Nos. 06-2640/2642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; et al,	)
Plaintiffs-Appellees	)
v.	)
JENNIFER GRANHOLM, et al;	)
Defendants-Appellees, (06-2640)	)
MICHAEL COX, Attorney General	)
Intervenor-Defendant	)
ERIC RUSSELL; TOWARD A FAIR MICHIGAN,	)
Proposed Intervenors-Appellants.	)
_____	)
In re: ERIC RUSSELL; TOWARD A FAIR MICHIGAN,	)
Petitioners. (06-2642)	)

GOVERNOR GRANHOLM'S RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR A STAY PENDING APPEAL AND PETITION FOR WRIT OF MANDAMUS

CHRONOLOGY OF RELEVANT EVENTS

On November 8, 2006, several plaintiffs, including Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality by Any Means Necessary (collectively referred to as BAMN) filed a complaint for injunctive and declaratory relief against Jennifer Granholm in her official capacity as Governor of the State of Michigan. The complaint challenged the constitutionality of Michigan's Proposal 2 (now Mich Const 1963, art 1, § 26). Plaintiffs assert that Proposal 2 violates the First Amendment and the Equal Protection Clause of the 14th Amendment to the United States Constitution, as well as various other federal laws. Proposal 2 provides, in part, that the "University of Michigan, Michigan State University, [and] Wayne State University . . . 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." Proposal 2 went into effect as an amendment to Michigan's Constitution on December 23, 2006.

In addition to naming Governor Granholm as a party defendant, BAMN also sued the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors (Universities). On December 11, 2006, the Universities filed a cross-complaint for declaratory judgment and for preliminary injunction against Governor Granholm.

The Universities also filed a motion for expedited hearing and consideration on their request for preliminary injunctive relief. In their cross-complaint, the Universities contended that "[s]erious controversies exist regarding the validity, meaning, impact, and application of the Amendment," and that "[i]nconsistent statements have been made about [the amendment's] constitutionality and its consequences and many, including the Universities, are uncertain of its reach."[1] In their request for preliminary injunction, the Universities asked the court to stay the implementation of Mich Const 1963, art 1, § 26 as to them through the end of their current admissions and financial aid cycle.

In support of their motion for preliminary injunction, the Universities submitted the affidavits of those responsible for admissions at the University of Michigan, Michigan State University, and Wayne State University, describing their respective admissions policies and the array of logistical problems and burdens the Universities faced upon implementation of art 1, § 26.

On December 14, 2006, Michigan Attorney General Michael Cox filed a motion to intervene as a party defendant in both the complaint and cross-complaint. Attorney General Cox also requested an expedited hearing and immediate consideration on his motion to intervene. In support of his motion to intervene, Attorney General Cox represented that he would "ensure that the Court

[1] See cross-complaint, ¶ 5.

is presented with a full range of arguments on the questions presented, . . . so that a vigorous defense of the constitutionality of [art 1], § 26 may be had."[2] The district court granted Attorney General Cox's motion to intervene on December 14, 2006.

On December 18, 2006, the parties to the action entered into a stipulation to dismiss the Universities' cross-complaint, and provided that "the application of [Mich] 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."

Also on December 18, 2006, Petitioner Eric Russell (Petitioner) and Toward a Fair Michigan (TAFM) filed a joint motion to intervene based on Fed R Civ P 24(a) and (b). Neither Petitioner nor TAFM filed a motion for expedited hearing or consideration on their motion to intervene.

On December 19, 2006, in accordance with the parties' stipulation, the district court entered an amended order enjoining the application of Mich Const 1963, art 1, § 26 to the Universities' current admissions and financial aid policies through the end of their current admissions and financial aid cycles. The district court also dismissed the Universities' cross-complaint.

After the Court entered the December 19, 2006, amended order, Petitioner

[2] See ¶ 9 of Attorney General's motion for expedited hearing and immediate consideration.

and TAFM filed an emergency motion for immediate resolution of their prior motion to intervene or a stay of the district court's temporary injunction. On December 20, 2006, the Universities filed a brief opposing Petitioner's and TAFM's motion to intervene and request for expedited hearing and immediate consideration. Governor Granholm also filed a brief opposing Petitioner's and TAFM's motion to intervene and request for expedited hearing and immediate consideration.

