IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE ERIC RUSSELL and TOWARD A FAIR MICHIGAN,

Petitioners,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSPEH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

No._____

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, and the TRUSTEES of any other public college or university, community college, or school district,

Respondents.

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION TO ORDER THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN TO LIFT THE INJUNCTION IT ISSUED ON DECEMBER 19, 2006

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of the 6th Cir. R. 26.1 on page 2 of this form. Sign and date this form.

Eric Russell and Toward a Fair Michigan,
Petitioners,

v.

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, et al.,
Respondents.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Eric Russell
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Marina E. Hoffman
Signature of Counsel

12/21/2006
Date

6CA-1

(Over)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of the 6th Cir. R. 26.1 on page 2 of this form. Sign and date this form.

Eric Russell and Toward a Fair Michigan,
Petitioners,

v.

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, et al.,
Respondents.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Toward A Fair Michigan
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Michael E Rozman
Signature of Counsel

12/21/2006
Date

6CA-1

(Over)

With each day that passes after December 23, 2006, the probability grows that petitioners Eric Russell and Toward a Fair Michigan ("TAFM") will be irreparably harmed by the grant by the U.S. District Court for the Eastern District of Michigan ("the district court") of an injunction that amounts to a usurpation of power by that court. Thus, in the alternative to petitioners' emergency appeal of the order of the district court denying petitioners' motion to intervene and granting an injunction on the basis of the consent of the parties, *see* Ex. 1 hereto (the district court's order of December 19, 2006, containing the injunction ("the December 19 Order")), petitioners submit this petition for a writ of mandamus or prohibition to direct the district court to lift its injunction.

Issue Presented

I.

WHETHER THE WRIT SHOULD LIE BECAUSE THE DISTRICT COURT EXCEEDED ITS JURISDICTION BY ISSUING AN INJUNCTION, IN DISREGARD OF APPROPRIATE PROCEDURAL SAFEGUARDS, ON PARTIES NOT BEFORE IT THAT AMENDMENT 1, § 26, OF THE CONSTITUTION OF THE STATE OF MICHIGAN NOT BE APPLIED TO DEFENDANTS-UNIVERSITIES, WHERE THE DISTRICT COURT BASED THIS RULING NOT ON ANY FINDING THAT AMENDMENT 1, § 26, IS UNLAWFUL, BUT SOLELY ON THE CONSENT OF THE PARTIES BEFORE IT.

Relevant Background

In the election held on November 7, 2006, the people of the State of Michigan voted on Proposal 2. Proposal 2 was a ballot initiative to amend the Constitution of the State of Michigan by adding Article I, § 26, thereto (the "Amendment"), that would prohibit state entities from discriminating against, or granting preferences to, any individual on the basis of race, sex, ethnicity, color or national origin in certain matters. *See* Ex. 2 (text of the Amendment). Paragraph 1 states: "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the

basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting." Paragraph 6 provides that the remedies available for violations of the Amendment are the same as those available for violations of Michigan anti-discrimination law. (Michigan's primary anti-discrimination law is the Elliott-Larsen statute, Section 801 of which provides for lawsuits seeking "damages or injunctive relief, or both" by a person alleging a violation. M.C.L. § 37.2801.)

A majority of the citizens of Michigan voted in favor of Proposal 2 and it passed. Pursuant to Michigan law, the Amendment will become effective on December 23, 2006. Michigan Constitution Art. XII, § 2 (at the end of 45 days after the date of election).

Petitioner Eric Russell is a resident of Auburn Hills, Michigan. He is white. He has applied to the University of Michigan's School of Law (the "Law School") for matriculation as a first-year student in the fall of 2007. *See* Ex. 3 (Russell Statement).

TAFM is a 501(c)(3) corporation that was formed to facilitate debate on the proposed constitutional amendment, to insure that the will of the people of Michigan, as reflected in their vote on November 7, 2006, would be carried out by the elected officials of Michigan, and to advise people of their rights under the newly-enacted constitutional provision. TAFM has

had to divert resources from its primary mission to investigate state institutions' intention to comply with the law and has had its ability to accurately advise people of their rights under the new provision frustrated as a consequence of their statements and conduct. *See* Ex. 4 (Allen Statement).

Plaintiffs commenced this case on November 7, 2006, to have the Amendment declared in violation of the United States Constitution and other federal laws. The amended complaint (*see* Ex. 5) in this action, filed on December 17, 2006, alleges that the Amendment is preempted by various federal laws, and violates the Equal Protection Clause and the First Amendment of the United States Constitution, as well as 42 U.S.C. § 1983. Defendants named in the initial complaint were Governor Jennifer Granholm, Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. On December 11, 2006, each of the latter three defendants (the "University Defendants") filed a cross-claim against defendant Granholm. *See* Ex. 6 hereto. The cross-claim contains just one count, for a declaratory judgment, asserting that the Amendment "implicates federal law""(¶ 6), that "it becomes effective in the midst of the Universities' current admissions and financial aid cycle" (¶ 8), and that the "Universities put their admissions and financial aid policies in place in reliance on the Supreme Court's

reaffirmation in *Grutter v. Bollinger*, 539 U.S. 306 (2003) that they have an academic freedom right" to "give some consideration to such factors as race" (¶ 9) in selecting their students. The cross-claim sought a judgment (1) declaring that under federal law, the University Defendants "may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law" and (2) issuing "a preliminary injunction that preserves the status quo and allows the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until this Court enters the requested declaratory judgment." Ex. 6 at 5. The University Defendants also moved for a preliminary injunction on the same date, and a motion for an expedited hearing (*see* Ex. 7) based on the fact that they had "filed a cross-claim seeking a declaratory judgment that determines their rights and responsibilites under [the Amendment], . . . [which] becomes effective on December 23, 2006" (Ex. 7 ¶ 1).

Granholm, the cross-claim defendant, was a vigorous opponent of Proposal 2 prior to the election. Indeed, in an action prior to the election seeking to have Proposal 2 removed from the ballot, she filed an *amicus* brief in support of plaintiffs. *See* Doc. No. 34 in *Operation King's Dream v.*

Connerly, E.D. Mich. Civ. No. 2:06-cv-12773-AJT-RSW (Granholm *amicus* brief). (This case is currently on appeal before this Court. *See* App. No. 06-2144.). Granholm was not served in the action until December 7, 2006. Ex. 8 hereto.

On December 14, 2006, Michigan Attorney General Michael Cox moved to intervene. *See* Ex. 9 hereto. The motion to intervene reported that the Governor had requested legal representation on December 11, 2006 and a "conflict wall" to assure the independence of her legal team given that (according to the Governor) the Governor and Attorney General had differing positions on Proposal 2 prior to the election. According to the Attorney General, "it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation." Ex. 9 ¶ 15; *see id.* Ex. 1 thereto (Governor's request for legal representation).

On December 14, 2006, the very same day that Cox moved to intervene, the district court granted that motion. *See* Ex. 10 (order granting intervention).

Given the University Defendants' efforts to avoid compliance with the law, and uncertainty about the state actors' willingness to defend it, petitioners here moved to intervene pursuant to Rule 24, Fed. R. Civ. P., on

December 18, 2006. On the same date, the existing parties to the action filed a stipulation. *See* Ex. 11. It stated in relevant part:

> It is hereby stipulated, by and between the parties that this Court may order (1) that the application of [the Amendment] to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire; (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim . . .

The next day, on December 19, 2006, the district court issued the December 19 Order. It specifically found that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation." Ex. 1. Accordingly, it enjoined the application of the Amendment "to the current admissions and financial aid policies of" the University Defendants "through the end of the current admissions and financial aid cycles or until further order of the court." *See* Ex. 1.

On the same day, December 19, 2006, petitioners Russell and TAFM moved for immediate resolution of their motion to intervene and a stay of the December 19 Order pending appeal. *See* Ex. 12, hereto. They noted that the district court's finding concerning the current parties adequately representing others' interests seemed to be a factual determination fatal to

the motion to intervene, that Russell's application was pending before the University of Michigan Law School, that the court's injunction would permit the Law School to treat it disadvantageously on the basis of race, and that TAFM and Russell intended to appeal the December 19 Order to this Court. They asked for resolution of the motion before December 21, 2006. When no order was entered on December 21, 2006, TAFM and Russell filed a notice of appeal from the December 19 Order and the Court's failure to allow them to intervene. *See* Ex. 13 hereto. They also prepared this petition, which is an alternative ground for the Court's jurisdiction.

Legal Argument

The All Writs Act permits this Court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. § 1651(a). This Court has set forth the standard for the issuance of writs as follows:

> The writ of mandamus has been traditionally used to confine an inferior court to its lawful exercise of jurisdiction. *Schlagenhauf v. Holder,* 379 U.S. 104, 109-10, 85 S.Ct. 234, 237-38, 13 L.Ed.2d 152 (1964); *Will v. United States,* 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967). The writ can be issued where there is an usurpation of judicial power or a clear abuse of discretion. *Schlagenhauf,* 379 U.S. at 110, 85 S.Ct. at 238; *Union Light, Heat & Power Co. v. U.S. District Court,* 588 F.2d 543, 544 (6th Cir.1978), *cert. dismissed sub nom. Union Light, Heat & Power Co. v. Rubin,* 443 U.S. 913, 99 S.Ct. 3103, 61 L.Ed.2d 877 (1979). Moreover, a party seeking mandamus has "the burden of showing that its right to

> the issuance of the writ is 'clear and undisputable.'" *Bankers Life and Casualty Company v. Holland,* 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953) (quoting *United States v. Duell,* 172 U.S. 576, 582, 19 S.Ct. 286, 287, 43 L.Ed. 559 (1899)); *In re Bendectin Products,* 749 F.2d 300, 303 (6th Cir.1984); *In re Post-Newsweek Stations Mich. Inc.,* 722 F.2d 325, 329 (6th Cir.1983).

Federal Deposit Ins. Corp. v. Ernst & Whinney, 921 F.2d 83, 86 (6th Cir. 1990). A writ may lie because a district court has acted in disregard of proper procedural safeguards, *Katz v. Carte Blanche Corp.,* 496 F.2d 747 (3rd Cir. 1974), and non-parties whose rights have been curtailed by a court order have standing to petition for writs, *CBS Inc. v. Young* 522 F.2d 234, 237 (6th Cir. 1975).

As indicated, a primary purpose of writs has been to confine a lower court to the lawful exercise of its jurisdiction. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). Indeed, in issuing writs for this reason, "the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction.'" *Will v. U.S.,* 389 U.S. 90, 95 (1967). Rather, writs are a remedy for "a judicial usurpation of power." *Id.* (internal quotation marks omitted). The Court in *Will* gave several examples of the use of a writ for this purpose:

> Thus the writ has been invoked where unwarranted judicial action threatened "to embarrass the executive arm of the government in conducting foreign relations," Ex parte Republic of Peru, 318 U.S. 578, 588, 63 S.Ct. 793, 799, 87 L.Ed. 1014

> (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, State of Maryland v. Soper, 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, United States v. United States Dist. Court, 334 U.S. 258, 68 S.Ct. 1035, 92 L.Ed. 1351 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); see McCullough v. Cosgrave, 309 U.S. 634, 60 S.Ct. 703, 84 L.Ed. 992 (1940); Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706, 707, 47 S.Ct. 286, 288, 71 L.Ed. 481 (1927) (dictum).

Id. at 95-96.

Here, the district court enjoined the entire citizenry of Michigan, and any others, from seeking remedies for the violation of the Amendment by the University Defendants in state court, though such remedies are expressly allowed for in the Amendment. It thus nullified the Amendment with respect to the University Defendants for many months, during which time the University Defendants will be free to deny admission to applicants, including petitioner Eric Russell, based on their race. The district court did this not because it found the Amendment unlawful, or that it might be unlawful, or indeed on any legal basis at all, but simply at the desire of the parties, including the universities explicitly named in the Amendment as subject to it and the Governor of Michigan, who was opposed to the passage of the Amendment. In addition to considerations of federalism, *see State of*

Maryland v. Soper, 270 U.S. 9 (1926), the district court's action thus amounted to a usurpation of power directly from the voters of Michigan, who enacted the Amendment, which is to take effect on December 23, 2006, in a referendum.

