Nos. 06-2640, 06-2656

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,
Plaintiffs-Appellees,

v.

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

MICHAEL A. COX, Attorney General of the State of Michigan
Intervening Defendant-Appellee,

and

ERIC RUSSELL; TOWARD A FAIR MICHIGAN,
Intervening Defendants-Appellants.

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

Honorable David M. Lawson, District Judge

UNIVERSITIES' BRIEF IN RESPONSE TO MOTION TO EXPEDITE

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Introduction

Defendants/Cross-Plaintiffs/Appellees Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University (the "Universities") ask this Court to deny the Motion to Expedite filed by Intervening Defendant-Appellant Eric Russell and by Toward A Fair Michigan ("TAFM"), which asks this Court to resolve the underlying case on the merits, notwithstanding that the subject of the appeal is only the temporary injunction entered by the District Court.[1]

As an initial matter, it should be noted that the District Court denied TAFM's motion to intervene and that TAFM's appeal of that ruling has not yet been decided by this Court. Accordingly, TAFM is not a proper party to the motion.

Russell has been allowed to intervene but recent factual developments raise serious questions as to whether he remains a proper intervenor. He has not applied to Michigan State University. He has been accepted for admission to the Wayne State University Law School. And the University of Michigan Law School has announced

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[1] The Motion to Expedite appears to be directed to resolution of the merits of the underlying case, and not to the timing of any further proceedings with respect to the appeal from the temporary injunction itself. However, if Russell is asking this Court to expedite resolution of the underlying appeal from the temporary injunction, the Universities are opposed. The only briefs addressing the merits of the temporary injunction before this Court were written during a 48-hour period. The important and complex legal issues raised by the temporary injunction should not be resolved without a normal period to develop legal arguments for the record.

that, in light of this Court's stay of the temporary injunction, the factors listed in Article I, § 26 of the Michigan Constitution ("the Amendment") will have no effect on admissions and financial aid decision making. In sum, the sole basis on which Russell intervened has been resolved.

The motion suffers from even more fundamental difficulties. It asks for extraordinary relief and does so based on two plainly incorrect premises: first, that all parties, including the Universities, agree that an emergency exists, requiring this court to rush to reach the merits (Motion to Expedite, p. 7); and, second, that the District Court intends for the parties to engage in "prolonged litigation and extensive factual and expert discovery" (Motion to Expedite, p. 1). To the contrary, any prior expressions of urgency by the Universities related: (i) to the circumstances in mid-December, not the current changed circumstances; and (ii) to the temporary injunction for the current cycle, not to the ultimate merits. Further, the district court has already put in place a process to minimize (or eliminate, if possible) discovery and to resolve this case in a prompt, efficient and fair manner.

Statement of Facts

On November 8, 2006, Plaintiffs filed a lawsuit against the Universities and Governor Jennifer Granholm challenging the Amendment on a variety of bases. On December 11, 2006, the Universities filed a cross-claim against Governor Granholm seeking a declaratory judgment and preliminary injunctive relief with

respect to the application of the Amendment to the Universities during the admissions and financial aid cycle already in progress.

On December 18, all of the parties to the case – the Plaintiffs, the Governor, the Universities and the Attorney General – submitted a Stipulation for Entry of Order ("Stipulation") to temporarily enjoin the application of the Amendment to the existing admissions and financial aid policies of the Universities through the end of the pending admissions and financial aid cycles. On December 19, the District Court entered an Amended Order that granted such a temporary injunction. Amended Order, Dkt. #39. On December 27, the District Court granted Intervenor Eric Russell's motion to intervene to allow him to protect his personal interest in the "implementation of Proposal 2 now, while his application is being processed." Opinion and Order, p. 15, Dkt. # 55.

Russell appealed from and sought a stay of the district court's injunction from this Court. On December 29, this Court granted the stay. On January 9, 2007, proposed intervenor DeCarto Draper sought *en banc* review of the stay, which was denied on January 12. On January 9, 2007, Plaintiffs sought from the Supreme Court a stay of this Court's stay, which was denied on January 19, 2007.

Following this Court's entry of a stay, each of the Universities publicly announced their policies for the current admissions and financial aid cycle. The University of Michigan announced in pertinent part that:

> **As stated in the language of Proposal 2, our admissions and financial aid processes will not discriminate, nor grant preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin.** Of course, we will recognize exceptions provided in the amendment including one for programs that receive federal funds.
>
> We want to emphasize that there is uncertainty about how Proposal 2 will be interpreted by the courts. However, because of the Sixth Circuit Court's decision and in the absence of further guidance from the courts, **we will proceed cautiously by adjusting our admissions and financial aid policies such that race and gender will have no effect on the decision-making process.**
>
> * * *
>
> The University of Michigan is a dedicated and creative community, and **we will seek innovative new ways to sustain our diversity within the boundaries of the law.** We must keep the doors of opportunity open for all.[2]

Likewise, the University of Michigan Law School (to which Russell has applied) announced:

> We will modify our admissions process ... so that the factors listed in Proposal 2 will have no effect on decisionmaking. See Letter from President Mary Sue Coleman Regarding Proposal 2.
>
> *** [T]he applicant's self-reported race or ethnicity ... will not be available to the admissions officers who conduct substantive reviews.[3]

Michigan State University has similarly affirmed that:

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[2] "Proposal 2 Next Steps," http://www.umich.edu/pres/speeches/070110prop2.html, last visited February 2, 2007.

[3] "Updated Note on Admissions Policy for the 2006-2007 Year" http://www.law.umich.edu/NewsandInfo/prop2/index.htm#January10Note, last visited February 2, 2007.

> The university has made adjustments to provide greater assurance that **admissions decisions are made in a manner that does not discriminate or grant preference in violation of the law**. Whereas individuals reviewing admissions applications were previously provided with an applicant's complete file, sometimes including notation of an applicant's race, sex, color, ethnicity or national origin, **the process has been adjusted to mask such data so that it is not available to individuals reviewing applications.** As it does during every admissions cycle, the university will continue to monitor its admissions process and make refinements in future cycles as necessary. [4]

Finally, Wayne State University has likewise declared its commitment to complying with the requirements of the Amendment.[5] For example, the admissions policy of the Wayne State Law School, which has accepted Russell for admission, expressly provides that:

> The Admissions Committee shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin (except to the extent necessary to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds).[6]

Also following entry of the Stay by this Court, on January 2, 2007, Russell and TAFM filed suit against the University of Michigan[7] and Governor Granholm

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[4] "Diversity and Inclusion at MSU After Proposition 2, Frequently Asked Questions," http://president.msu.edu/prop2response/faqs/index.php?faqs, last visited January 31, 2007.

[5] News Release, Exh. A.

[6] "Wayne State University Law School Admissions Standards and Procedures," Exh. B.

[7] The Washtenaw County suit also named individual regents and certain officials of the University of Michigan, all in their official capacities.

in the Circuit Court for Washtenaw County, Michigan. *See* Exh. C. On January 22, 2007, the University of Michigan moved to dismiss that case on the basis that (1) TAFM lacked standing under Michigan law and (2) no present case or controversy remained as to Russell in light of the University of Michigan's revised admissions policy, described above. *See* Exh. D.[8] In response, on January 30, 2007 Russell and TAFM stipulated to the dismissal without prejudice of their complaint. Exh. E.

