UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	:	
Plaintiffs,	:	Civ. No. 2:06-cv-15024-DML-RSW
v.	:	HON. DAVID M. LAWSON
JENNIFER GRANHOLM, *et al.*,	:	HON. R. STEVEN WHALEN
Defendants,	:	
and	:	
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	
Proposed Intervenor Defendants.	:	

BRIEF IN OPPOSITION TO THE UNIVERSITY DEFENDANTS' MOTION FOR A PRELIMINARY INJUNCTION

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, Michigan 48180
(734) 374-8930

MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW Suite 300
Washington, DC 20036
Phone: (202) 833-8400

Issues Presented

1. Does the First Amendment to the United States Constitution protect the people against federal, state, and local governments, or does it, as the moving defendants argue, protect state entities against the people?

2. Is uncertainty concerning the reach of a new provision of a state constitution a sufficient basis for a federal judge to impose a preliminary injunction against its application?

3. Are the moving parties entitled to a preliminary injunction delaying the application of Art. I, § 26 of the Michigan Constitution?

Leading Authorities

United States Const., amend. I

Runyon v. McCrary, 427 U.S. 160 (1976)

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Proposed Intervenors Eric Russell and Toward A Fair Michigan ("TAFM") hereby submit this brief in opposition to the motion of Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University (the "University Defendants") for a preliminary injunction. Although proposed intervenors Russell and TAFM ("Proposed Intervenors") are not yet parties to this action, they ask this court to consider this brief nonetheless given the very short time frame in which this motion is being heard.

Background

In the election held on November 7, 2006, the people of the State of Michigan voted on Proposal 2. Proposal 2 was a ballot initiative to amend the Constitution of the State of Michigan by adding an Article I, § 26 thereto, that would prohibit state entities from discriminating against, or granting preferences to, any individual on the basis of race, sex, ethnicity, color or national origin in certain matters. More specifically, the proposed amendment provided that the "University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."

A majority of the citizens of Michigan voted in favor of Proposal 2 and it passed. Pursuant to Michigan law, Article I, § 26 will become effective on December 23, 2006.

Michigan Constitution Art. XII, § 2 (at the end of 45 days after the date of election, which is December 22, 2006).

Argument

Prior to this motion, most people understood the Bill of Rights of the United States Constitution, as incorporated into the Fourteenth Amendment of the United States Constitution, as protections for the people against the states. The University Defendants now claim that the First Amendment is a bludgeon that can be used by state entities against the people. It is not.

In seeking a preliminary injunction, the University Defendants must show that they have a strong likelihood of success on the merits. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). They do not do so here. Given that, there is no basis for this court to grant a preliminary injunction.

I. THE UNIVERSITY DEFENDANTS HAVE NOT DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CROSS-CLAIM

The University Defendants try to show a likelihood of success on the merits by relying on their First Amendment "right" to consider the race, ethnicity, national origin or sex of applicants in offering admissions to their various colleges. University Defendants' Moving Memorandum ("UD Memo.") 8-13. They also suggest that Art. I, § 26 will not prohibit their use of these criteria in admissions. UD Memo. 14-19. The first argument is just wrong. The second is not one that this Court should consider.

A. The University Defendants Have No First Amendment "Right" To Consider Race Or Other Factors In The Admissions Process

The University Defendants recognize that other states such as California have prohibited the use of certain criteria like race by state entities, including state universities admitting students into their institutions. UD Memo. 2 n.6. They argue, at least implicitly, that their colleagues at those universities were simply not clever enough to come up with this well-established First Amendment argument on which, they claim, they have a substantial likelihood of success. To support this proposition, the University Defendants cite various cases supporting the general idea of academic freedom. But clever as they may be, they cannot cite one case suggesting that state entities -- "arms of the state" for purposes of both the Eleventh Amendment and falling outside the scope of potentially-liable "persons" under 42 U.S.C. § 1983 -- can challenge a state law as a violation of the Fourteenth Amendment. The Proposed Intervenors are not aware of any such case.

As a general rule, the First and Fourteenth Amendments provide protection for the people against the state. State entities do not have "rights" under those provisions. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 140 (1973) (Stewart, J. concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government. To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights."); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (holding that flying a

confederate flag above the state capital did not violate the free speech clause of the First Amendment, noting that "[f]ree speech theory has focused on the government as censor; it has had little to say about the process by which the government adds its voice to the marketplace. Indeed, the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment."); *Student Government Ass'n v. Bd. of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 481 (1st Cir. 1989) (administrative unit of state university "has no First Amendment rights" even though analogous private entities did); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1041 (5th Cir. 1982) (en banc) (television station operated by University of Houston, which in turn is operated by the state of Texas is a "state instrumentalit[y]" and is thus "without the protection of the First Amendment").

