Nos. 08-1387/1389/1534; 09-1111

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-1387/1534
COALITION TO DEFEND AFFIRMATIVE ACTION, etc, (BAMN), et al.
Plaintiff-Appellant (08-1387/Cross-Appellees
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.
Defendants-Appellees/Cross-Appellants (08-1534)

No. 08-1389
COALITION TO DEFEND AFFIRMATIVE ACTION, etc, (BAMN), et al.
Plaintiffs Appellees

CHASE CANTRELL, et al
Plaintiffs-Appellees
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.
Defendants

Nos. 09-1111
COALITION TO DEFEND AFFIRMATIVE ACTION, etc, (BAMN), et al.
Plaintiffs

CHASE CANTRELL, et al
Plaintiffs-Appellees
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, et al.
Defendants

En Banc Hearing from Sixth Circuit Court of
Appeals Three Judge Panel Decision

[PROPOSED] AMICUS CURIAE BRIEF
Of the California State Conference NAACP, and
Los Angeles NAACP
In support of Coalition to Defend
Affirmative Action etc, et al., (BAMN)
Plaintiffs-Appellants

And, Affirmance of the Three Judge Panel's Decision

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TABLE OF CONTENTS

	Pg.
AMICUS CURIAE INTEREST AND AUTHORITY TO FILE	1
FEDERAL RULE OF APPELLATE PROCEDURE, RULE 29(c)(5)(A)(B)(C) COMPLIANCE STATEMENT	3
SUMMARY OF PERTINENT FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
1. Statutes that appears race-neutral on its face may violate the United States Constitution "Equal Protection" Clause if they have a *"racial focus" and "reorder the political process to place a special burden on minorities."*	8
a. Proposal 2 has a "racial focus."	9
b. Proposal 2 reorders the political process, so as, to place "special burdens" on racial minorities not levied on the majority, or others seeking to change non-race based admissions policies.	11
CONCLUSION	13
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

	Pgs
Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)	8
Romer v. Evans, 517 U.S. 620, 634 (1996)	13
Coalition to Defend Affirmative Action, etc, et al., v. Regents of the Univ. of Mich., etc., et al., Nos. 08-1387/1389/1534; 09-1111 (2011)	2,6,7,8 11,12
Hunter v. Erickson, 393 U.S. 385 (1969)	5,6,9,13
Lee v. Nyquist, 318 F.Supp. 710, 720 (W.D.N.Y. 1970) (three-judge panel), *aff'd,* 402 U.S. 935 (1971)	13
Romer v. Evans, 517 U.S. 620, 634 (1996)	13
Pers. Adm'r v. Feeney, 442 U.S. 256, 485 (1979)	13
Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)	5,9,12,13
United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)	2,6,7,8 10,12
Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)	5,9,12,13

FEDERAL CONSTITUTION AND STATUTES

United States Constitution, 14th Amendment	5,7,12

FRCP, Rule 29(b) 3

FRAP, Rule 29(c)(5)(A)(B)(C) 3

STATE CONSTITUTIONS

Michigan Const. Art. 1, Sec. 26 [Proposal 2] 1,4,5,6,8 10,11,12

California Constitution, Article 1, Sec 31, [Proposition 209] 1,4,5

AMICUS CURIAE INTEREST AND AUTHORITY TO FILE

The National Association for the Advancement of Color People [NAACP] is a non-profit association founded in 1909 as a civil rights organization, which opened the Los Angeles NAACP Branch in 1914, and the NAACP California State Conference in 1986, and the other 53 California branches during its 102 year history. The mission statement for the NAACP body is:

MISSION

"The mission of the National Association for the Advancement of Colored People [NAACP] is to ensure the political, educational, social and economic equality of rights of all persons…"

California voter approved Proposition 209 (1996), which was codified in the California Constitution Article 1, Section 31, and was copied verbatim in the Michigan voter approved Proposal 2 (2006). The primary propose of each measure was to end affirmative action in public education, contracting and employment for racial and ethnic minorities.