The district court's injunction was a usurpation of power for other reasons. First, the district court did not even have a claim upon which it could issue an injunction. When the parties to the litigation signed and filed the December 18 stipulation, that terminated the University's cross-claim *immediately* (and with prejudice to the extent they sought temporary injunctive relief). A filed stipulation dismissing a claim under Rule 41(a)(1) needs no judicial approval to take effect. Its impact is automatic. *Hester Industries v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998) (holding district court abused its discretion in issuing contempt fine against party for violating the terms of settlement agreement that had been attached to dismissal by stipulation; "The judge's signature on the stipulation did not change the nature of the dismissal. Because the dismissal was effectuated by stipulation of the parties, the court lacked authority to condition dismissal on compliance with the Agreement"); *In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988) (issuing writ of mandamus where trial court dismissed claim with prejudice where parties had stipulated to dismissal without prejudice;

"[c]aselaw concerning stipulated dismissals under Rule 41(a)(1)(ii) is clear that the entry of such a stipulation of dismissal is effective automatically and does not require judicial approval . . .") (internal quotation marks omitted). *Cf. Aamot v. Kassel*, 1 F.3d 441, 445 (6th Cir. 1993) ("[A] Rule 41(a)(1) notice of dismissal is self-effectuating, leaving no basis upon which a District Court can prevent such a dismissal").[1] Indeed, approval of plaintiffs and/or Cox was entirely gratuitous to the dismissal of the cross-claim. *Century Mfg. Co. v. Central Transport Int'l Inc.*, 209 F.R.D. 647, 647 (D. Mass. 2002) (finding plaintiff lacked standing to object to stipulation dismissing third-party claim). Since the University Defendants' cross-claim for an injunction already had been dismissed with prejudice on December 18, 2006, the district court had no basis for issuing an injunction on December 19.

Furthermore, the district court acted in disregard of appropriate procedural safeguards. At best, the December 19 Order was a consent

[1] The fact that the parties stipulated that "the court may order . . . that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed" does not change this result. Rule 41(a)(1) does not require court approval, and parties stipulating pursuant to that provision cannot make their stipulation contingent upon court approval. *Hester*, 160 F.3d at 913, 916 (although settlement agreement specifically made dismissal dependent upon on terms of agreement being subjected to enforcement by the court, court still had no authority to condition dismissal on compliance with the agreement).

decree resolving the cross-claim. *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) ("[A] settlement agreement [is] subject to continued judicial policing"); *Masters Mates v. Riley*, 957 F.2d 1020, 1025 (2d Cir.1991) ("A consent decree is . . . a settlement agreement that contains an injunction."). As such, its terms had to be approved by the court. If a consent decree affects the legal rights of third parties, it cannot be approved without their consent. *Martin v. Wilks*, 490 U.S. 755, 768 (1989) ("'[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party AAA without that party's agreement'") (quoting *Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986)); *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) (affirming district court's refusal to approve consent decree because it affected the rights of third parties; "a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree"). Even if the decree only affects third parties' *non-legal* rights, or does not affect anyone else at all, a court must nonetheless review the terms of a consent decree before granting its imprimatur. *Martin*, 490 U.S. at 788 n.27 ("[T]he court reviews the consent decree to determine whether it is lawful, reasonable, and equitable"); *Williams*, 720 F.2d at 920 ("Judicial approval may not be obtained for an agreement which is illegal, a product of collusion, or contrary to the public

interest"); *Masters Mates*, 957 F.2d at 1026 ("'Even if no third party complains, the judge has to consider whether the decree he is being asked to sign is lawful and reasonable as every judicial act must be'") (quoting *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985)); *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) ("The court . . . must not merely sign on the line provided by the parties. Even though the decree is predicated on consent of the parties, the judge must not give it perfunctory approval"); *id.* at 441 ("Even where it affects only the parties, the court should . . . examine it carefully . . . ").

This Court has held that a district court must give notice to interested parties and hold a hearing, at the end of which the court must decide whether the consent decree is "fair, adequate, and reasonable." *Williams*, 720 F.2d at 921. Moreover, scrutiny of a consent decree is stricter than scrutiny of a compromise in a class action or stockholders' derivative suit. *City of Miami*, 664 F.2d at 441; *United States v. Michigan*, 680 F. Supp. 928, 947 (W.D. Mich. 1987). It "requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record." *City of Miami*, 664 F.2d at 441. If the decree does affect third parties, its "effect on them [can be] neither unreasonable nor proscribed." *Id.* The degree of appellate scrutiny "'depend[s] on a variety of factors, such as the

familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the types of issues involved.'" *City of Miami*, 664 F.2d at 441 n.14 (quoting *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980)).

The December 19 Order plainly affects the rights of parties not before the district court. It did not simply enjoin state officials from applying a state constitutional provision to the University Defendants. It purports, at least, to preclude *everyone* from applying it, even though there is a specific provision making remedies available to those alleging violations of the Amendment. Enjoining an entire citizenry from using a provision of the state constitution is a serious business and should give any federal judge pause. *Pharmaceutical Research and Mfrs. of American v. Walsh*, 538 U.S. 644, 661-62 (2003) (plurality op.) ("We start therefore with a presumption that the state statute is valid, . . . and ask whether petitioner has shouldered the burden of overcoming that presumption"); *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249, 254 (1931) ("[S]tate laws are presumed valid"). The district court did not even offer a legal ground for its injunction. It stated only that "the interests of all parties and the public are represented adequately through the state defendants and their various elected

representatives," a statement both cryptic and woefully insufficient.[2] A court must determine whether the *terms* of a settlement are fair to third parties, not merely whether their interests are adequately represented. *Williams*, 720 F.2d at 921 ("The decree must be fair and reasonable to those it affects"). If a school sued the President and Attorney General of the United States, claiming that Title VII violated the First Amendment because it precludes the use of race to achieve diversity in faculties, *see Taxman v. Bd. of Education of Piscataway*, 91 F.3d 1547, 1558 (3d Cir. 1996) (en banc) (so holding), a court could not enter an order enjoining the application of Title VII to the school just because a sympathetic President and Attorney General agreed to it.

Even if "adequate representation" were sufficient, it is obvious that the parties were *not* representing the interests of many applicants who, like Russell, are applying to the University Defendants now. Nor did the district court seem to understand the purpose of Michigan's initiative process: to *bypass* one's elected representatives precisely because they are *not*

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[2] It is entirely unclear who "all parties" are in the court's recitation; obviously, the stipulation represented the wishes of those parties signing it. Moreover, it is equally unclear who the district court was referring to by "the state defendants *and* their elected representatives" (emphasis added). There were no other elected representatives before the district court aside from the defendants, and no indication that other elected representatives supported the stipulation.

responding to the will of the people. *Michigan United Conservation Clubs v. Sec'y of State*, 464 Mich. 359, 382 (2001) (Young, J., concurring) (stating that referendum power "provides a means for citizens directly to challenge legislative action or inaction").

Since the district court did not identify any legal basis for enjoining a provision of the state constitution, little time needs to be spent on the inadequate reasons offered by the University Defendants below. They were, in essence, two: (1) they have a First Amendment right to consider applicants' race in the selection of students, and (2) they are in the middle of their admissions cycle, making it unfair to require them to change in the middle of their cycle, especially since it is unclear (they say) precisely whether the Amendment will be interpreted to preclude their use of race and ethnicity in the admissions and financial aid process.

State universities have no First Amendment right to select students as they wish in the face of a state law to the contrary. If they did, state laws requiring preferences to state residents or admission to those in the top 10% of their classes would be unconstitutional. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 140 (1973) (Stewart, J. concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.");

NAACP v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990) (holding that flying a confederate flag above the state capital did not violate the free speech clause of the First Amendment, noting that "[f]ree speech theory has focused on the government as censor; it has had little to say about the process by which the government adds its voice to the marketplace. Indeed, the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."); *Student Government Ass'n v. Bd. of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 481 (1st Cir. 1989) (stating administrative unit of state university "has no First Amendment rights" even though analogous private entities did); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1041 (5th Cir. 1982) (en banc) (recognizing that a station operated by University of Houston, which in turn is operated by the state of Texas is a "state instrumentalit[y]" and is thus "without the protection of the First Amendment").

The argument confused a First Amendment "right" with an *interest* grounded in the First Amendment. The University Defendants undoubtedly have an "interest" in academic freedom, as both Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) state. But those cases involved

students' challenges to systems of admission under the Equal Protection Clause of the United States Constitution. Justice Powell's opinion in *Bakke*, and the Court's opinion in *Grutter*, held only that the state entities in those cases had a compelling governmental *interest* in seeking a diverse student body, and that the defendants there could use race, ethnicity, and national origin in a limited and narrowly-tailored way to achieve that goal. There was no state law involved in either case that defendants were challenging.[3]

The second reason offered by the University Defendants in the district court is entirely irrelevant to federal courts. Whether state law is fair or equitable, or should be modified to make it fairer or more equitable, is a

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[3] Indeed, in *Grutter*, the Court emphasized that narrow-tailoring required colleges and universities (1) to periodically review systems of admission that used race to determine if they were necessary, and (2) to look to states that had prohibited and/or eliminated the use of race and the like as admissions criteria as exemplars in that process. *Grutter*, 539 U.S. at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). It would be rather odd to require state universities to look toward *unconstitutional* systems as a part of the narrow-tailoring process.

Narrow-tailoring also required that the system of considering race have "durational limits," and those durational limits, according to the Court, could be met by sunset provisions. *Id.* The Amendment is nothing more than that; it sunsets the use of prohibited criteria beginning on December 23, 2006. A sunset provision is not transformed from an integral part of constitutionally-valid system to wholly unconstitutional state action simply because it has been adopted by the people of the state.

question for the Michigan courts, a place that the University Defendants could have gone to at any time after November 7, 2006. In answering this question, a Michigan court likely would consider that (1) the people of the State of Michigan presumably have concluded that *their systems of admissions* are unfair to a whole host of applicants, (2) the Amendment was adopted by the people of Michigan after a very public debate and a public election, and that the University Defendants could have prepared for its passage long before the beginning of their admissions cycle, and (3) compliance with the Amendment only requires that the University Defendants remove certain criteria from the evaluation of applicants for admission. (Even if the University Defendants were correct that this might not be *necessary* for compliance, it certainly is sufficient.) Finally, if the University Defendants were correct that interpretation of the Amendment is still in doubt, that is all the more reason for a federal judge to *decline* jurisdiction, not enjoin the Amendment. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (holding that federal courts should ordinarily abstain where the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question).

Lastly, the district court exceeded its power by issuing a preliminary injunction when the test for such an injunction was not even close to being met. The factors in that test are:

> 1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.
>
> 2. Whether the movant has shown irreparable injury.
>
> 3. Whether the preliminary injunction could harm third parties.
>
> 4. Whether the public interest would be served by issuing the preliminary injunction.

Frisch's Restaurant, Inc. v. Shoney's Inc., 759 F.2d 1261, 1263 (6th Cir. 1985). *See* the extensive argument in petitioners' Emergency Motion for a Stay Pending Appeal; *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991) (noting that the factors for granting a preliminary injunction and those for granting a stay pending appeal are the same). That the parties then in the case consented to the December 19 Order does not make the factors in that test militate any less heavily in favor of lifting the injunction. Particularly, not only petitioner Russell, but many members of the public will be harmed by being on an unequal footing due to their race when they apply to universities covered by the injunction. Many of them will suffer the additional harm of being denied

admission to the university of their choice because of their race, in violation of the Amendment.

Conclusion

For all of these reasons, a writ of mandamus or prohibition should be issued to order the district court to lift its December 19 injunction.

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Certificate of Service

I hereby certify that on December 21, 2006, I served the following individuals with the foregoing petition for a writ of mandamus or prohibition by overnight mail, with a courtesy copy to counsel of record sent electronically:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

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, and the TRUSTEES of any other public college or university, community college, or school district,

Defendants,

and

Case No. 06-15024
Hon. David M. Lawson

AMENDED ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS-CLAIM

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.
_____/

AMENDED ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS-CLAIM

This case was commenced on November 8, 2006 by several plaintiffs who claim that a recently-approved state constitutional amendment, Proposal 06-2, now known as Article 1, section 26 of the Michigan Constitution of 1963, that purports to bar the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring, contracting, and university admission decisions, violates the United States Constitution. On December 11, 2006, defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University filed a cross-claim against co-defendant Governor Jennifer Granholm seeking declaratory relief. The University parties also requested a preliminary injunction to delay the implementation of the state constitutional amendment until the current enrollment season is completed. Thereafter, the Michigan Attorney General sought permission to intervene as a defendant in the matter, together with a motion to expedite consideration of the motion to intervene, citing his "duty to defendant the constitutionality" of the ballot initiative. Mot. to

Intervene ¶ 13. The parties to the case either took no position or consented to the relief, and the Court granted the motion to intervene on December 14, 2006.

