STATE OF MICHIGAN
SUPREME COURT

MICHIGAN CIVIL RIGHTS INITIATIVE,

Plaintiff/Respondent

-vs-

Sup Ct. No.

BOARD OF STATE CANVASSERS,

COA No. 264204

Defendant/Respondent,

and

OPERATION KING'S DREAM, EXIE CHESTER-GRIFFIN, ROOSEVELT J. BRISTON, LILLIAN A. CUMMINGS, NICOLE MCCOY, ALICIA ROSE SPENCER, CHERYL THOMPSON, LESLIE ATZMON, MONICA SMITH, MARICRUZ LOPEZ, KATE STENVIG, LIANA MULHOLLAND, ALISHIA STEWARD, JOSEPH JOHNSON, JOHNATHAN CRUTCHER, TURQUOISE WISE-KING, DENESHEA RICHEY, IVAN ADAMS, RHIANNON CHESTER, AND CURTIS RAY,

Intervening
Defendants/Respondents.

_____________________________________/

INTERVENING DEFENDANTS OPERATION KING'S DREAM, ET. AL'S, APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JUDGMENT AND ORDER APPEALED FROM

The intervening defendants Operation King's Dream, et. al, file this application for leave to appeal from the December 7, 2005 Order of the Michigan Court of Appeals denying the intervening defendants' motion to reconsider (Ex 1) and from that Court's October 31, 2005, Opinion and Order (Ex 2).

The applicants seek an order reversing the Court of Appeals and remanding this matter to the Board of Canvassers for either dismissal of the petition to amend the Constitution filed by the Michigan Civil Rights Initiative (MCRI) or for a hearing to determine whether the MCRI petition should be dismissed because it used fraudulent means to obtain the signatures that it submitted.

ISSUES PRESENTED

I

WHETHER THE MICHIGAN COURT OF APPEALS PROPERLY GRANTED A WRIT OF MANDAMUS DIRECTING THE MICHIGAN BOARD OF CANVASSERS TO PLACE THE CONSTITUTIONAL AMENDMENT PROPOSED BY THE MICHIGAN CIVIL RIGHTS INITIATIVE ON THE NOVEMBER 2006 BALLOT WHERE THE MCRI'S PETITION FAILED TO DISCLOSE THE EXISTING CONSTITUTIONAL PROVISIONS THAT WOULD BE ALTERED OR ABROGATED AND OTHERWISE FAILED TO COMPLY WITH THE REQUIREMENTS OF MCL 168.482(3)?

II

WHETHER THE MICHIGAN COURT OF APPEALS PROPERLY HELD THAT THE BOARD OF CANVASSERS HAD NO AUTHORITY TO INVESTIGATE WHETHER THE MICHIGAN CIVIL RIGHTS INITIATIVE HAD OBTAINED THE SIGNATURES ON ITS PETITION BY MEANS OF RACIALLY-TARGETED FRAUD AND WAS REQUIRED TO PLACE THE PROPOSED AMENDMENT ON THE NOVEMBER 2006 BALLOT NO MATTER HOW THE MCRI OBTAINED THE SIGNATURES ON ITS PETITION?

INTRODUCTION

The intervening defendants, Operation King's Dream, et. al, apply for leave to appeal from October 31 and December 7, 2005, decisions by the Michigan Court of Appeals granting a writ of mandamus ordering the Board of Canvassers and the Secretary of State to place on the November 2006 ballot the proposed Constitutional amendment submitted by the "Michigan Civil Rights Initiative" (Ex's 1, 2).

The MCRI's proposed amendment is a word-for-word copy of California's Proposition 209, which has eliminated all affirmative action in public education, employment and contracting.[1] The University of Michigan has publicly stated that the elimination of affirmative action in this State would result in an immediate drop of 75 percent in the number of black students in its incoming class.[2]

And yet, the statistical sample that the State Bureau of Elections to determine whether the MCRI had a sufficient number of valid signatures revealed a startling fact. Of the total of 508,202 signatures, 24 percent came from cities that are 60 to 99 percent black[3] --including 15 percent from the City of Detroit, which is now over 81 percent black.

As any honest observer would readily concede, in those cities and among black citizens generally, the support for affirmative action is nearly unanimous. The MCRI's claim that it obtained 76,000 valid signatures from Detroit and 122,000 from black majority cities is absurd on its face.

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[1] See *Hi-Voltage Wire Works, Inc. v City of San Jose*, 24 Cal 4th 537 (2000).

[2] *Grutter v. Bollinger*, 288 F 3d 732, 737-738 (CA 6 2002), *aff'd* 539 US 306 (2003).

[3] The other majority-black cities were Flint, Highland Park, Saginaw, Southfield, Benton Harbor, Oak Park, Mt. Morris Township, and Inkster.

The Michigan Civil Rights Commission is now holding hearings on how the MCRI obtained those signatures. The voluminous evidence submitted to the Board of Canvassers (see infra, at 5-14) has, however, already revealed that the MCRI obtained its signatures in those and other cities by two forms of blatant and unlawful deception.

First, in direct defiance of Michigan's election laws, MCL 168.472(3), the MCRI's petition does not reveal that the proposed amendment would alter or abrogate Article 1, Section 2 of the 1963 Constitution, which already bans racial and other forms of discrimination. By that omission, the MCRI's petition deceived black and many white voters into signing it based on the belief that its extensive—and absolutely redundant—verbiage banning "discrimination" meant that it was a civil rights bill. In fact, with the existing article not mentioned, a potential signer or even circulator had no way of knowing that the actual change proposed by the MCRI was the insertion of three words banning "grant[ing] preferential treatment" buried in the middle of a 337-word amendment.

Second, the deliberate omission of the existing article opened the door to the more blatant fraud committed by the MCRI. As set forth in detail below, the MCRI paid poor black people $1 to $2 for each signature that they obtained on its petition. Due variously to instructions from the MCRI, to the fact that the petition's language confused even the circulators, and to simple greed, those circulators proceeded to obtain signatures by telling potential voters that the petition *supported* affirmative action, that it would *assist* black students in getting into college, and that it was, in general, a civil rights initiative that would eliminate discrimination *against* blacks and other racial minorities.

