UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*, Plaintiffs, v. JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district, Defendants.	Case No. 06-15024 Hon. David M. Lawson CONSOLIDATED CASES This filing pertains to ALL CASES

- and -

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

DEFENDANT-INTERVENOR ERIC RUSSELL'S MOTION FOR SUMMARY JUDGMENT

Defendant-Intervenor Eric Russell respectfully moves this Court for summary judgment on all claims brought by the Coalition Plaintiffs, *see* Doc. 96, and the Cantrell Plaintiffs, *see*

Doc. 73. For the reasons stated in the attached memorandum, Defendant-Intervenor Eric Russell and Defendant-Intervenor Attorney General Cox ("Defendants") are entitled to judgment as a matter of law on these claims.

Pursuant to Rule 7.1 of the Local Rules of the U.S. District Court for the Eastern District of Michigan, Defendant-Intervenor attempted to confer by email with counsel for the parties regarding the relief sought in this motion. As of this filing, no party responded to Defendant-Intervenor's query.

MEMORANDUM IN SUPPORT OF DEFENDANT-INTERVENOR ERIC RUSSELL'S MOTION FOR SUMMARY JUDGMENT

Issues Presented

1. Whether Defendants are entitled to summary judgment on the Coalition and Cantrell Plaintiffs' claims that Proposal 2, Mich. Const. art. I, § 26, violates the Equal Protection Clause as interpreted in the Supreme Court's "political-structure" cases, such as *Hunter v. Erickson* and *Washington v. Seattle School Dist. No. 1*.
2. Whether Defendants are entitled to summary judgment on the Coalition Plaintiffs' claim that Proposal 2 violates the Equal Protection Clause because of intentional discrimination.
3. Whether Defendants are entitled to summary judgment on the Coalition Plaintiffs' claim that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964.
4. Whether Defendants are entitled to summary judgment on the Coalition Plaintiffs' claim that Proposal 2 is preempted by Title IX of the Education Amendments of 1972.
5. Whether Defendants are entitled to summary judgment on the Coalition Plaintiffs' claim that Proposal 2 violates the First Amendment rights of the University Defendants, of which they are alleged "benficiaries."

Leading Authorities

U.S. CONST. amend. XIV
Hunter v. Erickson, 393 U.S. 385 (1969)
Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)
Title VI, 42 U.S.C. §§ 2000d *et seq.*
Title IX, 20 U.S.C. §§ 1681 *et seq.*
U.S. CONST. amend. I
Coalition To Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006)

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Statement and Argument

On November 8, 2006, the voters of Michigan passed "Proposal 2," a ballot initiative that guarantees equal treatment to all citizens, regardless of their race, sex, color, ethnicity, or national origin. *See* MICH. CONST. art. I, § 26(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."); *id.* § 26(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."). Soon thereafter, these consolidated lawsuits were filed, each challenging Proposal 2 on the ground that it violates the Equal Protection Clause. To state the premise of these claims is to refute them. Guaranteeing equal protection cannot violate equal protection—otherwise, the Equal Protection Clause is at war with itself.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Moross Ltd. P'ship v. Eckenstein Capital, Inc.*, 466 F.3d 508, 515 (6th Cir. 2006) ("Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law."). For the reasons stated below, Defendants satisfy this standard with respect to all of Plaintiffs' claims.

I. Defendants Are Entitled To Summary Judgment On Plaintiffs' Equal Protection Claims Based On Political Structure.

Both the Cantrell Plaintiffs and the Coalition Plaintiffs claim that Proposal 2 violates the Equal Protection Clause by forcing certain protected groups seeking "beneficial legislation" to "face a completely different and much more onerous political process than do those seeking beneficial legislation based on other characteristics." Doc. 73, ¶ 60, at 18 (Cantrell Pl.); *see also id.* ¶¶ 57-58 (citing *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)). The Cantrell Plaintiffs allege this claim only on behalf of "racial minorities," *see id.* ¶ 60, while the Coalition Plaintiffs allege two similar claims, on behalf of "racial and national minorities," Doc. 96, ¶¶ 116-122 (Count Two), and "women," *id.* ¶¶ 131-36 (Count Four). For the reasons stated below, these claims lack merit.

As an initial matter, the Sixth Circuit's opinion staying the stipulated injunction initially entered in this case has already rejected, preliminarily, Plaintiffs' argument that *Hunter*, *Seattle*, and *Romer v. Evans*, 517 U.S. 620 (1996), support their claim that Proposal 2 violates the Equal Protection Clause. *See Coalition To Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250-51 (6th Cir. 2006) (discussing these three cases). In determining that the Coalition Plaintiffs had no likelihood of establishing an equal protection violation in their challenge to Proposal 2, the Court unequivocally explained that these cases are inapplicable, as a matter of law, to this dispute:

> In all three cases, however, the [Supreme] Court determined that the laws at issue burdened minority interests in the political process in a way that Propos[al] 2 does not.… 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. These are fundamentally different concepts. The *Hunter*, *Seattle* and *Romer* decisions,

> moreover, objected to a State's impermissible attempt to reallocate political authority. Instead of reallocating the political structure in the State of Michigan, 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.

Coalition To Defend Affirmative Action, 473 F.3d at 250-51 (emphases in original) (citations and quotation marks omitted). A review of the cases in the political-structure strand of the Supreme Court's equal protection doctrine, and of other relevant case law, confirms the Sixth Circuit's conclusive determination that *Hunter* and its progeny do not support Plaintiffs' claims.

A. Plaintiffs' Race-Based *Hunter* Claims Should Be Dismissed As A Matter Of Law.

In *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), the Ninth Circuit considered similar challenges to California's Proposition 209, which served as the model for Michigan's Proposal 2. The persuasive and thoroughgoing analysis of the Ninth Circuit's opinion is therefore equally applicable here.

Like the Sixth Circuit's stay opinion in this case, *see* 473 F.3d at 249-50, the Ninth Circuit began its analysis by noting that as a matter of conventional equal protection analysis, a state law prohibiting racial and gender discrimination is undoubtedly constitutional since the central purpose of the Equal Protection Clause " 'is the prevention of official conduct discriminating on the basis of race.' " 122 F.3d at 701-02 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *compare* 473 F.3d at 249. Indeed, the ultimate goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citation and footnote omitted). Therefore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's

guarantee of equal protection." *Adarand Constructors v. Pena*, 515 U.S. 200, 229-230 (1995). This principle obtains with equal force for minorities and nonminorities. *Gratz v. Bollinger*, 539 U.S. 240, 270 (2003).

Both Proposal 2 and California's Proposition 209 amended state constitutions "simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender." 122 F.3d at 702. As the Ninth Circuit reasoned: "Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence." *Id.* The Sixth Circuit came to a similar conclusion: "In contending that the Equal Protection Clause compels what it presumptively prohibits, plaintiffs face an uphill climb." 473 F.3d at 248.

Confronting the plaintiffs' reliance on *Hunter* and like cases, both the Sixth Circuit and the Ninth Circuit properly concluded that this line of authority does not invalidate measures such as Proposition 209 and Proposal 2 that directly prohibit racial and gender discrimination, rather than making it more *difficult* to prohibit such discrimination. The Supreme Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford v. Board of Educ.*, 458 U.S. 527, 538 (1982). In *Crawford*, the Supreme Court considered an amendment to the California Constitution that prohibited state courts from ordering race-based student assignments except as a remedy for a specific equal protection violation. *Id.* at 532. In the face of an equal protection challenge similar to that raised here by Plaintiffs, the Supreme Court held that the amendment did not employ a racial classification and thus did not violate 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." *Id*. at 539. The Supreme Court held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Id*. at 538; *see also Coalition To Defend Affirmative Action*, 473 F.3d at 251 ("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.") (citation and quotation marks omitted). Indeed, Proposal 2 is far *more* an "equal-protection virtue," 473 F.3d at 249, than was the legislation at issue in *Crawford*. Far from constituting the "repeal or modification of desegregation or antidiscrimination laws," *Crawford*, 458 U.S. at 539, Proposal 2 *is itself an antidiscrimination law*.