On December 18, 2006, the Court received a stipulation [dkt #26] from all parties to the case, including intervening defendant Michigan Attorney General, consenting to the temporary injunctive relief sought by the cross-claimants (the University defendants), and agreeing to dismiss with prejudice the portion of the cross-claim seeking a temporary injunction, and the balance of the cross-claim without prejudice. The Court finds that the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation.

Accordingly, it is **ORDERED** that the application of Article 1, section 26 of the Michigan Constitution of 1963 to the current admissions and financial aid policies of defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University is enjoined from this date through the end of the current admissions and financial aid cycles or until further order of the Court. This injunction shall expire at 12:01 a.m. on July 1, 2007, unless it is vacated by the Court before that date.

It is further **ORDERED** that the portion of the cross-claim by defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University seeking temporary injunctive relief is **DISMISSED WITH PREJUDICE**, and the remaining part of their cross-claim is **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that each party shall bear its own fees and costs.

It is further **ORDERED** that the motion for preliminary injunction [dkt # 5] is **DISMISSED** as moot.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 19, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 19, 2006.

s/Felicia M. Moses
FELICIA M. MOSES

Ex 2

ARTICLE I, SECTION 26:

Civil Rights.

1. The University of Michigan, Michigan State University, Wayne State University and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

2. The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

3. For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

4. This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

5. Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

6. The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.

7. This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

8. This section applies only to action taken after the effective date of this section.

9. This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	:	
Plaintiffs,	:	Civ. No. 2:06-cv-15024-DML-RSW
v.	:	HON. DAVID M. LAWSON
JENNIFER GRANHOLM, *et al.*,	:	HON. R. STEVEN WHALEN
Defendants,	:	
and	:	STATEMENT OF ERIC RUSSELL
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	
Intervenor Defendants.	:	

ERIC RUSSELL states:

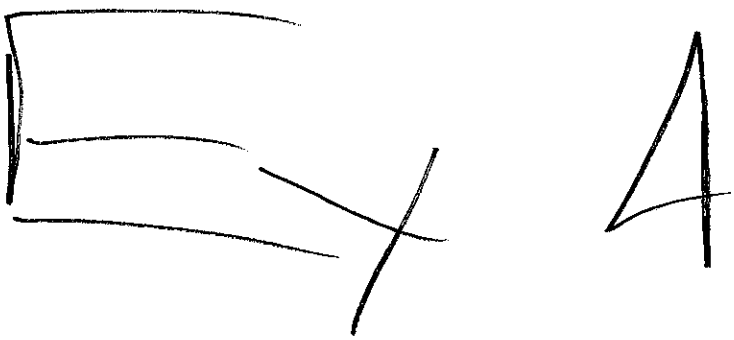
1. I am a resident of Auburn Hills, Michigan. I am Caucasian.

2. I graduated from Oakland University in Rochester Hills, Michigan in 1999, and am currently completing my masters degree in General Linguistics at Wayne State University. I am interested in going to law school. I have completed and sent in my application to the University of Michigan School of Law for matriculation into the first year class in the fall of

2007.

I state under penalties of perjury that the foregoing is true and correct. Executed on December 15, 2006.

ERIC RUSSELL



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	
Plaintiffs,	Civ. No. 2:06-cv-15024-DML-RSW
v.	HON. DAVID M. LAWSON
JENNIFER GRANHOLM, *et al.*,	HON. R. STEVEN WHALEN
Defendants,	
and	STATEMENT OF WILLIAM ALLEN
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	
Intervenor Defendants.	

WILLIAM ALLEN states:

1. I am a citizen of Michigan, a former member and Chair of the United States Commission on Civil Rights, and a professor of political science at Michigan State University. I also chair "Toward A Fair Michigan" (TAFM), a 501(c)(3) corporation whose mission is to further understanding of equal opportunity issues involved in guaranteeing civil rights for all citizens and to preserve Michigan's tradition of progressively affirming equal rights (as it did so helpfully in the darkest hours of segregation), and to provide a civic forum for a fair and

exchange of views on the question of affirmative action and using race and sex preferences. TAFM's mission included promoting and fostering balanced debate on Proposal 2 prior to the November 7, 2006 election and to insure that the deliberate will of the people, whatever it would be, would be upheld and enforced. I make this statement in support of TAFM's motion to intervene.

2. In addition to the foregoing efforts, TAFM has been advising organizations and agencies who wish to comply with Art. 1, § 26 (the constitutional provision that will be added to the Michigan Constitution as a consequence of the electors of Michigan having voted in favor of Proposal 2). These efforts include considering new ways to promote diversity, fairness, and equality. For example, on December 8, 2006, TAFM held a Leadership Assembly, a day-long workshop devoted to appraising the current status of programs of reconciliation and inclusion within Michigan, and to planning for progressive change within the state. The actions of both the plaintiffs and the University Defendants in this action have frustrated these efforts, and TAFM's efforts to advise and to promote non-discriminatory methods of fostering inclusion, by casting doubt on the validity and applicability of Art. 1, § 26.

I state under penalties of perjury that the foregoing is true and correct. Executed on December 15, 2006.

William B. Allen

WILLIAM ALLEN

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

vs.

Case No. 2:06-cv-15024
Hon David M. Lawson
Magistrate Judge R. Steven Whalen

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES OF any other public college or university, community college, or school district, MICHAEL COX, in his official capacity as Attorney General of the State of Michigan,

Defendants.

And

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross Plaintiff

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, and MICHAEL COX, in his official capacity as Attorney General of the State of Michigan,

Cross Defendants.

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

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FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Pursuant to the Federal Rules of Civil Procedure, the plaintiffs, by and through their attorneys, Scheff & Washington, P.C., state as follows:

INTRODUCTION

1. Having gotten on the ballot through what was identified by Federal District Court Judge Arthur Tarnow as "systematic voter fraud," Proposal 2 threatens to deny minorities and women equal access to the political process, to resegregate the finest public universities in the state in violation of Title VI and VII of the of the Civil Rights Act, and to suspend the First Amendment rights of the University of Michigan so recently asserted by the United States Supreme Court in *Grutter v. Bollinger,* 439 US 306 (2003).

2. Proposal 2 would never have made it to the ballot without systematic voter fraud that was specifically targeted against black voters. This fraud proceeded to a vote, despite the fact that it had been thoroughly documented in a one-thousand page report of the Michigan Civil Rights Commission and in the decision of the Honorable Arthur Tarnow of this District Court.

3. On November 7, 2006, white voters in Michigan, by nearly a two-to-one majority, overrode the opposition of over 85 percent of black voters to approve Proposal 2, which, if implemented, will deepen segregation and racial polarization in Michigan for years to come.

4. Michigan's black and Latino/a communities, a mere seventeen percent of the total electorate, know that the passage of Proposal 2 relied on deceit, prejudice, and fear. The capacity of the government to defend their basic right to equal treatment, justice and full citizenship has been called into question.

5. The circumscribing of fundamental democratic rights of black and other minority people carried out in the electoral process, cannot be extended to deny Michigan's black, Latino/a and other minority people and women the fundamental right to equal protection in the political process, to equal opportunities to attend their public universities and to become doctors, lawyers, engineers, or astronauts, and to be afforded on an equal basis the just desserts of the community they have contributed so fully to creating.

6. The plaintiffs, who are students, applicants and prospective applicants at the defendant universities, as well as organizations who have fought against Proposal 2, assert that both on its face and as applied Proposal 2 violates the following federal laws:

A. In violation of the Equal Protection Clause, Proposal 2 has created a political structure that discriminates on account of race, national origin and gender. Alumni, residents of the State, residents of particular areas of the State, veterans, lesbians and gay men and a host of other groups may continue to petition the faculties and administrations of the defendant universities for preferences in admissions. Racial and national minorities and women alone must, however, secure an amendment to the Constitution before they may petition for what are misleadingly called "preferences" in admissions.

B. In violation of the ban on racial discrimination contained in Title VI of the Civil Rights Act of 1964, 42 USC 2000d, Proposal 2 requires the defendant universities to apply grades, test scores and other admission criteria in rigid ways. These criteria encapsulate and magnify the inequalities caused by separate and unequal education. When applied rigidly and without considering the race or national origin of the applicant, these criteria inevitably result in a vast drop in the admissions of racial and national minorities. As such a drop prevents compliance with the terms, purposes and objectives of Title VI and of the regulations enforcing Title VI, Title VI preempts Proposal 2 under the Supremacy Clause of the Constitution of the United States.

C. In violation of the ban on sex discrimination contained in Title IX of the Education Amendments of 1972, Proposal 2 requires the defendant universities to abandon targeted recruiting and special admission and other programs designed to encourage women to enter careers in mathematics, science, engineering and other fields where women have been excluded or vastly underrepresented. As this prevents compliance with

the terms, purposes and objectives of Title IX, Title IX preempts Proposal 2 under the Supremacy Clause of the Constitution of the United States.

D. In violation of the ban on discrimination in employment contained in Title VII of the Civil Rights Act of 1964, 42 USC 2000e-l, and the mandate for affirmative action contained in Executive Order 11246, Proposal 2 requires the defendant universities to abandon the lawful, voluntary programs of affirmative action in recruiting, hiring and promoting employees which have been so essential to overcoming discrimination in hiring, especially in teaching and other professional positions. Title VII and Executive Order 11246 therefore preempt Proposal 2 under the Supremacy Clause of the Constitution of the United States.

E. In violation of the First Amendment right of the defendant universities to select their students and their teaching staff, Proposal 2 limits the universities' right to select their students and teachers in the crucial areas of race, national origin and gender. The Proposal therefore violates the First Amendment rights of the universities and the First Amendment rights of the students who attend those universities.

7. The plaintiffs assert that both on its face and as applied Proposal 2 deprives them of rights, privileges and immunities arising under the laws of the United States, in violation of 42 USC 1983. They accordingly seek declaratory and injunctive relief, attorneys' fees and costs, and such further relief as is just and equitable.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to 28 USC 1331 and 28 USC 1343(3).

9. The United States District Court for the Eastern District of Michigan is a proper venue for this action, as a substantial part of the events or omissions giving rise to this action occurred in the Eastern District of Michigan.

PARTIES

10. The plaintiff Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) is a voluntary unincorporated association organized for the purpose of building a new civil rights movement and opposing attacks upon affirmative action.

11. The plaintiff United for Equality and Affirmative Action Legal Defense Fund (UEAALDF) is a non-profit corporation organized to provide legal defense and education. It was established by BAMN to conduct the legal defense of our nation's civil rights.

12. The plaintiff Rainbow PUSH Coalition is a voluntary unincorporated association organized for the purpose of promoting education and participation in American democracy and civil rights.

13. The plaintiffs Beautie Mitchell and Christopher Sutton are black high school seniors in Detroit who are applying for admission to the defendant University of Michigan.

14. The plaintiff Stasia Brown is a black high school senior at Oak Park High School who is an applicant for admission to the defendant University of Michigan.

15. The plaintiff Josie Hyman is a black resident of Detroit and one of the few black graduates from the University of California at Berkeley in 2005. Ms. Hyman is in the process of applying for law school at the defendant University of Michigan and Wayne State Universities.

16. The plaintiff Alejandra Cruz is a Latina resident of Detroit and one of the few Latino/a graduates from the University of California at Berkeley in 2006. Ms. Cruz is in the process of applying for law school at the defendant University of Michigan and Wayne State Universities.

17. The plaintiffs Turquoise Wise-King and Shanae Tatum are currently black students at Henry Ford Community College and Wayne Community College, respectively, and are planning to apply to the defendant universities and to live and work in Michigan in the future.

18. The plaintiffs Calvin Jevon Cochran, Lashelle Benjamin, Deneshea Richey, Michael Gibson, Laquay Johnson, Brandon Flannigan, Kahleif Henry, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Matthew Griffith, Lacrissa Beverly, D'shawn Featherstone, Danielle Nelson, Julius Carter, Williams Frazier, and Dante Dixon are black high school students in Michigan who plan to apply to the defendant universities and to attend college and to work and live in Michigan in the future.

19. The plaintiffs Candice Young, Tristan Taylor, and Jerell Erves are black students and graduates who plan to apply to the graduate or professional schools of the defendant universities.

20. The plaintiff Maricruz Lopez is a Latina student at the University of Michigan and the chair of the Defend Affirmative Action Party. She plans to apply for admission to the graduate or professional programs of the defendant universities.

21. The plaintiff Issamar Camacho is a Latina high school student from Los Angeles California who intends to apply for admission at the defendant universities.