On December 21, 2006, Petitioner and TAFM filed their emergency motion for a stay pending appeal, requesting that this Court enter an emergency motion for a temporary stay of the district court's December 19, 2006, amended order. Petitioner and TAFM also filed a motion for a writ of mandamus, requesting that this Court direct the district court to enter an order staying entry of the December 19, 2006, amended order or, in the alternative, that this Court simply enter an order staying the December 19, 2006, amended order.

On December 26, 2006, the district court issued an order suspending deadlines and for status and scheduling conference. Thus, a status and scheduling conference is scheduled for January 5, 2007 at 10:00 with the district court. At the status and scheduling conference, counsel have been ordered to prepare to discuss, among other things, the necessity of amendments to pleadings, addition of parties, answers to pleadings, and cross-pleadings, and scheduling preliminary and

dispositive motions.

On December 27, 2006, the district court issued an opinion and order granting Petitioner's motion to intervene and denying TAFM's motion to intervene. The opinion and order also addressed and denied all other pending motions to intervene, including those filed by the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, and the City of Lansing.

For the reasons set forth below, Governor Granholm requests that this Court deny Petitioner's and TAFM's emergency motion for a stay pending appeal and petition for writ of mandamus.

ARGUMENT

I. TAFM's and Petitioner's emergency motion, to the extent it seeks a decision from the district court on their motions to intervene, is moot.

In light of the district court's December 27, 2006, opinion and order granting Petitioner's motion to intervene and denying TAFM's motion to intervene, their request for this Court to compel the district court to rule on their pending motion to intervene is moot.

II. This Court should deny Petitioner's and TAFM's emergency motion for stay pending appeal.

A. Standard of Review

Petitioner and TAFM challenge the district court's entry of a temporary injunction delaying the effective date of Mich Const 1963, art 1, § 26 as applied to

the Universities until the Universities complete their current admissions and financial aid cycle, but no later than July 1, 2007. In determining whether to grant a preliminary injunction, a court must consider and balances four factors[3]:

1. whether the plaintiff has established a substantial likelihood or probability of success on the merits;

2. whether there is a threat of irreparable harm to the plaintiff;

3. whether issuance of the injunction would cause substantial harm to others; and

4. whether the public interest would be served by granting injunctive relief.

A district court's grant or denial of a preliminary injunction is reviewed for an abuse of discretion.[4] A district court abuses its discretion only if "it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact."[5] Thus, this Court reviews a district court's legal conclusions *de novo* and its factual determinations for clear error.[6] Finally, a district court's "weighing and balancing of the equities should be disturbed on appeal only in the rarest of cases."[7]

While the district court has not yet ruled on Petitioner's and TAFM's request

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[3] *Nightclubs, Inc v City of Paducah*, 202 F3d 884, 888 (6th Cir 2000).
[4] *Allied Sys, Ltd v Teamsters Nat'l Auto Transporters Indus Negotiating Comm*, 179 F3d 982, 985-86 (6th Cir 1999).
[5] *Schenck v City of Hudson*, 114 F3d 590, 593 (6th Cir 1997).
[6] *Taubman Co v Webfeats*, 319 F3d 770, 774 (6th Cir 2003).
[7] *NAACP v City of Mansfield*, 866 F2d 162, 166 (6th Cir 1989).

to stay the court's December 19, 2006, amended order, in balancing the four factors set forth above, this Court should nevertheless deny the motion to stay and the petition for writ of mandamus.

1. Likelihood of success on the merits.

The December 19, 2006, amended order granting temporary injunction was the relief sought by the Universities in their cross-complaint against Governor Granholm. The amended order was entered based on the stipulation of all parties then before the court. Indeed, a condition of the stipulation was that the Universities dismiss their cross-complaint. Because Petitioner and TAFM's success is dependent on their assertion that Mich Const 1963, art 1, § 26 will compel the Universities to change their admission policies, it is appropriate to evaluate the likelihood of their success in light of the Universities' claims that the effect of the new provision is uncertain.

