Nos. 08-1387 & 08-1389 & 08-1534 & 09-1111

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants (08-1387)/Cross-Appellees, *Plaintiffs (08-1389/09-1111)*,

CHASE CANTRELL, *et al.*,

Plaintiffs-Appellees (08-1389), *Plaintiffs-Appellants (09-1111)*,

– v. –

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, *et al.*,

Defendants-Appellees/Cross-Appellants (08-1534), *Defendants (08-1389/09-1111)*,

BILL SCHUETTE, Michigan Attorney General,

Intervenor-Defendant-Appellee (08-1387/09-1111),

ERIC RUSSELL,

Intervenor-Defendant-Appellant (08-1389),

JENNIFER GRATZ,

Proposed Intervenor-Appellant (08-1389).

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

SUPPLEMENTAL BRIEF OF CANTRELL PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 34(a), the Cantrell Plaintiffs-Appellants hereby respectfully request oral argument on the present appeal. This appeal raises important issues relating to the Cantrell Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Pursuant to the Court's September 28, 2011 scheduling order, argument for this case is tentatively scheduled for March 7, 2012.

CITATION FORMS

RE.	Record Entry Number from the District Court Docket No. 2:06-cv-15637-DML-SDP (E.D. Mich.)
Compl.	Cantrell Plaintiffs' First Amended Complaint, dated January 17, 2007, RE. 17
Pls.' SJ Mot.	Cantrell Plaintiffs' Motion for Summary Judgment, dated November 30, 2007, with attached exhibits, RE. 125
Pls.' Russ. Mot.	Cantrell Plaintiffs' Motion for Summary Judgment as to Defendant-Intervenor Eric Russell, dated October 5, 2007, with attached exhibits, RE. 102
Tr.	Transcript of Dispositive Motions Hearing, held on February 6, 2008, RE. 165
3/18/08 Order	Opinion and Order Granting in Part and Denying in Part University Defendants' Motion to Dismiss, Denying Cantrell Plaintiffs' Motion for Summary Judgment, Granting Attorney General's Motion for Summary Judgment, and Dismissing Cases, dated March 18, 2008, RE. 166
Pls.' Mot. Alt.	Cantrell Plaintiffs' Motion to Alter or Amend Judgment, dated April 1, 2008, RE. 173
12/11/08 Order	Opinion and Order Denying Cantrell Plaintiffs' Motion to Alter or Amend Judgment, dated December 11, 2008, RE. 178
Panel Op.	Opinion and Judgment Affirming in Part the District Court's Decision, Reversing the District Court's Grant of Summary Judgment for the Defendants-Appellees, and Ordering the District Court to Enter Summary Judgment

	in Favor of Plaintiffs-Appellants, dated July 1, 2011, RE. 200
Pet. Rehearing	Michigan Attorney General Bill Schuette's Petition for Rehearing En Banc, dated July 29, 2011
9/9/11 Order	Order Granting Rehearing En Banc, dated September 9, 2011, RE. 204

JURISDICTIONAL STATEMENT

The Cantrell Plaintiffs, a group of students, faculty, and prospective applicants to Michigan's public universities, adopt and incorporate herein by reference the Jurisdictional Statement contained in their brief filed May 18, 2009. This brief is timely under the Court's September 28, 2011 scheduling order.

STATEMENT OF ISSUE FOR REVIEW

Whether Michigan's Ballot Proposal 06-02 ("Proposal 2"), by barring Michigan's public universities ("Universities") from considering race as one factor among many in admissions decisions, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, according to principles established in Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982).

STATEMENT OF THE CASE

This appeal seeks to restore to every person in Michigan the constitutionally guaranteed right to full and fair political participation. In 2006, a majority of Michigan's voters passed Proposal 2, a constitutional amendment that, inter alia, imposed unique burdens on racial minorities and other persons seeking to lobby for the Universities' inclusion of race as one factor among many in holistic admissions programs. As the Supreme Court held in Grutter v. Bollinger, 539 U.S. 306, 333

(2003), Michigan has a compelling state interest in using race-conscious admissions to achieve the educational benefits of diversity.

To be clear, this appeal does not concern the constitutionality of race-conscious admissions. Such programs are not constitutionally required, although their implementation in Michigan's Universities was the result of hard-fought battles waged over decades through regular political channels. Nor does this appeal challenge the ability to repeal such programs through the ordinary political process. Such a repeal would be constitutionally permissible. See Crawford v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 539 (1982).

