Nos. 06-2640, 06-2656

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,

Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Defendants-Appellees,

MICHAEL A. COX, Attorney General of the State of Michigan

Intervening Defendant-Appellee,

and

ERIC RUSSELL; TOWARD A FAIR MICHIGAN,

Intervening Defendants-Appellants.

INTERVENING DEFENDANT-APPELLANTS ERIC RUSSELL'S AND TOWARD A FAIR MICHIGAN'S MOTION TO EXPEDITE

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INTERVENING DEFENDANTS-APPELLANTS ERIC RUSSELL'S AND TOWARD A FAIR MICHIGAN MOTION TO EXPEDITE

Pursuant to Rule 27(f) of the Sixth Circuit Rules, intervening defendants-appellants Eric Russell and Toward A Fair Michigan ("TAFM") move for expedited consideration of their appeal from the Order issued on December 19, 2006 by the U.S. District Court for the Eastern District of Michigan. *See* 6 Cir. R. 27(f) ("At any time after a notice of appeal is filed, a party may file a motion to expedite. Such motion shall demonstrate good cause why a case should receive expedited review."). There is good cause for such expedited review. This case involves a federal constitutional challenge to a recently adopted amendment to the Michigan Constitution. The public interest strongly favors speedy resolution of the dispute, to curtail any further uncertainty about the validity of Article I, Section 26 of the Michigan Constitution. This Court made clear, in its decision of December 29 staying the District Court's December 19 order preliminarily enjoining the operation of Section 26, that the federal claims in this case uniformly lack merit. Nevertheless, the District Court has recently set the case on a course contemplating prolonged litigation and extensive factual and expert discovery. This course will unjustifiably ensure months of delay, great expense to the private parties and the State, and prolonged uncertainty about the validity of Section 26. In strikingly similar circumstances, having first granted an emergency stay pending appeal of the district court's preliminary injunction against the enforcement of a state statute, the en banc Fourth Circuit stated:

> Appellate adjudication of the underlying legal merits, on an appeal from the issuance of a preliminary injunction, is most clearly justified where not only does the injunction rest entirely upon a pure question of law, but it is plain that the plaintiff cannot prevail as a matter of the governing law. When this is apparent to the court of appeals, a defendant is, as the Supreme Court has observed for more than a century, entitled both to immediate relief and to relief from the expense of further litigation.

Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352, 360 (4th Cir. 1999) (en banc) (Luttig, J.). Here, as indicated by this Court's December 29 opinion, it is no less "plain that the plaintiff[s] cannot prevail as a matter of the governing law" and that defendants are thus "entitled both to immediate relief and to relief from the expense of further litigation." Therefore, despite the interlocutory nature of the current appeal, this Court should grant expedited review, exercise its power to resolve the merits of the pending federal legal challenges to Article I, Section 26 of the Michigan Constitution, and remand the case with instructions to dismiss the federal claims.

BACKGROUND

The facts and procedural history of this case have been fully briefed, and are set forth in some detail in this Court's prior opinion staying the stipulated preliminary injunction entered in this case. *See Coalition to Defend Affirmative Action, et al. v. Granholm, et al.*, Nos. 06-2640, 06-2642 (Dec. 29, 2006) ("Slip op.") 1-5. We briefly summarize facts relevant to this motion.

On November 7, 2006, the voters of Michigan approved a statewide ballot initiative that amended the Michigan Constitution to prohibit discrimination and preferential treatment on the basis of race, gender, color, ethnicity, or national origin in the public employment, public education, and public contracting of the State. *See* MICH. CONST. art. I, § 26. On November 8, plaintiffs-appellees filed suit in the U.S. District Court for the Eastern District of Michigan, alleging that Section 26 violated the federal Constitution and was preempted by various federal civil rights statutes. The lawsuit named as defendants both the Governor of Michigan and the governing bodies of three Michigan public universities—the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University (collectively, the "University defendants").

The University defendants subsequently filed a cross claim against the Governor, purporting to challenge Section 26 on First Amendment grounds. The plaintiffs, the Governor, the University defendants, and the Michigan Attorney General as intervening defendant subsequently entered into an agreement stipulating that Section 26 should be temporarily enjoined, for 6 months, in its application to the University defendants' admissions and financial aid policies. Intervening defendants-appellants Eric Russell and TAFM moved to intervene, but on December 19, 2006, without ruling on their motions to intervene, the District Court issued an Order granting the stipulated temporary injunction.

