

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

JENNIFER GRANHOLM, REGENTS OF THE
UNIVERSITY OF MICHIGAN, BOARD OF
TRUSTEES OF MICHIGAN STATE UNIVERSITY,
BOARD OF GOVERNORS OF WAYNE STATE
UNIVERSITY, MICHAEL COX, ERIC RUSSELL,
and the TRUSTEES OF any other public college or
university, community college or school district,

Defendants.

Case No. 06-15024
Hon. David M. Lawson

CONSOLIDATED CASES

This filing pertains to
ALL CASES

- and -

CHASE CANTRELL, *et al.*,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her Official Capacity
as Governor of the State of Michigan,

Defendant.

Case No. 06-15637
Hon. David M. Lawson

**DEFENDANT-INTERVENOR ERIC RUSSELL'S MOTION TO COMPEL
DISCOVERY FROM THE UNIVERSITY DEFENDANTS**

Defendant-Intervenor Eric Russell respectfully moves this Court to compel Defendants
the Regents of the University of Michigan, the Board of Trustees of Michigan State University,

and the Board of Governors of Wayne State University (collectively, “University defendants”) to provide discovery in response to Document Request No. 1 of Eric Russell’s First Set of Document Requests To the University Defendants (Exhibit A) and in response to Document Requests Nos. 1 - 4 of Eric Russell’s Second Set of Document Requests To the University Defendants (Exhibit C).

Pursuant to Rule 7.1 of the Local Rules of the U.S. District Court for the Eastern District of Michigan, Defendant-Intervenor conferred or attempted to confer with counsel for the parties. Counsel for the Cantrell Plaintiffs has indicated that they do not consent to this motion. Counsel for the Attorney General has stated that he takes no position on the motion. Counsel for the Coalition Plaintiffs have not indicated whether they consent or object.

Pursuant to Rule 37.2 of the Local Rules of the U.S. District Court for the Eastern District of Michigan, Defendant-Intervenor’s document requests and the University defendants’ objections and responses that are at issue in this motion are attached to this motion as Exhibits A, B, C, and D.

Counsel for Defendant-Intervenor certify that they have made good-faith efforts to narrow and reach agreement on the disputed discovery issues with the University defendants. These efforts were unsuccessful as to the disputes described herein.

**MEMORANDUM IN SUPPORT OF DEFENDANT-INTERVENOR
ERIC RUSSELL'S MOTION TO COMPEL DISCOVERY
FROM THE UNIVERSITY DEFENDANTS**

Issue Presented

1. Whether the Court should compel the University defendants to produce discovery responsive to five disputed document requests from Defendant-Intervenor Eric Russell.

Leading Authority

Fed. R. Civ. P. 26

Statement and Argument

In support of this Motion To Compel Discovery from the University defendants, Defendant-Intervenor Eric Russell states as follows:

A. The Scope of the Disputed Document Requests.

All the document requests at issue here relate to a single theme: To track, by race and gender if possible, the subsequent performance in academics and on professional licensing exams of students matriculating at Michigan public universities under admissions regimes in effect prior to the passage of Proposal 2. This information will allow a systemic analysis of the actual effect of the racial preferences on the underrepresented minority students in Michigan that they purport to benefit. This information will show whether those racial-preference programs impose a net benefit, or net harm, upon their intended beneficiaries. Specifically, the five areas of remaining dispute are as follows:

- (1) Defendant-Intervenor's request for "any Documents, including reports received from the state bars of Michigan, California, or any other State, relating to the bar exam performance or bar exam outcomes of graduates of the UMLS [i.e. University of Michigan Law School] on bar exams taken in any jurisdiction during the time period from 1996 to present." Document Request No. 1, Russell's First Set of Document Requests (Exhibit A), at 19.
- (2) Defendant-Intervenor's similar request for documents reflecting bar exam performance of graduates of Wayne State University Law School from 1996 to 2007. *See* Document Request No. 1, Russell's Second Set of Document Requests (Exhibit C), at 6.
- (3) Defendant-Intervenor's request for integrated data linking the race, gender, performance on admissions criteria, and subsequent academic and bar exam performance for two years of matriculants at WSU Law School. *See* Document Request No. 2, Russell's Second Set of Document Requests (Exhibit C), at 6.
- (4) Defendant-Intervenor's request for similar integrated data, linking race, gender, and admissions criteria to subsequent academic performance, for one year of applicants

and matriculants to Michigan State University undergraduate programs. *See* Document Request No. 3, Second Set of Document Requests (Exhibit C), at 6-7.

