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

LEONARD GREEN, Clerk

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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

*Plaintiff-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-Appellant (08-1389),*

ERIC RUSSELL,  
*Intervenor-Defendant-Appellant (08-1389),*

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

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**BRIEF OF THE CITY OF GRAND RAPIDS, MICHIGAN  
AS AMICA CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING  
REVERSAL OF THE DISTRICT COURT'S RULING ON THE  
CONSTITUTIONALITY OF PROPOSAL 2**

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Dated: November 1, 2011

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### **Identity and Interest of *Amica Curiae***

The City of Grand Rapids is the second largest city in the State of Michigan with a population of 188,040 residents.<sup>2</sup> The City is the economic and cultural hub for western Michigan, the location for five campuses of four state universities, and hometown of President Gerald Ford. The City files this brief on behalf of its residents, who voted *against* Proposal 2 by a margin 52% (no) to 44% (yes). (Exhibit 1, Certified City Results Proposal 06-02). Despite its residents' inclinations, the City was forced to abandon its traditional affirmative action policies in the wake of Art. I, § 26. See 2007 Mich. Op. Atty Gen. No. 7202 (Mich.A.G.), 2007 WL 1138859 (April 9, 2007).

Art. I, § 26 upended much more than the administration of higher education in Michigan. Indeed, the amendment undermines Michigan's decentralized government structure, which was designed to allow citizens' to express local preferences through their local governments. As a home-rule city operating within this framework, the City has a vital interest in the outcome of this case and the preservation of its residents' right to local self-governance.

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<sup>2</sup>U.S. Census 2010, <http://2010.census.gov/2010census/>

## SUMMARY OF ARGUMENT

The political structure doctrine cannot exist in a vacuum. When a court undertakes a *Hunter-Seattle* analysis without understanding the inner-workings of the State, the court does not apply the doctrine to the government structure as it exists. Rather, the court imposes on that State what the court thinks state government should look like—an error which was committed by the courts upholding California’s Proposition 209.

Even before the Lincoln-Douglas debates embroiled the nation, Michigan’s constitution recognized the governing boards of public universities as separate and independent corporations. In this way, the boards are like other local governments in the State, holding constitutionally delegated home rule within their educational borders. The City presents a cross-section of local government—comparing universities to home-rule cities and school districts—to show this Court how Proposal 2 strips from Michigan’s citizens their ability to express local preferences through their local governments.



## ARGUMENT

- I. **By their constitution, the people of Michigan have delegated their power to their state and local representative entities.**

A state constitution is not a grant of power; it is a limitation on its exercise. *See Oakland Co. Taxpayers' League v. Bd. of Supervisors*, 94 N.W.2d 875 (Mich. 1959). In Michigan "all political power is inherent in the people' except as delegated by Constitution or statute." *Pub. Sch. of City of Battle Creek v. Kennedy*, 223 N.W. 359, 360 (Mich. 1929)(citing Const. 1908, art I, §1); *See Const. 1963, art I, § 1.*

Government authority must be exercised "by those in whom the constitution vests them, or contemplates they may be vested. No act of government can emanate from any other source, not even the people themselves." *People v. Collins*, 3 Mich. 343, 413-414 (1854) (Douglass, J.)(court divided). The people of Michigan have delegated their power, not only to the three branches of state government, but also to local governments. Const. 1963, art IV (legislature); art V (executive) art VI (judiciary); art VII (local governments); art VIII (educational entities). Constitutional delegation is more than mere agency; the delegate acts under its own judgment, free from the direct control of the grantor of

the power. *See Id.*, at 350 (Green, J.); *Accord Sterling v. Regents of the Univ. of Mich.*, 110 Mich. 369, 372; 34 L.R.A. 150 (1896).

**a. University boards hold absolute home-rule authority over their institutions.**

Public universities have long enjoyed autonomy in Michigan. But under the State's first constitution, the legislature had entire control over the State's first university, including the ability to appoint faculty and establish departments. *See Mich Const. 1835*, art. X, § 5; 110 Mich. at 374. The university languished. *Id.*, at 374-375.

