For Opinion See 2011 WL 2600665

United States Court of Appeals, Sixth Circuit.
Chase CANTRELL, et al, Plaintiffs-Appellants,
v.
Michael COX, Michigan Attorney General, Intervenor-Defendant-Appellee.
No. 09-1111.
July 22, 2009.

Appeal from the United States District Court, Eastern District of Michigan, Southern Division, Honorable David M. Lawson

Brief for Defendant-Appellee

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Statement in Support of Oral Argument

This case presents unique and significant issues of law challenging a state constitutional amendment, specifically, Const 1963, art. 1, § 26, adopted by Michigan voters in November 2006. Plaintiffs-Appellants (hereafter Plaintiffs or *Cantrell* Plaintiffs) present an equal protection political structure challenge premised on the Supreme Court's decision in *Hunter v. Erickson*, and its progeny.[FN1] Oral argument will assist the Court's understanding of the legal argument, and provide an opportunity to address questions on these important issues.

FN1. *Hunter v. Erickson*, 393 U.S. 385; 89 S. Ct. 557; 21 L. Ed. 2d 616 (1969).

Jurisdictional Statement

Intervening Defendant-Appellee Attorney General Michael A. Cox (hereafter Defendant or Defendant Cox) concurs in the Plaintiffs' Jurisdictional Statement.

Statement of Issues Presented

I. In November 2006, the voters of the State of Michigan adopted a constitutional amendment that prohibits discrimination against or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public University admissions, government contracting and hiring. The amendment effectively removes all discretion from the respective governing bodies of the Universities to consider race or gender as a factor in admission. Does the constitutional amendment violate the Equal Protection Clause of the Fourteenth Amendment by restructuring the political process to lodge decision-making authority over the questions of race-conscious admissions at a new and remote level of government?

Statement of the Case

On November 7, 2006, Michigan voters adopted Proposal 06-02 (Proposal 2), a state constitutional amendment prohibiting discrimination against or the granting of preferential treatment to individuals or groups based on race, sex, ethnicity, and national origin in public education, government contracting, and public employment by a margin of 57.9% to 43.1%. The day after the election, the Coalition to Defend Affirmative Action and others, filed an action against Governor Jennifer Granholm, and the governing bodies of state universities (the University Defendants), alleging that the constitutional amendment violated the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, and other federal laws. (R 1, Complaint, ¶¶ 29-37). Another group - the *Cantrell* Plaintiffs - brought suit on December 19, 2006, also challenging the constitutional amendment on equal protection grounds. The District Court consolidated these cases on January 5, 2007. (R 69, Order consolidating cases and granting motion to intervene) The District Court also granted Defendant Attorney General Mike Cox's motion to intervene in the consolidated cases. (R 13, Order granting motion to intervene; R 69, Order consolidating cases and granting motion to intervene).

Proposal 2 took effect December 23, 2006, as Const. 1963, art. 1, § 26. The District Court granted the *Coalition* Plaintiffs, Defendant Cox, and the University Defendants a preliminary injunction delaying the effective date of the amendment to July 1, 2007, the end of the then current university admissions cycle. Intervening defendant Eric Russell an applicant to the University of Michigan, then moved in this Court to stay that preliminary injunction. On December 29, 2006, a panel of this Court granted the motion for stay pending a full appeal regarding the injunction.[FN2] That appeal was subsequently dismissed as moot after the injunction expired of its own accord.

FN2. *Coalition to Defend Affirmative Action, et al. v. Granholm, et ah,* 473 F.3d 237 (6th Cir. 2006).

The *Coalition* Plaintiffs amended their complaint on December 17, 2006, and again on March 28, 2007. (R 24, *Coalition* First Amended Complaint; R 96, *Coalition* Second Amended Complaint) The *Cantrell* Plaintiffs amended their complaint on January 17, 2007. (R 73, *Cantrell* First Amended Complaint)

On May 15 and 16, 2007, both Plaintiffs filed motions to certify a class action. (R 121, *Coalition* Plaintiffs' Motion to Certify Class Action; R 107, *Cantrell* Plaintiffs' Motion to Certify Class Action). Those motions were argued and taken under advisement. In the interim, the parties completed fact discovery. On October 5, 2007, the *Cantrell* Plaintiffs filed a motion for summary judgment as to intervening defendant Eric Russell. (R 172, *Cantrell* Motion for Summary Judgment as to Defendant Russell). The University Defendants filed a motion to dismiss on October 17, 2007. (R 179, University Defendants' Motion to Dismiss) On November 30, 2007, Defendant Cox and Defendant Russell filed dispositive motions. (R 201, Defendant Cox's Motion to Dismiss; R 202, Russell's Motion for Summary Judgment). The *Cantrell* Plaintiffs filed a second dispositive motion as to the remaining defendants and substantive claims. (R 203, *Cantrell* Motion for Summary Judgment). The motions were submitted for decision after oral argument on February 6, 2008. On March 18, 2008, the District Court issued its decision granting in part and denying in part the University Defendants' Motion to Dismiss, denying the *Cantrell* Plaintiffs' Motion for Summary Judgment, granting the Attorney General's Motion for Summary Judgment, and dismissing the cases.[FN3]

FN3. *Coalition To Defendant Affirmative Action, et al v. Regents of the University of Michigan, et al,* 539 F. Supp. 2d 924 (E.D. Mich. 2008).

The *Coalition* Plaintiffs filed an appeal on March 19, 2008. (R 249, *Coalition* Plaintiffs Notice of Appeal).[FN4] The *Cantrell* Plaintiffs filed a Motion to Alter or Amend the District Court's judgment. (R 253, *Cantrell* Plaintiffs Motion to Alter or Amend Judgment). The District Court denied that motion by Order entered December 11, 2008. (R 258, Order denying Motion to Alter or Amend Judgment) The *Cantrell* Plaintiffs filed an appeal on January 12, 2009, which was set for briefing with the *Coalition* Plaintiffs' appeal. (R 260, *Cantrell* Plaintiffs Notice of Appeal in 09-1111).

FN4. The *Coalition* Plaintiffs' appeal is pending in Sixth Circuit Case No. 08-1387.

