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.

Case No. 06-15024
Hon. David M. Lawson

CONSOLIDATED CASES

- and -

CHASE CANTRELL, *et al.*,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,

Defendant.

Case No. 06-15637
Hon. David M. Lawson

THE CANTRELL PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Proposal 2 has fundamentally shifted the rules of political engagement in Michigan by banning policies primarily benefiting people of color, and making it nearly impossible for those policies to be restored. By excising race from public universities' discretion to set their own admissions policies, Proposal 2 eviscerates the core principles of *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Supreme Court expressly upheld the use of race in admissions to further the compelling state interest of diversity. Moreover, Proposal 2 ensures that these race-based disadvantages will be entrenched forever by creating a virtually insurmountable hurdle for those seeking to reverse them through the political process. This is precisely the sort of race-targeted political restructuring that the Equal Protection Clause of the Fourteenth Amendment forbids. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390-91 (1969).

Defendants make incorrect legal assertions, dispute immaterial or irrelevant facts and misconstrue the Cantrell Plaintiffs' claims. They assert, for instance, that the *Hunter*/*Seattle* doctrine requires proof of discriminatory intent (which it does not), and that the process of amending a constitution is not as burdensome as the Cantrell Plaintiffs' expert witness attests (which is irrelevant). (*See* Def.-Int. Eric Russell's Mem. In Opp'n To Cantrell Pls.' Mot. For S. J. ("Russell Opp."), Dkt. No. 221, at 22-23; 32-35.) They also claim that the Cantrell Plaintiffs "advocate constitutionally mandatory racial preferences," which we do not. (*See* Russell Opp. at 9-11; *see also* Def. Cox's Resp. In Opp'n To The Cantrell Pls.' Mot. For S. J. ("Cox Opp."), Dkt. No. 214, at 5.) Finally, Defendants offer no compelling state interest justifying the invidious racial classifications created by Proposal 2.

I. PROPOSAL 2 SELECTIVELY BURDENS THE POLITICAL PROCESS TO THE DETRIMENT OF RACIAL MINORITIES.

In *Hunter* and *Seattle*, the Supreme Court held that a law violates the Equal Protection Clause if it imposes a higher political burden on those seeking policies that are "in [the] interest" of racial minorities. *Hunter*, 393 U.S. at 395; *Seattle*, 458 U.S. at 473-74. The challenged initiatives in those cases imposed two harms that reinforced each other: they banned policies that people of color considered to be in their interest, and made it virtually impossible to restore those policies by relocating the authority to address them to "a new and remote level of government." *Seattle*, 458 U.S. at 483. This combination raises special constitutional dangers not present in the ordinary Equal Protection case alleging racial discrimination: people of color are not merely subject to a burden, they are also stripped of an equal power to remove that burden through the ordinary political process. Proposal 2 imposes precisely the same mutually reinforcing harms by (1) targeting race-conscious admissions policies that are of special interest to people of color, and (2) removing public universities' discretion over those policies such that they are virtually impossible to restore, while leaving universities free to address matters that do not involve race.[1]

First, Proposal 2 has a "racial focus" because it targets policies that primarily benefit people of color. *Seattle*, 458 U.S. at 472-74 ("racial focus" exists where "minorities may

[1] The Attorney General is wrong that it is "premature" to determine "that the implementation and application of [Proposal 2] will render [it] unconstitutional." (Cox Opp. at 6-7.) Whether Proposal 2 violates the *Hunter/Seattle* doctrine does not depend on how the amendment fares during "one full admissions cycle." (*Id*. at 6.) Nor is a state court determination of the amendment's "permissible parameters" (Cox Opp. at 6) necessary because it is undisputed that the Universities eliminated their race-conscious admissions policies in response to Proposal 2.

