No. 09-1111

In the
United States Court of Appeals
for the Sixth Circuit

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

v.

ATTORNEY GENERAL MICHAEL COX, *et al.*,
Defendants-Appellees.

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

BRIEF OF THE EQUAL JUSTICE SOCIETY, THE CALIFORNIA VOTING RIGHTS INSTITUTE, THE ASIAN PACIFIC AMERICAN LEGAL CENTER, PUBLIC ADVOCATES, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL WOMEN'S LAW CENTER, CHINESE FOR AFFIRMATIVE ACTION, WORKSAFE, SOUTH ASIAN NETWORK, THE ASSOCIATION OF ASIAN AMERICAN ATTORNEY AND CPA FIRMS, THE COUNCIL OF ASIAN AMERICAN BUSINESS ASSOCIATIONS, EQUAL RIGHTS ADVOCATES, THE ASIAN AMERICAN JUSTICE CENTER, AND LATINOJUSTICE PRLDEF AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

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Dated: November 1, 2011

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STATEMENT OF INTEREST OF THE *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

The *amici curiae* represented in this brief are among the nation's leading organizations committed to protecting racial minorities and women from discrimination by government and private actors. *Amici* have played an active role in efforts to eradicate discrimination in the electoral and political processes, education, and the workplace through litigation, direct legal services, grassroots community organizing, business development, and public policy. Equal access to the political process enhances full and meaningful participation in strengthening the economies of communities and civic engagement.

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Equal Justice Society, the California Voting Rights Institute, the Asian Pacific American Legal Center, Public Advocates, the Asian American Legal Defense and Education Fund, the National Women's Law Center, Chinese for Affirmative Action, Worksafe, South Asian Network, the Association of Asian American Attorney and CPA Firms, the Council of Asian American Business Associations, Equal Rights Advocates, the Asian American Justice Center, and LatinoJustice PRLDEF respectfully submit this brief with an accompanying Motion for Leave to File in accordance with Rule 29(b).

SUMMARY OF THE ARGUMENT

The Court should strike down Proposal 2 as an impermissible procedural hurdle standing in the way of racial minorities attaining equal access to the political process. Proposal 2 restructures the decision-making process in a non-neutral way and places special burdens on racial minorities who want to lobby for race-conscious university admissions policies. When racial minorities are prevented from voicing their discontent at their underrepresentation in universities, they are effectively disenfranchised from trying to change the political system of which they are a crucial part. As the history of voting and political participation in this country demonstrates, this disenfranchisement can take many forms—intentional or unintentional, blatant or subtle. No matter the form, federal courts have consistently recognized that since equality in political participation goes to the very core of our democracy, the courts must guard against any such disenfranchisement. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) ("The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community.").

Voting changes and requirements that disproportionately impact racial minorities and provide them less opportunity than others to participate in the political process and effectuate their choices violate the Equal Protection Clause.

This Court should review Proposal 2 under the same equal protection analysis followed by the Supreme Court in its long line of political process and voting rights cases and affirm racial minorities' right of equal access to the political process.

ARGUMENT

I. Introduction

This country's history is checkered with examples of the disenfranchisement of citizens of color by the voting majority. This disenfranchisement has come in varied forms, from Jim Crow laws that circumvented the Fourteenth Amendment to modern day voter photo identification laws that disparately impact racial minorities. Citizens of color have had and continue to have unique burdens to complete and unhindered access to the decision-making processes within the public sphere. The damage that is inflicted upon our public institutions when exclusion occurs along racial lines is particularly severe. Excluding any one racial group from participation in the decision-making process regarding university admissions does more than just prevent that group of citizens from effectuating their choices during their time at the university; it can affect the racial community's representation in the university for generations. Barring racial minorities from lobbying the university regarding race effectively prevents them from providing input about an issue of crucial importance to them, and runs afoul

of the goal of providing equal access to the political arena of public education. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003) ("[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . . '[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.' And, '[n]owhere is the importance of such openness more acute than in the context of higher education.'") (citations omitted).[1]

Viewed in its historical context, Proposal 2 fits into a long line of procedural hurdles that courts have struck down as hindrances to racial minorities' equal participation in the political process. *See S.C. v. Katzenbach*, 383 U.S. 301, 308 (1966) (Legislation "must be judged with reference to the historical experience which it reflects.").

