No. 06A678

IN THE SUPREME COURT OF THE UNITED STATES

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND TO FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al*.,

Petitioners,

v.

JENNIFER GRANHOLM, as Governor of the State of Michigan, *et al*.,

and

MIKE COX, in his capacity as Attorney General of Michigan, *et al*.,

Respondents.

RESPONSE BY AMICI CURIAE MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE AND AMERICAN CIVIL RIGHTS FOUNDATION TO MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Amici curiae, the Michigan Civil Rights Initiative Committee (MCRIC) and American Civil Rights Foundation (ARCF), the coauthors, sponsors, and supporters of Proposal 2, respectfully urge the Honorable Justice Stevens to deny the instant Motion to Dissolve the stay issued by a unanimous panel of the Sixth Circuit Court of Appeals. The injunction at issue was entered by the United States District Court, for the Eastern District of Michigan, pursuant to a stipulation between the parties existing at the time without reference to or analysis of the factors that courts must consider when deciding whether to issue a preliminary injunction. The district court's Amended Order granting preliminary injunction is attached hereto as Exhibit A. The Sixth Circuit Court of Appeals thereafter issued a well-reasoned, thirteen page (single spaced) opinion that analyzed in detail all of the factors that provide grounds for issuing a preliminary injunction. The district court pointedly did not engage in such an analysis before agreeing to a stipulation to suspend the timely enforcement of a duly enacted amendment to Michigan's constitution. A copy of the Sixth Circuit's opinion is attached hereto as Exhibit B.

BAMN's request that the stay of preliminary injunction entered by a panel of the Sixth Circuit Court of Appeals be dissolved should be denied on the following grounds: (1) the extraordinary grounds described by Justice Rehnquist in *Coleman v. PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers), for a single Circuit Justice of this Court to exercise jurisdiction to dissolve a stay issued by a panel

of the court of appeals are not present; (2) contrary to BAMN's contention, Proposal 2 does not impose unequal political processes that disadvantage particular groups; and (3) just as California's Proposition 209 (the constitutionality of which was established by a unanimous panel of the Ninth Circuit in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert denied*, 522 U.S. 963 (1997)), has not harmed, but has in fact greatly benefitted the minority population of California in many significant respects, implementation of Proposal 2 will not irreparably harm the minority population of Michigan.

In addition to the legal flaws in BAMN's request to vacate the Sixth Circuit's stay, said request is moot at least with respect to the University of Michigan, which has recently announced that it would henceforth abide by Proposal 2. *See*, Announcement of Mary Sue Coleman, attached hereto as Exhibit C.

ARGUMENT

I

Justice Rehnquist's Opinion in *Coleman v. Paccar, Inc.,* Does Not Provide Authority for Justice Stevens, as Circuit Justice, to Vacate the Stay Issued by the Sixth Circuit Panel

In their Petition, BAMN's sole source of authority for its argument that Justice Stevens has jurisdiction to grant the relief sought herein is selected language from *Coleman v. PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers). However, a review of language in *Coleman* that was not cited by BAMN, as well as an understanding of the stark differences in the facts and procedural posture of the *Coleman* case verses the instant matter, establishes that no grounds exist to justify

the exercise of jurisdiction to vacate the Sixth Circuit's stay by Justice Stevens.

In *Coleman*, Justice Rehnquist was asked to vacate the Ninth Circuit's stay of the imposition of a motor vehicle safety standard promulgated by the Secretary of Transportation. An understanding of *Coleman's* procedural posture is essential to an understanding of its holding. In that case, PACCAR, Inc., filed an original petition for review in the Ninth Circuit regarding amendments to motor vehicle safety standards. *Coleman*, 424 U.S. at 1301. PACCAR, Inc., also sought from the Ninth Circuit a stay of the effective date of the safety standard, which was denied. *Id.* The Ninth Circuit heard oral arguments on the merits and then entered the following Order: "IT IS HEREBY ORDERED that (the motor vehicle safety standard) is stayed for a period of sixty days, this stay to remain in effect thereafter pending further order of this court upon the application of any party." *Id*. at 1302. The Secretary of Transportation thereafter applied to the Supreme Court to have the Ninth Circuit's stay order vacated.

In determining whether he had jurisdiction to vacate the Ninth Circuit's stay, Justice Rehnquist first recognized that there is no statutory provision that makes appealable an interlocutory order from a court of appeals. *Coleman*, 424 U.S. at 1303. Justice Rehnquist then stated that if he had authority to vacate the stay, "it must be on the ground that the vacation of the stay is 'in aid of this Court's jurisdiction' to review by certiorari a final disposition on the merits of respondents' petition to review and set aside the safety standard in question." *Id.*

Justice Rehnquist then stated that

> a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.

