves out from the ordinary political process issues of special pertinence to racial minorities, then the law wears its procedural flaws on its face. See Seattle, 458 U.S. at 485 (“[L]egislation of the kind challenged in Hunter . . . falls into an inherently suspect category.”) Because such legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938), one of the bedrock justifications for heightened judicial inquiry applies. Thus, the Hunter/Seattle doctrine is at heart an application of the core

Fourteenth Amendment principle that state laws skewing the political process against a particular racial group warrant suspicion.<sup>11</sup>

By insisting that the Hunter/Seattle doctrine applies only to laws that impede efforts to obtain “equal protection” in the form of protection from discrimination, the District Court has erroneously imposed an outcome-based limitation on a process-based right. In particular, the District Court’s adherence to

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<sup>11</sup> The process-based nature of the Hunter/Seattle principle is universally recognized by both courts and scholars. See, e.g., Seattle, 458 U.S. at 485-86 (reaffirming that judicial deference is inappropriate when legislation “‘curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities’” (quoting Carolene Prods., 304 U.S. at 152 n.4)); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 103 (1980) (justifying heightened judicial scrutiny when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out”); Vikram D. Amar & Evan H. Caminker, Equal Protection, Unequal Political Burdens, and the CCRI, 23 Hastings Const. L.Q. 1019, 1041 (1996) (“Hunter and Seattle reflect what might be called a ‘political process’ concern embedded within equal protection jurisprudence.”); Alan Howard and Bruce Howard, The Dilemma of the Voting Rights Act – Recognizing the Emerging Political Equality Norm, 83 Colum. L. Rev. 1615, 1645-46 (1983) (“The majority in Seattle School District embraced the [notion] that states must structure their political institutions according to what the [Hunter] Court called neutral principles that provid[e] a just framework within which the diverse political groups in the society may fairly compete.” (internal quotation marks omitted)); 3 John E. Nowak & Ronald D. Rotunda, Treatise on Constitutional Law 473 (4th ed. 2008) (“A state may not place ‘in the way of the racial minority’s attaining its political goal any barriers which, within the state’s political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.’” (quoting Charles Black, Foreword, “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 82 (1967-68))).

the Ninth Circuit’s rationale in Coalition for Economic Equity v. Wilson, 122 F.3d 692, 707 (9th Cir. 1997), that to be unconstitutional a political restructuring must “burden[] an individual’s right to equal treatment,” fundamentally mistakes the kind of injury against which Hunter and Seattle protect. (See 3/18/08 Order, RE #166, at 50.) To be sure, after hearing all sides of the debate, the Universities could themselves have chosen to modify or repeal their race-conscious admissions programs and not faced a constitutional challenge; if they had done so prior to Proposal 2’s enactment, the disaffected groups would have redoubled their efforts to lobby University officials for the policies’ return. “That, after all, is how race-conscious admissions programs developed in the first place.” (Id. at 49.) Being deprived on racial grounds of an opportunity to take part in this normal political process is itself a denial of equal treatment, regardless of what outcome the process might produce. Imposing such a “special burden[] on racial minorities within the governmental process . . . . is no more permissible than denying them the vote, on an equal basis with others.” Hunter, 393 U.S. at 391.

Conversely, the Supreme Court has acknowledged that not all laws structuring political institutions or allocating political power “are subject to equal protection attack,” even though they may make it more difficult ““for minorities to achieve favorable legislation.”” Seattle, 458 U.S. at 470 (quoting Hunter, 393 U.S. at 394). A state may place the same obstacles in the path of everyone seeking the

benefits of governmental action, such as an executive veto or a referendum requirement; equal protection concerns arise only “when the state allocates government power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process.” Id. at 470. Again, this rationale is process – rather than outcome – based.

An example makes clear the error in the District Court’s logic.

