UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

Case No. 06-15024
Hon. David Lawson

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MARY SUE COLEMAN, in her official capacity as President of the University of Michigan, LOU ANNA K. SIMON, in her official capacity as President of Michigan State University, IRVIN D. REID, in his official capacity as President of Wayne State University, MICHAEL COX, in his official capacity as Attorney General of the State of Michigan, and ERIC RUSSELL

Defendants.

And

CONSOLIDATED CASES

CHASE CANTRELL, et. al.

Plaintiffs

Case No. 06-15637

Vs.

Hon. David Lawson

JENNIFER GRANHOLM, and MICHAEL COX,

Defendants.

PLAINTIFF COALITION TO DEFEND AFFIRMATIVE ACTION (BAMN'S) ET.AL.'S MOTION TO CERTIFY CLASSES AND TO BE APPOINTED LEAD COUNSEL

Pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the plaintiffs move the Court to certify the following:

1. The plaintiffs Josie Hyman, Alejandra Cruz, Christopher Sutton, Cordelia Martin, Arielle Bullard, Randiah Green, Maricruz Lopez, Dmitri Garcia, Courtney Drake, and the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and to Fight for Equality by Any Means Necessary (BAMN) as the representatives of

The class of all black, Latino/a and Native American applicants to and students at any school of the University of Michigan, Michigan State University, and Wayne State University.

2. The plaintiffs Lorinda Buckingham, Josie Hyman, Alejandra Cruz, Cordelia Martin, Arielle Bullard, Randiah Green, Maricruz Lopez and the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and to Fight for Equality by Any Means Necessary (BAMN) as the representatives of

The class of all women applicants to and students at any school of the University of Michigan, Michigan State University, and Wayne State University.

The plaintiffs further move that the firm of Scheff & Washington, P.C. be appointed as lead counsel for both classes of plaintiffs.

By Plaintiffs' Attorneys,
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Dated: May 15, 2007

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Defendants.

And

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Defendants.

PLAINTIFF COALITION TO DEFEND AFFIRMATIVE ACTION ET.AL.'S (BAMN'S) BRIEF IN SUPPORT OF THEIR MOTION TO CERTIFY CLASSES AND TO BE APPOINTED LEAD COUNSEL

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SHOULD THE COALTION PLAINTIFFS BE CERTIFIED AS THE REPRESENTATIVES OF THE CLASS OF WOMEN STUDENTS, APPLICANTS, AND PROSPECTIVE APPLICANTS TO THE UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, AND WAYNE STATE UNIVERSITY WHO WILL SUFFER DIMINISHED CHANCES OF ADMISSION AND OF AN INTEGRATED EDUCATION DUE TO THE PASSAGE OF PROPOSAL 2?

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INTRODUCTION

The outcome of this case will shape the character our nation. If Proposal 2 stands, the lie that separate can be equal will again be the law of this land. The right of individual states to adopt laws that will resegregate their universities and to cast black, Latino and other minority communities into a second-class status will be restored. The optimism, the hope of *Brown* will be replaced with pessimism and despair. The nation as a whole will lose the gains towards equality achieved by the Civil Rights Movement.

If the last year has shown nothing else, it is that the Latino/a and black people of this Nation will not accept or tolerate a new Jim Crow America.

What Ward Connerly and the opponents of affirmative action are trying to pull off in Michigan is cynical and profound. Connerly came to Michigan three days after the U.S. Supreme Court had upheld the use of affirmative action admissions policies in the *Grutter* decision and announced his intention to nullify that decision. The experience in California had already shown that a state constitutional ban on affirmative action would lead to the resegregation of higher education and deeper and more profound segregation in K-12 education.

To get Proposal 2 on the ballot, Connerly utilized well-documented racially-targeted voter fraud. The vote on Proposal 2 gave Michigan's eighty-five percent white electorate the power to deny Michigan's black, Latino, and other minority communities equal political rights and educational opportunities.

The University of Michigan, which successfully defended their affirmative action policies at the US Supreme Court, has already been forced to adopt new admissions systems which Mary Sue Coleman, the President of the University has repeatedly

declared would result in a huge drop in black, Latino, and other minority students, and in particular programs, a significant drop in women.

Josie Hyman, Alejandra Cruz, Arielle Bullard, Christopher Sutton, and Cordelia Martin, and countless other black, Latino, Native American, and women students who the *Coalition* plaintiffs seek to represent in this case have already been denied the opportunity to attend the University of Michigan or its Law School because of the loss of affirmative action. Black and Latino communities are now the only class of people in this state who cannot utilize the political process to gain access for their sons and daughters at their state universities. Ward Connerly has already announced his intent to bring anti-affirmative action ballot initiatives in Colorado, Oklahoma, Missouri, South Dakota and Arizona. An attack of this sweeping historic and social consequence deserves thorough and serious consideration by this Court.

The Coalition to Defend Affirmative Action, Integration, & Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) and other *Coalition* plaintiffs are the most experienced, the best qualified and the most able representatives of the black, Latino, other minority and women students and youth who are both the people most immediately affected by Proposal 2 and those whose futures and lives will be completely determined by the outcome of this case.

