UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*, Plaintiffs, v. JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district, Defendants.	Case No. 06-15024 Hon. David M. Lawson CONSOLIDATED CASES This filing pertains to ALL CASES

- and -

CHASE CANTRELL, *et al.*, Plaintiffs, v. JENNIFER GRANHOLM, in her Official Capacity as Governor of the State of Michigan, Defendant.	Case No. 06-15637 Hon. David M. Lawson

MOTION TO INTERVENE

Jennifer Gratz respectfully moves to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. In support of this motion, movant submits the accompanying brief, a proposed answer in intervention pursuant to Fed. R. Civ. P. 24(c), and her statement.

Pursuant to Local Rule 7.1, movant conferred (or attempted to confer) by email with all counsel regarding the relief requested in this motion. Defendant-Intervenor Eric Russell consents to the relief sought by the motion. The Coalition Plaintiffs and Cantrell Plaintiffs do not consent to the motion. No reply was received from the Attorney General or from counsel for the University Defendants before the time of this filing.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

Issues Presented

1. Has movant met the requirements for intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2)?

2. Should movant be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)?

Leading Authorities

FED. R. CIV. P. 24

Coalition To Defend Affirmative Action v. Granholm, 240 F.R.D. 368 (E.D. Mich. 2006), *aff'd*, 501 F.3d 775 (6th Cir. 2007)

Coalition To Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2007)

Coalition To Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2007)

Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999)

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997)

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Jennifer Gratz hereby submits this memorandum in support of her motion to intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure.

BACKGROUND

The basic facts concerning the underlying claims of the two plaintiff groups in these consolidated cases are now well known to the Court. The specific facts relevant to this motion are as follows.

In an opinion and order dated December 27, 2006, this Court granted Eric Russell's motion to intervene as of right in this matter. Russell was then an applicant to the University of Michigan Law School ("UMLS") and Wayne State University Law School, and the Court held that he met all four requirements for intervention as of right under Rule 24. *Coalition to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 374-77 (E.D. Mich. 2006) ("*Coalition I*"), *aff'd on other grounds*, 501 F.3d 775 (6th Cir. 2007). The Sixth Circuit has agreed with much of the reasoning that supported that conclusion. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006) ("*Coalition II*") (concluding that Russell "has standing to participate in the case because he has applied for admission to the University of Michigan School of Law for matriculation in 2007 and accordingly has a direct interest in whether Proposal 2 applies to the Law School's admissions decisions this year"); *id.* at 245 (finding that this Court's grant of Russell's motion "confirm[ed] that the stipulated injunction did not account for the concerns of all interested parties"); *id.* (noting that this Court's conclusion that other parties may not take Russell's interests into account "seems to be an understatement"). *See also*

Coalition to Defend Affirmative Action v. Granholm, 501 F.3d 775, 783 (2007) ("*Coalition III*") (stating that the "minority-student intervenors in [*Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999)] . . . , *like Eric Russell*, no doubt had a substantial legal interest in the litigation") (emphasis added).

The Cantrell Plaintiffs have moved for summary judgment with respect to Russell on the ground that he no longer has a protectable interest in this matter. *See* Doc. 172. Russell has opposed that motion. *See* Doc. 182. A hearing on that motion is set for February 6, 2008, at 2:30 p.m. *See* Doc. 210.

Jennifer Gratz is a former resident of Michigan and a graduate of the University of Michigan at Dearborn. She is white. She has recently decided to apply to law school, and intends to apply to the UMLS later this year for matriculation in the fall of 2009 or 2010. She also intends to apply for financial aid from each of the law schools to which she applies, including the UMLS. *See* Statement of Jennifer Gratz (attached hereto as Ex. A). As the former Executive Director of the Michigan Civil Rights Initiative Committee, a ballot-question committee under Michigan law that was formed to support the initiative that eventually became Proposal 2, Gratz firmly believes that the UMLS (and all other entities subject to Proposal 2) should make a decision on her applications for admission and financial aid, as well as the applications of others who so apply, without consideration of the factors prohibited by Proposal 2. *Id.*

Gratz seeks to intervene pursuant to Fed. R. Civ. P. 24. As required by Rule 24(c), a pleading accompanies this motion (attached hereto as Ex. B).

