

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

COALITION TO DEFEND AFFIRMATIVE
ACTION, et al.,

Plaintiffs,

v.

Case Number 06-15024
Honorable David M. Lawson

JENNIFER GRANHOLM, REGENTS OF THE
UNIVERSITY OF MICHIGAN, BOARD OF
TRUSTEES OF MICHIGAN STATE
UNIVERSITY, BOARD OF GOVERNORS OF
WAYNE STATE UNIVERSITY, MICHAEL
COX, ERIC RUSSELL, and the TRUSTEES OF
any other public college or university, community
college or school district,

Defendants,

CONSOLIDATED CASES

-and-

CHASE CANTRELL, et al.,

Plaintiffs,

v.

Case Number 06-15637
Honorable David M. Lawson

JENNIFER GRANHOLM and
MICHAEL COX,

Defendants.

_____ /

AMICUS BRIEF OF WEST MICHIGAN MINORITY CONTRACTORS ASSOCIATION

**In Opposition to Intervening Defendants' Motions for Summary Judgment and
In Support of Plaintiffs' Motions for Summary Judgment Declaring Article I, § 26
of the Michigan Constitution ("Proposal 2") Facially Invalid and Unconstitutional**

Table of Contents

Table of Authorities.....iii

Index of Exhibits.....v

Statement of Interest of Amicus Curiae West Michigan Minority Contractors Association...1

Argument.....5

 I. The Fourteenth Amendment Imposes an Affirmative Duty on States to Remedy Their Own Identified Discrimination Against Minorities and Women in Public Contracting, Employment, and University Admissions.....5

 A. Remediating Identified Discrimination under *City of Richmond v. Croson*.....6

 B. A Majority of the Supreme Court in *Croson* Rejected a *Per Se* Ban on Race-Conscious Affirmative Action to Remedy Identified Discrimination.....8

 II. The Voters of Michigan Cannot Nullify Through a Ballot Initiative the State’s Affirmative Duty to Remedy Its Own Identified Discrimination.....9

 III. Proposal 2 Is Neither Facially Nor Racially Neutral and Should Be Strictly Scrutinized, Since it Employs Racial Classifications on its Face.....10

 IV. Proposal 2 Impermissibly Restructures the Political Processes of the State to the Detriment of Racial Minorities.....13

Conclusion.....13

Table of Authorities

Cases

Alden v. Maine, 527 U.S. 706 (1999)..... 8 n.26

Baker v. City of Detroit, 483 F.Supp. 930 (E.D. Mich., 1979)..... 6 n.21

Brown v. Board of Education, 347 U.S. 483 (1954)..... 6

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)..... 6-9

Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996), *cert. denied* 520 U.S. 1186 (1997)... 5, 7

Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982)..... 13

Ex parte Young, 209 U.S. 123 (1908)..... 2 n.5

Frey v. Dep't of Management & Budget, 429 Mich. 315, 338, 414 N.W.2d 873 (1987)..... 1 n.3

Gonzales v. Raich, 545 U.S. 1 (2005)..... 9 n.28

Green v. County School Board, 391 U.S. 430 (1968)..... 6 n.20, 7 n.22

Grutter v. Bollinger, 539 U.S. 306 (2003)..... 3

Halbert v. Michigan, 545 U.S. 605 (2005)..... 9 n.28

Palmore v. Sidoti, 466 U.S. 429 (1984)..... 14

Parents Involved in Community Schools v. Seattle School District No. 1,
 ___ U.S. ___ (2007)..... 6 n.20, 7 n.24

Reitman v. Mulkey, 387 U.S. 369 (1967)..... 10 n.28

Romer v. Evans, 517 U.S. 620 (1996)..... 9 n.28, 11

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)..... 7 n.22

United States v. Carolene Products Co., 304 U.S. 144 (1938)..... 14

United States v. City of Yonkers, 96 F.3d 600 (2nd Cir., 1996)..... 14

United States v. Paradise, 480 U.S. 149 (1987)..... 6 n.21

United States v. Virginia, 518 U.S. 515 (1996)..... 4 n.14

University of California Regents v. Bakke, 438 U.S. 265 (1978)..... 8

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)..... 9 n.28

Washington v. Seattle School Dist. No. 1, 58 U.S. 457 (1982)..... 10 n.28, 11

Williams v. City of Rochester Hills, 243 Mich.App 539, 556; 625 NW2d 64 (2000)..... 1 n.4

