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 TO ALTER OR AMEND JUDGMENT

Pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 7.1(g), and for the reasons set forth in the attached Memorandum, Plaintiffs Chase Cantrell, *et al.* (the "Cantrell Plaintiffs") respectfully move this Court to modify or amend its judgment

dismissing this action. In support of this motion, the Cantrell Plaintiffs submit the accompanying Memorandum of Law in support thereof.

Pursuant to Eastern District of Michigan Local Rule 7.1, movants have conferred with counsel for all parties via email. The Coalition Plaintiffs consent to the relief sought in this motion. The University Defendants take no position respecting the relief sought in this motion. The Attorney General opposes this motion.

MEMORANDUM OF LAW IN SUPPORT OF THE CANTRELL PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

Issue Presented

Whether the Court should alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) and E.D. Mich. L. R. 7.1(g).

Controlling Authorities

Fed. R. Civ. P. 59(e)

E.D. Mich. L. R. 7.1(g)

United States v. Carolene Products, 304 U.S. 144 (1938)

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

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

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Pursuant to Fed. R. of Civ. P. 59(e) and E.D. Mich. L. R. 7.1(g), Plaintiffs Chase Cantrell, et al. (the "Cantrell Plaintiffs") respectfully move this Court to alter or amend this Court's entry of summary judgment for the Attorney General and against the Cantrell Plaintiffs.[1]

Preliminary Statement

The Cantrell Plaintiffs respectfully ask this Court to alter or amend its decision by correctly applying the *Hunter-Seattle* principle without regard to the novel distinction between precluding "preferential treatment" and withholding "equal protection." The Cantrell Plaintiffs urge a single, simple point of law: the distinction between "preferential treatment" and "equal protection" is not a tenable means by which to limit the scope of the *Hunter-Seattle* principle. Such a distinction is contrary to the focus of the *Hunter-Seattle* principle, which protects a fair political *process* rather than a particular political *outcome*. Moreover, the "preferential treatment"/ "equal protection" distinction finds no support in *Hunter v. Erickson*, 393 U.S. 385 (1969), or *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and is too judicially unmanageable to be the basis for the doctrine. Properly applied, the *Hunter-Seattle* doctrine reveals Proposal 2 as a discriminatory law that denies the Cantrell Plaintiffs equal protection by unfairly burdening them in the political process on the basis of race.

[1] Federal Rule of Civil Procedure 59(e) authorizes motions "to alter or amend a judgment" where, among other reasons, the district court has made a clear error of law. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999); *see also Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Similarly, motions for reconsideration may also be granted pursuant to E.D. Mich. L. R. 7.1(g) when the moving party shows a palpable defect that misled the court and the parties, and that correcting the defect will result in a different disposition of the case. *Palmer v. Buscemi*, No. 05-10094, 2007 WL 3037715, at *1 (E.D. Mich. Oct. 16, 2007). A "palpable defect" is a defect which is obvious, clear, unmistakable, manifest, or plain. *Id.*

Argument

This case requires the Court to define when a state's racially selective exclusion of issues from the normal political and administrative agenda denies equal protection of the laws to members of racial groups with special interest in those issues. The burden on political participation in this case is imposed by an amendment to the Michigan Constitution that prohibits the State and its political subdivisions 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(1) (hereinafter "Proposal 2").

As this Court noted in granting the Attorney General's motion for summary judgment, the selective exclusion of issues with a racial focus from the states' normal decision-making process is not governed by ordinary equal protection principles but rather by the standards set forth in *Hunter*, 393 U.S. at 390-91, and *Washington v. Seattle*, 458 U.S. at 472 (the "*Hunter-Seattle*" principle). Although finding that the Cantrell Plaintiffs had plainly established the elements of a *Hunter-Seattle* claim, this Court held that *Hunter-Seattle* does not apply to Proposal 2, because Proposal 2 merely barred racial minorities from obtaining "preferential treatment" on the basis of race but did not deprive racial minority groups of "the means of obtaining *equal* protection." (Op. and Ord. Granting in Part and Denying in Part Univ. Defs.' Mot. to Dismiss, Denying Cantrell Pls.' Mot. for Summ. J., Granting Att. Gen.'s Mot for Summ. J., and Dismissing Consol. Cases, dated Mar. 18, 2008 ("Op.") at 51). In reaching this conclusion, this Court erroneously followed the Ninth Circuit's decision in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 707-709 (9th Cir. 1997), which deployed a novel

distinction between "preference" and "protection" that no other court has adopted in order to uphold a nearly identical amendment to the California Constitution. Contrary to *Hunter-Seattle* and the Equal Protection Clause itself, the application of this erroneous and unprecedented distinction tolerates laws that impose a special disability upon racial minorities.

