UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al,

Plaintiffs,

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants,

and

CHASE CANTRELL, et al,

Plaintiffs,

vs.

JENNIFER GRANHOLM and MICHAEL A. COX, ,

Defendants.
_____/

Case No. 2:06-CV-15024

Hon. David M. Lawson

CONSOLIDATED CASES

Case No. 06-15637

Hon. David M. Lawson

INTERVENING DEFENDANT ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Intervening Defendant Attorney General Michael A. Cox moves the Court to dismiss the *Coalition* Plaintiffs' Second Amended Complaint and the *Cantrell* Plaintiffs' First Amended Complaint pursuant to FR Civ P 12(b) (1) and (6), or alternatively for summary judgment pursuant to FR Civ P 56(c) for the reason Plaintiffs lack standing to bring the asserted claims and have failed to state claims upon which relief may be granted as a matter of law and/or fact. Defendant is, thus, entitled to judgment for the reasons fully set forth in the accompanying brief in support of this motion.

Counsel for Attorney General Cox contacted all other counsel in this matter by email on November 16, 2007, to ascertain if any parties concurred in this motion as required by LR 7.1(a). No response to that inquiry has been received as of the date this motion was filed.

Intervening Defendant Attorney General Cox, therefore, prays the Court grant this motion, dismiss Plaintiffs' respective Complaints and enter a judgment for Defendant of no cause of action and finding that art 1, § 26 of the Michigan Constitution is constitutional.

BRIEF IN SUPPORT OF INTERVENING DEFENDANT ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

CONCISE STATEMENT OF ISSUES PRESENTED

I. This Court lacks jurisdiction to entertain Plaintiffs' Complaints for declaratory and injunctive relief because all of the Plaintiffs lack standing to bring their claims.

II. Both the *Coalition* Plaintiffs and the *Cantrell* Plaintiffs fail to state a claim upon which relief may be granted with respect to the substantive claims asserted in their respective Complaints, and thus each suit must be dismissed.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

C & C Construction Inc v Sacramento Municipal Utility District, 122 Cal App 4th 284; 18 Cal Rptr 3d 715 (2004)

California Federal S & L Assoc v Guerra, 479 US 272, 281; 107 S Ct 683; 93 L Ed 2d 613 (1987)

Citizens for Equal Protection, et al v Bruning, 455 F3d 859, 868 (CA 8, 2006)

Cleveland Branch, NAACP v City of Parma, 263 F3d 513, 524 (CA 6, 2001)

Coalition for Economic Equity, et al v Wilson, et al, 122 F3d 692 (CA 9, 1997), cert den 522 US 963; 118 S Ct 397; 139 L Ed 2d 310 (1997)

Coalition to Defend Affirmative Action, et al v Granholm, et al, 473 F3d 237 (CA 6, 2006)

Crawford, et al v Board of Education of the City of Los Angeles, 458 US 527; 102 S Ct 3211; 73 L Ed 2d 948 (1982)

Fidelity Federal Savings and Loan Ass'n v de la Cuesta, 458 US 141, 153; 102 S Ct 3014; 73 L Ed 2d 664 (1982)

Gratz v Bollinger, 539 US 244; 156 L Ed 2d 257; 123 S Ct 2411 (2003)

Grutter v Bollinger, 539 US 306; 123 S Ct 2325; 156 L Ed 2d 304 (2003)

Hi-Voltage Wire Works, Inc v City of San Jose, 24 Cal 4th 537, 569; 101 Cal Rptr 2d 653 (2000)

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

Kowalski v Tesmer, 543 US 125, 130; 125 S Ct 564; 160 L Ed 2d 519 (2004)

Parents Involved in Community Schools v Seattle School District No 1, 555 US ___; 127 S Ct 2738; 168 L Ed 2d 508 (2007)

Regents of the University of California v Bakke, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978)

Romer v Evans, 517 US 620; 116 S Ct 1620; 134 L Ed 2d 855 (1996)

Warth v Seldin, 422 US 490, 499; 395 S Ct 2197; 145 L Ed 2d 34 (1973)

Washington v Seattle School District, 458 US

Const. 1963, Art 1, §26

STATEMENT OF THE FACTS

On November 7, 2006, Michigan voters overwhelmingly approved passage of Proposal 2,[1] 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.[2] Proposal 2, now art 1, § 26 of the 1963 Constitution, provides in part:

> (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, 2007.[3]

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

---

[1] The Amendment passed overwhelmingly on November 7, 2006, 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.html.

[2] 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 NW2d 287 (2004); *Michigan Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 605; 708 NW2d 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 F3d 584 (CA 6, 2007).

[3] See Const 1963, art 12, § 2.

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 alleges equal protection and First Amendment challenges under the federal constitution. The Complaint also asserts 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. Plaintiffs request this 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. The Complaint 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 Michael A. Cox then sought and was granted permission to intervene as a defendant in this action. First and Second Amended Complaints were subsequently filed by the *Coalition* Plaintiffs, but the allegations, claims, and relief sought are essentially the same as the original Complaint and the University President's were added as Defendants. Governor Granholm has since been voluntarily dismissed as a defendant in this 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 (U of M) and current U of M students and faculty. They seek a declaratory ruling that § 26 violates the Equal Protection Clause because it imposes additional burdens on racial and gender minorities when seeking to achieve legislation in their interest. This suit named only the Governor as a defendant. Defendant Attorney General Cox moved and was permitted to intervene in this suit as well. The Governor was subsequently dismissed from this suit as well. The two lawsuits

were later consolidated by agreement of the parties and by Order of the Court. (Order consolidating cases, 1/5/07). Discovery in these cases was bifurcated into fact and expert discovery. The cases have now proceeded through fact discovery to this point, the filing of legal and fact based dispositive motions.

Argument

I. This Court lacks jurisdiction to entertain Plaintiffs' Complaints for declaratory and injunctive relief because all of the Plaintiffs lack standing to bring their claims.

A. The elements of standing.

Jurisdiction, including standing, is "'assessed under the facts existing when the complaint is filed.'"[4] "[A] plaintiff must demonstrate standing for each claim he seeks to press."[5] "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."[6] In order to meet the standing requirements derived from Article III, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and, (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[7] The litigant must clearly and specifically set forth facts sufficient to satisfy all of these standing requirements.[8]

---

[4] *Cleveland Branch, NAACP v City of Parma*, 263 F3d 513, 524 (CA 6, 2001)(quoting *Lujan v Defenders of Wildlife*, 504 US 555, 570 n4; 112 S Ct 2130; 119 L Ed 2d 351 (1992)).
[5] *DaimlerChrysler Corp v Cuno*, 547 US ___; 126 S Ct 1854, 1867; 164 L Ed 2d 589 (2006); accord *Lac Vieux Desert Band of Lake Superior Chippewa Indians v Mich Gaming Control Bd*, 172 F3d 397, 407 (CA 6, 1999) (requiring proof of standing for each individual claim).
[6] *Allen v Wright*, 468 US 737, 752; 104 S Ct 3315; 82 L Ed 2d 556 (1984) (emphasis added); *ACLU v NSA*, 493 F3d 644, 652 (CA 6, 2007).
[7] *Cleveland Branch*, 263 F3d at 523-24 (quoting *Friends of the Earth, Inc v Laidlaw Envtl Servs*, 528 US 167, 180-81; 120 S Ct 693; 145 L Ed 2d 610 (2000)).
[8] *Whitmore v Arkansas*, 495 US 149, 155; 110 S Ct 1717; 109 L Ed 2d 135 (1990).

Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'"[9] The Supreme Court has adhered to the rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[10]

Here, Plaintiffs are a collection of various organizations, unions, individuals, students, and faculty opposed to the implementation of art 1, § 26. None of these Plaintiffs, however, have standing to sue and their Complaints should be dismissed.

B. The *Coalition* Plaintiffs do not have standing to assert their Equal Protection, First Amendment, and Preemption claims.

In the *Coalition* case, the Plaintiffs can essentially be divided into two groups – organizational plaintiffs and individual plaintiffs, neither of which have standing to assert their stated claims.

1. The organizational Plaintiffs lack standing.

To bring suit on behalf of its members, an organization must show "'its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'"[11]

[9] *Warth v Seldin*, 422 US 490, 499; 395 S Ct 2197; 145 L Ed 2d 34 (1973) (quoting *Linda R S v Richard D*, 410 US 614, 617; 93 S Ct 1146; 35 L Ed 2d 536 (1973)).
[10] *Warth*, 422 US at 499.
[11] *Cleveland Branch*, 263 F3d at 524 (quoting *Friends of the Earth, Inc*, 528 US at 181).

In this action, there are ten organizational Plaintiffs, all apparently attempting to sue on behalf of their membership.[12] (*Coalition* Second Amended Complaint, ¶¶ 16-18, 30-31.) The first three organizational Plaintiffs are groups committed to fighting for civil rights and affirmative action. (*Coalition* Second Amended Complaint, ¶¶ 16-18.) The union organizational Plaintiffs, according to the Second Amended Complaint, are labor organizations "with large minority memberships who have long fought for policies that will allow their members and the children of their members to attend the defendant universities." (*Coalition* Second Amended Complaint, ¶ 30.)

None of the organizational Plaintiffs, however, allege any concrete and particularized injury-in-fact. The members of the Plaintiff organizations or their children do not have a legally protected right to attend college, or to receive preferential treatment in the college or university admissions process on the basis of their race or gender, or to be admitted on the basis of their race or gender. In other words, there is no right to discrimination in the admissions process.[13] Nor do these members or their children possess a protected right to be taught in a racially or sexually diverse university community once admitted to college. To the extent the courts have recognized some interest in these principles under the rubric of a First Amendment academic freedom right, this "right" belongs to colleges and universities, not the Plaintiff organizations, their members, or their members' children.[14]

---

[12] Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary; United for Equality and Affirmative Action Legal Defense Fund; Rainbow Push Coalition; AFSCME Local 207; AFSCME Local 214; AFSCME Local 312; AFSCME Local 836; AFSCME Local 1642; AFSCME Local 2920; and the Defend Affirmative Action Party. (*Coalition* Second Amended Complaint, ¶¶ 16-18, 30-31.)

[13] See e.g. See Argument II (A), *infra*, discussing Plaintiffs' claims under Equal Protection Clause, which arguments Defendant incorporates into Argument I.

[14] See e.g., *Coalition to Defend Affirmative Action, et al v Granholm, et al*, 473 F3d 237 (CA 6, 2006); *Johnson-Kurck v Abu-Abs*, 423 F3d 590, 593-595 (CA 6, 2005). See also Argument II

Thus, the allegations in the Second Amended Complaint are devoid of any identifiable injury and there is nothing concrete and particularized about the speculative injury to the organizations or their members. Nor is there anything concrete and particularized about the speculative injury to the hypothetical class of persons Plaintiffs' claim to represent.

While the Supreme Court recognizes "that there may be circumstances where it is necessary to grant a third-party standing to assert the rights of another,"[15] there are express limits to this exception to general standing principles. In *Kowalski v Tesmer*, the Court observed that it has "limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a "close" relationship with the person who possesses the right. Second, we have considered whether there is a 'hindrance' to the possessor's ability to protect his own interests."[16]

Again, in this case, the organizational Plaintiffs fail to allege facts showing they meet the requirements to establish third party standing. They have not alleged facts establishing a "close" relationship with a person who possesses any right to challenge the application of the amendment. Nor have they shown that there is a "hindrance" to the possessor's ability to protect his own interests. In fact, the University Defendants have already made the argument that the amendment violates the First Amendment and maintain that "they have an academic freedom right, based in the First Amendment Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such facts . . . as race."[17] Accordingly, the organizational Plaintiffs lack standing to sue, and should be dismissed.

(C), *infra*, discussing the *Coalition* Plaintiffs' claim under the First Amendment, which argument Defendant incorporates into Argument I.

[15] *Kowalski v Tesmer*, 543 US 125, 130; 125 S Ct 564; 160 L Ed 2d 519 (2004).

[16] *Tesmer*, 543 US at 130 (internal citations omitted).

[17] *Granholm*, 473 F3d at 247.

2. The individual *Coalition* Plaintiffs lack standing.

In addition to showing the invasion of a legally protected interest, the second half of the "injury in fact" test requires that the party seeking future relief from the provisions of an allegedly unconstitutional law show "actual or imminent" as opposed to "conjectural or hypothetical" harm from its application.[18] Where a petitioner seeks declaratory or injunctive relief, it is insufficient that he has been injured in the past; "he must instead show a very significant possibility of future harm in order to have standing."[19]

The individual Plaintiffs can be subdivided into several categories: (a) those allegedly in some stage of the application process to a defendant University;[20] (b) those who allegedly "plan" to apply for admission to one of the defendant Universities "in the future";[21] (c) those who allegedly "plan" to apply to one of the defendant Universities graduate schools "in the future";[22]

[18] *Lujan*, 504 US at 560.

[19] *Bras v California Public Utilities Com*, 59 F3d 869, 873 (CA 9, 1995).

[20] Plaintiffs Beautie Mitchell, Christopher Sutton, Stasia Brown, Josie Hyman, and Alejandra Cruz, are Plaintiffs who are allegedly in the process of applying to a Defendant University or have applied to one of Defendant Universities. (*Coalition* Second Amended Complaint, ¶¶ 19-22.)

[21] Plaintiffs Turquoise Wise-King, Shanae Tatum, Calvin Jevon Cochran, Lashelle Benjamin, Deneshea Richey, Michael Gibson, Laquay Johnson, Brandon Flannigan, Kahleif Henry, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Williams Frazier, Dante Dixon, Candice Young, Tristan Taylor, and Jerell Erves allegedly all plan to apply to a Defendant University in the future. (*Coalition* Second Amended Complaint, ¶¶ 23-25).

[22] Maricruz Lopez is a Latina student at Defendant University of Michigan, and plans to apply to graduate school at one of the Defendant Universities. (*Coalition* Second Amended Complaint, ¶ 26). Issamar Camacho, a Latino, and Adarene Hoag, a Caucasian, are individuals who allegedly intend to apply to one of the Defendant Universities' undergraduate or graduate schools. (*Coalition* Second Amended Complaint, ¶¶ 27-28.)

and (d) a petition circulator.[23]

While the individual Plaintiffs may have some personal stake in the outcome of this litigation, they fail to establish that they have or will suffer the invasion of a legally protected interest, which injury is concrete and particularized, and actual or imminent, as opposed to merely conjectural or hypothetical. As noted above, Plaintiffs do not have a legally protected right to attend college, or to receive preferential treatment in the college or university admissions process on the basis of their race or gender, or to be admitted on the basis of their race or gender. Nor do they have any right to be educated amongst a certain community of students or teachers. Moreover, neither the group of applicants nor those intending to apply in the future have established or can establish with any certainty that they would be admitted even with the application of preferences. Nor is there any indication that their race will be any deciding factor in the decision to admit them to a Defendant University. They may be admitted without any consideration of race whatsoever. Additionally, simply being a petition circulator does not establish standing to seek the relief set forth in this lawsuit. Also, even if the Court were to find that the individual Plaintiffs pled an adequate "injury" for standing purposes, they have not shown that their allege injury is "likely" as opposed to merely "speculative."

