Nos. 08-1387 & 08-1389 & 08-1534 & 09-1111

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), *et al*.
*Plaintiffs-Appellants (08-1387)/Cross-Appellees, Plaintiffs (08-1389/09-1111),*

CHASE CANTRELL, *et al.,*
*Plaintiffs-Appellees (08-1389), Plaintiffs-Appellants (09-1111)*

*-v.-*

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, *et al.,*
*Defendants-Appellees/Cross-Appellants (08-1534), Defendants (08-1389/09-1111),*

BILL SCHUETTE, Michigan Attorney General,
*Intervenor-Defendant-Appellee (08-1387/09-1111),*

ERIC RUSSELL,
*Intervenor-Defendant-Appellant (08-1389,)*

JENNIFER GRATZ
*Proposed Intervenor-Appellant (08-1389).*

On Appeal from the United States District Court
for the Eastern District of Michigan

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**ORAL ARGUMENT REQUESTED**

# SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS THE UNIVERSITIES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for the Universities certifies that no party to this appeal is a subsidiary or affiliate of a publicly-owned corporation and no publicly-owned corporation that is not a party to this appeal has a financial interest in the outcome of this matter. The Universities are the governing boards of state universities and the Presidents of those Universities.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT IN SUPPORT OF ORAL ARGUMENT ..... iv

JURISDICTIONAL STATEMENT ..... v

STATEMENT OF ISSUES FOR REVIEW ..... 1

INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF FACTS ..... 5

ARGUMENT ..... 8

I. The District Court Erred in Concluding that the University Defendants Were Properly Joined in this Action ..... 8

II. The Governing Boards of the Universities Retain Ultimate Authority Over Admissions Policies and Engage with Admissions Policy Issues ..... 17

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

Cases

*Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ..... 15

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ..... 15

*Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*,
132 N.W. 1037 (Mich. 1911) ..... 18

*Brooks v. Glynn County,* 1989 U.S. Dist. LEXIS 4776, *11 (S.D. Ga. 1989) ..... 11

*Brown v. N.C. State Board of Elections,* 394 F. Supp. 359 (W.D.N.C. 1975) ..... 11

*Gratz v. Bollinger* ..... 22

*Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578 (E.D. Pa. 1982) ..... 10

*Letherer v. Alger Group, LLC,* 328 F.3d 262 (6th Cir. 2003) ..... 8

*Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) ..... 12

*Snyder v. Millersville Univ.*,
No. 071660, 2008 U.S. Dist. LEXIS 97943, at *12 (E.D. Pa. Dec. 3, 2008) ..... 12

*Williams v. Doyle*, 494 F. Supp. 2d 1019 (W.D. Wis. 2007) ..... 13

**Statutes**

28 U.S.C. §1291 ..... iv

Mich. Const. art. VIII, § 5 ..... 19, 24

**Other Authorities**

7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane,
*Federal Practice and Procedure* § 1683, at 475-476 (3d ed. 2001) ..... 8

Mich. State Univ. Bd. of Trs., Policy for Addressing the Board ..... 22

Mich. State Univ., Bd. of Trs. Bylaws, art. 17 .....19

Mich. State Univ., Bd. of Trs. Bylaws, art. 2 .....21

Mich. State Univ., Bd. of Trs. Bylaws, Preamble, arts. 4 and 8.....21

Univ. of Mich., Bylaws of the Bd. of Regents § 14.03 .....19

Univ. of Mich., Bylaws of the Bd. of Regents, § 1.11 .....22

Univ. of Mich., Bylaws of the Bd. of Regents, §§ 1.01 .....21

Univ. of Mich., Bylaws of the Bd. of Regents, §§ 2.04 .....20

Univ. of Mich., Bylaws of the Bd. of Regents, Preface .....21

Univ. of Mich., Public Comments Policy.....22

**Rules**

Fed. R. Civ. P. 12(b)(6).....9

Fed. R. Civ. P. 20(a).....14

Fed. R. Civ. P. 21 ..... 6, 8, 9, 16

Fed. R. Evid. 201 .....19

Fed. R. Evid. 201(b)(2) .....19

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), the Universities hereby respectfully request oral argument on their cross-appeal. The Universities' cross-appeal raises the important and foundational question of whether the Universities are properly named as parties in the action brought by the Coalition Plaintiffs. The Universities note that the Coalition Plaintiffs have requested oral argument with respect to their appeal.