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)..... 8

Michigan Attorney General Opinion

Attorney General Opinion No. 7202, April 9, 2007..... passim

Articles & Reports

“A Vision Fulfilled? The Impact of Proposition 209 on Equal Opportunity for Women
 Business Enterprises,” by the Thelton E. Henderson Center for Social Justice, at the
 University of California Berkeley School of Law Boalt Hall, September 2007..... 2 n.7

“Affirmative Action in the 1980's: Dismantling the Process of Discrimination
A Statement of the U.S. Commission on Civil Rights (Nov. 1981).....7 n.23

“Availability and Disparity Study California Department of Transportation Final Report,”
BBC Research & Consulting (June 29, 2007).....2 & n.8

Brent E. Simmons, *Affirmative Action: the Legislative Debate in the Michigan House of
Representatives*, 14 T.M. Cooley L. Rev. 267 (1997).....3 n.10

“Free to Compete? Measuring the Impact of Proposition 209 on Minority Business
Enterprises,” by the Discrimination Research Center of the Thelton E. Henderson
Center for Social Justice, at the University of California Berkeley School of Law
Boalt Hall..... 2 n.7

Index of Exhibits

- Exhibit 1** City of Grand Rapids Notice suspending affirmative action reporting requirements, dated December 18, 2006.
- Exhibit 2** Attorney General Letter Opinion No. 7202, dated April 9, 2007.
- Exhibit 3** Attorney Foutz letter to City of Grand Rapids, dated April 14, 2007.
- Exhibit 4** (Executive Summary from) Report: “Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises,” by the Discrimination Research Center of the Thelton E. Henderson Center for Social Justice, at the University of California Berkeley School of Law Boalt Hall.
- Exhibit 5** (Executive Summary from “A Vision Fulfilled? The Impact of Proposition 209 on Equal Opportunity for Women Business Enterprises,” by the Thelton E. Henderson Center for Social Justice, at the University of California Berkeley School of Law Boalt Hall, September 2007.
- Exhibit 6** (Executive Summary from) Final Report, “Availability and Disparity Study California Department of Transportation,” BBC Research & Consulting, June 29, 2007.
- Exhibit 7** (Executive Summary & excerpt from) “Do Minority-Owned Businesses Get a Fair Share of Government Contracts?,” Enchautegui, Fix, Loprest, von der Lippe, & Wissoker, The Urban Institute (Dec. 1997).
- Exhibit 8** Legislative history of Michigan House Joint Resolution L (Mar. 1995).
- Exhibit 9** U.S. Census: General Michigan population statistics (2006 estimate).
- Exhibit 10** U.S. Census Table 4a (Michigan): Reported Voting and Registration of the Total Voting-Age Population, by Sex Race and Hispanic Origin, for States (Nov. 2004).
- Exhibit 11** Michigan Secretary of State: Official election results for Proposal 2.
- Exhibit 12** U.S. Census: demographic data by Michigan counties (2005).
- Exhibit 13** (Introduction from) Affirmative Action in the 1980's: Dismantling the Process of Discrimination,” A Statement of the U.S. Commission on Civil Rights (Nov. 1981)
- Exhibit 14** MCRI Committee campaign leaflet.
- Exhibit 15** Michigan State Board of Canvassers agenda re Proposal 2 ballot language & related news article.

Statement of Interest of *Amicus Curiae* West Michigan Minority Contractors Association.

The West Michigan Minority Contractors Association (WMMCA) is a private, nonprofit association of about 42 minority and women-owned businesses in western Michigan. Prior to voter approval of "Proposal 2" in November 2006, WMMCA's members were being awarded State or local contracts or subcontracts under race and gender-conscious affirmative action programs that were adopted to remedy previously identified racial and gender discrimination in public contracting. Self-executing, Proposal 2 terminated all such remedial affirmative action programs as of December 23, 2006. WMMCA was notified by the City of Grand Rapids, Michigan that majority contractors doing business with the City would no longer be required to submit "affirmative action materials" previously required under the City's contract compliance ordinances. (Exhibit 1).

