

Nos. 08-1387/1534

In the
United States Court of Appeals
for the **Sixth Circuit**

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION
AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY
BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs-Appellants Cross-Appellees,

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.,
Defendants-Appellees Cross-Appellants,

and

MICHAEL COX, Michigan Attorney General,
Intervenor-Appellee.

**On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit**

THIRD BRIEF OF APPELLANTS CROSS-APPELLEES

GEORGE BOYER WASHINGTON
SHANTA DRIVER
SCHEFF, WASHINGTON & DRIVER, P.C.
645 GRISWOLD, SUITE 1817
DETROIT, MI 48226-0000
(313) 963-1921

*Counsel for Appellants Cross-Appellees Coalition to
Defend Affirmative Action, Integration and Immigrant
Rights and Fight for Equality by Any Means Necessary
(BAMN), et al.*

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE ON THE CROSS APPEAL	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	10
I PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY RELEGATING BLACK, LATINO AND NATIVE AMERICAN RESIDENTS TO A DISTINCTLY MORE ONEROUS POLITICAL PROCEDURE FOR SEEKING THE ADOPTION OF POLICIES THAT THE SUPREME COURT HAS FOUND ARE ESSENTIAL IF SIGNIFICANT NUMBERS OF MINORITY STUDENTS ARE TO BE ADMITTED TO MANY OF MICHIGAN’S PUBLIC UNIVERSITIES....	10
A. <u>Proposal 2 violates the Equal Protection Clause by depriving racial minorities of any political procedure through which to fight for the adoption of any form of affirmative action.</u>	10
B. <u>There is no basis for the Respondents’s claim that a state constitutional amendment may limit the scope of the rights protected by <i>Hunter</i> and <i>Seattle</i>.</u>	20
C. <u>Proposal 2 tramples on, rather than furthers, the rights protected by the Equal Protection Clause.</u>	25

II	PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY MANDATING ADMISSIONS POLICIES FOR BLACK, LATINO AND NATIVE AMERICAN STUDENTS THAT ARE LESS FAVORABLE THAN THOSE USED FOR OTHER STUDENTS.....	32
	A. <u>What <i>Plessy v Ferguson</i> actually tells us about Proposal 2.</u>	32
	B. <u>Proposal 2 has as its <i>sole</i> purpose the unlawful objective of preventing the universities from taking steps to integrate their student body.</u>	35
	C. <u>The effects of Proposition 209 and what they mean for Michigan.</u>	41
	D. <u>The effects so far of Michigan’s Proposal 2.</u>	44
III	THE DISTRICT COURT PROPERLY DENIED THE UNIVERSITY DEFENDANTS’ MOTION TO DISMISS.	46
	A. <u>Both in their Second Amended Complaint and on the facts developed during discovery, the Coalition Plaintiffs have stated claims for relief against the University Defendants.</u>	46
	B. <u>The University Defendants are proper parties under Rule 21.</u>	48
	CONCLUSION AND RELIEF REQUESTED	52
	CERTIFICATE OF COMPLIANCE.....	53
	CERTIFICATE OF SERVICE	54

TABLE OF AUTHORITIES

Adarand Constructors, Inc. v Pena, 515 U.S. 200 (1995).....22

Ashcroft v Iqbal, ___ U.S. ___, 129 S. Ct. 1937 (2009).....48

Brooks v Glynn County, 1989 U.S. Dist. LEXIS 4776 (S.D. Ga. 1989)50

City of Richmond v Crosson, 488 U.S. 469 (1989)22

Civil Rights Cases, 109 U.S. 3 (1883)32

Coalition for Economic Equity v Wilson, 122 F. 3d 692, 717 (9th Cir, 1997) (Norris, J, dissenting), *cert. den.* 521 U.S. 963 (1997)..... 19, 37

Coalition to Defend Affirmative Action v Granholm,
473 F.3d 237 (6th Cir. 2006).....26, 27

Coalition to Defend Aff. Action v. Regents of Univ. of Michigan,
539 F. Supp. 3d 924 (E.D.Mich. 2008).....17, 47

Crawford v. Bd. of Education of City of Los Angeles, 458 U.S. 527 (1982)....passim

Glendora v. Malone, 917 F.Supp. 224 (S.D.N.Y. 1996)48

Grutter v Bollinger, 539 U.S. 306 (2003).....passim

Hi-Voltage Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal.4th 537, 12
P.3d 1068 (2000).....45

*Hispanic Coalition of Reapportionment v Legislative Reapportionment
Commission*, 536 F. Supp. 578 (E.D. Pa. 1982)51

Hunter v Erickson, 393 U.S. 385 (1969)passim

Independent Lib. Life Ins. Co. v. Fiduciary and Gen. Corp.,
91 F.R.D. 535 (W.D. Mich. 1981).....49

James v Valtiera, 402 U.S. 137 (1991).....17

Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 (6th Cir. 1988).....48

Milliken v. Bradley, 418 U.S. 717 (1974)41

Okpalobi v Foster, 244 F.3d 404 (5th Cir. 2001)51

Operation King’s Dream v Connerly, 501 F.3d 584 (6th Cir. 2007)30

Parents Involved in Community Schools v. Seattle School District No. 1,
551 U.S. 701 (2007).....passim

Plessy v Ferguson, 163 U.S. 537 (1896)passim

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).....14, 25

Reynolds v Sims, 377 U.S. 533 (1964).....11

Rodriguez de Quijas v Searson/American Express, 490 U.S. 477 (1989).....19

Romer v Evans, 517 U.S. 620 (1996)passim

Safeco Ins. Co. of Am. v. City of White House, 36 F.3d 540 (6th Cir. 1994)50

Strauder v West Virginia, 100 U.S. 303 (1879).....10

United Mine Workers v. Gibbs, 383 U.S. 715 (1966).....49

United States v. Katz, 494 F.Supp.2d 645 (S.D. Ohio 2006)48

Washington v Seattle School District No. 1, 458 U.S. 457 (1982).....passim

Statutes

Proposition 209passim

Other Authorities

ABA Guides to Approved Law Schools, 2008, 2009, 2010.....45

Brotz, Howard, ed. *African-American Social & Political Thought*.....34

C. Vann Woodward, <i>The Origins of the New South</i>	33
Const 1850, art 13, ss. 6-8.....	18
Const 1908, art XI, ss. 3-5, 8, 16	18
Const 1963, art 1, sec. 26(1)	passim
Const 1963, art VIII, s. 5.....	18
MOORE’S FEDERAL PRACTICE 3D, § 21.02[1]	48, 49
Wayne State Medical School, Admission Office Reports, 2006, 2008.....	45
http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp	42
http://www.ucop.edu/news/factsheets/fall2008adm.html	43

JURISDICTONAL STATEMENT

The Coalition Plaintiffs accept the jurisdictional statement contained in the University Defendants' Second Brief on Appeal. Beyond that, the Coalition Plaintiffs incorporate the jurisdictional statement contained in their First Brief.

STATEMENT OF THE ISSUE ON THE CROSS APPEAL

Did the District Court err in denying the University Defendants' motion to dismiss given that the University Defendants have implemented Proposal 2 insofar as admissions in their respective universities are concerned and given that Plaintiffs will request affirmative relief, including the restoration of the status quo ante, from the University Defendants in the event they prevail on the merits?

STATEMENT OF THE CASE

Insofar as the cross appeal is concerned, the Coalition Plaintiffs accept the Statement of the Case of the University Defendants with two exceptions.

First, while the University Defendants did not draft, support or pass Proposal 2, they have been the sole parties implementing it insofar as university admissions and financial aid are concerned. They have made the choice both to implement it and how it was to be implemented. For those acts, the Coalition Plaintiffs assert they are responsible for the violations of the Equal Protection Clause in terms of the procedures created and the admission standards applied.

Second, the Coalition Plaintiffs both asked for in their Complaint and will seek in the event they prevail injunctive relief preventing the Universities from implementing Proposal 2 and directing them to restore the status quo ante.

STATEMENT OF FACTS

The Coalition Plaintiffs accept the University Defendants' Statement of Facts, with the following exceptions.

The University Defendants did not write or support Proposal 2. Most of the individual University Defendants publicly opposed it during the campaign leading up to its adoption. Moreover, after it passed, the University Defendants, as individuals and as institutions, have provided no legal support to it. Recognizing how harmful it is, they have also done much to mitigate its effects.

