Nos. 06-2640, 06-2642

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellees,

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

Intervening Defendant – Appellee,

and

ERIC RUSSELL ; TOWARD A FAIR MICHIGAN,

Proposed Intervenors-Defendants – Appellants.

INTERVENING DEFENDANT-APPELLEE ATTORNEY GENERAL MIKE COX'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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Statement of Facts

On November 7, 2006, Michigan voters overwhelmingly approved passage of Proposal 2, which amended the Michigan Constitution to prohibit the granting of 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.[1] Proposal 2, now art 1, § 26 of the 1963 Constitution, provides:

> (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 subsection 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

[1] 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.

> 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.

Under the Michigan Constitution, this section takes effect at 12:01 a.m. on December 23, 2007.[2]

On November 8, 2006, Plaintiffs filed a complaint for injunctive and declaratory relief raising a facial challenge to § 26 of the Michigan Constitution, previously Proposal 2. The complaint alleged equal protection and First Amendment challenges under the federal constitution. The complaint also asserted that § 26 is preempted by Titles VI and VII of the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs requested the district 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 named 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]

On December 11, 2006, the University Defendants filed a cross claim with the district court against defendant Governor Granholm seeking declaratory and injunctive relief. The cross claim asserted 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

[2] See Const 1963, art 12, § 2.
[3] Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

if the Universities are required to implement § 26 upon the section's effective date ---- 12:01 a.m. December 23, 2006.[4] Among other issues, the Universities asserted they had already begun both their admissions and financial aid cycles, with some decisions being made prior to the passage of § 26. They alleged that to implement § 26 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 requested 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 sought a preliminary injunction enjoining the application of § 26 to their current admissions and financial aid cycles 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.

On December 14, 2006, the Attorney General filed a motion to intervene with the district court and sought an expedited hearing on the motion. The district court granted the Attorney General's motion the same day. Plaintiffs then filed an amended complaint on December 17, 2006.

Recognizing the unique situation confronting the Universities in their admissions processes that began as early as July 2006, and in fairness to the student applicants whose choices and applications were made well in advance of the adoption of Proposal 2, the Attorney General agreed that the equities weighed in favor of a narrowly drawn six month temporary

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

injunction. This is what, in the Attorney General's opinion, distinguished the injunctive request on the Universities' cross claim from all other issues, such as contracting and hiring. This decision was also strategic in that any stipulated injunctive relief was dependent on dismissal of the Universities' cross claim. On December 18, 2006, the University Defendants, the Governor, and the Attorney General agreed to the entry of a temporary injunction that would enjoin the application of § 26 to the University Defendants regarding the current admissions and financial aid cycles, and would expire no later than 12:01 a.m., July 1, 2007. The University Defendants also agreed to dismiss their cross claim filed against Governor Granholm in its entirety, with prejudice as to the injunctive relief. These parties filed their stipulated agreement with the district court.

Also on December 18, 2006, Proposed Intervenors-Appellants Eric Russell and Toward a Fair Michigan, filed a motion to intervene as defendants in the complaint and cross claim. They did not file a motion for immediate consideration along with the motion to intervene.

On December 19, 2006, the district court entered an order granting the injunction and dismissing the cross claim as stipulated to by the parties ---- Plaintiffs, the Defendant/Cross Plaintiff Universities, the Defendant/Cross Defendant Governor, and Defendant Attorney General Cox. On the same day, Proposed Intervenors-Appellants Eric Russell and Toward a Fair Michigan, recognizing their strategic error in failing to originally request immediate consideration of their motion to intervene, filed a motion to expedite hearing on their motion to intervene and for a stay pending appeal of the order granting the injunction.

Two days later, on December 21, 2006, the Proposed Intervenors filed a notice of appeal, and pleadings entitled "Emergency Motion for a Stay Pending Appeal" and a "Petition for Writ of Mandamus or Prohibition to Order the US District Court for the Eastern District of Michigan

to Lift the Injunction it Issued on December 19, 2006." On December 26, 2006, this Court entered an order directing the parties to respond to the Proposed Intervenor's emergency motion by December 28, 2006.

Subsequently, on December 27, 2006, the district court granted in part and denied in part the Proposed Intervenors motion to intervene. The district court denied the motion with respect to the organization, Toward a Fair Michigan, concluding that its interests in the litigation would be adequately represented by the Attorney General. The district court, however, granted the motion with respect to Eric Russell, concluding that he has an individual interest that will not be adequately represented by the existing parties because he seeks the immediate implementation of § 26. (See Opinion and Order granting in part and denying in part motions to intervene, 12/27/06, pp 14-15.)

Pursuant to this Court's order, the Attorney General now files his response in opposition to the Petition for Writ of Mandamus.

Argument

I. Neither Intervenor-Defendant Eric Russell nor non-party Toward a Fair Michigan is entitled to the extraordinary relief of a writ of mandamus.