On January 23, 2007, the Grand Rapids approved a revised "Disadvantage Business Enterprises" (DBE) affirmative action program for city-funded contracts. However, in a letter Opinion dated April 9, 2007,¹ Defendant Attorney General Cox declared that since the City's revised affirmative action program was race and gender-conscious, it was invalid under Proposal 2.² Though not binding on the courts,³ OAG No. 7202 is "persuasive authority" that is binding on the City of Grand Rapids and other public agencies in Michigan.⁴ It sets forth the Michigan Attorney General's

¹See Op Atty Gen, April 9, 2007, No. 7202 (hereinafter, "OAG No. 7202") (Exhibit 2).

²The City also received a letter from Alan W. Foutz (Exhibit 3), who represents the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee in this action. See Notice of appearance, Dkt # 15. In that letter, Mr. Foutz also opined that the City's revised DBE affirmative action program violated Proposal 2 because it was race and gender-conscious. Mr. Foutz concluded by demanding termination of the revised program under threat of legal action.

³See *Frey v. Dep't of Management & Budget*, 429 Mich. 315, 338, 414 N.W.2d 873 (1987).

⁴See *Williams v. City of Rochester Hills*, 243 Mich.App 539, 556; 625 NW2d 64 (2000).

definitive interpretation of Proposal 2, as the State's chief law enforcement officer.⁵

Each of the parties in this action acknowledges that Michigan's Proposal 2 is "modeled" on California's Proposition 209.⁶ Studies document the devastating impact of Proposition 209 on minority (MBEs) and women-owned business enterprises (WBEs) in California over the past decade. MBE's experienced more than a 50% reduction of contract dollars awarded by the California Department of Transportation (Caltrans).⁷ "Only *one-third* of certified MBE's in California's 1996 transportation industry are still in business" a decade later. (Exhibit 4). An underutilization study commissioned by Caltrans gives the following assessment of Proposition 209's impact:

State-funded contracts. Caltrans operates a *solely neutral program* for state-funded transportation construction and engineering contracts. BBC determined that 19.3 percent of contract dollars for state-funded contracts from 2002 through 2006 would be expected to go to minority- and women-owned firms. Over this time period, 11.4 percent of state-funded contract dollars went to minority and women-owned firms, *far short* of the 19.3 percent benchmark for these contracts. (Emphasis added).⁸

These and other studies have found that "race-neutral" means are far less effective than "race-

⁵This case is ripe for declaratory and injunctive relief, per *Ex parte Young*, 209 U.S. 123 (1908).

⁶The text, history, and a legislative analysis of Proposition 209 is available online at <http://vote96.ss.ca.gov/bp/209.htm>. See also OAG No. 7202, at 12 (Ex. 2).

⁷See Executive Summary (Exhibit 4) of "Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises," by the Discrimination Research Center, Thelton E. Henderson Center for Social Justice, University of California Berkeley School of Law Boalt Hall. Available online at <http://www.law.berkeley.edu/centers/csj/FreetoCompeteReportFINAL.pdf>.

A separate study reports a corresponding 40% drop in Caltrans dollars awarded to WBEs and notes that only 36% of Caltrans-certified WBEs remained in business 10 years after Proposition 209. See Executive Summary (Exhibit 5) of, "A Vision Fulfilled? The Impact of Proposition 209 on Equal Opportunity for Women Business Enterprises." Available online at <http://www.law.berkeley.edu/centers/csj/A%20Vision%20Fulfilled%20-%20Sept%202007.pdf>.

⁸See Executive Summary at section ES, p.2 (Exhibit 6) from "Final Report - Availability and Disparity Study California Department of Transportation," BBC Research & Consulting, June 29, 2007. Available online at http://www.dot.ca.gov/hq/bep/study/Cover_ToC_ES.pdf.

conscious” remedies in correcting statistically significant underutilization of MBEs and WBEs that is often the product of “identified discrimination” in public contracting.⁹ Proposal 2, therefore, is certain to have similar economic consequences for MBEs and WBEs throughout Michigan, since it prohibits the most effective means available for remedying identified discrimination against minorities and women in public contracting.