Since the Constitution of 1850, boards of regents, trustees, governors, or control (hereinafter, "Regents") have supervised public universities and exercised autonomy over the schools' general operations. Const. 1850, art XIII, §8; 110 Mich. at 378-79 (citing *People ex rel. Drake v. Regents of Univ. of Mich.*, 4 Mich 98 (1856)); *See also* Const. 1963, art VIII, §§ 5, 6; *State Bd. of Agric. v. State Admin. Bd.*, 197 N.W. 160, 160 (Mich. 1924)(invalidating conditions on appropriations which attempted to control college affairs); *Federated Publications, Inc. v. Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 498 (Mich. 1999)(holding Open Meetings Act inapplicable to university's internal operations).

When constitutional powers collide, courts split the baby. The Michigan Supreme Court, for example, held that the Regents have a duty to bargain with medical school interns as public employees under the State's Public Employment Relations Act (PERA) because the constitution contemplates legislative control over public employment disputes. *See Mich. Const. 1963, art IV, § 48.* But the Court also held that the autonomous Regents may refuse to bargain over issues that are clearly pedagogical policy choices. *Regents of Univ. of Mich v. Mich. Employment Relations Comm'n*, 204 N.W.2d 218, 224 (Mich. 1973).

Regents are more than mere agencies of the State. Indeed, Regents hold the most powerful home-rule delegation available because their authority is constitutionally bestowed, self-executing, and immune from encroachment by the legislature. *See* 594 N.W.2d at 495-496 n.8 (citation omitted). This is not to say that universities are islands unto themselves; they hold no inherent sovereignty. *See* 204 N.W.2d at 224. But they are peninsulas, for which the Michigan Supreme Court has vowed it "will not, as it has not in the past, shirk its duty to protect the autonomy of the Regents in the educational sphere." *Id.*

**b. Cities hold home-rule authority over local municipal concerns subject to the state laws and constitution.**

Article VII of Michigan's constitution grants to local governments a wide range of powers, which are liberally construed in favor of the local entities. *See* Const. 1963, art. VII, § 34. But unlike universities, many of the powers held by cities, villages, townships, and counties are governed by statute.<sup>3</sup> Thus, these local entities hold a weaker form of home rule authority than that held by the Regents.

The City of Grand Rapids, as a duly chartered home-rule city, has the "power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." Const. 1963, art VII, § 22. This authority is further defined by statute, particularly the Home Rule Cities Act, Pub. Act 279 of 1909 as amended, codified at Mich. Comp. Law 117.1 *et seq.* But such legislative home-rule authority does not make Grand Rapids a mere regional marionette of the State. Indeed, home-rule cities enjoy not only those powers specifically granted, but also all powers not expressly denied. *City of Detroit v. Walker*, 520 N.W.2d 135, 137 (Mich. 1994)(tracing

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<sup>3</sup> *See, e.g.*, the Zoning Enabling Act, Pub. Act 110 of 2006 as amended, Mich. Comp. Law 125.3101 *et seq.*; The Revenue Bond Act, Pub. Act 94 of 1933 as amended, Mich. Comp. Laws 141.101 *et seq.*

development of home rule in Michigan). The result is that “[h]ome rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance.” *Id.* at 690; *See also Rental Prop. Owners Ass’n of Kent Co. v. City of Grand Rapids*, 566 N.W.2d 514, 524 (Mich. 1997)(validating City’s nuisance abatement ordinance against challenges of legislative preemption and usurpation of judicial powers).

Cities, like universities, must also collectively bargain under PERA. But legislative control of public employment disputes cannot undermine a city’s self-management or policy determinations as to the size and scope of the services to provide its residents. *Oak Park Pub Safety Officers Ass’n v City of Oak Park*, 745 NW2d 527, 535 (Mich.App.Ct. 2007) (citation omitted).

Given this wide latitude of discretion, some cities had implemented affirmative action policies in furtherance of local policy and preference. *See, e.g., Sharp v. City of Lansing*, 629 N.W.2d 873, 875 (Mich. 2001)(per curiam)(reverse discrimination case). In the wake of Proposal 2, the City of Grand Rapids was required to eliminate its traditional affirmative action policies. *See* 2007 Mich. Op. Atty Gen. No.