22. The plaintiff Adarene Hoag is a white graduate of the University of California at Berkeley who plans to apply to the graduate and professional schools of the defendant universities.

23. The plaintiff Joseph Henry Reed was a petition circulator for Proposal 2.

24. The plaintiffs AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 836, AFSCME Local 1642, AFSCME Local 2920, are labor organizations with large minority memberships who stand to suffer discrimination in the absence of affirmative action.

25. The plaintiff Defend Affirmative Action Party is a voluntary student political organization on the University of Michigan student government.

26. The defendant Jennifer Granholm is the Governor of Michigan and is sued in her official capacity.

27. The defendant Regents of the University of Michigan is the duly elected governing board of the University of Michigan.

28. The defendant Board of Trustees of Michigan State University is the duly elected governing board of Michigan State University.

29. The defendant Board of Governors of Wayne State University is the duly elected governing board of Wayne State University.

30. The intervening defendant Michael Cox is the Attorney General of the State of Michigan and is sued in his official capacity.

STATEMENT OF FACTS

A. Facts regarding the applicants to the defendant universities.

31. Michigan is and has been for many years one of the five most racially segregated states in the Nation.

32. Segregation in education is especially intense in Michigan. More than eighty-three percent of black students are in segregated majority-minority schools. Sixty-four percent of black students are in intensely-segregated schools (90-100% black).

33. Segregated schools are overcrowded, under-resourced, offer less advanced placement courses, and are increasingly being deprived of music, art, athletic, and afterschool programs.

34. Intensely-segregated schools have more concentrated poverty than poor white schools.

35. The plaintiffs named in paragraphs 13, 14, and 18 and almost all of the black, Latino/a, and Native American students from Michigan who apply to the defendant universities have thus attended separate and unequal elementary and secondary schools.

36. The plaintiff Issamar Camacho attends Roosevelt High School in Los Angeles, one of the largest high schools in the nation. Roosevelt High School is 99 percent Latino/a. Segregated education for Latino/a students is an increasing phenomenon in the nation, and almost all Latino/a, black, and Native American students from other states that apply to the defendant universities have attended separate and unequal elementary and secondary schools.

37. The few black, Latino/a and Native American students who attend integrated schools are frequently tracked, confronted by racially hostile environments, and otherwise deprived of the benefits of an equal elementary and secondary education.

38. As a direct and proximate result of the facts set forth in the preceding four paragraphs, the plaintiffs named in paragraphs 13, 14, 18 and 21 and almost all black, Latino/a and Native American students who apply to the defendant universities have on average lower median grade point averages and less advanced training than the average of the white students who apply.

39. The standardized tests used by the defendant universities to measure applicants for admission—including especially the SAT and the ACT tests—have a discriminatory impact upon black, Latino/a and Native American students, both because they capture the educational inequality set forth above and because they magnify that inequality by culturally-biased questions, test-taking conditions, access to test preparation courses, the test question selection process, and stereotype threat.

40. As a direct and proximate result of the facts set forth in the preceding paragraph, the plaintiffs named in paragraphs 13 through 21 and almost all black, Latino/a and Native American students, on average, score lower on standardized tests than do their white counterparts. These tests are used by all three defendant universities in making admissions decisions.

41. Josie Hyman, Alejandra Cruz, and Maricruz Lopez, who have been admitted into the defendant universities and other universities, have attempted to overcome the inequalities described above.

42. Black, Latina/o, and Native American students have experienced a hostile environment at majority-white campuses, greater financial pressures, and a host of other factors. Even when they have performed outstandingly at such universities, their grades have suffered from the discrimination they have endured.

43. As with the SAT and ACT tests, the LSAT, GRE and similar tests used to decide admissions into graduate and professional schools both capture and magnify the educational inequalities that black, Latino and Native American students face.

44. The lower median grade point averages and test scores for black, Latino/a and Native American applicants exist across all economic classes. The average test scores of high-income black and Latina/o students are lower than those of low-income white students.

45. Because of the intensity of racial and national inequality, the black, Latino/a and Native American applicants have lower median grade point averages and test scores than white students from equivalent economic backgrounds.

46. As a direct and proximate result of the facts set forth in the preceding paragraphs, the black, Latino/a and Native American students and almost all similar students who apply to the graduate and professional schools of the defendant universities have lower grade point averages and test scores than the white students who apply.

B. The defendant universities' admission systems.

47. From the Michigan Constitution of 1850 forward, the faculties and administrations of the various schools and colleges in the defendant universities have established the criteria for selecting applicants for admission.

48. Before the advent of affirmative action, the various schools and colleges of the defendant universities admitted students based upon a rigid application of grade point averages, test scores, and other criteria which denied black, Latina/o, and other minority students an equal opportunity to attend.

49. As a direct and proximate result of that system applied to the applicant pool described above, the schools and colleges of the various universities admitted almost no black, Latino or Native American students before the advent of affirmative action.

50. The University of Michigan Law School, for example, graduated approximately 2,000 white students in the 1960s and only eight black students during the same period.

51. The growth of the Civil Rights Movement, the antiwar movement, and intense student struggles led to political debate on admissions policies at the various campuses. The decision of the faculties and administrations of many of the schools and colleges in the defendant universities to adopt affirmative action programs was an outgrowth of this debate.

52. Affirmative action policies desegregated the defendant universities and, for the first time, gave minority and, in some instances, women students not only access to a university, professional and graduate education, but also to the process of shaping the educational institutions themselves.

53. The affirmative action plans differed in details, but in general they (a) placed a less rigid reliance on criteria that encapsulated discrimination like grade point averages and tests, (b) considered the race or national origin of the student in evaluating his or her qualifications, including test scores and grades, and (c) placed more reliance on

interviews, recommendations and similar factors that were used to evaluate the abilities of the applicants, including especially the applicants from racial and national minorities.

54. As a direct and proximate result of the affirmative action plans, the number of black, Latino/a and Native American students rose dramatically at each of the defendant universities, including in essentially all of the schools at those universities.

C. Proposition 209.

55. In 1996, the electorate of the State of California passed Proposition 209, from which Michigan's Proposal 2 is copied word-for-word.

56. As interpreted by its sponsors and by the government and courts of California, Proposition 209 banned granting any "preference" to black, Latino/a, Native American and other students in admissions to the universities of that State.

57. Under Proposition 209, the universities in California have been forced to return to a rigid use of grade point averages and test scores without any consideration of the race or national origin of a student.

58. As a result of Proposition 209, the enrollment of black, Latino/a and Native American students has fallen dramatically at the flagship universities in California, including, in particular at the University of California at Berkeley and the University of California at Los Angeles, especially when that enrollment is considered, as it must be, in relation to the fast-growing populations of young black and especially Latino/a people in the state.

59. As black, Latino/a and Native American students have been forced out of the flagship campuses of the University of California system, those able to attend college

have been forced into the less selective schools in the University of California and California State systems.

60. After ten years of Proposition 209, higher education in California is becoming a two-tier resegregated system.

D. Proposal 2.

61. In *Grutter*, the United States Supreme Court approved the affirmative action plan at the University of Michigan Law School.

62. The University of Michigan Law School plan considered the race of applicants as a means to assure diversity and it specifically did not require a rigid application of grade point averages, test scores and similar criteria in admitting incoming students.

63. Immediately after the *Grutter* decision, Ward Connerly and the Michigan Civil Rights Initiative announced a petition drive to amend the Constitution of the State of Michigan.

64. As set forth in a decision by the Honorable Arthur Tarnow of this Court, the MCRI proposal obtained a place on the general election ballot by a massive campaign of fraud characterized by soliciting signatures on its petition by telling blacks and liberal whites that the proposed amendment supported affirmative action.

65. On November 7, 2006, sixty-five percent of white voters of Michigan voted for Proposal 2, while eighty-five percent of black and Latino/a voters voted against it.

66. By their votes, the white voters of Michigan for the first time placed restrictions on the admission policies of the defendant universities.

67. By their votes, the white voters of Michigan purported to exclude those black, Latino/a and Native American students whom they believed had received "preference" for admission to the defendant universities.

68. As in California, the proponents of Proposal 2 assert that the elimination of "preference" requires the rigid application of the grades, test scores and other applicable criteria without any consideration of race, national origin or gender.

69. The failure to evaluate those criteria in light of the race, national origin or gender will result in a dramatic drop in the enrollment of black, Latino/a and Native American students in the various schools of the defendant universities.

70. The University of Michigan, for example, has estimated that there will be an immediate fall of 80 percent in the number of black, Latino/a and Native American students admitted to its Law School, with a further decline in later years as fewer students from underrepresented minorities are admitted to undergraduate institutions.

E. Affirmative action in employment.

71. For reasons analogous to the conditions of underrepresented minority students, prior to the advent of affirmative action, minority applicants for employment at academic institutions, particularly in the teaching and professional positions, were essentially unable to secure employment in the defendant universities.

72. With the adoption of affirmative action policies, the defendant universities have dramatically increased the number of black, Latino/a and Native American faculty members, administrators and employees.

73. By banning affirmative action in employment, however, Proposition 209 resulted in a one-third drop in female faculty hiring in the University of California from which the University has not fully recovered.

74. By banning affirmative action in employment, Proposal 2 will have the same effect on hiring in the defendant universities.

F. Conclusion.

75. As written and as applied, Proposal 2, like Proposition 209 in California, will result in the creation of a two-tier system of higher education Michigan in which the most selective undergraduate schools and almost all of the graduate and professional schools will be almost all white and in which black, Latino/a and Native American students will be forced to attend public institutions with less resources, less connections, and less possibility of providing an equal future for their students.

COUNT ONE
RACIAL AND OTHER DISCRIMINATION
IN THE STRUCTURE OF GOVERNMENT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

76. Proposal 2 establishes classifications in the structure of government based on race, national origin and gender in violation of the Equal Protection Clause of the Fourteenth Amendment.

77. Under Proposal 2, veterans, residents of the State, residents of particular areas of the State, alumni, persons who attend particular high schools or colleges and numerous other groups may petition the faculty and administration at the defendant universities for changes in admission and hiring criteria, including "preferences" for members of any of those groups.

78. Under the regime established by Proposal 2, however, racial minorities, students or applicants from particular national origins, and women may not petition the faculty and administration at the defendant universities for changes in admission and hiring that either are or could be labeled as "preferences."

79. In particular, racial and national minorities and women may not petition the faculties and administrations for affirmative action programs in admissions or employment that are lawful under the decisions of the United States Supreme Court even though every other group may petition for any form of lawful action that will benefit their particular interest.

80. In order to secure lawful changes in admission or employment practices, racial minorities, persons of particular national origins, and women may now seek relief only by mounting a statewide campaign to amend the Constitution of the State of Michigan to eliminate Proposal 2.

81. By essentially eliminating the right of underrepresented minorities and women to petition for lawful affirmative action plans by the same means that others petition for a redress of their grievances, Proposal 2 has denied black, Latino/a, Native American and other citizens, as well as women of all races, of the "rights, privileges and immunities" secured by the Equal Protection Clause and by the Constitution and laws of the United States.

82. By these acts, Proposal 2 violates 42 USC 1983, and causes great damage to the plaintiffs and the other citizens of the United States.

Wherefore, the plaintiffs ask that this Court enter preliminary and permanent injunctive and declaratory relief restraining the defendants from implementing

Proposal 2 and awarding to the plaintiffs such further relief as is just and equitable, including the attorneys' fees and costs of this action.

COUNT TWO
PREEMPTION BY TITLE VI
OF THE CIVIL RIGHTS ACT OF 1964

83. The defendant universities receive massive amounts of federal aid to support students, faculties, facilities and virtually every aspect of the university.

84. In an effort to end racial and national origin segregation in public schools, college, universities and other public services, Congress prohibited discrimination on account of race or national origin in any program or activity that received federal financial assistance:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 USC 2000d.

85. To enforce that mandate, Congress provided that each federal department and agency that extended financial assistance should issue rules, that were not effective until approved by the President of the United States, to assure that the recipients of federal assistance follow policies that are consistent with the federal mandate of non-discrimination. 42 USC 2000d-1.

86. Acting pursuant to that Congressional authorization, the Department of Education has promulgated rules that prohibit the defendant universities from utilizing criteria that have the effect of subjecting individuals to discrimination or that have the effect of substantially impairing accomplishment of the program's objectives as respects individuals of a particular race, color or national origin:

> A recipient, in determining the types of services, financial aid, or other benefits or facilities that will be provided under any such program, or the class of individuals to whom....such services, financial aid, other benefits, or facilities will be provided under any such program, may not, directly or through contractual arrangements, utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin.
>
> 34 CFR 100.3(b)(2).