In the meantime, on January 5, the District Court entered an "Order Consolidating Cases, Granting Attorney General's Motion To Intervene, And Setting Dates" (Scheduling Order, Dkt. # 69), which established a process for resolving this dispute in an orderly, thoughtful and speedy manner, requiring, among other things, that "plaintiffs ... shall serve on opposing counsel ... a joint proposed stipulation of facts on or before February 9, 2007 ... ***to determine the extent to which discovery can be foreshortened or eliminated, and to provide a possible basis for a record for dispositive motions or a trial on stipulated facts.***" Defendants are required to respond by February 28. By March 21, "[i]t is the Court's intention to conduct [a status] conference for the purpose of reviewing the proposed stipulation of fact and responses, evaluating the parties' discovery plan,

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[8] Exhibit D does not include the exhibits to the motion/

expediting discovery (***if any is needed***), and ***establishing deadlines for either filing dispositive motions or conducting a trial on stipulated facts***." *Id.*

Legal Argument

I. Expedited Resolution of the Merits on an Appeal from a Ruling on an Interlocutory Injunction is an Extraordinary Action which is Not Warranted Here

Appellate review of a preliminary injunction is ordinarily limited to consideration of only the preliminary injunction itself for self-evident reasons:

> The curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review, most obviously as to issues that have not yet been decided by the trial court, and appellate courts are apt to be particularly reluctant to expand review when constitutional issues are involved.

16, Wright Miller and Cooper, Fed. Prac. & P, §3921.1, pp 25-27 (1996), footnotes omitted. The Universities do not dispute that this Court may, in rare circumstances, reach the merits of a case that comes before it in the posture of an appeal from an order of preliminary injunctive relief. The Universities do not, however, believe it is appropriate to do so here. Indeed, Russell's argument that the Court should do so rests on demonstrably incorrect premises that ignore both the record in this case and the pertinent legal analysis.

A. The Universities do not Agree, and the Facts do not Support, that an Emergency Exists Requiring Expedited Resolution of the Ultimate Merits by this Court

At the heart of Russell's motion is the assertion that "all parties agree" that "pending admissions and financial aid decisions of the State's public universities" creates "a specific and immediate crisis" requiring expedited resolution. *See* Motion to Expedite at 6-7. In support of these assertions, Russell relies on the urgency expressed by the Universities (and other parties) with respect to the situation in mid-December, when they sought the temporary injunction with respect to the current admissions cycle. Russell ignores the events that have occurred since then, which have extinguished the urgency that previously existed with respect to the temporary injunction. Moreover, even in mid-December, the Universities' concerns were limited to the current admissions and financial aid cycle, not the ultimate merits. There is accordingly no reason that this Court must rush to reach the final merits here.[9]

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[9] More personally to Russell, these developments mean that his application to the University of Michigan law school, on which his interest in intervention is based, will be considered under policies adopted to comply with Proposal 2. As noted above, this calls into question whether he remains a proper party to this proceeding.

B. Immediate Resolution by this Court is Not Required to Prevent "Delay, Great Expense to the Private Parties and the State, and Prolonged Uncertainty about the Validity of Section 26"

Russell asserts that immediate resolution of the merits by this Court is required because "the District Court has recently set the case on a course contemplating prolonged litigation and extensive factual and expert discovery [that] will unjustifiably ensure months of delay, great expense to the private parties and the State, and prolonged uncertainty about the validity of Section 26." Motion to Expedite at 1.

As is clear from the facts set forth above, this assertion is grossly unfair to the District Court, which in fact adopted an accelerated procedure "***to determine the extent to which discovery can be foreshortened or eliminated, and to provide a possible basis for a record for dispositive motions or a trial on stipulated facts.***" The District Court's scheduling order is designed to determine by mid-March whether this case can be resolved as a matter of law or on stipulated facts. The District Court has thus expressed its commitment to resolving this case as quickly as possible consistent with the fair and orderly consideration of the dispute.

C. Russell has not Demonstrated that this Case can be Resolved as A Matter of Law

As cases cited by Russell himself reflect, an appellate court will reach the ultimate merits on an appeal from a preliminary injunction only in the unusual case where the record is sufficiently developed to permit the appellate court to conclude

that immediate disposition is proper. Thus, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986), *overruled in part on other grounds by Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court held:

> [I]f a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.
>
> ***
>
> [Here] we have before us ***an unusually complete factual and legal presentation*** from which to address the important constitutional issues at stake.

See also, Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1185-87 (8th Cir. 2000) (court could reach the merits because "we are faced with a purely legal issue on a fixed administrative record"); *Callaway v. Block,* 763 F.2d 1283, 1287 n. 6 (11th Cir. 1985) (court could reach the merits "as long as the facts are not disputed and the parties have presented their arguments to the court").

In this case, the legal issues were developed in briefs filed on forty-eight hours' notice in the context of an emergency motion for stay. When the motion to expedite was filed, answers had not even been filed to the underlying complaint (although that has since occurred). Further, the District Court has already put in place a process to very quickly identify the disputed issues of material fact, if any, and to resolve the case as a matter of law or on stipulated facts, if possible.

Accordingly, there is neither a need nor a basis for this Court to immediately reach the merits.

D. Expedited Resolution of the Merits is Inappropriate because Russell No Longer has an Interest that may be Affected by the Resolution

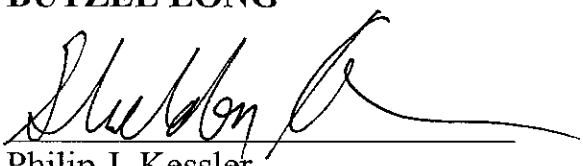
Russell was permitted to intervene based on his status as a current applicant to the University of Michigan law school seeking to protect his "personal stake in seeing that his law school admission chances are not diminished." (Opinion and Order, p. 15, Dtk. #55). The University of Michigan, including its law school, has now adopted policies providing Russell with precisely that. Thus, any ruling by this Court, whether on the preliminary injunction or the ultimate merits, would have no relevance to the only interest Russell has in this controversy. In light of these facts, it would be particularly inappropriate for this Court to grant Russell the extraordinary relief which he seeks. Instead, this Court should allow this case to proceed in the ordinary course, including before the District Court, which may, among other things, consider whether Russell remains a proper intervenor.

Conclusion

For the reasons stated, the motion to expedite should be denied.

Respectfully submitted,

BUTZEL LONG



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Dated: February 5, 2007

Certificate of Service

I hereby certify that on February 5, 2007, the following individuals were served with the **UNIVERSITIES' BRIEF IN RESPONSE TO MOTION TO EXPEDITE** by email:

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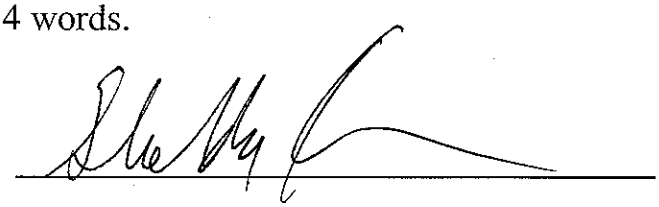
Certificate of Compliance

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 2634 words.



Sheldon Klein

EXHIBIT A

WAYNE STATE UNIVERSITY
news release

Date: November 8, 2006
Contact: Francine Wunder
Voice: 313-577-8155
E-mail: fwunder@Wayne.edu
Fax: 313-577-4459

Wayne State To Continue Pursuit of Urban Mission In Spite of Proposal 2 Setback

WSU President Irvin D. Reid Issues Statement in Response To Passage of Ballot Initiative

In the wake of the passage of Proposal 2 in Michigan on November 7, Wayne State University President Irvin D. Reid issued the following statement on November 8, 2006:

As President of Wayne State University, I am disappointed that Proposal 2 has passed. As the first person of color to lead this university, I believe in providing opportunity for academic achievement to the best and brightest students – and those who have the potential to be the best and brightest. Our urban mission is to equip all students with the personal and academic tools they need to succeed in school and in life.

As the most diverse institution of higher education in the state and the only urban research university in the state, we remain committed to including people of all backgrounds on our campus. We have long welcomed people of every race, color, and creed, and both genders, as equals in roles ranging from students and faculty to staff and administrators. We also recognize the importance of the rule of law and we fully respect the decision made yesterday by the voters of Michigan. We expect that many details of how the ballot measures affect our operations will still need to be determined.