The Michigan Civil Rights Initiative (“the MCRI,” aka Proposal 2) was considered and rejected in 1995-1996 by the peoples’ representatives in the Michigan House of Representatives. After public hearings and legislative debate over a 16-month period, the MCRI died in committee for lack of majority support.¹⁰ Federal litigation followed, challenging race-conscious admissions at the University of Michigan. When the U.S. Supreme Court upheld race-conscious admissions by the University of Michigan Law School in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the MCRI Committee launched its Proposal 2 campaign.¹¹

While the Michigan House rejected the MCRI as racially divisive,¹² the campaign for

⁹See, e.g., Executive Summary (Exhibit 7) from “Do Minority-Owned Businesses Get a Fair Share of Government Contracts?,” by Enchautegui, Fix, Loprest, von der Lippe, & Wissoker (The Urban Institute, Dec. 1997) (“[T]he results indicate that disparities are greater in those areas where no affirmative action program is in place. . . . *Repealing affirmative action policies would limit the tools available to rectify these disparities.*” Ex. 7, at xiv). Available online at <http://www.urban.org/uploadedPDF/DMOBGFSGC.pdf>. The Caltrans disparity study, n.8, shows the same result when comparing the levels of MBE participation under race-conscious DBE and MBE participation under the race-neutral requirements of Proposition 209. See Exhibit 6, Figure ES1, at section ES, p. 3.

¹⁰See legislative history of “House Joint Resolution L” (Exhibit 8); see also, Brent E. Simmons, *Affirmative Action: the Legislative Debate in the Michigan House of Representatives*, 14 T.M. Cooley L. Rev. 267 (1997).

¹¹See the MCRI Committee’s official website at <http://www.michigancivilrights.org/>.

¹²See, e.g., legislative history (Exhibit 8) (“Affirmative Action Proposal Raises Racial, Gender Tensions,” Gongwer News Service, July 12, 1995, p.1).

Proposal 2 was an unfortunate appeal to racial politics as evidenced by the sharp division of Michigan voters along racial lines. Proposal 2 passed 58 to 42%. However, 64% of whites voted *for* the MCRI, while 86% of African Americans voted overwhelmingly *against* it.¹³ Even women voters were sharply divided along racial lines. Fifty-nine percent of white women voted *for* Proposal 2,¹⁴ while 82% of nonwhite women voted *against* it.¹⁵ Moreover, Proposal 2 passed in 80 of Michigan's overwhelmingly white rural counties, but failed in the three counties with the largest, most racially diverse metropolitan population centers: Wayne (Detroit), Washtenaw (Ann Arbor), and Ingham (Lansing)¹⁶ – reflecting Michigan's pervasive residential segregation by race and ethnicity.

Nearly 78% of Michigan's population is white,¹⁷ as are more than 84% of its registered

¹³See Cantrell Pltf's SJMotion, Dkt # 203-17 (Exhibit 17).

¹⁴Even though a majority of white women voted in favor of Proposal 2, the Equal Protection Clause still protects *individual* victims of invidious, gender-based discrimination. As the Supreme Court observed in striking down the male-only admissions policy at the Virginia Military Institute: It may be assumed . . . that *most women* would not choose VMI's adversative method. . . . The issue, however, is not whether "women-or men-should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to [*individual*] *women* who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

United States v. Virginia, 518 U.S. 515, 542 (1996). Thus, even though a majority of white women voted *against* gender-conscious remedies, white female contractors would still be entitled to affirmative relief from identified gender discrimination in public contracting.

¹⁵Id.

¹⁶Compare Exhibit 11 (Michigan Secretary of State's official vote by county), available online at <http://miboecfr.nictusa.com/election/results/06GEN/90000002.html>, with Exhibit 12 (U.S. census demographic data of Michigan counties), available online at http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&_mt_name=DEC_2000_PL_U_GCTPL_ST2&format=ST-2&_bo_x_head_nbr=GCT-PL&_ds_name=DEC_2000_PL_U&geo_id=04000US26.