ARGUMENT

I. GRATZ IS ENTITLED TO INTERVENE AS OF RIGHT.

Rule 24(a)(2) provides that, upon timely application, the court shall permit anyone to intervene as of right who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Persons seeking to intervene under Rule 24(a)(2) must establish the following four elements:

> (1) that the motion to intervene was timely; (2) that they have a substantial legal interest in the subject matter of the case; (3) that their ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent their interest.

Grutter v. Bollinger, 188 F.3d 394, 397-98 (6th Cir. 1999). Gratz satisfies each of these requirements.

A. Timeliness

The Sixth Circuit has stated that timeliness "should be evaluated in the context of all relevant circumstances" and has identified five factors that should be considered:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in

> the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990).

The critical inquiry for measuring timeliness is when did the movant know or when should he have known that his interests were not being adequately represented. For example, in finding an application for intervention timely in *United Airlines v. McDonald*, 432 U.S. 385, 394 (1977), the Supreme Court explained that "as soon as it became clear to the [intervenor] that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests." Similarly, in *Jansen*—which involved a dispute over a consent decree establishing an affirmative action program for the Cincinnati fire department—the Sixth Circuit found timely an application for intervention by a class of black applicants and employees even though the motion was not brought until after the summary judgment papers had been submitted. The Sixth Circuit explained that while "the proposed intervenors knew their interest would be affected [by the suit]," "[t]hey were not aware, however, that their interest was inadequately represented by the City until the City responded to the plaintiffs' summary judgment motion" and failed to make arguments that the intervenors deemed important. 904 F.2d at 341.[1] Indeed, in this case, Russell

[1] *See also Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989) (holding that a district court abused its discretion in denying motion to intervene as untimely where local government responsible for maintaining local jails moved to intervene after district court entered remedial order that restricted transfer of prisoners from local jails to state facilities); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984) ("Although this [patent] litigation had progressed to

did not seek to intervene as a defendant until it became clear that none of the defendants, including the Attorney General, adequately represented his interests as a nonminority applicant to Michigan law schools. Accordingly, this Court held that Russell's motion, unlike those of other parties seeking to intervene, was timely. As the Court noted:

> None of the parties save Russell has offered an explanation why they waited over a month to join the suit. Russell's individual interest became apparent when the University defendants sought a delay in the effective date of the state constitutional amendment and reached an agreement to that effect with others in the lawsuit. Since Russell's own admission prospects may be affected by that agreement, it was sensible for him to seek intervention when that information came to light.

Coalition I, 240 F.R.D. at 374.

Finally, timeliness is construed more liberally when movants seek to intervene as a matter of right. *See, e.g.*, *Ozee v. American Council On Gift Annuities*, 110 F.3d 1082, 1095 (5th Cir. 1997) (holding that although motion for permissive intervention was untimely, motion for intervention as of right filed six months later was timely given more lenient standard); *United States v. International Bus. Machs. Corp.*, 62 F.R.D. 530, 541 (S.D.N.Y. 1974) ("[W]here . . . intervention as a matter of right is sought, courts have been more liberal in exercising their

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final judgment, and [inventor] knew of his interest in the litigation for some time, he had no reason to seek intervention prior to the decision of [the assignee of the patent] not to appeal."); *Piambino v. Bailey*, 610 F.2d 1306, 1321, 1325 (5th Cir. 1980) (noting that "the question of timeliness is at least partially linked to the question of adequate representation," and holding that a February 1977 motion for intervention was timely where intervenor-trustee knew of his interest in June 1976 but was being well represented until January 1977); *Allegheny Corp. v. Kirby*, 344 F.2d 571, 574 (2d Cir. 1965) ("[T]he timeliness requirement . . . is related to the question whether the [intervention applicants'] interests are or may be inadequately represented, for whether an application to intervene is prompt or tardy also turns on when the interests of the proposed intervenors were no longer properly represented.").

discretion over the timeliness requirement.").

