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	MOTION TO INTERVENE
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	
Intervenor Defendants.	

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Eric Russell and Toward A Fair Michigan move to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. In support of this motion, movants submit the accompanying

brief, a proposed answer in intervention pursuant to Rule 24(c), Fed. R. Civ. P., and the statements of Eric Russell and William Allen.

Pursuant to Local Rule 7.1, movants conferred (or attempted to confer) with counsel for plaintiffs, counsel for defendants, and counsel for intervenor Attorney General Cox to determine if they would consent to the relief sought by this motion. Plaintiffs and defendant Granholm have not consented to the relief sought by the motion. Attorney General Cox does consent. Counsel for defendants Regents of the University of Michigan, Board of Michigan State University, and Board of Wayne State University did not return a telephone message.

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Defendants,	:	
and	:	
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,	:	
Proposed Intervenor Defendants.	:	

BRIEF IN SUPPORT OF MOTION TO INTERVENE

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Issues Presented

1. Have movants met the requirements for intervention as of right pursuant to Rule 24(a)(2), Fed. R. Civ. P.?

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

Leading Authorities

Rule 24, Fed. R. Civ. P.

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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Eric Russell and Toward A Fair Michigan hereby submit this brief in support of their motion, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to intervene in this action.

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 1, § 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).

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. B (Russell Statement).

Toward A Fair Michigan ("TAFM") is a 501(c)(3) corporation that was formed to facilitate debate on the proposed constitutional amendment, to insure 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. *See* Ex. C (Allen Statement).

This action has been brought to have Article I, § 26 declared in violation of the United States Constitution and other federal laws. The amended complaint in this action, filed on December 17, 2006, alleges that Article I, § 26 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. Named defendants include Governor Jennifer Granholm, Attorney General Michael Cox, Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University.[1] Each of the latter three

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[1] Also named are the "Trustees of any other public college or university, community college, or school district." Amended Complaint, caption. Each of the named defendants other than Granholm and Cox are corporate bodies created by the state and have Eleventh Amendment immunity from suit in federal court. *E.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) ("we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment"); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (suit against State of Alabama and the Alabama Board of Corrections seeking to enjoin conditions constituting cruel and unusual punishment in the Alabama prison system barred by the Eleventh Amendment).

defendants (the "University Defendants") have filed a cross-claim against defendant Granholm, seeking a declaration that they may continue to use their existing admissions and financial aid policies through the end of the current admissions cycle and an injunction allowing the University Defendants to continue their policies during that time.

Granholm, for her part, 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).[2] After the election, Granholm asked the Michigan Civil Rights Commission ("MCRC"), yet another vigorous opponent of Proposal 2, to investigate the consequences of its implementation. *See* University Defendants' Motion For A Preliminary Injunction, Ex. B, Michigan Executive

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[2] Plaintiffs in the pre-election case included Locals 207 and 312 of the American Federation of State, County, and Municipal Employees (AFSCME), who are also plaintiffs in this action. The lead plaintiff was Operation King's Dream ("OKD"), an offshoot of BAMN, the lead plaintiff here. *See* http://www.bamn.com/operation-kings-dream.asp (OKD is "a civil rights campaign launched by Michigan BAMN."). Lead counsel in the pre-election case, Scheff & Washington, P.C., is counsel for plaintiffs in this matter.

Judgment against plaintiffs was entered by the district court in the pre-election case on August 29, 2006. Plaintiffs moved in the Sixth Circuit for an emergency motion for a preliminary injunction on September 2, 2006. The Sixth Circuit denied that motion in an order dated September 11, 2006 on the ground that "plaintiffs failed to demonstrate sufficient likelihood of success on the merits of their claims of violations of the Voting Rights Act to support the issuance of an injunction pending appeal." Thereafter, the Sixth Circuit set an expedited briefing schedule. Plaintiffs-appellants then moved for an extension of time, which was granted. Accordingly, the briefing in the Sixth Circuit on the pre-election case is not currently scheduled to be completed until April 2007. *See generally* Sixth Circuit Docket in *Operation King's Dream v. Connerly*, App. No. 06-2144.

Directive 2006-7. In January 2004, more than 2½ years before the election in November 2006, the MCRC passed a resolution announcing its fierce opposition:

> whereas, [Proposal 2] represents an attempt to mislead Michigan voters regarding the issue of discrimination by state entities . . . the Michigan Civil Rights Commission vigorously opposes [it] designed to eliminate and undermine the basic principles of equal treatment under the law as set forth in the Michigan Constitution.

See http://www.callsam.com/ bernstein_lawyers_in_the_news/supporting_equal_ opportunity_for_all.html.[3]

The Attorney General has also intervened in this action. His position on the current motion for a preliminary injunction is not yet known, but he asserts that he will represent the people of Michigan in defending the constitutional provision in question.

