

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION,
et al.,

Plaintiffs,

vs.

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.

and

CHASE CANTRELL, et al.,

Plaintiffs,

vs.

JENNIFER GRANHOLM and
MICHAEL COX,

Defendants.

Case No. 06-15024

Hon. David M. Lawson

CONSOLIDATED CASES

Case No. 06-15637

Hon. David M. Lawson

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

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INTRODUCTION

Defendant-Intervenor Eric Russell (“Russell”) moves to compel the production of documents from Defendants Michigan State University (“MSU”), the University of Michigan (“UM”), and Wayne State University (“WSU”) (collectively “the Universities”). The documents he demands fall into five categories.¹ They include (1) more than a decade’s worth of documents reflecting bar passage information for UM Law School graduates; (2) the same information for WSU Law School graduates; (3) two years of exhaustive data regarding WSU Law School students, including admissions, academic performance, and bar passage information; (4) similarly exhaustive data for all MSU undergraduate programs for one year; and (5) nine years’ worth of information regarding performance on the United States Medical Licensing Examination (“USMLE”) by graduates of the MSU, UM, and WSU medical schools.

The documents demanded are neither relevant to this case nor reasonably calculated to lead to the discovery of evidence admissible in this case. They have nothing to do with any of the claims at issue here or any defense to those claims. Indeed, these documents have not been requested by the Plaintiffs, who vigorously challenge the constitutionality of Article 1, § 26 of the Michigan Constitution (“Proposal 2”), or by the Attorney General, who vigorously defends it. Furthermore, these documents have no relevance to the distinct interest that served as the basis for Russell’s intervention in this case. In fact, these documents have nothing to do with the interests of Eric Russell: they include requests for information regarding the bar examination (a test he has not taken), the USMLE (a test he will not take), the undergraduate programs of MSU and the Medical Schools of MSU, UM, and WSU (schools to which he has not applied), and the law schools of WSU and UM (schools that have already reviewed his application, one of which

¹ See Memorandum in Support of Defendant-Intervenor Eric Russell’s Motion to Compel Discovery from the University Defendants (“Russell Memo”), pp. 4-5.

admitted him and one of which did not). Finally, these requests are improper in their scope and compliance with them would impose undue burdens on the Universities.

The Universities therefore respectfully request that this Court either (a) in the interest of efficiency, defer a decision on this motion until after the Court has decided the pending Motion for Summary Judgment that seeks to dismiss Russell from this case or (b) deny Russell's Motion to Compel outright.

BACKGROUND

Plaintiffs the Coalition to Defend Affirmative Action *et al.* ("Coalition Plaintiffs") and Chase Cantrell *et al.* ("Cantrell Plaintiffs") challenge the constitutional validity of Proposal 2. The central claim advanced by both the Coalition Plaintiffs and the Cantrell Plaintiffs is that Proposal 2 violates the Equal Protection Clause because it disadvantages minority groups by making it more difficult to enact legislation or advocate for policies on their behalf. Their pleadings indicate that this claim rests primarily on the United States Supreme Court decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). Based on this and related authority, Plaintiffs have asked this Court to declare Proposal 2 unconstitutional and to enjoin its enforcement.²

The Universities did not draft, campaign for, or adopt Proposal 2. They cannot repeal, amend, or ignore Proposal 2. They are not arms of the executive branch, charged with enforcing Proposal 2, or arms of the judicial branch, empowered to declare Proposal 2 unconstitutional. They are simply state institutions that – like all other affected state institutions – must follow Proposal 2 unless and until a court rules otherwise. Indeed, the Cantrell Plaintiffs did not name the Universities as defendants in this case. Although the Coalition Plaintiffs did name them, the

² The Universities take no position with respect to the merits of Plaintiffs' claim that Proposal 2 is unconstitutional.

Universities maintain they are unnecessary parties within the terms of Fed. R. Civ. P. 21 and have filed a motion seeking dismissal from this case on that basis.

