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 This filing pertains to ALL 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

DEFENDANT-INTERVENOR ERIC RUSSELL'S MEMORANDUM IN OPPOSITION TO THE CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant-Intervenor Eric Russell respectfully submits this Response to the Cantrell Plaintiffs' Motion For Summary Judgment, Doc. 203.

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DEFENDANT-INTERVENOR ERIC RUSSELL'S MEMORANDUM IN OPPOSITION TO THE CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Although these views were voiced, tragically, in dissent, there is now no principle of law more fundamental to the Fourteenth Amendment than the first Justice Harlan's prophetic statement that "the Constitution is color-blind, and neither knows nor tolerates classes among citizens." Since *Plessy*, the history of this Nation's equal protection jurisprudence may be fairly summarized as the judicial attempt to "smoke out," and eliminate, "*all* racial classifications" of individuals imposed by the government. *Johnson v. California*, 543 U.S. 499, 506 (2005) (emphasis in original). For 140 years, the Supreme Court has emphasized this foundational principle again and again, characterizing government-imposed racial classifications as "pernicious," "obnoxious," and "odious to a free people."[1] Under the Equal Protection Clause,

[1] *See, e.g., Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("What is called class legislation … would be obnoxious to the prohibitions of the Fourteenth Amendment…."); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (same); *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Adarand*, 515 U.S. 200, 229 (1995) (same); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (same); *Parents Involved In Community Schools v. Seattle School Dist. No. 1.*, 127 S. Ct. 2738, 2796 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake."); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 290-91 (1978) (opinion of Powell, J.) (same); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (same); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (same); *id.* at 215, 223-24

therefore, government-drawn racial classifications (whether invidious or supposedly "benign") either are intolerable, or are barely tolerated only in the most exceptional circumstances. *See Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995). To stamp out such racial classifications is "the core of the Fourteenth Amendment." *Hunter*, 393 U.S. at 391.

Squarely in the face of this venerable and unbroken line of authority, the Cantrell Plaintiffs' primary summary judgment argument is that the Equal Protection Clause requires a public university to consider race in evaluating applicants for admission if it considers any race-neutral, non-academic factor in the admissions process. *See* Cantrell Plaintiffs' Motion For Summary Judgment ("Pl. Mot."), Doc. 203, at 2-3, 9-21. This theory is novel, to say the least. And its novelty is not limited to the fact that it does not appear in any equal protection case. It also does not appear in the Cantrell Plaintiffs' complaint or other previously filed papers.

More importantly, if Plaintiffs' novel theory of equality were accepted into the stream of American jurisprudence, it would inflict a devastating wound to the very heart of the Equal Protection Clause, at whose "core" lies the *rejection* of governmental racial classifications. As the Supreme Court recently reaffirmed in *Grutter v. Bollinger*:

> We are mindful … that a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.… [R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. *Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle*.

(same). *See also, e.g.*, *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part and dissenting in part) ("It is a sordid business, this divvying us up by race."); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880) ("[T]he Thirteenth and Fourteenth Amendments … were intended to take away all possibility of oppression by law because of race or color.").

539 U.S. 306, 341 (2003) (internal quotation marks and citation omitted) (emphasis added). The Cantrell Plaintiffs' attempt to "enshrin[e] a permanent justification for racial preferences" in the United States Constitution is no less "obnoxious," "pernicious," and "odious to a free people" than the racial classifications that they seek to perpetuate.

I. THE CANTRELL PLAINTIFFS' NOVEL ARGUMENTS THAT PROPOSAL 2 EMBODIES EXPLICIT RACIAL CLASSIFICATIONS PLAINLY LACK MERIT.

The Cantrell Plaintiffs contend that Proposal 2 "creat[es] an impermissible distinction based on race in violation of the Fourteenth Amendment" by "prohibit[ing] universities seeking to achieve diversity from considering an applicant's race while allowing all other pertinent elements of diversity to be weighed in the admissions process." Pl. Mot. at 9. This novel argument is wholly unrelated to the only claim in their complaint—that Proposal 2 effectively restructures the political process in the State to the disadvantage of racial minorities. Rather than focusing on political structure, their argument that Proposal 2 creates "an impermissible distinction based on race" rests on two premises: (1) that race is "a critical part of how many people of color choose to define and portray themselves," Pl. Mot. 13; and (2) that "without the consideration of race in admissions, robust enrollment of students of color in Michigan's public universities will be virtually impossible to maintain," Pl. Mot. 15.

The Cantrell Plaintiffs failed to raise these claims in their complaint, and they are therefore precluded from doing so now. In any event, their new claims are facially meritless as a matter of both law and fact.

A. The Claims In Section I Of The Cantrell Plaintiffs' Motion For Summary Judgment Are Not Properly Before The Court.

Section I of the Cantrell Plaintiffs' Motion For Summary Judgment is devoted entirely to the argument that Proposal 2 is invalid for reasons *completely unrelated to political structure*.

See Pl. Mot. 9-21. Instead, the Cantrell Plaintiffs argue that, independent of the political-structure claim defended in Section II of their Motion, *see* Pl. Mot. 21-32, Proposal 2 "must be struck down" on the ground that it "force[s]" them "to live under a state mandate that one's race does *not* matter – in a context where it plainly does." Pl. Mot. 21 (emphasis in original). This claim would be equally applicable (and equally invalid) *regardless* of the level of the political decisionmaker rejecting racial preferences—from the lowliest reviewer of undergraduate applications to the United States Congress itself.

The Cantrell Plaintiffs' primary argument thus bears no relation to any of the allegations in their amended complaint, which is devoted exclusively to the claim that "Proposal 2 is unconstitutional because … groups seeking beneficial legislation including consideration of race face *a completely different and much more onerous political process* than do those seeking beneficial legislation based on other characteristics." First Amended Complaint, Doc. 73, ¶ 60, at 18 (emphasis added); *see also id.* ¶ 5-6 (alleging "different burdens" due to new "political obstacles" for the proponents of racial preferences); *id.* ¶¶ 47-56 (alleging differential "political burdens under Proposal 2"). The Cantrell complaint is notably devoid of any claim, or any allegation, that Proposal 2 is invalid because "racial identity" is "a critical part of how many people of color choose to define and portray themselves" or that it is invalid because it will supposedly forestall the "robust enrollment of students of color in Michigan's public universities"—the claims raised in Section I of their Motion. Pl. Mot. 13, 15. Indeed, the *only* "Claim For Relief" in their complaint is contained in paragraphs 59-61, and (as quoted above) it is devoted exclusively to the political-structure claim. Nor have the Cantrell Plaintiffs surfaced this claim in any other filing in this case.

In fact, the novelty of the Cantrell Plaintiffs' "racial identity" claim is highlighted by the fact that no member of the purported Cantrell class has third-party standing to bring it. The class for which the Cantrell Plaintiffs have sought certification, by definition, contains *no* future or prospective applicants to Michigan's public universities—only *past* applicants who are current members of the University community. *See* Cantrell Mot. For Class Certification, Doc. 107, at 1 ("The Cantrell Plaintiffs seek to represent a class of individuals … who (1) are present or future students or faculty at the University of Michigan, who (2) applied to, matriculated at, or continue to be enrolled at or employed by the University of Michigan in reliance upon the University's representation that it would continue to admit and enroll a diverse group of students at the school consistent with its former policies, which took race into account among other factors."). Therefore, because all their applications have already been considered and decided, they have no direct interest in having their "racial identity" considered in the *application* process. And because they have identified no obstacle to the assertion of this interest by third parties, they lack third-party standing to bring this claim. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991). This inconsistency between the class definition and the asserted interest confirms that this "racial identity" theory is nothing but an afterthought.