On December 21, intervening defendants-appellants filed a notice of appeal and sought an emergency stay of the preliminary injunction pending appeal, and on December 27, the District Court granted Russell's motion to intervene and denied TAFM's motion to intervene. This Court requested briefing on the likelihood of success of the plaintiffs' federal claims.

On December 29, 2006, this Court granted an emergency stay pending appeal of the December 19 temporary injunction, stating that it was "unable to identify any tenable basis under federal law for suspending [Section 26's] enforcement." Slip op. 1. In addition to noting the substantive defects in the Order itself, *see id.* at 6-7, this Court "look[ed] behind the [district] court's December 19 order to the Universities' cross-claim and motion for a preliminary injunction," and determined that "these filings do not supply a basis for enjoining the law on the ground that it violates federal constitutional or statutory law." *Id.* at 7. The opinion also explained in detail that neither "the Attorney General, the Governor, the Universities, [nor] the plaintiffs in the underlying action" had "offer[ed] tenable explanations for suspending Proposal 2 on the basis of federal law." *Id.* at 8. The Court considered and rejected, in some detail, the claims that the amendment violated or was preempted by (1) the Universities' First Amendment

rights, *id.* at 8-9; (2) the Equal Protection Clause, *id.* at 9-11; (3) Title VI of the Civil Rights Act of 1964, *id.* at 11-12; and (4) Title IX of the Education Amendments of 1972, *id.* at 12. Emphasizing that "these are weak federal claims" and that "this is an unusual way to use the federal courts," *id.* at 12-13, the Court "determined that Russell has a strong likelihood of reversing the district court's preliminary injunction…." *Id.* at 12.[1]

On January 5, 2007, one week after the issuance of this Court's opinion, the District Court conducted a status conference and issued a scheduling order. *See* January 5, 2007 Order Consolidating Cases, Granting Attorney General's Motion To Intervene, And Setting Dates (attached as Exhibit 5) ("January 5 Order"). The District Court firmly advised the defendants against filing motions to dismiss the federal claims under Rule 12(b)—despite this Court's clear indication that those claims uniformly lack merit as a matter of law. Instead, the District Court issued a scheduling order that contemplates fully litigating the case to a conclusion over the course of the next several months, including both factual and expert discovery and the possibility of an eventual trial on the merits of plaintiffs' claims and/or the University defendant's cross-

[1] On January 2, movants Russell and TAFM filed a complaint in the State of Michigan's Circuit Court for the County of Washtenaw. They named as defendants the individual Regents of the University of Michigan, the President of the University of Michigan, and Governor Granholm, all in their official capacities, as well as the corporate body of the Regents of the University of Michigan. The complaint seeks a declaratory judgment and injunction under Section 26 to prohibit the University's use of racial and gender preferences in its admissions and financial aid decisions. *See* No. 07-01, Class Action Complaint For Declaratory and Injunctive Relief (attached as Exhibit 1). On January 4, Russell and TAFM moved in that state-court action for a preliminary injunction forbidding the University of Michigan to continue its use of racial preferences in admissions and financial aid. *See* No. 07-01, Motion For Preliminary Injunctive Relief (attached as Exhibit 2). On January 5, Attorney General Mike Cox moved to intervene as a plaintiff in those proceedings. *See* No. 07-01, Motion of Attorney General To Intervene As a Plaintiff (attached as Exhibit 3). On January 11, many of the same plaintiffs who are named in the federal proceedings and who are current or prospective minority applicants to the University of Michigan, represented by the same counsel, moved to intervene as defendants in the same proceedings. *See* No. 07-01, Motion To Intervene As Parties Defendant By Josie Hyman, Alejandra Cruz, and Other Black and Latino/a Applicants and Prospective Applicants To the University of Michigan (attached as Exhibit 4). These motions remain pending in the state court. Because there is no ambiguity in Section 26's prohibition of the use of racial and gender preferences, Russell and TAFM have not taken the position that abstention is required in these federal proceedings. But they would not object if this Court, as an alternative to expediting this appeal, were to direct the District Court to abstain from exercising its jurisdiction pending the resolution of proceedings in state court. *See, e.g.*, Emergency Motion For Stay Pending Appeal in No. 06-2640, at 19 ("[I]f the University Defendants were correct that interpretation of the Amendment is still in doubt, that would be a reason for a federal judge to *decline jurisdiction*, not to enjoin the Amendment.") (emphasis in original) (citing *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941)).