Proposal 2, however, is not a mere repeal. Proposal 2 singles out otherwise permissible considerations of race in admissions for uniquely burdensome treatment by placing control over such policies in the hands of the electorate while leaving other admissions practices in the hands of the Universities' elected or governor-appointed boards ("Boards"). Thus, in violation of the Hunter/Seattle doctrine, Proposal 2 creates a racially selective restructuring of the political decision-making process that "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; accord Seattle, 458 U.S. at 485. Proposal 2 effectively creates two political processes for admissions policies: one that preserves the Boards' traditional control over admissions for all factors other

than race, and another that for race alone requires a constitutional amendment.[1] By singling out race in admissions for "peculiar and disadvantageous treatment," Proposal 2 "plainly 'rests on 'distinctions based on race'" and is therefore a presumptively unconstitutional "racial classification." Seattle, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race" (internal quotation marks and citation omitted).)

In January 2007, the Cantrell Plaintiffs, a group of students, faculty, and prospective applicants to Michigan's public universities, filed an Amended Complaint seeking to prohibit Proposal 2's enforcement in University admissions on the grounds that it violates the Fourteenth Amendment by impermissibly restructuring Michigan's political process on the basis of race. (See Compl., RE. 17, ¶¶ 9-27, 57-58.) After discovery, the District Court denied the Cantrell Plaintiffs' motion for summary judgment and granted the Attorney General's

[1] Although Proposal 2 on its face purports to prohibit consideration of gender, ethnicity and national origin, this does not undermine Proposal 2's racial focus. Sarah Zearfoss, Assistant Dean and Director of Admissions for the University of Michigan Law School, testified that "the meat of [the school's admissions] policy is the same . . . with the exception of race." (Pls.' SJ Mot., RE. 125, Ex. E (Zearfoss Dep.) at 192.) Thus, Proposal 2 lacked any functional effect other than to eliminate and prevent reinstatement of race-conscious admissions policies. See also infra at 8.

motion for summary judgment. (3/18/08 Order, RE. 166, at 43-51, 55.) The District Court then denied the Cantrell Plaintiffs' motion to alter or amend its Order (see 12/11/08 Order, RE. 178; Pls.' Mot. Alt., RE. 173), leading to this appeal.

A three-judge panel of this Court reversed, 2-1. The Panel found Proposal 2 unconstitutional as applied to Michigan's public universities and ordered that summary judgment be entered in favor of the Plaintiffs-Appellants. (Panel Op. at 40.) This Court granted the Attorney General's petition for a rehearing en banc. (9/9/11 Order, RE. 204.)

STATEMENT OF FACTS[2]

Pursuant to Michigan's constitution, the Universities are controlled by independent Boards, each of which has the power of "general supervision of its institution and the control and direction of all expenditures from the institution's funds." Mich. Const. art. VIII, § 5. Board members have long enjoyed autonomy over admissions policies, and they have largely "delegated the responsibility to establish admissions standards, policies and procedures to units within the institutions, including central admissions offices, schools and colleges." (Pls.' Russ. Mot., RE. 102, Ex. I (Univ. Defs.' Resp.) No. 4.) Students, faculty, and

[2] The Panel and District Court opinions set out in more detail the undisputed facts underlying this litigation. (See 3/18/08 Order, RE. 166, at 3-7; Panel Op. at 4-8.)

other individuals have always been "free to lobby the Universities for or against the adoption of particular admissions policies."[3] (Id. No. 7; see also Panel Op. at 4.) By the 1990s, in response to decades of lobbying, admissions decisions in many of the Universities' graduate and undergraduate programs included consideration of race as one of many factors. (See Pls.' Russ. Mot., RE. 102, Ex. I (Univ. Defs.' Resp.) Nos. 8-9; 3/18/08 Order, RE. 166, at 3-4, 13.)

In 2003, the Supreme Court in Grutter upheld as constitutional the University of Michigan Law School's holistic, race-conscious admissions policy. 539 U.S. at 325, 334. On the same day, the Court invalidated the admissions policy of the University of Michigan's undergraduate college as too formulaic. See Gratz v. Bollinger, 539 U.S. 244, 275-76 (2003).