There is no question that these statements were absolutely untrue: the initiative adds no new protections for discrimination against blacks and other minorities and would result in the drastic drop in enrollment set forth above.

There is also no question that this deception was extremely successful: as set forth in detail below, two circuit judges, many prominent citizens, and untold thousands of black and white citizens who *support* affirmative action were tricked into signing the MCRI's petitions.

Finally, there is no question that the Court of Appeals ignored the blatantly disregard for black citizens that this deception revealed.[4]

The intervening defendants filed voluminous evidence with the State Board of Canvassers in support of their challenge. They asked that body to use its subpoena power to conduct an investigation to see if the charges of racially-targeted fraud were in fact true. But just before the Board considered that request, the Attorney General, at the request of the chief legislative sponsor of the MCRI, issued an informal opinion stating that the Board had no authority to conduct such an investigation (Ex 4).

Even in the face of that opinion, the evidence of fraud that is summarized below was so compelling that the two Democratic members voted for a Board investigation and one Republican member asked the State legislature to conduct that investigation (Tr., 178, 181, 206-207).[5] On the motion to certify the MCRI's proposal to the ballot, two members voted No, the Republican member described above abstained, and only one

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4 If a petition in support of an amendment that would result in a 75 percent drop in white enrollment at the University of Michigan obtained signatures in majority-white communities by lying and reversing the ballot's purpose, it would clearly never be allowed on the ballot.

5 "Tr" refers to the transcript of the July 19, 2005 meeting of the Board of Canvassers that was part of the record below.

Canvasser voted to certify the MCRI's amendment without an investigation (Tr. 200-201).

The MCRI filed a petition for a writ of mandamus in the Court of Appeals. In its October 31 Opinion granting that writ, the panel held that it could not consider the deficiencies in the petition because that issue had purportedly been decided by a prior panel in *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 263 Mich App 486 (2004), *lv den* 471 Mich 939 (2004)(Ex 1, at 8). The current panel then held that the Board had no authority to investigate the charge of racially-targeted fraud and that if MCRI had a sufficient number of signatures, the Board had to certify the petition for the ballot, no matter how the MCRI obtained those signatures (Ex 1, at 8).

The intervening defendants filed a motion for reconsideration asserting that the Constitutional and statutory history demonstrated that the second conclusion of the Court of Appeals was in error. The Court denied that motion on December 7. In the same order, it gave immediate effect to its earlier decision under MCR 7.215(F)(2).

The intervening defendants ask this Court to grant the application for leave to appeal because the substantive and procedural issues at stake are clearly of major importance to the state as a whole. In fact, little more than a year ago, when it appeared that the MCRI might never obtain the required signatures, three justices on this Court opined that the first issue, the facial challenge to the petition, alone justified granting the application. *Coalition to Defend Affirmative Action, supra*, 471 Mich 939 (2004).

The issues at stake are clearly of far greater importance now than they were a year ago. The challenge to the omission of the existing article from the petition is now clearly a live controversy. Moreover, the abundant evidence of racially-targeted fraud that is

now available both underlines the importance of the omission from the petition and raises as well a second vital issue that could not be presented a year ago—the authority of the Board of Canvassers to determine whether fraud or other misconduct vitiates signatures that otherwise appear valid.

These issues raise questions that go the heart of the democratic process. In Detroit, Flint and the other communities, black citizens are now learning from web sites, lists of signers, and other sources that they personally were deceived by the MCRI into signing a petition that they know will lessen their children's opportunity to go to college or to secure a good job.

Whatever one thinks of eliminating affirmative action, obtaining the signatures through the fraudulent means that MCRI has employed will foment bitterness, division and anger for many years to come.

The intervening defendants ask this Court to grant their application because the State should not change a fundamental policy without deciding whether the MCRI's petition fairly presented the question and without even investigating whether it obtained its signatures by means of racially-targeted fraud and deception.

STATEMENT OF FACTS

A. The deceptive language of the MCRI's petition.

The MCRI's petition calls itself a "Civil Rights Initiative." But neither the summary nor the proposed amendment informed potential signers that the State Constitution already has a "civil rights article"—Article 1, Section 2 of the 1963 Constitution.

Neither the summary nor the proposed amendment therefore provided citizens with the information from which they could determine that the *sole* purpose of the proposed amendment is not to ban discrimination – which is already banned – but to end affirmative action.

The proposed ban on affirmative action is concealed in a phrase, prohibiting "preferential treatment," buried inside a 337-word amendment and a 252-word summary. Even assuming the voter somehow noticed that phrase, it is not defined. As a result, those persons who noticed that term, including especially any black person who noticed that term, saw it as either a synonym for discrimination or, in the words of one MCRI circulator, a restriction on "the kind of preferences that white families have in terms of money, connections and similar things" (Apx, Ex A, Dec of Chester, para 6). [6]

For the overwhelming majority of citizens who do not know that the MCRI and others use "preferential treatment" as a codeword for affirmative action, the elimination of "grant[ing] preferential treatment to" persons does not even suggest the aim of banning affirmative action.

In fact, as set forth in signed statements submitted to the Board, even for those well-trained in Michigan law, the meaning of the MCRI's petition was not clear. In signed statements submitted to the Board of Canvassers, Judge Robert Ziolkowski of the Third Circuit Court and Judge Archie Hayman of the Seventh Circuit Court—both of whom support affirmative action and oppose the MCRI's initiative—stated that they signed the petition because they did not know that it intended to ban affirmative action (Apx, Ex's B, C).

[6] "Apx, Ex" refers to the exhibits in the appendix submitted in support of this brief and motion. All exhibits were part of the record below.

If circuit judges can not understand what the MCRI's petition proposes, it is obvious that almost no ordinary citizens will understand it either. As will be seen, the failure of the MCRI to comply with the minimal statutory requirement that it disclose the existing civil rights article in the Constitution opened the door to the deliberate lies told by those whom the MCRI paid to circulate its petition.

