No. 06-2144

United States Court of Appeals
For The Sixth Circuit

OPERATION KING'S DREAM, *et al.*,

Plaintiffs-Appellants,

v.

WARD CONNERLY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF *AMICI CURIAE* WILLIAM BARCLAY ALLEN AND TOWARD A FAIR MICHIGAN IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Kerry L. Morgan
Counsel of Record
Pentiuk, Couvreur & Kobiljak, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, MI 48192
(734) 281-7100

Manuel S. Klausner
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Building
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
(213) 617-0414

Dr. John C. Eastman
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

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Kerry L. Morgan 9806
Kerry L. Morgan Date

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INTEREST OF *AMICUS CURIAE*

With a bit of logic that would make George Orwell himself proud, Appellants try to convince this Court that the constitutionally-protected voting rights of African-Americans can only be vindicated by *blocking* African-Americans—and everyone else, for that matter—from voting on the Michigan Civil Rights Initiative, a voter initiative that has been duly qualified to appear on Michigan's November ballot. Yet far more troubling than the illogic of Appellants' central proposition is the downright racist assumption on which their argument rests: Because the initiative petitions submitted by proponents of the initiative included signatures from predominantly Black neighborhoods, they argue, those signatures must have been fraudulently obtained because no self-respecting Black would have signed a petition that, on its face, would prohibit the State of Michigan from meting out government contracts, jobs, and slots at the state's educational institutions on the basis of race or sex.

Amici Curiae offer this brief to challenge the racist assumptions underlying Appellants' claims, and to highlight for the Court the evidence in the record below showing that the real fraud on the voters of the state of Michigan is the one being perpetuated by Appellants, in collusion with the Michigan Civil Rights Commission.

Amicus Curiae William Barclay Allen is a former member and chairman of the United States Commission on Civil Rights, a professor of political science at Michigan State University, and a nationally-known expert on minority voting patterns who has served as an expert witness in numerous voting rights cases providing demonstrable evidence of a diversity of opinion among Black voters. He provided eyewitness testimony in the court below to efforts by representatives of the Coalition to Defend Affirmative Action and

Integration, and Fight for Equality by Any Means Necessary ("BAMN") that were perilously close to (and may well have been) the suborning of perjurious testimony before the Michigan Civil Rights Commission, and to the sham hearing conducted by the Michigan Civil Rights Commission at which the Commission received "evidence" designed, in his opinion, "to provide fodder" for the Commission's "previously-announced opposition" to the Michigan Civil Rights Initiative. Dr. Allen also happens to be Black, and he signed the petition to place the Michigan Civil Rights Initiative on the November 2006 ballot with full knowledge that its purpose was to prevent the use of racial preferences by the State of Michigan.

Amicus Curiae Toward A Fair Michigan ("TAFM") is a 501(c)(3) non-profit corporation whose purpose is to promote and foster debate and discussion about the Michigan Civil Rights Initiative. Its members include Michigan citizens who desire to vote on whether the Michigan Civil Rights Initiative should be approved.

In light of the unique procedural stance of this matter, all parties have consented by telephone to the filing of this *Amicus Curiae* Brief.

ARGUMENT

One of the most contentious issues of our day is the extent to which (if at all) government may utilize race preferences in contracting, hiring, or admissions in order to eliminate the vestiges of discrimination or to achieve some utopic level of racial or ethnic. While the Supreme Court has recently held that the use of race preferences for such purposes is permissible in some circumstances, *see Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003); *but see Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411 (2003), the use of

racial preferences is by no means mandated, and the proponents of the Michigan Civil Rights Initiative sought to place the matter on the November 2006 ballot, where the contentious issue could be addressed by the voters of Michigan.

In this effort, MCRI's proponents were quite successful, garnering 505,202 signatures on the ballot initiative petitions, significantly more than the 317,757 required by state law and thereby earning a spot on the November 2006 ballot. Dist. Ct. Op., at 4.[1] Reflecting a solid diversity of opinion on the subject of race preferences even among voters who are members of racial minority groups, the petitions were signed by voters from across the broad racial and ethnic spectrum of Michigan. Yet that fact, which once would have been touted as a healthy indicator of progress toward a color-blind society, has been misused by the plaintiffs in this litigation as "evidence" of nefarious conduct by the Initiative's proponents, "evidence" that supports plaintiffs' claims only if one makes some pretty racist assumptions about the African American voters who signed the Initiative petitions.