Statement of Facts

On November 7, 2006, Michigan voters overwhelmingly approved passage of Proposal 2,[FN5] which amended the Michigan Constitution to prohibit the discrimination against or the granting of 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.[FN6] Proposal 2, now art. 1, § 26 of the Michigan Constitution, provides in part:

FN5. The Amendment passed with 2,141,010 citizens voting in favor of the proposal, and 1,555,691 citizens voting against the proposal, or by 57.9 % to 42.1%. See *http:// miboecfr.nictusa.com/election/results/06GEN/90000002.litml*.

FN6. The proposal engendered lengthy legal challenges prior to its passage. See *Coalition to Defend Affirmative Action, et al v Board of State Canvassers*, 262 Mich. App. 395; 686 N.W.2d 287 (2004); *Michigan Civil Rights Initiative v. Board of State Canvassers*, 268 Mich. App. 605; 708 N.W.2d 139 (2005); *Operation King's Dream v. Connerly*, United States District Court for the Eastern District of Michigan, Case No. 06-12773; 2006 US Dist LEXIS 61323; *Operation King's Dream, et al v. Connerly, et al*, 501 F.3d 584 (6th Cir. 2007).

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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.

(2) 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.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1.

This section took effect on December 23, 2006.[FN7]

FN7. See Const 1963, art 12, § 2. Although, as noted above, the parties had stipulated to a preliminary injunction enjoining the effective date of this provision until July 1, 2007, the end of the then current admissions cycle, this Court granted Defendant Russell's motion for stay of that injunction pending appeal on December 29, 2006, and the amendment was then fully implemented by the University Defendants.

On November 8, 2006, the *Coalition* Plaintiffs, who include the Coalition to Defend Affirmative Action, Integration

and Immigrant Rights and Fight for Equality by any means necessary (BAMN), two other organizations, several labor unions, and numerous individual plaintiffs, filed a Complaint for injunctive and declaratory relief raising a facial challenge to § 26 of the Michigan Constitution. The Complaint alleged equal protection and First Amendment challenges under the federal constitution. (R 1, *Coalition* Complaint, ¶¶ 32-37). The Complaint also asserted that § 26 is preempted by Titles VI and VII of the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. (R 1, *Coalition* Complaint, ¶¶ 29-31). Plaintiffs requested the District Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, permanently enjoin Defendants from eliminating any affirmative action plans in admissions to the State's three largest universities, and grant any other relief determined appropriate. (R 1, *Coalition* Complaint, p 8). The Complaint expressly named as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors. Michigan Attorney General Mike Cox then sought and was granted permission to intervene as a defendant in this action. (R 13, Order granting motion to intervene). First and Second Amended Complaints were subsequently filed by the *Coalition* Plaintiffs, in which the Plaintiffs added an equal protection political process claim, but the relief sought was essentially the same as the original Complaint. The *Coalition* Plaintiffs also added the University presidents as Defendants. (R 24, *Coalition* First Amended Complaint; R 96, *Coalition* Second Amended Complaint). Governor Granholm was later voluntarily dismissed as a defendant in this case. (R 151, Order dismissing Governor Granholm in *Coalition* case).

On December 19, 2006, a second lawsuit was filed by the *Cantrell* Plaintiffs challenging the constitutionality of § 26 by several applicants to the University of Michigan and current University of Michigan students and faculty. They sought a declaratory ruling that § 26 violates the Equal Protection Clause because it imposes additional burdens on racial minorities when seeking to achieve beneficial legislation in their interest. This suit named only Governor Granholm as a defendant. The *Cantrell* Plaintiffs also amended their Complaint on January 17, 2007. (R 73, *Cantrell* First Amended Complaint). Defendant Cox moved and was permitted to intervene in this suit as well. (R 69, Order consolidating cases and granting motion to intervene). The Governor was subsequently dismissed from this suit as well, leaving only the Attorney General to defend the amendment. (R 163, Order dismissing Governor Granholm in *Cantrell* case).

The two lawsuits were consolidated by agreement of the parties and by order of the Court. (R 69, Order consolidating cases and granting motion to intervene). Discovery in these cases was bifurcated into fact and expert discovery. After the cases proceeded through fact discovery, the parties filed dispositive motions, with the exception of the *Coalition* Plaintiffs.

The District Court issued its decision on these motions March 18, 2008. The District Court's Opinion succinctly and accurately describes the claims asserted by the Plaintiffs; the arguments of the parties; and the facts presented in the motions.[FN8] Defendant Cox relies on the District Court's recitation for purposes of this appeal. After determining "there are no material fact issues that require a trial on any of the claims," the District Court considered the legal issues and concluded "Proposal 2 [art.1, § 26] does not violate the United States Constitution."[FN9] The *Cantrell* Plaintiffs then moved to alter or amend the judgment (R 253, Cantrell Plaintiffs Motion to Alter or Amend Judgment), which motion the Court denied on December 11, 2008. (R 258, Order denying Motion to Alter or Amend Judgment). The *Cantrell* Plaintiffs then appealed.

FN8. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 930-940.

FN9. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 930.

Summary of Argument

The *Cantrell* Plaintiffs claim that Proposal 2, now art. 1, § 26 of the Michigan Constitution, violates the Equal Protection Clause of the Fourteenth Amendment under a "political structure" Equal Protection Clause analysis.

Pursuant to this theory, Plaintiffs assert that § 26 unconstitutionally restructures the political process because racial minorities, students or applicants from particular national origins, may not petition state universities and colleges to sustain or make changes in admissions and hiring practices that benefit or advantage these groups, outside of securing an amendment to the Michigan Constitution. Plaintiffs assert that this violates equal protection principles because other groups seeking beneficial legislation based on other characteristics do not face such an onerous political process. Plaintiffs cite the Supreme Court's decisions in *Hunter v. Erickson* and *Washington v. Seattle School District*, in support of their argument.[FN10]

FN10. *Hunter*, 393 U.S. 385; *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457; 102 S. Ct. 3187; 73 L. Ed. 2d 896 (1982). See also *Romer v. Evans*, 517 U.S. 620; 116 S. Ct. 1620; 134 L Ed. 2d 855 (1996).

The District Court correctly rejected this claim because, although the Court determined that the amendment did alter the political process to make it more difficult for Plaintiffs to seek such benefits or advantages, the Equal Protection Clause is only offended when the process is altered to make it more difficult to obtain *equal* treatment or protection - not *preferential* treatment.

