Nos. 06-2640, 06-2656

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, *et al.*,

Defendants-Appellees,

and

ERIC RUSSELL, *et al.*,

Intervener-Defendants-Appellants:

and

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE, AMERICAN CIVIL RIGHTS FOUNDATION,

Proposed Intervenor-Defendants-Appellants:

PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION TO ERIC RUSSELL'S MOTION TO EXPEDITE THE APPEAL

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INTRODUCTION

On January 17, 2007, Eric Russell told the Supreme Court that the Sixth Circuit *could not* render a decision on the merits of the plaintiff's underlying claims in the appeal that was then pending before this circuit:

> The Sixth Circuit's decision staying the district court's preliminary injunction does not present an appropriate vehicle for Supreme Court review of applicants' [i.e., plaintiffs'] claims.
> ***
> Nor would a potential decision by the Sixth Circuit reversing or vacating the district court's preliminary injunction present an appropriate vehicle for reviewing applicants' [i.e., plaintiffs'] claims.
>
> (Russell Resp. Br, at 9).

But in a motion that his attorneys signed barely 72 hours later, Russell tells this the Sixth Circuit *exactly the opposite:*

> Therefore, despite the interlocutory nature of the current appeal, this Court should grant expedited review, exercise its power to resolve the merits of the pending federal legal challenges to Article I, Section 26 of the Michigan Constitution, and remand the case with instructions to dismiss the federal claims.
>
> (Russell Mot Exped., at 2).

In form, Russell's motion is to expedite; in substance, it is an exercise in forum shopping.

Russell thought the Supreme Court might rule against him on the stay--so he told that Court that the plaintiffs' claims *could not* be resolved on the pending appeal in the Sixth Circuit. Now, he apparently believes the district

court will also rule against him--so he says that this Court should rule on this matter right now.

But the actual order on appeal before this Court is a consent order that will expire on June 30, 2007. As a result of the stay order entered by a panel of this Court, that consent order is now dormant and the universities are applying systems that comply with Proposal 2. Russell has not challenged the fact that the universities are complying with Proposal 2--and he thus has no reason whatever for expediting the appeal of the actual order that is before this Court. Put simply, if this Court does *nothing*, Russell's application to the University of Michigan Law School will be considered in a way that complies with Proposal 2, which is all that he has ever asked for.

No other party has asked for, or has an interest in, expediting the appeal from that order. The universities are now selecting students under a new system. They almost certainly do not want an order that would allow them to institute a third system for admitting students to the classes that will enter in fall 2007. Moreover, after those classes arrive, the universities recognize that the next large group of students will not enroll until August 2008.

Especially under the expedited schedule that the district court has established, the parties can secure a ruling from the district court long before

the universities have to admit their next classes. Moreover, the parties can proceed much more quickly to do that, if they do *not* have to spend time briefing and arguing a senseless expedited appeal from an order that is effectively a dead letter.

What Russell is really seeking from his "motion to expedite" is a chance to secure a ruling on a motion to dismiss that he has not even filed in the district court.[1] To get that ruling, Russell claims support from cases holding that where an appellate court *must* rule on the likelihood of success on the merits of the plaintiffs' claims in determining whether the district court properly granted a preliminary injunction, it *may* choose to rule on the merits of the underlying case if the question presented is a "pure question of law" and if "...it is plain that the plaintiff cannot prevail as a matter of the governing law." Russell Mot, at 1-2, citing, *inter alia. Planned Parenthood of the Blue Ridge v Camblos*, 155 F 3d 352, 360 (CA 4, 1999)(en banc); *Pinney Dock & Transp Co. v. Penn Cent. Corp.*, 838 F. 2d 1445, 1461 (CA 6 1988); and *Doe v Sundquist*, 106 F 3d 702, 707 (CA 6, 1997).

