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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,
Plaintiffs-Appellants,

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

and

ATTORNEY GENERAL BILL SCHUETTE, *et al.*,
Intervenor-Appellee.

Case Nos. 08-1387
08-1389, 08-1534

CHASE CANTRELL, *et al.*,
Plaintiffs-Appellants,

v.

ATTORNEY GENERAL BILL SCHUETTE, *et al.*,
Defendants-Appellees.

Case No. 09-1111

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
HONORABLE DAVID M. LAWSON

SUPPLEMENTAL BRIEF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION IN SUPPORT OF PLAINTIFF-APPELLANTS ON EN BANC REVIEW

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Michigan Civil Rights Commission (Commission) is an independent body created by the Michigan Constitution of 1963 for the purpose of protecting persons from discrimination by government and private actors and ensuring fair and equal access to employment, education and economic opportunities. [1]

The Michigan Constitution specifically charges the Commission with investigating alleged discrimination against any person on the basis of religion, race, color or national origin and "to secure the equal protection of such civil rights without such discrimination."[2] The Commission enforces Michigan's two antidiscrimination statutes, the Elliott-Larsen Civil Rights Act[3] and the Persons with Disabilities Civil Rights Act.[4] The Commission therefore has a strong interest in ensuring that every Michigan resident and visitor receives equal protection under the law. The Commission is also committed to guaranteeing equal educational opportunities throughout Michigan's public university system.

The Commission held four public hearings in 2006 investigating allegations of fraud perpetrated by proponents of Proposal 2. After hearing dozens of individuals testify and reviewing over five hundred affidavits, the Commission

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[1] Mich. Const., art. 5, §29
[2] *Id.*
[3] MCL 37.2101 et seq.
[4] MCL 37.1101 et seq.

reported its findings to the Michigan Supreme Court on June 7, 2006.[5] This report found supporters of Proposal 2 fraudulently obtained signatures by telling registered voters the initiative permitted affirmative action, when its terms and intent were to the contrary.[6] The Commission concluded the fraud committed by supporters of Proposal 2 was part of "a highly coordinated, systematic strategy involving many circulators and, most importantly, thousands of voters."[7]

The Commission's findings have since been widely accepted, including by this Court in *Operation King's Dream v Connerly:*

> The record and the district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . . By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.[8]

The District Court in *Operation King's Dream* also recognized the role played by, and the unique interest of, the Commission during the period surrounding the vote on Proposal 2 and adoption of the provision of Michigan's Constitution now at issue:

> The People of Michigan should also be concerned by the indifference exhibited by the state agencies who could have investigated and

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[5] *Report on the Use of Fraud and Deception in the Gathering of Signatures for the Michigan Civil Rights Initiative*. Available at, *http://www.michigan.gov/documents/PetitionFraudreport_162009 7.pdf.*
[6] *Report* at 4.
[7] *Report* at 12.
[8] *Operation King's Dream v Connerly,* 501 F.3d 584, 591 (6th Cir. 2007).

> addressed [the proponents of Proposal 2's] actions but failed to do so. With the exception of the Michigan Civil Rights Commission, the record shows that the state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud raised by Plaintiffs. If the institutions established by the People of Michigan, including the Michigan Courts, Board of State Canvassers, Secretary of State, Attorney General, and Bureau of Elections, had taken the allegations of voter fraud seriously, then it is quite possible that this case would not have come to federal court.[9]

Furthermore, Immediately after Proposal 2's passage, and pursuant to an Executive Directive issued by Michigan's Governor, the Commission assessed the extent of the new constitutional provision's impact on Michigan's laws, regulations, economic development efforts, and upon its educational institutions and programs. The Commission issued its report on March 7, 2007.[10] Among the Commission's many findings and recommendations was its conclusion Proposal 2's violated the Equal Protection clause of the United State's Constitution.[11]

The Attorney General would normally provide counsel and represent the Michigan Civil Rights Commission in matters before this Court.[12] However,

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[9] *Operation King's Dream v Connerly*, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 29, 2006).