87. As demonstrated by the experience in California and by the facts set forth above, Proposal 2's ban on any "preference" in the use of grade point averages, test scores and similar criteria has resulted and will result in a devastating decline in the number of black, Latino/a and Native American students, in direct violation of the purpose of Title VI and of the specific prohibitions of the regulations that implement Title VI.

88. In requiring the defendant universities to abandon any "preferences" in the evaluation of test scores, grade point averages or any similar criteria, Proposal 2 makes compliance with both Title VI and Proposal 2 a physical impossibility.

89. In requiring the defendant universities to abandon any "preferences" in the evaluation of test scores, grade point averages or any similar criteria, Proposal 2 also stands as an obstacle to the accomplishment of the purposes of Title VI of the Civil Rights Act of 1964.

90. Title VI preempts Proposal 2 under the Supremacy Clause of the Constitution of the United States.

Wherefore, the plaintiffs ask that this Court enter preliminary and permanent injunctive and declaratory relief restraining the defendants from implementing Proposal 2 and awarding to the plaintiffs such further relief as is just and equitable, including the attorneys' fees and costs of this action.

COUNT THREE
PREEMPTION BY TITLE IX
OF THE EDUCATION AMENDMENTS OF 1972

91. With certain exceptions not here relevant, Title IX of the Education Amendments of 1972 prevented discrimination on account of sex by any recipient of federal financial assistance:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...
>
> 20 USC 1681(a).

92. Like Title VI, Title IX authorized the federal agencies disbursing financial assistance to promulgate regulations to carry out its mandate. 20 USC 1682.

93. The regulations promulgated under Title VI prohibit recipients of federal assistance from administering any test or using any criterion for admission which has the effect of discriminating against persons on account of their sex, 34 CFR 106.21, and require in some circumstances and authorize in all circumstances special recruitment and other efforts to encourage participation of women in colleges, graduate and professional schools from which women have traditionally been excluded. 34 CFR 106.23.

94. In requiring the defendant universities to abandon any "preferences" in the evaluation of test scores, grade point averages or any similar criteria, Proposal 2 stands as an obstacle to the accomplishment of the eliminating admissions criteria which have the effect of discriminating on account of sex, as required by Title IX and the regulations implementing Title IX.

95. Title VI therefore preempts Proposal 2 under the Supremacy Clause of the Constitution of the United States.

Wherefore, the plaintiffs ask that this Court enter preliminary and permanent injunctive and declaratory relief restraining the defendants from implementing Proposal 2 and awarding to the plaintiffs such further relief as is just and equitable, including the attorneys' fees and costs of this action.

COUNT FOUR
PREEMPTION BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

96. In Title VII of the Civil Rights Act of 1964, the Congress of the United States prohibited discrimination on account of race, color, national origin and gender in the employment within the United States.

97. By the amendments of 1972, Congress made Title VII applicable to the states and their subdivisions, including the defendant universities.

98. Title VII was intended as a spur and catalyst to cause employers to reexamine their employment practices and to eliminate, insofar as it is practical, the vestiges and current practices of discrimination.

99. In furtherance of the purposes of Title VII, the defendant universities may, and in some cases, must take race- and gender-conscious steps to eliminate discrimination on account of race, national origin or gender in their employment practices, including but not limited to their practices for choosing employees for positions on the faculty and in the administration of the defendant universities.

100. In requiring the defendant universities to abandon any "preferences" in their employment practices, Proposal 2 stands as an obstacle to the voluntary efforts required and allowed in order to accomplish the purposes of Title VII of the Civil Rights Act of 1964.

101. Title VII preempts Proposal 2 under the Supremacy Clause of the Constitution of the United States.

Wherefore, the plaintiffs ask that this Court enter preliminary and permanent injunctive and declaratory relief restraining the defendants from implementing Proposal 2 and awarding to the plaintiffs such further relief as is just and equitable, including the attorneys' fees and costs of this action.

COUNT FIVE
VIOLATION OF THE FIRST AMENDMENT

102. The United States Supreme Court, in its landmark June 23, 2003 decision in *Grutter*, affirmed the defendant universities' First Amendment right to select their students and teaching staff and to determine their academic standards.

103. As prospective students at the defendant universities, the plaintiffs stand as beneficiaries of these First Amendment rights when they seek admission to the defendant universities.

104. As students at the defendant universities, the plaintiffs stand as further beneficiaries of these First Amendment rights because of the academic freedom and the educational benefits of the integrated and diverse student body produced by the admission policies of the defendant universities.

105. For the first time in the history of the State of Michigan Proposal 2 invades the First Amendment rights of the defendant universities to select their student bodies and their teaching staff in ways that the educational authorities have deemed most appropriate.

106. Moreover, Proposal 2 invades the First Amendment rights of the defendant universities in one area and one area alone: their right to seek diversity through the admission of students of diverse races and national origins and from both genders.

107. In invading the First Amendment rights of the universities on those matters alone, Proposal 2 violates the First Amendment rights of the universities and of the students who attend those universities.

WHEREFORE, the plaintiffs ask for declaratory relief that Proposal 2 violates the First Amendment and injunctive relief restraining the defendant universities from changing their admission or other policies in an attempt to comply with Proposal 2, for attorneys' fees and costs, and for such further relief as is just and equitable.

By Plaintiffs' Attorneys,
SCHEFF & WASHINGTON, P.C.

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Dated: December 17, 2006

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2006, I electronically filed the Plaintiffs' First Amended Complaint which will automatically send notification of filing to:

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Dated: December 17, 2006

Ex 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

vs.

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, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants

and

Case No. 2-06-CV-15024

Hon. David M. Lawson

The REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan

Cross-Defendant

/

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/

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

Defendants / Cross-Plaintiffs, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University ("the Universities"), hereby cross-claim against Cross-Defendant Jennifer Granholm, in her official capacity as Governor of the State of Michigan as follows:

NATURE OF THE ACTION

1. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 in which the Universities seek a determination of their rights and responsibilities under Article I, § 26 of the Michigan Constitution, an amendment passed on November 7, 2006 and with an effective date of December 23, 2006 (the "Amendment").

THE PARTIES

2. The Universities are corporate bodies created by Article VIII, § 5 of the Constitution of the State of Michigan and are charged with the "general supervision" of these institutions.

3. Cross-Defendant Jennifer Granholm is the Governor of the State of Michigan and, as such, responsible for enforcing the laws of the State of Michigan.

JURISDICTION

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case arises under the Constitution of the United States.

COUNT I

DECLARATORY JUDGMENT

5. The Amendment has nine sections, is among the longest provisions of the Michigan Constitution, and includes a number of legal terms. Serious controversies exist regarding the validity, meaning, impact, and application of the Amendment. Inconsistent statements have been made about its constitutionality and its consequences and many, including the Universities, are uncertain of its reach. The Governor has requested an interpretation of the Amendment from the Civil Rights Commission. The Universities have special reason for

concern about these controversies and uncertainties because they are specifically named in paragraph 1 of the Amendment.

6. The Amendment implicates federal law. It incorporates whole bodies of federal law by reference, including "federal programs," "federal law," and the "United States Constitution." Further, paragraph 7 of the Amendment provides that "[i]f any part or parts of this section are found to be in conflict with the United States Constitution or federal law, this section shall be implemented to the maximum extent that the United States Constitution and federal law permit." The Supremacy Clause of the United States Constitution similarly provides that, in the event of a conflict, federal law takes precedence over state law.

7. The Universities have a specific and immediate crisis that cannot await the clarifications that will ultimately be provided by this Court, other courts, and the Civil Rights Commission.

8. The Amendment becomes effective in the midst of the Universities' current admissions and financial aid cycle. For most colleges, schools, departments, and programs within the Universities those cycles run from the early fall through the spring.

9. Months before the current cycle began the Universities put their admissions and financial aid policies in place in reliance on the Supreme Court's reaffirmation in *Grutter v Bollinger*, 539 U.S. 306 (2003) that they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors such as race.

10. Before the current cycle began the Universities devoted substantial time and energy to training their admissions and financial aid personnel about those policies and to disseminating information about those policies to the public.

11. Individuals have applied for admission and have requested financial aid in reliance upon these announced policies. The Universities have not yet made decisions with respect to many of the applications and requests received to date. But the Universities have already made thousands of decisions applying those policies and processes during this cycle.

12. Forcing the Universities to abandon their existing admissions and financial aid policies in the midst of this cycle would require them to apply different policies to applicants within the same cycle and different policies than they have announced.

13. Moreover, because the Universities cannot by December 23 discover, evaluate, develop, implement, and train personnel around a new approach to admissions and financial aid that will yield a diverse student body, forcing the Universities to abandon their existing policies on that date would result in the loss of their First Amendment-based academic freedom right to admit a class that best meets their academic goals during this cycle.

14. The Universities therefore request a declaratory judgment determining their rights and responsibilities under the Amendment. In light of the urgency of the situation and the certainty that the Universities will suffer irreparable harm absent immediate relief, the Universities also seek limited and preliminary injunctive relief preserving the status quo until the Court has had the opportunity to give this issue full consideration.

WHEREFORE, the Universities respectfully request that this Court

A. enter a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law to the extent necessary and just, and

B. issue a preliminary injunction that preserves the status quo and allows the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until this Court enters the requested declaratory judgment; if the Court cannot rule on the request for a preliminary injunction before December 22 then the Universities alternatively seek a

temporary restraining order with notice to preserve the status quo from December 22 until the Court can rule on the request for preliminary injunction.

Respectfully submitted,

BUTZEL LONG, PC

By: /s/ Leonard M. Niehoff
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Dated: December 11, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Case No. 2-06-CV-15024

Hon. David M. Lawson

Plaintiffs,

vs.

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, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants

and

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan

Cross-Defendant

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_____/

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: George B. Washington and Shanta Driver, SCHEFF & WASHINGTON, PC, 645 Griswold, Suite 1817, Detroit, MI 48226 and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Michelle M. Rick, Deputy Legal Counsel, Office of Legal Counsel, State of Michigan, Office of the Governor, PO Box 30013, Lansing, MI 48909.

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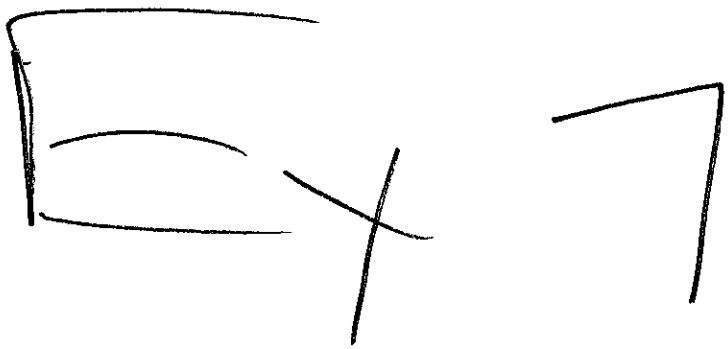

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

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Case No. 2-06-CV-15024

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_____/

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 FOR EXPEDITED HEARING AND CONSIDERATION

Defendants / Cross-Plaintiffs, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University ("the Universities"), hereby respectfully request that this Court grant expedited consideration of their Ex Parte Motion for Leave to File Brief in Excess of 20 Pages and grant an expedited hearing on their Motion for Preliminary Injunctive Relief for the following reasons:

1. The Universities have filed a cross-claim seeking a declaratory judgment that determines their rights and responsibilities under Article I, § 26 of the Michigan Constitution, an amendment passed on November 7, 2006 (the "Amendment"). The Amendment becomes effective on December 23, 2006.

2. The Amendment has nine sections, is among the longest provisions of the Michigan Constitution, and includes a number of legal terms. Serious controversies exist regarding the validity, meaning, impact, and application of the Amendment. Inconsistent statements have been made about its constitutionality and its consequences and many, including the Universities, are uncertain of its reach. The Governor has requested an interpretation of the Amendment from the Civil Rights Commission. The Universities have special reason for concern about these controversies and uncertainties because they are specifically named in paragraph 1 of the Amendment.

3. The Amendment implicates federal law. It incorporates whole bodies of federal law by reference, including "federal programs," "federal law," and the "United States Constitution." Further, paragraph 7 of the Amendment provides that "[i]f any part or parts of this section are found to be in conflict with the United States Constitution or federal law, this section shall be implemented to the maximum extent that the United States Constitution and federal law permit." The Supremacy Clause of the United States Constitution similarly provides that, in the event of a conflict, federal law takes precedence over state law.