I have asked the members of my team to engage in a comprehensive review of our programs that may be affected. All our activities should promote diversity and inclusion, and they should all be consistent with any applicable legal requirements. If necessary, we will develop alternatives to our present policies and determine methods for implementation that make sense during this time period.

We have not had time to investigate the impact of Proposal 2 on the university as a whole. However, Wayne State intends to fully honor its obligations to students, faculty and staff now and in the future. We stand behind funds previously awarded to students toward their education and want to reassure employees that their jobs are not in jeopardy as a result of Proposal 2. As an institution we value each of our stakeholders and intend to further cultivate these relationships regardless of the passage of any adverse legislation.

Although the programs and policies that we have abided by for many years have proven effective in providing opportunity to students of all backgrounds, I am confident we will be able to continue the pursuit and fulfillment of our urban mission. I invite the entire Wayne State community to join us in sustaining the momentum we have all worked so hard to achieve in pursuit of this important goal.

###

EXHIBIT B

Wayne State University Law School
Admissions Standards and Procedures
Effective December 22, 2006*

Section 1 -- Discretionary Admissions Criteria

The Admissions Office shall admit any applicant whose factor score is above an "automatic admit" level set by the Admissions Committee, unless the applicant's LSAT or GPA are unusually low, or the applicant otherwise merits special review and consideration by the Admissions Committee.

The Admissions Office has the authority to reject any applicant if the applicant's factor score is below a "presumptive deny" level set by the Admissions Committee, and that applicant, in the judgment of the Admissions Office, does not merit special review and consideration by the Admissions Committee. In deciding whether an applicant whose factor score is below the "presumptive deny" level nonetheless merits special review and consideration by the Admissions Committee, the Admissions Office shall consider the factors listed below in subsections two through five.

In making its decisions on the applicants brought before it, the Admissions Committee is directed to consider positively

(1) an applicant's academic achievement and potential, as shown by his LSAT score and Grade Point Average;

(2) an applicant's demonstrated capacity to overcome or persevere against:

(a) socioeconomic disadvantage, bearing in mind the applicant's socioeconomic background while he or she attended elementary and secondary school and was an undergraduate student; whether the applicant would be the first generation of his or her family to attend or graduate from an undergraduate program or from a graduate or

* Unless the University should receive the benefit of a court order excusing its compliance with Proposition 2 (passed November 7, 2006) until a later date, in which case it will become effective at that later date.

professional program; the applicant's responsibilities while attending elementary and secondary school and as an undergraduate student, including whether he or she was employed and whether he or she helped to raise children; or

(b) substantial obstacles such as family or personal adversity, educational disability (such as attendance at a school identified, for reasons of low student achievement or graduation rate, as "in need of improvement" under the No Child Left Behind Act), and prejudice or discrimination;

(3) any special circumstances suggesting that the applicant's LSAT score or prior academic record do not accurately reflect his or her current academic potential, such as the age of the applicant's undergraduate grades, a marked improvement in grades in the later years of college, or other special circumstances the candidate brings to the attention of the Admissions Committee in his or her personal statement or elsewhere in his application; and

(4) other factors that contribute to a diverse and engaged law school student body and legal profession, including but not limited to geographic residence (including in the City of Detroit), work and volunteer experience, leadership qualities, commitment to community and public service, communication skills, multilingual proficiency, experience of life in a foreign country or on a Native American tribal reservation, and other qualities of background and experience not ordinarily well represented in the student body.

Section 2 -- Special Directions to the Admissions Committee

1. The Admissions Committee shall take into account the Law School's tradition of providing an opportunity for qualified persons from economically and educationally disadvantaged backgrounds to become lawyers.

2. The Admissions Committee shall seek to admit a student body with a broad set of interests, backgrounds, life experiences, and perspectives.

3. The Admissions Committee shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin (except to the extent necessary to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds).

EXHIBIT C

Original — Court; 1st copy — Defendant; 2nd copy — Plaintiff; 3rd copy — Return

STATE OF MICHIGAN 22ND JUDICIAL CIRCUIT	**SUMMONS**	CASE NO. 07-01 JUDGE Melinda Morris

Court address Clerk of the Court, 101 E. Huron St., P.O. Box 8645, Ann Arbor MI 48107-8645 Court telephone no. (313) 994-2507

Plaintiff name(s), address(es) and telephone no(s).
Eric Russell, et. al. CLASS ACTION

Plaintiff attorney, bar no., address and telephone no.
KERRY L. MORGAN P-32645
2915 Biddle Ave, Suite 200
Wyandotte, MI 48192
(734)-281-7100

v.

Defendant name(s), address(es) and telephone no(s).
The Regents of the Univ. of Michigan, Mary Sue Coleman, and Jennifer Granholm, Governor

NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. YOU HAVE 21 DAYS after receiving this summons to file an answer with the court and serve a copy on the other party or to take other lawful action (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

This summons expires* APR 02 2007
*This summons is invalid unless served on or before its expiration date.

Court clerk

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in U.S. District Court, Eastern Dist., MI. The docket number and assigned judge are:
Name of court

Docket no.	Judge	Bar no.
06-15024	DAVID LAWSON	

The action ☒ remains ☐ is no longer pending.

VENUE

Plaintiff(s) residence	Defendant(s) residence
OAKLAND County	- WASHTENAW MCL 600.1621; 51615 - Ingham

Place where action arose or business conducted: WASHTENAW County

I declare that the information above is true to the best of my information, knowledge, and belief.

1-2-07 Kerry L Morgan P-32645
Date Signature of attorney/plaintiff

SUMMONS

Case No.

RETURN OF SERVICE

TO PROCESS SERVER: You are to serve the summons and complaint no later than 91 days from the date of filing. You must make and file your return with the court clerk. If you are unable to complete service you must return this original and all copies to the court clerk.

CERTIFICATE / AFFIDAVIT OF SERVICE / NON-SERVICE

☐ **OFFICER CERTIFICATE** OR ☐ **AFFIDAVIT OF PROCESS SERVER**

I certify that I am a sheriff, deputy sheriff, bailiff, appointed court officer, or attorney for a party [MCR 2.104(A)(2)], and that: (notary not required)

Being first duly sworn, I state that I am a legally competent adult who is not a party or an officer of a corporate party, and that: (notary required)

☐ I served personally a copy of the summons and complaint

☐ I served by registered or certified mail (copy of return receipt attached) a copy of the summons and complaint,

together with _____ Attachment on the defendant(s):

Defendant's name	Complete address(es) of service	Day, date, time

☐ After diligent search and inquiry, I have been unable to find and serve the following defendant(s): _____

I have made the following efforts in attempting to serve process: _____

☐ I have personally attempted to serve the summons and complaint, together with _____ Attachment

_____ on _____ Name

at _____ Address and have been unable to complete service because the address was incorrect at the time of filing.

Service fee	Miles traveled	Mileage fee	Total fee
$		$	$

_____ Signature

_____ Title

Subscribed and sworn to before me on _____ Date _____ County, Michigan.

My commission expires: _____ Date Signature: _____ Deputy court clerk / Notary public

ACKNOWLEDGMENT OF SERVICE

I acknowledge that I have received service of the summons and complaint, together with _____ Attachment

_____ on Tuesday, January 2, 2007 Day, date, time

Lynette J. Kosky on behalf of Brandon, Deitch, Maynard, McGowan, Fisher Newman, Ridener, Taylor, White, Coleman, The Regents of the Univ of Mich.

Signature

MCR 2.105

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and on behalf of all similarly-situated persons, and TOWARD A FAIR MICHIGAN, a Michigan non-profit corporation,

Plaintiffs,

v.

DAVID A. BRANDON, LAURENCE B. DEITCH, OLIVIA P. MAYNARD, REBECCA MCGOWAN, ANDREA FISHER NEWMAN, ANDREW C. RICHNER, S. MARTIN TAYLOR, KATHERINE E. WHITE, MARY SUE COLEMAN, in their official capacities, THE REGENTS OF THE UNIVERSITY OF MICHIGAN and JENNIFER GRANHOLM, in her official capacity as Governor of Michigan,

Defendants.

