For Opinion See 2011 WL 2600665

United States Court of Appeals,
Sixth Circuit.
COALITION TO DEFEND AFFIRMATIVE ACTION, et al., Plaintiffs-Appellees,
andChase CANTRELL, et al., Plaintiffs-Appellees,
v.
THE REGENTS OF THE UNIVERSITY OF MICHIGAN, et al., Defendants-Appellees,
andEric RUSSELL, Defendant-Intervenor-Appellant.
No. 08-1389.
May 15, 2009.

Appeal from the U.S. District Court for the Eastern District of Michigan Case Nos. 06-15024, 06-15637

Appellant's Opening Brief

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Statement in Support of Oral Argument

Because this appeal presents an important and complex issue of first impres-sion in this Circuit under the Federal Rules of Civil Procedure, in a case implicat-ing state and federal constitutional rights, oral argument would aid this Court's resolution of the matter.

Jurisdictional Statement

The United States District Court for the Eastern District of Michigan had ju-risdiction over this matter pursuant to 28 U.S.C. § 1331 . Defendant-Intervenor's Notice of Appeal was timely filed in accordance with Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Statement of Issues

1. Should a federal district court continually reevaluate whether an interven-ing party satisfies the requirements of Fed. R. Civ. P. 24(a) after the dis-trict court and this Court have already determined that the party may in-tervene as of right?

2. If it is proper for a district court to continually reevaluate whether an in-tervening party meets the requirements of Fed. R. Civ. P. 24(a), may the district court dismiss the intervenor on a motion for summary judgment where genuine issues of material fact still exist as to whether the impair-ment prong of that Rule was satisfied?

3. If it is proper for a district court to continually reevaluate whether an intervening party meets the requirements of Fed. R. Civ. P. 24(a), may the district court properly dismiss the intervenor on a motion for summary judgment by concluding that the intervenor is now adequately represented simply because another party begins to assert some, but not all, of the intervenor's arguments and litigation strategies after having refused to do so previously?

4. If the district court properly dismissed the defendant-intervenor in this case, did it otherwise err by failing to provide any reasoning for denying permissive intervention

Statement of the Case

This appeal presents a question of first impression for the Sixth Circuit-indeed, a question that has received virtually no treatment in the federal courts: whether district courts should continually reassess the status of parties who have previously been granted intervention as of right pursuant to Fed. R. Civ. P. 24(a). Specifically at issue is the continued participation of a defendant-intervenor in a suit challenging the validity of Michigan's constitutional ban on the State's use of racial, ethnic, and gender preferences. Eric Russell, currently a student at Wayne State University Law School, was granted leave to intervene in the case in December 2006, when the then-parties to the litigation, including all State Defendants, stipulated to an injunction barring enforcement, as against the State Universities' admission and finan-cial-aid policies, of the constitutional ban. From that time until the day the district court entered its final orders in this case, Mr. Russell participated as a full party. Among the Defendants, he was the only party to pursue factual discovery and to retain experts to counter the expert and factual evidence submitted by the Plaintiffs.

After the district court had dismissed all of the Plaintiffs' claims, it granted what one set of Plaintiffs styled as a "Motion for Summary Judgment as to Eric Russell." This ruling, which functionally served only to complicate the issues on appeal, was erroneous for several reasons. First, the district court endorsed a re gime of continual reevalu-ation of intervention decisions, a process that efficient federal litigation cannot possibly accommodate and that neither the Federal Rules nor federal caselaw sanctions. Second, even if it were proper for the court to entertain summary

judgment motions as to the status of intervenors, the court was required to analyze such motions pursuant to the standard burden-shifting framework applicable to Rule 56(c) process. Here, the court eschewed that framework, putting the initial burden on Mr. Russell rather than the moving party. Third, regardless of the standard the court applied, it could not have properly concluded that there exists a total absence of genuine issues of material fact as to whether Mr. Russell continues to satisfy Rule 24(a)'s requirements for intervention as of right. The evidence before the district court clearly showed that Mr. Russell has a continuing interest in nondiscriminatory consideration of his applications for financial aid, that this interest may be impaired in the absence of his intervention, and that he is not adequately represented by any other defendant. For these reasons, the district court's dismissal of Mr. Russell must be reversed.

Facts

On November 7, 2006, the citizens of Michigan approved a ballot initiative, Proposal 2, which amended the State's Constitution to bar the State, including Michigan's public universities, colleges, and schools from "discriminat[ing] against, or 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 employment, public education, or public contracting." Mich.Const art. I, §§ 26(1)-(2).[FN1] The provision was slated to go into effect on December 23, 2006.

> FN1. Even though it is now a valid provision of Michigan's Constitution, Section 26 has generally been referred to as "Proposal 2" throughout this litigation.

On November 8, 2006, the Coalition to Defend Affirmative Action, along with other organizations and individuals (the "Coalition Plaintiffs"), filed in the Eastern District of Michigan a federal challenge to Proposal 2, suing the Governor of Michigan, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. Doc. 1.[FN2] On December 11, the University Defendants filed a cross-claim against Governor Granholm and moved for a declaratory judgment and a preliminary injunction allowing the Universities to continue employing their existing race- and gender-preference policies for the remainder of the 2007 admissions and financial-aid cycles. Docs. 2, 5. On December 14, 2006, the district court granted the Michigan Attorney General's motion to intervene as a defendant. Docs. 8, 13.