I. THE COURT'S DISTINCTION BETWEEN PRECLUDING "PREFERENTIAL TREATMENT" AND WITHHOLDING "EQUAL PROTECTION" IS INCONSISTENT WITH THE PROCESS-BASED NATURE OF THE HUNTER-SEATTLE PRINCIPLE.

First, the distinction between precluding "preferential treatment" and withholding "equal protection" is fundamentally inconsistent with the character of *Hunter-Seattle* as an entitlement not to a particular *outcome* but to a fair political *process*. The *Hunter-Seattle* principle goes beyond conventional equal protection analysis precisely by focusing on political procedures rather than on political outcomes. In equal protection challenges not presenting the *Hunter-Seattle* process problem, the court will not ordinarily subject a law to heightened scrutiny absent a suspect classification or proof of racially discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 239-41 (1976). But the *Hunter-Seattle* principle addresses process problems in which these requirements would be misplaced. As this Court correctly observed, "the idea that a political restructuring claim must be based on purposeful discrimination finds no support in the cases." (Op. at 48.) Instead, *Hunter-Seattle* requires only that the challenged law have a "racial focus," in that it excludes from the ordinary political process issues that obviously have special relevance to the members of a particular racial group.

The immateriality of the "discriminatory purpose" requirement follows entirely from the process-based nature of the injury identified by the *Hunter-Seattle* principle. With ordinary legislation, a law's merely foreseeable effects on members of a particular racial group

are insufficient to trigger heightened scrutiny. Instead, there must be some specific proof that the challenged facially neutral law was enacted through a process corrupted by racial prejudice. *See Washington v. Davis*, 426 U.S. at 240-42. When, however, a law carves out from the ordinary political process issues of special pertinence to racial minorities, then the law wears its procedural flaws on its face. Such "legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), and the classic justification for suspending judicial deference to the outcomes of fair political processes applies. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980) (justifying heightened judicial scrutiny when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out"). Thus, the *Hunter-Seattle* doctrine is merely an application of the core Fourteenth Amendment principle that state laws tilting the political process against a particular racial group will be regarded with special suspicion.[2]

[2] The process-based nature of the *Hunter-Seattle* principle is widely recognized by both courts and scholars. *See, e.g., Seattle*, 458 U.S. at 485-86 (noting basis of *Hunter-Seattle* principle in *Carolene Products*' principle that judicial deference is inappropriate when legislation "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities" and quoting *Carolene Products*, 304 U.S. at 153, n. 4); Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1041 (1996) ("*Hunter* and *Seattle* reflect what might be called a political process concern embedded within equal protection jurisprudence."); Alan Howard and Bruce Howard, *The Dilemma of the Voting Rights Act – Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1645-46 (1983) ("The majority in *Seattle School District* embraced the theme of Justice Harlan's concurrence in *Hunter*. The Court indicated that states must structure their political institutions according to what the Court called 'neutral principles' that 'provid[e] a just framework within which the diverse political groups in the society may fairly compete'") (internal quotations omitted); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 660 (1995) ("A state may not place 'in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in

By insisting that the *Hunter-Seattle* principle applies only to laws that impede efforts to obtain "equal protection" in the sense of protection from the outcome-defined harm of discrimination, this Court has erroneously imposed an outcome-based limit on a process-based entitlement. The Court's opinion justified the limit by repeating *Coalition for Economic Equity*'s demand that the violation of the *Hunter-Seattle* principle lead to a denial of equal protection in substance. But this reasoning mistakes the kind of injury against which *Hunter-Seattle* protects. Being deprived of an equal opportunity to influence the political process is *itself* the denial of equal protection that *Hunter-Seattle* prohibits, irrespective of what that process might produce.

Other examples make clear the error in *Coalition for Economic Equity's* logic. Suppose, for instance, an example in which the voters of Michigan approved an amendment to the state constitution barring any public university from offering courses that focused on African-American history.[3] Under the Ninth Circuit's reasoning, such a law would not violate the *Hunter-Seattle* principle, because the courses prohibited would not themselves have protected any person from unequal treatment on the basis of race. Indeed, given the limited teaching resources at any university, offering specialized courses in African-American history might well be regarded as a form of "preferential treatment," because no university can afford to offer courses in every form of history desired by its student body. But it defies common sense to say

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the way") (quoting Charles Black, *Foreword, "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 82 (1967-68)).