## JURISDICTIONAL STATEMENT

The Court of Appeals has subject matter jurisdiction over this case pursuant to 28 U.S.C. §1291. On March 18, 2008, the District Court issued a final order granting summary judgment to the Attorney General and dismissing all claims. In that same order, however, the District Court denied in part the Universities' Motion to Dismiss. On April 11, 2008, the Universities filed a Notice of Appeal, thereby taking a timely appeal from that portion of the District Court's order. This brief is timely filed under the Court's September 28, 2011 scheduling order.

## STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court erred in declining to dismiss the Universities from this case because they are not necessary or appropriate parties to this litigation.

2. Whether the governing boards of the Universities maintain plenary authority over matters of admissions policy within their respective institutions.[1]

## INTRODUCTION

The Regents of the University of Michigan, the Board of Trustees of Michigan State University, Mary Sue Coleman, and Lou Anna K. Simon[2] ("Universities") file this supplemental brief for two purposes.

First, the Universities respectfully request that this Court reverse the District Court ruling that they are proper parties to this case. This case involves a challenge to the constitutionality of Article I, § 26 of the Michigan Constitution ("Proposal 2"). Plaintiffs name as a defendant the Michigan Attorney General, who holds the responsibility for enforcing and defending Proposal 2. Including the

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[1] This issue was raised by Plaintiffs and by the Panel opinions; the Universities address the issue here for clarification purposes only.

[2] Coleman and Simon are Presidents of the University of Michigan and Michigan State University, respectively.

Universities as defendants adds precisely nothing to Plaintiffs' ability to litigate this case or secure the relief they seek. Indeed, the complaint in question fails to state any specific claim against or demand any specific relief from the Universities. The Universities are improperly joined in this action and the District Court should have dismissed them from this lawsuit.

Second, the Universities wish to clarify the role of their governing boards with respect to admissions policy. The Panel opinions diverged in their understanding of that role, the significance of the legal principles that define it, and what (if any) insights the factual record offers into it. The Universities believe that some clarification of these matters will assist this Court in apprehending how the governing boards oversee and engage with questions of admissions policy. The governing boards have an obvious interest in ensuring that how they function in this regard is correctly understood by this Court and is accurately portrayed in any decision this Court renders. [3]

## STATEMENT OF THE CASE

The Second Amended Complaint ("Complaint") filed by Plaintiffs the Coalition to Defendant Affirmative Action, Integration, and Immigrant Rights and

[3] The need for clarification remains, even though the Panel decision was vacated by the grant of rehearing *en banc*, because this Court could choose to draw upon the Panel opinions in conducting its analysis and reaching its decision.

Fight for Equality by Any Means Necessary, *et al.* ("Coalition Plaintiffs") challenges the constitutionality of Proposal 2 under the Equal Protection Clause of the Fourteenth Amendment. The Complaint properly names the Attorney General of the State of Michigan as a defendant. But the Complaint also names the Universities as defendants. In contrast, Plaintiffs in the companion case of *Cantrell, et al. v. Cox, et al.* ("Cantrell Plaintiffs") did not name the Universities as parties—for good reason. The Universities do not belong in this case.

The limited role of the Universities here is obvious but merits emphasis. The Universities did not draft Proposal 2. They did not promote Proposal 2. They did not pass Proposal 2 into law. They cannot unilaterally amend or suspend Proposal 2. They are not executive branch entities charged with the responsibility of enforcing Proposal 2. Indeed, the Universities have no role here other than that they—like every other public body that is affected by this provision—must follow Proposal 2 unless and until it is declared unconstitutional. The Universities are therefore powerless to afford the Coalition Plaintiffs the relief they seek in the Complaint—an injunction against the enforcement of Proposal 2. In contrast, the Coalition Plaintiffs can obtain such relief from a party they did properly name as a defendant in this litigation, the Michigan Attorney General.

In light of these infirmities in the Coalition Plaintiffs' Complaint, the Universities filed a Motion to Dismiss, in which they argued that, *inter alia*, they were unnecessary parties to this action. In its March 18, 2008 Opinion and Order the District Court granted the Attorney General's Motion for Summary Judgment and dismissed the Complaint on its merits. In that same Opinion and Order, however, the District Court denied the Universities' Motion to Dismiss. The Universities filed this limited cross appeal because they believed—and continue to believe—that the District Court was plainly mistaken in so ruling.