> FN2. Unless otherwise noted, district court docket citations are to Case No. 06-15024, the action initiated by the Coalition Plaintiffs.

On December 18, 2006, five days before Proposal 2 was to go into effect, all parties to the litigation the Coalition Plaintiffs, the Governor, the Attorney General, and the Universities-filed a stipulation requesting an order enjoining appli-cation and enforcement of Proposal 2's nondiscrimination provisions as to the Uni-versiies until July 1, 2007-the end of the Universities' 2006-2007 admissions and financial-aid cycles. Doc. 26. The following day the district court issued a "temporary injunction" consistent with the stipulation. Doc. 36.

Also on December 19, another set of plaintiffs (the "Cantrell Plaintiffs") filed a separate suit, in the same court, challenging Proposal 2 on a "political restructuring" equal protection theory. Case No. 06-15637, Doc. 1. All of the Cantrell Plaintiffs alleged the same injury: that their "ability to obtain reinstate-ment of [the University of Michigan's] former admissions policies is unconstitu-tionally and unequally burdened by the difficulty of seeking an amendment to the Michigan Constitution." Cantrell Pls.' First Amended Cmplt., Doc. 73, at 4. At the time they filed suit in 2006, the Cantrell Plaintiffs consisted of four University of Michigan professors, four University of Michigan undergraduates, three Univer-sity of Michigan Law School students, one University of Michigan PhD candidate, and six Michigan high school seniors who had applied, or were planning to apply, to the University of Michigan. The record does not reflect the current status of these Plaintiffs, including whether they remain Michigan residents, but if they followed the normal course, the three law-student and four undergraduate plaintiffs have since graduated. Likewise, the plaintiffs who were high school students have likely matriculated at a college or university, but the record does not

reflect whether they were admitted to, or chose to attend, the University of Michigan or any other Michigan public educational institution.

Fearing prejudice to his right to equal treatment under Proposal 2, Eric Russell at that point had been granted admission to Wayne State University Law School and was an applicant to the University of Michigan School of Law a motion to intervene in the *Coalition* action on December 18. Doc. 27. On Decem-19, Mr. Russell filed an emergency motion asking the district court to expedite its consideration of his intervention motion or to stay the temporary injunction prior to Proposal 2's effective date of December 23. Doc. 43. As no decision on his motion was forthcoming by December 21, Mr. Russell filed a notice of appeal to this Court, Doc. 47, along with an Emergency Motion for Stay Pending Appeal and a Petition for a Writ of Mandamus or Prohibition. All other parties, including the three State Defendants Governor, the Attorney General, and the Universi-opposed Mr. Russell's motion and petition and defended the non-enforcement of Proposal 2.

On December 27, 2006, the district court granted Mr. Russell's motion to intervene. *See* *Coalition to Defend Affirmative Action v. Granholm,* 240 F.R.D. 368 (E.D. Mich. 2006).[FN3] And, on December 29, this Court granted Mr. Russell's mo tion for a stay pending appeal, finding an "absence of any likelihood of prevailing in invalidating [Proposal 2] on federal grounds," and explaining that Proposal 2 "would seem to be an equal-protection virtue, not an equal-protection vice." *Coalition II,* 473 F.3d at 240, 249. Specifically with respect to the political-process claim, this Court explained that such claims succeed where the challenged law "ma[kes] it more difficult for minorities to obtain protection from discrimination through the political process," whereas "Proposal 2 purports to make it more difficult for minorities to obtain racial preferences through the political process." *Id.* at 251.

> FN3. This Court and the district court have thus far issued six opinions in this case. For ease of reference, these opinions are herein referred to in chronological order as Coalition I-VI. Thus, the district court opinion granting Mr. Russell's motion to intervene, *Coal. To Defend Affirmative Action,* 240 F.R.D. 368, is referred to as *Coalition I.* This Court's opinion granting the stay, *Coal, to Defend Affirmative Action v. Granholm,* 473 F.3d 237 (6th Cir. 2006), is referred to as *Coalition II.* This Court's opinion affirming denial of intervention to certain groups, *Coal, to Defend Affirmative Action v. Granholm,* 501 F.3d 775 (6th Cir. 2007), is referred to as *Coalition III.* The district court's opinion granting summary judgment to the Attorney General, *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.,* 539 F. Supp. 2d 924 (E.D. Mich. 2008), is referred to as Coalition IV. The district court's opinion dismissing Mr. Russell from the case, Coal. to *Defend Affirmative Action v. Regents of the Univ. of Mich.,* 539 F. Supp. 2d 960 (E.D. Mich. 2008), is referred to as Coalition V. And the district court's opinion denying the *Cantrell* Plaintiffs' Rule 59(e) motion, *Coal, to Defend Affirmative Action v. Regents of the Univ. of Mich.,* 592 F. Supp. 2d 948 (E.D. Mich. 2008), is referred to as *Coalition VI.*

As to Mr. Russell's status in the case, this Court explained that his interven-tion as of right was proper and that he was now a "party in the case." *Id.* at 244. Indeed, given the other Defendants' refusal to enforce Proposal 2, this Court described the district court's conclusion that Mr. Russell's individual interests 'may not be taken into account by the present parties' to "be an understatement." *Id.* at 245. As this Court explained:

The parties knew of Russell's opposition to the stipulated injunction... and nonetheless proceeded to seek its entry. Even now, the closest they have come to accounting for his interests in the case is to say that "he is free to reapply" if the Law School denies him admission this year.

