IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, *et al.*,	:	
Plaintiffs-Appellees,	:	App. No. 06-2640
v.	:	
JENNIFER GRANHOLM, *et al.*,	:	
Defendants-Appellees,	:	
and	:	
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	
Proposed Intervenor-Defendants-Appellants	:	

EMERGENCY MOTION FOR A STAY PENDING APPEAL

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MOTION

Pursuant to FRAP Rule 8(a)(1)(A), appellants Eric Russell and Toward A Fair Michigan ("TAFM") hereby move for a temporary stay of the district court's amended order dated December 19, 2006 (the "December 19 Order"), which enjoined the application of a recently-enacted provision of the Michigan Constitution, Art. I, § 26, to the following entities: (1) Regents of the University of Michigan, (2) Board of Trustees of the University of Michigan, and (3) Board of Governors of Wayne State University (collectively, the "University Defendants"). The December 19 Order is Exhibit 1 to this motion.

RELEVANT 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 (the "Amendment"), 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. *See* Ex. 2 hereto (text of the Amendment). Paragraph 1 states: "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." Paragraph 6 provides that the remedies available for violations of the Amendment are the same as those available for violations of Michigan anti-discrimination law. (Michigan's primary anti-discrimination law is the Elliott-Larsen statute, Section 801 of

which provides for lawsuits seeking "damages or injunctive relief, or both" by a person alleging a violation. M.C.L. § 37.2801.)

A majority of the citizens of Michigan voted in favor of Proposal 2 and it passed. Pursuant to Michigan law, the Amendment will become effective on December 23, 2006. Michigan Constitution Art. XII, § 2 (at the end of 45 days after the date of election).

Appellant Eric Russell is a resident of Auburn Hills, Michigan. He is white. He has applied to the University of Michigan's School of Law (the "Law School") for matriculation as a first-year student in the fall of 2007. *See* Ex. 3 (Russell Statement).

Appellant Toward A Fair Michigan ("TAFM") is a 501(c)(3) corporation that was formed to facilitate debate on the proposed constitutional amendment, to assure 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 state institutions' 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 their statements and conduct. *See* Ex. 4 (Allen Statement).

Plaintiffs commenced this case on November 7, 2006 to have the Amendment declared in violation of the United States Constitution and other federal laws. The amended complaint (*see* Ex. 5 hereto) in this action, filed on December 17, 2006, alleges that the Amendment is preempted by various federal laws, and violates the Equal Protection Clause and the First

Amendment of the United States Constitution, as well as 42 U.S.C. § 1983. Defendants named in the initial complaint were Governor Jennifer Granholm and the University Defendants. On December 11, 2006, the University Defendants filed a cross-claim against defendant Granholm. *See* Ex. 6 hereto. The cross-claim contains just one count, for a declaratory judgment, asserting that the Amendment "implicates federal law" (¶ 6), that "it becomes effective in the midst of the Universities' current admissions and financial aid cycle" (¶ 8), and that the "Universities put their admissions and financial aid policies in place in reliance on the Supreme Court's reaffirmation in *Grutter v. Bollinger*, 539 U.S. 306 (2003) that they have an academic freedom right" to "give some consideration to such factors as race" (¶ 9) in selecting their students. The cross-claim sought a judgment (1) declaring that under federal law, the University Defendants "may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law" and (2) issuing "a preliminary injunction that preserves the status quo and allows the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until this Court enters the requested declaratory judgment." Ex. 6 at 5. The University Defendants also moved for a preliminary injunction on the same date, and a motion for an expedited hearing (*see* Ex. 7) based on the fact that they had "filed a cross-claim seeking a declaratory judgment that determines their rights and responsibilities under [the Amendment], . . . [which] becomes effective on December 23, 2006" (Ex. 7 ¶ 1).

Granholm, the cross-claim defendant, was a vigorous opponent of Proposal 2 prior to the election. Indeed, in an action prior to the election seeking to have Proposal 2 removed from the

ballot, she filed an *amicus* brief in support of plaintiffs. *See* Doc. No. 34 in *Operation King's Dream v. Connerly*, E.D. Mich. Civ. No. 2:06-cv-12773-AJT-RSW (Granholm *amicus* brief). (This case is currently on appeal before this Court. *See* App. No. 06-2144.). Granholm was not served in the action until December 7, 2006. Ex. 8 hereto.

