

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**COALITION TO DEFEND AFFIRMATIVE
ACTION, et al,**

Plaintiffs-Appellees

Case No. 06-2640

v

JENNIFER GRANHOLM,

Defendant-Appellee

ERIC RUSSELL; TOWARD A FAIR MICHIGAN,

Proposed Intervenor-Appellants

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**CITY OF LANSING'S
MOTION FOR LEAVE TO RESPOND
TO ERIC RUSSELL AND TOWARD A FAIR MICHIGAN'S
PETITION FOR WRIT OF MANDAMUS**

NOW COMES CITY OF LANSING, Proposed Intervenor-Appellant, by and through its attorneys, Brigham Smith, City Attorney, and Margaret E. Vroman, Deputy City Attorney and for its Motion to Respond to Eric Russell's and Toward a Fair Michigan's Petition for Writ of Mandamus states as follows:

1. On November 8, 2006, several parties filed a complaint for injunctive and declaratory relief raising a facial challenge to Michigan's newly adopted art 1, § 26 of the Michigan Constitution, better known as Proposal 2.

2. The complaint alleged equal protection and First Amendment challenges under the federal constitution. The complaint also asserted that § 26 is preempted by the Civil Rights Act of 1866, Titles VI and VII of the Civil Rights Act of 1964, and Title XI of the Education Amendments of 1972. Plaintiffs requested that the District Court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment and that it permanently enjoin defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate.

3. The Complaint named as Defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors.

4. The Defendant Universities filed a cross-claim on December 11, 2006. The cross claim asserted a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if the Universities are required to implement § 26 upon the section's effective date – 12:01 a.m. December 23, 2007.

5. On December 18, 2006, the City of Lansing filed a motion to intervene by stating that its City Charter Section 1-201; 1-302; 4-304 and Lansing Ordinances 206.20, 206.21, 206.22, 286.02, 283.03, 286.10 conflict with art 1 § 26 and that if it were required to implement § 26 on December 23, 2006 in the midst of its fiscal year process of letting contracts, awarding grants and completing previously initiated hiring processes, it would result in a severe hardship and either nullify or greatly delay the processes already underway.

6. On December 19, 2006, the court found that “the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives” and it approved a stipulation and order that enjoined the application of art 1 § 26 to the university Defendants through the end of the current admissions and financial aid cycles or until further order of the Court.

7. On December 27, 2006 the Court entered an Order denying the City of Lansing's Motion to Intervene by concluding that it was not timely and that the remaining parties to the litigation would adequately represent the interest of the City (Order Denying Intervention).

8. Although the City's interests in the litigation most closely paralleled that of the University Defendants, said Defendants were no longer a party to the lawsuit and the City was denied the injunctive relief afforded them.

9. On December 21, 2006 Toward a Fair Michigan filed an appeal of the Court's Order denying its Motion to Intervene.

10. On December 22, 2006 Eric Russell and Toward a Fair Michigan filed a Petition seeking a Writ of Mandamus seeking to lift the Court's injunction issued December 19, 2006.

11. On December 29, 2006, the City filed a Claim of Appeal alleging that the District Court committed reversible error when it denied the City's Motion to Intervene as a party Plaintiff.

12. The City seeks the Court's permission to respond to Eric Russell's and Toward a Fair Michigan's Petition for Writ of Mandamus because it believes that either the injunction should be made applicable to all parties or, in the alternative, it should be revoked.

13. It is unfair to allow this injunctive relief to parties who are no longer part of the litigation while denying others the right to intervene and obtain this relief, especially when the court erroneously concluded that the interests of all parties is adequately represented by the current parties.

WHEREFORE, for the reasons set forth above and in the accompanying brief, the City of Lansing requests that this Court grant its Motion to Respond to Eric Russell and Toward a Fair Michigan's Petition for Writ of Mandamus.