[10] "*One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06- 02, a*vailable at *http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf*

[11] *"One Michigan"* at 16, citing the *Hunter/Ericson* doctrines as discussed in the argument portion of this brief.

[12] MCL 37.2602 provides "(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act."

because the Attorney General is a party to this matter, and in recognition of the Michigan Civil Rights Commission's constitutional status as an independent entity within Michigan government, the Attorney General has appointed the Michigan Department of Civil Rights Director of Law and Policy a Special Assistant Attorney General to represent the Commission's interests in this case.

While FRAP 29(a) permits the filing of an Amicus brief by a state without motion, the Commission makes this motion for leave to file because it is filing in its independent capacity and not filing on behalf of the State.[13]

No party or party's counsel authored any part of this brief, nor did amicus curiae, its counsel, the Michigan Civil Rights Commission or Michigan Department of Civil Rights receive any money intended to fund preparing or submitting the brief.

The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and do not necessarily represent the opinions of any other person or entity within Michigan's government.

[13] FRAP 29(a) provides: "The United States . . . or a State . . . may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court . . . ."

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ARGUMENT

The Michigan Civil Rights Commission asserts that the Opinion of this Court entered on July 1, 2011 is both correct and persuasive. The Commission submits this brief because it believes the argument presented advocates the interests of persons not directly represented by the parties.

What is not at issue in this case is that universities (at least those outside Michigan) may include race as one non-dispositive factor among the many to be considered in admissions decisions, because doing so advances a compelling state interest. [14] In *Grutter v Bollinger* the United States Supreme Court in essence found that, because universities are better able to tailor admissions decisions to the best interests of their students than are courts, courts should defer to the universities educational judgment. Having failed to get the courts to directly usurp the universities' judgment that diversity has academic merit, advocates of Proposal 2 now seek the courts' imprimatur for supplanting the universities' educational judgment with that of the electorate, but only when it involves minorities. This court must reject this effort because it both unconstitutionally creates a separate and more difficult political process for changing university admissions policy on race and violates Michigan universities' right to educational freedom.

[14] *Grutter v. Bollinger*, 539 U.S. 306, 333, 123 S. Ct. 2325, 145 L.Ed. 2d 304 (2003).

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I. When, in order to change public university admissions policy the first inquiry must be "does the change involve race?" -- having different political processes for yes and no answers, is constitutionally impermissible.

The doctrine set forth by the U.S. Supreme Court in the *Hunter*[15] and *Seattle*[16] line of cases disallows legislation that, like Proposal 2, in a racially conscious way place political hurdles in the way of some, which do not exist for others. In particular, *Seattle* recognized that courts have a special duty to shield minority rights from majority rule:

> In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process." [17]

The Commission submits that it is precisely this judicial responsibility to insulate minority interests from the majoritarian political process that must be exercised here. But it is critical to first note that the doctrine enunciated in *Hunter* and *Seattle,* and on which the panel's decision in this case was based, does not hold that the majority cannot take action where the result accrues to the disadvantage of minorities (though doing so would be subject to traditional equal protection analysis) – only that the majority must not manipulate the process so as to make

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[15] *Hunter v. Erickson*, 393 U.S. 385; 89 S. Ct. 557; 21 L. Ed. 2d (1969).
[16] *Washington Seattle School District No. 1*, 458 U.S. 457; 102 S. Ct. 3187; 73 L. Ed. 286 (1982)
[17] *Seattle* at 486, citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 28; 93 S. Ct. 1278; 36 L. Ed. 2d 16 (1973), (emphasis added).