As the Universities discuss in support of their motion for preliminary injunctive relief, the effect of Mich Const 1963, art 1, § 26 is, at this point, uncertain. In their cross-complaint, the Universities assert a First Amendment-based academic freedom right to select their student body. Indeed, the Supreme Court, in discussing the University of Michigan's Law School admission policies, states that it has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the

university environment, universities occupy a special niche in our constitution tradition."[8]

Mich Const 1963, art 1, § 26 provides, in part, that "[i]f 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."[9] To what extent the Universities' First Amendment-based right conflicts with Mich Const 1963, art 1, § 26 is unknown at this point, as the issue has not before been litigated in the Sixth Circuit. Moreover, to what extent, if any, the Universities may continue to use race as a factor in its admissions policies, which the Supreme Court in *Grutter* determined to be a compelling governmental interest,[10] and still comply with Mich Const 1963, art 1, § 26, is also uncertain.

For example, the executive director of the Michigan Civil Rights Initiative (MCRI), Jennifer Gratz, who played a primary role in getting Proposal 2 on Michigan's ballot, testified in a separate lawsuit challenging MCRI's tactics for getting Proposal 2 on the ballot, that she did not know the extent of what Proposal 2 would prohibit. Specifically,

> Gratz claimed to be "familiar with . . . affirmative action programs in the state and in the nation[.]" However, she could not provide an answer to

[8] *Grutter v Bollinger*, 539 US 306, 330; 123 S Ct 2325; 156 L Ed 2d 304 (2003).
[9] Mich Const 1963, art 1, § 26(7).
[10] *Grutter*, 539 US at 328.

> Plaintiffs' counsels' inquiry into whether or not the MCRI proposal would spare any program commonly known as "affirmative action" from its broad prohibition. Gratz also testified that the purpose of using the term "preference" in the proposal was to ban "discrimination." However, she could not explain what forms of discrimination would be banned by the proposal that are not already prohibited by state and federal anti-discrimination laws.[11]

Thus, given the uncertainty of the reach and effect of Mich Const 1963, art 1, § 26, there is a likelihood or probability that the Universities, in their underlying cross-complaint, would have success on the merits to continue, in some form, to use race or gender as a factor in their admissions policies consistent with the Supreme Court's ruling in *Grutter*. At a minimum, because the issue has not before been litigated in the Sixth Circuit, the Universities have established a colorable claim for their requested relief. Consequently, because the effect of the new provision is uncertain, Petitioner and TAFM have not demonstrated a likelihood of success on the merits of their claim that the Universities' policies must change.

2. Threat of irreparable harm to the plaintiff.

The Universities, in support of their motion for preliminary injunctive relief, have set forth legitimate reasons showing that denying their use of current policies through the end of the current admissions and financial aid cycle would result in substantial and irreparable harm to them. Until there is a declaratory judgment that

[11] *Operation King's Dream v Connerly*, 2006 WL 2514115 (ED Mich) (slip op page 8, attached as Exhibit 1).

resolves the potential conflict between Mich Const 1963, art 1, § 26 and the Universities' admissions policies, the Universities are faced with the uncertainty of how to proceed with their admissions policies. Relying on the Supreme Court's decision in *Grutter*, which held that a university "has a compelling interest in attaining a diverse student body,"[12] the Universities have established their current admissions policies and devoted significant resources toward training their faculty members to apply those policies. The Universities are in the midst of reviewing admissions applications, and have spent substantial resources on advertising their policies to prospective students, parents, and high school counselors. The Universities have made assurances to prospective students, parents, and high school counselors that admissions and enrollment decisions would be based on criteria published before the beginning of their current admissions cycle. Prohibiting them from continuing with their current admissions policies through the end of this cycle would detrimentally affect their ability to select their student body in compliance with Mich Const 1963, art 1, § 26. As such, the threat of harm to the Universities is substantial.