Although the Universities were concerned about the formidable challenges that Proposal 2 poses to the admission of a genuinely diverse student body—and remain so—they left it to the proper parties to this case to litigate the question of that provision's constitutionality. Accordingly, the Universities' initial brief on appeal did not address a variety of issues that the Panel opinions explored, including questions of how the governing boards exercise their plenary constitutional authority; how they delegate responsibility; and how they maintain oversight of university policies and their implementation. Unfortunately, the Panel opinions reflect some misunderstandings about these issues that risk being perpetuated if they are not corrected. Indeed, a reading of those opinions might leave one with the erroneous impression that these governing boards retain very little actual authority; that they abdicate all real responsibility to various

administrators; that when they delegate authority they surrender it finally and irretrievably; and that they have no ongoing involvement or interest in matters like admissions policy. Because this would be a serious misperception, the Universities believe it is necessary and proper for them to offer some critical clarifications.

## STATEMENT OF FACTS[4]

On November 7, 2006, the voters of the State of Michigan passed Proposal 2, which added a new Section 26 to Article I of the Michigan State Constitution. Proposal 2 amends the Michigan Constitution to provide that no public university can "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin." Proposal 2 extends much further, though, barring any and all units of "[t]he state" from granting preferential treatment on any of the prohibited bases in the context of "public employment, public education, or public contracting." Shortly after the passage of Proposal 2, the Coalition Plaintiffs commenced an action challenging its validity and seeking to prevent its enforcement.[5]

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[4] The Panel and District Court opinions set out in greater detail the facts underlying this case. *See* 3/18/08 Order, District Court Record Entry ("RE") 166, at 3-7; Panel Op. at 4-8.

[5] The Coalition Plaintiffs filed their initial Complaint on November 8, 2006. RE 1. The Coalition Plaintiffs filed an Amended Complaint on December 17, 2006. RE 24. And the Coalition Plaintiffs filed a Second Amended Complaint on March 28, 2007. RE 96. As noted

The Coalition Plaintiffs' Complaint alleges that Proposal 2 violates federal law, including the United States Constitution. *See* Complaint, RE 96, at ¶ 11. The first count of the Complaint claims that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment by "intentionally discriminating" against minorities. *Id.* at ¶¶ 105-111. The second and fourth counts of the Complaint claim that Proposal 2 violates the Equal Protection Clause by restructuring government in a manner that eliminates "equal political means" for minorities and women to petition for university admissions policies in their interest. *Id.* at ¶¶ 112-121, 130-136. The third count alleges that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964. *Id.* at ¶¶ 122-129. The fifth count alleges that Proposal 2 is preempted by Title IX of the Education Amendments of 1972. *Id.* at ¶¶ 137-142. And the sixth count alleges that Proposal 2 violates "the First Amendment rights of the universities." *Id.* at ¶¶ 143-149. The Complaint requests declaratory and preliminary and permanent injunctive relief restraining the "enforc[ement of] Proposal 2 insofar as it applies to the admission, education and graduation of students at the defendant universities." *Id.* at 21.

On October 17, 2007, the Universities filed a Motion to Dismiss in which they requested that the District Court drop them from the case. RE 179. Among

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above, in this brief "the Complaint" refers to the Coalition Plaintiffs' Second Amended Complaint.

other things, the Universities argued that Fed. R. Civ. P. 21 provides a mechanism for courts to dismiss unnecessary parties from a lawsuit. They maintained that they plainly qualified as unnecessary defendants because they could not provide the relief the Complaint demanded.

The District Court denied this aspect of the Universities' Motion to Dismiss.[6] RE 246. The court acknowledged that "dismissal for misjoinder is proper where the party is not responsible for the alleged harm and does not have the power to accord relief." RE 246 at 22. But the court nevertheless concluded that the Universities were "properly joined as parties to the case" because "the claims brought against the universities are intertwined with those challenging Proposal 2 in general." *Id.* The Universities respectfully submit that in so ruling the District Court applied an incorrect legal standard to an incorrect characterization of the Complaint and consequently reached an incorrect conclusion.

Plaintiffs appealed from the District Court's dismissal of their claims and the Universities cross-appealed on the limited basis that the District Court had erred in

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[6] The District Court granted the Universities' motion insofar as it requested dismissal of the Coalition Plaintiffs' claim that Proposal 2 violated the Universities' right to academic freedom. The District Court concluded that the Coalition Plaintiffs lacked standing to advance this claim. *See* RE 246 at 23-27. The Coalition Plaintiffs have not challenged this ruling on appeal.

declining to dismiss them from the case as unnecessary parties. The Universities' brief on appeal therefore did not discuss the merits of Plaintiffs' claims or the constitutionality of Proposal 2. Nor did their brief discuss the authority of the governing boards or their oversight of or involvement in admissions policy. As to this last issue, the Panel opinions reached conclusions that reflected conflicting understandings of how these boards function. The majority found (as a matter of law) that these boards retain plenary authority over matters of admissions policy and are free to exercise that authority at any time. Panel Op. at 22-23 The dissent found (as a matter of fact) that while these boards may "superficially have 'plenary authority' over [their] respective institution[s]," in reality "the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the universities." Panel Op. at 49-50. Some clarifications may assist this Court in its consideration of this issue.