consider [the law in question] to be 'legislation that is in their interest'"). The very title of Proposal 2 reveals that it is focused on "affirmative action," a term that obviously refers to policies benefiting people of color. Mich. Const. art. I, § 26. It is incontrovertible that Proposal 2 denies people of color an equal opportunity to express a critical part of their identity – their race – in a process that allows applicants to self-identify on the basis of numerous other personal characteristics.[2] (*See* Dkt No. 203 at 12-15.) Under Proposal 2, a diversity-based admissions system cannot give weight to an applicant's racial identity, in contrast to the weight it accords to virtually every other self-defined identity. This selective elimination of the Universities' discretion is discriminatorily borne by people of color. Mr. Russell unwittingly highlights the inequity of this result, suggesting that if applicants "have an equal protection right to have any factor that is 'a critical part of how [they] choose to define themselves' considered by the admissions committee," such a right "would apply equally to *any* characteristic that might be equally 'critical' to an applicant's identity, including religion, family background, socioeconomic status, sexual orientation, geographical or cultural origin, gang affiliation, membership in a political party, or whatnot." (Russell Opp. at 7-8.) But the Universities *do*

[2] Mr. Russell's assertion that the Cantrell Plaintiffs lack standing to bring a claim relating to application for admission "because all their applications have already been considered and decided" (Russell Opp. at 5) is wrong. Whether the Cantrell Plaintiffs or proposed class members have applications currently pending at the Universities is irrelevant to their standing to bring a claim that Proposal 2 burdens their ability to achieve race-conscious admissions policies at the Universities. And in any event, the Cantrell Plaintiffs' proposed class includes applicants who will apply to the university in each admissions cycle. Indeed, the Cantrell Plaintiffs moved for class certification in part because the cyclic nature of the university admissions process means that the membership of their proposed class is perpetually in flux. By contrast, Mr. Russell – who had his application decided under Proposal 2, which is the *only* interest he sought to protect when he intervened in this action – did not move for certification of a defendant class.

consider many of these attributes, and remain free to consider *any* of them – except for race. (*See* Dkt. No. 172-11.) This targeted exclusion of race from a process that otherwise considers myriad other diversity-enhancing characteristics creates a "meaningful and unjustified official distinction[ ] based on race'" in the University admissions system. *See Seattle*, 458 U.S. at 486 (quoting *Hunter*, 393 U.S. at 391); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996) (invalidating law that "impos[ed] a special disability on [homosexuals] alone").[3]

Second, Proposal 2 "imposes direct and undeniable burdens on minority interests" by "mak[ing] the enactment of racially beneficial legislation uniquely difficult." *Seattle*, 458 U.S. at 458; *see also Romer*, 517 U.S. at 632 (striking down law that had "the peculiar property of imposing a broad and undifferentiated disability on a single named group"). Prior to Proposal 2, each University admitting unit had broad autonomy over its own admissions processes and procedures, drawn directly from Article VIII, § 5 of the Michigan Constitution. This educational autonomy has a federal "constitutional dimension, grounded in the First Amendment." *See Grutter*, 539 U.S. at 329 ("'The freedom of a university to make its own judgments as to education includes the selection of its student body.'"). Exercising this autonomy, the Universities created admissions processes that consider a wide variety of personal attributes, such as socioeconomic status, geography, military service, etc., to achieve broad student diversity. Proposal 2 leaves the Universities' discretion largely intact, removing only the ability

[3] In seeking to distinguish *Romer* on the ground that the law invalidated in that case provided underrepresented minorities with "*protection against discrimination*" rather than banning "differential treatment" (Russell Opp. at 14-15), Mr. Russell ignores the fact that Proposal 2 is far more than a discrimination ban, which itself creates unjustified race-based distinctions. (*See infra* at Part II.C.)

to consider race. This gerrymandering of the Universities' discretion can only be understood as an effort to exclude from the political process issues of particular interest to racial minorities. At the very least, it is utterly irrational to strip Michigan's educational authorities of the discretion to consider the view that race might be educationally relevant to a potential student's application.

II. THE MATERIAL FACTS ARE NOT IN DISPUTE AND DEFENDANTS' LEGAL ARGUMENTS ARE UNAVAILING.

Defendants twist the law, dispute irrelevant or immaterial facts and offer no compelling state interest justifying Proposal 2's racial classification.[4] As an initial matter, the Sixth Circuit's order in *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (2006), is not binding on this Court regardless of whether the Cantrell Plaintiffs' motion to vacate it was "effectively dismiss[ed] as moot." (*See* Russell Opp. at 25 n.8.) Although the Cantrell Plaintiffs were never informed that their motion to vacate had been dismissed, such dismissal is irrelevant because an order granting an injunction pending appeal "expires upon the disposition of [the] appeal." *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *Atlas Copco, Inc. v. Envt'l Prot. Agency*, 642 F.2d 458, 470 (D.C. Cir. 1979) ("a stay issued pursuant to Federal Appellate Rule 8(a) dissolves automatically upon