B. The MCRI defrauds voters in Detroit.

Judge Ziolkowski's statement illustrates the method that the MCRI circulators used to obtain thousands of signatures in Detroit. As Judge Ziolkowski entered a CVS store on Jefferson Avenue, an MCRI circulator asked him to sign a petition that she said *supported* affirmative action. Judge Ziolkowski signed the petition. Inside the store, however, other persons told him that the petition actually opposed affirmative action. He returned to the circulator and removed his signature, with the circulator telling him that the MCRI had told her to say that the petition supported affirmative action at the time that she was hired (Apx Ex B, statement of Judge Ziolkowski).

Judge Ziolkowski's statement is simply the tip of the iceberg. An MCRI circulator told Michael Mulholland, the Secretary-Treasurer of AFSCME Local 207, that he should sign the MCRI petition because it supported affirmative action (Apx, Ex D). Heidi Osgood, a local reporter, heard another black MCRI circulator telling the same lie to numerous citizens at the Apollo Market in Detroit (Apx, Ex E).

Exie Chester, a black MCRI circulator, described how she obtained signatures on 231 petitions, including 8 that were part of the Bureau's statistical sample. As Chester stated, the MCRI officials did not tell her what the petition was about – and she assumed that the ban on preferences meant "the kind of preferences that white families have…."

(Apx, Ex A, Dec of Chester, para 6). Soon after she began collecting signatures, Chester saw other MCRI circulators obtaining numerous signatures outside the 36th District Court by telling "everyone that it was a petition to help blacks get into college" (Apx, Ex A, Dec of Chester, para 9). From that point forward, Chester used the same appeal in front of liquor stores and at other public places in the City of Detroit. As she declared, she "…got an enthusiastic response and obtained many signatures based on the statement that 'This is a petition to help blacks get into college.'" (Apx, Ex A, Dec of Chester, paras 11-12).[7]

Dana Clowney, another black person hired by the MCRI to circulate petitions in Detroit, told similar falsehoods outside the main post office on Fort Street in downtown Detroit. As set forth in his sworn statement,

> I told persons that this petition was to help minority students in getting into college. I also told them that there were people who were trying to keep blacks out of college and that this initiative would stop that.
>
> (Apx, Ex E, Dec of Clowney, para 9).

Clowney only stopped circulating the MCRI's petition after a friend told him that it was actually against affirmative action (Apx, Ex E, Dec of Clowney, para 9).

John Henry Reed, another black citizen hired by the MCRI to circulate its petition in Detroit, made similarly false statements in order to obtain the signatures that the MCRI wanted. An MCRI official named "Glenda" told Reed that the petition was for affirmative action and "would help black students get into college." Glenda also told him

[7] Much later, Chester found out what the petition was really about when a friend's granddaughter – a University of Michigan student – saw the petition and told her that it would result in a dramatic drop in black enrollment in colleges and universities. When Chester confronted the MCRI officials, however, they only smiled over the fraud that they had used her to commit (Apx, Ex A, Dec of Chester, paras 15-17).

that there was another petition that was attempting to end affirmative action but that this one was to "preserve it" (Apx, Ex F, Dec of Reed, para 3).

Reed circulated the MCRI's petition at Northland Mall, in Troy, in downtown Detroit, and in the Cass Corridor. After a few potential signers objected that the petition was against affirmative action, he raised it with MCRI supervisors "Glenda" and "Heidi," who just laughed it off and said "some people will just be like that" (Apx, Ex F, Dec of Reed, para 8). Reed continued circulating the petitions from August through November, although he reported receiving more objections as time went on (Apx, Ex F, Dec of Reed, paras 8-10. 13). Reed obtained three of the signatures in the 500.

LaVon Marshall, another black citizen hired by the MCRI, received similar instructions from Jennifer Gratz, a top official in the MCRI campaign, along with a young white man and a black woman named Nicki, who were also officials in the MCRI campaign. Marshall circulated the petition outside Food Basics in Detroit and at downtown festivals, telling potential signers that it was for affirmative action. He obtained two of the signatures in the 500 (Apx, Ex G, Dec of Marshall, para 8-12).

Chester, Clowney, Reed and Marshall had the courage to come forward and state what they had done. The most open and systematic fraud was, however, perpetrated by those who now wish to remain silent.

The affidavit of Heather Miller, a Detroit teacher, sets forth what an investigation could reveal (Apx, Ex H, Aff of Miller). On July 13, Miller visited the home of Albert Anderson, an MCRI circulator who obtained four signatures in the sample of 500. When she asked Anderson whether he told potential signers that the petition was for affirmative action, Anderson said that "Yeah, I got a dollar a signature, so I told them it was for

affirmative action." After asking for money from Miller – and being refused – he would answer no more questions (Apx, Ex H, Aff of Miller, paras 2-3).

As Miller left his home, another person appeared, identifying himself as Sherman Irvin. Irvin told Miller that he also circulated the MCRI's petitions in Detroit and Flint, obtaining signatures by telling persons that it was for affirmative action. Some potential signatories reportedly objected to what Irvin was doing but he said he told them to "fuck off," and threatened to get a gun if they did not leave him alone. He said he "needed the money" (Apx, Ex H, Aff of Miller, paras 4-6).

Numerous citizens have signed statements demonstrating the widespread and systematic nature of the fraud that the MCRI circulators perpetrated in the black communities of this State. Samantha Canty, a resident of Southfield and one of those in the Bureau's sample, was approached by a black man at the Taste Fest in Detroit and asked to sign the MCRI petition in order to "keep affirmative action going" (Apx, Ex I, Statement of S. Canty). Similarly, Jewell Baltimore, Rasheda Chapman, Venetta Coleman, Ervin Jackson, Dorothy Jemison, Oletric Robinson, Yolanda Sharpe and eight other persons in the Bureau's sample declared that they signed the MCRI petition because they were told that it supported affirmative action.[8]

In fact, the challengers sent investigators to every address in Detroit, Highland Park, Inkster, Flint, and Benton Harbor that had been listed by the persons who were included in the statistical sample of 500 selected by the Bureau. Some could not be located; others could not remember what was said; but many recalled that the MCRI

[8] The declarations setting forth the statements to these persons and those in the next paragraph are part of the record below, but are not included in the Appendix for reasons of space.

circulator told him or her that the petition supported affirmative action. Despite a diligent search, the investigators were not able to find a *single* black person who signed the MCRI's petition after being told that it aimed to overturn affirmative action at the University of Michigan or anywhere else.