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those changes sought by minorities more difficult to achieve than others. As enunciated by the Court in *Seattle*, the Fourteenth Amendment prohibits that which purports to treat all individuals equally, "yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." [18]

The Court went on to explain:

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process.[19]

Thus Michigan voters might permissibly decide that all admissions criteria and decisions will in the future be made based only upon guidelines adopted by public referendum. As unwise, unwieldy, and arguably ludicrous as such a provision might be, it would be constitutional (at least pursuant to *Hunter/Seattle*). What Michigan may not do by majority vote, is provide that admissions policies involving race are subject to referendum, while all others remain subject only to a far less burdensome process -- yet this is precisely what was done by Proposal 2, and its provisions are thus unconstitutional.

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[18] *Seattle* at 467. Citations omitted.
[19] *Seattle* at 470.

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II. The attempt to justify the existence of two different political processes is especially offensive in this instance, because the process imposed by Proposal 2 is the same process Proposal 2's proponents were unable to meet without resorting to fraud.

This Court previously found "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception" and the initiative "found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes."[20]

But, having gotten away with it, Proposal 2's supporters now present that which they could not accomplish other than by fraud, as a reasonable process for those who would seek to again permit universities to employ policies that result in greater numbers of minority admissions. Because Proposal 2's placement on the ballot was fraudulently obtained, its requirement that others must use the same referendum process is especially disingenuous and the selective imposition of this second political process should be even more disturbing to the court than were those in *Hunter* and *Seattle*.

Permitting a majority vote to erect a separate and more difficult political process for those seeking change in the way universities evaluate minority applicants violates the very concept of equal protection. That the second process is in place as the result of fraud, and that it may now be impossible to remove by

[20] *Operation King's Dream at* 591.

those unwilling to resort to fraud, only underscores the need for judicial intervention.

III. The attempt to justify the existence of two different processes by characterizing the constitutionally enshrined autonomy of universities and their (elected) governing boards as non-political defies logic.

First, even if there were a basis for limiting application to only policies made by officials directly accountable to the public, the reality remains that the admissions boards said to be non-political are in fact answerable to either elected boards[21] or boards appointed by the elected Governor[22]. *Hunter* and *Seattle* should not be read so narrowly as to not apply when government regulations are created by department heads appointed by the Governor/President rather than by the elected chief executive. If *Seattle* is to be read as holding the ballot initiative was unconstitutional only because the decision making authority usurped had formerly been exercised by the elected school board and not by appointed superintendents, universities in states considering provisions like Proposal 2 can quash them simply by having their elected boards formally sign off on admissions policies. That Michigan's elected university boards did not formally rubberstamp the admissions is insufficient reason for finding the procedures were not political.

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[21] University of Michigan, Michigan State University, Wayne State University. Mich. Const. 1963, art. VIII §5.

[22] "Other institutions of higher education established by law having authority to grant baccalaureate degrees" Mich. Const. 1963, art. VII §6.

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Ironically, it is the dissent to the panel's decision that referenced the "unique constitutional status" of Michigan Universities. More ironic is that it did so as part of its contention that the control over admissions taken from the universities by Proposal 2 was not political. The dissent noted:

> The Michigan Constitution confers a unique constitutional status on its public universities and their governing boards. The status of these boards has been described by the Michigan Supreme Court as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to that of the legislature.". . . [T]he constitutional autonomy of these institutions is plenary as to its educational programs. . .[23]

Federated, the case employed by the dissent notes that this was not always the case. Initially university control and management was vested with the legislature. However, "[t]his experiment failed, prompting extensive debate regarding the future of the university at the Constitutional Convention of 1850."[24] The constitutional autonomy created in 1850, and still present in the current Constitution "emerged from these debates, divesting the Legislature of its power to regulate the university and placing control in an elected board."[25]

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[23] Panel Opinion at 47, *citing, inter alia, Federated Publ'ns, Inc. v. Bd. of Trustees of Mich. State Univ.*, 460 Mich. 75, 594 N.W.2d 491, 495–96 (1999), (other quotation marks and citations omitted.)
[24] *Federation* at 85 (citation omitted).
[25] *Id.*

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A university's autonomy removes its decision making from the political control of the legislature; it does not magically render it non-political. Constitutionally protecting the plenary autonomy of universities in all aspects related to its educational programs was itself a political act. Michigan has chosen, politically, to ensure decisions affecting a university's academic programs are not only made by the universities themselves, but that each is independent of the other.