claim. In particular, the January 5 Order sets deadlines for (1) responsive pleadings by all defendants; (2) mandatory disclosures by all parties pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure; (3) the negotiation of a joint stipulation of facts by all parties; (4) the negotiation by the parties of a discovery plan for submission to the Court pursuant to Rule 26(f) of the Federal Rules of Civil Procedure; and (5) "a status and scheduling conference" to be conducted on March 21, 2007 "for the purpose of reviewing the proposed stipulation of facts and responses, evaluating the parties' discovery plan, expediting discovery (if any is needed), and establishing deadlines for either filing dispositive motions or conducting a trial on stipulated facts." January 5 Order 2-3. Moreover, based on representations made by plaintiffs' counsel at the status conference, it is clear that plaintiffs plan and will be permitted to take discovery, including expert discovery, prior to the final resolution of this case (whether by trial or by "dispositive motion") in the District Court.[2]

LEGAL ARGUMENT

In its prior opinion in this case, this Court expressly recognized that "the public interest lies in the correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim, []and ultimately (in view of our interpretation of those provisions) upon the will of the people of Michigan being effected in accordance with Michigan law." Slip op. 12 (internal quotation marks omitted). Moreover, all parties to this case have

[2] In addition, at the District Court's January 5 scheduling conference, counsel for the plaintiffs announced their intention promptly to seek further review of the emergency stay of the temporary injunction granted by this Court on December 29. On January 9, the plaintiffs filed an application with Justice Stevens as Circuit Justice for the Sixth Circuit, seeking to vacate this Court's stay order. Justice Stevens called for responses to the plaintiffs' application, to be filed by January 17. Movants Russell and TAFM, and other parties, filed responsive briefs in the Supreme Court on January 17. The plaintiffs filed a reply brief on January 19. Justice Stevens referred the plaintiffs' application to the full Court, and the Supreme Court denied their application at around 5:00 pm on January 19. Absent these proceedings in the Supreme Court, movants Russell and TAFM would have filed this Motion To Expedite immediately after the District Court's January 5 status conference, when it became apparent that the District Court intended to impose the unjustifiable burden of extensive litigation on all parties. *See infra*. Out of deference to the emergency proceedings pending before the Circuit Justice, however, they awaited Justice Stevens' ruling on the plaintiffs' application before filing this Motion.

acknowledged the significant public interest in ending the confusion and doubt, on a question of considerable public interest and public moment, created by the continued pendency of these federal challenges to Section 26. This weighty public interest is now compounded by the burdensome expenses, delays, and additional uncertainty that the fact-intensive litigation contemplated by the District Court's January 5 Order will undoubtedly engender. By contrast, expedited proceedings in this Court will not create significant additional burdens either for the parties or the Court, because the parties have briefed the merits of all federal claims to this Court, and this Court has already given these claims careful consideration—and found them facially wanting. Under these circumstances, expedited consideration of this appeal will serve the public interest by circumventing the costs and burden of needless litigation, and preventing prolonged uncertainty for all parties and for the Michigan public at large.[3]

1. All parties agree that expedited resolution is in the public interest.

All parties agree that the confusion and uncertainty created by the pending federal challenges to Section 26 are a significant public evil, particularly in the context of the pending admissions and financial aid decisions of the State's public universities. For example, in their cross-claim before the District Court, the University defendants represented that they "have a specific and immediate crisis" in their need for "clarification[]," and emphasized "the urgency of the situation" in seeking "immediate relief." Cross-Claim of the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University For Declaratory Judgment 4-5 (attached as Exhibit 6). Likewise, in their Motion For Expedited Consideration in the District Court, the University defendants stressed the "controversies and uncertainties" surrounding "the validity, meaning, impact, and application of

[3] In order to preserve its ability to participate in this expedited appeal and in any future appeals in this case, movant TAFM simultaneously seeks expedited review, in No. 06-2656, of the District Court's denial of its motion to intervene.