In relying on *Hunter* and *Seattle*, Plaintiffs thus imply that *any* effort by the state to treat racial and gender issues differently from other classifications constitutes an impermissible classification that triggers application of the *Seattle* doctrine. But as the Sixth and Ninth Circuits explained in detail, *Seattle* and like cases are fully consistent with a statewide ban on state-sponsored racial discrimination. In *Seattle* itself, the Supreme Court recognized that the *Hunter* doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." *Seattle*, 458 U.S. at 485. Justice Powell's *Seattle* dissent, as if directly forecasting the adoption of Proposal 2, argued that the majority opinion could be misconstrued to invalidate statewide bans on affirmative action programs by state and local agencies:

> After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than

> the Fourteenth Amendment requires. *If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene*.

Seattle, 458 U.S. at 498 n.14 (Powell, J., dissenting) (emphasis added). The majority responded to this argument by explaining that it "evidence[s] a basic misunderstanding of our decision. . . . [I]t is evident . . . that *the horribles paraded by the dissent*, post, at 498-99 n.14—*which have nothing to do with the ability of minorities to participate in the process of self-government*—are *entirely unrelated* to this case." *Id*. at 480 n.23 (emphases added). Thus, the Court's opinion in *Seattle* plainly stated that it did not in any way foreclose the ability of states to address, and repeal, the use of racial preferences by local or subsidiary governmental units through statewide efforts. Moreover, in his concurrence in *Crawford*, Justice Blackmun, the author of *Seattle*, explicitly stated that he could not "rul[e] for petitioners on a *Hunter* theory [because it] seemingly would mean that *statutory affirmative-action* or antidiscrimination programs never could be repealed." *Crawford*, 458 U.S. at 546-47 (Blackmun, J., concurring) (emphasis added).

In *Coalition For Economic Equity*, the Ninth Circuit correctly relied on this express limitation in *Seattle* itself in upholding Proposition 209. The Ninth Circuit reasoned:

> 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.

122 F.3d at 707.

The Ninth Circuit went on to explain that even if a law does restructure the political process, it "can only deny equal protection if it burdens an individual's right to equal treatment." *Id*. The Supreme Court has made clear that "[a] denial of equal protection entails, at a minimum, a classification that treats individuals unequally." *Id.* (citing *Adarand*, 515 U.S. at 223). Here, both sets of Plaintiffs rest their claim of injury on their inability to obtain racially *preferential* treatment. *See* Doc. 73, ¶ 60; Doc. 96, ¶¶ 116, 132. But, as the Ninth Circuit held, "[i]mpediments 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." *Id*. at 708 (footnote omitted). And, as quoted above, the Sixth Circuit made precisely the same point in rejecting the Coalition Plaintiffs' reliance on the *Hunter* line of political-structure cases: "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. These are fundamentally different concepts." 473 F.3d at 251 (emphases in original).

In short, both federal appellate courts to consider the question have determined that *Hunter* and *Seattle* apply only where the political restructuring in question makes it more difficult for the challenging minority to receive *protection from adverse treatment*. Where, as here, the minority would avail itself of the allegedly less burdensome political process in order to

seek *unequal* protection, in the form of racially *preferential* treatment, there is no violation of the Equal Protection Clause.

For these reasons, *Romer v. Evans*, 517 U.S. 620 (1996), is inapplicable to Proposal 2 as well. As the Sixth Circuit has explained, the Colorado law at issue in *Romer* "could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of government for any type of victimization or abuse which they might suffer by either private or public actors." *Equality Found. v. Cincinnati*, 128 F.3d 289, 296 (6th Cir. 1997). Indeed, "Colorado Amendment 2 ominously threatened to reduce an entire segment of the state's population to the status of virtual non-citizens (or even non-persons) without legal rights under any and every type of state law. . . ." *Id.* Thus, *Romer* confirms, rather than undermines, the long-standing principle that denials of equal protection involve classifications that treat individuals differently. *See also Coalition For Econ. Equity*, 122 F.3d at 707-08 ("In *Romer,* Colorado's Amendment 2 denied homosexuals the ability to obtain 'protection against discrimination,' thus classifying homosexuals 'not to further a proper legislative end but to make them unequal to everyone else.' ") (citation omitted); *Coalition To Defend Affirmative Action*, 473 F.3d at 250 ("*Romer* struck down an amendment to the Colorado constitution that prohibited local governments from acting to protect homosexuals from discrimination, an amendment that imposed a special disability upon homosexuals alone.") (citation, alteration, and quotation marks omitted).

Furthermore, nothing in the Supreme Court's decisions in *Grutter* and *Gratz* provides any support for the Plaintiffs' political-structure claims. In those cases, the Supreme Court took great

pains to emphasize that intentional racial discrimination by state actors—*i.e.*, the denial of admission to non-minorities based on their race—is both extraordinary and presumptively invalid. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("Because 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,' *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting), our review of whether such requirements have been met must entail ' "a most searching examination." ' *Adarand, supra*, at 223 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.))."). In its stay opinion in this case, the Sixth Circuit again confirmed this interpretation:

> *Grutter* never said, or even hinted, that state universities *must* do what they barely *may* do. Otherwise: the Court would not have directed state universities to look to "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law," to "draw on the most promising aspects of these race-neutral alternatives as they develop," 539 U.S. at 342; it would not have quoted in the next line of the opinion Justice Kennedy's concurrence in *United States v. Lopez*, 514 U.S. 549, 581 (1995), to the effect that "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"—such as looking for race-neutral methods of seeking diverse student bodies; and it would not have said that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," *id.* at 343. Surely a State may offer more equal protection than the Fourteenth Amendment requires, and surely a State may end racial preferences some years before they must do so. In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification.

473 F.3d at 249 (emphases in original) (citation omitted). In short, nothing in the Supreme Court's Michigan cases remotely undermines the proposition that race-based classifications are *tolerated* by the equal protection only in specifically defined and temporally limited circumstances; they are never *mandated*.

B. The Cantrell Plaintiffs' *Hunter* Claim Is Defective For Failure To Plead Discriminatory Intent.

In addition to the fatal defects described above, the Cantrell Plaintiffs' political-structure claim suffers from an additional irremediable deficiency: They fail to plead that the passage of Proposal 2 resulted from *discriminatory intent*. It is a fundamental principle of equal protection doctrine that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003) (internal quotation marks omitted); *see also Washington v. Davis*, 426 U.S. 229 (1976). The Supreme Court's political-structure cases are no exception to this rule. In *Seattle*, for example, the Court took pains to establish 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." 458 U.S. at 471 (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). The Court thus required *both* a showing that "the initiative was effectively drawn for *racial purposes*," and—"*also*"—that "the *practical effect* of [the initiative] is to work a reallocation of power of the kind condemned in *Hunter*." *Id.* at 471, 474 (emphases added). *See also Buckeye*, 538 U.S. at 196, 197 (noting that both *Hunter* and *Seattle* relied on findings of "discriminatory intent in a challenge to an ultimately enacted initiative").