For the last twelve years, we have stood at the forefront of the fight to defend affirmative action. We have built and led the new, powerful and integrated youth-led civil rights movement. Our lawyers are the most experienced and qualified leaders in the court room and our plaintiffs are the most experienced and qualified leaders of black, Latino, other minority students and youth. It is for all these reasons that we ask this

Court to grant our motion for class status and give us the right to be lead counsel in this historic fight.

STATEMENT OF FACTS

A. The discrimination in the admissions systems at the defendant universities.

1. The basic admissions systems.

Like every selective public university in the country, Michigan's three leading public universities have adopted the basic admission system that was first put in place in the Ivy League colleges in the 1930s. With slight modifications, the same basic system is used in the three universities' law and other graduate professional schools.

The University of Michigan, Michigan State and Wayne State rely primarily upon grade point averages (GPAs) and standardized test scores, with the GPAs adjusted to represent the purported difficulty of the individual's curriculum or the claimed quality of the applicant's school. The universities also consider trends in GPAs, extenuating personal circumstances, extracurricular activities, and similar factors that they believe may indicate that the applicant is more (or less) deserving than the GPA-test score index would otherwise indicate.

At various times, the universities have authorized varying degrees of deviation from these standards in order to admit athletes, veterans, poorer students, Michigan residents, residents of particular areas of the state, and others. In addition, the universities have authorized deviations for applicants whose parents were perceived as providing some special support for the institution, including alumni, faculty, large donors, important political figures, and the like.

For many white citizens, the basic system has existed so long that they believe that it is a neutral determination of merit. As BAMN has argued for twelve years, however--and as the student interveners proved at the *Grutter* trial--the basic components of this system are *not* neutral measures of "merit." *Grutter v Bollinger*, 539 US 306 (2003).

2. Segregation and Grade Point Averages.

As is well-known, Michigan has for many years been one of the most segregated school systems in the country. According to the latest figures, 64 percent of black students in Michigan attend schools that are over 90 percent black. Similar, though slightly less intense, segregation of black students exists throughout the United States. Moreover, it is now paralleled by an increasing segregation of Latino/a students, who are separated not only by race but by language as well. [1]

Black, Latino/a, and Native American students are disproportionately from poor backgrounds. But segregation imposes special and more intense burdens on poor minority students. Unlike poor white students--who tend to be distributed in schools with students from other economic backgrounds--poor minority students overwhelming attend schools with concentrated poverty.

That segregation has crucial educational consequences. Separate schools are inherently inferior schools. They have poorer facilities, less credentialed teachers, larger class sizes, smaller libraries, and fewer parents with an educational background that will allow them to provide home support to make up for the educational deficiencies in the

[1]The description in the next three paragraphs of segregation and its effects is taken from the testimony of Dr. Gary Orfield in *Grutter* and is available on line. http://ueaa.net/transcript/06-012301-dowdell-orfield.txt

schools. But beyond these and other tangible inequalities, segregated education "generates a feeling of inferiority as to [black students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v Board of Education*, 347 US 483, 494 (1954).

Due in large part to the conditions in the schools, a far lower percentage of black, Latino/a, and Native American students apply to college and in particular to any selective college. As the declarations of the plaintiffs Calvin Jevon Cochran, Arielle Bullard, Issamar Camacho, Maricruz Lopez and others demonstrate, even for those who do apply to college, social and educational inequality and instability mean that they may not be able to achieve a raw grade point average that is as high as they would be capable of achieving under other circumstances (Ex's 1, 2, 3, 4 ; Dec of Cochran, para 8, 9, 10, 11, 14 ; Dec of Bullard, para, 10, 11; Dec of Camacho, para 4, 8; Dec of Lopez, para 3, 8, 9).

In any event, however, the universities recalculate the GPAs based on quality of the applicant's high school as assessed by the number of students going to college and the average test scores and the difficulty of the curriculum completed by the particular applicant. As the *Coalition* plaintiffs demonstrated in *Grutter*, the most brilliant student in a Detroit high school with few advanced classes, low average test scores, and few students going to college, can not compete on an equal basis even on GPAs with a far less brilliant student graduating from the more privileged suburban schools.

At the professional schools, including especially the Law School, minority applicants suffer from analogous disadvantages. The pool of minority applicants to Law School is disproportionately low because of the low number of minority students in the undergraduate institutions and especially in the selective undergraduate institutions from

which the Law Schools select the bulk of their students. Moreover, as was demonstrated in *Grutter*, the small number of minority students in the undergraduate institutions facilitates a climate of racial isolation and hostility that drives down the average grade points of black, Latino/a, and Native American students.

3. Standardized tests and racial discrimination.

Standardized tests are now very familiar to many Americans. Most Americans assume that because the use of standardized tests is so entrenched and so pervasive that they must be a fair, unbiased and objective measure of talent, ability, and the likelihood of success.

But science says otherwise. As was shown by the testing experts who testified in the *Grutter* trial, the word puzzles and mathematical problems on the test are learned and even coachable skills, which are at best peripherally related to the skills that it takes to succeed in college, in graduate school, or in life. Under a sustained critique inspired by the Civil Rights Movement, the test manufacturers have drastically scaled back their claims as to the significance of test scores. The Educational Testing Service (ETS), which manufactures the SAT, has long since dropped the claim that the SAT reveals "intelligence" or "aptitude.'' For the range of scores of students applying to college, ETS claims that the test results predict approximately 22 percent of the variation in first-year grades with independent observers placing that number far lower. [2] Neither ETS nor any other reputable source make any claims that the tests predict the probability of graduation or of "success" in life.

