

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

THE UNIVERSITY DEFENDANTS' MOTION TO DISMISS

1. The Amended Complaint filed by Plaintiff the Coalition to Defendant Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (“BAMN”) names the Regents of The University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official Capacity as President of The University of Michigan, Lou Anna K. Simon, in her official Capacity as President of Michigan State University, and Irvin D. Reid, in his official Capacity as President of Wayne State University (collectively, the “University Defendants”) as parties.¹ The University Defendants respectfully request that the Court dismiss them from this case.

2. Fed. R. Civ. P. 21 allows for the dropping of unnecessary parties and provides the primary basis for dismissing the University Defendants from this action.

3. BAMN seeks a declaration that Proposal 2 is unconstitutional and an injunction against its enforcement.

4. The University Defendants did not write Proposal 2; they did not pass Proposal 2; they cannot change Proposal 2; they are not executive branch entities charged with the responsibility of enforcing Proposal 2. The only role of the Universities is that they—like every other public body affected by this constitutional amendment—must follow Proposal 2.

5. If this claim by BAMN has merit, then BAMN can obtain all the relief it seeks from the Defendant Attorney General. The University Defendants, however, are powerless to afford BAMN the relief they demand. The University Defendants are therefore unnecessary parties to this action and should be dismissed pursuant to Rule 21.

¹ The Cantrell plaintiffs did not name the University Defendants as parties, but this Court has consolidated the Cantrell and BAMN cases. The Cantrell plaintiffs have indicated that they do not oppose the dismissal of the University Defendants from these consolidated cases.

6. An additional and independent reason exists to dismiss Count V of the BAMN complaint.

7. That Count alleges that Proposal 2 violates the University Defendants' right to academic freedom. BAMN plainly lacks standing to bring such a claim against the Universities. The University Defendants therefore respectfully request that this Court dismiss this claim against them pursuant to Fed. R. Civ. P. 12(b)(6).

8. On several occasions during October 2007, counsel for the University Defendants explained the nature of their Motion and its basis to counsel for BAMN and requested but did not obtain concurrence in the relief sought.

Respectfully submitted,

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Dated: October 17, 2007

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**MEMORANDUM OF LAW IN SUPPORT OF
THE UNIVERSITY DEFENDANTS' MOTION TO DISMISS**

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I. INTRODUCTION

The Amended Complaint filed by Plaintiff the Coalition to Defendant Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (“BAMN”) names the Regents of The University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official Capacity as President of The University of Michigan, Lou Anna K. Simon, in her official Capacity as President of Michigan State University, and Irvin D. Reid, in his official Capacity as President of Wayne State University (collectively, the “University Defendants”) as parties.² The University Defendants respectfully request that the Court dismiss them from this case.

Fed. R. Civ. P. 21 allows for the dropping of unnecessary parties and provides the primary basis for dismissing the University Defendants from this action. The limited role of the Universities here is obvious but merits emphasis: the University Defendants did not write Proposal 2;³ they did not pass Proposal 2; they cannot change Proposal 2; they are not executive branch entities charged with the responsibility of enforcing Proposal 2. The only role of the Universities is that they—like every other public body affected by this constitutional amendment—must follow Proposal 2.

BAMN seeks a declaration that Proposal 2 is unconstitutional and an injunction against its enforcement. If this claim has merit, then BAMN can obtain all the relief it seeks from the Defendant Attorney General. The University Defendants, however, are powerless to afford

² The Cantrell plaintiffs did not name the University Defendants as parties, but this Court has consolidated the Cantrell and BAMN cases. The Cantrell plaintiffs have indicated that they do not oppose the dismissal of the University Defendants from these consolidated cases.

³ On November 7, 2006, the voters of the State of Michigan enacted Proposal 2, which added a new Section 26 to Article I of the Michigan State Constitution. MICH. CONST. Art. I, § 26 (2007) (“Proposal 2”).

BAMN the relief they demand. The University Defendants are therefore unnecessary parties to this action and should be dismissed pursuant to Rule 21.

An additional and independent reason exists to dismiss Count V of the BAMN complaint. That Count alleges that Proposal 2 violates the University Defendants' right to academic freedom. BAMN plainly lacks standing to bring such a claim against the Universities. The University Defendants therefore respectfully request that this Court dismiss this claim against them pursuant to Fed. R. Civ. P. 12(b)(6).

II. STATEMENT OF RELEVANT FACTS

On November 7, 2006, the voters of the State of Michigan enacted Proposal 2, which added a new Section 26 to Article I of the Michigan State Constitution. In pertinent part, Proposal 2 amended the Constitution as follows:

(1) **The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.**

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting... MICH. CONST. Art. I, § 26 (2007) ("Proposal 2")⁴ (*emphasis added*)

Shortly after the enactment of Proposal 2, BAMN filed a Complaint challenging its validity and seeking to prevent its enforcement. BAMN subsequently filed the Amended Complaint that is the subject of this motion.