## ARGUMENT

### I. The District Court Erred in Concluding that the University Defendants Were Properly Joined in this Action

Fed. R. Civ. P. 21 provides a procedural mechanism by which a court "may drop or add parties" from a case. *Letherer v. Alger Group, LLC,* 328 F.3d 262, 267 (6th Cir. 2003). "A misjoinder of parties … frequently is declared because no relief is demanded from one or more of the parties joined as defendants." *Id.* (citing 7

Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1683, at 475-476 (3d ed. 2001)). In *Letherer*, for example, plaintiffs included a party as a defendant solely in order to have it divert certain proceeds into an escrow account. When plaintiffs withdrew the escrow request, the district court concluded that this defendant—"who was neither seeking relief nor having relief sought from it"—was no longer an appropriate party and dismissed it from the case. *Id.* at 268. This Court affirmed.[7]

In this case, the Coalition Plaintiffs' Complaint does not state any claim specifically directed at the Universities or demand any relief that the Universities can provide. The Complaint begins by summarizing the various bases on which the Coalition Plaintiffs allege Proposal 2 is invalid under federal law. RE 96 at ¶¶ 1-13. It alleges jurisdiction. *Id.* at ¶¶ 14-15. It identifies the parties. *Id.* at ¶¶ 16-39. It describes the putative class. *Id.* at ¶¶ 40-47. It offers an extended statement of facts that details the Coalition Plaintiffs' objections to Proposal 2. *Id.* at ¶¶ 48-

[7] In *Letherer*, this Court indicated that decisions to dismiss parties under Rule 21 are reviewed for an abuse of discretion. The Universities submit that the District Court so plainly erred in declining to dismiss them from this case that this standard is satisfied here. The Universities respectfully suggest, however, that misjoinder cases like this one might more appropriately be subject to the sort of *de novo* review that this Court applies to decisions on motions to dismiss under Fed. R. Civ. P. 12(b)(6). Where a decision on misjoinder requires the trial court to exercise its discretion in determining what is "just" under Fed. R. Civ. P. 21, then application of an abuse of discretion standard makes sense. Where, however, a decision on misjoinder requires the trial court to determine whether the plaintiff failed to advance any actual claims or seek any recoverable relief as to some of the named defendants, then the trial court is deciding a question of law that is similar, if not analytically identical, to the question presented by 12(b)(6) motions.

104. It fleshes out the Coalition Plaintiffs' six theories as to why Proposal 2 is unconstitutional. *Id.* at ¶¶ 105-149. And it concludes each count by asking for "preliminary and permanent injunctive and declaratory relief restraining the defendants from enforcing Proposal 2"—a request that can only be directed against the state actor charged with "enforcing Proposal 2," the Michigan Attorney General. The Complaint neither does, nor could, seek this relief from the Universities.

In numerous cases involving analogous facts courts have dismissed misjoined parties. Consider, for example, *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578 (E.D. Pa. 1982). In that case, plaintiffs challenged the constitutionality of a reapportionment plan and sought a declaratory judgment, a preliminary and permanent injunction, and an order directing the adoption of a valid plan. Several defendants asked to be dismissed from the case because they were not involved in the state reapportionment process and therefore had no authority to grant plaintiffs the relief they sought. The court granted the motion, holding that "where certain defendants are clearly without authority or power to effect any of the relief sought by the plaintiffs, a motion to drop those defendants may properly be granted." Because the Universities are "clearly without authority or power to effect any of the relief

sought by the [Coalition Plaintiffs]," the District Court plainly erred in not reaching the same conclusion here.

Consider also *Brown v. N.C. State Board of Elections,* 394 F. Supp. 359 (W.D.N.C. 1975). In that case, the plaintiff brought an action against a state board of elections and a county board of elections and their respective members, challenging the constitutionality of a statute that required individuals who wished to stand as candidates for public office to pay a filing fee. The county board and its members moved for dismissal on the ground that they were not proper parties to the action. The court granted the motion, observing that the statute in question required that candidates file their applications with the state board and that the county board had "no authority to accept or reject such applications." Because the county board and its members were unable to afford plaintiff the relief he wanted—as the Universities here are unable to do with respect to the demands of the Coalition Plaintiffs—they were dismissed from the case.