Despite these facts, and the remote (at best) relevance of the Universities to the merits of the underlying action, the burden of discovery in this matter has overwhelmingly fallen on these institutions. To date, the Universities have produced an estimated twenty-five thousand pages of documents and data to the parties.³ In addition, the parties have deposed three witnesses from the University of Michigan and one witness from Wayne State University.⁴

Russell has participated fully in this discovery. His lawyers have interrogated all of the witnesses the Universities have produced. He has received all of the twenty-five thousand pages the Universities have provided to every other party. The Universities have even produced documents to him that no other party has requested, though they have done so over objections that included irrelevancy and burdensomeness.⁵

Russell has enjoyed the fruits of full participation in discovery despite the fact that the interest that justified his intervention has vanished and he has no continuing personal stake in this litigation. When Russell moved to intervene, on December 18, 2006, he argued as follows in support of his request:

Eric Russell is a resident of Auburn Hills, Michigan. He is white. He has applied to the University of Michigan's School of Law (the "Law School") for matriculation as a first year student in the fall of 2007.⁶

³ See Niehoff declaration, attached as Exhibit A.

⁴ The Universities also arranged to make available for deposition two witnesses from Michigan State University and two additional witnesses from Wayne State University. The parties elected to withdraw their requests for these depositions after they were scheduled. See Niehoff declaration, attached as Exhibit A.

⁵ See Niehoff declaration, attached as Exhibit A.

⁶ Brief in Support of Motion to Intervene, p. 1 (citing Russell statement, attached to Brief as Exhibit B).

[Russell's] interests in Article 1, § 26 are both his interest in being treated equally in the admissions process and in maximizing his chances of being admitted.⁷

[Russell's] interest is to have a non-discriminatory and non-preferential system instituted right *now*, while his application [to the Law School] is under consideration.⁸

Russell thus sought to intervene on a specific and limited basis: he had applied to the University of Michigan Law School and wanted his application to receive consideration in a manner consistent with Proposal 2.

This Court accepted Russell's argument, ruling as follows:

The circumstances of Eric Russell are different [from those of the other proposed intervenors.] Russell is the only intervenor who has alleged an individual interest that may not be taken into account by the present parties. He has alleged a personal stake in seeing that his law school admission chances are not diminished by a narrow construction or invalidation of the amendment. His interest extends beyond those of the citizens and election groups that promoted or opposed the ballot proposal. He seeks the implementation of Proposal 2 *now*, while his application is being processed.⁹

Similarly, the Sixth Circuit ruled that Russell "has standing to participate in the case because he has applied for admission to the University of Michigan School of Law for matriculation in 2007 and accordingly has a direct interest in whether Proposal 2 applies to the Law School's admissions decisions this year."¹⁰

The discovery conducted in this case conclusively establishes that Russell no longer has any substantial interest in this case. The UM Law School did not admit him and Russell has

⁷ *Id.*, p. 7.

⁸ *Id.*, p. 10.

⁹ Opinion and Order Granting Motions to Expedite, Granting in Part and Denying in Part Motions to Intervene, and Striking Motions to Dismiss, p. 15 (emphasis in original).

¹⁰ *Coalition to Defendant Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006)

testified that he agreed with that decision.¹¹ The school's Assistant Dean and Director of Admissions, Sarah Zearfoss, testified that the Law School acted on his application after Proposal 2 became effective and that race was not a factor in this decision.¹² Her testimony is undisputed. The WSU Law School did admit him – indeed, it did so *before* Proposal 2 became effective – and he intends to study law there.¹³ Thus, Russell has no legally cognizable interest justifying his continued participation in this case. The Cantrell Plaintiffs have therefore filed a Motion for Summary Judgment seeking his dismissal from this action, and the Universities have concurred in the relief requested in that motion.

These facts notwithstanding, Russell now asks this Court to order the Universities to produce documents that no other party has requested, that have no relevance to the issues joined between the Plaintiffs and the Attorney General, that have no relevance to the interest that provided the basis for his intervention, and that would be unduly burdensome to provide. The Universities respectfully request that this Court either deny this motion or defer ruling on this motion until after it has decided the pending motion for summary judgment.

¹¹ See excerpted deposition of Eric Russell, attached as Exhibit B, pp. 45-46.