7202 (Mich.A.G.), 2007 WL 1138859 (April 9, 2007) (opining City's policy providing construction bid discounts to certified disabled business enterprises violated art. I, § 26).

**c. School districts have autonomy over educational policy, subject to the constitution and laws.**

Public school districts are under the control of the legislature and the state Board of Education. Const. 1963, art VIII, §§ 2, 3. Yet school districts enjoy a large measure of local control. As such, school districts:

- are bodies corporate. *See, e.g.*, Mich. Comp. Laws 380.10, 380.604;
- are governed by a locally elected school boards. *See, e.g.*, Mich. Comp. Laws 380.11a(4), 380.614; and
- have all the powers expressly stated and those implied, incidental, and appropriate "in the interests of public elementary and secondary education in the school district," including the welfare of pupils, and the hiring, contracting, and supervising of employees. Mich. Comp. Laws 380.11a(3); 380.601a.

School districts also have a degree of home rule. But unlike cities, whose home rule is constitutionally recognized, school district autonomy is delegated by statute. Nevertheless, courts have protected a school district's statutory autonomy from legislative interference. So while school districts must also collectively bargain under PERA, they are not required to bargain over issues involving their educational policies

because “[t]o hold otherwise would unduly restrict local school boards from making decisions that are specifically authorized by the Legislature.” See *Bay City Educ. Ass’n v. Bay City Pub. Sch.*, 422 N.W.2d 504, 510 (1988)(board need not bargain over decision to end special education).

**II. Proposal 2 disregards the decentralized structure of government in Michigan and strips from citizens their pre-existing ability to express local preferences on affirmative action.**

Art I, § 26 fails the political structure doctrine because it ignores Michigan’s decentralized government structure. Proponents of Proposal 2 make much of the fact that the amendment was enacted by state-wide initiative. But who gets to decide? The residents of Grand Rapids, whose local government was utilizing affirmative action policies, voted *against* Proposal 2—52% (no) to 44% (yes). (Exhibit 1, Certified City Results Proposal 06-02). Indeed, five of Michigan’s eight cities with populations over 100,000 voted against the measure.<sup>4</sup> Proposal 2 also

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<sup>4</sup> See John Barnes, *15 of Michigan’s 20 largest cities see population drops in 2010 Census*, Grand Rapids Press (March 22, 2011), available online at <http://www.mlive.com>. Proposal 2 failed in Detroit (Wayne County); Flint (Genessee Co.); Lansing (Ingham Co.), Ann Arbor (Washtenaw Co.), and Grand Rapids (Kent Co.), but passed in Livonia

failed in Ingham, Washtenaw, and Wayne counties, which house the main campuses of the defendant universities.<sup>5</sup>

Proposal 2 interfered with the expression of local community preferences precisely because the vote was not decided at the level of government closest to the people—where the decision-making authority was previously lodged. See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997). Supreme Court precedent has cautioned against overlooking the importance of local self-governance—not only in *Hunter* and *Seattle*, but even in *Milliken v. Bradley*. 418 U.S. 717, 742-43 (1974)(striking down court-ordered inter-district bussing remedy because it disregarded district boundaries and altered structure of public education in Michigan).

This is not to say that once a State does more than required under the Fourteenth Amendment it may never recede. See *Crawford v. Bd.*

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(Wayne Co.), Sterling Heights, and Warren (both in Macomb Co.). See Mich. Dept. of State website at, [http://miboecfr.nicusa.com/cgi-bin/cfr/precinct\\_srch.cgi](http://miboecfr.nicusa.com/cgi-bin/cfr/precinct_srch.cgi)

<sup>5</sup> Official election results, by county, for State Proposal 06-02: available at Mich. Dept. of State website: <http://miboecfr.nicusa.com/election/results/06GEN/90000002.html>.



*Ed. of City of Los Angeles*, 458 U.S. 527, 535 (1982). Nor have the people abdicated their sovereignty to local governments. But constitutionally delegated autonomy cannot be so flippantly disregarded whenever the sovereign *en masse* is displeased with the policy decisions made by local delegates acting within the scope of their authority and at the behest of local constituents. The people have always had the power to repeal affirmative action policies by working within the structure by which these policies were promulgated.