II. Legislation that Impedes Racial Minorities' Participation in the Political Process Violates the Equal Protection Clause

Throughout this nation's history, voting majorities have used laws and voter initiatives to limit the rights of racial and other minorities. The Supreme Court and

[1] Proposal 2 amends Michigan's Constitution and prohibits Michigan's public colleges and universities from granting "preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin." Mich. Const. art. I, § 26. While this brief focuses on equal protection for racial minorities, we note that lobbying about gender-conscious admissions is also prohibited, and such a restriction similarly runs afoul of the goal of providing equal access to the political arena of public education.

other federal courts have regularly invalidated such laws that are facially neutral yet "subtly distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Seattle*, 458 U.S. at 467. The courts have acted to protect racial minorities against disenfranchisement, no matter the form. Under the *Hunter-Seattle* line of cases, a state cannot "allocate[] governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process." *Seattle*, 458 U.S. at 470 (emphasis in original); *Hunter v. Erickson*, 393 U.S. 385 (1969). An equal protection violation occurs if political processes are restructured in a way that affects only a program that "at bottom inures primarily to the benefit of the minority, and [if the restructuring] is designed for that purpose." *Seattle*, 458 U.S. at 472; c*f. U.S.* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (A "more searching judicial inquiry" is required for statutes directed at curtailing "the operation of those political processes ordinarily to be relied upon to protect [discrete and insular] minorities."). By unconstitutionally altering the political structure, Proposal 2 effectively prevents citizens of color from actively pursuing their legitimate hopes of equality and representation in the universities through the political process.

In *Seattle*, the initiative at issue removed from the local school board the capacity to desegregate schools through mandatory busing. *Seattle*, 458 U.S. at

457. Similarly, Proposal 2 bars advocates of race-conscious admissions policies from lobbying their admissions committees or administrators and strips the university of all authority to adopt race-conscious admissions policies. *See id.* at 474 ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests.").

Moreover, Proposal 2 drastically alters the "community's political mechanisms" by removing racial issues from the traditional political decision-making process and placing them at a "new and remote level of government," requiring advocates of race-conscious admissions to amend the state constitution to gain the opportunity to lobby Michigan's public universities. *See id.* at 483. "[T]he law's impact falls on the minority," who must now take their case directly to over seven million Michigan voters. *See Hunter*, 393 U.S. at 391. This restructured political process forces racial minorities to conduct an extraordinarily expensive statewide initiative campaign that is an onerous, "substantial and unique burden." *See Seattle*, 458 U.S. at 470, 484. In comparison, advocates for other considerations in the admissions process enjoy access to representative government—they are free to continue lobbying admissions committees without structural limitations. *See id.* at 458 (A state is forbidden from "differentiat[ing] between the treatment of problems involving racial matters and that afforded other

problems in the same area") (quoting *Lee v. Nyquist*, 318 F. Supp. 710, 718 (WDNY 1970), summarily aff'd, 402 U.S. 935 (1971)). As the Supreme Court affirmed in *Romer*, "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Proposal 2 thus breaks with the Equal Protection Clause's guarantee that "government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633. Indeed, Proposal 2 reestablishes the very same procedural barriers that resulted in racial minorities' historical underrepresentation in public institutions. Courts "have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination . . . ." *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986). Consequently, the judiciary serves a "special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Seattle*, 458 U.S. at 486 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). Such questions of equal protection should be left to the courts and not the popular vote.

III. Racial Minorities Have Historically Faced Procedural Hurdles That Hinder Their Participation in the Political Process.

Racial minorities' participation in the political process has been historically impeded in many ways, including but not limited to: primary elections that barred racial minority participation; literacy tests that applied differently to distinct racial groups; and vote dilution by drawing electoral districts that disfavor racial minorities.[2] Recently, many states have established seemingly innocuous voter laws, such as restrictions on early voting or voter registration drives and voter identification requirements, that result in racial exclusion and vote suppression. The courts have consistently held that laws that exclude citizens of color or place special burdens on racial minorities are unconstitutional, regardless of whether the law is invidious or benign in nature. Proposal 2 is yet another example of such an unconstitutional law, and should therefore be invalidated.