¹² See excerpted deposition of Sarah Zearfoss, attached as Exhibit C, pp. 199:2-200:7. Russell has indicated that he may attempt to transfer to the UM Law School (or another school) at the end of his first year if his grades are high enough. See Exhibit C, p. 66. Of course, Russell cannot predict his academic performance during his first year of law school (see Exhibit C, p. 64), so this is nothing more than a hypothetical possibility. In any event, the undisputed testimony of Sarah Zearfoss is that race has never been a factor in the consideration of transfer applications to the UM Law School. See Exhibit C, pp. 187:17-189:3.

¹³ Russell suggests to this Court that he has a continuing interest in this case because he wants to be “treated equally in the allocation of financial aid and scholarship funds by Wayne State University.” Russell Memo, p. 12. This ignores the undisputed testimony of Dean Frank Wu of the WSU Law School, who has indicated that race will not affect any financial aid decisions the institution will make as to Russell. See excerpted deposition of Frank Wu, attached as Exhibit D, pp. 248:24-249:8.

ARGUMENT

I. THE COURT SHOULD DEFER ITS DECISION ON THIS MOTION UNTIL AFTER IT HAS DECIDED THE PENDING MOTION FOR SUMMARY JUDGMENT THAT SEEKS TO DISMISS RUSSELL FROM THIS CASE

As noted above, the Cantrell Plaintiffs have filed a Motion for Summary Judgment that seeks to dismiss Russell from this case and the Universities concur in that Motion. Based on the facts set forth above and the arguments advanced in the Motion for Summary Judgment, it seems clear that Russell no longer has any substantial interest in this case and should be dismissed from it without further ado. If the Court agrees and grants that motion then the issues raised in Russell's Motion to Compel will become moot, because no other party has requested the documents he demands. Such scheduling decisions plainly lie within the sound discretion of this Court. *See In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996) ("Matters of docket control and conduct of discovery are committed to the sound discretion of the district court") and *Russell v. GTE Government Systems Corp.*, 2005 U.S. App. LEXIS 13637 (6th Cir. 2005) ("Issues of docket control are within the sound discretion of the trial court").¹⁴ Deferring a decision on the Motion to Compel would serve the interest of efficiency¹⁵ and would honor the principle that a court should not decide issues it does not need to reach.¹⁶ This approach is facilitated by this Court's recent decision to hear both motions on the same date.

¹⁴ All unpublished opinions are attached as Exhibit E.

¹⁵ Fed. R. Civ. P. 1 provides that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

¹⁶ This Court has followed this principle in numerous cases. *See, e.g., Forton v. Ogemaw County*, 435 F. Supp. 2d 640, 657 (E.D. Mich. 2006) (dismissing motion to compel as moot in light of the Court's decision dismissing plaintiffs' complaint) and *Ouderkirk v. PETA*, 2007 U.S. Dist. LEXIS 29451 (E.D. Mich. 2007) (denying plaintiffs' motion to compel discovery as moot in light of the Court's decision granting summary judgment to defendants) (attached as Exhibit F).

In addition, Russell cannot claim this approach will result in any unfair prejudice to him. Russell does not need eleven years of bar examination results, or nine years of medical licensing test data, or vast amounts of information about WSU Law School students or MSU undergraduates in order to respond to the Motion for Summary Judgment. That Motion relates solely to the question of whether Russell continues to have any legally cognizable interest in this case.¹⁷

II. IF THE COURT ELECTS TO DECIDE RUSSELL'S MOTION NOW, THEN THE COURT SHOULD DENY THAT MOTION

If the Court elects to decide Russell's motion now, then there are several clear and independently sufficient bases on which the Court can and should deny it. First, the discovery Russell demands is not relevant to this case, nor is it likely to lead to the discovery of admissible evidence. Second, that discovery has no relevance to the distinct interest that served as the basis for Russell's intervention in this case. And, third, the document requests at issue are improper in their scope and the production of responsive material would impose an undue burden on the Universities.

