No. 08-1387 AND No. 09-1111

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

-v.-

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

and

ATTORNEY GENERAL MICHAEL COX, *et al.*,
Intervenor-Appellee.

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 PROPOSED AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Michigan Civil Rights Commission (the "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. 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."[1] The Commission enforces Michigan's two antidiscrimination statutes, the Elliott-Larsen Civil Rights Act[2] and the Persons with Disabilities Civil Rights Act.[3] 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.

On January 11, 2006, the Commission held the first of four public hearings investigating allegations of fraud perpetrated by proponents of what was then Proposal 2.[4] After hearing testimony from dozens of individuals and reviewing

[1] Mich. Const., art. 5, §29.
[2] MCL 37.2101 et seq.
[3] MCL 37.1101 et seq.
[4] After passage, Proposal 2 amended the 1963 Michigan Constitution, becoming Article 1, Section 26.

over five hundred affidavits, the Commission 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 that 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:

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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).

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

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 that Proposal 2's passage would violate the Equal Protection clause of the United State's Constitution.[11]

The Commission asserts its interest and submits this amicus brief pursuant to Federal Rule of Appellate Procedure 29 to support the arguments raised by the Coalition and Cantrell Plaintiffs-Appellants. The Commission urges this Court to reverse the District Court's decision granting summary judgment and purge the

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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.

offending language from Michigan Constitution Article I, Section 26, at least as it applies to the consideration of race in Michigan public university admissions.

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.

Normally, the Attorney General would provide counsel and represent the Michigan Civil Rights Commission in matters before this Court.[12] But 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,[13] 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 here.

[12] MCL 37.2602 provides that "(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."

[13] The Michigan Civil Rights Commission (MCRC) is a constitutionally created body charged with a duty "to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination." (Const 1963, Art 5, §29)

ARGUMENT

Introduction.

Before examining what is at issue in this case it is important to recognize what is not.

Not at issue is the right of universities (at least those outside Michigan) to include race as one non-dispositive factor among the many that may be considered in admissions decisions. The United States Supreme Court specifically found in *Grutter v Bollinger*[14] that university admissions programs that consider race in this fashion are constitutional.[15]

Grutter does not mandate states or public academic institutions to enact programs in order to further diversity in education, but it does declare that doing so advances a compelling state interest.[16] The Michigan Civil Rights Commission asserts that this compelling state interest is firmly rooted in both the history and intent of federal equal protection law, and can not be negated by majority citizen vote. Doing so is anathema to the ideals of minority rights and equal protection that are at the very heart of American democracy.

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[14] *Grutter v. Bollinger*, 539 U.S. 306, 333, 123 S. Ct. 2325, 145 L.Ed. 2d 304 (2003).
[15] As opposed to programs that granted an automatic scoring advantage to members of certain predetermined groups, which were rejected as unconstitutional in *Gratz v. Bolinger*, 539 U.S. 244, 123 S. Ct. 2411, 145 L. Ed. 2d 257 (2003).
[16] *Grutter*, 539 U.S. at 329.

Proposal 2 passed in the general election of November 2006. Its terms were thereby incorporated into the Michigan Constitution, becoming Article 1, Section 26 (§26).[17] The Commission will use both references interchangeably.

The Commission asserts that the voter-enacted provisions of Proposal 2 are unconstitutional, not only as applied to public universities, but also as applied to state government.[18] As such, the Commission asks this Court to strike the entire amendment, while recognizing that the constitutional challenge made by Plaintiff-Appellants here is only to the proposal's application to universities. In this regard, the Commission notes that Proposal 2 and §26 both contain language providing that; "Any provision held invalid shall be severable from the remaining portions of this section."[19] Thus, should this Court find that only those provisions applying to public universities must be eliminated, the remaining provisions are unaffected.

The Commission asserts that Proposal 2's provisions regarding race, sex, color, ethnicity, and national origin are all constitutionally infirm. However, the

[17] §26(1) provides: "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."
[18] The provisions are contrary to the compelling state interests of creating and maintaining the diverse workforce, suppliers and service providers that can best serve the interests of the state and its diverse population.
[19] §26(7)

Commission will focus its arguments on the amendment's application to race, because this is where the amendment will have the greatest effect, and where the amendment most runs afoul of constitutional law.

