

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

BARBARA GRUTTER, for herself and all others similarly situated,

Plaintiff,

v.

LEE BOLLINGER, JEFFREY LEHMAN,
DENNIS SHIELDS, REGENTS OF THE
UNIVERSITY OF MICHIGAN, and THE
UNIVERSITY OF MICHIGAN LAW SCHOOL,

Defendants,

and

KIMBERLY JAMES, FARAH MONGEAU, JEANETTE
HASLETT, RAYMOND MICHAEL WHITLOW,
SHABATAYAH ANDRICH, DENA FERNANDEZ,
SHALAMAREL KEVIN KILLOUGH, DIEGO BERNAL,
JULIE FRY, JESSICA CURTIN, JAMES HUANG,
HEATHER BERGMAN, ASHWANA CARLISLE,
RONALD CRUZ, NORA CECILIA MELENDEZ, IRAMI
OSEI-FRIMPONG, GERALD RAMOS, ARTURO
VASQUEZ, EDWARD VASQUEZ, VINCENT KUKUA,
HOKU JEFFREY, KARLITA STEPHENS, by her Next
Friend KARLA STEPHENS-DAWSON, YOLANDA
GIBSON, by her Next Friend MARY GIBSON, ERIKA
DOWDELL, by her Next Friend HERBERT DOWDELL,
JR., AGNES ALEOBUA, by her Next Friend PAUL
ALEOBUA, CASSANDRA YOUNG, by her Next Friend
YOLANDA J. KING, JAASI MUNANKA, JODI-MARIE
MASLEY, SHANNON EWING, JULIE KEROUAC,
KEVIN PIMENTEL, BERNARD COOPER, NORBERTO
SALINAS, SCOTT ROWEKAMP, RUSS ABRUTYN,
JASMINE AB DEL - KHAL I K, MEERA DEO , WINIFRED
KAO, MELISA RESCH, OSCAR DE LA TORRE,
CAROL SCARLETT, UNITED FOR EQUALITY AND
AFFIRMATIVE ACTION, THE COALITION TO
DEFEND AFFIRMATIVE ACTION BY ANY MEANS
NECESSARY, and LAW STUDENTS FOR
AFFIRMATIVE ACTION,

Proposed Intervening Defendants

Civil Action No. 97-75928 Hon. Bernard Friedman Hon. Virginia Morgan

Motion to Intervene

MOTION TO INTERVENE

Pursuant to the Federal Rules of Procedure, Rule 24(a) and (b), Kimberly James, Farah Mongeau, Jeanette Haslett, Raymond Michael Whitlow, Shabatayah Andrich, Dena Fernandez, Shalamarel Kevin Killough, Diego Bernal, Julie Fry, Jessica Curtin, James Huang, Heather Bergman, Ashwana Carlisle, Ronald Cruz, Nora Cecilia Melendez, Irami Osei-Frimpong, Gerald Ramos, Arturo Vasquez, Edward Vasquez, Vincent Kukua, Hoku Jeffrey, Karlita Stephens, by her Next Friend Karla Stephens-Dawson, Yolanda Gibson, by her Next Friend Mary Gibson, Erika Dowdell, by her Next Friend Herbert Dowdell, Jr., Agnes Aleobua, by her Next Friend Paul Aleobua, Cassandra Young, by her Next Friend Yolanda J. King, Jaasi Munanka, Jodi-Marie Masley, Shannon Ewing, Julie Kerouac, Kevin Pimentel, Bernard Cooper, Norberto Salinas, Scott Rowekamp, Russ Abrutyn, Jasmine Abdel-Khalik, Meera Deo, Winifred Kao, Melisa Resch, Oscar de la Torre, Carol Scarlett, United for Equality and Affirmative Action, the Coalition to Defend Affirmative Action By Any Means Necessary, and Law Students for Affirmative Action, by and through their attorneys, Scheff & Washington, P.C., hereby move for leave to intervene as party defendants in this action. A copy of the Proposed Answer of Intervening Defendants is attached hereto.

As more fully described below, applicant individuals are black, Latino/a, MexicanAmerican, Filipino/a, Asian-American and other students who currently attend the University of Michigan (the University), including some who attend the University of Michigan Law School (the Law School), or who plan to attend the University of Michigan and/or its Law School; applicant organizations are interracial coalitions which actively seek to preserve

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affirmative action programs at the University of Michigan. All of the applicants have interests in this case which in breadth, depth and urgency exceed the University's own interests in defending its affirmative action admissions policy. Applicants are the persons whose rights, skills acquisition, aspirations and lives--present and future--will be indelibly changed by whether or not efforts to equalize educational access and opportunity are maintained. They are the ones who will be most affected by the outcome of this litigation.

A. Undergraduate applicants for intervention

1. Kimberly James is a black student at the University of Michigan College of Literature, Sciences, and Arts (LSA) in her sophomore year. She intends to apply to the University of Michigan Law School.
2. Farah Mongeau is a black student in LSA in her senior year. She intends to apply to the Law School.
3. Jeanette Haslett is a black student in LSA in her sophomore year. She intends to apply to the Law School.
4. Raymond Michael Whitlow is a black student in LSA in his freshman year. He intends to apply to the Law School.
- 5 Shabatayah Andrich is a black student in LSA in his sophomore year. He intends to apply to the Law School.

6. Dena Fernandez is a mixed-race freshman at the University of Michigan School of Nursing in her freshman year. She intends to apply to the Law School.

7. Shalamarel Kevin Killough is a black student in LSA in his senior year. He has applied to the Law School.

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8. Diego Bernal is a Latino student in LSA in his junior year. He intends to pursue graduate studies in social work and then apply to the Law School.

9. Julie Fry is a white student in LSA in her freshman year. She intends to apply to the Law School.

10. Jessica Curtin is a white student in LSA in her senior year. She has been accepted to the University of Michigan School of Education, where she will be going next year. When she finishes her studies at the School of Education, she intends to apply to the Law School.

11. James Huang is an Asian-American student at Wayne State University in his junior year. He intends to apply to the Law School.

12. Heather Bergman is a white student at the University of California at Berkeley (UCB) in her senior year. She intends to apply to the Law School.

13. Ashwana Carlisle is a black student at UCB in her senior year. She intends to apply to the Law School.

14. Ronald Cruz is a Filipino student at UCB in his junior year. He intends to apply to the Law School.

15. Nora Cecilia Melendez is a Latina student at UCB in her sophomore year. She intends to apply to the Law School.

16. Irami Osei-Frimpong is a black student at UCB in his junior year. He intends to apply to the Law School.

17. Gerald Ramos is a Filipino student at UCB in his junior year. He intends to apply to the Law School.

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18. Arturo Vasquez is a Latino student at UCB in his freshman year. He intends to apply to the Law School.

19. Edward Vasquez is a Latino student at UCB in his junior year. He intends to apply to the Law School.

20. Vincent Kukua is a Hawaiian student at Diablo Valley Community College (DVCC) in Pleasant Hill, California in his freshman year. He intends to apply to the Law School.

21. Hoku Jeffrey is a black student at DVCC in his sophomore year. He intends to apply to the Law School.

B. High school applicants for intervention

22. Karlita Stephens is a black student at Cass Technical High School in Detroit (Cass Tech) in her junior

year. She intends to apply to LSA and the Law School.

