UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,
Plaintiffs-Appellants, Case Nos. 08-1387
08-1389, 08-1534

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

and

ATTORNEY GENERAL BILL SCHUETTE, *et al.*,
Intervenor-Appellee.

CHASE CANTRELL, *et al.*,
Plaintiffs-Appellants, Case No. 09-1111

v.

ATTORNEY GENERAL BILL SCHUETTE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
HONORABLE DAVID M. LAWSON

MICHIGAN CIVIL RIGHTS COMMISSION
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN OPPOSITION TO PETITION FOR REHEARING EN BANC

Pursuant to FRAP 29(B), The Michigan Civil Rights Commission moves for leave to file the contemporaneously provided brief as Amicus Curia for the following reasons:

1. This case involves a constitutional challenge to Michigan's ballot initiative, Proposal 06-02 ("Proposal 2"), which amended Michigan's Constitution by adding Mich. Const. art I, § 26, to prohibit Michigan's public universities from providing "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin."

2. The Michigan Civil Rights Commission (Commission) is an independent body created by the Michigan Constitution of 1963 for the purpose of protecting persons from discrimination by government and private actors and ensuring fair and equal access to employment, education and economic opportunities. [1]

3. The Michigan Constitution specifically charges the Commission with investigating alleged discrimination against any person on the basis of religion, race, color or national origin and "to secure the equal protection of such civil rights without such discrimination."[2] The Commission enforces Michigan's two antidiscrimination statutes, the Elliott-Larsen Civil Rights Act[3] and the Persons with Disabilities Civil Rights Act.[4] The Commission has a strong interest in ensuring that every Michigan resident and visitor receives equal protection under

[1] Mich. Const., art. 5, §29
[2] *Id.*
[3] MCL 37.2101 et seq.
[4] MCL 37.1101 et seq.

the law. The Commission is also committed to guaranteeing equal educational opportunities throughout Michigan's public university system.

4. The Commission held four public hearings investigating allegations of fraud perpetrated by proponents of Proposal 2. After hearing testimony from dozens of individuals and reviewing over five hundred affidavits, the Commission reported its findings to the Michigan Supreme Court on June 7, 2006.[5] This report found supporters of Proposal 2 fraudulently obtained signatures by telling registered voters the initiative permitted affirmative action, when its terms and intent were to the contrary.[6] The Commission concluded that the fraud committed by supporters of Proposal 2 was part of "a highly coordinated, systematic strategy involving many circulators and, most importantly, thousands of voters."[7]

5. The Commission's findings have since been widely accepted, including by this Court in *Operation King's Dream v Connerly:*

> The record and the district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . . By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.[8]

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[5] *Report on the Use of Fraud and Deception in the Gathering of Signatures for the Michigan Civil Rights Initiative*. Available at, *http://www.michigan.gov/documents/PetitionFraudreport_162009 7.pdf.*
[6] *Report* at 4.
[7] *Report* at 12.
[8] *Operation King's Dream v Connerly,* 501 F.3d 584, 591 (6th Cir. 2007).

6. The District Court in *Operation King's Dream* also recognized the role played by, and the unique interest of, the Commission during the period surrounding the vote on Proposal 2 and adoption of the provision of Michigan's Constitution now at issue:

> The People of Michigan should also be concerned by the indifference exhibited by the state agencies who could have investigated and addressed [the proponents of Proposal 2's] actions but failed to do so. With the exception of the Michigan Civil Rights Commission, the record shows that the state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud raised by Plaintiffs. If the institutions established by the People of Michigan, including the Michigan Courts, Board of State Canvassers, Secretary of State, Attorney General, and Bureau of Elections, had taken the allegations of voter fraud seriously, then it is quite possible that this case would not have come to federal court.[9]

7. Furthermore, Immediately after Proposal 2's passage, and pursuant to an Executive Directive issued by Michigan's Governor, the Commission assessed the extent of the new constitutional provision's impact on Michigan's laws, regulations, economic development efforts, and upon its educational institutions and programs. The Commission issued its report on March 7, 2007.[10] Among the Commission's many findings and recommendations was its conclusion Proposal 2

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[9] *Operation King's Dream v Connerly*, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 29, 2006).

[10] *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06- 02, a*vailable at *http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf*

violated the Equal Protection clause of the United State's Constitution.[11]

8. The Attorney General would normally provide counsel and represent the Michigan Civil Rights Commission in matters before this Court.[12] However, because the Attorney General is a party to this matter, and in recognition of the Michigan Civil Rights Commission's constitutional status as an independent entity within Michigan government, the Attorney General has appointed the Michigan Department of Civil Rights Director of Law and Policy a Special Assistant Attorney General to represent the Commission's interests in this case.