I. Proposal 2's adoption and the voter-enacted provisions of Article 1, Section 26, of the Michigan Constitution violate the Fourteenth Amendment of the United States Constitution by creating two separate and unequal political processes for those wishing to bring about a change in a public university's admissions policy: (a) a very difficult and costly process in areas involving race, sex, color, ethnicity or national origin, and (b) a less difficult and far less costly process for those seeking change in any other area (including the suspect class of religion).

A. Amicus adopts the arguments made in the principal briefs of Plaintiff-Appellants in both cases.

Subsequent to the passage of Proposal 2 by majoritarian political process, anyone in Michigan wishing to change a public university's admissions practices involving athletics, legacy, sexual orientation, or even religion, need only lobby university officials to change the policy. However, anyone seeking a similar change with respect to race[20] must engage in the lengthy, extremely difficult and very expensive process of changing the Michigan Constitution.

As correctly illustrated in Plaintiffs-Appellants' principal briefs, the doctrine set forth by the U.S. Supreme Court in the *Hunter*[21] and *Seattle*[22] line of cases

[20] As well as sex, color, ethnicity, or national origin.
[21] *Hunter v. Erickson,* 393 U.S. 385; 89 S. Ct. 557; 21 L. Ed. 2d (1969).
[22] *Washington Seattle School District No. 1,* 458 U.S. 457; 102 S. Ct. 3187; 73 L. Ed. 286 (1982)

disallows legislation that, like Proposal 2, in a racially conscious way places political hurdles in the way of some, which do not exist for others. In particular, *Hunter* recognized that courts have a special duty to insulate 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."[23]

The Commission submits that it is precisely this judicial responsibility to safeguard minority interests by removing them from the majoritarian political process that faces this Court in the present case.

Shortly after the enactment of §26, at the Governor's direction, the Commission issued a report on the constitutional amendment's impact.[24] The Commission asserted that any interpretation of Proposal 2 as prohibiting race or sex as considerations in admission decisions at Michigan's public universities would violate federal equal protection law.[25] The Commission Report noted, and criticized as unconstitutional, continued use of other types of affirmative action preferences:

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[23] *Hunter* 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).
[24] *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06- 02, (2007), a*vailable at *http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf*
[25] *"One Michigan,"* at 2-3.

> Universities in our state continue to use affirmative action[26] programs that give preferences to athletes, legacies, and students from different geographic regions, students from certain select schools, and so forth. Proposal 2 singles out students based on race, sex, ethnicity, and national origin and prohibits our universities from extending the same type of affirmative action benefits offered to these and other students. Proposal 2 allows for preferential treatment for some students, but not for others. This double standard seems to us to be in direct conflict with existing federal law.[27]

The Commission stands by these words today and fully supports the arguments made in the principle briefs of both the Coalition to Defend Affirmative Action and Chase Cantrell Plaintiffs-Appellants.

B. Proposal 2's passage does not merely set the procedural hurdles higher for changing admissions policy in areas involving race, it sets them so high that the proposal's proponents found them impossible to overcome without the use of deception and fraud.

In addition to the substantial political hurdles described by Plaintiffs-Appellants, the Commission draws attention to another. Proposal 2's placement on the ballot was fraudulently obtained. As such, the facts here are more compelling than those requiring invalidation of legislation in *Hunter* and *Seattle* themselves.

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[26] The term "affirmative action" has many definitions and denotes very different things to different people. Because Proposal 2 was billed as prohibiting affirmative action for minorities the Commission used the term in this broad "preferences" context. The Commission does not argue in this case that public universities should be permitted to admit African-American students in order to address historical discrimination and its legacy, nor that universities favor any particular group over others. The Commission asserts only that universities should be permitted to consider race in the furtherance of creating diversity within its student body, thereby providing the compelling educational benefits of diversity to all its students.