[2] See www.fairtest.org/facts/satvalidity.html for a collection of studies on the SAT's ability to predict success of those who take it.

If there is any gain in prediction from the SAT or the LSAT, minority students pay a terrible price for that gain. As is well-known--and as is revealed on the attached exhibit--test takers whose families earned more than $100,000 per year scored 340 points higher than test takers who families earned less than $10,000 per year. Even more significantly, in 2005, white test takers scored almost 300 points higher on average than black test takers and over 200 points higher on average than Mexican or Mexican American test takers.[3] As a more detailed breakdown of the test results would show, white test takers from the same income group significantly outscore black, Latino/a, and Native American test takers.

At the level of law schools, the test score gap on the LSAT even exists between students with *identical* levels of performance at the *same* undergraduate institutions. Thus, in a systematic study of applicants to Berkeley's Boalt Hall Law School, William Kidder found that black applicants with the same grade point average in the same college in the same major scored 9.2 points less on the LSAT, while Latino/as scored 6.8 points less and Native Americans scored 4.0 points less.[4] If the admissions office does not consider race in admissions, that gap is more than enough to guarantee the rejection of almost every minority applicant to law school.

While some of this data is new, the racially disparate impact of standardized "aptitude" tests has been known since the 1920s. With few exceptions, [5] however,

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[3] See attached Ex , 2006 College Bound Seniors Average SAT Scores, Calculations by Fair Test, Cambridge, MA.

[4] William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment*, 89 Cal L Rev 1005, 1068-1075 (2001).

[5] The exceptions also illustrate the danger of the tests. Seven days after the Fifth Circuit ordered the University of Mississippi to admit James Meredith, for example, all white colleges and universities adopted the ACT test as a requirement for admission. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino and American Indian Law School Admissions, 1950-2000*, 19 Harvard Black Letter Law Journal, at 17 n. 85 (2003).

officials at public universities adopted standardized tests not because of their racially disparate impact, but in spite of that impact. With the influx of Baby Boomers into college, the officials saw the tests as an administratively necessary and politically-acceptable way to regulate admissions. They also believed that the test would help them identify "diamonds in the rough," including those among white lower-middle-class applicants whom the universities might not otherwise have admitted.[6]

Once public universities adopted the tests--often on an experimental basis[7]--they assumed a life of their own. Especially among white citizens and the political leaders who represented them, the tests came to be seen as neutral measures of "merit" and entitlement. US News and World Report ranks universities based in part on average test scores--and alumni perception of the worth of their own degree as well as tens of millions of dollars in donations, grants and contracts depend upon the perception of the university's relative rank. The ABA even requires law schools to use the LSAT as part of their assessment of merit. Even though almost everyone now agrees that the SAT and the LSAT have limited predictive value, it has, to date, proved impossible to secure the elimination of the test in major public universities.

With the rise of the Civil Rights Movement, however, the racial blinders came down on the indiscriminate use of the tests. Major public universities recognized that if the standardized test scores were applied rigidly, without considering the race of the applicant, they would exclude the overwhelming majority of black, Latino/a, and Native

[6] Most notably, those were the views of President James Conant of Harvard and Clark Kerr of the University of California--the two most prominent leaders in American education after World War II. Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* (Boston: Houghton Mifflin Co, 2005), at 158-160; Lehman, at 59-66; 127-136.

[7] See, e.g., the experience at the University of California as described in John Aubrey Douglas, *The Conditions for Admission: Access, Equity, and the Social Contract of Public Universities* (Stanford: Stanford Univ Press, 2007), at 82-92.

American applicants. Often without directly saying so, universities adopted affirmative action programs as the antidote to discrimination in the rest of the admissions system.

B. Affirmative action as a means to counter discrimination in the admissions criteria.

A single exhibit from the Grutter trial reveals the de facto segregation at Michigan's public universities caused by the rigid use of GPAs and standardized tests. During the entire decade of the 1960s, the University of Michigan Law School had no Latino/a graduates, 9 black graduates, and 3032 white graduates (Ex 6).

Just after Selma, President Johnson at Howard University proclaimed the need for "affirmative action" to assure real equality for black Americans. In the 1960s, the Civil Rights Movement joined by a growing student and antiwar movement carried forward that fight by demanding the end to de facto segregation in Michigan's universities.

That fight culminated in the campaign of protests and student strikes led by the Black Action Movement (BAM I) in 1970. As described in the expert report submitted in *Gratz* by Professor James Anderson (who has agreed to serve as an expert witness for the *Coalition* plaintiffs in this case), the Board of Regents exercised its constitutional authority by agreeing to admit 900 more black students and 50 more Chicano students and to revise admissions and other policies in order to reach a goal of ten percent black enrollment by 1973. The settlement, which was endorsed by then Governor William Milliken, resulted in changes in every State university (Ex 7, Anderson Report, at 16-24).

