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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
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Nos. 08-1387 & 08-1389 & 08-1534 & 09-1111

LEONARD GREEN, Clerk

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

Plaintiffs-Appellants (08-1387)/Cross-Appellees, Plaintiffs (08-1389/09-1111),

CHASE CANTRELL, et al.,

Plaintiffs-Appellees (08-1389), Plaintiffs-Appellants (09-1111),

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES
OF MICHIGAN STATE UNIVERSITY et al.,
Defendants-Appellees/Cross-Appellants (08-1534), Defendants (08-1389/09-1111),

BILL SCHUTTE, Michigan Attorney General,
Intervenor-Defendant-Appellee (08-1389/09-1111),

ERIC RUSSELL,
Intervenor-Defendant-Appellee (08-1387/09-1111),

JENNIFER GRATZ,
Proposed Intervenor-Appellant (08-1389).

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

**BRIEF OF *AMICI CURIAE* GARY SEGURA, SHAUN BOWLER, TODD
DONOVAN, ZOLTAN HAJNAL, RODNEY HERO, STEPHEN
NICHOLSON, AND CAROLINE TOLBERT IN SUPPORT OF
APPELLANT EN BANC**

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are distinguished professors of political science who specialize in the study of American political elections and voting, especially at the state and local levels. A short biography of each *amicus* is can be found at Appendix A. *Amici* have engaged in extensive analysis bearing on the comparative burdens of state-wide initiatives and referenda on racial and ethnic minorities. *Amici* have a strong interest in ensuring that the *en banc* court's decision rests on sound empirical data and theoretical research about the impact of Proposition 2 on minority interests.¹

ARGUMENT

I. STATE-WIDE BALLOT INITIATIVES POSE SEVERE POLITICAL BURDENS ON THE ACHIEVEMENT OF MINORITY INTERESTS

Under Michigan's Ballot Proposal 06-02 ("Proposal 2"), advocates of race-conscious admissions must *first* amend the state Constitution to repeal Proposal 2 through an onerous state-wide initiative process; only then can they seek to accomplish their policy goals through ordinary political channels.² Both history and empirical research strongly support the panel's conclusion that Proposal 2 "reorders the political process in Michigan in such a way as to place 'special

¹ Counsel for *amici curiae* authored this brief in its entirety. No person contributed money that was intended to fund preparing or submitting this brief.

² Amendments to the Michigan Constitution can be initiated either by the a vote of two-third of both houses of the legislature, or by vote-initiated petition. *See* Mich. Const. art. XII, §§ 1, 2. Under either procedure, however, the amendment must be approved by a "majority of the electors voting" in a general election. *See id.*

burdens' on racial minorities" by requiring those advocating for race-conscious university admissions policies to "surmount a considerably higher hurdle" than those seeking other legislative action. Panel Op.³ 14-15 (internal quotation marks omitted); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982).

Proposal-2 clearly imposes a "higher hurdle" by requiring an *additional* requirement on proponents of race-conscious admissions policies. As the panel majority correctly concluded, that additional requirement would impose a significant barrier for *any* group seeking changes in university policies.

The focus of this brief is the political science research and evidence demonstrating that this additional burden is *especially* severe for racial and ethnic minorities. Empirical studies have demonstrated that racial and ethnic minorities, in comparison to the majority, face far greater obstacles to effectuating their interests through state-wide referenda or ballot initiatives than through other democratic processes such as voting for or lobbying elected officials such as university Boards. In fact, state-wide initiatives in the United States frequently have been used, as here, to disfavor minority interests, and rarely, if ever, used to promote such interests. This evidence is refutes the panel dissent's suggestion that

³ *Amici* adopt the citation forms set forth at pages v and vi of the supplemental brief of the Cantrell Plaintiffs-Appellants.

Proposal 2 does not impose a comparative political burden on racial and ethnic minorities. *See* Panel Op. 56 n.6.

A. State-Wide Ballot Initiatives Are Uniquely Disadvantageous To Minority Interests

Among the different political processes available to citizens attempting to influence public policy, state-wide ballot measures uniquely disadvantage racial and ethnic minorities. Voters in states across the country have used the initiative and referendum process to enact policies that expressly target minorities for disfavored treatment, or repeal legislatively-enacted policies that explicitly benefit minority groups. Between 1959 and 1993, for example, 26 ballot initiatives directly involving racial, ethnic, and linguistic minorities appeared on state-wide ballots in the United States. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 251-53 (1997). Of those 26 initiatives, 25 targeted minority groups and were placed on the ballot by those opposed to minority interests. Of those 25, minority groups suffered defeat in 22 cases, or 88% of the time, including in the initiatives at issue in the *Hunter*⁴ and *Seattle* cases. The rate of passage for anti-minority ballot initiatives was more than two-and-a-half times the rate of passage for all referenda during this period. *See*

⁴ *Hunter v. Erickson*, 393 U.S. 385 (1969).