Though the Cantrell Plaintiffs' complaint attempts to allege that the "practical effect of [Proposal 2] is to work a reallocation of power of the kind condemned in *Hunter*," 458 U.S. at 474; *see also* Doc. 73, ¶¶ 47-56 (alleging "Political Burdens Under Proposal 2"), their complaint is devoid of any allegation that Proposal 2 "was effectively drawn for racial purposes" and was "enacted because of, not merely in spite of, its [alleged] adverse effects" on racial minorities.

458 U.S. at 471 (internal quotation marks omitted). As such, it draws a complete blank on the discriminatory-intent requirement of *Hunter* and *Seattle*.[1] *See* Doc. 73, ¶¶ 59-61. For these reasons, the Cantrell Plaintiffs' political-structure claim is facially deficient.

C. The Coalition Plaintiffs' Gender-Based *Hunter* Claim Should Be Dismissed As A Matter Of Law.

For all the reasons stated above, the Coalition Plaintiffs' *Hunter* claim that Proposal 2 has injected "*gender* discrimination in[to] the structure of government," Doc. 96, at 25 (emphasis added), must likewise fail as a matter of law. As the Sixth Circuit recognized in its stay opinion in this case, it is, if anything, *more* difficult for Plaintiffs to make out a gender-based equal protection claim than a race-based claim: "Much the same is true of classifications based on gender.… If the Equal Protection Clause gives 'heightened' scrutiny to such distinctions, a State acts well within the letter and spirit of the Clause when it eliminates the risk of any such scrutiny by removing gender classifications altogether in its admissions programs." 473 F.3d at 249-50.

This gender-based *Hunter* claim is legally meritless for another reason as well. *Hunter* rested heavily on the notion that the additional referendum requirement for anti-discrimination legislation "place[d] special burdens on racial minorities within the governmental process," 393 U.S. at 391, precisely because they were *numerical* minorities—there were *fewer* of them: "The majority needs no protection against discrimination and if it did, a referendum might be

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[1] Moreover, even if the *Cantrell* complaint had included such allegations, they would undoubtedly have fallen short of the stringent standards for showing discriminatory intent in challenges to referendum elections, as established in *Arthur v. Toledo*, 782 F.2d 565, 573-74 (6th Cir. 1986). For the reasons stated below in Part II.A, the Coalition Plaintiffs' allegations of intentional discrimination likewise fall far short of satisfying the *Arthur* standard. Because the Coalition Plaintiffs have not alleged, and cannot prove, discriminatory intent within the meaning of *Arthur*, both their *Hunter* claims (Counts Two and Four) and their intentional discrimination claim (Count One) are equally defective as a matter of law. *See infra* Part II.A.

bothersome but no more than that." *Id.* *See also Seattle*, 458 U.S. at 470 ("[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action."). This rationale, however, has no application to a group that is, in absolute numbers and voting power, equal to or greater than any other group in the State of Michigan. Women in Michigan are by themselves a numerical voting majority, not a numerical minority.[2]

Similarly, the Sixth Circuit acknowledged that this numerical reality undermined the Coalition Plaintiffs' reliance on the political-structure cases—and concluded that, since women and racial minorities *combined* comprise a clear numerical majority of Michigan voters, Proposal 2 was valid as applied to *both* groups:

> Unlike the laws invalidated in *Hunter*, *Seattle* and *Romer*, Proposal 2 does not burden minority interests and minority interests alone. The proposal prohibits the State from discriminating against or granting preferential treatment to individuals on the basis of "race, sex, color, ethnicity, or national origin." No matter how one chooses to characterize the individuals and classes benefited or burdened by this law, the classes burdened by the law according to plaintiffs—women and minorities—make up a majority of the Michigan population.… Unlike the *Hunter* line of cases, then, Proposal 2 does not single out minority interests for this alleged burden but extends it to a majority of the people of the State.

473 F.3d at 250-51 (citation omitted); *cf. Coalition For Economic Equity*, 122 F.3d at 705 n.13 ("[The] argument that *Hunter* and *Seattle* do not extend to gender-based laws because women themselves constitute a majority of the electorate is … compelling."). Because the combined voting strength of women and minorities—the "classes burdened by the law according to [the

[2] For example, the U.S. Census Bureau reports that, in 2005, women comprised 50.8 percent of the population of Michigan. *See* http://quickfacts.census.gov/qfd/states/26000.html. The court may take judicial notice of this fact, which is not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 387 F.3d 468, 472 n.1 (6th Cir. 2004).

Coalition] plaintiffs"—constitutes a clear majority of the political power in Michigan, both the race- and gender-based *Hunter* challenges to Proposal 2 must fail.

II. Coalition Plaintiffs' Intentional Discrimination Claim Fails As A Matter Of Law.

The Coalition Plaintiffs also assert an equal protection violation based, apparently, on the allegation that Proposal 2 was motivated by an invidious purpose of depressing the enrollments of women and minorities at Michigan's public universities: "Proposal 2 has as its primary purpose the elimination of the desegregation plans that have resulted in the admission of significant numbers of black, Latino/a, and Native American students and of women students into the defendant universities." Doc. 96, ¶ 106; *see also id.* ¶¶ 106-11 (Count One). Defendants are entitled to judgment on this claim because Plaintiffs are foreclosed by law from establishing either the discriminatory intent or the discriminatory effect required to make out an equal protection claim.

A. Plaintiffs Are Foreclosed By Law From Showing Discriminatory Intent.

First, Plaintiffs' allegations that Proposal 2's "primary purpose" was invidious and thus that it "violates the Equal Protection Clause of the Fourteenth Amendment by intentionally discriminating against black, Latino/a, Native American and women students," Doc. 96, ¶¶ 106, 111, are squarely foreclosed by Sixth Circuit precedent. Plaintiffs concede that Proposal 2 was passed by a referendum of Michigan citizens. *Id.* ¶ 8. And it is indisputable that Proposal 2, like the Equal Protection Clause itself, is facially neutral; it equally bans *all* discrimination or preferential treatment on the basis of race, gender, color, ethnicity, or national origin. *See* MICH. CONST. art. I, § 26. In the Sixth Circuit, however, a facially neutral provision enacted by citizen

referendum violates the equal protection clause only if racial discrimination *was the only possible motivation behind the referendum results*:

> [N]either the Supreme Court nor this Court has ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results…. If courts could always inquire into the motivation of voters even when the electorate has an otherwise valid reason for its decision, … [opponents of the measure] could always introduce race as an issue in the referendum election.… We hold that absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context.

Arthur v. Toledo, 782 F.2d 565, 573-74 (6th Cir. 1986); *see also Equality Found. v. Cincinnati*, 128 F.3d at 294 n.4 (6th Cir. 1997) ("[A] reviewing court in this circuit may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum. Instead, the court must consider all hypothetical justifications which potentially support the enactment."); *Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994) (relying on *Arthur* and rejecting an equal protection challenge to a referendum where "there were in fact neutral explanations" for the voters' support of the provision).[3]

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[3] To be sure, a later decision of the Sixth Circuit purported to "critique" *Arthur* on the ground that it was in tension with *Seattle*. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 637 n.2 (6th Cir. 2001), *rev'd*, 538 U.S. 188 (2003). As noted, the relevant part of this decision was unanimously reversed by the Supreme Court and has no precedential value. *See* 538 U.S. at 194. Moreover, despite its "critique" of *Arthur*, the Sixth Circuit in *Buckeye* expressly reaffirmed that *Arthur* remains good precedent and binding law. 263 F.3d at 637 n.2 ("[W]e are bound by the Sixth Circuit's decision in *Arthur v. City of Toledo*….").