Hon. Melinda Morris

No- 07-01 AZ

RECEIVED

Washtenaw County Clerk/Register

Kerry L. Morgan, (P-32645)
Pentiuk, Couvreur & Koblijak, P.C.
Attorneys for Plaintiffs
2915 Biddle Ave, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100 / (734) 281-7102 FAX

There is no other pending or resolved state civil action arising out of the transaction or occurrence alleged in the complaint. A federal civil action between similar parties is pending before U.S. District Court Judge David Lawson, 06-15024. MCR 2.113(C)(2)(a).

Kerry L. Morgan

Kerry L. Morgan (P-32645)

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES the above named Plaintiffs and Class, by and through its attorneys and pursuant to MCR 2.605 and in support of its Complaint against the Defendants states as follows:

1. This is an action for a declaratory judgment and injunctive relief, seeking to ensure that Defendants accurately interpret and immediately comply with Article I, Section 26, of the Michigan Constitution, which went into effect on December 23, 2006. Section 26 prohibits public institutions from considering "race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." MICHIGAN CONST., art I. § 26.

2. Defendants have expressed, in various ways, their view that Section 26 does not or may not forbid the University of Michigan ("UM") from granting racially preferential treatment to minority applicants for admission and that even if it does, UM should not be required to comply with the amendment, at least with respect to current admissions and financial aid decisions. Accordingly, this action for injunctive relief and a declaratory judgment action pursuant to MCR 2.605 is appropriate.

3. This Court has jurisdiction under MCL §§ 600.601 and 605. Venue is proper in this Court pursuant to MCL §§ 600.1621 and 1615.

PARTIES

4. Plaintiff Eric Russell is a resident of Auburn Hills, Michigan. He has applied to the University of Michigan's School of Law (the "Law School"). He is not a member of any ethnic or racial minority and is therefore not eligible for preferential treatment under UM's current admissions policies or procedures.

5. Toward A Fair Michigan ("TAFM") is a 501(c)(3) Michigan Domestic corporation that was formed to facilitate debate on the proposed constitutional amendment, to

ensure that the will of the people of Michigan, as reflected in their vote on November 7, 2006, would be carried out by the elected officials of Michigan, and to advise people of their rights under the newly-enacted constitutional provision. TAFM has had to divert resources from its primary mission to investigate defendants' intention to comply with the law and has had its ability to accurately advise people of their rights under the new provision frustrated as a consequence of defendants' statements and conduct.

6. Defendants David A. Brandon, Laurence B. Deitch, Olivia P. Maynard, Rebecca McGowan, Andrea Fisher Newman, Andrew C. Richner, S. Martin Taylor, and Katherine E. White (the "Individual Regent Defendants") are Regents and defendant Regents of the University of Michigan (the "Regents"). The Regents is a corporate body established by Article 8, § 5 of the Michigan Constitution and is responsible for the operation of UM, including the admissions policies of its various schools and colleges.

7. Defendant Mary Sue Coleman is the President of UM, and, as a consequence, a member *ex officio* of the Regents. As President, she is legally responsible for both recommending policies and practices to the Regents and for implementing the Regents's decisions concerning policies and practices.

8. Jennifer Granholm is the Governor of the State of Michigan. As such, she has a sworn duty to uphold and enforce the Constitution and law of Michigan.

CLASS ACTION ALLEGATIONS

9. Plaintiffs bring this action on behalf of a class of individuals who are current and future applicants to any of the colleges or schools operated by defendants and who are not members of the groups that defendants would otherwise prefer on the basis of race, sex, color, ethnicity, or national origin.

10. The class is numerous and some members of the class will not be identified until they apply. Accordingly, joinder is impracticable.

11. Questions of law predominate among all members of the class in that any legal issues relating to the meaning or validity of Section 26 will be equally applicable to any and all class members.

12. Plaintiffs' claims are typical of the claims of the other members of the class, and plaintiffs will fairly and adequately represent the interests of the class.

13. The maintenance of a class action is superior to other available methods of adjudication in promoting the convenient administration of justice because, *inter alia*, final declaratory and equitable relief is appropriate with respect to the class. The Plaintiff class is proper for certification under MCR 3.501.

CLAIM FOR RELIEF

14. UM is a state-operated university in the State of Michigan. Under Article 8, § 4 of the Michigan Constitution, the legislature of the State of Michigan is obligated to provide funds for UM.

15. UM currently uses, and in the past has used, an admissions system that provides preferential treatment to members of certain racial or ethnic groups, including Hispanics, African Americans, and Native Americans.

16. Applicants have until February 15, 2007 to apply to the Law School for the first year class matriculating in the Fall of 2007.

17. In the election held on November 7, 2006, Proposal 2 was a ballot initiative to amend the Constitution of the State of Michigan by adding an Article 1, § 26 thereto. Among other things, the proposed amendment provided that the "University of Michigan . . . 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."

18. A majority of the citizens of Michigan voted in favor of Proposal 2, and it passed.

19. Pursuant to Michigan law, Article 1, Section 26 of the Michigan Constitution became effective on December 23, 2006.

20. Defendant Coleman has stated that the University of Michigan cannot change its admissions and financial aid systems in the middle of an "admissions cycle," and, accordingly, could not be expected to comply with Section 26 when it took effect. She has pledged to "overcome the handcuffs Proposal 2 [i.e., Article 26] attempts to place on our reach for greater diversity." The Defendants have also stated it would be "virtually impossible" to comply with Article 26 this admissions cycle. Likewise, they have stated that "serious controversies exist regarding the validity and effect of the Amendment" and that they would have to "guess as to what the Amendment requires them to do" if required to comply with the law.

21. On November 8, 2006, the Coalition to Defend Affirmative Action and other plaintiffs filed suit in the United States District Court for the Eastern District of Michigan. The suit challenged Section 26 as violative of the Equal Protection Clause and the First Amendment. The suit also claimed that Section 26 was preempted by the federal civil rights act. On December 11, 2006, Defendant Regents (among others) filed a cross-claim against Defendant Granholm in an ongoing case in federal court. The cross-claim asked the court to declare that Section 26 cannot be applied against the admissions and financial aid decisions of UM (among others) when it becomes effective, and to enjoin it from being applied to those decisions until the end of the current admissions and financial aid cycle on July 1, 2007. Upon information and belief, each of the Individual Regent Defendants supported Regents' effort to obtain such a declaration and injunction. This request was made in federal court despite the fact that it involved an interpretation of a new state constitutional provision.

22. On December 18, 2006, Defendant Granholm and Attorney General Cox signed a stipulation agreeing that the federal district court judge should order that Section 26 not go into effect as to the admissions and financial aid decisions of the UM (as well as those of Michigan State University and Wayne State University) until the end of the current admissions and financial aid cycle.

23. The following day, on December 19, 2006, the federal district court judge entered an order (the "December 19 Order") enjoining the application of Section 26 to the admissions and financial aid decisions of UM (and the other universities) until July 1, 2007.

24. Russell and TAFM appealed that order on December 21, 2006, and sought an emergency stay of the December 19 Order from the United States Court of Appeals for the Sixth Circuit.

25. On December 29, 2006, the Sixth Circuit Court of Appeals granted an emergency stay of the federal district court's order. Accordingly, the December 19 Order is not currently in effect.

26. In defending the December 19 Order, each of the defendants herein asserted that Section 26 is either unclear and/or is likely to be interpreted by Michigan courts as permitting the consideration of race, sex, ethnicity, national origin, or color to further the States' interest in a diverse student enrollment.

27. Defendants have no legal basis for their position that Section 26 should not apply immediately to the admissions or financial aid decisions of schools or colleges in UM.

28. Defendants have no legal basis for their position that Section 26 permits the use of race, sex, ethnicity, national origin or color in the UM's financial aid or admissions decisions to achieve a diverse class.