[4] Mr. Russell complains that the Cantrell Plaintiffs seek "to smuggle [new claims] in through their summary judgment motion." (Russell Opp. at 6 n.2.) That is wrong. The Cantrell Plaintiffs have always brought a single claim: that Proposal 2 selectively burdens people of color in the political process by making it virtually impossible to secure race-conscious admissions policies. The law does not require that plaintiffs plead in their complaint every possible legal theory on which they may seek to rely. *See Wysong v. Dow Chem. Co.*, 503 F.3d 441, 446 (6th Cir. 2007) (reversing District Court's refusal to consider plaintiff's legal theory because "notice pleading does not box plaintiffs into one theory or the other at the complaint stage"). Moreover, Mr. Russell never sought to depose the Cantrell Plaintiffs, and cannot now complain that he "had no notice or opportunity" to do so. (*See* Russell Opp. at 13.)

resolution of the appeal"). In any event, the order "has no *res judicata* effect because it does not constitute a final adjudication of the merits of an issue." *Overstreet*, 305 F.3d at 573.

A. Defendants' Arguments Regarding Racial Focus Are Without Merit.

First, Mr. Russell asserts that a law violates the Equal Protection Clause "*only* [if it is] intentionally discriminatory," contains "an express racial classification" or is an "obvious pretext for racial discrimination.'" (Russell Opp. at 22-23 & 26.) That is not the law. Laws with a "racial focus" that restructure the political process to the detriment of minorities "fall[ ] into an inherently suspect category" and do not need "a particularized inquiry into motivation." *Seattle*, 458 U.S. at 485. *Seattle* itself rejected the notion "that *Hunter* was swept away, along with the disparate-impact approach to equal protection," in *Washington v. Davis*, 46 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977):

> "[W]hen facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine."

Seattle, 458 U.S. at 484-85.[5]

Second, Mr. Russell claims that the Cantrell Plaintiffs' "overbroad reading of 'racial focus'" would "strip authority from the voters of every State to address any racially

[5] Mr. Russell's reliance on *James v. Valtierra*, 402 U.S. 371 (1971), is misplaced. (Russell Opp. at 27.) The challenged enactments in *Valtierra* required a majority vote to approve federally-subsidized low-income housing and thus had nothing to do with race. Indeed, the *Valtierra* Court expressly distinguished *Hunter*, noting that "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." *Valtierra*, 402 U.S. at 141. By contrast, there can be no dispute that Proposal 2 was "effectively drawn for racial purposes." *See Seattle*, 458 U.S. at 471.

related issues through the State referendum process." (Russell Opp. at 26-27.) That, again, misstates the law. The restructuring principle established in *Hunter* "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification," but "when the political process or the decisionmaking mechanism used to *address* racially conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on 'distinctions based on race.'" *Seattle*, 458 U.S. at 485. Moreover, the notion that *Hunter/Seattle* "run[s] contrary to the Supreme Court's unequivocal *approval* of the use of voter referendums to address issues that impact upon race" (Russell Opp. at 27) is absurd. Proposal 2 is not relieved of constitutional scrutiny simply because it was passed by referendum. *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.").

Third, the Cantrell Plaintiffs do not "advocate constitutionally mandatory preferences." (Russell Opp. at 9-11; *see also* Cox Opp. at 5.) Instead, we argue only that the Equal Protection Clause guarantees a race-neutral process that gives racial minorities an equal opportunity to urge consideration of policies that are in their interest. To be sure, states need not decentralize power to specialized state agencies or subdivisions. But once the state chooses to decentralize power broadly, it may not carve out topics that are of special interest to racial minorities while leaving the process unfettered for every other group.

Fourth, Mr. Russell argues that the Cantrell Plaintiffs "have presented virtually no evidence," apart from the plaintiffs' declarations, to show that the inability to have one's race considered in the university admissions process disadvantages people of color. (Russell Opp. at

12-13.) The Cantrell Plaintiffs of course do not "purport to speak for *all* black people in the State of Michigan" (*see id*.), nor could we. It is sufficient that the Cantrell Plaintiffs believe race-conscious admissions policies are in their interest, and seek an equal opportunity to lobby for them. *See Seattle*, 458 U.S. at 472-74; *Hunter*, 393 U.S. at 395 (Harlan, J., concurring).