Under these principles, Gratz's motion is timely. She seeks to intervene to protect her interests as an applicant to educational institutions governed by Article I, Section 26 of the Michigan Constitution. This Court already has held that to be an adequate purpose for intervention as a matter of right. *See Coalition I*, 240 F.R.D. at 374, 377.

Gratz has very recently decided to apply for admission to law schools, and specifically to the University of Michigan Law School. Thus, she has moved to intervene promptly after it became apparent to her that she has an interest in this lawsuit as a future applicant. *Cf. id.* at 374 (concluding that it was sensible for Russell to seek intervention when it "came to light" that his "own admission prospects may be affected" by the litigation). Moreover, Eric Russell, and only Russell, currently represents Gatz's interests in this suit. Gratz seeks intervention in the case to ensure that her interests *remain* adequately represented in the event that the Cantrell Plaintiffs succeed in dismissing Russell from the case, either in their pending motion or in future such attempts. As the cases cited above make plain, it is only if and when Russell is no longer a party to this case that Gratz's interests would be inadequately represented and the "timeliness" clock ought to start running. *See, e.g.*, *McDonald*, 432 U.S. at 394; *Jansen* 904 F.2d at 341.

No prejudice to the other parties could possibly result from the miniscule delay between the time that Gratz concluded that she had an interest in this litigation and the time of this motion. Moreover, there is little prejudice at all resulting from the progress of the litigation generally. Gratz is represented by the same attorneys as represent Russell; they are obviously

familiar with the case. Movant needs no additional discovery beyond that being sought by Russell (or which he would seek as a party). In short, Gratz would simply join Russell as an intervening defendant and continue the litigation should he become unable to represent her interests. *See, e.g., Triax Co. v. TRW, Inc.*, 724 F.2d at 1228 (finding that "[a]lthough this litigation has already had a protracted history, and parties have an interest in a final resolution of their claims, [alleged patent infringer's interest] does not outweigh [intervenor patent-inventor's] interest in seeking appellate court review of the finding that his patents are invalid," and therefore holding that the alleged patent infringers' "interests will not be prejudiced substantially by granting . . . intervention for purposes of appeal."). The fact that parties are frequently permitted to intervene *after a case has proceeded to a final judgment* demonstrates that the timing of Gratz's intervention could not prejudice any other party. *See id.*; 15A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3902.1 (2007) ("Many cases establish that intervention can be sought in the district court for the purpose of appealing a judgment that has an adverse effect on the intervenor.").

Finally, the "unusual circumstances" factor here militates in favor of the timeliness of this motion. The Cantrell Plaintiffs have moved to dismiss Russell on the ground that he no longer has an interest in this litigation. As Russell has noted in opposition, this motion is virtually unprecedented. *See* Russell's Resp. to the Cantrell Plaintiffs' Mot. for Summ. J. as to Def.-Intervenor Eric Russell ("Russell's Opp. to Cantrell SJ Mot.") (Doc. 182) at 13 n.5. Indeed, the problem of a class of people with similar interests, some of whose interests may expire

during the course of the litigation, is usually solved by the class-action procedure. *See Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) ("[C]lass-action treatment was particularly important in this case because 'the claims of the individual students run the risk of becoming moot' and the 'the class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court.' ") (ellipses in original); *Johnson v. Opelousas*, 658 F.2d 1065, 1069-70 (5th Cir. 1981) (finding, in a suit by a 16-year old challenging a curfew, that "the district court abused its discretion in denying class certification [based upon doctrine of necessity] because it failed to consider the risk of mootness in th[e] litigation," and noting that "[c]ertification of a class under Rule 23(b)(2) is 'especially appropriate where, as here, the claims of the members of the class may become moot as the case progresses' ") (*quoting Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979), *aff'd*, 643 F.2d 995 (4th Cir. 1981)); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 326 (D. Mass. 1997) (finding that "all too often student-initiated disputes escape review," and certifying class action by disabled students against university—over defendants' argument that a class was not necessary for plaintiffs to obtain relief—because "[s]tudents graduate, transfer, drop out, move away, grow disinterested, fall in love," and "[t]he class action mechanism solves this potential mootness problem"). *See also* 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1785.2, at 182 (2d ed. 1990) ("[I]n cases in which the mootness of the plaintiff's claim before the action is terminated is highly likely, class action status may be vital to the continuation of the suit."). In a case such as this one, unfortunately, Sixth Circuit precedent precludes defendant class actions. *Thompson v. Board of Educ. of the*

