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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), *et al.*,

Plaintiffs-Appellants/Cross-Appellees,

\- v. -

REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Defendants-Appellees/Cross-Appellants,

and

BILL SCHUETTE, Michigan Attorney General,

Intervenor-Defendant-Appellee.

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

BRIEF OF CANTRELL PLAINTIFFS-APPELLANTS IN OPPOSITION TO MICHIGAN ATTORNEY GENERAL BILL SCHUETTE'S PETITION FOR REHEARING EN BANC

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Cantrell Plaintiffs-Appellants respectfully submit this opposition to Defendant-Appellee Michigan Attorney General Bill Schuette's Petition for Rehearing En Banc (the "Petition").

STATEMENT IN OPPOSITION TO REHEARING EN BANC

The Attorney General seeks en banc review of the constitutionality of Michigan's ban on race-conscious admissions at state universities, enacted in 2006 through a state ballot initiative ("Proposal 2"). The Petition reasserts many of the same arguments that the Attorney General made in his brief on appeal. However, contrary to the Attorney General's assertions that the panel's decision in this case either is inconsistent with or establishes new precedent, the panel correctly applied long-standing Supreme Court jurisprudence to these facts. As the panel explained:

> Our task is to determine whether Proposal 2 is constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Fortunately, the slate is not blank. The Supreme Court has twice held that equal protection does not permit the kind of political restructuring that Proposal 2 effected. See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Hunter v. Erickson, 393 U.S. 385 (1969). Applying Hunter and Seattle, we find that Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities.

(Slip Op. at 3.)

Now, in simply seeking a second opportunity to argue that this Court should deviate from reasoning twice upheld by the Supreme Court, the Attorney General primarily relies upon three cases from outside this Circuit and an earlier

non-binding decision from this Court. (See Pet. at 5-8.) These opinions are insufficient justification for en banc review of the panel's well-reasoned decision.

ARGUMENT

I. THE PANEL'S DECISION WAS BASED UPON ESTABLISHED SUPREME COURT PRECEDENT.

Rehearing en banc "is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6 Cir. R. 35(c). The Attorney General points to no such error that would warrant review by this entire Court. To the contrary, the panel grounded its opinion in firmly established Supreme Court jurisprudence.

The panel rightly concluded that Proposal 2 violates the principles set forth by the Supreme Court in Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), and thus violates the Equal Protection Clause because it "targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in such a way as to place 'special burdens' on racial minorities." (Slip Op. at 14-15 (citing Seattle, 458 U.S. at 470; Hunter, 393 U.S. at 391).) Hunter and Seattle "yield a simple but central principle": A state may not "allocate[ ] governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process." Seattle, 458 U.S. at 469-70.

Applying this principle, the Supreme Court has ruled that it is unconstitutional for a state to relocate decisionmaking authority over racial issues to "a new and remote level of government." Seattle, 458 U.S. at 483; see also Hunter, 393 U.S. at 393 ("[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.").

This Hunter/Seattle principle required the panel to perform a two-pronged review: (1) determining whether Proposal 2 has a racial focus that targets a policy or program that "inures primarily to the benefit of the minority, and is designed for that purpose," Seattle, 458 U.S. at 472; and (2) considering whether Proposal 2 places "special burdens on racial minorities" by restructuring the political process, Hunter, 393 U.S. at 391. Finding these two prongs satisfied, the panel properly concluded that Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities.

A. The Panel Correctly Found That Proposal 2 Has a Racial Focus.

As the District Court recognized and the Attorney General does not dispute, "there can be no question that Proposal 2 has a racial focus." Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 539 F. Supp. 2d 924, 955 (E.D. Mich. 2008) ("Coal. IV"). The panel rightly noted that "[a]mple evidence" grounded its conclusion that the "race-conscious admissions policies"

prohibited by Proposal 2 "inure primarily to the benefit of racial minorities" and thus have a racial focus. (Slip Op. at 16-17.)

B. The Panel Correctly Found That Proposal 2 Impermissibly Reorders the Political Process to Place Special Burdens on Racial Minorities.

