Nos. 06-2640, 06-2656

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,

*Plaintiffs-Appellees*

- v. -

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, and the TRUSTEES OF any other public college or university, community college or school district,

*Defendants-Appellees*

ERIC RUSSELL and TOWARD A FAIR MICHIGAN

*Intervening Defendants-Appellants*

-Consolidated by the District Court with-

CHASE CANTRELL, et al.

*Plaintiffs*

- v. -

JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan

*Defendant*

## THE CANTRELL PLAINTIFFS' MOTION TO DISMISS APPEAL AND VACATE ORDERS RELATING TO THE STIPULATED INJUNCTION


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## The Cantrell Plaintiffs' Motion To Dismiss Appeal And Vacate Orders Relating To The Stipulated Injunction

Plaintiffs Chase Cantrell, et al. (the "Cantrell Plaintiffs")[1] respectfully move this Court pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Rule 27(a) of the Sixth Circuit Rules to (i) dismiss Intervening Defendants-Appellants Eric Russell's And Toward A Fair Michigan's ("Russell Defendants") appeal of the December 19, 2006 stipulated injunction entered by the United States District Court for the Eastern District of Michigan,

(ii) remand the case with instructions to vacate the December 19, 2006 stipulated injunction, and

(iii) vacate this Court's December 29, 2006 Order regarding the stipulated injunction.

## Legal Argument

### I. PRELIMINARY STATEMENT

This appeal arose out of a stipulated injunction entered by the District Court on December 19, 2006 (the "Injunction"). The Injunction provided that "Proposal 2"—which, among other things, amended the Michigan Constitution to ban affirmative action in university admissions—would not apply to Michigan's public universities until July 1, 2007, after the 2006-2007 admissions cycle was complete. The Russell Defendants sought an emergency stay of the Injunction, which this Court granted on December 29, 2006, pending final appeal of the Injunction (the "December 29 Order). Following the December 29 Order, Proposal 2 went into full effect at all public universities in Michigan, and remains so today. As a result, the Injunction has no effect and will expire on its own terms in less than four months.

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[1] The Cantrell Plaintiffs are the plaintiffs in Cantrell v. Granholm, No. 06-15637, which was "consolidated for all purposes" with Coalition to Defend Affirmative Action v. Granholm, No. 06-15024, pursuant to the District Court's Order of January 5, 2007.

Recognizing this, the Russell Defendants (having previously sought to expedite their appeal) now move to "suspend" their appeal because the briefing schedule "appears to foreclose as a practical matter the possibility of full consideration of this appeal (including oral argument, if any) prior to the expiration of the preliminary injunction from which this appeal was taken—an event that will, most likely, render this appeal moot."[2] In circumstances such as these where an order becomes moot pending appeal by no fault of any party, it is appropriate for this Court to dismiss the appeal and vacate all prior orders relating to the Injunction, including this Court's December 29 Order. The Supreme Court has held that such vacatur is "necessary to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences" and to ensure that "the rights of all parties are preserved." United States v. Munsingwear, 340 U.S. 36, 40-41 (1950).

## II. FACTUAL BACKGROUND

Proposal 2 was passed into law on November 6, 2006. Among other things, Proposal 2 amended the Michigan Constitution to ban "grant[ing] preferential treatment to . . . any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation . . . of public education." Mich. Const. Art. I, § 26. Federal challenges to the constitutionality of Proposal 2 followed.

On December 19, 2006, the District Court in the underlying litigation entered the stipulated Injunction to prevent the unfairness that would result from compelling Michigan's

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[2] See Intervening Defendants-Appellants Eric Russell's and Toward A Fair Michigan's Motion To Suspend The Briefing Schedule ("Motion To Suspend") at 4.

public universities to comply with Proposal 2 during the middle of an admissions cycle.[3] By its terms, the Injunction was to expire on July 1, 2007. In response to the Injunction, the Russell Defendants (who wanted Proposal 2 implemented mid-cycle) moved to intervene and filed an emergency motion to stay the Injunction. On December 29, 2006, this Court granted their motion and stayed the Injunction pending an appeal of the Injunction. Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006) (hereinafter the "December 29 Order"). Shortly thereafter, the Universities made any necessary changes to bring their policies into compliance with Proposal 2. Those policies remain in effect today.[4] As a result, the Injunction no longer has any effect.