A. Standard of Review

This Court has recognized that mandamus relief is an "extraordinary remedy" that should be utilized only infrequently.[5] This extraordinary remedy is generally reserved for "questions of unusual importance necessary to the economical and efficient administration of justice," or "important issues of first impression."[6] The traditional use of the writ of mandamus in aid of appellate jurisdiction "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[7] A party who seeks a writ bears the burden of proving that it has no other means of attaining the relief desired,[8] and that the right to issuance of the writ is "clear and indisputable."[9] "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'"[10] Similarly, a court of appeals has no occasion to engage in extraordinary review by mandamus, when it can exercise the same review by a contemporaneous ordinary appeal.[11]

B. Neither Intervenor-Defendant Eric Russell nor non-party Toward a Fair Michigan is entitled to the extraordinary relief of a writ of mandamus.

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[5] *In re Lott*, 424 F3d 446, 449 (CA 6, 2005).
[6] *EEOC v K-Mart Corp*, 694 F2d 1055, 1061 (CA 6, 1982).
[7] *Roche v Evaporated Milk Ass'n*, 319 US 21, 26; 63 S Ct 938; 87 L Ed 1185 (1943).
[8] *Mallard v US Dist Court for the Southern Dist of Iowa*, 490 US 296, 309; 109 S Ct 1814; 104 L Ed 2d 318 (1989).
[9] *Allied Chemical Corp v Daiflon, Inc*, 449 US 33, 35; 101 S Ct 188; 66 L Ed 2d 193 (1980).
[10] *Allied Chemical Corp v Daiflon, Inc*, 449 US at 36.
[11] *Moses H Cone Hospital v Mercury Constr Corp*, 460 US 1, 8 n 6; 1703 S Ct 927; 74 L Ed 2d 765 (1983).

Intervenor Defendant Eric Russell, now a party to the underlying complaint, and non-party Toward a Fair Michigan, seek a writ of mandamus from this Court directing the District Court to lift the injunction it entered as stipulated to by the parties in the cross claim – the Governor, the University Defendants, and the Attorney General.

Federal Rule of Appellate Procedure 21, regarding writs of mandamus and other extraordinary writs, provides (emphasis added):

> (1) A *party* petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all *parties* to the proceeding in the trial court. The *party* must also provide a copy to the trial-court judge. All *parties* to the proceeding in the trial court other than the petitioner are respondents for all purposes.

This Rule contemplates that petitions for mandamus will be filed by "parties" to the underlying proceedings.[12] In this case, neither Russell nor Toward a Fair Michigan were parties to the cross claim and the resulting injunction. Although some courts have recognized the right of a nonparty to petition for mandamus in the context of orders restricting press activity related to criminal proceedings, no similar federal decisions supporting the ability of Russell and Toward a Fair Michigan to petition for mandamus as nonparties under circumstances similar to this case have been located.[13] Thus, this Court lacks jurisdiction over Russell's and Toward a Fair Michigan's petition for mandamus, and it should be dismissed.[14]

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[12] Fed R App P 21; see also Notes of Adv Comm on 1996 Amendments to Rule 21 ("Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties.").

[13] See, e.g.,*United States v Brooklier*, 685 F2d 1162, 1165-66 (CA 9, 1982); *CBS, Inc v Young*, 522 F2d 234, 237 (CA 6, 1975); *In re Washington Post Co*, 807 F2d 383, 388 (CA 4, 1986).

[14] See, e.g., *Aref v United States*, 452 F3d 202, 207 (CA 2, 2006) ("We are aware of no authority authorizing a non-party to petition the Court of Appeals for a writ of mandamus in a criminal case.").

Moreover, it appears that Russell and Toward a Fair Michigan now have an opportunity to pursue an appeal rather than their petition for mandamus since the District Court denied in part, and granted in part their motion to intervene.[15] And, in fact, they have filed an amended notice of appeal pursuant to that order. Thus, their petition for mandamus should be dismissed as moot.

Additionally, the present circumstances are not those that warrant a grant of mandamus relief. Mandamus is not necessary here to confine the District Court's jurisdiction, which was proper, or to compel it to exercise any authority since it has no duty to lift the temporary injunction.[16]

Finally, to obtain mandamus relief, Russell and Toward a Fair Michigan must do more than prove merely that the District Court erred.[17] Here, all that Russell and Towards a Fair Michigan assert, repetitively, is that the District Court erred in granting the injunction and dismissing the cross claim. Certainly, Russell and Toward a Fair Michigan have not demonstrated a "clear and indisputable" right to have the injunction lifted where the parties agreed to the injunction, and its entry was supported under the unique circumstances of this case and the attendant equities.[18] Accordingly, their petition for mandamus should be dismissed on this basis as well.

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[15] *Moses H Cone Hospital*, 460 US at 8 n 6.
[16] *Roche*, 319 US at 26.
[17] *In re Occidental Petroleum Corp*, 217 F3d 293 (CA 5, 2000).
[18] *Allied Chemical Corp v Daiflon, Inc*, 449 US 33, 35; 101 S Ct 188; 66 L Ed 2d 193 (1980).

Conclusion and Relief Sought

For the reasons set forth above, Intervener Defendant Attorney General Cox requests that this Honorable Court dismiss Intervenor Eric Russell's and nonparty Toward a Fair Michigan's petition for writ of mandamus.

Respectfully submitted,

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