4. The Universities have a particular and immediate crisis that cannot await the clarifications that will ultimately be provided by this Court, other courts, and the Civil Rights Commission.

5. The Amendment becomes effective in the midst of the Universities' current admissions and financial aid cycle. For most colleges, schools, departments, and programs within the Universities those cycles run from the early fall through the spring.

6. Months before the current cycle began the Universities put their admissions and financial aid policies in place in reliance on the Supreme Court's reaffirmation in *Grutter v Bollinger*, 539 U.S. 306 (2003) that they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors such as race.

7. Before the current cycle began the Universities devoted substantial time and energy to training their admissions and financial aid personnel about those policies and to disseminating information about those policies to the public.

8. Individuals have applied for admission and have requested financial aid in reliance upon these announced policies. The Universities have not yet made decisions with respect to many of the applications and requests received to date. But the Universities have already made thousands of decisions applying those policies and processes during this cycle.

9. Forcing the Universities to abandon their existing admissions and financial aid policies in the midst of this cycle would require them to apply different policies to applicants within the same cycle and different policies than they have announced.

10. Moreover, because the Universities cannot by December 23 discover, evaluate, develop, implement, and train personnel around a new approach to admissions and financial aid that will yield a diverse student body, forcing the Universities to abandon their existing policies on that date would result in the loss of their First Amendment-based academic freedom right to admit the class that best meets their academic goals during this cycle.

11. The Universities have filed a Motion for Preliminary Injunctive Relief that would preserve the status quo and that would allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until this Court enters the requested declaratory judgment; if the Court cannot rule on this request for a preliminary injunction before December 22, then the Universities have alternatively requested a temporary restraining order with notice to preserve the status quo from December 22 until the Court can rule on the request for preliminary injunction. Because of the urgency of the situation, the Universities request an expedited hearing, to be conducted before December 22, on that Motion for Preliminary Injunctive Relief.

12. The Brief in support of that Motion slightly exceeds the twenty-page limit imposed by the Local Rules. The Universities have therefore also filed an Ex Parte Motion for Leave to File Brief in Excess of 20 Pages. Because of the urgency of the situation the Universities also request an expedited decision on that Motion.

WHEREFORE, the Universities respectfully request that this Court (a) enter an Order setting their Motion for Preliminary Injunction for hearing as soon as possible and, in any event, before December 22, and (b) enter an Order allowing the Universities to file a Brief in support of their Motion for Preliminary Injunction not to exceed 23 pages.

Respectfully submitted,

BUTZEL LONG, PC

By: /s/ Leonard M. Niehoff
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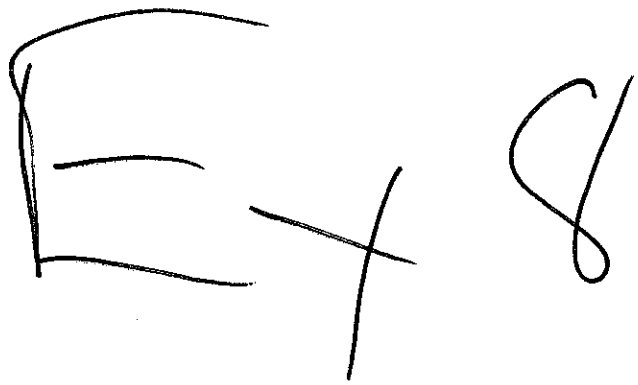
Dated: December 11, 2006



United States District Court
Eastern District of Michigan

Summons in a Civil Action and Return of Service Form

Case: 2:06-cv-15024
Assigned To: Lawson, David M

Plaintiff name(s):	vs.	Defendant name(s):
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN)		JENNIFER GRANHOLM, AND REGENTS OF THE UNIVERSITY OF MICHIGAN
Plaintiff's attorney, address and telephone: George B. Washington, Shanta Driver Scheff & Washington, P.C. 645 Griswold – Suite 1817 Detroit, Michigan 48226 313-963-1921		Name and address of defendant being served: JENNIFER GRANHOLM GOVERNOR'S OFFICE 111 S. CAPITOL AVENUE, GEORGE ROMNEY BUILDING LANSING, MI 48933

To the defendant:

This summons is notification that YOU ARE BEING SUED by the above named plaintiff(s).

1. You are required to serve upon the plaintiff's attorney, name and address above, an answer to the complaint within 20 days after receiving this summons, or take other actions that are permitted by the Federal Rules of Civil Procedure.

2. You must file the original and one copy of your answer within the time limits specified above with the Clerk of Court.

3. Failure to answer or take other action permitted by the Federal Rules of Civil Procedure may result in the issuance of a judgment by default against you for the relief demanded in the complaint.

David J. Weaver
Clerk of the Court

By: _____
Deputy Clerk

DEC - 6 2006
Date of issuance

RETURN OF SERVICE

A copy of the summons and complaint has been served upon the defendant in the manner indicated below:

Name of Defendant served: Jennifer Granholm

Date of service: December 7, 2006

Method of Service

☐ Personally served at this address: _____

_____

☐ Left copies at the defendant's usual place of abode with (name of person): _____

At this address: _____

_____

☒ Other (please specify): Federal Express

_____

Service fees: Travel $ 0 Service $ 0 Total $ 0

I declare under the penalty of perjury that the information contained in this Return of Service is true.

12/7/06
Date

Signature of server

Adrienne Hoag
Server's printed name

19460 Cranbrook Dr. #207 Detroit MI 48221
Server's address

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERRELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY RED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

vs.

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, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants

and

The REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD

Case No. 2:06-CV-15024

Hon. David M. Lawson

OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

_____/

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_____/

ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO INTERVENE AS A DEFENDANT IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES

NOW COMES Attorney General Michael A. Cox, by his attorneys, Margaret A. Nelson, Heather S. Meingast, and Joseph E. Potchen, Assistant Attorneys General, and in support of his motion to intervene states as follows:

1. On November 8, 2006, Plaintiffs filed with this Court a complaint for injunctive and declaratory relief raising a facial challenge to newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2. The complaint alleges equal protection and First Amendment challenges under the federal constitution. The complaint also asserts that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII and, the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs request that this Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate.

2. The complaint names as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors.

3. Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

4. The Defendant Universities then filed their cross claim on December 11, 2006. The cross claim asserts a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.[1]

5. The Universities assert they have already begun both their admissions and financial aid cycles, with some decisions being made prior to the passage of § 26. They allege that to implement § 26 now, in the middle of that cycle, would require them to apply different polices to applicants within the same cycle and different polices than they have announced as

[1] See Const 1963, art 12, § 2 providing for the effective date of § 26.

applicable to this cycle. The Universities also allege that the amendment's exceptions applicable to federal programs, federal law, and the federal constitution apply to their admissions policy and effectively exempt them from the amendment's provisions.

6. The Universities request a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

7. The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities seek a preliminary injunction enjoining the application of § 26 to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment. Alternatively, if the Court cannot rule by December 22, 2006, the Universities ask this Court to enter a temporary restraining order pending a ruling on the preliminary injunction.

8. On December 11, 2006, Governor Granholm formally requested that the Attorney General provide her with legal representation in this suit as provided for by the state constitution and statutes.[2] Recognizing a potential legal conflict because of the differing political positions taken by the Governor and the Attorney General on Proposal 2, now Const 1963, art 1, § 26, Governor Granholm requested the creation of a conflict wall to assure the independence of her assigned legal team. (See Exhibit 1) Governor Granholm also indicated she will not oppose the Attorney General's intervention in this matter.

[2] See Const 1963, art 5, §§ 3, 21; MCL 14.28.

9. In acknowledgement of a legal conflict, and pursuant to the Governor's request, the Attorney General has assigned an independent team of Assistant Attorneys General and established a conflict wall.

10. These unique circumstances, however, compel the Attorney General to seek leave to intervene in both the complaint and cross claim filed in this matter in order to ensure that the Court is presented with the full range of arguments on the questions presented, and so that a vigorous defense of the constitutionality of § 26 may be had.

11. Federal Rule of Civil Procedure 24, states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) *when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.*
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) *when an applicant's claim or defense and the main action have a question of law or fact in common.* When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Emphasis added.]

12. Again the Attorney General, as the state's chief law enforcement officer, has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted by the Legislature, or as in this case by the People of Michigan themselves, when

those laws are challengedl.[3] Concomitant with those duties is the Attorney General's right under Michigan law to intervene in any matter to protect state interests.[4]

13. The Attorney General thus has a substantial legal interest in this matter relating to his duty to defend the constitutionality of § 26 on behalf of the State of Michigan, which interest will not be adequately represented through Governor Granholm's participation in this suit.

14. The United States Court of Appeals for the Sixth Circuit recognized in *Associated Builders & Contrs, Saginaw Valley Area Chapter v Perry* that the Attorney General has broad authority to intervene in matters affecting the public's interests, and that he should only be prohibited from doing so when it would prove inimical to the public interest. [5] In that case, the Sixth Circuit determined that then Attorney General Frank Kelley should have been allowed to intervene as of right and appeal a district court decision that held a state statute preempted by federal law where the defendant Director of the Department of Labor and Governor did not appeal, but rather "permitted the thirty-year-old [statute] to go to its demise without fully exercising their right to object."[6] The Court concluded that the State's interests were not adequately represented by the decision not to appeal because substantial questions of law existed as to whether the state statute was in fact preempted by federal law, and that these circumstances warranted the Attorney General's intervention and appeal in the matter.[7]

15. The circumstances here are analogous to those presented in *Associated Builders* and support the Attorney General's intervention. While this case does not yet involve an appeal

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[3] Const 1963, art 5, §§ 3, 21; MCL 14.28.
[4] See MCL 14.101 See also *Attorney General v Public Service Comm*, 243 Mich App 487, 496-497; 625 NW2d 16 (2000).
[5] *Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (CA 6, 1997).
[6] *Associated Builders*, 115 F3d at 390.
[7] *Associated Builders*, 115 F3d at 390-392.

and Governor Granholm remains an active party to the suit, it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation.

16. The Attorney General should thus be allowed to intervene as a matter of right in this case under FR Civ P 24(a) to ensure that the State's interests are adequately presented via a vigorous defense of the constitutionality of § 26.

17. Alternatively, the Attorney General should be permitted to intervene under FR Civ P 24(b) because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties as required by the rule. His motion is timely and permitting the Attorney General's intervention will in no way unduly delay or prejudice the adjudication of the rights of the original parties since this suit is still in its initial phase. Accordingly, intervention should be granted in accordance with FR Civ P 24(b).

18. Under LR 7.1(a), Attorney General Cox has sought concurrence in the motion to intervene from all counsel to the parties in this action. The Governor does not oppose the Attorney General's intervention. Counsel for the Universities was unable to respond before speaking with his clients. Counsel for the Plaintiffs does not oppose the Attorney General's intervention.

WHEREFORE, for the reasons set forth above and in the accompanying brief, Attorney General Michael A. Cox requests that this Court grant his Motion to Intervene pursuant to Fed R Civ P 24(a) and (b).

ATTORNEY GENERAL MICHAEL A. COX'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES

CONCISE STATEMENT OF ISSUE PRESENTED

Federal Rule of Civil Procedure 24 accords persons the opportunity to intervene in a matter either as of right or by permission. Here, the Attorney General has a substantial legal interest in the matters presented to this Court in the complaint and cross claim, which challenge the constitutionality of Const 1963, art 1, § 26 and which interest will not be adequately represented through Governor Granholm's participation in the suit thus warranting his intervention as of right. Alternatively, the Attorney General should be permitted to intervene because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties. Should this Court therefore exercise its discretion and allow the Attorney General to intervene either as of right or by permission in the underlying complaint and cross claim?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry, 115 F3d 386 (CA 6, 1997)

Attorney General v Public Service Comm, 243 Mich App 487, 496-497; 625 NW2d 16 (2000)

Jordan v Michigan Conference of Teamsters Welfare Fund, 207 F3d 854, 863 (CA 6, 2000)

Linton v Commissioner of Health & Evn't, 973 F2d 1311, 1319 (CA 6, 1992)

Michigan State v Miller, 103 F3d 1240, 1248 (CA 6, 1997)

Michigan State AFL-CIO v Miller, 103 F3d 1240, 1245 (CA 6, 1997)

Providence Baptist Church v Hillandale Comm, Ltd., 425 F3d 309, 313 (CA 6, 2005)

Stupak-Thrall v Glickman, 226 F3d 467, 471 (CA 6, 2000)

United States v Michigan, 424 F3d 438, 443-444 (CA 6, 2005)

STATEMENT OF THE FACTS

On November 8, 2006, Plaintiffs filed with this Court a complaint for injunctive and declaratory relief raising a facial challenge to newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2.[8] The complaint alleges equal protection and First Amendment challenges under the federal constitution. The complaint also asserts that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII and, the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs request that this Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate. The complaint names as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors. Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

On December 11, 2006, the defendant Universities filed a cross claim with this Court against defendant Governor Granholm seeking declaratory and injunctive relief. The cross claim asserts a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.[9] The Universities assert they have already begun both their admissions and

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[8] The amendment passed overwhelmingly on November 7, 2006, with 2,141,010 citizens voting in favor of the proposal, and 1,555,691 citizens voting against the proposal, or by 57.9 % to 42.1%. See http://miboecfr.nictusa.com/election/results/06GEN/90000002.html.

