Nos. 08-1387/1534

*In the*

# *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 Cross-Appellees,*

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,
*Defendants-Appellees Cross-Appellants,*

and

BILL SCHEUTTE, Michigan Attorney General,
*Intervening Defendat-Appellee*.

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

## COALITION PLAINTIFFS' SUPPLEMENTAL BRIEF ON EN BANC REVIEW

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**ORAL ARGUMENT REQUESTED**

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[1] The plaintiffs rely on the jurisdictional statement, the statement of the case and the summary of argument presented in their First Brief in this Court.

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Coalition plaintiffs assert that oral argument in this case because the case raises fundamental issues regarding the Equal Protection Clause and regarding the democratic rights and educational opportunities of the minority citizens of Michigan and of the country. Pursuant to this Court's order, oral argument is tentatively scheduled for March 7, 2011.

## ISSUES PRESENTED

1. Does Article 1, Section 26 of the Michigan Constitution ("Proposal 2") violate the Equal Protection Clause by depriving Michigan's minority residents alone of the ability to win, by simple majority vote of the governing bodies of the state's public universities, the adoption of the only admission programs that will make it possible for a significant number of their children to be admitted to those universities?
2. Does Article 1, Section 26 of the Michigan Constitution ("Proposal 2") violate the Equal Protection Clause by regulating and limiting the admission of minority applicants alone through a standard that is in reality only applicable and enforceable against those programs that benefit minority applicants?

## INTRODUCTION

The plaintiffs' challenge to Michigan's Proposal 2 is of decisive importance for the future of civil rights in the nation. The Bureau of the Census tells us that we will be a "majority-minority" nation by mid-century at the latest. In fact, already today, half of all high-school graduates in California and half of the children born in the United States as a whole are Latino, black or Asian.[1]

But at the same time as the black and especially the Latino population is dramatically increasing, Proposal 2 has caused a one-third or more drop in the

[1] William H. Frey, "America Reaches its Demographic Tippling Point," the Brookings Institute, Oct. 11, 2011; available at www.brookings.edu/opinions/2011/0826_census _race_frey.aspx (last visited 10/24/2011)

percentage of minority students in the entering classes at the undergraduate and key graduate schools at the University of Michigan.[2] For 14 years, Proposition 209 has had a similarly devastating effect. R. 206, Report of Dr. J. Oakes, at 5-6.

Recognizing our past *and* our future, *Grutter* held that assuring that "the path to leadership [was] visibly open to qualified individuals of every race and ethnicity" was of paramount importance to the nation. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). It held that in selective universities the consideration of race—and the resulting departure from the exclusive use of grade-test score criteria with undeniably disparate effect—was the only way to achieve that objective. *Id*.

Three days after *Grutter* was decided, Ward Connerly launched his campaign to amend Michigan's Constitution in order to overrule that decision by preventing any public body from ever again considering such a plan. Three years later, Connerly's proposal—which came to be known as "Proposal 2"—was adopted by the electorate and became part of Michigan's Constitution. MI Const 1963, art 1, sec 26 (hereafter referred to as "Proposal 2").

The plaintiff black and Latino students and civil rights organizations assert that Proposal 2 denies racial minorities equal political rights *and* subjects them to a special law restricting minority admissions alone. We focus on the denial of political equality because the constitutional violation is so extraordinarily clear.

[2] Off. of the Registrar, Univ. of Mich., Tables 843 and 844 at http://ro.umich.edu (last visited Oct. 24, 2011).

Twice, the Supreme Court has directly held that a state may not deprive racial minorities of political rights equal to those available to all other citizens when minorities seek the adoption of lawful proposals to lessen *de facto* racial exclusion and inequality. *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v Seattle School District No. 1*, 458 U.S. 457 (1977). In each case, the Court held that exceptions from that principle could be justified, if at all, only by demonstrating a compelling justification for that exception. *Hunter*, 393 US at 395 (Harlan, J., concurring); *Seattle*, 458 U.S. at 485.