Id. From that point in late December 2006 until the day the district court entered its final orders in this case in March 2008, Mr. Russell participated as a full party to this litigation. Of the four defendants in the suit, only he and the Attorney General sought to defend Proposal 2.[FN4] As explained below, however, they took very different approaches to that defense.

FN4. Although the Universities were named as defendants, they have made no efforts to defend Proposal 2. Instead, these State-run institutions first attacked Proposal 2 and then, after losing that battle, settled into a passive-aggressive role, taking no official position on the merits but continuing to join and assist the Plaintiffs in various ways. For example, the Universities supported the Cantrell Plaintiffs' efforts to have Mr. Russell dismissed from the case and also resisted attempts by Mr. Russell to obtain discovery necessary to rebut Plaintiffs' allegations.

On January 5, 2007, the district court consolidated the *Coalition* and *Cantrell* suits. Doc. 69. On March 22, 2007, the court entered a case management order, which explained that the case could not be decided upon stipulated facts and thus specified that "a period of discovery will be necessary before a record can be developed that permits adjudication of the matter." Doc. 95 at 1-2. The order au-thorized the parties to proceed with both fact and expert discovery. Of the two par-ties seeking to defend Proposal -Mr. Russell and the Attorney General-only Mr. Russell sought discovery in an effort to rebut the factual case the Plaintiffs were preparing. Wayne State University Law School-the institution at which Mr. Russell ultimately matriculated-produced its then-dean, Frank Wu, for a deposi-tion as a Fed. R. Civ. P. 30(b)(6) witness. During the discovery period, Mr. Rus-sell also retained two expert witnesses, who filed extensive declarations rebutting claims made by the Plaintiffs and their experts. *See* Docs. 188, 221 at Ex. 1, 228. The Attorney General retained no such witnesses and did not attempt to rebut the Plaintiffs' factual and expert claims.

The case management order also established a timeline for filing summary judgment motions and specified that "[n]o party may file more than one motion for summary judgment without obtaining leave of court." Doc. 95 at 3. Although the Cantrell Plaintiffs were planning to, and ultimately did, file a motion for summary judgment as to the merits, they also filed, on October 5, 2007, what was styled as a "Motion for Summary Judgment as to Eric Russell," which requested that the court dismiss Mr. Russell as a party because he had "no remaining legal interest in this case and, as a matter of law, is no longer entitled to participate in the subject matter of this litigation." Doc. 172 at 1-2. The Cantrell Plaintiffs moved for leave to file this paper as an additional motion for summary judgment, asserting only one rea-son why such leave was requested and proper-that the issue of Mr. Russell's con tinued participation "should be considered in advance of dispositive motions on the merits" so as to "streamline the litigation and eliminate duplication." Doc. 171 at 2-3. The district court granted the requested leave over Mr. Russell's objection, Doc. 173, explaining only that it found "the request to be reasonable," Doc. 175. The court, however, never acted upon the sole reason advanced for this anomalous process, and instead considered the motion alongside the summary judgment fil-ings regarding the merits, deciding the former on the same day as the latter.

On November 30, 2007, three parties separately moved for summary judg-ment on the merits: the Attorney General, Mr. Russell, and the Cantrell Plaintiffs. Docs. 201-03. On March 18, 2008, the Court ruled on all the motions pending be-fore it, bifurcating its ruling into two orders (Docs. 246 and 247) but offering no reason for the bifurcation. Its final judgment effectuating both orders is Document 248.

The district court's first order denied the Cantrell Plaintiffs' motion for summary judgment on the merits of their political restructuring claim, granted the Attorney General's motion for summary judgment on the merits as to all claims, and dismissed the consolidated cases. *See Coalition IV*, 539 F. Supp. 2d 924. As to the political restructuring claim, the district court found that because Proposal 2 bans racial preferences "[t]here is no question... that [it] makes it more difficult for minorities to obtain official action that is in their interest." *Id.* at 956. But the court held that that finding was inconsequential because the Equal Protection Clause "does not prohibit the State from banning programs that give an advantage on the basis of race." *Id.* at 957.[FN5] In rejecting the Plaintiffs' challenges to Proposal 2, the district court adopted many of the arguments advanced by Mr. Russell throughout the course of the litigation, including some arguments found only in his papers.

FN5. The district court also addressed the Cantrell Plaintiffs' standing. The court held that it "must take the claims as they are fairly pleaded," and explained that the Cantrell Plaintiffs "contend that they have suffered harm in that they have been hindered unconstitutionally in advancing their legal objectives through the political process." *Id.* at 946. In light of this allegation, the court concluded that the Cantrell Plaintiffs "plainly

identify injuries recognized in the law." *Id.* For ex-ample, the court concluded that the professor-plaintiffs have standing because "they support affirmative action" and Proposal 2 has resulted in "heightened dif-fi-culty in securing legislation or policies... that inure primarily to the benefit of minorities." *Id.*

The district court's second order of March 18 granted the Cantrell Plaintiffs' "Motion for Summary Judgment as to Eric Russell." See Coalition V, 539 F. Supp. 2d 960. Because the court had already dismissed all claims asserted by Plaintiffs in the first order, the second order's sole consequence, and presumably its sole purpose, was to affect Mr. Russell's status on appeal.