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[2] *See* NAT'L COMM'N ON VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005 3 (2006) ("[T]he efforts of white southerners to prevent African Americans from voting are well-documented in history texts. Going back to the nineteenth century, these efforts consisted of a host of devices that were designed to frustrate the purpose of the Fifteenth Amendment while appearing racially neutral: literacy tests; the "grandfather clause"; good-character and understanding tests; and the poll tax. In addition, throughout the South, violence and harassment were directed at blacks who tried to vote.").

A. Laws Regarding Political Primaries and Party Membership Have Impeded Minority Political Participation.

After the Fifteenth Amendment guaranteed African Americans the right to vote, southern states responded by establishing a series of voting qualifications and devices aimed at contravening that guarantee. *See Shelby Cnty., Ala. v. Holder*, No. 10-CV-0651 (JDB), 2011 WL 4375001, at *2 (D.D.C. 2011) (reviewing history of such measures). The Supreme Court has struck down some of the most egregious laws that prevented racial minorities from participating in the political process. For instance, in *Nixon v. Herndon*, the Court invalidated a Texas law that established "white primaries" and excluded racial minorities from voting in primary elections. 273 U.S. 536 (1927). Undeterred, the Texas Legislature then delegated the responsibility of determining qualifications for primary voting to the state-wide committees of the political parties. The committees then passed resolutions adopting white primaries. Once again, the Court rejected this restructuring of the political process in *Nixon v. Condon*. 286 U.S. 73 (1932). Political parties addressed this new ruling by adopting resolutions to bar racial minorities from membership altogether.

More than a decade later, the Court again acted to protect racial minorities in *Smith v. Allwright*, 321 U.S. 649 (1944). The Court in *Smith* held that the actions of the political parties disenfranchised African Americans in violation of the Fourteenth and Fifteenth Amendments, even though the policies were the result of

private organizations (*i.e.*, political parties) and not the government. *See Smith*, 321 U.S. at 664 (The right to be free from racial discrimination in voting "is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."); *see also Terry v. Adams*, 345 U.S. 461 (1953) (affirming the *Smith v. Allwright* principle).

Similarly, here, Proposal 2 cannot function as an end-run around the protections of the Fourteenth Amendment by prohibiting racial minorities and students of color from having input in the admissions process. The university is an agency of the state, and any attempt to single out a particular group for exclusion from its decision-making processes is inherently political. For example, the admissions policy upheld by the Supreme Court in *Grutter v. Bollinger* was created, and subsequently altered, because of student organizers and community pressure. Citizens of color cannot be singled out for exclusion from the decision-making processes of their public institutions, while other prospective applicants, such as athletes and legacies, are still permitted to participate.

B. Laws Establishing Voting Qualifications and Tests Have Impeded Minority Political Participation.

In addition to the "white primaries" and limitations on party membership, literacy tests were another attempt to restrict the ability of racial minorities to meaningfully engage in the political process. Literacy tests enabled states to continue excluding African Americans from the right to vote after the Fifteenth

Amendment's ratification. *See, e.g.*, *Shelby*, 2011 WL 4375001, at *2 (discussing poll taxes, literacy requirements, and alternate tests and qualifications "motivated entirely and exclusively by a desire to exclude [African Americans] from voting").

In 1910, Oklahoma adopted a constitutional amendment that required prospective voters to pass a literacy test in order to vote in state elections. *See Guinn v. U.S.*, 238 U.S. 347, 356 (1915). The amendment exempted from the literacy test anyone who was entitled to vote on January 1, 1866 or the lineal descendants of anyone who could vote at such time, which in practice meant that only whites were exempted. *Guinn*, 238 U.S. at 356. The Supreme Court struck down this "grandfather clause" because it subjected racial minorities—but not white citizens—to the literacy test in order to vote in state elections. *See id.* at 366. The Court found that imposing the literacy test on new voters (*i.e.*, African Americans) "re-creates and perpetuates the very conditions which the [Fifteenth] Amendment was intended to destroy." *Id.* at 360. Because the literacy test was not equally applied to all groups, the exemption for white voters was held unconstitutional by the Court. *Id.* at 356.