On January 20, 2006, the Russell Defendants moved this Court for an expedited appeal from the Injunction (the "Appeal"), arguing that there is "good cause" for such expedited review because of "the confusion and uncertainty created by the pending federal challenges to [Proposal 2]." (Intervening Defendants-Appellant Eric Russell's and Toward A Fair Michigan's Motion to Expedite at 6.) In response to that motion, this Court set a briefing schedule for the Appeal, setting June 19, 2007, as the deadline for all final briefs. The Russell Defendants now move this Court to suspend the briefing schedule to avoid "the burden of briefing and

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[3] The December 18, 2006 Stipulation For Entry of Order and the District Court's December 19, 2006 Amended Order Granting Temporary Injunction and Dismissing Cross-Claim are attached hereto as Exhibit A.

[4] On January 10, 2007, the University of Michigan announced that it had revised its admissions policy so that "race and gender will have no effect on the decision-making process" except as permitted by limited exceptions contained in Proposal 2. See Press Release, Mary Sue Coleman, President & Teresa A. Sullivan, Provost, University of Michigan, *Proposal 2 Next Steps* (Jan. 10, 2007) *available at* http://www.umich.edu/pres/speeches/070110prop2.html. Wayne State University Law School and Michigan State University made similar changes. See Wayne State University Law School Admissions Standards and Procedures, Effective Dec. 22, 2006, *available at* http://www.law.wayne.edu/docs/Admissions%20Policy--12-06-06.pdf; Michigan State University, Frequently Asked Questions, *available at* http://president.msu.edu/prop2response/faqs/index.php?faqs.

considering the merits of an appeal that will, in all likelihood, become moot so promptly after the close of the briefing schedule."[5] (Motion To Suspend at 4.)

Thus, as the Russell Defendants now concede, the Injunction is moot: the Injunction is stayed under the December 29 Order, the universities changed their admissions policies to comply with Proposal 2, and the Injunction will expire on its own terms eleven days after the Appeal is briefed. As a result, all parties acknowledge that the Injunction has become moot pending appeal.

## III. ARGUMENT

### A. Where An Order Becomes Moot Pending Appeal, The Court Should Dismiss The Appeal And Vacate The Moot Order.

Where a judgment becomes moot pending appeal by no fault of any party, it is "the duty of the appellate court" to "clear[] the path for future relitigation of the issues between the parties" by dismissing the appeal and remanding the judgment below with instructions to vacate the underlying order. See Munsingwear, 340 U.S. at 39, 40; see also Harper v. Poway Unified School Dist., No. 06-595, 2007 WL 632768, at *1 (U.S. March 5, 2007) (vacating a prior judgment with instructions to dismiss the appeal as moot where the underlying judgment had become moot and "vacatur of the prior judgment was [therefore] appropriate"). In establishing this rule, the Supreme Court noted that this procedure is dictated by fairness:

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[5] The Russell Defendants' dramatic about-face is strange, to say the least. Two months ago, they moved to expedite their appeal and in reply rebuked the argument that their appeal was moot as a "suggestion that cannot be taken seriously." (Intervening Defendants-Appellants' Reply Brief in Support of Motiont to Expedite at 10.) Now—without any change to the facts, claims or circumstances in the underlying litigation—the Russell Defendants suddenly concede that the Injunction is moot and announce their intention to dismiss their appeal.

> "That procedure [of dismissing and vacating orders below] clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which . . . was only preliminary."

Munsingwear, 340 U.S. at 40. Accordingly, this procedure "is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." Id. at 41.

This Court has routinely followed the Munsingwear rule. "When a civil case becomes moot pending appellate adjudication" and the mootness "occurs through circumstances not attributable to the parties," the "established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." Stewart v. Blackwell, 473 F.3d 692, 693 (6th Cir. 2007) (vacating the district court's judgment and remanding with instructions to dismiss the judgment as moot where appeal from the denial of declaratory and injunctive relief had become moot). Accord United States v. City of Detroit, 401 F.3d 448, 452 (6th Cir. 2005) (granting petitioner's motion to dismiss its appeal as moot and remanding the case to the district court with instructions that the injunction be vacated where both the appeal and the district court's injunction had become moot); United States v. Cleveland Elec. Illuminating Co., 689 F.2d 66, 68 (6th Cir. 1982) (vacating the district court's order "so that a judgment unreviewable because of mootness . . . will have no legal consequences").

B. This Court Should Dismiss The Appeal And Vacate All Prior Orders Relating To The Injunction.

Following the Munsingwear rule, this Court should dismiss the Appeal as moot and vacate all prior orders relating to the Injunction.