But those facts, while important, do not absolve the University Defendants of liability. Proposal 2 ordered them not to use racially-conscious means to achieve a racially diverse student body. Above all other parties, they knew the consequences of following those orders. Three years before Proposal 2 passed, the University of Michigan told the Supreme Court that the elimination of affirmative action would lead to a sharp fall in minority admissions at its Law School—and the experience since the passage of Proposal 2 has shown that representation to be absolutely true. *Grutter v Bollinger*, 539 U.S. 306, 339-340 (2003).

The universities had a choice of following the Constitution of the United States or Proposal 2—and they chose the latter. For that choice, they are responsible.

Moreover, having made that choice, they have decided how to enforce Proposal 2 in their respective universities. Even though Proposal 2 prohibits a state university from “granting preferential treatment” to an applicant due to his or her race or national origin, Const 1963, art 1, sec 26(1), the Universities decided to enforce that by banning the *consideration* of race for any purpose during the admission process (Compare R. 222-5, Dep. of Spencer, UM Evaluation Procedure for Freshman Applicants, 2003-2006, Ex 2, at UM 012214, with R. 222-6, Dep. of Spencer, Ex 7, UM Evaluation Procedure, Dec. 29, 2006, at UM 02166). Using that interpretation, they—and only they—have implemented Proposal 2 in the admissions policies of their respective universities.

In the event the Coalition Plaintiffs are successful in this case, they will seek affirmative relief that only the University Defendants can give, including a restoration of the status quo ante.

SUMMARY OF ARGUMENT

The fundamental questions in this case are how the great liberating promises of the Fourteenth Amendment should be fulfilled in the nation as it actually exists 140 years after that Amendment was ratified.

The Respondents' briefs have not, and cannot, answer those questions because the underlying premise of their legal arguments—the so-called theory of the color-blind constitution—distorts the real promises of the Fourteenth Amendment and compels the Respondents to ignore the reality of discrimination today.

The Supreme Court has repeatedly held that the theory of the color-blind constitution is inconsistent with the Fourteenth Amendment. As will be shown below, it is even more inconsistent with that Amendment when a state claims the right to implement its own interpretation of federal rights in its own constitution.

We shall deal with the Respondents' legal arguments in more detail below. But what is most striking about their arguments is that they simply ignore *every* relevant fact. They not only ignore the facts set forth in the Coalition's First Brief—they ignore facts that are so obvious that they are both undisputed and essential for even debating what the promise of Equal Protection must mean today.

Most glaringly, the Respondents simply ignore the obvious fact that 55 years after *Brown* the nation's elementary and secondary schools remain largely separate

and unequal. They ignore as well the undisputed fact that in the overwhelmingly white suburbs, small towns and even most rural areas, primary and secondary education is far superior to that offered to the vast majority of black, Latino and Native American students. Finally, they ignore the undisputed fact that the graduates from those schools, including especially those in the most affluent suburbs, obtain real advantages on every criterion that the universities use in determining who is admitted to selective universities.

Almost every parent knows these facts. Those who can afford to do so, including many judges and lawyers, purchase homes in areas where their children can obtain those advantages. No one can blame parents for their efforts to obtain the best possible education for their children. But their efforts, combined with a variety of other factors, perpetuate an educational system in which white students, on average, continue to be given substantial advantages in securing admission to selective colleges and universities.

Of course, today there are a few black and Latino parents who can and do obtain educational advantages for their children. But, for the reasons set forth in the Coalition's initial brief, that does not change the overall fact that the system of primary and secondary education continues to give large advantages to white students applying to college. There is no evidence that the gap is narrowing—and considerable evidence that it is growing wider (Coal. Br., at 13-17).

Leaving aside legal categories for the moment, by any reasonable *factual* standard, affirmative action is not a “preference.” As the overwhelming majority of black and Latino citizens recognize, it is an effort to overcome the whole complex of advantages that are given to white students. As they recognize, the elimination of affirmative action would not result in a racially neutral system, but a system which ratifies the advantages that white students obtain in primary and secondary education. It would mean, over time, the re-segregation of the most selective universities.

The same point can be made in another way. In 2003, students and parents from Detroit’s virtually all-black Mumford High School drove to Washington where they joined 50,000 others for the rally outside the Supreme Court on the day of the argument in *Grutter v Bollinger*, 539 U.S. 306 (2003). The Mumford participants were attempting to defend an affirmative action system at Michigan that resulted, quite literally, in the admission of one student from Mumford in the same year that 80 were admitted from the mostly white Grosse Pointe South High School. Only a heart hardened to the real problem of discrimination could say that the Mumford delegation went to Washington to fight for “racial preferences.”

As any fair-minded person recognizes, affirmative action is a “preference” *only* in the sense that it sanctions a departure from the grades and test score criteria that capture and magnify the advantages that white students, on average, receive in

primary and secondary education. Because the term “preferences” is so misleading, the Coalition will use it only where necessary and only then in quotation marks. The aim is not politically correct language, but the truthful analysis of reality.

In *Grutter*, the Court held that Michigan’s Law School could consider race as part of its effort to assure that it admitted a diverse class of students. This was not simply rhetoric. A student from Mumford brings life experiences that are rare, indeed almost non-existent, in a university setting. Moreover, he or she has almost certainly displayed courage and enormous dedication in achieving the qualifications necessary for admission to a selective public university.

From long experience, Michigan and other universities know that they cannot determine whether a particular student from Mumford or anywhere else will be able to succeed in some important endeavor to a greater extent than some or all of the 80 students from Grosse Pointe South. But what they do know is that if they do not open their doors to that one student from Mumford, they will have no chance of graduating the next Colin Powell, Condoleeza Rice, Barack Obama, Sonia Sotomayor or any of the other leaders who were in the first generation produced by affirmative action.

By any reasonable *factual* analysis, Proposal 2 will substantially close the door for minority students seeking entrance to the most selective graduate and

professional schools in all of Michigan's public universities. Over time, it will almost certainly have the same effect at the University of Michigan's undergraduate colleges as well. We will deal below with the Respondents' attempt to minimize the decline, but it is sufficient to say at this point that the difference is over where and how much the door will close, not over whether it will close.

The long-term effect of Proposal 2 is certain, in large part because it has created a separate and unequal system for seeking change on admission standards. Under that system, the most prominent minority leaders in the country—Powell, Rice, Obama and Sotomayor—may not even ask the governing boards of Michigan's public universities to reenact the program that they have repeatedly said was essential for their own success. They and Michigan's minority residents, must sit, hat-in-hand, outside the meetings of the governing board, while everyone else is inside fighting for the standards that will assist *their* constituents in gaining admission to the university.

The substantive standard set by Proposal 2 violates the Equal Protection Clause as well. As is undisputed, Michigan and all selective universities rightly depart from a rigid grade and test point system on the explicit basis of lower social and economic status of the applicant. As is also undisputed, however, race is the source of far greater inequalities than class. And yet, Proposal 2 has prohibited the universities from taking explicit account of it like they do of class and similar

factors. Proposal 2 orders the universities to abandon the programs that have been shown to be essential to admitting minority students. It thus adds the sanction of law to de facto discrimination and, thus, in effect, converts it to de jure discrimination.

Finally, we must note that Michigan's public universities have *not* chosen to create such second-class standards and procedures for minority citizens. To their credit they do not, even now, offer legal support for Proposal 2. They undoubtedly recognize that as long as Proposal 2 exists, they will not be able to play the same leading role in public higher education in the 21st century that they played in the 19th and 20th centuries. But with all of their misgivings, Michigan's public universities have implemented Proposal 2—and for that, they are responsible, although not nearly as responsible as the sponsors of this law and the State which has given it effect.

ARGUMENT

I

PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY RELEGATING BLACK, LATINO AND NATIVE AMERICAN RESIDENTS TO A DISTINCTLY MORE ONEROUS POLITICAL PROCEDURE FOR SEEKING THE ADOPTION OF POLICIES THAT THE SUPREME COURT HAS FOUND ARE ESSENTIAL IF SIGNIFICANT NUMBERS OF MINORITY STUDENTS ARE TO BE ADMITTED TO MANY OF MICHIGAN’S PUBLIC UNIVERSITIES.

A. Proposal 2 violates the Equal Protection Clause by depriving racial minorities of any political procedure through which to fight for the adoption of any form of affirmative action.