Id. at 1304. In *Coleman*, the merits of the underlying litigation were then before the Ninth Circuit. Thus, there was pending in the Ninth Circuit a case from which a petition for writ of certiorari could eventually be filed. Such is not the case in the instant matter. The litigation over the merits of Proposal 2's constitutionality is in its embryonic stages in the district court. The Sixth Circuit's only involvement has been to review the district court's interlocutory order enjoining enforcement of Proposal 2 against the University Defendants for a period of six months. The Sixth Circuit presently has nothing before it that is reviewable by writ of certiorari. Thus, vacating the Sixth Circuit's interlocutory stay cannot be justified as being in aid of the Supreme Court's jurisdiction to review a final disposition by the court of appeals on the merits of Proposal 2's constitutionality.

The second flaw in BAMN's petition revealed by the *Coleman* decision is that Justice Rehnquist vacated the stay because the court of appeals failed to make an express or implied finding that the automakers would probably succeed on the merits of their petition for review of the standard. *Coleman*, 424 U.S. at 1305. Justice Rehnquist stated plainly that jurisdiction could *only* be exercised when "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Id*. at 1304. In *Coleman*, Justice Rehnquist could not find anything

in either the Ninth Circuit's Order or in the record of the surrounding proceedings consistent with a finding that PACCAR, Inc., would probably succeed on the merits. *Id.* at 1306-07. In contrast, the Sixth Circuit's opinion analyzed in great detail all of the factors that the district court should have considered, but did not, in issuing a preliminary injunction, including the probable likelihood of success on the merits. Exhibit B at 6-12.

In fact, in its Order dated December 26, 2006, setting briefing dates, the Sixth Circuit directed the parties to address their briefs to the issue of the University Defendants' likelihood of success on the claims they had made in the district court regarding Proposal 2's constitutionality. This case is not an instance where the court of appeals failed to apply "accepted standards" in issuing a stay, as happened in *Coleman*. This is a case of the court of appeals scrupulously applying the required standards, and BAMN simply being dissatisfied with the outcome.

By conditioning a Circuit Justice's jurisdiction to vacate a stay on both the existence of a case pending in the court of appeal, the parties to which may be irreparably harmed by the stay, and the court of appeals' failure to apply accepted standards in deciding to issue the stay, Justice Rehnquist specifically sought to avoid a "broader rule [that] would permit a single Justice of this Court to simply second-guess a three-judge panel of the court of appeals in the application of principles with respect to which there was no dispute." *Id*. at 1304. Exercising jurisdiction in this case would constitute precisely the type of unjustified "second-guessing" denounced by Justice Rehnquist.

II

PROPOSAL 2 DOES NOT IMPOSE UNEQUAL POLITICAL PROCEDURES UPON ONE GROUP OF CITIZENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

BAMN argues, erroneously, that Proposal 2 creates a political process that makes it more difficult for one group of citizens to seek aid from the government and therefore violates the Equal Protection Clause.[1] Arguments identical to those BAMN makes herein have been thoroughly analyzed and rejected by the Ninth Circuit in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702-09 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

BAMN relies upon *Romer v. Evans*, 517 U.S. 620 (1996), *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), for their position. None of these cases, however, support BAMN's argument.

In *Hunter v. Erickson*, the city of Akron, Ohio, adopted a charter amendment that operated to prevent the city council from enacting ordinances addressing racial discrimination in housing without majority approval of the Akron voters. *Hunter*, 393 U.S. at 387. Before the charter amendment was enacted, the Akron City Council had authority to pass ordinances regulating the real estate market. *Id.* at 390. The Supreme Court found the charter amendment to be "an explicitly racial classification

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[1] As an initial matter, BAMN fails to recognize that there has yet to be issued a decision from the district court or the court of appeals upon which a petition for writ of certiorari might be made when it argues that there is a "fair chance" that the Supreme Court will "reverse the ruling below."

treating racial housing matters differently from other racial and housing matters." *Id.* at 389.

In the *Seattle School District* case, a statewide initiative was passed that had the effect of precluding only desegregative busing. *Seattle*, 458 U.S. at 462-63. The Supreme Court held that the initiative effected a racial classification that burdened minorities. *Id*. at 474.

In *Romer v. Evans*, the Supreme Court found that an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination put homosexuals in a position where they could "obtain specific protection against discrimination only by enlisting the citizenry of Colorado" and was therefore in violation of the Equal Protection Clause. *Romer*, 517 U.S. at 631.

