STATE OF MICHIGAN 22nd JUDICIAL COURT WASHTENAW COUNTY	REQUEST FOR HEARING ON A MOTION (PRAECIPE) ORDER/JUDGMENT	CASE NO. 07-01-AZ

Plaintiff name(s) **ERIC RUSSELL, et al.**	VS.	Defendant name(s) **The Regents of the University of Michigan**
Plaintiff's attorney, bar no., address and telephone no. Kerry L. Morgan (P32645) Pentiuk, Couvreur & Koblijak, PC 2915 Biddle Avenue Wyandotte, MI 48192 (734) 281-7100		Defendant's attorney, bar no., address, and telephone no. Leonard M. Niehoff (P36695) 350 S. Main Street, Suite 300 Ann Arbor, MI 48104 (734) 213-3625

List additional attorneys on other side

1. Motion Title: Motion for Summary Disposition

2. Moving Party: Defendants the Regents of the University of Michigan and Mary Sue Coleman Telephone No. **(734) 213-3625**

3. Please place on the motion calendar for:

Judge	Bar No.	Date	Time
Melinda Morris		**March 7, 2007**	**2:00 p.m.**

Adj. to:_____ Adj. to: _____ Adj. to: _____

4. I certify that I have made personal contact with David Thompson regarding concurrence in relief sought in this motion and the concurrence has not been granted.

January 22, 2007
Date

_____
Attorney Leonard M. Niehoff **(P36695)**
Bar no.

ORDER/JUDGMENT

DATED:

IT IS ORDERED THAT THIS MOTION IS:

☐ DENIED ☐ GRANTED IN PART/DENIED IN PART ☐ TAKEN UNDER ADVISEMENT ☐ DISMISSED

☐ GRANTED AND IT IS FURTHER ORDERED AND ADJUDGED:

_____
CIRCUIT JUDGE

Approved as to form and substance by Counsel for:

_____
Plaintiff

_____
Defendant

_____
Date

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and
on behalf of all similarly-situated persons,
and TOWARD A FAIR MICHIGAN,
a Michigan non-profit corporation,

Plaintiffs,

vs.

DAVID A. BRANDON, LAURENCE B. DEITCH,
OLIVIA P. MAYNARD, REBECCA McGOWAN,
ANDREA FISHER NEWMAN, ANDREW C. RICHNER,
S. MARTIN TAYLOR, KATHERINE E. WHITE,
MARY SUE COLEMAN, in their official capacities,
THE REGENTS OF THE UNIVERSITY OF MICHIGAN
and JENNIFER GRANHOLM, in her official capacity as
Governor of Michigan,

Defendants.
_____/

Case No. 07-01-AZ

Hon. Melinda Morris

PENTIUK, COUVREUR & KOBLIJAK, PC
Kerry L. Morgan (P32645)
2915 Biddle Avenue
Suite 200
Wyandotte, MI 48192
(734) 281-7100
Attorneys for Plaintiffs

BUTZEL LONG, PC
Leonard M. Niehoff (P36695)
Christopher M. Taylor (P63780)
Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that the attached Motion for Summary Disposition of Defendants the Regents of the University of Michigan and President Mary Sue Coleman will be brought on for hearing before the Honorable Melinda Morris on Wednesday, March 7, 2007, at 2:00 p.m.

Respectfully submitted,

BUTZEL LONG, PC

Leonard M. Niehoff (P36695)
Christopher M. Taylor (P63780)
Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

Dated: January 22, 2007

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350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

_____/

MOTION FOR SUMMARY DISPOSITION
OF DEFENDANTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN
AND PRESIDENT MARY SUE COLEMAN

Defendants The Regents of the University of Michigan and President Mary Sue Coleman hereby move this Court for an order granting summary disposition in their favor pursuant to MCR 2.116(c)(4) and (c)(8) for the following reasons:

1. Plaintiffs Eric Russell ("Russell"), an applicant to the University of Michigan Law School and Toward a Fair Michigan ("TAFM"), a domestic corporation, bring this action for declaratory and injunctive relief against the Regents of The University of Michigan and President Mary Sue Coleman.

2. Plaintiff TAFM does not have standing to bring this action.

3. Plaintiff Russell has not identified a case or controversy that provides this Court with jurisdiction to award the requested relief.

4. The requested relief is inconsistent with the plain language of the Constitutional amendment Plaintiffs ask this Court to interpret.