the Amendment" to justify "request[ing] an expedited decision." Motion of the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University 3, 5 (attached as Exhibit 7). Similarly, in their Amended Complaint, the plaintiffs emphasized their desire for prompt resolution by repeatedly asking for preliminary as well as permanent relief.[4] *See* First Amended Complaint For Injunctive and Declaratory Relief ¶¶ 82, 90, 95, 101 ("Amended Complaint") (attached as Exhibit 8). In the same vein, in his brief before this Court, the Michigan Attorney General referred to the University defendants' request for expedited review and their asserted need for a judgment "declaring their rights and responsibilities under the Amendment in light of federal law," as partial justification for his decision to stipulate to the temporary injunction. Intervening Defendant-Appellee Attorney General Mike Cox's Response In Opposition To Emergency Motion For Stay Pending Appeal 3. And Governor Granholm, in her brief before this Court, placed emphasis on her view that "[t]o what extent the Universities' First Amendment-based right conflicts with [Section 26] is unknown at this point, as the issue has not before been litigated in the Sixth Circuit." Governor Granholm's Response In Opposition To Emergency Motion For a Stay Pending Appeal and Petition For Writ of Mandamus 9. The Governor then specifically acknowledged the "interest[] of the public" in "ensur[ing] that [Section 26] is properly applied, implemented, and enforced throughout the State," and thus in eliminating the "uncertainty about [its] proper application and constitutional ramifications as applied to the admissions policies of the state's public universities." *Id.* at 12-13.

In short, all parties to this case agree that the case is of great public significance, and that the public interest, as well as the interests of the parties, strongly favors a prompt resolution of the pending federal claims.

[4] At no point, however, have the plaintiffs filed a motion seeking a preliminary injunction in the District Court.

2. This court has the power to decide the merits of the federal claims in the current interlocutory appeal.

The current appeal is taken from an order granting a preliminary injunction, and is therefore interlocutory in nature. *See* Slip op. at 4 ("However the injunction is labeled, it remains a preliminary injunction, albeit one of finite duration."). In such circumstances, the usual practice is for the appellate court to decline to reach the merits, and to limit its review to the district court's application of the traditional four factors governing equitable relief. *See, e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272 (11th Cir. 2005) ("[O]rdinarily, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal."). A well-entrenched exception to this rule, however, applies in cases raising "purely legal" issues where "the record needs no expansion" via factual development, and calls for the appellate court to decide such issues on the merits. *Id.* at 1274.

Both the Supreme Court and the Sixth Circuit have explicitly recognized the authority and propriety of an appellate court's decision to reach the merits of an appeal from an order granting or denying a preliminary injunction, when factual development is unnecessary to resolve the legal issues—*especially* in cases involving constitutional issues of great public significance. In *Thornburgh v. American College of Obstetricians and Gynecologists*, for example, the Supreme Court stated that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." 476 U.S. 747, 756 (1986), *overruled in part on other grounds by Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *see also Youngstown Sheet & Tube Co*. v. *Sawyer*, 343 U.S. 579, 585 (1952). In accordance with this instruction, this Court has stated:

> If an issue unaddressed by the district court is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation, we have often chosen to consider that issue. The sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy. We have never applied th[is] … exception precisely to an appeal from the grant or denial of a preliminary injunction, but we find that the principle applies squarely to such a case when the legal issues have been briefed and the factual record does not need expansion.

Doe v. Sundquist, 106 F.3d 702, 707 (6th Cir. 1997) (citations and quotation marks omitted). Thus, in *Sundquist*, though the appeal was taken from an order denying a preliminary injunction, the Court reached the merits and ordered the dismissal of the federal claims. *See id.* Moreover, as the quoted language indicates, the *Sundquist* Court emphasized that this course of action was appropriate even when the issues in question had been "unaddressed by the district court." *Id.*

