No. 06A678

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

JENNIFER GRANHOLM, as Governor of the State of Michigan, *et al.*,
and
MIKE COX, in his capacity as Attorney General of Michigan, *et al.*,

Respondents.

GOVERNOR GRANHOLM'S RESPONSE TO PETITIONERS' MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

On November 7, 2006, Michigan voters approved a state-wide ballot initiative – Proposal 2. Proposal 2 (now Mich. Const. 1963, art. 1, § 26) purports to prohibit discrimination against or preferential treatment of, individuals and groups because of "race, sex, color, ethnicity, or national origin, in the operation of public employment, public education, or public contracting." Pursuant to Mich. Const. 1963, art. 12, §2, Proposal 2 became part of the Michigan's Constitution on December 23, 2006, 45 days after it was approved by a majority of Michigan's electorate.

Controversy has surrounded Proposal 2 and the intentions of its backers, resulting in litigation in state and federal courts even before the proposal was voted upon by Michigan's

electorate.[1] It remains to be seen what effect Proposal 2 will have on diversity efforts in public employment, education, and contracting. Governor Granholm recognizes that diversity is a vital component to Michigan's educational institutions and that Michigan must remain diverse to compete globally. Consequently, the Governor remains committed to promoting diversity to the fullest extent permitted by law. To achieve this, Governor Granholm has charged Michigan's Civil Rights Commission with the responsibility of reviewing the impact of Proposal 2 in the context of the State's existing public education, employment, and contracting programs.[2] The Commission's comprehensive report is due to the Governor by February 9, 2007.

While Proposal 2 encompasses public contracting, employment, *and* education, Petitioners here focus solely on the constitutionality of Proposal 2 as applied to Michigan's public universities and, more specifically, to the University of Michigan, Michigan State University, and Wayne State University. Like the Universities, Governor Granholm submits this filing to provide this Court with her rationale for stipulating to the stay entered by the district court, and to underscore her belief that, under the totality of the circumstances, the stipulated preliminary injunction was, and is, in the best interests of Michigan's citizens.

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. In addition to

[1] For an account of Proposal 2 litigation from 2004 through the fall of 2006, see *Operation King's Dream v. Connerly*, 2006 WL 2514115 (E.D. Mich.) (slip opinion attached as Exhibit 1).
[2] The Michigan Civil Rights Commission is currently reviewing the impact of the proposal in accordance with the Governor's Executive Directive 2006-7, entitled "Promoting Diversity in Michigan."

naming Governor Granholm as a party defendant, the plaintiffs 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). Plaintiffs' complaint challenges the constitutionality of Michigan's Proposal 2. 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.

On December 11, 2006, the Universities filed a cross-claim 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-claim, 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."[3] In their request for preliminary injunction, the Universities asked the court to stay the implementation of Proposal 2 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. The affidavits described their respective admissions policies and the array of logistical problems and burdens the Universities faced upon implementation of Proposal 2. In their brief in response to Petitioners' Motion to Dissolve Stay and Reinstate Injunction, the Universities reiterate the logistical problems they face with implementing Proposal 2 during their current admissions and financial aid cycle. To date, no

[3] See cross-claim, ¶ 5.

party has introduced evidence to refute the claims, assertions, and proofs that the Universities submitted establishing the myriad of logistical problems they face by implementing Proposal 2 during the current admissions and financial aid cycle.

On December 14, 2006, Michigan Attorney General Michael Cox filed a motion to intervene as a party defendant in both the complaint and cross-claim. 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 is presented with a full range of arguments on the questions presented, . . . so that a vigorous defense of the constitutionality of [Proposal 2] may be had."[4] The district court granted Attorney General Cox's motion to intervene on December 14, 2006.

On December 18, 2006, the Petitioners, Governor Granholm, the Universities, and Attorney General Cox, entered into a stipulation to dismiss the Universities' cross-claim, and provided 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."

Also on December 18, 2006, Eric Russell (Russell) and Toward a Fair Michigan (TAFM) filed a joint motion to intervene based on Fed. R. Civ. P 24(a) and (b).

On December 19, 2006, in accordance with the parties' stipulation, the district court entered an amended order enjoining the application of Proposal 2 to the Universities' admissions and financial aid policies through the end of their current admissions and financial aid cycles.

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[4] See ¶ 9 of Attorney General's motion for expedited hearing and immediate consideration. Unlike Governor Granholm, who opposed the passage of Proposal 2, Attorney General Cox was a proponent of Proposal 2.

The district court also dismissed the Universities' cross-claim.

After the district court entered the December 19, 2006, amended order, Russell 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 Russell's and TAFM's motion to intervene and request for expedited hearing and immediate consideration. Governor Granholm also filed a brief opposing Russell's and TAFM's motion to intervene and request for expedited hearing and immediate consideration.

On December 21, 2006, Russell and TAFM filed an emergency motion for a stay pending appeal, requesting that the Court of Appeals for the Sixth Circuit enter an order for a temporary stay of the district court's December 19, 2006, amended order.

