UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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| COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. 06-15024<br>Hon. David M. Lawson<br><br>CONSOLIDATED CASES<br><br>This filing pertains to<br>ALL CASES |

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| CHASE CANTRELL, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan,<br><br>Defendant. | Case No. 06-15637<br>Hon. David M. Lawson |

**DEFENDANT-INTERVENOR ERIC RUSSELL'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

Defendant-Intervenor Eric Russell respectfully submits this reply memorandum in support of his Motion For Summary Judgment, Doc. 202.

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Statement and Argument

**A. The Cantrell Plaintiffs' Arguments In Opposition To Summary Judgment Uniformly Lack Merit**

The Cantrell Plaintiffs' Omnibus Response to Russell's and the Attorney General's Motions for Summary Judgment ("Cantrell Resp."), Doc. 220, brings into sharp focus the startling breadth of their interpretation of *Hunter* and *Seattle*. They frankly admit, as they must, that both the Sixth and Ninth Circuits, the only federal appellate courts to address this precise issue, have flatly rejected their reading of *Hunter* and *Seattle*, and that their theory has been adopted only in Judge Norris' dissenting opinion for a small minority of the Ninth Circuit, which they repeatedly cite as if it were governing law. *See* Cantrell Resp. 11, 12, 14, 15, 17, 18 n.11.

To be sure, neither decision is binding on this Court: another Circuit decided *Wilson*, and the holding of the Sixth Circuit's stay opinion in this case, *Coal. to Defend Affirmative Action v. Graholm*, 473 F.3d 237, 252 (6th Cir. 2006), was technically limited to the Court's "conviction that these are weak federal claims" and that "Russell has a strong likelihood of reversing the district court's preliminary injunction." Nevertheless, the reasoning of the unanimous panel of the Sixth Circuit, shared by a decisive majority of the Ninth Circuit, provides the only basis for deciding this case consistent with controlling Supreme Court precedent, American democratic traditions, fundamental principles of justice, sound logic, and common sense.

With respect to the question of what *sort* of legislation triggers heightened scrutiny under *Hunter* and *Seattle*, the Cantrell Plaintiffs are of three minds. They repeatedly invoke the mantra "racial focus," and variably suggest that legislation is suspect under *Hunter* if it enhances the difficulty entailed in adopting and implementing policies: (1) that *actually* "inure[] to the benefit of the minority," *see* Cantrell Resp. 15; (2) that merely are *perceived* by some minorities to be to

their benefit, regardless of their actual impact, *see id.* at 14; and (most sweeping of all) (3) that somehow touch upon a racially-related issue, *see id.* at 12.

Not one of these three increasingly broad views of what is subject to scrutiny under *Hunter* and *Seattle* can be squared with those cases or with other Supreme Court case law. The last (and least plausible) of the three, of course, flatly contradicts the *Seattle* Court's statement that the *Hunter* doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982). The former two, moreover, are inconsistent with the Supreme Court's holdings in *Crawford v. Board of Education*, 458 U.S. 527 (1982), and *James v. Valtierra*, 402 U.S. 137 (1971) (which the Cantrell Plaintiffs do not cite). *Crawford* and *James* rejected claims based on alleged restructuring of the political process through the adoption of statewide policies making it more difficult for localities to implement low-income housing projects (*James*), and to achieve court-ordered school desegregation through busing (*Crawford*). In each of these cases, the local policies precluded by the challenged legislation could be characterized as "inur[ing] primarily to the benefit of the minority," and were undoubtedly *perceived* as such by minorities.

In fact, contrary to the Cantrell Plaintiffs' radical interpretation, *racially neutral* legislation like Proposal 2 is simply not subject to heightened scrutiny under *Hunter* and *Seattle*. Justice Harlan's opinion in *Hunter*, which the *Seattle* Court cited repeatedly with approval, was pellucid on this point: heightened scrutiny applied because "the charter amendment is *discriminatory on its face*." *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring) (emphasis added). The *Seattle* Court likewise repeatedly recognized that the provision at issue was subject to heightened scrutiny only because it was "carefully tailored" on

its face to address a racially charged issue *in a way that raised an unavoidable inference of intentional discrimination*. *See* 458 U.S. at 471 (holding that, because "the text of the initiative was carefully tailored to interfere only with desegregative busing," it was "beyond reasonable dispute … that the initiative was enacted '*because of*,' not merely 'in spite of,' its adverse effects" on minorities); *see also id.* at 469-70 ("As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to 'neutral principles'—such as … the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may 'make it more difficult for minorities to achieve favorable legislation.'"); *id.* at 470 (noting that *Hunter* applies only when "the State allocates governmental power *nonneutrally*") (all emphases added).