Romeo Cmty. Schs., 709 F.2d 1200, 1204 (6th Cir. 1983) (holding that Rule 23(b)(2) authorizes certification only of plaintiff classes). *See also* 7A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 1775, at 461-62 (2d. ed. 1986) (citing *Thompson* and noting that "the better view" of Rule 23(b)(2) "is to restrict its applicability to plaintiff classes seeking injunctive relief"). Thus, if Russell—who in practice speaks in this case for the interests of all current and prospective students who share his desire to have their admissions, transfer, financial aid, and other applications considered under a racially nondiscriminatory regime—is removed from this litigation, then the special problem noted by the *Guckenberger* court will arise here: students facing significant risk of legal impairment of their interests will be unable to defend those interests in court.[2] And the only means of solving that problem will be to allow the intervention of another applicant who can adequately represent these interests. *See Triax Co.*, 724 F.2d at 1228 (finding that once patent-holder's "reasonabl[e] . . . expect[ation]" of adequate representation of his interests was not borne out by developments in the case, he could timely intervene to avoid being "collaterally estopped" in future suits). Thus, this case presents "unusual circumstances" that weigh in favor of the timeliness of movants' application.

[2] Indeed, Gratz is in the same position as the applicant- and student-defendants who were granted intervention as of right in *Grutter* and *Gratz*, and who, like Gratz, argued that they had a "substantial legal interest in educational opportunity." *Grutter*, 188 F.3d at 398; *see also id.* at 397, 401 (holding that intervention as of right was necessary for seventeen applicant/student-defendants in *Gratz* and forty-one applicant/student-defendants in *Grutter*).

B. Substantial Interest and Impairment

The Sixth Circuit has rejected the notion that a "substantial interest" requires a specific legal or equitable interest, or the interest needed to establish standing in federal court. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Rather, the Circuit espouses an expansive view of the "substantial interest" factor, and the "inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Id.*

Here, this Court already has held that an applicant to one of the universities subject to Proposal 2 has the interest required by Rule 24. *Coalition I*, 240 F.R.D. at 375 ("Eric Russell is situated similarly to the intervenors in *Grutter v. Bollinger*, in that if the present plaintiffs are successful in obtaining a ruling that the constitutional amendment is invalid, Russell's chances of gaining admission to the University of Michigan law school may be diminished."). *See also Grutter*, 188 F.3d at 399 (holding that the intervenors' interest in "gaining admission to the University" was a direct and substantial interest sufficient for purposes of Rule 24(a)). In affirming this Court's denial of other parties' motion to intervene in this matter, the Sixth Circuit adopted this interpretatation of *Grutter*. *Coalition III*, 501 F.3d at 783 (explaining that organization-intervenor in *Grutter* had a sufficient Rule 24 interest and were "directly affected by the challenged policy" because some of its members were " 'parents or grandparents of prospective African-American and Latino students in the State of Michigan' ").[3]

[3] In addition to the interest mentioned by this Court in *Coalition I*, Gratz also has an interest in being treated equally in their applications for admission and financial aid. That interest, alone, has been recognized by the Supreme Court as one sufficient to support Article III standing. *See, e.g., Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[A] plaintiff who challenges an ongoing race-