As shown in both the *Gratz* and *Grutter* decisions, the University accomplished this goal by recognizing the reality of race, by setting goals for admission, and by admitting black, Latino/a and Native American students who had, on average, lower GPAs and test scores than the average of their white counterparts. The same exhibit that

revealed the de facto segregation reveals as well the success of this policy. The number of black attorneys graduated by the University skyrocketed from 9 in the 1960s to 262 in the 1970s, 230 in the 1980s, and 288 in the 1990s, with a similar increase in Latino/a, Native American and Asian attorneys as well (Ex 6).

Even though the gains at both the undergraduate and professional levels were modest, they were vital. Because of the peculiarly important role that attorneys play in America, the increase in black, Latino/a, and Native American attorneys meant that there would be more minority legislators, mayors, Congresspeople, and judges. It meant, in short, some measure of representation and political power.

C. Proposal 2 outlaws affirmative action.

From his office as a Regent of the University of California, Ward Connerly began the national fight against affirmative action. Playing upon the misconception that GPAs and test scores were neutral measures of merit, Connerly and then Governor Pete Wilson agreed to claim that "affirmative action *is* race preference." [8] On Connerly's motion, the UC Regents passed a resolution in 1995 banning the consideration of race, national origin or gender in admissions.[9] Because Connerly and Wilson believed that the vote in favor of that ban was "fragile," they supported the campaign to put the ban on affirmative action in the state constitution. Using the racist battle-cry of "banning race preferences," Connerly and Wilson rallied a solid white majority whose votes overrode the determined opposition of two thirds or more of black, Latino/a, and Asian voters.[10]

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[8] Ward Connerly, *Creating Equal: My Fight Against Race Preferences* (San Francisco: Encounter Books, 2000), at 133.
[9] Connerly, at 166.
[10] *Coal. for Economic Equity v Wilson*, 946 F Supp 1480, 1495 n 12 (ND Cal 1996), *rev'd on other grounds* 122 F. 3d 692 (CA 9, 1997), *cert den* 522 US 963 (1997).

The effect in California was and is devastating. In the year after the ban, there was exactly one black student at Boalt Hall. Even as the minority population of California grew dramatically, the number of Latino/a, black and Native American students at the most selective universities dropped. As the Declarations of Josie Hyman, Alejandra Cruz, and Dimitri Garcia relate, the drop in minority admissions meant a dramatic increase in racial isolation and hostility on the campus (Ex's 8. 9, 10).

In May 2001, BAMN and some of the *Coalition* plaintiffs secured a Regents' vote reversing the ban on affirmative action at UC. But because the ban was in the California Constitution, the reversal was symbolic. As Proposition 209 intended, black and Latino/a citizens did not have the rights that all other citizens had to secure a change from the UC Regents.

In *Grutter*, Connerly and other opponents of affirmative action unsuccessfully attempted to make the ban on affirmative action permanent and national by hijacking the Fourteenth Amendment as a device to protect the discrimination inherent in the admissions systems without affirmative action. After they lost, Connerly, Jennifer Gratz and others launched the petition drive that eventually led to the vote on Proposal 2. Like its essentially identical California namesake, Proposal 2's sole intent was to ban affirmative action--which it called "preferences"--on race, national origin, or gender.[11]

As in the State of Washington, Connerly hired black and Hispanic circulators (whom he called "the horses")[12] to obtain the signatures needed to place Proposal 2 on Michigan's ballot. As BAMN documented and Judge Tarnow and the Michigan Civil

[11] Proposal 2 also banned "discrimination" because of race and national origin. But that was purely a public relations ploy because the Michigan Constitution had long since banned those forms of discrimination. Const 1963, art 1, sec 2.
[12] Connerly, at 223.

Rights Commission found, the MCRI's circulators defrauded many Michigan voters, obtaining their signatures by claiming that the petition actually supported affirmative action.[13] Proposal 2 passed, with black voters rejecting it by a margin of 85 percent and white voters, who comprised 85 percent of the electorate, approving it by two-to-one.[14]

D. Proposal 2 will lead to the resegregation of Michigan's public universities.

After a decade of experience in California, the leaders of the campaign for Proposal 2 knew what its passage meant. As Mary Sue Coleman, the President of the University of Michigan, said before the election, despite numerous efforts by the leaders of the UC system, and despite the dramatic increase in the Latino/a population, Proposition 209 had led to a dramatic decline in the enrollment of black, Latino/a, and Native American students in the UC system as a whole and, in particular, at its most selective campuses (UCLA and Berkeley). At those two campuses, in entering classes that totaled over 8,000, there were 83 black men, half of whom were recruited as scholarship athletes (Ex, at 4, paras 5, 7).

Michigan's universities have now been forced to adopt the same admissions systems that have failed in California. As the Supreme Court held in *Grutter,* there are no race neutral means to achieve the level of racial integration that Michigan's Law School had achieved. *Grutter*, *supra*, 539 US at 339-341.

In fact, particularly at the level of law schools, where tests are mandated by the ABA and the effects of Proposal 2 are vastly compounded by the effect of reduced admissions of minority students in the colleges, there are clearly no solutions to the drastic drop in minority admissions. Boalt Hall, UCLA and the University of Texas Law

[13] *Operation King's Dream, et al. v. Connerly*, E.D. Mich No. 06-12773, 2006 WL 254115 (E.D. Mich. Aug. 29, 2006), *app pending* Nos. 06-2144, 06-2258.
[14] "America Votes 2006," CNN.com/ELECTION/2006/pages/results/states/MI/01/epolls.0.html.