23. Yolanda Gibson is a black student at Cass Tech in her senior year. She has accepted admission at Michigan State University and intends to apply to the Law School.

24. Erika Dowdell is a black student at Cass Tech in her senior year. She has applied to the University's undergraduate School of Music and intends to apply to the Law School.

25. Agnes Aleobua is a black student at Cass Tech in her junior year. She intends to apply to LSA and the Law School.

26. Cassandra Young is a black student at Northwestern High School in Detroit. She is in her junior year. She intends to apply to LSA and the Law School.

C. Law School applicants for intervention

27. Jaasi Munanka is a black student at the Law School in his first year.

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28. Jodi-Marie Masley is a white student at the Law School in her first year.

29. Shannon Ewing is a Latina student at the Law School in her first year.

30. Julie Kerouac is a Latina student at the Law School in her first year.

31. Kevin Pimentel is a Filipino student at the Law School in his first year.

32. Bernard Cooper is a black student at the Law School in his second year.

33. Norberto Salinas is a Mexican-American student at the Law School in his first year.

34. Scott Rowekamp is a white student at the Law School in his first year.

35. Russ Abrutyn is a white student at the Law School in his second year.

36. Jasmine Abdel-Khalik is a Latina/Arab-American student at the Law School in her first year.

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38. Winifred Kao is an Asian-American student at the Law School in her first year.

D. Other individual applicants for intervention

39. Melisa Resch graduated from Wayne State University in 1993. She works as a

Meera Deo is a South Asian student at the Law School in her first year.

Health Unit Coordinator and does part-time, free lance paralegal work, including factual investigation and witness preparation. She intends to apply to the Law School.

40. Oscar de la Torre is a Latino graduate student in Public Affairs at the University of Texas at Austin in his second year. He will graduate in May, and intends to apply to the Law School.

41. Carol Scarlett is a black graduate student in the Department of Physics at the University of Michigan in her second year. She is a graduate school representative from the

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Defend Affirmative Action Party in the Michigan Student Assembly. She is one of two black representatives out of 25 in the Michigan Student Assembly.

E. Organizational applicants for intervention

42. United for Equality and Affirmative Action (UEAA) is a pro-affirmative action coalition consisting of applicants for intervention, teachers, parents of minor applicants, and other supporters of affirmative action.

43. The Coalition to Defend Affirmative Action By Any Means Necessary (BAMN) is a pro-affirmative action coalition with chapters in California and Michigan. BAMN has engaged in a wide range of activities in defense of affirmative action at the University of Michigan in the 1997-1998 school year. BAMN built the Defend Affirmative Action Party, which has run and elected candidates in student elections in November 1997 and March 1998. BAMN also has taken a leading role in pulling together a coalition of student groups to sponsor days of action in defense of affirmative action on February 24 and April 1, 1998, including demonstrations, rallies, and mass meetings, with more than 500 students participating on February 24.

44. Law Students for Affirmative Action (LSAA) is a pro-affirmative action coalition at the Law School which has devoted itself to mobilizing support for affirmative action at the Law School and the University. LSAA also took a leading role in organizing the campus for the February 24th Day of Action, in contacting student groups on other campuses, and in putting together a well-attended teach-in on that day.

45. Applicants must be permitted to intervene in this litigation in order to defend and protect their interests which, for all practical purposes, cannot otherwise be protected. For

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many applicants, the outcome of this case will determine whether they ever have the opportunity to attend the Law School and whether they are able to avail themselves of the educational and professional opportunities which a University of Michigan Law School degree provides. For other applicants, the outcome of this case will affect the environment at the Law School and other parts of the University and significantly contribute to determining whether that environment is conducive to the education of black, other minority, and women students, or whether it is riddled with racial and sexual prejudice and hostility. For all applicants, the outcome of this case will have a profound effect--both immediately and in its aftermath--on their vital interests in higher education not being resegregated and in the promotion of equality and democracy for all persons.

46. The University of Michigan cannot adequately represent the applicants' interests. While having a

strong stake in maintaining its admissions policy at the Law School, as a public institution, the University is accountable to, and subject to pressure from, a broad spectrum of students, parents, alumni and state legislators, including some who do not support affirmative action.

47. Further, in all likelihood, the University will fail to raise a number of available defenses in this lawsuit, including particularly those which call into question its own past discriminatory practices and/or passive participation in present discriminatory practices--for example, the Law School's continued use of LSAT scores as a factor in determining admissions, when the discriminatory impact of such use has been documented. Nor is the University likely to pursue a number of available defenses as vigorously as will applicants if allowed to intervene, in part because the evidence to support those defenses is more readily

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available to applicants as persons who have direct knowledge of segregated and/or resegregated educational institutions.

48. Further, applicants assert an interest in an affirmative action policy at the Law School which attempts to provide fair and equal access to women, as well as black and other minority students, by considering gender as a factor in admissions. Although not directly challenged by plaintiff, that policy will also be affected by the outcome of this case, and thus far the University has indicated no intent to defend it.

49. This motion to intervene is timely, being brought early on in the proceedings. Applicants' interests, coupled with the University's inability to fully and adequately express and represent those interests, more than satisfy the requirements for intervention as of right. Indeed, as the direct beneficiaries of affirmative action and as the direct targets of this lawsuit, no possibility of a fair adjudication of this dispute exists without applicants' full participation as parties to the action.

50. For similar reasons, should this Court for any reason deny intervention as of right, applicants have established the basis for being granted permissive intervention. Applicants' defenses have numerous legal and factual questions in common with those raised in the main action. Further, their request for intervention is timely and poses no threat of delay or prejudice to the original parties.

51. In accordance with Local Rule 7.1, applicants have sought the parties' concurrence in this motion. Counsel for Proposed Intervening Defendants attempted to contact and left messages for Leonard Niehoff and Jane Sherburne, counsel for the University, at approximately 5:30 P.M. on Wednesday, March 26, 1998. On Thursday, March 27, she

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spoke with Mr. Niehoff, who wished to review these papers. At approximately 5:30 on Wednesday, she also spoke with Michael Rosman, counsel for plaintiff, and left messages for plaintiff's other counsel. Mr. Rosman stated that the decision was Mr. Kolbo's, but that he believed Mr. Kolbo would not concur in this motion. Counsel for Proposed Intervening Defendants again attempted to reach Mr. Kolbo on Thursday, and left another message for him.

For the above reasons and those set forth in the accompanying Memorandum of Law In Support of Motion To Intervene, applicants request that this motion be granted and the Court allow them to intervene as party defendants in this action. Respectfully requested,

Scheff & Washington, P. C.

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Intervening Defendants
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Dated: March 26, 1998

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Memorandum of Law in Support of Motion to Intervene

INTRODUCTION

By the accompanying motion, forty-one black, Latino/a, Mexican-American, Filipino/a, Asian-American and other students and three pro-affirmative action coalitions seek to intervene as defendants in this lawsuit brought to challenge affirmative action admissions at the University of Michigan Law School. Proposed Intervening Defendants assert that they have a significant legal interest in the subject matter of this litigation and that their interest will not be adequately represented by existing parties.

Therefore, the applicants for intervention respectfully request that this Court grant them leave to intervene as of right in the instant matter, or, in the alternative, that this Court grant them permissive intervention.

