

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 RESPONSE TO THE
CANTRELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO
INTERVENOR-DEFENDANT ERIC RUSSELL**

Defendant-Intervenor Eric Russell respectfully submits this Response to the Cantrell
Plaintiffs' Motion For Summary Judgment As To Intervenor-Defendant Eric Russell, Doc. 172.

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In granting intervention to Defendant-Intervenor Russell, this Court determined that Mr. Russell satisfied all the prerequisites of Rule 24(a)(2) of the Federal Rules of Civil Procedure, which permits intervention of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by the existing parties.” The Cantrell Plaintiffs’ Motion For Summary Judgment As To Intervenor-Defendant Eric Russell (“Doc. 172”) seeks the virtually unprecedented relief of *dismissing* an unquestionably proper intervenor in the midst of pending proceedings. Their argument errs in both fact and law. There is no legal basis for the dismissal of Russell, and he retains both his original and other continuing substantial interests that are threatened by the outcome of this case, and which are not adequately represented by any other party.

I. MR. RUSSELL CONTINUES TO HAVE THE INTERESTS WHICH THIS COURT FOUND TO JUSTIFY INTERVENTION AS OF RIGHT, AND WHICH ARE THREATENED WITH IMPAIRMENT BY THIS ACTION.

Mr. Russell continues to have the same interest that he had when this Court first granted his motion to intervene: equal treatment, without regard to race, ethnicity, or gender as required by Proposal 2, by the school he currently attends, Wayne State University Law School (“Wayne State”); and by the school to which he plans to apply for a transfer, University of Michigan Law School (“Michigan”).¹ Those interests are obviously “related” to this lawsuit, which seeks to

¹ The Cantrell Plaintiffs rely heavily on the allegation that Russell no longer has a “unique interest.” *See, e.g.*, Doc. 172 at 5 (Russell “no longer has any unique interest in this matter”), *id.* at 6 (this Court initially relied upon Russell’s “unique `circumstances”); *id.* at 9 (Russell has “no further unique interest”); *id.* at 13 (“Such discovery bears no relation to Mr. Russell’s `unique’ interest”). We are never told why Mr. Russell needs to have “unique” interests in order to

have Proposal 2 declared invalid. Mr. Russell has made, and will continue to make, financial-aid applications to Wayne State, and he intends to apply as a transfer student to Michigan.

The Cantrell Plaintiffs nonetheless claim that Mr. Russell had an interest in being treated equally only while his *initial* application to Michigan was pending. They further assert that he does not have an interest in equal treatment now because there is no likelihood that he will be treated unequally in the financial aid decisions of Wayne State or in any transfer application to Michigan, even if Proposal 2 is declared unconstitutional. They cite testimony from two university officials to support this proposition. But even if one assumes that these are the only two possible interactions that Russell ever will have with any educational institution subject to Proposal 2, the argument is wrong both conceptually and factually.

As an initial matter, the Cantrell Plaintiffs' argument confuses Mr. Russell's *interest* with the *possible impairment* of that interest. As a transfer and financial-aid applicant, Mr. Russell has an interest in the enforcement of Proposal 2 and equal treatment in his dealings with any school subject to Proposal 2. Even if the evidence were clear – and as shown below, it is not – that, for example, Wayne State currently has no intent to racially discriminate against Mr. Russell in making a financial aid decision even if Proposal 2 were struck down, that would go only to whether this lawsuit might result in a ruling that would *impair* his interest in equal, race-neutral treatment by that law school, *not* to whether he has an interest in such treatment in the first place or whether that interest is related to this lawsuit challenging Proposal 2.

continue as an intervening party. Rule 24(a) requires only an "interest," and the Sixth Circuit has interpreted that requirement broadly. Russell would not dispute that there are other students and prospective students at Michigan schools who would have interests similar to his.