9. While FRAP 29(a) permits the filing of an Amicus brief by a state without motion, the Commission makes this motion for leave to file because it is filing in its independent capacity and not filing on behalf of the State.[13]

10. No party or party's counsel authored any part of this brief, nor did amicus curiae, its counsel, the Michigan Civil Rights Commission or Michigan Department of Civil Rights receive any money intended to fund preparing or submitting the brief.

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[11] *"One Michigan"* at 16, citing the *Hunter/Ericson* doctrines as discussed in the argument portion of this brief.

[12] MCL 37.2602 provides "(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act."

[13] FRAP 29(a) provides: "The United States . . . or a State . . . may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court . . . ."

11. The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and do not necessarily represent the opinions of any other person or entity within Michigan's government.

12. The Commission's independence, its prior involvement with the matter presently before this Court, and its function as Michigan's civil rights watchdog, provide it with a prospective different from the principle parties that is relevant to the disposition of this case that it believes will assist this Court in its deliberations.

WHEREFORE, the Michigan Civil Rights Commission moves that this Court grant its Motion to file the contemporaneously provided Brief in Opposition to Petition for Rehearing En Banc as Amicus Curia.

Respectfully submitted,

s/Daniel M. Levy
Daniel M. Levy (P39152)
Special MI Assistant Attorney General
Director of Law and Policy
Michigan Department of Civil Rights
3054 W. Grand Blvd., Suite 03-600
Detroit, MI 48202
(313) 456-3812
Counsel of Record for Amicus Curiae
Michigan Civil Rights Commission

Dated: August 16, 2011

CERTIFICATE OF SERVICE

I certify that on August 16, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record – and additionally by providing a copy to the Court's en banc coordinator.

s/Daniel M. Levy
Daniel M. Levy (P39152)
Special MI Assistant Attorney General
Director of Law and Policy
Michigan Department of Civil Rights
3054 W. Grand Blvd., Suite 03-600
Detroit, MI 48202
(313) 456-3812
Counsel of Record for Amicus Curiae
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BRIEF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION IN OPPOSITION TO PETITION FOR REHEARING EN BANC

Daniel M. Levy
Special Assistant MI Attorney General
Director of Law and Policy
Michigan Department of Civil Rights
3054 W. Grand Blvd., Suite 03-600
Detroit, MI 48202
(313) 456-3812
Counsel of Record for Amicus Curiae
Michigan Civil Rights Commission

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Michigan Civil Rights Commission (Commission) is an independent body created by the Michigan Constitution of 1963 for the purpose of protecting persons from discrimination by government and private actors and ensuring fair and equal access to employment, education and economic opportunities. [1]

The Michigan Constitution specifically charges the Commission with investigating alleged discrimination against any person on the basis of religion, race, color or national origin and "to secure the equal protection of such civil rights without such discrimination."[2] The Commission enforces Michigan's two antidiscrimination statutes, the Elliott-Larsen Civil Rights Act[3] and the Persons with Disabilities Civil Rights Act.[4] The Commission therefore has a strong interest in ensuring that every Michigan resident and visitor receives equal protection under the law. The Commission is also committed to guaranteeing equal educational opportunities throughout Michigan's public university system.

The Commission held four public hearings in 2006 investigating allegations of fraud perpetrated by proponents of Proposal 2. After hearing dozens of individuals testify and reviewing over five hundred affidavits, the Commission

[1] Mich. Const., art. 5, §29
[2] *Id.*
[3] MCL 37.2101 et seq.
[4] MCL 37.1101 et seq.

reported its findings to the Michigan Supreme Court on June 7, 2006.[5] This report found supporters of Proposal 2 fraudulently obtained signatures by telling registered voters the initiative permitted affirmative action, when its terms and intent were to the contrary.[6] The Commission concluded the fraud committed by supporters of Proposal 2 was part of "a highly coordinated, systematic strategy involving many circulators and, most importantly, thousands of voters."[7]

The Commission's findings have since been widely accepted, including by this Court in *Operation King's Dream v Connerly:*

> The record and the district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. . . . By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.[8]

The District Court in *Operation King's Dream* also recognized the role played by, and the unique interest of, the Commission during the period surrounding the vote on Proposal 2 and adoption of the provision of Michigan's Constitution now at issue:

> The People of Michigan should also be concerned by the indifference exhibited by the state agencies who could have investigated and

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> addressed [the proponents of Proposal 2's] actions but failed to do so. With the exception of the Michigan Civil Rights Commission, the record shows that the state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud raised by Plaintiffs. If the institutions established by the People of Michigan, including the Michigan Courts, Board of State Canvassers, Secretary of State, Attorney General, and Bureau of Elections, had taken the allegations of voter fraud seriously, then it is quite possible that this case would not have come to federal court.[9]

Furthermore, Immediately after Proposal 2's passage, and pursuant to an Executive Directive issued by Michigan's Governor, the Commission assessed the extent of the new constitutional provision's impact on Michigan's laws, regulations, economic development efforts, and upon its educational institutions and programs. The Commission issued its report on March 7, 2007.[10] Among the Commission's many findings and recommendations was its conclusion Proposal 2's violated the Equal Protection clause of the United State's Constitution.[11]

The Attorney General would normally provide counsel and represent the Michigan Civil Rights Commission in matters before this Court.[12] However, because the Attorney General is a party to this matter, and in recognition of the

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[9] *Operation King's Dream v Connerly*, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 29, 2006).

[10] "*One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06- 02, a*vailable at *http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf*

[11] *"One Michigan"* at 16, citing the *Hunter/Ericson* doctrines as discussed in the argument portion of this brief.

Michigan Civil Rights Commission's constitutional status as an independent entity within Michigan government, the Attorney General has appointed the Michigan Department of Civil Rights Director of Law and Policy a Special Assistant Attorney General to represent the Commission's interests in this case.

While FRAP 29(a) permits the filing of an Amicus brief by a state without motion, the Commission makes this motion for leave to file because it is filing in its independent capacity and not filing on behalf of the State.[13]

No party or party's counsel authored any part of this brief, nor did amicus curiae, its counsel, the Michigan Civil Rights Commission or Michigan Department of Civil Rights receive any money intended to fund preparing or submitting the brief.

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[12] MCL 37.2602 provides "(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act."

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ARGUMENT

The Michigan Civil Rights Commission asserts that the Opinion of this Court entered on July 1, 2011 is both correct and persuasive. The Commission submits this brief because it believes there are a number of considerations that warrant even more attention than was given by the panel majority, and that represent the interests of persons not directly represented by the parties.

Before examining what is at issue in this case it is important to recognize what is not. Not at issue is the right of universities (at least those outside Michigan) to include race as one non-dispositive factor among the many that may be considered in admissions decisions. In *Grutter v Bollinger*[1] The United States Supreme Court specifically found that university admissions programs that choose to consider race in this fashion advance a compelling state interest and are constitutional.[2]

At its core, *Grutter* simply finds that universities are better able to tailor admissions decisions to the best interests of their students, than are courts. The issue here is the attempt to take this function away from the universities and give it to a majority vote of the general public for, but only when it involves minorities.

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[1] *Grutter v. Bollinger*, 539 U.S. 306, 333, 123 S. Ct. 2325, 145 L.Ed. 2d 304 (2003).

[2] As opposed to the programs granting an automatic scoring advantage to members of certain predetermined groups, rejected as unconstitutional in *Gratz v. Bolinger*, 539 U.S. 244, 123 S. Ct. 2411, 145 L. Ed. 2d 257 (2003).

I. Having two separate processes is inherently unequal.

The panel correctly determined Proposal 2 "restructures the political process along racial lines and places special burdens on racial minorities." [3] Critically, the opinion does not hold that it would be unconstitutional to put *all* university admissions policy decisions to a public vote, only that it is unconstitutional to do so solely for decisions involving race, sex or ethnic diversity.

It is of course preposterous to consider putting all admissions policies to a popular vote. It would be too cumbersome and inefficient. More important, it would violate the well established right of "Academic freedom," which the US Supreme Court has noted "though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[4] It is easy to see why putting out of state student admissions policies to popular vote would be unwise, and it should be no less so of minority interests -- but above all the procedures for adopting/altering policies must be the same.

II. The panel's determination is not just about the "procedures" for adopting admissions policy, but also who decides and on what basis.

This case is not merely about two separate political "processes." The two processes also involve very different decision makers.

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[3] Slip opinion at 35.

[4] *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312; 98 S. Ct. 2733; 57 L. Ed. 2d 750 (1978), (concurring and controlling opinion by Justice Powell.)

