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
- 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 FOR CLASS CERTIFICATION AND APPOINTMENT OF LEAD COUNSEL

Plaintiffs Chase Cantrell, et al. (the "Cantrell Plaintiffs") respectfully move for this Court to certify a plaintiff class in the above-captioned matter. The Proposed Class is comprised of individuals who (1) are present or future students or

faculty at the University of Michigan, who (2) applied to, matriculated at, or continue to be enrolled at or employed by the University of Michigan in reliance upon the University's representation that it would continue to admit and enroll a diverse group of students at the school consistent with its former policies, which took race into account among other factors. (First Amended Complaint ¶ 31.) Further individuals will enter the class as they meet the class definition. The Cantrell Plaintiffs also request that Counsel for the Cantrell Plaintiffs be named lead counsel for the class upon certification. In support of this motion, the Cantrell Plaintiffs submit the accompanying Memorandum of Law and the declarations of plaintiffs Rachel Quinn ("Quinn Decl."), Casey R. Kasper ("Kasper Decl."), Bryon Maxey ("Maxey Decl."), Chase Cantrell ("Cantrell Decl."), Sergio Eduardo Munoz ("Munoz Decl."), Joshua Kay ("Kay Decl."), Kathleen Canning ("Canning Decl."), Sheldon Johnson ("Johnson Decl."), Matthew Countryman ("Countryman Decl."), Rosario Ceballo ("Ceballo Decl.") and counsel Mark D. Rosenbaum, Esq., ("Rosenbaum Decl."), Karin A. DeMasi, Esq., ("DeMasi Decl."), and Melvin Butch Hollowell, Esq., ("Hollowell Decl."), with exhibits.

Pursuant to Eastern District of Michigan Local Rule 7.1, movants conferred or attempted to confer with counsel for the parties via email. Counsel for Defendant Attorney General Cox and Defendant-Intervenor Eric Russell do not consent to the motion. The other parties have not taken a position on the motion.

MEMORANDUM OF LAW IN SUPPORT OF CHASE CANTRELL ET AL.'S MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF LEAD COUNSEL

Issues Presented

I. Should the Court certify a plaintiff class of individuals who (1) are present or future students or faculty at the University of Michigan, who (2) applied to, matriculated at, or continue to be enrolled at or employed by the University of Michigan in reliance upon the University's representation that it would continue to admit and enroll a diverse group of students at the school consistent with its former policies, which took race into account among other factors?

II. If the Motion for Class Certification is granted, should the Court appoint counsel for the Cantrell Plaintiffs as lead counsel for the certified class?

Leading Authorities

Fed. R. Civ. P. 23

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Preliminary Statement

Plaintiffs Chase Cantrell et al. ("Cantrell Plaintiffs") bring this case to address the unconstitutional burden imposed by proposed Michigan Constitutional Amendment 06-02 ("Proposal 2"), now enacted as Article I, § 26 of the Michigan Constitution of 1963. (First Amended Complaint, "Compl." ¶ 39.) That statute imposes an unconstitutional race-based burden on tens of thousands of students, faculty members, and prospective students by creating a uniquely burdensome political process for those who support race- or gender-based affirmative action programs at public universities in Michigan. The Cantrell Plaintiffs seek to represent a class of individuals (the "Proposed Class") who (1) are present or future students or faculty at the University of Michigan, who (2) applied to, matriculated at, or continue to be enrolled at or employed by the University of Michigan in reliance upon the University's representation that it would continue to admit and enroll a diverse group of students at the school consistent with its former policies, which took race into account among other factors. (Compl. ¶ 31.)

The representative Cantrell Plaintiffs include professors employed by the University of Michigan and current students at the University of Michigan.[1] (Compl. ¶¶ 9-27.) Each named plaintiff supports policies that include race as one among many factors considered in university admissions decisions but is burdened by the unequal political standards created by Proposal 2, which requires that supporters of such policies procure a state constitutional

[1] Certain of the original named plaintiffs in the *Cantrell* action no longer fit into the class definition because their applications for admission were denied or because they were admitted but have chosen not to attend the University of Michigan. Additional class representatives will be identified when the University of Michigan's 2007-2008 admissions cycle begins. Should it become necessary to substitute these individuals for the original named plaintiffs, the Cantrell plaintiffs will do so at the appropriate time.

amendment before the policy can be implemented. (*See* Compl. ¶¶ 9, 47-56; Quinn Decl. ¶ 3; Kasper Decl. ¶ 4; Maxey Decl. ¶ 3; Cantrell Decl. ¶¶ 4-5; Munoz Decl. ¶ 3; Kay Decl. ¶ 4; Canning Decl. ¶¶ 2-3; Johnson Decl. ¶¶ 2-3; Countryman Decl. ¶ 3; Ceballo Decl. ¶¶ 3, 4.) Additional individuals will enter the class as they meet the class definition.