On December 27, 2006, the district court issued an opinion and order granting Russell's motion to intervene and denying TAFM's motion to intervene.

On December 29, 2006, the United States Court of Appeals for the Sixth Circuit granted Russell and TAFM's motion for stay of the preliminary injunction pending appeal.

On January 8, 2007, Petitioners filed their Motion with the Honorable Justice John Paul Stevens requesting to dissolve the stay entered by the United States Court of Appeals for the Sixth Circuit.

DISCUSSION

I. Given the potential conflict between the Universities' First Amendment right to a diverse student body, and the mandates of Proposal 2, the district court properly enjoined the application of Proposal 2 to the Universities' current admissions and financial aid cycle.

In *Grutter v. Bollinger*[5], this Court held that the University of Michigan's "Law School has a compelling interest in attaining a diverse student body" and accordingly, that the

[5] *Grutter v. Bollinger*, 539 U.S. 306, 328; 123 S. Ct. 2325; 156 L. Ed. 304 (2003).

University's narrowly tailored use of race as a factor, among many other factors, did not violate the Fourteenth Amendment's equal protection clause. In reliance on *Grutter*, the Universities represent that they implemented admissions policies that considered race as a factor, among many other factors, so as to achieve their compelling interest of attaining a diverse student body. As the Court recognized in *Grutter*, the benefits of a diverse student body are substantial.[6] Relying on the district court's findings, this Court noted:[7]

> [T]he Law School's admissions policy promotes "racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

As stated in *Grutter*, "attaining a diverse student body is at the heart of the Law School's proper institutional mission,"[8] and "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."[9]

The impact that Proposal 2 will have on the Universities' First Amendment freedom to select a student body is unknown. The evidence presented to date supports the Universities' assertion that they will be not be able to attain a diverse student body with the hurried implementation of Proposal 2 during their current admissions cycle. Furthermore, Petitioners and the Universities raise legitimate questions related to Proposal 2 in the context of public education. Given the uncertainty surrounding the questions raised by the parties to this litigation, Governor Granholm agreed to the limited, narrow stay, to allow the Universities to finish their current admissions cycle. In agreeing to the stipulation, Governor Granholm weighed the

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[6] *Grutter*, 539 U.S. at 333.
[7] *Grutter*, 539 U.S. at 333. (Internal citations omitted).
[8] *Grutter*, 539 U.S. at 333; citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-319; 57 L. Ed. 2d 750; 98 S. Ct. 2733 (1978).
[9] *Grutter*, 539 U.S. at 333; citing *Bakke*, 438 U.S. at 312.

equities of all of the parties, including the citizens of Michigan and those individuals who applied for admissions to Michigan's public universities.

II. The district court properly enjoined the application of Proposal 2 to the Universities' current admissions and financial aid cycles out of fundamental fairness to the students who had submitted admissions and financial aid applications before December 23, 2006.

The Universities have articulated both logistical problems and constitutional concerns relative to implementing Proposal 2 for their current admissions cycle. Governor Granholm stipulated to the district court's temporary injunction because of the unique hardships identified by the Universities. The Governor also realized a mid-process change in admissions and financial aid policies and procedures would significantly affect the thousands of students who submitted applications to the Universities during for the 2007-2008 academic school year. The concept of fundamental fairness required the Governor's consent to the district court's issuance of a preliminary injunction to ensure that all of these students would have their admissions and financial aid applications reviewed using the same criteria, regardless of when the Universities made admissions and financial aid decisions affecting those students. Additionally, the Governor believed that, as a matter of fundamental fairness, the mandates of Proposal 2 should not be imposed upon the Universities' admissions cycles and other similar educational processes that were already underway before the effective date of Proposal 2. For these reasons, the Governor supported the action taken by the district court.

A. Fundamental fairness to applicants.

The current admissions and financial aid cycle for the University of Michigan (U of M) officially began in September of 2006. According to the U of M, however, prospective students were able to download applications for undergraduate admission as early as August 2, 2006, and the U of M made hard copies of its applications available by August 15, 2006. Throughout the

fall of 2006, U of M staff conducted 464 high school visits and attended 217 college fairs around the country. A total of 12,062 in-state high school students and 37,700 out-of-state students attended the events to learn about the University's admissions policies and procedures. An additional 8,462 high school students (with their 11,976 parents) attended the University's on-campus visitation between January and November 2006. By December 4, 2006, weeks before Proposal 2 took effect, U of M's Office of Undergraduate Admissions had received approximately 16,000 applications for admission from students all over the world. By December 11, 2006, 3,100 students had been accepted to admission to U of M, and another 6,000 applicants had been fully completed, but had not been reviewed because they were missing one or more documents from the applicants' high school or an educational testing agency. U of M recognizes that financial aid encourages admitted students to enroll at the University.[10]

By December 11, 2006, Michigan State University (MSU) projected that it would have offered admission to over 9,000 undergraduate applicants. Financial aid is very important to prospective and existing students at MSU. MSU's financial aid programs make it possible for students who cannot afford a higher education degree to attend the University. Financial aid also makes it possible for MSU to attract and retain a diverse student body. MSU manages some privately-funded loans and scholarship programs, some of which require consideration and encouragement of race, ethnicity, gender, and national origin.[11]

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[10] Affidavit of Teresa A. Sullivan, U of M Provost and Executive Vice President, pp. 1 – 4, attached as Exhibit "C" to Motion of the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University for Preliminary Injunction, dated December 11, 2006.