In March 1970, black students at the University of Michigan in the Black Action Movement (BAM I) led a successful campus-wide strike for increased black enrollment. When the University publicly announced its decision to meet the enrollment and other demands--in effect, when it announced its first affirmative action program--it was attacked by Vice President Spiro Agnew, who claimed that the new black students would not be qualified and that the best approach to college admissions would be to screen high school students to identify a "natural aristocracy." University President Robben Fleming responded that the University was "proud" of its recent commitment, which represented "another first in the service of the people of Michigan and this nation" and an "opportunity to serve the American promise." (1)

1 "Strike for BAM Affects All of LSA as Support Snowballs" and related articles, The Michigan Daily, March 25, 1970, p. 1; "Agnew Attacks U-M 'Retreat' in Raising Black Enrollment" and "Fleming Defends Settlement," Detroit Free Press, April 14, 1970, p. 1.

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Again in 1975 and 1987, black students mobilized the campus in support of educational equality.(2) Out of the 1987 activism came President James Duderstadt's Michigan Mandate, which has since provided the framework for the University's affirmative action programs, including the Law School's admissions system.(3)

Now these programs are under attack in this case and a companion case brought against the University's undergraduate College of Literature, Arts, and Sciences by the same legal organization, the Center for Individual Rights (CIR).(4) CIR's two lawsuits are part of a legal and public relations campaign that has been waged against affirmative action for several years by an array of forces--not the least of which is CIR itself. CIR brought a similar suit against The University of Texas School of Law that resulted in the invalidation of affirmative action admissions throughout the Fifth Circuit in 1996.(5)

This lawsuit seeks the result obtained in the Fifth Circuit: the elimination of affirmative action in higher

education.(6) The complaint alleges that when the University of Michigan Law School rejected a white woman, it "discriminated" against her on the basis of her race by maintaining an affirmative action program that did not apply to her. It requests injunctive relief against such "discrimination. " The complaint thus equates affirmative action with "discrimination" and seeks to impose on the Law School an admissions system in which

2 BAM II and 111, respectively. On BAM 11, see "Minorities still hold Ad. Bldg.," The Michigan Daily, February 20, 1975, p. 1. Just before the major BAM 11 actions, the graduate student union at the University, on the verge of what was to be a successful one-month strike, obtained agreement from the Administration on its affirmative action and anti-discrimination demands. See "'U', GEO agree on bias clause, affirmative action," The Michigan Daily, February 15, 1975, p. 1, and "GEO strike rally pulls 2,500," same day, same page. On BAM 111, see Howard Peckham, The Making of the University of Michigan. 1817-1992 (1997), pp. 349-350. On February 24, 1998, hundreds of students again rallied in support of affirmative action at the University of Michigan. "A National Day of Action," The Michigan Daily, February 25, 1998, p. 1.

3 "Group Suing University of Michigan Over Diversity," The New York Times, October 14, 1997, p.A14.

1. Gratz v. Bollinger, Case No. 97-75231 (ED MI) (filed October 14, 1997).
2. Hopwood v. Texas. 78 F.3d 932 (CA 5, 1996) (Hopwood II).

6 CIR has also filed a case challenging affirmative action admissions policies at the University of Washington Law School. Smith v. University of Washington Law School, Civ. No. C-97-335(C)Z (WD WA) (filed March 5, 1997).

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applicants of all races are treated in a formally equal way.(7)

But mechanical "equal" treatment is a pretext for resegregation, a means to ensure that stark educational inequality endures and intensifies. In California and the Fifth Circuit, the recent abolition of affirmative action has already had a dramatic tendency to create two

tiered, segregated university education systems--and, in the case of professional school, has very nearly denied black and Latino students any access at all. A victory for plaintiff would overturn significant gains for black people and other minorities and would resurrect the norms of Jim Crow in this jurisdiction.

Against plaintiff's superficial and retrograde conception of formal equality, proposed intervenor-defendants--prospective Law School applicants from Michigan, Texas, and California, local high-school students, current Law School students, and pro-affirmative action coalitions--will counterpose real educational equality. As Lyndon B. Johnson said in announcing the first federal affirmative action program in 1965, "[w]e seek not just legal equity but human ability, not just equality as a right and a theory, but equality as a fact and equality as a result.(8) In the view of proposed intervenors, the University is entitled--indeed, obligated9--to be an engine for equality as a fact and a result. It may not avert its gaze from discrimination, and in so doing become an engine for inequity. It may select a student body that reflects the composition of society. It may not segregate.

While the University has a real stake in preserving its rights, the interests of applicants are broader, deeper, and more urgent. It is they, and not the University, who are

1. Complaint, paragraphs 17-23, 26, Relief B. The claims arc brought under 42 USC §§ 1981, 1983, 2000d et. seq.
2. Henry Hampton and Steve Fayer, Voices of Freedom: An Oral History of the Civil Rights Movement from the 1950s through the 1980s (1990), p. 621. The affirmative action programs for black people that arose out of the Civil Rights Movement were extended to other minorities and to all women.
3. "The University shall provide the inhabitants of this state with the means of acquiring a thorough knowledge of the various branches of literature, science, and arts." MSA 15.903; MCLA 390.

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the direct beneficiaries of affirmative action and the direct targets of this lawsuit. This case will determine the quality of their prospects and their day-to-day lives; it will not leave an hour untouched. It is essential that they participate in the adjudication of their rights and interests.

III. ARGUMENT

. PROPOSED INTERVENING DEFENDANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

Rule 24 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

Upon timely application anyone shall be permitted to intervene in an action...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 existing parties.

Fed. R. Civ. P. 24(a)(2). The purpose of the provision is to avoid a rash of lawsuits on related questions "by involving as many apparently concerned persons as is compatible with efficiency and due process." Coalition of Arizona/New Mexico Counties v. Department of the Interior, 100 F.3d 837, 841 (CA 10 1996) (citing decisions by three Courts of Appeals). Therefore, "(t)he need to settle claims among a disparate group of affected persons militates in favor of intervention." Jansen v. City of Cincinnati, 904 F.2d 336, 340 (CA 6 1990).

In light of the Rule and its goals, courts have granted motions to intervene as of right when the following four criteria are met: (1) the motion is timely; (2) the applicants have a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the applicants' ability to protect their interest; and (4) the existing parties cannot adequately protect the applicants' interests. *Id.*

In the instant case, applicants clearly and undeniably meet these demands.

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1. The application is timely.

This lawsuit was filed on December 3, 1997. No discovery has taken place as of yet. Applicants have moved quickly to assert their rights and have satisfied the Rule's timeliness requirement. See, e.g., Baker v. City of Detroit, 504 F. Supp 841, 848 (ED MI 1980), aff'd sub nom Bratton v. City of Detroit, 704 F.2d 878 (CA 6 1983), cert. denied, 464 US 1040 (case filed in November and December 1975; trial undertaken in August 1978; motion to intervene filed in May 1978; motion granted).

2. The beneficiaries of the challenged affirmative action program have a "significant legal interest" in this case.

Affirmative action gives effect to the ideals that have both animated and been animated by progress throughout United States history: democracy and equality.^o In a diverse society committed to the abolition of all caste--that is, to integration--unjust and unearned privilege benefits no one. This recognition undergirds a broad national antidiscrimination policy, expressed comprehensively in

legislative terms in the Civil Rights Act of 1964.