As troubling, an agency of the state of Michigan, which improperly weighed in with a formal opposition to the Initiative, appears to have colluded with plaintiffs in order to bolster plaintiffs' prospect for success in this litigation. The Michigan Civil Rights Commission produced a patently-flawed report that purports to document fraud on the part of signature gathers but that in reality was merely a summary of a hearing obviously designed to manufacture record support for a pre-determined conclusion rather than to elicit the truth by way of an honest evidentiary investigation. Plaintiffs/Appellants

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[1] The District Court Opinion is attached as Exhibit 1 to Appellants "Emergency Motion for a Preliminary Injunction."

may be committed to blocking a vote on the Initiative "by any means necessary," but these are tactics that this Court simply must not countenance.

I. The Statistical "Evidence" Offered by Plaintiffs and Relied Upon by the Court Below For Its Finding of Fraud Is Not Only Faulty, But Is Based on Racist Assumptions About Black Voters That Must Not Be Given Credence By This Court.

A. Plaintiffs' Faulty Statistical Analysis Cannot Support Their Claim that Black and Latino Voters Were "Targeted."

Central to Plaintiffs' contention is the claim that the Michigan Civil Rights Initiative committee "targeted" minority voters with a misleading message about the purpose of the Initiative. Proof of this allegedly unlawful "targeting" is, according to Plaintiffs, found in data "retrieved from the statistical sample" of petition signatures "compiled by the State Board of Elections. Plaintiffs contend that the data reveals that approximately one fourth of the signatures were gathered from cities where Black and Latino citizens constituted a majority ranging from 55 to 99 percent, and thus that the rate of signature gathering from these two minority groups, which comprise only 12 percent of the state's population, was "more than double" the rate at which signatures from white citizens were gathered.

The errors in Plaintiffs' statistical analysis are so numerous that one hardly knows where to begin, giving proof to Mark Twain's adage about "lies, damn lies, and statistics." First, the fact that 25% of the signatures were gathered from cities in which Black and Latino voters constituted a majority does not mean that the signatures gathered from those cities were exclusively or even primarily from Black or Latino voters, yet it is just such an inference that Plaintiffs make to reach their conclusion that these two groups were targeted at

"more than double" the rate of white citizens. Indeed, given that the total number of signatures gathered by the Initiative's proponents (505,202) is only about 7% of the total number of registered voters in Michigan (7,113,246),[2] it is possible that signatures were gathered *only* from non-Black or Latino voters in any city where less than 93% of the registered voters are Black or Latino. Because Plaintiffs' own brief describes the racial make-up of these cities as between 55% and 99%, Plaintiffs' statistical data offers no guidance whatsoever on the relative rates at which signatures were gathered from Blacks and Latinos, on the one hand, and whites and other racial groups, on the other.

Second, even if one assumes that the percentage of signatures by race gathered from these cities parallels the percentages of the general population by race, although only registered voters are permitted to sign petitions, and plaintiffs offered no statistical evidence on the demographic breakdown of that group--the fact that the racial percentages range from 55% to 99% makes it impossible to ascertain just how many of the signatures gathered from these areas are actually from Black or Latino citizens. Plaintiffs' claim that blacks and Latino's were solicited to sign the Initiative petitions at "more than double" the rate of whites is therefore entirely unsupported by any evidence.

Finally, even if Plaintiffs' statistics demonstrated that the percentage of Blacks and Latinos who signed the Initiative petitions was greater than the percentage of Black and Latino registered voters, Plaintiffs still would not have demonstrated that the Initiative's proponents "targeted" Black and Latino voters on the basis of race. Just as plausible (indeed, much more likely), is that signature gatherers went to the densest population centers (such as Detroit, the

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[2] "2006 Voter Registration Totals," Michigan Department of State, available on-line at http://www.michigan.gov/sos/0,1607,7-127-1633_8722_14688-147529--,00.html (visited September 7, 2006).

largest city in the state, with a Black and Latino population of 85%) because that is where the people are, just as Willie Sutton robbed banks because that is where the money was. Plaintiffs' statistical evidence simply cannot prove nefarious purpose when a much more plausible, perfectly legitimate explanation for the same statistical evidence exists. It is for this very reason that the Supreme Court has rightly been suspicious of the use of statistics to support broader claims than the statistics warrant. "Statistics 'come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.'" *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 (1988) (quoting *Teamsters v. United States,* 431 U.S. 324, 340 (1977)).