Schools suffered when affirmative action was ended in those states. No one has suggested that a ten percent plan can succeed at a law school--and the particularly devastating decline in minority admissions at California's law schools shows that none of the alternatives that have been announced have provided more than token relief.

As the experience of California so dramatically illustrates, if Proposal 2 is not struck down, almost every gain in political and social equality secured by the Civil Rights Movement will be lost. From the chambers of the US Senate to the emergency rooms at Detroit Receiving, the modest steps towards equality will be extinguished.

ARGUMENT

I. THE COALITION PLAINTIFFS CAN DEMONSTRATE THAT PROPOSAL 2 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS AND THE FEDERAL CIVIL RIGHTS ACTS.

A. Proposal 2 violates the Equal Protection Clause by imposing a far more onerous burden on minorities and women who seek to change admissions policies.

On three occasions, the Supreme Court has held that a state violates the Equal Protection Clause by requiring black citizens or lesbian and gay citizens to follow more onerous procedures in order to secure government action in their favor than are required for any other group. *Hunter v Erickson*, 393 US 385 (1969); *Washington v Seattle School District No. 1*, 458 US 457 (1982); *Romer v Evans*, 517 US 620 (1996).

The *Coalition* and the *Cantrell* plaintiffs assert that Proposal 2 violates this fundamental guarantee. Veterans, athletes, poorer students, residents of Grosse Pointe, Seventh Day Adventists, or practically any other group can secure an adjustment of the existing admission criteria (a "preference") simply by asking the governing boards of the defendant universities.

Even though both the *Coalition* and the *Cantrell* plaintiffs have asserted a *Hunter* claim, the *Coalition* plaintiffs assert that it is *absolutely essential* to introduce evidence as to the reality of the admission system in order to prevail on the *Hunter* claim. The panel in the Ninth Circuit and the Sixth Circuit panel that reversed this Court's stay accepted the argument that *Hunter* did not apply because Proposition 209 and Proposal 2 did not prevent minorities from fighting against discrimination but rather "only" from fighting for "preferences." *Coal. for Economic Equity v Wilson*, 122 F. 3d 692, CITE (CA 9, 1997), *cert den* 522 US 963 (1997); C*oalition to Defend Affirmative Action v Granholm*, 473 F 3d 237, 250-251 (CA 6 2006).

As set forth above, however, BAMN and the other *Coalition* plaintiffs have proved that affirmative action is not a "preference" but is instead precisely a measure to combat the discrimination inherent in the other admissions criteria. Not to present that argument and evidence is to leave the class of minority students defenseless in the face of their opponents' main legal argument. And it does nothing to eliminate the stigma cast on all minority students by continuing to call affirmative action a "preference."

Similarly, the *Coalition* plaintiffs assert that it is absolutely vital to present the historical evidence outlined above as to the crucial role that the Regents' governing authority over admissions played in the adoption of affirmative action in Michigan. Without that evidence, it will be impossible for this Court or the appellate court to recognize that equality and access could never have come about if Proposal 2 had been in effect in 1970 when the Regents of the University of Michigan took the first steps towards desegregating the University.

Finally, the *Coalition* plaintiffs assert that it is necessary to present the evidence they will offer in order to prove the decisive substantive significance of the democratic right that Proposal 2 has abrogated. As set forth above, without an adjustment in the use of the existing criteria--which is all that Connerly means by a "preference"--there are only two alternatives left for minority students. Either they can launch an expensive statewide referendum whose fate will be determined by an electorate that remains 85 percent white. Or, they can attempt to persuade the universities to eliminate the use of standardized tests and adopt an entirely new admissions system. As the ABA and an enormous constituency support the use of the standardized tests now in existence, the second alternative has as much chance of success as the first--which is to say zero.

The *Coalition* plaintiffs assert that it is essential to produce the evidence and argument outlined above in order to prove that the denial of rights under *Hunter* means that minority citizens will have no effective democratic procedure in which they can fight for policies that will allow their children to attend the public universities of their state. What is at stake is far more than the reallocation of government power--which four dissenting Justices in *Seattle* said was lawful. *Seattle Schools, supra*, 458 US at 489-490 (Powell, J, dissenting).

Finally, unlike the *Cantrell* plaintiffs, the *Coalition* plaintiffs have also asserted that *Hunter* also protects the rights of women. In the sciences and engineering, where women remain disproportionately excluded, affirmative action by gender remains vital. Unlike the *Cantrell* plaintiffs, the *Coalition* plaintiffs assert that women should not be forced to face an onerous and, in practice, impossible burden in order to secure the

adoption of admission policies that will provide them with equal opportunities in every field.

B. Proposal 2 is intentional race and gender discrimination in violation of the Fourteenth Amendment.

As the Court has held, if one of the reasons that a state enacts a law is to discriminate against persons because of their race (or gender), the statute violates the Fourteenth Amendment. *Village of Arlington Heights v Metropolitan Housing Development Corporation*, 429 US 252 (1977). In considering whether a law violates that proscription, the Court must consider the law's effect, its historical background, its departures from existing procedures, and the statements of its chief sponsors. *Id*.