[27] "*One Michigan*". at 16, *citing Hunter v. Erickson*, 393 U.S. 385; 89 S. Ct. 557; 21 L. Ed. 2d (1969) and *Washington Seattle School District No. 1*, 458 U.S. 457; 102 S. Ct. 3187; 73 L. Ed. 286 (1982) among other cases.

The one arguable saving grace of allowing university admissions policy to be dictated by voter referendum would be the idea that the same referendum process would always be available to those wishing to change policy. In this instance, any suggestion by Appellees that they have already met the burden they now seek to impose on others is patently false.

This Court has previously determined that "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception" and that the initiative "found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes."[28] Thus Proposal 2's supporters, even with substantial financing from outside the State of Michigan, were unable to meet the very same burdens they now want others to face without resorting to "fraud and deception." [29]

Permitting a majority vote to erect a barrier for those seeking change in the way universities evaluate minority applicants violates the very concept of equal protection. That the barrier could not have been erected absent fraud, and that it may now be impossible to remove by those unwilling to resort to fraud, only underscores the need for judicial intervention.

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[28] *Operation King's Dream at* 591, (referring in part to the findings of the Michigan Civil Rights Commission).

[29] The Commission also finds it somewhat astounding that MCRI would now proudly proclaim in its brief to this Court, that: "It would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts." (Brief of amicus MCRI at p 2; quoting *Coal. To Defend Affirmative Action v. Granholm*, 501 F. 2d 775, 780 (6th Cir. 2007))

II. Race-neutral does not mean color blind and considering all factors that contribute to a student's unique personal merit except for race, is by definition treating race differently than all other factors, and thus violates the doctrine of equal protection.

Proposal 2 appeared on the ballot through a campaign of deception in which its proponents repeatedly misled the public about what the constitutional amendment would do. Now §26's defenders seek to perpetuate this slight of hand by asking this Court to judge the amendment only by its language while ignoring both its effect and intent. This Court should not accept the invitation to settle for facial neutrality when the amendment's effect is discriminatory.

A. Race-neutral methods of obtaining racial diversity, in addition to being of questionable integrity, do not achieve the desired goal of admitting the best possible class body to serve the interests of all a university's students.

Those seeking to outlaw any consideration of race in university admissions procedures argue that universities can achieve racial diversity by other means. They suggest that implementation of Texas style 10% rules, other "percentage plus" rules, consideration of economic or geographic status, or some other race neutral means could be implemented for the express purpose of achieving a diverse student body.

The Commission finds repugnant, any suggestion that the United States courts should condone university admissions programs that are discriminatory in

operation, simply because they are facially neutral. In addition to the offensive intellectual and moral dishonesty of condoning by ruse what is pretended to be prohibited by rule, such programs merely force universities into making an unacceptable Hobson's choice. As stated by the U.S. Supreme Court: "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."[30]

Defenders of §26's are unconcerned that a university which adopts a particular facially neutral policy (like granting automatic admission to any student in the top X% of their high-school class), may still do so only for the purpose achieving racial diversity. They appear content with such a policy as long as some other, non-minority, students who would not otherwise be admitted get swept along. They do not care that racial diversity achieved in this manner makes it impossible for the university to consider many other, equally valuable, diversity elements, or that this diversity may come at the expense of academic quality.

Most tellingly, when arguing for such race-neutral ways to achieve racial diversity, §26's defenders completely ignore how it places the focus on elements not directly related to a university's overall academic environment. Indeed, many who argue against diversity being an admissions factor seem to regard any lowering of a university's overall academic standards as a victory for their cause

[30]*Grutter*, 539 U.S. at 340.

and refuse to recognize it as a loss for the university or its student body. They have become so concerned with whether they will be admitted they have forgotten why they want to be admitted, which presumably has something to do with the quality of the institution and what it offers students. [31]

B. Race-neutral university admissions policies aren't really racially neutral, they tacitly favor certain racial groups over others.

As noted previously, following enactment of §26, Michigan universities continue to give preferences prospective students who are athletes, legacies, debate team members, musicians, those who attend certain select schools, and hosts of other merit factors. While such factors may each be appropriate when looked at in concert with all other factors, excluding race from the picture actually prevents neutrality.

