UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*, Plaintiffs, v. JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district, Defendants.	Case No. 06-15024 Hon. David M. Lawson CONSOLIDATED CASES
- and - CHASE CANTRELL, *et al.*, Plaintiffs, v. JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan, Defendant.	Case No. 06-15637 Hon. David M. Lawson

THE CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.1, and for the reasons set forth in the attached Memorandum, Plaintiffs Chase Cantrell, *et al.* (the "Cantrell Plaintiffs") respectfully move this Court for the entry of summary judgment that Michigan

Constitution Article I, § 26 ("Proposal 2") is unconstitutional. In support of this motion, the Cantrell Plaintiffs submit the accompanying Memorandum of Law and Exhibits A through R in support thereof.

Pursuant to Eastern District of Michigan Local Rule 7.1, movants have conferred with counsel for all parties via email. The University Defendants take no position respecting the relief sought in this motion. The Attorney General and Intervenor-Defendant Eric Russell oppose this motion. The Coalition Plaintiffs could not be reached by the date of filing.

MEMORANDUM OF LAW IN SUPPORT OF THE CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Issue Presented

Whether the Court should enter summary judgment that Michigan Constitution Article I, § 26 ("Proposal 2") is unconstitutional.

Controlling Authority

Fed. R. Civ. P. 56.

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Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.1, Plaintiffs Chase Cantrell, *et al.* (the "Cantrell Plaintiffs") respectfully move this Court for the entry of summary judgment that Michigan Constitution Article I, § 26 (hereinafter "Proposal 2") is unconstitutional.[1]

PRELIMINARY STATEMENT

"'[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race.'" *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)). Proposal 2 contravenes this core principle by creating indefensible distinctions based on race in the university admissions process that redound to the detriment of people of color. Proposal 2 distinguishes between race and all other pertinent elements of diversity that a university may permissibly consider in the admissions process. As a result, applicants may support their applications with any aspect of their identity that matters to them – and that may enhance student body diversity – *except* their race. Similarly, Proposal 2 selectively burdens people of color in the political process by making it virtually impossible to secure race-conscious admissions policies.

This surgically targeted excision of race pronounces race meaningless and denies people of color an equal opportunity to have race considered in a process that values diversity.

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[1] In relevant part, Proposal 2 prohibits Michigan's public universities, among others, from "discriminat[ing] against, or grant[ing] 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." Mich. Const. art. I, § 26. For purposes of this motion, the term "race" is used to encompass "race," "color," "ethnicity," and "national origin," as those terms are used in Proposal 2. Proposal 2's effect on "sex" is not relevant in the context of university admissions in this case because gender diversity occurs naturally in most circumstances at Michigan's universities; "sex", therefore, is not a widely used admissions criterion.

As the Supreme Court has recognized, race and diversity are inextricably linked: "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." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). Indeed, diversity without race is not genuine diversity.

Summary judgment is the appropriate way to adjudicate Proposal 2's constitutionality because, even after extensive discovery, the facts about Proposal 2 are not in dispute. The Universities have produced thousands of pages of documents, the directors of admissions at the University of Michigan undergraduate, law and medical schools as well as the dean of Wayne State University Law School all have testified as persons most knowledgeable about their respective admissions policies, and discovery has been sought from Proposal 2's sponsors and proponents. That discovery – along with the defendants' own admissions – dispositively shows that Proposal 2 impermissibly burdens interests of minorities in two distinct ways.

First, it is undisputed that Proposal 2 prohibits the consideration of race in an admissions process that otherwise permissibly seeks diversity through all other personal attributes, such as socioeconomic status, geography, military service, etc. The targeted extraction of race from the pursuit of student body diversity indisputably redounds to the detriment of people of color whose *racial* identity – informed by a unique set of life experiences – may be a defining aspect of their character. While public universities may not be constitutionally *required* to consider race, neither can they be legislatively *proscribed* from according any weight to an applicant's race while considering any other pertinent personal

attribute in pursuit of broad student body diversity. Singling out race in this manner – by subtracting it from an equation that values all other diversity-enhancing characteristics in an attempt to divorce race from diversity – "imposes direct and undeniable burdens on minority interests" in violation of the Fourteenth Amendment. *Seattle*, 458 U.S. at 484. To hold otherwise permits the state to mandate that one's race does not matter in a community that values diversity.

Second, it is also beyond dispute that Proposal 2 imposes a substantial and unique political burden on individuals seeking to restore race-conscious admissions policies. Proposal 2 makes it far more difficult – indeed, practically impossible – to achieve race-conscious admissions policies that inure primarily to the benefit of racial minorities than to achieve other types of beneficial legislation. In *Hunter* and *Seattle*, the Supreme Court struck down laws that drew distinctions based on race by restructuring the political process so as to selectively burden attempts to secure programs that "inure[ ] primarily to the benefit of the minority." *Seattle*, 458 U.S. at 472; *see also Hunter*, 393 U.S. at 390-91. Precisely like the laws in those cases, Proposal 2 impermissibly "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. And while the Supreme Court has repeatedly underscored that racial diversity benefits the entire academic community, *Grutter*, 539 U.S. at 329-330; *Seattle*, 458 U.S. at 472, it is incontrovertible that Proposal 2 most directly burdens students of color by significantly diminishing their ability to access Michigan's institutions of higher education and depressing their admission and enrollment numbers.

STATEMENT OF UNDISPUTED FACTS

A. The Advent of Proposal 2.

Michigan's public universities have long enjoyed autonomy over their admissions policies and procedures. (*See* The University Defs. Responses To Pls. Chase Cantrell, Et Al.'s First Requests For Admissions, Ex. I to Dkt. No. 172, at Nos. 4, 5, 6 ("Univ. RFA Resp., Ex. I to Dkt. No. 172 at No. __").) The governing boards of the University of Michigan, Michigan State University and Wayne State University (the "Universities") have generally "delegated the responsibility to establish admission standards, policies and procedures to units within the institutions, including central admissions offices, schools and colleges" (hereinafter "University Admitting Units"). (*Id*. at No. 4.) Over the last three decades – and partly in response to lobbying efforts by underrepresented minority students – the Universities sought to achieve a diverse student body by considering a wide variety of non-academic factors, including race, as part of a holistic review of each individual applicant. (*Id*. at No. 8; *see also infra* Part I.A.) Student body diversity, including racial diversity, was an affirmative goal of the Universities' admissions process, and one that the Supreme Court deemed a "compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. Thus, prior to Proposal 2, applicants were reviewed under a process that highly valued and inquired into all pertinent aspects of their identity – including their race.

