UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,

Plaintiffs,

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants,

and

CHASE CANTRELL, et al,

Plaintiffs,

vs.

JENNIFER GRANHOLM and MICHAEL A. COX,

Defendants.
_____/

Case No. 2:06-CV-15024

Hon. David M. Lawson

CONSOLIDATED CASES

Case No. 06-15637

Hon. David M. Lawson

DEFENDANT COX'S RESPONSE IN OPPOSITION TO CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CONCISE STATEMENT OF ISSUES PRESENTED

I. Proposal 2, now Const 1963, art 1, § 26, which prohibits the use of racial considerations in university admissions, not only conforms to the requirements of the Fourteenth Amendment's Equal Protection Clause but furthers its purpose and intent by fostering diversity in a race-neutral manner and without imposing or creating an unequal burden on people of color. Because art 1, § 26 comports in all respects with the requirements of the federal Equal Protection Clause, Plaintiffs' constitutional challenge to this provision fails as a matter of law and should be dismissed.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

City of Cleburne v Cleburne Living Center, 473 US 432; 105 S Ct 3249; 87 L Ed 2d 413 (1985)

Coalition For Economic Equity, et al v Wilson, 122 F3d 692, 701, 702 (CA 9, 1997)

Coalition to Defend v Granholm, 473 F3d 237, 248 (CA 6, 2006)

Crawford, et al v Board of Education of the City of Los Angeles, et al, 458 US 527; 102 S Ct 3211; 73 L Ed 2d 984 (1982)

Palmore v Sidoti, 466 US 429, 432; 104 S Ct 1879; 80 L Ed 2d 421 (1984)

Washington v Davis, 426 US 229, 239; 96 S Ct 2040; 48 L Ed2d 597 (1976)

STATEMENT OF THE FACTS

Defendant Cox incorporates the facts set forth in the brief in support of his motion to dismiss filed November 30, 2007.

ARGUMENT

I. Proposal 2, now Const 1963, art 1, § 26, which prohibits the use of racial considerations in university admissions not only conforms to the requirements of the Fourteenth Amendment's Equal Protection Clause but furthers its purpose and intent by fostering diversity in a race-neutral manner and without imposing or creating an unequal burden on people of color. Because art 1, § 26 comports in all respects with the requirements of the federal Equal Protection Clause, Plaintiffs' constitutional challenge to this provision fails as a matter of law and should be dismissed.

The Cantrell Plaintiffs and Defendant Cox have filed opposing dispositive motions in this matter. The arguments presented in Defendant Cox's brief in support of his motion to dismiss challenging the legal and factual sufficiency of the Cantrell Plaintiffs' Complaint are adopted here. While the those legal arguments support the denial of summary judgment for Plaintiffs and, alternatively the dismissal of their Complaint, Defendant Cox asserts the following additional argument in response to this motion.[1]

A. **Art 1, §26 comports with the requirements of the federal Equal Protection Clause in the context of the Defendant Universities' admissions process.**

Contrary to Plaintiffs' argument, as a matter of "conventional" equal protection analysis, there is simply no doubt that § 26 is constitutional. The central purpose of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race."[2] Classification by race or considerations based on race by government officials is inherently unconstitutional and requires justification within a narrowly drawn and compelling exception. The ultimate goal is "to do away with all governmentally imposed discrimination based on race,"[3] because racial

[1] Although art 1, §26 prohibits discrimination based on race, sex, color, ethnicity, or national origin, the sole focus of the Cantrell Plaintiffs' Amended Complaint and summary judgment motion is race. As such, the Attorney General's specific response to this summary judgment motion will similarly focus only on race.

[2] *Washington v Davis,* 426 US 229, 239; 96 S Ct 2040; 48 L Ed2d 597 (1976).

[3] *Palmore v Sidoti,* 466 US 429, 432; 104 S Ct 1879; 80 L Ed 2d 421 (1984).

distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[4] Here, § 26 simply prohibits state discrimination against or preferential treatment to any person on account of race, a prohibition wholly consistent with the purpose of the Equal Protection Clause.