As *Guinn* demonstrated, "[n]ot only were these [literacy] tests intentionally discriminatory in their design, but southern voting officials were given unfettered discretion to administer them in a discriminatory fashion." *See Shelby*, 2011 WL 4375001, at *2. In the early 1900s in Louisiana, for example, the literacy tests

allowed registrars to test a voter's knowledge of the state constitution and gave the registrar discretion to determine whether the voter was correct.[3] When a white voter was asked about a provision of the constitution, "FRDUM FOOF SPETGH" was considered an acceptable written response; by contrast, a black voter was rejected for interpreting the right to peaceable assembly as meaning that "one may assemble or belong to any group, club or organization he chooses as long as it is within the law."[4] The results of such voter suppression tactics were drastic, eliminating nearly all the black voters from the rolls.[5]

Pursuant to the Fourteenth Amendment, Congress enacted the Voting Rights Act to ensure that the protections of the Equal Protection Clause would no longer be circumvented by voting majorities or the states. Eventually, Congress amended the Voting Rights Act to prohibit literacy tests because they were being used in a discriminatory way. Continuing the federal courts' protection of racial minorities' right to participate in the political process and in recognition of the importance of this right in our democratic nation, the Supreme Court upheld Congress's amendment. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that Section 4(e) of the Voting Rights Act was a proper exercise of the powers granted to Congress by the Fourteenth Amendment, thereby preventing New York from

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[3] SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 91 (W. W. Norton & Co. 2006).

[4] *Id.*

[5] *Id.*

enforcing a literacy test as a voting requirement, and asserting that "[t]he practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. . . . This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'"); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that Congress has broad powers to prohibit the use of literacy tests or requirements that discriminate on the basis of race).

The courts have repeatedly invalidated laws—both intentional and unintentional—that exclude racial minorities from the political process, holding that they are violations of the Fourteenth Amendment. The Sixth Circuit should continue this judicial tradition of protecting the rights of racial minorities and prevent discriminatory application of the law from creating special burdens that impede racial minorities' participation in the political process.

C. Laws Restructuring Voting Districts Have Impeded Minority Political Participation.

Restructuring the political process to burden racial minorities has also taken the form of vote dilution. Vote dilution along racial lines is a process-based hurdle that limits racial minorities' effectiveness and ability to effectuate their choices.[6]

In *Thornburg v. Gingles*, black voters in North Carolina challenged a redistricting plan that impaired black voters' ability to elect representatives of their choice. *Thornburg*, 478 U.S. at 35. The Supreme Court extensively reviewed the district court findings, the legislative history of Section 2 of the Voting Rights Act, and vote dilution through the use of multimember districts. *Id.* at 42-55. The Court held the redistricting plan violated the Voting Rights Act because "the legacy of official discrimination . . . and the persistence of campaign appeals to racial prejudice acted in concert" to impede an "insular and politically cohesive groups of black voters [from] participat[ing] equally in the political process and [] elect[ing] candidates of their choice." *Thornburg*, 478 U.S. at 78.

Entering the political process in a "reliable and meaningful manner" goes beyond having access to the right to vote—laws must not minimize the voting strength of residents based on race. In *White v. Regester*, Texas reapportioned its

[6] *See* PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 3 ("Less well-known are the techniques of vote dilution . . . widely employed once again by southern officials in the twentieth century . . . The standard dilutive techniques, still used in many places today, include racial gerrymandering . . . .").

House of Representatives after the 1970 census. 412 U.S. 755, 756 (1973). Four lawsuits, later consolidated, were filed challenging the reapportionment plan. *White*, 412 U.S. at 759. The plaintiffs argued that the use of multimember districts impermissibly diluted the voting strength of racial and ethnic minorities. *White*, 412 U.S. at 765. The Supreme Court found that Texas had a long history of creating procedural hurdles that impeded the ability of blacks and Mexican-Americans to participate in the political process "in a reliable and meaningful manner." *White*, 412 U.S. at 766-68. *See*, *e.g.*, *id.* at 768, citing *Graves v. Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972) ("[T]he most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.").