The Proposed Class meets the requirements of Federal Rule 23, and is well suited for class certification. Proposal 2 affects tens of thousands of students, faculty members, and prospective students from across the country and around the globe. Last year, the University of Michigan enrolled over 40,000 students, employed over 5,500 faculty members, and received more than 25,000 applications from prospective undergraduates alone. Each of these individuals is affected in a substantively identical way by Proposal 2, and the injunctive relief sought by the Cantrell Plaintiffs protects each of them with equal force. (Compl. ¶¶ 59-61.) The Cantrell Plaintiffs are dedicated to the pursuit of this action, and have assembled an exceptional team of practitioners, public interest lawyers, and legal scholars to ensure the best possible representation of the class.

Under these circumstances, individual adjudication of the plaintiffs' claims is impractical and unnecessary. In fact, Federal Rule 23 was designed specifically for civil rights cases of this sort, "where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23 Advisory Committee Note, 1966 Amendment. The motion for class certification should be granted, and the counsel for the Cantrell Plaintiffs should be designated lead counsel for the class.

Statement of Facts

The University of Michigan was founded in 1817 as one of the first public universities in the nation. It has since become one of America's largest universities; in the fall of 2006, the University of Michigan had over 40,000 students and employed more than 5,500 faculty members spread across three campuses. The University of Michigan receives thousands of applications for admission each year from individuals who reside in all fifty states and over 100 foreign countries. In 2006, more than 25,000 of these applications were submitted for undergraduate admission alone.[2]

This case involves Proposal 2, the newly-enacted amendment to the Michigan Constitution. On its face, Proposal 2 purports to ban Michigan's public universities, which include University of Michigan, from "grant[ing] preferential treatment to . . . any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation . . . of public education." Mich. Const. Art. I, § 26. By operation of law, Proposal 2 took effect on December 23, 2006, during the middle of the current university admissions cycle. However, the application of Proposal 2 was delayed until December 29, 2007 due to a stipulation of the parties in a related case, *Coalition to Defend Affirmative Action, et al. v. Granholm, et al*, No. 06-15024, including Governor Jennifer Granholm, Attorney General Michael Cox, the universities and plaintiff civil rights organizations. Defendant Eric Russell was also permitted to intervene in the case to protect his interest in having Proposal 2 applied during the current admissions cycle while his

[2] University of Michigan, *History of U-M*, last updated Nov. 16, 2006, *available at* http://www.umich.edu/~info/; University of Michigan, *Fast Facts*, n.d., *available at* http://www.admissions.umich.edu/fastfacts.html; University of Michigan, *U-M Fact Sheet*, last updated Oct. 25, 2006, *available at* http://www.umich.edu/~info/.

applications for admission to the University of Michigan Law School and Wayne State University Law School were being reviewed.

Shortly after December 29, 2007, the University of Michigan revised its admissions policies to comply with Proposal 2, and announced "that race and gender will have no effect on the decision-making process" except as permitted by limited exceptions contained in Proposal 2.[3] Wayne State University Law School and Michigan State University made similar changes.[4] On January 5, 2007, this Court consolidated the *Coalition* and *Cantrell* cases for all purposes. (Ord. Cons. Cases, Granting Att'y General's Mot. to Intervene, and Setting Dates, DeMasi Decl. Ex. A at 2.) Subsequently, Mr. Russell's application to Wayne State University Law School was accepted, and his application to the University of Michigan Law School was denied.