- (5) Defendant-Intervenor's request for "Documents containing sufficient information to identify, by race, the passage rates on each Step of the United States Medical Licensing Examination of minority students who matriculated during the years 1996-2005 at the University of Michigan Medical School, Michigan State University College of Human Medicine, and Wayne State University School of Medicine." Document Request No. 4, Second Set of Document Requests (Exhibit C), at 7.

The first of these five areas of dispute -- documents reflecting eleven years' of bar exam performance from the University of Michigan Law School -- has been partially resolved by agreement of the parties. This request was the subject of prolonged disagreement over the summer. On August 13, after repeatedly and unsuccessfully seeking telephone conferences on this issue, Defendant-Intervenor notified counsel for the University defendants that Defendant-Intervenor intended to file a motion to compel on this issue by August 21. *See* August 13, 2007 Email of J. Sauer (Exhibit E). Counsel for the University defendants responded, first by email and then with an August 20 letter, offering to produce the eleven years' of data requested, without waiving any objections as to relevance or undue burden. *See* August 20, 2007 Letter of L. Niehoff (Exhibit F), at 1 (quoting Defendant-Intervenor's request for data from 1996 to 2007 and advising that "we have ... decided to produce the bar reports we have on hand"). Counsel for the Universities insisted that Defendant-Intervenor bear the costs associated with the offered production. *Id.* at 1. (Counsel for the University defendants also advised Defendant-Intervenor that the Universities would be "extraordinarily unlikely" to agree to any further follow-up discovery, *id.*). Defendant-Intervenor accepted this offer, and agreed to shoulder any reasonable costs of copying and compiling the requested information -- an agreement that the University defendants have not yet taken up. August 20, 2007 Email of J. Sauer (Exhibit G) (restating

Defendant-Intervenor's agreement "to bear reasonable costs of compiling and copying the documents and data requested," and requesting "please contact me immediately if you anticipate costs will exceed \$3000"). On August 27, however, only three years (2004-2006) of the requested data were produced. When queried about the other 8 years of data, *see* September 4, 2007 Email of J. Sauer (Exhibit H), counsel for the University defendants responded that the Universities would no longer to agree to produce any further documents, notwithstanding the prior agreement, and reasserted objections on the basis of burden and relevance. September 12, 2007 Email of L. Niehoff (Exhibit I). As a result, Defendant-Intervenor's request for the remaining eight years of data (1996-2003) remains in dispute.

With regard to Defendant-Intevenor's request for integrated data relating to the 1999 and 2003 matriculants at Wayne State University Law School, the University defendants have also made a partial production. Specifically, the WSU Law School has produced printouts linking the performance on two admission criteria (LSAT score and undergraduate GPA) with a single index of subsequent academic performance (first-year law school GPA) for matriculants in one of the requested classes (1999). This production, to be sure, has some probative value to Defendant-Intervenor. It is not fully responsive, however, because it is limited to a single year; it is limited to a subset of the variables requested; and it fails to provide key relevant information on the races and genders of the individual students specified. Perhaps most importantly, by failing to include individual race and gender information, it does not preserve the critical threefold link between (1) race and gender, (2) admissions criteria, and (3) subsequent performance (in academics and on the bar exam).

Regarding the other three areas of dispute (which are coextensive with Requests 1, 3, and 4 in Russell's Second Set of Document Requests), there has been no agreement between the parties and no responsive production. These issues, therefore, remain fully in dispute.

B. The Documents Requested Are Discoverable Under the Federal Rules.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a party "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." It is well established that "the purpose of the broad scope of discovery is to permit parties to 'obtain the fullest possible knowledge of the issues and facts before trial.'" *Marshall v. Bramer*, 828 F.2d 355, 359 (6th Cir. 1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

The requested discovery is highly relevant to the claims brought by the Plaintiffs challenging the application of Proposal 2 to the admissions and financial aid policies of the University defendants. From the outset of this litigation, both sets of Plaintiffs have made clear that proving the *actual effect* of Proposal 2 on underrepresented minorities is, on their view, a central aspect of their case -- and they have avidly sought and obtained discovery on this issue. For example, in seeking to compel discovery from the Michigan Civil Rights Initiative Committee, the Cantrell Plaintiffs recently emphasized that proving such a detrimental effect on underrepresented minorities "relate[s] to the question of whether affirmative action policies 'inure[] primarily to the benefit of the minority,' a *foundational consideration* in the Supreme Court's decisions in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 474 and 475 fn.17 (1982), and *Hunter v. Erikson*, 393 U.S. 385, 560 (1969)." Cantrell Plaintiffs' Mot. To