As will be seen, the Attorney General attempts to avoid *Hunter* and *Seattle* by a sleight-of-hand. No factual justification is needed for denying equal political rights, the AG claims, if racial minorities fight for what he believes to be "preferences." There is neither legal nor factual support for this claim.

The Justices who decided *Hunter* and *Seattle* were intimately familiar with racially explicit remedies, strict scrutiny, and the charge of "preferences." But there is not a single *word* in the majority opinions or the dissents in *Hunter* and *Seattle* that supports the AG's assertion. Nor is there any support in *Grutter*. In fact, given that *Grutter held* that the state had a compelling interest in *departing* from the grade-test score criteria, there is no legal basis for finding a compelling interest in *preventing departures* from those same standards.

Nor is there a factual basis for the AG's claim. The AG asserts that the state has a compelling interest in assuring that admissions are by "merit" and asserts that the existing grade-test score criteria are the immutable standard by which merit can be measured. But he offers no proof of that. He *assumes* it to be true—and asks this Court to make the same *assumption*.

As will be seen, the evidence is directly to the contrary. The adjusted grade point average and standardized test score components of this system impose an enormously disparate burden on minority applicants—and confer a converse advantage on white applicants. Moreover, among students who are qualified for admission, the criteria only poorly predict first-year grades—and nothing else.

Tragically, however, the absence of a legal or factual basis for a state law depriving minority citizens of their rights has not always sufficed to defeat such a law. As Justice Marshall once observed, our courts have at crucial times accepted the most "ingenious rationales" for protecting inequality. The Supreme Court itself, he said, had once accepted rationales that robbed the Fourteenth Amendment of all meaning, including the claim that the grand promises of the Equal Protection Clause had not been breached when Louisiana followed its "local customs" by enacting *de jure* segregation. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 387-393 (1978)(Marshall, J., dissenting).

The AG's rationales—which he derives from Connerly—are the same wine in a new bottle. They loudly repeat the promises of ending racial discrimination, but in fact they exclude black, Latino and Native American students from the universities. And they then assert that minorities should be denied any political means for winning departures from the grade-test score criteria because admissions should be governed by the "customary" standards of grades and test scores.

The plaintiffs ask this Court to strike down Proposal 2 because it will profoundly limit their rights and their opportunities. But much more is at stake. Slavery and *de jure* segregation only survived because the states deprived racial minorities of all political means to challenge inequality. In both cases, these actions crippled and disfigured the country and were finally overcome only by great convulsions. We should not again inflict such damage on the country or on the young people of all races who will soon inherit that country.

## STATEMENT OF FACTS

1. Before the passage of Proposal 2, the elected governing boards of Michigan's public universities had always adopted admissions standards, including affirmative action programs, by democratic procedures open to all citizens.

Beginning in 1863, Michigan conferred complete power over admissions on the elected Regents of the University of Michigan. Const. 1850, art 13, ss. 6-8. The elected governing boards of Michigan State and Wayne State succeeded to the same powers when they achieved constitutional status. Const 1963, art 8, sec 5.

In exercising those powers, the Regents and the other governing boards have made decisions of far-reaching political importance. Early on, Michigan's Regents decided to admit students of all races and both genders, to abandon the use of Greek and Latin as admission criteria, and to offer admission offered to *any* graduate of an approved public high school. In 1961, when the sons and daughters of the middle and working classes first entered college in large numbers, the university adopted for the first time and on an experimental basis standardized tests as a requirement for in-state applicants. R. 222-25, at 2. From the start, however, the Regents provided exceptions from the grade-test score standards in order to assure the admission of poorer students, rural students, veterans and many others. R. 203-6, Dep. of Spencer, at 34-35.