Although an unpublished opinion, *Brooks v. Glynn County,* 1989 U.S. Dist. LEXIS 4776, *11 (S.D. Ga. 1989) follows the same reasoning and is also instructive. In that case, plaintiffs brought a class action challenging state laws that allowed for certain election procedures that prevented African Americans from being the majority voting block in many districts. Plaintiffs claimed that these procedures ran afoul of the Federal Voting Rights Act and the Thirteenth,

Fourteenth, and Fifteenth Amendments. *Id.* at *2. Plaintiffs sued the State Election Board, the Secretary of State of Georgia, the Chairman of the State Election Board, and also the local superintendents of elections of several counties. The local defendants moved to be dropped from the case pursuant to Rule 21 on the basis that the state defendants were responsible for the challenged practices and the local defendants could not grant plaintiffs the relief they wanted. Plaintiffs claimed that the local defendants were proper parties because they supervised the elections and would implement any changes to the law. *Id.* at *6. Thus, the argument raised by plaintiffs in *Brooks* is identical to that raised by the Coalition Plaintiffs here, i.e., that a party who has no connection with a law beyond the obligation to *follow it* is a proper defendant in a lawsuit challenging the law. The *Brooks* court granted the local defendants' Rule 21 motion, ruling that "[w]here a particular defendant lacks authority to provide the requested relief, dismissal is proper." *Id.* at *8-*11.

A number of courts have described dismissal under these circumstances as grounded in principles of standing, reasoning that no actual case or controversy exists between those particular defendants and the plaintiffs in the case. *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (holding that because the governor and attorney general had no powers to redress the injuries alleged, the plaintiffs had no case or controversy with those defendants that would permit them

to maintain an action in federal court); *Snyder v. Millersville Univ.*, No. 071660, 2008 U.S. Dist. LEXIS 97943, at *12 (E.D. Pa. Dec. 3, 2008) (holding that plaintiff's request for a mandatory injunction failed because she had proceeded against only individuals who did not have the authority to afford her the desired relief); *Williams v. Doyle*, 494 F. Supp. 2d 1019, 1024 (W.D. Wis. 2007) (holding that a claim for injunctive relief can only stand against someone who has the authority to grant it).

The Universities should have been dismissed pursuant to Rule 21 because the Complaint demands no relief they can provide. Rather, as discussed above, the Complaint claims only that Proposal 2 violates various federal laws and asks for an injunction against its enforcement. Because the requested remedy would restrain the "enforc[ement] of Proposal 2," the Complaint, in its totality, raises a claim solely with respect to the state officer charged with defending and enforcing that constitutional provision—the Michigan Attorney General.

The District Court therefore erred in concluding that "the claims brought against the universities are intertwined with those challenging Proposal 2 in general." RE 246 at 22. After all, the Complaint—for the reasons discussed—did not actually advance *any* claim against the Universities. Rather, the Complaint simply alleged that the enforcement of Proposal 2 should be enjoined because it

runs afoul of various federal laws. Accordingly, there were "no claims brought against the universities" in the Complaint, let alone claims that were "intertwined" with "those challenging Proposal 2 in general."

The District Court further erred in relying on Fed. R. Civ. P. 20(a) in concluding that the Universities were properly joined in this case. The District Court reasoned that, because "the claims against the university defendants and the attorney general share common questions of law and fact and arise out of the same occurrence, the preconditions of joinder under Rule 20(a) have been met and dismissal is unwarranted." RE 246 at 22. But that analysis obviously does not apply here, where the Complaint actually states no claim at all against the Universities, let alone a claim that "share[s] common questions of law and fact and arise[s] out of the same occurrence" as the other claims advanced.

Unfortunately, the District Court fell into this error because it accepted an argument advanced by the Coalition Plaintiffs that has no merit. In response to the Universities' Motion to Dismiss, the Coalition Plaintiffs argued that they had a claim against, and might need a remedy from, the Universities because those institutions "implemented" Proposal 2 by making such changes to their admissions and financial aid policies as the law required. RE 198 at 1. The Coalition Plaintiffs contended that, if the District Court declared that Proposal 2 violated the

Constitution or other federal law, and if that violation "harmed the admission" of minorities, then "affirmative relief" against the Universities might be required to undo those injuries. *Id.* at 7. The District Court accepted this argument, stating that "[i]f this Court were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own." RE 246 at 22.