¹⁷ Statements throughout Russell's Memorandum confirm that he has no immediate need for the requested documents in any event. Russell declares that "all the pending claims are insufficient as a matter of law, and ... the case can be resolved without *any* factual discovery." Russell Memo, p. 9. If Russell is correct then he has no need for this information at all. In addition, Russell indicates that he seeks this information for use by a retained expert. He states that "the disputed document requests have been carefully calibrated to seek data that will support a sound analysis using established methodology." Russell Memo, p. 10. He further claims that "[c]ounsel for Defendant-Intervenor collaborated closely with a retained expert in crafting the disputed document requests from the University defendants." Russell Memo, p. 11. To date, however, the parties have conducted no expert discovery in this matter and the Court's First Supplemental Case Management and Scheduling Order does not even require a party to furnish Rule 26(a)(2) expert reports until an undetermined time after dispositive motions have been filed.

A. The Discovery Russell Demands Is Not Relevant to This Case

Russell claims that the discovery he demands 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.”¹⁸ He maintains that this is so because Plaintiffs have argued that the *Hunter* and *Seattle School District* cases implicate the question of whether “affirmative action” policies “inure primarily to the benefit of the minority.”¹⁹ He says he therefore needs this discovery “[i]n support of his rebuttal case,” because he hopes to show the following:

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.

As noted above, the Universities maintain they are unnecessary parties to this litigation; they therefore take no position with respect to the merits of Plaintiffs’ claims or the defenses the Attorney General raises to them. In order to respond to this Motion to Compel, however, the Universities must discuss *Hunter* and *Seattle*, the nature of the Plaintiffs’ claims, and the failings of Russell’s relevancy argument.

Russell seizes a few phrases that appear in *Hunter* and *Seattle* (and that Plaintiffs have invoked) and then argues they mean something they plainly do not. More specifically, he takes out of context the Supreme Court’s references to the “impact” and the “benefit” of the laws at issue in those cases and then argues that this language invites a broad debate about every

¹⁸ Russell Memo, p. 7.

¹⁹ *Id.*

arguable consequence of affirmative action. To the contrary, the Supreme Court looked at the practical “impact” of these laws simply in order to demonstrate that they affected some racial groups more than others despite their apparent neutrality. And in assessing the “benefit” of these laws the Court did not look to an elaborate factual record but, rather, to its own precedents.

In *Hunter*, the Akron City Council enacted a fair housing ordinance that included a number of nondiscrimination provisions. The City charter was subsequently amended to indicate that such nondiscrimination ordinances would be ineffective unless and until approved by a majority of voters at a regular or general election. As a result of this amendment, those who wanted the City to adopt most kinds of real estate ordinances needed only the approval of the City Council. But, as the Supreme Court noted, “for those who sought protection against racial bias, the approval of the City Council was not enough.” *Hunter*, 393 U.S. at 390. Those individuals needed a referendum. The amendment thus “obviously made it substantially more difficult to secure [the] enactment of [nondiscrimination] ordinances” than other kinds of ordinances. *Id.* The Court held that this constituted a “real, substantial, and invidious denial of the equal protection of the laws.” *Id.* at 393.

The Supreme Court acknowledged that the amendment “on its face treats Negro and white, Jew and gentile in an identical manner.” *Id.* at 391. Nevertheless, the Court also recognized that “the reality is that the law’s impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.” *Id.* The referendum was thus unconstitutional because it placed “special burdens on racial minorities within the governmental process.” *Id.* In other words, the amendment violated the Equal Protection clause because it identified a kind of law that was of particular interest to minorities and then made it significantly more difficult to adopt than other kinds of laws.

In *Seattle* the Supreme Court followed and clarified *Hunter*. *Seattle* concerned a statewide initiative that prohibited a school board from requiring “any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence.” *Seattle*, 458 U.S. at 462. The initiative included a number of exceptions, but did not allow for mandatory busing to achieve desegregation. The initiative was championed by an organization that opposed a mandatory busing plan that had been adopted by the Seattle school district. Citing and quoting *Hunter*, the Supreme Court concluded that the initiative violated the Equal Protection Clause because it did not “allocate governmental power on the basis of any general principle,” but rather used “the racial nature of an issue to define the governmental decision-making structure,” thus imposing “substantial and unique burdens on racial minorities.” *Id* at 470.²⁰