In the 1960s, the emerging Civil Rights Movement protested that even with those exceptions, the new grade-test score system excluded almost all black and other minority applicants. Black students in particular pointed to the Law School which graduated 3,032 white law students—and eight black law students—during the entire decade of the 1960s. R. 222-19; UM Law School Graduates. They pointed as well to the University's famous College of Literature, Science and the Arts, where black students were only 3.5 percent of the total enrollment as late as 1970. R. 222-16, Report of Dr. J. Anderson, at 18.

In 1970, the student Black Action Movement (BAM) led a campaign of political action, including a three-week strike, demanding change by the Regents. After intense negotiations, the Regents passed a resolution agreeing to consider race in order to reach a "goal" of 10 percent black students by 1973. R. 222-22, Regents' Minutes. The new policy ended *de facto* segregation, with black students increasing to 8 to 9 percent and Latino students moving to 4.7 percent.

2. The supporters of Proposal 2 mobilized a white majority to win adoption of an amendment whose purpose was to limit the university's ability to admit minority students.

Proposal 2, which is an exact copy of California's Proposition 209, prohibits the universities from "discriminating against, or granting preferential treatment to" any applicant because of race or national origin. But such discrimination had long been banned by the state constitution. The sole operative content was the ban on "preferential treatment." Const 1963, art 1, sec 26(1); Calif. Const. art 1, sec. 31

In his book, Connerly made clear that Proposition 209's ban on "preferential treatment" prohibited all consideration of race and all systems that admitted minority students with lower averages of adjusted grade points and test scores than the average grades and scores of rejected white applicants. Ward Connerly, Creating Equal, 121-124, 134, Encounter Books (2000). In *Grutter*, the white plaintiff asserted that these same actions constituted an unlawful "preference"

under the Fourteenth Amendment. *Grutter*, 539 U.S. at 320. Connerly proposed to overrule *Grutter* by putting Ms. Grutter's assertions into the state constitution.

The AG claims that this Court should approve of Proposal 2 because Michigan voters adopted it in a referendum. But, of course, a state electorate cannot override the democratic mandate of the Fourteenth Amendment. Moreover, in this case, the decision to override *Grutter* was in reality a white majority voting to deny a black and Latino minority political rights and educational opportunities.

This Court has already found that the supporters of Proposal 2 obtained the signatures needed to put it on the ballot by deceiving large numbers of minority voters. *Operation King's Dream v. Connerly*, 501 F. 3d 584, 591 (6h Cir. 2007). It passed by a 58 to 42 percent margin. A statistical study of the 2006 elections as a whole conducted for the major television networks demonstrated that it passed only because the two-to-one Yes votes among white voters overwhelmed the nine-to-one vote against Proposal 2 by the state's black minority. R. 222-2, Dep. of Linski, Ex. 3. The raw vote totals are even more revealing: Detroit, where almost 90 percent of voters are black or Latino, rejected Proposal 2 by a vote of 206,529 to 14,863. http://miboecfr.nictuse.com/cgi-bin/cfr/ precinct_srch_res.cgi. By any fair analysis of the facts, for a range of subjective motivations, the white majority imposed Proposal 2 on Michigan's black, Latino and Native American minorities.

3. The Attorney General has failed to show a compelling factual basis for Proposal 2's elimination of racial minorities' democratic rights or educational opportunities.

The AG asserts that Michigan has a compelling interest in admissions by "merit," by which he means "merit" as determined by the grade-test score system. But because universities have long granted exceptions from this system for many purposes, the AG has the impossible task of showing that the state has a compelling interest in assuring a "merit system" for minority applicants alone.

Even apart from the double-standard, the AG offers no proof that Michigan has a compelling interest in preventing the consideration of departures from *this* system. As shown by the historic experience both before and after affirmative action, the grade-test score criteria exclude large numbers of minority applicants. See supra, note 2 and pp. 6. This is not an accident, for both of its key components—grades and test scores—incorporate and magnify inequality.