Compel, Doc. 156, at 1-2 (emphasis added). Likewise, in successfully seeking to compel discovery for this case in the U.S. District Court for the Middle District of California, the Coalition Plaintiffs took the position that “the [Supreme] Court has repeatedly held that the likely or predicted impact of the initiative is of *decisive significance* in evaluating its constitutional validity,” and urged that “the likely effect of an initiative upon racial and national minorities and women is *highly relevant* to establishing whether that initiative had a discriminatory purpose under both the Constitution and the statutes of the United States.” Coalition Plaintiffs’ Mot. To Quash Subpoena, Doc. 158-3, at 4, 8 (emphases added).

Numerous other filings of the Plaintiffs -- from their complaints onward -- plainly attest their view that the claim that Proposal 2 will have a “devastating ... effect” on minorities is a central aspect of this case, and one which they intend to prove through factual evidence. Coal. Pl. Mot. For Class Certif., Doc. 121, at 11; *see also id.* at 14 (asserting that it is “absolutely essential” to introduce evidence relating to the effect of Proposal 2 on minorities); Cantrell Pl. First Amended Complaint, Doc. 73, at ¶¶ 6, 57 (alleging that Proposal 2 will “place special burdens on the ability of minority groups to achieve *beneficial* legislation”) (quoting *Seattle Sch. Dist. No. 1*, 458 U.S. at 467) (emphasis added); Plaintiffs’ Joint Proposed Stipulation of Facts, ¶ 16, *see* Doc. 86, at 7 (requesting a stipulation that “[r]ace-conscious affirmative action policies, such as those employed by the Universities, inure primarily to the benefit of underrepresented minorities”); Coal. Pl. Second Amended Complaint, Doc. 96, at ¶¶ 84-92, 101 (alleging effects of Proposition 209 in California and predicting that Proposal 2 will cause a “dramatic drop” in Michigan enrollments); *id.* ¶ 126 (claiming, under 34 C.F.R. § 100.3(b)(2), that Proposal 2 is invalid because it will “have the effect of defeating or substantially impairing accomplishments

of the objectives of the program as respects individuals of a particular race, color, or national origin”); Coal. Pl. Supp. Br. in Support of Mot. For Class Certif., Doc. 144, at 4 (stating that “the *Coalition* plaintiffs’ experts will testify ... [that] minorities are being forced from the most selective campuses in the UC system and are cascading down onto campuses ... that have fewer resources and offer less opportunities for their graduates”); *id.* at 5 (emphasizing the “vital importance” of proving the ill effects of Proposal 2 for underrepresented minorities). In short, both sets of Plaintiffs believe that the actual effects of Proposal 2 on minorities have “foundational” and “decisive” significance in this case, and they have sought (and received) discovery on this issue.

Admittedly, Defendant-Intervenor does not concede that any ruling on the Plaintiffs’ factual allegations about the effects of Proposal 2 is necessary to resolve the legal challenges they have brought against Proposal 2. Rather, Defendant-Intervenor takes the position that all the pending claims are insufficient as a matter of law, and that the case can be resolved without *any* factual discovery. In the event that the Court may rule otherwise, however, Defendant-Intervenor is compelled to prepare a factual case to rebut the Plaintiffs’ allegations that Proposal 2 will have a “devastating effect” on underrepresented minorities.

In support of this rebuttal case, Defendant-Intervenor has sought evidence relating to the actual impact of racial preference programs in Michigan on minority students who are granted admissions preferences, by comparing their subsequent academic and professional-exam performance with that of students who do not receive admissions preferences. Defendant-Intervenor has reason to believe, and will attempt to prove, that racial-preference programs prior to Proposal 2 imposed significant negative effects on underrepresented minorities by