Following Grutter and Gratz, the Universities, as needed, amended admissions policies to comply with Grutter. (See 3/18/08 Order, RE. 166, at 13). After Grutter, for instance, the University of Michigan's undergraduate admissions officers, "[i]n the context of . . . individualized inquiry into the possible diversity contributions of all applicants," Grutter, 539 U.S. at 341, considered race along with another "50 to 80 different categories" such as personal interests and

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

achievements, geographic location, alumni connections, athletic skills, socioeconomic status, family educational background, "overcoming obstacles, work experience [and] any extraordinary awards, both inside the classroom and outside the classroom." (Pls.' SJ Mot., RE. 125, Ex. D (Spencer Dep.) at 35.)

Dissatisfied with the Universities' decision to consider race in their admissions processes, the successful plaintiff in Gratz led efforts to amend Michigan's constitution by a statewide referendum, Proposal 2. (See 3/18/08 Order, RE. 166, at 4; see also Panel Op. at 4.) While "Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes," Operation King's Dream v. Connerly, 501 F.3d 584, 591 (6th Cir. 2007), it remained on the ballot and passed as a state constitutional amendment. (3/18/08 Order, RE. 166, at 5; Mich. Const. art. I, § 26).

In December 2006, Proposal 2 took effect and wrought "two significant changes" to the admissions policies at the Universities. (Panel Op. at 5.) First, the Universities removed race as a potential factor in the admissions process, even though the Boards and their designated admissions committees could continue to consider all other factors. (See 3/18/08 Order, RE. 166, at 14.) Second, Proposal 2 "entrenched this prohibition at the state constitutional level, thus preventing the public colleges and universities or their boards from revisiting this issue without repeal or modification of Proposal 2." (Panel Op. at 5.)

In contrast to the informal and low-cost method of lobbying the Boards or the admissions committees to change admissions policies, the process of amending Michigan's Constitution is "lengthy, complex, difficult and expensive." ((Pls.' SJ Mot., RE. 125, Ex. C (Wilfore Decl.) at ¶10.) According to an expert in ballot initiative campaigns, such a campaign may last up to three years and can cost as much as $153 million.[4] (Id. ¶¶ 11, 25.)

SUMMARY OF ARGUMENT

The political restructuring doctrine is a bedrock tenet of Fourteenth Amendment jurisprudence, originally set forth by the Supreme Court in Hunter, 393 U.S. 385 (1969), and Seattle, 458 U.S. 457 (1982). "These cases yield a simple but central principle": a state may not "allocate[] governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decision-making process." Seattle, 458 U.S. at 469-70. In both Hunter and Seattle, the Court invalidated laws that (1) had a "racial focus" in that they banned policies that "inure[d] primarily to the benefit" of racial minorities, and (2) reordered the existing political process to require persons championing those policies to "surmount a considerably higher hurdle than [those] seeking

[4] Further, the initial stages "can take anywhere from six months to two years of advance work," and successful proponents "may be forced to spend additional funds to defend the measure from legal challenges after it has already been approved." (Id. ¶¶ 15, 23). In Michigan, an initiative's early signature-gathering and public-relations phases alone can cost between $5 million and $15 million. (Id. ¶¶ 30-31; see also Panel Op. at 26-28.)

comparable legislative action." Id. at 470-74; see also Hunter, 393 U.S. at 390-91. If governmental action satisfies both prongs of this Hunter/Seattle test, it triggers strict scrutiny because it operates as a racial classification and thus "falls into an inherently suspect category." Seattle, 458 U.S. at 485.

Here, as the District Court and the Panel found—and neither the Attorney General nor the Panel dissent disputed—"there can be no question that Proposal 2 has a racial focus." (3/18/08 Order, RE. 166, at 47; Panel Op. at 15-17.) Proposal 2 lacked any functional effect other than to eliminate and prevent reinstatement of race-conscious admissions policies, which "inure primarily to the benefit of racial minorities." (Panel Op. at 17; see 3/18/08 Order, RE. 166, at 47.)[5] Not surprisingly, after Proposal 2 took effect, enrollment of underrepresented minorities in the University of Michigan's undergraduate class dropped dramatically.[6]

[5] Proposal 2 was "characterized by the Michigan Attorney General at oral argument in this case as an anti-affirmative action measure," (3/18/08 Order, RE. 166, at 4; see also Tr., RE. 165, at 15-16) and the Attorney General admits that Proposal 2 began "[i]n response" to Grutter and the upholding of "the University of Michigan Law School's race-based admissions preferences." (Pet. Rehearing at 3.) The ballot argument drafted by the proponents of Proposal 2 flatly stated that race-conscious affirmative action "practices are WRONG and it is time that we got rid of them," (Pls.' SJ. Mot., RE. 125, Ex. P (2006 Voter Guide) at 30).