[1] Russell claims that the district court "firmly advised the defendants against filing motions to dismiss..." (Russell Mot., p. 4). Actually, in the scheduling conference, the judge "discouraged" the parties from filing motions to dismiss before they had attempted to stipulate to the relevant facts. The district court is proceeding along a reasonable course. If Russell disagrees with that court, he, of course, has the right to file a Rule 12 motion at any time. If he has not done so, he has no one to blame other than himself.

Stating the rule, however, shows why it does not apply here. Leaving aside the procedural problems discussed below, this Court has no obligation to rule on the likelihood of success on the merits where the order at stake is dormant and will soon expire by its own terms. Since the Court does not even have to consider the likelihood of success, there is therefore no basis and no authority for this Court to reach out to rule on the merits of a case when those issues have *never* been presented to the district court. *Singleton v Wulff*, 428 U.S. 106, 120 (1976); *Dubuc v Michigan Board of Law Examiners*, 342 F. 3d 610, 620 (CA 6 2003). Especially where the issues at stake are constitutional issues of profound importance, this Court should decline to rule on them in the absence of a fully-developed record and a well-considered opinion by the district court.

While that alone is sufficient to deny the motion to expedite, there are two additional reasons that the motion should be denied.

First, the question presented is *far* from a "pure question of law." In striking down California's Proposition 209--from which Proposal 2 is a word-for-word copy--the United States District Court for the North District of California issued a 41 page Opinion containing numerous detailed findings of fact. *Coal. for Economic Equity v Wilson*, 946 F. Supp. 1480 (N.D. CA, 1996). In the Ninth Circuit, no judge even suggested that those

factual findings were not necessary for the later decision. *Coal. for Economic Equity v Wilson,* 122 F. 3d 692 (CA 9 1997), *cert. den.* 522 U.S. 963 (1997). In this case, the same factual issues and more are present because the district court must know what happened in California in order to determine what is likely to happen in Michigan.

Second, contrary to Russell's contentions, it is *very* far from "plain that the plaintiff cannot prevail as a matter of law." *Planned Parenthood, supra*, 155 F 3d at 360. In order to grant a stay to Russell in this case, the panel had to sharply limit and effectively overrule three decisions of the United States Supreme Court. *Hunter v Erickson*, 393 U.S. 385 (1969); *Washington v Seattle School District No. 1*, 458 U.S. 457 (1982); and *Romer v Evans*, 517 U.S. 620 (1996). Of the Judges on the Ninth Circuit who expressed an opinion on the merits, five felt that the same arguments were not valid--and only the three judges on the initial panel adopted arguments like those put forward by the panel of this Court that stayed the consent order below. See *Coal. for Economic Equity, supra*, 122 F 3d at 711-718 (Schroeder, Pregreson, Norris, Tashima, and Hawkins, JJ, dissenting from rehearing en banc).[2]

[2] The Ninth Circuit denied en banc review and so the views of the other twelve justices on that Court on the merits of the plaintiffs' claims are not known.

As the Supreme Court recognized in soliciting briefs from the parties and receiving briefs from numerous amici on the motion to stay in this case, it presents substantial legal issues that deserve and demand careful consideration by the district court, by this court, and, plaintiffs submit, by the Supreme Court. As plaintiffs said to the Supreme Court, the panel of this Court wrongly eliminated the *rights* of a minority to fight for lawful demands that it saw as legitimate simply because the majority and the panel labeled those demands as "preferences."

This Court has, of course, faced related issues before. *Grutter v Bollinger*, 539 U.S. 306 (2003). In *Grutter* (and *Gratz*), the district courts and this Court earned just praise for assembling a record and rendering substantial decisions that set the stage for the historic decisions rendered by the Supreme Court in those cases. At issue here is whether those decisions can be effectively overruled by a racially polarized vote in which two-thirds of white voters outvote 85 percent of black voters because black people are a racial minority in Michigan.

The issues at stake in this case are no less fundamental than those in *Grutter*--and they deserve and demand the same careful attention from the courts.

In fact, the passage of Proposal 2 has already been stained by state agencies that refused to investigate what another district judge has found was massive fraud in obtaining the signatures needed to place Proposal 2 on the ballot. *Operation King's Dream v Connerly*, 2006 WL 2514115 (ED Mich. 2006)(Tarnow, J.), *app. pending* No. 06-2144.