Athletics presents many such examples. Looking beyond just the "major" sports, one can quickly see how such preferences work to the advantage of the advantaged. A university's 'preference' for lacrosse enthusiasts, fencers, equestrians, gymnasts, or skiers would likely each yield disparate racial impact.

[31] It is interesting to note that many of Proposal 2's proponents attacked University of Michigan's selective admissions program as elitist while at the same time arguing that by denying their admission the university also denied them the future value of a U of M degree. U of M's elite standing as an academic institution is a great asset to not only its students, but also the State of Michigan and the Nation. Apparently some see the value of a degree in terms of its marketability rather than the education it represents. Yet they either fail to appreciate the relationship between this marketability and U of M's elite reputation -- or their problem with 'eliteness' only extends up to the point of their personal admission.

Many such sports require (or at least favor those with access to) club membership and/or expensive equipment. Even sports like competitive swimming or skating require relatively exclusive access to a pool/rink to enable uninterrupted laps.

While universities do, and should be permitted to, consider each of the above as possible plus factors when looking at a prospective student, each also provides a "tacit" racial advantage that favors the historically privileged at the expense of other racial minorities. Permitting universities to look at every factor, including race, enables them to look at each individual in a race-neutral (though race-conscious) way. "Race-neutral" policies that permit the color blind consideration of such tacitly racial factors make not only diversity, but also equal opportunity, impossible.

C. Favoring diversity is not synonymous with giving a preference.

Implied throughout the various arguments in support of Proposal 2 and §26, is the deliberate deception that promoting "diversity" is synonymous with granting a "preference" to one group in particular. Equating the terms requires an assumption that diversity efforts will invariably aid the same groups time-after-time. The never stated but necessarily implied assumption underpinning any argument that the *Grutter* decision's effect is so harmful as to require its being voided by a majority vote, is that diversity will at all times favor African-

Americans because (the assumption would be), they could never be able to compete on a level playing field.

The Commission asserts that no matter how hard we might want to pretend otherwise, it is only because the playing field is not level, that certain minority groups, including African-Americans are predictably underrepresented. Were our educational system truly equal, standardized testing completely fair, historical discrimination's effects properly addressed, and societal prejudices eliminated, diversity efforts would not be seen to "prefer" African-Americans any more than diversity could now be said to "prefer" clarinetists over violinists. Simply put, the belief that diversity in university admissions policies will always benefit certain groups in particular is a racially prejudiced one, because it is based upon a premise the groups have been provided equal opportunities but are somehow intellectually inferior.

Indeed, a graduate music program at an elite university would never be accused of "preferring" clarinet players just because it adopts a policy that its orchestra should include all instruments. While obviously not a constitutional matter because neither musical instrument is legally recognized as a suspect class, it is unlikely even §26's defenders case would suggest a music program continue to admit more and more violin students and just 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, 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.

Will Proposal 2's proponents next argue that Baskin Robbins discriminates against vanilla because their ice cream stores insist on having the other 30 flavors even though vanilla is by far America's most popular?[32] Would §26's defenders really be happy if they were to purchase a Crayola 8-pack, and discover that six of the crayons were the same shade of blue? Considering color is neither necessarily granting preference to a particular color, nor discriminating against particular other colors.

D. Members of racial minority groups are not fungible commodities, they are unique individuals -- who remain persons of color even when succeeding economically.

The disingenuous use of race neutral programs to achieve diversity would also be antithetical to the academic purpose for creating diversity in the first place. Asserting that the benefits of racial diversity can be achieved by economics or geographics requires presupposing that all African-Americans, or all members of other underrepresented minority groups, are interchangeable.

[32] International Dairy Foods Association, at http://www.idfa.org/facts/icmonth/page2.cfm.

The *Grutter* opinion highlights the testimony of one of the trial experts who explained that; "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students."[33] Similarly, admitting a dozen black students from the same disadvantaged inner-city school system would provide numerical minority representation, but it would not provide the type of diversity the University of Michigan Law School was seeking in *Grutter*.

During the Proposal 2campaign, one of the often heard complaints was, "Why should a black student with rich parents who lives in a suburban school district be looked at any differently than the white student living next door?" The short answer is that, had this black student been in your constitutional law class during its discussions of "driving while black," you probably wouldn't still have to ask the question because as a beneficiary of diversity, you would understand its value in the educational setting.