BAMN's Amended Complaint alleges that Proposal 2 violates federal law, including the United States Constitution. *See* Amended Complaint, Docket No. 24. In Count I, BAMN claims

⁴ Emphasis supplied throughout and citations omitted unless otherwise noted.

that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.*, ¶¶ 76-82. BAMN therefore requests declaratory and injunctive relief “restraining the defendants from implementing Proposal 2.” *Id.* In Counts II, III and IV, BAMN alleges that Proposal 2 is preempted by Titles VI and VII of the Civil Rights Act of 1964, and by Title IX of the Educational Amendments of 1972. *Id.*, ¶¶ 83–101. Here again, BAMN requests declaratory and injunctive relief “restraining the defendants from implementing Proposal 2...” *Id.*

In Count V, BAMN alleges that Proposal 2 violates a First Amendment right to academic freedom. But the Amended Complaint clearly—and correctly—alleges that this right belongs to the University Defendants rather than to BAMN: “Proposal 2 invades *the First Amendment rights of the defendant universities* to select their student bodies and their teaching staff in ways that the educational authorities have deemed most appropriate.” *Id.*, ¶ 105. For this alleged violation of the University Defendants’ rights, BAMN seeks “injunctive relief restraining the defendant universities from changing their admission or other policies in an attempt to comply with Proposal 2.” *Id.*

III. ARGUMENT

A. BAMN’s Complaint Should Be Dismissed Under Rule 21 as to the University Defendants Because They Are Not Necessary Parties.

1. Applicable Standard

All five counts of BAMN’s Complaint should be dismissed as to the University Defendants pursuant to Fed. R. Civ. P. 21, which provides, in pertinent part, as follows:

Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Fed. R. Civ. P. 21.

Rule 21 thus provides “a mechanism for correcting either the misjoinder or non-joinder of parties or claims.” *American Fid. Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164, 190 (D.C. V.I. 1975). The Court has broad discretion to drop a party under Rule 21. *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 682 (6th Cir. 1988) (“The manner in which a trial court handles misjoinder lies with that court’s sound discretion.”). “Dropping” a misjoined party is achieved by dismissing the claims against that party without prejudice. *Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 267 (6th Cir. 2003).

2. Dismissal Is Proper Here Under Rule 21

Rule 21 does not itself define “misjoinder.” The cases interpreting the rule, however, clarify its meaning and application. That case law makes plain that where a defendant’s presence is not necessary to afford a plaintiff complete relief, such as where the defendant lacks the authority to provide the requested relief, the defendant should be dropped as a party and dismissed without prejudice. *See, e.g., Brooks v. Glynn County*, 1989 U.S. Dist. LEXIS 4776, *11 (S.D. Ga. 1989) (“Where a particular defendant lacks authority to provide the requested relief, dismissal is proper.”).⁵

Brooks is instructive here. In that case, plaintiffs—African American voters in the various judicial circuits in Georgia—brought a class action challenging state laws that allowed for the use of “at large” elections. Plaintiffs claimed that such elections prevented African Americans from being the majority voting bloc in many districts. *Id.* at 2-4. Plaintiffs argued that this election system unfairly discriminated against African American voters and violated the Federal Voting Rights Act and the 13th, 14th, and 15th amendments. *Id.* at 2. Plaintiffs sued the State Election Board, the Secretary of the State of Georgia, and the Chairman of the State

⁵ A copy of *Brooks* is attached hereto as Exhibit A.

Election Board. *Id.* Plaintiffs also sued the “Superintendent of Elections” of several counties (“local defendants”).

The local defendants moved to be dropped from the case pursuant to Rule 21 on the basis that the election practices at issue were statewide and that, therefore, the state defendants—not the local defendants—were responsible for the challenged practices. *Id.* at 4–5. The local defendants argued that they had no power to grant plaintiffs any of the relief requested, and that dismissing them would not prejudice the plaintiffs or the state defendants. *Id.* Plaintiffs claimed that the local defendants were proper parties because they supervised the elections and would implement any changes to the law. *Id.* at p. 6.

The Court granted the local defendants’ Rule 21 Motion and held that they were not necessary parties:

The Court finds that the local defendants’ presence is not necessary to afford plaintiffs complete relief. State officials are charged with the responsibility of complying with preclearance requirements. In addition, the other challenged election procedures were promulgated by the state legislature and not by the local defendants....

.....