The court explained that a "motion for summary judgment... presumes the absence of a genuine issue of material fact for trial," *id.* at 967, but did not explain (or cite any authority for) the proposition that the Rule 56(c) process is ap-propriate for or amenable to questions arising under Rule 24. Instead, citing to a lone First Circuit decision and to a statement in the commentary to Fed. R. Civ. P. 24 that an intervenor of right may be "subject to appropriate conditions or restrictions the court held that "[w]hen a party that has been granted intervention as of right no longer meets the requirements for such intervention, a court properly dismisses that party from the case." *Id.* at 968. The court then turned to the four criteria that a proposed intervenor of right must timeliness, substantial legal interest, potential im-pairment of that interest, and adequacy of representation - determine whether Mr. Russell, already deemed by this Court to have satisfied those criteria, could remain in the case.

The district court found timeliness to be "irrelevant since Russell already [was] a party to the case." *Id.* at 968. The court also found that Mr. Russell's interest in receiving racially nondiscriminatory treatment in consideration of fi-nancial-aid awards, "likely suffice[s]" as a substantial legal interest. *Id.* at 969. The court found, however, that Mr. Russell's ability to protect this interest would not be impaired "in the absence of continued intervention." *Id.* at 969. Despite noting that "[i]t is unclear whether race was considered in the context of need-based financial aid before Proposal 2," and despite further noting that under controlling precedent "proof of impairment need only be 'minimal, the court found that because Dean Wu's deposition testimony since passage of Proposal 2, scholarship eligibility did not depend on criteria impermissible under Proposal 2 "unrebutted," Mr. Russell did not meet the third prong of the Rule 24(a) test, and thus summary judgment was appropriate. *Id.* at 971. The court also found that even though this Court "rightly" characterized the Attorney General's "lack of consistency in its acceptance of Proposal as puzzl[ing], Mr. Russell was now adequately represented because "it now appears that the [A]ttorney [G]eneral has resolved to defend the measure. *Id.* at 971.[FN6]

FN6. In this second order, the court also denied a motion to intervene by another putative applicant to the University of Michigan Law School, Jennifer *Gratz. Coalition* V, 539 F. Supp. 2d at 971-73. In her motion, Ms. Gratz asserted an interest in defending Proposal 2 so as to ensure nondiscriminatory consideration of her application. Doc. 241 at 10-12. Despite this Court's prior description of Proposal 2 as "an equal-protection virtue," 473 F.3d at 249, the district court, in its opinion on the merits of this case, described Ms. Gratz's effort to protect this interest as a "craven approach" through which she merely sought to secure "her own slice of the pie," *Coalition IV,* 539 F. Supp. 2d at 952. The district court did not explain why it attributed such a motive to Ms. Gratz (and, by implication, Mr. Russell), or how such a description could be accurate in light of the fact that Ms. Gratz is female, yet was seeking to enforce the elimination of preferences for females.

On March 19, 2008, the Coalition Plaintiffs appealed from the final judgment entered on March 18, Doc. 249, and this Court docketed the appeal as No. 08-1387. On March 20, 2008, Mr. Russell appealed from the final judgment to the extent it dismissed him from the consolidated cases, Doc. 251, and this Court docketed the appeal as No. 08-1389. On April 1, 2008, the Cantrell Plaintiffs filed in the district court a Rule 59(e) motion to alter or amend the judgment. Doc. 253. On April 11, 2008, the Universities appealed from the final judgment denying in part their motion to be dismissed as parties, Doc. 255, and this Court docketed the appeal as No. 08-1534. Pursuant to Fed. R. App. P. 4, this Court notified the parties that the appeals would be held in abeyance until the Cantrell Plaintiffs' Rule 59(e) motion was ruled upon by the district court. The district court denied the Cantrell Plaintiffs' Rule 59(e) motion over eight months later, on December 11, 2008. *See Coalition VI,* 592 F. Supp. 2d 948. On January 12, 2009, the Cantrell Plaintiffs filed a

notice of appeal, Doc. 260, and this Court docketed the appeal as No. 09-1111.

Summary of Argument

The district court ade three errors in granting the Cantrell Plaintiffs' motion for summary judgment as to Mr. Russell. First, the court adopted a regime of continual reevaluation of an intervenor's status' process that has no basis in federal law and that would undermine the efficiency embodied in the Federal Rules of Civil Procedure. Second, even if such a regime were proper, the district court was obliged to apply to this motion for summary judgment the same legal standard that applies to all Rule 56(c) motions, with the initial burden falling on the moving party to show why there was no question of material fact as to whether Mr. Russell still satisfied Rule 24's requirements. And given that the motion was essentially a claim of mootness, that burden was a heavy one. Instead, the district court wrongly put the initial burden on Mr. Russell. Moreover, the court required a conclusive showing that Mr. Russell still satisfied Rule 24(a)'s requirements, whereas all that is required at the summary judgment phase is an open question of material fact. Third, regardless of the standard applied by the court, it had no basis on the merits to grant the motion. The evidence in the record demonstrates that, at the very least, genuine issues of material fact exist; indeed, the evidence affirmatively establishes that Mr. Russell still satisfies the requirements of Rule 24.

ARGUMENT

I. Standard of Review

The district court granted what the Cantrell Plaintiffs styled as a "Motion for Summary Judgment as to Eric Russell," and in considering the motion purported to apply the summary judgment framework. *See Coalition V,* 539 F. Supp. 2d at 967. But the Cantrell Plaintiffs did not seek summary judgment as to the merits of their claims or the defenses raised in Mr. Russell's answer to their complaint. Instead, the motion requested that the district court reconsider whether Mr. Russell qualified for intervention under Rule 24. As discussed below, the entire inquiry under taken by the district court was improper and thus the only question this Court need decide is whether the district court should have entertained this motion at all, a question to be reviewed *de novo. See Matheny v. TVA,* 557 F.3d 311,315 (6th Cir. 2009) ("Questions of law are reviewed *de novo.*").