On December 14, 2006, Michigan Attorney General Michael Cox moved to intervene. *See* Ex. 9 hereto. The motion to intervene reported that the Governor had requested legal representation on December 11, 2006 and a "conflict wall" to assure the independence of her legal team given that (according to the Governor) the Governor and Attorney General had differing positions on Proposal 2 prior to the election. According to the Attorney General, "it is clear that the State's interests as a whole will not be adequately represented through the Governor's participation." Ex. 9 ¶ 15.

The court below granted Cox's motion on the same day. *See* Ex. 10 (order granting intervention). The order required the Attorney General to file papers in opposition to the University Defendants' preliminary injunction motion by December 18. *Id.*

Given the University Defendants' efforts to avoid compliance with the law, and uncertainty about the state actors' willingness to defend it, appellants here moved to intervene pursuant to Rule 24, Fed. R. Civ. P., on December 18, 2006. On the same date, the existing parties to the action filed a stipulation. *See* Ex. 11. It stated in relevant part:

> It is hereby stipulated, by and between the parties that this Court may order as follows: (1) that the application of [the Amendment] to the current admissions and financial aid policies of the

> University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire; (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim . . .

The court then issued the December 19 Order. It specifically found that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation." Ex. 1. Accordingly, it enjoined the application of the Amendment "to the current admissions and financial aid policies of" the University Defendants "through the end of the current admissions and financial aid cycles or until further order of the court." *See* Ex. 1.

On the same day, December 19, 2006, Appellants Russell and TAFM moved for immediate resolution of their motion to intervene and a stay of the December 19 Order pending appeal. *See* Ex. 12, hereto. They noted that the lower court's finding concerning the current parties adequately representing others' interests seemed to be a factual determination fatal to the motion to intervene, that Russell's application was pending before the University of Michigan Law School, that the court's injunction would permit the Law School to treat it disadvantageously on the basis of race, and that TAFM and Russell intended to appeal the December 19 Order to this Court. They asked for resolution of the motion before December 21, 2006. On December 21, 2006, when no resolution was forthcoming and the court below's office did not respond to an inquiry concerning whether one was imminent, TAFM and Russell filed a notice appealing the December 19 Order and the court below's failure to allow them to intervene. *See* Ex. 13 hereto.

LEGAL ARGUMENT

I. RUSSELL AND TAFM HAVE STANDING TO APPEAL

While the court below has not yet (at the time these papers are being prepared) resolved Russell and TAFM's motion to intervene, despite their request that it do so immediately so that they could appeal the December 19 Order, they nonetheless have standing to appeal. The court's refusal to expeditiously decide the motion to intervene so that this Court might effectively review the December 19 Order -- particularly in light of its seemingly fatal finding that the public's interests were adequately represented -- is itself appealable.

In *Americans United For Separation Of Church And State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990) ("*Grand Rapids*"), the district court enjoined the City from permitting a Jewish group (Chabad) to display a menorah on public land during Chanukah. When Grand Rapids indicated that it might not appeal, Chabad moved to intervene on December 7, four days before the start of Chanukah. *Id.* at 305. The district court scheduled a hearing on the motion to intervene on December 18, at the end of Chanukah, which "would obviously have the effect of denying Chabad judicial review at a time when such review could be meaningful." *Id.* This Court held that the "spirit of Rule 24(a)(2) . . . requires us to treat any order of the district court as a denial of an application to intervene that has the same effect on the intervenor's interest as would an outright denial." *Id.* at 306. This Court also held that it would expedite the case by permitted Chabad to combine an appeal from the district court's injunction simultaneously with the appeal from the effective denial of the motion to intervene, "not[ing] that had the district

court granted Chabad's motion . . . the court's order of injunction would be appealable as an interlocutory order." *Id.*

Russell and TAFM are in the same position here as Chabad was in *Grand Rapids*. Russell has an application pending with the Law School. That application will be treated differently than others because of his race despite the promise of the Amendment that, beginning on December 23, it would not be. That, in itself, is a serious harm. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 658, 666 (1993) (contractors' association had standing to challenge "preferential treatment to certain minority-owned businesses in award of city contracts" regardless of whether "one of its members would have received a contract absent the ordinance"; "[t]he `injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"). Moreover, each day that passes is one where his application could be denied because of his race, thus rendering ineffectual any effort by Russell to have this Court review the December 19 Order before that time. Similarly, TAFM has had a drain on its resources, its ability to perform its organization tasks it undertakes blocked, and its efforts to see the will of the people of Michigan enforced, hampered by the acts of the University Defendants, and, now, the effect of the December 19 Order. *Cf. Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993).