Argument

The motion for class certification should be granted because this action meets the requirements of Federal Rule 23. To qualify for class certification, a plaintiff must first satisfy each of the four prerequisites contained in Federal Rule 23(a), which permits certification if:

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[3] Press Release, Mary Sue Coleman, President & Teresa A. Sullivan, Provost, University of Michigan, *Proposal 2 Next Steps* (Jan. 10, 2007) *available at* http://www.umich.edu/pres/speeches/070110prop2.html.

[4] *See* Wayne State University Law School Admissions Standards and Procedures, Effective Dec. 22, 2006, *available at* http://www.law.wayne.edu/docs/Admissions%20Policy--12-06-06.pdf (amending its admissions policy to provide that "the Admissions Committee shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin (except to the extent necessary to establish or maintain eligibility for any federal program where ineligibility would result in a loss of federal funds)."); *Diversity and Inclusion at MSU After Proposal 2: Frequently Asked Questions*, updated January 23, 2007, *available at* http://president.msu.edu/prop2response/faqs/index.php?faqs.

"(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the class." Fed. R. Civ. P. 23(a); *McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 387 (S.D. Ohio 2001). If these requirements are met, the class may be certified if it fits into any of the three categories described in Federal Rule 23(b). Fed. R. Civ. P. 23(b).

Within the confines of Federal Rule 23, this Court has broad discretion to certify the class, and it is well-established that "any doubts concerning the propriety of class certification should be resolved in favor of upholding the class." *Gasperoni v. Metabolife Int'l, Inc.*, No. 00-71255, 2000 WL 33365948 at *8 (E.D. Mich. Sept. 27, 2000). Because the requirements of Federal Rule 23 are met in this case, this motion should be granted.

I. THE PROPOSED CLASS MEETS THE REQUIREMENTS FOR CLASS CERTIFICATION OF FEDERAL RULE 23(a).

The Proposed Class meets each of the four requirements of Federal Rule 23(a).

A. The Class Is so Numerous that Joinder of all Members Is Impracticable.

Federal Rule 23(a)(1) requires only that the members of the class be so numerous that "joinder of all class members is impracticable." Although this is more than a strict numerical test, "'substantial' numbers usually satisfy the numerosity requirement," *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006), and classes of forty or more typically suffice. *See, e.g., Crawford v. TRW Automotive U.S.*, No. 06-14276, 2007 WL 851627, at *3

(E.D. Mich. Mar. 21, 2007) ("it generally is accepted that a class of 40 or more is sufficient to satisfy the numerosity requirement").[5]

This minimal standard is easily met here. Last year, the University of Michigan enrolled over 40,000 students, employed over 5,500 faculty members, and received more than 25,000 applications from prospective undergraduates alone.[6] Certainly many of the University of Michigan's students enrolled, at least in part, in reliance on the Defendant Universities' policies promoting the admission and enrollment of a diverse group of students. Indeed, named plaintiffs' are aware that many additional members of the Proposed Class exist. (*See* Quinn Decl. ¶ 4; Kasper Decl. ¶ 4; Maxey Decl. ¶ 4; Cantrell Decl. ¶ 5; Munoz Decl. ¶ 3; Kay Decl. ¶ 4; Canning Decl. ¶ 3; Johnson Decl. ¶ 4; Countryman Decl. ¶ 4; Ceballo Decl. ¶ 4.) These numbers show that joinder would impose an unnecessary burden on the Court and the parties. At this stage of the proceedings, it is not necessary for the Court to know the precise number of class members. Instead, the Court may rely upon reasonable inferences drawn from the known facts. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (inferring numerosity in a products liability case based on defendant's time in business). Accordingly, these figures alone show that the Proposed Class meets the numerosity requirement. *See also Bittinger v. Tecumseh*

[5] *Accord* Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 3:5 (4th ed. 2002) ("The difficulty inherent in joining a few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone."); James Wm. Moore et al., 5 Moore's Federal Practice, 23.22[1][b] (3d ed. 2006) (noting that classes with more than 40 members are generally held sufficient to meet numerosity requirement).

[6] University of Michigan, *History of U-M*, last updated Nov. 16, 2006, *available at* http://www.umich.edu/~info/; University of Michigan, *Fast Facts*), n.d., *available at* http://www.admissions.umich.edu/fastfacts.html; University of Michigan, *U-M Fact Sheet*, last updated Oct. 25, 2006, *available at* http://www.umich.edu/~info/.