Ultimately, the Court held that multimember electoral districts that minimized the voting strength of black and Mexican-American residents violated the Equal Protection Clause because they "invidiously excluded [them] from effective participation in political life." *White*, 412 U.S at 769; *see also*, *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding that the Alabama legislature's attempt to redefine the boundaries of the city of Tuskegee had the effect of "remov[ing] from the city all save four or five of its 400 [black] voters while not removing a single white voter or resident" and therefore was

unconstitutional racial gerrymandering).[7] The Court has consistently looked at the historical context of a change in law and invalidated laws and policies that continued a history of disenfranchisement of racial minorities.

Today, redistricting continues as a means of vote suppression and still presents serious obstacles to racial minorities who wish to participate in the political process. Rapidly expanding Asian American and Latino populations are changing voter demographics and invite increasing opportunities for dilution of minority votes. As recently as 2006, the Supreme Court invalidated a redistricting plan that diluted the vote of racial minorities. *See League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399 (2006). The Court found that the proposed new legislative district violated Section 2 of the Voting Rights Act based on Texas's historical exclusion of Latinos from the political process on the basis of race. *LULAC*, 548 U.S. at 439-42. The Court ultimately found that "the State took away the Latinos' opportunity because Latinos were about to exercise it. This

[7] Justice Whittaker in his concurring opinion suggested that the decision should have rested on the Fourteenth Amendment's Equal Protection Clause because of unlawful racial segregation. *See Gomillion*, 364 U.S. at 349. In fact, the Court in the subsequent term held that apportionment issues were justiciable under the Fourteenth Amendment. *See Baker v. Carr*, 369 U.S. 186, 226 (1962); *see also Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 737 (1964) (holding an apportionment plan "approved by the electorate is without federal constitutional significance if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause"); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding the apportionment unconstitutional and explaining that "[t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.").

bears the mark of intentional discrimination that could give rise to an equal protection violation." *LULAC*, 548 U.S. at 440.

Just last year, the predominantly white suburb of Shelby County in Alabama brought suit against the Department of Justice seeking a declaration that Section 5 of the Voting Rights Act is unconstitutional. The Department of Justice had objected to a redistricting plan that would have eliminated Shelby's only predominantly black district, but the city held elections under the objected-to plan, resulting in the defeat of the district's incumbent African American councilman. *See Shelby*, 2011 WL 4375001, at *17. The district court conducted an in-depth historical and legislative analysis of racial exclusion and found that the issue of vote dilution has not lost its prevalence. *See Shelby*, 2011 WL 4375001, at *40 (citing H.R. Rep. No. 109–478 at 25). Despite Congress's enactment of Section 5, the court found that "voting discrimination by covered jurisdictions had continued into the 21st century" and legal protections are "still needed to safeguard racial and language minority voters." *Shelby*, 2011 WL 4375001, at *80 (referring to H.R. Rep. No. 109–478). The district court ruled against the County on its motion for summary judgment, demonstrating that the federal courts still rely on the historical persistence of the disenfranchisement of racial minorities when determining the constitutionality of a voting change. *See Shelby*, 2011 WL 4375001, at *40, *80.

As with multi-member districts, at-large election systems also tend to produce discriminatory results, particularly when plagued by racially polarized voting in which the majority population votes in a manner that consistently denies the minority population an opportunity to elect candidates of its choice. Though not as blatantly discriminatory as poll taxes or literacy tests, reliance on facially neutral at-large election systems can impede minority political participation as effectively as these more explicit devices. The Supreme Court has "long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population." *Thornburg*, 478 U.S. at 47 (internal quotations and citations omitted). This discriminatory, if unintentional, effect of at-large systems is acknowledged in the language of the Voting Rights Act itself, which focuses on whether the system *results* in discrimination. 42 U.S.C. § 1973(a) (emphasis added). In assessing discriminatory effects, courts are to conduct a "functional analysis of the political process" and a "searching practical evaluation of the past and present reality." *Thornburg*, 478 U.S. at 62-63.

The redistricting efforts described above diluted the votes of racial minorities in such a way as to deprive them of the opportunity to effectuate their choices and have their voices heard. Similarly, Proposal 2 prevents racial minorities from lobbying for their interests regarding race-conscious admissions,

effectively depriving them of the opportunity to effectuate their choices and have their voices heard. Removing hurdles that impede meaningful participation in the political process by racial minorities—in whatever form they take—is a principle consistently followed by the courts, and one that should be applied by the Sixth Circuit here.