In any event, the Sixth Circuit's "critique" of *Arthur* rested on the premise that an equal protection claim based on political structure, such as was at issue in *Seattle*, requires a positive showing of *intentional discrimination* in addition to an unfairly restructured political process. After all, the portion of *Arthur* allegedly in tension with *Seattle* addressed the standard for showing invidious intent in an intentional-discrimination challenge to a facially neutral referendum, such as Proposal 2. *See id.* If this premise is true, and Plaintiffs must show *intentional discrimination* to establish their *Hunter* claims, the Cantrell Plaintiffs' *Hunter* claim

Arthur's stringent requirement that "the only possible rationale" for the challenged referendum must be "racial discrimination," 782 F.2d at 573-74, is fatal to the Coalition Plaintiffs' intentional discrimination claim. Plaintiffs do not, and cannot, plead that "racial discrimination was the *only* possible motivation behind the referendum results." *Id.* at 573 (emphasis added). They plead only that invidious discrimination was a "primary purpose" (apparently, not even of the voters, but merely of some of the initiative's sponsors or supporters).[4] Doc. 96, ¶ 106. This is a far cry from the showing required by *Arthur*. The deeply rooted traditions of race-blind justice and equal treatment in our society, and the concomitant widespread public disapproval of race-conscious distinctions, provide the true explanation for the voters' decision. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions

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should be dismissed outright, because they did not plead intentional discrimination. *See supra* Part I.B. Even on these grounds, moreover, *Buckeye*'s criticism of *Arthur* was unfounded because the *Arthur* court expressly distinguished (and exempted from its holding) cases like *Seattle* where, despite its facial neutrality, the challenged provision was so gerrymandered for racial purposes that it "engendered discrimination based on an obvious racial classification." *Arthur*, 782 F.2d at 574; *see also Seattle*, 458 U.S. at 471 ("[D]espite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes.… [T]he District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing."). Needless to say, no plausible allegation can be made that "the text of [Proposal 2] was carefully tailored to interfere only with" minority interests. *Ibid.*

[4] Even this narrow allegation is itself manifestly erroneous and contradicted by the evidence. In the face of extensive cross-examination, both Ward Connerly and Jennifer Gratz—the only two purported sponsors of Proposal 2 whom Plaintiffs deposed—repeatedly testified that their support for Proposal 2 was based, not on invidious racial animus, but on the simple moral principle that "treating anyone differently because of race and skin color is wrong." Connerly Depo. at 129:13-14 (attached as Exhibit A); *see also id.* at 159:1-3 ("My view is shaped by my own belief that the government should not discriminate against or in favor of its citizens."); *id.* at 163:14-17 ("Preferences are wrong. As I said just a moment ago, the effects of this approach or that approach are secondary to whether we believe as a society whether our citizens should be treated equally without regard to race…"); Gratz Depo. at 17:17-18 (attached as Exhibit B) ("I believe that using race for or against someone is wrong."); *id.* at 94:16-21 ("I believe by and large the people in this country believe that government should not be … discriminating against or granting preferential treatment to anyone based on their race, regardless of whether it's in favor of someone or opposed to that person.").

between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"). The obvious and genuine explanation for the passage of Proposal 2 is that a clear majority of Michiganders share Mr. Connerly's view that racial and gender "[p]references are wrong." Connerly Depo. at 163:14; *see also* Gratz Depo. at 94:16-21. To suggest that the *only* possible motivation for voting in favor of Proposal 2 was *individious discrimination* against racial minorities would be a vile insult to 58 percent of Michigan's voters.

In all events, even if Plaintiffs were subject to a lesser standard for showing intentional discrimination than that required by *Arthur*, Defendants would still be entitled to judgment as a matter of law on this ground. Based on discovery to date, the only evidence that the Coalition Plaintiffs have alleged, or can forecast, of *intentional discrimination* by the sponsors or supporters of Proposal 2 tends to show, at most, merely that those sponsors or supporters may have been *aware* of Proposal 2's (putative) anticipated negative effects on minorities—such as depressed minority enrollment rates at Michigan's public universities. In fact, the entire factual section of their complaint is entirely devoted to this theory of the case. *See* Doc. 96, ¶¶ 48-81 (alleging, at length, that racial preferences were the remedy for minority enrollments at Michigan universities); *id.* ¶¶ 82-92 (alleging negative effects on minorities of California's Proposition 209); *id.* ¶¶ 93-101 (alleging anticipated negative effects of Proposal 2 in Michigan); *see also, e.g.*, *id.* ¶¶ 110-11 (implying that the "evident purpose" of Proposal 2 was "to reduce drastically the numbers of black, Latino/a, and Native American students at the defendant universities"). The evidence that the Coalition Plaintiffs have sought in discovery is precisely of this dubious

sort, *see, e.g.*, Connerly Depo. at 119:1-121:13, and there is no other significant evidence of invidious animus in this case.

Under the Supreme Court's case law, however, the mere *awareness* that a provision may have an adverse impact on a protected class, without more, is insufficient to establish discriminatory intent. In *Personnel Administrator of Massachusetts v. Feeney*, the Supreme Court rejected an equal-protection challenge to Massachusetts' lifelong hiring preference for veterans in public employment, which predictably had a significant adverse impact on the hiring of women to civil-service jobs (because the vast majority of veterans were men). 442 U.S. 256, 259 (1979). The only evidence of discriminatory animus cited by the plaintiff was the evidence of the policy's significant negative *effects* on the hiring of women, which were claimed to be "too inevitable to have been unintended." *Id.* at 276. But the Supreme Court rejected the argument that the awareness of these "inevitable" negative effects alone raised an inference of intentional discrimination:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

Id. at 279 (citation omitted); *see also id.* at 279 n.25 (rejecting an inference of discriminatory intent when "the [negative] impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate"). So also here, the equal treatment mandated by Proposal 2 is "a legislative policy that has in itself always been deemed to be legitimate"—at the very least, since the ratification of the Equal Protection Clause in 1868.

Without nothing more than a putative inference drawn from the supposed negative effects of Proposal 2, the Coalition Plaintiffs cannot establish that Proposal 2 was passed "because of," not merely "in spite of," its supposed negative impact on minorities. Their claim of intentional discrimination would therefore fail as a matter of law, even if they were not subject to the heightened standard of proof for referendum provisions imposed by *Arthur*.

B. Plaintiffs Are Foreclosed By Law From Showing Discriminatory Effect.

Moreover, even if the Coalition Plaintiffs had any chance of pleading and proving intentional discrimination, their claim would fail because they cannot show that Proposal 2 has a discriminatory *effect*. Their bare allegation of a free-floating impermissible *motive*, no matter how invidious, does not establish an equal protection violation. At bare minimum, the allegedly invidious purpose must be coupled with some form of *unequal treatment* by the government. *See, e.g., Coalition For Economic Equity*, 122 F.3d at 707 ("A denial of equal protection entails, at a minimum, a classification that treats individuals unequally."); *Feeney*, 442 U.S. at 271-72. In other words, the purpose of treating all persons without regard to race or gender -- that is, treating them *equally* -- cannot be discriminatory, cannot be invidious, cannot be unconstitutional.