Suppose, for instance, that the voters of Michigan approve an amendment to the state Constitution barring any public university from offering courses in African-American history. Under the District Court’s reasoning, such an amendment would not implicate the Hunter/Seattle principle, because the prohibited courses would not themselves have protected any person from discrimination on the basis of race. Indeed, given a university’s limited teaching resources, offering specialized courses in African-American history might well be regarded as a form of “preferential treatment,” because no university can afford to offer courses in every form of history desired by its student body. Still, since university officials would remain free to consider requests for any other specialized courses except those of unique relevance to African-American students, such a racially focused exclusion would

deprive those students of an equal chance to lobby for their curricular interests, thus violating the Equal Protection Clause under Hunter and Seattle.<sup>12</sup>

Likewise, Proposal 2 deprives students with a particular interest in race-conscious admissions from lobbying – as every other student may – for the Universities to allow consideration of one of the most significant aspects of their applications. This is particularly acute for many applicants of color, for whom racial identity may well be the most essential component of how they view themselves and what they might bring to a university seeking a genuinely diverse student enrollment. See Grutter, 539 U.S. at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”); Devon W. Carbado & Cheryl I. Harris, The New Racial Preferences, 96 Cal. L. Rev. 1139, 1148 (2008) (“The problem is compounded by the fact that the life story of many people – particularly with regard to describing disadvantage – simply does not make sense without reference to race.”). In the words of one Plaintiff: “Being a black American is one of the most important ways in which I view myself, along with

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<sup>12</sup> Although this illustration may sound far-fetched, it is precisely this type of ill conceived and racially focused state action that the continuing presence of the Hunter/Seattle doctrine prevents.

being my parent's son [and] being a Christian.” (Pls.’ SJ Mot., RE #125, Ex. G (Johnson Decl.) ¶ 6.)

If children of alumni, oboe players, track stars and residents of Michigan's Upper Peninsula are all, within the four corners of their applications, permitted to press their arguments to University administrators that these characteristics are educationally valuable and thus worthy of consideration in the admissions process, then racial minorities must be given the same chance. To hold otherwise on the ground that affirmative action affords “preferential treatment” squarely misses the point of Hunter, Seattle, Romer and the like. The injury imposed by Proposal 2 is not that Proposal 2 repeals Michigan's affirmative action programs. Rather, the injury is that Proposal 2 prospectively bars University officials from giving equal – indeed, any – access in the political process to racial minorities for purposes of considering their unique interests, thereby depriving those minorities of a level playing field. Unlike all other citizens, who may continue to advocate admissions policies that advance their own interests, “any individual or group who believes that any of the Universities should restore its prior admissions policies and their use of race” may now express this belief “only by seeking a state constitutional amendment.” (Pls.’ SJ Mot., RE #125, Ex. B (Granholm Resp.) No. 21.)

2. The District Court’s proffered distinction between precluding “preferential treatment” and withholding “equal protection” is directly contrary to controlling Supreme Court precedent.

The District Court’s distinction between barring “preferential treatment” and denying “equal protection” likewise breaks impermissibly with controlling precedent. In upholding Proposal 2, the District Court relied on the fact that “the Supreme Court has never held that affirmative action is required.” (12/11/08 Order, RE #178, at 6.) With all due respect to the District Court, that misses the point. Indeed, the amendment barring the voluntary integrative busing program at issue in Seattle violated the Equal Protection Clause even though, like here, the program was not constitutionally required.

In Seattle, the Supreme Court struck down a statewide initiative which banned an inter-district busing program aimed at integrating Seattle’s elementary and secondary schools. The Court did so even though the busing program was not constitutionally mandated to remedy prior intentional discrimination, and thus ensure what the District Court in this case labeled “equal treatment.” See 458 U.S. at 461-64; see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752, 2768 (2007) (noting that the Seattle School District was “never segregated by law nor subject to court-ordered desegregation,” and thus “the remedial justification for racial classifications cannot decide these cases”).