Under this conventional equal protection analysis, legislative classifications as a general rule are presumptively valid and will deny equal protection only when "not rationally related to a legitimate state interest."[5] This general rule does not apply, though, when a law classifies individuals by race. A government action that classifies by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny.[6] To be constitutional, a racial classification must be narrowly tailored to serve a compelling government interest, "an extraordinary justification."[7] Art 1, § 26 draws no classification, racial or otherwise and, thus is presumptively constitutional. Thus, as "a matter of law and logic," § 26 does not violate equal protection.[8] Indeed, it is Plaintiffs who suggest the State must do what the Equal Protection Clause prohibits. "In contending that the Equal Protection Clause compels what it presumptively prohibits [P]laintiffs face an uphill climb."[9]

In support of this uphill climb, Plaintiffs assert art 1, § 26 violates the federal Equal Protection Clause by creating indefensible distinctions based on race in the university admissions

---

[4] *Shaw v Reno,* 509 US 630, 643; 113 S Ct 2816; 125 L Ed2d 511 (1993). See also, *Coalition For Economic Equity, et al v Wilson,* 122 F3d 692, 701, 702 (CA 9, 1997).
[5] *City of Cleburne v Cleburne Living Center,* 473 US 432, 440; 105 S Ct 3249; 87 L Ed 2d 413 (1985).
[6] *Adabrand Contractors, Inc v Pener,* 515 US 200, 229-230; 115 S Ct 2097; 132 L Ed 2d 158 (1995).
[7] *Wygant v Jackson Bd of Education,* 476 US 267, 277-279; 106 S Ct 1842; 90 L Ed 2d 260 (1986); *Cleburne,* 473 US at 441.
[8] *Coalition for Economic Equity,* 122 F3d at 702.
[9] *Coalition to Defend v Granholm,* 473 F3d 237, 248 (CA 6, 2006).

process in two ways. First, they argue this provision prohibits the consideration of race in an admissions process that otherwise permissibly seeks diversity through other attributes. Plaintiffs contend this so called targeted elimination of race from the admission criteria disadvantages "people of color" since it prohibits a minority applicant's meaningful expression of identity and character formed by their racial makeup while allowing consideration of "all other pertinent elements of diversity that a university may permissively consider" in a holistic admissions process. This argument is contrary to both the law and logic of the equal protection analysis. The other criteria utilized by the Universities to achieve diversity are presumptively constitutional unlike racial criteria which are based on the most suspect and presumptively unconstitutional classification and require a narrowly drawn application and compelling exception to justify their use.

Plaintiffs also argue art 1, § 26 is unconstitutional because the elimination of racial criteria in the admissions process makes achieving the goal of diversity more difficult and the "robust enrollment of students of color" virtually impossible to maintain. Yet, no court has recognized that the level of difficulty in achieving a notable goal such as diversity itself justifies government conduct that is presumptively prohibited by the Equal Protection Clause. Consequently, Plaintiffs provide no legal support for their argument. Rather, Plaintiffs' argument relies first on the assumption that minority applicants will likely be more reluctant to apply to public universities that do not consider race as a factor in the admissions process, and, second on the assertion the facts extant support the conclusion that race-neutral alternatives are inadequate to achieve a racially diverse student body. Yet, neither argument is a compelling justification for requiring government discrimination by preferential treatment. The first is a matter of personal choice, not government action. The second is not based on undisputed, genuine, material facts

but rather on anecdotal information, generalities, improperly presented expert opinion and most critically, a fundamental misapplication of equal protection law.

Plaintiffs argue that because the State permits the use of other pertinent elements of diversity – those criteria that are not based on suspect and presumptively unconstitutional classifications – it "may not then prohibit consideration of race within that holistic process." This generalization exposes the fundamental flaw in Plaintiffs' logic, that the State must continue to do what it is not compelled to do and what the Equal Protection Clause presumptively prohibits – discriminate based on race through the perpetuation of a system in which race continues to matter. It also demonstrates the fundamental legal weakness of this challenge[10]:

> That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification. Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications – race and gender- must be readily available at the lowest level of government . . . .