This line of reasoning suffers from two conspicuous and fatal flaws. First, the Complaint nowhere states that the Universities violated the Fourteenth Amendment or the federal civil rights laws. Rather, it alleges, over and over again, that Proposal 2 runs afoul of those provisions. Nor does the Complaint include a request for relief that encompasses the "affirmative" remedies that the District Court speculated might prove necessary. Indeed, with respect to this failing the Coalition Plaintiffs made no argument at all, save the weak observation that the "Second Amended Complaint repeatedly requests 'such further relief as may be necessary' to implement any judgment that they secure." RE 198 at 2, n. 1. Surely, the pleading requirements of the federal rules—particularly after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)—demand more from a complaint than this.

Second, and for these purposes more importantly, such a claim against the Universities—even if made—would not bring them within the terms of Rule 20(a). After all, the "transaction" or "occurrence" allegedly giving rise to such a claim would not be the passage of Proposal 2; it would be the implementing policies and procedures adopted by the Universities. Of course, the Universities deny that the Coalition Plaintiffs have a legally cognizable claim against them based upon their decision to obey the law. But the critical point here is that if such a claim did exist it would not belong in this lawsuit because it would relate to transactions and occurrences different than those at issue in this case. Permissive joinder under Rule 20(a) therefore has no application here.[8]

The Universities are not necessary parties to this action. They are not charged with the responsibility of enforcing Proposal 2 against anyone or of defending Proposal 2 in court. They did not draft or enact Proposal 2 and they cannot repeal or amend it. At present, all they can do is comply with their legal obligation to follow it. Should this Court grant the Coalition Plaintiffs the relief they seek, that relief can be obtained from the Michigan Attorney General. Because the Universities are not necessary parties to this action, they should have

[8] In addition, *if* the Coalition Plaintiffs were to prevail in this action, and *if* the courts were to hold Proposal 2 unconstitutional or otherwise unlawful, and *if* the law required the Universities to take remedial steps as a result, then there is no reason to believe that the Universities would not then follow the law and adopt such measures.

been dismissed pursuant to Fed. R. Civ. P. 21. The Universities therefore respectfully request that this aspect of the District Court's Opinion and Order be reversed.[9]

### II. The Governing Boards of the Universities Retain Ultimate Authority Over Admissions Policies and Engage with Admissions Policy Issues

As noted above, one of the claims advanced by the Plaintiffs is that Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities. This claim led the Panel judges into a discussion of what qualifies as a "political process." Panel Op. at 18-25 and 47-56. In the course of analyzing this issue, the Panel opinions made a number of statements about the Universities' governing boards. The Universities take no position on the merits of the political process claim or how it should be analyzed, leaving that to this Court and the parties who are properly before it. Nevertheless, because the Panel opinions reflect some conflict and confusion over the role of the governing boards with respect to admissions matters, and because the Universities have an obvious interest in ensuring that their governance is correctly understood and portrayed, the Universities offer some clarifications they hope will assist the Court.

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[9] Because another party to the litigation can afford the Coalition Plaintiffs the relief they seek, although the Universities cannot, the Coalition Plaintiffs obviously would not be prejudiced by the dismissal of the Universities from this case.

As both Panel opinions recognize, the general supervision of these Universities is vested in governing boards whose members are elected.[10] Panel Op. at 21 and 48. The Panel opinions agree that the Michigan Constitution confers upon these boards the plenary authority to manage their respective institutions. Panel Op. at 21 ("Michigan law has confirmed this absolute authority again and again") and 47 ("The status of these boards has been described by the Michigan Supreme Court as 'the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature,'" quoting *Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1039 (Mich. 1911)). And the Panel opinions agree that these boards, through their bylaws, authorize various administrators to set admissions standards. Panel Op. at 21 n. 5 and 48-49.

The opinions part company, however, with respect to their understanding of whether these governing boards do, or even could, maintain any ongoing supervisory role over admissions issues once this authorization has occurred. Compare majority Panel Op. at 22 ("Nothing prevents the board from altering this

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[10] Interestingly, some candidates for these boards have made their positions on admissions issues, including affirmative action, part of their campaign platform. *See*, *e.g.*, Kalamazoo League of Women Voters report on University of Michigan regent candidates, http://www.lwvka.org/guide04/regents.html (last visited December 1, 2011) (two candidates expressing opposition to affirmative action in admissions); "University of Michigan's admissions policy still an issue for regents' election," *Black Issues in Higher Education*, October 21, 2004 (candidates expressing disagreement over affirmative action in admissions).

framework for admissions decisions if they are so inclined") with dissenting Panel Op. at 49-50 ("The governing boards have fully delegated the responsibility for establishing admissions standards to several program-specific administrative units within each institution …. Each institution's board may superficially have 'plenary authority' over its respective institution[], but the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the universities"). A clearer understanding of governing board authority and how it operates may help avoid further conflict or confusion over this issue.