D. Contemporary Voting Requirement Laws are a Present Iteration of the Procedural Hurdles that Impede Minority Political Participation.

More modern examples abound of attempts to impede the political participation of racial minorities. Just as with the literacy tests, these laws are facially neutral but disproportionately affect the political engagement and voting strength of minorities. Though these laws may not reach the level of blocking African Americans from voting by prohibiting their membership in political parties or requiring literacy tests in order to be able to vote, they still work to disenfranchise racial minorities, and courts have rigorously scrutinized any such disenfranchisement—no matter how egregious or subtle.

One method of voter restrictions is curtailment of early voting in both Ohio and Florida.[8] Restrictions on early voting largely impact citizens of color, since

[8] *See New State Voting Laws: Barriers to the Ballot?: Hearing Before the S. Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 16 (Sept. 8, 2011) (statement of Judith A. Browne-Dianis, Co-Director of the Advancement Project), *available at*

early voting has been used largely by black churches to mobilize voters[9] and because African Americans vote on the Sunday preceding the election "in proportionately far greater numbers than whites."[10] In Florida's 2008 election, two times as many African Americans voted early compared with whites.[11] Studies show that voters of color are far more likely to vote early than whites.[12]

Another restriction on voter registration takes the form of stringent requirements for voter registration drives. "These restrictions have a disparate impact on voters of color: African- Americans and Latinos are more than twice as likely as white voters to register through a voter registration drive."[13]

The most prevalent voter restriction today takes the form of voter photo identification requirements.[14] According to a Brennan Center report, *Voting Law*

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http://judiciary.senate.gov/pdf/11-9-8DianisTestimony.pdf [hereinafter *New State Voting Laws*].

[9] *Id.* at 17.

[10] *See* BRENNAN CENTER FOR JUST. AT NYU SCH. OF L., BY WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012 24 (2011) [hereinafter VOTING LAW CHANGES]; *see also* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 202 (2009) [hereinafter *ID at the Polls*].

[11] *See New State Voting Laws*, *supra* note 8, at 16.

[12] *See id.* at 16-17.

[13] *New State Voting Laws*, *supra* note 8, at 15-16.

[14] Though the Supreme Court has not invalidated voter ID requirements, it evaluated them in Indiana as "a neutral, nondiscriminatory regulation of voting procedure." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008). Nevertheless, the Eastern District of Pennsylvania, the Brennan Center, and other studies and reports have found that such voter ID requirements are *applied* in a discriminatory way. *See infra* pp. 20-22.

Changes in 2012, such stringent voting requirements have widespread effects and disparately impact those who have been historically locked out of our electoral system, such as racial minorities.[15] The story of Dorothy Cooper, a 96-year-old African American in Tennessee, illustrates how seemingly neutral procedural hurdles obstruct equal access to the political process for citizens of color.

Ms. Cooper was born in rural Georgia, before women had the right to vote, and first began voting in her 20s after she moved to Chattanooga, Tennessee. For over 70 years, she has missed only one presidential election, in 1960, due to a move that prevented her from registering in time. After learning that Tennessee's new voter identification law required voters to present voter identification at the polls, Ms. Cooper assembled the required documents and went to the local government agency charged with issuing photo identification. She provided a rent receipt, a copy of her lease, her voter registration card, and her birth certificate displaying her maiden name, Dorothy Alexander.[16] The clerk, however, denied Ms. Cooper her free voter card because she could not produce a marriage license.[17]

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[15] *See* VOTING LAW CHANGES, *supra* note 10, at 24; *see also ID at the Polls*, *supra* note 10, at 202 (concluding that voter ID laws disenfranchised 3 to 4.5 million voters in 2006).

[16] *See* Ansley Haman, *96-year-old Chattanooga resident denied voting ID*, CHATTANOOGA TIMES FREE PRESS, Oct. 5, 2011, *available at* http://timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/.