The Court acknowledged that mandatory busing was controversial. *Id* at 473. And it acknowledged that minorities and non-minorities could be counted among both the supporters and opponents of the initiative at issue in the case. *Id* at 472. Nevertheless, the Court held that “desegregation of the public schools ... inures primarily to the benefit of the minority, and is designed for that purpose.” *Id*. In so ruling, the Court cited *Brown v. Board of Education*, 347 U.S. 483 (1954) and stated as follows:

When [the educational environment] is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in – and are fully accepted by – the larger community. Attending

²⁰ The Court observed that the practical effect of the initiative was “to work a relocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.” *Id*, p. 474.

an ethnically diverse school may help accomplish this goal by preparing minority children ‘for citizenship in our pluralistic society,’ while, we may hope, teaching members of the racial majority ‘to live in harmony and mutual respect’ with children of minority heritage.’

Id at 472. The Court concluded that, “[f]or present purposes, it is enough that minorities may consider busing for integration to be legislation that is in their interest.” *Id* at 474.

Plaintiffs here argue that Proposal 2 “effects precisely the same type of distortion of the political process that the Supreme Court condemned in *Hunter* and *Seattle*.”²¹ They contend that individuals who want a Michigan public university to consider race or gender in its admissions or financial aid processes must first seek a constitutional amendment, while individuals who want to propose other sorts of changes in admissions or financial aid policies may generally do so by approaching an appropriate administrative unit of the university itself.²² They maintain that, “by creating a political process that sets aside race, among other categories, for consideration ‘at a new and remote level of government,’ *Seattle*, 458 U.S. at 483, Proposal 2 imposes a ‘substantial and unique burden on racial minorities.’”²³ And they argue that the impact of Proposal 2 falls primarily on minorities because a university’s inability to consider race in its admissions and financial aid decisions will have a significant adverse effect on minority admissions and financial assistance.

Russell’s argument and the documents he demands have no relevance to these claims. Plaintiffs’ claims concern the effect of Proposal 2 on public university admissions and financial aid decisions and on the ability of individuals who support the consideration of race in those decisions to participate equally in the political process. Neither bar nor medical licensing

²¹ First Amended Complaint of the Cantrell Plaintiffs, ¶ 58.

²² *Id.*, ¶¶ 51-52.

²³ *Id.* See also Second Amended Class-Action Complaint of the Coalition Plaintiffs, ¶¶ 116-121.

examination results have anything to do with those issues. Exhaustive data about post-admission academic performance have nothing to do with them, either.²⁴

Simply put, Russell does not seek information that relates to the claims at hand or to defenses that might be raised in opposition to them. Rather, Russell wants to engage in a fishing expedition he hopes will provide information he can use to argue that affirmative action may have some adverse consequences. But this effort must fail for three reasons. First, the Federal Rules of Civil Procedure do not allow for this sort of fishing expedition.²⁵ Second, this argument has nothing to do with *Hunter*, *Seattle*, or the Plaintiffs' claims. Indeed, *Seattle* indicates that the test is not whether a legislative measure is beyond controversy or admits of no disagreement; rather, "it is enough that minorities may consider [the measure] to be legislation that is in their interest."²⁶ And, finally, Russell cannot use this case to re-litigate issues settled by the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), although his argument suggests that this is precisely what he has in mind.²⁷ Again, the Universities take no position with respect to the value of *Hunter* and *Seattle* as precedent here or with respect to the merits of Plaintiffs'

²⁴ Of course, the Coalition Plaintiffs have advanced additional claims as well. The thrust of those claims is that Proposal 2 violates constitutional and statutory bans against intentional discrimination. The Coalition Plaintiffs maintain that Proposal 2 was intended to reduce the number of minority students offered admission to these state universities. The documents Russell demands likewise have no relevance to any of these claims.

²⁵ See, e.g., *Sparks v. Wal-Mart Stores, Inc.*, 361 F.Supp.2d 664, 672 (E.D. Mich. 2005) (quoting *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001)) ("Discovery is so limited as to avoid a 'fishing expedition masquerading as discovery."); *Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431 (E.D. Mich. 1979) ("An overly broad request for discovery which constitutes no more than a fishing expedition will not be allowed.").

²⁶ *Seattle*, 485 U.S. at 474.