The results, among other things, undermined and drastically eliminated educational opportunities of higher education for minorities, especially African-Americans, Hispanics and Native Americans. The passage of each of these constitutional amendments terminated a primarily minority benefit, and reordered the political process in such a way as to

place a special burden on racial minorities. This is the antithesis of the 102 years civil rights mission of the NAACP, and its California branches.

The fate of higher education opportunities for California and Michigan minorities are intricately tied together, and the legal and moral obligations of both states will be measured by the outcome of this case. Historically, where the civil rights of individuals have been abridged by government actions, or the acts of individuals the NAACP, true to its mission, has sought to intervene to assist in securing, re-securing or procuring civil rights protections.

As a result, the Los Angeles NAACP, California State Conference NAACP, which include the following California Branches: Long Beach, Beverly Hills/Hollywood, Pasadena, Santa Monica/Venice, Inglewood/South Bay, Compton, Carson/Torrance, Altadena, Antelope Valley, San Fernando Valley, Victor Valley, San Gabriel Valley, San Bernardino, Oakland, Richmond, San Francisco, Sacramento, Stockton, San Diego, San Diego/Oceanside, Orange County/Santa Ana, Riverside, Fresno, San Jose, San Mateo County, Bakersfield, Hanford, Indian Wells Valley, Lake Elsinore, Santa Maria/Lompoc, Ventura County, Barstow, Monterey/Peninsula, Santa Rosa/Sonoma, Eureka, Lake County, Redding, Tri-City/Fairfield, Butte County/Oroville, Vallejo, Berkeley East County, El Cerrito, Hayward/S. Alameda County, Los Banos, Madera, Merced, and Modesto/Stanislaus, [NAACP]

have sought leave to file this Amicus Curiae Brief in support of Plaintiffs-Appellants, *Coalition to Defend Affirmative Action, Integration and Immigrant Rights For Equality By Any Means Necessary (BAMN) et al.*,

under FRCP, Rule 29(b). Further Appellants/Plaintiffs consent to the NAACP filing of their Amicus Curiae brief.

COMPLIANCE STATEMENT
FRAP, RULE 29(c)(5)(A)(B)(C)

No party's counsel authored any part of this Amicus Curiae brief submitted by the NAACP.

No party or party's counsel contributed any money to fund the preparation or submission of the NAACP's Amicus Curiae brief.

All expenses incurred in the preparation and submission of this Amicus Curiae brief was paid for by the NAACP.

SUMMARY OF PERTINENT FACTS

In the sixties and seventies African-American along with several other minority groups fought and won affirmative action programs in higher education, employment and public contracting in an effort to level the playing field in the aforementioned areas, and increase minority representation and participation in government controlled educational, economic and employment activities.

The successes of these programs were gradual, but meaningful. The programs and processes resulted in a more diverse, integrated and well rounded population; advanced educational and occupational aspirations; enhanced critical thinking skills; facilitated the equitable distribution of

resources; reduced, prevented or eliminated the effects of racial and social isolation; encouraged positive relationships across racial and economic lines by breaking the cycle of racial hostility to foster a community of tolerance and the appreciation of students from varied and diverse backgrounds; and promotes participation in a pluralistic society in the United States, especially in states such as; California and Michigan.

Notwithstanding, California in 1996, and Michigan in 2006 passed identical voter approved anti-affirmative action initiatives with little, if any, support from identifiable minority groups. California Constitution, Article 1, Sec. 31, (Proposition 209), Michigan Const. Art. 1, Sec. 26, (Proposal 2).

The undisputed goal, purpose, mission, plan and motive for passing these anti-affirmative action amendments were to end affirmative action programs for African-Americans and other minorities in education, public employment and public contracting in the states of Michigan and California, and to place as great a barrier possible to prevent future repeal, or modification of the amendments by heavily burdening African-Americans and other minorities abilities to challenge the anti-affirmative action constitutional amendments. Contrary to the diversity statement of the University of California System, which is comprised nine campuses throughout the state.