Prod. Co., 123 F.3d 877, 884 n.1 (6th Cir. 1997) (finding it "frivolous" to contest the numerosity of a 1,000-member class because "to reach this conclusion is to state the obvious.").

Sheer numbers aside, joinder is impractical here because of the nature of the case. Joinder would be extremely difficult and needlessly time consuming because individual identification of all plaintiffs would require contact with virtually all of the 40,000-plus students currently enrolled at the University of Michigan, more than 5,500 faculty members, and thousands of widely-dispersed applicants. The named plaintiffs alone reside in several different states and varied parts of Michigan, (Quinn Decl. ¶ 1; Kasper Decl. ¶ 1; Maxey Decl. ¶ 1; Cantrell Decl. ¶ 1; Munoz Decl. ¶ 1; Kay Decl. ¶ 1; Canning Decl. ¶ 1; Johnson Decl. ¶ 1; Countryman Decl. ¶ 1; Ceballo Decl. ¶ 1), and the applicants to the University of Michigan come from "all 50 states and over 100 foreign countries from Afghanistan to Zimbabwe."[7] *Compare Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1014 (W.D. Mich. 1987) (finding numerosity in part because the named plaintiffs "are permanent residents of Texas, Ohio, Iowa, Michigan, and Florida"). "[P]roblems in identifying all class members is actually a situation that makes class certification more desirable," because of the increased difficulty of joinder. *Roman v. Korson*, 152 F.R.D. 101, 105 (W.D. Mich. 1993).[8] The Proposed Class meets the numerosity requirement.

[7] University of Michigan, *History of U-M*, last updated Nov. 16, 2006, *available at* http://www.umich.edu/~info/.

[8] Also, many class members are high school, undergraduate, and graduate students who may not have the means to bring an individual suit on their own behalf. *See Cervantes v. Sugar Creek Packing Co., Inc.*, 210 F.R.D. 611, 621 (S.D. Ohio 2002) (noting that a court properly considers "the financial resources of class members" and whether requiring joinder will cause "litigational hardship or inconvenience").

B. There Are Questions of Law and Fact Common to the Class.

The commonality requirement of Federal Rule 23(a)(2), "simply requires a common question of law or fact." *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 591 (E.D. Mich. 2006) (citation omitted). It is not necessary that plaintiffs have in common all of the questions of law or fact raised. "The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members." *UAW v. Gen. Motors Corp.*, No. 05-CV-73991, 2006 WL 891151, at *10 (E.D. Mich. Mar. 31, 2006) (citing *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422 (6th Cir. 1998)).

As the Court noted in *Snow v. Atofina Chemicals Inc.*, "when the legality of the defendant's standardized conduct is at issue, the commonality element is normally met." No. 01-72648, 2006 WL 1008002, at *4 (E.D. Mich. March 31, 2006). This is the case for most actions for injunctive relief, which "by their very nature often present common questions." *Baby Neal v. Casey*, 43 F.3d 48, 57 (3rd Cir. 1994) (citation omitted). *See also Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976) (finding commonality because plaintiff "alleged that promotional discrimination had been practiced across the board").

It is also the case here. Each of the class members supports admissions policies that include race as one among many factors considered in University of Michigan admissions decisions, but is burdened by Proposal 2. (*See* Compl. ¶¶ 47-61; Quinn Decl. ¶ 3; Kasper Decl. ¶ 4; Maxey Decl. ¶¶ 2-3; Cantrell Decl. ¶¶ 4-5; Munoz Decl. ¶ 3; Kay Decl. ¶¶ 3-4; Canning Decl. ¶ 3; Johnson Decl. ¶ 4; Countryman Decl. ¶ 4; Ceballo Decl. ¶ 3.) Each raises the fundamental legal question of whether Proposal 2 violates the Equal Protection Clause by

relocating the authority to implement such policies to a new and remote level of government. (*See Id.*) Other common issues include, among others:

- whether and to what extent Proposal 2 makes it more difficult to achieve policies that include race as one among many factors considered in admissions decisions at the University of Michigan;
- whether and to what extent similar difficulties apply to those who seek "preferences" in admissions that are unrelated to race and gender;
- whether and to what extent the University of Michigan maintains control over those aspects of their admissions policies which are not affected by Proposal 2; and
- whether and to what extent the University of Michigan's admissions policies have changed and evolved in response to various lobbying efforts and in the interest of furthering particular policies.