The experience in Detroit reveals the plain, obvious fact that the MCRI obtained the signatures it submitted by deceiving large numbers of black and many white citizens about what it was they were signing.

C. The MCRI defrauds black voters in southeastern Michigan outside Detroit.

Just as Judge Ziolkowski's signature on the MCRI petition is the tip of the iceberg of the fraud in Detroit, Judge Hayman's signature on that petition is the tip of the iceberg of fraud in the rest of southeastern Michigan (Apx, Ex C).

In Mt. Clemens, Ruthie Stevenson, the President of the Macomb County branch of the NAACP was approached by an MCRI circulator outside the Mt. Clemens post office. The young white man asked her to sign the petition because it was for "civil rights" and "affirmative action" and because the President of the Macomb County NAACP had endorsed the petition. Stevenson, however, told this MCRI circulator that she *was* the President of the Macomb County NAACP, that she had not endorsed the petition, and that it was not for civil rights or affirmative action. But two weeks later, another member of the NAACP reported to her that the same circulator had told the same lie to him as he approached the Mt. Clemens post office (Apx, Ex J, Dec of Stevenson, paras 3-8).

In Flint, the basic story was the same. At a Halo Burger in downtown Flint, two white MCRI officials hired Elitha Marie Shumpert to circulate the MCRI petition. She

petitioned in front of the Family Dollar Store in Flint. When some black citizens began telling her that the petition was against affirmative action, she asked her supervisors, who assured her that it was "…not against affirmative action at all." She continued telling voters that it was for affirmative action until she quit for unrelated personal reasons (Apx, Ex K, Dec of Shumpert, paras 9-12) (See also Ex L, Dec. of Moore).

Three other black residents of Flint – Christi Lynn Sanders, June Scroggins, and Lerwonia Summers – have signed sworn declarations setting forth similar misrepresentation and fraud perpetrated on them – and, unwittingly, by them on voters whom they induced to sign the MCRI's petition. Together, they obtained three of the 500 signatures by these means (Apx, Ex's M, N, O, Decs of Sanders, Scroggins, and Summers).

The MCRI circulators lied to many other citizens throughout southeast Michigan. Betty Henderson, one of the 500 names selected by the Bureau, signed the MCRI petition outside Kessel's grocery store in Flint because a black MCRI circulator told her that it would save affirmative action (Apx, Ex S, Aff of Taylor, para 7). Christie Fields, another of the 500, signed the MCRI petition because a black MCRI circulator told her the same lie outside a Dollar Store in Flint (Apx, Ex S, Aff of Taylor, para 9). Willie Foyer, yet another of the 500, not only signed himself, but saw many other black people sign the petition in a strip mall in Auburn Hills because young black circulators hired by the MCRI told them that the MCRI petition supported affirmative action (Apx, Ex P, Aff of Taylor, para 5, 7, 9).

As in Detroit, the MCRI obtained tens of thousands of signatures from black citizens throughout southeastern Michigan by fraud and deception.

D. The MCRI defrauds black voters in western Michigan.

For reasons of time, the challengers were not able to conduct the same type of investigation on the western side of the State as they conducted in Detroit and southeastern Michigan. But the available evidence demonstrates that the MCRI used the same methods in those areas.

Lupe Ramos-Montigny was approached at a Martin Luther King Day celebration in Grand Rapids and asked to sign the MCRI's petition on the representation that it "protected" affirmative action in Michigan. She not only signed it, but persuaded her friends to sign it based on this misrepresentation (Apx, Ex Q, Dec of Ramos-Montigny).

Similarly, the challengers also submitted an affidavit from Sammy Williams who used the same type of deception as an MCRI circulator in Benton Harbor (Apx, Ex R, Dec of Williams).

E. The proceedings below.

The intervening defendants submitted all of the evidence described above to the State Board of Canvassers in support of their request that the Board exercise its authority under MCL 168.476(2) to investigate whether the MCRI had in fact submitted a sufficient number of valid and genuine signatures.

Just prior to the July 19, 2005 meeting that was to consider that request, the Deputy Attorney General issued an informal (non-binding) opinion that stated that the Board of Canvassers had no authority to conduct an investigation into whether the MCRI obtained its signatures by unlawful means. According to the Opinion, the Board could only consider whether a sufficient number of registered voters actually signed the petition (Ex 4).

On a motion to conduct an investigation, the Board split two-two, with Republican member Lyn Bankes stating that she felt bound by the Attorney General's Opinion but that she believed that an investigation by the Legislature was warranted by the evidence of fraud that she had seen (Tr 180-181, 206-207; see also Apx Ex S). On the subsequent motion to certify the question for the ballot, Member Bankes abstained, the two Democratic members voted No, and only one Canvasser voted to place the proposed amendment on the ballot (Tr 200-201).

The MCRI filed a Petition for Mandamus with the Court of Appeals. The intervening defendants filed a motion to intervene which was granted. In its October 31 Opinion, the Court of Appeals denied all relief, stating that it could not consider the petition's compliance with MCL 168.476(3) because that issue had been decided by the prior panel in *Coalition to Defend Affirmative Action* (Ex 1, at 8). The Court further stated that the Board could not consider the evidence of racially-targeted fraud because it could not consider challenges that went beyond the four corners of the petition itself (Ex 1, at 8).

On December 7, the Court of Appeals denied a motion for reconsideration and gave immediate effect to its decision (Ex 2).