Just a few weeks after *Grutter*, the Michigan Civil Rights Initiative Committee ("MCRIC") announced a new plan for eradicating the use of race in admissions by means of a voter ballot initiative to amend the Michigan Constitution. *See* "Introduction: The Michigan

Civil Rights Initiative," *available at http://www.adversity.net/michigan/mcri_start.htm* (last visited November 30, 2007). That plan eventually took shape as Ballot Proposal 06-02.

B. The Implementation Of Proposal 2.

On November 7, 2006, Michigan voters passed Proposal 2 by a margin of 58 to 42 percent. As a result, the Michigan Constitution was amended to prohibit the Universities from "discriminat[ing] against or grant[ing] 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." MICH. CONST. art. I, § 26. Proposal 2 took effect on December 23, 2006, and, after a brief stay,[2] applied to the Universities' 2006-2007 admissions cycles. (*See* Univ. RFA Resp., Ex. I to Dkt. No. 172 at No. 47; Def.-Intervenor Att. Gen. Michael Cox's Resp. To Cantrell Pls.' Requests For Admission, attached hereto as Ex. A, at No. 14 ("Cox RFA Resp., Ex. A No. __").) In response to Proposal 2, the Universities eliminated race from their admissions criteria but retained discretion to consider numerous other personal

[2] Full implementation of Proposal 2 at Michigan's public universities was delayed briefly due to the entry of a stipulated injunction intended to avoid the unfairness of having admissions criteria change mid-cycle. On December 29, 2006, a panel of the Sixth Circuit issued a preliminary decision staying the injunction pending a full appeal. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 253 (6th Cir. 2006). In doing so, the panel made "clear" that it was *not* making a decision "on the merits." *Id.* at 243 ("Let us be clear that the merits of the appeal of the order granting the preliminary injunction . . . are not before this panel."). Shortly after Proposal 2 went into full effect, the appeal from the stay was withdrawn as moot, never having been heard on the merits. The Sixth Circuit presently has pending before it a motion to vacate the December 29 order because in circumstances such as these, where an order becomes moot pending appeal by no fault of any party, it is "the duty of the appellate court" to "clear[] the path for future relitigation of the issues between the parties" by dismissing the appeal and vacating the underlying order. *See United States v. Munsingwear*, 340 U.S. 36, 40 (1950). The Supreme Court has held that such vacatur is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences" and to ensure that the rights of the parties are not "prejudiced by a decision which . . . was only preliminary." *Id.* at 40-41.

identities, however defined by student applicants, along with multiple other non-academic factors – for example, geographic location, alumni connections, socioeconomic status and identification as a possible scholarship athlete – in selecting among candidates for admission. (*See* Univ. RFA Resp., Ex. I to Dkt. No. 172 at Nos. 48, 50, 51, 52, 53, 54, 55.) The Directors of admission at the University of Michigan undergraduate, law and medical schools and the Dean of Wayne State University Law School all testified that Proposal 2 prohibits them from implementing changes to their admissions policies that would permit any consideration of race, even as constitutionally upheld in *Grutter*. (*See infra* Part II.B.2.) With Proposal 2 in effect, "any individual or group who believes that . . . the Universities should restore . . . their use of race or gender may now seek [such] a change . . . only by seeking a state constitutional amendment." (Resp. To Pls. Chase Cantrell, Et Al.'s Modified First Request For Admissions To Gov. Jennifer Granholm, attached hereto as Ex. B, at No. 21 ("Granholm RFA Resp., Ex. B No. __")); *see also infra* Part II.B.2.)

The process of amending the Michigan Constitution by voter ballot initiative is indisputably "lengthy, complex, difficult and expensive." (Declaration of Kristina Wilfore, attached hereto as Ex. C, at heading II ("Wilfore Decl., Ex. C ¶ __").)[3] Successful ballot initiative campaigns "require connections with a network of supporters, political capital with the major players in the relevant state, and access to significant financial resources as well as a substantial base of willing volunteer supporters." (*Id.* at ¶ 12.) In Michigan – "a politically

[3] As discussed below (*infra* at 8), Ms. Wilfore is Executive Director of the Ballot Initiative Strategy Center, Inc., a non-profit organization with expertise in ballot initiative campaigns across the country, including in Michigan.

competitive state, with expensive media markets and a particularly large number of initiatives vying for voters' attention on any given ballot" – the ballot initiative process is "particularly onerous, expensive and burdensome when compared to other states." (*See id.* at ¶¶ 27, 29.) More than 380,000 signatures are required to put a proposal on the Michigan ballot. (Cox RFA Resp., Ex. A No. 17.) The cost of gathering these signatures and launching a state-wide media campaign is, at minimum, $5 million, and can be as high as $10 million to $15 million. (Wilfore Decl., Ex. C ¶ 30.) For those reasons, and because "[p]roponents of initiatives seeking to benefit minorities on the basis of race, such as initiatives dealing with affirmative action, are even more disadvantaged" in this process, "a voter initiative campaign targeted at overturning Proposal 2 in the area of [considering] race in universities [*sic*] admissions faces overwhelming odds." (*Id.* at ¶ 39.)

C. The Present Litigation.

The Cantrell Plaintiffs filed their First Amended Complaint on January 17, 2007. Through months of discovery, the Universities have produced thousands of pages of documents, and those individuals in the best position to understand the practical effects of Proposal 2 have been deposed: Ted Spencer, Director of Undergraduate Admissions for the University of Michigan; Sarah Zearfoss, Assistant Dean for Admissions at the University of Michigan Law School; Robert Ruiz, Director of Admissions for the Medical School of the University of Michigan; and Frank Wu, Dean of Wayne State University School of Law. Defendants Attorney General Cox and the Universities, as well as Governor Jennifer Granholm,[4] have made numerous

[4] Governor Granholm was dismissed from this litigation on September 5, 2007, by stipulation among the parties.

admissions that are central to the Cantrell Plaintiffs' claims. And non-party MCRIC has provided document and deposition discovery in response to a subpoena issued by the Coalition Plaintiffs relating directly to the intended purpose of Proposal 2.[5]

In addition, two students of color at the University of Michigan (both of whom are named plaintiffs here) and a prospective applicant of color to the University of Michigan and Michigan State University (who is a member of the putative *Cantrell* class) have submitted declarations in support of this motion confirming that race is a fundamentally important part of their identity. The Cantrell Plaintiffs also submit the declarations of three expert witnesses:

- **William Bowen**, a former president of Princeton University and the author of two books on the subject of race-conscious admissions policies. Mr. Bowen has submitted a declaration in support of this motion on the role of race-conscious admissions in American higher education;

- **Jeannie Oakes**, Presidential Professor in Educational Equity at the Graduate School of Education and Information Studies, University of California, Los Angeles; an expert in the area of access to college and inequities in United States schooling; and author of more than 100 published research reports, chapters and articles as well as many books on these subjects. Ms. Oakes has submitted a report in support of this motion concluding that there are no race-neutral approaches to achieving diversity at the University of Michigan;

- **Kristina Wilfore**, Executive Director of Ballot Initiative Strategy, Inc., a non-profit specializing in planning, studying, researching and participating in voter ballot initiative processes across the country, including in Michigan. Ms. Wilfore, who has worked on approximately 150 ballot initiative campaigns in 30 different states (including seven in Michigan), has submitted a declaration in support of this motion addressing the difficulties and expense of using a ballot initiative to amend a state constitution, Michigan's in particular.