The diversity statement which read in pertinent parts: "The University particularly acknowledges the acute need to remove barriers to the recruitment, retention, and advancement of talented students, faculty, and staff from historically excluded population who are currently underrepresented." *Adopted by the Assembly of the Academic Senate May 10, 2006, Endorsed by he President of the University of California June 30, 2006, and adopted as policy by the Regents of the University of California September 20, 2007.*

The University of Michigan has expressed a similar desire prior to and after the passage of Proposal 2. However, neither the University of Michigan system, nor the University of California system after the passage of Proposal 2, and Proposition 209 has any independent powers to make race-related admissions decisions.

SUMMARY OF ARGUMENT

Michigan Const. Art. 1, Sec. 26 [Proposal 2] violates the United States 14th Amendment Equal Protection Clause under *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969). Proposal 2 cherry picked and singled out for permanent elimination only higher education preference programs that benefited African-Americans and other minorities (eliminating all preference based on

race, sex, color, ethnicity, or national origin) while leaving intact preferences for family alumni connections, athletics, grades, arts, or other special skills or attributes preferences.

Proposal 2 not only eliminated affirmative action in Michigan higher education, it eliminated any chance of modification or repeal absent the extraordinarily burdensome and costly initiative process. It should be noted that Michigan has never had an African-American of other under-representative minority group sponsored statewide initiative to make it on the ballot for a vote by the general public.

"…State[s] may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter 393 U.S. at 393.* "Ensuring the fairness of the political processes, in particular, is essential, because an electoral minority is by definition disadvantaged in its attempts to pass legislation; and 'discrete and insular minorities' are especially so given the unique hurdles they face." This court's decision herein, *Coalition to Defend Affirmative Action, etc, et al., v. Regents of the Univ. of Mich., etc., et al*., Nos. 08-1387/1389/1534; 09-1111 (2011), quoting *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152 n. 4 (1938) at 9-10.

While it is true that the signature principle of the 14th Amendment is to provide equal protection for all individuals regardless of race, color, national origin, gender or ethnicity, the 14th Amendment also secures and protects the equal rights of minorities from political processes that places special burdens on the ability of minority groups to achieve beneficial legislation. *Coalition to Defend Affirmative Action,* at 28.

For nearly a half a century Michigan universities and colleges had use affirmative actions programs to increase, what would otherwise be insignificant numbers of African-Americans and other minorities on their campuses. While these programs primarily assisted African-Americans, Hispanics and Native Americans the diverse campuses populations enriched the universities and colleges experience of all who attended, and created a more global campus climate, produced various and multicultural ideas, diverse views, and enhanced social interracial and intercultural interactions.

Proposal 2 targeted for elimination, and did eliminate programs primarily design for minorities, and primarily benefited minorities. Proposal 2 was designed specifically to reallocate political power, and/or reorder the decision-making process, so as, to place "special burdens" on Michigan's African-American and other minority groups' ability to modify or repeal the

anti-affirmative action constitutional amendment through the political process.

"The equal protection injury imposed by Proposal 2 is not the Michigan electorate's attempt to end affirmative action, but the method by which it sought to do so." *Coalition to Defend Affirmative Action,* at 33.

ARGUMENT

1. Statutes that appears race-neutral on its face may violate the United States Constitution "Equal Protection" Clause if they have a *"racial focus" and "reorder the political process to place a special burden on minorities."*

A fair political process in education is paramount to good citizenship and is the bedrock for equal opportunity. *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954).

"*Therefore, in the context of education, we must apply the 'political process' protection with the utmost rigor given the high stakes. Of course, the Constitution does not protect minorities from political defeat: Politics necessarily produces winners and losers. We must therefore have some way to differentiate between the constitutional and the impermissible. And Hunter and Seattle do just that. They provide the benchmark for when the majority has not only won, but also rigged the game to reproduce its success indefinitely." Coalition to Defend Affirmative Action,* at 10.

The initiative Proposal 06-2, commonly known as Proposal 2, was presented to the Michigan general public as a proposal to amend the Michigan Constitution to ban affirmative action programs. Though, the

Proposal found it way on the ballot through methods that undermined the integrity and fairness of the democratic processes, once on the ballot it passed by 58% to 42% of the vote, with little or no African-American, Hispanic or Native American support.

a. Proposal 2 has a "racial focus."