5. For all of the foregoing reasons, Plaintiffs have failed to state a claim upon which relief can be granted or over which this Court has proper jurisdiction.

6. Concurrence in the relief requested was sought and denied.

WHEREFORE Defendants the Regents of the University of Michigan and President Mary Sue Coleman respectfully request that this Court grant summary disposition in their favor and dismiss Plaintiffs' claims against them in their entirety.

A brief in support of this Motion is filed herewith.

Respectfully submitted,

BUTZEL LONG, PC

Leonard M. Niehoff (P36695)
Christopher M. Taylor (P63780)
Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

Dated: January 22, 2007

STATE OF MICHIGAN
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Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

_____/

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION OF DEFENDANTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN AND PRESIDENT MARY SUE COLEMAN

INTRODUCTION

Plaintiffs Eric Russell ("Russell"), an applicant to the University of Michigan Law School, and Toward a Fair Michigan ("TAFM"), a domestic corporation, bring this action for

declaratory and injunctive relief against the Regents of the University of Michigan and President Mary Sue Coleman.[1] The Complaint suffers from numerous fatal infirmities. TAFM does not have standing. Russell has not identified a case or controversy that provides this Court with jurisdiction to award the requested relief. And, finally, the requested relief is inconsistent with the plain language of the very constitutional Amendment that Plaintiffs ask this Court to interpret. This case should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

On November 7, 2006, the Michigan Constitution was amended to include a section providing that no state entity, including the Universities, shall "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" (the "Amendment").[2] By operation of Michigan law, the Amendment was scheduled to become effective on December 23, 2006.[3]

Existing controversies regarding the validity and effect of the Amendment escalated after its passage. On November 8, a collection of individual and organizational plaintiffs filed an action challenging the Amendment in the United States District Court for the Eastern District of Michigan. That lawsuit named as defendants Governor Granholm, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, and the Board of Regents of the University of Michigan. Attorney General Mike Cox later intervened in the case.[4]

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[1] The Regents of the University of Michigan is the corporate body constitutionally charged with the "general supervision" of the institution. Mich Const 1963, art 8, § 5. Plaintiffs therefore err in naming the Regents individually "in their official capacities."

[2] The complete text of the Amendment is attached as Exhibit A.

[3] Mich. Const. 1963, art. XII, § 2 provides that an amendment becomes effective "at the end of 45 days after the date of the election at which it was approved."

[4] Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN), et al. v Granholm, et al., case no. 06-15024. It should be noted that, in

On December 11, the Universities filed a cross-claim against the Governor and a motion for preliminary injunctive relief to preserve the status quo. The motion filed by the Universities asked for the opportunity to complete the current admissions and financial aid cycle (which began last fall and will end this spring) under their existing policies.[5] The Universities had profound worries that abandoning these policies in the middle of this cycle would have dire consequences. They recognized that such a mid-cycle change would require them to apply different standards than were announced and relied upon by applicants, counselors, and others. Further, they believed that an abrupt shift of this nature would deprive them of their academic freedom right, recognized by the United States Supreme Court in *Grutter*, to admit those students they thought would contribute the most to a rich and diverse learning environment.

After extensive discussions and negotiations, on December 18, 2006, all the existing parties to the litigation submitted a stipulation to the District Court that in pertinent part provided as follows:

> It is hereby stipulated, by and between the parties, that this Court may order as follows:
>
> (1) that the application of Const. 1963, art. I, § 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

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addition, the Governor on November 9 issued a directive instructing the Michigan Civil Rights Commission to "investigate the impact" of the Amendment, including "upon state educational institutions and educational programs," and to issue a report within 90 days. Exec. Directive No. 2006-7.

[5] Months before the effective date of the Amendment, the Universities designed, implemented, trained personnel around, and publicly announced their admissions and financial aid policies, which were developed in reliance on this Court's reaffirmation in *Grutter v Bollinger*, 539 U.S. 306 (2003) that they have the right, grounded in the First Amendment, to select their students and may, in the course of doing so, give some consideration to factors such as race.

> entirety, with prejudice only as to the specific injunctive relief requested in the cross claim . . .

This stipulation was endorsed by every party then before the District Court. On the morning of December 19, the District Court entered a Temporary Injunction that, consistent with the stipulation, enjoined application of the Amendment to the Universities' admissions and financial aid policies until July 1, 2007, and dismissed the Universities' cross-claim.