The intervening defendants, who were the challengers at the Board of Canvassers, then filed this application for leave to appeal.

ARGUMENT

I

THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY ORDERING THE MCRI'S PROPOSED AMENDMENT PLACED ON THE BALLOT ON THE BASIS OF PETITIONS THAT CLEARLY FAILED TO COMPLY WITH MCL 168.482(3).

A. In violation of MCL 168.482(3), the MCRI petition failed to disclose that the proposed amendment would alter or abrogate Article 1, Section 2 of the 1963 Constitution.

Acting under the authority conferred by Article 12, Section 2 of the Michigan Constitution, the Legislature has specifically required that petitions seeking a vote on a proposed amendment set forth in full the existing articles of the Constitution that would be "altered or abrogated" by the proposal. The statute reads as follows:

> If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provision to be altered or abrogated shall be inserted, preceded by the words: "Provisions of the existing constitution altered or abrogated by the proposal if adopted.
>
> MCL 168.482(3).

The evidence before the Board of Canvassers demonstrates the crucial importance of this requirement. Because the MCRI's petition did not state that the proposed amendment would alter an existing article that already banned racial and other discrimination, many of the MCRI's own circulators did not understand what they were circulating. The circulators were free to tell voters that this was a "civil rights petition" designed to eliminate discrimination. Without the crucial information about the existing article, only those potential signers who independently knew of the existing article had a basis for determining that the real intent of this proposal was to alter the existing

provision to add the three-word ban on "grant[ing] preferential treatment" on account of the enumerated criteria.

Assuming that the current panel correctly determined that it was bound by the decision of the prior panel in *Coalition to Defend Affirmative Action*, it is evident that that unreviewed decision was wrongly decided.[9] Everywhere except in the words of its petition, the MCRI has made clear that the fundamental purpose of the proposed amendment is to alter the existing anti-discrimination language.

The MCRI's proposed amendment is a word-for-word copy of California's Proposition 209. (Compare Proposed Amend, Ex 2, with Const CA, Art 1, sec 31). Mr. Connerly and other supporters of the MCRI have successfully told the California Court of Appeals and the California Supreme Court that the language at issue here had as its fundamental purpose the alteration of the equal protection clause of that State's Constitution so as to prohibit any race or gender conscious action, no matter how compelling the purpose for that action:

> Under equal protection analysis, all state actions that rely on suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.
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> *Connerly v State Personnel Board*, 92 Cal App 4th 16, 42 (2001). *Accord. Hi-Voltage Wire Works, Inc. v City of San Jose,* 24 Cal 4th 537 (2000).[10]

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[9] This Court's denial of leave in 2004 does not, of course, preclude or decide any of the issues that were raised at that time. *Grievance Adm'r v. Lopatin*, 462 Mich. 235, (2000).

[10] The Supreme Court of Florida also recognized that the proposals that Connerly has supported had as their fundamental aim the alteration of the equal protection clause in that state's Constitution. *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education,* 778 So 2d 888, 894 (Sup Ct Fla 2001).

In Michigan, Mr. Connerly made the same intent clear when he announced this petition drive as a means to nullify the United States Supreme Court decision in *Grutter v Bollinger*, 539 US 306 (2003). *Washington Post*, June 25, 2003. As the State equal protection clause had long been held to provide protections that were identical with those of the federal Constitution,[11] Connerly and the MCRI knew that the proposed amendment had to alter or abrogate Article 1, Section 2 if it was to nullify *Grutter*.

Finally, the proposed amendment's alteration of Article 1, Section 2 is obvious from a comparison of the language of the existing section with the language of the proposed amendment. Article 1, Section 2 now provides in relevant part as follows:

> No person shall be denied the equal protection of the laws; nor shall any person be … discriminated against in the exercise [of his civil or political rights] because of religion, race, color or national origin.
>
> Const 1963, art 1, sec 2.

The MCRI's proposed amendment states in relevant part as follows:

> The state shall not discriminate against, *or grant preferential treatment to*, any individual or group on the basis of race, *sex*, color, *ethnicity*, or national origin *in the operation of public employment, public education, or public contracting*.
>
> MCRI Proposal, Section 2 (emphasis added).

The MCRI's proposal *alters* the language of Article 1, Section 2 in three ways: (1) by adding sex and "ethnicity" to the list of prohibited discrimination, (2) by making explicit that the ban on discrimination applies to public employment, education and contracting, and (3) by limiting the existing ban on discrimination by adding the ban on "grant[ing] preferential treatment." Because the courts and the Legislature have already accomplished the first and second alterations, the third alteration – adding the ban on

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11 *Moore v. Spangler*, 401 Mich. 360, 370 (1977).

"preferential treatment" – is the only important alteration that the proposed amendment effects.

In defining when a proposed amendment and a supporting petition must disclose the existing articles that the proposed amendment will alter or abrogate, this Court has held as follows:

> We hold that it is only where the proposed amendment would directly "alter or abrogate" ("amend" or "replace") a specific provision or provisions of the Constitution that the provision or provisions must be noted on the petitions. An existing constitutional provision is altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative.
>
> *Ferency v Secretary of State,* 409 Mich 569, 597 (1980).

In a subsequent decision, the Court declared that the phrase "existing wording" in the *Ferency* standard should be "taken literally." *Massey v Secretary of State*, 457 Mich 410, 418 (1998).

Despite the fact that the MCRI's proposed amendment is an obvious attempt to alter, amend and partially replace Article 1, Section 2, the prior panel of the Court of Appeals defied common sense by holding that the MCRI's petitions had no obligation to disclose the alteration, amendment or existence of the existing Constitutional provision. *Coalition to Defend Affirmative Action*, Mich App at 262, *supra*. According to that panel, the MCRI had no such obligation because its proposed amendment did not explicitly state that it aimed to amend Article 1, Section 2 and because its proposed amendment used some different words and a different word order than the existing provision. *Id*, 262 Mich App at 402. As is apparent, both reasons converted the statutory *requirement* for disclosure into a *drafting option* for the proponent of the amendment.