In short, by refusing to resolve the motion to intervene expeditiously as Russell and TAFM have requested, the court below has attempted to deny them the ability to effectively appeal the December 19 Order so that this Court may review it before the effective date of the Amendment. Accordingly, they have standing to appeal both the refusal to permit intervention

and the December 19 Order. Moreover, they also can separately appeal the December 19 Order since it effectively enjoins them from suing the University Defendants in state court for violations of the Amendment. *Brown v. Bd. of Bar Examiners of Nevada*, 623 F.2d 605, 608 (9th Cir. 1980).[1]

II. THIS COURT SHOULD ISSUE A TEMPORARY STAY OF THE DECEMBER 19 ORDER

On a motion for a stay of a district court order pending appeal, this Court considers the following factors: (1) whether the stay applicants have made a strong showing that they are likely to succeed on the merits, (2) whether they will be irreparably harmed absent a stay, (3) whether issuance of the stay will substantially injure other parties interested in the proceeding, and (4) the public interest. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These factors are not prerequisites, but are interrelated considerations that must be balanced together. *Id.*

A. Likelihood of Success

TAFM and Russell are very likely to succeed on both their motion to intervene pursuant to Rule 24(a)(2) and on the appeal of the December 19 Order.

1. Motion To Intervene. -- Persons moving to intervene as a matter of right under

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[1] In a surfeit of caution, and to ensure this Court's jurisdiction, TAFM and Russell are also simultaneously filing a petition for a writ of mandamus or prohibition with this Court. As set forth in that petition, as well as in the facts set forth here, those petitions are meritorious and the relief that TAFM and Russell seek can appropriately be granted through that vehicle.

Rule 24(a)(2) must establish the following four elements: (1) that the motion 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). Movants meet each of those elements.

a. Timeliness. -- Timeliness is measured from the time that the movants knew or should have known that their interests were not being adequately represented. *United Airlines v. McDonald*, 432 U.S. 385, 394 (1977) ("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"); *Allegheny Corp. v. Kirby*, 344 F.2d 571, 574 (2d Cir. 1965) ("the timeliness requirement [under predecessor rule] . . . 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"); *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980). Thus, the amount of time between the filing of complaint and time of intervention motion is not particularly important. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000).

This case commenced on November 8, 2006. The cross-claim by the University Defendants, at which point it became clear that they would not adequately represent the interests of Russell and TAFM, was filed on December 11, 2006. The amended complaint, which adds considerable detail to the initial allegations, was filed on December 17, 2006. Under any criteria,

the motion to intervene on December 18, 2006 is timely.

b. Substantial Interest. -- This Court has rejected the proposition that the requirement of 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, it espouses an expansive notion of the "substantial interest" factor. *Id.* The "inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Id.* Here, movant Russell has applied to the University of Michigan Law School. His interests in the Amendment are both his interest in being treated equally in the admissions process and in maximizing his chances of being admitted. The first is a substantial interest, sufficient to support standing under Article III of the U.S. Constitution. *E.g.*, *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("a plaintiff who challenges an ongoing race-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 General Contractors of America v. City of Jacksonville*, 508 U.S. at 666 (1993).

The second interest was specifically recognized by the Sixth Circuit in *Grutter* as sufficient under Rule 24(a). *Grutter*, 188 F.3d at 394 (interest in "gaining admission to the University" was a direct and substantial interest sufficient for purposes of Rule 24(a)).[2]

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[2] In a remarkable demonstration of "too-clever-by-half" reasoning, the University Defendants claimed in the court below that Russell had no substantial interest because (1) the court issued its December 19 Order enjoining application of the Amendment to the University Defendants before Russell had any rights under it, and (2) the Amendment itself (in ¶ 9) states (continued...)