29. Given the controversy between Plaintiffs and Defendants over the meaning and/or applicability of Section 26 to Defendants, declaratory and injunctive relief is appropriate.

30. If not enjoined Defendants will continue to employ systems of admissions and financial aid for the Law School that will authorize offers of admission and financial aid in violation of Section 26 in that the decision to make such offers will be based in some part on a preference based upon the applicants' race, sex, color, ethnicity, or national origin.

31. If not enjoined, Defendants will continue to employ systems of admissions and financial aid for other UM schools and colleges that similarly will violate Section 26.

32. If Defendants are not enjoined, Plaintiff Russell's application for admission to the Law School will be treated unequally in that he will be disadvantaged by preferences given to other applicants based upon consideration of those other applicants' race, color, ethnicity, or national origin, in violation of Section 26.

33. If Defendants are not enjoined, TAFM will continue to have its resources diverted as a consequence of Defendants' actions.

WHEREFORE Plaintiffs request a judgment:

1 Declaring that Section 26 of the Michigan Constitution applies to the University of Michigan's current admissions and financial aid decisions and that Coleman the Regents, and the Individual Regent Defendants have no legal excuse to avoid complying with it immediately;

2. Declaring that Section 26 of the Michigan Constitution precludes consideration of race, sex, ethnicity, national origin and color in making any admissions or financial aid decisions at the University of Michigan;

3. Enjoining Defendants from employing any policy, procedure or system of admissions or financial aid for any of the schools or colleges at the University of Michigan that is based in any way or part on consideration of the applicants' race, color, ethnicity, or national origin;

4. Awarding appropriate attorney fees and costs as authorized by law; and

5. Granting any other relief that is appropriate

Respectfully Submitted,

Kerry L Morgan

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The following Counsel for Plaintiff will seek *pro hac vice* admission to this Circuit:

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Center for Individual Rights
1233 20th St., NW, Suite 300
Washington, D. C. 20036
(202) 833-8400

Dated: January 2, 2007

EXHIBIT D

STATE OF MICHIGAN 22nd JUDICIAL COURT WASHTENAW COUNTY	REQUEST FOR HEARING ON A MOTION (PRAECIPE) ORDER/JUDGMENT	CASE NO. 07-01-AZ

Plaintiff name(s) **ERIC RUSSELL, et al.**	VS.	Defendant name(s) **The Regents of the University of Michigan**
Plaintiff's attorney, bar no., address and telephone no. Kerry L. Morgan (P32645) Pentiuk, Couvreur & Koblijak, PC 2915 Biddle Avenue Wyandotte, MI 48192 (734) 281-7100		Defendant's attorney, bar no., address, and telephone no. Leonard M. Niehoff (P36695) 350 S. Main Street, Suite 300 Ann Arbor, MI 48104 (734) 213-3625

List additional attorneys on other side

1. Motion Title: Motion for Summary Disposition

2. Moving Party: Defendants the Regents of the University of Michigan and Mary Sue Coleman Telephone No. **(734) 213-3625**

3. Please place on the motion calendar for:

Judge	Bar No.	Date	Time
Melinda Morris		**March 7, 2007**	**2:00 p.m.**

Adj. to:_____ Adj. to: _____ Adj. to: _____

4. I certify that I have made personal contact with David Thompson regarding concurrence in relief sought in this motion and the concurrence has not been granted.

January 22, 2007
Date

_____
Attorney Leonard M. Niehoff **(P36695)**
Bar no.

ORDER/JUDGMENT

DATED:

IT IS ORDERED THAT THIS MOTION IS:

☐ DENIED ☐ GRANTED IN PART/DENIED IN PART ☐ TAKEN UNDER ADVISEMENT ☐ DISMISSED

☐ GRANTED AND IT IS FURTHER ORDERED AND ADJUDGED:

_____
CIRCUIT JUDGE

Approved as to form and substance by Counsel for:

_____
Plaintiff

_____
Defendant

_____
Date

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and
on behalf of all similarly-situated persons,
and TOWARD A FAIR MICHIGAN,
a Michigan non-profit corporation,

Plaintiffs,

vs.

DAVID A. BRANDON, LAURENCE B. DEITCH,
OLIVIA P. MAYNARD, REBECCA McGOWAN,
ANDREA FISHER NEWMAN, ANDREW C. RICHNER,
S. MARTIN TAYLOR, KATHERINE E. WHITE,
MARY SUE COLEMAN, in their official capacities,
THE REGENTS OF THE UNIVERSITY OF MICHIGAN
and JENNIFER GRANHOLM, in her official capacity as
Governor of Michigan,

Defendants.
_____/

Case No. 07-01-AZ

Hon. Melinda Morris

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Attorneys for Plaintiffs

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Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that the attached Motion for Summary Disposition of Defendants the Regents of the University of Michigan and President Mary Sue Coleman will be brought on for hearing before the Honorable Melinda Morris on Wednesday, March 7, 2007, at 2:00 p.m.

Respectfully submitted,

BUTZEL LONG, PC

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Christopher M. Taylor (P63780)
Deborah J. Swedlow (67844)
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(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

Dated: January 22, 2007

165270

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and
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THE REGENTS OF THE UNIVERSITY OF MICHIGAN
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Defendants.
_____/

Case No. 07-01-AZ

Hon. Melinda Morris

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Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman
_____/

MOTION FOR SUMMARY DISPOSITION
OF DEFENDANTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN
AND PRESIDENT MARY SUE COLEMAN

Defendants The Regents of the University of Michigan and President Mary Sue Coleman hereby move this Court for an order granting summary disposition in their favor pursuant to MCR 2.116(c)(4) and (c)(8) for the following reasons:

1. Plaintiffs Eric Russell ("Russell"), an applicant to the University of Michigan Law School and Toward a Fair Michigan ("TAFM"), a domestic corporation, bring this action for declaratory and injunctive relief against the Regents of The University of Michigan and President Mary Sue Coleman.

2. Plaintiff TAFM does not have standing to bring this action.

3. Plaintiff Russell has not identified a case or controversy that provides this Court with jurisdiction to award the requested relief.

4. The requested relief is inconsistent with the plain language of the Constitutional amendment Plaintiffs ask this Court to interpret.

5. For all of the foregoing reasons, Plaintiffs have failed to state a claim upon which relief can be granted or over which this Court has proper jurisdiction.

6. Concurrence in the relief requested was sought and denied.

WHEREFORE Defendants the Regents of the University of Michigan and President Mary Sue Coleman respectfully request that this Court grant summary disposition in their favor and dismiss Plaintiffs' claims against them in their entirety.

A brief in support of this Motion is filed herewith.

Respectfully submitted,

BUTZEL LONG, PC

Leonard M. Niehoff (P36695)
Christopher M. Taylor (P63780)
Deborah J. Swedlow (67844)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

Dated: January 22, 2007

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and
on behalf of all similarly-situated persons,
and TOWARD A FAIR MICHIGAN,
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MARY SUE COLEMAN, in their official capacities,
THE REGENTS OF THE UNIVERSITY OF MICHIGAN
and JENNIFER GRANHOLM, in her official capacity as
Governor of Michigan,

Defendants.
_____/

Case No. 07-01-AZ

Hon. Melinda Morris

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Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman
_____/

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION OF DEFENDANTS THE REGENTS OF THE UNIVERSITY OF MICHIGAN AND PRESIDENT MARY SUE COLEMAN

INTRODUCTION

Plaintiffs Eric Russell ("Russell"), an applicant to the University of Michigan Law School, and Toward a Fair Michigan ("TAFM"), a domestic corporation, bring this action for

declaratory and injunctive relief against the Regents of the University of Michigan and President Mary Sue Coleman.[1] The Complaint suffers from numerous fatal infirmities. TAFM does not have standing. Russell has not identified a case or controversy that provides this Court with jurisdiction to award the requested relief. And, finally, the requested relief is inconsistent with the plain language of the very constitutional Amendment that Plaintiffs ask this Court to interpret. This case should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

On November 7, 2006, the Michigan Constitution was amended to include a section providing that no state entity, including the Universities, shall "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" (the "Amendment").[2] By operation of Michigan law, the Amendment was scheduled to become effective on December 23, 2006.[3]

Existing controversies regarding the validity and effect of the Amendment escalated after its passage. On November 8, a collection of individual and organizational plaintiffs filed an action challenging the Amendment in the United States District Court for the Eastern District of Michigan. That lawsuit named as defendants Governor Granholm, the Board of Trustees of Michigan State University, the Board of Governors of Wayne State University, and the Board of Regents of the University of Michigan. Attorney General Mike Cox later intervened in the case.[4]

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[1] The Regents of the University of Michigan is the corporate body constitutionally charged with the "general supervision" of the institution. Mich Const 1963, art 8, § 5. Plaintiffs therefore err in naming the Regents individually "in their official capacities."