[5] On August 23, 2007, the Cantrell Plaintiffs moved to compel MCRIC's compliance with a document subpoena issued on June 26, 2007. That motion is pending before the Court.

The facts revealed in discovery, the declarations of students of color, and the research of experts in this area dispositively show that Proposal 2 (1) prohibits universities seeking to achieve diversity from considering an applicant's racial identity while allowing the consideration of all other individual identities and pertinent non-academic factors, and (2) makes it substantially more difficult to achieve race-conscious admissions policies than to achieve other types of beneficial legislation.

ARGUMENT

I. THERE IS NO DISPUTE THAT PROPOSAL 2 PROHIBITS UNIVERSITIES SEEKING TO ACHIEVE DIVERSITY FROM CONSIDERING AN APPLICANT'S RACE WHILE ALLOWING ALL OTHER PERTINENT ELEMENTS OF DIVERSITY TO BE WEIGHED IN THE ADMISSIONS PROCESS, THEREBY CREATING AN IMPERMISSIBLE DISTINCTION BASED ON RACE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. It Is Undisputed That The Universities Have Long Sought To Achieve A Diverse – Including A *Racially* Diverse – Student Body.

Recognizing that "substantial educational benefits . . . flow from having a diverse student body," the Universities have long sought to achieve diversity on their campuses. (*See* Univ. RFA Resp., Ex. I to Dkt. No. 172 at No. 9.) For example, diversity at the University of Michigan is "far more than a demographic goal: [it] is the experience of meaningful exploration and exchange through a set of dynamic and reciprocal interactions." (University of Michigan, Diversity Blueprints: Final Report (2007), Ex. 3 to Dkt. No. 182, at 6 ("Diversity Blueprints Report, Ex. 3 to Dkt. No. 182 at __").) Race, along with many other non-academic factors and personal attributes, has long been essential to the Universities' "definition of diversity." (*See, e.g.*, Deposition of Theodore Spencer, attached hereto as Ex. D, at 40:6-9 ("Spencer Dep., Ex. D at __").) Beginning in the 1960s, the Universities "adopted policies that permitted the

consideration of the race of an applicant as one of many factors used in making admissions decisions." (*See* Univ. RFA Resp., Ex. I to Dkt. No. 172 at Nos. 9, 11 (admitting that the Universities employed race-conscious admissions policies in an effort "to increase minority presence" on their campuses).) At the University of Michigan Law School, for example, Dean Zearfoss testified that it is "important in the [admissions] policy to get a critical mass of underrepresented minorities" because "having a critical mass of various ethnic groups in the classroom enhance[s] the classroom dialogue, and, thus, enhance[s] the educational experience for all our students." (Deposition of Sarah Zearfoss, attached hereto as Ex. E, at 49:13-23 ("Zearfoss Dep., Ex. E at __").) Dean Wu similarly testified that Wayne State University Law School's "commitment to achieving racial and ethnic diversity in the law school student body [was] explicitly noted" in the policy that was in place prior to Proposal 2. (Deposition of Frank Wu, attached hereto as Ex. F, at 32:5-8 ("Wu Dep., Ex. F at __").)

Prior to Proposal 2, the Universities permissibly considered myriad non-academic factors, including race, as part of their admissions process in order to achieve student body diversity. *See Grutter*, 539 U.S. at 334 (upholding admissions programs that are "'flexible enough to consider *all* pertinent elements of diversity in light of the particular qualifications of each applicant'") (quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 317 (1978)) (emphasis added). The University of Michigan undergraduate admissions committee, for example, "look[ed] at many, many different factors in reviewing [each] student's application" and based its admissions decisions not just on "any one particular factor, race or anything else, but rather on the composite review of all the information that the student provide[d]." (Spencer Dep., Ex. D at 38:5-19.) The admissions application inquired into what students could contribute

to the university community in terms of diversity, and applicants were free to characterize their identity however they understood it. In addition, Director Spencer testified that the admissions committee considered "over 50 to 80 different categories [of factors] in evaluating each student," the "largest portion of [which] . . . would fall into the category of perhaps the non-academic and cognitive kinds of things." (*Id.* at 35:18-22.) Such factors included, for example, personal interest and achievements, geography, alumni connections, family income, family educational background, race and ethnicity, as well as "overcoming obstacles, work experience, [and] any extraordinary awards, both inside the classroom and outside the classroom." (*Id.* at 34:13-35:18.) Dean Zearfoss also testified that, prior to Proposal 2, the University of Michigan Law School considered "many factors in [its] admissions decision[s]," including, for example, underrepresented minority status, ethnic background, socioeconomic background, alumni connections and military service. (*See* Zearfoss Dep., Ex. E at 43:17-46:3; 57:3-58:2.) And Dean Wu similarly testified that Wayne State University Law School's pre-Proposal 2 admissions policy allowed the admissions committee to consider a wide variety of non-academic factors that "contribute to a diverse and engaged law student body," such as "attending for several years a de jure segregated school or a public high school in a low-income geographic area . . . anything that reduces the reliability of GPA as an index of academic achievement and promise " and "factors that would be commonly understood as . . . some type of [race-conscious admissions] program." (*See* Wu Dep., Ex. F at 31:24-32:21.)

The Universities have admitted that "as a result of their [race-conscious] admissions policies and other efforts, prior to the adoption of Proposal 2, the Universities had racially diverse student bodies." (Univ. RFA Resp., Ex. I to Dkt. 172 at No. 12.)

B. It Is Undisputed That Proposal 2 Prevents The Consideration of Race In An Admissions Process That Weighs Myriad Other Non-Academic Factors And Pertinent Elements Of Diversity.