From the time it was first proposed by the 39th Congress, the Fourteenth Amendment has *never* been color blind. It specifically aimed at preventing white Southerners—who were a majority in most areas and a minority in some—from re-imposing the equivalent of slavery through the Southern states’ adoption of the notorious Black Codes. More generally, it attempted to protect in the future, as far as a constitutional provision could do, “...the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.” *Strauder v West Virginia*, 100 U.S. 303, 307 (1879).

The so-called Redeemer governments, the segregationist governments that followed, and then *Plessy* buried those promises. By the 1950s, the Southern political system was so undemocratic that there was no hope of achieving change by working within it.

After *Brown*, on the basis of *Brown*, and in order to fulfill *Brown*, the Supreme Court struck down those anti-democratic measures in a series of historic decisions. And it attempted to prevent the rise of a similarly undemocratic system in the North, as soon as the black minority began fighting against the pervasive discrimination in those states.

Among its historic decisions, the Court, citing its now universally acclaimed one-person, one-vote decisions, directly held that a state referendum "...may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter v Erickson*, 393 U.S. 385 (1969), citing *Reynolds v Sims*, 377 U.S. 533 (1964). See also *Washington v Seattle School District No. 1*, 458 U.S. 457, 467 (1982).

Years later, a six-Justice majority applied the same principle in declaring a referendum unlawful because it broadly denied, without any basis, the rights of lesbians and gay men to seek protection from local and state legislative bodies in Colorado. *Romer v Evans*, 517 U.S. 620 (1996)(Kennedy, J).

The Respondents quibble over *Romer*, but they must pay lip service to *Hunter* and *Seattle*. However, because they do not recognize the existence of de facto segregation, they move quickly to confine *Hunter* and *Seattle* to the past. They say that those precedents only apply to demands to end legal

discrimination—which was banned in Michigan over 50 years ago. They simply fail to recognize that *Hunter* and, especially, *Seattle* established minority rights in political procedures in the North, where the overwhelming problems were those of de facto segregation and discrimination (Russell Br., at 12-22; Cox Br., at 15-33). Indeed, given that numerical goals, affirmative action and the like were almost universally accepted in 1967 and in 1982, what is most striking about *Hunter* and *Seattle* is that in neither opinion is there even a suggestion that they do not apply to those demands. In fact, as will be seen, there is no support in the language, logic, or holdings of *Hunter* and *Seattle* for the limitations that the Respondents now seek to impose on the rights protected by those precedents.

Beginning with the language of those cases, the Respondents tear the word “discrimination” from any location where it can be found in those opinions and then attempt to force that word into the holdings of *Hunter* and *Seattle* by declaring that those cases only protect fights against what the majority agrees is “discrimination” (Russell Br., at 14-15; Cox Br., at 19-21). But *Hunter* and *Seattle* Courts protected the minorities’ rights to fight for *any* demand to address the “special conditions of prejudice” so long as the substantive demand was lawful under the Equal Protection Clause. In repeated and carefully chosen words, the *Hunter* and *Seattle* majorities held that the rights protected extended to *any lawful proposal* related to race that *the minority saw* as “in its interests,” “on its behalf,”

or as a means to “overcome the special condition of prejudice.” *Hunter*, 393 U.S. at 393 (White, J), *Id.*, at 395 (Harlan, J, concurring); *Seattle*, 458 U.S. at 467 (Blackmun, J). That language clearly includes a proposal for racially conscious action “in the absence of a Constitutional violation” in the substance of the proposal itself. *Id.*, at 494.

The logic of *Hunter*, *Seattle* and *Grutter* makes that even clearer. As *Grutter* recognized, universities may adopt an affirmative action as a *means* to achieve a compelling interest related to “overcoming the special conditions of prejudice.” By repeating the phrase “preferences,” the Respondents hope to detract attention from the compelling needs that justify racial classifications. But once those needs are recognized—and they are part of established law—it makes no sense to say that *Hunter* and *Seattle* protect the right of racial minorities to equal access to the legislative body in order to prevent discrimination—except where the discrimination is so intractable that the only available means for overcoming it are racially conscious programs like the one upheld in *Grutter*.

Finally, the holdings in *Hunter*, and, especially, in *Seattle* make clear that the Respondents have no basis for asserting that those cases fail to protect minorities’ right to fight for racially conscious means to overcome de facto discrimination. In *Seattle*, the Court specifically held that *Hunter* protected a minority’s right to fight in the local school board for a racially-conscious program

designed to overcome de facto residential segregation. The *Seattle* majority held that the racial minority could reasonably see “attending an ethnically diverse school” as a means for its children to “assure full success in the larger community.” *Seattle*, 458 U.S. at 472-473. As those words echo the basis on which the Court had sustained affirmative action five years earlier in *Bakke*, the *Seattle* holding protects the right to fight for lawful affirmative action programs as surely as it protects the right to fight for lawful programs to integrate the public schools. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265(1978)

Having failed to find any support in the language, logic or holding of the majority opinions in *Hunter* and *Seattle*, Russell turns to the dissent. On the basis of an exchange of footnotes between Justices Blackmun and Powell, Russell claims that *Seattle* “plainly stated” that it “...did not foreclose the ability of the states to address and prohibit the use of racial preferences by local or subsidiary governmental units” (Russell Br., at 16, citing *Seattle*, 458 U.S. at 480 n. 23 (Blackmun, J) and 498 n. 14 (Powell, J, dissenting)).

In Mark Twain’s terms, that statement is beyond a stretch and approaches a whopper. In the footnotes on which Russell claims to rely, Justice Powell claimed that the majority opinion would prohibit a university governing body from overruling a faculty decision to adopt an affirmative action plan. Far from disputing that the majority opinion applied to affirmative action—as Russell now

claims—the *Seattle* majority responded to Justice Powell by reiterating its holding that a state could *not selectively* remove power from a lower body over racial issues and racial issues alone. *Id.*, at 480 n. 23.¹

Fairly read, the overall exchange between the dissenting and majority opinions in *Seattle* support the Plaintiffs, not the Respondents. In his dissent, Justice Powell suggested that there were substantive constitutional problems in the busing plan and directly asserted that *Hunter* should not apply because the state ballot proposal was based on the supposedly “neutral principle” of “neighborhood schools.” *Id.*, at 495-496 (Powell, J, dissenting). The majority rejected those arguments and specifically held that the rights protected by *Hunter* extended *to the full range of proposals that were lawful under the Equal Protection Clause*:

But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process [of the local school boards].

Seattle, at 494 (emphasis added)

Russell’s linguistic methods are displayed again in his attempt to twist a phrase from Justice Blackmun’s concurrence in *Crawford* into an argument that the *Hunter/Seattle* holdings do not invalidate Proposal 2 (Russell Br., at 16, citing

¹ The majority did not deal with the question of whether a governing board could overrule a faculty, although it seems abundantly clear that *Hunter* and *Seattle* protect the powers of the responsible body—the city council, the school board or the university governing board—not the powers of a committee or subcommittee of those bodies.

Crawford v. Board of Education, 458 U.S. 527, 546-547(1982)(Blackmun, J, concurring)). But Justice Blackmun merely stated that *a legislature* that enacted an affirmative action plan could later repeal that plan without offending *Seattle* because that had not changed the governing process. He went on to add, in the words not quoted, that if an amendment, like Proposal 2, “single[d] out for peculiar and disadvantageous treatment” the “*political processes or decision-making mechanism used to address racially conscious legislation*,” it was patently unconstitutional under the majority opinion in *Seattle*. *Crawford*, 458 U.S. at 458 (Blackmun, J., concurring)(emphasis added).

Beyond the misquotations, Russell and Cox launch a fusillade of attacks in support their claim that *Hunter* and *Seattle* do not protect the right of minorities to fight for affirmative action in the governing boards of state universities. Both the number and the quality of their attacks reveal not strength, but desperation.

Repeatedly, both Respondents assert that “The reallocation of political power over racial issues violates equal protection *only* where there is evidence of purposeful racial discrimination...” (Cox Br., at 39; Russell Br., at 26-28). But *Seattle* directly *held* to the contrary:

We have not insisted on a particularized inquiry into motivation in all equal protection cases. “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only on a extraordinary justification.” [citation omitted]. And legislation of the kind challenged in *Hunter* similarly falls into the inherently suspect category.

Seattle, 458 U.S. at 485.