Fifth, the Cantrell Plaintiffs' claim is not "foreclose[d]" by the Supreme Court's opinions in *Parents Involved in Community Schools v. Seattle School District No 1*, 127 S. Ct. 2738 (2007). (Russell Opp. at 11.) To begin, the flexible, multi-faceted, race-conscious admissions policies that were expressly upheld in *Grutter* are plainly different from the mechanical use of race invalidated in *Parents Involved*. Moreover, Justice Harlan's "vision" of a color-blind Constitution in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Russell Opp. at 19) is not the reality of 2008. *See, e.g.*, *Grutter*, 539 U.S. at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."); *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does."). The reality now is that race matters, and genuine diversity cannot exist without it.

B. Defendants' Arguments Regarding Political Restructuring Are Unavailing.

First, Mr. Russell argues that the Cantrell Plaintiffs cannot prove that Proposal 2 "*is specifically structured to disenfranchise a minority constituency*" because advocates of race-conscious policies "are as racially mixed a group as those who oppose them." (*See* Russell Opp. at 31-32.) That is irrelevant. Under *Hunter* and *Seattle* the race of those seeking to lobby for policies that are of special interest to people of color is irrelevant. Indeed, in *Seattle*, the

Supreme Court acknowledged that there were white proponents of fair housing and desegregation burdened by the amendments in those cases:

> "It undoubtedly is true . . . that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.' But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance."

Seattle, 458 U.S. at 471-72 (internal citations omitted).

Second, Mr. Russell disputes certain bases presented in the declaration of Kristina Wilfore, Executive Director of Ballot Initiative Strategy, Inc. (Russell Opp. at 33-35.) Notably, neither Mr. Russell nor the Attorney General disputes Ms. Wilfore's core conclusion that the process of amending Michigan's Constitution – now the only means of restoring race-conscious admissions policies at the Universities – is far more onerous than the process of seeking a policy change by lobbying the Universities directly. That undisputed fact is all that matters since the relevant inquiry under *Hunter* and *Seattle* is whether a law requires minorities to "surmount a considerably *higher* hurdle than [those] seeking comparable legislative action." *See Seattle*, 458 U.S. at 474 (emphasis added); *see also Hunter*, 393 U.S. at 390-91.

C. Proposal 2 Is Not Justified By Any Compelling State Interest.

The Attorney General and Mr. Russell defend Proposal 2 as a broadly neutral ban of all racial classifications serving "the compelling state interest in guaranteeing that all citizens will be treated equally by the State without regard to race." (Russell Opp. at 18; *see also* Cox

Opp. at 3.) But that is not what Proposal 2 does.[6] Proposal 2 *itself* discriminates against people of color by selectively burdening racial minorities in the political process. Indeed, Michigan could have enacted broad legislation to eliminate racial classifications in areas where they continue to disadvantage people of color (for example, in housing and zoning, access to credit and private employment), but instead it focused selectively on public employment, contracting and education – precisely the areas in which minorities have achieved hard-fought political victories. *See* Mich. Const. art. I, § 26. There is nothing race-neutral, let alone "compelling," about a proscription of programs whose primary beneficiaries are people of color.[7]

January 22, 2008 Respectfully submitted,

s/ with consent of Mark D. Rosenbaum
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[6] Mr. Russell's additional "justification" that Proposal 2 prevents "systemic mismatching of minority students" who are "underqualified" for elite universities is irrelevant and insulting. (*See* Russell Opp. at 17, 20.)

[7] To the extent Defendant Cox has incorporated by reference additional arguments made in his summary judgment motion (Cox Opp. at 7), we similarly incorporate our responses thereto.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

	Case 06-15024 Hon. David M. Lawson
COALITION TO DEFEND AFFIRMATIVE ACTION, et al., Plaintiffs, vs. JENNIFER GRANHOLM, et al., Defendants.	**CONSOLIDATED CASES** CERTIFICATE OF SERVICE
	Case 06-15637 Hon. David M. Lawson

KARIN A. DEMASI hereby certifies the following under the penalty of perjury:

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Dated at New York, New York, this 22nd day of January, 2008.

s/ Karin A. DeMasi
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