[2] The complete text of the Amendment is attached as Exhibit A.

[3] Mich. Const. 1963, art. XII, § 2 provides that an amendment becomes effective "at the end of 45 days after the date of the election at which it was approved."

[4] Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN), et al. v Granholm, et al., case no. 06-15024. It should be noted that, in

On December 11, the Universities filed a cross-claim against the Governor and a motion for preliminary injunctive relief to preserve the status quo. The motion filed by the Universities asked for the opportunity to complete the current admissions and financial aid cycle (which began last fall and will end this spring) under their existing policies.[5] The Universities had profound worries that abandoning these policies in the middle of this cycle would have dire consequences. They recognized that such a mid-cycle change would require them to apply different standards than were announced and relied upon by applicants, counselors, and others. Further, they believed that an abrupt shift of this nature would deprive them of their academic freedom right, recognized by the United States Supreme Court in *Grutter*, to admit those students they thought would contribute the most to a rich and diverse learning environment.

After extensive discussions and negotiations, on December 18, 2006, all the existing parties to the litigation submitted a stipulation to the District Court that in pertinent part provided as follows:

> It is hereby stipulated, by and between the parties, that this Court may order as follows:
>
> (1) that the application of Const. 1963, art. I, § 26 to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;
>
> (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c) the Universities' cross-claim shall be and hereby is dismissed in its

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addition, the Governor on November 9 issued a directive instructing the Michigan Civil Rights Commission to "investigate the impact" of the Amendment, including "upon state educational institutions and educational programs," and to issue a report within 90 days. Exec. Directive No. 2006-7.

[5] Months before the effective date of the Amendment, the Universities designed, implemented, trained personnel around, and publicly announced their admissions and financial aid policies, which were developed in reliance on this Court's reaffirmation in *Grutter v Bollinger*, 539 U.S. 306 (2003) that they have the right, grounded in the First Amendment, to select their students and may, in the course of doing so, give some consideration to factors such as race.

> entirety, with prejudice only as to the specific injunctive relief requested in the cross claim . . .

This stipulation was endorsed by every party then before the District Court. On the morning of December 19, the District Court entered a Temporary Injunction that, consistent with the stipulation, enjoined application of the Amendment to the Universities' admissions and financial aid policies until July 1, 2007, and dismissed the Universities' cross-claim.

Russell and TAFM had, in the meantime on December 18, filed a motion to intervene in the case. After the District Court entered the Temporary Injunction on December 19, Russell and TAFM filed a motion to expedite consideration of their request for intervention and sought a stay. The District Court did not immediately rule on their motion and so, on December 21, Russell and TAFM filed a notice of appeal with the Sixth Circuit. On December 22, they filed an Emergency Motion for a Stay Pending Appeal and a Petition for Writ of Mandamus.

On December 26 the Sixth Circuit ordered briefing on a highly accelerated schedule. On December 27, the District Court granted Russell's pending motion to intervene but denied that of TAFM.[6] On December 29 the Sixth Circuit issued an opinion concluding that Russell, as an applicant for admission to the University of Michigan Law School, had a "direct interest in whether [the Amendment] applies to the Law School's admissions decisions this year" and agreeing that he could intervene in the case.[7] The Sixth Circuit has not yet addressed TAFM's appeal of the District Court's denial of its request to intervene.[8]

The Sixth Circuit went on, in its December 29 opinion, to issue a stay of the Temporary Injunction.[9] On January 3, the University announced that it was placing a brief a moratorium on

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[6] A copy of the District Court opinion is attached under Exhibit B.
[7] Sixth Circuit opinion, p. 5. A copy of the Sixth Circuit opinion is attached under Exhibit C.
[8] The Complaint fails to disclose that the District Court denied TAFM's motion to intervene in the litigation and that the Sixth Circuit has not ruled on that decision.
[9] *Id*, p 13.

admissions and financial aid decisions until it could evaluate the impact of the court's ruling.[10] In the meantime, on January 2, Russell and TAFM filed this state court case. On January 8, Plaintiffs in the federal case petitioned Justice Stevens of the United States Supreme Court to dissolve the stay entered by the Sixth Circuit and to reinstate the Temporary Injunction.[11]

On Wednesday, January 10, the moratorium was lifted and President Mary Sue Coleman and Provost Theresa Sullivan issued a statement to the public and the campus community that, in pertinent part, said as follows:

> We are writing to let you know of the University's next steps with respect to Proposal 2 for admissions and financial aid ...
>
> We cannot sustain any further delay in our admissions process without harming our ability to enroll a class of students for the 2007-08 academic year. Therefore, we are resuming admissions today at all levels of the University. **As stated in the language of Proposal 2, our admissions and financial aid processes will not discriminate, nor grant preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin.** Of course, we will recognize exceptions provided in the amendment including one for programs that receive federal funds.[12]
>
> We want to emphasize that there is uncertainty about how Proposal 2 will be interpreted by the courts. However, because of the Sixth Circuit Court's decision and in the absence of further guidance from the courts, **we will proceed cautiously by adjusting our admissions and financial aid policies such that race and gender will have no effect on the decision-making process.**
>
> * * *
>
> When admitting students to U-M, our focus has always been first and foremost on academic excellence. By far the greatest consideration in undergraduate admissions is given to the student's academic achievement in challenging, college-preparatory courses. In addition, we will continue to consider a range of attributes that

[10] A copy of this announcement from University of Michigan Provost Theresa Sullivan is attached under Exhibit D.

[11] The Court denied that request on January 19, 2007.

[12] *See* discussion in section C, *infra.*

> contribute to a dynamic and diverse intellectual environment, including: the student's character and motivation; interesting personal experiences; special talents and abilities; geographic diversity; civic engagement and concern for community; demonstrated ability to overcome obstacles; leadership potential; grasp of world events; intellectual interests; and socioeconomic indicators such as low income or being the first in the family to attend college.
>
> * * *
>
> The University of Michigan is a dedicated and creative community, and **we will seek innovative new ways to sustain our diversity within the boundaries of the law.** We must keep the doors of opportunity open for all.[13]

Similarly, the University of Michigan Law school issued an announcement that included these statements:

> **We will modify our admissions process ... so that the factors listed in Proposal 2 will have no effect on decisionmaking.** See Letter from President Mary Sue Coleman Regarding Proposal 2.
>
> Proposal 2 explicitly permits compliance with federal laws and funding requirements. Consistent with federal law (implementing 20 U.S.C. 1094(a)(17)), we will continue to collect data on the race and sex of our applicants. A staff member will remove the page of the application that contains the applicant's self-reported race or ethnicity after recording the data, however, so that the information will not be available to the admissions officers who conduct substantive reviews. Moreover, LSDAS will remove all racial data from the reports it provides us.[14]

This motion is necessary because Plaintiffs have not voluntarily dismissed their Complaint despite these developments.