The governing boards of the Universities derive their authority from the Michigan Constitution. Mich. Const. art. VIII, § 5. Their bylaws are not the source of that authority but, rather, derive from it. Each board therefore expressly reserves the power to amend its bylaws. *See* Univ. of Mich., Bylaws of the Bd. of Regents § 14.03, *available at* http://www.regents.umich.edu/bylaws (last visited December 1, 2011) and Mich. State Univ., Bd. of Trs. Bylaws, art. 17, available at http://trustees.msu.edu/bylaws (last visited December 1, 2011).[11] That a governing board can revise its bylaws is not a mere theoretical possibility. It

[11] The bylaws and proceedings of the governing boards of these constitutionally created institutions are, in the view of the Universities, "legislative facts" that this Court is free to consider, just as it could consider "the ruling of a judge" or "the enactment of a legislative body." *See* Fed. R. Evid. 201, Notes of Advisory Committee. Even if this Court did treat these bylaws and proceedings as "adjudicative facts," however, judicial notice could be taken of them as facts that can "accurately and readily [be] determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

happens with some frequency. For example, since 2008 the University of Michigan Board of Regents has revised more than two-dozen of its bylaws. Two of those bylaws fall within Chapter VIII, which addresses "Admission and Registration of Students."[12] The bylaws of the Board of Trustees of Michigan State University indicate they were adopted in 1965 and revised in 1977, 1979, 1980, 1990, 1994, 2000 and 2003.

Because the Universities are vast and highly complex institutions, their governing boards must authorize others—a President, a Provost, executive officers, and a host of others—to implement university policy and conduct day-to-day operations. This includes rule- and decision-making responsibilities with respect to admissions. *See* Univ. of Mich., Bylaws of the Bd. of Regents, §§ 2.04 and 8.01, *available at* http://www.regents.umich.edu/bylaws (last visited December 1, 2011) (placing academic affairs and, specifically, undergraduate admissions under the authority of the Provost) and Mich. State Univ., Bd. of Trs. Bylaws, art. 4, *available at* http://trustees.msu.edu/bylaws (last visited December 1, 2011)

[12] Bylaw 8.01 states that it was revised in April of 2009. The minutes from the April, 2009 board meeting include a line-edited text of the bylaw that shows what was changed. The bylaw was revised to name the specific administrators at the three University of Michigan campuses responsible for undergraduate admissions and to indicate their respective lines of direct report. Bylaw 8.04 states that it was revised in July of 2008. The minutes from the July, 2008 board meeting indicate that this was among a number of non-substantive "housekeeping" amendments to the bylaws. Interestingly, the minutes from the July, 2008 board meeting also show that an alumna of the university addressed admissions policy issues during the public comment portion of the meeting. These minutes can be found at http://www.regents.umich.edu/meetings/minutes.

(directing that the Provost "[s]hall be responsible for supervising procedures and policies relating to the admissions of students").

At the same time, the governing boards have unambiguously declared that they retain the plenary and final authority that the Michigan Constitution confers upon them. *See* Univ. of Mich., Bylaws of the Bd. of Regents, Preface, *available at* http://www.regents.umich.edu/bylaws (last visited December 1, 2011) (noting that all rule-making authority within the institution is subject "to the ultimate authority of the board") and Mich. State Univ., Bd. of Trs. Bylaws, Preamble, arts. 4 and 8, *available at* http://trustees.msu.edu/bylaws (last visited December 1, 2011) (emphasizing that "The Board of Trustees …. exercises the final authority in the government of the University" and specifically stating that the board retains the authority to "determine and establish the qualifications of students for admission at any level" upon the recommendation of the President, whom the Board elects and who serves at the pleasure of the Board). The governing boards take seriously their constitutional charge of institutional oversight.