The *Coalition to Defend Affirmative Action* panel's first reason for not requiring disclosure converts *Massey's* observation that requiring an alteration of the existing language should be "taken literally" into a requirement that the proposed amendment itself state that it will amend the existing Constitutional provision. *Id.*, 262 Mich at 402, citing *Ferency, supra.* [12] But neither *Massey* nor *Ferency* allowed the drafter of the proposed amendment to choose whether he or she would disclose the existing article by choosing how he or she drafted the proposed amendment. In fact, in *Massey*, this Court sensibly disavowed such an interpretation of the requirements of MCL 168.476(3) by basing its decision not on language chosen by the drafters of the term-limit amendment but on the *fact* that the term limit amendment did not alter the age and residence requirements contained in the existing article. *Massey, supra*, 457 Mich at 416-418.

The same method of analysis compels the opposite conclusion. The MCRI's proposed amendment *in fact* alters and abrogates Article 1, Section 2. If it passed, any Court would have to consider whether action by the State discriminated against a person in conjunction with the question whether it granted preference to persons based on race or national origin. Indeed, the MCRI would be the first in the line to say that insofar as action by the state was concerned, the courts could not interpret Article 1, Section 2's ban on discrimination separate from the new amendment's ban on "preferential treatment."

[12] In *Coalition to Defend Affirmative Action*, the Attorney General proposed a variant of this argument by asserting that the Board of Canvassers needed a bright-line test and should not be required to determine whether a proposed amendment actually alters the language of an existing provision. But it takes nothing more than putting the language of Article 1, Section 2 next to the language of the MCRI's proposed amendment to see that this amendment alters the language of an existing section. Moreover, the Supreme Court has long held that the Board of Canvassers has the competence and the duty to "appreciate the meaning and effect of what appears on the face of a petition" so that it "can determine whether, upon its face, it imports one thing or another." *Scott v Vaughn*, 202 Mich 629, 644 (1918).

Similarly, the *Coalition to Defend Affirmative Action's* second reason for relieving the MCRI of the disclosure obligation is also without merit. According to that panel, the MCRI need not disclose the intent to alter or abrogate Article 1, Section 2 because:

> …[T]he only words that the proposed amendment and Article 1, Section 2 have in common is some form of the word "discriminate" and the words "race," "color," and "national origin." The fact that the proposed amendment uses some of the same terms found in Article 1, Section 2 does not compel the conclusion that the proposal alters, amends or abrogates the existing wording of that provision.
>
> *Coalition to Defend Affirmative Action*, 262 Mich App at 402.

But this ignores the evident fact that the *sole* objective of the MCRI's proposed amendment is to alter the language of Article 1, Section 2's ban on discrimination by adding the ban on "preferential treatment." It amounts to saying that the MCRI or anyone else can avoid disclosing the evident purpose to the electorate by using new words in a slightly different order.

The MCRI has attempted to conceal its intent to alter or abrogate the existing article so that it can portray the petition as one defending civil rights.[13] In fact, the crucial role that that deception played in its campaign is demonstrated by the fact that the MCRI risked losing its entire campaign by circulating petitions that did not disclose the existing article even though those petitions were subject to challenge at the very time that the MCRI was circulating them.

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[13] As the Texas Court of Appeals found in considering another petition with identical language to that proposed by the MCRI, Connerly's supporters have consciously attempted to force votes on proposals banning so-called "preferences" because they believe that they can win more votes on such proposals than on attempts to ban "affirmative action" or, still less, attempts to amend the civil rights act. See *Brown v Blum*, 9 SW 2d 840, 848-852 (1999).

But the fact that the MCRI believed that withholding knowledge of the existing article was *essential* to its public relations strategy of portraying itself as a "civil rights initiative" can not trump the public's right to know. In fact, it confirms why the electorate was entitled to know of the existing provision and of the way in which the MCRI's proposal would alter, amend, and partially replace that provision.

As the MCRI should not be able to gain a place on the ballot by withholding crucial information from potential signers in general and from black signers in particular, the intervening respondents ask this Court to grant review and to reverse the decision of the Court of Appeals in this case.

B. <u>In further violation of MCL 168.482(3), the MCRI's petition places a misleading summary on the first page of the petition, where the statute requires the text of the amendment to be.</u>

To amend a statute, the notice of the election need not set forth the full text of the laws to be altered or abrogated. To amend the Constitution, however, the full text of the Constitutional provisions that will be altered or abrogated must be set forth. Const 1963, art 12, sec 2.

Consistent with that distinction and with the greater gravity of Constitutional amendments, the Legislature established a requirement that applies *solely* to those petitions that sought to amend the Constitution. In that subsection alone, the Legislature clearly required that: "The full text of the amendment so proposed *shall follow* [the heading prescribed by statute] and be printed in 8-point type." MCL 168.482(3) (emphasis added).

Despite the clear requirements of the statute, the MCRI petition deliberately failed to place its proposed amendment on the front of the petition. Even after challengers

objected to this failure at the December 2003 meeting of the Board of Canvassers, the MCRI persisted in this violation of the statute. For a year-and-a-half, the MCRI persisted in circulating petitions that buried the text of the amendment on the back of the petition--and that included an inaccurate summary in far smaller type on the front page of the petition, in open and direct violation of MCL 168.482(3).

In *Coalition to Defend Affirmative Action*, the Court of Appeals held that "Neither 168.482 nor MCL 168.544d require that the text of the proposed amendment appear on the front of the petition." *Id.,* 262 Mich App at 405-406. But MCL 168.482(3) specifically *does* require that the text of the proposed amendment shall follow the heading prescribed by law and MCL 168.544d does not grant the Secretary or the Board power to vary *that* requirement.[14]

In repeated cases, this Court's majority has insisted on strict compliance with the words chosen by the Legislature. *State Farm Fire and Casualty Company v Old Republic Insurance Company*, 466 Mich 142 (2002). This Court should grant leave and reverse a decision that has allowed the MCRI to gain access to the ballot because its petitions supposedly "substantially complied" with a clear statutory requirement that the MCRI deliberately ignored for over a year-and-a-half.