Moreover, even private entities, who indisputably *are* protected by the First Amendment, do not have the right to engage in discrimination in selecting students for their schools. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (although "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, . . . it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle" (emphasis in original)). *A fortiori*, state entities do not have the "right" to use race as an admissions criteria.

The University Defendants' argument confuses a First Amendment "right" with an *interest* grounded in the First Amendment. The University Defendants undoubtedly have an "interest" in academic freedom, and that interest may be a compelling one that enables them to

consider a criterion like race in admitting students even in the face of a generally-applicable prohibition against such consideration. But it is a large leap from an "interest," even a compelling one, to a right. None of the cases cited by the University Defendants make that leap. Indeed, several of them (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)) and (*Keyishian v. Bd. of Regents of University of State of New York*, 385 U.S. 589 (1967)) are typical First Amendment cases, with individuals challenging the scope of state investigations and state laws. Another, *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), was a case in which a student challenged his dismissal from the University of Michigan as a violation of the Fourteenth Amendment's Due Process clause.

Both *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) involved students' challenges to systems of admission under the Equal Protection Clause of the United States Constitution. Justice Powell's opinion in *Bakke*, and the Court's opinion in *Grutter*, held only that the state entities in those cases had a compelling governmental *interest* in seeking a diverse student body, and that the defendants there could use race, ethnicity, and national origin in a limited and narrowly-tailored way to achieve that goal. There was no state law involved in either case that defendants were challenging.

Indeed, in *Grutter*, the Court emphasized that narrow-tailoring required colleges and universities (1) to periodically review systems of admission that used race to determine if they were necessary, and (2) to look to states that had prohibited and/or eliminated the use of race and the like as admissions criteria as exemplars in that process. *Grutter*, 539 U.S. at 342

("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). It would be rather odd to require state universities to look toward *unconstitutional* systems as a part of the narrow-tailoring process.

Narrow-tailoring also required that the system of considering race have "durational limits," and those durational limits, according to the Court, could be met by sunset provisions. *Id.* Art. I, § 26 is nothing more than that; it sunsets the use of prohibited criteria beginning on December 23, 2006. A sunset provision is not transformed from an integral part of a constitutionally-valid system to wholly unconstitutional state action simply because it has been adopted by the people of the state.

Finally, the distinction between a First Amendment right and an interest grounded in the First Amendment is illuminated further if one considers other restrictions that states impose upon their own educational institutions. For example, states will frequently dictate that state universities give preference to residents of the state or accept all high school graduates (or all students within the top 10% of their high school classes). *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (preference given for in-state residents). If state universities and state colleges really had First Amendment "rights" against sovereign states to choose their own student bodies, it is hard to understand how states could dictate such policies. Indeed, the universities' ability to

ignore such state direction would be an *a fortiori* case. Favoring out-of-state residents, for example, does not implicate any federal law at all (unlike favoring members of a particular race, which obviously does implicate a whole host of federal laws even if it does not invariably violate them). A "right" to choose one's student body would not even have to be balanced against some other individual right, like the right to Equal Protection. (In-state residents do not have a federal right to better treatment.) That these examples seem far-fetched only demonstrates that the University Defendants' theory here does not follow from the precedents they cite, but stretches those precedents beyond recognition.[1]

B. This Court Should Decline Any Cross-Claim That Seeks To Determine The Scope of Art. I, § 26 And Probability Of Success Cannot Be Shown By Speculating About What Other Courts Might Do

Although it is not altogether clear what their purpose is, the University Defendants spend a great deal of time discussing the possibility that Art. I, § 26 will not prohibit their use of race in admissions. *E.g.*, UD Memo. 14-19. Nonetheless, they do not "ask the Court to decide this broader issue, [but] only that the Court note that it might ultimately be determined that the Amendment allow the Universities to continue their use of these policies through the present cycle and beyond." *Id.* at 15.

[1] Assuming *arguendo* that state universities did have First Amendment rights to use race, ethnicity, and sex as admissions criteria, that would not end the inquiry. Even First Amendment rights must yield to a state's compelling interest in eradicating discrimination. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (private club's right to associate for expressive purposes must yield to the State of Minnesota's interest in eradicating discrimination).