¹⁷See Exhibit 9. Also available online at <http://quickfacts.census.gov/qfd/states/26000.html>.

voters.¹⁸ By contrast, blacks are 14.3% of the general population and only 12.6% of registered voters. Hispanics are 3.8% of the general population, but only 1.4% of registered voters. Minority voters clearly viewed Proposal 2 as inimical to their interests in remedying identified discrimination in public contracting, employment, and university admissions. On the other hand, the sponsors of Proposal 2 were able to persuade a majority of white voters that minorities and women received “preferential treatment” under race and gender-conscious affirmative action programs that were adopted to remedy identified discrimination.

As the First Circuit has observed, “While ‘affirmative action’ may have different connotations as a matter of politics, *as a matter of law*, its meaning is more circumscribed. True affirmative action cases have historically involved a voluntary¹⁹ undertaking to remedy discrimination by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals.” *Cohen v. Brown University*, 101 F.3d 155, 170 (1st Cir. 1996), *cert. denied* 520 U.S. 1186 (1997). It is precisely that form of *remedial* “preference” that is the primary, if not the *sole* target of Proposal 2.

As a consequence, Proposal 2 is *anything but* “a ballot initiative that guarantees equal treatment to all citizens, regardless of their race, sex, color, ethnicity, or national origin,” as

¹⁸See Exhibit 10: Michigan data reported in Table 4a, “Reported Voting and Registration of the Total Voting-Age Population, by Sex Race and Hispanic Origin, for States: November 2004 (In thousands).” Also available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls> (lines 307-319).

¹⁹“Voluntary” in this connection simply means that the affirmative action program is not one that has been *judicially mandated*, in response to judicial findings of discrimination – which is the traditional understanding of the phrase “voluntary affirmative action.” The State’s affirmative duty to remedy its own identified discrimination, on the other hand, is a *constitutional command* of the Equal Protection Clause.

Intervening Defendant Russell asserts. *See* Def-Intervener Russell’s SJ Mot.(Dkt # 202), at 1. Defendant Russell’s arguments in support of Proposal 2 proceed from the plainly erroneous premise that the Equal Protection Clause *prohibits* race and gender-conscious affirmative action *as a remedy* for identified discrimination in public contracting, employment, and university admissions.

ARGUMENT

I. The Fourteenth Amendment Imposes an Affirmative Duty on States to Remedy Their Own Identified Discrimination Against Minorities and Women in Public Contracting, Employment, and University Admissions.

Since *Brown v. Board of Education*, 347 U.S. 483 (1954), it has become settled doctrine that whenever State government *itself* engages in or sanctions racial discrimination, the Constitution *commands* not only that the government remedy its own discrimination,²⁰ but also that it uses whatever constitutionally permissible means are necessary *to effect* a remedy. States have “the absolute duty” to remedy “those wrongs . . . caused intentionally by the [government] itself.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., *concurring*).²¹ Moreover, “[t]he Fourteenth Amendment *ought not to be interpreted to reduce a State's authority in this regard.*” *Croson*, *Id.*, at 518 (emphasis added). States are both constitutionally *obligated* and *authorized* to employ *race-conscious* means, where *race-neutral* means are clearly – *and generally*

²⁰See *Green v. County School Board*, 391 U.S. 430, 437-438 (1968) (holding that school districts have an “*affirmative duty*” to eliminate the vestiges of racial discrimination “root and branch”); and *Parents Involved in Community Schools v. Seattle School District No. 1*, ___ U.S. ___ (2007) (“School districts that had engaged in *de jure* segregation *had an affirmative constitutional duty* to desegregate”) (Kennedy, J., *concurring*, slip op, at 14).

²¹See also, *United States v. Paradise*, 480 U.S. 149, 166 (1987) (“A state or municipality, *when presented with evidence of its own culpability in fostering or furthering race discrimination*, might well be remiss if it failed to act upon such evidence.”); and *Baker v. City of Detroit*, 483 F.Supp. 930, 988 (E.D. Mich., 1979) (“A state has an *affirmative duty* to eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*”).

– unavailing.²²

A. Remediating Identified Discrimination under *City of Richmond v. Croson*.

As noted by the U.S. Commission on Civil Rights in 1981, “Affirmative action *has no meaning outside the context of discrimination, the problem it was created to remedy*. All too often, discussions of affirmative action *first divorce this remedy* from the historic and continuing problem of discrimination against minorities and women.”²³ The arguments in support of Proposal 2 are predicated on that same error – the refusal to recognize that race and gender-conscious affirmative action is generally employed *as a remedy* for identified discrimination.