When university admissions policies are left in the hands of the universities, they are developed in what is believed (right or wrong) to be the best interests of the university and its students. U of M's law school policy, for example "aspires to achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[5]

When university admissions policies are left in the hands of voters, what interests motivate their determinations? Do those arguing for rehearing contend that voters are primarily motivated by what is best for the schools and students? While the potential motivations of voters alone do not render the separate process unconstitutional, they do raise substantial questions about not only the wisdom but also the desire to create the separate process that puts the decision in their hands.

III. The panel's decision, like those of the universities, correctly considers not only the interests of *applicants* – but those of *students* as well.

Petitioners would have the court believe that the only parties affected by this Court's decision are the handful of students who will be admitted if diversity is considered versus those who will get in if it is not. This is a slanted view which ignores the interests of all other students -- as they would benefit from diversity.

Sixty-five of America's largest corporate competitors joined together to submit amicus briefs in *Grutter* and *Gratz* indicating their desire to hire graduates of diverse institutions. A post-*Grutter* study published in *The Harvard*

[5] *Grutter* at 315 (citation and internal quotation marks omitted).

Educational Review determined that "[c]ontrary to the discourse that frames people of color as the sole beneficiaries of affirmative action and integration . . . racial diversity is also essential to the prosperity of white Americans." [6] The study not only concluded that "[c]ollege exposure to diversity is more important than precollege or postcollege exposure,"[7] but even suggested that "businesses should consider recruiting employees from less-selective institutions, which are more likely to offer diverse learning environments," and that "…business leaders might go so far as to publicly announce their preference for hiring graduates from certain selective institutions that have particularly diverse student bodies."[8]

Preventing a university from ensuring diversity comes at the expense of every student who is admitted. And not only do they lose in the educational setting, they are at a disadvantage when seeking employment and advancement.

IV. Proposal 2's passage not only requires a separate, and more difficult, procedure when race is involved, it requires the impossible.

This Court previously found "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud

[6] Jayakumar, U., (2008), *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies.* Harvard Educational Review, 78/4, 615-651, at 636.
[7] Jayakumar, at 641.
[8] Jayakumar, at 643.

and deception" and the initiative "found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes."[9]

Even with substantial financing from outside the State of Michigan and an initiative billed as favoring the majority, Proposal 2's supporters could not meet the burdens they now want to impose on others without employing "fraud and deception". To now require anyone seeking to make a change involving minority interests to the very process that proved impossible then defies reason.

Conclusion

Grutter begins by noting that the Law School "receives more than 3,500 applications each year for a class of around 350 students."[10] Those advocating for reconsideration seek to move the focus of the admissions process from the best interests of the 350 to those of the 3,500, by requiring any admissions policy relating to minorities be determined by majority vote of 7,000,000 plus voters.

The Michigan Civil Rights Commission asserts that diversity is a compelling state interest recognized by the US Supreme Court and firmly rooted in both the history and intent of federal equal protection law. The creation of a separate, unequal, and unattainable procedure subjecting only admissions criteria effecting minorities to majority vote is anathema to these ideals.

[9] *Operation King's Dream at* 591.
[10] *Grutter* at 311-12.

The Petition for Rehearing should be denied.

Respectfully submitted,

s/Daniel M. Levy
Daniel M. Levy (P39152)
Special MI Assistant Attorney General
Director of Law and Policy
Michigan Department of Civil Rights
3054 W. Grand Blvd., Suite 03-600
Detroit, MI 48202
(313) 456-3812

Counsel of Record for Amicus Curiae
Michigan Civil Rights Commission

Dated: August 16, 2011

Certification of Compliance with Court Rules
For Brief of Proposed Amicus Curiae
Michigan Civil Rights Commission

In accordance with FRAP 29(d) which limits the allowable length of an amicus brief to one-half the maximum length authorized for a party's principal brief, and the Courts August 3, 2011 direction that a party's response brief be limited to ten pages, counsel hereby certifies that the brief submitted on behalf of Proposed Amicus Curia Michigan Civil Rights Commission, is within the page limit, and contains 14 point type, double spaced, with one inch margins, pursuant to FRAP 32.

s/ Daniel M. Levy
Daniel M. Levy (P39152)
Special MI Assistant Attorney General
Director of Law and Policy
Michigan Department of Civil Rights
3054 W. Grand Blvd., Suite 03-600
Detroit, MI 48202
(313) 456-3812

Counsel of Record for Amicus Curiae
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