10 On November 19, 1863, some ten months after issuing the Emancipation Proclamation, President Abraham Lincoln, in dedicating the ground on which a turning-point Civil War battle had been fought, began with equality and closed with democracy: "Fourscore and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure...It is for us the living...to be here dedicated to the great task remaining before us...--that we here highly resolve that these dead shall not have died in vain--that this nation, under God, shall have a new birth of freedom--and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, Speeches and Writings 1859-1865 (ed. Don Fehrenbacher 1989), p. 536. Just short of a century later, on August 28, 1963, The Reverend Dr. Martin Luther King, Jr., addressed hundreds of thousands from the Lincoln Memorial. His speech also addressed the relationship between equality and political participation: "I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed--we hold these truths to be self-evident, that all men are created equal...With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day." James Washington, A Testament of Hope (1986), pp. 217-219.

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Affirmative action, as an antidote to pervasive past and present racial and sexual discrimination in education and employment, has had a decisive, profound impact on the majority of the United States population: on all black people and other minorities, and on all women. The affirmative action program at the University of Michigan Law School will have (and, in some cases, has already had) the same impact on all intervenors. It would be unconscionable for this case to proceed without them; they are the real targets of plaintiff's suit.

Applicants' shared and individual interests are far more urgent, direct, and addressable than the Rule requires. The Sixth Circuit Court of Appeals and other courts have set a low threshold for what constitutes a "significant legal interest," sometimes called a "significantly protectable interest," Donaldson v. United States, 400 US 517, 531 (1971), or indeed simply "an interest," Associated General Contractors of Connecticut, Inc. v. City of New Haven, 130 F.R.D. 4, 11 (D CT 1990). As is indicated by the variety of terms, the precise contours of an interest sufficient to support intervention as of right have not been delineated. See, e.g., Purnell v. City of Akron, 925 F.2d 941, 947 (CA 6 1991); Arizona/New Mexico, 100 F.3d at 840. Nonetheless, it is absolutely clear in the Sixth Circuit that intervenors need not have Article III standing, or a "specific legal or equitable interest." Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (CA 6 1996); Purnell, 925 F.2d at 948. Further, the interest requirement "is to be construed liberally". Bradley v. Milliken, 828 F.2d 1186, 1192 (CA 6 1987); see also Michigan AFL-CIO, 103 F.3d at 1245 (overruling the District Court's denial of intervention and noting the "rather expansive notion of the interest sufficient to invoke intervention of right" in the Sixth Circuit).

Indeed, failure to satisfy the interest prong of the test has rarely barred prospective

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intervenors from participating. The range of interests deemed sufficient is broad, and their character is often general. Economic interests have been cited as supporting intervention. See, e.g., Linton v. Commissioner of Health and Environment, State of Tennessee, 973 F.2d 1311, 1319 (CA 6 1992). So have interests in the purity and integrity of local air and water and in the residential and rural character of a town, Herdman v. Town of Angelica, 163 FRD 180, 183 (WD NY 1995), and the interest of a naturalist photographer in the protection of an owl species, Arizona/New Mexico, 100 F.3d at 841-844.

Closer to home, social interests provide a sufficient basis: in school desegregation cases, for example,

students in a school system, their parents, and parent organizations "generally have a sufficient interest" to support intervention as of right. Bradley, 828 F.2d at 1192 (citing cases from several circuits); see also Hatton v. County Board of Education of Maury County, Tennessee, 422 F.2d 457, 461 (CA 6 1970).(11)

In cases like this one--cases in which the beneficiaries of affirmative action plans have sought to intervene in lawsuits brought by alleged victims of so-called "reverse discrimination"--the courts have, with one exception, uniformly granted intervention, giving force of law to what should be an article of common-sense justice: that such beneficiaries must be present to defend their interests and rights against regressive attack.(12) See, e.g., Jansen, 904 F.2d at 343 (permitting intervention in case brought to challenge the City of

11 The Bradley Court questioned whether the proposed intervenors' interests were sufficiently broad, since their concerns focused on one school only in a city-wide desegregation case. However, it rested its decision on the grounds that the proposed intervenors' interests were adequately represented. The Hatton Court, after finding a sufficient interest on the part of segregationist parents who opposed an integration plan, upheld the District Court's denial of intervention on the same basis. The general trend of granting intervention in school desegregation cases has special bearing on this case, which is in effle2ct a resegregation case.

12 Research has uncovered just one affirmative action/"reverse discrimination" case refusing to grant intervention by affirmative action beneficiaries, Hopwood v. Texas, 21 F.3d 603 (CA 5 1994) (Hopwood I). But even the Hopwood Court, which took an anomalously restricted view of the procedural and substantive rights of affirmative action beneficiaries, did not suggest their interest was insufficient. Instead, it based its decision on the inadequate representation prong of the test.

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Cincinnati Fire Department's affirmative action plan); In Re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1497 n13, aff'd sub nom Martin v. Wilks, 490 US 755 (1989) (same, in Birmingham, Alabama); Baker, 504 F. Supp. at 849 (same, for Police Department of the City of Detroit); Associated General Contractors, 130 F.R.D. at 11-12 (same, in case brought to challenge New Haven's affirmative action contracting rules); Podberesky v. Kirwan, 838 F. Supp 1075, 1077 n2 (D MD 1993) (noting intervention by recipients of challenged all-black scholarship), rev'd on other grounds, 38 F.3d 147 (CA 4 1994); Doherty v. Rutgers School of Law-Newark, 487 F. Supp 1291 (D NJ 1980) (challenge to Rutgers School of Law's affirmative action program with caption listing the Asian American Law Students Association, the Association of Black Law Students, the Association of Latin American Law Students, the Student Bar Association, the Women's Caucus, and individual members of these organizations as intervening defendants), aff'd 651 F.2d 893 (CA 3 1981).

The applicants' interests are more than sufficient to meet the standard established by the case law. Applicants fall into four general groups: current undergraduates at several universities who are prospective applicants to the Law School, Detroit high school students who wish to attend the University for college and/or law school, current students at the Law School, and pro-affirmative action coalitions.

Those who are prospective applicants to the Law School from various institutions in Michigan, Texas, and California have an interest in an admissions system that treats all applicants fairly--and only an admissions system which includes affirmative action can begin to do so. They have an interest in access to legal education and an interest in access to first rate legal education at a flagship state university. Those who would be admitted to the Law

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School even without affirmative action have an interest in seeing first-rate legal education available to all

regardless of race and gender. All prospective applicants also have a concomitant interest in attending a law school which is not segregated or virtually segregated and which includes a representative number of women students.(13)

Applicants have an interest in attending a law school in which a successful legal attack on affirmative action has not resulted in a hostile environment for all minorities and all women.(14) For those who have experienced first-hand the effects of anti-affirmative action

13 An admissions system without affirmative action--that is, one that did not take account of race and gender--would fail to provide equal opportunity by becoming a "passive participant" in existing racial and sexual discrimination on and off undergraduate campuses. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1989) (Opinion of O'Connor, J.). For references regarding racism and sexism on campuses, see note 14, *infra*. Quite aside from more fundamental questions of equality, such discrimination and the stereotypes that accompany it have been shown to harm academic achievement by minorities and women. See, for example, Claude Steele, "A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance," 278 *American Psychology* 613 (1997); Michael Nettles, "Racial Similarities and Differences in the Predictors of College Student Achievement," in Walter Allen, et al., Collee in Black and White (1991), p. 87.