[6] See, e.g., University of Michigan Office of the Registrar, Ethnicity Reports, available at http://www.ro.umich.edu/enrollment/ethnicity.php?limit=none#r836U (last visited October 25, 2011).

The second prong of the Hunter/Seattle test is also satisfied here. As the Panel and the District Court both concluded, Proposal 2 reordered the political process to require persons championing race-conscious admissions policies to "surmount a considerably higher hurdle than [those] seeking comparable legislative action." Seattle, 458 U.S. at 470-74; 3/18/08 Order, RE. 166, at 49; Panel Op. at 26 ("We face here an enactment even more troubling than those at issue in Hunter and Seattle, as the hurdle Proposal 2 creates is of the highest possible order."). Contrary to the Panel dissent's reasoning, the Boards' admissions policies result from decision-making processes that are fundamentally political in nature within the meaning of the Hunter/Seattle doctrine. The Michigan constitution vests decision-making authority over all University policies in their elected or governor-appointed Boards; even when those Boards delegate this authority to admissions committees, they remain free under Michigan's constitution to revoke those powers as they see fit.

The Cantrell Plaintiffs and the Panel disagree with the District Court on a single point of law. Although the District Court properly concluded that Proposal 2 satisfied both prongs of the Hunter/Seattle test, it incorrectly held that the political restructuring doctrine applies only to laws that impede minorities' efforts to obtain "equal protection," not to laws such as Proposal 2 that expressly preclude "preferential treatment." 3/18/08 Order, RE. 166, at 49-50 (quoting Coal. for

Econ. Equity v. Wilson, 122 F.3d 692, 708 (9th Cir. 1997)). Neither Hunter nor Seattle supports this purported distinction. In the words of Justice Kennedy in Parents Involved, legislation like Proposal 2 inserts into the political process a racial classification system that "benefits and burdens" advocates based on whether or not they seek policies that would inure to the benefit of people of color. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring in part).

STANDARD OF REVIEW

This appeal is subject to "de novo" review. (Panel Op. at 8.)

ARGUMENT

The Hunter/Seattle political restructuring doctrine is a well-settled application of the core Fourteenth Amendment principle that "[t]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." Hunter, 393 U.S. at 393. As the Panel correctly reasoned:

> Hunter and Seattle clarify that equal protection of the laws is more than a guarantee of equal treatment under the law substantively. It is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities. In effect, the political process theory hews to the unremarkable belief that, when two competitors are running a race, one may not require the other to run twice as far, or to scale obstacles not present in the first runner's course.

(Panel Op. at 9.)

In Hunter, an amendment to the city charter of Akron, Ohio overturned a fair housing ordinance enacted by the City Council and required all future ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry" to be approved by referendum, whereas other ordinances were subject to referenda only in limited circumstances. Hunter, 393 U.S. at 387, 390. Although the Supreme Court recognized that "the law, on its face, treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority" because the amendment "places special burdens on racial minorities within the governmental process." Id. at 391. "In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality." Crawford, 458 U.S. at 537 n.14 (explaining Hunter).

Seattle, "a case identical in many respects to the one we confront here" (Panel Op. at 11), involved a challenge to Initiative 350, a Washington state ballot measure that prohibited any school board from "'directly or indirectly requir[ing] any student to attend a school other than'" one in the student's neighborhood. 458 U.S. at 462. The amendment's many exceptions, however, effectively allowed for busing for any reason other than to promote racial integration, thus precluding a student assignment plan recently adopted by the Seattle school board. After the

initiative's passage, proponents of such integrative plans had to seek relief from the statewide electorate or the legislature, a hurdle that proponents of all other educational policies were spared. Id. at 464. The Supreme Court reasoned that "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes," because it targeted a policy that "inures primarily to the benefit of the minority" student community. Id. at 471-72 (internal quotation marks omitted). Since Initiative 350 "remove[d] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body in such a way as to burden minority interests," the amendment presumptively violated the Equal Protection Clause. Id. at 474.