As the plain text of Proposal 2 establishes, and as the Sixth Circuit has already determined, this provision does *not* impose unequal treatment—quite the contrary, it prohibits it:

> In contending that the Equal Protection Clause compels what it presumptively prohibits, plaintiffs face an uphill climb. The Clause prevents official conduct discriminating on the basis of race and on the basis of sex, not official conduct that bans discrimination against or preferential treatment to individuals on the basis of race or sex—as Proposal 2 does.
>
> If distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of

> equality, and if racial distinctions threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility, a state constitutional amendment designed to eliminate such distinctions in state government would seem to be an equal-protection virtue, not an equal-protection vice.

473 F.3d at 248-49 (citations, quotation marks, and alterations omitted). *See also Coalition For Econ. Equity*, 122 F.3d at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense."). Thus, just like Plaintiffs' political-structure claims, the Coalition Plaintiffs' intentional-discrimination claim founders on the bedrock of the Equal Protection Clause: its guarantee of equal treatment to all citizens. By arguing that Proposal 2's *guarantee* of equal treatment constitutes *unequal* treatment, the Coalition Plaintiffs' claim goes beyond "teeter[ing] on the brink of incoherence," 122 F.3d at 702, and fairly topples overboard.

In apparent support of their theory that "Equal equals Unequal," the Coalition Plaintiffs invoke a number of non-governmental societal factors to suggest that minorities and women will have greater difficulty than non-minority males in achieving admission to Michigan's public universities. *See, e.g.*, Doc. 96, ¶¶ 49-57 (alleging de facto segregation in housing patterns and secondary school attendance); *id.* ¶¶ 58-60 (alleging disparate results for minorities on standardized test scores). Notably absent from their Complaint, however, is any allegation that these purported societal inequities were *created by state-imposed, de jure segregation*. On the contrary, the Coalition Plaintiffs concede that any putative "segregation" at Michigan's public universities is "[d]e facto," Doc. 96, at 13, and they admit that "[t]he defendant universities have

at all times maintained a formal policy of accepting applications from students of all races," *id.* ¶ 68. The Supreme Court has made clear that, while the Equal Protection Clause may sometimes permit the narrow use of express racial classifications to remedy past *de jure* segregation and state-imposed discrimination, *see, e.g.*, *Adarand*, 515 U.S. at 237, it does not permit the freewheeling use of racial classifications as a general remedy for perceived social inequities of the sort alleged by the Coalition Plaintiffs' complaint. *See id.* at 226-27 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.") (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.)); *Grutter*, 539 U.S. at 323 ("Justice Powell [in *Bakke*] rejected an interest in 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' as an unlawful interest in racial balancing.") (quoting *Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 306-07 (1978)). In short, the Equal Protection Clause would not even *permit* the use of racial preferences to rectify perceived shortfalls in minority attendance at the defendant Universities—far less *require* it. For these reasons, the Coalition Plaintiffs cannot establish that Proposal 2's abolition of racial preferences at the Universities somehow constitutes a form of "unequal treatment" countenanced by the Equal Protection Clause.

III. The Coalition Plaintiffs' Statutory Preemption Claims Lack Merit.

The Coalition Plaintiffs' claims that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, *see* Doc. 96, ¶¶ 122-29, 137-42 (Counts Three and Five), fare no better. The Sixth Circuit gave short shrift to these

claims in its stay opinion, *see Coalition To Defend Affirmative Action*, 473 F.3d at 251-52, and its application of these statutes is indisputably correct.[5] Defendants are entitled to judgment as a matter of law on these claims.

A. Title VI Does Not Preempt Proposal 2.

In ruling that the Coalition Plaintiffs' Title VI claims lacked merit, the Sixth Circuit noted that a Title VI preemption claim requires a showing of direct conflict between state law and the purposes and objectives of Title VI, and held that this showing is impossible here:

> Proposal 2 by its terms eliminates any conflict between it and federal-funding statutes like Title VI. "This section," the proposal says, "does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state."… What Title VI requires, in other words, Proposal 2 expressly allows—eliminating any conflict between the two laws.
>
> Nor does Proposal 2 thwart the purposes of Title VI—"preventing discrimination in federally assisted programs." Proposal 2 reinforces that goal by prohibiting state universities from discriminating, or granting preferential treatment, on the basis of race.

473 F.3d at 251-52 (internal citation omitted).

The Sixth Circuit's analysis is not only authoritative but clearly convincing. Any potential preemption of state law under Title VI is expressly limited by section 1104 of the Civil Rights Act of 1964, which provides:

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[5] Indeed, even the district court in *Coalition for Economic Equity v. Wilson*, despite its erroneous conclusions regarding the Equal Protection Clause and Title VII, rejected these preemption arguments, explaining that "[t]he statutory language, agency interpretation, and legislative history of Titles VI and IX do not establish that Congress intended to preserve voluntary race- and gender-conscious affirmative action as an option for entities covered by the two statutes." 946 F. Supp. 1480, 1519 (N.D. Cal. 1996), *vacated and remanded on other grounds*, 122 F.3d 692 (9th Cir. 1997).

> Nothing contained in any title of this Act [the Civil Rights Act of 1964] shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4. As the Supreme Court has explained, the legislative history of this provision makes clear that it was intended to provide "that state laws would not be preempted 'except to the extent there is a direct and positive conflict between such provisions [state law and federal civil rights law] so that the two cannot be reconciled or consistently stand together.' " *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 282 n.12 (1987) (quoting the original draft of this provision and explaining that "there is no indication" that language ultimately adopted "altered the basic thrust of" this draft). Accordingly, the Court has concluded that in section 1104 and other provisions of the Civil Rights Act of 1964, "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law." *Id*. at 281 (discussing sections 1104 and 708). Because, as explained below, nothing in Proposal 2 "actually conflict[s]" with Title VI, the Coalition Plaintiffs' preemption claim lacks merit.

Section 601, the operative provision of Title VI, provides that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. It is "beyond dispute" that this provision "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Title VI thus "proscribes only those racial classifications that would violate the Equal Protection Clause of the Fifth

Amendment." *Id*. (quoting *Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.)).

As demonstrated above regarding Plaintiffs' equal protection claims, Proposal 2 does not draw any racial classifications whatsoever, let alone classifications that would violate the Equal Protection Clause. On the contrary, it prohibits classifications based on race, sex, or other constitutionally suspect bases. Accordingly, Proposal 2 is fully consistent with the plain language and evident purposes of Title VI. The Coalition Plaintiffs cannot seriously argue that the text of Title VI itself requires the University defendants to grant preferences based on any of the categories with respect to which it, like Proposal 2, prohibits discrimination. Rather, their Complaint invokes regulations promulgated under section 602 of Title VI, 42 U.S.C. § 2000d-1, in support of their preemption claim. *See* Doc. 96, ¶ 126 (citing 34 C.F.R. § 100.3(b)(2)). Their reliance on these regulations, however, is also foreclosed by precedent.

First, the Coalition Plaintiffs' reliance on 34 C.F.R. § 100.3(b)(2) is unavailing. This regulation purports to bar recipients of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin." Even if one were to assume that this regulation were valid,[6] it provides no basis for concluding that Title VI preempts Proposal 2.