Even the most privileged of African-Americans have an American experience that is different than that of their white neighbors. Whether one agrees or disagrees with the legal decisions reached by Justice Clarence Thomas vis-à-vis the rest of the bench, it cannot be seriously disputed that his presence on the

[33] *Grutter,* 539 U.S. at 320.

Supreme Court has brought to it a perspective from which all have benefited. One very public example, as described by author Laurence Wrightsman, took place during oral arguments:

> The case was *Virginia v. Black* (2003), and the central issue was whether what the Klan had done [in a particular cross burning] was legal. Justice Thomas interrupted the petitioner and with great emotion described the impact of the KKK on a black man in America. A burning cross is "unlike any symbol in our society. . ." For him the cross burned by the KKK was a symbol of a reign of terror, signifying "one hundred years of lynching." [34]

Nobody present doubts that the Court's diversity played a role that day. Linda Greenhouse described in *The New York Times*, that:

> During the brief minute or two that Justice Thomas spoke, about halfway through the hourlong argument session, the other justices gave him rapt attention. Afterward, the court's mood appeared to have changed. While the justices had earlier appeared somewhat doubtful of the Virginia statue's constitutionality, they now seemed quite convinced that they could uphold it as consistent with the First Amendment.[35]

Ultimately the Supreme Court did not agree with Justice Thomas's assessment that the act of burning a cross was by itself *prima facia* proof of intent to intimidate and the Virginia statute was struck down in that regard.[36] But the point of diversity is not that others give up their own perspective or point of view. It is that the whole can become stronger than the sum of its parts – and that each of

[34] Oral Arguments Before the Supreme Court, An Emprical Approach; Wrightsman, Lawrence; Oxford University Press (2008), page 28.

the parts benefits along the way. Reading the opinion and concurrences of the other Justices in *Black* reveals that the Court's understanding of the issues presented was deeper and its analysis enhanced because of Justice Thomas's presence.

E. Race plays too great a role in far too many aspects of every person's experiences for a university to be able to fully and equally evaluate and compare the qualities of each applicant without its consideration.

The Commission asserts that one critical flaw in defendants' arguments, can be seen by examining two mutually contradictory claims deceitfully made by the proponents of Proposal 2 when campaigning for its passage: (a) that Proposal 2 (and now §26) required the University of Michigan Law School to change the admissions program approved by the Supreme Court in *Grutter*, and (b) that it merely prohibits a university from "preferring" a given applicant's race (and not from considering it in any way). The Commission avers that the conflict between these conflicting representations of what §26 now prohibits, illustrates that (at least as applies to universities) the provision is either unconstitutional, or completely superfluous .

First, with respect to the latter claim that §26 merely prohibits a university from specifically "preferring" an applicant's race as an independent plus factor

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[35] December 12, 2002 edition, available at http://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on-cross-burning.html.
[36] *Virginia v. Black*, 538 U.S. 343; 123 S. Ct. 1536; 155 L. Ed. 2d 535 (2003)

while allowing its consideration in other ways, the Commission frankly wishes this was really all defendants were asking this Court to decree. Described in this way §26 would merely enshrine both the *Gratz* and *Grutter* decisions as Michigan law, which would be contrary to Proposal 2's stated objective of nullifying the Supreme Court's decision in *Grutter*.

Pursuant to *Gratz*, a university is already prohibited from providing an automatic "plus" or "bonus" to a prospective student based upon their race.[37] If this were all that §26 does, it would be redundant and unnecessary. To the extent defendants now argue §26 should be read to merely prohibit considering race alone as an admissions "plus" factor, and should this Court agree with this interpretation, the Commission asks the Court to clearly state this outer limit on §26's application. In doing so, the Court should specifically recognize that the law school's admissions policy at issue in *Grutter* is therefore still permissible.

The alternative is that §26 does prohibit the admissions policy approved by the Supreme Court in *Grutter* by forbidding any consideration of race as a factor in admissions. Read this broadly, the provision unconstitutionally places members of minority groups at a disadvantage because it prohibits assessing them using the same holistic standards used for everyone else.