[3] Such an amendment would be formally race-neutral in that it would not classify any person based on race: both black and white students would be denied the opportunity to study African-American history. Moreover, the voters might have a race-neutral justification for such a constitutional amendment, perhaps regarding courses in African-American history as distractions from the core educational mission of the universities. Therefore, ordinary equal protection principles would not obviously invalidate such a measure.

that such an amendment would not violate the *Hunter-Seattle* principle. Given that university officials would remain free to consider favorably every other student's claims for specialized courses, the exclusion of any power to give meaningful consideration to courses of special relevance to black students would obviously deprive those students of an equal chance to lobby for their curricular interests. Similarly, Proposal 2 deprives students with a particular interest in race-conscious admissions from lobbying – as every other student may do – for the inclusion of one of the most significant aspects of their application. Such a harm is particularly acute for many applicants of color for whom racial identity is the most essential component of how they view themselves and what they uniquely bring to a university seeking a diverse student enrollment.

If children of alumni, oboe players, track stars, and residents of the Upper Peninsula are all permitted to press their arguments to university administrators that their experience is educationally valuable, then racial minorities must be given the same chance to persuade university administrators that their racial experience is likewise educationally valuable. To hold otherwise on the ground that affirmative action is merely "preferential treatment" that does not remedy denials of equal protection is to mistake the point of *Hunter-Seattle*. The injury imposed by Proposal 2 is not that Proposal 2 bars affirmative action programs; the injury is that Proposal 2 bars university officials from giving equal – indeed, any – consideration to the interests of racial minorities, thereby depriving those minorities of a level playing field.

II. THE COURT'S DISTINCTION BETWEEN PRECLUDING "PREFERENTIAL TREATMENT" AND WITHHOLDING "EQUAL PROTECTION" IS INCONSISTENT WITH PRECEDENT.

This Court's distinction between barring "preferential treatment" and denying "equal protection" is also inconsistent with precedent. In particular, *Washington v. Seattle* struck down Initiative 350 even though that statewide initiative eliminated only an integrative busing program that was not constitutionally required to insure the equal protection of the laws. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. at 461-64; *see also Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2761 (2007) (noting that the Seattle school district was "never segregated by law"). Such voluntary busing programs, when restricted on the basis of an individual student's race, may constitute "preferential treatment" by allowing some students to attend particular schools to the exclusion of other students. *See Parents Involved in Community Schools*, 127 S.Ct. at 2768. As Professors Vikram Amar and Evan Caminker have noted, "[i]n a very meaningful sense, then, the busing at issue [in *Washington v. Seattle*] was affirmative action – and yet the Court applied Hunter to invalidate Initiative 350." Amar & Caminker, 23 Hastings Const. L.Q. at 1033.

The Ninth Circuit in *Coalition for Economic Equity* has not provided any coherent principle by which to distinguish voluntary busing programs that are restricted on the basis of an individual student's race from affirmative action programs that deny applicants seats at universities because of race. In either case, the program in question might be said to provide some students with "preferential treatment." The Ninth Circuit attempted to distinguish K-12 school integration programs from university affirmative action programs by arguing that, "[u]nlike racial preference programs, school desegregation programs are not inherently

invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights." *Coalition for Economic Equity*, 122 F.3d at 708 n.16. But the Supreme Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Parents Involved in Community Schools*, defeat these assertions. *Grutter* establishes that "racial preference programs" are not always "inherently invidious," *Grutter*, 539 U.S. at 334-45, and do not work "wholly to the benefit of certain members of one group" but instead may benefit the entire student body, *id.* at 328-32. And *Parents Involved in Community Schools* noted that K-12 school desegregation programs that prejudice individual students on the basis of their race can impose injury and thereby "deprive citizens of rights."[4] *See Parents Involved in Community Schools*, 127 S.Ct. at 2751.

Significantly, other than the Ninth Circuit in *Coalition for Economic Equity*, no other court has adopted this novel distinction. And *Washington v. Seattle*, 393 U.S at 469-70, -- which, unlike the *Coalition* case, is binding authority -- rejects this distinction. In short, there simply is no plausible way to distinguish Initiative 350 in *Washington v. Seattle* from Proposal 2

[4] The Ninth Circuit's opposite conclusion was supported only by a citation to *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.*,616 F.2d 1381, 1387 (9th Cir. 1980), a case that concerned neither university admissions nor student busing. In *Associated General Contractors*, the court stated only in dicta that busing remedies for *de jure* segregation were more defensible than the racial-quota system of public contracting then under consideration. Even if this is correct, *Associated General Contractors* was decided *before Washington v. Seattle*, which struck down a prohibition upon *voluntary* desegregative busing. The case therefore provides no basis for distinguishing between Proposal 2 and *Washington v. Seattle*'s Initiative 350.

in Michigan on the ground that the latter provides mere "preferential treatment" while the former provides "equal protection."