B. Plaintiffs' Racist Assumptions Should Be Rejected by this Court in the Strongest Terms.

Much more troubling than Plaintiffs' faulty use of statistics, however, are the assumptions underlying the conclusions that Plaintiffs would have this Court draw from those statistics. On the assumption that no or almost no Black citizen would knowingly sign a petition to ban preferences, Plaintiffs conclude that the existence of signatures from Black citizens in any significant number must have been based on fraud or misunderstanding or fraud-induced misunderstanding. In other words, Plaintiffs' conclusion turns on one of two highly suspect assumptions: 1) either blacks, as a group, were more susceptible to being misled about the meaning of the Initiative than whites, or 2) blacks, as a group, are so uniform in their thinking that the courts can, as a matter of law, assume nefarious purpose when customary diversity of opinion would suffice as a legitimate explanation for any other racial group. Even to give voice to such assumptions is an affront to the guarantee of equality in the Fourteenth Amendment and something that no court should countenance. But to block an

election based on such assumptions is simply beyond the pale, for Plaintiffs have essentially asked this Court to disfranchise Michigan's black voters on the basis of a pre-determined view of how those citizens should vote, based on their race.

Nor should this Court be misled by such vague and factually incorrect generalizations as that "black...voters support affirmative action by majorities far in excess of those in any other population group." The critical issue for Plaintiffs' claims, of course, is just what is meant by "far in excess," yet nowhere does Plaintiff establish that with anything approaching the level of specificity necessary for this bare assertion to serve as evidence. Related to that issue is the following logical question: Since the proposed amendment calls upon citizens to "ban racial and gender preferences," and not to "ban affirmative action," is it reasonable (or even permissible) to insist, as Plaintiffs do, that black citizens cannot tell the difference? Certainly no evidence has been presented to that effect.

To the contrary, expert polling has consistently demonstrated that black citizens throughout the United States, just like everyone else, express diminished support for quotas and preferences insofar as those are explicit choices of affirmative action policies, and the most recent comprehensive polling by the *Washington Post Company* has demonstrated that the rate at which Black citizens respond negatively to "preferences" approaches 80%, much like the rest of the population.

Despite the District Court's attempt to impose a single definition of affirmative action, it is also well established by expert analysis that "affirmative action policies" constitute a diverse array of initiatives often in tension with one another. For example, "outreach" may be rendered nugatory by "preferences" and "quotas," as has been demonstrated in a Report of the United States

Commission on Civil Rights.[3] This ambiguity in the meaning of the phrase, "affirmative action," provides a full explanation for the different take proponents and opponents have on the Initiative. Plaintiffs' position, accepted by the District Court on this point, would essentially criminalize (by declaring it a "fraud") the view that affirmative action, properly understood, permits outreach efforts of various sorts but not racial quotas or preferences. Yet it is precisely that view, fully protected by the First Amendment and critical to the political campaign over the Initiative at issue here, which places any statements by signature gatherers to the effect that the Initiative favors "affirmative action" well within the range of permissible campaign discourse. The district court's finding of "fraud" is therefore not only grounded on improper assumptions that this Court must not countenance, but it poses an ongoing threat to fundamental First Amendment principles, even against the backdrop of the District Court's correct holding that Plaintiffs have no claim under the Voting Rights Act.

II. This Court Should Also Refuse To Give Credence To A Manifestly Biased Report of a Government Agency That, Improperly, Had Publicly Advocated Against The Initiative.

One of the most clearly-established requirements of Due Process is the right to an unbiased judge, yet here, much of the "evidence" upon which Plaintiffs' base their claims was manufactured by the Michigan Civil Rights

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[3] See. REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS ON THE CIVIL RIGHTS ACT OF 1990, STATEMENT OF COMMISSIONERS WILLIAM B. ALLEN, CARL A. ANDERSON, AND RUSSELL G. REDENBAUGH, 81-90 (1990). Also see a related discussion of this Report in Allen, "Epstein's Challenge to the Civil Rights Regime," *San Diego Law Review*, vol. 31, no. 1 (Winter 1994): 57-66.