The only difference between Gratz, on the one hand, and Russell, on the other, is that while Russell already had applied to the law school at the time he intervened, and Gratz intends to apply in the near future. That difference is inconsequential, as the Sixth Circuit's opinion in *Grutter* makes plain. *See* 188 F.3d at 397 (permitting intervention of right for "17 African-American and Latino/a individuals who have applied *or intend to apply* to the University," "21 undergraduate students of various races who currently attend [various undergraduate institutions], all of whom *plan to apply* to the law school for admission," and "a paralegal and a Latino graduate student at the University of Austin who *intend to apply* to the law school for admission") (emphasis added and brackets in original). Indeed, the fact that Gratz plans to apply would not affect their Article III standing, were that the issue here. *See, e.g.*, *Gratz*, 539 U.S. at 260-62 (holding that plaintiff challenging affirmative action policies had standing because he "demonstrated that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions," and finding that "whether [he] 'actually applied' for admission as a transfer student is not determinative of his ability to seek injunctive relief" because if he "had submitted a transfer application and been rejected, he would still need to

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conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is the inability to compete on an equal footing.") (internal quotation marks omitted); *Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 658, 666 (1993) (holding that contractors' association had standing to challenge "preferential treatment to certain minority-owned businesses in the award of city contracts" regardless of whether "one of its members would have received a contract absent the ordinance," and explaining that the " 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit").

allege an intent to apply again in order to seek prospective relief"); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 595-96 (E.D. Va. 2004) (holding that illegal immigrant had standing in early 2004 to challenge admission policies at University of Virginia and William & Mary because he planned to apply for admission for the fall of 2005); *Weser v. Glen*, 190 F. Supp. 2d 384, 394 (E.D.N.Y. 2002) (holding that a "plaintiff seeking redress for the ongoing denial of an opportunity to compete 'on an equal footing' for admission "need only show that he will apply for admission in the relatively near future"). It is this very same interest that many of the Coalition's named plaintiffs claim in this case and which they state is sufficient for certification as a class. *See, e.g.*, Pl. BAMN's Mot. to Certify Classes and to Be Appointed Lead Counsel (Doc. 121) at 20-21 (noting that many plaintiffs "plan" or "intend" to apply to various Michigan schools). Accordingly, Gratz's interest is sufficient to meet the lower standard of Rule 24.

This Court has also already held that the requirement of impairment is minimal, and that Russell satisfied it because a declaration that Proposal 2 is unconstitutional could have affected his chances for admission. *Coalition I*, 240 F.R.D. at 375 (Russell's chances for admission "may be diminished"). *See also Grutter*, 188 F.3d at 399. For that same reason, and also because of the likelihood that they may not be treated equally in either their admissions or financial aid applications should plaintiffs here be successful, Gratz meets the minimal requirement of "impairment."

C. Adequate Representation

To satisfy the element of inadequate representation, proposed intervenors need not show that the representation of their interests *will* be inadequate, only that there is a potential for inadequate representation or that the existing parties will not make the same arguments as the proposed intervenors. *Grutter*, 188 F.3d at 400; *Jansen*, 904 F.2d at 341. The showing required is minimal. *Grutter*, 188 F.3d at 400.

Again, this element is easily met here because there is a potential that Eric Russell may be dismissed as a party, either as a result of the Cantrell Plaintiffs' pending motion or some such future motion.[4] Both this Court and the Sixth Circuit have already found that Russell's interests were or may not be adequately represented by the Attorney General or any other party. *See Coalition I*, 240 F.R.D. at 377 ("Russell . . . has alleged an individual interest that may not be taken into account by the present parties."); *Coalition II*, 473 F.3d at 245 (noting that it "seems to be an understatement" to say that Russell's " 'individual interest . . . *may not* be taken into account by the present parties' "). In so finding, this Court did not rely upon the other parties' stipulation to suspend the effectiveness of Proposal 2. The Sixth Circuit agreed with this analysis in *Coalition II*, and, indeed, went somewhat further in identifying the weaknesses of any argument that any of the parties (including the Attorney General) adequately represents the

[4] The various reasons why Gratz's interests—and the interests of other applicants to colleges and universities covered by Art. I, § 26—would not be represented adequately by parties other than Russell are set forth in detail in Russell's opposition to the Cantrell Plaintiffs' motion for summary judgment with respect to Russell. Russell's Opp. to Cantrell Pls.' SJ Mot. at 12-17. Gratz incorporates that discussion here.