[6] In fact, these regulations cannot be squared with the Supreme Court's interpretation of Title VI. *See Sandoval*, 532 U.S. at 281-82 (explaining that dictum and opinions of individual justices suggesting that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups" are "in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination," but declining to

As an initial matter, section 1104 expressly preserves state laws from preemption unless they are "inconsistent with any of the purposes *of this Act*, or any provision *thereof*." (Emphases added.) Actions that do not amount to intentional discrimination are not inconsistent with the provisions of Title VI itself, however, even if they have a disparate impact. *See, e.g.*, *Sandoval*, 532 U.S. at 281 (absent intentional discrimination, "activities that have a disparate impact on racial groups . . . are permissible under § 601"). Accordingly, the Supreme Court has made clear that "disparate impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits." *Id*. at 285; *see also id*. at 286 n.6 ("§ 601 permits the very behavior that the regulations forbid."). And although actions prohibited by disparate impact regulations may be inconsistent with the policy reflected in those regulations, they are not inconsistent with any purpose *of Title VI*. As the Supreme Court has explained, " 'If, as five members of the Court concluded in *Bakke* [and as the Court confirmed in *Sandoval*], the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* … do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.' " *Sandoval*, 532 U.S. at 286 n.6 (quoting *Guardians Ass'n. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 613 (1983)) (O'Connor, J., concurring in judgment) (first alteration added; deletions and emphasis in original).

In any event, Proposal 2 is not inconsistent with 34 C.F.R. § 100.3(b)(2). That regulation bars the use of "criteria or methods of administration" that have a disparate impact on members of a particular race, color, or national origin. Proposal 2, however, does not require the

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resolve this tension because "petitioners have not challenged the regulations here"); *id*. at 293 (holding that there is no "private right of action to enforce regulations promulgated under § 602").

Universities to adopt any particular criterion or method of administration, let alone a criterion or method that has a disparate impact on a protected class. On the contrary, it simply prohibits one type of criteria or methods—criteria or methods that grant preferences based on race, sex, color, ethnicity, or national origin. The Coalition Plaintiffs' assertion that the disparate impact regulation *requires* race-based and other similar preferences in view of the enrollment disparities that the Coalition Plaintiffs assert would otherwise necessarily result, *see* Doc. 96, ¶ 101, is contrary to Congress's intent as expressed in the context of Title VII—the context where the disparate impact doctrine originated and where Congress has carefully codified that doctrine. *Compare* 42 U.S.C. § 2000e-2(k) (codifying burden of proof for disparate impact cases), *with* 42 U.S.C. § 2000e-2(j) ("Nothing contained in this title . . . shall be interpreted to require any employer … to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer … in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.").[7]

To be sure, a related regulation not cited in Plaintiffs' complaint, 34 C.F.R. § 100.3(6)(ii), states that "a recipient in administering a program *may* take affirmative action to overcome the

[7] Comparison of the Coalition Plaintiffs' vague assertions regarding the potential impact of Proposal 2, *see* Doc. 96, ¶ 101, with the demanding procedural requirements for establishing a disparate impact claim set forth in § 2000e-2(k), further undermines any claim that Proposal 2 might conflict with the disparate impact regulations.

effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." (Emphasis added.) As even the district court in *Coalition For Economic Equity* recognized, however:

> The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.

946 F. Supp. at 1518. Plainly, the fact that 34 C.F.R. § 100.3(6)(ii) might *permit* racial preferences does not mean that such preferences are *required*. *See California Federal*, 479 U.S. at 286-87.[8]

In short, Proposal 2 "does not prevent [the Universities] from complying with both the federal law … and the state law." *California Federal*, 479 U.S. at 290-91. Accordingly, the Coalition Plaintiffs' claim that Proposal 2 is preempted by Title VI fails as a matter of law.

B. Title IX Does Not Preempt Proposal 2.

[8] Another regulatory provision, 34 C.F.R. § 100.3(6)(i), also provides no support for Plaintiffs' claim. That provision provides that "[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." Even assuming the "affirmative action" contemplated by this provision could require race-based preferences as a remedy, *but see Bazemore v. Friday*, 478 U.S. 385, 409 (1986) (White, J., concurring) (suggesting recipient's "affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system" satisfied regulation requiring "affirmative action" to overcome the effects of prior discrimination), as noted above the Coalition Plaintiffs make no allegation that the Universities have engaged in invidious discrimination. Furthermore, even if this provision were to become applicable—if, for instance, the Department of Education or other federal grantor were to order affirmative action as a remedy for victims of discrimination by one or more of the Universities—Proposal 2 would pose no obstacle to such a remedy. *See* Mich. Const. art. I, § 26, ¶ 4 ("This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.").

The Sixth Circuit, in its stay opinion, was no less dismissive of the Coalition Plaintiffs' Title IX preemption claim:

> This claim … holds little promise. Proposal 2, as shown, expressly avoids conflicts with federal-funding statutes like [Title IX]. And by preventing discrimination on the basis of sex, Proposal 2 directly serves Title IX's objectives.

473 F.3d at 252. Again, as expounded in further detail below, this conclusion is compelling as well as authoritative.

Title IX " 'was patterned after Title VI of the Civil Rights Act of 1964,' " *Sandoval*, 532 U.S. at 280 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), and the Supreme Court has indicated that Title IX, like Title VI, prohibits only intentional discrimination. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (holding that retaliation "falls within [Title IX's] prohibition of intentional discrimination on the basis of sex"). The Coalition Plaintiffs' complaint cites regulations relating to affirmative action and disparate impact, purportedly promulgated pursuant to Title IX, *see* Doc. 96, ¶ 140 (citing 34 C.F.R. §§ 106.21, 106.23). But these Title IX regulations are essentially analogous to those discussed above in relation to their Title VI preemption claim. *See* 34 C.F.R. § 106.3(b) ("[A] recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation [in an education program or activity] by persons of a particular sex"); *id.* § 106.21(b)(2) ("A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately

adverse effect are shown to be unavailable.").[9] Accordingly, their Title IX preemption claim suffers from the same fatal defects discussed above. Furthermore, Title IX expressly provides:

> Nothing contained in subsection (a) of this section [the provision containing Title IX's operative prohibition of discrimination] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area.

20 U.S.C. § 1681(b). This provision plainly confirms that Proposal 2 does not conflict with Title IX. For all of these reasons, the Coalition Plaintiffs' Title IX preemption claim also fails.

IV. Defendants Are Entitled To Judgment On The Plaintiffs' First Amendment Claim.

[9] The Coalition Plaintiffs' citation of 34 C.F.R. § 106.23(a), *see* Doc. 96, ¶ 140, is plainly unavailing. In the main, that provision directs that a recipient of federal funds "shall not discriminate on the basis of sex in the recruitment and admission of students." This, of course, is precisely what Proposal 2 also requires. To be sure, the regulation also states: "A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and *may* choose to undertake such efforts as affirmative action pursuant to § 106.3(b)." As for the latter half of this provision, the fact that a school *may* choose "such efforts as affirmative action" does not imply that a school *must* choose those efforts; the regulation merely states that federal law does not *prohibit* such "affirmative action," not that federal law *mandates* that federally funded universities be guaranteed that option under state law. And as for the former half, 34 C.F.R. § 106.3(a), which is referenced therein, provides that "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." Of course, the Coalition Plaintiffs do not allege that the Universities have engaged in sex-based discrimination, let alone that they have been found to have engaged in such discrimination. Furthermore, this provision does not mandate sex-based preferences in the event of such a finding, but requires only "such remedial action as the Assistant Secretary deems necessary." *Id.* In the unlikely event that a situation arose where the Assistant Secretary properly determined that sex-based preferences were required as a remedy for discrimination by the Universities, Proposal 2 would not bar such preferences. *See* MICH. CONST. art. I, § 26, ¶ 4 ("This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.").