Additionally, the people can decide that home rule no longer suits them. But centralization of authority must be done in the same manner by which it was delegated. In Michigan, that means nothing short of revising the constitution through convention. *See* Const. 1963, art XII, § 3; *Accord Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich.App. 273, 305-307 (2008)(rejecting ballot petition for amendment because changes sought amounted to revision). But in 2010, when the people were asked whether it was time to convene a convention to reexamine and possibly revise our fundamental law—not

based on a racially charged issue but simply as a matter of course—an overwhelming two-thirds of Michiganders said, “No, thanks.”<sup>6</sup>

**III. Failure to recognize the autonomy of the university boards is an invitation to err.**

The judge that undertakes a *Hunter-Seattle* analysis without understanding the government structure under review imposes on that State her beliefs of what state government should to look like—not what the people have actually made it. For this reason, *amica* cautions this Court to be weary of those opinions upholding California’s Proposition 209 because they fail to analyze that amendment vis-à-vis the pre-existing government structure. *See, e.g., Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 706-708 (9th Cir. 1997); *Coral Const., Inc. v. City & County of San Francisco*, 235 P.3d 947, 956-960 (2010); Accord Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 Urb.Law. 257 (1999)(arguing *Romer* represents recognition of local governments in federal constitutional framework).

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<sup>6</sup> Election results for State Proposal 10-1: official as of March 2, 2011, available at Mich. Dept. of State website, <http://miboecfr.nictusa.com/election/results/10GEN/90000001.html>.

In *Wilson*, the Ninth Circuit waxes philosophical on the idea of constitutional amendment by plebiscite, but does not analyze California's structure at the time the amendment went to vote. *See* 122 F.3d at 708-709. Contrast that to the study of Proposition 209's effects on local-government autonomy found in the district court opinion that *Wilson* reversed. 946 F.Supp. 1480, 1499, 1504-05, 1506-07 (1996); *See also Coral Const., Inc.*, 235 P.3d at 980-983 (Moreno, dissenting). Unlike *Wilson*, the panel opinion in this case examined the autonomy of Michigan's universities and then applied those facts to the *Hunter-Seattle* calculus. *See* Panel Opinion, RE. 200, pp. 20-24; 25-28.

*Wilson's* bane is its failure to contextualize its federal constitutional analysis within the proper state-law framework—namely California's strong home-rule constitution. *See, e.g.*, Cal. Const. art. 11, § 5 (cities); art. 9, § 9 (home rule for Regents of Univ. of Cal.); *See also* Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149, 177-191 (2005)(discussing historical development of Regents' plenary authority). As such, the Ninth Circuit has done all Californians a great disservice by undermining their right to local self-governance.

## CONCLUSION

When the people don the mantle of state sovereignty, so too must their shoulders bear the weight of constitutional constraint. Thomas Cooley instructs us as to the only proper treatment of state constitutional amendments that run afoul of the federal:

[I]t would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of fundamental law, as when enacted in the form of statutes through the delegated power of their legislatures.

Cooley, *Constitutional Limitations*, p.33 (1868). City of Grand Rapids, *amica curiae*, beseeches this Court to declare Proposal 2 void.

Respectfully submitted,  
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Dated: November 1, 2011

## CERTIFICATE OF COMPLIANCE

I hereby certify that:

- this brief complies with the page limitation set forth in Fed. R. App. P. 29(d) because the brief is 13 pages, which is half (rounded to the nearest whole number) of the 25-page limit established by the Court for parties' supplemental briefs *en banc* (Sept. 28, 2011 letter from the Court, Doc 006111085464), Fed. R. App. P. 32(7)(A).
- This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)&(6) because it has been prepared in Microsoft Word with 14-point, proportionally spaced typeface Century Schoolbook font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2011, and as directed by the Sixth Circuit En Banc Coordinator, I transmitted the above **BRIEF OF THE CITY OF GRAND RAPIDS, MICHIGAN AS *AMICA CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS** by email to the Coordinator for service on all parties or their counsel of record.

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