Similarly, Russell claims that *Hunter* and *Seattle* are not applicable because a significant number of white people opposed Proposal 2, while a few black people supported it (Russell Br., at 33-34). But even though “Negroes and whites may be counted among the supporters and proponents of [the Washington initiative],” the Court held that fact was irrelevant, because the initiative clearly burdened racial minorities. *Seattle*, 458 U.S. at 472.

Russell also claims that Proposal 2 is valid because the Court has upheld a law requiring a referendum before low income housing projects may be placed in a particular community (Russell Br., at 24, 28, citing *James v Valtiera*, 402 U.S. 137 (1991)). But *Valtiera* explicitly reaffirms *Hunter* where racial criteria are used—and, by its terms, Proposal 2 plainly uses racial criteria when it bans what it calls “racial preferences.”

Finally, Cox asserts that *Hunter* and *Seattle* do not apply because the governing boards’ decisions on admissions standards are not political processes (Cox Br., at 33-38). The District Court rightly and summarily rejected this argument, especially given the national political attention that has always been paid to Michigan’s admission programs. *Coalition to Defend Aff. Action v. Regents of Univ. of Michigan*, 539 F. Supp. 3d 924, 956 (E.D.Mich. 2008).

The number and the weakness of the Respondents' attacks make clear that Proposal 2 is an almost chemically-pure violation of *Hunter* and *Seattle*. For 150 years, the *elected* governing boards of Michigan's public universities have had *full* power over *all* aspects of admissions. Const 1850, art 13, ss. 6-8; Const 1908, art XI, ss. 3-5, 8, 16; Const 1963, art VIII, s. 5. Indeed, unlike with school boards, cities and other subdivisions, neither the Governor nor the Legislature has ever had any power over state universities, save the power to determine the total funds they receive. Proposal 2 is thus the first and only time that Michigan has limited the powers of the boards—and it has done so only for “preferences” related to race, gender or national origin. Const 1963, art 1, sec. 26(1).

In form, Proposal 2 is identical to the charter amendment struck down in *Hunter*. In substance, the demand for affirmative action—which is the only meaning ever ascribed to the term “preferences”—is identical to the demand for measures to assure “ethnically diverse” schools in *Seattle*. The sole difference between this case and *Seattle* is that the Supreme Court has approved the substantive plan in advance. *Grutter*, 539 U.S. at 344.

Proposal 2 has left Michigan's minority citizens without a right to petition *any governmental institution* for the adoption of the *only* programs that could make it possible for significant numbers of their children to be admitted to Michigan's Law School.

Even before *Grutter*, the five dissenting judges in the Ninth Circuit declared that the panel opinion upholding Proposition 209 was clearly “contrary to controlling Supreme Court precedent” as announced in *Hunter* and *Seattle Coalition for Economic Equity v Wilson*, 122 F. 3d 692, 717 (9th Cir, 1997)(Norris, J, dissenting), *cert. den.* 521 U.S. 963 (1997). See also, *Id.*, at 718 n. 3 (Hawkins, J. dissenting). In blunt words, they accused the panel of injecting its personal opposition to affirmative action into its opinion and of violating their *obligation* to follow governing precedent from the Supreme Court:

It is the particular responsibility of the judges of lower federal courts, moreover, to abide by the precedent that binds us without regard to changes in the political climate or the Nation—or even changes in the sentiment of the Supreme Court—that we think might cast a favorable eye upon a different result. “If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v Searson/American Express*, 490 U.S. 477, 484 (1989)(Kennedy, J).

Id., at 717 (Hawkins, J, dissenting).

The Respondents’ repeated, baseless attempts to distort *Hunter* and *Seattle* make clear that they are asking this Court to ignore those decisions as the Ninth Circuit panel did in *Wilson*. As the dissenters in *Wilson* made clear, what is at stake is not simply minority rights—as vital as those are—but the rule of law itself, which requires lower courts to follow the holdings of the Supreme Court.

In the name of both minority political rights and the rule of law, this Court should strike down Proposal 2 on the basis of the language, logic and holdings of *Hunter* and *Seattle*.

B. There is no basis for the Respondents’s claim that a state constitutional amendment may limit the scope of the rights protected by *Hunter* and *Seattle*.

Even assuming *arguendo* that *Hunter* and *Seattle* had not already decided the issue, the Respondents and the authorities that they rely on offer no legal support for their claim that the state may limit minorities’ rights to equal access to the legislative bodies in order to fight for the exact program found lawful in *Grutter*.

The Respondents repeat the same arguments twice: first, they claim that “preferences” are so harmful that there must be a limit on *Hunter* and *Seattle*, and, second, they claim that for the same reason, a ban of so-called “preferences” is a compelling justification sufficient to justify Proposal 2 under *Hunter* and *Seattle*. We respond to both arguments in this and the next section.

In attempting to find a legal basis for their claims, the Respondents and the authorities that they cite are on the horns of a dilemma. The legal basis for their claimed exception or justification cannot be in federal law—because *Grutter* has resoundingly endorsed the exact programs that Proposal 2 has claimed to outlaw.

The Respondents desperately seek solace in Justice O'Connor's innocuous comment that universities should draw lessons from the race-neutral alternatives in those states where affirmative action had been outlawed (Russell Br., at 7, citing *Grutter*, at 342). But looking at what happened says nothing about whether how it happened was lawful. As the campaign for Proposal 2 did not begin until *after Grutter* was decided, neither Justice O'Connor's comments nor those of any other Justice in *Grutter* are *dicta*, *obiter dicta* or even relevant to the scope of the protection afforded by *Hunter* and *Seattle*.

The Respondents recognize that state law may not, on its own accord, limit the federal rights protected by *Hunter* and *Seattle*, for the obvious reason that the state may not limit the rights afforded by the Fourteenth Amendment. And so, Russell and the authorities that he relies on fashion a hybrid argument that federal law sanctions state limits on those rights. Because the Equal Protection Clause supposedly "barely permits" affirmative action, he says the states may step in and eliminate the right to equal access to legislative bodies to propose lawful affirmative action programs:

But [the] proposition [that] the Equal Protection Clause forbids the voters of Michigan from prohibiting that which the Clause presumptively prohibits and, only upon a showing of a compelling interest and narrow tailoring, barely permits [is] only slightly less absurd than the proposition that the Equal Protection Clause bans states from banning that which the Clause itself bans.

(Russell Br., at 20).

But “strict scrutiny” is a standard to be used *by the federal courts* to “smoke out illegitimate uses of race” by the states. *Grutter*, 539 U.S. at 326. It “says nothing about the ultimate validity of the particular law,” *Adarand Constructors, Inc. v Pena*, 515 U.S. 200, 229-230 (1995)(O’Connor, J). There is absolutely nothing in *Grutter*, *Adarand* or any other opinion that even suggests that strict scrutiny is a license for states to limit or define the rights protected by *Hunter* and *Seattle*.

The standard itself makes this clear. *Grutter* and numerous other cases have repeatedly declared that “strict in theory” is not “fatal in fact.” *Grutter*, 539 U.S. at 326. But states cannot then eliminate the right to fight in all governing bodies for any racially-conscious affirmative action programs because that would, in fact, convert “strict in theory” to “fatal in fact.”

The fundamental problem with the claimed state authority is even deeper. As the Supreme Court has directly held, Section 1 of the Fourteenth Amendment is, by its explicit terms, “...a *constraint* on state power.” *City of Richmond v Crosson*, 488 U.S. 469, 490 (1989)(O’Connor, J)(emphasis in original). The Court has therefore given the states *no* role in *defining* rights under the Fourteenth Amendment because that would “...cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions.” *Id.*

Even more significantly, the Court has held that Section 5 of the Fourteenth Amendment allows Congress “to adopt prophylactic rules” to prevent acts that *might* violate the Equal Protection Clause. But it has held that the states have no such power because the framers of the Fourteenth Amendment “...desired to place clear limits on the States’ use of race as a criterion for legislative action, *and to have the federal courts enforce those limitations.*” *Id.*, 488 U.S. at 490-491 (emphasis added).

Michigan has no authority to prohibit minority residents from asking the governing boards of state universities to adopt *all* racially conscious programs because *some* of them may be found unlawful by the federal courts. Even more to the point, Michigan has no authority to ban a governing board from adopting the exact program that *Grutter* found to serve a “vital national interest.”