The U.S. Supreme Court “has taken the position that voluntary affirmative action plans *cannot be constitutionally justified absent a particularized factual predicate* demonstrating the existence of ‘identified discrimination,’ . . . because ‘[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.’” *Cohen*, at 101 F.3d, at 101 (citing *Croson*).²⁴

²²See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13 (1971): . . . While acknowledging that a freedom of choice concept could be a valid remedial measure in some circumstances, *its failure to be effective in Green [v. County School Board] required* . . . [t]he . . . school board . . . to come forward with a plan that promises realistically to work . . . now...[S]chool authorities are clearly charged with *the affirmative duty to take whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch. (Emphasis added).

The Supreme Court in *Swann* also noted that, “A school desegregation case *does not differ fundamentally from other cases involving . . . the denial of a constitutional right*. The task is to correct, *by a balancing of the individual and collective interests*, the condition that offends the Constitution.” *Id.*, at 15-16.

²³See “Affirmative Action in the 1980’s: Dismantling the Process of Discrimination,” A Statement of the U.S. Commission on Civil Rights (Nov. 1981) , at 1. Exhibit 13 (excerpt). A photocopy of the original report is available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr11070.pdf>.

²⁴See also *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. ____ (2007), slip op., at 14 (Kennedy, J., concurring) (“The Court has insisted upon some showing of prior

Judicial findings are not required, because “it diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court.” *Croson*, 488 U.S., at 519 (Kennedy, J., concurring). “[E]vidence which would support a judicial finding of intentional discrimination may suffice also to justify remedial *legislative* action.” *Id.* See also *University of California Regents v. Bakke*, 438 U.S. 265, 301 (1978) (Powell, J.), and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 292 (1986) (O'Connor, J., concurring).

While statistical evidence of the underutilization of minorities and women in public contracting provides *prima facie* evidence of intentional discrimination,²⁵ *Croson* requires much more. Under “strict scrutiny,” race-conscious means can be employed *only if the discrimination is identified “with the particularity required by the Fourteenth Amendment.”* *Croson*, 488 U.S., at 480 and 492. “While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, *they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.*” *Id.*, at 504. “Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects.” *Id.*, at 510

Since State and local agencies are presumed to have complied with the constitution requirements of *Croson*²⁶ in developing their pre Proposal 2 affirmative action programs, all such

discrimination by the governmental unit involved *before* allowing limited use of racial classifications in order to remedy such discrimination.”).

²⁵See *Croson*, 488 U.S., at 501 (“There is no doubt that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination”).

²⁶See *Alden v. Maine*, 527 U.S. 706, 755 (1999): “States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional

programs terminated by Proposal 2 on December 23, 2006 *were necessarily predicated on findings of identified discrimination.*

B. A Majority of the Supreme Court in *Croson* Rejected a *per Se* Ban on Race-conscious Affirmative Action to Remedy Identified Discrimination.

A 7-2 majority of the Supreme Court rejected a *per se* ban on the remedial use of race-conscious affirmative action in *Croson*.²⁷ While acknowledging the “moral imperative of racial neutrality,” Justice Kennedy wrote in his concurring opinion that “a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents *that require a case-by-case test.*” *Croson*, 488 U.S., at 519. Moreover, he continued, “the rule against race-conscious remedies is already less than an absolute one, *for that relief may be the only adequate remedy* after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause.” *Id* (emphasis added).

II. The Voters of Michigan Cannot Nullify Through a Ballot Initiative the State’s Affirmative Duty to Remedy Its Own Identified Discrimination.

Voter-approved initiatives have been struck down with some frequency, whenever they conflict with the U.S. Constitution.²⁸ Like the State itself, *the people of Michigan* are also bound by the

design. *We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.* The good faith of the States thus provides an important assurance that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.” (Emphasis added).

²⁷Only Justices Scalia and Thomas supported a *per se* ban on the use of race-conscious affirmative action to remedy identified discrimination.