As the *Sundquist* Court also observed, "[o]ther appeals courts have readily addressed the merits of cases on interlocutory appeal from the denial of a preliminary injunction." *Id.* (citing *Illinois Council on Long Term Care v. Bradley*, 957 F.2d 305, 310 (7th Cir. 1992) ("Since plaintiffs cannot win on the merits, there is no point in remanding the case for further proceedings."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2962, at 434-35 (2d ed. 1995) ("If an interlocutory appeal is taken, the appellate court … may dismiss the action if an insuperable obstacle to awarding relief is apparent.")). Indeed, a legion of cases from the courts of appeals attests to the propriety of this practice. *See, e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1273 (11th Cir. 2005) ("We have, on a number of occasions, reached the merits of cases before us on interlocutory appeal from the grant or denial of a preliminary injunction."); *Hurwitz v. Directors Guild of Am., Inc.*, 364 F.2d 67, 69-70 (2d Cir. 1966) (reversing denial of preliminary injunction and directing entry of judgment for plaintiffs on the merits, and reasoning that doing so "served the obvious interest of

economy of litigation" and was appropriate since the case "contained no triable issue of fact"); *Amandola v. Town of Babylon*, 251 F.3d 339, 343-44 (2d Cir. 2001) (reversing denial of preliminary injunction and striking down permitting requirement for use of town facilities on First Amendment grounds); *United Parcel Serv., Inc. v. United States Postal Serv*., 615 F.2d 102, 106-07 (3d Cir. 1980) (reaching the merits because the case involved "a pure question of law," the legal question was "intimately related to the merits of the grant of preliminary injunctive relief," and the legal issue would not "be seen in any different light after final hearing than before"); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1185-87 (8th Cir. 2000) (reaching the merits because "we are faced with a purely legal issue on a fixed administrative record"). Moreover, as noted above, the en banc Fourth Circuit in *Camblos* held in similar circumstances that "a defendant is … *entitled* both to immediate relief and to relief from the expense of further litigation." 155 F.3d at 360 (emphasis added).

3. Prompt resolution of the federal claims on the merits is uniquely appropriate in this case.

In accordance with *Thornburgh*, *Sundquist*, and numerous other cases, the current interlocutory appeal provides a quintessential case for prompt resolution on the merits by this Court. First, this case presents "purely legal" issues, *Solantic*, 410 F.3d at 1272, in which "the legal issues have been briefed and the factual record does not need expansion," *Sundquist*, 106 F.3d at 707. This Court's opinion strongly indicates that both the plaintiffs' and the University defendants' federal claims may be resolved on the merits without further factual analysis. As noted above, taking at face value the plaintiffs' and the University defendants' factual claims regarding the implications of Section 26 for student enrollments, this Court did not hesitate to assert that it was "unable to identify any tenable basis in federal law for suspending [Section 26's] enforcement," nor to express its "conviction that these are weak federal claims." Slip op.

1, 12. This Court's legal skepticism extended to all of the federal claims relating to the application of Section 26 to the University defendants' admissions and financial aid decisions[5]—the First Amendment claim, *see id.* at 8-9 (noting that "[t]he Universities mistake interests grounded in the First Amendment … with First Amendment rights" and that it is "improbable that the same Court that decided *Grutter* would hold that state universities have a First Amendment right to maintain racial preferences"); the equal protection claim, *see id.* at 9 ("In contending that the Equal Protection Clause compels what it presumptively prohibits, plaintiffs face an uphill climb."); the Title VI claim, *see id.* at 11 (noting that plaintiffs "face several obstacles in bringing the [Title IV] claim"); and the Title IX claim, *see id.* at 12 (noting that this claim "holds little promise"). All of these conclusions were based on this Court's "purely legal" analysis and were expressed with "conviction" after extensive briefing. In short, this Court's prior opinion makes clear this appeal is one in which purely legal issues are "presented with sufficient clarity and completeness" such that their "resolution will materially advance the progress of this … litigation." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988), *quoted in Sundquist*, 106 F.3d at 707.

Second, as the cases cited above attest, the principal justification for reaching the merits in such cases is to promote judicial economy and prevent unnecessary litigation. *See, e.g.*, *Sundquist*, 106 F.3d at 707 (reaching the merits is appropriate when "resolution will materially