Proposal 2 leaves the Universities' admissions processes unaltered, with the critical and intentional exception that the Universities no longer are free to maintain or adopt policies that include the consideration of an applicant's race. Thus, when Proposal 2 took effect, the Universities deleted race from their admissions criteria but left in place numerous other non-academic factors and personal characteristics that contribute to student body diversity. (*See* Univ. RFA Resp., Ex. I to Dkt. No. 172 at Nos. 48, 51, 52, 53, 54.) At the University of Michigan Law School, for example, "the meat of the [pre-Proposal 2] policy is the same [as the revised policy] . . . with the exception of race." (Zearfoss Dep., Ex. E at 192:16-24.) Dean Zearfoss testified:

> "Q. So under both the interim policy and under the official policy that was voted on in March, you still considered socioeconomic status?
>
> A. Yes.
>
> Q. And you still considered whether a candidate worked many hours?
>
> A. Yes.
>
> Q. And you would still consider geography?
>
> A. Yes.
>
> Q. And other work experience, for example?
>
> A. Yes."

(*Id*. at 192:25-193:10.) As a result, Proposal 2 prevents universities from meaningfully considering the fundamental ways in which race is a critical part of how students choose to define themselves. There is no question that this extraction of race from the Universities'

otherwise "flexible, holistic and individualized" review of applicants (Spencer Dep., Ex. D at 38:5-19; 39:4-10) redounds to the particular detriment of people of color for at least two reasons.

First, the unique set of life experiences that students of color have confronted as a consequence of their racial identity, the "invidious prejudice that affects their life opportunities" (*see* Wu Dep., Ex. F at 15:3-13) and the historical backdrop that informs their American experience are a critical part of how many people of color choose to define and portray themselves. As the Supreme Court has recognized, "one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" is undoubtedly "likely to affect an individual's views." *Grutter*, 539 U.S. at 333. Sheldon Johnson, for example, an African-American student at the University of Michigan and one of the Cantrell Plaintiffs, submitted a declaration in support of this motion articulating the fundamental ways in which "[b]eing a black American" affects the way he views himself:

> "Throughout my childhood my parents instilled in me a deep understanding and belief in the importance of my black identity. Being a black American is one of the most important ways in which I view myself, along with being my parent's son (and the particular values that they have passed on to me) and being a Christian. I consider that being black is the most important of the three ways in which I view myself, in part because being black is an immediately observable aspect of my identity, in a way that the other two characteristics are not. It is significant that the other two characteristics have positive inferences whereas being black in the United States today contains negative inferences. The sense of unfairness that comes from those negative inferences makes being a black American intensely more important to me. I hope that in the future, when black people like myself are no longer viewed negatively simply on the basis of the color of their skin, I may be able to feel strongly about being a black American without the sense of urgency to dispel stereotypes and negative perceptions. "

(Decl. of Sheldon Johnson, attached hereto as Ex. G, at ¶ 6 ("Sheldon Decl., Ex. G ¶ __").)

With Proposal 2 in effect, Mr. Johnson "would not choose to apply to the University [of

Michigan] again because [he is] no longer able to have [his] race considered as part of [his] application." (*Id.* at ¶ 7.) And "[w]ithout the ability to discuss [his] race . . . [he is] deprived of the ability to discuss the most important feature of [his] own self identity," which would mean that he "could only present a diminished picture of the totality of who [he is]." (*Id.*)

Bryon Maxey, also an African-American student at the University of Michigan and a Cantrell Plaintiff, likewise considers "race to be the most prominent and essential aspect of [his] identity." (Declaration of Bryon Maxey, attached hereto as Ex. H, at ¶ 8 ("Maxey Decl., Ex. H ¶ __").) In his attached declaration, Mr. Maxey states:

> "Being black is one of the most visible aspects of my identity and one that I confront every day. I am extremely proud of my racial identity and it makes me appreciate my being black even more knowing that my ancestors have gone through so much struggle and knowing that there still remains so much road to travel in order for black Americans to reach their mountaintop of finally being treated as equal."

(*Id*.) Unsurprisingly, Mr. Maxey's "racial identity played a very important part in [his] application to the University of Michigan":

> "In my application, I discussed the way in which my father brought our race to the forefront of my identity, in part by educating me in our black history. My main goal in coming to the University was to further my studies in black history."

(*Id*. at ¶ 5.) Mr. Maxey believes "that not being able to have race considered in an application" – as Proposal 2 requires – "has an intensely negative effect on minority applicants like [him]self, for whom race is such an important and central part of [their] identity." (*Id*. at ¶ 6.)

Ariel Roberts, a member of the putative *Cantrell* class and an African- American student at Pioneer High School in Ann Arbor, Michigan who plans to apply to the University of Michigan and Michigan State University, believes that "[t]aking race out of consideration from

the admissions process is hurtful to [her] because race is a such an important part of who [she is]." (Declaration of Ariel Roberts, attached hereto as Ex. I, at ¶¶ 1, 4.) Ms. Roberts has stated:

> "Being an African American is a very important part of the way I see myself. I am currently taking a course at school that deals with slavery and the end of slavery. Just learning about my historical past makes me proud to be black. The recent death of Rosa Parks and the fact that I was alive during her era makes me realize that racism and the effects of slavery are very recent. I want to know more about my black ancestry and show the pride that I have in being black."

(*Id*. at ¶ 3.) Accordingly, Ms. Roberts "want[s] the universities to be able to consider [her] race and ancestors and where [she] came from." (*Id*. at ¶ 4.) That cannot happen under Proposal 2.

Second, Director Spencer, Dean Zearfoss and Dean Wu all testified that without the consideration of race in admissions, robust enrollment of students of color in Michigan's public universities will be virtually impossible to maintain. For example, Director Spencer – one of the leading experts in the country as to methods and methodologies of recruiting underrepresented minorities to universities (*see* Spencer Dep., Ex. D at 21:23-22:11) – testified that socioeconomic status cannot serve as a "proxy" for race as a means of achieving racial diversity:

> "Q. Is it also true . . . that another problem is that you don't have a sufficient number of minority students from middle-class families, in terms of whether or not socioeconomic status could otherwise serve as a proxy?
>
> A. That is correct.
>
> Q. Incidentally, sir, a proxy means it's not the real thing; isn't that right?
>
> A. Yes. That's my understanding, yes.
>
> Q. And race is the real thing; is that true?
>
> A. That is true, yes."

(*Id*. at 74:7-17.) Director Spencer also confirmed that university administrators from California, Washington, Texas and Georgia – states with laws nearly identical to Proposal 2 – "cannot achieve the same sort of racial and ethnic diversity that they had prior to such measures, through the result of any measure that does not include affirmative action, using race . . . as one of many factors." (*See id.* at 100:14-101:12.)