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[14] In *Coalition to Defend Affirmative Action*, the prior panel also took note of a letter issued by the Secretary of State that allowed an amendment to be placed on the back if there was insufficient room on the front of the petition for that text. *Id*., 262 Mich App at 405. Even assuming that the Secretary could authorize a violation of the clear words of the statute, the prior panel did not even address the fact that the letter was not applicable to this petition because there was sufficient room on the front. The MCRI's summary contained 252 words; the text of the proposed amendment was only 337 words; and no one can claim that there was no room for the proposal on the front of the petition.

C. <u>In further violation of MCL 168.482(3), the MCRI's petition contains a misleading summary where the text of the amendment is required to be.</u>

In December 2003, the State Board of Canvassers approved a motion that specifically did not "…extend to the summary of the proposal which appears on the signature side of the petition or extend to the manner in which the proposal is affixed on the petition."(Tr of 12/11/2003 hearing, at 100). In *Coalition to Defend Affirmative Action*, the prior panel of the Court of Appeals cautioned the MCRI and others against including extraneous matter on the face of the petition. And yet, from December 2003 forward, the MCRI has continued to put its purported summary in the place where the text of the amendment is required to be.

The self-serving summary compounded the MCRI's violation of the statute, not only because the voter would naturally believe that he or she was signing in support of the summary, but because the MCRI's summary itself deliberately misleads the voter by asserting that the proposed amendment would "allow remedies as now allowed by law." (Ex 3). But the entire point of the proposed amendment is to eliminate affirmative action, which is a remedy for discrimination that is specified in the Elliott-Larsen Act itself.

In continuing to circulate a petition with a misleading summary directly above where the voters signed, the MCRI committed another violation of MCL 168.482(3).

II

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN ORDERING THE BOARD OF CANVASSERS TO PLACE THE MCRI'S PROPOSED AMENDMENT ON THE BALLOT WITHOUT EVEN AN INVESTIGATION INTO WHETHER THE MCRI PROCURED THE SIGNATURES ON ITS PETITIONS BY MEANS OF RACIALLY-TARGETED FRAUD.

The Michigan Constitution guarantees the electorate's right to amend the Constitution by popular vote *if and only if* the proponents of the proposed amendment submit valid signatures equal to ten percent of those who voted in the last election for Governor. Const 1963, art 12, sec 12.

The current Constitution—as distinct from the initial provisions for initiative and referenda (see infra, at 27-28)—explicitly recognizes that state authorities may take reasonable steps to assure that the signatures submitted by a proponent of a proposed amendment are in fact a valid expression of the voters' support for that amendment. In particular, the current Constitution provides in relevant part as follows:

> Any such petition [to amend the Constitution] *shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.* The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, *the validity* and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Const 1963, art 12, sec 2 (emphasis added).

By specific statute, the Legislature has designated the Board of Canvassers, a body now created by the Constitution, to be the officials identified in Article 12, Section 2. MCL 168.474. The Legislature has conferred upon the Board the specific duty to assure that there are a sufficient number of signatures and that those signatures are in fact the signatures of registered voters. MCL 168.476(1). The Legislature then conferred upon the Board a *broader* power to assure that the signatures are "valid" by authorizing it

to "…hold hearings upon *any* complaints filed or *for any purpose considered necessary by the board to conduct investigations of the petitions*." MCL 168.476(2)(emphasis added).[15]

In the common understanding, which is the standard by which the Constitution must be interpreted, signatures obtained by fraud, bribery, threats, extortion and fraud are not "valid," even if the writing was made by the hand of the person whose signature it is. Consistent with that understanding, this Court has observed in the specific context of a referendum election that fraud, if proved on a sufficiently extensive basis, would "vitiate" the signatures submitted on a petition in support of such an election. *Burton Township v Genesee County*, 369 Mich 180, 186 (1963).[16] Similarly, in an unreported case dealing with a referendum election, the Court of Appeals sensibly held that there was no difference between signatures that were forged and those that were procured by fraud:

> When it comes to this purpose [i.e., the showing of sufficient support to warrant an election], there is essentially no difference between a forged signature and the signature of a person from whom the purpose of the petition has been concealed; neither signature is a manifestation of the named person's desire to see the real matter at issue voted upon by the general public. To hold otherwise would allow the petition requirement to become a sham.
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> *Stierle v Lima Township*, 1996 WL 33349455 (1996), citing 82 CJS Statutes, ss 116, 123, pp 194, 217 n 21.

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[15] The full text of that section reads as follows:

> 2) The board of state canvassers may hold hearings *upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions.* To conduct a hearing, the board may issue subpoenas and administer oaths. The board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes, but shall complete the canvass at least 2 months before the election at which the proposal is to be submitted. MCL 168.476(2).

[16] In *Burton*, the Court found insufficient proof.

Citing that and other authority, the intervening defendants submitted all of the evidence of fraud set forth above to the Board of Canvassers and asked it to conduct an investigation under MCL 168.476(2). Four days before the meeting that the Board had scheduled to consider the challenges to the MCRI's petition, however, the Deputy Attorney General issued an informal opinion that "…the Board may not consider claims of fraudulent misrepresentation or fraudulent inducement in determining the validity and sufficiency of the signatures on petitions submitted to the Board in support of a proposed constitutional amendment…" (Ex 4, Letter, G. Gordon to Rep Leon Drolet, July 15, 2005, at 7).

The two Democratic members of the Board nevertheless voted to conduct an investigation of the fraud by the MCRI. As a direct result of that letter, however, Republican member Lyn Bankes felt compelled to vote against a Board investigation of the charges of racially-targeted fraud – even though she believed that there was a substantial question as to the validity of the signatures that the MCRI had submitted that she believed merited investigation (Tr 181, 206-207).