3. Substantial harm to others.

The Universities, in support of their motion for preliminary injunctive relief, have also articulated the substantial harm to others that would result in the event

[12] *Grutter*, 539 US at 328.

they are not permitted to continue their admissions policies through the end of the current admissions and financial aid cycle. As noted above, prospective students, parents, and high school counselors have relied on the Universities' published admissions policies and assurances about those policies through the end of the current admissions cycle. The Universities have already admitted a substantial number of students under their current admissions policies. To change the admissions policies midstream would have a detrimental effect on those who have relied on the published admissions policies and prejudice students applying at different times for entry into the same academic class.[13]

4. The public interest would not be served by lifting the temporary injunction.

Governor Granholm's interest in this case is consistent with the interests of the public – to ensure that Mich Const 1963, art 1, § 26 is properly applied, implemented, and enforced throughout the state. The public's interest is not

[13] At p 14, fn 17 of the Universities Brief in Support of Motion for Preliminary Injunctive Relief, they cite to *Hopwood v Texas*, 78 F3d 932 (5th Cir 1996). In that case, the Fifth Circuit, despite ruling that diversity was not a compelling interest for the defendant universities, entered a stay allowing the university to seek Supreme Court review based, in large part, on the school's description of irreparable harm. The university represented that "'[t]he prospect of changes in admission practices midstream – which would prejudice students applying at different times for entry into the same academic class – is real.'" Order Granting Stay Until May 13, 1996, in *Hopwood v Texas Litigation Documents, Part 2: Attorney's Fees in District Court and First Appeal to the Fifth Circuit and U.S. Supreme Court* (1994-1996), Volume 2, Document 194 (compiled by Kumar Percy (Wm S Hein & Co, Inc 2003).

served, however, by implementing a law where there is uncertainty about the proper application and constitutional ramifications as applied to the admissions policies of the state's public universities.

In addition to Governor Granholm, defendant intervenor Attorney General Cox also represents the public's interest in this case. While Governor Granholm and Attorney General Cox took different public stances on Proposal 2 before the November 2006 election – Governor Granholm publicly opposed the Amendment, while Attorney General Cox supported it – they have both sworn to uphold Michigan's Constitution. Notwithstanding Attorney General Cox's support of Proposal 2, and his statement in support of his motion to intervene that he would engage in a "vigorous defense of the constitutionality of [Mich Const 1963, art 1,] § 26,"[14] Attorney General Cox stipulated to entry of the district court's amended order granting temporary injunction to allow the Universities to continue their admissions policies through the end of the current admissions and financial aid cycle. Attorney General Cox did so, no doubt, because he realized that the public's interest was best served by allowing the Universities to continue with their current admissions and financial aid cycle. To do otherwise would cripple the Universities' ability to process student applications and fail to provide the time necessary for the court to determine the constitutionality of Mich Const 1963, art 1,

[14] See p 4, ¶ 9 of Attorney General Cox's Motion to Intervene as a Party.

§ 26 as it applies to the defendant Universities' admissions policies. Lifting the district court's preliminary injunction, which was entered based on the parties' stipulation, would not serve the public's interest.

III. Petitioner's and TAFM's petition for writ of mandamus is inappropriate where, as here, they have failed to exhaust all other remedies available to them, and the district court did not have a clearly established duty to refrain from entering the stipulated order.

A. Standard of Review

The common-law writ of mandamus against a lower court is codified at 28 USC 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A writ of mandamus is a "drastic and extraordinary" remedy, reserved for extraordinary causes.[15] Only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion are sufficient to justify the writ.[16]

Three conditions must be satisfied before the extraordinary remedy of writ of mandamus may issue[17]:

1. The party seeking the writ must have no other adequate means to attain the relief desired. In other words, the writ is not to be used as a substitute for the regular appeals process.

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[15] *Ex parte Fahey*, 332 US 258, 259-260; 67 S Ct 1558; 91 L Ed 2041 (1947).
[16] *Cheney v United States Dist Court*, 542 US 367, 381; 124 S Ct 2576; 159 L Ed 2d 459 (2004).
[17] *Cheney*, 542 US at 381 (internal citations omitted).