1. Proposal 2 Reorders a "Political" Process.

The panel stated that "a process is 'political' under Hunter and Seattle if it involves governmental decisionmaking" and, applying this definition, found that public university admissions committees in Michigan are governmental decisionmaking bodies. (Slip Op. at 18-20, 24 (citing Seattle, 458 U.S. at 476) (noting that the Supreme Court deemed the school boards at issue in Seattle to be "political" because "they were governmental entities, not necessarily electoral or partisan ones").) The Attorney General nevertheless reasserts the argument that "Proposal 2 does not reallocate political authority with respect to university admissions" because the public universities' governing boards "'have fully delegated the responsibility for establishing admission standards to several program-specific administrative units [(i.e., admissions committees)] within each institution.'" (Pet. at 10-11 (quoting Slip Op. at 49 (Gibbons, J., dissenting)).)

The Attorney General wrongly focuses on the delegation of power rather than on the nature of the power being delegated. That the admissions committees are a step removed from the universities' governing boards does not alter the political nature of their power . (See Slip Op. at 24 (stating "that the

admissions committees received the political power they exercise through delegation rather than direct election is irrelevant to the nature of that power and thus the applicability of the Hunter/Seattle test").) Indeed, the nature of the power these admissions committees ultimately wield is the authority conferred by the Michigan Constitution upon the governing board of each public university to run its respective institution. See Mich. Const. art. VIII, § 5; see also Mich. United Conservation Clubs v. Bd. of Trs. of Mich. State Univ., 431 N.W.2d 217, 219 (Mich. Ct. App. 1988) (per curiam) (noting that the university's board of trustees "is an independent authority possessing power coordinate with and equivalent to the Legislature within the scope of its function").

The delegation of political authority here is no different from the fair-housing "structure" and the public schools' "student-assignment systems," which were at issue in Hunter and Seattle, respectively. (Slip Op. at 18.) As the Supreme Court stated, "that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." Hunter, 393 U.S. at 392 (citation omitted).

The panel found that because the institutions' governing boards appoint those delegated with the responsibility for setting admissions standards at the public universities and the "boards are free to reassign this responsibility as

they see fit[,] . . . there is little doubt that Proposal 2 affects a 'political process' under Hunter and Seattle." (Slip Op. at 24-25.) By simply reasserting the argument the panel flatly rejected based on settled Supreme Court precedent, the Attorney General does little to impugn the accuracy of the panel's findings.

2. Proposal 2 Effects a "Reordering" of the Political Process That Places Special Burdens on Racial Minorities.

The Supreme Court has indicated that a "comparative structural burden placed on the political achievement of minority interests" satisfies the Hunter/Seattle test's reordering prong. Seattle, 458 U.S. at 474 n.17. The District Court and the panel recognized that Proposal 2 enacted such a burden. See Coal. IV, 539 F. Supp. 2d at 956 ("Proposal 2 makes it more difficult for minorities to obtain official action that is in their interest."); Slip Op. at 28 ("Proposal 2 reorders the political process in Michigan to place special burdens on minority interests.").

The Attorney General does not disagree that the reordering of the political process effected by Proposal 2, just like the reordering effected by Initiative 350 in Seattle, has made minorities face a "considerably higher hurdle than [those] seeking comparable legislative action," forcing minorities to seek relief from a statewide electorate through the onerous process of enacting a new constitutional amendment. Seattle, 458 U.S. at 474. He instead argues that this burden is somehow mitigated because, whereas Hunter and Seattle "involved initiatives targeted solely at minorities," the burden here rests not on "minority

interests alone" because women simultaneously share it. (Pet. at 11-12.) Thus, according to the Attorney General's logic, which consists of simply adding together the populations of multiple minority groups, the "'classes burdened by the law . . . make up a majority of the Michigan population,'" which does not need protection against discrimination. (Id. at 12 (emphasis added) (quoting Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 251 (6th Cir. 2006)).)

The argument that burdening several minorities somehow renders an enactment constitutional because the minorities, in the aggregate, form a majority that needs no protection from discrimination relies on the false premise that multiple minorities wield political influence proportionate to their numbers. Both the District Court and the panel rejected this premise. See Coal. IV, 539 F. Supp. 2d at 956 ("Lumping minority groups into a contrived category does not allow any greater political influence over the process of advocating for affirmative action programs . . . . "); Slip Op. at 33-34 ("[I]t is a considerable oversimplification—and simply inaccurate—to conflate a simple numerical majority comprised of members of different minority groups with a political majority . . . ."). The Attorney General provides no rationale for reconsidering this flawed premise.