Because the District Court rightly concluded that § 26 is constitutional and does not violate the Equal Protection Clause of the Fourteenth Amendment, this Court should affirm the grant of summary judgment in favor of Defendant Cox.

Argument

I. In November 2006, the voters of the State of Michigan adopted a constitutional amendment that prohibits discrimination against or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public University admissions, government contracting and hiring. The amendment effectively removes all discretion from the respective governing bodies of the Universities to consider race or gender as a factor in admission. The constitutional amendment does not violate the Equal Protection Clause of the Fourteenth Amendment by restructuring the political process to lodge decision-making authority over the questions of race-conscious admissions at a new and remote level of government.

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo.[FN11] More specifically, a state law's constitutionality "is a question of law which this Court reviews de novo."[FN12]

FN11. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431 (6th Cir. 2008).

FN12. *Cherry Hill Vineyards*, 553 F.3d at 431, citing *Cmtys for Equity v. Mich. High School Athletic Ass'n.*, 459 F.3d 676, 680 (6th Cir. 2006).

B. Discussion

The *Cantrell* Plaintiffs asserted in their amended Complaint a constitutional challenge to § 26 grounded in a "political structure" equal protection analysis. (R 73, *Cantrell* Amended Complaint, ¶¶ 78-79). Premised on the Supreme Court's decisions in *Hunter* and *Seattle School District*, Plaintiffs argue that § 26 unconstitutionally restructures the political process because racial minorities, students or applicants from particular national origins, may not petition the faculty and administration at state universities and colleges to sustain or make changes in admissions and hiring practices that benefit or advantage these groups. Rather, they allege, racial minorities may only secure adoption of such benefits or

advantages based on racial status by mounting an extremely costly effort to amend the state constitution - the same process the proponents of § 26 used to secure its passage in the first instance. (R 73, *Cantrell* Amended Complaint, ¶¶ 78-79.) In examining these allegations and the evidence presented in opposition to Defendant Cox's dispositive motion, the District Court correctly determined "there are no material fact issues that require a trial on any of the claims, and the Court must find that Proposal 2 [art. 1, § 26] does not violate the United States Constitution."[FN13]

FN13. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 930.

1. The Supreme Court trilogy - *Hunter, Seattle*, and *Romer.*

In *Hunter,* the Akron city charter had been amended by the voters to provide that no ordinance regulating real estate on the basis of race, color, religion, or national origin could take effect until approved by a referendum. As a result of the charter amendment, a fair housing ordinance, adopted by the city council at an earlier date, was no longer effective. In holding the charter amendment invalid under the Fourteenth Amendment, the Supreme Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect."[FN14] Thus, whereas most ordinances regulating real property would take effect once enacted by the city council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle. As such, the charter amendment placed an impermissible, "special [burden] on racial minorities within the governmental process."[FN15]

FN14. *Hunter*, 393 U.S. at 389-390.

FN15. *Hunter*, 393 U.S. at 391.

Similarly, in *Seattle School District*, the Supreme Court invoked *Hunter* to strike down a Washington State initiative preventing local school boards from utilizing racially integrative busing practices. There the Court reasoned that the initiative "remove[d] authority to address a racial problem--and only a racial problem--from the existing decision making body, in such a way as to burden minority interests."[FN16]

FN16. *Seattle,* 458 U.S. at 474.

Finally, in *Romer v. Evans* the Supreme Court considered an amendment to the Colorado Constitution barring all state and local governments from allowing "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" to be the basis for a claim of "minority status, quota preferences, protected status or claim of discrimination."[FN17] The amendment invalidated certain local ordinances prohibiting discrimination on the basis of sexual orientation. The Colorado Supreme Court found the amendment unconstitutional. The Supreme Court affirmed, although based on a different rationale. The Court noted that the Colorado constitutional amendment "withdr [ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbid[ ] reinstatement of these laws and policies."[FN18] The Court then concluded that the amendment lacked a rational relationship to a legitimate governmental purpose since there was no factual context from which the Court could discern a relationship to legitimate state interests, but rather it was a classification of persons undertaken for its own sake, in violation of the Equal Protection Clause.[FN19]

FN17. *Romer*, 517 U.S. at 624. Although not technically a political structure equal protection case, *Romer* involved an amendment to a state constitution, as here, and discussed fundamental equal protection principles, pertinent to this case.

FN18. *Romer,* 517 U.S. at 627.

FN19. *Romer,* 517 U.S. at 635.

2. The District Court correctly held that the *Hunter, Seattle,* and *Romer* holdings are inapplicable to art. 1, § 26 because the amendment does not create an unequal burden on racial minorities to obtaining equal treatment or protection under the law.

The decisions in *Hunter, Seattle,* and *Romer* are inapplicable to § 26. The laws struck down in those cases prohibited or made it more difficult for minorities to seek *protection* from discrimination through the political process, thus, in effect using the political process to promote discrimination contrary to the Equal Protection Clause. Here, unlike the initiatives at issue in the *Hunter* line of cases, § 26 prohibits the State's universities and colleges from discriminating against, or in favor of, persons or groups based on their race or sex. This prohibition is not only compelled by § 26 but also by the Fourteenth Amendment's Equal Protection Clause.[FN20] The language and purpose of § 26 is to eliminate both discriminatory and preferential treatment in public contracting, public employment, and public education on account of race or sex.

FN20. See *Romer,* 517 U.S. at 637-640 (Scalia, J., dissenting)("The only denial of equal treatment [the majority] contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged 'equal protection' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.") See also *Equality Foundation of Greater Cincinnati, Inc v. Buchanan,* 128 F.3d 289 (6th Cir. 1997)(Affirming constitutionality of local ordinance that prohibited municipality from enacting legislation or policies that would accord gays and lesbians special status, privileges, or preferential treatment).

While the District Court agreed with Plaintiffs that § 26 did alter the political structure by making it more difficult to achieve race-conscious admissions or hiring policies than other types of beneficial legislation,[FN21] the District Court concluded that neither the *Hunter* line of cases nor the Fourteenth Amendment prohibited such a restructuring. On this the Court was persuaded by the distinction drawn by the United States Court of Appeals for the Ninth Circuit in *Coalition for Economic Equity v. Wilson,* which addressed the constitutionality of California's Proposition 209, after which Proposal 2 was modeled.[FN22]

FN21. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 956.