"Of course," as the Panel recognized, "the Constitution does not protect minorities from political defeat." (Panel Op. at 10.) But Hunter and Seattle "provide the benchmark for when the majority has not only won, but also rigged the game to reproduce its success indefinitely." (Id.) Like the laws struck down by the Supreme Court in Hunter and Seattle, Proposal 2 unconstitutionally rigs the political process because it "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." Seattle, 458 U.S. at 470.

A. PROPOSAL 2 REORDERS A POLITICAL PROCESS BY LODGING DECISION-MAKING AUTHORITY OVER THE QUESTION OF RACE-CONSCIOUS ADMISSIONS AT A NEW AND REMOTE LEVEL OF GOVERNMENT.

The Panel correctly concluded that "Proposal 2 reorders the political process in Michigan to place special burdens on minority interests" (Panel Op. at 28) because it forces racial minorities and their allies to run the "gauntlet" of a ballot initiative campaign, which is far more onerous than the avenues of change open to those advocating consideration of other admissions factors. (3/18/08 Order, RE. 166, at 49 ("There is no question . . . that Proposal 2 makes it more difficult for minorities to obtain official action that is in their interest.").)[7]

Notwithstanding the Panel dissent's reasoning to the contrary, the Universities' admissions decision-making is indisputably "political," as that term is used in the Hunter/Seattle test. As the Panel held, "a process is 'political'" within the meaning of Hunter/Seattle "if it involves governmental decisionmaking."

[7] This special burden is unaffected by the fact that Proposal 2 applies to multiple minority groups plus women. "The attempt to cobble together an artificial coalition" of minorities and women ignores political and social realities. (Panel Op. at 33-34 ("[I]t is a considerable oversimplification—and simply inaccurate—to conflate a simple numerical majority comprised of members of different minority groups with a political majority . . . ."); 3/18/08 Order, RE. 166, at 48 (noting that this argument "borders on nonsense").) Indeed, the Supreme Court invalidated the legislation in Hunter even though it "likewise burdened non-racial minorities, including Catholics, Hispanics and numerous other groups (which, grouped together, would constitute a majority of the electorate)." (Panel Op. at 16-17.) Here, as in Hunter, "the reality is that the law's impact falls on the minority." 393 U.S. at 391.

(Panel Op. at 19.) Throughout Seattle, the Court described public school boards' effort to restructure student-assignment systems as a "decisionmaking process" and a "governmental process." Seattle, 458 U.S. at 470. The Court further explained that the school boards were "political" because they were "creatures of the State" and had to "give effect to policies announced by the state legislature." Id. at 476. In other words, the boards were political because they were governmental entities, even though not necessarily electoral or partisan ones. (Panel Op. at 18 (quoting Seattle, 458 U.S. at 476).) Here, each University's Board wields plenary political power, granted by the state constitution, to govern its respective institution. Mich. Const. art. VIII, §§ 5-6; see also id. art. VIII, § 6 (allowing establishment of other similarly structured institutions of higher learning). Michigan law has repeatedly confirmed this absolute authority. (See Panel Op. at 21 (collecting cases).)

At the state's three flagship universities (the University of Michigan, Michigan State University, and Wayne State University), the Boards are directly elected by the statewide citizenry; the Boards of other Universities are appointed by the governor with consent of the state senate. Mich. Const. art. VIII, §§ 5, 6. Each Board enacts regulations that control the University government, typically at public meetings. Mich. Const. art. VIII, § 5; see also id. art. VIII, § 6; Mich.

Comp. Laws §§ 390.2-.6 (University of Michigan).[8] Importantly, admissions procedures are laid out in University bylaws, over which the Boards have complete authority. See Univ. of Mich., Bylaws of the Bd. of Regents § 8.01, available at http://www.regents.umich.edu/bylaws (last visited October 25, 2011). Nothing prevents the Boards from altering the framework for admissions decisions if they want. See id.; Mich. Const. art. VIII, § 5; Mich. Comp. Laws §§ 390.3-.6; see also Mich. United Conservation Clubs v. Bd. of Trs. of Mich. State Univ., 431 N.W.2d 217, 219 (Mich. Ct. App. 1988) (per curiam) (noting that Michigan State University's board of trustees "is an independent authority possessing power coordinate with and equivalent to the Legislature within the scope of its function"). As in Seattle, Proposal 2 "worked a major reordering of the State's educational decisionmaking process" by selectively transferring authority about race in admissions from the Boards to the statewide electorate. 458 U.S. at 479-80 ("Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion.").