[37] *Gratz*, 539 U.S. at 278.

Proposal 2 was intended to end U of M Law School's "highly individualized, holistic review of each applicant's file."[38] The Court noted the policy:

> . . . makes clear "there are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic--e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.[39]

Would §26's defenders suggest that a university following this policy may consider those who have overcome a personal adversity unless it has to do with race? Is it proper to consider that an applicant from a northern state attended an undergraduate school in the south, but illegal to factor that he or she was the lone minority student in an otherwise all white high school, or one of only a few white students currently at a particular historically black college, or university?

The U of M Law School admissions policy in *Grutter* focused upon each prospective student's "academic ability coupled with a flexible assessment of their

[38] *Grutter*, 539 U.S. at 337.
[39] *Grutter*, 539 U.S. at 338-339, (citations omitted).

talents, experiences, and potential."[40] Prohibiting any consideration of race would prevent universities from even considering that in some instances the grades black students receive in white suburban schools might reflect cultural biases or even outright prejudice. The rule against consideration of race thus prevents full assessment of even academic ability.

A prospective student's experiences with race and racism can provide a window through which to assess their potential. A university track coach may actively recruit the slower of two runners if that runner has poor form and little training. Coaches are not only permitted to look past an athlete's current "score" in order to assess potential; it is often this "holistic" approach that separates the great coaches from the less so. Certainly, race standing alone does not establish the existence or non-existence of adversities or disadvantages. However, keeping race entirely off the table could often deny minority students the ability to have their unique experiences even considered.

It must also be recognized that Proposal 2's creators opted to pick and choose which protected classes were to be included. Although this brief primarily addresses race, §26 also includes sex, color, ethnicity and national origin. The inclusion of only these five classifications begs the question of whether the omission of not only sexual orientation and age, but also the historically and

[40] *Grutter,* 539 U.S. at 319.

legally recognized suspect class of religion, was occasioned by a desire to retain the ability to "discriminate against or to grant preferential treatment to" these groups. More importantly the omission of sexual orientation and religion dramatically underlines that while §26's language is borrowed from the anti-discrimination world; its effect is to use selected classifications to separate individuals for disparate treatment.

Are §26's defenders really suggesting that a prospective student's religion may be considered in order to assure diversity but his race may not, or that an applicant's sex cannot be considered, but her sexual orientation can? While its wording is neutral, §26 effects are to treat persons differently based upon racial as well as other classifications.

Requiring public universities to act as if race plays no role in determining a person's identity and perceptions, even while they are considering every other trait, is itself race-based discrimination and it cannot be made constitutional merely because the majority voted for it.

III. Article 1, Section 26, of the Michigan Constitution prevents Michigan universities from, exercising the educational independence that the United States Constitution guarantees, and denies all students, the opportunity to attend the university of their choice - one that guarantees the exposure to diversity that they desire and that future employers demand.

A. The portion of Michigan Constitution Article 1, Section 26 that applies to universities violates the doctrine of academic freedom.

Amicus, Michigan Civil Rights Commission asserts that a university's primary responsibility must be to provide its student body with the best education possible. While how to define "best" is of course always subject to debate, it is an issue that the federal courts have wisely left to the universities themselves.

The U.S. Supreme Court, when upholding the University of Michigan Law School's right to consider race as one among many admissions factors, 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.[41]

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."[42]

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

[41] *Grutter*, 539 U.S. at 328.
[42] *Grutter*, 539 U.S. at 328 (emphasis added).

concern of the First Amendment."[43] Justice Powell built upon the "four freedoms" upon which a university's independence is based as earlier articulated by Justice Frankfurter:

> 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.[44]

Consistent with this doctrine of academic freedom, the Supreme Court also found support for diversity in "numerous" studies, that establish the essential value of a diverse student body.[45] To this long list of studies considered by the *Grutter* Court, the Commission wishes to add one post-*Grutter* study. "Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society?"[46]

Published in the *Harvard Educational Review*, the study was designed to examine empirically what numerous Fortune 500 companies and large corporations had asserted based only upon anecdotal evidence in their joint *amicus* brief to the Supreme Court, that "exposure to racial diversity in college has the long-term

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[43] *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.)
[44] *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).
[45] *Grutter*, 539 U.S. at 333.
[46] 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).

benefit of preparing students to understand multiple perspectives, to negotiate conflict, and to relate to different worldviews."[47]

Focusing on the relationship between white individuals' 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."[48] The study further concluded "College 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."[49]

[47] *Jayakumar*, at 617.
[48] *Jayakumar*, at 636, (emphasis added).
[49] *Jayakumar*, at 641, (emphasis added).