As for TAFM, it is an organization that was intimately involved in Proposal 2 prior to its passage. Although the debates it held for purposes of educating the public did not take a position one way or another on the propriety of its passage, its purpose was to educate the public and to see that the decision of an informed electorate is upheld. Under *Miller*, this is a sufficient basis for intervention. *Miller*, 103 F.3d at 1246 (drawing analogy to *Meek v. Metropolitan Dade Cty.*, 985 F.2d 1471 (11th Cir. 1993), where individuals seeking to uphold at-large system for electing county commissioners were permitted to intervene). Moreover, the diversion of its resources give it Article III standing. *Hooker*, *supra*.

c. Impairment. -- To satisfy the "impairment" element, a would-be intervenor must show only that it is possible that his interest will be impaired if intervention is denied. *Grutter*, 188 F.3d at 399. Both Russell and TAFM have an interest in the Amendment being effective when Michigan law states (on December 23, 2006), Russell because it will affect the way his application is considered in comparison to other applicants and TAFM because of its efforts to advise those affected. Obviously, both plaintiffs' lawsuit and the December 19 Order threaten those interests.

d. Adequate Representation. -- To satisfy the element of inadequate

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[2](...continued)
that it does not invalidate any court order. This simply ignores Sixth Circuit law that the interest need not be a legal one; the intervenors in *Grutter* did not have a *legal* right to favorable treatment by the law school there. In any event, Russell would have standing to challenge a threat to an imminent legal right about to be created, just as a party whose right to be paid money would accrue in five days could sue to prevent a threat to that right. And the fact that the Amendment itself does not invalidate a preexisting court order hardly means that this Court cannot do so on appeal from that order.

representation, proposed intervenors need not show that the representation of their interests *will* be inadequate, only that there is a potential for inadequate representation and/or that the existing parties will not make the same arguments as the proposed intervenors. *Grutter*, 188 F.3d at 400. The showing required is minimal. *Id.* Again, this element is easily met here. Not only have the University Defendants not resisted plaintiffs' argument, they have joined them to some degree. Granholm was a vigorous opponent of Proposal 2 who urged that it be taken off the ballot because its sponsors committed fraud in violation of the Voting Rights Act. Both she and Attorney General Cox have entered into a stipulation that led to the court below enjoining the application of the Amendment to the University Defendants during the period of time that Eric Russell's application is going to be considered. Whether the University Defendants move to a non-discriminatory and non-preferential system of admissions thereafter does not do him much good at all. His interest is to have a non-discriminatory and non-preferential system instituted right *now*, while his application is under consideration. Indeed, in recognition of these differing interests, Attorney General Cox did not oppose movants' request to intervene in the lower court.

2. The December 19 Order. -- Movants are likely to succeed in showing that the court below abused its discretion in issuing an order enjoining the Amendment's application to the University Defendants. Indeed, it is deficient in many ways.

First, the court below did not even have a claim upon which it could issue an injunction. When the parties to the litigation signed and filed the December 18 stipulation, that terminated the University's cross-claim *immediately* (and with prejudice to the extent they sought temporary injunctive relief). A filed stipulation dismissing a claim under Rule 41(a)(1) needs no judicial

approval to take effect. Its impact is automatic. *Hester Industries v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998) (district court abused its discretion in issuing contempt fine against party for violating the terms of settlement agreement that had been attached to dismissal by stipulation; "The judge's signature on the stipulation did not change the nature of the dismissal. Because the dismissal was effectuated by stipulation of the parties, the court lacked authority to condition dismissal on compliance with the Agreement"); *In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988) (issuing writ of mandamus where trial court dismissed claim with prejudice where parties had stipulated to dismissal without prejudice; "[c]aselaw concerning stipulated dismissals under Rule 41(a)(1)(ii) is clear that the entry of such a stipulation of dismissal is effective automatically and does not require judicial approval . . . ") (internal quotation marks omitted). *Cf. Aamot v. Kassel*, 1 F.3d 441, 445 (6th Cir. 1993) ("a Rule 41(a)(1) notice of dismissal is self-effectuating, leaving no basis upon which a District Court can prevent such a dismissal").[3] Indeed, approval of plaintiffs was entirely gratuitous to the dismissal of the cross-claim. *Century Mfg. Co. v. Central Transport Int'l Inc.*, 209 F.R.D. 647, 647 (D. Mass. 2002) (plaintiff had no standing to object to stipulation dismissing third-party claim). Since the University Defendants' cross-claim for an injunction already had been dismissed with prejudice on December 18, 2006, the court below had no basis for issuing an injunction on December 19.