Section I of the Cantrell Plaintiffs' Motion, therefore, seeks to raise entirely new claims at the summary judgment stage, after the close of discovery. Indeed, Plaintiffs have filed surprise affidavits in support of these claims that the parties now have no opportunity to test. *See* Doc. 203, Exs. G, H, I. This is impermissible. "A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary judgment has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories." *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989); *see also id.* ("[S]ubstantive amendments to the

complaint just before trial are not to be countenanced.") (alteration omitted); *Tucker v. Union of Needletrades, Indus., & Textile Emples.*, 407 F.3d 784, 788 (6th Cir. 2005); *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 459 (6th Cir. 2001).[2] The Cantrell Plaintiffs have touted the expertise of their counsel in voluminous filings before this Court. *See* Docs. 112, 113, 120 Exs. A-F. They can provide no justification or excuse for waiting until after the close of discovery, and months after the deadline for amendments, to propose completely new and "entirely different legal theories" of relief, thus unfairly prejudicing Defendants who have had no notice or opportunity in discovery to test these theories.

B. The Cantrell Plaintiffs Fail To Identify Any Impermissible Racial Classification.

Even if the novel claims in Section I of their Motion were properly before this Court, the Cantrell Plaintiffs utterly fail to offer any remotely plausible argument that Proposal 2 creates a racial classification that might trigger heightened scrutiny under the Fourteenth Amendment.

1. Plaintiffs' "Racial Identity" Argument Is Plainly Meritless.

First, the Cantrell Plaintiffs contend that, because at least some black applicants view their race as a central part of their personal identity, state universities must consider the race of *all* black and other minority applicants as a positive factor in favor of admission. *See* Pl. Mot. 13-15. In other words, in evaluating its university applicants, the State must use racial

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[2] Unlike *Priddy* and similar cases, here the Cantrell Plaintiffs have not even sought leave to amend their complaint to add the new claims, instead seeking to smuggle them in through their summary judgment motion. This is not surprising, because the deadline for amendments has long passed, *see* Doc. 95, at 2 (permitting amendments to complaints until March 28, 2007), and courts are consistently reluctant to grant leave to amend, absent compelling reasons, after court-imposed schedules for amendments, discovery, and dispositive motions have passed. *See, e.g., Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 459 (6th Cir. 2001). Moreover, even if the Cantrell Plaintiffs had sought leave to amend, they would not be entitled to such relief after their inexcusable dilatoriness. *See, e.g., Duggins v. Steak 'n Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) ("[A]llowing amendment after the close of discovery creates significant prejudice.").

classifications, not as a necessary evil to achieve some compelling state interest, but *for their own sake*. This argument has no logical stopping point and would violently distort the fundamental principles of equal protection.

As an initial matter, acceptance of this argument would lead to absurd results because there is no ground for limiting it to race.[3] The Cantrell Plaintiffs claim that, because race is a "critical part of how [minority] students choose to define themselves," state universities *cannot* "delete[] race from their admissions criteria." Pl. Mot. 12. The underlying principle, therefore, seems to be that applicants to public universities 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. *See* Pl. Mot. 19 ("[T]he state may not … selectively deny applicants the opportunity to have central aspects of their identity considered while allowing myriad other non-academic

[3] One might argue that there is a distinction, unacknowledged by the Cantrell Plaintiffs, between considering race as a *per se* plus factor in allocating admissions and financial aid, and considering an applicant's unique experiences that might have racial overtones (such as having been the victim of discrimination)—and that Proposal 2 prohibits only the former, while permitting a minority applicant to discuss his race as "the most important feature of [his] own self identity" in an application for admission. Declaration of Sheldon Kenneth Johnson, Doc. 203 Ex. G, ¶ 7. (Mr. Johnson did not bother to mention this issue, despite its importance to him, in the prior Declaration he submitted in this case, *see* Doc. 114.) But Defendant-Intervenor views any such distinction, whether or not valid in principle, as highly tenuous in practice, and therefore does not dispute the Cantrell Plaintiffs' implied assumption that Proposal 2's prohibition of "preferential treatment" on the basis of race prevents the Universities from deliberately providing a forum, in their application process, for applicants such as Mr. Johnson to highlight their "racial identity" to sympathetic reviewers. Regrettably, however, the University of Michigan has decided to provide just such a forum. Its 2008 Application For Freshman Undergraduate Admission includes a mandatory essay that quotes President Mary Sue Coleman's Nov. 8, 2006 speech defying Proposal 2 and directs all undergraduate applicants to "[c]omment on how your personal experiences and achievements would contribute to the diversity of the University of Michigan." *See* University of Michigan, 2008 Application For Freshman Undergraduate Admission, at 11, *available at* http://www.admissions.umich.edu/applying/application2008.pdf. In light of President Coleman's speech, it is difficult to view this mandatory essay without cynicism—indeed, as a calculated ploy to encourage minority applicants to publish racial information, otherwise forbidden by law, to a sympathetic admissions committee.

factors to be weighed and positively evaluated by the Universities."). If true, this 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. Who is to say, for example, that a Mormon or Baha'i applicant might not view his or her religion as equally "critical" to his or her identity as, for example, Mr. Johnson views his race? *See* Declaration of Sheldon Kenneth Johnson, Doc. 203 Ex. G, ¶ 6.

On the Cantrell Plaintiffs' theory, moreover, *each* of these "critical" aspects of identity must be grounds for "preferential treatment"—which is all that Proposal 2 forbids with respect to race. Thus, the theory is internally incoherent and, indeed, self-defeating, for a member of the white race who views her race (or an Italian-American who views her ethnicity) as "critical" to her identity surely must be given an equal preference to a member of the black race. Likewise, a member of the Mormon religion must be given an equal preference to a Christian, and so forth. To resist this reduction to absurdity, the Cantrell Plaintiffs would have to argue that race is categorically *more* fundamental to minority applicants' identities than other cherished characteristics are to minority and non-minority applicants alike—something they cannot do without openly adopting invidiously overbroad stereotypes about minorities.[4] The logical

[4] Indeed, the Cantrell Plaintiffs' argument strays perilously close to advocating such stereotypes. For example, they imply that, because Mr. Sheldon Johnson, a black Christian, views his race as more fundamental to his identity than his Christianity, *see* Doc. 203 Ex. G, ¶ 6, *all* black Christians must take a similar view. (Indeed, on the basis of three affidavits like Mr. Johnson's, they urge mandatory preferential treatment for *all* black applicants, but not for *any* Christian applicants.) The only other evidence they provide in support of this is an exit poll reporting that 86 percent of blacks supported Proposal 2, *see* Pl. Mot. 24-25; unfortunately for their argument, however, not only is this "evidence" irrelevant to this point, it is also both unreliable and inadmissible. *See* Declaration of Chris Wilson ¶¶ 4-10 (attached as Exhibit 1); *see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc*., 140 F.3d 494, 517

stopping point of this theory, then, is that *all* characteristics are to be considered equally favorable for awarding admission or financial aid. "The year was 2008, and everyone was finally equal."

The only way out of this logical quandary for the Cantrell Plaintiffs would be to assert, for reasons inscrutable, that race is the *only* fundamental identity characteristic that generates an entitlement to preferential treatment under the Equal Protection Clause. Any such assertion, however, would heap irony upon irony. As demonstrated above, it is a fundamental precept of equal protection that preferential treatment on the basis of race is inherently suspect, presumptively invalid, and only permissible for the most compelling reasons. *See Grutter*, 539 U.S. at 326-27; *Adarand*, 515 U.S. at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."). To hold that preferential treatment on the basis of race is mandatory, on an equal footing with other identity characteristics, would violently depart from this principle. But to hold that race alone, among all other identity characteristics, is *specially* entitled to preferential treatment, would make sheer mockery out of it.