To satisfy the “impairment” element, a would-be intervenor need show only that it is *possible* that his interest will be impaired if intervention is denied. *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). Plainly, Mr. Russell’s interest in equal, race-neutral treatment in the Universities’ consideration of his financial aid and transfer applications would be impaired by a holding that Proposal 2 is invalid. The fact that university officials now disclaim an interest in using racial preferences is irrelevant, for if the Plaintiffs succeed and Proposal 2 is struck down, defendants will be free to go back to using racial preferences, regardless of what they say now. If Proposal 2 is sustained, however, Mr. Russell’s interest in equal, race-neutral treatment by defendants will be protected *by law*, not just by the current inclinations of the current university officeholders mouthing the current litigation position of the University defendants.

Ironically, the Cantrell Plaintiffs' argument that Mr. Russell has no intervention-worthy interest ignores their own legal theory for their own standing and claim. The Cantrell Plaintiffs claim that Proposal 2 is unconstitutional because they cannot successfully lobby admissions officers, faculty committees, and boards of regents to adopt policies permitting the use of race. If they succeed in convincing this Court that this is unconstitutional, they will be able to lobby those officers, committees, and boards. And their reason for lobbying – that they *might* be successful in convincing these bodies to adopt their favored policies, which might then redound to their benefit in admissions and other university decisions – is the very reason why Russell's interest likewise *may* be impaired. If the Cantrell Plaintiffs have standing, then Mr. Russell has an interest sufficient to entitle him to intervention.

II. GENUINE ISSUES OF MATERIAL FACT RELATE TO THE EXISTENCE AND SCOPE OF MR. RUSSELL’S CONTINUING INTERESTS IN THIS CASE.

Rule 24 provides that an intervenor must have “an interest” in the outcome of the case. It does not require that the interest that justified intervention at the outset must continue to exist throughout the litigation. Therefore, even if the passage of time results in the attenuation of an intervenor’s original interest, there is no basis for dismissing the intervenor if he can show an interest in the outcome, even if it be different from the interest originally identified by the court in granting intervention. At a bare minimum, genuine issues of material fact exist regarding Mr. Russell’s continuing interest in the case:

- There is a genuine issue of material fact as to whether, if Proposal 2 were struck down, Mr. Russell would be treated without regard to racial preferences in connection with his ability to transfer from Wayne State Law School to the University of Michigan Law School and to obtain financial aid there.
- In addition, there is a genuine issue of material fact regarding whether Mr. Russell would be treated on a nondiscriminatory basis as to eligibility for financial aid at Wayne State Law School if Proposal 2 were held to be unconstitutional.

The Cantrell Plaintiffs cite testimony by the Director of Admissions at the University of Michigan Law School and the Dean of Wayne State University Law School. They assert that, as to Michigan, where Mr. Russell would like to apply as a transfer student at the end of the current academic year (and where he would want to receive financial aid), his desire to transfer “is far too contingent to support his continued participation in this case now.” Doc. 172 at 8.

Unsurprisingly, no citation is provided for this bald assertion. Mr. Russell’s desire to transfer to Michigan and to receive financial aid there is a sufficient interest in the outcome of this litigation to defeat the Cantrell Plaintiffs’ motion. If Proposal 2 were to held to be held unconstitutional,

Michigan would be free to treat Mr. Russell unequally on account of his race and ethnicity, in both the transfer process and the financial aid process.

A. The University of Michigan Law School

Mr. Russell intends to apply for a transfer from Wayne State Law School to Michigan Law School. Russell Depo. 66:8-13 (Exhibit 1). He is aware that he can succeed in such an application only if his academic performance this year is good, *id.* at 66:14-19, but that fact does not undercut his interest in being considered as a transfer applicant on a basis that does not consider race or ethnicity. To begin with, the Cantrell Plaintiffs provide no evidence whatever that Mr. Russell's grades at Wayne State will not be good enough to put him realistically into the mix for securing a transfer slot at Michigan. At the very least, there exists a genuine question of material fact about that issue. In addition, even if Mr. Russell should fail to secure a transfer slot at Michigan Law School were he to apply (or fail to secure financial aid) under a legal regime applying Proposal 2, that would not undermine his interest in the outcome of the case. The Cantrell Plaintiffs ignore the Supreme Court's decision in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), where an association of non-minority contractors brought suit seeking a declaration that Jacksonville's set-aside program for minority contractors violated the Fourteenth Amendment. The Eleventh Circuit held that the association lacked Article III standing because it "ha[d] not demonstrated that, but for the program, any ... member would have bid successfully for any of [the relevant] contracts." *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 951 F.2d 1217, 1219 (11th Cir. 1992). The Supreme Court reversed:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member