Similarly, Dean Zearfoss testified that there was not "any way to get a critical mass of underrepresented minorities or any group of underrepresented minorities [at the University of Michigan Law School], prior to Proposal 2, without considering race." (Zearfoss Dep., Ex. E at 56:23-57:2.) Since the University of Michigan Law School "stopped considering race in admissions, [Dean Zearfoss has not] identified or applied any policy that . . . gets [the University] as close to the critical mass [of racial minorities] as the affirmative action policies did." (*See id.* at 206:25-207:13.) Dean Wu also testified that at Wayne State University Law School, none of the proposed alternatives to race-conscious affirmative action "or any combination of [them] was reasonably likely to result in the admission of a class that had the same or similar or higher numbers of African Americans, Latinos and Native Americans as the prior policy." (Wu Dep., Ex. F at 78:12-79:4.)

These facts are not disputed. Every witness who testified on this topic – including proponents of Proposal 2 – confirmed that enrollment of students of color from historically underrepresented groups in Michigan's public universities will decline substantially in the absence of race-conscious admissions policies.[6] Moreover, this undisputed testimony is

[6] Even Jennifer Gratz, Executive Director of MCRIC, and Ward Connerly, a prominent supporter of Proposal 2, agree that Proposal 2's ban on race-conscious admissions policies will

corroborated by the research of Professor William Bowen, who has extensively studied and written on the subject of race-conscious admissions. Professor Bowen's research shows that "race-neutral alternatives are unlikely to be as effective as race-conscious admissions in enrolling a diverse student body," and that "moving from a race-conscious admissions policy to a class-based one would substantially reduce the minority enrollments at selective institutions." (Declaration of William Bowen, attached hereto as Ex. L, at ¶¶ 11, 13 ("Bowen Decl., Ex L ¶ __").) Professor Bowen's research further reveals that the consideration of race in university admissions "has been an important contributor to the socioeconomic mobility" of people of color in the United States. (*Id*. at ¶ 6.)

The fact that race-neutral alternatives are inadequate to achieve racial diversity on university campuses is also supported by the experience of public universities in California, Washington and Texas, which have experienced a significant drop in the enrollment of students of color in their public universities since the enactment of laws nearly identical to Proposal 2. (*See, e.g.*, "The Viability of Race-Neutral Approaches for Achieving Diversity at the University of Michigan", attached hereto as Ex. M ("Oakes Study, Ex. M at __");[7] *see also* Diversity Blueprints Report, Ex. 3 to Dkt. No. 182 at 6 (summarizing reports of "significant setbacks in

result in decreased enrollment of students of color at Michigan's public universities. (*See* Deposition of Jennifer Gratz, attached hereto as Ex. J, at 107:23-108:10 ("Q. So your opinion was that [the number of students of color at the University of Michigan] was going to drop [if Proposal 2 were adopted], true? A. True."); Deposition of Ward Connerly, attached hereto as Ex. K., at 120:15-23 ("Q. Mr. Connerly, there was no question in your mind when you [supported] Proposal 2 that the University of Michigan would be virtually resegregated as the University of California Berkeley and UCLA have; is that not true? . . . A. That's correct.").)

[7] The Cantrell Plaintiffs have moved to file the Oakes Study under seal because it contains information that the Universities have designated as confidential.

demographic representation").) A study submitted in support of this motion authored by Professor Jeannie Oakes, an expert in the area of access to college and inequities in United States schooling, confirms that "[r]ace-neutral admissions strategies . . . have not been effective as replacements for race-conscious strategies in maintaining or increasing diversity in the public universities in Texas and California, two states with restrictions on race-conscious practices in university admissions similar to those required under Michigan's Proposal 2." (Oakes Study, Ex. M at 3.) Professor Oakes' study concludes 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." (*Id*. (emphasis added).) And "[i]n fact, such strategies would likely exclude from admission in-state African American and Latino high school graduates with academic preparation sufficient to succeed at the university." (*Id*.)

C. Proposal 2 Creates An Impermissible Distinction Based On Race In Violation Of The Fourteenth Amendment.

It is axiomatic that the Equal Protection Clause of the Fourteenth Amendment rests on the core principle that "no person shall be denied the equal protection of the laws." *Romer v. Evans*, 517 U.S. 620, 631 (1996). As the Supreme Court recognized in *Hunter* and *Seattle*, "'the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race.'" *Seattle*, 458 U.S. at 486 (citing *Hunter*, 393 U.S. at 391-92).[8] In *Hunter* and *Seattle*, therefore, the Supreme Court struck down laws that drew distinctions based on race "infect[ing] the reallocation of decisionmaking authority," reasoning

[8] Laws that "treat people differently because of their race" will be upheld "only for the most compelling reasons." *See Grutter*, 539 U.S. at 326.

that "minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups 'from effective participation in the political proces[s].'" *Seattle*, 458 U.S. at 487; *see also id.* at 472 (holding that the Equal Protection Clause prohibits states from selectively burdening attempts to secure programs that "inure[ ] primarily to the benefit of the minority"). Similarly, in *Romer* the Supreme Court invalidated a law that prohibited "specific legal protections" for homosexuals, reasoning that such a law does more "than deprive homosexuals of special rights" – "[t]o the contrary, [it] imposes a special disability on those persons alone." 517 U.S. at 631.

Precisely like the laws that were struck down in *Hunter*, *Seattle* and *Romer*, Proposal 2 impermissibly singles out underrepresented minority groups for separate and unequal treatment by "impos[ing] a special disability on those persons alone." *See id.* Having permitted the Universities to "take into account 'all pertinent elements of diversity,'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1*, 127 S.Ct. 2738, 2794 (2007) (Kennedy, J., concurring) (quoting *Grutter*, 539 U.S. at 341), the state may not then prohibit consideration of race within that holistic process. (*See* Johnson Decl., Ex. G ¶ 7 (stating that Proposal 2 "deprive[s him] of the ability to discuss the most important feature of [his] own self identity" – his race); *see also* Maxey Decl., Ex. H ¶ 7.) That is, the state may not – on the basis of race – selectively deny applicants the opportunity to have central aspects of their identity considered while allowing myriad other non-academic factors to be weighed and positively evaluated by the Universities. Exempting race in this manner is impermissible because it "imposes direct and undeniable burdens on minority interests." *Seattle*, 458 U.S. at 484; *see also Romer*, 517 U.S. at 632 (striking down an amendment because it had "the peculiar property of imposing a broad and

undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation"). The burden that Proposal 2 imposes upon students of color is especially acute in light of the Universities' undisputed testimony, confirmed by experts, that there is no way to achieve a critical mass of underrepresented students of color without considering race. *See supra* Part I.B.

