UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al*.,

Plaintiffs,

v

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district,

Defendants,

-and-

CHASE CANTRELL, *et al*.,

Plaintiffs,

v

JENNIFER GRANHOLM and MICHAEL COX,

Defendants.

Case No. 06-15024

Honorable David M. Lawson
U.S. District Court Judge

CONSOLIDATED CASES

Case No. 06-15637

Honorable David M. Lawson
U.S. District Court Judge

MICHIGAN EDUCATION ASSOCIATION'S
***AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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QUESTION PRESENTED

Should the Court grant Plaintiffs' Motion for Summary Judgment on the basis that Article 1, §26 ("Proposal 2") of the Michigan Constitution is unconstitutional?

STATEMENT OF COURT JURISDICTION

The Michigan Education Association as A*micus Curiae*, concurs in the statement of jurisdiction and venue filed by Plaintiffs.

***AMICUS* STATEMENT OF INTEREST**

The Michigan Education Association (MEA) originated as the Michigan State Teachers Association in 1852, and officially became known as the MEA in 1926. Today, the MEA is the largest single public employee union in the State, and the third largest education association in the United States, representing more than 130,000 teachers, higher education faculty, professional education staff, and education support personnel throughout Michigan.

It is the mission of the MEA to ensure that the education of all students and the working environments of all its members are of the highest quality. In furtherance of this mission and through collective action, the MEA is dedicated to the purpose of serving its members' employment goals, interests, and needs, while also advocating for quality public education. Most significantly, the MEA believes in finding solutions to problems facing public education that serve to strengthen and preserve quality public educational opportunities for every individual. In keeping with this mission and purpose, the MEA is fully committed to the promotion of the principles of democracy and civil rights.

For the foregoing reasons, the MEA has a strong interest in protecting the employment goals and interests of its membership, and also in advocating for quality public education for all. Therefore, the MEA submits this *Amicus Curiae* Brief in support of the arguments raised by Plaintiffs.

ARGUMENT

I. PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY ELIMINATING NOT ONLY AFFIRMATIVE ACTION, BUT SCHOLARSHIP OPPORTUNITIES AND TARGETED OUTREACH EFFORTS DESIGNED TO PROMOTE DIVERSITY AND EQUAL ACCESS TO OPPORTUNITY FOR MINORITIES.

A. Proposal 2 prevents efforts to address and remedy segregation and the inequalities that remain pervasive in our society five decades after *Brown.*

In 1954, when the Supreme Court in *Brown* determined segregation in public schools deprived black individuals of equal protection of the laws and held that "separate education facilities are inherently unequal", the Court did so with the consideration of public education "in the light of its full development and its present place in American life . . . ." *Brown v. Bd. of Ed.*, 347 U.S. 483, 495 (1954). The same consideration must be given to public education today in determining the constitutionality of Proposal 2.

Amicus Curiae MEA asserts that pervasive racial segregation remains a major factor today in low educational attainment, which has obvious consequences on access to a quality education and valued jobs. Research has shown that three of the top ten and five of the top 25 most segregated cities in the country are in Michigan, and the Detroit Metropolitan area is the second most segregated in the nation, second only to Gary, Indiana. Sugrue, *Expert Report of Thomas Sugrue*, 5 Mich. J. Race & L. 261 (1999).

Specifically with regard to K-12 public education in Michigan, most children attend schools with others like themselves. Based on data from 83 Detroit area school districts compiled in 1997 by the Michigan League for Human Services, the black

student population in 60 of those 83 districts was three percent or less and another seven districts had black student populations under ten percent, while 90.7 percent of Detroit area white students attended schools in those districts. Sugrue, *supra.* Accordingly, districts with large numbers of black students had very few white students. Additionally, more than 50 percent of Detroit area Hispanic students attended schools in two predominantly black school districts. Sugrue, *supra.* Consequently, research shows that public schools are "almost as racially segregated as those which were constitutionally permitted before the 1954 *Brown* decision." Reynolds, Farley, *Blacks and Whites: Narrowing the Gap?* Cambridge, MA: Harvard University Press 1983.