Gamble, 41 Am. J. Pol. Sci. at 254, 261 (noting that voters endorsed one-third of referendum measures overall).⁵

More recent empirical research confirms that state-wide ballot initiatives frequently target racial and ethnic minority groups, and predictable racially polarized-voting on these divisive racial issues systemically disadvantages minority interests. For example, a 2002 study of 47 California ballot initiatives addressing a broad array of issues from 1980 to 1998 found that racial and ethnic minorities – Latinos, in particular – lost regularly on a number of racially targeted propositions. See Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Initiatives*, 64 J. Pol. 154, 169-72 (2002). In general, the study found that “African Americans, Latinos and Asian Americans are all much less likely than whites to be on the winning side of the vote on these

⁵ Gamble examined five policy areas where ballot measures have limited minority rights: AIDS testing, gay rights, language, school desegregation and housing and public accommodation. A study by two *amici* found that in one of these areas (civil rights of lesbians and gays from 1972 – 1996), anti-minority ballot measures did not pass with greater frequency at the state level than other measures, see Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 Am. J. Pol. Sci. 1020-24 (1998), but this result did not challenge Gamble’s conclusions that direct democracy constrained the rights of racial and ethnic minorities. A 2007 study subsequently analyzed data beyond 1996 to include public votes on proposals to prohibit same sex marriage. When that extended time frame is considered, results that limit rights of gays and lesbians are much more common. See Donald P. Haider-Marke et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 307-08 (2007).

minority-targeted initiatives.” *Id.* at 171. Even more strikingly, the study found that Latinos – who are the largest minority group in California – were especially likely to lose on minority-targeted ballot initiatives, including “on subjects of fundamental importance to the Latino community.” *Id.*

By contrast, it is difficult to find a *single* state-wide referendum in any of the 50 states in which voters approved policies explicitly *favorable* to minority groups. A comprehensive survey of state-wide initiatives in all 50 states since the first state-wide initiative appeared in Oregon in 1904 reveals very few, if any, that could be said to expand rather than restrict minority rights.⁶ Thus, the state-wide initiative process serves the majority better than other forms of democratic decision-making. *See, e.g.*, Hajnal et al., 64 J. Pol. at 171 (finding that “on the whole, members of minority groups are indeed less likely than whites to prevail on . . . minority-targeted initiatives”).

There are a number of factors that make state-wide referenda inimical to minority political interests. First, state-wide initiatives are extremely costly. Under the Michigan Constitution, for a statewide constitutional amendment initiative to qualify for the ballot, proponents must collect signatures equal to 10% of the total vote in the previous gubernatorial election – in 2012, more than

⁶ The non-profit Initiative and Referenda Institute’s compilation of nearly 2,000 referenda since 1904 can be found at <http://www.iandrinstitute.org/data.htm>.

320,000 signatures – in a period of 180 days. *See* Mich. Const. art. XII, § 2; Mich. Comp. Laws § 168.472a.⁷ The burden of collecting this many signatures over such a short period of time – nearly 2,000 per day – is so substantial that the vast majority of petition efforts require the initiative sponsor to hire paid petition circulators, at significant expense.⁸

The costs of campaigning for state-wide initiatives and referenda are also substantial. A study by the National Institute on Money in State Politics found that, in 2006, spending on ballot initiatives in Michigan averaged \$1.65 for each of the state's residents.⁹ The costs of state-wide initiatives and referenda are even more pronounced in other states. In 2008, per capita spending on initiatives was as high as \$5.75 in Oregon, almost \$13 in California, nearly \$15 in Colorado, and \$19 per capita in Alaska; spending in each of these states exceeded per capita spending

⁷ *See* http://michigan.gov/sos/0,4670,7-127-1633_8722-29616--,00.html (indicating official voter turnout of more than 3.2 million for the 2010 gubernatorial election). In practice, initiative sponsors must obtain up to 20% more than the required number of signatures to account for invalid and duplicative signatures.

⁸ *See, e.g.,* Todd Donovan et al., *State and Local Politics: Institution and Reform* 96-97 (2011).