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[3] The fact that the parties stipulated that "the court may order . . . that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed" does not change this result. Rule 41(a)(1) does not require court approval, and parties stipulating pursuant to that provision cannot make their stipulation contingent upon court approval. *Hester*, 160 F.3d at 913, 916 (although settlement agreement specifically made dismissal dependent upon on terms of agreement being subjected to enforcement by the court, court still had no authority to condition dismissal on compliance with the agreement).

Second, the December 19 Order was, at best, a consent decree resolving the cross-claim. *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) ("a settlement agreement subject to continued judicial policing"); *Masters Mates v. Riley*, 957 F.2d 1020, 1025 (2d Cir. 1991) ("A consent decree is . . . a settlement agreement that contains an injunction."). As such, its terms had to be approved by the court. If a consent decree affects the legal rights of third parties, it cannot be approved without their consent. *Martin v. Wilks*, 490 U.S. 755, 768 (1989) ("`[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ··· without that party's agreement'") (quoting *Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986)); *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) (affirming district court's refusal to approve consent decree because it affected the rights of third parties; "a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree"). Even if the decree only affects third parties' non-legal rights, or does not affect anyone else at all, a court must nonetheless review the terms of a consent decree before granting its imprimatur. *Martin*, 490 U.S. at 788 n.27 ("the court reviews the consent decree to determine whether it is lawful, reasonable, and equitable"); *Williams*, 720 F.2d at 920 ("Judicial approval may not be obtained for an agreement which is illegal, a product of collusion, or contrary to the public interest"); *Masters Mates*, 957 F.2d at 1026 ("`Even if no third party complains, the judge has to consider whether the decree he is being asked to sign is lawful and reasonable as every judicial act must be'" (quoting *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985))); *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) ("The court . . . must not merely sign on the line provided by the parties. Even though the decree is predicated on consent of the parties, the judge must not give it perfunctory approval"); *id.* at 441 ("Even where it affects

only the parties, the court should . . . examine it carefully . . . ").

This Court has held that a district court must give notice to interested parties and hold a hearing, at the end of which the court must decide whether the consent decree is "fair, adequate, and reasonable." *Williams*, 720 F.2d at 921. Moreover, scrutiny of a consent decree is stricter than scrutiny of a compromise in a class action or stockholders' derivative suit. *City of Miami*, 664 F.2d at 441; *United States v. Michigan*, 680 F. Supp. 928, 947 (W.D. Mich. 1987). It "requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record." *City of Miami*, 664 F.2d at 441. If the decree does affect third parties, its "effect on them [can be] neither unreasonable nor proscribed." *Id.* The degree of appellate scrutiny "`depend[s] on a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the types of issues involved.'" *City of Miami*, 664 F.2d at 441 n.14 (quoting *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980)).

The December 19 Order plainly affects the rights of parties not before the court below. It did not simply enjoin state officials from applying a state constitutional provision to the University Defendants. It purports, at least, to preclude *everyone* from applying it, even though there is a specific provision making remedies available to those alleging violations of the Amendment. *See* discussion *supra* at 1-2. Enjoining an entire citizenry from using a provision of the state constitution against certain parties is a serious business and should give any federal judge pause. *Pharmaceutical Research and Mfrs. of American v. Walsh*, 538 U.S. 644, 661-62 (2003) (plurality op.) ("We start therefore with a presumption that the state statute is valid, . . .

and ask whether petitioner has shouldered the burden of overcoming that presumption"); *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249, 254 (1931) ("state laws are presumed valid"). The court below did not even offer a good reason. It stated only that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives," a statement both cryptic and woefully insufficient.[4] A court must determine whether the *terms* of a settlement are fair to third parties, not merely whether their interests are adequately represented. *Williams*, 720 F.2d at 921 ("The decree must be fair and reasonable to those it affects"). If a school sued the President and Attorney General of the United States, claiming that Title VII violated the First Amendment because it precludes the use of race to achieve diversity in faculties (*see Taxman v. Bd. of Education of Piscataway*, 91 F.3d 1547, 1558 (3d Cir. 1996) (en banc) (so holding)), a court could not enter an order enjoining the application of Title VII to the school just because a sympathetic President and Attorney General agreed to it.