[5] The plaintiffs' Amended Complaint includes a claim that Title VII of the Civil Rights Act preempts Section 26 as it applies to the University defendants' hiring practices, which is not at issue in this appeal. *See* Amended Complaint ¶¶ 6.D, 96-101. Admittedly, this claim will not be finally resolved by the current appeal from the December 19 Order, which applied only to the University defendants' "current admissions and financial aid policies." December 19, 2006 Amended Order Granting Temporary Injunction and Dismissing Cross-Claim 3 (attached as Exhibit 9). But there is no requirement in *Sundquist* or other cases that the judgment on appeal must resolve *all* claims pending in the court below, in order for the appellate court to reach the merits of the claims before it. On the contrary, the benefits of judicial economy recognized in those cases are no less applicable when the Court of Appeals cannot resolve the entire case at one blow. This is especially true in this particular appeal, where the claims relating to admissions and financial aid have been the most hotly disputed in the public forum and promise to be the most comprehensively litigated if the District Court proceedings are allowed to continue apace.

advance the progress of the litigation" because it is "in the interest of judicial economy"); *Camblos*, 155 F.3d at 360 (holding that reaching the merits was required because the defendant was "entitled … to relief from the expense of further litigation"); *Hurwitz*, 364 F.2d at 69-70 (reaching the merits was appropriate because it "served the obvious interest of economy of litigation"); *Callaway v. Block*, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985) (citing numerous cases) ("Reaching the merits in cases such as these obviously serves judicial economy …."). This interest in preventing burdensome and costly litigation is paramount in this case. Indeed, as the District Court's January 5 Order suggests, the parties face expensive and time-consuming factual and expert discovery, briefing, and perhaps even trial on the merits—all of which are almost certain to turn out to be exercises in futility, in light of this Court's assessment of the legal merits of the claims. Moreover, in addition to state officials sued in their official capacity, this case involves a large number of parties, including university applicants of limited means such as movant Russell, for whom the burdens of such litigation are not trivial. Obviating the need for unnecessary litigation would be an unmitigated good for all the parties, for the courts, and for the public.

Finally, it is particularly appropriate for the appellate court to reach the merits on interlocutory appeal in cases involving constitutional issues and issues of great public moment, where prompt resolution of the disputed issues serves the public interest. For example, *Youngstown Sheet & Tube Co.*, *supra*, involved the constitutionality of President Truman's seizure of the steel mills during the Korean War. *Thornburgh* involved the constitutionality of Pennsylvania's statutes restricting abortion, and *Camblos* considered a constitutional challenge to Virginia's parental-notification requirement for minors' abortions. *Sundquist* involved the constitutionality of Tennessee's adoption regulation statutes. *See also Solantic*, 410 F.3d at 1252

(constitutionality of sign code under the First Amendment); *Bradley*, 957 F.2d at 306-07 (Medicaid Act challenge to delay of payments to nursing homes serving the elderly poor); *Amandola*, 251 F.3d at 341 (First Amendment challenge to the exclusion of church worship services from town property); *Hurwitz*, 364 F.2d at 68 (permissibility of an anti-Communist loyalty oath as a requirement for membership in a directors' guild). The present case falls squarely into this class of cases calling for speedy resolution on matters of public significance. As noted above, and as all parties agree, the question whether Michigan's voters may, consistent with the United States Constitution, prohibit the use of racial preferences in admissions and financial aid at their public universities, is a question of great public significance whose speedy resolution will eradicate doubt and bring finality to this fiercely debated issue.

Therefore, good cause for expedited review exists in this case. It is highly probable that the current appeal will present an appropriate vehicle to resolve all the pending federal claims on the merits, and that prompt resolution will greatly promote the public interest and obviate the need for burdensome and costly litigation.

In their Reply Brief filed in the Supreme Court on January 19, Plaintiffs-Appellees unequivocally took the position that this Court can, and will, decide the merits in this interlocutory appeal: "This case presents fundamental issues now—and will present even more fundamental issues on final disposition of the proceedings in the Sixth Circuit." No. 06A678, Petitioners' Reply Brief In Support Of Their Motion To Dissolve The Stay Entered By The Sixth Circuit 9 (attached as Exhibit 10); *see also id.* at 8 ("The Sixth Circuit's final disposition of the issues now before it will thus provide a clear vehicle for resolving the fundamental constitutional and statutory issues at stake."). Movants Russell and TAFM agree. This appeal "presents [the] fundamental issues now," and this Court should speedily resolve them.

CONCLUSION

For the reasons stated, intervening defendant-appellant Eric Russell respectfully moves this Court for expedited consideration of the current appeal.

January 20, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

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