This analysis by the Ninth Circuit is supported by an earlier Supreme Court decision which rejected, in no uncertain terms, the very argument made by Plaintiffs here[11]:

> We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.

This same reasoning is applicable here. While the Defendant Universities chose at one time to utilize race-based admissions criteria based on a narrowly drawn, compelling exception that permitted this discriminatory classification, the State clearly may choose to recede from that practice and require its public universities to conform their admission policies to the

[10] *Coalition For Economic Equity*, 122 F3d at 708.

requirements of the Equal Protection Clause. Art 1, § 26 clearly prohibits discrimination and, thus, is facially valid under a conventional equal protection analysis.

It is clearly premature, though, to determine, as Plaintiffs' suggest, that the implementation and application of this provision will render § 26 unconstitutional. Confronted with this same issue in addressing the earliest legal challenge to California's Proposition 209, the Ninth Circuit noted[12]:

> The Supreme court recently reminded federal judges that we should not even undertake to review the constitutionality of a state law without first asking: "Is this conflict really necessary?" *Arizonans for Official English v Arizona*, 137 L. Ed. 2d 170, 117 S. Ct. 1055,__, 1997 WL 84990, at *18 (U.S. 1997). As a general rule, federal courts "ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Id.* (quoting *Poe v Ulman*, U.S. 497, 526, 6 L. Ed.2d 989, 81 S. Ct. 1752 (1961) (Harlan, J., dissenting)). Justice Ginsburg emphasized for a unanimous court that "when anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Id.* "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at *20.
>
> The ink on Proposition 209 was barely dry when plaintiffs filed this lawsuit. For this federal tribunal to tell the people of California that their one-day-old, never-applied-law violates the Constitution, we must have more than a vague inkling of what the law actually does.

This same caution should apply here, particularly in light of the clear facial validity of § 26. Plaintiffs attempt to have this Court find § 26 unconstitutional on the grounds of anecdotal information, supposition, and suggestion when it has not even been tested in one full admissions cycle at the State's public universities or scrutinized by the State's courts with respect to its permissible parameters, is the very premature adjudication the Supreme Court cautions against.

---

[11] *Crawford, et al v Board of Education of the City of Los Angeles, et al*, 458 US 527, 535; 102 S Ct 3211; 73 L Ed 2d 984 (1982).

Thus, although Plaintiffs have presented declarations, expert opinions, and deposition testimony in support of their motion, none address facts material to a determination of the constitutionality of § 26 under the law applicable to this equal protection challenge. Plaintiffs' argument fails as a matter of law and their summary judgment motion should be denied.

B. Art 1, § 26 does not reallocate the political structure applicable to the admissions process at Michigan's public universities to the detriment of racial minorities in violation of the Equal Protection Clause.

Defendant Cox incorporates the argument on this issue presented in the Brief in support of his motion to dismiss filed with the Court on November 30, 2007. Based on the applicable law as set forth in that brief, Plaintiffs' argument fails and their summary judgment motion should therefore be denied.

CONCLUSION AND RELIEF SOUGHT

Defendant Cox requests that this Court deny Plaintiffs' motion for summary judgment for the reasons set forth above, and grant his pending motion to dismiss for the reason set forth therein.

Respectfully submitted,

Michael A. Cox
Attorney General

s/Margaret A. Nelson (P30342)
Margaret A. Nelson (P30342)
Heather S. Meingast (P55439)
Joseph E. Potchen (P49501)
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Intervening Defendant
Attorney General Mike Cox
PO Box 30736
Lansing, Michigan 48909
517.373.6434

Dated: January 7, 2008

[12] *Coalition For Economic Equity*, 122 F3d at 699, 700.

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2008, I electronically filed the foregoing paper with the clerk of the court using the ECF system which will send notification of such filing of the following: DEFENDANT COX'S RESPONSE IN OPPOSITION TO CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

s/Margaret A. Nelson
Margaret A. Nelson (P30342)
Assistant Attorney General
Dept of Attorney General
Public Employment, Elections & Tort Div.
P.O. Box 30736
Lansing, MI 48909-8236
(517) 373-6434
Email: nelsonma@michigan.gov