“mismatching” them with more elite institutions, where they struggle academically. This “mismatch” results in significant academic underperformance by preferred minorities, higher attrition rates of minorities in elite institutions, lower overall passage rates on bar exams and professional licensing exams, and (ultimately) *fewer* minority doctors, lawyers, and so forth.¹ The limited document production already received from the University defendants tends strongly to confirm this hypothesis. Among other things, this factual case will rebut (1) the Cantrell Plaintiffs’ claim that Michigan’s racial preference programs prior to Proposal 2 “inure[d] primarily to the benefit of minorities,” which they view as a “foundational consideration” in their *Hunter v. Erikson* claim; (2) the Coalition Plaintiffs’ claim that the purported ill effects of Proposal 2 raise an inference of invidious intent on the part of the Proposal’s sponsors, proof of which they view as “of decisive significance in evaluating [Proposal 2’s] constitutional validity”; and (3) the Coalition Plaintiffs’ claim that Proposal 2 is invalid because it “substantially impair[s] accomplishments of the objectives of the [Michigan educational programs] as respects individuals of a particular race.”

Moreover, the disputed document requests have been carefully calibrated to seek data that will support a sound analysis using established methodology. Based on analysis of data that is very similar in nature to that requested here, one legal scholar concluded:

[B]lacks are the victims of law school programs of affirmative action, not the beneficiaries. The programs set blacks up for failure in school, aggravate attrition

¹ In close connection with this “mismatch” thesis, Defendant-Intervenor is seeking information about the potential “cascade effect” of preferences at more elite institutions (such as University of Michigan Law School) on the performance of students at less selective institutions (such as Wayne State University Law School). *See, e.g.,* R. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stanford L. Rev.* 367, 480 (2004). (The Coalition Plaintiffs have alleged such a “cascade effect” in the California public university system. *See* Coal. Pl. Supp. Br. In Support of Mot. for Class Certif., Doc. 144, at 4.)

rates, turn the bar exam into a major hurdle, disadvantage most blacks in the job market, and depress the overall production of black lawyers.

Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *Stanford L. Rev.* 367, 481 (2004). Similarly, the categories of disclosure sought by Defendant-Intervenor have recently received the imprimatur of no lesser authority than the United States Commission on Civil Rights. In its recent report, *Affirmative Action In American Law Schools* (released August 28, 2007, available at www.usccr.gov), the Commission called for the public release of just the sort of data that is in dispute here, to permit just the sort of analysis that Defendant-Intervenor here proposes. In order to assist the investigation of the effects of racial preferences on minorities in the legal profession, the Commission recommended (1) that the government fund “independent research on the impact of racial preferences on racial disparities in law school academic performance, bar passage rates, graduation rates, student loan default rates, and future income and that state bar associations cooperate with this research”; (2) that “[l]aw schools *voluntarily* provide disclosure to the public ... on student academic performance, attrition, graduation, bar passage, student loan default, and future income disaggregated by academic credentials”; (3) that Congress *require* law schools receiving federal funds to disclose data on their use of racial preferences and “any correlation between academic credentials and placement in remediation program, graduation rates, and student loan default rates”; and (4) that “States require bar admissions authorities to provide disclosure on bar passage rates disaggregated by academic credentials.” *Id.* at 7 (emphases added).

Counsel for Defendant-Intervenor collaborated closely with a retained expert in crafting the disputed document requests from the University defendants. They are thus carefully calibrated to elicit the maximum amount of probative information on the effects of racial

preferences prior to Proposal 2, while imposing the most limited possible burden of production on the Universities. The material sought is unquestionably “relevant” within the broad meaning of Rule 26(b)(1).

C. There Is No Valid Basis To Refuse Production.

In correspondence regarding the disputed document requests, the University defendants have interposed several objections to production. These objections lack merit.

1. *Relevance.* The University defendants have objected in general that Defendant-Intervenor’s document requests are not relevant to the issues in dispute in this litigation. For the reasons stated above, this contention is not supportable.

The University defendants have also interposed a specific objection with regard to relevance. They have taken the position that Russell’s requests for discovery must be directly germane to his interest in this case, which they define as limited to his being treated equally on the basis of race by the admissions office of the University of Michigan Law School. On this ground, they contend that Russell’s document requests from, for example, Wayne State University Law School and from the medical schools are not “relevant” so far as Defendant-Intervenor is concerned. Even setting aside the Universities’ unjustifiably crimped view of Russell’s interest in this case (which also includes, *inter alia*, Russell’s interest in being treated equally in the allocation of financial aid and scholarship funds by Wayne State University), this objection lacks foundation in law or in fact. Rule 26(b)(1) provides, without qualification, that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of *any* party” (emphasis added) -- not merely to *their own* “claims or defenses.”