⁹ *See* <http://www.followthemoney.org/database/nationalview.phtml?l=0&f=B&y=2006&abbr=1>. For per capita expenditures see Caroline Tolbert et al., *Initiative Campaigns: Direct Democracy and Voter Mobilization*, 37 *Am. Pol. Res.* 155 (2009).

in the 2008 presidential election.¹⁰ The costs of the referendum process thus impose a serious impediment to minority groups that must first repeal Proposal 2 before they can advocate for race-conscious admissions at the university level.

Second, minorities are at an electoral disadvantage when minority interests are put at stake on in state-wide referenda. State-wide ballot initiatives often are exploited as lightning rods for attacks on disfavored minority groups.¹¹ Exit polling showing racially polarized voting on Proposal 2, *see* 3/18/08 Order, RE #166, at 6, is consistent with substantial empirical evidence demonstrating the prevalence of racially polarized voting that targets policies that benefit an identifiable minority group. In California, for example, exit polls showed 59% white voters (who made up 75% of the electorate) supported California's Proposition 187 in 1994 (limiting immigrants' access to public services), while

¹⁰ *See id.*; Daniel Smith et al., *Reassessing Direct Democracy and Civic Engagement: A Panel Study of the 2008 Election* 14-15, 23-30 (paper presented at the Annual Meeting of the American Political Science Association, Washington DC, 2010); *see also* Tolbert et al., 37 *Am. Pol. Res.* at 157-62.

¹¹ *See* Derrick A. Bell, *The Referendum: Democracy's Barrier to Racial Equality* 54 *Wash. L. Rev.* 1, 19 (1978) ("Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."); Peter Schrag, *Paradise Lost: California's Experience, America's Future* 226 (1998) (describing the "the demagogic potential of the initiative").

75% of Hispanics voted against it.¹² Exit polls also showed racially polarized voting on Proposition 227, the 1998 California measure limiting bilingual education programs. Sixty-seven percent of white voter supported the initiative, while 63% of Latino voters opposed it.¹³ Voting on these proposals displayed heavily racially polarized voting in which support by white voters resulted in passage of the referendum despite opposition by minority groups.

Likewise, a 2003 study of voting on California's Proposition 209, which, like Proposal 2, amended the state constitution to prevent state public institutions from considering race, ethnicity, or gender, found that white support for the initiative was higher in neighborhoods with larger Latino, African-American and Asian-American populations, even after controlling for other factors, than among whites living in more homogeneous areas. These results provide evidence of a racial threat or backlash in support for ending race-conscious public policies.¹⁴

Similarly polarized voting can be seen on state-wide ballot initiatives in other

¹² See R. Michael Alvarez & Tara L. Butterfield, *The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration* 7 (1997), available at <http://polmeth.wustl.edu/media/Paper/alvar97d.pdf>; Caroline Tolbert & Rodney Hero, *Race/Ethnicity and Direct Democracy: An Analysis of California's Illegal Immigration Initiative*, 58 J. Pol. 806, 809 (1996).

¹³ L.A. Times, L.A. Times Poll, Study #413/Exit Poll, California Primary Election (June 2, 1998), available at http://www.latimesinteractive.com/pdfarchive/stat_sheets/la-timespoll413ss.pdf.

¹⁴ See generally Caroline Tolbert & John Grummel, *Revisiting the Racial Threat Hypothesis: White Voter Support for California's Proposition 209*, 3 State Pol. & Pol'y Q. 183 (2003).

states, such as Colorado and Washington, where voters approved initiatives restricting legislated attempts at desegregating public schools.¹⁵

Research on state-wide ballot initiatives overall demonstrates that the problem of minority disadvantage is especially acute on racially focused initiatives: racial and ethnic minorities fail regularly when the measures on the ballot deal explicitly with race while they fare less poorly on ballot measures not explicitly tied to race. *See* Hajnal et al., 64 J. Pol. at 171; Gamble, 41 Am. J. Pol. Sci. at 254, 261. The reasons for this are well understood. First, initiatives that single out racially divisive issues dilute minority voting strength relative to legislative elections by isolating minority voters from potential electoral allies. *See* Bell, 54 Wash. L. Rev. at 23. Ballot initiatives on explicitly racial issues uniquely disadvantage minorities by depriving them of the ability to form effective coalitions that allow them to pursue their interests more effectively through other modes of democratic decisionmaking.