Moreover, a national survey of teachers in K-12 public education conducted by The Civil Rights Project, demonstrates that not only does segregation continue to exist among certain public school students, but the teaching force in those schools in which segregation is seen to exist is also largely segregated. Frankenberg, Erica, *The Segregation of American Teachers*, Cambridge, MA: The Civil Rights Project at Harvard University 2006. White teachers dominate the teaching profession, yet white teachers are the least likely to have experience with racial diversity. For example, on average, white teachers as students attended elementary schools that were over 90 percent white, and they are currently teaching in schools where 90 percent of their faculty colleagues are white and over 70 percent of their students are white. Frankenberg, *supra.*

This research highlights the continuing existence of segregation in public education. As evidenced by the statistics from the research cited above, the existing

segregation inexorably leads to inequality in opportunities in higher education, employment, contracting, and other societal areas for minorities in Michigan.

A significant aspect of the mission of the MEA is the delivery of a quality public education to **all** students in Michigan. In fulfilling this mission, the MEA has always been committed to finding ways to remove barriers to the achievement of a totally integrated society. The MEA asserts that Proposal 2 constitutes a definite barrier to the total integration of society that is unconstitutional based on its racial focus and practical effect of targeting and eliminating efforts designed to provide equal opportunity for women and minorities who have historically experienced discrimination and inequalities in resources and opportunities.

The MEA asserts that the segregation in K-12 education, as recognized above, leads to inequality among disadvantaged groups. These inequalities result in the reduction of numbers of disadvantaged members who are admitted to college, and the benefits which flow from access to higher education. Yet in the face of the continuing and established inequalities, Proposal 2 bars the State of Michigan from tailoring programs to specifically redress the inequalities which are the result of continuing segregation.

By removing potential tools from the State of Michigan's arsenal in the war on the last vestiges of segregation, Proposal 2 serves as a legal impediment to redressing segregation by serving as a prohibition on the utilization of otherwise legal mechanisms for dealing with said segregation. By barring tools to redress the inequalities which result from continuing segregation, Proposal 2 assures continuity of the inequalities while refusing access to the law to remedy segregation. By preventing

disadvantaged groups from equal access to the law to remedy segregation, Proposal 2 is in violation of the equal protection of the laws. Consequently, it is imperative to revisit the promise of *Brown* and work to ensure that unconstitutional measures such as Proposal 2 do not remain in effect to eliminate policies, scholarships, and targeted outreach programs designed to achieve and maintain diversity and equal access to opportunity for all.

B. Evidence of the negative impact of California's Proposal 209 solely on women and minorities further demonstrates Michigan's Proposal 2 is unconstitutional.

Proposal 2 was modeled after California's Proposal 209, a virtually identical constitutional amendment adopted by California voters in 1996. The negative impact of Proposal 209 on Californians has been wide-ranging, as California courts have consistently construed Proposal 209 broadly serving to dismantle not only programs designed to benefit women and minorities, but also programs aimed at redressing documented patterns of discrimination. Susan W. Kaufman, *The Potential Impact of the Michigan Civil Rights Initiative on Employment, Education and Contracting,* The Center for the Education of Women, The University of Michigan 2006. This included the elimination of services such as college preparation programs for students of color, summer science programs for girls, outreach to minority and women owned businesses, funding for training of minority professionals in fields where they are underrepresented, and the end of numerous voluntary K-12 school integration efforts. Kaufman, *supra.*

Additionally, according to Richard Atkinson, the former president of the University of California system, research shows that prior to the passage of California's

Proposal 209, in 1995, the University of California Berkley and the University of California Los Angeles (UCLA) enrolled a total of 469 African American women and men in a combined freshmen class of 7,100. Richard C. Atkinson and Patricia A. Pelfrey, <http://rca.ucsd.edu/speeches/FinalMichiganPaper.pdf> (accessed January 3, 2008). In 2004, after Proposal 209 was implemented, the number was 218 out of a combined freshmen class of 7,350, a greater than 50 percent reduction in minority enrollment. Atkinson and Pelfrey, *supra*. Even more alarming is the fact that in 2006, UCLA, which is located in the county with the second largest African American population in the U.S., enrolled the smallest number of entering African American freshmen since 1973. Kaufman, *supra.* Finally, the hiring of women faculty dropped immediately on a number of University of California campuses, while the hiring of African American Faculty members at the University of California demonstrated the largest decrease with an overall decline of 14 percent between 1991-1995 and 2001 and 2004. Kaufman, *supra.*

Given the clear impact of California's Proposal 209, Michigan citizens can expect the same sharp decrease in the college enrollment of underrepresented minority students, as well as dramatic drops in the hiring of women faculty and underrepresented minority faculty. Additionally, the impact of Proposal 2 will be felt with the elimination of scholarships, fellowships, and grants at all levels of education that consider gender, race, ethnicity, and national origin. Significantly, Proposal 2 does not just ban affirmative action, but also impacts targeted efforts at the K-12 level and beyond designed to promote diversity, integration, and equal opportunity. This will have a

devastating impact on desegregation efforts that are so desperately needed in Michigan, one of the leading states with regard to ongoing racial segregation.