The decision making authority taken from the universities was politically established and protected. Holding an election on a voter initiated proposal for the purpose of supplanting a portion of this constitutionally protected autonomy is an unquestionably political act. It stretches reason beyond the breaking point to defend the constitutionality of Proposal 2 on the claim that there was never anything political about the process voters have taken away from Michigan's public universities and their governing boards.

IV. The separate process imposed on minority concerns by Proposal 2 also violates the federally recognized right of Academic Freedom.

Amicus, Michigan Civil Rights Commission asserts that a university's primary responsibility is to provide its student body with the best education possible. This limited focus on the interests of the student body is in part behind Michigan's decision in 1850 to constitutionally insulate the university from the

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broader interests and constituencies of other political institutions. It is also at the root of the federally recognized right of "Academic Freedom."

When upholding the University of Michigan Law School's right to consider race as one among many admissions factors, The U.S. Supreme Court, noted:

> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.[26]

In particular, the *Grutter* Court stated that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."[27]

This judicial deference to educational judgment and university independence is hardly new. In determining that the University of California had a right to create a diverse student body by implementing policies that considered race as part of the admissions process, Justice Powell noted; "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[28] Justice Powell built upon the "four freedoms" upon which a university's independence is based as earlier articulated by Justice Frankfurter:

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[26] *Grutter,* 539 U.S. at 328.
[27] *Grutter,* 539 U.S. at 328 (emphasis added).
[28] *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312; 98 S. Ct. 2733; 57 L. Ed. 2d 750 (1978), (concurring and controlling opinion by Justice Powell.)

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[29]

In *Grutter*, the Supreme Court found support for diversity in "numerous" studies, that establish the essential value of a diverse student body.[30] In its initial brief to this court, the Commission discussed a post-*Grutter* study published in the *Harvard Educational Review*.[31]

The study did not look at minorities to determine whether increasing diversity in a student body addressed prior discrimination, or had a positive effect on the community at large after the minority students graduated. It looked at white individuals, their exposure to racial diversity during college and their post-college cross-cultural workforce competencies. The study determined that "Contrary to the discourse that frames people of color as the sole beneficiaries of affirmative action and integration, [the] findings demonstrate that racial diversity is also essential to the prosperity of white Americans, whether they come from segregated or diverse precollege neighborhoods."[32] The study further concluded "College

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[29] *Bakke,* 438 U.S. at 312, quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 263; 77 S. Ct. 1203; 1 L. Ed. 2d 1311 (1957) (concurring opinion by Justice Frankfurter, emphasis added).
[30] *Grutter,* 539 U.S. at 333.
[31] Jayakumar, U., (2008), Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies. *Harvard Educational Review,* 78/4, 615-651, (attached as exhibit 1, and available at http://www.edreview.org/harvard08/2008/wi08/w08jayak.htm).
[32] *Jayakumar,* at 636, (emphasis added).

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exposure to diversity is more important than precollege or postcollege exposure in terms of developing pluralistic skills that reflect the highest stages of moral and intellectual development."[33]

The conclusions help explain why sixty-five of America's largest corporate competitors had earlier joined together to submit a single *amicus* brief in the *Grutter/Gratz* cases. These major employers recognize the value of hiring employees from diverse institutions, and make no secret of their desire to do so.

Social scientists and potential employers agree a student who wants to excel in their professional life should go to a university that values diversity and assures a diverse student body. The 'best and brightest' students, even if they might not believe they will benefit from diversity, certainly desire to attend those schools from which potential employers most actively recruit. Michigan's universities determined that including diversity as one of many other admissions considerations served the best academic interests of all admitted students, and the university itself.