In order to perform their supervisory function, the governing boards meet regularly. *See* Univ. of Mich., Bylaws of the Bd. of Regents, §§ 1.01, *available at* http://www.regents.umich.edu/bylaws (last visited December 1, 2011) and Mich. State Univ., Bd. of Trs. Bylaws, art. 2, *available at* http://trustees.msu.edu/bylaws

(last visited December 1, 2011).[13] Time is set aside at open board meetings for public comment. *See* Univ. of Mich., Public Comments Policy, *available at* http://www.regents.umich.edu/meetings/addressing.html (last visited December 1, 2011) and Mich. State Univ. Bd. of Trs., Policy for Addressing the Board, *available at* http://trustees.msu.edu/meetings/publicparticipation.html (last visited December 1, 2011). These public meetings provide a vehicle for the governing boards to receive reports from the President, Provost, and others; to hear the thoughts, concerns, and requests of members of the public; and to express their views on matters of university policy. This has included discussion of the specific issue of university policy regarding the use of affirmative action in admissions. *See*, *e.g.*, Univ. of Mich. Bd. Regents Proceedings, March, 2007, p. 264-265 (report by Provost to Regents regarding changes in admissions practices in light of Proposal 2; public statements by Regents regarding the report); Univ. of Mich. Bd. Regents Proceedings, June, 2004, p. 301 (report by Provost to Regents on the revamping of the undergraduate admissions process in light of the United States Supreme Court decision in *Gratz v. Bollinger*); and Univ. of Mich. Bd. Regents

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[13] Minutes of public meetings are prepared and made available. *See* Univ. of Mich., Bylaws of the Bd. of Regents, § 1.11, *available at* http://www.regents.umich.edu/bylaws and Proceedings and Minutes, *available at* http://websvcs.itcs.umich.edu/regntpro or http://www.regents.umich.edu/meetings/minutes (last visited December 1, 2011) and Mich. State Univ., Bd. of Trs. Meetings, available at http://trustees.msu.edu/meetings (last visited December 1, 2011).

Proceedings, July, 2003, p. 11 (Regents commenting on the importance of affirmative action in university admissions and of the United States Supreme Court decision in *Grutter v. Bollinger*), *available at* http://websvcs.itcs.umich.edu/regntpro (last visited December 1, 2011).

The record in this case does not contradict the notion that the governing boards have continuing authority over and involvement in matters of admissions policy. In reaching a different conclusion, the Panel dissent primarily relied upon the deposition of the University of Michigan Law School Assistant Dean of Admissions, Sarah Zearfoss, and the deposition of the former Dean of the Wayne State University Law School, Frank Wu. The Universities respectfully submit that it is important to understand the limited scope of the testimony offered in these depositions. As the record indicates, Assistant Dean Zearfoss was produced in response to a 30(b)(6) deposition notice requesting a witness who could testify about how the University of Michigan Law School makes admissions decisions. RE 203, Pls.' SJ Mot., Ex. E. (Zearfoss Dep.) at 4. She was not produced to testify about—and nothing in her deposition suggests she has personal knowledge of—questions regarding the extent to which admissions policies are subject to the control and oversight of the University of Michigan Board of Regents, let alone the Board of Trustees of Michigan State University or the governing board of any

other institution.[14] In the same vein, Dean Wu could only speak to his understanding of how admissions decisions were made within one academic unit at Wayne State, and certainly not to any issue relevant to these Universities.[15] The Universities respectfully suggest that a correct understanding of how their governing boards exercise their authority is better achieved through an examination of art. VIII, § 5 of the Michigan Constitution, which affords them plenary power over their institutions; their bylaws, which clearly express their intention to retain that power even in the context of necessary delegation; and their proceedings, which reflect their ongoing involvement in matters of academic policy, including admissions.

## CONCLUSION

For the reasons set forth above, the Universities respectfully request that this Court reverse the District Court's ruling that the Universities are proper parties to this case and dismiss them from this action. The Universities further respectfully request that, to the extent this Court finds it necessary to address the authority of

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[14] Indeed, immediately prior to Assistant Dean Zearfoss's cited testimony, counsel for the Universities interposed an objection on the basis that the witness "obviously can't speak to [the] question" of "who has the legal power to do these things." RE 203, Pls' SJ Mot., Ex. E (Zearfoss Dep.) at 214.

[15] Again, in conjunction with Dean Wu's cited testimony, counsel for the Universities interposed an objection that the witness could not answer legal questions about who had authority over admissions issues. RE 203, Pls' SJ Mot., Ex. F (Wu Dep.) at 192.

the governing boards and their involvement with matters of admissions policy, it consider the clarifications offered above.

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Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 4,931 words.

/s/ Leonard M. Niehoff
Leonard M. Niehoff

## CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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