The Respondents’ own assertions make clear *why* the states can *never* have such a power. Russell and the sponsor of Proposal 2 proudly state that Proposal 2 “enshrines in Michigan law” the first Justice Harlan’s “vision” of the color-blind constitution (Russell Br., at 43; MCRI Amicus Br., at 5-6, n. 1, citing *Plessy v Ferguson*, 163 U.S. 537, 559 (1896)(Harlan, J, dissenting)).

As Justice Harlan justly earned his place in history by battling the *white* racism that engulfed the Supreme Court from 1877 forward (see *infra*, at 32-35), it is extremely unlikely that he would have lent his name to the MCRI’s ignoble

effort. But what is indisputably true is that the Supreme Court has directly held that Justice Harlan's phrase *cannot be adopted today as a "universal constitutional principle"* because today it is *"inconsistent in both its approach and its implications with the history, meaning and reach of the Equal Protection Clause."* *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 782-783, 788 (2007)(Kennedy, J.)(emphasis added).

In their briefs, Russell, the MCRI and the Attorney General have not answered—because they have no answer—to the evident fact that the states cannot define the rights protected by *Hunter* and *Seattle* under a standard that has been held to be inconsistent with the Fourteenth Amendment.

The unanswered point is absolutely crucial. Under *Hunter* and *Seattle*, minorities have the right to equal access to fight in legislative bodies for any demand that is lawful under the Fourteenth Amendment. *Grutter* held that affirmative action is lawful. The Regents can choose not to adopt an affirmative action plan—but there is absolutely no authority for the state to limit the right of the Regents to adopt, or minority residents to fight for, a program that has already been found lawful by the Supreme Court. Otherwise, Michigan can define what is permissible under the Fourteenth Amendment within its borders—while Tennessee, Kentucky and Ohio can define what is lawful to fight for within their borders.

In place of uniform federal law as to what one can seek from legislative bodies, we have state's rights and Nullification. Russell bristles at the mention of John C. Calhoun—but Russell's assertion of a state's alleged right to define or limit a federal right derives directly from Calhoun's original theory of Nullification.

C. Proposal 2 tramples on, rather than furthers, the rights protected by the Equal Protection Clause.

Before assessing the Respondents' claim that Proposal 2 furthers the rights protected by the Equal Protection Clause, we will state—as the Respondents do not—the holding of the most important case in three decades on the rights of Equal Protection in higher education.

In *Grutter*, the Court *held* that “It is not too much to say that the “nation's future depends upon leaders trained through wide exposure” to the “ideas and mores of students as diverse as this Nation of many peoples.” *Grutter*, 539 U.S. at 324, quoting *Bakke*, 438 U.S. at 313 (Powell, J). On that basis, it *held* that there was a *compelling national* interest in assuring that legal education and the legal profession were open and seen to be open to “talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332-333, 340. Recognizing the “special niche” that universities occupied in “our Constitutional tradition,” it *held*—by a vote of 6 to 3—that universities had a right to consider race in admitting students that was grounded in the First Amendment and consistent with

the Fourteenth Amendment. *Id.*, at 329, 392 (Kennedy, J, dissenting on other grounds).

The Court further *held*, by a vote of 5 to 4, that the Michigan Law School plan was narrowly tailored because it was *only* practical way to further the compelling national interest in assuring a racially diverse legal education at that school. *Id.*, at 339-340.

The *holding* of *Grutter* destroys the *premise* of the Ninth Circuit opinion on which the Respondents rely so heavily. For it makes no sense to say that *Hunter* and *Seattle* do not apply because affirmative action is a “preference,” when the Supreme Court has held that it furthers an interest that is “vital for the nation’s future” and that it is the only practical means for achieving that interest.

Similarly, it destroys Russell’s claim that “...*Grutter* ‘never said, or even hinted, that state universities must do what they barely may do.’” (Russell Br., at 7, quoting *Coalition to Defend Affirmative Action v Granholm*, 473 F.3d 237, 249 (6th Cir. 2006). After *Grutter*’s ringing endorsement of affirmative action, it is surely disingenuous to say that affirmative action is something that universities “barely may do.” Nor is there any basis for deliberately misstating the question by saying that the Plaintiffs seek to *require* the governing boards to adopt an affirmative action plan. As is obvious, “All that is required is that minorities have the

opportunity, on equal terms, to seek [the adoption of an affirmative action plan].” *Wilson*, at 715 (Norris, J, dissenting).

But the misstatements of *Hunter* and of *Grutter* are simply a warm up for another rendition of the Respondents’ main claim. Quoting the usual sources, the Respondents assert again and again that Proposal 2 is valid because the state may offer “more equal protection than the Fourteenth Amendment requires...and...may end ‘racial preferences’ some years before they must do.” Similarly, they assert that a “state constitutional amendment designed to eliminate such [racial] ‘distinctions’ in state government would seem to be an equal-protection virtue, not an equal-protection vice.” (Russell Br., at 6-7, quoting *Coal. To Defend Affirmative Action v. Granholm*, 473 F. 2d 237, 249 (6th Cir.2006)).

But the claim that Proposal 2 “offers more protection than the Fourteenth Amendment requires” is true *only* if one *ignores* black, Latino and Native American residents. For *racial minorities*, Proposal 2 *takes away* the right to present to the governing bodies *lawful* demands that the Supreme Court has found are the *only* practical means for assuring that racial minorities can be admitted in any significant numbers to those universities. For racial minorities—who the Fourteenth Amendment was intended to protect—Proposal 2 does *not* advance a Fourteenth Amendment interest. It denies that interest completely.

Similarly, the claim that states may eliminate affirmative action “some years” before the 25-year date mentioned in *Grutter* denies the rights of minority citizens. Without discussing the significance of the 25 year “expectation” in *Grutter*, that case clearly held that affirmative action was lawful at least for that period. Under *Hunter* and *Seattle*, minorities therefore have the right to fight on equal terms for it *during that period*. A state decision to eliminate the right of universities even to consider those programs barely three years after *Grutter* was decided does not provide more protection for minorities—it eliminates that protection at least 22 years too early.

Finally, the claim that Proposal 2 is an “equal protection virtue” *assumes* that *any* step towards ending a racial classification is a step towards greater protection under the Fourteenth Amendment. But that is simply not true. In *Grutter*, the Supreme Court specifically *rejected* the claim that eliminating the racial classifications in the Michigan affirmative action plan was a step that furthered protection under the Fourteenth Amendment. On the contrary, it held that affirmative action furthered a “vital” national interest *in a way that was fully consistent with the Fourteenth Amendment*.

More generally, the fundamental assumption underlying the assertions that Proposal 2 is an “equal protection virtue” is, once again, the theory of the color-blind Constitution. All preferences are bad; eliminating any racial classification is

good; eliminating all of them is the greatest of virtues. Justices Scalia and Thomas state that view *in dissent*--but it is not the law and this Court should not treat it as such.

Justice Kennedy has recognized the obvious fact. The theory of the color-blind Constitution is “inconsistent in both its approach and its implications with the history, meaning and reach of the Equal Protection Clause.” *Parents Involved*, 551 U.S. at 782-783, 788 (Kennedy, J). The Fourteenth Amendment was not ratified to eliminate the Freedmen’s Bureau—but to provide a constitutional basis for it. Depriving the parents and students at Mumford of the right even to fight for the demands that are essential if one student from that school is to go to Michigan does not further the interests of the Fourteenth Amendment. It tramples those interests under its feet.

In fact, defining the limits of the rights under *Hunter*, *Seattle*, and *Romer* is a fundamental test of what the courts say the Fourteenth Amendment actually means. If the federal courts protect, as they have protected, the right of a racial minority to obtain equal access to governmental bodies for all lawful demands to combat the special condition of prejudice, then the Fourteenth Amendment will serve its originally-intended role of protecting minority rights. On the other hand, if Russell’s argument is adopted and minorities have no protected right to fight for racially-conscious demands in areas where the discrimination is especially

intractable, then the courts will have denied protection to the minorities and converted the Fourteenth Amendment into a law that allows the white majority to deny rights to the minority and defend the advantages that it has in the admission process.

The great merit of *Hunter*, *Seattle* and *Romer* is that they channeled what were once controversial issues into the normal democratic processes of school boards, city councils and governing boards. Accommodations have been worked out, change has occurred, and the entire nation has progressed to the point where the substantive issues at stake in at least *Hunter* and *Romer* are no longer even controversial.