Even if this Court does proceed to review the merits of the district court's decision, however, it must still undertake a *de novo* review, as that is the standard applicable to both summary judgment and intervention rulings. *See Northland Family Planning Clinic, Inc. v. Cox,* 487 F.3d 323, 344 (6th Cir. 2007) (intervention)[FN7]; *Farhat v. Jopke,* 370 F.3d 580, 587 (6th Cir. 2004) (summary judgment).

> FN7. The timeliness element of a motion to intervene is reviewed for abuse of discretion, *id.,* but as the district court found, timeliness is not at issue here, *Coalition V,* 539 F. Supp. 2d at 968.

The district court's denial of Mr. Russell's motion for permissive intervention is reviewed for abuse of discretion, but this Court must ensure the lower court "provides enough of an explanation for its decision to enable... meaningful review." *Michigan State v. Miller,* 103 F.3d 1240, 1248 (6th Cir. 1997).

II. Intervention as of Right Is Not Subject to Continual Reevaluation and Such a Process Would Prove Unworkable and Inefficient

In granting the Cantrell Plaintiffs' motion, the district court sanctioned a regime that would have district courts, while adjudicating the main subject matter of a suit, hold a continual series of mini-trials whenever a party requested reevaluation of an intervenor's qualifications under Rule 24(a). Such a process of repeatedly and continually reopening the intervention inquirywhich, following the Cantrell Plaintiffs' logic, would apply in both district and appellate courtswould render federal litigation extremely inefficient.[FN8] As the district court itself pointed out in *Coalition I,*

"[t]he rules of civil procedure, including Rule 24[], must be construed and administered to secure the just, speedy, and inexpensive determina-tion of every action. 240 F.R.D. at 377 (quoting Fed. R. Civ. P. 1). It is to avoid such inefficiencies that the Supreme Court and this Court have held, in analogous situations, that such inquiries are unnecessary. *See, e.g., Dep't of Commerce,* 525 U.S. 316, 330 (1999) (holding that the presence of at least one party with standing means that court need not inquire into other parties' standing); *Director, Office of Workers' Compensation Programs v. Perini N. River Associates,* 459 U.S. 297, 303-05 (1983) (same); *1064 Old River Rd., Inc. v. City of Cleveland,* 137 Fed. Appx. 760, 765 (6th Cir. 2005) (same); *McConnell v. FEC,* 540 U.S. 93, 233 (2003) (holding that it is unnecessary to address an intervening defendant's standing where another defendant has standing); *Diamond v. Charles,* 476 U.S. 54, 64 (1986) (nothing that intervening defendant may submit briefing and argument, regardless of standing, so long as defendant with standing appealed).

> FN8. Here, such a process resulted in an entire extra round of summary judgment briefing and an extra appeal.

Moreover, nothing in Rule 24 sanctions a continual reevaluation of the in-erventio inquiry once it has been decided; the Rule speaks to qualifications necessary to *enter* the case as an intervenor, not to qualifications necessary to *remain* as a party. *See* Fed. R. Civ. P. 24(a) ("the court must permit anyone to intervene who" meets certain qualifications) (emphasis added); *Coalition III,* 501 F.3d at 779 ("We have explained that a proposed intervenor must establish four factors *before being entitled to intervene.")* (emphasis added). Indeed, as the district court's opinion demonstrates, such a regime makes no sense under Rule 24 because one of the essential elements for interventiontimeliness of the motion will always be "irrelevant" and superfluous. *Coalition V,* 539 F. Supp. 2d at 968. *See also Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992) ("courts should disfavor interpretations of statutes that render language superfluous").

As authority for its holding, the district court cited the Advisory Committee Notes to Rule 24, which state that "[a]n intervention of right... may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." But this statement offers scant support for the court's decision. First, as one respected treatise notes, the "Advisory Committee cites no authority... and it may be said [that] ... the Advisory Committee's qualification in the Notes of important textual language is a questionable technique." 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1922 (3d ed. 2007). thus... the fact that the Committee Note says that [courts] have the power does not create the power if it does not otherwise exist." *Id.* And while conditions of a "housekeeping nature" may be permissible, it is "very doubtful" that courts have the power to make "significant inroads on the standing of an intervenor." *Id.* Second, even if reliance on this dubious authority were proper, the statement does not support the out-and-out dismissal of an intervenor, but rather the imposition of "conditions and restrictions' upon an intervenor. By definition, a party must actually remain in the case to have "conditions and restrictions" placed upon it.[FN9]

> FN9. Rule 21 states: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party." This Rule is "a mechanism for remedying either the misjoinder or nonjoinder of parties," and "[t]he cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." 7 Wright, Miller & Kane, *supra,* § 1683 (3d ed. 2001). In other words, Rule 21, although broadly worded, deals with the joinder provisions that precede it, not with the intervention procedure that follows it. 10