²⁷ In describing the "benefits" of "diversity" Plaintiffs rely heavily on the United States Supreme Court decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). For example, the Cantrell Plaintiffs' Complaint cites and quotes verbatim from that decision at some length. See Cantrell Plaintiffs' Complaint at ¶¶ 40-46. Plaintiffs here thus invite this Court to look toward *Grutter* much as the *Seattle* court looked toward *Brown*.

claims; but Russell's motion does not allow the Universities the luxury of standing silent while he mischaracterizes Supreme Court authority and the Complaints filed in this case.

B. The Discovery Russell Demands Is Not Relevant to the Interest That Provided the Basis for His Intervention

As discussed above, this Court allowed Russell to intervene – and the Sixth Circuit approved his intervention – so he could advance his interest in having his application to the UM Law School evaluated under Proposal 2. That interest was achieved. Russell apparently now argues that he has an ongoing personal interest in this litigation because he wants to receive financial aid from the WSU Law School and may apply to transfer to the UM Law School at the end of his first year. For the reasons noted above, these arguments fail.²⁸

For present purposes, however, it suffices to observe that the documents Russell demands have nothing to do with any specific personal interest he claims here. Indeed, Russell makes no such argument in his motion – nor could he, particularly since many of the documents he seeks relate to medical and undergraduate performance, in-school and post-graduation. Rather, he argues that he needs these documents in order to advance a broad “rebuttal case” against the Plaintiffs’ claim that Proposal 2 violates the Equal Protection Clause. *See* Russell Memo, pp. 7-9. For the reasons discussed above, however, this argument is wholly without merit.

C. The Document Requests Are Improper and Burdensome

Courts consider a number of factors in determining whether a party has exceeded the scope of discovery permitted by the federal rules:

Courts can limit discovery to “that which is proper and warranted in the circumstances of the case.” Courts should balance the need for discovery against the burden imposed on the person ordered to produce documents. Non-party status is one of the factors the court uses in weighing the burden of imposing discovery. An

²⁸ *See* footnotes 12 and 13, *supra*.

undue burden is identified by looking at factors such as relevance, the need for the documents, the breadth of the document request, the time period covered by such request, the particularity with which the documents are described, and the burden imposed.

State of Wyoming v. U.S. Dept. of Agriculture, 208 F.R.D. 449, 453 (D.C.D.C. 2002) (citations omitted). *See also Insulate America v. Masco Corp.*, 227 F.R.D. 427, 432 (W.D.N.C. 2005). In this case, every single one of these considerations indicates that the discovery demanded is improper, unwarranted, and unduly burdensome.

First, for all the reasons discussed above, Russell has failed to demonstrate a “need” for the requested documents or that they are in any way relevant to this case or his interest therein. Second, these requests are extraordinarily broad in their scope and in the time periods they cover. The request for students admitted to all MSU undergraduate programs encompasses twelve fields of information. The request for WSU law school students lists nine. The requests for bar and medical licensing information cover eleven and nine years respectively. Third, compliance with at least some of these requests would require the review of hundreds of files and extensive time commitments from key university personnel. *See, e.g.*, the declarations of WSU Law School Recorder Betty Van Goethem, attached as Exhibit F, and of WSU Medical School Executive Vice Dean Dr. Robert Frank, attached as Exhibit G.

Most of these requests raise an additional burdensomeness issue. Most of the documents requested by Russell constitute “education records” of students and are therefore protected by the terms of the federal Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. pt. 99.²⁹ FERPA allows for disclosure of

²⁹ FERPA defines “education record” to mean “those records, files, documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). The vast student data requested from MSU and the WSU Law School clearly

education records without student consent under limited circumstances, including “to comply with a judicial order or lawfully issued subpoena.” 34 C.F.R. § 99.31(a)(9)(i). Even under those circumstances, however, the school must (except in very limited circumstances not applicable here) “make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action ...” 34 C.F.R. § 99.31(a)(9)(ii). Accordingly, production of most of the requested documents would trigger an obligation to send notices to thousands of students – so that they might come before this Court to question the propriety of providing their private information to a first-year law student they’ve never heard of. In an e-mail of September 12, counsel for UM explained this concern to counsel for Russell.³⁰ Russell nevertheless proceeded with this Motion to Compel and says nothing whatsoever about FERPA.