Moreover, these individual Plaintiffs fail to establish third-party standing.[24] Even if the individual Plaintiffs can show the required "close" relationship, they fail to meet the second requirement because they do not allege any facts showing that universities are somehow impeded or hindered in asserting any claim of academic freedom. As stated previously, the Defendant Universities have already raised these arguments before the Sixth Circuit.

---

[23] Plaintiff Joseph Henry Reed was a petition circulator for Proposal 2. The complaint does not state what Plaintiff Reed's interests are in this lawsuit. (*Coalition* Second Amended Complaint, ¶ 29.)

[24] *Kowalski*, 543 at 130.

Accordingly, the individual Plaintiffs do not have individual or third-party standing to pursue the claims set forth in their Second Amended Complaint and this action should be dismissed.

C. The *Cantrell* Plaintiffs do not have standing to assert their Equal Protection claim.

Like the *Coalition* Plaintiffs, the Plaintiffs in *Cantrell* may be divided into categories – in this case students and faculty.

1. The Plaintiff students do not have standing.

The student category may be further subdivided into three categories: (a) current students at a University of Michigan school[25]; (b) high school students who have applied to the University of Michigan[26]; and (c) high school students who intend to apply to the University of Michigan.[27] The First Amended Complaint asserts (*Cantrell* Amended Complaint, ¶ 9):

> Each of the Plaintiffs . . . benefited from the diversity achieved by the former admissions policies that were altered by the University of Michigan in response to Proposal 2, and each supports policies that include race as one among many factors taken into account in making admissions decisions. Plaintiffs' ability to obtain reinstatement of those former admissions policies is unconstitutionally and unequally burdened by the difficulty of seeking an amendment to the Michigan Constitution.

These nonspecific allegations hardly set forth the invasion of a legally protected interest that is actual or imminent and concrete and particularized, as opposed to speculative or hypothetical. Plaintiffs, like the *Coalition* Plaintiffs, appear to ground their injury in fact on a First Amendment academic freedom right to be educated in a culturally diverse academic setting

[25] Plaintiffs Chase Cantrell, Joshua Kay, Sheldon Johnson, Bryon Maxey, Rachel Quinn, Dana Christensen, Casey Kasper, and Sergio Munoz fall into this category. (First Amended Complaint, ¶¶ 9-27).

[26] Plaintiffs Melinda Nestor, Toniesha Jones, Seger Weisberg, and Jay Robinson fall into this category. (*Cantrell* First Amended Complaint, ¶¶ 9-27).

[27] Plaintiffs Chidimma Uche, and Mark Carter, II, fall into this category. (First Amended Complaint, ¶¶ 9-27).

by culturally diverse faculty as determined by colleges or universities through their admissions policies and hiring practices. As previously argued, however, this "right" belongs to colleges and universities, not students or potential students.[28] Additionally, Plaintiffs cannot establish the additional elements to support a claim of third-party standing in order to assert this alleged right. Similarly, Plaintiffs' claim that their ability to petition the State for reinstatement of racial and gender preferences is unequally burdened by art 1, § 26, fails to establish the requisite injury. Plaintiffs are not and cannot be injured when the constitution specifically prohibits discriminatory treatment on the basis of race and in some cases gender. Thus, there is no harm or injury based on an alleged recognized or protected right to lobby or petition the State for the imposition of discriminatory practices. Moreover, this "injury" is no different from that of any other organization or group who seeks to amend the Michigan Constitution via the initiative process.

Accordingly, the individual Plaintiffs do not have individual or third-party standing to pursue the Equal Protection claim set forth in their Second Amended Complaint and these Plaintiffs should be dismissed.

2. The faculty Plaintiffs do not have standing.

The *Cantrell* Plaintiffs include four professors employed by the University of Michigan.[29] These Plaintiffs claim that having a racially diverse student body is essential to the quality of the courses they teach and that U of M's changes to its admissions policies in response to art 1, § 26 will impair their ability to teach effectively. (*Cantrell* First Amended Complaint, ¶¶ 15, 18, 25-26). Essentially, these professor Plaintiffs claim they are third-party beneficiaries of

[28] See fn 14.

[29] Plaintiffs Matthew Countryman, Kevin Gaines, Rosario Ceballo, and Kathleen Canning are faculty at the University of Michigan. (*Cantrell* First Amended Complaint, ¶¶ 15, 18, 25-26).

U of M's First Amendment academic-freedom right and that § 26 somehow infringes on their alleged opportunity to enjoy this right. These Plaintiffs, like the other Plaintiffs, have failed to allege proper third-party standing for the reasons stated above. Moreover, U of M's academic freedom does not provide the professor Plaintiffs with standing to assert an equal protection claim. Simply having an interest in teaching a diverse student body does not equate to the denial of a fundamental constitutional right. Accordingly, these Plaintiffs lack individual or third-party standing to sue, and this Court should dismiss their complaint.

II. Both the *Coalition* Plaintiffs and the *Cantrell* Plaintiffs fail to state claims upon which relief may be granted with respect to the substantive claims asserted in their respective Complaints, and thus each suit must be dismissed.

The *Coalition* Plaintiffs' Second Amended Complaint asserts six causes of action: a violation of the Fourteenth Amendment's Equal Protection Clause premised on a theory of racial and gender discrimination (Count I); a violation of the Fourteenth Amendment's Equal Protection Clause premised on a theory of "political structure" equal protection (Count II); a claim that Title VI of the Civil Rights Act of 1964 preempts the Amendment (Count III); a claim of "gender discrimination in the structure of government" premised on the Equal Protection Clause of the Fourteenth Amendment (Count IV); a claim that Title IX of the Education Amendments of 1972 preempts the Amendment (Count V); and a claim § 26 violates the First Amendment (Count VI).

The *Cantrell* Plaintiffs' First Amended Complaint asserts only one cause of action: A violation of the Fourteenth Amendment's Equal Protection Clause premised on a theory of "political structure" equal protection. These claims all fail as a matter of law.

A. Equal Protection Claims

1. Equal Protection – Race and Gender Discrimination (*Coalition* Second Amended Complaint Count I).

The *Coalition* Plaintiffs assert that § 26 violates the Equal Protection Clause because it discriminates on the basis of race and sex by eliminating those categories but not others as a basis upon which the State, including colleges and universities, could chose to grant preferential treatment. Plaintiffs' argument fails for the following reasons.

Contrary to Plaintiffs' assertions, the purpose or "primary aim" of § 26 is not "reducing the admission of black, Latino, and Native American students and of women students in some programs" at the Defendant Universities. (*Coalition* Second Amended Complaint, ¶ 107). Art 1, § 26 states that[30]:

> 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.

