

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

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ERIC RUSSELL, individually and :
on behalf of all similarly-situated persons, and : Hon.
TOWARD A FAIR MICHIGAN, :
a Michigan non-profit corporation, : No- AZ
:
Plaintiffs, :
:
v. :
:
DAVID A. BRANDON, LAURENCE B. DEITCH, :
OLIVIA P. MAYNARD, REBECCA MCGOWAN, :
ANDREA FISHER NEWMAN, ANDREW C. RICHNER, :
S. MARTIN TAYLOR, KATHERINE E. WHITE, :
MARY SUE COLEMAN, in their official capacities, :
THE REGENTS OF THE UNIVERSITY OF MICHIGAN :
and :
JENNIFER GRANHOLM, in her official :
capacity as Governor of Michigan, :
:
Defendants.

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There is no other pending or resolved state civil action arising out
of the transaction or occurrence alleged in the complaint.
A federal civil action between similar parties is pending before
U.S. District Court Judge David Lawson, 06-15024. MCR 2.113(C)(2)(a).

Kerry L. Morgan (P-32645)

CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES the above named Plaintiffs and Class, by and through its attorneys and pursuant to MCR 2.605 and in support of its Complaint against the Defendants states as follows:

1. This is an action for a declaratory judgment and injunctive relief, seeking to ensure that Defendants accurately interpret and immediately comply with Article I, Section 26, of the Michigan Constitution, which went into effect on December 23, 2006. Section 26 prohibits public institutions from considering “race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” MICHIGAN CONST., art I. § 26.

2. Defendants have expressed, in various ways, their view that Section 26 does not or may not forbid the University of Michigan ("UM") from granting racially preferential treatment to minority applicants for admission and that even if it does, UM should not be required to comply with the amendment, at least with respect to current admissions and financial aid decisions. Accordingly, this action for injunctive relief and a declaratory judgment action pursuant to MCR 2.605 is appropriate.

3. This Court has jurisdiction under MCL §§ 600.601 and 605. Venue is proper in this Court pursuant to MCL §§ 600.1621 and 1615.

PARTIES

4. Plaintiff Eric Russell is a resident of Auburn Hills, Michigan. He has applied to the University of Michigan's School of Law (the "Law School"). He is not a member of any ethnic or racial minority and is therefore not eligible for preferential treatment under UM's current admissions policies or procedures.

5. Toward A Fair Michigan ("TAFM") is a 501(c)(3) Michigan Domestic corporation that was formed to facilitate debate on the proposed constitutional amendment, to

ensure that the will of the people of Michigan, as reflected in their vote on November 7, 2006, would be carried out by the elected officials of Michigan, and to advise people of their rights under the newly-enacted constitutional provision. TAFM has had to divert resources from its primary mission to investigate defendants' intention to comply with the law and has had its ability to accurately advise people of their rights under the new provision frustrated as a consequence of defendants' statements and conduct.

6. Defendants David A. Brandon, Laurence B. Deitch, Olivia P. Maynard, Rebecca McGowan, Andrea Fisher Newman, Andrew C. Richner, S. Martin Taylor, and Katherine E. White (the "Individual Regent Defendants") are Regents on defendant Regents of the University of Michigan (the "Regents"). The Regents is a corporate body established by Article 8, § 5 of the Michigan Constitution and is responsible for the operation of UM, including the admissions policies of its various schools and colleges.

7. Defendant Mary Sue Coleman is the President of UM, and, as a consequence, a member *ex officio* of the Regents. As President, she is legally responsible for both recommending policies and practices to the Regents and for implementing the Regents's decisions concerning policies and practices.

8. Jennifer Granholm is the Governor of the State of Michigan. As such, she has a sworn duty to uphold and enforce the Constitution and law of Michigan.

CLASS ACTION ALLEGATIONS

9. Plaintiffs bring this action on behalf of a class of individuals who are current and future applicants to any of the colleges or schools operated by defendants and who are not members of the groups that defendants would otherwise prefer on the basis of race, sex, color, ethnicity, or national origin.

10. The class is numerous and some members of the class will not be identified until they apply. Accordingly, joinder is impracticable.

11. Questions of law predominate among all members of the class in that any legal issues relating to the meaning or validity of Section 26 will be equally applicable to any and all class members.

12. Plaintiffs' claims are typical of the claims of the other members of the class, and plaintiffs will fairly and adequately represent the interests of the class.

13. The maintenance of a class action is superior to other available methods of adjudication in promoting the convenient administration of justice because, *inter alia*, final declaratory and equitable relief is appropriate with respect to the class. The Plaintiff class is proper for certification under MCR 3.501.

CLAIM FOR RELIEF

14. UM is a state-operated university in the State of Michigan. Under Article 8, § 4 of the Michigan Constitution, the legislature of the State of Michigan is obligated to provide funds for UM.

15. UM currently uses, and in the past has used, an admissions system that provides preferential treatment to members of certain racial or ethnic groups, including Hispanics, African Americans, and Native Americans.