In fact, diversity cannot be understood – and cannot meaningfully exist – apart from race. Recognizing this, the Supreme Court framed the central question in *Grutter* – "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities" – around the principle that race and diversity are inextricably linked. 539 U.S. at 322. Indeed, the Court plainly acknowledged in *Grutter* that race is an indispensable component of diversity in the higher education context:

> "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America. The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."

Id. at 332-33. The Court reaffirmed this principle just last term in *Parents Involved*, describing the admission of a "'meaningful number'" of students of color as "necessary to achieve a genuinely diverse student body." 127 S.Ct. at 2757 (Roberts, C.J.); *see also id*. at 2792 (Kennedy, J., concurring) ("In the administration of public schools. . . . it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.").

Where the Constitution permits universities to pursue the compelling state interest of achieving student body diversity by considering many non-academic factors and personal attributes – and where a university *chooses* to seek such diversity – the state may not legislatively nullify an applicant's race while permitting all other aspects of identity to be positively evaluated.[9] Indeed, Justice Kennedy has acknowledged that race matters. *See Parents Involved*, 127 S.Ct. at 2791 (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that it too often does."). To be forced to live under a state mandate that one's race does *not* matter – in a context where it plainly does – flies in the face of the Fourteenth Amendment's core principle that the state may not create "meaningful and unjustified official distinctions based on race." *See Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J., concurring). As such, Proposal 2 must be struck down.

II. THERE IS NO DISPUTE THAT PROPOSAL 2 MAKES IT MORE DIFFICULT TO ACHIEVE RACE-CONSCIOUS ADMISSIONS POLICIES THAN TO ACHIEVE OTHER TYPES OF BENEFICIAL LEGISLATION, THUS IMPOSING AN UNEQUAL BURDEN ON PEOPLE OF COLOR IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Proposal 2 not only imposes a "special disability on [racial minorities] alone" by legislatively proscribing any consideration of racial identity in an application process that evaluates all other pertinent elements of diversity, *see Romer*, 517 U.S. at 631; it also creates an impermissible racial distinction by singling out individuals seeking race-conscious admissions policies for a unique political burden. As the Supreme Court held in *Hunter* and *Seattle*, the

[9] Importantly, this does not mean that Universities are *required* to take race into account in making admissions decisions; rather, where universities have elected to seek diversity, the state cannot require that race *not* be taken into account.

Equal Protection Clause prohibits precisely this sort of inequality in the political process. *See Hunter*, 393 U.S. at 391-93; *Seattle*, 458 U.S. at 470.

A. A Law That Selectively Burdens The Political Process To The Detriment Of Racial Minorities Violates The Equal Protection Clause Of The Fourteenth Amendment.

Nearly four decades ago, the Supreme Court held that a state law violates the Equal Protection Clause if it "mak[es] 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. In *Seattle*, the Court reaffirmed its decision in *Hunter*, holding once again that the Equal Protection Clause prohibits states from selectively burdening attempts to secure programs that "inure[ ] primarily to the benefit of the minority." *Seattle*, 458 U.S. at 470; *see Hunter*, 393 U.S. at 391-93. *Hunter* and *Seattle* both struck down laws that made it politically futile for advocates of policies benefiting members of a class subject to strict scrutiny to seek such measures from their local decision-making bodies.

In *Hunter*, the law in question amended a city charter to require popular approval of any ordinance regulating real estate transactions "on the basis of color, religion, national origin or ancestry." *Id.* at 387. *Seattle* involved a challenge to Initiative 350, a measure that prohibited any school board from "directly or indirectly requir[ing] any student to attend a school other than [one in his or her neighborhood]." *Seattle*, 458 U.S. at 462. The Supreme Court struck down both the charter amendment in *Hunter* and the initiative in *Seattle*, in each case finding that the challenged provision uniquely disadvantaged those principally benefiting from the measures barred by the provision – *i.e.*, citizens of color – by forcing them to run a legislative "gantlet" of popular approval that other laws were spared. *See Hunter*, 393 U.S. at 390-91;

Seattle, 458 U.S. at 474 ("The initiative removes 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."). In both cases, the Court looked to (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." *See Seattle*, 458 U.S. at 470, 472, 474; *see also Hunter*, 393 U.S. at 390-91. Proposal 2 violates the fundamental principle established in *Hunter* and *Seattle* because there is no dispute that it satisfies both of these conditions.[10]

B. It Is Undisputed That Proposal 2 Restructures The Political Process By Lodging Decisionmaking Authority Over The Question Of Race-Conscious Admissions At A New And Remote Level Of Government.

1. There Is No Dispute That Proposal 2 Has A Racial Focus.

For a challenged enactment to have a "racial focus" under *Hunter* and *Seattle*, "[i]t is enough that minorities may consider [the type of law- or policy-making subject to an increased burden] to be 'legislation that is in their interest'" and that "inure[s] primarily to [their] benefit." *Seattle*, 458 U.S. at 472-74; *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." *See Seattle*, 458 U.S. at 471, 474 (striking down initiative that was "carefully tailored to interfere only with desegregative busing"); *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 enact an

[10] The decision in *Coal. for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997) ("CEE") is not binding on this Court and, in any event, is inapposite. To begin, that decision was reached prior to *Grutter*, which blessed race-conscious admissions as a narrowly-tailored means of achieving the compelling state interest of diversity.

ordinance banning discrimination in real estate transactions on the basis of race) (emphasis added); *Lee v. Nyquist*, 318 F. Supp. 710, 719 (D.C.N.Y. 1970), *aff'd* 402 U.S. 935 (1971) (finding unconstitutional a law that was "destined to bring to an end New York's strong pro-integration policy"). Here, there is no question that Proposal 2 was designed to eliminate race-conscious admissions policies, which plainly inure to the primary benefit of applicants of color.

First, communities of color have long considered race-conscious admissions policies to be "in their interest." *Seattle*, 458 U.S. at 472-74. Beginning in the 1960s, "African Americans and other underrepresented minorities [among others] lobbied for the adoption of admissions policies, often called 'Affirmative Action' policies, that allowed for the consideration of race" and "sought to increase minority presence at the Universities." (Univ. RFA Resp., Ex. I to Dkt. No. 172 at Nos. 8, 9.) Since that time, race-conscious admissions policies have maintained their critical importance to underrepresented communities – precisely because they "inure[] primarily to [their] benefit." *See Seattle*, 458 U.S. at 474; *see also supra* Part I.B. Sheldon Johnson, for example, "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." (Decl. of Sheldon Johnson in Supp. of Cantrell Pls' Mot. for Class Cert., Dkt. No. 114 at ¶ 2.) Bryon Maxey "attribute[s] much of the diversity at the University of Michigan to policies that include race as one among many factors considered in university admissions decisions." (Decl. of Bryon Maxey in Supp. of Cantrell Pls' Mot. for Class Cert., Dkt. No. 117 at ¶ 3.)