The Coalition Plaintiffs also claim that Proposal 2 violates an alleged First Amendment right of the University Defendants "to select their students and teaching staff and to determine their academic standards"—a right of which they are the alleged third-party "beneficiaries." *See* Doc. 96, ¶¶ 144-49 (Count Six), at 27-28. This claim parrots a similar cross-claim that was brought by the University Defendants and subsequently dismissed. *See* Doc. 2; Doc. 39. Defendants are entitled to summary judgment on this claim as well.

A. The Coalition Plaintiffs Lack Third-Party Standing To Assert This Claim.

As an initial matter, even if the First Amendment rights asserted by the Coalition Plaintiffs on behalf of the Universities actually existed, *but see infra* Parts IV.B-D, the Coalition Plaintiffs would lack third-party standing to assert them. For third-party standing, the Supreme Court requires that "there must exist some hindrance to the third party's ability to protect his or her own interests," *Powers v. Ohio*, 499 U.S. 400, 411 (1991). But if the alleged right existed, no such "hindrance" could possibly be found in this case, where the University Defendants have already sought to assert a virtually identical claim in their own right, by bringing a cross-claim against their own Governor. *See* Doc. 2.

In one place, the Coalition Plaintiffs' complaint suggests that they seek to assert First Amendment rights in *their own* behalf, not as third-party beneficiaries. *See* Doc. 96, ¶ 11(F), at 4 ("Proposal 2 violates … the First Amendment rights of the students who attend those universities by sharply limiting the universities' ability to achieve diversity in the race, national origin and gender of its [sic] students."). In the actual paragraphs of Count Six of their complaint, however, they seem to repudiate this theory, asserting that they are the "beneficiaries" of alleged First Amendment rights held by the universities. *See id.* ¶¶ 145-46, at 27-28. In the event that the

Coalition Plaintiffs intend to make such a First Amendment claim on *their own* behalf, this claim is, like all the others, meritless as a matter of law. Applicants to state universities have no First Amendment right to be guaranteed admission, or favorable criteria for admission, and Defendant-Intervenor is not aware of any authority to support such a remarkable position. In general, the First Amendment guarantees freedom of expression; it does not require the government to provide any particular *forum* for expression—least of all admission to, or financial aid at, a public university. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) ("[S]peech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State."); *Cornelius v. NAACP Legal Defense Fund & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) ("Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property."). Moreover, even if applicants had such First Amendment rights, the right of each applicant to admissions or financial aid would be effectively counterbalanced and canceled out by the equal and opposing right of each competing applicant.

B. The Fourteenth Amendment Does Not Confer Rights On A State University That May Be Asserted Against The State.

As an initial matter, the Coalition Plaintiffs admit that the right they assert belongs to the University Defendants, not themselves. *See* Doc. 96, ¶ 144 (asserting "the *defendant universities'* First Amendment right to select their students") (emphasis added). But it has been clear for almost two centuries that a subdivision of a State, such as a municipality or a state university, does not hold constitutional rights against the State that creates it. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 629 (1819) (Marshall, C.J.) ("The general

correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted."); *id.* at 628 (holding that an interpretation of the Contracts Clause that would grant rights to a "civil institution[]" against its creating State "would be an unprofitable and vexatious interference with the internal concerns of the State [and] would unnecessarily and unwisely embarrass its legislation," and that "the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit"); *City of Trenton v. New Jersey*, 262 U.S. 188, 192 (1923) ("The power of the State, unrestrained by … the Fourteenth Amendment, over the rights and property of cities … cannot be questioned."); *Williams v. Baltimore*, 289 U.S. 36, 40 (1933) (Cardozo, J.) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.").

In keeping with this venerable line of authority, the Sixth Circuit has squarely held that "'because municipal bodies are essentially creatures of the state and because the state retains the inherent power to alter, change or even to abolish them in accordance with the state's constitution and laws made thereunder, the United States Constitution simply does not concern itself with matters of internal disagreements between a state and subdivisions created by it … for this area involves matters which the state is uniquely competent to resolve.'" *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 998 (6th Cir. 1987) (quoting *South Macomb Disp. Auth. v. Washington*, 790 F.2d 500, 507 n.1 (6th Cir. 1986) (Engel, J., concurring)); *see*

also South Macomb, 790 F.2d at 504 ("[A] municipal corporation 'cannot invoke the protection of the Fourteenth Amendment' against its own state, and is prevented from attacking the constitutionality of state legislation on the grounds that its own rights have been impaired."). Other circuits are in accord. *See, e.g., New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) ("Political subdivisions of a State may not challenge the validity of a state statute under the Fourteenth Amendment."); *Brandon Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) ("It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment.").

It is abundantly clear that this bar on constitutional claims by arms of the State against the State extends to claims by state *universities* as well as other "creatures of the State." As the Eleventh Circuit has stated, "the law is clear that [Alabama State University], as a creature of the State, may not raise a Fourteenth Amendment claim under Section 1983." *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *see also id.* at 1456 n.6 ("ASU has no Fourteenth Amendment rights"). And there can be no doubt that the University defendants in this case—the University of Michigan, Michigan State University, and Wayne State University—are "creatures of the State." *Kelley*, 836 F.2d at 998; *Alabama*, 791 F.2d at 1455. They are considered to be "the State" both under state law and under federal constitutional law. *See* MICH. COMP. LAWS § 691.1401(c) (" 'State' … includes every public university and college of the state, whether established as a constitutional corporation or otherwise."); *Estate of Ritter v. University of Mich.*, 851 F.2d 846, 850 (6th Cir. 1988) (holding that "the Board of Regents of the University of Michigan is, as an arm of the State, immune under the eleventh amendment from suit in federal district court"); *Weisbord v. Michigan State Univ.*, 495 F. Supp. 1347, 1356-57

(W.D. Mich. 1980) (detailing the extensive public character of Michigan State University and concluding that "[n]othing in the charter of Michigan State University states or implies that it is anything other than a state institution entitled to the privileges and immunities of the state"), *cited in Hall v. Medical College of Ohio*, 742 F.2d 299, 302 (6th Cir. 1984); *Johnson-Brown v. Wayne State Univ.*, No. 98-1001, 1999 U.S. App. LEXIS 4751 at *3 (6th Cir. Mar. 17, 1999) (holding that "[Wayne State] University is considered to be the 'state' for government liability purposes").

The Sixth Circuit applied these principles in its stay opinion in this case:

> It is not clear … how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. One does not generally think of the First Amendment as protecting the State from the people but the other way around—of the Amendment protecting individuals from the State.

Coalition To Defend Affirmative Action, 473 F.3d at 247 (citations omitted). Because the University Defendants have no First Amendment rights against the State of Michigan, it follows *a fortiori* that the Coalition Plaintiffs cannot assert those non-existent rights as their putative "beneficiaries."

C. The Supreme Court Has Recognized Only A First Amendment Academic-Freedom *Interest* Of The State, Not An Independent *Right* Held By Its Universities.

In perfect accord with the Supreme Court's uncontradicted line of authority from *Trustees of Dartmouth College* onward, *Grutter* and like cases have never recognized any First Amendment "right" to academic freedom that may be asserted *by a public university against its parent State*. On the contrary, the Supreme Court has repeatedly emphasized that the "First Amendment-based academic freedom right" asserted by the Universities is not a "right" at all, but an "*interest*" that is *possessed by the State*. Because it is possessed by the State, of course, it

cannot be asserted *against* the State—in particular, it cannot be asserted against the democratically adopted legal constraints that the voters of Michigan have chosen to place on the discretion of their state actors, including their public university admissions committees.