In addition, the Universities believe that this Motion to Compel presents an appropriate circumstance in which to apply the principle that courts should be especially protective of non-parties to whom discovery is directed. As noted above, the Universities maintain that they are not necessary parties to this litigation and are filing a motion to drop them from this case on that basis. But even putting the Universities’ *general* non-party status aside, it is clear that the Universities are not parties to the particular dispute that Russell seeks to resolve through the production of the discovery sought through this Motion to Compel. Russell’s Memo makes plain that he seeks discovery related to claims raised by the Plaintiffs and defended against by the Attorney General. *See* Russell Memo, pp. 7-10. He does not seek discovery related to any

fall within this provision. The examinations administered by the Universities’ medical schools appear to fall within it as well.

³⁰ *See* e-mail of Leonard Niehoff, attached to Russell Memo as Exhibit I.

claim or defense raised by the Universities. In the context of this case and these particular discovery demands, the Universities are the functional equivalent of non-parties.

Russell makes several points with respect to burdensomeness. None of them has any merit.

First, Russell argues that production of UM Law bar passage results cannot be burdensome because he has offered to pay copying costs. Russell Memo, p. 14. Of course, this non-sequitur ignores all of the other considerations that figure into a burdensomeness calculation and that are discussed above. This is important here because the experience of copying three years' worth of bar passage information made clear to UM that this project entailed a much more substantial time commitment on the part of key personnel in the Registrar's office than initially anticipated and that cost-shifting therefore did not fully address UM's concerns. Counsel for UM explained this in his e-mail of September 12 but Russell nevertheless decided to proceed with this motion.³¹

Second, Russell argues that the sort of vast data runs he demands from the WSU Law School and MSU cannot be burdensome because he offered to pay up to \$3,000 in copying costs to the UM Law School for a similar data run but it has "not sought reimbursement." Russell Memo, p. 14. This argument fails in both its premise and its conclusion. The argument fails in its premise because the UM Law School is indeed seeking reimbursement for its costs incurred in preparing the database it produced for Russell. The school has not done so previously because discovery was still open and discussions with Russell's counsel were ongoing. The argument fails in its conclusion because this aspect of burdensomeness varies from institution to institution, depending on whether and how each school maintains the data demanded. Thus, as

³¹ See e-mail of Leonard Niehoff, attached to Russell Memo as Exhibit I.

noted above, producing a similar database for the WSU Law School would require the physical review of literally hundreds of student files.

Third, Russell acknowledges that “[p]roduction of student files may raise student privacy concerns” but argues that a “stipulated protective order” would address those issues. This argument may have some merit with respect to documents that raise possible student privacy issues but that do not implicate FERPA.³² As noted above, however, most of the information requested here falls within FERPA’s strictures. Because a protective order does not *compel* the production of anything it does not seem to satisfy the requirement of 34 C.F.R. § 99.31(a)(9)(i). And, even if it did, the Universities would still need to comply with FERPA’s notice requirements and bear the substantial burdens they impose.³³

CONCLUSION

For all the reasons set forth above, the University Defendants respectfully that this Court either (a) in the interest of efficiency, defer consideration and decision of this motion until after the Court has decided the pending Motion for Summary Judgment that seeks to dismiss Russell from this case or (b) deny Russell’s Motion to Compel outright.

³² For example, the Universities have produced some documents marked as “confidential” on the condition that they will be covered by a protective order. (To keep discovery moving forward, all counsel agreed to treat such documents as confidential pending entry of an order.) The Universities do not believe these documents render individual students identifiable and so do not believe they implicate FERPA. Nevertheless, because some risk of student identification exists whenever an institution releases data runs with multiple fields, the Universities have designated those records as “confidential.”

³³ See discussion *supra* at footnote 29 and accompanying text.

Respectfully submitted,

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Dated: October 12, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2007, I electronically filed the foregoing Memorandum of the University Defendants in Response to Defendant-Intervenor Eric Russell's Motion to Compel Discovery and it is available for viewing and downloading from the ECF system. Service was accomplished by means of Notice of Electronic Filing upon the attorneys of record.

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