The facts are set forth in the Coalition Plaintiffs' prior briefs and will only be summarized. Three-quarters of Michigan's black students attend segregated or intensely segregated primary or secondary schools. By any standard, these schools are not equal to those attended by almost all of the state's white students. Moreover, for reasons set forth in the plaintiffs' prior briefs, the pervasive segregation and inequality negatively affect the educational achievements of even those few minority students who are able to attend integrated schools. The

adjusted grade point average reflects both the stability of the schools available and the type and quality of the courses that those schools offer—and minority applicants suffer sharp disadvantages on both counts. Coal. Pl. First Br, at 13-15.

The standardized tests place those students at a far greater disadvantage. In 2007, white students' combined score on the SAT verbal and math sections was, respectively, 125, 208 and 292 points higher than the average score by students from Native American, Latino, and African-American backgrounds. R. 222-14, Dec of Schaeffer, Ex. 3. Some of the gap was caused by economic disadvantage. But Connerly, who was once a Regent of the University of California, testified that the UC's studies revealed that black students from families in the highest one-fifth of income scored lower on average than white students from families in the lowest one-fifth of income. R 222-1, Dep of Connerly, at 101.

Some of the gap reflects the educational disparities. But for some students, the tests produce gaps even though the students' records show that they have equal educational achievements. Most famously, at the UC's Boalt Hall Law School, the admission records revealed that black applicants scored on average nine points lower on the LSAT than white applicants with the same grade point average in the same major at the same undergraduate college. R. 222-14, Dec of Schaeffer, para. 18; William C. Kidder, "Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?," 89 Calif. L. Rev. 1055 (2001).

Every expert—including those employed by the manufacturers of the test—agrees that test scores and the test score gaps do *not* reflect differences in "intelligence," "aptitude," or similar qualities. Even more clearly, test scores do not reveal commitment, industry, imagination, motivation, curiosity, or leadership. Among students deemed qualified for universities, differences in test scores and grade point averages do show a weak correlation with average first-year grades. But the significance of that correlation is itself suspect because first-year grades are affected by racial isolation and deficiencies in preparation—both of which can be overcome with time. R. 222-14, Dec of Schaeffer, paras. 22-39; Kidder, supra, at 1101-1106.

The low predictive value of the tests is constantly revealed. The University of Texas, for example, recently discovered that students admitted from small rural and large urban high schools under the top "ten percent" plan achieved higher grades at UT than students admitted under other criteria even though the ten percent group had significantly lower average test scores. David Montejano, "Access to the University of Texas at Austin and the Ten Percent Plan: A Three Year Assessment;" Univ. of Texas, Sept. 2006, available at www.utexas.edu/student/admissions/research/montejanopaper.html.

The question here is, of course, not the validity of the grade-test score criteria, or how they should be used, or, even the value of affirmative action plans.

The question rather is whether the AG has shown a compelling factual basis for preventing the governing boards from *considering*—and minority residents from *proposing*—affirmative action plans. On that decisive point, the plaintiffs assert that the AG has offered no proof at all.

## ARGUMENT

### I

### PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT SELECTIVELY BARS RACIAL MINORITIES FROM SEEKING APPROVAL BY THE UNIVERSITY GOVERNING BOARDS OF THE ONLY ADMISSION PLANS THAT WILL MAKE IT POSSIBLE FOR SIGNIFICANT NUMBERS OF QUALIFIED MINORITY STUDENTS TO ATTEND MICHIGAN'S LEADING PUBLIC UNIVERSITIES.

#### A. The Supreme Court has twice held that states may not deny racial minorities access to the political procedures open to all other citizens when minorities seek the adoption of measures to alleviate racial inequality and *de facto* segregation.

The Supreme Court decided *Hunter* and *Seattle after* it had outlawed every form of *de jure* segregation. Both decisions thus establish the political rights of minority citizens in their attempts to end *de facto* inequality and segregation.