FN22. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), cert den 522 US 963; 118 S Ct 397; 139 L Ed 2d 310 (1997).

"[T]he distinction drawn by the Ninth Circuit in the Proposition 209 case between laws that protect against *unequal* treatment on the basis of race and those that seek *advantageous* treatment on the basis of race is one yielded by precedent."[FN23] The District Court quoted favorably from the Ninth Circuit:

FN23. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 957.

"Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms."[FN24]

FN24. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 957, quoting *Coalition for Economic Equity,* 122 F.3d at 708 (footnote omitted).

This Court in its preliminary analysis of this case on Defendant-Intervenor Russell's motion for stay also recognized this unequivocal reading of the *Hunter/Seattle* doctrine concluding that obstructions to gaining "protection from discrimination" and obstructions to gaining "racial preferences" implicate "fundamentally different concepts."[FN25] The District Court clearly and properly recognized this distinction in its substantive analysis of the Plaintiffs' claim and in addressing their post-judgment motion raising this specific issue.

FN25. *Granholm,* 473 F.3d at 251.

Further, the District Court acknowledged the Supreme Court's ruling in *Grutter v. Bollinger*, in which the Supreme Court affirmed the use of narrowly tailored race-based policies or practices with respect to the University of Michigan's Law School admissions, and the more recent case of *Parents Involved in Community Schools v. Seattle School Dist*. 7, in which the Court struck down school resegregation policies that were not narrowly tailored, but noted that "these decisions do not change the fact that affirmative action programs not mandated by the obligation to cure past discrimination are fundamentally different than laws intended to protect against discrimination."[FN26]

FN26. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 957.

The District Court left open the idea that if a plaintiff could demonstrate that racial preferences were required to combat discrimination in admissions or prevent resegregation, that plaintiff may have an as-applied claim, but that the *Hunter* line of cases do not "prohibit the State from banning programs that give an advantage on the basis of race as a remedy to combating other social disadvantages."[FN27] Thus, the District Court held:

FN27. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 957.

[T]hat Michigan may limit the ability of discrete groups to secure an advantage based upon a racial classification without offending the Fourteenth Amendment. Neither *Hunter, Seattle,* nor *Romer v. Evans* holds otherwise. Because the political restructuring effectuated by Proposal 2 does not offend the Equal Protection Clause by distancing racial minority groups from the means of obtaining equal protection, the plaintiffs' challenge to the measure based on these cases cannot prevail.[FN28]

FN28. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 957-958.

The District Court correctly decided this claim in the context of this significant equal protection precedent. Plaintiffs' claims on appeal are unpersuasive for the same reasons.

Indeed, this was the very reasoning applied by this Court, which drew these same distinctions and conclusions with respect to § 26 in the earlier decision on the motion for stay pending appeal in this case.[FN29] This Court noted that even if it were to consider § 26's "restrictions on racial preferences," Plaintiffs' political process claim would not succeed. The Court observed that the challenged enactments in *Hunter, Seattle,* and *Romer* "made it more difficult for minorities to obtain *protection from discrimination* through the political process; here, by contrast, Proposal 2 purports to make it more difficult for minorities to obtain *racial preferences* through the political process."[FN30] This Court found these concepts "fundamentally different."[FN31] The District Court's conclusion and this Court's observation that the outcome of the process cannot be divorced from the process itself for purposes of analyzing a *Hunter/Seattle* equal protection claim is consistent with both the purpose of the Equal Protection Clause itself, and the Supreme Court's reasoning in this line of cases. It is equal protection, not unequal treatment that is guaranteed.

FN29. *Granholm,* 473 F.3d at 250-251.

FN30. *Granholm,* 473 F.3d at 251.

FN31. *Granholm,* 473 F.3d at 251.

In Defendant-Intervenor Eric Russell's Proposed Brief on Appeal, he offers a persuasive analysis of this point that succinctly disposes of Plaintiffs' argument.[FN32] For example, in *Hunter,* Russell notes, the Court consistently described the housing ordinance at issue as one that burdened "those groups who sought the law's protection against racial, religious or ancestral discrimination;" that the law burdened "those who sought protection against racial bias"; that only laws to end housing discrimination were burdened by the offending ordinance; and that the offending ordinance "disadvantages those who would benefit from laws barring racial, religious, or ancestral discrimination."[FN33] Further, in *Seattle,* the Court placed great weight on the fact the "District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing"; that the offending law "was enacted because of, not merely in spite of, its adverse effects upon busing for integration"; and that the offending law burdened those seeking "elimination of *de facto* school segregation."[FN34] Thus, as the Ninth Circuit, the District Court and this Court have concluded, the burdened process was the search for equal treatment, not preferential treatment, which in and of itself is discriminating.

FN32. Although this Court has not ruled on Russell's motion to participate as a party or alternatively as an *amicus* in this appeal, he has submitted a Proposed Brief addressing this process/outcome issue raised by Plaintiffs. Significantly, this issue was not fully presented or briefed below. The *Cantrell* Plaintiffs did not fully argue this issue until their post-judgment motion. Defendants, including Russell, did not address it in their respective dispositive motions or responses and were not invited by the District Court to respond to the post-judgment motion. Defendant Cox urges this Court to consider Russell's well-crafted argument in its analysis of this issue to assure a complete briefing on this important constitutional claim.

FN33. *Hunter,* 393 U.S. at 390, 391.

FN34. *Seattle,* 458 US at 771, 474.

Moreover, this Court was not convinced that § 26 actually reallocated the political structure. Quoting the Supreme Court's decision in *Crawford v. Bd. of Education of City of Los Angeles*, this Court observed that "Proposal 2 is more akin to the 'repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place,' an action that does not violate the Equal Protection Clause,"[FN35] an observation entirely consistent with applicable precedent on this issue.

FN35. *Granholm,* 473 F.3d at 251, quoting *Crawford v. Bd. of Education of City of Los Angeles,* 458 U.S. 527, 538; 102 S. Ct. 3211; 73 L. Ed. 2d 948 (1982).

In *Crawford,* for example, the Supreme Court found constitutional an amendment to the California Constitution that prohibited state courts from ordering race-based student assignments except as a remedy for an equal protection violation. In addressing an equal protection challenge, the Court held that the amendment did not create a racial classification in violation of the Equal Protection Clause. "The simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[FN36] Because the prior panel's decision is fully consistent with the law, this Court should find it persuasive, and similarly conclude that Plaintiffs' claim fails on appeal.