The Supreme Court in *Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982), and *Hunter v. Erickson,* 393 U.S. 385 (1969), *Hunter/Seattle* framed the issue as whether the policy targeted by the law "at bottom inures primarily to the benefit of the minority, and is designed for that purpose." *Seattle,* at 472. The Court in *Seattle,* held it is enough that minorities may consider busing for integration to be legislation that is in their interest. Id. at 474, quoting *Hunter,* 393 U.S. at 395 (Harlan, J. concurring).

In the instance case, underrepresented minorities lobbied for affirmative actions policies in Michigan universities and colleges so as to increase minority representation at all Michigan schools of higher learning. The unrebutted evidence in the record in this action indicates that Proposal 2 will likely negatively impact minority representation at Michigan universities and colleges.

By comparison the California anti-affirmative action constitutional amendment, which was enacted 10 years earlier than the Michigan's Proposal 2 shows a significant negative impact on minority students. Ten years after the passage of California Proposition 209 African-American student enrollment at the University of California Los Angeles (UCLA) in 2006 hit an all time low of 96 students, which included enrolled athletes. Native American hit a new low of 11 enrollees in 2008, Pacific Islanders a new low of 10 in 2009, and Latinos at 141 in 2006 hit their new low. These new all time lows at UCLA from 2006-2010 were out of an annual average freshmen enrollment of 4,600 students. (UCLA first-year-college admissions, all colleges fall 2006-fall 2010).

The fact that Proposal 2 found little or no support in the African-American, Hispanic and Native American communities attest to the fact that these minority groups considered Michigan's affirmative action programs in higher education a primary and necessary benefit to increase their presence on Michigan universities and colleges campuses.

The herein, three judge panel's finding that race-conscious admissions policies now barred by Proposal 2 inure primarily to the benefit of racial minorities, and its prohibition of the use of race in the admissions process

has a "racial focus." *Coalition to Defend Affirmative Action*, at 17, finds ample support in the record of this case.

b. Proposal 2 reorders the political process, so as, to place "special burdens" on racial minorities not levied on the majority, or others seeking to change non-race based admissions policies.

The simple repeal or modification of desegregation or antidiscrimination laws without more, has never been presumptively viewed as an invalid classification. However, Proposal 2 does much more than just merely repealed affirmative action programs in Michigan universities and colleges. It placed the decision-making authority over affirmative action at a new and remote level of government. Proposal 2 "burdens all future attempts" to implement race-conscious admissions policies by having to obtain an affirmative vote of two-thirds of the state assembly and senate, or 10% of those who voted in the last governor's race, and finally a majority of the voters who vote on a new initiative.

The cost of such an undertaking could easily run into the millions of dollars. Notwithstanding the fact that no minority sponsored initiative has even made it on a Michigan general election ballot.

Whereas, if a Michigan citizen wanted to effect a change, repeal or modification of any other admission policy concerning a Michigan

university or college he/she would have a multitude of options for seeking change, such as; lobby the admissions committee by letter or in person, petitioning the schools trustees, its dean of admissions, the schools' presidents, their local legislative representative, the governor, etc.

In other words, the political process for implementing changes unrelated to race were not changed by the passage of Proposal 2, only race related admissions changes are drastically and heavy burdened. The ordinary Michigan citizen rights to redress for non-race related admissions policies are post-Proposal 2 not loaded with "special burdens."

The U.S. Supreme court noted that special procedural barriers to minority interests discriminate against racial minorities just as surely as, and more insidiously than, substantive legal barriers challenged under the traditional equal protection rubic. *Seattle,* at 467. Where Michigan requires less onerous avenues to effect political change for non-race related admissions decisions, it cannot enforce more arduous pathways in front of those who would advocate for changes in race-related admissions decisions without violating the 14th Amendment. *Coalition to Defend Affirmative Action,* at 28.