In *Hunter*, black and white citizens of Akron, Ohio had won passage of a local ordinance outlawing racial and religious discrimination in housing. White citizens then waged a successful campaign to amend the city charter to repeal that ordinance and to prevent the adoption of any similar ordinance until it was approved in a referendum. The Court found that the charter amendment forced

those who wanted protection from racial or religious discrimination to run a gauntlet that those who sought to prevent other abuses in real estate did not have to run. The Court struck down the amendment because the "…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 that of another of comparable size." *Hunter*, 393 U.S at 393.

*Seattle* reaffirmed *Hunter*. Black and other citizens had won school board approval of a busing plan to lessen the *de facto* segregation in Seattle's public schools. White citizens then waged a successful campaign to amend the state's constitution to authorize school boards to use busing for specified purposes—which did not include busing to achieve racial integration. The Court again held that the state could not impose more onerous political burdens on racial minorities seeking relief from racial inequality than it imposed on citizens seeking relief in other areas. *Seattle*, 458 U.S. at 474, citing with approval *Lee v. Nyquist*, 318 F. Supp. 710 (WDNY 1970), *aff'd without opinion*, 402 U.S. 935 (1971).

*Seattle* is controlling here. Just as the Washington amendment deprived local school boards of power over the racial aspects of school assignment choices alone, Proposal 2 denies Michigan's university governing boards of power over the racial aspects of admissions policies alone. Similarly, just as the Supreme Court held that minority citizens in Seattle had the right to political equality in their

attempt to gain access to the city's best primary and secondary schools, the panel rightly held that Michigan's minority citizens have the right to political equality in their attempt to gain access to Michigan's leading public universities.

The purportedly non-discriminatory rationale that the AG has offered for Proposal 2—the asserted devotion to admissions by "merit"—has no greater constitutional validity than the Akron citizens' asserted devotion to the rights of property owners or the Washington citizens' asserted devotion to the principles of neighborhood schools. As the panel held, Proposal 2 openly and obviously violates *Hunter* and, especially, *Seattle*. *Coal to Defend Aff. Action v. Regents*, ___ F.3d ___, 2011 WL 2600665 (6th Cir.2011)(hereafter "Panel Op.")

B. Especially after *Grutter*, the Ninth Circuit's decision in *Wilson* provides no basis for sustaining Proposal 2 in the area of higher education.

The primary support for the AG's claim that alleged "preferences" are exempt from *Hunter* and *Seattle* is a Ninth Circuit panel opinion rejecting a facial challenge to Proposition 209. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir.1997). Five judges—that is, two more than were on the panel—substantively disagreed with the panel's holding in their dissents from a denial of rehearing en banc. *Id.* at 711-718. Because *Wilson* and its rationale are so central to the AG's claims, we will analyze that decision in some detail.

The panel correctly found that *Wilson* wrongly attempts to restrict *Hunter* and *Seattle* to demands to end "discrimination." Panel Op, at 17-18. As the panel

held, *Wilson* is directly inconsistent with the precise holding in *Seattle* and with the scope that the Supreme Court gave to its own holdings in *Hunter* and *Seattle*. As the panel rightly observed, the Supreme Court held that racial minorities had the right to political equality when they sought legislation that they believed was "in their interest," that was "beneficial," that was on "their behalf," that was "racially conscious," or that was "specifically designed to overcome 'the special condition of prejudice." Panel Op., at 19.

*Hunter* and *Seattle* establish that racial minorities have a right to political equality in seeking to win such legislation *unless* the state demonstrated a compelling interest in an exception or *unless* there was a "*constitutional violation" in the substance of the proposed legislation*. Otherwise, the state could not deprive racial minorities of political equality in fighting for proposals that fell within the broad scope defined by the Court's holding. *Seattle*, 458 U.S. at 474, 485-486. Neither exception applied and the panel rightly held that *Wilson* wrongly imposed an "*outcome*-based limitation on a *process*-based right, in direct violation of both *Hunter* and *Seattle*. Panel Op, at 19.