[8] The statutes and bylaws cited in this paragraph govern the University of Michigan, but the other Boards are similarly empowered. See, e.g., Mich. Comp. Laws §§ 390.102-.107 (Michigan State University), 390.641-.645 (Wayne State University).

The Boards' delegation of some of their power over admissions standards does not change the nature of that power, despite the Panel dissent's claims to the contrary.[9] (See Panel Op. at 22-24.). Nor does the delegation of power from an elected body to an unelected body make that power, when ultimately exercised, non-political.[10] This argument is defeated by Lee v. Nyquist, where the Supreme Court summarily affirmed the three-judge panel's conclusion that a New York statute unconstitutionally reordered the political process by "prohibit[ing] state education officials and appointed school boards" from performing various education-related functions "for the purpose of achieving racial equality in attendance." 318 F. Supp. 710, 712 (W.D.N.Y. 1970), summarily aff'd 402 U.S. 935 (1971) (emphasis added). The fact that some boards were appointed rather than elected did not affect the outcome in Nyquist; nor should it here. See id., at 712 n.1. As the Panel noted, "[n]o matter how many times this power is delegated,

[9] Former-Dean Wu's opinion about the possibility of a "constitutional crisis" caused by alteration of the admissions structure (See Pls.' SJ Mot., RE. 125, Ex. F (Wu Dep.) at 191-92) was "inadmissible as both speculation and a legal conclusion (notably, with no basis in Michigan law)." (Panel Op. at 22 (citing Torres v. Cnty. of Oakland, 758 F.2d 147, 149-51 (6th Cir. 1985)).) Moreover, Wu's testimony "does not support the dissent's claim of 'full' delegation or the idea that the boards could not theoretically change the policies; it merely describes the current admissions structures." (Panel Op. at 22.)

[10] Delegation of political power is common throughout government. See, e.g., Mistretta v. United States, 488 U.S. 361, 393 (1989) (referring to the United States Sentencing Commission, operating under delegated authority, as performing work of a "significantly political nature").

or to whom, an elected official is ultimately responsible for it." (Panel Op. at 24 n.6.)[11]

Seattle itself presupposed that delegated political power remained political, and thus subject to Hunter's equal protection safeguards: "[T]hat a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment." Seattle, 458 U.S. at 476 (quoting Hunter, 393 U.S. at 392) (first alteration added). Michigan, like "Washington[,] . . . has chosen to make use of a more complex governmental structure" than direct administration by the legislature, or even the University Boards, of admissions decisions in university and college affairs, see id. at 476-77, but that decision-making is no less political as a result.

The admissions committees are thus "political" because: (1) they exercise governmental decision-making powers by delegation, and (2) they are appointed by the Boards (or their delegates), which are free to reassign their powers as they see fit. Proposal 2 thus clearly affects a political process under Hunter and Seattle.

B. THE DISTINCTION BETWEEN ACTIONS THAT PRECLUDE "EQUAL PROTECTION" AND THOSE THAT PRECLUDE "PREFERENTIAL TREATMENT" IS UNJUSTIFIED.

Hunter and Seattle permit no distinction "between laws that protect against unequal treatment on the basis of race and those that seek advantageous treatment

[11] Thus, "even using the [Panel] dissent's erroneous definition of 'political' as 'electoral,'" the admissions decisions here "still qualify as political." (Id. at 20.)

on the basis of race," (3/18/08 Order, RE. 166, at 49; Panel Op. at 56-58 (Gibbons, J., dissenting)). The District Court's and Panel dissent's contrary view is incompatible with those cases themselves, which constitutionally protect a fair political process, as opposed to any particular political outcome.