FN36. *Crawford,* 458 U.S. at 539.

Indeed, the Ninth Circuit's decision in *Coalition for Economic Equity* is fully instructive in this case as well. In re-

jecting the identical political structure equal protection attack on California's Proposition 209, the Ninth Circuit asked the telling question, "Can a statewide ballot initiative deny equal protection to members of a group that constitute a majority of the electorate that enacted it?"[FN37] That Court answered, "No," stating:

FN37. *Coalition for Economic Equity,* 122 F.3d at 704.

When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather it prohibits all race and gender preferences by state entities.[FN38]

FN38. *Coalition for Economic Equity,* 122 F.3d at 707.

The same conclusion is required regarding § 26. Like the California case, Plaintiffs here challenge § 26 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. Impediments to preferential treatment do not deny equal protection.[FN39] Thus, Plaintiffs have no equal protection rights against a political obstruction to preferential treatment. As the Ninth Circuit noted, Plaintiffs have "no fundamental right to be free of the political barrier a validly enacted constitutional amendment erects."[FN40]

FN39. *Coalition for Economic Equity,* 122 F.3d at 708.

FN40. *Citizens for Equal Protection, et al v. Pruning,* 455 F.3d 859, 868 (8th Cir. 2006).

3. The distinction drawn by the District Court between impediments to seeking "equal treatment" and impediments to seeking "preferential treatment" is supported by the law.

Plaintiffs argue that the District Court erred in drawing a distinction between demands for equal treatment and demands for preferential treatment for purposes of distinguishing the *Hunter* cases, particularly the *Seattle* decision. *(Cantrell* Plaintiffs' Brief, pp 24-36).

Plaintiffs assert that the District Court "[b]y insisting that the *Hunter/Seattle* doctrine applies only to laws that impede efforts to obtain 'equal treatment' in the form of protection from discrimination, [ ] has erroneously imposed an outcome-based limitation on a *process*-based right." *(Cantrell* Plaintiffs' Brief, p 26). Plaintiffs complain that drawing this distinction is directly contrary to Supreme Court precedent in *Hunter* and *Seattle,* as well as *Grutter* and the *Parents Involved* decisions. (*Cantrell* Plaintiffs' Brief, pp 31-34).

Although the District Court did not address this issue in its opinion granting Defendant Cox's motion for summary judgment, the *Cantrell* Plaintiffs essentially raised the same issues in their motion to alter or amend the judgment. The *Cantrell* Plaintiffs asserted that the District Court misapplied *Hunter, Seattle,* and *Romer* "by failing to understand that those cases recognized a right to fairness in the political *process,* as opposed to entitlement to a particular *outcome*." (R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 4). The Plaintiffs contended that "to consider differently legislation that burdens, on the one hand, a group's interest in preferential treatment and, on the other hand, its interest in equal treatment is to inject a substantive component into the analysis" that is inconsistent with the Supreme Court's holdings. (R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 4).

The District Court disagreed, soundly rejecting this argument:
To acknowledge that there are limits to the *Hunter/Seattle* doctrine based on the nature of the legislative agenda that is

burdened is not to tear the doctrine from its moorings; in fact, the Supreme Court's decisions placed substantial weight on this variable. [R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 3.]

The District Court's analysis on this issue is similar to that presented above and clearly denotes a distinction by the Supreme Court, as argued previously, that both focuses on the "outcome" of the process as well as its purpose, i.e., equal treatment or preferential treatment.

In its analysis of this issue presented post-judgment, the District Court again reviewed *Hunter* and *Romer* and observed that the legislation at issue in both those cases had the effect of impeding demands for equal treatment, not preferential treatment. (R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, pp 4-5.) With respect to *Seattle* and its prohibition regarding desegregative busing, the District Court agreed that it could not quite make this same distinction "[b]ecause prohibiting integration (when it is not constitutionally mandated) is not tantamount to discrimination." (R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 5.)

However, the District Court noted that did not mean "any political restructuring with a racial focus that happens to burden minority interests is unconstitutional." Also significant to the District Court was the fact the initiative in *Seattle* was "fundamentally different than Proposal 2" because racial integration programs do not presumptively offend the Equal Protection Clause while affirmative actions programs might. (R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 5.) The District Court again found persuasive the Ninth Circuit, which addressed this concept:
"The district court perceived no relevant difference between the busing programs at issue in *Seattle* and the racial preference programs at issue here. We have recognized, however, that " 'stacked deck' programs [such as race-based 'affirmative action'] trench on Fourteenth Amendment values in ways that 'reshuffle' programs [such as school desegregation] do not." *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1387 (9th Cir.), cert. denied, 449 U.S. 1061, 101 S. Ct. 783, 66 L. Ed. 2d 603 (1980). Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights. *Id."* [R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 5, quoting *Coalition for Economic Equity*, 122 F.3d at 708 n16.]

The District Court recognized that certain aspects of the Ninth Circuit's decision had been "undermined" by the subsequent decisions in *Grutter*[FN41] and *Parents Involved*,[FN42] but that the "core principle" remained sound. (R 258, Opinion and order denying *Cantrell* Plaintiffs' Motion to Alter or Amend Judgment, p 6). Indeed, the Supreme Court has consistently questioned and criticized racial preferences and classifications as "odious," "pernicious," and "demean[ing]"and limited them to the narrowest of circumstances and compelling interests.[FN43] Indeed, in its more recent discussion of this issue in *Parents Involved In Community Schools,* the Supreme Court declared "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[FN44]

FN41. *Grutter v. Bollinger,* 539 U.S. 306; 123 S. Ct. 2325; 145 L. Ed. 2d 304 (2003).

FN42. *Parents Involved in Community Schools v. Seattle School District No* 7, 551 U.S. 701; 127 S. Ct. 2738; 168 L. Ed. 2d 508 (2007).

FN43. *Gratz v Bollinger,* 539 U.S. 244 at 270; 123 S. Ct. 2411; 156 L. Ed. 2d 257 (2003); *Grutter,* 539 U.S. at 326-328.

FN44. *Parents Involved in Community Schools,* 127 S. Ct. at 2768.