The supporters of Proposal 2 fear the normal democratic processes. In fact, if they had the support they claimed to have, they would long ago have persuaded the existing regents or elected new ones who would have eliminated the affirmative action programs that are the underlying issue in this case. But they do not have that support.

They got their Proposal on the ballot by fraud. *Operation King's Dream v Connerly*, 501 F.3d 584 (6th Cir. 2007). They won it only by mobilizing a white majority to override the almost unanimous No votes of Michigan's black, Latino, and Native American citizens (Coal. Br., at 22-23). And as Connerly himself conceded, in states like Michigan and California, his supporters can only prevent

minorities from securing the restoration of affirmative-action policies through the normal democratic process by eliminating those processes altogether.

Grutter clearly held that affirmative action was lawful. In stripping the governing boards of the power to adopt the exact program that it held lawful, Proposal 2 has violated the rights of minority citizens under *Hunter* and *Seattle*.

Fortunately, Proposal 2 is first constitutional amendment in Michigan's history whose drafters regarded its legality as so dubious that they included a severability clause within the amendment itself. Const 1963, art 1, sec 26(7). This Court should avail itself of that severability clause and strike down Proposal 2 insofar as it attempts to selectively strip the governing boards of Michigan's public universities of the power to adopt affirmative action programs, including the one that was so resoundingly endorsed by the United States Supreme Court in *Grutter v Bollinger*.

II

PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY MANDATING ADMISSIONS POLICIES FOR BLACK, LATINO AND NATIVE AMERICAN STUDENTS THAT ARE LESS FAVORABLE THAN THOSE USED FOR OTHER STUDENTS.

A. What *Plessy v Ferguson* actually tells us about Proposal 2.

Russell and the amicus MCRI grab a phrase from Justice Harlan's famous dissent as support for their claim that Proposal 2 represents the ultimate triumph of the Equal Protection Clause and the Civil Rights Movement. But as Justice Kennedy suggested in *Parents Involved*, we cannot take a phrase from Nineteenth Century and plunk it down in the Twenty-First Century as the standard for interpreting the Fourteenth Amendment.

If we are serious about the slogan "Never Again," we cannot adopt so cavalier an approach to Justice Harlan's dissent. If we are to learn the *actual* lessons of *Plessy* so that we can avoid repeating, in new forms, the tragic errors contained in that case, we must take the actual lessons, not a phrase, from that case.

The context of *Plessy* is crucial. Reconstruction had ended in 1877. With reasons like those advanced by Mr. Connerly today, the Supreme Court, over Justice Harlan's dissent, struck down the first Civil Rights Act based on the claim that "...there must be some stage in the progress of the [the Negro's] elevation when he ...ceases to be the special favorite of the laws." *Civil Rights Cases*, 109 U.S. 3, 25 (1883). With the withdrawal of federal troops and federal law, periods

of white racist violence had led to de facto segregation in many areas of the South and legal segregation in some. But by 1896, segregation was not yet secure. Many laws had not yet been passed. New Orleans and other major cities still had integrated neighborhoods, streetcars, parks, city councils and courts. Louisiana's law requiring "separate but equal" accommodations on street cars was an attempt to weaken and ultimately destroy integration in those areas where the gains of Reconstruction survived.²

Justice Harlan, who had learned much from his experience during Reconstruction in Kentucky, made three points in his dissent that are crucial today.

First, he demanded candor. He declared that the law requiring separate accommodations was not a neutral act, as the majority claimed, but was intended to "put the brand of servitude and degradation upon a large class of our fellow citizens." He declared that the "thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done." *Id.*, at 562.

Second, he recognized that if the law decreed separation, there would never be a possibility for the races to meet "upon the terms of social equality." He thus emphatically rejected the majority's assertion that equal rights could not be

²C. Vann Woodward, *The Origins of the New South*, LSU Press: 1971, pp. 209-213.

achieved by “an enforced comingling of the two races” but rather had to be achieved by a “voluntary consent of individuals.” *Id.*, at 551, 563-564.

Third, he correctly predicted that if the Court approved the streetcar ordinance, it would lead to a wave of segregationist ordinances, some of which, like separate seating in courtrooms, he regarded as unthinkable even in 1896. *Id.*, at 557-558.

History turned out far worse than even Justice Harlan feared. Booker T. Washington, who had wrongly opposed the protests against segregation, nevertheless described the process accurately in 1915, when the segregationists completed the final phase of their bloody campaign by driving black middle-class families out of neighborhoods where they had lived for years:

In all of my experience I have never found a case where the masses of the people of any given city were interested in the matter of segregation of white and colored people; that is, there has been no spontaneous demand for segregation ordinances. In certain cities politicians have taken the leadership in introducing such segregation ordinances into city councils, and after making an appeal to racial prejudices have succeeded in securing a backing for ordinances which would segregate the Negro people from their white fellow citizens. After such ordinances have been introduced it is always difficult, in the present state of public opinion in the South, to have any considerable body of white people oppose them, because their attitude is likely to be misrepresented as favoring Negroes against white people.³

³ Brotz, Howard, ed. *African-American Social & Political Thought, 1850-1920*. Transaction Publishers: New Brunswick, 1997. p. 460-61.

This campaign and the thousands of lynchings that went with it was ethnic cleansing on American soil. Despite Russell's protests, no one has accused him of *wanting* a return of legal segregation or the terrible consequences that flowed from it. But just as the steps dismantling the gains of Reconstruction paved the way for what followed, ordering state universities to abandon the only programs that have resulted in the desegregation of those campuses can pave the way for more terrible steps tomorrow.

Even though we start at a far different place than Washington described in 1915 or than confronted the Court in 1896 or 1883, the nation still has massive de facto separation. As Justice Harlan foresaw, separation reinforces prejudice which in turn leads demagogues to propose more measures that enforce separation. It is *that* process that Proposal 2 facilitates—and it is that process that must be stopped if we are to avoid another slide downward towards deeper segregation.

B. Proposal 2 has as its *sole* purpose the unlawful objective of preventing the universities from taking steps to integrate their student body.

The supporters of Proposal 2 actually derive their arguments not from Justice Harlan's dissent, but from the majority opinion in *Plessy*.

They begin by abandoning the demand for candor. In their briefs, Cox and Russell repeatedly assert that a law that “prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender.” (Cox Br., at 49, citing *Wilson*, 122 F. 3d at 702). But one could as easily argue that a law that assures separation but equality *a fortiori* does not offend the Equal Protection Clause. As Justice Harlan said and *Brown* demanded, we must look behind Proposal 2 in order to determine whether the law in reality furthers or violates the Equal Protection Clause.

If we do that, the sole purpose of Proposal 2 is abundantly clear. The Proposal’s words banning discrimination do not express its purpose, because the Michigan Constitution has banned discrimination due to race and national origin for almost fifty years. Const 1963, art. 1, sec. 2. Nor, with one exception, do its words banning “preferential treatment” express its purpose, because Michigan’s universities, whose student bodies have always been overwhelmingly white, have never provided *any explicit* preference for white students. The sole purpose of Proposal 2 is to ban what its proponents call “racial preferences” and what everyone else has called “affirmative action.” The California District Court confirms what is in any event an obvious conclusion: “...despite repeated questioning by the Plaintiffs and

the Court, [the supporters of Proposition 209] have not yet identified a single existing program, other than race and gender conscious affirmative action programs, that would be affected by Proposition 209 [Proposal 2].”

Coalition for Economic Equity v Wilson, 946 F. Supp. 1480, 1505 (N.D. Cal.1996), *rev'd on other grounds*, 122 F.3d 692 (9th Cir.1997).

In fact, at one point in his brief, the Attorney General almost concedes that this is the real purpose of Proposal 2 when he asserts that it prohibits universities “...from denying admission to an applicant *because he is white or a male*” (Cox Br., at 44)(emphasis added). Leaving aside gender for the moment, protecting “white rights” has a history that cannot be forgotten, so the proponents of Proposal 2 avoid candor in favor of the false claim that it is designed to assure fair treatment for *all* races (Cox Br., at 42; Russell Br., at 6-10). In Justice Harlan’s phrase, that often-repeated claim is only a “thin disguise” for the law’s actual purpose.