By using the terms "discriminate against" and "grant preferential treatment to," art 1, § 26 prohibits both the prejudicial treatment of a person and its counterpart – the favorable treatment of a person or group – on account of race, sex, color, ethnicity, and national origin. Thus, by adopting § 26 the people of Michigan chose to prohibit both discrimination disfavoring and preferential treatment favoring persons or groups based on race and sex. In other words, except

[30] Const 1963, art 1, § 26(1). The amendment also prohibits the "state" from engaging in the same conduct, and defines "state" as including, but not 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." Const 1963, art 1, § 26(3).

under limited circumstances,[31] the State must treat all individuals equally in the areas of public contracting, education, and employment.

In the context of this case then, for example, § 26 prohibits the Defendant Universities from denying admission to an applicant because he is white or a male (thereby discriminating against that person on the basis of his race or sex), and granting admission to another applicant because he or she is black or female (thereby according that person an advantage or "preferential treatment" on the basis of his or her race or sex).[32] Nothing about this prohibition violates the Equal Protection Clause of the United States Constitution.

"In contending that the Equal Protection Clause compels what it presumptively prohibits [P]laintiffs face an uphill climb."[33] The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[34] The central purpose of the clause "is the prevention of official conduct discriminating on the basis of race,"[35]

---

[31] Art 1, § 26 does provide certain exceptions to its application:

> (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.
>
> (5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

Section 26 also specifies that federal law or the federal Constitution prevails over any part of art 1, § 26 in conflict with those laws. Const 1963, art 1, § 26(7).

[32] Defendant Attorney General understands that the admissions process is more sophisticated than the simple example provided, but would note that the end result is the same – one applicant may not be chosen over another because of that applicant's race or sex.

[33] *Granholm*, 473 F3d at 248.

[34] US Const amend VIX, § 1.

[35] *Washington v Davis*, 426 US 229; 96 S Ct 2040; 48 L Ed 2d 597 (1976).

and on the basis of sex,[36] not State conduct that bans discrimination against or preferential treatment to individuals on the basis of race or sex as § 26 does.[37] Indeed, the ultimate goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race" and gender.[38] The Ninth Circuit came to this very conclusion in *Coalition for Economic Equity, et al v Wilson, et al*, where the Court addressed the constitutionality of Proposition 209 now Cal Const, art 1, § 31, after which Michigan's Proposal 2 was modeled and contains identical language.[39]

In addressing the equal protection claim asserted there, the Ninth Circuit opined that "[a]s a matter of 'conventional' equal protection analysis there is simply no doubt that Proposition 209 is constitutional."[40] "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."[41] The Court observed that the Equal Protection Clause guarantees that the government "will not classify individuals on the basis of impermissible

---

[36] *United States v Virginia*, 518 US 515; 116 S Ct 2264; 135 L Ed 2d 735 (1996).

[37] *Granholm*, 473 F3d at 248.

[38] *Palmore v Sidoti*, 466 US 429, 432; 104 S Ct 1879; 80 L Ed 2d 421 (1984); *Virginia*, 518 US 515.

[39] *Coalition for Economic Equity, et al v Wilson, et al*, 122 F3d 692 (CA 9, 1997), cert den 522 US 963; 118 S Ct 397; 139 L Ed 2d 310 (1997). Section 31 of the California Constitution provides in part, "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." See also Citizens Research Council of Michigan, Report 343, Statewide Issues on the November General Election Ballot, Proposal 2006-02: Michigan Civil Rights Initiative, September 2006, p 13, available at http://crcmich.org/PUBLICAT/2000s/2006/rpt343.pdf.

[40] *Coalition*, 122 F3d at 701.

[41] *Coalition*, 122 F3d at 702.

criteria."[42] The Court noted that while most laws classify individuals in some fashion, and thus condition the receipt or denial of state benefits on those classifications, i.e. income level, disability, age, occupation, etc, such legislative classifications "as a general rule are presumptively valid under the Equal Protection Clause."[43] "The general rule does not apply, however, when a law classifies individuals by race or gender." In those cases, any governmental action that classifies persons by race is presumptively unconstitutional and in order to be constitutional, the classification must be narrowly tailored to serve a compelling governmental interest.[44] "When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring an 'exceedingly persuasive' justification."[45]

The Ninth Circuit thus observed that the "first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws," and then concluded that because Proposition 209 drew no classifications, it did not violate equal protection[46]:

> Proposition 209 provides that the State of California shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race or gender. Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender. 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.

---

[42] *Coalition for Economic Equity*, 122 F3d at 702.
[43] *Coalition for Economic Equity*, 122 F3d at 702.
[44] *Coalition for Economic Equity*, 122 F3d at 702, citing *Wygant v Jackson Bd of Ed*, 476 US 267, 277-78; 90 L Ed 2d 260; 106 S Ct 1842 (1986) (plurality opinion).
[45] *Coalition for Economic Equity*, 122 F3d at 702, quoting *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 440; 105 S Ct 3249; 87 L Ed 2d 313 (1985).
[46] *Coalition for Economic Equity*, 122 F3d at 702.

This same analysis can and should be applied to § 26. Like the California law, § 26 does not classify any individuals by race or sex, but rather prohibits the State and Defendant Universities from doing the very same. A law that forbids these entities from discriminating either favorably or unfavorably on the basis of race or sex, simply cannot and does not violate the Equal Protection Clause under any interpretation accorded that clause by the courts, including the Supreme Court's 2003 decision in *Grutter v Bollinger*.[47]

In *Grutter*, the Supreme Court held that colleges and universities may still use racial classifications as a factor, among others, in school admissions when the school can establish a compelling state interest for doing so, and further establish that the classification is narrowly tailored to serve that interest.[48] The 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.[49] "But *Grutter* never said, or even hinted, that state universities *must* do what they barely *may* do."[50] Nowhere in *Grutter* did the 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

---

[47] *Grutter v Bollinger*, 539 US 306; 123 S Ct 2325; 156 L Ed 2d 304 (2003). Notably, the Supreme Court's decision in the recent school desegregation case does not alter or affect any of the analysis in this case. See *Parents Involved in Community Schools v Seattle School District No 1*, 555 US ___; 127 S Ct 2738; 168 L Ed 2d 508 (2007).

[48] *Grutter*, 539 US at 326-328.

[49] *Grutter*, 539 US at 328.

[50] *Granholm*, 473 F3d at 249 (emphasis in original).

develop," and warned that in 25 years, the Court expected that the use of racial preferences "will no longer be necessary."[51]

Arguments that the denial of the opportunity to obtain preferential treatment based on race or sex is unconstitutional, simply confuses what the Equal Protection Clause has been interpreted by the courts to permit with what it actually requires under its plain terms.[52] As the Ninth Circuit observed in the *Coalition for Economic Equity* case, "[t]hat the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether."[53] Here, as in California, the people chose to ban preferential treatment based on race and sex altogether.

Plaintiffs appear to argue that § 26 creates classifications based on race and sex because the amendment targets only those groups as no longer being entitled to seek preferential treatment in public employment, education and contracting, while other potential classes are not prohibited from seeking preferential treatment in those areas. Plaintiffs assert that the targeting of only race and sex is evidence of a discriminatory purpose behind § 26. Similar arguments were raised before and rejected by the Supreme Court in the analogous case of *Crawford, et al v Board of Education of the City of Los Angeles*.[54]

Crawford involved desegregation litigation in the Los Angeles Unified School district. The state trial court found *de jure* segregation in violation of both the State and Federal

---

[51] *Grutter*, 539 US at 342-343.