When a law specifically excludes from the ordinary political process issues of special pertinence to racial minorities, that law wears its procedural flaws on its face and thus operates as an impermissible racial classification. See Seattle, 458 U.S. at 485 ("[L]egislation of the kind challenged in Hunter . . . falls into an inherently suspect category.").[12] Thus, the Hunter/Seattle doctrine is entirely consistent with a long line of cases holding that strict scrutiny is triggered when government action "'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" Seattle, 458 U.S. at 485-86 (quoting United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938));[13] see also

[12] For this reason, Seattle held that laws that restructure the political process to the detriment of racial minorities—like any other racial classification—do not require "a particularized inquiry into motivation." (See Panel Op. at 35 (quoting Seattle, 458 U.S. at 485); 3/18/08 Order, RE. 166, at 48.)

[13] The process-based nature of the Hunter/Seattle principle is universally recognized by scholars. E.g., 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"); 3 John E. Nowak & Ronald D. Rotunda, Treatise on Constitutional Law 473 (4th ed. 2008) ("A state may not place 'in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (holding that "[d]epartures from the normal procedural sequence also might afford evidence" of an Equal Protection violation); cf. Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009) (requiring heightened justification under Title VII for a public employer's racially selective restructuring of its promotion process). The Fourteenth Amendment thus prohibits not only the direct disenfranchisement of minorities, but also the exclusion from the usual political process of issues particularly important to those minorities.

The District Court's insistence that the Hunter/Seattle doctrine applies only to laws that impede efforts to obtain "equal protection" from discrimination erroneously imposes an outcome-based limitation on a process-based right. In so holding, the District Court relied on the fact that "the Supreme Court has never held that affirmative action is required." (12/11/08 Order, RE. 178, at 6; see also Panel Op. at 58 n.7 (Gibbons, J., dissenting) (quoting 3/18/08 Order, RE. 166, at 50, to distinguish between race-based programs that are and are not constitutionally mandated to cure past discrimination).) The Cantrell Plaintiffs agree that eliminating race-based admissions policies does not on its own raise a constitutional problem. See Crawford, 458 U.S. at 539. To be sure, the Boards, or

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comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.'" (quoting Charles Black, Foreword, "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 82 (1967-68))).

those to whom they delegated decision-making authority, could have chosen to modify or repeal their race-conscious admissions programs without facing a constitutional challenge; if they had done so prior to Proposal 2's enactment, the disaffected groups would simply have redoubled their efforts to lobby the Boards and University officials for the policies' return. "That, after all, is how race-conscious admissions programs developed in the first place." (3/18/08 Order, RE. 166, at 49.)

Yet Proposal 2 does not merely eliminate race-conscious admissions. When it comes to lobbying university officials to consider their unique interests and perspectives, Proposal 2 gerrymanders the political process, relegating minority interests to a separate playing field. Before Proposal 2, the Boards were empowered to make (or delegate) all admissions decisions; after Proposal 2, the Boards were empowered by Michigan's constitution to make (or delegate) admissions decisions except those regarding whether and how to consider race as part of a Grutter-style holistic analysis. Such a deprivation, on race-based grounds, of the opportunity to participate in this normal political process is itself a denial of equal treatment in violation of the Fourteenth Amendment, regardless of what outcome the process might produce.[14]

[14] Of course, not all laws restructuring political institutions or allocating political power are "subject to equal protection attack." Seattle, 458 U.S. at 470 (quoting Hunter, 393 U.S. at 394). A state may place obstacles, such as an

Seattle's facts show that the Hunter/Seattle doctrine does not (as the District Court erroneously concluded) apply only to laws that prohibit enactment of anti-discrimination guarantees that are "constitutionally mandated." The doctrine also prohibits rigging the political process to make it more difficult for minorities to obtain favorable legislation that is merely "constitutionally permissible." (See Panel Op. at 29-30.) The Court struck down a statewide initiative that banned an inter-district busing program aimed at integrating Seattle's elementary and secondary schools, even though the busing program was not constitutionally mandated to remedy de jure discrimination. See 458 U.S. at 461-64; see also Parents Involved, 551 U.S. at 720 (noting that the Seattle School District was never "segregated by law" nor "subject to court-ordered desegregation").