ARGUMENT

Plaintiffs' Complaint seeks a declaratory judgment and, based upon that judgment, an injunction. The controlling law and the undisputed facts establish that Plaintiffs have no claim

[13] The full text of the announcement is attached under Exhibit E.
[14] The full text of the announcement is attached under Exhibit F.

and that this is a wholly inappropriate case for the relief requested.[15] Indeed, as will be shown, the relief requested is not even consistent with the plain language of the Amendment.

I. This is an Inappropriate Case for a Declaratory Judgment

The Michigan Court Rules expressly leave the question of whether it is proper to grant declaratory relief to the sound discretion of the trial court. *See* MCR 2.605(A)(1) ("In a case of actual controversy within its jurisdiction, a Michigan court of record *may* declare ... rights and other legal relations")(emphasis supplied). This is an inappropriate case for a declaratory judgment because (a) plaintiff TAFM does not have standing to bring this claim and (b) there is no existing "case or controversy" between Russell and the University of Michigan.[16]

A. TAFM Does Not Have Standing

TAFM lacks standing to bring this claim. TAFM does not claim to be an applicant to the University. Nor does it claim any other relationship to the University that would be affected in any way by the policies that are the subject of this lawsuit. Further, TAFM does not claim to be a membership organization representing applicants or others with a relationship to the University. Instead, TAFM is, according to its Articles of Incorporation, a Michigan not-for-profit corporation organized "exclusively for educational purposes" (Article VI), specifically to

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[15] Dismissal is proper under MCR 2.116(c)(4) and (c)(8). 2.116 (c)(4) applies because standing is jurisdictional in nature and, as this brief shows, TAFM does not have standing. *Michigan Chiropractic Council v Commissioner, Office of Fin & Ins Servs*, 475 Mich 363, 371-372 (2006). In addition, TAFM's lack of standing represents a failure to state a claim under MCR 2.116(c)(8). *See, e.g., 46th Circuit Trial Court v Crawford County*, 266 Mich App 150, 178 (2005). For the reasons discussed herein, Russell has failed to identify an existing case and controversy between himself and the University and has therefore also failed to state a claim under MCR 2.116(c)(8). In the alternative, the undisputed facts show that – even if a legally cognizable controversy existed at the time Russell filed his Complaint – such a controversy no longer exists. Dismissal is therefore alternatively proper under MCR 2.116(c)(10).

[16] It has been suggested that under such circumstances the trial court even has a duty to take notice of its lack of subject matter jurisdiction *sua sponte* and dismiss a request for declaratory relief. *See Detroit Base Coalition for the Human Rights of the Handicapped v Michigan Dept of Social Services*, 158 Mich App 613, 621 (1987) (Swallow, J, concurring).

"further citizen understanding of the equal opportunity issues involved in guaranteeing civil rights for all citizens" (Article II).[17]

The only interest TAFM alleges in this action is that it "has had to divert resources from its primary mission to investigate defendants' intention to comply with the law and has had its ability to accurately advise people of their rights frustrated as a consequence of defendants' statements and conduct" (Complaint ¶ 5). These claimed interests are insufficient to confer standing to bring this action.[18]

Under controlling Michigan law, standing requires – at a minimum – the following elements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lee v Macomb Co Bd of Comm'rs, 464 Mich 726, 739 (2001), quoting *Lujan v Defenders of Wildlife*, 505 US 555, 560-561 (1992)(internal quotation marks omitted).[19] *See also, Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629 (2004) and *Crawford v*

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[17] The TAFM Articles of Incorporation are attached under Exhibit G. This appears inconsistent with the Complaint's allegation that TAFM was formed "to ensure that the will of the people of Michigan, as reflected in their vote on November 7, 2006, would be carried out by the elected officials of Michigan." Complaint, ¶ 5. For purposes of this motion the University takes as true the allegations of the Complaint.

[18] The University notes that, in the case pending in the United States District Court for the Eastern District of Michigan, Judge Lawson concluded that these "interests" did not suffice to afford TAFM the right to intervene. *See* District Court opinion, Exhibit B.

[19] The minimal standing requirements detailed in *Lee* are *constitutional* requirements. *Michigan Education Ass'n v Superintendent of Public Instruction*, __ Mich App __ (2006) at * 6 (attached under Exhibit H).

Dep't of Civil Svcs, 466 Mich 250, 258 (2002). These requirements apply to declaratory judgment actions. *MOSES v SEMCOG*, 270 Mich App 401, 416 (2006).

TAFM can satisfy none of these prerequisites. Its claimed injury is not a legally protected interest; it is not concrete and particularized; it is not caused by the conduct complained of; and it will not be redressed through the favorable resolution of the suit. TAFM's claims must therefore be dismissed.

TAFM alleges that it has been injured because it has been "diverted from its primary mission" in order to determine whether the University is complying with the law. This obviously does not qualify as a "legally protected interest." TAFM has no legally protected interest in having this court rescue it from its own decision to pursue a distraction.

TAFM further alleges that its "ability to accurately advise people of their rights [has been] frustrated" by the University. This allegation makes no sense: TAFM's ability to advise people of their rights (as TAFM understands them) is unaffected by the University. Perhaps TAFM means to allege that it has been unable to confirm that the University of Michigan shares its understanding of the law. But TAFM has no legally protected interest in having others share its understanding or act in accordance with that understanding. *See, House Speaker v State Administrative Board*, 441 Mich 547, 556 (1993)("[A] generalized grievance that the law is not being followed" is not sufficient to create standing).

In addition, these alleged "injuries" are neither concrete nor particularized. This requirement means that the injury must be distinct from that of the public generally. *Michigan Citizens for Water Conservation v Nestles Waters N America Inc*, 269 Mich App 25 (2005). TAFM's claimed injury – that it doesn't know whether the University shares its understanding of the Amendment and will act in accordance with that understanding – is indistinguishable from

that of the public at large. Indeed, even if TAFM cares more about this question than do some members of the general public, this does not suffice to confer standing. The requirement of a concrete and particularized injury exists to ensure that standing is not conferred simply because a litigant passionately wants it. *MOSES v SEMCOG*, 270 Mich App 401, 414 (2006) ("standing requires more than having a 'personal stake' in the outcome of litigation sufficient to ensure vigorous advocacy"). In sum, TAFM does not have standing to bring this claim.

TAFM's fundamental standing problem also shows why its claim is precisely the sort of request for an advisory opinion that the declaratory judgment law disallows. TAFM has no concrete or particularized injury; rather, its claim is that its ability to provide people with advice about the Amendment has been hampered by statements the University has allegedly made in public and in pleadings. TAFM thus seeks an advisory opinion from this court so it can, in turn, give people advice about what the University needs to do to comply with the Amendment. That TAFM would like an answer to these questions does not give it standing to seek a declaratory judgment or, as will be discussed in the next section, give this court jurisdiction to issue one.

B. There is No Existing Case or Controversy Warranting a Declaratory Judgment

That leaves Russell, who has applied to the University of Michigan Law School for admission. The Complaint does not expressly allege why Russell needs a declaratory judgment. Presumably, however, he thinks he needs one as a predicate for his request for injunctive relief:

> If Defendants are not enjoined, Plaintiff Russell's application for admission to the Law School will be treated unequally in that he will be disadvantaged by preferences given to other applicants based upon consideration of those other applicants' race, color, ethnicity, or national origin, in violation of [the Amendment].

Complaint ¶ 32. Russell apparently wants this Court to declare that the University cannot consider these factors during this admissions cycle and to enjoin it from doing so.

Of course, the Complaint says nothing about how the University actually intended to proceed in light of the Sixth Circuit ruling. Nor could it, since Russell filed his Complaint immediately after that ruling and before the University had announced what it intended to do. Furthermore, the Complaint says virtually nothing about the Law School (the academic unit to which Russell had applied and that would make the decision regarding his application), let alone about what it planned to do. Again, the Complaint could not include such allegations because its filing preceded the Law School's announcement.