Even more fundamental than its logical flaws, however, is the appalling perversion that this argument would wreak on the "core purpose of the Fourteenth Amendment," the abolition of governmental racial classifications. *Hunter*, 393 U.S. at 391. After all, the Cantrell Plaintiffs advocate constitutionally mandatory racial preferences, not for any compelling governmental purpose, but merely *for the sake of treating people of different races differently*. *See* Pl. Mot. 2

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n.14 (3d Cir. 1998). The Supreme Court has been particularly vigilant in rejecting such invidiously overbroad generalizations in equal protection cases. *See, e.g.*, *Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment); *Grutter*, 539 U.S. at 342.

("While public universities may not be constitutionally *required* to consider race, neither can they be legislatively *proscribed* from according any weight to an applicant's race…."); *id.* at 21 n.9 ("[W]here universities have elected to seek diversity, the state cannot require that race *not* be taken into account.") (all emphases in original).[5] The Supreme Court has repeatedly disavowed this purpose, not only by describing racial classifications as "pernicious," "obnoxious," and "odious to a free people," *see supra*, but also in even more direct terms in its recent cases of *Grutter* and *Parents Involved*. In *Grutter*, for example, the Court instructed that "[e]nshrining a permanent justification for racial preferences would offend th[e] fundamental equal protection principle" that "racial classifications … are potentially so dangerous that they may be employed

[5] The Cantrell Plaintiffs attempt to soften the avulsive force of their argument by limiting it, apparently, to circumstances where a public university seeks a diverse student body through the consideration of "non-academic factors." Pl. Mot. 19 ("The state may not … selectively deny applicants the opportunity to have central aspects of their identity considered while allowing myriad other non-academic factors to be weighed and positively evaluated by the Universities."); *see also id.* at 2-3 ("[P]ublic universities [cannot] be legislatively *proscribed* from according any weight to an applicant's race while considering any other pertinent personal attribute in pursuit of broad student body diversity") (emphasis in original). If this is so, then their argument should be, *not* that Proposal 2 is facially unconstitutional, but that in order to avoid unconstitutionality, Proposal 2 effectively prevents Michigan's public universities from considering anything but "academic" factors in their admissions decisions. It would be unprecedented for a federal court to enjoin the enforcement of a democratically adopted state constitutional provision when there is a plainly constitutional method for state agencies to comply with it. *See, e.g., Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("We prefer … to enjoin only the unconstitutional applications of a statute while leaving other applications in force…."); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). In other words, insofar as the Cantrell Plaintiffs concede that the Constitution does not *compel* the State to pursue diversity in public higher education, *see* Pl. Mot. 19, they must concede that the Universities can constitutionally comply with Proposal 2 simply by declining to pursue diversity *at all*, and thus that there is no ground for injunctive relief against the enforcement of Proposal 2. An ironic twist on this point is that the University of Michigan *Law School*'s pre-Proposal 2 admissions system, at least, did not seem to consider *any* "non-academic" factors other than race, to any significant degree. *See* Declaration of Richard Sander ¶¶ 6-7 (attached as Exhibit 2) (filed under seal). Under the Cantrell Plaintiffs' logic, therefore, Proposal 2 would be constitutional at least as applied to the law school.

no more broadly than the [compelling] interest demands." 539 U.S. at 342; *see also id.* at 344 (Ginsburg, J., concurring) ("The Court's observation that race-conscious programs 'must have a logical end point' accords with the international understanding of the office of affirmative action.") (citation omitted). The Cantrell Plaintiffs' argument, however, is nothing less than an attempt to "enshrine a permanent justification for racial preferences" in the Equal Protection Clause. Moreover, the *Grutter* Court identified, as models, race-neutral admissions policies that rely on "non-academic" diversity factors while excluding race from consideration, such as the "percent plans" of Texas and California. *See id.* at 340. These plans, by contrast, would clearly be unconstitutional under the "racial identity" theory espoused by the Cantrell Plaintiffs.

The Supreme Court's opinions in *Parents Involved* also squarely foreclose the Cantrell Plaintiffs' "racial identity" theory—which is ironic, because *Parents Involved* is the case they chiefly cite to support this novel argument. *See* Pl. Mot. 19, 20. In rejecting the use of race as a factor in assigning pupils in elementary and secondary schools, the *Parents Involved* plurality communicated its unequivocal disdain for the use of racial classifications in assigning educational benefits: "Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." 127 S. Ct. at 2758 (plurality opinion of Roberts, C.J.) (quotation marks omitted). And Justice Kennedy's separate opinion in *Parents Involved* was, if anything, even more emphatic on this point:

> Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications.… To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is

> a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.… Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

127 S. Ct. at 2796-97 (Kennedy, J., concurring in part and concurring in the judgment). The Cantrell Plaintiffs' argument collides head-on with this unequivocal rejection of racial classifications as an "end in itself," *id.* at 2758 (Roberts, C.J.), and with innumerable other statements from the Supreme Court rejecting racial classifications.[6]

Moreover, even if their "racial identity" theory were not foreclosed as a matter of law, the Cantrell Plaintiffs would not in any event be entitled to summary judgment on this issue because their theory rests on wholly untested and facially implausible factual premises. The argument

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[6] *See, e.g., Parents Involved*, 127 S. Ct. at 2760 (majority opinion) (reliance on race in public education is an "extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it"); *id.* at 2756 (plurality opinion of Roberts, C.J.) (referring to "the extreme measure of relying on race in assignments"); *id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (strict judicial scrutiny is required when governmental actions "lead to different treatment based on a classification that tells each student he or she is to be defined by race"); *Johnson v. California*, 543 U.S. 499, 506 (2005) ("We … apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool.") (emphasis in original) (quotation marks and alteration omitted); *Grutter*, 539 U.S. at 327 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.") (quoting *Adarand*, 515 U.S. at 229-30); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989) ("The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.… We think such a result would be contrary to both the letter and the spirit of a constitutional provision whose central command is equality."); *Seattle*, 458 U.S. at 491 (Powell, J., dissenting) ("We have never held, or even intimated, that absent a federal constitutional violation, a State *must* choose to treat persons differently on the basis of race."); *Washington v. Davis*, 426 U.S. 229 (1976) ("[R]acial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (race is "in most circumstances irrelevant and therefore prohibited").

rests on the premise that the "targeted extraction of race from the pursuit of student body diversity … redounds to the detriment of people of color whose *racial* identity … may be a defining aspect of their character"—presumably (or else the argument makes no sense) to a degree *categorically greater* for minorities than for non-minorities. *See* Pl. Mot. 2 (emphasis in original). After all, on Plaintiffs' theory, if a white applicant viewed his or her race as fundamental to identity to the same degree as a black applicant, both applicants would be equally entitled to have their race considered as a positive factor in public university admissions. Plaintiffs have presented virtually no evidence to support this sweeping racial generalization—merely three conclusory affidavits from black declarants, who apparently purport to speak for *all* black people in the State of Michigan, and not a single affidavit from a member of any other racial or ethnic group. Moreover, due to Plaintiffs' inexcusable delay in raising this novel claim, Defendants have had no notice or opportunity to depose these witnesses or to take any discovery on the vague and elusive relation between "racial identity" and "how many people" (whether whites, blacks, or other minorities) "choose to define and portray themselves." Pl. Mot. 2, 13. Plaintiffs, therefore, obviously cannot claim that there is "no genuine issue of material fact" on this question, such that they would be entitled to "judgment as a matter of law." Fed. R. Civ. P. 56(c).

2. Plaintiffs' "Practical Effects" Argument Is Plainly Meritless.

The Cantrell Plaintiffs also challenge "the practical effects of Proposal 2," arguing that its ban on racial preferences will mean that "robust enrollment of students of color in Michigan's public universities will be virtually impossible to maintain." Pl. Mot. 7, 15. This argument is nothing more than a naked disparate impact claim: Because Proposal 2 will supposedly have a

disproportionately negative effect on minority admissions, the Cantrell Plaintiffs contend, it must be unconstitutional.