The Cantrell Plaintiffs, however, do not contend that Proposal 2 was enacted "'because of,' not merely 'in spite of,' its [putative] adverse effects" on minorities (as was the provision invalidated in *Seattle*); and they do not make the equivalent contention that Proposal 2 is "discriminatory on its face" (as was the provision invalidated in *Hunter*). On the contrary, they concede that Proposal 2 is *not* discriminatory on its face, but is "facially neutral." Cantrell Resp. 12. And because it is a facially neutral provision, their equal protection challenge can succeed only if they can show *independent* evidence (aside from the text of the initiative itself) that its enactment was motivated by intentional racial discrimination. *See Washington v. Davis*, 426 U.S. 229 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986). This they cannot, and have not attempted, to do.

The Cantrell Plaintiffs claim, however, that Proposal 2 affects only minorities and not whites, arguing that Proposal 2's constitutional ban on racial "discrimination" is essentially

redundant to longstanding Michigan law barring official discrimination against minorities, but not against whites: "In fact, because Proposal 2's 'nondiscrimination' provisions are redundant of the Elliot-Larsen Act which was enacted long before the passage of Proposal 2, its only real effect is to end (and prevent the future implementation of) race-conscious admissions." Cantrell Resp. 20 (citing Mich. Comp. Laws § 37.2101 *et seq.*, the "Elliott-Larsen Act"); *see id.* at 13. As an initial matter, the Cantrell Plaintiffs' argument is at war with their entire political restructuring theory, which attacks Proposal 2 because it was enacted at a "new and remote level of government" from ordinary state political processes—namely, the *constitutional* referendum process. Enshrining a protection from discrimination in the state *constitution*, through the referendum process, is obviously a significant advance over enacting the same policy in a mere *statute*, such as the Elliott-Larsen Act. Hence, Proposal 2 is hardly superfluous, and, contrary to the Cantrell Plaintiffs' suggestion, *id.* at 13, it quite clearly does "prohibit racial discrimination generally" and not in one direction only.

To be sure, the Elliott-Larsen Act had been interpreted by Michigan and federal courts to provide differential burdens, according to race and gender, on plaintiffs bringing discrimination claims against employers and other defendants. *See, e.g.*, *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003) (citing *Allen v. Comprehensive Health Servs.*, 564 N.W.2d 914, 917 (Mich. Ct. App. 1997)). And Michigan law provides certain safe harbors—now unconstitutional under Proposal 2, at least as applied to public education, public contracting, and public employment—that specifically permit the use of racially discriminatory preferences favoring minorities, notwithstanding the facially neutral language of the laws' antidiscrimination protections. *See, e.g.*, M.C.L. § 37.2210; *Victorson v. Dep't of Treasury*, 439 Mich. 131, 140

(1992); *see also Dabrowski v. Dow Chem. Co.*, No. 06-11037, 2007 U.S. Dist. LEXIS 4602, at *10 (E.D. Mich. Jan. 24, 2007) (indicating that race-based "affirmative action" preference programs do not violate the Elliott-Larsen Act). In adopting Proposal 2, then, Michigan's voters simply exercised their ultimate authority under the State's constitution to modify antidiscrimination laws. And "the simple . . . modification of . . . antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford*, 458 U.S. at 539. Unlike Elliott-Larsen and other Michigan law, Proposal 2 now truly guarantees for *all* Michiganders, in the words of Elliot-Larsen itself: "[t]he opportunity to obtain [public] employment . . . and the full and equal utilization of . . . educational facilities without discrimination because of . . . race, color, national origin, . . . [or] sex." M.C.L. § 37.2102.

The Cantrell Plaintiffs' reliance on Elliot-Larsen highlights yet another extraordinary feature of their overbroad reading of *Hunter* and *Seattle*—namely, that they would interpret these cases to create a constitutional right held *only* by racial minorities, and probably not all minorities at that. To apply *Hunter* and *Seattle* to a racially neutral antidiscrimination provision like Proposal 2 would imply that *only* "underrepresented" minorities—not whites or minorities that may be more fully "represented" at the Universities, such as Asians or Jews—may invoke the constitutional right claimed by the Cantrell Plaintiffs. If these rights were equally available to all racial groups, then every such group would be able equally to claim that Proposal 2 restructures the political process to their disadvantage—every group is equally forestalled from lobbying the admissions committees of the Universities for racially preferential treatment, and there is no "special burden[]" imposed on any particular group. *Seattle*, 458 U.S. at 467. Unlike