Even if "adequate representation" were sufficient, it is obvious that the parties were *not* representing the interests of many applicants who, like Russell, are applying to the University Defendants now. Nor did the court below seem to understand the purpose of Michigan's initiative process: to *bypass* one's elected representatives precisely because they are *not* responding to the will of the people. *Michigan United Conservation Clubs v. Sec'y of State*, 464 Mich. 359, 382 (2001) (Young, J., concurring) (referendum power "provides a means for citizens

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[4] It is entirely unclear who "all parties" are in the court's recitation; obviously, the stipulation represented the wishes of those parties signing it. Moreover, it is equally unclear who the court was referring to by "the state defendants *and* their elected representatives" (emphasis added). There were no other elected representatives before the court below aside from the defendants, and no indication that other elected representatives supported the stipulation.

directly to challenge legislative action or inaction").

Since the court below did not identify any legal basis for enjoining a provision of the state constitution, little time needs to be spent on the inadequate reasons offered by the University Defendants below. There were two: (1) they have a First Amendment right to consider applicants' race in the selection of students, and (2) they are in the middle of their admissions cycle, making it unfair to require them to change in the middle of their cycle, especially since it is unclear (they say) precisely whether the Amendment will be interpreted to preclude their use of race and ethnicity in the admissions and financial aid process.

State universities have no First Amendment right to select students as they wish in the face of a state law to the contrary. If they did, state laws requiring colleges to give preferences to state residents or to admit those in the top 10% of their high school classes would be unconstitutional. The First Amendment protects the people from state entities. It does not protect state entities from the people.[5]

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[5] *E.g.*, *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."); *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").

This argument confuses a First Amendment right with an *interest* grounded in the First Amendment. The University Defendants undoubtedly have an "interest" in academic freedom, as both Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) state. But those cases 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.[6]

The second reason offered by the University Defendants in the court below is entirely irrelevant to federal courts. Whether state law is fair or equitable, or should be modified to make

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[6] 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 systems improperly imposed by unconstitutional state laws 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.* The Amendment 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 constitutionally-valid system to wholly unconstitutional state action simply because it has been adopted by the people of the state.

it fairer or more equitable, is a question for the Michigan courts, a place that the University Defendants could have gone to at any time after November 7, 2006. In doing so, a Michigan court likely would consider that (1) the people of the State of Michigan presumably have concluded that *their systems of admissions* are unfair to a whole host of applicants, (2) the Amendment was adopted by the people of Michigan after a very public debate and a public election, and that the University Defendants could have prepared for its passage long before the beginning of their admissions cycle, and (3) compliance only requires that the University Defendants remove certain criteria from the evaluation of applicants for admission. Finally, if the University Defendants were correct that interpretation of the Amendment is still in doubt, that would be a reason for a federal judge to *decline jurisdiction*, not enjoin the Amendment. *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).

B. The Other Factors All Militate In Favor Of A Stay

The harm that TAFM and Russell will incur if a stay is not issued already has been discussed. *See* Part I, *supra*. They will be denied the promise of the Amendment: equal treatment regardless of race or ethnicity. On the other hand, the harm to the University Defendants is minimal; they can use all of the criteria they currently use to make admissions and financial aid decisions save the ones prohibited by the Amendment. And finally, the public interest strongly militates in favor of the will of the people of Michigan being effected in accordance with Michigan law, placed in effect on the date prescribed by Michigan law.

Conclusion

The emergency motion for a temporary stay of the December 19 Order should be granted.

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Certificate of Service

I hereby certify that on December 21, 2006, I served the following individuals with the foregoing emergency motion for a temporary stay by overnight mail, with a courtesy copy sent electronically:

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