III. THE DISTINCTION BETWEEN BARRING "PREFERENTIAL TREATMENT" AND WITHHOLDING "EQUAL PROTECTION" IS JUDICIALLY UNMANAGEABLE.

Quite apart from its lack of foundation in any precedent, the distinction between barring "preferential treatment" and withholding "equal protection" is so subjective as to be judicially unmanageable. Whether a race-conscious policy bestows "preferential treatment" on its beneficiaries turns on whether those beneficiaries receive some preference that similarly situated persons do not receive. But determining which persons are similarly situated to the beneficiaries of the race-conscious policy is an ad hoc and politically controversial inquiry unguided by any clear legal standards.

Consider, for instance, university admission policies that take the race of an applicant into account, along with countless other non-racial factors. Such policies give "preferential" treatment to members of racial minorities only if one assumes that their racial experiences are less relevant to the educational process than all of the non-racial factors that the university admittedly considers – factors like one's county of residence, parental alumni status, athletic prowess, summer jobs and volunteer work, etc. If one's identity as a member of a racial group is just as educationally relevant as one's status as the child of an alumnus of a public university, then refusing to consider the former does not merely remove "preferential treatment" but instead imposes a special disability.

Grutter held that an applicant's racial identity can be educationally relevant and that a university can have a compelling interest in considering racial identity in admissions. If

this is so, then excluding all consideration of race across the board while permitting universities to consider a host of factors that bear only tangential relevance to the educational experience – for instance, parental alumni status – might reasonably be regarded as imposing a special disability rather than bestowing "preferential treatment." At the very least, defining the concept of "preferential treatment" will turn into a circular political quagmire, forcing courts across the country to take a stand on the relevance of race to the educational process without any judicially manageable standard to guide its discretion. Cantrell Plaintiffs urge this Court to reject any doctrine that requires subjectivity and provides no clear guidance to the courts or the citizenry.

The difficulties posed by the concept of "preferential treatment" are well-illustrated by the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). Amendment 2, the state constitutional amendment invalidated by the Court in *Romer*, had been defended by its proponents as an effort to curb "special rights" for gay and lesbian persons. These proponents argued that anti-discrimination laws protecting persons from private discrimination on the basis of sexual orientation in housing, employment, public accommodations, and other contexts bestowed "special rights" on their beneficiaries, because private actors are normally free to discriminate in their contractual relations, subject only to a few exceptions contained in existing anti-discrimination legislation. *Romer*, 517 U.S. at 626. The *Romer* Court rejected this characterization of Amendment 2 because the provision eliminated a wide swath of group-based protections from discrimination in both public and private contexts. *Id.* at 626-28. In the words of the *Romer* Court,

> "We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost

> limitless number of transactions and endeavors that constitute ordinary civic life in a free society."

Id. at 631.

The status of a right as a "special right" (or, congruently, as "preferential treatment"), in short, requires an assessment not only of the rights that "most people . . . already have" but also those protections that "most people" might "need." *Id.* The *Romer* Court could easily find that Amendment 2 did not block "special rights," because Amendment 2 imposed "a broad and undifferentiated disability on a single named group." *Id.* at 632. When a measure such as Proposal 2 imposes a more targeted disability on a group, depriving its members of the opportunity to persuade university administrators that their distinctive racial experience is educationally relevant, the assessment of whether the measure imposes a special burden or eliminates "preferential treatment" will be much more difficult.

Rather than embark on the quixotic attempt to define whether some right affords "special" or "preferential" treatment as opposed to "equal protection," Cantrell Plaintiffs urge this Court to adopt a much simpler test, consistent with settled equal protection precedent and the procedural character of the *Hunter-Seattle* doctrine. The Court should hold that, when a state constitutional amendment strips the state's ordinary political and administrative process of the power to address a narrow category of issues of special pertinence to a racial minority, then such an amendment falls squarely within the *Hunter-Seattle* principle.

Conclusion

For the foregoing reasons, the Cantrell Plaintiffs respectfully submit that this Court should amend its judgment.