of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

508 U.S. at 666. In short, the existence of potential injury depends on “the inability to compete on an equal footing . . . , not the loss of a [benefit].” *Id.* Likewise, in its first university affirmative action case, the Supreme Court held that “even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978). *A fortiori* here, where Mr. Russell does not have even have the burden of establishing Article III standing, *see Assoc. Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994), he has an interest in this case that turns on his “ability to compete on an equal footing” with respect to transfer to Michigan Law School and receipt of financial aid there, not on whether he would necessarily be successful in his efforts to transfer and to receive aid in a system applying Proposal 2.

To be sure, Ms. Zearfoss, the current admissions director at Michigan, has testified that she never took race into account in reviewing transfer applications. She also testified that she personally would not weigh the race of transfer applicants if Proposal 2 were struck down. The Cantrell Plaintiffs proceed as if that ends the summary-judgment inquiry.

Even leaving aside that Ms. Zearfoss may not be the director when Mr. Russell applies to transfer, the Cantrell Plaintiffs’ reliance on this testimony ignores a fundamental point. The issue is not whether Michigan necessarily *would* take race or ethnicity into account regarding transfer applicants in the summer of 2008. Instead, it is whether, if Proposal 2 were held to be

unconstitutional, the University *could* take race or ethnicity into account. And to that question there is only one answer: of course it could.

Indeed, although Ms. Zearfoss says she has never taken race into account with respect to transfer applications, she says *nothing* about whether she took *ethnicity* into account in connection with such applications.² Even more significantly, it is beyond cavil that Michigan *did* take race and ethnicity into account prior to Proposal 2, as the Supreme Court itself has held. *See Grutter v. Bollinger*, 539 U.S. 306, 319 (2003) (“race is considered in admissions” and “may be a ‘determinative’ factor”); Zearfoss Depo. 46:1-13 (Exhibit 2) (underrepresented minority status “was weighed” in the application process and “could help somebody be admitted”). It is also uncontroverted that both the University of Michigan and its Law School continue to regard racial and ethnic diversity as paramount objectives. Here is a quick sample of the myriad public reaffirmations by the University of its view that racial and ethnic diversity remain central goals:

- Diversity is “central to the university’s educational mission.” University of Michigan, Diversity Blueprints Final Report of University, March 15, 2007, at 2, available at <http://www.diversity.umich.edu/about/bp-final.pdf> (also UM 01239) (Exhibit 3).
- The University of Michigan has “a powerful legacy in our commitment to diversity and a considerable commitment to extending its reach.” *Id.* at 19 (also UM 01256).

² *See* Zearfoss Depo. 188:16-25 (Exhibit 2). Indeed, far from denying her employment of ethnicity as a factor, in the context of questions concerning ethnicity, she mentioned “Native Americans and Hispanics” as “underrepresented minorities,” *id.* at 45:4-8, and referred to “Hispanic ethnicities.” *Id.* at 45:14. Nor does she say anything about whether transfer preferences may have been given on the basis of either race or ethnicity *before* her tenure in that position (which did not begin until 2001, *id.* at 13:18-14:3). Even taken fully at face value, then, her testimony is woefully incomplete and insufficient to demonstrate that Mr. Russell has nothing at risk in the outcome of this case.