What then of selective institutions that do not have, or are prohibited from creating, diverse student bodies? The study's author suggests "businesses should consider recruiting employees from less-selective institutions, which are more likely to offer diverse learning environments." And that "…business leaders might go so far as to publicly announce their preference for hiring graduates from certain selective institutions that have particularly diverse student bodies."[50]

These conclusions should not be mistaken as the hyperbole of an overly dramatic social scientist. Rather, the conclusions verify the belief of the sixty-five of America's largest corporate competitors, who joined together to submit a single *amicus* brief in the *Grutter/Gratz* cases, and who recognize the importance of hiring employees from diverse institutions.[51]

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[50] *Jayakumar*, at 643.

[51] The list includes: 3M, Abbott Laboratories, Alcoa, Inc., Alliant Energy Corporation, Altria Group, Inc., American Airlines, Inc., American Express Company, Amgen Corporation, Ashland Inc., Bank One Corporation, Baxter Healthcare Corporation, The Boeing Company, Charter One Financial, Inc., ChevronTexaco Corporation, The Coca-Cola Company, Coca-Cola Enterprises Inc., DaimlerChrysler Corporation, Deloitte Consulting L.P., Deloitte & Touche LLP, The Dow Chemical Company, Eastman Kodak Company, Eaton Corporation, Eli Lilly & Company, Ernst & Young LLP, Exelon Corporation, Fannie Mae, General Dynamics Corporation, General Electric Company, General Mills, Inc., John Hancock Financial Services, Harris Bankcorp, Inc., Hewlett-Packard Company, Illinois Tool Works Inc., Intel Corporation, Johnson & Johnson, Kaiser Found. Health Plan, Inc., Kellogg Company, KPMG Int'l for KPMG LLP, Kraft Foods Inc., Lockheed Martin Corporation, Lucent Technologies, Inc., Medtronic, Inc., Merck & Co., Inc., Microsoft Corporation, Mitsubishi Motors North America, MSC.Software Corporation, Nationwide Mutual Insurance Co., NetCom Solutions International, Nike Inc., Northrop Grumman Corporation, Pepsi Bottling Group, Inc., PepsiCo Inc., Pfizer Inc., PPG Industries, Inc., PricewaterhouseCoopers LLP, The Procter & Gamble Company, Reebok International, Sara Lee Corporation, Schering-Plough Corporation, Shell Oil Company, Steelcase Inc., Sterling Financial Group of Cos., United Airlines, Inc., Whirlpool Corporation, and Xerox Corporation.

Social scientists and potential employers agree that a student who wants to excel in their professional life should go to a university that values diversity and assures a diverse student population. If that student lives in Michigan he or she, regardless of their own race, is being denied the opportunity to apply to a university (at least with in-state tuition), that will provide the education desired.

A university's First Amendment academic freedom to further a compelling state interest and attain a racially diverse student body by the constitutional consideration of race as one among the many factors used in making admissions decisions should not be revocable by popular vote. It is impossible to say with certainty why the majority of Michigan voters approved Proposal 2. Certainly some voted in the hope the majority owned-business they worked for might get more government contracts. Many likely believed in a general way that minority rights come at an unfair cost to "innocent" members of the majority. Others no doubt felt that they, or someone they care about, could be one of the few potential students who might get admitted to a particular university if only it were forbidden to look at race.