Additionally, absent affirmative action, any use of the Law School Admission Test (LSAT), which is required by the American Bar Association for law school accreditation, would guarantee the rejection of many qualified black, Latino, Asian-American, and Native American applicants who have an interest in pursuing legal education, including a large majority who would, if accepted, graduate and pass the bar. See Linda Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions," 72 *N.Y.U.L. Rev.* I (1997) (attached as Exhibit A); Theodore Cross and Robert Slater, "Special Report: Why the End of Affirmative Action Would Exclude All But a Very Few Blacks from America's Leading Universities and Graduate Schools," 17 *Journal of Blacks in Higher Education* 8 (1997).

Due to Hopwood II, the number of black students accepted at the University of Texas Law School dropped from 65 in 1996 to 11 in 1997. Four black students enrolled--in a first-year class of more than 400. "The Severe Decline in Black Higher Education Enrollments at Highly Selective Universities," 18 *Journal of Blacks in Higher Education* 31; "Impact of Affirmative-Action Ruling in Texas is Less Than Predicted," *The Chronicle of Higher Education*, January 31, 1997, p. A28. The number of Latino first-year students was slashed by 46% and the number of Native American first-year students by 40%. "Impact of Affirmative-Action Decision." After the ban on affirmative action was implemented at the University of California, Berkeley, Law School, the number of black students admitted dropped from 75 in 1996 to 14 (out of 792 applicants) in 1997; none enrolled. "The Severe Decline".

Similarly, at the University of California, San Diego, School of Medicine, not one of 196 black applicants was admitted in 1997. "The Severe Decline". A study of the period 1968-1987 conducted by UCSD School of Medicine professors shows that initial gaps in performance between students admitted under the regular and affirmative action admissions standards narrowed and then disappeared over the course of medical education. Robert Davidson and Ernest Lewis, "Affirmative Action and Other Special Consideration Admissions at the University of California, San Diego, School of Medicine," 278 *Journal of the American Medical Association* 1153 (1997).

14 Racism, racial isolation, and a generally hostile environment for black students on college and university campuses are well-documented. See Joe Feagin, et al., The Agony of Education: Black Students at White Colleges and Universities (Routledge 1996); Anthony D'Augelli and Scott Hershberger, "African American Undergraduates on a Predominantly White Campus: Academic Factors, Social Networks, and Climate," 62 *Journal of Negro Education* 67 (1993); Walter Allen, "The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities," 62 *Harvard Educational Review* 26 (1992); "Blacks and Whites on the Campuses: Behind Ugly Racist Incidents, Student Isolation and Insensitivity," *The Chronicle of Higher Education*, April 26, 1989, p.1.

Overt bigotry and subtler forms of discrimination also infect the education of Latino, Asian-American, and other minority students. Ruth Simmons, "Report on Campus Race Relations" (Princeton University 1993); Institute for the Study

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Proposition 209 in California and of the Fifth Circuit's decision in Hopwood, that interest is especially sharp and concrete, and they will be able to provide the Court with crucial information and perspectives not available elsewhere. See, e.g., Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (CA 9 1983).

The undergraduate applicants are also anti-racist and anti-sexist activists, some of them members of applicant organization the Coalition to Defend Affirmative Action By Any Means Necessary (BAMN), and all of them members of applicant organization United for Equality and Affirmative Action (UEAA). They have engaged in protracted and intense efforts to preserve affirmative action in Michigan, Texas, and California. Their involvement in the question at stake further buttresses the strength of their claim to intervene. See Arizona/New Mexico, 100 F.3d at 841; Michigan AFL-CIO, 103 F.3d at 1245-1247 (lobbying and other political activities noted as shoring up applicant's claim of interest). Further, those attending the University of Michigan follow in the footsteps of the BAM activists whose campaigns

precipitated the adoption of affirmative action policies there, and as such are comparable to the intervening black firefighters in Jansen who were parties to a

of Social Change, "The Diversity Project: Final Report" (University of California, Berkeley 1991). Racist incidents are common at the University of Michigan. Recently a swastika was drawn and the words "nigger" and "two stupid bitches" were written on the dormitory-room door of two black women students. "Racial graffiti found in Markley," *The Michigan Daily*, March 11, 1998, p. 1. The Director of Housing Public Affairs later wrote a column stating that several other such incidents have occurred in the 1997-1998 school year so far. Alan Levy, "Acts of Hatred Cannot Be Tolerated," *The Michigan Daily*, March 12, 1998, p. 4A.

Sexism also plays a dramatic and damaging role in education. Roberta Hall and Bernice Sandler, "The Classroom Climate: A Chilly One for Women?" (1982); Hall and Sandler, "Out of the Classroom: A Chilly Campus Climate for Women?" (1984). In a recent study, 41% of women law students from all Ohio law schools reported feeling "less intelligent and articulate" than they had before law school. Joan Krauskopf, "Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools," 44 *Journal of Legal Education* 311, 314 (1994). 20% of women students reported having been sexually harassed in law school, and 50% of minority women students reported having been racially discriminated against there. *Id.* at 313. A survey conducted in 1995 ranked the University of Michigan Law School as 136th out of 168 law schools as a school for women. "Best Law Schools for Women," *The National Jurist*, October/November 1995, cover story.

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consent decree governing affirmative action in the Cincinnati Fire Department.(15)

Detroit high-school student applicants want to be lawyers; some have participated in legal internship programs. Most intend to apply to the University of Michigan for both law school and college. Their interests overlap with those of the undergraduates, but are doubled: if there is an adverse ruling in this case prior to resolution of the companion suit against the undergraduate college, it will also apply to undergraduate admissions.

The high-school students have attended a school system that is overwhelmingly segregated, a school system in which the faculty-student ratio is enormous, facilities are decrepit, and supplies of all kinds--including books--are scanty, deteriorating, and completely out-of-date. Each year the number of Advanced Placement courses, arts classes, and other electives shrinks.(16) These students have fought mightily against tremendous disadvantage to develop their intellectual skills and aspirations. Their interest in continuing to act on their hopes and ambitions--indeed, in continuing to harbor their hopes and ambitions--would be snuffed out by an admissions program without affirmative action.(17) An adverse decision by

15 The Michigan Mandate differs from the affirmative action plan in Jansen in that it is not a court decree, but it is similar in that it is an agreement by the University to take account of the interests, demands, and claims of independently organized black and other minority students and their supporters. Since students rather than employees are at issue, the parties have changed--but the present parties are situated similarly to BAM I, II, and III members and are the beneficiaries of BAM activities.

16 Both the number and the percentage of black and Latino students nationwide confined to segregated and inferior schools are rising sharply. Gary Orfield et al., "Deepening Segregation in American Public Schools: A Special Report of the Harvard Project on School Desegregation" (1997). Of the ten largest central city school districts, Detroit's is the most segregated: 89.7% of black students attend schools that are 90% to 100% black. *Id.* at 13. Statewide, 59.6% of black students attend such schools, making Michigan the second-most educationally segregated state, after Illinois. *Id.* at 15. On conditions in Detroit schools, and particularly at Cass Technical High, which is attended by four of the high-school applicants, see Affidavit of Stephen Conn (attached as Exhibit B).