It is well established that the bare allegation that a governmental policy will have a negative "practical effect[]" (even a dramatic impact) on a racial class, without more, fails to state a claim for violation of the Equal Protection Clause. *See, e.g., Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to *a discriminatory purpose*.") (emphasis added) (citing *Washington v. Davis*, 426 U.S. at 229; *Arlington Heights*, 429 U.S. at 252). As noted in Defendant-Intervenor's Motion For Summary Judgment, the Cantrell Plaintiffs do not even allege, much less attempt to prove, that the enactment of Proposal 2 was motivated by a discriminatory purpose. *See* Defendant-Intervenor Eric Russell's Motion For Summary Judgment ("Russell Mot."), Doc. 202, at 10-11.

To support this claim, the Cantrell Plaintiffs wrench out of context a few phrases from *Romer v. Evans*, seeming to imply that the Supreme Court in that case abandoned, *sub silentio*, its longstanding doctrine that disparate impact alone does not establish an equal protection violation. *See* Pl. Mot. 19 (quoting *Romer* to argue that Proposal 2 "impos[es] a special disability on those persons alone"); *id.* at 19-20 (quoting *Romer* to argue that Proposal 2 is invalid because it has "the peculiar property of imposing a broad and undifferentiated disability on a single named group"). Needless to say, the Cantrell Plaintiffs' claim bears no recognizable relation to *Romer*, in which the Supreme Court, applying rational-basis scrutiny, struck down Colorado's constitutional prohibition of ordinances providing *protection against discrimination* to homosexuals. The *Romer* Court concluded that the Colorado provision was unsupported by

any plausible justification and thus was "inexplicable by anything but animus toward the class it affects" and "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." 517 U.S. at 632, 634. Proposal 2, which bans *all* differential treatment on the basis of race, gender, color, ethnicity, or national origin, cannot plausibly be described as "imposing a broad and undifferentiated disability on a single named group." *See* Russell Mot. 18-20. Nor was Proposal 2 "born of animosity" toward any class of persons—indeed, the Cantrell Plaintiffs have not even attempted to plead or prove this point. (The Coalition Plaintiffs, by contrast, have made such an effort—but in vain. *See* Russell Mot. 13-18.) In sum, nothing in *Romer* or any other case purported to overrule *Feeney*, *Davis*, or *Arlington Heights*. Accordingly, Proposal 2 stands regardless of the validity of the Cantrell Plaintiffs' disparate racial impact allegations.

But even if the bare allegation that the "practical effects of Proposal 2," Pl. Mot. 7, will have a negative impact on minority applicants could establish a suspect racial *classification*, Plaintiffs would fall far short of establishing that they are entitled to summary judgment on this issue. Virtually every "fact" that they allege (and that they claim is "not disputed," Pl. Mot. 16) is highly contentious, if not wholly insupportable. These "facts" fall into three categories: (1) the allegation that eliminating racial preferences will have a dramatic adverse impact on minority enrollments, Pl. Mot. 15-17; (2) the allegation that race-neutral alternatives will be ineffective in promoting minority enrollments, *id.* at 15-18; and (3) the allegation that the overall impact on the socioeconomic status of minorities will be negative, *id.* at 17. As the attached Declaration of Richard Sander attests, Plaintiffs' affidavits fail to provide substantial or convincing support for any of these propositions.

First, there plainly is a genuine dispute of fact about the first of these allegations. The speculative statements of University administrators, quoted by Plaintiffs, in desperately defending their racial preference programs, *see* Pl. Mot. 15-16, cannot expunge the contrary, empirical evidence about minority enrollments in California's public universities under Proposition 209. Overall minority enrollments have increased in California's public universities since the enactment of Proposition 209, *see* Declaration of Richard Sander ¶ 18 (attached as Exhibit 2) ("Sander Declaration"),[7] and the shift of minorities away from so-called "elite" campuses toward better-matched public institutions appears to have been, on the whole, a positive outcome, *id.* ¶¶ 19, 28-35, 39. Moreover, Proposition 209 has functioned as a spur at California's public universities to achieving a truer, broader-based diversity that transcends mere skin color at California's public universities, *id.* ¶¶ 4-8. The University of Michigan's aggressive racial preference programs, in contrast, appear to have achieved a largely one-dimensional "diversity." *Id.* ¶¶ 6-8. The University of Michigan Law School's program has been particularly shallow in this regard, because skin color is effectively the *only* non-academic factor it has considered in admissions—thus constructing a "diversity" that is, quite literally, only skin-deep. *Id.* ¶¶ 6-7.

In addition, the evidence that the Cantrell Plaintiffs provide in support of their contention that race-neutral alternatives will be ineffective in promoting minority enrollments is flawed by fundamental errors and is entirely unconvincing. Professor Bowen's contention on this point is simply unsupported, *see* Bowen Declaration ¶ 11, while the Professor Oakes' argument is "off by one hundred eighty degrees." Sander Declaration ¶ 26; *see also id.* ¶¶ 21-25. Both of these affidavits, moreover, are plagued by basic factual and calculation errors. *See id.* ¶¶ 21-26, 37-38.

[7] For the reasons stated in Defendant-Intervenor's Motion To File Temporarily Under Seal, filed concurrently with this brief, this Declaration has been filed under seal.

Third, Plaintiffs' contention that "the consideration of race in university admissions 'has been an important contributor to the socioeconomic mobility' of people of color in the United States," Pl. Mot. 17 (quoting Bowen Declaration ¶ 6), is highly contentious and open to vigorous dispute. Extensive published research indicates that systematically mismatching minority students to institutions for which they are less qualified, through the operation of racial preferences, works a disservice on the very students that the preferences are supposed to benefit. *See* Sander Declaration ¶¶ 28-35. Professor Bowen's unsupported *ipse dixit* to the contrary, *see* Pl. Mot. 17, is woefully insufficient to establish that there is no genuine dispute of material fact on this issue. On the contrary, Defendant-Intervenor is still seeking discovery from the University defendants of Michigan-specific data on this very issue—the effects of the operation of racial preferences specifically in Michigan on the academic performance, graduation rates, and professional prospects of the minority students favored by them. *See* Defendant-Intervenor Russell's Motion To Compel Discovery, Doc. 169. For the Cantrell Plaintiffs to assert that "[t]hese facts are not disputed," Pl. Mot. 16, is quite mistaken.

In sum, virtually every material "fact" that the Cantrell Plaintiffs allege in their Motion is subject to a genuine dispute, and they are therefore not entitled to summary judgment.

C. Proposal 2 Is Justified By Compelling State Interests.

Even if Plaintiffs could succeed in their Orwellian attempt to establish that Proposal 2's ban on racial distinctions somehow created a "distinction based on race," Pl. Mot. 9, they would still not be entitled to summary judgment. Establishing that a legislative policy embodies a racial classification does not automatically invalidate it; it merely triggers heightened judicial scrutiny of the policy. *See, e.g., Crawford v. Bd. Of Educ.*, 458 U.S. 527, 536 (1982) ("[I]f Proposition I employed a racial classification it would be unconstitutional *unless necessary to further a*

compelling state interest.") (emphasis added). The Supreme Court has repeatedly stated that such heightened scrutiny is *not* "strict in theory, but fatal in fact." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237); *see also id.* at 326-27. ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."). So if we must enter the Cantrell Plaintiffs' surreal world, where a measure *banning* all "governmental uses of race" is itself a "governmental use of race," we must also submit that this "use" of race surely falls into the class of those policies that are justified by, and properly tailored to achieve, compelling governmental interests.