Movants here seek to intervene pursuant to Rule 24, Fed. R. Civ. P. As required by Rule 24(c), a pleading accompanies this motion.[4]

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[3] In the press release announcing the resolution, the Chair of the Commission stated that the proposal "is a shameful attempt to confuse and manipulate unsuspecting Michigan voters. Ward Connerly's initiative is to civil rights what an ax is to a tree. Don't let these extremists tear down our state's great tradition of enabling and protecting diversity." *Id.*

[4] Movants filed an amended complaint, superseding their original complaint, on December 17, 2006, while these papers in support of the motion to intervene were being prepared. The amended complaint, which has 107 paragraphs, is far longer than the original complaint, which had 37. Given the time pressure caused by the University Defendants' motion for a preliminary injunction, and the need to intervene expeditiously, movants have had to prepare a proposed answer to comply with Rule 24(c) in very little time. Should the motion to intervene be granted, movants reserve the right to amend the proposed answer. *Cf.* Rule 15(a), Fed. R. Civ. P.

Argument

I. MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

Rule 24(a)(2), Fed. R. Civ. P., provides that upon timely application, anyone shall be permitted to intervene in an action as of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Persons seeking to intervene as a matter of right 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). Movants here can meet each of those four 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) ("the question of timeliness is at least partially linked to the question of adequate representation"); *id.* at 1325 (motion was timely where intervenor-trustee knew of his interest in June 1976, but that interest was being well represented until January 1977 and intervenor moved several weeks later, in February 1977). 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).

Timeliness is determined by a totality of circumstances. The most important consideration is prejudice to the other parties. *E.g.*, *Spring Construction Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) (after district court denied relief to general contractor for federally funded housing, and appellate court reversed, district court properly granted motion to intervene by mortgage title insurer; motion was timely because "[t]he most important consideration is whether the delay has prejudiced the other parties; in this case no party has been prejudiced by [insurer's] waiting to intervene until the case was remanded to the district court"). Finally, timeliness is construed more liberally when movants seek to intervene as a matter of right. *E.g.*,

Ozee v. American Council On Gift Annuities, 110 F.3d 1082, 1095 (5th Cir. 1997) (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 Business Machines, Corp.*, 62 F.R.D. 530, 541 (S.D.N.Y. 1974) ("where . . . intervention as a matter of right is sought, courts have been more liberal in exercising their discretion over timeliness").

This case commenced on November 8, 2005. The cross-claims by the University Defendants, at which point it became clear that they would not adequately represent the interests of movants here, 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 is timely.

B. Substantial Interest

The Sixth Circuit 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 Art. 1, § 26 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. 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").

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)).

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.3d 1471 (11th Cir. 1993), where individuals seeking to uphold at-large system for electing

county commissioners were permitted to intervene).

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 Art. 1, § 26 being effective as soon as possible, Russell because it will affect the way his application is considered in comparison to other applicants and TAFM because of its continuing interest in the will of the people being upheld. Obviously, both plaintiffs' lawsuit and the University Defendants' cross-claim threaten those interests since they seek to either have Art. 1 § 26 declared in violation of the United States Constitution or to delay its implementation.

D. 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 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. Moreover, they have *not* bothered to make a rather straightforward argument on this Court's subject matter jurisdiction.

See n.1, *supra*. As for Granholm, she was a vigorous opponent of Proposal 2 who urged this Court in a pre-election litigation to have it taken off the ballot because its sponsors committed fraud in violation of the Voting Rights Act. Intervenors have a legitimate basis for being concerned about whether she will adequately defend Proposal 2, much less make all of the arguments needed to vindicate it. (One such argument, for example, is whether this court should exercise its discretion to decline supplemental jurisdiction over the University Defendants' cross-claims under 28 U.S.C. § 1367(c).)

Finally, even Attorney General Cox, who has intervened to uphold the law, does not have the same interests as proposed intervenors. Attorney General Cox purports to represent the interest of the people. The people might have an interest in resolving this dispute by permitting the University Defendants' current system to continue past December 23, 2006 if they obtained some agreement from the University Defendants to move to a non-discriminatory and non-preferential system of admissions thereafter. That resolution, of course, would not do Eric Russell 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 does not oppose movants' request to intervene.

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, movants' defense is that Art. 1, § 26 does not violate any provision of the United States Constitution or federal law; it is then, a mirror image of the amended complaint, which alleges that Art. 1, § 26 *does* violate the United States Constitution and federal law.

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, this litigation is in an early stage, and the inclusion of those whose interests are in the law being upheld to its fullest extent will only sharpen and clarify the issues for the court. Accordingly, permissive intervention should be granted.

Conclusion

For the foregoing reasons, the motion to intervene should be granted.

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Certificate of Service

I hereby certify that on December 18, 2006, I electronically filed the foregoing motion to intervene and brief in support of a motion to intervene (with exhibits) 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
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