[52] See *Shaw v Reno*, 509 US 630, 654; 113 S Ct 2816; 125 L Ed 2d 511 (1993) ("in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires").

[53] *Coalition for Economic Equity*, 122 F3d at 708. (Emphasis deleted).

[54] *Crawford, et al v Board of Education of the City of Los Angeles*, 458 US 527; 102 S Ct 3211; 73 L Ed 2d 948 (1982).

Constitutions and ordered the school district to prepare a desegregation plan.[55] While the state trial court was considering alternative new plans in 1979, California voters ratified an amendment – known as Proposition I – to the State Constitution that provided that state courts could not order mandatory pupil assignment or busing unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.[56] The trial court denied the school district's request to halt all mandatory reassignment and busing, holding that Proposition I was not applicable in light of the court's 1970 finding of *de jure* segregation in violation of the Fourteenth Amendment.[57] The California Court of Appeals reversed the trial court, and further held that Proposition I was constitutional under the Fourteenth Amendment and barred that part of the plan requiring mandatory student reassignment and busing.[58] The California Supreme Court denied review, and the Supreme Court granted certiorari to determine the constitutionality of Proposition I.[59]

The Supreme Court opened its analysis of Proposition I by stating that it agreed with the California Court of Appeals "in rejecting the contention that once a State chooses to do 'more'

---

[55] *Crawford*, 458 US at 530.

[56] *Crawford*, 458 US at 531-532. Proposition I stated in part:

> "[No] court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause . . . ." [*Crawford*, 458 US at 532, quoting Cal Const art 1, § 7.]

[57] *Crawford*, 458 US at 533.

[58] *Crawford*, 458 US at 533-534.

[59] *Crawford*, 458 US at 534.

than the Fourteenth Amendment requires, it may never recede."[60] "We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court."[61] According to the Court, the amendment did not inhibit enforcement of any federal law or constitutional requirement, but rather sought to embrace "the requirements of the Federal Constitution." The Court commented that "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it."[62] Moreover, even after the amendment, the Court observed that the California Constitution and state law still obligated school desegregation and accorded greater protection on that front than federal law. Petitioners nonetheless argued that the amendment was unconstitutional on its face.

Petitioners "argue[d] that Proposition I employ[ed] an 'explicit racial classification' and impose[d] a 'race-specific' burden on minorities seeking to vindicate state-created rights," by creating a "'dual court system' that discriminates on the basis of race."[63] The Court observed that it would agree that if "Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest."[64] The Court did not agree, however, because "Proposition I [did] not embody a racial classification. It neither sa[id] nor implie[d] that persons are to be treated differently on account of their race."[65] The benefit the amendment sought to confer – neighborhood schooling – was available regardless of race. "In addition, this

[60] *Crawford*, 458 US at 535.
[61] *Crawford*, 458 US at 535.
[62] *Crawford*, 458 US at 535.
[63] *Crawford*, 458 US at 536.
[64] *Crawford*, 458 US at 536.
[65] *Crawford*, 458 US at 537.

Court previously has held that even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown."[66] The Court continued, stating that[67]:

> [A] distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters. This distinction is implicit in the Court's repeated statement 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. . . . In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.

The Court again noted that "a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose," and that "[i]n determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides "an 'important starting point.'"[68] The Court observed that Proposition I did not limit the power of the California courts to remedy the effects of intentional segregation; that the benefits of neighborhood schooling were race neutral; that the amendment only removed one means of achieving school desegregation.[69] The Court determined that even if it could assume that Proposition I had a disproportionately adverse effect on racial minorities, the Court could see no reason to challenge the Court of Appeals' conclusion that the California voters were not motivated by a discriminatory purpose. "In this case the Proposition was approved by an overwhelming majority of the electorate. It received support from members of all races. The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory

---

[66] *Crawford*, 458 US at 537-538.
[67] *Crawford*, 458 US at 538-539.
[68] *Crawford*, 458 US at 544 (citations omitted).
[69] *Crawford*, 458 US at 544.

objectives."[70] Under these circumstances, the Court concluded there was no reason to dispute the judgment of the Court of Appeals or "impugn the motives of the State's electorate."[71] Thus, the Court rejected the petitioners' arguments and affirmed the constitutionality of Proposition I.

Here, the people of Michigan chose to "repeal" the State's ability to grant preferential treatment to classes of citizens based on their race and sex. Before the passage of § 26, the State was able to do "more" than the Fourteenth Amendment requires by granting such treatment under certain conditions. The people, through the democratic process, have mandated that the State "recede" from this practice, and now do what the Fourteenth Amendment requires, which is to treat citizens of all races and either sex equally under the law. Under these circumstances, it would be "paradoxical" to conclude that the voters of the State of Michigan have thus violated the Equal Protection Clause. In any event, like Proposition I in *Crawford*, § 26 does not "embody a racial [or sexual] classification" since it neither says nor implies that "persons are to be treated differently on account of their race [or sex.]"[72] The benefit the amendment sought to confer – equal access to public education, public employment, and public contracting – is available to all persons regardless of their race or sex.

To the extent Plaintiffs argue that § 26 is unconstitutional because it will have a disproportionately adverse effect on the admissions of racial minorities and women to universities and colleges, they must demonstrate that the amendment was adopted with a discriminatory purpose.[73] Defendant Cox observes that arguments that § 26 will have a disproportionate effect on the ability of racial minorities and women to achieve admission into state universities and colleges, is entirely speculative at this point since § 26 only became

[70] *Crawford*, 458 US at 545.
[71] *Crawford*, 458 US at 545.
[72] *Crawford*, 458 US at 537.
[73] *Crawford*, 458 US at 537-538.

effective in December 2006. Thus, the universities have not even completed one full admissions cycle under § 26, and there is no credible or reliable way to determine whether § 26 will have a disproportionate effect at this time. Plaintiffs' reliance on statistics and studies from California or other States and the purported effect of Proposition 209 certainly cannot be considered determinative of what effect § 26 will have in the State of Michigan.

Moreover, even if it is assumed that § 26 will have an unintended disproportionate impact, this assumption in and of itself fails to demonstrate a discriminatory purpose or intent.[74] Indeed, there is no support for Plaintiffs' argument that the amendment was adopted for a discriminatory purpose. In order to establish a present intent to discriminate, the burden rests with the Plaintiffs to demonstrate that the State acted with discriminatory purpose. The Supreme Court has explained that "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[75]

Section 26 prohibits discrimination based on race and sex, and certainly does not preclude the State and its related entities from taking actions to protect against or remedy discrimination based on those impermissible classifications. Like Proposition I in *Crawford*, §

---

[74] See, e.g., *Washington v Davis*, 426 US 229, 242; 96 S Ct 2040; 48 L Ed 2d 597 (1976) (("An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.")); *Hernandez v New York*, 500 US 352, 359-60; 111 S Ct 1859; 114 L Ed 2d 395 (1991) ("A court addressing [an equal protection claim] must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" (omission in original) (internal citation omitted)); *State action Bd of Trs of the Univ of Ala v Garrett*, 531 US 356, 373; 121 S Ct 955; 148 L Ed 2d 866 (2001).

[75] *Hernandez*, 500 US at 360 (quoting *Pers Adm'r v Feeney*, 442 US 256, 279; 99 S Ct 2282; 60 L Ed 2d 870 (1979)) (omissions in original).