As such, the District Court’s reliance upon the Ninth Circuit’s 1997 opinion in Coalition for Economic Equity, upholding a statewide California ballot initiative similar to Proposal 2, does not provide any coherent basis upon which to distinguish the voluntary busing program in Seattle from the affirmative action programs at issue here. Attempting to distinguish Proposal 2 from Initiative 350 in Seattle, the District Court repeats the Ninth Circuit’s statement that “[u]nlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.” Coalition for Economic Equity, 122 F.3d at 708 n.16. But the Supreme Court’s decisions in Grutter and Parents Involved – both of which postdate the Ninth Circuit’s opinion – defeat this assertion here.<sup>13</sup> Grutter established that “racial preference programs” such as race-conscious admissions

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<sup>13</sup> The Ninth Circuit’s conclusion was supported only by a citation to Associated General Contractors of California v. San Francisco Unified School District, 616 F.2d 1381, 1387 (9th Cir. 1980), a case that concerned neither university admissions nor student busing. In Associated General Contractors, the court stated in dicta that busing remedies for de jure segregation were more defensible than the racial-quota system of public contracting then under consideration. Even assuming this to be true, Associated General Contractors was decided before Seattle, which struck down a ban on inter-district busing remedying purely de facto segregation. That case therefore provides no basis for distinguishing between Proposal 2 and Seattle’s Initiative 350.

policies are not always inherently invidious, 539 U.S. at 334-45, and do not work wholly to the benefit of certain members of one group, id. at 328-32, but instead may benefit the entire student body and the community at large. Further, Parents Involved held that K-12 school desegregation programs that prejudice individual students on the basis of their race can sometimes impose injury and thereby deprive citizens of rights.<sup>14</sup> See 127 S. Ct. at 2751.

Thus, there is no plausible way to distinguish Washington’s unconstitutional anti-integrative busing initiative from Michigan’s Proposal 2 on the ground that the latter prohibits access to mere “preferential treatment” while the former stood in the way of obtaining “equal protection.” Significantly, no other court has adopted this novel distinction, and Seattle – which unlike Coalition for Economic Equality, is binding authority – plainly rejects it.

Sidestepping this issue in denying the Cantrell Plaintiffs’ Motion to Alter or Amend Judgment (Pls.’ Mot. Alt., RE #173), the District Court offered no principled basis for its refusal to apply the Hunter/Seattle principle to Proposal 2, other than to assert that “[t]he initiative in Seattle is still fundamentally different than Proposal 2 in that racial integration programs do not presumptively offend the

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<sup>14</sup> As a result, the District Court’s assertion that “these decisions do not change the fact that affirmative action programs not mandated by the obligation to cure past discrimination are fundamentally different than laws intended to protect against discrimination” likewise misses the point. (3/18/08 Order, RE #166, at 50.)

Equal Protection Clause, whereas affirmative action programs might.” (12/11/08 Order, RE #178, at 5.) Yet, as noted above, the Supreme Court has already turned this formulation on its head. In Grutter, the Court upheld the very higher education admissions programs since banned by Proposal 2, thus making clear that the relevant “affirmative action programs” not only do not offend the Equal Protection Clause, but serve the compelling state interest of diversity in higher education. In Parents Involved, conversely, the Court struck down a so-called “racial integration program” as constituted in that case for offending the Equal Protection Clause not just presumptively, but in fact.

Indeed, the District Court acknowledged the Cantrell Plaintiffs “ma[de] a fair point,” namely that “the Court in Seattle did not (and could not) rely on the notion that the restructuring at issue impeded efforts to secure equal treatment.” (12/11/08 Order, RE #178, at 5.) The inexorable conclusion, surely suggested in Parents Involved, is that consideration of the race of individual students in Seattle’s voluntary busing program afforded “preferential treatment.” By failing to recognize the similarity of the busing program at issue in Seattle to the Universities’ race-conscious admissions programs at issue here, the District Court, as did the Ninth Circuit, impermissibly ignored Seattle’s dictates and effectively dislodged its holding from that of Hunter. While the Ninth Circuit’s error may not have been

apparent when Coalition for Educational Equity was decided in 1997, Parents Involved and Grutter now compel a contrary conclusion.