Beyond the panel's reasons—which are more than sufficient to reject the AG's claim—there are additional reasons for rejecting his claims. *Wilson* states its main basis for its holding as follows:

> Impediments to preferential treatment do not deny equal protection [footnote omitted]. It is one thing to say that individuals have equal protection rights

> against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment.
>
> *Wilson*, 122 F. 3d at 708.

*Brown* and every case that followed *Brown*, including *Hunter*, *Seattle* and *Grutter*, held, however, that the validity of such rationales had to be judged in light of factual reality. *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954). But *Wilson* does not assess its main legal assertion *in light of the reality of the admissions criteria that are actually used*. In fact, it does not even mention those criteria. Indeed, it does not even mention *Bakke*, even though that was then the leading decision on affirmative action in admissions.

The reality that was not considered by *Wilson* is that the grade-test score criteria incorporate and exaggerate *de facto* inequality in the primary and secondary schools and in the tests themselves. Because, however, there are no commonly-accepted alternative criteria, the only alternative to accepting the discriminatory exclusion that those criteria produce is, as *Grutter* held, the conscious consideration of race and the resulting departures from those criteria. Placing an impediment—a ban—on any consideration of that alternative not only obstructs but denies equal treatment. It means that the overwhelming majority of qualified black, Latino and Native American applicants will be excluded from the universities and they will have no political means available to end that exclusion.

If, as *Grutter* held, the nation has a paramount interest in assuring that the path to leadership remains open to those students, slamming the door on all political procedures in which they can secure the adoption of the programs that alone will make that possible is inconsistent with *Hunter*, *Seattle* and *Grutter*.

Of course, *Grutter* did not require public universities to adopt an affirmative action plan. But the right of Michigan's Regents or any other governing body to decide *not* to adopt such a plan is *not* what is at stake in this case. The issue before this Court is whether a majority-white electorate may *prohibit* the governing boards from *ever considering*—and thus minority citizens from *ever proposing*—the adoption of such plans.

*Grutter* also recognized that Proposition 209 actually existed. *Grutter*, 539 U.S. at 342. Even though Connerly's supporters have suggested that that recognition constituted an approval of Proposition 209, *Grutter* made no comment—and certainly rendered no decision—on whether Proposition 209 complied with *Hunter* and *Seattle* or with any other requirement of the Fourteenth Amendment. That argument stretches ingenuity beyond all limits.

C. *Wilson* is inconsistent with the fundamental purpose of the Fourteenth Amendment.

At base, *Wilson* claims that language from cases applying the standard of strict scrutiny provide a justification for its departure from the direct holdings of *Hunter* and *Seattle.* The Supreme Court has directly rejected such a claim:

> We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."
>
> *Agostini v. Felton*, 521 U.S. 203, 237-238 (1997), quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)(Kennedy, J.)

But even assuming that a circuit court somehow had the right to ignore *Agostini* and *Shearson* and *Hunter*, *Seattle* and *Grutter*, *Wilson* has no support—and none is cited—for its central claim that "Impediments to preferential treatment do not deny equal protection." *Wilson*, 122 F. 3d at 708. *Wilson* claims that it is a "burden that the Constitution itself imposes," but when it identifies that supposed constitutional burden, its returns to the claim that racial classifications are reviewed under strict scrutiny and are prohibited "in all but the most compelling circumstances." *Id.*

*Wilson* transformed the constitutional requirement that a *federal court* use strict scrutiny to determine *which* considerations of race are valid into a general license for a *state* to declare that *no* racial classification may *ever* be *considered*. *Wilson* thus licenses each state to promulgate the theory of the color-blind Constitution and to enforce that theory by preventing any citizen from ever proposing and any official from ever considering any measure that departs from it.