[11] Affidavit of Kim A. Wilcox, MSU Vice President and Provost, pp. 2 – 4, attached as Exhibit "D" to Motion of the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University for Preliminary Injunction, dated December 11, 2006.

The admissions process for the 2007-2008 academic year at Wayne State University (WSU) began in August 2006. Beginning in August, WSU representatives spoke to prospective students at open houses, college fairs, and conferences. By December 11, 2006, WSU had received several thousand applications to its undergraduate and graduate programs. While some students had been notified by December 11, 2006 of their admission to WSU, many others were still participating in the admissions process as of that date.[12]

Without the force of an injunction, applications that were reviewed and decided on before December 23, 2006 would be reviewed using criteria that differed for those applications that were received after December 23, 2006. It was of paramount importance to Governor Granholm that the Universities employed uniform standards in their respective admissions processes to ensure that all applications were treated the same. In an effort to ensure fairness and consistency for all prospective students, regardless of when during the admissions cycle the Universities reviewed their application, Governor Granholm consented to the preliminary injunction at issue in this case.

While authority discussing this issue is sparse, Governor Granholm urges this Court to consider and apply the common-sense decision in *George Washington Univ. v. District of Columbia*, 148 F. Supp. 2d 15 (D.D.C. 2001) in reviewing the instant matter. In *George Washington Univ.*, the district court granted a preliminary injunction, in part to avoid harm to students impacted by a zoning change imposed by the District of Columbia zoning board. The zoning change would have required the university to retract offers of admission to certain students. The court recognized that that the university had a responsibility to students invited to

[12] Affidavit of Nancy Barrett, Provost and Senior Vice President for Academic Affairs, WSU, attached as Exhibit "E" to Motion of the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University for Preliminary Injunction, dated December 11, 2006.

enroll in the university, particularly those individuals who had declined offers from other universities in reliance upon George Washington University's admissions representations.[13]

The same common-sense approach applies here: Governor Granholm properly consented to the preliminary injunction based on her conviction that fundamental fairness required that the applications of all prospective students be judged in accordance with uniform criteria. All prospective students were entitled to have their applications reviewed based on the criteria promised to them by the Universities in the fall of 2006, and used by the Universities to review student applications up through December 23, 2006.

B. Applicability of Proposal 2 to educational processes that began before December 23, 2006.

The parties to this case have expressed divergent viewpoints about the constitutionality of Proposal 2. Regardless of how that critical issue is ultimately determined, Governor Granholm contends that it was appropriate for the district court to enter an order consistent with the parties' stipulation because the injunction avoided the unintended and inappropriate application of Proposal 2 to educational processes that were already underway at the time of the Proposal's effective date.

Assuming that Michigan's electorate was fully apprised of the impact of Proposal 2 on public education, and that the Proposal is ultimately found to comport with the federal and state constitutions,[14] Governor Granholm believes that Michigan's electorate could not, and did not, intend that Proposal 2 would apply to educational processes already underway at the time that the Proposal took effect, because this would have the potentially unfair effect of imposing

[13] *George Washington Univ.*, 148 F. Supp. at 18.

[14] Governor Granholm does not offer an opinion regarding the constitutionality of the provision nor the level of understanding of the Michigan electorate, recognizing that these issues may likely be judicially determined in the Proposal 2 cases currently being litigated.

different admissions criteria to individuals within the same pool of applicants. Fundamental fairness mandates that the proposal apply prospectively only to admissions and financial aid cycles that began on or after December 23, 2006. The parties' stipulated injunction not only guaranteed that uniform standards would be employed by the Universities in existing processes, but also that the proposal would only be applied to future admissions and financial aid cycles.

CONCLUSION

While the courts have yet to interpret the breadth of Proposal 2 as applied to Michigan's public universities, given the Universities' compelling interest in attaining a diverse student body, and in light of considerations of fundamental fairness owed to all applicants to the Universities during their current admissions cycle, Governor Granholm and the other parties to this litigation all agreed that the most prudent course of action was to allow the University defendants to continue their admissions policies through the end of their current admissions cycle. To do so was then, and continues to be in the best interests of the Universities, those prospective students whose applications to Michigan's public universities were pending on or after December 23, 2006, and Michigan's citizens. For these reasons, Governor Granholm supports the relief requested in the petition under consideration.

Respectfully submitted,

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Dated: January 17, 2007

Certificate of Service

I hereby certify that on January 17, 2007, my secretary electronically filed the foregoing paper with the United States Supreme Court Clerk: **GOVERNOR GRANHOLM'S RESPONSE TO PETITIONERS' MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT** and as noted below:

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