Plaintiffs in this case are not anomalous: exit polling data gathered during the Michigan 2006 election demonstrates that the vast majority of underrepresented communities of

color in Michigan appreciate the benefits of race-conscious admissions policies. Polling and analysis conducted on behalf of the nation's leading media outlets revealed that 70 percent of non-white men and 82 percent of non-white women voted against Proposal 2. Black voters opposed the measure by a margin of 86 to 14 percent.[11] (Edison/Minofsky, "Michigan General Exit Poll," Nov. 8, 2006, attached hereto as Ex. O.) These numbers alone demonstrate that communities of color strongly perceive race-conscious admissions policies to be "legislation that is in their interest." *See Hunter*, 393 U.S. at 395.

Second, it cannot be disputed that Proposal 2 was "effectively drawn for racial purposes." *See Seattle*, 458 U.S. at 471. Numerous facts demonstrate that the clear purpose of Proposal 2 was to eliminate race-conscious admissions policies:

- A summary of the ballot proposal approved by the Michigan Secretary of State and distributed to voters explained that Proposal 2 would "[b]an public institutions from using affirmative action programs" (*see* Approved Ballot Language, *available at http://www.michigan.gov/documents/Bal_Lang_MCRI_152610_7.pdf* (last visited November 30, 2007));

- the ballot argument drafted by the proponents of Proposal 2, published in the League of Women Voters' non-partisan voting guide, flatly stated that race-conscious affirmative action "practices are WRONG and it is time that we got rid of them" (League of Women Voters of Michigan, "Non-partisan Michigan Voter Guide" at 30 (2006), attached hereto as Ex. P);

[11] Due to sample size limitations, results could not be broken out for minority groups other than African-Americans. (Deposition of Joseph Lenski, attached hereto as Ex. N, at 34:21-35:1; 58:12-18.)

- the registered Ballot Question Committee for Proposal 2, MCRIC, candidly states on its website that the initiative was intended to end the application of "different standards to individuals or groups based on the intrinsic characteristics of race, sex, color, ethnicity or national origin." (*see* *http://www.michigancivilrights.org/aboutus.html* (last visited November 30, 2007)).

Moreover, because Proposal 2's "anti-discrimination" provisions are redundant of existing statutes,[12] its only real effect is to end (and prevent the future implementation of) race-conscious admissions policies. (*See* Cox RFA Resp., Ex. A No. 24 (admitting that "Proposal 2's ban on race preferences has eliminated state and local race-conscious affirmative action efforts in education that existed prior to Proposal 2").) Thus, it is difficult to imagine that Proposal 2 had any genuine purpose other than to eliminate admissions policies based on race.

2. <u>There Is No Dispute That The Process Of Amending The Michigan Constitution – Now The Only Means Of Restoring Race-Conscious Admissions Policies – Is Far More Onerous Than The Process Of Seeking A Policy Change By Lobbying The Universities Directly.</u>

Prior to Proposal 2, each University Admitting Unit had autonomy over its own admissions processes, including the power to implement policies permitting the consideration of "underrepresented minority status." (Univ. RFA Resp., Ex. I to Dkt. No. 172 at No. 25.) The Universities admitted that their autonomy prior to Proposal 2 included the power to consider any

[12] The portions of Proposal 2 that purport to "ban" discrimination on the basis of race are merely duplicative of existing law. Indeed, Michigan has had a strong anti-discrimination law since long before Proposal 2 was enacted. *See* 1976 Mich. Pub. Acts 453, as amended, Mich. Comp. Laws § 37.2201 *et seq.* (the "Elliott-Larsen Act").

change suggested by students, faculty or citizens, including changes concerning race:

> "[P]rior to the enactment of Proposal 2, any individual or group who believed that any Admitting Unit . . . should amend its admissions policies to benefit applicants based on any factor (including, for example, educational background, geographic background, family alumni connections, socioeconomic status, *underrepresented minority status* and athletics, or any other factor that could be weighed in the admissions process) . . . could petition that Admitting Unit for such a change."

(University RFA Resp. Nos. 36, 44, Ex. I to Dkt. No. 172 (emphasis added).)[13] At the University of Michigan Law School, for example, Dean Zearfoss testified that the faculty had the "power . . . to set the policy for admissions," and that the "[p]re-Proposal 2 . . . admissions policy . . . was passed by a vote of the faculty." (Zearfoss Dep., Ex. E at 64:15-25; *see also id*. at 213:22-24; 214:19 (stating that "there[] [was] no higher body" than the faculty for purposes of adopting admissions policies).) Dean Wu testified that at Wayne State University Law School, "the ultimate decision whether to change admissions standards rest[ed] with the faculty alone . . . ." (Wu Dep., Ex. F at 190:10-191:3.) Proposal 2 leaves the autonomy of each University Admitting Unit unaltered, with a critical exception that they are no longer free to maintain or adopt policies that consider race. Thus, when Proposal 2 took effect, the Universities eliminated race from their admissions criteria but left myriad non-academic criteria in place. (*See* Univ. RFA Resp., Ex. I to Dkt. No. 172 at Nos. 48, 51, 53, 54; *see also supra* at Part I.A.)

[13] Indeed, race-conscious affirmative action policies were first implemented in the 1970s at the University of Michigan directly in response to the demands of a minority activist group, the Black Action Movement, that the University "set as [its] minimal black population in Ann Arbor by 1973-74 ten per cent of the total population," which number "shall increase yearly until[] the overall population of blacks shall approach if not exceed the proportion of blacks in the state." (Ltr. of Feb. 9, 1970 from H. W. Hildebrandt (enclosing list of student demands), attached hereto as Ex. Q.)

Not only did Proposal 2 require the Universities to end their race-conscious admissions policies, but it also *prospectively* prohibits the Universities from restoring those policies in the future. Now, "any individual or group who believes that any of the Universities should restore its prior admissions policies and their use of race or gender" may seek such a change "only by seeking a state constitutional amendment." (*See* Granholm RFA Resp., Ex. B No. 21.) At Wayne State University Law School, for example, Dean Wu testified that Proposal 2 renders "futile" any attempt to seek a change in that school's admissions policy based on race or gender:

> "A. . . . I would imagine that if someone had come before Prop 2, we would have allowed them to speak. If someone were to come after Prop 2, we would allow them to speak. Before Prop 2, they could have offered a variety of viewpoints. After Prop 2, they could still offer a variety of viewpoints, but it would be futile for them to agitate for the inclusion of race or gender as a factor."