Once that thin disguise is gone, it is clear that the supporters of Proposal 2 have abandoned Justice Harlan’s second major point as well. Under the guise of saying that integration must be the voluntary actions of individuals, they support a law that enforces the separation of the races.

Insofar as higher education is concerned, the *sole* purpose of Proposal 2 is the elimination under *any* circumstance of *any* affirmative action

program. But the Supreme Court has just held that in the most selective schools, affirmative action is the *only* practical means to secure any measure of integration in the student body. *Grutter*, 539 U.S. at 339-340. Under existing case law, public authorities have no constitutional duty to end de facto segregation. *Parents Involved*, 551 U.S. at 794 (Kennedy, J). But if the State *orders* its universities *not* to take measures to end de facto segregation, then it has crossed the line into *de jure* segregation. It has now added state sanction to racial exclusion.

Michigan has not, and cannot, offer any purportedly neutral justification for this order. There is not now, nor has there ever been, a “merit system” for admissions. In addition to the criteria being so amorphous and so admittedly biased in numerous ways, there have been innumerable exceptions to those criteria. For example, today, and for many years, Michigan’s universities have, without any opposition, taken “low economic family background,” “academically disadvantaged” schools and regions, and similar sources of educational disadvantage into account—along with numerous other, less worthy considerations including alumni status and political connections (R. 222-5, Dep. of Spencer, Ex. 12, at UM00057).

Proposal 2 has ordered the universities to not take account of only one form of educational disadvantage—race. Similarly, under its terms, the universities may take any steps they want to achieve any form of diversity except that which has been most difficult and most important to achieve—racial diversity.

The Respondents’ final line of defense is the claim that “...the simple repeal or modification of desegregation or antidiscrimination laws, without more, has never been viewed as embodying a presumptively invalid racial classification.” (Cox Br., at 52-55, citing *Crawford v. Bd. of Education of City of Los Angeles*, 458 U.S. 527, 538-539 (1982)).

If the governing boards at Michigan or the other state universities had decided to repeal or modify an affirmative action plan, *Crawford* would almost certainly apply. Indeed, because *Grutter* was largely based on the autonomy that the First Amendment affords to universities, an educational decision by the university’s democratically-elected board would receive enormous deference by the federal courts.

But that is not what happened here. The President and the Regents of the University of Michigan and important officials at other schools adamantly *opposed* Proposal 2. They ended affirmative action because they were ordered to do so—not because they made an educational judgment to

do so. Proposal 2 declared that however compelling the need for affirmative action was—or however ineffective the other alternatives might be—the universities could not adopt an affirmative action plan to assure that there would be a “critical mass” of black, Latino and Native American students at the universities.

As noted at the outset, the facts of unequal primary and secondary education by race are not, and cannot be, disputed. Proposal 2 has ordered the universities to avoid the only programs that have been successful in making sure that admissions do not simply ratify the de facto segregation and inequality in primary and secondary schools.

There is no question of intent. Some want to exclude minority students so that supposedly more deserving (i.e., more privileged) white students can be admitted. Some, like Connerly, believe that the exclusion of minority students will be the “tough love” needed to induce them to work harder—as if the lack of hard work was the problem to begin with. In either case, Proposal 2 is a racially-motivated attempt to codify the de facto discrimination in society.

If there is any doubt about that, the District Court should not have granted a motion for summary judgment, but rather should have set this matter down for trial.

Proposal 2 has and will increase the separation of the races in the single most important institution where there is some measure of integration today: the universities. It is both a product of and an encouragement to separation that can open the way to demagogues who can lead us on another downward slide towards more segregation. As Justice Marshall said soon after school buses burned in Pontiac, "...unless our [students] begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley*, 418 U.S. 717, 783 (1974)(Marshall, J, dissenting).

This Court should strike down a law whose only purpose in higher education is to order the universities not to undertake the measures that alone can integrate those selective schools that will in fact train a large share of the leaders of the future.

C. The effects of Proposition 209 and what they mean for Michigan.

In their initial brief, the Coalition Plaintiffs set forth the effects of Proposition 209 in California and the preliminary data on the effects of Proposal 2 in Michigan. In response, the MCRI has submitted an amicus brief that claims that minorities are "thriving" in California under Proposition 209 and that they will "thrive" in Michigan as soon as the beneficent effects of Proposal 2 are known (MCRI Br., at 11-25).

Much of the data in that brief is irrelevant, misleading or both.

In assessing the California data provided by the MCRI, data showing that there has been an increase in minority student enrollment in the California State University, or University of California systems as a whole, or at the least selective of the ten campuses of the University of California, is simply irrelevant. It is the equivalent of saying there is no problem at the University of Michigan Law School because minority admissions at Grand Valley State are increasing.

Similarly, in assessing California data, it is crucial to place it in the context of the enormous growth in the Latino population since Proposition 209 passed. In 1997, Latinos made up 30.5 percent of the high-school graduates in California; in 2008, they made up 36 percent, while the percent of black and native American graduates remained stable. Simply staying even with the growth in the Latino share of high-school graduates (much less with the share of Latino high-school students) would thus require an 18 percent increase in the share of Latino enrollments at the most selective campuses. See Ethnicity Snapshots Table, Post Sec. Educ. Commission, <http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp> (8/22/2009).

The actual effects at the two schools most clearly comparable to Michigan show what can happen in Michigan. Despite the fact that the administration of the University of California and at its Berkeley campus in

particular have taken numerous measures to mitigate the effects of Proposition 209, the share of underrepresented minorities in the entering class at UC Berkeley has *fallen* from 25.2 percent in 1997 to 17.7 percent in 2008. At the other selective campus, UCLA, the share of underrepresented minorities has *fallen* from 21.2 percent in 1997 to 19.4 percent in 2008. See 2008 Freshman Admissions to the Univ. of California, Table 4, <http://www.ucop.edu/news/factsheets/fall2008adm.html> (August , 2009).

The effects at law, medical and most graduate schools are far worse—although the data is less readily available.

There is no dispute about these facts—they are part of an undisputed expert report below, they are explained by the former admissions director at Berkeley, and they are summarized in the University of California’s official report on its experience with Proposition 209. (See R. 206, Dec. and Report of Jeannie Oakes, at 5-6; R. 222-12, Dec. of Laird, paras. 35-64; Undergraduate Access to the University of California after the Elimination of Race Conscious Policies, Univ. of California, Office of the President, March 2003, at 1-3).

Finally, the asserted increase in six-year graduation rates cited by the MCRI is misleading and irrelevant. It is true that the six-year graduation rates for black and Latino students at Berkeley increased from the class that

entered in 1996 to the class that entered in 2002. But overall graduation rates went up as well. Moreover, because there were less minority students, the number of black graduates actually went down from 155 of the 236 who entered in 1996 to 109 of the 142 who entered in 2002.⁴

As any straightforward look at the data will show, the ten-year effects of Proposition 209 show irreparable damage to minority admissions at the most selective universities in California.

D. The effects so far of Michigan's Proposal 2.

Most of the MCRI's data on Michigan are even more misleading than its data on California. The data for admissions for the class that entered in fall 2007 is largely irrelevant because much, if not all, of that class was admitted before Proposal 2 went into effect on December 29, 2006. With respect to 2008, the data on Eastern, Western and Central Michigan Universities are irrelevant because none are selective schools. It is not known whether they even had an affirmative action policy that was affected by Proposal 2.

⁴ The data on graduation rates was obtained by the MCRI and by the Coalition from the University of California at Berkeley Office of Student Research web site. That web site is, however, now down for repairs and reconstruction and it is not clear what the site will be when it is returned to active service. The Coalition can provide the information on request as soon as the site is restored, however.

With respect to the undergraduate College of Literature, Science and the Arts at the University of Michigan, the number of underrepresented minorities in the first full year after Proposal 2 did indeed stay roughly the same. But the record does not disclose how that was done or whether it can be maintained in the context of funding cutbacks for higher education and, especially, for primary and secondary education.

Moreover, if Proposal 2 is sustained, the pressure on Michigan universities will grow. They have continued to use targeted recruiting even though that has been held unlawful under Proposition 209. *Hi-Voltage Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 12 P.3d 1068 (2000). Similarly, in *Grutter* and in other cases, the supporters of Proposal 2 have asserted that there must be no differences in the average test scores of white and minority students—an interpretation that would be devastating for minority admissions. Finally, in its rose-colored “assessment” of the effects of Proposal 2, the MCRI does not even mention the 31 percent drop in the percentage of minorities in the entering class at the University of Michigan Law School or the 64 percent fall in minority admissions at Wayne State’s Medical School. See *ABA Guides to Approved Law Schools, 2008, 2009, 2010* (pp. 464-465); Wayne State Medical School, Admission Office Reports, 2006, 2008.