1. Proposal 2 serves the compelling state interest of treating all citizens equally without regard to their race.

First and most fundamentally, Proposal 2 directly serves the compelling state interest in guaranteeing that all citizens will be treated equally by the State without regard to race. There can be no doubt that this interest represents a fundamental principle of justice, deeply rooted in our Nation's post-bellum legal traditions, that is both legitimate and compelling for the State to pursue. It is, after all, the very "core" of the Equal Protection Clause. *Hunter*, 393 U.S. at 392. Even the Supreme Court's cases reluctantly approving racial preferences in limited circumstances have been careful to emphasize that "there are serious problems of justice connected with the idea of preferences itself." *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)). Few state interests could be so compelling as the desire to stamp out the racial classifications that the Supreme Court and its Justices have variably and repeatedly described as "pernicious," "obnoxious," "sordid," "inherently suspect," and "by their very nature odious to a free people." *See supra*, at 1, n. 1; *see also, e.g.*, *Adarand*, 515 U.S. at 214, 215, 218, 220, 223-24, 229; *id.* at 229-30 ("*[W]henever* the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the

language and spirit of the Constitution's guarantee of Equal Protection.") (emphasis added); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (holding that "Minnesota's compelling interest in eradicating discrimination" justified burdening the Jaycees' associational freedoms). A State and its people are thus free to adopt, as the most compelling of public interests, the achievement of Justice Harlan's vision that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)—a vision for which our Nation was willing to suffer "this mighty scourge of war … until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword." Abraham Lincoln, Second Inaugural Address (March 4, 1865). And it was this vision, more than anything else, that in fact motivated the supporters of Proposal 2 who have been deposed in this case. *See* Russell Mot., at 15 n.4 (quoting Connerly Depo. at 129:13-14, 159:1-3, 163:14-17; Gratz Depo. 17:17-18, 94:16-21).

Moreover, Proposal 2 is precisely tailored to advance this interest in guaranteeing all citizens equal treatment by the State on the basis of race in contracting, education, and employment. It eliminates all racial classifications in those areas. The only exception it makes to its prohibition of *racial* preferences is for those (if any) legislated by a superior sovereign, namely the federal government, *see* Mich. Const. art. I, § 26(4).

Of course, only in the Cantrell Plaintiffs' world is a State forced to defend its guarantee of equal treatment of all people by pointing out that it serves the compelling interest of treating all people equally. The Cantrell Plaintiffs' notions of "equality" are, to be kind, without merit.

2. Proposal 2 serves a compelling interest in eliminating the negative effects caused by the State through its racial-preference programs.

Proposal 2 also serves the compelling State interest of eliminating the negative effects imposed on minorities through its prior racial preference programs. Racial preference programs have at least two serious negative effects on their putative beneficiaries. First, the Supreme Court has repeatedly acknowledged the pernicious stigma imposed on *all* individual members of "beneficiary" races through the imposition of racial preferences. *See, e.g., Parents Involved*, 127 S. Ct. at 2759 (plurality opinion of Roberts, C.J.) ("To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."); *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

Second, extensive evidence shows that the systematic mismatching of minority students, through racial preferences, to academic institutions for which they are underqualified imposes substantial harm on the very minorities that are supposed to benefit: increased minority attrition rates; systemic minority academic underperformance; decimation of minority participants in academic disciplines such as mathematics, engineering, and the natural sciences; decreased minority graduation rates; and net decline in the number of minorities passing professional licensing exams, such as the bar exam and the USMLE. *See* Sander Declaration ¶¶ 19, 28-35, 39; *see also* Declaration of Richard H. Sander, Doc. 188, ¶¶ 6, 11.

To be sure, Proposal 2 cannot, and does not purport to, eliminate *all* stigmatic and educational harms inflicted on minorities by racial preferences. In particular, it does not prevent *private entities* (or superior sovereigns) from using racial preferences in employment, contracting, and education. But it does eliminate the State's unique contribution to those harms. Insofar as the State itself has *directly contributed* to these harms, its interest in eliminating them is uniquely compelling under the Equal Protection Clause. *See, e.g., Green v. County School Board*, 391 U.S. 430, 438 (1968) (in dismantling *its own* previously discriminatory programs, a school district has a special responsibility to "convert to a unitary system in which racial discrimination would be eliminated root and branch"). And, as applied to the Universities' admissions and financial aid policies, Proposal 2 is precisely tailored to eliminate the State's contribution to the stigmatic and educational harms caused by the use of racial preferences in education.

Because Defendants had no opportunity to move for summary judgment on the novel claims raised in Section I of the Cantrell Plaintiffs' Motion, we respectfully request the Court to treat this Response as a request for dismissal of, or summary judgment on, these claims.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CANTRELL PLAINTIFFS' POLITICAL-STRUCTURE CLAIM.

In order to make out an equal protection violation based on restructuring of the political process to disadvantage minorities under *Hunter* and *Seattle*, a plaintiff must prove at least two elements: (1) that the challenged policy is so "carefully tailored to interfere *only* with" an interest unique to minorities that it effectively "serve[s] as an 'explicitly racial classification,'" *Seattle*, 458 U.S. at 468, 471 (quoting *Hunter*, 393 U.S. at 389) (emphasis added); and (2) that the challenged policy imposes a impermissibly onerous burden on minorities in the political

process, *id.* at 474. The Cantrell Plaintiffs fail to show that they are entitled to summary judgment on either element of this claim.

A. Proposal 2 Does Not Trigger Scrutiny Under *Hunter* Or *Seattle* Because It Does Not Embody An Explicit Racial Classification.

In arguing that Proposal 2 triggers heightened scrutiny under *Hunter* and *Seattle*, the Cantrell Plaintiffs contend that it has a "racial focus" and was "effectively drawn for racial purposes" within the meaning of those two cases. Pl. Mot. 23. Once again, however, they wrench these terms out of context to propose an indefensibly overbroad reading of those two phrases. For the reasons stated in our motion for summary judgment, *see* Russell Mot. 2-13, and those set forth below as well, the Cantrell Plaintiffs' political-structure claim is devoid of merit.

As demonstrated above, it is well settled that *only* intentionally discriminatory governmental policies violate the Equal Protection Clause. *See Seattle*, 458 U.S. at 484 ("[P]urposeful discrimination is the condition that offends the Constitution.") (quotation marks omitted). And, as the Supreme Court has repeatedly instructed, intentional discrimination is shown in three ways:

> Certain classifications … in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. But, as was made clear in *Washington v. Davis*, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.

Feeney, 442 U.S. at 272 (citations omitted). In other words, absent extraneous evidence of intentional discrimination, a law violates the Equal Protection Clause only if it contains an express racial classification (*e.g.*, mandating that blacks be treated differently than whites) or is so gerrymandered to disadvantage a particular race that it is "an obvious pretext for racial

discrimination." *Id.*; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (facially neutral prohibition against the operation of laundry facilities in wooden buildings that was selectively enforced against Chinese immigrants violated the Equal Protection Clause); *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41 (1960) (gerrymandering of city boundaries that "alter[ed] the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure," and whose "essential inevitable effect [was] to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident," was designed to disenfranchise minority voters and violated the Equal Protection Clause).