It is, however, safe to surmise that very few voters asked themselves "what is in the best interests of the students attending Michigan universities" or, "what is in the best interests of the University of Michigan?" Indeed this is a critical distinction. While each applicant's personal interest is their own admission, and

each voter is likely to look for their personal interest, a public university's interest is in the student body as a whole. That interest cannot be served by asking only which of two academically qualified applicants scored higher on standardized tests, but ignoring the ways each of those applicants might contribute to the quality of the education and experiences of all other admitted students.

The Commission urges this Court not to fall into the trap of looking at a university admissions decision as affecting only the student who gets in and the one who doesn't. Each individual admissions decision also affects the educational experience of every other admitted student, and the university's reputation for academic excellence.

This Court should not permit a majority, voting in its individual perceived interests, to override the constitutionally-rooted academic freedom of Michigan's universities to act in their own best interest, and that of their students.

B. Even if not found conclusive on its own, the educational independence of universities should be examined in concert with the political structure and traditional equal protection arguments, and this Court should consider the cumulative damage done to the ability of Michigan's universities to act in either their own interests or that of their students.

§26 violates academic freedom principles not only by usurping the universities' authority to make the admissions decisions that are in their own and their students' interests, but also by subjecting the admissions process to the two tiered and inherently unequal political process discussed earlier. Even more

unjustifiably, decisions on changes in areas not involving race will ultimately be made by the university based upon the interests of the university and its students, while decisions involving race are to be decided by majority vote and based upon voters personal motivation that may well be contrary to the interests of the university and its students.

In denying a university its academic independence, §26 also denies minority students who are admitted to universities any assurance that the campus climate will be one where they can feel comfortable in a supportive learning environment. While it disguises itself with neutral language, §26 denies minority applicants the right to be "holistically" considered as unique individuals in the same way as other applicants. And it denies all students the opportunity to benefit from a diverse student body.

Pursuant to §26, it is impossible for any prospective applicant seeking a diverse campus to assess whether to apply to a particular Michigan university. A student who wants to someday apply to a company that (like the sixty-five employers listed at *fn*. 51), values and recruits employees who have been exposed to diversity as part of their university experience, best go elsewhere if they want to be assured their university will qualify.

The universities' academic freedom, the separate but unequal political processes for changing admissions policies, and the more traditional equal protection arguments, are each alone sufficient to invalidate §26's application to universities, but they are also inexorably intertwined. Each, when looked at in concert with the other grounds becomes more compelling. Subjugating the university's judgment to a majoritarian political process violates both the university's academic freedom and the prospective student's equal protection rights.

Conclusion

The proponents of Proposal 2, and the defenders of §26, like to claim the legacy of Dr. Martin Luther King Jr. by co-opting one line of his landmark "I Have a Dream" speech as though it were the entire body of his life's work. Amicus Michigan Civil Rights Commission, disputes that Dr. King would believe that his race was not part of his character. King's body of work stands, the Commission believes, upon a fundamental belief that people are equal, not interchangeable.

More directly to the point here, nothing suggests that when Dr. King spoke of his dream that his children would one day be judged not by the color of their skin but by the content of their character, that he believed skin color and character make up the universe of ways to judge a person's value.

Michigan Constitution, Article 1, Section 26 creates separate and very unequal political processes with the more burdensome process applying to matters involving race. It prevents minority applicants from being assessed in the same "holistic" manner considered as other applicants. It denies universities the academic freedom to create a student body that is in the best interests of the university itself or of its students.

Allowing majority rule to reset minority rights is inconstant with not only the letter, but the very spirit, of equal protection.

At least as it applies to universities, §26 should be invalidated.

Respectfully submitted,

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Michigan Civil Rights Commission
In Support of Appellants

In accordance with FRAP 29(d) which limits the allowable length of an amicus brief to one-half the maximum length authorized for a party's principal brief, and FRAP 32(a)(7), which limited the parties principal briefs to 14,000 words, counsel for Proposed Amicus Curia Michigan Civil Rights Commission hereby certifies that the brief submitted on behalf of Proposed Amicus Curia Michigan Civil Rights Commission on August, 19, 2009, is within the word limit and the entire countable words contained in the brief from pages 1 through 33 is 6,418.

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CERTIFICATE OF SERVICE

I certify that on August 19, 2009 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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