April 1, 2008

Respectfully submitted,

s/ with consent of Mark D. Rosenbaum
MARK D. ROSENBAUM
CATHERINE E. LHAMON
ACLU Foundation of Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500
mrosenbaum@aclu-sc.org
clhamon@aclu-sc.org

s/ with consent of Laurence H. Tribe
LAURENCE H. TRIBE (Admission Pending)
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, Mass. 02138
617-495-4621
larry@tribelaw.com

s/ with consent of Melvin Butch Hollowell, Jr.
MELVIN BUTCH HOLLOWELL, JR.
(P37834)
General Counsel, Detroit Branch NAACP
Allen Brothers PLLC
400 Monroe St., Suite 220
Detroit, MI 48226
(313) 962-7777
mbh@allenbrotherspllc.com

/s Karin A. DeMasi
KARIN A. DEMASI
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
kdemasi@cravath.com

s/ with consent of Kary L. Moss
KARY L. MOSS (P49759)
MICHAEL J. STEINBERG (P43085)
MARK P. FANCHER (P56223)
American Civil Liberties Union Fund
of Michigan
60 W. Hancock Street
Detroit, MI 48201
(313) 578-6814
kmoss@aclumich.org
msteinberg@aclumich.org
mfancher@aclumich.org

s/ with consent of Victor Bolden
VICTOR BOLDEN
ANURIMA BHARGAVA
NAACP Legal Defense & Educational Fund
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200
abhargava@naacpldf.org

s/ with consent of Erwin Chemerinsky
ERWIN CHEMERINSKY
Duke University School of Law
Science Drive & Towerview Rd.
Durham, N.C. 27708
(919) 613-7173
Chemerinsky@law.duke.edu

s/ with consent of Daniel P. Tokaji
DANIEL P. TOKAJI (Admission Pending)
The Ohio State University
Moritz College of Law
55 W. 12th Ave.
Columbus, OH 43206
(614) 292-6566
tokaji.1@osu.edu

s/ with consent of Dennis Parker
DENNIS PARKER (Admission Pending)
ALEXIS AGATHOCLEOUS
(Admission Pending)
American Civil Liberties Union Foundation
Racial Justice Program
125 Broad St., 18th Floor
New York, NY 10004-2400
(212) 519-7832
dparker@aclu.org

s/ with consent of Jerome R. Watson
JEROME R. WATSON (P27082)
Michigan State Conference, NAACP
Miller, Canfield, Paddock and Stone, P.L.C.
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
Watson@millercanfield.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

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

On the 1st day of April, 2008, I filed the foregoing document electronically and it is available for viewing and downloading from the ECF system. Service was accomplished by means of Notice of Electronic Filing upon:

Sharon L. Browne
slb@pacificlegal.org,bas@pacificlegal.org

Erwin S. Chemerinsky
chemerinsky@law.duke.edu

Charles J. Cooper
ccooper@cooperkirk.com

Karin A. DeMasi
kdemasi@cravath.com,jrichman@cravath.com

Mark P. Fancher
mfancher@aclumich.org

Alan W. Foutz
awf@pacificlegal.org,IncomingLit@pacificlegal.org,bas@pacificlegal.org

Melvin J. Hollowell , Jr
mbh@allenbrotherspllc.com

Sheldon H. Klein
klein@butzel.com

James E. Long
longj@michigan.gov,ThelenN@michigan.gov

Robin Luce Herrmann
luce-herrmann@butzel.com , roudonis@butzel.com

Heather S. Meingast
meingasth@michigan.gov

Laurie J. Michelson
michelso@butzel.com,vancleve@butzel.com

Kerry L. Morgan
kmorganesq@aol.com

Kary L. Moss
kmoss@aclumich.org

Brian O. Neill
neillb@michigan.gov,pawlusc@michigan.gov

Margaret A. Nelson
nelsonma@michigan.gov,toddwl@michigan.gov,richardsd@michigan.gov

Leonard M. Niehoff
niehoff@butzel.com

Jesse M. Panuccio
jpanuccio@cooperkirk.com

Joseph E. Potchen
potchenj@michigan.gov,vanbeelenl@michigan.gov,robisonr@michigan.gov

Michael E. Rosman
rosman@cir-usa.org,kokolis@cir-usa.org

Brent E. Simmons
simmonbr@cooley.edu

Brigham C. Smith
Bsmith@ci.lansing.mi.us,spodlesk@ci.lansing.mi.us

Michael J. Steinberg
msteinberg@aclumich.org,bbove@aclumich.org

Reginald M. Turner , Jr
rturner@clarkhill.com

George B. Washington
scheff@ameritech.net

Jerome R. Watson
watson@millercanfield.com,leidner@millercanfield.com

William F. Young
wyoung@wsbyc.com

Dated at New York, New York, this 1st day of April, 2008.

s/ Karin A. DeMasi
Karin A. DeMasi