- Diversity is “the very heart and soul of this great university” Diversity Matters at Michigan, November 8, 2006, at 2, available at <http://www.umich.edu/-pres/speeches/061103div.html> (also UM 00095) (Exhibit 4).
- “. . . I am fully and completely committed to building diversity at Michigan, and I will do whatever it takes.” *Id.* at 2 (also UM 00097).
- “[W]e will be steadfast in our goal” of securing a “student body that is . . . diverse racially” Dean’s Statement on the Passage of Proposal 2, November 17, 2006, at 1, available at <http://www.law.umich.edu/NewsandInfo/Pages/-november2006.aspx> (also Ex. 3 to the Zearfoss Depo., at 2) (Exhibit 5).
- “Racial diversity . . . serves the central missions of the [Law] School.” *Id.*

These undisputed record excerpts (the mere tip of the iceberg) demonstrate that the University and its Law School remain fully committed to ensuring racial and ethnic diversity in their student bodies. Therefore, if Proposal 2 were struck down, there is ample reason to believe that they would revert to the racial and ethnic preferences that they openly and systematically employed before the adoption of Proposal 2. At a minimum, the Cantrell Plaintiffs certainly have not, by offering the conclusory testimony of Ms. Zearfoss, shown that there is no genuine issue of material fact as to whether that result might occur. Again, Ms. Zearfoss’s testimony wholly ignores the question of *ethnicity*; she also elides the fundamental question of why, given the avowedly “central” and “critical” importance of racial and ethnic diversity to the University, she would *not* take race into account regarding transfer applications if she were legally permitted to do so.³

³ Indeed, the Law School’s *failure* to consider race in order to achieve diversity could be cited by opponents of racial preferences as proof that even the Law School itself does not deem diversity to be a compelling governmental interest. *See, e.g., Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 188, 192 (1999) (insufficiently vigorous or consistent pursuit of alleged government interest undermines asserted interest) (citation omitted); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regulatory scheme undermined asserted government interest); *Church of the Lukumi Babalu Aye v. City of*

The Cantrell Plaintiffs' position is even weaker with respect to the issue of financial aid at Michigan, which perhaps explains their notable silence on that issue. The only testimony comes from the depositions of Ms. Zearfoss, who says merely that she's unaware of past racial or ethnic preferences with respect to financial aid, and of Theodore Spencer, Executive Director of Admissions at the University of Michigan. But neither deponent claims full knowledge of financial aid decisions at Michigan Law School, so neither can testify that race and ethnicity were not, prior to Proposal 2, taken into account.⁴ See Zearfoss Depo. 215:19-25; 230:15-22 (Exhibit 2); Spencer Depo. 162:22-163:8 (Exhibit 6). At the very least, therefore, a genuine issue of material fact remains concerning whether, if Proposal 2 were struck down, Mr. Russell would be eligible, as a transfer to Michigan Law School, for financial aid on an equal footing with all financial aid applicants.

B. Wayne State University Law School

Mr. Russell's interest is even clearer with respect to financial aid at Wayne State. He currently receives aid there, Russell Depo. 87:1-6 (Exhibit 1), and if Proposal 2 were held unconstitutional, his interest in being considered for such aid without reference to his race and ethnicity would be at risk. According to the Cantrell Plaintiffs, this is not a concern because of

Hialeah, 508 U.S. 520, 546-8 (1993). This seems particularly likely inasmuch as Ms. Zearfoss testified that the Law School had an inadequate number of racial and ethnic minorities prior to the enactment of Proposal 2. Zearfoss Depo. 92-93 (Exhibit 2).

⁴ In fact, there is ample reason to believe that, prior to Proposal 2, race and gender *were* taken into account in the allocation of financial aid at the University of Michigan. In fact, the *Michigan Daily* recently reported that the University of Michigan's Alumni Association is planning to establish privately funded race- and gender-based scholarships to *replace* the race- and gender-based financial that was available at the University of Michigan prior Proposal 2. "Alumni Assoc. to give aid to minorities," *The Michigan Daily*, Oct. 19, 2007, available at <http://media.www.michigandaily.com/media/storage/paper851/news/2007/10/19/-UAdministration/Alumni.Assoc.To.Give.Aid.To.Minorities-3043894.shtml>.

the testimony of Wayne State Law School Dean Frank Wu that “race will not affect any financial aid decision made as to Mr. Russell.” Doc. 172 at 5. But the Cantrell Plaintiffs ignore Dean Wu’s more specific testimony on this subject, which concedes that, prior to Proposal 2, Wayne State awarded at least 14 scholarships based in whole or in part on race, ethnicity, or gender. Wu Depo. 238:2:4 (Exhibit 7). He also admits that, after the enactment of Proposal 2, the Law School amended those scholarships so that they complied with Proposal 2, thus making Mr. Russell eligible to receive some if not all of their benefits without regard to his race or ethnicity:

[W]e are systematically approaching the donors [with respect to those 14 scholarships] . . . to indicate to them that following passage of Prop 2, references to race, gender or ethnicity and so on are impermissible, and we'd like to discuss with them how we can meet the goal of realizing their intent, supporting our students, and at the same time ensuring compliance with the mandate of the law . . . [I]f we have not altered with the donor's consent the agreement and the terms for the scholarship so that they comply with Prop 2, . . . we will not be able to award the scholarship.

Q. And have any of those 14 [scholarship donors] agreed to continue the scholarship?

A. Yes.

Id. 238:12-239:3, 239:7-9.

Mr. Russell’s current eligibility for those scholarships is clear:

Q. [A]ssuming he met the revised characteristics, Eric Russell would be eligible to receive those scholarships; is that correct?

A. That would be correct.

Id. 239:20-23.

Dean Wu’s testimony on this critical point demonstrates not only that a genuine issue of material fact exists; it actually establishes beyond doubt that Mr. Russell in fact has a substantial

legal interest that may be impaired by the outcome of this case. Prior to Proposal 2, Wayne State used race, ethnicity and gender as factors in the award of some financial aid, *id.* 237:25-238:4, and Proposal 2 is causally tied to the Law School's decision to amend the terms of its race-based scholarships. *Id.* 238:13-19. Thus, Mr. Russell's eligibility to be considered on a nondiscriminatory basis for these formerly race- or gender-based scholarships will clearly be affected if Proposal 2 is invalidated by the Court's resolution of this case. *Id.* 239:20-23.

To be sure, Dean Wu does say that "we would not expect even if Prop 2 were struck down tomorrow by a court, that we would go back and renegotiate the [scholarship] agreements," *id.* 240:11-13, and that he would discourage any future endowments of race or gender-based scholarships by "counsel[ing] the donor that that was an unwise course of action." *Id.* 241:7-8. But Dean Wu may change his mind about the wisdom of racially discriminatory scholarships, or his "counseling" might be ignored, or his successor may view the issue differently. Indeed, his tenure at Wayne State will end at the close of this academic year. *Id.* 137:8-15; *see* Frank W. Wu, Personal Announcement, April 10, 2007, <http://deanwublog.classcaster.org/blog/archives/2007/04/10>. In any event, even in the more stringent context of Article III, it is well settled "that a defendant's voluntary cessation of a challenged practice" is inherently suspect and thus does not moot the legal issues related to the practice. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). Hence Dean Wu's assurances are insufficient to negate Mr. Russell's interest in race- and ethnicity-blind treatment with respect to financial aid. As explained above, the ultimate *outcome* of any financial aid decision is irrelevant for purposes of determining Mr. Russell's legal interest in this proceeding under the *Jacksonville* analysis, 508 U.S. at 666 (existence of potential injury depends on "the

inability to *compete on an equal footing*,” not on the actual “loss” of a benefit) (emphasis added). Proposal 2 allows Mr. Russell to compete on an equal basis for scholarships for which he was, prior to Proposal 2, at a disadvantage or even wholly ineligible. Mr. Russell hence has an interest in preventing reversion to a pre-Proposal 2 world in which he would be classified by race and ethnicity and treated accordingly in his application for financial aid at Wayne State.

III. MR. RUSSELL’S CONTINUED PARTICIPATION IS NECESSARY BECAUSE THE ATTORNEY GENERAL DOES NOT AND WILL NOT ADEQUATELY REPRESENT INTERVENOR’S INTERESTS.

The Supreme Court and Sixth Circuit have repeatedly held that the burden on a proposed intervenor to show inadequate representation of his or her interests is “minimal.” *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10). “The proposed intervenors need show only that there is a *potential* for inadequate representation.” *Grutter*, 188 F.3d at 400 (emphasis in original).