[9] See Const 1963, art 12, § 2 providing for the effective date of § 26.

financial aid cycles, with some decisions being made prior to the passage of § 26. They allege that to implement § 26 now, in the middle of that cycle, would require them to apply different polices to applicants within the same cycle and different polices than they have announced as applicable to this cycle. The Universities also allege that the amendment's exceptions applicable to federal programs, federal law, and the federal constitution apply to their admissions policy and effectively exempt them from the amendment's provisions. The Universities request a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities seek a preliminary injunction enjoining the application of § 26 to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment. Alternatively, if the Court cannot rule by December 22, 2006, the Universities ask this Court to enter a temporary restraining order pending a ruling on the preliminary injunction.

On December 11, 2006, Governor Granholm formally requested that the Attorney General provide her with legal representation in this suit as provided for by the state constitution and statutes.[10] Recognizing a potential legal conflict because of the differing political positions taken by the Governor and the Attorney General on Proposal 2, now art 1, § 26, Governor Granholm requested the creation of a conflict wall to assure the independence of her assigned

[10] See Const 1963, art 5, §§ 3, 21; MCL 14.28.

legal team. Governor Granholm also indicated she will not oppose the Attorney General's intervention in this matter.

In acknowledgement of the legal conflict, and pursuant to the Governor's request, the Attorney General has assigned an independent team of Assistant Attorneys General and established a conflict wall.

These unique circumstances, however, compel the Attorney General to seek leave to intervene in both the complaint and cross claim filed in this matter in order to ensure that the Court is presented with the full range of arguments on the questions presented, and so that a vigorous defense of the constitutionality of § 26 may be had.

ARGUMENT

Federal Rule of Civil Procedure 24 accords persons the opportunity to intervene in a matter either as of right or by permission. Here, the Attorney General has a substantial legal interest in the matters presented to this Court in the complaint and cross claim, which challenge the constitutionality of Const 1963, art 1, § 26 and which interest will not be adequately represented through Governor Granholm's participation in the suit thus warranting his intervention as of right. Alternatively, the Attorney General should be permitted to intervene because his defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and original parties. This Court should therefore exercise its discretion and allow the Attorney General to intervene either as of right or by permission in the underlying complaint and cross claim.

A. Standard of Review

The decision whether to grant a motion to intervene lies within the discretion of the district court.[11]

B. The Attorney General should be allowed to intervene as of right under FR Civ 24(a).

Federal Rule of Civil Procedure 24, states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the . . . transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Four criteria must be met for intervention as a matter of right: (1) the application is timely; (2) the party must have a substantial legal interest in the case; (3) the party must demonstrate that its ability to protect that interest will be impaired in the absence of intervention; and (4) there must be inadequate representation of that interest by the current party.[12] If any of

[11] *Providence Baptist Church v Hillandale Comm, Ltd.*, 425 F3d 309, 313 (CA 6, 2005).
[12] See *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1245 (CA 6, 1997).

these criteria are not satisfied, a motion to intervene must be denied.[13] The Sixth Circuit has adopted a "rather expansive notion of the interest sufficient to invoke intervention."[14]

A proposed intervenor's burden in showing inadequate representation of its interests is minimal.[15] A showing of possible inadequate representation is sufficient to meet such burden.[16] Despite such a minimal burden, "applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit."[17] The Sixth Circuit has adopted a three-part test to determine if the existing parties adequately represent the interests of a proposed intervenor.[18] The Sixth Circuit has held that a movant fails to meet his burden of demonstrating inadequate representation when (1) no collusion is shown between the existing party and the opposition; (2) the existing party does not have any interests adverse to the intervenor; and (3) the existing party has not failed in the fulfillment of its duty.[19]

In reviewing these factors, it is apparent that the Attorney General's motion to intervene is timely filed as the present lawsuit is in its initial phase. Moreover, the Attorney General has a substantial legal interest in this matter that will not be adequately represented by the existing parties. The Attorney General, as the state's chief law enforcement officer, has not only a duty to ensure that the laws of the State are followed, but also a duty to defend those laws as enacted by the Legislature, or as in this case by the People of Michigan themselves, when those laws are

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[13] *Stupak-Thrall v Glickman*, 226 F3d 467, 471 (CA 6, 2000).
[14] *Michigan State AFL-CIO*, 103 F3d at 1245.
[15] *Linton v Commissioner of Health & Evn't*, 973 F2d 1311, 1319 (CA 6, 1992).
[16] *Linton*, 973 F2d at 1319.
[17] *United States v. Michigan*, 424 F3d 438, 443-444 (CA 6, 2005).
[18] *Jordan v Michigan Conference of Teamsters Welfare Fund*, 207 F3d 854, 863 (CA 6, 2000).
[19] *Jordan*, 207 F3d at 863.

challenged.[20] Concomitant with those duties is the Attorney General's right under Michigan law to intervene in any matter to protect state interests.[21] The Attorney General thus has a substantial legal interest in this matter relating to his duty to defend the constitutionality of § 26 on behalf of the State of Michigan, which interest will not be adequately represented through Governor Granholm's participation in this suit.

In *Associated Builders & Contrs, Saginaw Valley Area Chapter v Perry* the United States Court of Appeals for the Sixth Circuit recognized the Attorney General's broad authority and duty to represent the interests of the State [22]:

> In *Michigan ex rel. Kelley v CR Equipment Sales, Inc*, 898 F Supp 509, 513-14 (WD Mich 1995), District Judge Benjamin Gibson, discussing the same Attorney General involved in the instant case, said:
>
> "Michigan's Attorney General has broad authority to prosecute actions when to do so is in the interest of the state. First, Michigan statutory law provides as follows:
>
> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party ... and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested. Mich. Comp. Laws Ann. § 14.28 (West 1994). In addition, 'the attorney general has a wide range of powers at common law.' *Mundy v McDonald*, 216 Mich 444, 450; 185 NW 877 (1921). Thus, the Attorney General 'has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed.' *Michigan State Chiropractic Ass'n v Kelley*, 79 Mich App 789; 262 NW2d 676, 677 (1977)(citations omitted); see also *Mundy*, 216 Mich at 450, 185 NW 877 (Attorney General has broad discretion 'in determining what matters may, or may not, be of interest to the people generally.').
>
> The Court should only prohibit the Attorney General from intervening or bringing an action when to do so 'is clearly inimical to the public interest.' *In re*

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[20] Const 1963, art 5, §§ 3, 21; MCL 14.28.
[21] See MCL 14.101 See also *Attorney General v Public Service Comm*, 243 Mich App 487, 496-497; 625 NW2d 16 (2000).
[22] *Associated Builders & Contrs., Saginaw Valley Area Chapter v Perry*, 115 F3d 386, 390 (CA 6, 1997).

> *Intervention of Attorney Gen.*, 326 Mich 213; 40 NW2d 124, 126 (1949) (citation omitted); see also *Michigan State Chiropractic Ass'n*, 262 NW2d at 677. Although a procedural distinction exists between intervention and initiating an action, 'there is merger of purpose, by reason of public policy, when the interests of the State call for action by its chief law officer and there is no express legislative restriction to the contrary.' *In re Lewis' Estate*, 287 Mich. 179, 184, 283 N.W. 21 (1938)." See also *Humphrey v Kleinhardt*, 157 FRD 404, 405 (WD Mich 1994).

In that case, the Sixth Circuit determined that then Attorney General Frank Kelley should have been allowed to intervene as of right and appeal a district court decision that held a state statute preempted by federal law where the defendant Director of the Department of Labor and Governor did not appeal, but rather "permitted the thirty-year-old [statute] to go to its demise without fully exercising their right to object."[23] The Court concluded that the state's interests were not adequately represented by the decision not to appeal because substantial questions of law existed as to whether the state statute was in fact preempted by federal law, and that these circumstances warranted the Attorney General's intervention and appeal in the matter[24]:

> The existence of a substantial unsettled question of law is a proper circumstance for allowing intervention and appeal. Where such uncertainty exists, one whose interests have been affected adversely by a district court's decision should be entitled to "receive the protection of appellate review." A failure to seek such protection may constitute inadequate representation warranting intervention. "Although diligent prosecution may not require an appeal in every case . . . appeal . . . should be liberally granted where the judgment of the trial court raises substantial and important questions of law in relation to its correctness."
>
> * * *
>
> [The Attorney General's] burden of demonstrating inadequacy of representation was minimal, not heavy. Unlike the questionable status of the Electrical Contractors' Association in *Perry I*, [the Attorney General], representing the State of Michigan, has standing to argue the question of ERISA preemption of a state statute.

The circumstances here are analogous to those presented in *Associated Builders* and support the Attorney General's intervention. While this case does not yet involve an appeal and Governor

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[23] *Associated Builders*, 115 F3d at 390.
[24] *Associated Builders*, 115 F3d at 390-392.

Granholm remains an active party to the suit, it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation given the conflict in legal positions. Although there is no apparent collusion between the Governor and the plaintiffs or the Universities as cross plaintiffs, it is expected that the Governor's legal position will more closely align with the positions asserted by the plaintiffs and cross plaintiffs in this case. Under these circumstances, the Attorney General has met his minimal burden of showing possible – if not probable – inadequate representation in the defense of the constitutionality of § 26 without his intervention. Indeed, Governor Granholm has acknowledged the conflict between the respective positions, and does not oppose the Attorney General's intervention. For these reasons, this Court should exercise its discretion and allow the Attorney General to intervene as of right.

C. Alternatively, the Attorney General should be permitted to intervene under FR Civ 24(b).

Federal Rule of Civil Procedure 24, states:

> b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the

Should this Court determine that the Attorney General is not entitled to intervene as of right, he asks that this Court permit him to intervene under FR Civ P 24(b). Again, the Attorney General's motion is timely since this lawsuit is in its infancy. In addition, the Attorney General's defense of § 26 – that it withstands constitutional scrutiny under the First Amendment and the Fourteenth Amendment – will have questions of fact or law in common with the main action and

original parties as required by the rule.[25] Finally, permitting the Attorney General's intervention will in no way unduly delay or prejudice the adjudication of the rights of the original parties since this suit is still in its initial phase and no substantive proceedings have taken place. Accordingly, the Attorney General should permitted to intervene in accordance with FR Civ P 24(b).

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above and in the accompanying motion, Attorney General Michael A. Cox respectfully requests that this Court exercise its discretion and grant his motion to intervene in the complaint and cross claim filed in this matter pursuant to either FR Civ P 24(a) or (b).

Respectfully submitted,

Michael A. Cox
Attorney General

s/Margaret A. Nelson
Margaret A. Nelson (P30342)
Heather S. Meingast (P55439)
Joseph Potchen (P49501)
Assistant Attorneys General
Attorneys for Intervening Defendant Cox
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P.O. Box 30736
Lansing, MI 48909

Dated: December 14, 2006

[25] See, e.g. *Michigan State v Miller*, 103 F3d 1240, 1248 (CA 6, 1997), where the Sixth Circuit concluded that the Michigan Chamber of Commerce should have been permitted to intervene in a lawsuit challenging the constitutionality of state campaign finance laws because "[t]he Chamber's claim that the 1994 amendments are valid presents a question of law common to the main action."