Seattle itself thus rebuts the District Court's conclusion that, for purposes of the Hunter/Seattle doctrine, "affirmative action programs not mandated by the obligation to cure past discrimination are fundamentally different than laws

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executive veto or a referendum requirement, in the path of everyone seeking beneficial governmental action; equal protection concerns arise only "when the state allocates government power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process." Id. at 470-71 ("[T]here is little doubt that the initiative was effectively drawn for racial purposes."). Moreover, a political restructuring must deal in "explicitly racial terms with legislation designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger group of underprivileged citizens among whom minorities [may be] disproportionately represented." Id. at 485; James v. Valtierra, 402 U.S. 137, 141 (1971).

intended to protect against discrimination." (3/18/08 Order, RE. 166, at 50 (cited by Panel Op. at 58 n.7 (Gibbons, J., dissenting)).) As the Panel noted, a "political process theory" that protected "constitutionally mandated" racially-focused laws but not "constitutionally permissible" laws would be "superfluous." (Panel Op. at 29-30.)

The District Court's distinction between Proposal 2 and Initiative 350 relied on a Ninth Circuit opinion that upheld a California ballot initiative, similar to Proposal 2, and manufactured an exception to the Hunter/Seattle doctrine for race-conscious admissions policies. For the Ninth Circuit, the critical distinction was that Seattle's desegregation programs, unlike race-conscious admissions policies, "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." Coal. for Econ. Equity, 122 F.3d at 708 n.16. But Grutter established that race-conscious policies in admissions are not always inherently invidious, 539 U.S. at 334-45, and do not work wholly to the benefit of certain members of one group, id. at 328-32, but instead may benefit the entire student body and the community at large. And Parents Involved held that some desegregation programs do impose injury and thereby deprive citizens of

rights. See 551 U.S. at 719.[15] The unavoidable conclusion, confirmed by Parents Involved, is that consideration of individual students' race in Seattle's voluntary busing program was more than just equal protection from discrimination. Thus, the inaccuracy of the Ninth Circuit's distinction may not have been entirely apparent when Coalition for Economic Equity was decided in 1997, but Parents Involved and Grutter have subsequently revealed the Ninth Circuit's error. The distinction invoked by the District Court to uphold Proposal 2 is therefore factually and doctrinally unsound, and usurps the principle's essential purpose of preserving racial minorities' equal access to the political process.

Moreover, in the context of university admissions, the District Court's distinction created a false dichotomy between "equal" and "preferential" treatment. Allowing an admissions committee to consider an applicant's unique racial experience may functionally be a "preference," but so then is allowing athletes, musicians, or residents of Michigan's Upper Peninsula to make the case that their identities have the "potential to enhance student body diversity." Grutter, 539 U.S.

[15] The Ninth Circuit's only legal support was dictum that busing remedies for de jure segregation were more defensible than the racial-quota system for public contracting under consideration. Associated Gen. Contractors of Calif. v. San Francisco Unified Sch. Dist., 616 F.2d 1381, 1387 (9th Cir. 1980). Even assuming this to be true, Associated General Contractors was decided before Seattle and concerned neither university admissions nor student busing. Associated General Contractors therefore provides no basis for distinguishing between Proposal 2 and Seattle's Initiative 350.

at 341. As the Supreme Court has noted, "[j]ust 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." Id. at 333. Of the 50 to 80 different categories of potentially subjective "preferences" evaluated by admissions officials, (Pls.' SJ Mot., RE. 125, Ex. D (Spencer Dep.) at 35), Proposal 2 relocates decision-making over racial factors alone at the level of a state constitutional amendment, leaving consideration of all other "preferences" untouched.

Rejecting the argument in Romer that a state constitutional amendment banning measures protecting gays and lesbians was permissible because the amendment denied merely "special rights," the Supreme Court stated: "We find nothing special in the protections [the amendment] withholds. These are protections taken for granted by most people either because they already have them or do not need them . . . ." Romer v. Evans, 517 U.S. 620, 631 (1996). The same may be said of a student's ability to advocate for the consideration of his or her most pertinent characteristics—including race—in a school application.

Indeed, in the context of policies that ensure access to educational opportunity, "we must apply the 'political process' protection with the utmost rigor given the high stakes." (Panel Op. at 10.) As the Supreme Court has held, "[t]he

nature's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." Grutter, 539 U.S. at 324 (internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, Cantrell Plaintiffs request that this Court reverse the District Court's grant of summary judgment and invalidate Proposal 2 as applied to consideration of race in admissions to Michigan's public universities.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 25, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

Dated at New York, New York, on October 25, 2011.

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