Each of these issues alone satisfies the commonality requirement. *See also Van Vels v. Premier Athletic Ctr. of Mainfield, Inc.*, 182 F.R.D. 500, 507 (W.D. Mich. 1998) ("In cases involving the question of whether defendant has acted through illegal policy or procedure, commonality is readily shown because the common question becomes whether the defendant in fact acted through the illegal policy or procedure.").

C. The Claims or Defenses of the Representative Parties Are Typical of the Claims or Defenses of the Class.

Federal Rule 23(a)(3) requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class. "A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [the] claims are based on the same legal theory.'" *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160, 169 (E.D. Mich. 2006) *citing In re Am. Med'l Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). Given the similarities of the two standards, the Sixth Circuit "has held that the

commonality and typicality requirements tend to merge." *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 269 (E.D. Mich. 2001) (*"Olden I")*. This is because these elements are so clearly overlapping and interrelated:

> [b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Rutherford v. City of Cleveland, 137 F.3d 905, 909 (6th Cir. 1998). Due in part to these similarities, "[t]he test for typicality, like commonality, is not demanding." *Atofina*, 2006 WL 1008002, at *5 (citations omitted).

The typicality requirement is satisfied here. The named plaintiffs represent a variety of perspectives, but each is burdened by Proposal 2. (Compl. ¶ 9-27; Quinn Decl. ¶ 3; Kasper Decl. ¶ 4; Maxey Decl. ¶ 3; Cantrell Decl. ¶ 4-5; Munoz Decl. ¶ 3; Kay Decl. ¶ 4; Canning Decl. ¶ 2-3; Johnson Decl. ¶ 2-3; Countryman Decl. ¶ 3; Ceballo Decl. ¶ 3.) Although each may have particular reasons for supporting policies banned by Proposal 2, their legal claims arise from precisely the same course of conduct on the part of the defendants and are based on their universal belief that Proposal 2 violates the Fourteenth Amendment to the United States Constitution. (Compl. ¶32, 60.) These same characteristics also mark the members of the Proposed Class, whose interests are substantively identical. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (summarizing the typicality requirement: "as goes the claim of the named plaintiffs, so as the claims of the class."). That is all—indeed more—than is required by Federal Rule 23. *See also Glover v. Johnson*, 85 F.R.D. 1, 5 (E.D. Mich. 1977) (finding

typicality because, despite each individual plaintiff's "unique situation," the complaint alleged a "general across-the-board policy of sexual discrimination.").

D. The Representative Parties Will Fairly and Adequately Represent the Interests of the Class.

To satisfy the final requirement of Federal Rule 23(a), the representative plaintiff must be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Sixth Circuit has explained that "adequate representation" requires that: 1) the class representatives have common interests with the unnamed members of the class, and 2) it appears that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Senter*, 532 F.2d, at 525.

These requirements are met here. The named plaintiffs together represent a fair cross-section of the Proposed Class. There are no intra-class conflicts between the named and unnamed members of the Proposed Class because, as discussed more thoroughly above (in Sections I-B and I-C), the legal and practical interests of the named plaintiffs are substantively identical to those of the unnamed class members. The named plaintiffs are committed to the legal claims and interests of the Proposed Class, (Quinn Decl. ¶ 4; Kasper Decl. ¶ 4; Maxey Decl. ¶ 4; Cantrell Decl. ¶ 5; Munoz Decl. ¶ 3; Kay Decl. ¶ 4; Canning Decl. ¶ 3; Johnson Decl. ¶ 4; Countryman Decl. ¶ 4; Ceballo Decl. ¶ 4.), as you would expect in a case where all parties seek precisely the same non-exclusive relief. Accordingly, any differences of opinion that exist between the named and unnamed class members will not "go[] to the very subject matter of the claims" as required to defeat class certification. *Int'l Union v. Ford Motor Co.*, Nos. 05-74730, 06-10331, 2006 WL 1984363, at *20 (E.D. Mich. July 13, 2006) (citation omitted).