[Georgia law] specifies that a superintendent’s rulemaking authority is circumscribed by laws and by regulations of the State Elections Board. Plaintiffs have not alleged that the local defendants failed to follow the dictates of the State Election Board or that the local defendants applied state law discriminatorily. **Consequently, the Court can afford plaintiffs the relief requested without the presence of the local defendants; the Court can address the alleged grievances, if necessary, by directing the state defendants to amend state laws, by declaring certain statutes unenforceable until precleared, and by enjoining certain state-wide procedures.**

The gravamen of plaintiffs’ complaint is that the local defendants and other superintendents have acted in accordance with a superior court judge election system that discriminates against blacks. **The local defendants do not have the authority to amend these laws. They function in a ministerial capacity and they cannot act in a manner inconsistent with the statute governing election of superior court judges.**

Where a particular defendant lacks authority to provide the requested relief, dismissal is proper... [t]he power to alter the contested procedures rests with the state defendants. Joinder of the local defendants is superfluous and they will be dismissed.

Id. at 8–11. *See also Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578, 584 (E.D. Pa. 1982) (“where certain defendants are clearly without authority or power to effect any of the relief sought by plaintiffs, a motion to drop those defendants may be properly granted.”).

As noted above, the University Defendants are not necessary parties to this action. They are not charged with the responsibility of enforcing Proposal 2 against anyone or of defending Proposal 2 in court. They did not draft or enact Proposal 2 and they cannot repeal it, amend it, or ignore it. At present, all they can do is follow it. In contrast, should this Court grant BAMN the relief it seeks, that relief can be obtained from the Defendant Attorney General. Because the University Defendants are not necessary parties to this action they should be dismissed pursuant to Fed. R. Civ. P. 21.

B. Count V of BAMN’s Complaint (Violation of the First Amendment) Should Be Dismissed with Prejudice Because BAMN Lacks Standing as to That Count

1. Applicable Standard

Pursuant to Fed. R. Civ. P. 12(b)(6), the University Defendants also seek dismissal of Count V of BAMN’s Complaint (“Violation of the First Amendment”) on the separate and independent basis that BAMN lacks standing to assert it. A 12(b)(6) motion requires the Court to determine whether a legally cognizable claim has been pleaded in the Complaint. *See Davis v. Int’l Union, UAW*, 274 F. Supp. 2d 922, 924 (E.D. Mich. 2004). The Court must view the complaint in a light most favorable to the plaintiff, accept the plaintiff’s factual allegations as true, and must determine whether the plaintiff undoubtedly can prove no set of facts in support of

its claims that would entitle it to relief. *See Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). While the requirements of “notice pleading” may be minimal, a plaintiff still must plead either direct or inferential allegations concerning all material or essential elements necessary for recovery as to each claim asserted. *See, e.g., Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726-27 (6th Cir. 1996). Here, BAMN alleges that “defendant universities”—not BAMN—have a First Amendment right to exercise academic freedom and to determine academic standards. Under controlling principles of law, BAMN has no such right, and therefore lacks standing to proceed with this claim. As a result, Count V should be dismissed with prejudice.

2. BAMN Lacks Standing to Assert the University Defendants’ First Amendment Rights.

BAMN bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Courts should “presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991). Plaintiffs have the “responsibility...to allege facts demonstrating that [they are] proper part[ies] to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.” *Id.*

To meet its burden, BAMN must demonstrate that it has a legally protected interest at stake. *See Lujan*, 504 U.S. at 560. However, BAMN’s Amended Complaint itself acknowledges that any right of “academic freedom” implicated here belongs to the University Defendants – and not BAMN – when it alleges that “Proposal 2 invades *the First Amendment rights of the defendant universities* to select their student bodies and their teaching staff in ways that the educational authorities have deemed most appropriate.” *See* Amended Complaint, Docket No. 24, ¶ 105.

Significantly, there is a “general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). As a result, a plaintiff “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). As the Supreme Court noted in *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973):

Constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect our conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the Nation’s laws.

Further, the case law indicates that any right of “academic freedom” implicated here belongs to the University Defendants. Just last year, the Sixth Circuit declared that “[t]o the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University.” *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593-595 (6th Cir. 2005).

BAMN has failed to meet its burden of establishing its standing to assert this claim and Count V should therefore be dismissed with prejudice.

IV. CONCLUSION

For the foregoing reasons, the University Defendants respectfully request that the Court enter an Order granting this Motion and dismissing BAMN’s Complaint against the University Defendants as outline above. In addition, the University Defendants respectfully request that the Court award any other relief it determines is equitable and just.

Respectfully submitted,

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Dated: October 17, 2007

182304

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2007, I electronically filed the foregoing Motion to Dismiss of the University Defendants and Brief in Support of Motion 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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