26 "was approved by an overwhelming majority of the electorate," and the "purposes of the Proposition [were] stated in its text and [were] legitimate, nondiscriminatory objectives."[76] The public debate over this amendment began early in 2004 and continued until the very eve of the election in November 2006. The print and broadcast media carried numerous stories and editorials during those years setting out both sides of the debate. There is no evidence that the 2.1 million "decisionmakers," or even a majority of that number, who voted in favor of the amendment did so "because of" the allegedly disproportionate impact it would have on the admissions of racial minorities and women to State universities and colleges.[77] Absent such evidence, there is no reason to "impugn the motives" of the citizens who voted in favor of the amendment.[78] Indeed, the Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices."[79]

Plaintiffs have thus failed to state a "conventional" claim under the Equal Protection Clause of the Fourteenth Amendment because; (1) § 26 does not create impermissible classifications based on race or sex, and does not discriminate on either basis; and (2) Plaintiffs cannot show that § 26 was adopted with a discriminatory purpose, thus making its allegedly disproportionate impact on racial minorities and women unconstitutional. Count I of the *Coalition* Plaintiffs' Second Amended Complaint therefore should be dismissed as a matter of law.

---

[76] *Crawford*, 458 US at 545.
[77] *Hernandez*, 500 US at 360.
[78] *Crawford*, 458 US at 545.
[79] *FCC v Beech Communications*, 508 US 307, 313; 113 S Ct 2096; 124 L Ed 2d 211 (1993).

2. Equal Protection – "Political Structure" Claim (*Coalition* Second Amended Complaint Counts II and IV; *Cantrell* Amended Complaint)

Both the *Coalition* and *Cantrell* Plaintiffs assert a constitutional violation grounded in "political structure" equal protection analysis. (*Cantrell* Amended Complaint, ¶¶ 78-79; *Coalition* Second Amended Complaint, ¶¶ 112-121, 130-136). Apparently premised on the Supreme Court's decisions in *Hunter v Erickson*,[80] *Washington v Seattle School District*,[81] and *Romer v Evans*,[82] Plaintiffs contend that § 26 unconstitutionally restructures the political process because racial minorities, students or applicants from particular national origins, and women may not petition the faculty and administration at the Defendant Universities for sustaining or making changes in admissions and hiring practices that benefit these groups. Rather, they allege, racial minorities and women may only secure adoption of preferences based on racial and gender status by mounting an extremely costly effort to amend the state constitution, the same process the proponents of § 26 were required to use to secure its passage. (*Cantrell* First Amended Complaint, ¶78; *Coalition* Second Amended Complaint, ¶¶ 116, 117, 120, 121, 134-136.)

These allegations fail to state an equal protection claim within the contexts of the *Hunter*, *Seattle* and *Romer* decisions. 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 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

[80] *Hunter v Erickson*, 393 US 385; 89 S Ct 557; 21 L Ed 2d 616 (1969).
[81] *Washington v Seattle School District*, 458 US 457; 102 S Ct 3187; 73 L Ed 2d 896 (1982).
[82] *Romer v Evans*, 517 US 620; 116 S Ct 1620; 134 L Ed 2d 855 (1996).

also required the approval of the electors before any future [antidiscrimination] ordinance could take effect."[83] 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."[84]

Similarly, in *Seattle*, the 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."[85]

Finally, in *Romer*, 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."[86] 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

[83] *Hunter*, 393 US at 389-390.
[84] *Hunter*, 393 US at 391.
[85] *Seattle*, 458 US at 474.
[86] *Romer*, 517 US at 624.

policies."[87] The Court than 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.[88]

The decisions in *Hunter, Seattle*, and *Romer* are simply inapplicable to § 26. First, § 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."[89] 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."[90]

Second, § 26 does not discriminate. The laws struck down in *Hunter*, *Seattle*, and *Romer*, 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 statute, policy, and amendment 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.[91]

---

[87] *Romer*, 517 US at 627.
[88] *Romer*, 517 US at 635.
[89] *Granholm*, 473 F3d at 251.
[90] *Hunter*, 393 US at 391.
[91] See *Romer*, 517 US 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 o the laws. If merely stating this alleged 'equal protection' violation does not suffice to refute it, our

Third, under a "political structure" analysis, reallocation of political decision-making violates equal protection only when there is evidence of purposeful racial discrimination, similar to "conventional" equal protection analysis.[92] Here, Plaintiffs do not make any showing of purposeful discrimination in support of their claim. Further, 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*, or the amendment in *Romer*. The language and purpose of § 26 is to eliminate preferential treatment in public contracting, public employment, and public education. This amendment does not reallocate the authority to address only a racial or gender problem "from the existing decision making body, in such a way as to burden minority interests."[93]

This is the very reasoning applied by the Sixth Circuit which drew these same distinctions and conclusions with respect to § 26 in its earlier decision in this case.[94] Addressing the viability of this claim, the Sixth Circuit concluded 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."[95] The same conclusion is required here.

Fourth, § 26 does not prohibit racial minorities and women from suggesting or urging colleges and universities to create practices promoting diversity. These individuals are free to support nondiscrimination policies. In fact, such nondiscrimination policies are entirely

---

constitutional jurisprudence has achieved terminal silliness.") See also *Equality Foundation of Greater Cincinnati, Inc v Buchanan*, 128 F3d 289 (CA 6, 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).

[92] *Seattle*, 458 US at 484-485; *Valieria v Davis, et al*, 307 F3d 1036, 1040 (CA 9, 2002).

[93] *Valeria*, 307 F3d at 1041.

[94] *Granholm*, 473 F3d at 250-251.

[95] *Granholm*, 473 F3d at 251, quoting *Crawford*, 458 US at 538.

consistent with § 26. Section 26 prohibits the State from discriminating, unlike the laws and policy in the *Hunter* line of cases, which eliminated the government's protection against discrimination.

Finally, the university admissions process is not a political process as contemplated in the *Hunter* line of cases. 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. (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. (Ex 1, Wu dep, p 31).

Similarly, U of M's one goal of the undergraduate admissions policy for the LS&A and Engineering Colleges is diversity. (Ex 2, Spencer dep, p 225). The faculty are the primary architects of all the admissions criteria and protocols. (Ex 2, p 235). These colleges have adopted a holistic review process that involves multiple reviews looking at many different factors. (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. (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. (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.

The Ninth Circuit concluded as much in the *Coalition for Economic Equity* case. There the Court rejected the identical "political structure" equal protection attack on California's Proposition 209. In *Coalition for Economic Equity*, 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?" [96] The Ninth Circuit answered, "No," stating[97]:

> 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.

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.[98] Thus, Plaintiffs have no equal protection rights against a political obstruction to preferential treatment. As the Ninth Circuit noted, "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms."[99] Plaintiffs' equal protection claim is premised on just such preferential

---

[96] *Coalition for Economic Equity*, 122 F3d at 704.
[97] *Coalition for Economic Equity*, 122 F3d at 707.
[98] *Coalition for Economic Equity*, 122 F3d at 708.
[99] *Coalition for Economic Equity*, 122 F3d at 708.

treatment and, therefore, fails as a matter law. Plaintiffs have "no fundamental right to be free of the political barrier a validly enacted constitutional amendment erects."[100]

For these reasons, both the *Coalition* Plaintiffs' and the *Cantrell* Plaintiffs' "political structure" equal protection claims clearly fail as a matter of law and should therefore be dismissed.