The Court should not add another layer of suspicion by shunting the substantive challenge to Proposal 2 to a panel that will be asked to consider it in haste, on a bare skeleton of a record, in the absence of any decision by the district court, and on the basis of a consent order that does not have to be reviewed at all.

Such a procedure would violate not the only the normal course of appellate review, *Singleton, supra*, but the rights and the expectations of the black and Latino/a plaintiffs and of their parents, who have long fought for the equal educational opportunity that Proposal 2 will deny to their children.

ARGUMENT

I

RUSSELL HAS NO BASIS FOR REQUESTING AN EXPEDITED DECISION ON AN APPEAL FROM A DORMANT CONSENT ORDER THAT THIS COURT MAY NEVER HAVE TO RULE ON.

A. No party has an interest in an expedited appeal from the consent order that was entered by the district court.

Russell's claim that all parties "agree that an expedited decision is in the public interest" is deliberately misleading (Russell Mot, p. 6).[3]

Before the district court, this Court, and the Supreme Court, the plaintiffs, the universities and the Governor stated that it *was* necessary to get an expedited decision on the application of Proposal 2 to the classes that were then being admitted *because there was an on-going admission process*. That need is now gone. The universities are implementing Proposal 2 at breakneck speed, with all of the harms that they said would occur if they were forced to do so.

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[3] Russell's quotation of plaintiffs' reply brief in the Supreme Court is doubly misleading. The plaintiffs told the Supreme Court that they were not seeking immediate review but that the case could be worthy of certiorari at the conclusion of the proceedings in the Sixth Circuit in large part because it seemed likely that the appeal from a district court decision on the merits would reach the Sixth Circuit and be combined with a decision on the consent order. Moreover, if the Supreme Court had granted the stay, then Russell would have had a reason for seeking an expedited review of the injunction and the issues might have been considered by this Court (Pet. Reply Br, p. 13). Neither of those contingencies has or will occur--and it is wrong to rip phrases out of context and suggest that the plaintiffs believe that this Court should now reach issues on a defunct consent order that will expire in a few months.

With compliance now ongoing, *no* party other than Russell has suggested any need to expedite the appeal from the consent order. The universities are not now considering applications for admission to the class entering in fall 2008--and they will not do so for many months to come. The plaintiffs, the universities and public do not need an expedited decision on the criteria that may apply to admission decisions that will occur many, many months from now.

More fundamentally, this case will profoundly affect Michigan's educational system for years to come. As everyone, save Russell, now recognizes, the parties fundamentally need a well-considered and correct decision by the district court, by this Court, and, perhaps, by the Supreme Court. That process should not be short-circuited or impeded by granting a motion to expedite an appeal that can decide nothing.

From any perspective other than Russell's attempt to forum-shop, there is no reason at all for expediting this appeal.[4]

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[4] Russell claims that he will waste resources in the district court supposedly burdening Russell himself (Russell Mot, p. 12). But in reality, the parties and this Court will waste resources by rushing for a decision before the district court has even considered the matter. Moreover, the claim that Russell himself is burdened by the costs of this litigation is disingenuous at best, since it is well-known that his lawsuit is fully funded by organizations and individuals far wealthier than he. In any event, having intervened in this action by an emergency appeal, Russell has no basis for claiming that the Court should expedite its procedures to save the funds that he chose to expend by intervening in a lawsuit between other parties.

B. The panel need not and can not reach the ultimate issues in this case on the appeal from the consent order.

In *Singleton*, the Supreme Court reversed and rebuked the Eighth Circuit for deciding a facial challenge to a ban on Medicaid funding for abortions on an appeal from a district court decision that had merely held that the plaintiff had no standing to raise that claim. The Court held that a federal appellate court should not "consider an issue not passed upon below" except in exceptional circumstances such as "where the proper resolution is beyond any doubt," or where "injustice might otherwise result." *Id.*, at 120-121.