C. The Panel Correctly Found That the *Hunter/Seattle* Test Does Not Contain an Intent Requirement.

The Attorney General contends that a valid political restructuring claim requires a showing of discriminatory intent. (See Pet. at 12-13.) However,

both the District Court and the panel agreed that "the idea that a political restructuring claim must be based on purposeful discrimination finds no support in the [Supreme Court's] cases." Coal. IV, 539 F. Supp. 2d at 956. As the panel explained, legislation that "restructures the political process along racial lines and places special burdens on racial minorities . . . 'falls into an inherently suspect category,' regardless of whether purposeful racial discrimination is its demonstrated motivation." (Slip Op. at 35 (quoting Seattle, 458 U.S. at 485).) Indeed, the Supreme Court expressly rejected the imposition of an intent requirement in such cases. (See id. (citing Seattle, 458 U.S. at 485).)

Whether purposeful discrimination was "the only rationale motivating Proposal 2's passage" (Pet. at 13), or whether any discriminatory intent ever existed, is therefore irrelevant. Accordingly, the panel did not err by failing to apply a discriminatory intent requirement to the Hunter/Seattle test.

II. THERE IS NO CONFLICT WITH EARLIER DECISIONS THAT JUSTIFIES EN BANC REVIEW.

The Attorney General seeks to fabricate a conflict between the panel's opinion and earlier decisions interpreting Hunter and Seattle. Yet none of these decisions justify en banc review. Although the Attorney General relies on this Court's ruling on a motion to stay pending appeal in Granholm, 473 F.3d 237, that decision does not impact the "uniformity of the court's decisions" and thus does not provide a basis for rehearing en banc. Fed. R. App. P. 35(a)(1). Granholm was

issued without the benefit of fully briefed arguments, and "the merits of the appeal" were "not before th[e] panel." Granholm, 473 F.3d at 243. Considering the precedential weight of Granholm, the panel found that decision to be neither "binding" nor "persuasive." (Slip Op. at 29.) The Attorney General provides no justification for reconsidering that decision.

Moreover, en banc review's primary purpose is not to ensure consistency between this Court's rulings and those of the Ninth (or any other) Circuit. See Moody v. Albemarle Paper Co., 417 U.S. 622, 626 (1974) (per curiam) (observing that the en banc procedure is normally reserved to "secure or maintain uniformity of decision within the circuit") (emphasis added). Relying on the Ninth Circuit's opinion in Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), the Attorney General argues that the Hunter/Seattle principle applies only to laws prohibiting discrimination and not to those prohibiting preferential treatment.[1] (See Pet. at 6-8). Wilson's rationale flies in the face of the political process doctrine because it "add[s] another element to the Hunter/Seattle

[1] The Attorney General also cites Coalition to Defend Affirmative Action, Integration and Immigration Rights v. Schwarzenegger, No. 10-641 SC, 2010 WL 5094278 (N.D. Cal. Dec. 8, 2010), and Coral Construction, Inc. v. City & County of San Francisco, 235 P.3d 947 (Cal. 2010), to support this proposition. (Pet. at 6-7). Both of these cases, however, unsurprisingly rely on Wilson. See, e.g., Schwarzenegger, 2010 WL 5094278, at *5 (recognizing that the court was "bound by stare decisis" when addressing the plaintiffs' critique of Wilson).

test," causing this test to render an enactment "unconstitutional . . . only if the enactment is already unconstitutional under the 'traditional' rubric." (Slip Op. at 29-30.) In any event, the Supreme Court's more recent decisions in Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), and Grutter v. Bollinger, 539 U.S. 306 (2003), undermine Wilson and thus the existence of a split justifying en banc review. Labeling race-conscious admissions policies as "inherently invidious," Wilson attempted to distinguish them from voluntary integration programs, 122 F.3d at 707 n.16, but Grutter established that the former are, in some contexts, constitutionally permissible, while Parents Involved held that the latter can be constitutionally impermissible.

In sum, the panel correctly interpreted Supreme Court precedent, and to the extent that a circuit split exists, it should be left to the Supreme Court to correct the Ninth Circuit's misinterpretation of established law.

CONCLUSION

For all of the foregoing reasons, Cantrell Plaintiffs-Appellants respectfully request that the Attorney General's request for rehearing en banc be denied.

Dated: August 17, 2011

Respectfully submitted,

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I certify that on August 17, 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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