In any event, both sets of Plaintiffs have brought challenges seeking a blanket declaration or injunction against the application of Proposal 2 to *all* the University defendants. No plaintiff has sought targeted injunctive relief against a particular academic institution; rather, Russell's interest in being treated equally on the basis of race by Michigan public law schools will stand or fall in accordance with the success of Plaintiffs' case as a whole. Just as the Plaintiffs have launched a broad attack on all programs at all Universities, Defendant-Intervenor must be prepared to present an equally broad "defense" -- to which the requested documents are unquestionably "relevant."

Finally, even if Plaintiffs had sought relief only against a single defendant institution, the effects of racial preferences at other Michigan institutions of higher education would still very likely be "relevant" within the meaning of Rule 26(b)(1). The effects at analogous institutions would tend to corroborate (or counterpoise) the evidence of the effects of racial preferences at the challenged institution. For all these reasons, the University defendants' claim that Russell's right to seek discovery is restricted to certain Michigan institutions is not meritorious.

2. *Burdensomeness.* The University defendants have objected to all Defendant-Intervenor's discovery requests on the ground that they are unduly burdensome. This objection also lacks merit.

The disputed requests fall into two different classes with respect to burdensomeness: (A) those that require straightforward production of copies of documents -- namely, the requests for bar passage reports from the University of Michigan Law School and Wayne State University Law School, and of USMLE results from the medical schools (requests numbered (1), (2), and (5), at page 3 above); and (B) those that would likely require the Universities to compile

anonymous spreadsheets of data to avoid individually identifying students -- namely, the requests for integrated data on two years of matriculants to Wayne State University Law School and one year of applicants and matriculants to Michigan State University undergraduate programs (requests numbered (3) and (4), at page 3 above). Neither category of requests presents an undue burden to the University defendants.

As to the first, the University defendants have objected that collection and copying of such information is unduly burdensome. For example, in advising Defendant-Intervenor that they had unilaterally decided to narrow their agreed production of eleven years of bar passage reports from the University of Michigan Law School, counsel for the University defendants stated that “[t]he documents are not all formatted in the same way and copying many of them is cumbersome.” *See* September 12, 2007 Email of L. Niehoff (Exhibit I).² However, Defendant-Intervenor had previously agreed to shoulder any reasonable costs of copying the requested documents -- with no restriction on those with varying “format[s]” that are “cumbersome” to copy -- up to \$3000 of copying costs. *See* August 20, 2007 Email of J. Sauer (Exhibit G). The University defendants have not sought any reimbursement for the documents that they did produce, so their objection on grounds of “cumbersome” copying is not convincing.

As to the second category (items (3) and (4) from page 3), the University defendants have produced data in response to similar document requests in the form of anonymous spreadsheets

² The same message also asserted, for the first time after months of dispute, that “because of the sensitivity of this information it must be copied by the Registrar and reviewed by the Assistant Dean for Student Affairs before production.” *See id.* The University defendants did not explain, however, why such copying by the Registrar *personally* (as opposed to clerical members of his or her staff) was necessary, or why review by the Assistant Dean of Student Affairs was either necessary or particularly burdensome. After all, the three years of bar passage reports already produced from the University of Michigan Law School comprised less than 150 pages.

that provide requested information while excluding the identities of individual students. Production of student files directly may raise student privacy concerns (albeit concerns that may well be addressed, in whole or in part, by an appropriate order such as the stipulated protective order that the parties intend soon to file); in-house compilation of such information by the Universities would obviate such concerns about individual privacy. Defendant-Intervenor has no objection to production in this format, but compiling these spreadsheets admittedly requires more clerical effort on the part of University personnel. However, as noted above, Defendant-Intervenor is willing to reimburse the Universities for the reasonable costs of such an effort, up to at least \$3000. In fact, the University defendants insisted on such an agreement prior to their production of a similar spreadsheet from the University of Michigan Law School -- but then never followed up on it. Their failure to do so suggests that the cost of compilation was not, in fact, an undue burden.

In any event, even setting aside Defendant-Intervenor's offer to shoulder the reasonable costs of such compilations, any additional costs and clerical disruption incident to such requests are decisively outweighed by the compelling public interest in full and fair resolution of the factual issues in this case.

CONCLUSION

For the reasons stated, Defendant-Intervenor respectfully requests this Court to order the University defendants to produce the requested documents.

September 28, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2007, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following:

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/s/ D. John Sauer

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