This holding revises the substantive commands of the Fourteenth Amendment. The Supreme Court has repeatedly held, including in *Grutter*, that

the theory of the color-blind Constitution is *inconsistent* with the history, meaning and reach of the Fourteenth Amendment. See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 782-783, 788 (2007) (Kennedy, J.). Yet, somehow, the Ninth Circuit has resurrected it as a standard for defining political rights. Even though the federal courts have held that centuries of overt discrimination have created conditions that sometimes cannot be changed without explicit racial classifications, California, *Wilson* says, may proclaim a different doctrine—and enforce it against all those who disagree.

Moreover, *Wilson* says, a state may proclaim and enforce a standard that has been directly rejected by the Supreme Court. But the original, fundamental and overriding purpose of the Fourteenth Amendment was to provide federal standards and federal protection above all for the political rights of racial minorities. *Richmond v. J.A. Croson Co*., 488 U.S. 469, 491 (1989), citing *Slaughterhouse Cases*, 16 Wall. 36, 68, 21 L.Ed.394 (1873). The Congress that proposed the Fourteenth Amendment believed that the states had plunged the nation into a devastating war because the Constitution of 1789 had allowed them to pursue their own policies on race. That Congress was determined to prevent that from ever occurring again. See Garrett Epps, "Interpreting the Fourteenth Amendment: Two Don'ts and Three Do's," 16 Wm. & Mary Bill Rts. J. 433, 451-453 (December

2007); Richard L. Aynes, "The 39th Congress and the Fourteenth Amendment: Some Preliminary Perspectives," 42 Akron L. Rev. 1019, 1037-1041 (2009).

The cruel and bitter irony, of course, is that it did occur again, as reflected in the Supreme Court decisions that Justice Marshall described in his dissent in *Bakke*. But now, having painfully rectified some of the consequences of that relapse into state's rights and the denial of minority rights, *Wilson* asserts that the states can again enforce their own view of the Constitution and of political rights in the area of race. It recreates a house divided and does so under the name of the Fourteenth Amendment. *Wilson* should not have gone down that path and this Court should not follow it.

D. The Attorney General has no other valid reasons for rejecting the *Hunter-Seattle* challenge to Proposal 2.

1. *The claim that Proposal 2 burdens a majority of the population*.

Proposal 2 is also valid, the AG says, because the total number of persons whose rights it eliminates is a majority of the population. The district court and the panel said this first argument "borders on nonsense"—and that phrase is appropriate. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 539 F. Supp.2d 924, 956 (E.D. Mich,2008); Panel Op., at 20.

The *Hunter* Court made no attempt to determine if the religious and racial minorities affected by the charter amendment might, when added together, comprise a majority, because it recognized that black people were especially

burdened no matter how many partial allies they might have. Similarly here, one cannot, in the panel's words, "cobble together" women (85 percent of whom are white) with black citizens (numbering about 15 percent of Michigan's electorate) and say that Proposal 2 should be subject to no constitutional limits because its potential victims together constitute a majority. Panel Op., at 20. The various groups who have been subjected to discrimination are, unfortunately, still discrete and insular and *Hunter* and *Seattle* protect each group.

2. *The claim that admissions decisions are not a political process*.

Finally, the AG claims that the adoption of admission standards should be exempt from *Hunter* and *Seattle* because they are supposedly decided by non-political faculties. But there is no basis for this claim because the Constitutional power is absolutely clear and the governing boards have jealously guarded their power over admissions.

The current By-laws of the University of Michigan provide that "The faculty of each school and college shall from time to time *recommend* to the Board for approval…requirements for admission and graduation." Sec. 5.03, *www.regents.umich.edu/bylaws/bylaws.pdf* (emphasis added). The Bylaws of the MSU's Trustees provide, "Upon *recommendation* of the President the Board may determine the qualifications of students for admission at any level…," Art. 8; trustees.msu.edu/bylaws (emphasis added). And the current Statutes of Wayne

State's Governors establish in detail the admission standards at both the undergraduate and graduate levels. WSU Statutes, 2.34.09, 2.34.12; bog.wayne.edu/code.