In ruling on the MCRI's petition for a writ of mandamus, the Michigan Court of Appeals held that the Board of Canvassers had no power even to investigate whether the MCRI had engaged in systematic, racially-targeted fraud. The Board's powers, said the panel, were limited to determining whether there were a sufficient number of signatures and whether the persons who signed the petitions were in fact registered voters (Ex 1, at 8, citing *Citizens for the Protection of Marriage v Bd of State Canvassers*, 263 Mich App

486 (2004) and *Deleeuw v Bd of State Canvassers*, 263 Mich App 497 (2004).[17] According to the Court of Appeals, the Board had authority to consider *only* those defects that appeared within the four corners of the petition itself because anything else would purportedly allow state officials to frustrate the purposes o Article 12, Section 2 (Ex 1, at 8).

In declaring, as it did, that the Board has no power to investigate fraud—or, therefore, bribery, threats or extortion—the Court of Appeals not only disregarded the broad wording of MCL 168.476(2) but also deprived the Board of the ability to discharge its statutory and Constitutional responsibility to assure that a petitioner has submitted a sufficient number of "valid" signatures. In fact, in an era where paid circulators have demonstrated that the referendum process can be abused as surely as the Legislative process, the Court left Michigan defenseless against fraud, bribery or any other unlawful means to obtain signatures where the evidence is not within the four corners of the petition itself.

In holding that the Board was limited to considering the "four corners of the petition" so as not to defeat the referendum process, the Court of Appeals adopted a view of the law that this State specifically abandoned. Based on the wording of the original Constitutional provisions enacted in the Progressive Era—which essentially denied public officials any discretion in such matters—this Court once held that state election

[17] Although cited extensively by the Court of Appeals, its prior decisions in *Citizens for the Protection of Marriage* and *Deleeuw* are completely irrelevant to this case. In *Citizens*, the Court of Appeals held that the Board of Canvassers could not refuse to certify a question for the ballot "…on the basis of their conclusion that it was unlawful and unconstitutional." *Citizens for Protection of Marriage*, 263 Mich App at 489. In *Deleeuw*, the Court of Appeals held that the Board could not refuse to accept signatures for Ralph Nader because they were procured by representatives of the Republican state Committee. *Deleeuw,* 263 Mich App at 499-500. Neither have any application here.

authorities had no power to investigate fraudulent means allegedly used in obtaining signatures on a petition seeking to amend the state constitution. *Thompson v Vaughn*, 191 Mich 303, 307-308 (1916); *People ex rel Wright v Kelly*, 294 Mich 503, 869-870 (1940).

Due in large part to the public revulsion at the fraudulent means used to circulate the petitions at issue in *Wright*, the Legislature proposed and the electorate adopted an amendment to the Constitution to allow the Legislature to regulate the use of forgery and other frauds on petitions. Const 1908, art 17, sec 2. See Jt Res 1941, No. 1 (Ex 5). In exercising that power, the Legislature passed in 1941 the forerunner of MCL 168.476(2), which granted the Board of Canvassers broad power to investigate any subject deemed necessary by the board in determining the validity of signatures:

> Said board may hold hearings upon *any* complaints filed or for *any* purpose deemed necessary by said board to conduct investigations of said petitions, and to conduct said hearings said board shall have the power to issue subpoenas and to administer oaths.
>
> 1941 PA 246, s. 6 (emphasis added) (Ex 6).

In the years since the 1941 Constitutional amendment and the 1941 statute, the electorate amended the 1908 Constitution to make the Board of Canvassers a Constitutional body, Const 1908, art 3, sec 9, and enacted a new Constitution that explicitly granted power to the state to regulate the form and manner in which petitions were circulated. Const 1963, art 12, sec 2. It has, moreover, continued essentially intact the broad statutory authority to investigate the validity of petitions that was first enacted in 1941. Compare MCL 168.476(2) with 1941 PA 246.

In holding that the Board had no power to go beyond the "four corners" of the petition, the Court of Appeals ignored the history of the provisions and the language of

the 1963 Constitution—and stripped this Constitutionally-created body of its power to protect Michigan voters from fraud perpetrated in the circulation of petitions.

At issue in this case are not simply isolated misstatements of fact – or mere puffery or expressions of opinion, as might happen in any campaign. At issue here is evidence of a systematic and racially-targeted campaign of fraud that obtained over a hundred thousand signatures by telling black voters that this amendment was the exact opposite of what it actually was.

The Court of Appeals order directing the Board of Canvassers to ignore that evidence can not be squared with the Constitutional grant of authority to regulate the manner in which petitions are circulated, Const 1963, art 12, sec 2, with the Legislative grant of authority to investigate for any purpose deemed necessary to determine the validity of the signatures, MCL 168.476(2), or with the Constitutional duty to enact laws to "…preserve the purity of elections …[and] to guard against abuses of the elective franchise…" Const 1963, art 2, sec 4.

Nor can it be squared with the State's commitment to civil rights that are equal without regard to race. Const 1963, art 1, sec 2. Put simply, if the proponents of an increase in the income tax obtained a quarter of their signatures by telling persons that the amendment would decrease the income tax, the initiative would be thrown out.

The same standard demands an investigation of a petition where one fourth of the signatures were obtained by telling black citizens that the petition was the exact opposite of its actual purpose.

As in determining whether there are forgeries or the like, the State may undoubtedly use reasonable sampling techniques to conduct such an investigation. But

its courts and in particular the Court of Appeals should not order election officials to hold their nose and certify an amendment for the ballot in the face of evidence of massive and racially-targeted fraud.

CONCLUSION AND RELIEF REQUESTED

The intervening respondents request that this Court grant their application for leave to appeal and reverse the decision of the Court of Appeals.

If this Court sustains the challenge to the form of the MCRI's petition, it should direct the Board of Canvassers to dismiss the MCRI's petition. If the Court finds that the Court of Appeals erred in concluding that the Board of Canvassers had no authority to investigate the charge that the MCRI obtained its signatures by means of racially-targeted fraud, it should remand this matter for a hearing by the Board of Canvassers to determine whether those charges are in fact true.

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