But if that was true for the abortion issue in *Singleton*, it is even truer here. At least in *Singelton*, the district court had ruled on something. Here, the district court has yet to consider a single substantive issue in the case.

None of the authorities cited by Russell involved an appeal from a consent order--and *none* involved an order that will expire by its own terms before the circuit court ever has to rule on it.[5]

Moreover, *none* of the cases cited by Russell involve an order with the procedural deficiencies that Russell himself told the Supreme Court existed

[5] Russell told the Supreme Court that the consent order is a "temporary interim measure that will almost certainly expire before the Sixth Circuit and Supreme Court review could be completed." Russell Sup Ct Br., p. 9.

in this case. According to Russell, the consent order was "not entered on the claims of the applicants, but on a cross claim brought by some of the defendants (the Universities)." Russell Sup Ct Br, p. 9. According to Russell, the cross-claim did not raise "...the Equal Protection, Title VI, and Title IX issues that [plaintiffs] urge..." As Russell told the Supreme Court, the district court's order is "irredeemably flawed, and therefore due to be reversed or vacated in a variety of ways that are wholly unrelated to the merits of applicants' claims." Russell Sup Ct Br, pp. 9-11.

If what Russell said to the Supreme Court was true--and he said it only hours before he filed this motion--then this Court does not have to reach the merits on this appeal--which is the *first and essential* premise of *every* case that Russell has cited.

As this Court has recognized, where the district court has held no hearing and made no findings of fact on a request for a preliminary injunction, this Court should leave "...for the district court the initial resolution of [the party's] motion for a preliminary injunction." *Dubuc, supra,* 342 F. 3d at 620.

That principle is even more applicable when a motion to expedite is nothing other than an attempt to secure a ruling on a motion to dismiss that the movant has not even been filed in the district court.

II

THE COURT SHOULD DENY THE MOTION TO EXPEDITE BECAUSE THERE CLEARLY IS A NEED FOR A FACTUAL RECORD AND THE RESOLUTION OF FACTUAL DISPUTES BEFORE THE APPELLATE COURT CAN DECIDE THE ISSUES AT STAKE IN THIS CASE.

A. There are clear factual disputes.

Russell claims that there are no factual disputes in this case. Yet, he has neither filed a motion to dismiss nor offered a serious reason for failing to do so. Moreover, in the answer that he did file below, Russell disputed every factual allegation that the plaintiffs made, except for their assertion that Jennifer Granholm is the Governor of Michigan.

In California, the district judge issued a 41 page Opinion containing numerous factual findings. Those findings formed the basis of the Ninth Circuit's panel Opinion that sustained that Proposal, as well as the basis for the five dissents that would have struck it down and the petition for certiorari and the numerous amicus briefs that asked the Supreme Court to strike it down. See *Coal. for Economic Equity, supra.* If anything, there are more factual issues in this case, because the district court and the appellate courts will have to consider what has happened in California in order to determine what will happen in Michigan.

B. Examples of the factual disputes that must be determined.

The plaintiffs allege that Proposal 2 violates the Equal Protection Clause both on its face and as applied because it not only imposes a discriminatory burden on black citizens' efforts to secure change in admissions policies. As will be established, it makes it essentially impossible for black and Latino/a citizens to secure *any* change in the admission policies that will benefit their children.

The plaintiffs assert that Proposal 2's imposition of onerous and discriminatory burdens on efforts to secure change in admissions policies for black people and other minorities--while leaving the door wide open for all other groups seeking to secure change that is in their interests--violates three governing decisions of the United States Supreme Court. *Hunter, supra*; *Seattle School District No. 1, supra.*; and *Romer, supra.*

The plaintiffs further assert that Title VI of the Civil Rights Act of 1964, 42 USC 2000d, et seq., and Title IX of the Educational Amendments of 1992, 20 U.S.C. ss. 1681-1682, preempt Proposal 2 because that proposal "...is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. 2000h-4. As the plaintiffs will set forth in the district court, Proposition 209 has driven black and Latino/a students out of the most selective universities in California in a way that directly conflicts with the

purposes of the civil rights acts, including but not limited to the purposes that are elaborated in the regulations that implement the Act. See 34 CFR s. 100.39(b)(2) and 34 CFR 106.21(b)(2) and 106.23(a).[6]

Finally, the plaintiffs assert that they are beneficiaries of the universities' First Amendment rights to select a class that is diverse, including racially diverse.