Russell and TAFM had, in the meantime on December 18, filed a motion to intervene in the case. After the District Court entered the Temporary Injunction on December 19, Russell and TAFM filed a motion to expedite consideration of their request for intervention and sought a stay. The District Court did not immediately rule on their motion and so, on December 21, Russell and TAFM filed a notice of appeal with the Sixth Circuit. On December 22, they filed an Emergency Motion for a Stay Pending Appeal and a Petition for Writ of Mandamus.

On December 26 the Sixth Circuit ordered briefing on a highly accelerated schedule. On December 27, the District Court granted Russell's pending motion to intervene but denied that of TAFM.[6] On December 29 the Sixth Circuit issued an opinion concluding that Russell, as an applicant for admission to the University of Michigan Law School, had a "direct interest in whether [the Amendment] applies to the Law School's admissions decisions this year" and agreeing that he could intervene in the case.[7] The Sixth Circuit has not yet addressed TAFM's appeal of the District Court's denial of its request to intervene.[8]

The Sixth Circuit went on, in its December 29 opinion, to issue a stay of the Temporary Injunction.[9] On January 3, the University announced that it was placing a brief a moratorium on

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[6] A copy of the District Court opinion is attached under Exhibit B.
[7] Sixth Circuit opinion, p. 5. A copy of the Sixth Circuit opinion is attached under Exhibit C.
[8] The Complaint fails to disclose that the District Court denied TAFM's motion to intervene in the litigation and that the Sixth Circuit has not ruled on that decision.
[9] *Id*, p 13.

admissions and financial aid decisions until it could evaluate the impact of the court's ruling.[10] In the meantime, on January 2, Russell and TAFM filed this state court case. On January 8, Plaintiffs in the federal case petitioned Justice Stevens of the United States Supreme Court to dissolve the stay entered by the Sixth Circuit and to reinstate the Temporary Injunction.[11]

On Wednesday, January 10, the moratorium was lifted and President Mary Sue Coleman and Provost Theresa Sullivan issued a statement to the public and the campus community that, in pertinent part, said as follows:

> We are writing to let you know of the University's next steps with respect to Proposal 2 for admissions and financial aid ...
>
> We cannot sustain any further delay in our admissions process without harming our ability to enroll a class of students for the 2007-08 academic year. Therefore, we are resuming admissions today at all levels of the University. **As stated in the language of Proposal 2, our admissions and financial aid processes will not discriminate, nor grant preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin.** Of course, we will recognize exceptions provided in the amendment including one for programs that receive federal funds.[12]
>
> We want to emphasize that there is uncertainty about how Proposal 2 will be interpreted by the courts. However, because of the Sixth Circuit Court's decision and in the absence of further guidance from the courts, **we will proceed cautiously by adjusting our admissions and financial aid policies such that race and gender will have no effect on the decision-making process.**
>
> * * *
>
> When admitting students to U-M, our focus has always been first and foremost on academic excellence. By far the greatest consideration in undergraduate admissions is given to the student's academic achievement in challenging, college-preparatory courses. In addition, we will continue to consider a range of attributes that

[10] A copy of this announcement from University of Michigan Provost Theresa Sullivan is attached under Exhibit D.

[11] The Court denied that request on January 19, 2007.

[12] *See* discussion in section C, *infra*.

> contribute to a dynamic and diverse intellectual environment, including: the student's character and motivation; interesting personal experiences; special talents and abilities; geographic diversity; civic engagement and concern for community; demonstrated ability to overcome obstacles; leadership potential; grasp of world events; intellectual interests; and socioeconomic indicators such as low income or being the first in the family to attend college.
>
> * * *
>
> The University of Michigan is a dedicated and creative community, and **we will seek innovative new ways to sustain our diversity within the boundaries of the law.** We must keep the doors of opportunity open for all.[13]

Similarly, the University of Michigan Law school issued an announcement that included these statements:

> **We will modify our admissions process ... so that the factors listed in Proposal 2 will have no effect on decisionmaking.** See Letter from President Mary Sue Coleman Regarding Proposal 2.
>
> Proposal 2 explicitly permits compliance with federal laws and funding requirements. Consistent with federal law (implementing 20 U.S.C. 1094(a)(17)), we will continue to collect data on the race and sex of our applicants. A staff member will remove the page of the application that contains the applicant's self-reported race or ethnicity after recording the data, however, so that the information will not be available to the admissions officers who conduct substantive reviews. Moreover, LSDAS will remove all racial data from the reports it provides us.[14]

This motion is necessary because Plaintiffs have not voluntarily dismissed their Complaint despite these developments.