**OFFICE OF CITY ATTORNEY
CITY OF LANSING**

Dated: December 28, 2006

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**CITY OF LANSING’S RESPONSE TO
ERIC RUSSELL AND TOWARD A FAIR MICHIGAN’S
PETITION FOR WRIT OF MANDAMUS**

For its response to Eric Russell’s and Toward a Fair Michigan’s Petition for Writ of Mandamus, the City of Lansing points out that it is appealing the lower court’s Order denying it the right to intervene in this case because it made two erroneous assumptions that should result in a reversal of its decision denying the City of Lansing’s Motion to Intervene.

The first is that contrary to the trial court’s assumption, the City did not “choose to wait for over a month before seeking entry into the case.” (Opinion p. 10) After the proposal was passed the City engaged in a good faith effort to determine what programs, policies and ordinances it had that required change as a result of the newly passed constitutional amendment and only when it became apparent that this task was too onerous to be completed, and the changes made necessary too great to meet the December 23, 2006 deadline, did the City move to intervene.

Secondly, the Court’s determination that the remaining parties to the lawsuit can adequately represent the interests of the City is based on the erroneous assumption that the City’s goal is to invalidate all portions of art 1 § 26 as sought by the remaining plaintiffs. Unfortunately, the parties that most closely

represented the interests of the City were the University Defendants who sought (and were allowed to obtain) a stay delaying the implementation date of the amendment. These Defendants (cross-Plaintiffs) obtained the relief they sought via the contested injunction and were dismissed from the lawsuit. None of the remaining parties seek to broaden the injunctive relief to include them as is desired by the City of Lansing and therefore it is imperative that the City's voice be heard.

Similar to the Universities, the City's operations are planned, budgeted and carried out according to a fiscal year, which in this instance runs from July 1, 2006 to June 30, 2007. If the City is unable to obtain the same injunctive relief as granted them, it will be irreparably harmed in that the City of Lansing has ordinances, policies and resolutions in place that require the consideration of an applicant's race and gender when awarding contracts, grants or employment. It cannot instantly stop using these – especially when there is nothing to take their place. To do so would result in chaos and bring to a halt several aspects of city governance

The trial court erroneously assumed that private organizations, a variety of individuals and labor unions have the same interest in litigating Proposal 2 as does the City of Lansing. Contrary to this assertion, however, is the fact that unlike these other parties, the City operates under a year long plan of governance that is built around the mandates of its City Charter, ordinances, executive policies and

budget. None of the current parties to this lawsuit are bound by these same commitments and none are forced to choose between timely complying with art 1 § 26 and nullifying their contracts, hiring commitments and participation in federal programs while risking federal lawsuits or continuing the status quo in order to maintain its stable governance while violating art 1 § 26.

The Petitioner seeks to invalidate the injunction by arguing that the trial court exceeded its authority in issuing it. (Petitioner's brf p.13). If this is true than the injunction should be lifted. However, if this Court determines that the injunction is appropriate, than it should be determined to be appropriate for ALL individuals, institutions and government organizations who face the same obstacles to implementation as does the university defendants. How can the trial court justify its position that all parties interests are currently represented in this litigation when the City of Lansing seeks to obtain the injunctive relief at issue and no party to the litigation is advancing this position?

As such, either the relief granted by the court's injunction should be made applicable to all parties obligated to follow Proposal 2 who cannot timely follow its mandates or it should be nullified. To do otherwise clearly violates established principles of equity by allowing a select few to obtain relief that many are entitled to. No court of equity should sustain such a result. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 5 F. Cas. 590 (ND Ill 1874); *American Surety Co. v. Jones*,

224 F. 673 (1915).

Since the court has the discretion to tailor an injunction to the harm that it addresses it should have done so by ordering that all similarly situated parties were entitled to the same relief granted the university defendants. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409-10, 89 L. Ed. 322, 65 S. Ct. 373 (1945).

WHEREFORE, the City of Lansing requests that this Court grant its Motion to Respond to Petitioner's request for a writ of mandamus and that the trial court's December 19th injunction be made applicable to all similarly situated parties or to none at all..

**OFFICE OF CITY ATTORNEY
CITY OF LANSING**

Dated: December 28, 2006

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CERTIFICATE OF SERVICE

I hereby certify that Legal Assistant Sue Podleski electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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