B. *Coalition* Complaint, Counts III and V – Preemption under the Civil Rights Act.

In Count III of their Second Amended Complaint, the *Coalition* Plaintiffs assert that Title VI of the Civil Rights Act of 1964 preempts Art 1 § 26. (*Coalition* Second Amended Complaint, ¶ 129). They argue that that since Title VI prohibits discrimination on account of race, color, or national origin in any program or activity that receives federal financial assistance, § 26's elimination of racial preferences somehow "stands as an obstacle to the accomplishment of the purposes of Title VI." (*Coalition* Second Amended Complaint, ¶ 128). The *Coalition* Plaintiffs' argument, however, fails because: (1) § 26 is consistent with the purpose of Title VI; and (2) § 26 contains express language to make certain no conflicts between state and federal laws occur.

First, it should be noted that § 1104 of the Civil Rights Act expressly limits the Act's application[101]:

> Nothing contained in any title of this Act 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 purposed of this Act, or any provision thereof.

Through this provision, "Congress has indicated that state laws will be preempted only if they actually conflict with federal laws."[102] Conflict preemption, which is the basis of the *Coalition*

[100] *Citizens for Equal Protection, et al v Bruning*, 455 F3d 859, 868 (CA 8, 2006).
[101] 42 USC § 2000h-4.

Plaintiffs' claim, occurs either where it is impossible to comply with both federal and state law, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as reflected in the language, structure, or underlying goals of the federal statute at issue.[103] Here, § 26's elimination of discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin, does not make compliance with the federal law a "physical impossibility." Nor does § 26 create an "obstacle" in accomplishing the purpose of the federal law. Rather, § 26 prohibits state universities from discriminating, or granting preferential treatment, on the basis of race, color and national origin. This prohibition is entirely consistent with Title VI's purpose, which is to prohibit intentional discrimination based on the same protected group status.[104]

Second, subsection (4) of § 26 states: "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."[105] Subsection (4) ensures that there is no conflict between the amendment and the Civil Rights Act. Thus, § 26 by its terms eliminates any conflict between it and federal-funding statutes like Title VI.[106]

In an apparent attempt to avoid the express language of both Title VI and § 26, the *Coalition* Plaintiffs' claim that United States Department of Education regulation 100.3(b)(2)

---

[102] *California Federal S & L Assoc v Guerra*, 479 US 272, 281; 107 S Ct 683; 93 L Ed 2d 613 (1987).

[103] *Fidelity Federal Savings and Loan Ass'n v de la Cuesta*, 458 US 141, 153; 102 S Ct 3014; 73 L Ed 2d 664 (1982).

[104] See *Alexander v Sandoval*, 532 US 275, 280; 121 S Ct 1511; 149 L Ed 2d 517 (2001) (Title VI proscribes only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment).

[105] Const 1963, art 1, § 26(4).

[106] *Granholm*, 473 F3d at 251. See also, *C & C Construction Inc v Sacramento Municipal Utility District*, 122 Cal App 4th 284; 18 Cal Rptr 3d 715 (2004), reviewing art 1, § 31(e) of the California constitution.

prohibits the utilization of criteria or methods of administration that has "the effect of subjecting individuals to discrimination because of their race, color or national origin, or has the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin." (*Coalition* Second Amended Complaint, ¶ 126)[107] The *Coalition* Plaintiffs, relying on "the experience in California", assert that compliance with § 26 will have the "effect" of reducing the number of black, Latino/a and Native American students attending universities. (*Coalition* Second Amended Complaint, ¶ 127). To state a claim under this regulation promulgated pursuant to Title VI, however, the Supreme Court has made clear that a plaintiff must allege facts showing intentional discrimination, not disparate impact.[108] Simply claiming that § 26 may result in a lower number of protected groups at a particular school is insufficient to establish intentional discrimination. Notably, § 26 does not require the universities to adopt any particular criterion or method of administration to intentionally discriminate against any members of a protected class. The mere fact that affirmative action is permissible under a regulation implemented pursuant to Title VI does not require preemption of a state law that prohibits affirmative action.[109] Therefore, since § 26 does not require acts that are contrary to Title VI or any related regulations, and in fact furthers the objectives of this federal statute, preemption does not apply.[110]

In Count V, the *Coalition* Plaintiffs further contend that Title IX of the Education Amendments of 1972 preempts § 26. Title IX provides, in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits

---

[107] See 34 CFR 100.3(b)(2).

[108] *Sandoval*, 532 US at 280-81.

[109] *Hi-Voltage Wire Works, Inc v City of San Jose*, 24 Cal 4th 537, 569; 101 Cal Rptr 2d 653 (2000), citing *Coalition for Economic Equity*, 946 F Supp 1480, 1517 n 49 (1996), vacated in part and remanded by *Coalition for Economic Equity*, 122 F3d 692.

[110] *Granholm*, 473 F3d at 251.

of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[111] This claim also lacks merit. As shown above, § 26 expressly avoids conflicts with federal-funding statutes like this one. Moreover, by preventing discrimination on the basis of sex, § 26 directly serves Title IX's objectives.[112]

In addressing a similar preemption challenge to California's Proposition 209, a constitutional amendment similar to § 26, the California Supreme Court noted that[113]:

> Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender. The ballot arguments--from which we draw our historical perspective--make clear that in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, "to achieve equality of [public employment, education, and contracting] opportunities" and to remove "barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." In short, the electorate desired to restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: " 'Basing present discrimination on past discrimination is obviously not right.'"

Put another way, and as Chief Justice Roberts recently observed, "[t]he way to stop discrimination on the basis of race is to stop discrimination on the basis of race."[114] Counts III and V of the *Coalition* Plaintiff's Second Amended Complaint therefore should be dismissed as a matter of law.

C. *Coalition* Complaint, Count VI – Violation of the First Amendment.

In this claim, the *Coalition* Plaintiffs assert that § 26 violates the University Defendants' First Amendment right of "academic freedom" as discussed in *Grutter v Bollinger.*[115] Plaintiffs assert that § 26 "invades the First Amendment rights of the defendant universities to select their

---

[111] 20 USC § 1681(a).
[112] *Granholm*, 473 F3d at 252 (citing 20 USC 1681)
[113] *Hi-Voltage Wire Works*, 24 Cal 4th at 670-71.
[114] *Parents Involved in Community Schools*, 555 US at ___.
[115] *Grutter*, 539 US 306.

student bodies and their teaching staff in ways that the educational authorities have deemed most appropriate," which includes "their right to seek diversity through the admission of a critical mass of students of diverse races and national origins and from both genders." (*Coalition* Second Amended Complaint, ¶¶ 147-148). Plaintiffs, as students or prospective students at the graduate or undergraduate Defendant Universities, attempt to assert this claim as "beneficiaries" of the asserted right. (*Coalition* Second Amended Complaint, ¶¶ 145-146). As discussed in Argument I above, Plaintiffs lack standing to assert this constitutional right vicariously. Additionally, this right of academic freedom, to the extent it exists, does not conflict with § 26 nor otherwise render it unconstitutional.