ARGUMENT

Plaintiffs' Complaint seeks a declaratory judgment and, based upon that judgment, an injunction. The controlling law and the undisputed facts establish that Plaintiffs have no claim

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[13] The full text of the announcement is attached under Exhibit E.
[14] The full text of the announcement is attached under Exhibit F.

and that this is a wholly inappropriate case for the relief requested.[15] Indeed, as will be shown, the relief requested is not even consistent with the plain language of the Amendment.

I. This is an Inappropriate Case for a Declaratory Judgment

The Michigan Court Rules expressly leave the question of whether it is proper to grant declaratory relief to the sound discretion of the trial court. *See* MCR 2.605(A)(1) ("In a case of actual controversy within its jurisdiction, a Michigan court of record *may* declare ... rights and other legal relations")(emphasis supplied). This is an inappropriate case for a declaratory judgment because (a) plaintiff TAFM does not have standing to bring this claim and (b) there is no existing "case or controversy" between Russell and the University of Michigan.[16]

A. TAFM Does Not Have Standing

TAFM lacks standing to bring this claim. TAFM does not claim to be an applicant to the University. Nor does it claim any other relationship to the University that would be affected in any way by the policies that are the subject of this lawsuit. Further, TAFM does not claim to be a membership organization representing applicants or others with a relationship to the University. Instead, TAFM is, according to its Articles of Incorporation, a Michigan not-for-profit corporation organized "exclusively for educational purposes" (Article VI), specifically to

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[15] Dismissal is proper under MCR 2.116(c)(4) and (c)(8). 2.116 (c)(4) applies because standing is jurisdictional in nature and, as this brief shows, TAFM does not have standing. *Michigan Chiropractic Council v Commissioner, Office of Fin & Ins Servs*, 475 Mich 363, 371-372 (2006). In addition, TAFM's lack of standing represents a failure to state a claim under MCR 2.116(c)(8). *See, e.g., 46th Circuit Trial Court v Crawford County*, 266 Mich App 150, 178 (2005). For the reasons discussed herein, Russell has failed to identify an existing case and controversy between himself and the University and has therefore also failed to state a claim under MCR 2.116(c)(8). In the alternative, the undisputed facts show that – even if a legally cognizable controversy existed at the time Russell filed his Complaint – such a controversy no longer exists. Dismissal is therefore alternatively proper under MCR 2.116(c)(10).

[16] It has been suggested that under such circumstances the trial court even has a duty to take notice of its lack of subject matter jurisdiction *sua sponte* and dismiss a request for declaratory relief. *See Detroit Base Coalition for the Human Rights of the Handicapped v Michigan Dept of Social Services*, 158 Mich App 613, 621 (1987) (Swallow, J, concurring).

"further citizen understanding of the equal opportunity issues involved in guaranteeing civil rights for all citizens" (Article II).[17]

The only interest TAFM alleges in this action is that it "has had to divert resources from its primary mission to investigate defendants' intention to comply with the law and has had its ability to accurately advise people of their rights frustrated as a consequence of defendants' statements and conduct" (Complaint ¶ 5). These claimed interests are insufficient to confer standing to bring this action.[18]

Under controlling Michigan law, standing requires – at a minimum – the following elements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lee v Macomb Co Bd of Comm'rs, 464 Mich 726, 739 (2001), quoting *Lujan v Defenders of Wildlife*, 505 US 555, 560-561 (1992)(internal quotation marks omitted).[19] *See also, Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629 (2004) and *Crawford v*

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[17] The TAFM Articles of Incorporation are attached under Exhibit G. This appears inconsistent with the Complaint's allegation that TAFM was formed "to ensure 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." Complaint, ¶ 5. For purposes of this motion the University takes as true the allegations of the Complaint.

[18] The University notes that, in the case pending in the United States District Court for the Eastern District of Michigan, Judge Lawson concluded that these "interests" did not suffice to afford TAFM the right to intervene. *See* District Court opinion, Exhibit B.

[19] The minimal standing requirements detailed in *Lee* are *constitutional* requirements. *Michigan Education Ass'n v Superintendent of Public Instruction*, __ Mich App __ (2006) at * 6 (attached under Exhibit H).

Dep't of Civil Svcs, 466 Mich 250, 258 (2002). These requirements apply to declaratory judgment actions. *MOSES v SEMCOG*, 270 Mich App 401, 416 (2006).