Second, empirical research has confirmed that when ballot measures explicitly target minority interests, public opinion toward the minority group

¹⁵ Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 93 (1989); Caroline Tolbert & Rodney Hero, *Dealing with Diversity: Racial/Ethnic Context and Social Change Policy*, 54 Pol. Res. Q. 571, 594 (2001); Daniel Martinez HoSang, *Racial Propositions: Ballot Initiatives and the Making of Postwar California* 241 (2010).

erodes.¹⁶ Single issue ballot initiatives on racially explicit measures not only are harder for racial and ethnic minorities to win, but they also tend to diminish their electoral strength on other issues. In sum, because of the disadvantages of single-issue, racially explicit ballot initiatives, Proposal 2's requirement that proponents of race-conscious admissions first prevail in a single-issue, racially explicit constitutional amendment measure imposes enormous political burdens on racial and ethnic minority groups.

B. State-Wide Ballot Measures Impose Comparatively Greater Burdens on Minority Interests Than Electoral Processes

Empirical political science research and public choice theory also indicate that minority groups have significantly more influence over the selection of university Boards than they do in state-wide referenda. Thus, by foreclosing minority groups from using normal political channels to effect change in university policy, Proposal 2 requires such groups to overcome greater obstacles to pursue their political interests.

In general, for the reasons set forth above, electoral processes are significantly less burdensome than state-wide ballot initiatives for racial and ethnic minorities because they allow minorities to form coalitions with other groups, and diminish the racial polarization that characterizes racially explicit state-wide ballot

¹⁶ See James Wenzel et al., *Direct Democracy and Minorities: Changing Attitudes about Minorities Targeted by Initiatives*, in *Citizens as Legislators: Direct Democracy in the United States* 228, 241-43 (Shaun Bowler et al. eds., 1998).

initiatives. Moreover, minority groups have been more effective in effectuating change in university policies through more informal methods such as lobbying the respective Boards. In fact, as the district court in this case concluded, the universities' policies of considering race as one of many factors in admissions was the product of decades of lobbying effort. 3/18/08 Order, RE. 166, at 3-4, 13. While lobbying Board members efforts remain open to those advocating other changes in university policy, Proposal 2 forecloses this important avenue of political advocacy exclusively for those that seek consideration of race in university admissions.¹⁷

Two structural features of Michigan's system for electing Boards at the state's three flagship universities bolster racial and ethnic minorities' ability to effectuate change through the electoral process. First, the Boards are selected through a "modified at-large" electoral process in which the first-place and second-place candidates are both elected. *See* Mich. Const. art. VIII, § 5; Mich. Comp. Laws § 168.286. Political science research has established that winner-take-all, at-large elections – in which a single candidate must obtain a plurality of the vote to be elected for a single position – disfavors minority preferred candidates (and by

¹⁷ Lobbying and other informal modes of political advocacy are particularly important for effectuating changes in policy at Michigan's other state universities, where, unlike at the three flagship universities, the Boards are appointed by the Governor with the consent of the Senate. *See* Mich. Const. art. VIII, § 6.

extension, the interests that they represent). In contrast, modified at-large, multi-seat election systems have been shown to produce greater minority representation (and thus greater representation of minority interests) than a pure at-large system.¹⁸ In multi-candidate elections, electoral success is possible with lower vote totals, which, other things being equal, is beneficial to minority candidates. In several elections in recent years, second-place candidates were elected to the Wayne State, University of Michigan, and Michigan State University boards with less than 25% of the vote,¹⁹ which would not be possible in a single-member election or in a state-wide referendum.

Board members are also nominated on a partisan basis. *See* Mich. Comp. Laws § 186.282. Political parties are, by their nature, coalitions of various groups.²⁰ These groups in a party nominate candidates with shared goals and offer candidates from various elements of the party to secure nominations for various

¹⁸ *See* Elizabeth R. Gerber et al., *Minority Representation in Multi-Member Districts*, 92 *Am. Pol. Sci. Rev.* 127, 128-30 (1998); Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 *Am. Pol. Sci. Rev.* 344, 347-52 (1981); Shaun Bowler et al., *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections* 95-98 (2003).

¹⁹ Election results can be found at http://www.michigan.gov/sos/0,4670,7-127-1633_8722---,00.html (last visited Oct. 31, 2011).