Proposal 2 is the first time since 1850 that the electorate or the Legislature has attempted to restrict the power of any university over admissions criteria. As the statements of the MCRI's leaders and the history of this Amendment make clear, the sole purpose of this amendment is to restrict the governing boards in order to prevent them from adopting policies that will secure the admission of any meaningful number of underrepresented minorities. As Connerly knew when he was a Regent--and as the whole Nation knows after a decade of experience with Proposition 209--the sole intent and effect of Proposal 2 is to drive the overwhelming majority of black, Latino/a, and Native American students out of the most selective schools in the State, into less selective schools, where the supporters of Proposal 2 have said they will be "happier."

Connerly claims to be furthering the interest of a meritocracy. But he has made no attempt to assure a meritocracy when it comes to the admission of athletes, the children of alumni or large donors, residents, poorer students, veterans, or any group. The sole social policy that the governing boards may not follow in adjusting their

admission policies is the attempt to assure a racially integrated student body. That is intentional discrimination in its classic form.[15]

C. Proposal 2 obstructs the enforcement of the federal civil rights acts.

Title VI and its implementing regulations prevent any state from utilizing criteria that have the *effect* of excluding persons because of their race or national origin. 42 USC s. 2000d-1; 34 CFR s. 100.3(b)(2). Similarly, Title IX of the Education Amendments of 1972 and its implementing regulations prohibit the use of criteria that have the effect of excluding persons on account of their gender. 20 USC s. 1681; 34 CFR s. 106.21(b)(2).

The Civil Rights Act preempts any state law that stands as an obstacle to accomplishing the purposes of Title VI. *Cal. Fed. Sav. & Loan Ass'n. v Guerra*, 479 US 272, 281 (1987)(plurality opinion). As Proposal 2 does precisely that, the *Coalition* plaintiffs alone have challenged it on that basis.[16]

D. Proposal 2 violates the First Amendment.

Grutter held that the First Amendment right of the University to select its own students in order to achieve intellectual diversity provided a compelling state interest sufficient to justify the use of explicitly racial criteria in the admissions system. Proposal 2 has now taken a chain saw to the independence of the universities by enshrining in the Constitution an extremely vague requirement that the University may not grant a "preference" to any student on account of race or national origin.

[15] The fact that Connerly is himself black is of course no defense to the claim of intentional discrimination. Booker T. Washington supported segregation. More generally, the well-springs of human motivation are far too complex to assert that a black man can not discriminate against other black people.

[16] Similar, although not identical, claims were rejected by the Ninth Circuit in *Coalition for Economic Equity*. But there has now been a decade of experience that that court did not have available to it.

As a practical matter, the University can now achieve any form of diversity *except* that form of diversity which is most difficult and most important to achieve in America--diversity by race. For that reason, the Coalition plaintiffs have challenged it on that basis.

II. THERE ARE MORE THAN SUFFICIENT GROUNDS TO MAINTAIN THIS ACTION AS A CLASS ACTION.

A. The classes are too numerous to join.

The University of Michigan received 25,733 applications for its undergraduate class of 2006, offered admission to 12,196 students, and enrolled 5,399 students.[17] MSU, WSU and the graduate schools at all three institutions accept far more applications than that. Assuming that seven to ten percent of those students are underrepresented minorities, the class of black, Latino/a, and Native American applicants and students is obviously far too numerous to join. Similarly, assuming that half or more of the applications are submitted by women, the class of women applicants or students is too numerous to join.

B. There are questions of law and fact common to the classes.

The minority applicants to the three universities attend the same separate and unequal high schools and take the same discriminatory tests. Similarly, the minority students who apply to the graduate and professional schools must pass through not only the discriminatory admissions system of the graduate or professional schools, but in most cases through a discriminatory and hostile undergraduate system.

The legal questions at issue are also common to the entire class. The constitutional powers of Michigan, Michigan State and Wayne State are the same. Const

[17] www.admissions,umich.edu/fastfacts.html

1963, art 8, sec 5. Proposal 2 applies to all three.[18] As set forth in the first Argument, every legal challenge to racial and national origin discrimination applies equally to all underrepresented minorities. Similarly, every legal challenge to gender discrimination applies equally to every woman student or applicant.

C. The claims of the representative parties are typical.

The Coalition plaintiffs brought their actions against the three defendant universities because they have suffered and will suffer the loss of any chance for the best education and, in some cases, the chance for any higher education because of the changes in admissions policies forced on those universities by the passage of Proposal 2.

The Coalition plaintiffs include three black high school students who applied for and were rejected by the University of Michigan after Proposal 2 went into effect. Arielle Bullard applied--and was virtually assured that she would be accepted as an undergraduate before Proposal 2 went into effect. She, however, was then rejected despite the 4.0 GPA she had earned in her last semester. Cordelia Martin and Chris Sutton also applied--and were also rejected after Proposal 2 went into effect (Ex's 2, 12, 13; Dec of Bullard, para 2; Dec of Martin, paras 7, 8, 9; Dec of Sutton, paras 2, 17). [19]

Similarly, Josie Hyman, a black graduate of UC Berkeley, and Alejandra Cruz, a Latina graduate of UC Berkeley, applied for and were rejected by the Michigan Law School despite excellent undergraduate records.[20] Under the admission grids that were in effect when affirmative action was in place at Michigan, they almost certainly would

[18] Even Michigan State, which claims not to have considered race in admissions, is subject to challenge under Proposal 2 because it, too, admits black and other minority students with average GPAs and test scores lower than those of white students--and thus has an "affirmative action program" as that term has been defined by the proponents of Proposal 2.