Like *Gomillion* and *Yick Wo*, *Hunter* and *Seattle* were cases in which the Supreme Court held that, though the laws were facially neutral, they were actually a "pretext for racial discrimination." For example, in *Hunter*, Justice Harlan carefully distinguished the legislation at issue from political restructurings that might "occasionally operate to disadvantage Negro interests," and noted that "[i]f a governmental institution is to be fair, one group cannot always be expected to win." 393 U.S. at 394 (Harlan, J., concurring). So long as the law is "grounded in neutral principle," it does not violate equal protection even if minorities face significant political obstacles in repealing it: "[E]ven if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection." *Id.* at 395. The provision invalidated in *Hunter*, by contrast, had "the clear *purpose* of making more difficult for racial and religious minorities to further their political aims" and was thus "discriminatory on its face." *Id.* at 393 (emphasis added); *see also id.* at 395 (same). The Court reaffirmed this requirement of discriminatory purpose and facial discrimination in *James v. Valtierra*, expressly noting that *Hunter*, like *Gomillion*, was a case in which "a law seemingly neutral on its face is in

fact aimed at a racial minority," and that any other reading would be an unwarranted extension of *Hunter*. 402 U.S. 137, 141 (1971) (citing *Gomillion*, 364 U.S. 339 (1960)).

The Court's opinion in *Seattle* was even more explicit in identifying the provision at issue in that case as one gerrymandered to give effect to a veiled invidious racial classification, thus distinguishing it from *Crawford* (which the Court decided on the same day). First, *Seattle* unequivocally reaffirmed the holding of *Washington v. Davis*, stating that "[a]ppellants unquestionably are correct when they suggest that purposeful discrimination is the condition that offends the Constitution." 458 U.S. at 484 (quotation marks omitted). The Court emphasized that its task was "to determine whether the legislation in some sense was *designed* to accord disparate treatment on the basis of rac[e]." *Id.* at 485 (emphasis added). Accordingly, the Court exhaustively specified the ways in which the legislation challenged had been "carefully tailored" so that it was "directed solely at desegregative busing." *Id.* at 463, 471. And the Court reaffirmed that, as in *Hunter*, the legislation was so invidiously tailored as to raise an automatic inference of intentional discrimination, just as would an explicit racial classification: "*Hunter* recognized the considerations addressed above, and it therefore rested on a principle that has been vital for over a century—that the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Id.* at 486 (quotation marks omitted). It is these "unjustified distinctions based on race"—whether appearing on the face of the statute or achieved through gerrymandered provisions—are what trigger heightened judicial scrutiny.

Proposal 2 thus bears no relation to the measures struck down in these cases. As argued in Defendant-Intervenor's Motion For Summary Judgment, no plausible argument can be made that Proposal 2 was gerrymandered or "carefully tailored" to mask an invidious racial

classification. *See* Russell Mot., at 18-20. "In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification." *Coalition To Defend Affirmative Action v. Granholm*, 473 F.3d 237, 249 (6th Cir. 2006).[8]

Nor was Proposal 2 designed solely to eliminate the preferential admissions programs of Michigan's public universities, as the Cantrell Plaintiffs suggest. *See* Pl. Mot. 26 ("Proposal 2's … only real effect is to end (and prevent the future implementation of) race-conscious admissions policies."). Even if this were true, of course, it would be completely acceptable, for the reasons stated above. But it is plainly incorrect. Proposal 2's ban of discrimination and preferential treatment applies to *all* "public education, public employment, and public contracting" in the State of Michigan. Mich. Const. art. I, § 26. Even the Michigan Civil Rights Commission, which has made no secret of its hostility to Proposal 2, has admitted that Proposal 2 invalidates numerous state statutes wholly unrelated to university admissions, in areas as diverse as collective bargaining, foster care, human services, and minority-owned businesses. The

[8] The Cantrell Plaintiffs attempt to cast a shadow of uncertainty over the validity of the Sixth Circuit's stay opinion in *Coalition To Defend Affirmative Action*, 473 F.3d 237, by alleging that "the Sixth Circuit presently has pending before it a motion to vacate [the panel opinion] because in circumstances such as these, where an order becomes moot pending appeal by no fault of any party, it is 'the duty of the appellate court' to 'clear the path for future relitigation of the issues between the parties' by dismissing the appeal and vacating the underlying order." Pl. Mot. 5 n.2 (quoting *United States v. Munsingwear*, 340 U.S. 36, 40 (1950)). As the Cantrell Plaintiffs concede, however, the Sixth Circuit dismissed the entire appeal in which their *Munsingwear* motion was pending without taking affirmative action on their motion. As the Deputy Clerk of the Sixth Circuit has confirmed to Defendant-Intervenor's counsel, the dismissal of the entire appeal operated to effectively dismiss as moot the Cantrell Plaintiffs' motion pending in that appeal. Therefore, the motion is *not* "currently … pending" before the Sixth Circuit. In any event, even if it were still pending, the Sixth Circuit's panel opinion would remain authoritative unless and until it were vacated by the Sixth Circuit. And there would be scant chance of that, because for numerous reasons the Cantrell Plaintiffs' reliance on *Munsingwear* was unavailing. Among others, an appellate panel lacks authority under *Munsingwear* to vacate the published decision of a prior appellate panel—it has authority to vacate only the orders of an *inferior* court. *See, e.g., United States v. City of Detroit*, 401 F.3d 448, 452 (6th Cir. 2005).

Commission also conceded, on the basis of its own legal expert's recommendation, that Proposal 2 "may" invalidate provisions of state law in eighteen other areas unrelated to the Universities' admissions and financial aid policies. *See* Michigan Civil Rights Commission, "One Michigan" At The Crossroads (March 7, 2007), at 37-51, *available at* http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_201451_7.pdf. Though the Universities' highly controversial racial preference programs have attracted the most media attention (and this lawsuit), they were but one form of state-sponsored discrimination in Michigan, among many, abolished by Proposal 2.

The Cantrell Plaintiffs gravely err, therefore, in implying that legislation with *any* "racial focus" or racially related purpose is subject to heightened scrutiny under *Hunter* and *Seattle*. *See* Pl. Mot. 23-26. On the contrary, *only* a "racial focus" or "racial purpose" that is *designed with the invidious intention of disadvantaging minorities* is "inherently suspect" under those cases. *Seattle*, 458 U.S. at 485; *see also id.* ("This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification."). As shown above, the Cantrell Plaintiffs do not even allege or argue that Proposal 2 was designed with the invidious purpose of disadvantaging minorities—only that it relates to a racial issue and that it may have detrimental *effects* on minorities. As noted above, these features are insufficient to trigger heightened scrutiny under the Equal Protection Clause.

Moreover, the Cantrell Plaintiffs' overbroad reading of "racial focus" would lead to absurd conclusions. First, it would strip authority from the voters of every State to address any racially related issues through the State referendum process—any provision, however innocuous, that is tangentially related to race, or that is arguably in minorities' interest, *see* Pl. Mot. 23-24, would be subject to constitutional attack as having a "racial focus." Not only would such a result

be anti-democratic, it would run contrary to the Supreme Court's unequivocal *approval* of the use of voter referendums to address issues that impact upon race.

James v. Valtierra, for example, squarely rejected the Cantrell Plaintiffs' logic. In *James*, the Court rejected a claim that a state constitutional provision singling out low-income public housing decisions for mandatory referendum approval fell afoul of *Hunter*, despite the fact that public-housing projects were undoubtedly perceived by many minorities as "legislation that [wa]s in their interest," Pl. Mot. 23:

> Unlike the Akron referendum provision [at issue in *Hunter*], it cannot be said that California's Article XXXIV rests on 'distinctions based on race'.… Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.… Under [appellees' view], presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

402 U.S. at 141-42; *see also Cuyahoga Falls*, 538 U.S. at 196 ("[T]he referendum [i]s a 'basic instrument of democratic government'"); *Crawford*, 458 U.S. at 535 ("We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment.").