interests of prospective applicants, precisely because they fought Russell's effort to stay the suspension. *Coalition II*, 473 F.3d at 245, 246-47. The Attorney General is a constitutional officer of the State of Michigan and thus necessarily has broader interests than prospective applicants; as he has done in the past, he may view it necessary to sacrifice the interests of some group of prospective applicants for what he deems the overall good of the State and its institutions. *Grutter*, 188 F.3d at 400 (crediting argument by proposed intervenors that the defendant "is less at risk of harm than the applicants if it loses this case and, thus, that the [defendant[may not defend the case as vigorously as will the proposed intervenors"); *Coalition III*, 501 F.3d at 788 (Kennedy, J., concurring in part and dissenting in part) ("[T]he fact that this court overturned the stipulated injunction on appeal indicates that a more zealous litigation approach could significantly alter the enforcement and ultimately the interpretation of this constitutional amendment. . . . [T]he appellants' interpretation could be more expansive than that of the existing parties."); *Miller*, 103 F.3d at 1248 ("The decision not to appeal certain aspects of the district court's preliminary injunction may amount to sound litigation strategy and a prudent allocation of Michigan taxpayers' money, but this decision also further illustrates how the interests of the state and of the Chamber [of Commerce] diverge.").

Moreover, as a part of the state government, the Attorney General runs an agency that is *regulated* by Proposal 2, in all of its employment and contracting activities. In significant ways, any outcome of this challenge to Proposal 2 will directly affect him and his agency. *Cf. Miller*, 103 F.3d at 1247 ("One would expect that the Chamber [of Commerce], as a target of the

statutes' regulations, would harbor an approach and reasoning for upholding the statutes that will differ markedly from those of the state, which is cast by the statutes in the role of regulator.").

Thus, like the intervenors approved by the Sixth Circuit in *Grutter*, Gratz believes that "there is indeed a possibility that the [Defendants] will inadequately represent the[] [intervenors'] interests, because the [Defendants are] subject to internal and external institutional pressures that may prevent [them] from articulating some of the defenses [of Proposal 2] that the proposed intervenors intend to present." 188 F.3d at 400. The *Grutter* Court credited this concern, finding that the "proposed intervenors . . . have presented legitimate and reasonable concerns about whether the University will present particular defenses of the contested race-[neutral] admissions policies." *Id.* at 401. Here, the course of litigation has already shown this concern to be real, as the Attorney General has pursued only a legal defense of Proposition 2 while Russell vigorously contests the Plaintiffs' factual contentions. Gratz intends to do the same.

For all these reasons, Gratz's interest as an applicant to UMLS is not adequately represented by the Attorney General or any party other than Russell. And even Russell may not adequately represent Gratz's interests throughout the course of this litigation. While Russell may be able to adequately represent Gratz's interests presently, he may not be able to do so for the duration of this case if the Cantrell Plaintiffs' pending motion, or a similar future motion, is granted. And he obviously cannot represent her interests if he is dismissed as a party. Accordingly, Gratz satisfies this and every other requirement for intervention as of right.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT PERMISSIVE INTERVENTION UNDER RULE 24(B).

Rule 24(b) states that upon timely application, anyone may be permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common." As shown above, this motion is timely. Moreover, Gratz's defense is the same as Russell's—that Art. 1, § 26 does not violate any provision of the United States Constitution or federal law. Her claim is, then, a mirror image of the Plaintiffs' claims, which alleges that Art. 1, § 26 *does* violate the United States Constitution and federal law. And Gratz further agrees with and endorses the legal and factual positions thus far advanced by Russell's counsel and expert witnesses in this case.

In a motion pursuant to Rule 24(b), the court may consider other equitable factors like undue delay, prejudice to the original parties, and other relevant factors. *Miller*, 103 F.3d at 1248. Here, the inclusion of an individual whose interests are both personal and important will only sharpen and clarify the issues for the Court. Accordingly, permissive intervention should be granted.

CONCLUSION

For the foregoing reasons, Gratz respectfully asserts that her motion to intervene should be granted.

February 1, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2008, I caused a true and correct copy of the foregoing to be filed with the Court's electronic filing system, which served electronic notification upon the following:

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