²⁸See, e.g., *Halbert v. Michigan*, 545 U.S. 605 (2005) (voiding a voter initiative denying appeals of right from guilty or nolo pleas); *Gonzales v. Raich*, 545 U.S. 1 (2005) (nullifying voter approval of medicinal marijuana use); *Romer v. Evans*, 517 U.S. 620 (1996) (voiding a ballot initiative repealing anti-discrimination laws protecting gays and lesbians); *U.S. Term Limits, Inc. v. Thornton*,

Constitution. Proposal 2 is *facially invalid* because it prohibits public agencies in Michigan from fulfilling their affirmative, constitutional duty to remedy *their own* identified race and gender discrimination in public contracting, employment and university admissions. That duty also includes the affirmative obligation to employ race- and gender-conscious means, whenever they are necessary *to effectively remedy* identified discrimination against minorities and women.

Defendant Attorney General Cox, therefore, *errs as a matter of law* in asserting that, “While the Equal Protection Clause has been interpreted as *permitting* states to consider race or sex in fashioning a remedy to address the effects of past discrimination, . . . *a state is not required to do so.*” Intrvg-Def AG Cox’s Dismiss/SJ Motion (Dkt. # 201), at 17 and 21; *see also* OAG 7202, at 14. He claims that Michigan voters are free to impose a blanket ban on race-conscious affirmative action *that may be required by the 14th Amendment to effectively remedy “identified discrimination”* in public contracting, employment, and university admissions. *See* Intrvg-Def AG Cox’s Dismiss/SJ Motion (Dkt. # 201), at 17 and 21; *see also*, OAG 7202, at 15.

Clearly a State’s refusal to remedy *its own* identified discrimination would be in direct contravention of the 14th Amendment’s command that no State “shall . . . deny to any person within its jurisdiction the equal protection of the laws.” A State’s affirmative duty to remedy its own discrimination *is simply not a matter of voluntary or elective choice*, as Defendant Cox contends.

III. Proposal 2 Is Neither Facially Nor Racially Neutral and Should Be Strictly Scrutinized, Since it Employs Racial Classifications on its Face.

514 U.S. 779 (1995) (voiding a ballot initiative limiting terms of the state’s congressional delegation; a similar voter-approved provision in the Michigan constitution was rendered invalid); *Washington v. Seattle School Dist. No. 1*, 58 U.S. 457 (1982) (voiding a voter initiative banning the use of busing to end *de facto* segregation of public schools); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (voiding a ballot initiative creating a state constitutional right to discriminate on the basis of race in the housing market).

Defendant Attorney General Cox contends that “Like the California law, [Proposal 2] does not classify any individuals by race or sex, but rather prohibits the State and Defendant Universities from doing the very same.” Intrvg-Def AG Cox’s Dismiss/SJ Motion (Dkt. # 201), at 16. Contrary to the Intervening-Defendants’ assertions of race neutrality, however, Proposal 2 (1) employs racial classifications *on its face*, and (2) for an openly acknowledged “invidious purpose” – specifically, to deny racial and ethnic minorities their constitutional right to *effective, race-conscious remedies* for identified discrimination against them in public contracting, employment, and university admissions.

Significantly, Proposal 2 does not ban remedial affirmative action for other disadvantaged or “protected” groups that are defined by age, disability, socioeconomic class, veterans’ status, religion, sexual orientation, or any other characteristic. Thus, similar to the voter-approved initiative struck down in *Romer v. Evans*, 517 U.S. 620 (1996), Proposal 2 “withdraws from [minorities and women], *but no others*, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” *Id.*, at 627.

In *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), the Supreme Court went so far as to *look behind* the facially-neutral facade of the Washington State voter initiative banning school busing to discern its illicit racial purpose. Even so, the Court found the State’s claim of neutrality “difficult to believe,” since “despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes.” *Id.*, at 471. “Neither the initiative’s sponsors, nor the District Court, nor the Court of Appeals,” the Court said, “had any difficulty perceiving the racial nature of the issue settled by Initiative 350.” *Id.* Defendants’ claim of race neutrality in this case is even more implausible, given Proposal 2’s explicit use of racial classifications and its *openly*

acknowledged racial purpose – i.e., the prohibiting of race-conscious remedies for identified racial discrimination by State and local government agencies.