the provisions at issue in *Hunter* and *Seattle*, which were specifically targeted at minorities, Proposal 2 cannot be held to violate the Equal Protection Clause without positing minorities-only constitutional rights, which is the antithesis of *Hunter*: "[T]he State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 392-93 (emphasis added). Nor can the Cantrell Plaintiffs' postulation of minorities-only equal protection rights be squared with the Supreme Court's long-settled doctrine, cited (ironically) by the Cantrell Plaintiffs, that "the rights implicated … in all Fourteenth Amendment race cases, are personal to individuals." Cantrell Resp. 18 (citing *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 289 (1978)).[1]

**B. <u>The Coalition Plaintiffs' Arguments Lack Merit</u>**

Although the Coalition Plaintiffs consume forty pages in their opposition to our summary judgment motion, the laborious task of sifting through their inflamed and insulting rhetoric in search of fresh legal analysis is a largely vain enterprise. The only feature of their brief not anticipated and answered in our prior filings is their repeated distortion of the deposition testimony of Ward Connerly, whom their brief repeatedly singles out for personal attack. *See, e.g.*, Doc. 222 ("Coalition Resp.") at 4, 6, 11, 17-18, 19-20, 21-22, 23, 29. The Coalition Plaintiffs cite extensively Mr. Connerly's deposition testimony in an attempt to show that Proposal 2 was motivated by discriminatory intent. *See id.* at 18, 19-20, 21-22, 29. Even if a

[1] The Cantrell Plaintiffs' response brief contains scant discussion of the novel claims raised in their Motion For Summary Judgment, relegating all mention of them to a single footnote. *See* Cantrell Resp. 14 n.9. For the reasons stated in Defendant-Intervenor's response brief, these novel claims are not properly before the Court and are in any event meritless as a matter of law and fact. *See* Doc. 221 at 3-6.

showing of discriminatory motivation in a *single* supporter of Proposal 2 had any probative value on the issue of discriminatory motivation, *but see Arthur*, 782 F.2d 565, 573-74 (6th Cir. 1986),[2] their characterization of Mr. Connerly's testimony is misleading and their reliance upon it is erroneous as a matter of law.

The only specific accusation that they level at Mr. Connerly is that he was *aware* of the putative negative impacts of Proposal 2 on minorities. *Id.* at 18 (citing Connerly Dep. at 101, as showing that Mr. Connerly was aware of the performance gap between whites and minorities on standardized tests); *id.* at 19-20 (citing Connerly Dep. at 84, 95, 120, as showing that Mr. Connerly was aware that California's Proposition 209 would likely cause a decline of minority enrollments as California's most elite public universities); *id.* at 21 (citing Connerly Dep. at 118, 120, as showing that Mr. Connerly was aware that Proposal 2 would supposedly have devastating effects on minorities). But as demonstrated in Defendant-Intervenor's Motion For Summary Judgment, these allegations, even if true, are insufficient as a matter of law to raise an inference of intentional discrimination—mere awareness of putative negative effects is not enough, given a nondiscriminatory motive. *Feeney*, 442 U.S. at 279 ("'Discriminatory purpose,' however, implies more than … intent as awareness of consequences.").

And Mr. Connerly's testimony abundantly establishes that he was moved by neutral, non-discriminatory motives to support Proposal 2. Indeed, his support for Proposition 2 was

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[2] Both the Cantrell Plaintiffs' and the Coalition Plaintiffs' treatment of *Arthur* is more in the nature of protest than legal analysis. *See* Cantrell Resp. 9-10; Coalition Resp. 26-27. Though they fulminate against *Arthur*'s reasoning and invoke the criticism of *Arthur* in *Buckeye Community*, *see* Cantrell Resp. 9, they both fail to acknowledge that *Arthur* is binding law upon this Court, as the *Buckeye* court itself acknowledged. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 638 n.2 (6th Cir. 2001) *rev'd on other grounds*, 538 U.S. 188 (2003).