On all of these claims, the district court will have to consider at least the following factual issues:

(1) Whether the white majority imposed its will on a racial minority in passing Proposal 2;

(2) Whether procedures available to racial and other minorities for securing changes in admission policies are significantly more onerous than those available for all other citizens seeking a change in admission policies;

(3) Whether black and Latino/a citizens have any remaining means to secure admission policies that will make it possible for more than a token number of their children to attend the universities;

(4) Whether black and Latino/a citizens have any remaining means to secure other policies that further their interests in the defendant universities;

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[6] Russell has misunderstood the plaintiffs' argument that Title VI and Title IX preempt Proposal 2 for an argument that Proposal 2 simply violates the implementing regulations, which, he says, are barred by *Alexander v Sandoval*, 532 U.S. 275 (2001). As set forth above, there is a clear statutory basis for a preemption claim--one not addressed in *Sandoval*.

(5) Whether California's Proposition 209 has made it essentially impossible for minorities to secure changes in admission and other policies in that state;

(6) Whether there are any facts that suggest that the results in Michigan will be any different than those in California;

(7) Whether the effects of Proposal 2 on the efforts to admit racial and national minorities stands as an obstacle to fulfilling the purposes of Title VI;

(8) Whether the effects of Proposal 2 on efforts to admit women (particularly in the sciences and in engineering) stand as an obstacle to fulfilling the purposes of Title IX;

(9) Whether the damage caused to equal opportunity can be remedied in any way that is consistent with Proposal 2; and

(10) Whether the enforced change in admission policies will have any effect on the First Amendment interests of the universities and of the students who attend those universities.

As is obvious, a panel of the Sixth Circuit can not decide any of those issues on an expedited review based on nothing other than a complaint.

III

THE PLAINTIFFS HAVE STATED STRONG CONSTITUTIONAL AND STATUTORY CLAIMS.

Finally, Russell is not entitled to his motion to expedite because even if a panel of this Court had to rule on the validity of the dormant consent order and even if it avoided all of the procedural deficiencies and factual disputes that are at issue, the legal issues at stake are such that this Court should not and would not want to rule on them in the context of an expedited appeal from a consent order that will soon expire.

In the panel decision denying the stay, the panel had to effectively overrule *Hunter*, *Seattle School District* and *Romer* insofar as affirmative action was concerned. The Opinion is not valid and the argument it advances was rejected by more judges on the Ninth Circuit than those who accepted it. Put simply, the plaintiffs assert that the majority can not deprive a racial minority of its rights to an equal political process simply by labeling the demands of the minority a preference.

As to the Title VI and Title IX claims, there are very few decisions addressing the issue of the preemptive force of the federal civil rights acts. See *Cal. Fed. Sav. & Loan Ass'n v Guerra*, 479 U.S. 272, 281 (1987)(plurality opinion). Establishing the standards that should govern

Finally, the First Amendment claims derive from *Grutter*. Precisely because *Grutter* was the first majority opinion to recognize those claims in this context, those issues as well should not be resolved by a panel on expedited review of a consent order.

CONCLUSION

For the foregoing reasons, the Court should deny Russell's motion to expedite the appeal of a suspended consent order that will expire on June 30, 2007.

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Dated: February 5, 2007

CERTIFICATE OF SERVICE

George B. Washington hereby certifies that on this day he served a copy of the Plaintiff-Appellees' Brief in Opposition to Eric Russell's Motion to Expedite the Appeal by e-mail and United States mail, postage prepaid, to the following counsel of record:

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