The MCRI Committee – principal sponsor of Proposal 2 – openly acknowledged in its campaign literature that while “racial ... disparities do exist, . . . state enforced blanket *racial preferences* in such areas as college admissions and hiring *is wrong*.” See Exhibit 14. On the other hand, however, Proposal 2 would not “would not prevent, and indeed, would probably result in significantly greater use of socio-economic solutions that would benefit every ‘disadvantaged’ individual *regardless of race*.” Id. Thus, while Proposal 2 would ban race-conscious “solutions” for racial discrimination, it would promote greater use of “socio-economic solutions” for economically “disadvantaged” persons *regardless of race*.²⁹ No clearer declaration of Proposal 2's invidious racial purpose is possible – Proposal 2 prohibits *only* race and gender-based remedies for identified discrimination against minorities and women and not other forms of group-based relief for discrimination.

The State Board of Canvassers ordered a change in Proposal 2's ballot language to alert voters about its differential impact on race and gender-conscious affirmative action -- even though the words “affirmative action” do not appear in the actual text of Article I, § 26. See Exhibit 15. At no point in the campaign did the MCRI Committee ever attempt to distinguish *remedial* race-conscious affirmative action from naked racial preferences.

²⁹WMMCA certainly has no objection to remedies for socioeconomic discrimination or disadvantage. It is disingenuous, however, to argue that providing affirmative relief to socioeconomically disadvantaged whites effects a “narrowly tailored” remedy for identified *racial* discrimination. The MCRI Committee's approach simply places disadvantaged whites and disadvantaged minorities in direct competition for fewer opportunities – which, of course, explains why race-neutral means are far less effective in remedying identified *racial* discrimination. See discussion at 2-3 and notes 8 and 9, *supra*.

In OAG No. 7202, Defendant Attorney General Cox both interpreted and applied Proposal 2 as proscribing the use of race and gender-conscious remedies for identified discrimination against minorities and women in public contracting, employment, and university admissions. Thus, the assertions by both Intervening Defendants that Proposal 2 is neutral on its face and in its application is plain sophistry and is flatly contradicted by OAG No. 7202.

“To be sure, the simple repeal or modification of desegregation or antidiscrimination laws, *without more*, never has been viewed as embodying a presumptively invalid racial classification.” *Seattle School Dist. No. 1*, 458 U. S., at 483. However, Proposal 2 works something more than the “mere repeal” of a voluntarily adopted anti-discrimination law – i.e., it prohibits State and local agencies from remedying their own identified violations of the Equal Protection Clause. “A racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Crawford v. Los Angeles Bd of Ed.*, 458 U.S. 527, 537 (1982).

Crawford lends absolutely no support for Proposal 2's invidious use of racial classifications. Indeed, the very language of the ballot initiative upheld in *Crawford* is itself evidence of Proposal 2's constitutional defect. California Proposition I provided in pertinent part:

[N]o 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 . . . that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution. . . .* (Emphasis added).

See 458 U.S., at 532. Constitutionally significant by its absence, Proposal 2 contains no similar exception for remedying violations of the 14th Amendment – *viz*, identified discrimination.

IV. Proposal 2 Impermissibly Restructures the Political Processes of the State to the Detriment of Racial Minorities.

“Legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation *is to be subjected to more exacting scrutiny* under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Moreover, “prejudice against discrete and insular minorities may be a special consideration, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *Id.* Proposal 2 is *precisely* the kind of legislation footnote 4 describes. While the private biases of Michigan voters may be outside the reach of the law, “the law cannot, directly or indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). *Proposal 2 does exactly that.* The State “ may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens.” *United States v. City of Yonkers*, 96 F.3d 600, 612 (2nd Cir.,1996).

Conclusion

For the foregoing reasons, the Court should: 1) declare Article I, § 26 of the Michigan Constitution (“Proposal 2”) either *facially invalid* or *invalid as applied* to remedial race- and gender-conscious affirmative action for identified discrimination under the Equal Protection Clause of the Fourteenth Amendment, and 2) permanently enjoin its enforcement.

Respectfully submitted,

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West Michigan Minority Contractors Association

Certificate of Service

I certify that on January 6, 2008 the foregoing Brief for Amicus Curiae West Michigan Minority Contractors Association, together with accompanying exhibits, was electronically served upon each counsel of record designated for electronic service in this action.

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