2. The petitioner must show that his or her right to issuance of the writ is "clear and indisputable."

3. Even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

B. Analysis

A writ of mandamus directing the district court to stay its December 19, 2006, amended order granting preliminary injunction is inappropriate where, as here, these parties have other means to seek the requested relief. As set forth above, on December 27, 2006, the district court issued an opinion and order granting Petitioner's request to intervene as a party defendant. As a party, Petitioner now has standing to request that the district court stay implementation of its December 19, 2006, amended order.[18] In the event the district court denies the motion, Petitioner may directly appeal that ruling. In fact, TAFM has already taken steps to appeal the district court's denial of its motion to intervene. Thus, the petition for writ of mandamus is simply an attempt to substitute and/or circumvent the ordinary appeals process. As such, this Court should deny the petition for writ of mandamus.

Additionally, there has been no demonstration of a clearly established and indisputable right to issuance of a writ of mandamus against the district court.

[18] See *Ex parte Fahey*, 332 US at 260.

Petitioner and TAFM contend that the district court lacked jurisdiction to enter the temporary injunction because the parties' stipulation resulted in the immediate dismissal of the Universities' cross-complaint for injunctive relief. The contention is without support.

A consent decree is both a voluntary settlement agreement that may be fully effective without judicial intervention and a final judicial order placing the power and prestige of the court behind the parties' compromise.[19] The injunctive quality of a consent decree compels the approving court to retain jurisdiction over the term of the decree's existence, protect the integrity of the decree, and modify the decree if circumstances have sufficiently changed.[20] A stipulation by the parties does not deny a court of jurisdiction to enter a judicial order designed to enforce the stipulated agreement. Even if, as Petitioner and TAFM contend, the parties' stipulation resulted in the dismissal of the Universities' cross-complaint, it did not affect BAMN's complaint, which also seeks injunctive relief.

To the extent Petitioner and TAFM contend that the Universities have failed to establish the threat of irreparable harm by immediate enforcement of Mich Const 1963, art 1, § 26, such a claim alone does not amount to a clear and indisputable right for a writ of mandamus. Moreover, as discussed above, the

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[19] *Vanguards of Cleveland v City of Cleveland*, 23 F3d 1013, 1017 (6th Cir, 1994), quoting *Williams v Vukovich*, 720 F2d 909, 920 (6th Cir, 1983).
[20] *Vanguards*, 23 F2d at 1018.

Universities have set forth several legitimate concerns in support of their motion for injunctive relief, not the least of which is the reliance that prospective applicants have placed on the assurances of the Universities relating to their use of admissions and financial aid policies during the current admissions cycle. There is no clearly established or indisputable right to mandamus relief.

Finally, to the extent Petitioner and TAFM contend that the district court exceeded its authority by failing to properly balance the factors used to determine whether to grant a preliminary injunction, this assertion is without merit.[21] The balancing of the relevant factors used to determine whether a preliminary injunction is appropriate, does not lend itself to the clear and indisputable standard required for mandamus relief.[22]

CONCLUSION AND REQUESTED RELIEF

For the reasons set forth above, Governor Granholm requests that this court deny Petitioner's and TAFM's emergency motion for a stay pending appeal and petition for writ of mandamus. In considering the relevant factors, the district court did not abuse its discretion in issuing the limited temporary injunction preventing application of Mich Const 1963, art 1, § 26 to defendant Universities

[21] See argument II above.

[22] See *Bankers Life & Casualty Co v Holland*, 346 US 379, 382; 74 S Ct 145; 98 L Ed 106 (1953). (Even an erroneous decision made in the course of the court's jurisdiction to decide issues properly brought before it does not exceed legal power and oust the court from jurisdiction).

for the remainder of their current admissions and financial aid cycles.

Respectfully submitted,

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Dated: December 28, 2006

Certificate of Service

I hereby certify that on December 28, 2006, my secretary electronically filed the foregoing paper with the Clerk of the Court and will send notification of such filing of the following: GOVERNOR GRANHOLM'S RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR A STAY PENDING APPEAL AND PETITION FOR WRIT OF MANDAMUS as noted below:

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