In *Parents Involved in Community Schools,* a plurality of the Supreme Court concluded the desegregation policies at

issue there, which sought to create or maintain racially balanced or proportional K-12 school districts, violated the Equal Protection Clause because they essentially were traditional, "crude" racial classifications.[FN45] The District Court acknowledged that the implication of the holding was that "desegregation programs may deprive individuals of legal rights" a conclusion Plaintiffs fail to overcome in this appeal. (R 258, Opinion and Order denying *Cantrell* Plaintiffs' motion to alter or amend judgment, p 6). However, *Parents Involved* did not invoke or discuss the political restructuring doctrine, and cannot be seen as somehow modifying the scope of the *Hunter* or *Seattle* cases.

FN45. *Parents Involved in Community Schools,* 127 S. Ct. at 2757-58, 2797 (Roberts, C.J., Kennedy, J., concurring). Chief Justice Roberts wrote an opinion in which Justices Scalia, Alito and Thomas joined. Justice Kennedy filed a separate opinion concurring with the Roberts opinion on narrow grounds, thus leading to a plurality opinion. The Supreme Court has explained, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Grutter,* 539 U.S. at 325 (*quoting Marks v. United States,* 430 U.S. 188, 193; 97 S. Ct. 990; 51 L. Ed. 2d 260 (1977).

Plaintiffs' reliance on *Grutter* in support of this claim is similarly misplaced. While the *Grutter* Court held that colleges and universities may still use racial classifications as a factor, among others, in school admissions, it continued to apply longstanding limitations. Thus, the school must establish a compelling state interest for using racial classifications as an admissions factor, and further, must establish that the classification is narrowly tailored to serve that interest.[FN46] The Supreme Court concluded that the University of Michigan law school had a compelling state interest for equal protection purposes in "attaining a diverse student body" and that the admissions practice was narrowly tailored to withstand constitutional challenge.[FN47]

FN46. *Grutter,* 539 U.S. at 326-328.

FN47. *Grutter,* 539 U.S. at 328.

Nowhere in *Grutter,* however, did the Supreme Court state or imply that universities and colleges must or should employ racial classifications, or that the failure to do so violates the Equal Protection Clause. Indeed, the *Grutter* Court specifically directed colleges and universities to look to "California, Florida, and Washington State, where racial *preferences* in admissions are prohibited by state law," to "draw upon the most promising aspects of these race-neutral alternatives as they develop," and warned that in 25 years, the Court expected that the use of racial preferences "will no longer be necessary."[FN48]

FN48. *Grutter,* 539 U.S. at 342-343 (emphasis added).

Acknowledging *Parents Involved*, and the import of the statements in *Grutter,* the District Court observed that while "desegregation is *required* in certain circumstances," the Supreme Court "has *never* held that affirmative action is required."[FN49] (R 258, Opinion and order denying *Cantrell* Plaintiffs' motion to alter or amend judgment, pp 5-6). The Court concluded that it was "reasonable to take account of this circumstance in interpreting the scope of the *Hunter/Seattle* doctrine." (R 258, Opinion and order denying *Cantrell* Plaintiffs' motion to alter or amend judgment, p 6). Plaintiffs' argument ignores this clear distinction that is consistently maintained in equal protection *Hunter/Seattle* precedent. As the Ninth Circuit noted:

FN49. *Grutter,* 539 U.S. at 341-343.

Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications - race and gender - must be readily available at the lowest level of government while preferences based on any other presumptively legitimate classification - such as wealth, age, or

disability - are at the mercy of statewide referenda.[FN50]

FN50. *Coalition for Economic Equity,* 122 F.3d at 708.

Plaintiffs' argument requires this Court to conclude that the *Hunter/Seattle* doctrine prohibits a state from limiting, even eliminating, preferential treatment based on presumptively unconstitutional classifications. In other words, a state's constitution must afford more than equal treatment, more than is guaranteed by the federal Equal Protection Clause. Acceptance of such a thesis must be rejected based on the overwhelming precedent to the contrary.

The District Court correctly rejected this thesis. Thereafter, the District Court also properly rejected Plaintiffs' arguments that its distinction drawn between legislation or initiatives that prohibit "preferential" treatment and those that deny "equal" treatment will be too difficult or too subjective for the courts to apply. Observing that courts do "not render decisions by assessing how useful they may prove to future practitioners or judges," the Court concluded that it would not "contradict its view of the law simply because the plaintiffs perceive that this view may be difficult to apply." (R 258, Opinion and order denying *Cantrell* Plaintiffs' motion to alter or amend judgment, p 6). With respect to Plaintiffs' argument that the distinction will be too subjective to apply, the District Court concluded:
Courts, just like individuals, may disagree on the propriety of affirmative action in public education for a host of reasons. In cases such as this, a court's objective assessment of the legal issues may even be at odds with its subjective analysis of sound policy. But the idea that affirmative action constitutes race-based preferential treatment is well established by Supreme Court precedent. Granted it may not be so clear in other contexts whether the burdened legislative agenda calls for preferential treatment (as opposed to equal) treatment. But courts deal with tough calls on a daily basis, and there is little doubt here that they be equal to the tasks to come. [R 258, Opinion and order denying *Cantrell* Plaintiffs' motion to alter or amend judgment, p 7 (citation omitted).]

This Court should agree. This case does not fit neatly within any of the Supreme Court's equal protection decisions. Section 26 is fundamentally different from the initiatives at issue in *Hunter, Seattle,* and *Romer* because it prevents racial minorities and others from using the political process to obtain *better* or *preferential* treatment under the law. Consistent with the *Seattle* Court, upon which Plaintiffs rely so heavily, this conclusion recognizes that not every attempt to address a racial issue will give rise to an impermissible racial classification.[FN51]

FN51. *Seattle,* 485 U.S. at 485.

Indeed, Justice Powell's dissent in *Seattle* expressed concern that the majority's opinion could be seen as invalidating attempts to prohibit affirmative action or preference policies by state and local governments.[FN52] Justice Powell observed that after the *Seattle* decision it was "unclear" if a State could set policy regarding race relations where a local government had "done 'more' than the Fourteenth Amendment requires."[FN53] Justice Powell commented that "[i]f local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene."[FN54] The *Seattle* majority eschewed this concern as a "misunderstanding" of its decision that had "nothing to do with the ability of minorities to participate in the process of self-government."[FN55] Thus, the *Seattle* Court did not intend to foreclose the ability of States to discontinue or repeal the use of racial preferences at a statewide level, as Michigan did here.[FN56]

FN52. Intervening Defendant Eric Russell raised this point below in support of his motion for summary judgment. (R 202, Russell's Motion for Summary Judgment, pp 5-6).