[19] Bullard is joined as a member of BAMN. Similarly, Martin's mother is a member of the plaintiff AFSCME Local 207. If the Court orders, either may be added as an individual plaintiff.

[20] Hyman was accepted at Wayne State Law School and has chosen to defer her admission for one year due to family reasons (Ex , Dec of Hyman, para).

have been admitted but for the passage of Proposal 2. Indeed, Hyman and Cruz are examples of the now tragic consequences of the racial gap that Kidder's research revealed about the black-white and Latina-white test score gap among applicants to law school from elite educational institutions. Despite excellent records at UC Berkeley, Hyman and Cruz almost certainly lost the chance to go to the University of Michigan Law School because of the scores that they received on an LSAT that was demonstrably stacked against them (Ex 8, 9; Dec of Hyman, para 6; Dec of Cruz, para 9).

Maricruz Lopez, a Latina graduate of Cass Tech, is now an undergraduate at Michigan--but she almost certainly would not have been admitted if Proposal 2 had been in effect. She will be forced to endure the increased isolation and hostility that will result from the increased segregation that Proposal 2 will cause and will almost certainly not have the chance to attend the Law School at Michigan (Ex 4; Dec of Lopez, paras 17).

Dimitri Garcia, a Latino student at UC Berkeley, has stated that he intends to apply to Michigan's Law School (Ex 10, Dec of Garcia, para 15). Issamar Camacho, an excellent student at Roosevelt High School in East Los Angeles, has declared that she will apply to the University of Michigan next year (Ex 3; Dec of Camacho, para 12).

Three black high school juniors from Detroit have also declared that they intend to apply to Michigan, with MSU and WSU as second choices. Calvin Jevon Cochran, Courtney Drake, and Randiah Green, all from Cass Tech, would have had an excellent chance of going to Michigan before Proposal 2--but may have little chance now (Ex's 1, 14, 15; Dec of Cochran, paras 2, 19, 20; Dec of Drake, paras 2, 12; Dec of Green, para 5).

The plaintiff BAMN is an organization that is overwhelmingly composed of black and Latino/a high-school and college students. From its founding in 1995, BAMN's first

purpose has been to fight for and defend affirmative action in secondary schools, in colleges and in the graduate and professional schools--and it has done so on a consistent basis across the country (Ex.16). As the Court may certify an organization as a representative of the class, BAMN requests that it be certified as a class representative in its own name. *Norwalk CORE v Norwalk Redev. Agency*, 395 F 2d 920, 937 (CA 2 1968); *National Organization for Women, Inc. v Scheidler*, 172 FRD 351 (DC Ill 1997); *Garrett v City of Hamtramck*, 503 F 2d 1236, 1245 (CA 6 1974).

Finally, Lorinda Buckingham, who has a B.S. from Tuskegee, is the only woman and the only black engineer at an auto manufacturer in Detroit. She intends to apply to a Master's program in Electrical Engineering at Michigan. She represents both women and minorities (Ex. 21, Dec of Buckingham, para 7).[21]

D. The representative parties will fairly and adequately protect the interests of the classes.

For two reasons, the *Coalition* plaintiffs are not only adequate, but the best representatives of the actual class that has been harmed by Proposal 2.

First, the Coalition plaintiffs are overwhelmingly high school and college students who have been directly harmed in that they have been or will be rejected by the universities solely because of Proposal 2. Their interest is not an abstract interest in diversity--as important as that may be. It is a direct interest in whether they will receive a fair chance at an education. Composed overwhelmingly of black students from Detroit and Latino/a students from Southwest Detroit and California, the *Coalition* plaintiffs are the most representative plaintiffs in this action.

[21] She is a member of BAMN. If BAMN is not certified as a class representative for women, she could be added as a representative for the class of women affected by Proposal 2.

Second, the overwhelming majority of the *Coalition* plaintiffs have already been recognized by their peers as representatives of the class of minority students and prospective students. Many hold elected office in their school or college; almost all are well-respected and recognized leaders of the new Civil Rights Movement, experienced as spokespersons and leaders of the millions of black and Latino/a people who have returned to the streets to end second-class treatment for black and brown people.

III. THE COURT SHOULD APPOINT COUNSEL FOR THE COALITION PLAINTIFFS AS COUNSEL FOR THE CLASSES OF MINORITY STUDENTS AND PROSPECTIVE STUDENTS AND OF WOMEN STUDENTS AND PROSPECTIVE STUDENTS.

If a class is certified, Rule 23(g) requires the Court to appoint class counsel and spells out the criteria that the Court must consider in making that determination.

The qualifications and resources of the *Coalition* plaintiffs' counsel are set forth in the attached Declarations of George B. Washington, Shanta Driver, Miranda Massie, and Donna Stern. Washington, Driver and Massie are uniquely qualified to handle this matter because of their general experience in civil rights, but even more so because they have spent the last ten years defending affirmative action on a national basis.