In light of the inefficiencies this regime would create, as well as the lack of support in Rule 24 for such a regime, it is little wonder that the district court cited only one case in which a federal court dismissed a previously-admitted intervenor over the intervenor's protest. *See Morgan v. McDonough,* 726 F.2d 11, 14 (1st Cir. 1984).[FN10] That lone case, which to the best of Appellant's knowledge has never been followed on this point by any court, involved extraordinary circumstances not present here. In *Morgan,* an organization was granted highly conditional interven-tion and the district court failed to make clear whether the intervention was of right or permissive. *Id.* at 12. Eight years later, the district court dismissed the organi zation because the public defendant in the case had adopted a *lasting,* reconstituted

position and the intervenor's stance was *completely* redundant of the public defen-dant's. *Id.* at 13. In affirming the dismissal of the intervenor, the First Circuit em-phasized the "unique" nature of the proceedings and the extraordinary passage of time. *Id.* at 14. By contrast, this case involves none of these extraordinary fea-tures: as discussed below, his position is not wholly redundant of the Attorney General's and the possibility of inadequate representation remains; it is not a dec-ade-long, multi-phase suit, but rather an expedited case that has been resolved at summary judgment; and Mr. Russell is not an organization speaking for the diffuse interests of many members (as does a public defendant), but rather an individual with a highly particularized, personal interest. Moreover, unlike this case, there was no need in *Morgan* for extensive exploration and resolution of factual issues surrounding the intervenor's status.

> FN10. In their reply brief below, the Cantrell Plaintiffs cited three other cases they claimed "empower[ed] th[e] court to dismiss Mr. Russell, Doc. 190 at 3, but none of them are remotely analogous to the situation presented here. *Sutherland v. Mich. Dep't of Treasury,* 344 F.3d 603, 612-13 (6th Cir. 2003), dealt with the dis-missal of an original defendant because the plaintiffs failed to state a proper claim against it. *Letherer v. Alger Group, L.L.C.,* 328 F.3d 262, 266-67 (6th Cir. 2003), and *Cunningham v. Grayson,* 541 F.2d 538, 543-44 (6th Cir. 1976), dealt with the dismissal of a defendant who was originally deemed a necessary party, and thus was joined by the court, and who later stipulated or did not object to dismissal. None of these cases dealt with an intervenor of right who objected to dismissal.

III. Mr. Russell Still Qualifies for Intervention as of Right and the Cantrell Plaintiffs Have Not Demonstrated an Absence of Genuine Issues of Ma-terial Fact as to that Question

Even if the district court were correct in holding that it must continually re-examine the qualifications of each and every intervenor in a case, it erred by failing to apply the proper standard to the Cantrell Plaintiffs' summary judgment motion; and, regardless, the court erred in concluding that there was a total absence of any genuine issue of material fact as to whether Mr. Russell still qualified as an inter venor. The evidence before the district court affirmatively established that Mr. Russell does, in fact, still satisfy Rule 24's requirements.

To qualify as an intervenor of right, a party must: (1) file a timely motion to intervene; (2) have a substantial legal interest in the subject matter of the case; (3) face potential impairment of the ability to protect this interest in the absence of in-tervention; and (4) not be adequately represented by the existing parties. *Grutter v. Bollinger,* 188 F.3d 394, 397-98 (6th Cir. 1999). As the district court explained, the timeliness requirement cannot logically apply here. *Coalition* V, 539 F. Supp. 2d at 968. Thus, the questions at issue are whether Mr. Russell has a substantial legal in-terest that may be impaired in the absence of his continued participation, and whether any party to the litigation adequately represents that interest.

Because the Cantrell Plaintiffs brought a Rule 56(c) motion, the familiar summary-judgment framework is applicable. *Cf. Dep't of Commerce v. United States House of Representatives,* 525 U.S. 316, 329 (1999) (holding that where a party challenges standing in a motion for summary judgment, the party must show there is "no genuine issue of ma-terial fact as to justiciability"). "On a motion for summary judgment the movant has the burden of showing conclu-sively that there exists no genuine issue as to a material fact... " *Hutt v. Gibson Fiber Glass Products, Inc.,* 914 F.2d 790, 792 (6th Cir. 1990); *see also Sims v. Memphis Proc-essors, Inc.,* 926 F.2d 524, 526 (6th Cir. 1991) ("The moving party bears the bur den of 'clearly and convincingly' demonstrating the absence of any genuine issues of material fact."). In other words, because the Cantrell Plaintiffs moved for sum-mary judgment on the theory that Mr. Russell no longer satisfied the requirements of Rule 24, it was their burden to demonstrate conclusively, based on "the plead-ings, the discovery and disclosure materials on file, and any affidavits," that there was no genuine issue of material fact as to whether Mr. Russell still satisfied the requirements of Rule 24. Fed. R. Civ. P. 56(c); *Farhat,* 370 F.3d. at 587; *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989) ("The substantive law governing the case will determine what issues of fact are material... "). "An issue of fact is 'genuine' if a reasonable person could return a verdict for the non-moving party." *Farhat,* 370 F.3d at 587 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in the light most favorable to the nonmoving party. *White v. Turfway Park Racing Ass'n., Inc.,* 909 F.2d 941, 943-44 (6th Cir. 1990); *Hunt,* 914 F.2d at 792 ("[T]he evidence together with all

inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion."). That is, if a reasonable jury *could* find that Mr. Russell has a continuing legal interest in this case, that such interest *might* be impaired in the absence of his continued intervention, and that no party adequately represents his interest (as that requirement has been de-fined by this Court), then summary judgment was improper. Because the Cantrell Plaintiffs failed to demonstrate an absence of any genuine issue of material fact as to these issues, its motion for summary judgment should have been denied.