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the following: **ATTORNEY GENERAL MICHAEL A. COX'S MOTION TO INTERVENE AS A DEFENDANT IN THE COMPLAINT FILED BY PLAINTIFFS, AND IN THE CROSS CLAIM FILED BY THE DEFENDANT UNIVERSITIES WITH BRIEF IN SUPPORT**

s/Margaret A. Nelson
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Ex 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

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, and the TRUSTEES of any other public college or university, community college, or school district,

Defendants,

and

Case No. 06-15024
Hon. David M. Lawson

ORDER GRANTING MOTION TO INTERVENE AND DIRECTING RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.
_____/

ORDER GRANTING ATTORNEY GENERAL'S MOTION TO INTERVENE AND DIRECTING RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on a motion to intervene filed by the Attorney General of the State of Michigan. That a state official is already a party to a lawsuit does not necessarily preclude intervention by a state attorney general. *See Northeast Ohio Coalition for Homeless and Service Employees v. Blackwell*, 467 F.3d 999, 1006-08 (6th Cir. 2006). Federal Rule of Civil Procedure 24(b) provides for permissive intervention when the intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). The Attorney General sought concurrence from the various parties in this matter. None of these parties, including defendant Governor Jennifer Granholm, who has the most at stake in the outcome of this motion, oppose the request for intervention. The plaintiffs do not oppose the motion, and the universities have not taken a position on the matter. Under these circumstances and pursuant to Federal Rule of Civil Procedure 24(b), the Court finds intervention is warranted.

Accordingly, it is **ORDERED** that the motion to expedite consideration of the motion to intervene [dkt # 9] is **GRANTED**.

It is further **ORDERED** that the motion to intervene [dkt # 8] is **GRANTED**.

It is further **ORDERED** that on or before **December 18, 2006**, the Attorney General shall file his answer to the motion for preliminary injunction or seek further time to respond. Any request for additional time must be accompanied by a statement indicating whether or not the Attorney General concurs or opposes the relief requested in the motion.

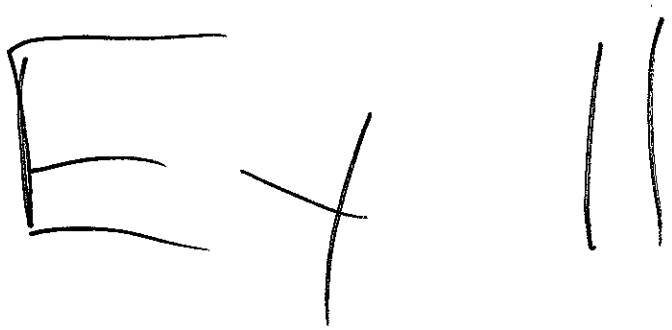
s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 14, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 14, 2006.

s/Felicia M. Moses
FELICIA M. MOSES



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERRELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

vs.

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, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants,

Case No. 2:06-CV-15024

Hon. David M. Lawson

MICHAEL A. COX, Attorney General for Michigan,

Intervenor-Defendant

and

The REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant,

MICHAEL A. COX, Attorney General for Michigan,

Intervenor Cross-Defendant.
_____/

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STIPULATION FOR ENTRY OF ORDER

It is hereby stipulated, by and between the parties that this Court may order as follows:

(1) that the application of Const 1963, art 1, § 26 to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;

(2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim, and

(3) that each party shall bear its own fees and costs.

The parties so stipulate.

s/Leonard M. Niehoff
Leonard M. Niehoff
Attorney for Cross-Plaintiffs

s/James E. Long (w/consent)
James E. Long
Assistant Attorney General
Attorney for Governor Granholm

s/Margaret A. Nelson (P30342)
Margaret A. Nelson (P30342)
Assistant Attorney General
Attorney for Attorney General Cox

s/George B. Washington
George B. Washington
Attorney for Plaintiffs

Ex 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	:	
Plaintiffs,	:	Civ. No. 2:06-cv-15024-DML-RSW
v.	:	HON. DAVID M. LAWSON
JENNIFER GRANHOLM, *et al.*,	:	HON. R. STEVEN WHALEN
Defendants,	:	
and	:	EMERGENCY MOTION FOR IMMEDIATE RESOLUTION OF PRIOR MOTION TO INTERVENE
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	OR A STAY OF THIS COURT'S TEMPORARY INJUNCTION
Intervenor Defendants.	:	

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Eric Russell and Toward A Fair Michigan move for an expedited hearing, and/or immediate resolution, of their motion to intervene, filed on December 18, 2006. Movants also

seek a stay of this Court's temporary injunction (the "December 19 Order") precluding the application of Art. I, § 26 of the Michigan Constitution to certain defendants in this action until July 1, 2007 pending appeal of the order. Alternatively, it should stay the December 19 Order pending resolution of the motion to intervene.

The basis for the primary relief sought by this motion is that the December 19 Order has denied, for all practical purposes, movants' motion to intervene by concluding that the "state defendants and their various elected representatives" adequately represent the interests of "all parties and the public." Consistent with that order, this Court should deny movants' motion explicitly so that movants may appeal the denial.

Pursuant to Local Rule 7.1, movants conferred with counsel for all other parties to this action to determine if they would consent to the relief sought by this motion. Plaintiffs, defendant Granholm, and the University Defendants have not consented to any of the relief sought by the motion. Attorney General Cox does consent to the motion to expedite resolution of the prior motion to intervene, but not to anything else.

/s/ Kerry L. Morgan
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/s/ Michael E. Rosman
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	:	
Plaintiffs,	:	Civ. No. 2:06-cv-15024-DML-RSW
v.	:	HON. DAVID M. LAWSON
JENNIFER GRANHOLM, *et al.*,	:	HON. R. STEVEN WHALEN
Defendants,	:	
and	:	
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	
Proposed Intervenor Defendants.	:	

BRIEF IN SUPPORT OF EMERGENCY MOTION FOR EXPEDITED RESOLUTION OF PRIOR MOTION TO INTERVENE AND A STAY OF THE COURT'S TEMPORARY INJUNCTION AGAINST A PROVISION OF THE MICHIGAN CONSTITUTION

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Issues Presented

1. Given that the Court has already concluded that the interests of the "parties and the public" are adequately represented by the current parties to this lawsuit, should the Court immediately deny movants' prior motion to intervene?

2. Should the Court stay its order, dated December 19, 2006, precluding application of Art. I, § 26 of the Michigan Constitution to certain defendants in this action pending appeal of that injunction?

3. Should the Court stay its injunction pending resolution of movants' motion to intervene?

Leading Authorities

Rule 24, Fed. R. Civ. P.

Leary v. Daeschner, 228 F.3d 729 (6th Cir. 2000).

Table Of Contents

Eric Russell and Toward A Fair Michigan (the "Proposed Intervenors") hereby submit this brief in support of their motion for expedited resolution of their prior motion to intervene and a stay of this Court's December 19, 2006 order (the "December 19 Order") enjoining the application of a section of the Michigan Constitution (Art. I, § 26) to defendants Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University (the "University Defendants") pending an appeal of the Court's December 19 Order. Alternatively, the Proposed Intervenors seek a stay of the December 19 Order pending resolution of their prior motion to intervene.

Background

On December 11, 2006, the University Defendants filed a cross-claim in this action claiming that Art. I, § 26 of the Michigan Constitution would violate its rights under the First Amendment to the United States Constitution. At that point, it became apparent that the University Defendants would not defend the validity of the provision in question, and the Proposed Intervenors prepared to intervene. They moved to intervene on December 18, 2006.

At the same time, the current parties to the action entered into a stipulation that enjoined the application of Art. I, § 26 to the University Defendants through 12:01 a.m. on July 1, 2007. The parties also stipulation that the University Defendants' cross-claim would be dismissed in its entirety. *See* Doc. No. 26, ¶ 2. On December 19, 2006, this Court entered an injunction based upon that stipulation, and enjoined the application of Art. I, § 26 to the University Defendants through 12:01 a.m. on July 1, 2007. The Court's order stated: "The Court finds that the interests

of all parties and the public are represented adequately through the state defendants and their various elected representatives . . . " The Proposed Intervenors intend to appeal the December 19 Order prior to the effective date of Art. I, § 26. Russell's application to the University of Michigan Law School will be considered with the use of race and ethnicity, and he will be disadvantaged thereby in violation of the general prohibition Art. I, § 26, if the injunction remains in place.

Argument

I. THIS COURT SHOULD EXPEDITIOUSLY RESOLVE MOVANTS' PRIOR MOTION TO INTERVENE

Rule 24(a)(2) states that a party may intervene as of right under certain circumstances "unless the applicant's interest is adequately represented by existing parties." For the reasons set forth in their papers supporting their motion to intervene, the Proposed Intervenors believe that the current parties to this litigation do not adequately represent their interests. The stipulation entered into by the parties, leading to this Court's December 19 Order, only underscores this inadequacy. But this Court's December 19 Order specifically concluded that the interests of "all parties and the public are represented adequately through the state defendants and their various elected representatives." Thus, this Court apparently has already made a finding precluding intervention as of right.

Although adequacy of representation is not explicitly mentioned in Rule 24(b), it is also a

consideration in determining whether permissive intervention should be allowed. *See United States Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978).

Accordingly, this Court should resolve the motion to intervene as expeditiously as possible and before it becomes meaningless to the Proposed Intervenors. It should deny the motion to intervene based upon its previous finding of "adequate representation," so that movants can appeal that holding to the Sixth Circuit. Alternatively, should the Court believe that its previous holding does not resolve the motion to intervene, it should expedite a hearing on the motion and resolve the motion no later than December 21, 2006. Proposed Intervenors note that the City of Lansing also has asked for expeditious resolution of its motion to intervene.

II. THIS COURT SHOULD GRANT A STAY OF ITS DECEMBER 19 ORDER UNTIL AN APPEAL OF THAT ORDER IS RESOLVED, OR, ALTERNATIVELY, UNTIL THE MOTION TO INTERVENE IS RESOLVED

This Court also should stay the December 19 Order pending an appeal of that order. Whether the Court grants or denies the motion to intervene, Proposed Intervenors will appeal the December 19 Order. As set forth in its papers opposing the University Defendants' motion for a preliminary injunction, there is a strong likelihood of success on such an appeal because there is no basis for any claim that Art. I, § 26 violates the First Amendment to the United States Constitution, particularly prior to it having been interpreted by the Michigan Supreme Court, and no other basis for this Court to enjoin a provision of the Michigan Constitution. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). Moreover, the Proposed Intervenors, and

particularly Eric Russell, will be harmed by the Court's December 19 Order in that his application to the University of Michigan School of Law will be treated unequally as a consequence of his race, in violation of the protections of Art. I, § 26. Given that the University Defendants will not be substantially harmed if they are forced to comply with the law, and that the public interest is best served by the will of the people of Michigan being enforced in accordance with Michigan law, a stay pending appeal should be granted.

Alternatively, and assuming *arguendo* that this Court believes that it has not already resolved a dispositive factual issue related to the Proposed Intervenors' motion to intervene, and that it cannot be resolved prior to the effective date of Art. I, § 26, then this Court should stay its December 19 Order until resolution of the motion to intervene. The underlying assumption of the December 19 Order is that the existing parties to this litigation are adequately representing the interests of the public, including the Proposed Intervenors. If the Court wishes to hear further argument on the motion to intervene, then that underlying assumption is in question, and the Court should stay its December 19 Order until that question can be resolved.

Conclusion

For the foregoing reasons, the motion to expedite hearing on the prior motion to intervene should be granted, and the motion for a stay of the December 19 Order should be granted. Alternatively, this Court should stay the December 19 Order until the motion for intervention can be resolved.

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/s/ Michael E. Rosman
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Certificate of Service

I hereby certify that on December 19, 2006, I electronically filed the foregoing motion and brief in support of an expedited hearing on a prior motion for intervention and other relief with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

George B. Washington (attorney for plaintiffs)

Leonard Niehoff (attorney for defendants Regents of the University of Michigan, Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University)

James Long (attorney for defendant Granholm)

Margaret Nelson (attorney for intervenor Cox)

/s/ Michael E. Rosman
Michael E. Rosman

Ex 13

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	:	
Plaintiffs,	:	Civ. No. 2:06-cv-15024-DML-RSW
v.	:	HON. DAVID M. LAWSON
JENNIFER GRANHOLM, *et al.*,	:	HON. R. STEVEN WHALEN
Defendants,	:	
and	:	NOTICE OF APPEAL
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	
Intervenor Defendants.	:	

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Eric Russell and Toward A Fair Michigan hereby appeal to the Sixth Circuit Court of Appeals from this Court's amended order dated December 19, 2006 and from its failure to grant

them intervenor status.

/s/ Kerry L. Morgan
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/s/ Michael E. Rosman
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Certificate of Service

I hereby certify that on December 21, 2006, I electronically filed the foregoing notice of appeal with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

George B. Washington (attorney for plaintiffs)

Leonard Niehoff (attorney for defendants Regents of the University of Michigan, Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University)

James Long (attorney for defendant Granholm)

Margaret Nelson (attorney for intervenor Cox)

/s/ Michael E. Rosman
Michael E. Rosman