Ten years ago, few believed that affirmative action could be defended. Fewer still believed that it could be defended by asserting that its end would mean the resegregation of American education and a deepening of the segregation of American society. Similarly, very few believed that it could be defended--indeed, that it had to be defended--by asserting that affirmative action was not a "preference" to achieve "diversity," but rather a desegregation plan designed to combat the preferences for white applicants contained in other aspects of the admissions process in use at every major public

university in the United States. But today, those arguments--which were first introduced into the courtroom by BAMN and its attorneys--are commonplaces that are recognized in the concurring opinions in *Grutter* and that form the unspoken assumptions of the majority opinion in *Grutter*.

The *Coalition* attorneys have eminent qualifications as attorneys. Attorney Washington has over 30 years of experience in the areas of labor and civil rights. He has tried hundreds of cases and handled fifty cases where there are decisions of record in the state or federal appellate courts, including many on precedent-setting decisions involving civil rights and civil liberties (Ex 17, Dec of Washington, paras 8, 9, 11, 17, 21, 25). Attorneys Driver and Massie have, respectively, 5 years and 10 years of experience trying civil rights cases, including many cases of enormous importance in this state, in California, and in the nation as a whole (Ex's 18, 19, Dec of Driver, paras 13, 14; Dec of Massie, paras 2, 3, 4, 5, 6).

What most distinguishes the *Coalition* plaintiffs' counsel, however, is not simply their general qualifications but their specific qualifications to represent the plaintiffs in this case. For ten years, Washington, Driver and Massie have devoted much of their time to representing minority students in the fight to defend affirmative action. They are intimately familiar with the admissions systems at Michigan because they were counsel for the intervening student defendants in *Grutter*. They worked closely with University counsel to defend the Law School plan and to win the victory in *Grutter*.

Even more than that, the Coalition's attorneys gave support and, in the case of Driver, spearheaded the birth of a new, integrated civil rights movement, born at the march of 50,000 at the Supreme Court on the day of the argument in *Grutter* and

continuing today in the irrepressible fight for immigrant rights and for equal, integrated and quality education.

Since the decision in *Grutter*, the Coalition plaintiffs' attorneys have taken the lead in every legal challenge to Proposal 2--and in exposing the deception and fraud that were the most effective arguments against Proposal 2. [22]

As set forth in the Declarations of Driver and Massie, they are nationally recognized experts in the fight to defend affirmative action. Driver has spoken on those topics before organizations ranging from the Congressional Black Caucus to the Rainbow PUSH Coalition to the NAACP and the Society of American Law Teachers. Universities from Columbia to Harvard to Howard and Yale have invited her to speak on that subject, and she has received voluminous awards for her legal and political work in defense of affirmative action (Ex 18, Dec of Driver, paras 11, 12, 13, 14, 15)

Similarly, Massie has spoken on the topic of affirmative action at organizations ranging from the American Constitution Society at Harvard and Yale Law Schools to the National Bar Association, the National Legal Aid and Defender Association, and the UCLA Chicano-Latino Law Review Committee. She, too, has received numerous awards and a fellowship to write a book on the current status of *Brown v Board of Education* (Ex 19, Dec of Massie, paras 7, 10, 11).

Because of the work of plaintiffs' counsel--including in particular on the *Grutter* case--the most prominent experts in the country have agreed to work pro bono or at greatly reduced rates in support of the Coalition plaintiffs challenge to Proposal 2. In

[22] See *Coalition to Defend Affirmative Action and Integration v Board of State Canvassers*, 262 Mich App 395 (2004), *lv den* 471 Mich 939 (2004); *Operation King's Dream, et al. v. Connerly*, E.D. Mich No. 06-12773, 2006 WL 254115 (E.D. Mich. Aug. 29, 2006), *app pending* Nos. 06-2144, 06-2258; *Michigan Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 268 (2005), *lv den* 474 Mich 1099 (2006)

addition, three major labor organizations have already donated or pledged substantial funds--with more contributions expected in the future (Ex 20, Dec of Stern, para 6).

Most important of all, the Coalition plaintiffs' attorneys are known to and recognized by many in the actual class of minority students and prospective students as the attorneys who have fought for them for ten years.

The *Coalition* plaintiffs are the best representatives of the actual class of students who have been and will be harmed by Proposal 2. The arguments that the *Coalition* plaintiffs have made are absolutely essential if Proposal 2 is to be defeated--and the Coalition's attorneys are the ones who have developed and led the legal fight for affirmative action for the last ten years. The *Coalition* plaintiffs assert that their attorneys should be appointed as the lead attorneys for the class of black, Latino/a, and Native American students who have been and will be excluded from the public universities of this state because of the passage of Proposal 2.

CONCLUSION

For the reasons stated, the Coalition plaintiffs request that their motion for class certification be granted and that their attorneys be appointed as lead counsel for both classes that have been requested.

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Dated: May 15, 2007

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2007, I electronically filed the Plaintiff Coalition to Defend Affirmative Action's Motion to Certify a Class and the Coalition's Attorneys as Lead Counsel, Brief and Accompanying Exhibits with the Clerk of the Court using the ECF system which will automatically send notification of filing to:

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