FN53. *Seattle*, 485 U.S. at 498 n. 14 (Powell, J., dissenting).

FN54. *Seattle*, 485 U.S. at 498 n. 14 (Powell, J., dissenting).

FN55. *Seattle,* 485 U.S. at 480 n 23.

FN56. This point is further bolstered by the fact that the author of *Seattle*, Justice Blackmun, expressly stated in *Crawford* that he could not "[r]ule for petitioners on a *Hunter* theory [because it] seemingly would mean that statutory affirmative-action or antidiscrimination programs could never be repealed." *Crawford,* 458 U.S. at 546-547 (Blackmun, J., concurring).

The Equal Protection Clause does not guarantee a right to *better* treatment based on race or gender - it mandates "*equal* protection of the laws."[FN57] Where a State is not constitutionally obligated to offer affirmative action programs or similar policies, it may, as the people of Michigan did, choose to prohibit the use of such policies without violating equal protection principles. This is the clear import of the *Grutter* decision, which contains the Supreme Court's most recent express pronouncements with respect to affirmative action or preference policies. The logical progression then is that if the State can prohibit outright the use of such policies, it can certainly impede the political process being used to obtain a reversal of that decision without offending the Equal Protection Clause.

FN57. U.S. Const. amend. XIV, § 1 (emphasis added).

The District Court's decision that Plaintiffs' equal protection political process claim failed is consistent with the law, and the Court properly granted summary judgment in favor of Defendant Cox. This Court should find that decision persuasive and affirm.

4. Additionally, this Court should conclude that § 26 is constitutional because the university admissions process is not a political process for purposes of applying *Hunter* and its progeny.

The District Court and Plaintiffs presumed for purposes of this case, that a public university admissions process, more specifically, the development of admissions factors, is a political process subject to the *Hunter/Seattle* equal protection analysis. Defendant argued below, the development of admissions factors, and the ability of individuals and groups to submit requests to university officials for consideration of specific criteria and/or factors is not a "political process" within the meaning of this narrow equal protection claim. The District Court summarily rejected this argument yet provided no substantive analysis to support its conclusion.[FN58] Defendant Cox maintains that the university admissions process is not a political process as contemplated in the *Hunter* line of cases.

FN58. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 955-956.

Significantly, the consideration and development of admissions factors to public universities or colleges does not involve the legislative process; does not have the force of law; involves a mix of faculty, administrators and Board members; is limited to the specific university or college; and is generally not open to public scrutiny. For example, at the Wayne State University Law School, a faculty committee develops the "Discretionary Admissions Criteria" and the ultimate decision to adopt or change admissions criteria rests with the faculty. Students who are not on the student board, prospective students and the public are not eligible to vote on admissions criteria. The public may attend meetings at which admissions criteria are discussed and may comment if they provide advance notice by submitting a card requesting that opportunity. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Motion, Ex 1; Wu dep, pp 8, 30-32, 188-191) The admissions goal of the law school is to continue its commitment to achieving a substantial representation of qualified minority persons and qualified persons from a disadvantaged background. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Motion, Ex 1; Wu dep, p 31).

Similarly, the University of Michigan's (U of M) one goal of the undergraduate admissions policy for the LS&A and Engineering Colleges is diversity. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Motion Ex 2; Spencer dep, p 225). The faculty are the primary architects of all the admissions criteria and protocols. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Mo-

tion Ex 2, p 235). These colleges have adopted a holistic review process that involves multiple reviews looking at many different factors. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Motion Ex 2, pp 17, 38) There is no process by which members of the public, prospective students or others who are not faculty or part of the college, can comment or submit suggestions for admissions criteria. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Motion Ex 2, pp 234-235). The same practices are also followed at U of M's Law School and U of M's Medical School. That is, the faculty develop and adopt the admissions criteria and there is no formal process by which the public "petitions" or submits suggestions for consideration. (R 201, Defendant Cox's Memorandum in Support of Motion to Dismiss; R 205, Exhibits to Cox Motion Ex 3, Zeafross dep, pp 13-14; 208-213; Ex 4, Ruiz dep, pp 13-17, 85-86, 89-94). Thus, the selection criteria and methodology for reviewing and adopting changes to the admissions process, and criteria that defendant universities use in selecting its students is not itself a political process, but rather, is an academic one. The mere fact a public university is engaged in the process should not elevate it to the level of a "political process."

Axiomatically, limitations imposed by the State through its Constitution on the granting of preferential treatment by these public universities through their admissions criteria does not alter or reallocate the political process. The Ninth Circuit concluded as much in the *Coalition for Economic Equity* case when it observed:
When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather it prohibits all race and gender preferences by state entities.[FN59]

FN59. *Coalition for Economic Equity,* 122 F3d at 707.

Moreover, as noted above, this Court was not convinced that § 26 actually reallocated the political structure in examining the issue in the context of the stay motion. Quoting from the Supreme Court's decision in *Crawford v Bd. of Education of City of Los Angeles,* this Court observed that "Proposal 2 is more akin to the 'repeal of race-related legislation or policies that were not required by the Federal constitution in the first place,' an action that does not violate the Equal Protection Clause."[FN60]

FN60. *Granholm*, 473 F3d at 251, quoting *Crawford,* 485 U.S. at 538.

Also critical to this analysis is the fact the reallocation of political power must impose an impermissible burden on a unique minority constituency. Thus, an objectionable reallocation of power must involve more than simply elevating the decision-making authority to a higher level of government. The reallocation of power must be specifically structured "in such a way to burden minority interests."[FN61] Again, the District Court concluded in summary fashion that § 26 did impose such a burden on racial minorities in the State contrary to this Court's earlier conclusion on this very issue.

FN61. *Hunter,* 393 U.S. at 392-393; *Seattle,* 458 U.S. at 474.