A state may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any

person's vote… *Lee v. Nyquist*, 318 F.Supp. 710, 720 (W.D.N.Y. 1970) (three-judge panel), *aff'd*, 402 U.S. 935 (1971).

Racial classifications regardless of purported motivation are presumptively invalid. Legislation such as Proposal 2, which restructures the political process along racial lines and places special burdens on racial minorities are inherently suspect regardless of whether purposeful racial discrimination is its demonstrated motivation. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 485 (1979).

"A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. 'The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

CONCLUSION

The political process theory does not serve as a duplicative backstop against already unconstitutional action. Instead, it prevents the placement of special procedural obstacles on minority objectives, whatever those objectives may be. *(The Hunter/Seattle Doctrine).*

WHEREFORE, the Los Angeles NAACP, the State Conference of California NAACP, inclusive of Long Beach, Beverly Hills/Hollywood,

Pasadena, Santa Monica/Venice, Inglewood/South Bay, Compton, Carson/Torrance, Altadena, Antelope Valley, San Fernando Valley, Victor Valley, San Gabriel Valley, San Bernardino, Oakland, Richmond, San Francisco, Sacramento, Stockton, San Diego, San Diego/Oceanside, Orange County/Santa Ana, Riverside, Fresno, San Jose, San Mateo County, Bakersfield, Hanford, Indian Wells Valley, Lake Elsinore, Santa Maria/Lompoc, Ventura County, Barstow, Monterey/Peninsula, Santa Rosa/Sonoma, Eureka, Lake County, Redding, Tri-City/Fairfield, Butte County/Oroville, Vallejo, Berkeley East County, El Cerrito, Hayward/S. Alameda County, Los Banos, Madera, Merced, Modesto/Stanislaus branches request the Honorable Sixth Circuit Court of Appeals En Banc to affirm the decision of the three-judge panel in the aforementioned case.

Dated:_____

_____
Kenneth C. Yeager
Attorney for NAACP et al

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the type-volume limitations of Federal Rules of Appellate Procedure, Rule 29(d), and Rule 32, because it is proportionately spaced, has a typeface of 14 points, and contains 2,692 words, excluding the parts of the brief exempted by federal Rule of Appellate Procedure, Rule 32(a)(7)(B)(iii).

Dated:_____

_____
Kenneth C. Yeager
Attorney for NAACP et al

PROOF OF SERVICE

I am not a party in the within action, and I hereby certify that on October 26, 2011, I served the foregoing documents described as the NAACP Motion for Leave to file a Brief Amicus Curiae, and [Proposed] Amicus Curiae Brief of the NAACP.

By United States Postal Mail copies of the NAACP Motion for Leave to file a Brief Amicus Curiae, and [Proposed] Amicus Curiae Brief of the NAACP on George Boyer Washington, Esq., Scheff, Washington & Diver, 645 Griswold, Ste. 1817, Detroit, Mi. 48226-0000; Shanta Driver, Esq., Scheff, Washington & Driver, 645 Griswold, Ste. 1817, Detroit, Mi. 48226-0000; Winifred V. Kao, Esq., Asian Law Caucus, 55 Columbus Avenue, San Francisco, Ca. 94111; Leonard M. Niehoff, Esq., Honigman, Miller, Schwartz & Cohn, Esq., 130 S. First Street, 4th Flr., Ann Arbor, Mi. 48104-1386; John J. Bursch, Esq., Office of the Michigan Attorney General, 525 Ottawa Street, 7th Flr., Law Bldg., Lansing, Mi. 48909; Heather S. Meingast, Assistant Attorney General, Office of the Michigan Attorney General, P.O. Box 30736, Lansing, Mi. 48909; Margaret A. Nelson, Assistant Attorney General, Office of the Michigan Attorney General, Public Employment & Elections Division, P.O. Box 30736, Lansing, Mi. 48909; Joseph E. Potchen, Public Employment Elections & Tort Division, P.O. Box 30736, Lansing, Mi. 48909-0000 by first class mail.

I deposit such envelope in the United States Mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I declare under penalty of perjury that the above is true and correct.

_____

Declarant