Likewise, the Counsel for the Cantrell Plaintiffs are dedicated to and capable of protecting the interests of the Proposed Class. The Cantrell Plaintiffs have assembled a team of uncommonly capable and experienced counsel composed of veteran public-interest lawyers, skilled practitioners, and esteemed legal scholars. Counsel associated with the American Civil Liberties Union ("ACLU"), the NAACP Legal Defense and Education Fund ("LDF"), the Detroit Branch NAACP, and the American Civil Liberties Foundation have litigated scores of complex constitutional cases, including numerous Fourteenth Amendment cases. (Rosenbaum Decl. ¶ 4; Hollowell Decl. ¶ 4, 6.) In *Coalition for Economic Equity v. Wilson*, Lead Counsel Mark D. Rosenbaum litigated a *Hunter/Seattle* challenge to California Proposition 209 through trial and appeal, making Mr. Rosenbaum one of the only lawyers in the country to have tried a case that is closely related to this one. (Rosenbaum Decl. Ex. A, at 8). Karin A. DeMasi of the law firm of Cravath, Swaine & Moore LLP ("Cravath") has extensive experience representing clients in class-action and other types of complex litigation. (DeMasi Decl. ¶ 3.) Cravath, of which Ms. DeMasi is a Partner, has served as counsel of record in more than eighty complex class action cases since 2002, and has significant experience representing plaintiffs in the public-interest context. (*Id.*) Professors Laurence H. Tribe, Erwin Chemerinsky and Daniel P. Tokaji are preeminent constitutional law scholars who have participated in many of the most significant Fourteenth Amendment cases brought in recent years. (Rosenbaum Decl. ¶ 9-16.) Counsel for the Cantrell Plaintiffs have already devoted significant resources to the preparation of this lawsuit and the development of relationships of trust and confidence with class members, and will provide adequate resources and co-representation to the class. (DeMasi Decl. ¶ 2, 7; Rosenbaum Decl. ¶ 2; Hollowell Decl. ¶ 2). The adequacy requirement is satisfied.

II. THE PROPOSED CLASS MEETS THE REQUIREMENTS FOR CLASS CERTIFICATION OF FEDERAL RULE 23(b).

Federal Rule 23(b) sets out the three types of class action suits that may be certified if the requirements of subsection (a) have been met. Most relevant here is subsection (b)(2), which provides that a class action is appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[9] Fed. R. Civ. P. 23(b)(2).

Subsection (b)(2) was specifically designed for civil rights cases in which class members seek injunctive relief from a similar legal wrong. *See* Fed. R. Civ. P. 23 Advisory Committee Note, 1966 Amendment ("Illustrative [of subsection (b)(2)] are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."). The Sixth Circuit has endorsed this application of 23(b)(2), noting that "[l]awsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter*, 532 F.2d at 525. In fact, the Sixth

[9] Although best suited for certification as a (b)(2) class, the Proposed Class also satisfies the more rigorous requirements of Federal Rule 23(b)(3). Federal Rule 23(b)(3) "is designed . . . to achieve the economies of time, effort and expense." *Olden I*, 203 F.R.D. at 270 (citation and internal quotation marks omitted). Class certification will avoid multiple litigation over the same issues as to the constitutionality of Proposal 2. The superiority of addressing the controversy among the parties through a class action is manifest when compared with the alternative—the possibility of numerous courts deciding identical issues on different schedules, risking inconsistent records and decisions, delayed appeals and uncertain results. This alternative would needlessly burden the parties and the Court and encourage tactical maneuvering. *See Van Vels*, 182 F.R.D. at 512 ("The filing of separate suits by class members would be a monumental waste of resources and would likely jeopardize the rights of class members and would waste the resources of defendants in defending separate suits.").

Circuit has made clear that "i[f] the Rule 23(a) prerequisites have been met, and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed" under Federal Rule 23(a)(2). *Olden v. LaFarge Corp.*, 383 F.3d 495, 510 (6th Cir. 2004) (*"Olden II").*

This is a prototypical class action under subsection (b)(2). As discussed more thoroughly above, all members of the Proposed Class seek relief from the same conduct—namely, the application of Proposal 2—which affects each of them in a substantively identical way.[10] This is a classic case for certification under Federal Rule 23(b)(2) and Sixth Circuit case law. *See, e.g.*, *McGee*, 200 F.R.D. at 391 (certifying a 23(b)(2) class where plaintiffs charged the defendants of discriminating against credit applicants based on their marital status). The motion for class certification should be granted.