As the University Defendants seem to concede, this Court should not weigh in on the meaning of Art. I, § 26. If that were the purpose of their cross-claim against defendant Granholm, this Court should decline supplemental jurisdiction over that cross-claim. *See* 28 U.S.C. § 1367(c)(1) ("district courts may decline to exercise supplemental jurisdiction over a claim . . . if the claim raises a novel or complex issue of State law"). Indeed, if one believes the University Defendants' claim that the question is a close and difficult one under state law, then this Court should abstain from deciding the First Amendment question altogether, and dismiss both the cross-claim and the complaint, under *Pullman* abstention. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (holding that federal courts should ordinarily abstain where the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question).

The mere possibility that *some other court* might conclude that defendants will not violate Art. I, § 26 if they continue to use race and ethnicity as admissions criteria is not a sufficient basis to show a likelihood of success on the merits. That prong of the preliminary injunction calculus has always been understood to mean that the movant has a strong likelihood of achieving success in the case before the court, not some other case. The University Defendants point to no authority that suggests that a federal court should grant the extraordinary remedy of a preliminary injunction just because the movants are unsure of how to comply with a state law.

II. THE OTHER FACTORS DO NOT SUPPORT GRANTING A PRELIMINARY INJUNCTION

The foregoing analysis demonstrates that the University Defendants cannot show a strong likelihood of success on the merits. The other factors do not weigh heavily in the University Defendants' favor, as would be required to make up for its weak showing on the first factor. Before briefly addressing those factors, a few general points deserve emphasis.

First, for all their talk of equities and fairness, the University Defendants have completely ignored the fact that the people of the State of Michigan presumably have concluded that *their systems of admissions* are unfair to a whole host of applicants. Allowing them to continue with those systems after the people have spoken would exacerbate these injustices.

Second, Art. I, § 26 was not adopted by a secret star chamber, but by the people of Michigan after a very public debate and a public election. If the University Defendants did nothing at all prior to November 7, 2006 to prepare for the possibility that this provision would become a part of Michigan's organic law, they have no one to blame but themselves. Similarly, if they really told thousands of potential applicants about their systems of admissions and financial aid, and never bothered to tell them that Proposal 2 might require them to change some parts of that system, then their behavior has been reprehensible. One hopes, in fact, that they were not quite so irresponsible.

Third, Art. I, § 26 is not hard to comply with. One need only remove certain criteria from

the evaluation of applicants for admission. Even if the University Defendants were correct that this might not be *necessary* for compliance, it certainly is sufficient. The University Defendants suggest that there is great harm in taking potentially gratuitous prophylactic measures to comply with an uncertain law, UD Memo. 13, but they cite no cases at all for the this proposition. And the other concern expressed by the University Defendants -- that they may do "less than the Amendment is ultimately interpreted as requiring" (*id.*), which presumably means that they might end up violating the Michigan Constitution -- is the risk one takes if one insists upon testing the limits of the law. Again, there is no case law to suggest that it is the task of federal judges to protect state agencies from the uncertainties of state law or their own unwillingness to follow the safest course of action.

Finally, the University Defendants could have avoided the alleged harm of uncertainty by asserting a cross-claim in state court right after the election to try and get a state court to interpret Art. I, § 26 as quickly as possible. That they did not, but rather waited for one month, and have now attempted to get a federal court to simply delay the application of the provision while *not* interpreting it, suggests that they feared the outcome of that more obvious and potentially effective strategy.

With these basic facts in mind, the University Defendants' efforts to meet the other elements of the preliminary injunction standard fail. Both their "irreparable harm" and their "public interest" discussion presume that they have shown that Art. I, § 26 will violate the First Amendment to the United States Constitution. UD Memo. 13, 19-20. As shown above, it does

not. Their "weighing of harms" analysis ignores the harms to applicants who will be treated less favorably than others on the basis of race or other prohibited criteria, and exalts the possibility that some other court may conclude that their system does not violate the law.

Conclusion

For the foregoing reasons, the motion for a preliminary injunction should be denied.

/s/ Kerry L. Morgan
KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
Suite 230, Superior Place
20300 Superior Street
Taylor, Michigan 48180
(734) 374-8930

/s/ Michael E. Rosman
MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW Suite 300
Washington, DC 20036
Phone: (202) 833-8400

Certificate of Service

I hereby certify that on December 18, 2006, I electronically filed the foregoing brief in opposition to a motion for preliminary injunction with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

George B. Washington (attorney for plaintiffs)

Leonard Niehoff (attorney for defendants Regents of the University of Michigan, Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University)

James Long (attorney for defendant Granholm)

Margaret Nelson (attorney for intervenor Cox)

/s/ Michael E. Rosman
Michael E. Rosman