Likewise, Proposal 2's ban on *racial* preferences, and its allegedly adverse effects on minorities, are simply not enough to trigger scrutiny under *Hunter* or to disenfranchise Michigan's voters on the issue of racial preferences. Nor is the mere fact that, allegedly, members of minority races are overrepresented among the ranks of the supporters of racial preferences. *See* Pl. Mot. 24-25.[9] *See Hunter*, 393 U.S. at 394-95 (Harlan, J., concurring) ("The

[9] The only support that the Cantrell Plaintiffs provide for this assertion is exit polling data from the Proposal 2 election, which, as noted above, is of dubious reliability. *See* Declaration of Chris Wilson ¶¶ 4-10. In fact, the Cantrell Plaintiffs' own witness avers that "polling data is

existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively more difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments.… [E]ven if Negroes are obliged to undertake the arduous task of amending the state constitution, they are not thereby denied equal protection.").

Worse still, the Cantrell Plaintiffs' theory would freeze state decisionmaking authority on any racially tinged issue at the *lowest* level of decisionmaking, thus turning fundamental notions of democratic hierarchy and accountability on their heads. After all, when seeking racially preferential admission policies, it is easier for minorities to lobby an individual application reviewer than the entire admissions committee; in turn, it is easier to lobby the admissions committee than the entire faculty governing body. The lobbying challenge facing minorities only increases as they move up the decisionmaking hierarchy to the Board of Regents, the state legislature, and ultimately to the state's voters in the referendum process. On the Cantrell Plaintiffs' theory, there is a distinct Equal Protection Clause violation every time one level of government overrules the one below it on the issue of racial preferences—or, for that matter, on any issue with a "racial focus."

For this very reason, Justice Powell's dissent in *Seattle* admonished the majority that its holding threatened a radical inversion of democratic governance on the very issue at stake here:

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unreliable in this area," because "citizens do not vote predictably when it comes to race issues in polling booths when compared to providing data for pollsters." Declaration of Kristina Wilfore, Doc. 203-5, at ¶ 36. In other words, the Cantrell Plaintiffs' own expert admits that voters responding to polls—such as the exit poll on which the Cantrell Plaintiffs rely—do not accurately represent their voting behavior to pollsters on politically contentious issues such as racial preferences.

> Under [the Court's] holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. *Thus, if an admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene…. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university system, and the board of regents might be powerless to intervene despite their greater authority under state law*.

Seattle, 458 U.S. at 499 n.12 (Powell, J., dissenting) (emphasis added); *see also id.*, 458 U.S. at 498-99 ("Under its unprecedented theory of a vested constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multi-racial society where, as in this case, the local school board has acted first.") (emphasis in original). In the face of this prescient admonition, the majority in *Seattle* expressly emphasized that its holding was narrowly limited, and specifically repudiated the notion that Justice Powell's law-school affirmative-action hypothetical would fall within the case's ambit. *See id.* at 480 n.23 (majority opinion) (insisting that "the horribles paraded by the dissent … are entirely unrelated to this case" because they "have nothing to do with the ability of minorities to participate in the process of self-government").

Proposal 2, likewise, "ha[s] nothing to do with the ability of minorities to participate in the process of self-government." Unlike the measures at issue in *Hunter* and *Seattle*, Proposal 2 was not "carefully tailored" to achieve a racially discriminatory purpose. It therefore does not justify the anti-democratic inversion of state governmental policy-making processes demanded by the Cantrell Plaintiffs.

Moreover, in addition to expressly disavowing the applicability of its holding to the context of university affirmative-action programs, the *Seattle* Court also took pains to limit its holding by emphasizing the unique role and tradition that *local school boards* have played in the

history of school government in this Nation, and in the desegregation of schools in particular. The constitutional freezing of state governmental decision-making at the local-school board level was less problematic and offensive because that level had traditionally been recognized as a particularly appropriate place for school-district authority to be exercised—specifically because state law rendered local school boards uniquely accountable to the residents of the local school districts. *See Seattle*, 458 U.S. at 478-79 ("[T]he notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's 'accountability' to the people of the community ….") (citing numerous statutes establishing the authority and accountability of local school boards under Washington law). In this case, by contrast, there is no longstanding tradition of accountability of public university administrators and admissions committees to the residents of the State of Michigan. On the contrary, the overwhelming margin by which Proposal 2 passed, despite the vehement and virtually unanimous objections of key university administrators, indicates a striking *lack* of accountability of the leadership of Michigan's public universities to their constituents, the citizens of Michigan.

In fact, the Cantrell Plaintiffs' own argument belies their claim that Proposal 2 contains an impermissible, inherently suspect racial classification. Tellingly, even the Cantrell Plaintiffs do not define the class created by Proposal 2 in terms of race. On the contrary, as the Cantrell Plaintiffs effectively admit, the class burdened by Proposal 2's alleged restructuring of the political process is defined by *political ideology*, not by race—specifically, the ideology of supporting governmental racial preferences. Thus, the Cantrell Plaintiffs define the class supposedly burdened by Proposal 2 as "individuals seeking race-conscious admissions polices" and "advocates of policies benefiting members of a [minority group]." Pl. Mot. 21, 22; *see also*

Cantrell First Amended Complaint, Doc. 73, ¶ 31 (defining the purported Cantrell class as composed of those who, among other characteristics, "seek the re-implementation of the former admissions policies altered in response to Proposal 2"). Of course, these "individuals" and "advocates" are *not* monolithically black, white, or any other race. Indeed, far more whites than blacks voted against Proposal 2. Even in this case, many of the named Cantrell Plaintiffs are white, while Ward Connerly, who was deposed as a principal supporter of Proposal 2, is black. *See, e.g.*, Doc. 73, at ¶¶ 11, 13, 19, 21, 22.

In sum, the class of those who "seek the re-implementation" of racial preferences at Michigan's public universities is no more a *racial* classification than the class of those who favor lower income taxes, or those who oppose greenhouse gas emissions, or those who support Dennis Kucinich for President. As in all of these political classes, those both within and without the putative class here cross all racial boundaries. It is only when a provision is adopted to achieve a racially discriminatory purpose—as Proposal 2 manifestly was not—that burdening the political rights of this "class" of persons becomes a suspect action under *Hunter* and *Seattle*.

B. There Is A Genuine Dispute Of Fact About The Nature Of The Political Burdens Allegedly Imposed By Proposal 2.

The Cantrell Plaintiffs also fail to show that they are entitled to summary judgment on the second requisite element of their *Seattle* claim—namely, that "the practical effect of [Proposal 2] is to work a reallocation of power of the kind condemned in *Hunter*." 458 U.S. at 474. In particular, Plaintiffs fail to establish that there is no genuine issue of material fact on the question whether the state referendum process imposes an impermissible burden on minorities by disenfranchising a unique minority constituency.

As an initial matter, as demonstrated above, it is clear that the "reallocation of power of the kind condemned in *Hunter*" is not simply *any* exercise of decisionmaking authority at a

different level of government. Rather, *Hunter* condemned only those "reallocation[s] of power" that are specifically structured "in such a way to burden minority interests"—in other words, that the *political structure itself* becomes distorted to create an intrinsic problem for the representation of minority interests. *Seattle* thus emphasized that the imposition of a referendum requirement alone was not sufficient to constitute such a distortion: "The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests." 458 U.S. at 474 n.17. Likewise, *Hunter* made clear that the *combination* of (1) the reallocation of political power by a referendum requirement, with (2) an issue whose *only natural constituency* was minorities, was what constituted an impermissible "comparative structural burden" on minorities. *See, e.g.*, *Hunter*, 393 U.S. at 392-93 (holding that the State may not "disadvantage any particular group by making it more difficult to enact legislation *in its behalf*") (emphasis added); *id.* at 390 (characterizing the burdened class as "those who sought protection against racial bias"); *see also id.* at 391 ("The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."). In other words, to make out their claim, the Cantrell Plaintiffs must prove, not just any reallocation of political authority, but a reallocation that is *specifically structured to disenfranchise a minority constituency*.