motivated by the *quintessential* nondiscriminatory purpose—namely, to abolish government-sponsored differential treatment on the basis of race. *See* Connerly Dep. at 76:16-19 ("As a black man born in the deep South in 1939, keenly familiar with racial discrimination, I have always felt that it was wrong morally for government agencies to discriminate against people on the basis of color of my skin."); *id.* at 77:1 (attesting that the use of race in public university admissions "offend[ed] me as a person with that history"); *id.* at 96:15-97:4 ("Ms. Driver, there are certain principles that are important to some of us and to me there is one that rises right to the tippy top. . . . That's that every government agency that deals with its citizens has an obligation to . . . treat those citizens equally as that citizen interacts with that government agency, not to try to presuppose different treatments somewhere else and to try and compensate for that someplace else . . . ."); *id.* at 104:18-19 ("[M]y actions were driven by the value I stated to you."); *id.* at 124:17-21 ("I think given my own history and my own set of beliefs that it's wrong for the government to use a person's skin color, where their granddaddy came from, their, quote, race, in any facet of America's public life, that's my belief."); *id.* at 129:13-14 ("[T]reating anyone differently because of race and skin color is wrong."); *id.* at 159:1-7 ("My view is shaped by my own belief that the government should not discriminate against or in favor of any of its citizens . . . . The government should not discriminate against its citizens, for or against them, on the basis of race, sex, color, ethnicity, racial origin, sexual orientation, religion.").

Moreover, the Coalition Plaintiffs misrepresent Mr. Connerly's testimony when they assert that he was aware of, but callously disregarded, the putative negative effects of Proposal 2 on minorities. On the contrary, while his opposition to racial preferences was primarily motivated by principles of justice and fairness, he also attested to a belief that racial preferences

are on balance harmful to minorities, and to a guarded optimism that abolishing racial preferences will have long-term positive effects on minorities. *See, e.g.*, *id.* at 20:13-15 ("[A]nyone who is put into a situation where they would not be ready to compete, rather than gaining confidence, they could become demoralized by that."); *id.* at 63:12-14 (expressing skepticism of *The Shape of the River*'s conclusion that racial preferences benefit minorities by suggesting that "different people can draw different conclusions from the same data"); *id.* at 64:18 (expressing disagreement with the analysis in *The Shape of the River*); *id.* at 65:22-66:5 (similar); *id.* at 69:4 (expressing "serious doubts" about the benefits of racial preferences to minorities); *id.* at 106:22-25 (attesting to the overall increase in minority enrollments at California universities after Proposition 209); *id.* at 124:21-23 ("And I think that the consequences of [racial preferences] create problems that require you then to use race more to compensate for the consequences."); *id.* at 125:8-9 (attesting to "negative effects" of racial preferences); *id.* at 157:16-20 (noting research indicating that "race preferences [in law schools] are harmful because of the mismatch factor that is created with students who are essentially assigned to one campus and they're not able to compete at that campus and don't pass the bar and therefore don't go to work at the major law firms"); *id.* at 158:8-10 ("[I]n the aftermath of Proposition 209 at U.C. San Diego for example, the graduation rate among blacks has doubled . . . .").

In keeping with this consistent theme in his testimony, Mr. Connerly's reference to "tough love"—which the Cantrell Plaintiffs attempt to contort into smoking-gun evidence of racially discriminatory intent—was clearly a statement of his belief in the long-term *benefits* of Proposal 2 and similar measures to racial minorities:

> I knew . . . that the only way we're going to close this academic gap between black and Latino on the one hand and Asian and white on the other, is not to keep papering over it with preferences, but to apply the tough love that's necessary to get black and Latino students up to the bar . . . .
>
> [In supporting Proposal 2,] I wanted to be sure we could get black students and Latino-American students that were not performing well academically on a path to performance. I believe we will not do that as long as we perform the remedies that you [i.e., Ms. Driver] obviously support and that is preferences. That does not solve the problem. They patch up the problem, Ms. Driver, they don't solve the problem.

*Id.* at 120:8-14, 120:25-121:6. Quoted thus in context, it is clear that Mr. Connerly's reference to "tough love" was nothing other than an expression of his belief that the *only* way to "close this academic gap between black and Latino on the one hand and Asian and white on the other" is to abolish racial preferences, which merely "paper[] over" the problem without actually addressing it. In other words, Mr. Connerly's belief was that Proposal 2 would *benefit*, not to harm, minorities—squarely contrary to the Coalition Plaintiffs' characterization of his testimony. In sum, the Coalition Plaintiffs discussion of Mr. Connerly's testimony fails to establish any impermissible "prejudice" on his part.

## CONCLUSION

For the reasons stated, Defendant-Intervenor respectfully requests that this Court grant summary judgment to Defendants on all pending claims against Proposal 2.

January 22, 2008

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of January 2008, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following:

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