²⁰ *See, e.g.*, David W. Brady, *Party Coalitions in the US Congress: Intra-v. Interparty*, in *The Oxford Handbook of American Political Parties and Interest Groups* (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

offices. See V.O. Key, Jr., *American State Politics: An Introduction* 198-99 (1956). Moreover, party conventions are known to give greater influence to groups promoting candidates who represent a party's core constituencies.²¹ As a result, racial minorities have had more success in legislative settings than in statewide referendum votes.²² Indeed, there are numerous examples of voters approving citizen initiatives that repeal policies favorable to minorities that were secured through the legislative process.²³

* * *

In sum, political science literature and research amply support the conclusions of the district court and the panel in this case: “[t]here is no question . . . that Proposal 2 makes it more difficult for minorities to obtain official action that is in their interests.” 3/18/08 Order, RE. 166, at 49; Panel Op. 28 (agreeing

²¹ See Marty Cohen et al., *The Party Decides: Presidential Nominations Before and After Reform* 31 (2010). For example, because African American voters are a core component of the contemporary Democratic Party coalition, see William Flanigan & Nancy Zingale, *Political Behavior of the American Electorate* 112 (2010), local and state Democratic parties have regularly nominated and elected African American candidates, see generally Rene R. Rocha et al., *Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?*, 63 Pol. Res. Q. 890 (2010).

²² Bruce Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, in *Controversies in Minority Voting* 261, 274-75 (Bernard Grofman & Chandler Davidson eds., 1992).

²³ See, e.g., Gamble, 41 Am. J. Pol. Sci. at 255-56; Donald P. Haider-Marke et al., *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. at 307-08; see generally Lydia Chavez, *The Color Bind: California's Battle to End Affirmative Action* (1998).

that Proposal 2 “force[s] those advocating for consideration of racial factors to go down a more arduous road than others”). Because the state-wide referendum process generally disfavors minority groups’ pursuit of their interests, Proposal 2’s entrenchment of the majority’s policy preferences at a constitutional level disproportionately hamstrings minority groups’ ability to pursue their policy goals. Moreover, Proposal 2 deprives advocates of race-conscious admissions – but not advocates of other policy changes – of access to the ordinary political processes for effectuating change at the university level, which are far more conducive to minorities’ achievement and protection of their interests. Proposal 2 thus clearly fails the “simple but central principle” of *Hunter* and *Seattle* – namely, that racial minorities cannot be required to “surmount more formidable obstacles to achieve their political objectives than other groups face.” Panel Op. 28 (quoting *Seattle*, 458 U.S. at 469-70).

November 11, 2011

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 3,303 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

/s/ Derek T. Ho

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November 11, 2011

Appendix A

Gary Segura is a Professor of American Politics at Stanford University. His work includes four books and over forty articles on political representation, with a particular focus on minority citizens. He is the co-Principal Investigator of the American National Election Study for 2010-2013, and in 2010, was elected a Fellow of the American Academy of Arts and Sciences.

Shaun Bowler is a professor of political science at the University of California – Riverside. His research includes comparative electoral systems and voting behavior both domestically and internationally. Among the issues he has studied is the relationship between institutional arrangements and voter choice in California’s initiative process.

Todd Donovan is a professor of political science at Western Washington University, where he studies and teaches on issues representation and electoral systems, political behavior and electoral politics, and American state politics and policy (with an emphasis on direct democracy). Professor Donovan has written extensively on institutional reform in state and local electoral processes.

Zoltan Hajnal is a professor in the Department of Political Science at the University of California – San Diego. Professor Hajnal has written extensively on minority participation and influence on direct legislation, including California’s ballot initiative process, and its implications for minority interests.

Rodney Hero is a professor of political science at the University of California – Berkeley. He studies American politics and democracy, with a focus on state and local government, politics, and policy. Prior to his appointment to the faculty at Berkeley, he was chair of the political science department at University of Notre Dame.

Stephen Nicholson is Associate Professor of Political Science at the University of California – Merced. He has published numerous books and articles addressing state and local politics, including *Voting the Agenda: Candidates, Elections, and Ballot Propositions*, published by Princeton University in 2005.

Caroline Tolbert is Professor of Political Science at the University of Iowa and the coauthor of a half dozen books and more than thirty articles in peer reviewed scholarly journals. Her research focuses on political behavior and voting, elections and political representation. She has extensively studied and published on issues relating to state ballot initiatives.

CERTIFICATE OF SERVICE

I, Derek T. Ho, hereby certify that, on November 11, 2011, I electronically filed the foregoing BRIEF OF *AMICI CURIAE* GARY SEGURA, SHAUN BOWLER, TODD DONOVAN, ZOLTAN HAJNAL, RODNEY HERO, STEPHEN NICHOLSON, AND CAROLINE TOLBERT IN SUPPORT OF APPELLANT EN BANC with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Derek T. Ho
Derek T. Ho