16. Applicants have until February 15, 2007 to apply to the Law School for the first year class matriculating in the Fall of 2007.

17. In the election held on November 7, 2006, Proposal 2 was a ballot initiative to amend the Constitution of the State of Michigan by adding an Article 1, § 26 thereto. Among other things, the proposed amendment provided that the "University of Michigan . . . 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."

18. A majority of the citizens of Michigan voted in favor of Proposal 2, and it passed.

19. Pursuant to Michigan law, Article 1, Section 26 of the Michigan Constitution became effective on December 23, 2006.

20. Defendant Coleman has stated that the University of Michigan cannot change its admissions and financial aid systems in the middle of an "admissions cycle," and, accordingly, could not be expected to comply with Section 26 when it took effect. She has pledged to "overcome the handcuffs Proposal 2 [i.e., Article 26] attempts to place on our reach for greater diversity." The Defendants have also stated it would be "virtually impossible" to comply with Article 26 this admissions cycle. Likewise, they have stated that "serious controversies exist regarding the validity and effect of the Amendment" and that they would have to "guess as to what the Amendment requires them to do" if required to comply with the law.

21. On November 8, 2006, the Coalition to Defend Affirmative Action and other plaintiffs filed suit in the United States District Court for the Eastern District of Michigan. The suit challenged Section 26 as violative of the Equal Protection Clause and the First Amendment. The suit also claimed that Section 26 was preempted by the federal civil rights act. On December 11, 2006, Defendant Regents (among others) filed a cross-claim against Defendant Granholm in an ongoing case in federal court. The cross-claim asked the court to declare that Section 26 cannot be applied against the admissions and financial aid decisions of UM (among others) when it becomes effective, and to enjoin it from being applied to those decisions until the end of the current admissions and financial aid cycle on July 1, 2007. Upon information and belief, each of the Individual Regent Defendants supported Regents' effort to obtain such a declaration and injunction. This request was made in federal court despite the fact that it involved an interpretation of a new state constitutional provision.

22. On December 18, 2006, Defendant Granholm and Attorney General Cox signed a stipulation agreeing that the federal district court judge should order that Section 26 not go into effect as to the admissions and financial aid decisions of the UM (as well as those of Michigan State University and Wayne State University) until the end of the current admissions and financial aid cycle.

23. The following day, on December 19, 2006, the federal district court judge entered an order (the "December 19 Order") enjoining the application of Section 26 to the admissions and financial aid decisions of UM (and the other universities) until July 1, 2007.

24. Russell and TAFM appealed that order on December 21, 2006, and sought an emergency stay of the December 19 Order from the United States Court of Appeals for the Sixth Circuit.

25. On December 29, 2006, the Sixth Circuit Court of Appeals granted an emergency stay of the federal district court's order. Accordingly, the December 19 Order is not currently in effect.

26. In defending the December 19 Order, each of the defendants herein asserted that Section 26 is either unclear and/or is likely to be interpreted by Michigan courts as permitting the consideration of race, sex, ethnicity, national origin, or color to further the States' interest in a diverse student enrollment.

27. Defendants have no legal basis for their position that Section 26 should not apply immediately to the admissions or financial aid decisions of schools or colleges in UM.

28. Defendants have no legal basis for their position that Section 26 permits the use of race, sex, ethnicity, national origin or color in the UM's financial aid or admissions decisions to achieve a diverse class.

29. Given the controversy between Plaintiffs and Defendants over the meaning and/or applicability of Section 26 to Defendants, declaratory and injunctive relief is appropriate.

30. If not enjoined Defendants will continue to employ systems of admissions and financial aid for the Law School that will authorize offers of admission and financial aid in violation of Section 26 in that the decision to make such offers will be based in some part on a preference based upon the applicants' race, sex, color, ethnicity, or national origin.

31. If not enjoined, Defendants will continue to employ systems of admissions and financial aid for other UM schools and colleges that similarly will violate Section 26.

32. If Defendants are not enjoined, Plaintiff Russell's application for admission to the Law School will be treated unequally in that he will be disadvantaged by preferences given to other applicants based upon consideration of those other applicants' race, color, ethnicity, or national origin, in violation of Section 26.

33. If Defendants are not enjoined, TAFM will continue to have its resources diverted as a consequence of Defendants' actions.

WHEREFORE Plaintiffs request a judgment:

1. Declaring that Section 26 of the Michigan Constitution applies to the University of Michigan's current admissions and financial aid decisions and that Coleman, the Regents, and the Individual Regent Defendants have no legal excuse to avoid complying with it immediately;

2. Declaring that Section 26 of the Michigan Constitution precludes consideration of race, sex, ethnicity, national origin and color in making any admissions or financial aid decisions at the University of Michigan;

3. Enjoining Defendants from employing any policy, procedure, or system of admissions or financial aid for any of the schools or colleges at the University of Michigan that is based in any way or part on consideration of the applicants' race, color, ethnicity, or national origin;

4. Awarding appropriate attorney fees and costs as authorized by law; and

5. Granting any other relief that is appropriate.

Respectfully Submitted,

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