A. The District Court Correctly Found that Mr. Russell Has a Sub-stantial Legal Interest in Nondiscrimina-tory Consideration of His Eligibility for Financial Aid

When the district court granted Mr. Russell's intervention in December 2006, it explained that he asserted a substantial interest sufficient for intervention because "if... plaintiffs are successful in obtaining a ruling that [Proposal 2] is in-valid, Russell's chances of gaining admission to the University of Michigan law school may be diminished." *Coa-lition I,* 240 F.R.D. at 375. Similarly, this Court explained that Mr. Russell's pending application for admission gave him "a direct interest in whether Proposal 2 applies." *Coalition II,* 473 F.3d at 243. These decisions thus recognized the general principle that where a party might be subject to "a race-conscious program ... [t]he relevant injury... is the 'inability to compete on an equal footing.'" *Texas v. Lesage,* 528 U.S. 18, 21 (1999) (quoting Ne. Florida Chapter of the *Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666 (1993)). Accordingly, in its opinion dismissing Mr. Russell, the district court correctly noted that while Mr. Russell no longer has a pending application for admission, he does have a continuing interest in "obtaining] financial aid without regard to... considerations" of race, gender, or ethnicity, and that this in terest 'likely suffice[s]" as a substantial interest under Rule 24(a).[FN11] *Coalition V,* 539 F. Supp. 2d at 969. *See also id.* ("Eric Russell has shown a substantial legal interest"); *id.* at 971 (recognizing Mr. Russell's interest in "equal treatment in financial aid decisions").[FN12] Indeed, not only does this interest "likely" suffice, it clearly suffices, for an interest in student financial aid is sufficient to meet the even higher bar of the in-jury-in-fact requirement of constitutional standing. *See Nyquist v. Mauclet,* 432 U.S. 1, 6 n.7 (1977) (mere possibility that a student might require financial aid gave standing to challenge a statute excluding financial aid for aliens). *Cf. Corr v. Mattheis,* 407 F. Supp. 847 (D.R.I. 1976) (interest in student financial aid is protected by the Due Process Clause).

> FN11. At the time the district court was considering the Cantrell Plaintiffs' motion, Mr. Russell was also planning to submit a transfer application to the University of Michigan; thus, the opinion below addresses that interest. Because the time for transferring has passed, Mr. Russell does not press the issue here.
>
> FN12. Rule 24 provides that an intervenor must have "an interest" in the outcome of the case. It does not require that the interest that justified intervention at the outset must continue to exist, unchanged, throughout the litigation. Like any other party to litigation, an intervenor's interest may change due to the passage of time, the conduct of the parties, and the outcomes of the ongoing lawsuit. Thus, there is no basis for dismissing an intervenor if he still has an interest in the outcome, even if it is different from the interest originally identified. This is especially true here, where the general nature of the intervenor's interestmaintenance of nondiscri-minatory treatment in an application process-remains exactly the same, but the particular application has changed.

Moreover, quite apart from Mr. Russell's interest in nondiscriminatory consideration of his financial-aid applications, he also possesses exactly the same type of interest in this litigation as the Cantrell Plaintiffs, who base their standing to bring suit solely on the allegation that their ability to obtain reinstatement of racial and gender preferences is burdened by Proposal 2. Cantrell Pl.'s First Am. Compl. (Doc. 73) at 4. Take, for example, Professor Kathleen Canning, who maintains that she has standing to sue because she "believes that the University of Michigan's changes to its admis-sions policies in response to Proposal 2 will make the discussions in her classroom more abstract, and thereby damage the learning process" and that she will now have to lobby at the state rather than the local level to change those policies. *Id.* at 10. If such an interest clears the high bar of constitutional standing, it follows that Mr. Russell's corresponding interestin not having to lobby for a schooling environment where students are chosen without regard to factors such as

race and genderclears the lower bar of an interest sufficient for intervention of right. *See* *Coalition IV*, 539 F. Supp. 2d at 946-47 (concluding that the professor-plaintiffs have standing because they support racial and gender preferences and face "heightened difficulty in securing legislation or policies" mandating the use of such preferences); *San Juan County v. United States*, 503 F.3d 1163, 1171-72 (10th Cir. 2007) (en banc) (holding "that parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case") (quotation marks omitted) (citing *McConnell v. FEC*, 540 U.S. 93, 233 (2003); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997); *Dia-mond v. Charles*, 476 U.S. 54, 64 (1986)).[FN13]

> FN13. The Cantrell Plaintiffs protestations regarding Mr. Russell's continued participation in this case are thus a great irony, for he, as an intervenor, has every interest that they purport to have as plaintiffs with constitutional standing. More-over, Mr. Russell is distinct from most, if not all, of the Cantrell Plaintiffs because he actually is a student at a Michigan public institution, whereas it is quite possible that *none* of the Cantrell Plaintiffs are (or ever were) students at Michigan schools. At this point, then, the Cantrell Plaintiffs' claim may boil down to the four profes-sors' allegations that they are harmed by having to teach students who were se-lected without regard to their race, ethnicity, or gender.
>
> Oddly, while the district court went to great lengths to explain why Mr. Rus-sell should no longer remain a party to this case, the court's review of its continu-ing jurisdiction over the Cantrell Plaintiffs' case was cursory at best. In addressing standing, the court, without citation, stated that it "must take the claims as they are fairly pleaded." *Coalition IV*, 539 F. Supp. 2d at 946 That, of course, is not true on summary judgment. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("In response to a summary judgment motion,... the plaintiff can no longer rest on such mere allegations...") (quotation marks omitted). Moreover, the district court ignored entirely the jurisdictional question of mootness. *See* *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009).