Only by taking away the academic freedom universities had over admissions decisions and then subjecting those decisions to interests of the electorate, was a majority of voters able to mandate a policy requiring universities to ignore the academic value a student would bring to all others, in favor of what the university believes to be an academically insignificant difference on a standardized test.

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[33] *Jayakumar,* at 641, (emphasis added).

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A referendum adopted by popular vote of the electorate that imposes public will in place of academic reason in admissions policy violates the university's academic freedom. When the public referendum attempts to impose public will over universities' educational judgment, but only to those admissions policies that involve minorities, it simply illustrates why "universities occupy a special niche in our constitutional tradition" and why academic freedom must remain a "special concern of the First Amendment."

V. The very premise that a university's desire to achieve diversity in its admissions policy amounts to a "preference" for minority students is faulty and unworthy of judicial endorsement.

If a university has an admissions policy that seeks to create gender diversity in its students, which gender does it prefer? Would a requirement that no more than 2/3 of incoming classes be of a single gender constitute a "preference" for male students or female? Would it "discriminate" against either?

A university's music program would never be accused of "preferring" clarinet players just because it adopts a policy that its orchestra should include all instruments. Nobody would suggest the program continue to admit more and more violin students, and make do without clarinetists, because the clarinetists scored two points lower on a standardized test. A student body is like an orchestra in that diversity is not based upon favoritism for, or discrimination against, any one

group's interests over another. Diversity's focus is on creating a mix that is in the interests of the program itself, and benefits every participant thereof.

Why then, when a university seeks to create racial diversity in its student body is it argued that the university is providing a "preference" for students of a particular race? There are only two possible answers, and neither is worthy of judicial imprimatur.

The implied assumption underpinning Proposal 2 is that considering race in order to insure diversity is a "preference" because African-American and other minority applicants will always unfairly benefit, as they are unable to compete on a level playing field. To believe that any particular minority group 'could not' compete, would be to argue they are racially inferior. Any other explanation is to concede that the playing field is not level.

The Commission asserts that no matter how hard Proposal 2's advocates want to pretend otherwise, it is only because the playing field is not level that certain minority groups, including African-Americans, are currently predictably underrepresented when admissions is based solely on objective "merit". Were our educational system truly equal, standardized testing completely fair, historical and institutional discrimination's effects addressed, and societal prejudices eliminated, diversity efforts would not be seen to "prefer" minorities any more than orchestras "prefer" clarinetists over violinists.

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The idea that diversity is a "preference" for African-Americans is rooted in either outright racism (supremacy), or abject defeatism (societal inequities will never be overcome). Proposal 2's attempt to overrule the compelling interest in diversity, as embodied in both *Grutter* and the academic judgment of universities, by labeling it a "preference" should be rejected.

CONCLUSION

The Michigan Civil Rights Commission asserts that diversity is a compelling state interest recognized by the US Supreme Court and firmly rooted in both the history and intent of federal equal protection law. The creation of a separate, unequal, and unattainable procedure subjecting only admissions criteria effecting minorities to majority vote is anathema to these ideals.

Respectfully submitted,

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Dated: October 30, 2011

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CERTIFICATION OF COMPLIANCE WITH COURT RULES

In accordance Court's September 28, 2011 direction that a party's supplemental brief be limited to twenty-five pages, counsel hereby certifies that the Supplemental Brief submitted on behalf of Proposed Amicus Curia Michigan Civil Rights Commission complies with FRAP 29(d) which limits the allowable length of an amicus brief to one-half the maximum length authorized for a party's brief, and that it contains 14 point type, double spaced, with one inch margins, pursuant to FRAP 32.

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CERTIFICATE OF SERVICE

I certify that on October 30, 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– and additionally by providing a copy to the Court's en banc coordinator.

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