The Cantrell Plaintiffs’ contention that there is not even a *potential* for inadequate representation of Russell’s interests in this case is wholly unconvincing. Quite the contrary, this Court has already determined that the Attorney General has failed to represent Russell’s interests, in a critical way, through his stipulation to the injunction against the enforcement of Proposal 2. *See* Doc. 55, at 15. The Sixth Circuit powerfully confirmed this holding:

Subsequent events confirm that the stipulated injunction did not account for the concerns of all interested parties The parties [including the Attorney General] knew of Russell’s opposition to the stipulated injunction, to say nothing of the opposition to the injunction by other interested groups seeking to intervene in the case (including the proponent of Proposal 2), and nonetheless proceeded to seek its entry.

Coalition To Defend Affirmative Action v. Granholm, 473 F.3d 237, 245 (6th Cir. 2006). Thus, in this case, there is no need to speculate about whether it is *possible* that the Attorney General

might fail to represent Russell -- that possibility has already been clearly actuated. To be sure, Russell casts no aspersions on the Attorney General's diligence or competence. But the Attorney General's accession to the stipulated injunction revealed, quite clearly, that he is "subject to internal and external institutional pressures that may prevent" his single-minded focus on Russell's interest. *Grutter*, 188 F.3d at 400. Once bitten, Russell is now entitled to be twice shy of the Attorney General's representation in the future.⁵

Indeed, one Sixth Circuit judge has already observed, in this very case, that the Attorney General's prior inadequacy casts doubt on his adequacy going forward as well. In her partial concurrence in the organizational intervenors' appeal, Judge Kennedy asserted that "[t]he procedural history of this case indicates that this potentiality [for inadequate representation] exists." Doc. 172 Ex. G, at 12-13; 2007 U.S. App. LEXIS 21251 at *35. In particular, she noted, the Attorney General's accession to the stipulation was no mere "litigation strategy" -- it revealed that "a more zealous approach could significantly alter the enforcement and ultimately

⁵ It is virtually unheard-of for a public defendant's representation of a private interest, once deemed inadequate, to be later held adequate. Neither Rule 24(a) nor any other Rule calls for such perpetual reassessment of the representation of an intervenor's interest. On the contrary, the relief sought by the Cantrell Plaintiffs is almost wholly unprecedented, and with good reason -- if there is a *potential* for failure of representation (which is all that is required) at the outset of a lawsuit, such potential is almost certain to endure until the conclusion. The Cantrell Plaintiffs cite a sole case to the contrary, *Morgan v. McDonough*, 726 F.2d 11 (1st Cir. 1984) -- a 23-year-old precedent that, to the best of Defendant-Intervenor's knowledge, *has never been followed on this point by any Court*. *Morgan*, moreover, involved truly extraordinary circumstances: a highly conditional permissive intervention that lasted for eight years, during which there was a complete reconstitution of the public defendant's position. In affirming the dismissal of the intervenor, the First Circuit emphasized the "unique" nature of the proceedings and the extraordinary passage of time. By contrast, this case involves none of these "unique" and extraordinary features -- it is rather on an *expedited* schedule, and the scant months that have passed since Russell was granted intervention are scarcely enough to eliminate any *possibility* of future inadequate representation by the Attorney General and other parties. On the contrary, as argued further below, that inadequacy is again being realized in the current proceedings.

the interpretation of this constitutional amendment.” *Id* at 13. In addition, “the conflict wall set up across the Attorney General's office at the request of the Governor further indicates that different interpretations of this provision and its interaction with federal constitutional and statutory law are possible; [the proposed intervenors’] interpretation could be more expansive than that of the existing parties.” *Id*. In short, the Attorney General’s failure to represent Mr. Russell’s interests adequately in the past creates grave doubt – not merely a “reasonable” concern – that he will fully and adequately represent Russell’s interests in the future.