In *Grutter*, the Supreme Court observed in its discussion of the Equal Protection Clause that "[w]e are a 'free people whose institutions are founded upon the doctrine of equality.'"[116] The People of Michigan have exercised their freedom, and consistent with the Equal Protection Clause and the Supreme Court's unequivocal statement that "race-conscious admissions policies must be limited in time," voted to prohibit such policies as of November 7, 2006. Despite the clear import of the decision in *Grutter*, Plaintiffs assert that a right exists under the First Amendment pursuant to which the Universities may use race as a factor in their admissions process regardless of § 26. Such a "right" has never been recognized in either First Amendment or Equal Protection jurisprudence, and certainly was not recognized in *Grutter* or its companion case *Gratz v Bollinger*, or in the seminal affirmative action case *Regents of the University of California v Bakke*.[117] Even a cursory review of cases referring to the First Amendment in the

[116] *Grutter*, 539 US at 331 (quoting *Loving v Virginia*, 388 US 1, 11; 87 S Ct 1817; 18 L Ed 2d 1010 (1967) (internal quotation marks and citation omitted)).
[117] *Gratz v Bollinger*, 539 US 244; 156 L Ed 2d 257; 123 S Ct 2411 (2003); *Regents of the University of California v Bakke*, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978).

university context reveals that Plaintiffs' attempt to reclassify this issue as one of "academic freedom" rather than one of equal protection is without merit.

Plaintiffs assert that under *Grutter* and its predecessors, public universities have a First Amendment right to determine their academic standards and the criteria for admission, specifically, the admission of students of diverse races and national origins and from both genders. Plaintiffs contend §26 invades this right and violates the First Amendment rights of the universities and of the students who attend those universities. This allegation fails. First, § 26 does not bar diversity and does not bar the universities from admitting a diverse student body. Rather, § 26 prohibits preferential treatment based on class status, itself a form of discrimination, in achieving that diversity. Second, the asserted First Amendment "right" is not a "right" and certainly is not as expansive as alleged and must be applied in the context of other constitutional guarantees, here, specifically, that of equal protection.

For example, the Supreme Court has consistently subjected racial classifications to an equal protection analysis, and has only upheld these classifications if they survive strict scrutiny.[118] Case precedent thus requires that § 26's impact on public universities be analyzed under the line of Supreme Court cases, including *Grutter*, that subject race-conscious classifications to strict scrutiny under the Equal Protection Clause—not cases interpreting the scope of the First Amendment.

In *Grutter*, the Court adopted Justice Powell's opinion in *Bakke* and concluded that the University of Michigan law school had a compelling state interest for Equal Protection Clause

[118] See, e.g., *Grutter*, 539 US at 326-328, 343.

purposes in "attaining a diverse student body."[119] The exact language of the *Grutter* Court bears repeating here[120]:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School *is no less strict* for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within constitutionally prescribed limits.*
>
> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. 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*: "The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission." Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission.

Nowhere in this passage does the *Grutter* Court clarify or establish that universities have a First Amendment "right" of equal weight or which surpasses the Equal Protection Clause – nor does *Bakke* stand for that proposition. In other words, a university may not exercise this First Amendment "right" in a manner that violates the Equal Protection Clause.

In *Bakke*, Justice Powell cited *Sweezy v New Hampshire* for the principle that the freedom to choose "who may be admitted to study" is one of the "essential freedoms" that constitute "academic freedom."[121] Guided by that principle, Justice Powell concluded that a university's judgment that a diverse student body yields educational benefits renders the

---

[119] *Grutter*, 539 US at 328.

[120] *Grutter*, 539 US at 328-330 (internal citations omitted) (emphasis added).

[121] *Bakke*, 438 US at 312, citing *Sweezy v New Hampshire*, 354 US 234, 263 (1957).

attainment of a diverse student body constitutionally permissible.[122] Even so, Justice Powell recognized and warned universities that "*constitutional limitations protecting individual rights may not be disregarded*."[123] Thus, the compelling interest in achieving diversity is a separate and distinct concept from the use of racial classifications in order to achieve such diversity. Justice Powell employed the concept of academic freedom only to demonstrate why pursuing diversity could be considered a compelling state interest for purposes of the Equal Protection Clause.[124]

The *Grutter* Court similarly separated the concept of First Amendment "academic freedom" from the use of racial classifications to achieve diversity by specifically holding that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions *to further a compelling interest in obtaining the educational benefits that flow from a diverse student body*."[125] The Court observed that its holding was "in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within constitutionally prescribed limits*."[126] *Grutter* was thus not defining a First Amendment right enjoyed by the law school or other universities that outweighs equal protection principles or the Fourteenth Amendment. Rather, the Court discussed First Amendment principles in determining whether the law school's interest in obtaining educational benefits from a diverse student body constituted a compelling state interest for the purpose of satisfying the Equal Protection

[122] *Bakke*, 438 US at 312-313.
[123] *Bakke*, 438 US at 314 (emphasis added).
[124] *Bakke*, 438 US at 306, 312-315.
[125] *Grutter*, 539 US at 326-329, 343.
[126] *Grutter*, 539 US at 328 (internal citation omitted) (emphasis added).

Clause.[127] Indeed, it defies logic to suggest that the Court, which acknowledged the "'serious problems of justice connected with the idea of preference itself,'" and refused to "enshrin[e] a permanent justification for racial preferences" within the context of the Equal Protection Clause, somehow enshrined a similar justification within the context of the First Amendment.[128]

In this case, Plaintiffs "mistake interests grounded in the First Amendment – including [the Universities'] interests in selecting student bodies – with First Amendment rights."[129] Neither *Bakke* nor *Grutter* support the Plaintiffs' claim of a First Amendment "right" to use racial, gender or national origin classifications in order to obtain a diverse student body that somehow trumps or supplants the Fourteenth Amendment. Thus, Plaintiffs' claim that § 26 is unconstitutional under a First Amendment analysis fails as a matter of law. Count VI of the *Coalition* Plaintiffs Second Amended Complaint therefore should be dismissed as a matter of law.

Conclusion and Relief Sought

For the reasons set forth above, Intervening Defendant Attorney General Michael A. Cox's motion to dismiss or alternatively for summary judgment should be granted.

Respectfully submitted,

Michael A. Cox
Attorney General

s/Margaret A. Nelson (P30342)
Margaret A. Nelson (P30342)
Heather S. Meingast (P55439)
Joseph E. Potchen (P49501)

---

[127] *Grutter*, 539 US at 328-333. Moreover, the Supreme Court's companion decision in *Gratz* further deflates Plaintiffs' claim that § 26 violates a university's First Amendment "rights," since that Court found unconstitutional automatic preferences based on the race of the applicant despite the fact that student body diversity can be a compelling state interest under *Grutter*.

[128] *Grutter*, 539 US at 341-342 (internal citation omitted).

[129] *Coalition*, 473 F3d at 247.

Assistant Attorneys General
Co-Counsel of Record
Attorneys for Intervening Defendant
Attorney General Mike Cox
PO Box 30736
Lansing, Michigan 48909
517.373.6434

Dated: November 30, 2007

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2007, I electronically filed the foregoing paper with the clerk of the court using the ECF system which will send notification of such filing of the following: INTERVENING DEFENDANT ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT WITH BRIEF IN SUPPORT.

s/Margaret A. Nelson
Margaret A. Nelson (P30342)
Assistant Attorney General
Dept of Attorney General
Public Employment, Elections & Tort Div.
P.O. Box 30736
Lansing, MI 48909-8236
(517) 373-6434
Email: nelsonma@michigan.gov