TAFM can satisfy none of these prerequisites. Its claimed injury is not a legally protected interest; it is not concrete and particularized; it is not caused by the conduct complained of; and it will not be redressed through the favorable resolution of the suit. TAFM's claims must therefore be dismissed.

TAFM alleges that it has been injured because it has been "diverted from its primary mission" in order to determine whether the University is complying with the law. This obviously does not qualify as a "legally protected interest." TAFM has no legally protected interest in having this court rescue it from its own decision to pursue a distraction.

TAFM further alleges that its "ability to accurately advise people of their rights [has been] frustrated" by the University. This allegation makes no sense: TAFM's ability to advise people of their rights (as TAFM understands them) is unaffected by the University. Perhaps TAFM means to allege that it has been unable to confirm that the University of Michigan shares its understanding of the law. But TAFM has no legally protected interest in having others share its understanding or act in accordance with that understanding. *See, House Speaker v State Administrative Board*, 441 Mich 547, 556 (1993)("[A] generalized grievance that the law is not being followed" is not sufficient to create standing).

In addition, these alleged "injuries" are neither concrete nor particularized. This requirement means that the injury must be distinct from that of the public generally. *Michigan Citizens for Water Conservation v Nestles Waters N America Inc*, 269 Mich App 25 (2005). TAFM's claimed injury – that it doesn't know whether the University shares its understanding of the Amendment and will act in accordance with that understanding – is indistinguishable from

that of the public at large. Indeed, even if TAFM cares more about this question than do some members of the general public, this does not suffice to confer standing. The requirement of a concrete and particularized injury exists to ensure that standing is not conferred simply because a litigant passionately wants it. *MOSES v SEMCOG*, 270 Mich App 401, 414 (2006) ("standing requires more than having a 'personal stake' in the outcome of litigation sufficient to ensure vigorous advocacy"). In sum, TAFM does not have standing to bring this claim.

TAFM's fundamental standing problem also shows why its claim is precisely the sort of request for an advisory opinion that the declaratory judgment law disallows. TAFM has no concrete or particularized injury; rather, its claim is that its ability to provide people with advice about the Amendment has been hampered by statements the University has allegedly made in public and in pleadings. TAFM thus seeks an advisory opinion from this court so it can, in turn, give people advice about what the University needs to do to comply with the Amendment. That TAFM would like an answer to these questions does not give it standing to seek a declaratory judgment or, as will be discussed in the next section, give this court jurisdiction to issue one.

B. There is No Existing Case or Controversy Warranting a Declaratory Judgment

That leaves Russell, who has applied to the University of Michigan Law School for admission. The Complaint does not expressly allege why Russell needs a declaratory judgment. Presumably, however, he thinks he needs one as a predicate for his request for injunctive relief:

> If Defendants are not enjoined, Plaintiff Russell's application for admission to the Law School will be treated unequally in that he will be disadvantaged by preferences given to other applicants based upon consideration of those other applicants' race, color, ethnicity, or national origin, in violation of [the Amendment].

Complaint ¶ 32. Russell apparently wants this Court to declare that the University cannot consider these factors during this admissions cycle and to enjoin it from doing so.

Of course, the Complaint says nothing about how the University actually intended to proceed in light of the Sixth Circuit ruling. Nor could it, since Russell filed his Complaint immediately after that ruling and before the University had announced what it intended to do. Furthermore, the Complaint says virtually nothing about the Law School (the academic unit to which Russell had applied and that would make the decision regarding his application), let alone about what it planned to do. Again, the Complaint could not include such allegations because its filing preceded the Law School's announcement.

A Complaint based upon hypothetical concerns about what might or might not happen seeks an advisory opinion and does not provide a basis for jurisdiction. *See McGill v Automobile Ass'n of Michigan*, 207 Mich App 402 (1994)("[w]here no case or actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment. A case or actual controversy does not exist where the injuries sought to be prevented are merely hypothetical; there must be an actual injury or loss") and *Fieger v Bowman*, 174 Mich App 467 (1988)(holding that without the "distinct and palpable injury" requirement "courts would be continually called upon to decide abstract questions on hypothetical issues").