Furthermore, the inadequacy of the Attorney General’s representation has become manifest *now* in ways entirely separate from conflict of interest reflected in his agreement to the stipulated injunction. “The proposed intervenors are not required to show that the representation will *in fact* be inadequate. Indeed, it may be enough to show that the existing party who purports to seek the same outcome *will not make all of the prospective intervenor’s arguments.*” *Grutter*, 188 F.3d at 400 (emphases added) (citation and quotation marks omitted); *see also, e.g.*, Doc. 172 Ex. G, at 12, *Coalition To Defend Affirmative Action v. Granholm*, Nos. 06-2653, 06-2656 (6th Cir. Sept. 6, 2007) (Kennedy, J., concurring in part and dissenting in part) (“[Defendant-intervenors in this case] need not show that representation *won’t* be inadequate, only that the *potential* exists that the Attorney General will not make all of their arguments.”) (emphases in original).⁶

⁶ In arguing that Russell is adequately represented by the Attorney General, the Cantrell Plaintiffs repeatedly invoke the Sixth Circuit’s opinion affirming the denial of intervention to the *organizational* intervenors to this case (MCRIC, ACRF, and TAFM). *See* Doc. 172, at 3 n.3, 10, 11 (citing *Coalition To Defend Affirmative Action v. Granholm*, Nos. 06-2653, 06-2656, 2007 U.S. App. LEXIS 21251 (6th Cir. Sept. 6, 2007) (Doc. 172 Ex. G)). But in that appeal, the Sixth Circuit held, *not* that the intervenors’ asserted interests were adequately represented, but that

The Cantrell Plaintiffs contend *both* that (1) Mr. Russell should be dismissed from the case because his interests are represented by the Attorney General in such a way that “there [is] little likelihood that [his] participation would shed any new light on the issues presented,” Doc. 172, at 11 (quoting December 27, 2006 Opinion and Order, Doc. 55, at 14); *and* that (2) Mr. Russell should be dismissed because he alone, *unlike* the Attorney General, has requested “extensive[.]” discovery seeking “detailed information” about the likely effects of Proposal 2 on underrepresented minorities, Doc. 172, at 12-13. These two claims are demonstrably at war with one another. As the Cantrell Plaintiffs’ own focus on contested discovery shows, Mr. Russell is preparing a vigorous *factual* defense of Proposal 2. *This, of course, is why the Cantrell Plaintiffs want him out of the case*, because the Attorney General of Michigan, by contrast, has placed all his eggs in the basket of purely *legal* defenses of the amendment. Thus the Cantrell Plaintiffs are hoist on their own petard: Their emphasis on Mr. Russell’s discovery requests and his different approach to the issues in this case confirm that the Attorney General does not adequately represent him.

On this basis, denial of the Cantrell Plaintiffs’ argument is mandated by the Sixth Circuit’s ruling on intervention by the supporters of racial preferences in *Grutter*. The Sixth

they lacked a sufficient “substantial legal interest” in the first place. Doc. 172 Ex. G at 8, 2007 U.S. App. LEXIS 21251 at *21. The Court did not even reach the issue of inadequacy of representation. *Ibid.* (“[W]e need not address the remaining intervention-as-of-right elements.”). In fact, the only judge on the panel to reach this issue found that the intervenors had easily satisfied this requirement. *See* Doc. 172 Ex. G at 12-13, 2007 U.S. App. LEXIS 21251 at *34-35 (Kennedy, J., concurring in part and dissenting in part). Because Mr. Russell clearly *does* possess a continuing, individual, and particularized legal interest in the outcome of this case (based on his financial aid and transfer applications, among other things) wholly distinct from those asserted by the organizational intervenors, this particular Sixth Circuit holding in that appeal simply does not address the question presented here, and certainly does not support the Cantrell Plaintiffs’ argument.

Circuit held that minority applicants to the University of Michigan were entitled to intervene to defend the University's use of racial preferences in admissions and financial aid, even though the University itself was vigorously defending those policies. *Grutter*, 188 F.3d at 401.