17 The University of Michigan uses the Scholastic Aptitude Test (SAT) in its undergraduate admissions process; in fact, it appears that the University double-counts the SAT by using high schools' average SAT scores to adjust applicants' grades. "'U' admissions process alters GPAs," *The Michigan Daily*, December 10, 1997, p.1. The use of the SAT guarantees dramatic reductions in the number of minorities and women offered admission, due to persistent score gaps between white and minority students and between men and women. In 1994, for example, national average scores by race and gender were as follows: white men, 964; white women, 916; black men, 747; black women, 735; Mexican American men, 823; Mexican American women, 778. "Gender Bias in College Admissions Tests," FairTest/National Center for Fair and Open Testing (undated). Until the early 1970's, female students outscored male students on the verbal section of the SAT; the verbal section was "balanced" to produce minimally lower scores by women than men. The math section, which has consistently reflected a significant gap in favor of men, has never been "balanced." *Id.* A recent change in the SAT was

this Court or by the Sixth Circuit Court of Appeals would immediately eliminate or severely damage their prospects for attaining any higher education in their home state or region.(18) In addition, it would deprive other students--more educationally privileged minority students and all white students--of the indispensable, dynamic perspectives and understandings of working- and middle-class black students from Detroit.

Proposed intervenors who currently attend the Law School have many of the same interests as the undergraduates. They also have an interest in not being members of an increasingly segregated profession, and an interest in not being displaced from the Law School in the event that plaintiff prevails on her class action claims as well as on the merits.

See Baker, 504 F. Supp. at 849 (possibility of demotion of black police officers buttressed claim of right to intervene by beneficiaries). Finally, many of the law student applicants are members of Law Students for Affirmative Action (LSAA).(19)

the elimination of antonym questions--on which black students outscored white students. "Selected Annotated Bibliography on the SAT: Bias and Misuse," FairTest/National Center for Fair and Open Testing (1995), p. 4. In addition, SAT-takers score on average 30 test points higher for every \$10,000 in parental annual income. Peter Sacks, "Standardized Testing: Meritocracy's Crooked Yardstick," *Change*, March/April 1997, p. 27.

Generally speaking, standardized admissions tests have a history of suspect and disturbing--indeed, racist--use, as do IQ tests. See Stephen Jay Gould, The Mismeasure of Man (1996). They were first adopted by Columbia University in 1919 to limit the growing number of first- and second-generation Jewish immigrants enrolled at Columbia. James Crouse and Dale Trusheim, The Case Against the SAT (1988), pp. 19-20. Carl Brigham, the author of the first SAT, was an open eugenicist. David Owen, None of the Above: Behind the Myth of Scholastic Aptitude (1985), pp. 178-179.

Further, the SAT adds nothing to the accuracy of predictions of first-year undergraduate grade point averages based on high-school grades, and its effect on black applicants is to cause the rejection of greater numbers with zero validity in predictive terms. The Case Against the SAT, pp. 68, 107. Applicants sharply dispute the wisdom and acceptability of basing admissions on predictions of first-year grades in the first place. See "Affirmative Action and Other Special Consideration Admissions," note 13, supra; Karen Cheowith, "A Measurement of What?," *Black Issues in Higher Education*, September 4, 1997, p. 19; The University of California Latino Eligibility Task Force, "Latino Student Eligibility and Participation in the University of California YA BASTA!--Report Number Five of the Latino Eligibility Task Force" (July 191987).

18. A ruling against affirmative action will apply to all public, and, through Title VI of the Civil Rights Act of 1964, 42 USC §2000d, to all federally-funded private institutions in the jurisdiction. See Guardians Assn. v. Civil Service Commission of the City of New York, 463 US 582, 589-590 (1983) (equal protection and Title VI statutory violations turn on same standard).

19. Three individual applicants for intervention are neither undergraduates, nor high-school students, nor current law students. Melisa Resch and Oscar de la Torre will apply to the law school. Carol Scarlett, a Physics graduate student at the University of Michigan, does not intend to apply to the Law School. Her interests are based on the effect of an adverse decision on her department and the University generally, and thus parallel other applicants' interests in not being subjected to an increasingly hostile environment and in not being a member of an increasingly segregated profession. Ms. Scarlett also asserts an interest based on her recent election as graduate student representative in the Michigan Student Assembly on the

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Applicant coalitions--UEAA, BAMN, and LSAA--are entitled to intervene due to their organizational interest in the lawsuit and because members of all three individually meet the standard. See Lujan v Defenders of Wildlife, 504 US 559, 563, (1992) (requiring Article III standing of at least one group member in addition to group interest in order for group to have Article III standing). The caselaw is replete with interventions by groups of all sorts; there is no question that applicant organizations have sufficient interest to intervene as of right. See, e.g., Michigan AFL-CIO (Chamber of Commerce); Conservation Law Foundation v. Mosbacher, 966 F.2d 39 (CA 1 1992) (commercial fishing groups); Sagebrush Rebellion (environmental groups); Bradley, 828 F.2d at 1192 (noting that groups of students and parents are generally granted intervention in school desegregation cases).

All applicants are members of UEAA, a coalition of applicants, parents, teachers, and other supporters of affirmative action founded to provide a democratic forum for the conduct of this lawsuit, to administer publicity and fundraising efforts, and to promote the interests of applicants in particular and the defense of affirmative action in general.

In addition, some applicants are members of BAMN. BAMN was founded in Berkeley, California in July 1995 in response to the University of California Regents' decision to ban affirmative action--a precursor to the passage of anti-affirmative action California Proposition 209. The Michigan chapter of BAMN has been a leading organization in student activism in defense of affirmative action on the University of Michigan campus throughout the fall of 1997 and the winter of 1998. For example, BAMN spearheaded the successful student stay-away/strike that took place on the campus on February 24, 1998; is currently organizing for a National Day of Action called for April 1, 1998, in which more

Defend Affirmative Action Party slate.

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than 60 colleges and universities around the country will participate; has organized forums on affirmative action; and has organized the Defend Affirmative Action Party, which has participated in Michigan Student Assembly elections in both semesters.

A number of applicants are also members of LSAA, a pro-affirmative action coalition at the law school founded in January 1998. LSAA has also been a major participant in pro-affirmative action organizing on the campus. It was central in mobilizing students for the February 24th Day of Action, organized a heavily attended teach-in on that day, and is planning a speakers series on affirmative action and segregation in education.

All proposed defendant-intervenors share a broader set of interests relating to the impact of this case on black and other minority communities generally and on all women. Affirmative action has resulted in a vast increase in the number of minority and women lawyers--and therefore in the quality and availability of legal representation for minorities and women, and in the number of minority and women judges, legislators, and executives.²⁰ Plaintiff's suit is thus a direct attack on the access to legal services and the political representation of the communities of which applicants are members and supporters.

Finally, all applicants share an interest in the generalized, national effects of an

20. Between 1890 and 1970, the percentage of lawyers who were black increased less than one percentage point: from 0.48% to 1.29%. Edward Littlejohn and Leonard Rabinowitz, "Black Enrollment in Law School: Forward to the Past," 12 *Thurgood Marshall L.Rev.* 41S, 418 (1987). Fifteen years later, 5.1% of law students were black. *Id.* at 435. Similarly, in 1971, women received 6.3% of all professional degrees; ten years later, the figure had more than quadrupled to 27.5%. Eulius Simien, "The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action," 12 *Thurgood Marshall L.Rev.* 359, 361 (1987).