One need look no further than *Grutter* to confirm this conclusion. Justice O'Connor's opinion for the Court in *Grutter* repeatedly emphasized that the "academic freedom" that permits public universities to consider race as a "plus" factor in university admissions is possessed *by the State*: "[T]oday we endorse Justice Powell's view that student body diversity is a compelling *state* interest that can justify the use of race in university admissions." *Grutter v. Bollinger*, 539 U.S. at 325 (emphasis added). From the outset of its analysis, the Court stressed that the University was being considered as a *state* actor, *see id.* at 326 ("The Equal Protection Clause provides that no *State* shall 'deny to any person within its jurisdiction the equal protection of the laws.' ") (emphasis added). Indeed, if the University had not been a state actor subject to the strictures of the Fourteenth Amendment, the question of its use of race in admissions would have been, as it were, academic. It was essential to the Court's analysis, therefore, that the interest in selecting students to promote a diverse student body was held by the State. Otherwise, that interest could not be invoked to justify the State's use of race-conscious admissions procedures.

The Court's "conclusion that *the Law School* has a compelling interest in a diverse student body," *id*. at 330, was in no way distinct from its acceptance of "the principle of student body diversity as a compelling *state* interest," *id.* (both emphases added). Nor could it have been. On the contrary, the Court repeatedly stressed that the "constitutional dimension, grounded in the First Amendment, of educational autonomy" possessed by public universities, and the "tradition of giving a degree of deference to a university's academic decisions, within

constitutionally prescribed limits," generated a *state governmental* interest when applied to a state governmental institution like a public university, *id.* at 328, 330. *See id.* at 326 (noting that "*government* may treat people differently because of their race only for the most compelling reasons"); *id.* (noting that "all racial classifications imposed by *government* 'must be analyzed by a reviewing court under strict scrutiny'"); *id.* (noting that the question was whether there existed "compelling *governmental* interests"); *id.* ("We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [*government*] is pursuing a goal important enough to warrant use of a highly suspect tool.") (brackets in original); *id.* at 326-27 (noting that the Court was considering "*governmental* uses of race"); *id.* at 327 ("When race-based action is necessary to further a compelling *governmental* interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."); *id.* (noting that the Court was "reviewing race-based *governmental* action"); *id.* ("[W]e turn to the question whether the Law School's use of race is justified by a compelling *state* interest.") (all emphases added). In fact, the University of Michigan did not ask for the Court to recognize any "First Amendment-based" right distinct from the interest held by the State: "In other words, the Law School asks us to recognize, in the context of higher education, a compelling *state* interest in student body diversity." *Id.* at 328 (emphasis added).

In short, the Supreme Court in *Grutter* had no occasion to reconsider its longstanding holding that political subdivisions, such as state universities, cannot assert Fourteenth Amendment rights against their parent States. The Court was not asked to recognize such a freestanding right, independent of its relationship to the state interest in a diverse body, and there was certainly no indication that the Court intended to effect a radical departure from two

centuries of consistent doctrine and practice since *Trustees of Dartmouth College*. To the contrary, the Court explicitly linked its reliance on the purported First Amendment interest that the Coalition Plaintiffs would assert *against* the State on the Universities' behalf to its recognition of an interest *held by* the State: "In announcing the principle of student body diversity as a compelling *state* interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy." *Id.* at 330 (emphasis added).

Justice Powell's opinion in *Bakke* is precisely to the same effect. Like Justice O'Connor, Justice Powell emphasized from the outset that his consideration of a public university's interest in selecting its student body arose only in the context of justifying potentially unconstitutional race-based discrimination *by the State*. *See Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 287 (1978) ("Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrators of state universities are reviewable under the Fourteenth Amendment."). And Justice Powell's opinion repeatedly emphasized that he was considering each of the justifications asserted by the University for its race-based admissions program as a distinct *state* interest. *See id.* at 307 (noting that "[t]he *State* certainly has a legitimate and substantial interest in ameliorating … the disabling effects of identified discrimination," but holding that it did not justify the race-based admissions program); *id.* at 308-09 ("[I]t cannot be said that the *government* has any greater interest in helping one individual than in refraining from harming another."); *id.* at 310 (noting that "a *State's* interest in facilitating the health care of its citizens [may be] sufficiently compelling to support the use of a suspect classification," but holding that it was not so in this case) (emphases added). This was no less true for the fourth proposed state

interest that Justice Powell considered, namely "the attainment of a diverse student body." *Id.* at 311. He repeatedly described this interest as one held by the State—indeed, it would have been irrelevant to his equal protection analysis if it had been held by any entity besides the State. *See id.* at 315 (asserting that "petitioner's argument … misconceives the nature of the *state* interest that would justify consideration of race or ethnic background"); *id.* ("The diversity that furthers a compelling *state* interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."); *id.* (describing "the *state* interest in genuine diversity"); *id.* at 320 ("[W]hen a *State's* distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial *state* interest.") (emphases added). Just as in *Grutter*, Justice Powell relied on "[a]cademic freedom … as a special concern of the First Amendment" only in order to identify "a compelling *state* interest" in achieving a diverse student body. *Id.* at 312, 315. In fact, he expressly disavowed the notion that "academic freedom" was a "specifically enumerated constitutional right." *Id.* at 312.

In rejecting the First Amendment cross-claim brought by the University Defendants in this case, the Sixth Circuit concluded: "The Universities mistake interests grounded in the First Amendment—including their interests in selecting student bodies—with First Amendment rights." 473 F.3d at 247. The Coalition Plaintiffs' similar First Amendment claim makes the same error.

D. Proposal 2 Does Not Implicate the First Amendment Interest In Academic Freedom Recognized by the Supreme Court.

Even assuming that the Universities possessed an independent First Amendment right that they could assert against the State, and assuming further that the Coalition Plaintiffs were entitled to enforce that right as its third-party beneficiaries, it would have no conceivable application to Proposal 2. By forbidding race-based discrimination in the admissions process, Proposal 2 imposes a restriction on university admissions that is both content-neutral and neutral to any academic qualifications. Again, the Sixth Circuit's stay opinion in this case is dispositive:

> It is one thing to defer to a state university's judgment in deciding who may attend that university—and to defer in the process to the university's academic freedom 'that has long been viewed as a special concern of the First Amendment'—in determining whether the university has run the gauntlet of defending presumptively unconstitutional racial classifications. It is quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences.

473 F.3d at 247. In short, discriminating or providing preferential treatment on the basis of race simply lies outside the scope of any First Amendment interest in academic freedom.

There is no conceivable First Amendment right for a state university to be free from state regulations of its admissions process on the basis of academic and non-academic criteria such as geography, state residency, or high school performance—and the Supreme Court has certainly never recognized one. On the contrary, the Supreme Court in *Grutter* openly contemplated the possibility that a State could even impose *academic* criteria on the admission to its public universities, by discussing "'percentage plans,' recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State." *Grutter*, 539 U.S. at 340. Academic qualifications, as well as other content-neutral restrictions for admission to state

universities, evidently, are fair game for state regulation irrespective of any illusory First Amendment "right" of public universities to select whomever they please for admission. *A fortiori*, the First Amendment imposes no restriction on the State's ability to restrict the use of *race* in public university admissions, within the extremely narrow range permitted by *Grutter*'s interpretation of the Equal Protection Clause.

CONCLUSION

For the reasons stated, Defendant-Intervenor respectfully requests this Court to grant summary judgment to Defendants on all claims brought by the Coalition and Cantrell Plaintiffs.

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Respectfully Submitted,

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2007, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following:

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

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

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

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

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

/s/ D. John Sauer

D. John Sauer