As shown above, of course, the Cantrell Plaintiffs cannot make out this specific showing of minority disenfranchisement because those supporting racial preferences are as racially mixed a group as those who oppose them. *See supra*, Part II.A. Nevertheless, in apparent attempt to satisfy their burden of showing an impermissible "comparative structural burden," Plaintiffs attempt to prove that the imposition of a referendum requirement imposes a *unique* burden on

proponents of racial preferences, above and beyond the burdens normally inherent in the process of amending the state constitution by any other group. *See* Pl. Mot. 31 (arguing that "[p]roponents of initiatives seeking to benefit communities of color—such as an initiative to reinstate race-conscious admissions policies—are even more disadvantaged in this process because of the peculiar and unique problems associated with pro-affirmative action ballot initiatives and minority protection measures generally") (quotation marks omitted). In particular, the declaration of Kristina Wilfore contends that proponents of racial preferences face three unique obstacles in the referendum process that putatively render it impermissibly burdensome for those advocates: (1) "polling data is unreliable in this area" because "citizens do not vote predictably when it comes to race issues in polling booths when compared to providing data for pollsters"; (2) "there is no natural constituency among pro-affirmative action groups in Michigan that would form an appropriate base for those groups to financially coalesce"; and (3) "affirmative action measures … are particularly difficult to market because they tend to elicit highly emotive responses from voters." Declaration of Kristina Wilfore, Doc. 203 Ex. XX, at ¶ 36-37. Of these three claims, the first is irrelevant, the second is demonstrably false, and the third is merely a naked admission of the unpopularity of the Cantrell Plaintiffs' political position.

First, the fact that "polling data is unreliable in this area" is plainly irrelevant to showing that "proponents of affirmative action" are "at a particular disadvantage" in the state referendum process. *Id.* ¶ 36. Clearly, polling data in this area is no less reliable for proponents of racial preferences than it is for opponents. At bottom, Wilfore's point, which we do not dispute, serves only to undermine Plaintiffs' reliance on the exit poll reporting the purported voting results on Proposal 2 by race.

Second, Wilfore contends that "[t]here is no single obvious financial benefactor in Michigan who would support the pro-affirmative action position." *Id.* ¶ 37. This assertion is flatly belied, ironically, by the political battle over the passage of Proposal 2 itself. As the attached Declaration of Jennifer Gratz attests, a wide array of Michigan's largest corporations and labor unions and its wealthiest and most influential individuals contributed to the campaign *against* Proposal 2. *See* Gratz Declaration ¶ 12 (attached as Exhibit 3). The main organizations opposing Proposal 2 outspent its supporters by more than 2:1. *Id.* ¶¶ 8, 10-11. And Michigan's political establishment and its dominant media institutions overwhelmingly opposed Proposal 2, as a cursory browse through the press releases and editorial pages of the time confirms. The Supreme Court amicus briefs in the *Grutter-Gratz* litigation likewise confirm that there is no shortage of powerful and well-financed support for racial preferences. In short, Wilfore's contention that proponents of Proposal 2 lack a "natural constituency … who would support the pro-affirmative action position" with financial contributions is facially preposterous. To the extent that the champions of racial preferences are unwilling to finance a Proposal 2 repeal campaign, it is undoubtedly because any such effort would be futile in light of the overwhelming unpopularity of racial preferences among Michigan's voters—which brings us to Wilfore's third point.

Wilfore contends that "affirmative action measures … are particularly difficult to market because they tend to elicit highly emotive responses from voters." Wilfore Declaration, ¶ 36. To put the same point more plainly, racial preferences "are particularly difficult to market" because they offend the deep-seated sense of equality and justice shared by a decisive majority of ordinary Michiganders. In a breathtaking burst of condescension, Wilfore alleges that "[v]oters often mistakenly link these measures in their minds to politically charged issues … such as

unfair economic advantages," and that ordinary voters fail to grasp the "pro-affirmative action" message because it is "by its nature, more complex." *Id.* She provides no evidence or other basis for her insinuation that the 58 percent of Michiganders (like similar majorities in California and Washington) who supported Proposal 2 did so because they were too simple-minded and confused to understand the "complex" issue of whether racial discrimination is unjust in all circumstances, or just some. *See also Grutter*, 539 U.S. at 341 ("[T]here are serious problems of justice connected with the idea of preference itself.") (quoting *Bakke*, 438 U.S. at 298 (Powell, J.)). Her testimony thus falls far short of rebutting the palpable truth that racial preferences are unpopular among a large majority of Michigan voters because they think that such preferences are simply unjust.[10]

In short, the Wilfore Declaration provides no support for the thesis that Proposal 2 imposes a unique political burden on a minority constituency. Accordingly, the Cantrell Plaintiffs cannot establish an impermissible "comparative political burden" under *Hunter* and *Seattle*.

C. Even If It Triggered Heightened Scrutiny Under *Hunter*, Proposal 2 Is Justified By Compelling State Interests.

Even if the Cantrell Plaintiffs could show that Proposal 2 fell into the "inherently suspect category" identified in *Seattle*, 458 U.S. at 485, this showing would suffice only to trigger heightened judicial scrutiny, not to invalidate it. *See id.* As noted above, such scrutiny is not "strict in theory, but fatal in fact." *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

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[10] The Wilfore Declaration exaggerates the burdens of passing a state constitutional amendment in several other ways as well. Wilfore errs in attesting that expensive "polling" and "focus groups" are required for a successful initiative's "initial stage." Gratz Declaration ¶ 4. She errs in attesting that a "paid media campaign" is required for the "second stage." *Id.* ¶ 6. She errs in attesting that the Michigan referendum process is particularly burdensome because of its supposedly "unusually short" period for signature-gathering. *Id.* ¶ 7. And she errs in estimating that the minimum cost of launching a successful ballot initiative is $5 million. *Id.* ¶ 8.

As demonstrated above, Proposal 2 is justified even under heightened judicial scrutiny because it is appropriately tailored to advance overriding state interests. *See supra*, Part I.C. The Cantrell Plaintiffs proffer no evidence or argument against these compelling justifications. For this reason, they would not be entitled to summary judgment even if they could make out a *Hunter-Seattle* claim.

CONCLUSION

For the reasons stated, Defendant-Intervenor respectfully requests this Court to deny the Cantrell Plaintiffs' Motion For Summary Judgment, Doc. 203, and to dismiss or to grant Defendants summary judgment on the novel claims raised in Section I of that motion.

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Respectfully Submitted,

/s/ Charles J. Cooper
Charles J. Cooper
D. John Sauer
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600

Kerry L. Morgan
PENTIUK, COUVEREUR & KOBILJAK
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, MI 48192
734-281-7100

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW Suite 300
Washington, DC 20036
Phone: (202) 833-8400

CERTIFICATE OF SERVICE

I hereby certify that on this 7th 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:

George B. Washington
SCHEFF & WASHINGTON
Attorneys for Respondents BAMN, *et al.*
645 Griswold, Suite 1817
Detroit, MI 48226
(313) 963-1921
scheff@ameritech.net

Mark D. Rosenbaum
ACLU Foundation of Southern California
1616 Beverly Boulevard
Los Angeles, CA 90026
(213) 977-9500
mrosenbaum@aclu-sc.org

Leonard M. Niehoff (P36695)
BUTZEL LONG, P.C.
Attorneys for Respondents the Regents of the University of Michigan, *et al.*
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
niehoff@butzel.com

Margaret A. Nelson (P30342)
Michigan Dept of Attorney General
Attorneys for Respondent Cox
525 West Ottawa St.
Lansing, MI 48933
(517) 373-6434
nelsonma@michigan.gov

Karin A. DeMasi
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
kdemasi@cravath.com

/s/ D. John Sauer

D. John Sauer