In its earlier decision on the stay motion, this Court recognized that § 26 does not create an unequal political burden on minorities or women. "No matter how one chooses to characterize the individuals and classes benefited or burdened by this law, the classes burdened . . . according to plaintiffs - women and minorities - make up a majority of the Michigan population."[FN62] The *Hunter* Court specifically observed that the "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."[FN63] Thus, this Court determined that "unlike the *Hunter* line of cases . . . Proposal 2 does not single out minority interests for this alleged burden but extends it to a majority of the people of the State."[FN64] The Ninth Circuit also accepted this premise in its analysis of California's Proposition 209.[FN65]

FN62. *Granholm,* 473 F.3d at 251.

FN63. *Hunter*, 393 U.S. at 391.

FN64. *Granholm,* 473 F.3d at 251.

FN65. *Coalition for Economic Equity,* 122 F.3d at 705.

In an effort to circumvent this substantial burden, Plaintiffs instead attempt to show that the referendum process those who seek to amend or repeal § 26 must now engage in, imposes a "unique burden" on the proponents of racial preferences. Yet, § 26 does not prohibit racial minorities and women from advocating or urging colleges and universities to create practices promoting diversity within the admissions or hiring process. These individuals are free to support race-neutral nondiscrimination policies. In fact, such nondiscrimination policies are entirely consistent with § 26. Section 26 prohibits the State from discriminating, unlike the laws and policy in the *Hunter* line of cases, which eliminated or inhibited government protection against discrimination. Moreover, Plaintiffs may also seek to repeal § 26 through the petition process - the same process the proponents used to secure its passage. The fact that such a process is challenging does not make it any less available to these Plaintiffs than it is for any other group desiring to effect beneficial change at a statewide level. Further, as argued by Intervenor Russell, in his proposed brief, the referendum process is not as daunting and onerous as asserted.

First, the fact that poling data in this area is unreliable, as asserted by Plaintiffs, is irrelevant, as such data would be equally unreliable for opponents and proponents alike. Second, Plaintiffs' claim financial backing would be difficult to secure is also suspect given the amount of contributions from a wide-array of interests and business made in opposition to Proposal 2. The remaining issues raised by Plaintiffs are nothing more than mere speculation. (Russell Proposed Brief, pp 38, 39). Thus, Plaintiffs' argument fails and it was properly rejected by the District Court, which correctly granted summary judgment for Defendant Cox on this political process challenge.

5. In the alternative, this Court should conclude that § 26 is constitutional because the *Cantrell* Plaintiffs failed to show that the passage of § 26 resulted from a discriminatory intent or purpose.

Although the District Court rejected this argument, Defendant maintains that in order to succeed on their political structure theory equal protection claim, Plaintiffs had to show that § 26 was passed for a discriminatory purpose.

Under a political structure analysis, reallocation of political decision-making violates equal protection only when there is evidence of purposeful racial discrimination, similar to a conventional equal protection analysis.[FN66] Indeed, the Supreme Court has observed that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[FN67] It is no different for political structure claims. In *Seattle,* the Court expressly stated that the challenged initiative "was effectively drawn for racial purposes" and was enacted " 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration."[FN68] Reviewing *Seattle,* the Court effectively required a showing that the initiative was "drawn for racial purposes," and that "the practical effect of [the initiative] [was] to work a reallocation of power of the kind condemned in *Hunter.*"[FN69]

FN66. *Seattle,* 458 U.S. at 484-485; *Valieria v. Davis, et al,* 307 F.3d 1036, 1040 (9th Cir. 2002).

FN67. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194; 123 S. Ct. 1389; 155 L. Ed. 2d 349 (2003).

FN68. *Seattle,* 458 U.S. at 471 (quoting *Feeney*, 442 U.S. at 279).

FN69. *Seattle,* 458 U.S. at 471, 474. See also *Buckeye,* 538 U.S. at 196, 197 (Observing that both *Hunter* and *Seattle* relied on findings of "discriminatory intent in a challenge to an [ ] enacted initiative.").

With respect to showing discriminatory intent or purpose in the context of facially neutral referendums or initiatives, such as § 26, this Court held in *Arthur v. Toledo* that such an initiative only violates equal protection if racial discrimination was "the only possible rationale" behind its passage.[FN70] Accordingly, Plaintiffs need to demonstrate that the only possible rationale behind § 26 was race discrimination, which they did not and could not do here.

FN70. *Arthur v. Toledo*, 78 F.2d 565, 573-574 (6th Cir. 1986); *Equality Found.,* 128 F3.d at 294 n.4; *Clarke v. City of Cincinnati,* 40 F.3d 807, 815 (6th Cir. 1994) (rejecting equal protection challenge to a referendum based on *Arthur)*. This Court has indicated that *Arthur* is still good law. See *Buckeye Cmty. Hope Found.,* 263 F.3d 627, 637 n.2. (6th Cir. 2001), rev'd 538 U.S. 188 (2003).

As the District Court concluded with respect to the *Coalition* Plaintiffs' conventional equal protection claim, it could not say under *Arthur* "that the only purpose of Proposal 2 is to discriminate against minorities," since both the sponsor of Proposal 2, Ward Connerly, and one of its leading proponents, Jennifer Gratz, posited nondiscriminatory purposes for the amendment.[FN71]

FN71. *Coalition To Defend Affirmative Action,* 539 F. Supp. 2d at 951-952.

Thus, Plaintiffs in fact could not make any showing of purposeful discrimination in support of their claim. Indeed, no such showing is possible as § 26 does not obstruct minorities or women from seeking protection against unequal treatment unlike the ordinance reviewed in *Hunter* or the student assignment and desegregation policy at issue in *Seattle*. The language and purpose of § 26 is to eliminate preferential treatment in public contracting, public employment, and public education. Without a showing of discriminatory intent as required by *Hunter* and *Seattle,* Plaintiffs' political structure claim fails, and this Court may affirm the District Court's grant of summary judgment on this basis as well.

Conclusion and Relief Sought

For the reasons set forth above, Intervening Defendant-Appellee Attorney General Michael A. Cox respectfully requests that this Honorable Court affirm the District Court's grant of summary judgment in favor of Defendant.

Appendix not available.

Chase CANTRELL, et al, Plaintiffs-Appellants, v. Michael COX, Michigan Attorney General, Intervenor-Defendant-Appellee.
2009 WL 2390019 (C.A.6) (Appellate Brief)

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