[17] *See* Jeff Woods, *96-year-old Woman Who Voted During Jim Crow Is Denied Photo ID*, NASHVILLE SCENE, Oct. 5, 2011, *available at*

Ms. Cooper's story of suddenly being unable to go to the polls after decades of participating in the political process is not an aberration: photo identification requirements disproportionately impact citizens of color. Latinos, Asians, Blacks, and immigrants have been statistically shown to be less likely to have access to five out of six types of acceptable types of voter identification.[18] For example, a handgun license may be acceptable (only 7.69% of handgun licenses are held by black citizens) but ID from a state university is unacceptable (black students of voting age are more likely to be students at a public university than their white counterparts).[19] These laws continue to affect citizens of color at alarmingly higher rates than their white counterparts. African Americans are more than twice as likely as white citizens to lack adequate ID,[20] and Latinos are statistically the most likely to lack ready access to the proper government offices to procure photo identification.[21]

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http://www.nashvillescene.com/pitw/archives/2011/10/05/96-year-old-woman-who-voted-during-jim-crow-is-denied-photo-id.

[18] Matt A. Barreto, Stephen A. Nuño, & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters*, Prepared for 2007 Am. Political Sci. Assoc. Annual Conf., at 17 (2007), *available at* http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf.

[19] *See* VOTING LAW CHANGES, *supra* note 10, at 24; *see also ID at the Polls*, *supra* note 10, at 202.

[20] *See* VOTING LAW CHANGES, *supra* note 10, at 24; *see also ID at the Polls*, *supra* note 10, at 202.

[21] *See New State Voting Laws*, *supra* note 8, at 8, 13 (stating that 401,374 Latinos in 127 counties in the state of Texas do not have ready access to photo ID) (citing

Even if a citizen of color has access to the proper ID, a recent Harvard study showed that citizens of color are more likely to have their IDs harshly scrutinized at the polls.[22] This reality is demonstrated by the court's findings in *United States v. Berks County, Pennsylvania.* 277 F. Supp. 2d 570 (E.D. Pa. 2003). The court found "substantial evidence of hostile and unique treatment" of Hispanic voters by poll officials because poll officials "placed burdens on Hispanic voters that were not imposed on white voters, such as demanding photo identification or a voter registration card from Hispanic voters, even though it is not required under Pennsylvania law" and "requir[ing] only Hispanic voters to verify their address." *Id.* at 575-76. Poll officials even "boasted of the outright exclusion of Hispanic voters to Voting Section staff" during a primary election. *Id.* Accordingly, the Court held that Hispanic voters "have enjoyed less opportunity than other voters to participate in the political process in past elections . . . [and] [t]he harm suffered by [the city's] Hispanic voters in past elections will occur in future elections if Defendants follow their past policies and practices." *Id.* at 582.

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to date provided by the U.S. Census Bureau, *available at* http://quickfacts.census.gov/qfd/states/48000.html).

[22] *See New State Voting Laws*, *supra* note 8, at 9 (citing Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCIENCE & POLITICS 127 (2009)).

Thus, there are millions of citizens like Ms. Cooper who will face obstacles when they attempt to exercise their right to participate in our political process.[23] Such procedural hurdles are the modern iterations of the white primaries, literacy tests, and redistricting. Proposal 2 also represents a modern version of the historical attempts to disenfranchise racial minorities. Like voting, lobbying to change the admissions processes in Michigan is a way for racial minorities to effectuate their choices and have their voices heard. The Equal Protection Clause guarantees racial minorities the right to participate in the political process in a meaningful way, and therefore requires that every group has equal opportunity to have a voice in the decision-making process, particularly in the context of public education. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (Education is "the very foundation of good citizenship" and "a right which must be made available to all on equal terms."). Proposal 2 prevents the full participation of racial minorities in the decision-making process regarding admissions. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. 306, 331-32.

[23] *See* VOTING LAW CHANGES, *supra* note 10, at 37 (stating that a combined 3.2 million voters will be affected by new photo ID laws).

CONCLUSION

Proposal 2 has its place in a long line of procedural methods that have been used to impede racial minorities' political participation by making it more difficult for them to vote or diluting their voting power. As the Supreme Court and other federal courts have consistently held in the past, such a procedural hurdle should be struck down as a violation of the Equal Protection Clause.

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