Women and minorities consistently express greater interest in practicing public-interest law. See, for example, Lani Guiner, et al., "Becoming Gentlemen: Womens' Experiences at One Ivy League Law School," 143 *U. Pa L.Rev.* 1, 40 (1994).

The rationale for affirmative action based on provision of services to underserved communities was not established by the Regents of California in the medical-school context in *Regents of the University of California v. Bakke*, 438 US 265, 310-311 (1978) (Opinion of Powell, J.). However, Justice Powell noted that this rationale might provide a compelling state interest justifying a school's admissions system; the problem was one of proof. In any case, legal services--not to mention formal political representation--are distinguishable from the medical care provision at stake in *Bakke* in a number of ways.

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adverse decision in what is a generalized, national attack on affirmative action.(21) This case is about the ongoing struggle for equality in this country. The case will have direct legal consequences in this District and almost surely throughout this Circuit--and it will also have ripple effects throughout the United States. Hopwood and Proposition 209 have reduced the number of black *applicants* to professional school nationwide.(22) These effects will not be limited to higher education, though it would suffice to support applicants' motion if they were. Rather, they will tend to match the scope and depth of a broad principle inherent in plaintiff's case: that public, publicly-funded, and publicly-regulated institutions, including but not limited to courts and universities, may not act against inequality. Such policies have broad support in the population as a whole(23)--but no one has a greater stake than the applicants in their continuation.

Simple justice requires that applicants be granted a voice in this proceeding. In Baker, Judge Keith, sitting by designation, wrote of the Eastern District's earlier decision to grant intervention as of right that "[fairness dictated that the black police officers who would be hurt by a ruling against affirmative action be heard." 504 F. Supp. at 849. Fairness dictates no less here: all the applicants would be hurt by a ruling against affirmative action,

21 In addition to Proposition 209, Hopwood, and the case against the University of Washington, public magnet schools in Boston, Arlington, and Buffalo, among others, are currently facing or have recently faced court challenges to their affirmative action programs. "Suit Calls Diversity Policy Unfair," The Washington Post, January 29, 1998, p.A10; "Admissions Denial Challenged", News in Brief: A National Roundup, Education Week, October 22, 1997. Numerous reports have been released on the national campaign against affirmative action generally, including Nicholas Lemann, "What Happened to the Case for Affirmative Action, The New York Times Magazine, June 11, 1995, cover story; "Puppet: Money Strings Behind Prop 209's Ward Connerly," Emerge, March 1998, cover story.

22. See "A Quarter-Century of Strong African-American Progress in Medical School Education May Be Coming to an Abrupt Halt," 18 Journal of Blacks in Higher Education, p. 14 (Winter 1997/1998).

23. Proposition 209 used the anti-discrimination language of the Civil Rights Act of 1964 to ban affirmative action, confusing many voters who supported affirmative action. "Divide and Conquer," San Francisco Bay Guardian, May 24, 1996; "Poll Backs Affirmative Action," San Francisco Examiner, April 24, 1996. When an attempt to mimic Proposition 209 in the City of Houston, Texas, was, after an initial skirmish, framed in terms of eliminating affirmative action rather than promoting equal rights for all, Houston voters roundly rejected it. "Houston Vote Underlined Complexity of Rights Issue," The New York Times, November 6, 1997, p.A1.

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and all have a right to be heard.

3. The applicants' ability to protect their interests will be impaired if they are not permitted to intervene.

The impairment prong of the test requires only a hypothetical showing: applicants need show neither "substantial impairment" of their interests nor that "impairment will inevitably ensue from an unfavorable disposition". Purnell, 925 F.2d at 947. Rather, as stated in Rule 24, they need only show that the disposition may harm their ability to protect their interest. *Id.*

For that reason, the *stare decisis* effect of a potential adverse holding is sufficient to show impairment. Jansen, 904 F.2d at 342; Linton, 973 F.2d 1319. In this case, if plaintiff prevailed, it would be impossible for applicants to advance their arguments and put forth their evidence in a separate action. Even

assuming *arguendo* that applicants possess affirmative claims--as opposed to the defenses they now wish to assert--any such claims would be legally void if this challenge to affirmative action is successful.

In any event, the time-sensitive nature of many of applicants' claims makes intervention necessary for the protection of their interests. If plaintiff prevails before they apply to the Law School, and they are forced to commence their own proceeding, the legal education of undergraduate and high school applicants could be delayed for years pending the resolution of their claims. See Americans United for Separation of Church and State v. City of Grand Rapids, 922 F. 2d 303, 305-306 (CA 6 1990) (where intervenor sought to display a menorah on public property during Chanukah, and the extra time involved in initiating a lawsuit could have pushed resolution of the question beyond the coming Chanukah season, intervention was granted).

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Thus, unless this Court grants intervention, applicants will be wholly unable to protect their interests.(24)

4. The University cannot adequately protect the applicants' interests, which are broader, deeper, and more urgent than those of the University, and possibly adverse to them.

The inadequate representation prong of the test, like the impairment prong, requires only a minimal and hypothetical showing:

The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.

Trbovich v. United Mine Workers of America, 404 US 528, 538 n.10 (1972) (emphasis added).

Therefore, applicants "should be allowed to intervene unless it is clear that [the University] will provide adequate representation." 7C Wright, Miller, and Kane, Federal Practice and Procedure §1909, at 319 (2d ed. 1986). Since it is, on the contrary, clear that the University cannot adequately represent the applicants, they have the right to represent themselves.

That result will be in line with all similar cases but one.(25) In previous suits brought to challenge public affirmative action programs, the courts have recognized that the interests of a program's beneficiaries are distinct enough to cast doubt on whether they will be

24 Status as *amici curiae* will not enable the applicants to protect their interests adequately, because in order to do so they must be able to take part in discovery and in the conduct of trial. In particular, applicants must be allowed to participate in establishing a complete and sophisticated evidentiary record, for their own sakes and for that of this Court. In Bakke, as set forth above in note 20, the Supreme Court lacked a sufficient record to determine the validity of one of the arguments advanced by the University of California. Justice Powell also noted that a showing of bias in test scores and grades might support the University's affirmative action programs, but that no such arguments or evidence had been advanced. 43S US at 306 n43. As stated in the text, infra, applicants here intend to advance them. See generally Emma Jones, "Litigation Without Representation: the Need for Intervention to Affirm Affirmative Action," 14 Harv. CR-CL L.Rev. 31 (1979). 25 See note 12, supra.

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adequately represented. See, e.g., Jansen, 904 F.2d at 343; Associated General Contractors, 130 F.R.D. at 11 (noting that applicants had a "different position and interest from that of the City" and might present "different insight, arguments, and claims"); see also Michigan AFL-CIO, 103 F.3d at 1247 ("One would expect that the Chamber, as a target of the statutes' regulations, would harbor an approach and reasoning

that will differ markedly from those of the state...").