A Complaint based upon hypothetical concerns about what might or might not happen seeks an advisory opinion and does not provide a basis for jurisdiction. *See McGill v Automobile Ass'n of Michigan*, 207 Mich App 402 (1994)("[w]here no case or actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment. A case or actual controversy does not exist where the injuries sought to be prevented are merely hypothetical; there must be an actual injury or loss") and *Fieger v Bowman*, 174 Mich App 467 (1988)(holding that without the "distinct and palpable injury" requirement "courts would be continually called upon to decide abstract questions on hypothetical issues").

Indeed, the events that followed the filing of the Complaint show Russell's concerns to be not just hypothetical, but nonexistent. The January 10 announcement of President Coleman and Provost Sullivan plainly state that, in light of the Sixth Circuit stay, the University of Michigan will "not discriminate [against], nor grant preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin," will "proceed cautiously by adjusting [its] admissions and financial aid policies such that race and gender will have no effect on the decision-making process," and will act "within the boundaries of the law." The Law School announcement similarly declares that "the factors listed in Proposal 2 will have *no* effect on

decisionmaking" and describes the careful data collection process it will use to comply with federal law, including an assurance that this "information will not be available to the admissions officers who conduct substantive reviews." In short, even if there was a "case and controversy" between Russell and the University when the Complaint was filed it clearly ceased to exist on January 10.

The law recognizes a strong presumption that the University will honor its announcement and act within the boundaries of the Amendment. *See, e.g., West Shore Community College v Manistee County Board of Comm'rs*, 389 Mich 287, 302 (1973)("Community college trustees, like all public officers, are presumed to act in accordance with the law"); *Poynter v Drevdahl*, 359 F Supp 1137, 1142 (WD Mich 1972)("Consideration must begin with a presumption of validity attaching to actions of [the Northern Michigan University] board, acting under statutory authority and buttressed by the Constitution of the State of Michigan"); and *United States v Corrado*, 121 F Supp 75, 79 (ED Mich 1954) ("In the absence of any proof to the contrary there is a strong assumption that public officials have properly discharged their duties"). The Complaint alleges no facts suggesting otherwise.[20]

C. The Relief Requested Cannot Be Granted Under the Plain Language of the Amendment

The Complaint concludes by asking for a judgment that (a) declares the Amendment "applies to the University of Michigan's current admissions and financial aid decisions and that Coleman, the Regents, and the Individual Regent Defendants have no legal excuse to avoid complying with it immediately"; (b) declares that the Amendment "precludes consideration of

[20] The Complaint logically could not do so since Plaintiffs filed it before the University had an opportunity to announce how it intended to proceed. Instead, the Complaint quoted out of context some statements made by President Coleman in a speech immediately after passage of the Amendment – for example, omitting her clear declaration that "Of course the University of Michigan will comply with the laws of the state." Compare Complaint ¶ 20 with President Coleman's speech, attached under Exhibit I.

race, sex, ethnicity, national origin and color in making any admissions or financial aid decisions at the University of Michigan"; and (c) enjoins the University from "employing any policy, procedure, or system of admissions or financial aid for any of the schools or colleges at the University of Michigan that is based in any way or part on consideration of the applicant's race, color, ethnicity, or national origin." Complaint, p. 8. As a matter of law, this Court cannot afford the relief requested because Plaintiffs' overreaching demand is inconsistent with the plain language of the Amendment.

The Amendment expressly allows departures from its prohibition against "preferential treatment" under certain specified circumstances. For example, the Amendment allows the consideration of such factors as race and gender "to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state" (Section 4). It allows a departure where "bona fide qualifications based on sex are reasonably necessary to the normal operation of public employment, public education, or public contracting" (Section 5). And it allows the consideration of such factors if prohibiting it would bring the Amendment into conflict with "the United States Constitution or federal law" (Section 7) or would have the effect of invalidating an existing "court order or consent decree" (Section 9) – indeed, issues raised by sections 7 and 9 are currently pending in the federal litigation.[21]

The Complaint allows for none of this. Instead, Plaintiffs demand declaratory and injunctive relief that is absolute and unqualified in its scope. Thus, the Complaint asks this Court to declare that the Amendment precludes consideration of these factors in making "*any* admissions or financial aid decisions" and to enjoin the University from using "*any* policy,

[21] Of course, even if the Amendment did not require this result, the Supremacy Clause of the United States Constitution would. *See, e.g., Gonzales v Raich*, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

procedure, or system of admissions or financial aid for *any* of the schools or colleges at the University of Michigan that is based *in any way or part* on consideration of the applicant's race, color, ethnicity, or national origin." As a matter of law, Plaintiffs have failed to state a claim – and cannot state a claim – that would justify such a judgment. Their Complaint is subject to dismissal under MCR 2.116(c)(8) for this reason as well.

CONCLUSION

The Amendment is among the longest provisions in the Michigan Constitution and will doubtless require interpretation in the state and federal courts and by the Michigan Civil Rights Commission. The University and Mary Sue Coleman respectfully submit, however, that those issues are properly joined in a factual context that involves the proper parties and an actual case and controversy. This is, quite plainly, not such a case.

Respectfully submitted,

BUTZEL LONG, PC

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(734) 995-3110
Attorneys for Defendants the Regents of the University of Michigan and Mary Sue Coleman

Dated: January 22, 2007

165270

EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and
on behalf of all similarly-situated persons, and
TOWARD A FAIR MICHIGAN,
a Michigan non-profit corporation,

Plaintiffs,

v.

DAVID A. BRANDON, LAURENCE B. DEITCH,
OLIVIA P. MAYNARD, REBECCA MCGOWAN,
ANDREA FISHER NEWMAN, ANDREW C. RICHNER,
S. MARTIN TAYLOR, KATHERINE E. WHITE,
MARY SUE COLEMAN, in their official capacities,
THE REGENTS OF THE UNIVERSITY OF MICHIGAN

and

JENNIFER GRANHOLM, in her official
capacity as Governor of Michigan,

Defendants.
----------/

Hon. Melinda Morris
No- 07-01 AZ

STIPULATED ORDER OF DISMISSAL WITHOUT PREJUDICE

PENTIUK, COUVREUR & KOBILJAK, P.C. By: Kerry L. Morgan (P32645) Attorneys for Plaintiffs 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100	Thomas L. Casey (P24215) James E. Long (P53251) Brian O. Neill (P63511) Michigan Dept of Attorney General Attorneys for Governor Granholm P.O. Box 30758 Lansing, MI 48909 (517) 373-1111
Philip J. Kessler (P15921) Leonard M. Niehoff (P36695) Sheldon H. Klein (P41062) BUTZEL LONG Attorneys for University President and Regents 350 S. Main Street, Suite 300 Ann Arbor, MI 48104 (734) 995-3110	

STIPULATED ORDER
OF DISMISSAL WITHOUT PREJUDICE

At a session of said Court, held in the City of Ann Arbor, County of Washtenaw, State of Michigan

on _____.

PRESENT: THE HON. JAN 3 0 2007 MELINDA MORRIS.
Circuit Court Judge

The parties hereto, having stipulated to the following relief, and the Court being otherwise fully advised in the premises, Now, Therefore:

IT IS HEREBY ORDERED that this matter is hereby DISMISSED in its entirety without prejudice and without costs or fees to any party.

IT IS SO ORDERED.

S/MELINDA MORRIS

JAN 3 0 2007 _____
Circuit Court Judge

The parties hereto stipulate to the entry of this Order:

PENTIUK, COUVREUR & KOBILJAK, P.C. By: Kerry L Morgan Kerry L. Morgan (P32645) Attorneys for Plaintiffs 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100	MICHIGAN DEPT OF ATTORNEY GENERAL By: James E. Long (KM) Thomas L. Casey (P24215) James E. Long (P53251) Brian O. Neill (P63511) Attorneys for Governor Granholm P.O. Box 30758 Lansing, MI 48909 (517) 373-1111

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