First, the Injunction is moot because it is no longer—and never will be—in effect. Proposal 2 is now fully implemented at all public universities in Michigan, and the Injunction

(currently stayed for its lifetime) will expire on its own terms during the pendency of the Appeal. Indeed, the Russell Defendants themselves call the Injunction "moot." (Motion To Suspend, at 3.)

Second, the Injunction was mooted by "happenstance"—not by the fault of any party. See Stewart, 473 F.3d at 693 (finding vacatur appropriate "when mootness occurs through happenstance" in order "to avoid entrenching a decision rendered unreviewable through no fault of the losing party"). As the Russell Defendants concede, the Injunction has become moot due to the mere passage of time and the fact that the Injunction will shortly expire. Moreover, because Proposal 2 is now fully in effect, nothing can resurrect the Injunction.

As such, there is no basis for this Appeal to continue, or for the orders relating to the Injunction to stand. See, e.g., City of Detroit, 401 F.3d at 450 (dismissing appeal as moot because federal courts have "no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue"). Instead, following well-established principles, this Court should dismiss the Appeal as moot and remand the case with instructions to vacate the Injunction.[6] See, e.g., Munsingwear, 340 U.S. at 40; Harper, 75 U.S.L.W. 3248; Stewart, 473 F.3d at 693; City of Detroit, 401 F.3d at 452; Cleveland Elec. Illuminating Co., 689 F.2d at 68.

In addition, this Court should vacate its December 29 Order staying the now-moot Injunction. That order has no continuing effect once the Injunction is vacated. See Clarinda Home Health v. Shalala, 100 F.3d 526, 531 (6th Cir. 1996) (dismissing appeal, vacating this

[6] Vacating the Injunction will also avoid the purported (and unrealistic) risk identified by the Russell Defendants that the Injunction "might well go back into effect immediately, prior to its date of self-expiration" if the appeal were dismissed now. (Motion to Suspend at 3.)

Court's stay pending appeal and directing the district court to dismiss the complaint); Buckeye Power, Inc. v. Environmental Protection Agency, 525 F.2d 80, 84 (6th Cir. 1975) (dismissing petitions on appeal and vacating the stays previously entered). Vacating the December 29 Order is particularly appropriate given the circumstances under which it was issued: in an emergency posture over less than a week and without the opportunity for the Court to receive full briefing.[7] Indeed, the Court's December 29 Order included dicta on issues relating to the merits of the underlying claims that were not fully briefed by the parties and were not part of the emergency appeal. For this reason, the Court itself made clear that its opinion was preliminary, to be in effect only "until such time as [the Russell Defendants'] appeal can be decided on the merits." Coalition to Defend Affirmative Action, 473 F.3d at 243 ("Let us be clear that the merits of the appeal of the order granting the preliminary injunction . . . are not before this panel."). Now that the Appeal and Injunction are moot, the December 29 Order should have no continuing effect. Moreover, vacating the December 29 Order will ensure that "the rights of all parties are preserved" and that no party "is prejudiced by a decision which . . . was only preliminary." Munsingware, 340 U.S. at 40.

Such orders are proper because they will "clear[] the path for future relitigation of the issues between the parties." Id. at 40, 41. Given the substantial time and attention that this Court has already devoted to this appeal, the parties assume that the Court will retain jurisdiction over this matter to consider future appellate issues that will inevitably arise once a full record is developed in the District Court.

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[7] The Cantrell Plaintiffs, for example, were not given any opportunity to participate in that briefing, which took place prior to the District Court's consolidation of the cases. As such, the Cantrell Plaintiffs should not be prejudiced by a preliminary proceeding in which they did not participate and in which the appeal became moot before briefing. See Munsingwear, 340 U.S. at 40 (ordering vacatur of underlying orders to prevent prejudice).

## Conclusion

For the foregoing reasons, this Court should (i) dismiss the Appeal, (ii) remand the case with instructions to vacate the Injunction, and (iii) vacate this Court's December 29, 2006 Order.

March 27, 2007

Respectfully submitted,


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# EXHIBIT A

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.

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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

**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury, that on this 27th day of March, 2007, I served The Cantrell Plaintiffs' Motion To Dismiss Appeal And Vacate Orders Relating To The Stipulated Injunction via First-Class Mail upon:

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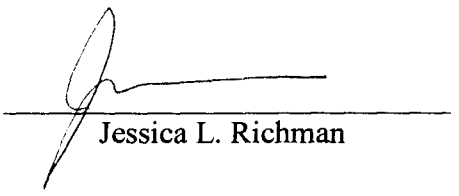

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