3. The District Court’s Distinction between “Preferential Treatment” and “Equal Protection” Undermines the Essential Purpose of the Hunter/Seattle Principle.

The Hunter/Seattle principle is a bedrock Fourteenth Amendment doctrine never modified, or even re-examined, by the Supreme Court. The distinction invoked by the District Court to uphold Proposal 2 is factually and doctrinally unsound, and usurps the principle’s essential purpose of preserving racial minorities’ access to the political process. In the context of university admissions, labeling consideration of race to be “preferential treatment” rests on the faulty assumption that applicants’ unique race-based experiences are somehow less educationally relevant than the myriad other qualitative traits that the universities are free to consider.

In rejecting the Colorado Attorney General’s argument in Romer that a state constitutional amendment banning measures protecting gays and lesbians was permissible because the amendment denied merely “special rights,” the Supreme Court stated: “We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them . . . .” 517 U.S. at 631. The same may be said of the ability to identify all of one’s most pertinent characteristics – including race – in a

college or law school application. Once an artificial distinction between denying “equal protection” and “preferential treatment” is honored, therefore, there is no defensible stopping point.

Thus, following established precedent, this Court should hold that when a constitutional amendment bars a state’s ordinary political and administrative process from addressing a discrete category of issues primarily benefiting racial minorities, instead predicating any discussion of those issues upon a direct majority vote, such an amendment falls squarely within the Hunter/Seattle principle and violates the Equal Protection Clause.

## CONCLUSION

For the foregoing reasons, the Cantrell Plaintiffs request that the Court of Appeals reverse the District Court's grant of summary judgment, and invalidate Michigan's Proposal 06-02, pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as applied to the consideration of race in admissions to Michigan's public universities.

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Respectfully submitted,

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## **TYPE-VOLUME CERTIFICATION**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Karin

A. DeMasi hereby certifies that this brief complies with the type-volume limitation in Rule 32(a)(7)(B) because, as counted by the Microsoft Word 2002 word count tool, this brief contains 8,787 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements in Rule 32(a)(5)(A) and the type-style requirements in Rule 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font.

Dated: May 15, 2009

s/ Karin A. DeMasi

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Karin A. DeMasi

## **RULE 30(B) DESIGNATION**

<u>Record Entry</u>	<u>Date</u>	<u>Description</u>
12	1/5/07	Order Consolidating Cases, Granting Attorney General's Motion to Intervene, and Setting Dates
17	1/17/07	Cantrell Plaintiffs' First Amended Complaint
53	5/15/07	Declaration of Sheldon Johnson in Support of Motion to Certify Class
102	10/5/07	Cantrell Plaintiffs' Motion for Summary Judgment as to Defendant-Intervenor Eric Russell
125	11/30/07	Cantrell Plaintiffs' Motion for Summary Judgment, with attached exhibits
165	2/20/08	Transcript of Dispositive Motions Hearing held on February 6, 2008
166	3/18/08	Opinion and Order Granting in Part and Denying in Part University Defendants' Motion to Dismiss, Denying Cantrell Plaintiffs' Motion for Summary Judgment, Granting Attorney General's Motion for Summary Judgment, and Dismissing Cases
173	4/1/08	Cantrell Plaintiffs' Motion to Alter or Amend Judgment
178	12/11/08	Opinion and Order Denying Cantrell Plaintiffs' Motion to Alter or Amend Judgment

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

CHASE CANTRELL, *et al.*,

Plaintiffs,

v.

ATTORNEY GENERAL MICHAEL COX, *et al.*,

Defendants.

Case No. 09-1111

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

On the 15th day of May, 2009, I filed the foregoing document electronically and it is available for viewing and downloading from the ECF system. Service was accomplished by means of Notice of Electronic Filing upon:

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