(Wu Dep., Ex. F at 193:16-25.) And at the University of Michigan Law School, Dean Zearfoss similarly testified that "somebody could come to the faculty and propose that it do essentially anything on admissions," except that Proposal 2 prevents the faculty from "tak[ing] race into account as an admissions consideration." (Zearfoss Dep., Ex. E at 274:4-23.)

The Universities' Admitting Units still have wide latitude to consider all changes to their admissions policies – other than changes seeking the consideration of race or gender – through a largely informal process. At the University of Michigan Medical School, for example, "feedback" may be "directed through multiple or any of [the admissions officials]," including the "Director of Admission, the Assistant Dean of Admission or the Admissions Committee membership." (Deposition of Robert Ruiz, attached hereto as Ex. R, at 91:8-17.) The admissions officials "convene at the close of each admission cycle where they . . . take up

proposals, suggestions, [and] recommendations for changes to subsequent processes." (*Id.* at 92:7-10.) At the University of Michigan Law School, faculty members and students offer suggested changes directly to the admissions committee. (*See* Zearfoss Dep., Ex. E at 209:20-210:14.) Dean Zearfoss testified that in her experience, "[s]tudents have indicated," usually in meetings, "that they want [the admissions committee] to do certain things with regard to the [admissions] policy." (*Id.* at 210:11-14.) This process is similar at Wayne State University Law School, where individuals seeking changes to the admissions policy may do so by meeting informally with faculty members, the admissions committee or Dean Wu himself:

> "Q. If a student or prospective student was upset with the law school faculty's decisions to change the law school's admissions policy, is there some sort if internal appeal process within Wayne State to appeal that decision? . . .
>
> A. They could certainly ask the student representatives on the admissions committee to agitate for change, they could ask for a meeting with me, they could meet informally with members of the faculty, but if you're asking is there a formal appeals mechanism that would allow a student to come and present complaints about the admissions policy, no, there is not."

(Wu Dep., Ex. F at 192:24-193:15.)

In marked contrast to the informal process of lobbying the Universities for changes to their admissions policies, the process of amending a state constitution by voter ballot initiative is "lengthy, complex, difficult and expensive." (Wilfore Decl., Ex. at heading II.) Successful ballot initiative campaigns "require connections with a network of supporters, political capital with the major players in the relevant state, and access to significant financial resources as well as a substantial base of willing volunteer supporters." (*Id.* at ¶ 12.) A ballot

initiative campaign may run as long as two to three years and can cost as much as $153 million. (*Id.* at ¶¶ 11, 25.)

Even before the official campaign begins, proponents of a ballot initiative must undertake a series of expensive and time-consuming steps, including, for example, conducting policy research to evaluate the validity of the proposal, mounting a pre-polling fundraising campaign and polling the populace to determine the proposal's popularity. (*See id.* at ¶ 14.) "Depending on the complexity and controversy of the issue being undertaken, the initial stage of a ballot initiative campaign can take anywhere from six months to two years of advance work." (*Id*. at ¶ 15.) The official campaign demands considerably more volunteers, staff and funding. (*Id*. at ¶ 21.) In addition to television advertising – which requires the greatest expenditure of funds and is "essential to any campaign" – initiative campaigns use a variety of publicity methods, including direct mail, phone calls and canvassing. (*Id.* at ¶ 22.) "In some cases, proponents of a measure may be forced to spend additional funds to defend the measure from legal challenges after it has already been approved by the electorate." (*Id.* at ¶ 23.)

In Michigan – "a politically competitive state, with expensive media markets and a particularly large number of initiatives vying for voters' attention on any given ballot" – the ballot initiative process is "particularly onerous, expensive and burdensome when compared to other states." (*Id.* at ¶¶ 27, 29.) Defendant Attorney General Cox admitted that "a petition seeking to place an initiative to amend Michigan's Constitution on the next statewide election ballot will require more than 380,000 signatures" (Cox RFA Resp., Ex. A No. 17), and the Michigan Department of State advises that "the number of signatures gathered on an initiative or referendum petition should be significantly greater than the minimum number required as invalid

signatures are eliminated through a verification process which involves a random sample of the submitted signatures" (Granholm RFA Resp., Ex. B No. 24). Gathering these signatures can cost between $750,000 and $1 million, and a state-wide media campaign to pitch the proposal to voters alone can require as much as $4 million. (Wilfore Decl., Ex. C ¶¶ 30, 31.) In total, signature-gathering and media campaigning in Michigan can cost a minimum of $5 million and as much as $10 million to $15 million. (*Id*. at ¶ 30.)

Proponents of initiatives seeking to benefit communities of color – such as an initiative to reinstate race-conscious admissions policies – are even more disadvantaged in this process because of "the peculiar and unique problems associated with pro-affirmative action ballot initiatives and minority protection measures generally." (*Id.* at ¶ 34.) In particular, "ballot initiative campaigns benefit proponents who have simple messages rather than those who have messages, such as pro-affirmative action campaigns, which are, by their nature, more complex." (*Id.* at ¶ 36.) Moreover, "[o]verturning any recently passed measure requires more efforts, both physical and financial, than seeking to approve a new measure"; as a result, "it is extremely unlikely that groups supporting affirmative action would commit any significant resources to a new measure in Michigan." (*Id.* at ¶ 38.) Thus, "[a] voter initiative campaign targeted at overturning Proposal 2 in the area of [considering] race in universities [*sic*] admissions faces overwhelming odds." (*Id.* at ¶ 39.)

The undisputed facts set forth above demonstrate that the process of seeking a constitutional amendment – now the only means of restoring race-conscious admissions policies at the Universities – is far more onerous than the process of seeking a policy change by lobbying the University Admitting Units directly. Thus, Proposal 2 violates the Equal Protection Clause

by requiring those "championing [race-conscious affirmative action] to surmount a considerably higher hurdle than persons seeking comparable legislative action." *See Seattle*, 458 U.S. at 474. As the Supreme Court held in *Hunter*, "the state may no more disadvantage any particular group by making it more difficult to enact legislation [on] its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 392-93.

CONCLUSION

For the foregoing reasons, the Cantrell Plaintiffs respectfully request that the Court grant their motion for summary judgment.

November 30, 2007

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

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

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Dated at New York, New York, this 30th day of November, 2007.

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