C. Proposal 2 is contrary to multiple United States Supreme Court rulings.

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Const. guarantees that "no person shall be denied the equal protection of the laws." Following this core principal, Supreme Court precedent established in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), *Washington v*. *Seattle School District No. 1*, 458 U.S. 457 (1982), and *Romer v. Evans*, 517 U.S. 620 (1996), supports the position that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment.

In *Hunter*, an existing city charter gave authority to the City Council alone to adopt ordinances regulating real estate transactions with respect to a multitude of criteria, including children, pets, etc. *Hunter*, *supra* at 390-391. However, a charter amendment was adopted which prohibited the City Council from passing any ordinance that regulated the use, sale, or other disposition of real estate on the basis of "race, color, religion, national origin, or ancestry" without first submitting that ordinance to a vote of the electorate. *Id.* at 387. The Court held that while the charter was facially neutral, in practice, "the law's impact falls on the minority." As such, the Court found the charter in violation of the Fourteenth Amendment because it required racial and religious groups to go through "a far more arduous procedure in order to enact legislation on their behalf." *Id.* at 393.

Similarly, in *Seattle School District No. 1*, the Court determined that a statute which overturned a voluntary busing plan designed to achieve racial integration in schools violated the Equal Protection Clause of the Fourteenth Amendment.

Seattle School District No. 1, supra. The statute at issue created a barrier only for racial minorities in that an integration plan could only be implemented through a referendum to amend the Constitution. The Court held the statute unconstitutional on the basis that it imposed an unequal burden on minority interests. *Id.* at 483.

More recently in *Romer*, the Court reaffirmed the holdings in *Hunter* and *Seattle School District No. 1* by prohibiting the enactment of statutes in Colorado that banned discrimination against lesbians and gay men. *Romer*, *supra*. The Court found the Colorado statute unconstitutional because, once again, the statute at issue made it more difficult for only one class of citizens, homosexuals, to seek beneficial legislation. *Id*. at 633-634.

Similar to the cases referenced above, Proposal 2 specifically requires public universities to eliminate race from admissions criteria, while still allowing the consideration of multiple non-academic factors such as geographic location, legacy, socioeconomic status, and scholarship athlete status. While individuals falling into these criteria may simply petition the faculty for special consideration in admissions, minorities and women must undergo the lengthy and complex process of amending Michigan's Constitution. This clearly works a hardship on women and minorities, serving to undermine long held Supreme Court precedent in direct violation of the Equal Protection Clause of the Fourteenth Amendment.

Additionally, in the context of K-12 education, the Supreme Court determined in *Parents Involved In Community School v. Seattle School Dist. No. 1,* 127 S.Ct. 2738 (2007), that voluntary integration programs implemented in Seattle and Kentucky were unconstitutional. *Parents Involved, supra*. However, in his concurring

opinion Justice Kennedy stated, "In the administration of public schools . . . it is permissible to consider racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." *Id.* at 2792. Proposal 2 contradicts this and works to deprive school districts of a variety of tools to address the very real problem of segregation and the provision of equal education to all students. Such an outcome blatantly destroys the promise of *Brown.*

CONCLUSION

For the foregoing reasons, the MEA respectfully requests that this Court grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

Dated: January 7, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Sharon L. Browne, Erwin S. Chemerinsky, Charles J. Cooper, Karin A. DeMasi, Mark P. Fancher, Alan W. Foutz, Robin Luce Herrmann, Melvin J. Hollowell, Jr., Sheldon H. Klein, James E. Long, Heather S. Meingast, Laurie J. Michelson, Kerry L. Morgan, Kary L. Moss, Brian O. Neill, Margaret A. Nelson, Leonard M. Niehoff, Joseph E. Potchen, Michael E. Rosman, Dean J. Sauer, Brent E. Simmons, Brigham C. Smith, Michael J. Steinberg, Reginald M. Turner, Jr., George B. Washington, and Jerome R. Watson

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