Indeed, the events that followed the filing of the Complaint show Russell's concerns to be not just hypothetical, but nonexistent. The January 10 announcement of President Coleman and Provost Sullivan plainly state that, in light of the Sixth Circuit stay, the University of Michigan will "not discriminate [against], nor grant preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin," will "proceed cautiously by adjusting [its] admissions and financial aid policies such that race and gender will have no effect on the decision-making process," and will act "within the boundaries of the law." The Law School announcement similarly declares that "the factors listed in Proposal 2 will have *no* effect on

decisionmaking" and describes the careful data collection process it will use to comply with federal law, including an assurance that this "information will not be available to the admissions officers who conduct substantive reviews." In short, even if there was a "case and controversy" between Russell and the University when the Complaint was filed it clearly ceased to exist on January 10.

The law recognizes a strong presumption that the University will honor its announcement and act within the boundaries of the Amendment. *See, e.g., West Shore Community College v Manistee County Board of Comm'rs*, 389 Mich 287, 302 (1973)("Community college trustees, like all public officers, are presumed to act in accordance with the law"); *Poynter v Drevdahl*, 359 F Supp 1137, 1142 (WD Mich 1972)("Consideration must begin with a presumption of validity attaching to actions of [the Northern Michigan University] board, acting under statutory authority and buttressed by the Constitution of the State of Michigan"); and *United States v Corrado*, 121 F Supp 75, 79 (ED Mich 1954) ("In the absence of any proof to the contrary there is a strong assumption that public officials have properly discharged their duties"). The Complaint alleges no facts suggesting otherwise.[20]

C. The Relief Requested Cannot Be Granted Under the Plain Language of the Amendment

The Complaint concludes by asking for a judgment that (a) declares the Amendment "applies to the University of Michigan's current admissions and financial aid decisions and that Coleman, the Regents, and the Individual Regent Defendants have no legal excuse to avoid complying with it immediately"; (b) declares that the Amendment "precludes consideration of

[20] The Complaint logically could not do so since Plaintiffs filed it before the University had an opportunity to announce how it intended to proceed. Instead, the Complaint quoted out of context some statements made by President Coleman in a speech immediately after passage of the Amendment – for example, omitting her clear declaration that "Of course the University of Michigan will comply with the laws of the state." Compare Complaint ¶ 20 with President Coleman's speech, attached under Exhibit I.

race, sex, ethnicity, national origin and color in making any admissions or financial aid decisions at the University of Michigan"; and (c) enjoins the University from "employing any policy, procedure, or system of admissions or financial aid for any of the schools or colleges at the University of Michigan that is based in any way or part on consideration of the applicant's race, color, ethnicity, or national origin." Complaint, p. 8. As a matter of law, this Court cannot afford the relief requested because Plaintiffs' overreaching demand is inconsistent with the plain language of the Amendment.

The Amendment expressly allows departures from its prohibition against "preferential treatment" under certain specified circumstances. For example, the Amendment allows the consideration of such factors as race and gender "to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state" (Section 4). It allows a departure where "bona fide qualifications based on sex are reasonably necessary to the normal operation of public employment, public education, or public contracting" (Section 5). And it allows the consideration of such factors if prohibiting it would bring the Amendment into conflict with "the United States Constitution or federal law" (Section 7) or would have the effect of invalidating an existing "court order or consent decree" (Section 9) – indeed, issues raised by sections 7 and 9 are currently pending in the federal litigation.[21]

The Complaint allows for none of this. Instead, Plaintiffs demand declaratory and injunctive relief that is absolute and unqualified in its scope. Thus, the Complaint asks this Court to declare that the Amendment precludes consideration of these factors in making "*any* admissions or financial aid decisions" and to enjoin the University from using "*any* policy,

[21] Of course, even if the Amendment did not require this result, the Supremacy Clause of the United States Constitution would. *See, e.g., Gonzales v Raich*, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

procedure, or system of admissions or financial aid for *any* of the schools or colleges at the University of Michigan that is based *in any way or part* on consideration of the applicant's race, color, ethnicity, or national origin." As a matter of law, Plaintiffs have failed to state a claim – and cannot state a claim – that would justify such a judgment. Their Complaint is subject to dismissal under MCR 2.116(c)(8) for this reason as well.

CONCLUSION

The Amendment is among the longest provisions in the Michigan Constitution and will doubtless require interpretation in the state and federal courts and by the Michigan Civil Rights Commission. The University and Mary Sue Coleman respectfully submit, however, that those issues are properly joined in a factual context that involves the proper parties and an actual case and controversy. This is, quite plainly, not such a case.

Respectfully submitted,

BUTZEL LONG, PC

Leonard M. Niehoff (P36695)
Christopher M. Taylor (P63780)
Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

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