The same basic difference in interests exists here. While the University has a stake in the integrity of its admissions program, it is accountable to the general public, including those students, parents, alumni, and state legislators who do not support affirmative action. Given its position as a public entity, it cannot advance the applicants' interests as beneficiaries and supporters of affirmative action without balancing them against countervailing forces within and without the University. See In re Sierra Club, 945 F.2d at 780.(26)

Further, the University cannot be expected to raise all available defenses, or to raise them in the same manner as applicants will. Defenses already upheld by the Supreme Court would include, as applied here, the remedying of the University's own past discrimination; the University's avoidance of becoming a passive participant in existing discrimination; and the University's interest in diversity. See City of Richmond v. J. A. Croson Co., 488 US 469, 492 (1989) (Opinion of O'Connor, J.); Regents of the University of California v. Bakke, 438 US 265, 311-312 (1978). The list is not exhaustive; there are other rationales for taking account of race not yet addressed by the Supreme Court. See Hunter by Brandt v.

26 As applicants for intervention in the companion case against the University's undergraduate college have argued, the University is especially subject to such balancing needs given its reliance on public and private funding. See Motion to Intervene by Ebony Patterson, et al., Gratz v Bollinger, pp. 10-11.

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Regents of the University of California, 971 F. Supp. 1316, 1324-1330 (CD CA 1997).

As an initial matter, the University has an interest in not raising its own past or present discrimination as a basis for its affirmative action program; to do so could subject it to legal liability. See Baker, 504 F. Supp. at 849.

For similar reasons, it is not in a position to expose racial and sexual discrimination and harassment in its undergraduate college. Due to their effect on student performance, these phenomena may well be held to provide a compelling state interest in altering admissions criteria for minority and women students--for example, they might establish that affirmative action is necessary to avoid the University's becoming a passive participant in existing discrimination. Out of institutional solidarity, the University may also hesitate to expose these conditions at other universities from which it draws its applicant pool. Nor is it likely to present evidence, as will applicants, showing that a hostile environment for minority and women students at the Law School will be created--or exacerbated, as the case may be--by the elimination of affirmative action.

Applicants, then, are in a position to present a fuller and more vigorous set of defenses based on discrimination than is the University. New York Public Interest Research Group, Inc. v. The Regents of the University of the State of New York, 516 F.2d 350, 352 (CA 2 1975) (likelihood of a "more vigorous presentation" meets requirement of Rule). They also intend to present defenses arising out of their interest in diversity in the broadest social terms. See United States v. Oregon, 839 F.2d 635, 637-638 (CA 9 1987) (where applicants for intervention wished to challenge mental health facility conditions in broad terms and federal government's regulatory suit challenged narrower set of conditions,

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intervention was granted).

Further, applicants have asserted an interest in an admissions program that takes account of gender as well as race--an interest that is likely to be utterly underrepresented by the University. While plaintiff has not challenged the anti-sexist components of the Law School's admissions program, it is clear that they would be legally vulnerable if plaintiff prevailed,²⁷ and the University has thus far expressed no intention of raising the question of affirmative action for women. See Doherty, 487 F. Supp 1291 (in case brought to challenge affirmative action for minorities, Women's Law Caucus permitted to intervene).

These differences alone demonstrate that applicants' interests and likely approach are more than sufficiently distinct from those of the University. Moreover, it is possible that the applicants' interests will turn out to be in conflict with those of the University.

First, the number of black freshmen at the University dropped by 33 % between 1995 and 1997--from 602 to 400.²⁸ In the same period, the number of black law students in all three years of study dropped by 27%--from 104 to 76.²⁹ While it is too early to be certain, it seems that the University scaled back its affirmative action program in response to Proposition 209, Hopwood II, or some other signal event in the national campaign against affirmative action. If so, the University clearly cannot adequately represent affirmative action beneficiaries and supporters. The mere possibility demonstrates the force of the argument that the University has to balance too many interests to do justice to those of the applicants.

²⁷ They would be subject to intermediate rather than strict scrutiny. Craig v. Boren, 429 US 190 (1976).

²⁸ Cross and Slater, "Special Report," p. 20.

²⁹ 1995-1996 figures: "The Verdict is in: Blacks Continue to Flock to Highly Ranked Law Schools," 11 *Journal of Blacks in Higher Education* 54 (1996). 1997-1998 figures provided by the Research Department of the *Journal of Blacks in Higher Education* (article to be published in Spring 1998).

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Second, applicants intend to present evidence challenging the validity of the Law School Admission Test (LSAT) for law school admissions purposes, particularly in the absence of an affirmative action program to compensate for the test's unfair impact on black and other minority applicants and on women applicants of all races. The University will probably be at odds with this approach, because of its interest in its current admissions system, because the American Bar Association requires the test for accreditation, and because, if a factual basis for a finding of disparate impact on minorities and women were established, the University would be in violation of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.⁽³⁰⁾ Guardians Assn. v. Civil Service Commission of the City of New York, 463 US 582, 584n2 (1983) (disparate impact establishes a violation of Title VI under its implementing regulations); Alexander v. Choate, 469 US 287, 293-294 (1985) (same); Larry P. v. Riles, 793 F.2d 969 (CA9 1984) (use of IQ tests for tracking violated Title VI due to disparate impact on black students); Sharif v. New York State Dept. of Education, 709 F. Supp. 345 (SD NY 1989) (disparate impact claim available under Title IX). From applicants' perspective, exposing the unfairness and unreasonableness of the LSAT is vital to the protection of their interests.

Since 1970, the existence, maintenance, and expansion of affirmative action at the University of Michigan have been due in large part to an independent student movement that has pressed its demands on the Administration. It is essential that students and prospective students have an independent voice in this lawsuit.

Even absent the possibility of a conflict between their interests and those of the University, applicants are entitled to intervene as of right. They have broader interests at

30. 42 USC s2000d et seq. and 20 USC s1681a et seq., respectively.

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stake than does the University because they represent, through personnel and approach, the national importance of affirmative action and its crucial significance to black and other minority communities and to women. Their asserted interest in the University's admissions program is also broader because it includes the defense of any existing anti-sexist provisions and practices in the program.

Applicants' interests are also deeper than the University's, because they imbricate questions of entrenched educational and social inequality and the effect of existing racism and sexism on students. While the University's most prudent course may be to defend its affirmative action program by invoking--and by only invoking--the most clearly established legal principles that do not potentially subject it to liability, in particular the compelling state interest in diversity upheld in Bakke, applicants intend to raise fundamental questions of equality.

Finally, applicants' interests are more urgent than the University's. Each of them will be personally, permanently, and profoundly affected by the outcome of this lawsuit. It will decide what they can do, and how they can do it. It will decide what they receive from society, and what they give back. It will decide whether they can reasonably expect to meet others as equals and fellows. It will decide, in the end, whether they will look forward to a life of dreams realized, or chafe under the prospect of a life of dreams deferred.

B. PERMISSIVE INTERVENTION IS ALSO APPROPRIATE

In addition to meeting the requirements for intervention as of right, applicants have met those establishing a basis for a discretionary grant of permissive intervention. Rule 24(b) provides that a court may grant intervention if "the applicant's claim or defense and

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the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b)(2). In addition, a court should consider the timeliness of the application and whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Purnell, 925 F.2d at 950, 951.

As is shown above, applicants will raise defenses that have numerous questions of law and fact in common with the main action. Their application is also timely. Finally, their intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Therefore, permissive intervention is appropriate.

CONCLUSION

For all the reasons set forth in this memorandum, applicants ask this Court to grant

the accompanying Motion for Intervention.

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