Commission, a government agency sympathetic to Plaintiffs' cause (and apparently working in concert with Plaintiffs) that not only ignored significant evidence of false testimony but whose Chairman had actually endorsed Plaintiffs' opposition to the Initiative two years prior to conducting its "evidentiary" investigation. *See* Memorandum Of Connerly, Gratz, and Michigan Civil Rights Initiative Committee, Ex. B; http://www.callsam.com/bernstein_lawyers_in_the_news/supporting_equal_opportunity_for_all.html (January 1994 resolution of the Michigan Civil Rights Commission condemning the proposed amendment to the constitution, along with a press release describing it as "racist" and its proponents as "extremists.)

Unrebutted sworn testimony introduced in the court below by William Allen, as an eyewitness, for example, demonstrated that a representative of Plaintiff BAMN had urged members of the Union Missionary Baptist Church to testify before the Michigan Civil Rights Commission that they had been misled into signing the Initiative petitions, and that it did not matter whether they had actually signed the petition or remembered signing the petition in order for them to testify. Allen Aff. ¶ 4.[4]

Another critical aspect of Due Process is the right to confront witnesses, yet much of the "evidence" of "fraud" relied upon by Plaintiffs and the District Court below was culled from the Michigan Civil Rights Commission's report of its "investigative" hearing, where that testimony was not subjected to the usual interrogation and cross-examination customary with investigative bodies. As Dr. Allen noted in his sworn testimony, the shoddy process by which "evidence" was gathered by the Commission led him to conclude that the Commission "had no particular interest in fairly assessing the facts, but rather

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[4] Dr. Allen's affidavit is part of the record below.

was designed to provide fodder for its previously-announced opposition to the proposed" Initiative. Allen Aff. ¶ 2. Moreover, Dr. Allen's sworn description of the "remarkably consistent" testimony provided to the Michigan Civil Rights Commission, "to the point where any reasonable investigator should have considered the possibility that the testimony was coached," was ignored by the District Court in order to embrace the Commission's Report as an accurate portrayal of the state of the evidence. Allen Aff. ¶ 7.

Troubling enough that a government agency, funded with taxpayer dollars, was attempting to influence the outcome of an election by coordinating its activities with opponents of the Initiative, the sham hearing that it conducted "to provide fodder" for Plaintiffs' claims of fraud place the imprimatur of government on a slanderous accusation that the District Court has now sanctioned. Even though the District Court correctly held that the finding was insufficient to support Plaintiffs' claims as a matter of law, this Court should not accept such an ill-supported finding at face value.

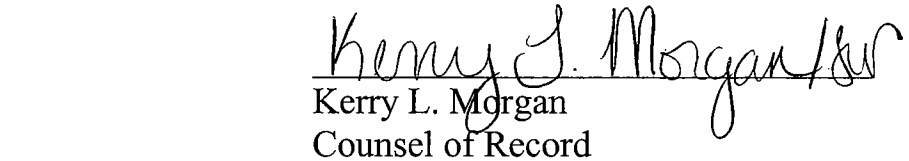
CONCLUSION

Plaintiffs' Motion for Emergency Preliminary Injunction Pending Appeal should be denied.

Dated: September 8, 2006

Respectfully submitted,

John C. Eastman
THE CLAREMONT INSTITUTE CENTER
FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University School of Law
One University Drive
Orange, CA 92866



Kerry L. Morgan
Counsel of Record
Pentiuk, Couvreur & Kobiljak, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, MI 48192
(734) 281-7100

Manuel S. Klausner
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Building
601 West Fifth Street, Suite 800
Los Angeles, CA 90071
(213) 617-0414

By: Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

This brief is filed pursuant to F.R.A.P. 32(a)(7)(A); the certificate of compliance required by F.R.A.P. 32(a)(7)(C) is therefore not required. In addition, I hereby certify that this brief complies with Rule 32(a)(7)(B), uses a proportional font of 14-point size and contains 2,779 words, according to a word count on the word-processing system used to prepare the brief.

Kerry L. Morgan

PROOF OF SERVICE

The undersigned hereby certifies that the attached documents described as Brief of *Amicus Curiae* was served on this 8th day of September, 2006, on interested parties in this action by UPS service to:

George B. Washington
Scheff & Washington
645 Griswold
Suite 1817
Detroit, MI 48226

Heather S. Meingast
Asst. Atty. General
Patrick J. O'Brien
Asst. Atty. General
Office of the Attorney General
Appellate Division
525 W. Ottawa
P.O. Box 30217
Lansing, MI 48909

Michael E. Rosman
Center for Individual Rights
1233 20th Street, N.W.
Suite 300
Washington, DC 20036

Donna J. Wolf