III. THE COURT SHOULD APPOINT COUNSEL FOR THE CANTRELL PLAINTIFFS AS LEAD COUNSEL TO THE PLAINTIFF CLASS

Federal Rule 23(g) requires the Court to appoint class counsel if the Court certifies a class, and outlines the requirements for class counsel, requiring, above all, that the

[10] Although all members of the Proposed Class would benefit from the injunctive relief sought in this action, this is not a case in which "no useful purpose would be served by permitting this case to proceed as a class action because the determination of the constitutional question can be made . . . regardless of whether this action is treated as an individual action or as a class action." *See Craft v. Memphis Light, Gas, and Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976) (internal quotation marks omitted). Unlike *Craft*, the claims in this case are susceptible to mootness due to the inevitable turnover of class members. This not only makes *Craft* inapplicable, but in fact also makes class certification significantly more desirable. *See Glover*, 85 F.R.D. at 4 ("The fact that membership of the class may change over time . . . . makes class certification advantageous in this case, since joinder of all class members becomes correspondingly more impractical and mootness of individual claims more likely."). *Craft* has been distinguished on precisely this basis in strikingly similar cases. *See, e.g.*, *Gratz v. Bollinger*, No. 97-CV-75231-DT slip. op. at 13 (E.D. Mich. Dec. 23, 1998), DeMasi Decl. Ex. B at 13 ("In contrast to *Craft*, the Court believes that a class action serves a useful purpose in the instant case because plaintiff Hamacher's claims are particularly susceptible to mootness.").

chosen counsel "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Federal Rule 23(g)(1)(C) lists a variety of other factors to be considered, including:

> 1) the work that counsel has performed in identifying or investigating potential claims in the action; 2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; 3) counsel's knowledge of the applicable law; and 4) the resources that counsel will commit to representing the class. Pursuant to Rule 23(g)(1)(ii), the Court may also consider other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.

In re Delphi Erisa Litigation, 230 F.R.D. 496, 498 (E.D. Mich. 2005).

Applying the requirements of Federal Rule 23(g), this Court should appoint the counsel for the Cantrell Plaintiffs as lead counsel for the class. As more fully discussed in Section I-D and in the attached declarations of Mark D. Rosenbaum (who has been appointed lead counsel), Karin A. DeMasi, and Melvin Butch Hollowell, Counsel for the Cantrell Plaintiffs are highly experienced in litigation of this type. They have already committed substantial resources to this litigation, and are dedicated to pursuing the class members' claims in a vigorous and expeditious manner. (*See* Rosenbaum Decl. ¶¶ 2, 4; DeMasi Decl. ¶¶ 2, 7; Hollowell Decl. ¶¶ 2, 6.) Because they are best able to represent and protect the interests of the class, counsel for the Cantrell Plaintiffs should be named lead counsel for the certified class.

Conclusion

For the foregoing reasons, the Cantrell Plaintiffs respectfully request that the Court grant the motion for class certification and appoint counsel for the Cantrell Plaintiffs as lead counsel for the class.

Dated: May 15, 2007.

Respectfully submitted,

s/ with consent of Mark D. Rosenbaum
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

COALITION TO DEFEND AFFIRMATIVE ACTION, et al., Plaintiffs, vs. 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. and CHASE CANTRELL, et al., Plaintiffs, vs. JENNIFER GRANHOLM and MICHAEL COX, Defendants.	Case 06-15024 Hon. David M. Lawson **CONSOLIDATED CASES** CERTIFICATE OF SERVICE Case 06-15637 Hon. David M. Lawson

KARIN A. DeMASI hereby certifies the following under the penalty of perjury:

On the 15th Day of May, 2007, I filed the foregoing document electronically and it is available for viewing and downloading from the ECF system. Service was accomplished by means of Notice of Electronic Filing upon

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by delivering a true copy of the aforementioned documents to a courier of United Parcel Service, an

overnight delivery service, for delivery the next business day to wit: Wednesday, May 16, 2007.

Dated at New York, New York, this 15th day of May, 2007.

s/ Karin A. DeMasi
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