The streetcars in New Orleans were not, in fact, segregated in the first year after the Supreme Court’s decision. The crucial question, as set forth in the Coalition’s first brief, is the regime and the standards that have been established. In California, the disastrous effect of Proposition 209 at the undergraduate level came early; in Michigan, they are only be delayed.

III

THE DISTRICT COURT PROPERLY DENIED THE UNIVERSITY DEFENDANTS’ MOTION TO DISMISS.

- A. Both in their Second Amended Complaint and on the facts developed during discovery, the Coalition Plaintiffs have stated claims for relief against the University Defendants.

The University Defendants did not file their “motion to dismiss” until almost a year after the action was filed. Given the stage at which the University Defendants filed that motion—and the fact that the Plaintiffs and the District Court referred to the facts as they had been developed during discovery—the relevant standards are those under Rule 56—not those under Rules 8 and 12.

The question now is what the University Defendants have done as a matter of fact—and what they may be required to do as a remedy. As the facts reveal, what they have done is to apply and enforce Proposal 2 in the manner described. And what the Plaintiffs will ask for is specific relief to undo the harm caused by enforcing Proposal 2 over the last 20 months. On that basis, the District Court properly found that the claims against the Universities and the other defendants

“share common questions of fact and law and arise out of the same occurrence” and further found that if Proposal 2 were struck down, the Plaintiffs could ask for relief that only the University Defendants could give. *Coalition to Defend*, 539 F. Supp. 2d at 941.

Moreover, even assuming *arguendo* that the complaint and the standards for pleading were the relevant standard, the Coalition Plaintiffs’ Second Amended Complaint repeatedly asserts that “as written *and as applied*” Proposal 2 violated the Equal Protection Clause both in the political structure it created and in the segregative actions that it required. Many of the individual Plaintiffs have alleged that they specifically applied to the universities during the time that Proposal 2 has been in effect and were thus specifically subject to the policies at issue (R.24 , Pl. Sec. Amend. Compl., paras. 19-22, 102-104).⁵ In the prayers for relief following Counts One, Two and Four, which are the counts that are the subject of this appeal, the Plaintiffs repeatedly asked for declaratory and injunctive relief “restraining the defendants from enforcing Proposal 2 insofar as it applies to the admission, education and graduation of students at the defendant universities...” (R. 96, Pl. Sec. Amend. Compl., at pp. 21, 23, 25).

Even if the pleading standards were now applicable, the Coalition Plaintiffs have thus clearly stated facts sufficient to create a “facial plausibility” that the

⁵ Although the allegation does not appear in the Complaint, many of the minority plaintiffs were specifically rejected after Proposal 2 took effect.

universities have violated the Plaintiffs' rights as is required by *Ashcroft v Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009).

B. The University Defendants are proper parties under Rule 21.

Rule 21 provides that the District Court may dismiss any party that has been “misjoined” in the action. The University Defendants’ entire brief proceeds on the premise that they must be necessary parties under Rule 19 in order to be joined in this case (Univ. Br., at 5). But in the Sixth Circuit, the courts have held that if a party satisfies the requirements for *permissive* joinder under Rule 20(a), there is no misjoinder under Rule 21. *See e.g., Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674, 682 (6th Cir. 1988) (dismissing parties as improperly joined under Rule 21 after concluding that the permissive joinder requirements of Rule 20(a) had not been met); *United States v. Katz*, 494 F.Supp.2d 645, 647-48 (S.D. Ohio 2006)(same); *see also Glendora v. Malone*, 917 F.Supp. 224, 227 (S.D.N.Y. 1996) (“The Federal Rules of Civil Procedure do not define misjoinder, but the cases make clear that misjoinder of parties occurs when they fail to satisfy the conditions for permissive joinder under Rule 20(a)); MOORE’S FEDERAL PRACTICE 3D, § 21.02[1]”).

Rule 20(a) provides:

All persons .. may be joined in one action as defendants if there is asserted against them any right to relief jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence,

or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Rule 20 aims at promoting judicial efficiency by joining all interested parties in one proceeding to encourage resolution of the dispute and to avoid overlapping and inconsistent results. They have accordingly construed Rule 20 liberally to entertain a broad scope of litigation, so long as that scope remains consistent with the fair administration of justice for all parties. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966)(Rule 20 to be interpreted to encourage “the broadest possible scope of action consistent with fairness to the parties...”); *Independent Lib. Life Ins. Co. v. Fiduciary and Gen. Corp.*, 91 F.R.D. 535, 537-38 (W.D. Mich. 1981) (same); MOORE’S, *supra* at § 20.02[1][a].

Judged by those standards, there clearly has been no misjoinder here. As set forth in the preceding section, the Coalition Plaintiffs have brought claims seeking declaratory and injunctive relief from all defendants based on the same underlying events and transactions. In the counts that are before this Court, they have asserted that Proposal 2 violated the Equal Protection Clause as to both race and gender. From *Brown* forward, the educational bodies implementing discriminatory policies have been proper parties, even where their conduct was mandated or permitted by state statute. There is no reason for a different decision here.

Even if the Court were to apply University Defendants’ proposed “necessary party” standard, the Universities’ motion should still be dismissed. Rule 19(a) of

the Federal Rules states that a party is “necessary” for just adjudication if “(1) complete relief cannot be given to existing parties in his absence; [or]... (3) his absence would expose existing parties to substantial risk of double or inconsistent obligations.” *Safeco Ins. Co. of Am. v. City of White House*, 36 F.3d 540, 545 (6th Cir. 1994). If *either* of these conditions are met, the party is a necessary party to the case. *Id.* Here, both are met.

As the University Defendants acknowledge, the *Coalition* Plaintiffs’ Second Amended Complaint asks to enjoin the *implementation* of Proposal 2. The Universities’ actions in implementing are far from ministerial. Moreover, given the time that has passed and the applicants who have accordingly been passed over, the Plaintiffs must ask for affirmative relief including, but not limited to, restoring the status quo ante—relief that can only be obtained if the Universities are parties to this action.

The University Defendants are also necessary parties under the third prong of Rule 19(a) because failure to include those defendants in this case exposes them and thus the Plaintiffs to the possibility of double liability and inconsistent results. The only causes of action are currently before this Court. But others can institute claims at any time in either state or federal court.

As even a brief review of the cases cited by the Universities will show, they are a far cry from the facts present here. See *Brooks v Glynn County*, 1989 U.S.

Dist. LEXIS 4776, *11 (S.D. Ga. 1989)(local official with ministerial counting duties improperly joined); *Hispanic Coalition of Reapportionment v Legislative Reapportionment Commission*, 536 F. Supp. 578, 584 (E.D. Pa. 1982)(party officials and committees misjoined in action challenging reapportionment commission's decisions); *Okpalobi v Foster*, 244 F.3d 404, 425 (5th Cir. 2001)(Governor and Attorney General misjoined in action challenging state law creating private right of action for damages allegedly caused by abortions). The University Defendants have thus provided neither precedent nor reason that supports their request to be dismissed from this action.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Coalition Plaintiffs ask that the Court reverse the District Court and hold that Michigan Proposal 2 violates the Equal Protection Clause as applied to university admissions as to both race and gender because it imposes a far more onerous burden on minorities and women seeking change and because it intentionally discriminates against the Plaintiffs due to their race or gender. The Coalition Plaintiffs further request that this Court affirm the District Court's decision denying the University Defendants' motion to dismiss.

By the Coalition Plaintiff-Appellant's
Attorneys,

SCHEFF, WASHINGTON & DRIVER,
P.C.

BY: /s/ George B. Washington
George B. Washington (P-26201)
Shanta Driver (P-65007)
645 Griswold—Ste 1817
Detroit, Michigan 48226
(313) 963-1921

Dated: August 27, 2009

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

/s/ George B. Washington
George B. Washington
Attorney for Plaintiff/Appellants

August 27, 2009
Date

CERTIFICATE OF SERVICE

I certify that on August 27, 2009, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ George B. Washington
George B. Washington
Attorney for Plaintiff/Appellants