Emphasizing, again, that “[t]he proposed intervenors need show only that there is a *potential* for inadequate representation,” *id* at 400 (emphasis in original), the Sixth Circuit held that the proposed intervenors met their burden by “present[ing] legitimate and reasonable concerns about whether the University will present *particular* defenses of the contested race-conscious admissions policies.” *Id.* at 401 (emphasis added). Specifically, the Court of Appeals “[fou]nd persuasive [intervenors’] argument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy.” *Id.*

Mr. Russell's case for inadequate representation is more compelling than that of the intervenors in *Grutter*. Here, Mr. Russell does not merely have “reasonable concerns” that it may be “unlikely” that the Attorney General will present Mr. Russell's factual defense of Proposal 2 – *it is certain that the Attorney General will not*. Unsurprisingly, therefore, the Attorney General does not support the Cantrell Plaintiffs' motion. *See* Doc. 172, at ii. Unlike Mr. Russell, the Attorney General has not sought discovery on the likely adverse effects of Proposal 2 on racial minorities, and does not intend to present any factual evidence or expert testimony on that point. Indeed, the chief objection of *both* the Cantrell Plaintiffs and the University Defendants to Mr. Russell's discovery requests is that Mr. Russell *alone* is preparing

this “particular defense[]” of Proposal 2, *id.* See Doc. 172, at 13;⁷ Doc. 178, at 3, 5, 6 (“[N]o other party has requested the documents [Russell] demands.”). Factual discovery has now closed, so it is *certain* that the Attorney General “will not present evidence” of the adverse effects that the Universities’ racially discriminatory admissions policies have had on their purported beneficiaries in the past. 188 F.3d at 401.

It is also important to recall that, in *Grutter*, the Sixth Circuit accepted the intervenors’ argument that the University of Michigan was “subject to internal and external institutional pressures that may prevent it from articulating some of the defenses ... that the proposed intervenors intend to present.” *Id* at 400. In particular, the Court observed that the University was unlikely to present evidence of its own alleged “past discrimination.” *Id* at 401. In this case, the “internal and external institutional pressures” preventing Michigan’s public defendants from presenting Russell’s factual defense are equally compelling. The factual defense that Mr. Russell alone is preparing to present likewise implicates past discrimination, but not only past discrimination, of the Defendants. Mr. Russell is also preparing to show that the regimes of racial preferences formerly used by Michigan’s public Universities -- and which those

⁷ The Cantrell Plaintiffs contend, without any supporting citation or argument, that the discovery sought by Russell on the effects of Proposal 2 is “largely irrelevant.” Doc. 172, at 13. This contention runs headlong against Plaintiffs’ own theory of this case. As stated in detail in Russell’s Motion To Compel Discovery and Reply Brief, *see* Docs. 169, at 7-9; Doc. 181, at 1-2, the Coalition Plaintiffs have contended that evidence on the practical effects of Proposal 2 on underrepresented minorities is “absolutely essential,” “highly relevant,” and “of decisive significance” to this case. Doc. 121, at 14; Doc. 158-3, at 4, 8. Similarly, the Cantrell Plaintiffs themselves, in moving for non-party discovery from MCRIC, contended that “documents reflecting the impact of California Proposition 209” and “documents relating to the effect of Proposal 2” on minorities are closely related to “a foundational consideration” for their *Hunter v. Erikson* claim. Doc. 156, at 1-2. Therefore, the Cantrell Plaintiffs’ contention here, that the “documents relating to the effect of Proposal 2” sought by Russell are irrelevant, squarely contradicts their own prior position.

Universities, in obvious league with the Plaintiffs, have actively defended and sought to resurrect in this very lawsuit -- are in fact systematically harming underrepresented minorities *now*. In other words, Mr. Russell's defense of Proposal 2 implicates the *current* ideologies and practices of Michigan's public universities, and will show that those universities' policies of racial classifications have systematically injured the very parties they were supposedly designed to help. The "institutional pressures" that prevent Michigan's public officials from contending that Michigan's institutions of higher education have been systematically injuring racial minorities are, if anything, far greater than those that prevented a public admission of past discrimination in *Grutter*.

CONCLUSION

For these reasons, Defendant-Intervenor Eric Russell respectfully requests this Court to deny the Cantrell Plaintiffs' Motion For Summary Judgment As To Intervenor-Defendant Eric Russell.

October 29, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 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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