Moreover, the specific policies at issue—affirmative action—were indisputably adopted by the President and Regents in 1970 and defended by the same President and Regents in 2003 in *Grutter* itself. In fact, from 1970 through this date, Michigan's admissions policies have been major, national political issues. It makes no sense to hold that school boards making school assignment decisions are subject to the Constitution but university governing boards are not. Nor does it make any sense to assert that fundamental decisions made by elected officials are exempt from the requirements of the Constitution.

## II

## PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE ITS SOLE PURPOSE IS TO REGULATE AND LIMIT THE ADMISSON OF QUALIFIED BLACK, LATINO AND NATIVE AMERICAN STUDENTS.

The substantive restriction that Proposal 2 imposes on admissions decisions violates the Fourteenth Amendment as surely as does its elimination of political rights. The ban on "preferential treatment," while designed to sound benign, is in reality a special law regulating minority admissions alone.

The Fourteenth Amendment was proposed and ratified in order to eliminate special laws. In particular, Congress passed the Civil Rights Act of 1866 to outlaw

the "Black Codes" that the South had enacted and which, among many provisions, "…forbade blacks from pursuing certain occupations or professions (e.g. skilled artisans, merchants, physicians, preaching without a license) and, in some states, even imposed special taxes on those newly-freed slaves who dared to take jobs outside farming and domestic service. H. Hyman & W. Wiecek, Equal Justice Under Law 319 (1982); Eric Foner, Reconstruction, 199-201 Harper & Row (1988). Congress then proposed and the states ratified the Fourteenth Amendment in part to put the provisions of the 1866 Act into the Constitution where it was hoped that they could not be changed. *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948).

Proposal 2 is obviously not as draconian as the Black Codes. But its terms, its history and the statements by its supporters make clear that its ban on "granting preferential treatment" had as its sole purpose regulating and limiting the admission of black, Latino and Native American applicants whom its sponsors asserted were receiving unfair advantages. If Proposal 2 did not prohibit black, Latino and Native American students from entering certain professions as the Black Codes once did, it sharply limited their ability to enter key professions, as shown by the dramatic and irremediable fall in minority admissions in the law, medical and undergraduate schools in California and Michigan. Supra, note 2.

The claimed justification of enforcing "merit" makes the substantive violation clearer. Leaving aside whether the criteria actually measure "merit,"

Proposal 2 imposes a "merit" system on racial minorities alone. The universities can with impunity grant real or imagined preferences to any category of students—except racial minorities.

In practical effect, Proposal 2 has handed the opponents of the admissions of racial minorities—and no one else—a weapon to display whenever the admission of such students increases slightly. When UCLA decided to review qualifications beyond grades and test scores, opponents of minority admissions threatened lawsuits under Proposition 209. David Leonhardt, "The New Affirmative Action," New York Times, Sept. 30, 2007. When an admissions official discovered that applicants' essays revealed that they were Latino, he threatened legal action under Proposition 209. Tim Groseclose, "Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Coverup," available at mages.ocregister.com/newsimages/news/2008/08/CUARSGroseCloseResignationReport.pdf (last visited October 24, 2011). Especially in light of the exceptionally broad and ill-defined nature of the ban on "preferential treatment," university officials must scrutinize and limit *every* decision involving minority admissions—and only those decisions—because they can only be sued for those decisions.

The Supreme Court has held that there is "…no more effective practical guaranty against arbitrary and unreasonable government [action] than to require that the principles of law which officials would impose upon a minority must be

imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949)(Jackson, J., concurring). *Accord. Lawrence v. Texas*, 539 U.S. 558, 585 (O'Connor, J., concurring). Proposal 2 defies that principle. It enforces a "merit" system for racial minority applicants alone.

## CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Coalition plaintiffs ask that the Court reverse the district court and hold that Michigan's Proposal 2 violates the Equal Protection Clause as applied to university admissions.

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Dated: October 25, 2011

## 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.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the 25-page limit established by this Court, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

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