In *Coal. for Econ. Equity*, the Ninth Circuit set forth the irreducible reason why these three cases do not work to invalidate measures such as Proposal 2, by stating that "the Fourteenth Amendment guarantees equal protection to individuals and not to groups. That the Fourteenth Amendment affords individuals, not groups, the right to demand equal protection is a fundamental first principle of "conventional" equal protection jurisprudence. *Coal. for Econ. Equity*, 122 F.3d. at 704 (citing *Adarand Constructors v. Pena*, 515 U.S. 200, 223-25). Thus, if an individual is denied a job or an education because of her race or sex, that person's injury is clear. However, where "a state prohibits race or gender preferences at any level of government, the injury to any specific individual is utterly inscrutable." *Coal. for Econ. Equity*, 122 F.3d at 704.

The corollary to this fundamental principle of equal protection jurisprudence is that the Supreme Court has recognized a difference "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford v. Board of Education of the City of Los Angeles,* 458 U.S. 527, 538, (1982). "The former denies persons against whom the law discriminates equal protection of the laws; the latter does not." *Coal. for Econ. Equity*, 122 F.3d at 705. In finding that California's Proposition 209 did not burden any individual's right to equal protection, the Ninth Circuit explained that according to *Crawford*, the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place did not constitute an equal protection violation. *Coal. for Econ. Equity*, 122 F.3d at 706 (citing *Crawford*, 458 U.S. at 538).

Nevertheless, BAMN seeks to ascribe to Proposal 2 the same unequal consequences and intents as were found to offend the constitution in *Hunter, Seattle School District,* and *Romer*. It does so by asserting, among other things, that after Proposal 2's adoption, minorities are precluded from seeking changes to admissions or other academic standards where other groups are not. As the Ninth Circuit observed however, it is the goal of the Fourteenth Amendment to create "a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). If advocates of racial preferences wish to "enact a law that says race somehow matters, they must come forward with a compelling state interest to back it up." *Coal. for Econ Equity*, 122 F.3d at 708. Thus, it has <u>never</u> been the case that groups could seek changes in admissions or other academic standards based on race or sex

without proffering a compelling state interest for doing so. "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." *Id*. at 709.

III

PROPOSAL 2 WILL NOT HAVE THE EFFECT OF DEFEATING OR SUBSTANTIALLY IMPAIRING THE LAWFUL OBJECTIVES OF THE UNIVERSITIES WITH RESPECT TO MINORITY STUDENTS

In arguing that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), BAMN contends that Proposal 2 will have the effect of subjecting persons to discrimination on account of race or color or will substantially impair the accomplishment of the universities with respect to minority students. In support of their argument, BAMN cites a few "snapshot" statistics that do not give an accurate account of how California's Proposition 209 has affected the education of California's underrepresented minority population.

Omitted from BAMN's analysis are the following facts, as set forth in Eryn Hadley, Comment, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. Pub. L. 103 (2005):

1. While there was a decrease of admissions of underrepresented minorities at California's most prestigious schools, there was a corresponding and dramatic increase in admissions of underrepresented minorities at the University of California's Santa Cruz and Riverside campuses. *Id*. at 128.
2. The overall percent change in admissions of underrepresented minority students at all University of California campuses decreased by only 1%

between the years 1995 (pre-Proposition 209) and 2000. *Id*.

3. At U.C. Berkeley, the six-year or less graduation rate of African-American and Hispanic freshmen entering in the fall of 1998 increased by 6.5% and 4.9%, respectively, compared to the graduation rates of their peers just two years earlier, before Proposition 209 was in effect. *Id*. at 129-130.

4. A University of San Diego Academic Performance Report noted that "underrepresented students admitted to UC San Diego in 1998 (after Proposition 209 went into effect) substantially outperformed their 1997 (pre-Proposition 209) counterparts" and the "majority/minority performance gap observed in past studies was narrowed considerably." *Id*. at 138, n.179.

It is therefore inaccurate to simply cite statistics that show an initial decrease in the number of minority students being accepted to the University of California, Berkeley and the University of California, Los Angeles. Those students are being accepted to other University of California campuses and are now performing better and graduating at significantly higher rates from those schools. A degree from U.C. Santa Cruz is much more valuable than an acceptance letter from Berkeley.

CONCLUSION

BAMN has not shown that a Circuit Justice of the Supreme Court may exercise jurisdiction to vacate the Sixth Circuit's stay of the collusively negotiated stipulation to enjoin Proposal 2 for six months that was entered by the district court. The instant petition to vacate the Sixth Circuit's stay should be denied.

DATED: January 16, 2007.

Respectfully submitted,

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