B. Mr. Russell's Interest May Be Impaired Absent Intervention

This Court has explained that impairment need only be "possible if interven-tion is denied. This burden is minimal." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999). Despite recognizing that Mr. Russell had a continuing, sub-stantial legal interest, the district court concluded that there was no possibility his ability to protect that interest may be impaired in the absence of continued intervention. *Coalition V*, 539 F. Supp. 2d at 969. Its conclusion was erroneous both because it was based on the wrong legal standard and because the evidence before the court not only showed that the Cantrell Plaintiffs failed to establish the absence of genu-ine issues of material fact regarding potential impairment, but also established just the opposite-the potential and even likelihood of impairment.

1. The District Court Applied the Wrong Legal Standard

Because the Cantrell Plaintiffs brought a motion for summary judgment to challenge Mr. Russell's settled status as an intervenor, it was their burden to con-clusively demonstrate an absence of any genuine issue of material fact as to whether his ability to protect his interest in nondiscriminatory consideration for fi-nancial aid *may* be impaired in the absence of intervention. *See* *Farhat*, 370 F.3d. at 587. *Cf.* *Dep't of Commerce*, 525 U.S. at 329. Yet this is not the standard the district court applied to this question. Instead, the court explained its consideration of the issue as follows: The Court concludes... that *Eric Russell* has failed to establish that impairment of his substantial legal interest with respect to... Wayne State is possible if continued intervention is denied. Although proof of impairment need only be minimal, this element poses a burden nonetheless, which *Russell* has failed to carry.

Coalition V, 539 F. Supp. 2d at 971 (emphasis added and quotation marks omit-ted). But both the district court and this Court had already decided Mr. Russell qualified as an intervenor of right. The motion at issue was not a motion to inter-vene, but rather a motion for summary judgment, and thus the initial burden was on the Cantrell Plaintiffs, not on

Mr. Russell. *See* *Martingale LLC v. City of Lou isville*, 361 F.3d 297, 301 (6th Cir. 2004) ("The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential ele-ment of the non-moving party's case."). Moreover, at the summary judgment stage, the nonmoving party need not firmly "establish" any fact, but rather need only show that a genuine issue of material fact exists.

The Rule 24 inquiry is analogous to (though not as burdensome as) the standing inquiry. Standing is a snapshot, and the facts relevant to the inquiry are those in existence when the suit is filed. Thus, for example, in the precursor to this case, *Gratz,* the Supreme Court held that Patrick Hamacher, who had already graduated from Michigan State University by the time the case reached the Court, still had standing to pursue an appeal regarding his claim for injunctive relief. 539 U.S. at 251 n.1, 262. As the Supreme Court noted just last Term, "[w]hile the proof required to establish standing increases as the suit proceeds, the standing in-quiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008). There is no question that at the time he intervened, Mr. Russell satis-fied the Rule 24 analogue to standing.

Thus, what the Cantrell Plaintiffs really question is whether Mr. Russell's claim has become moot-either because his interest has dissipated, he no longer faces impairment, or he is adequately represented. *Cf. Gratz,* 539 U.S. at 268 (not-ing that a student's interest in nondiscriminatory treatment can become moot). But when a party brings a mootness challenge, that party "bears a 'heavy burden' and must show that 'subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Bogaert v. Land,* 543 F.3d 862, 869 (6th Cir. 2008) (quoting *Branch, N.A.A.C.P. v. City of Parma,* 263 F.3d 513, 530-31 (6th Cir. 2001)). The district court utterly ignored this concept, and not only failed to place a "heavy burden" on the Cantrell Plaintiffs' placed no burden at all. The lower court's opinion thus violated controlling legal standards. Accordingly, at the very least, the decision below must be reversed and remanded for adjudication under the correct legal standard.

2. The Cantrell Plaintiffs Did Not Establish the Absence of Genuine Issues of Material Fact

Remand is unnecessary, however, because the evidence before the court not only failed to establish the absence of any genuine issue of material fact as to whether Mr. Russell still satisfies the minimal burden of showing potential impairment, it affirmatively proved that Mr. Russell's interest may be impaired in the absence of his continued intervention. The district court focused on two types of financial aid: scholarship aid and need-based financial aid.

(a) *Scholarship Aid*

As to the first category of aid-scholarships funded by donors and administered by Wayne State-the district found that it "is clear that race, ethnicity, or gender were factors in approximately fourteen annual scholarships."[FN14] *Coalition V.*, 539 F. Supp. 2d at 971 (emphasis added). The court then engaged in this puzzling analysis:

> FN14. Mr. Russell's eligibility for these scholarships is established in the record:
> Q. [A]ssuming he met the revised characteristics, Eric Russell would be eligible to receive those scholarships; is that correct
>
> A. That would be correct.
>
> Wu Dep., Doc. 182-8, at 239:20-23.

Wu testified that, following the passage of Proposal 2, he or a devel-opment officer "systematically approach[ed]" the donors to inform them that such criteria were impermissible. Some of the donors-it is unclear how many-agreed to continue funding the scholarships with elimination of the impermissible criteria. Accordingly, assuming he met the remaining criteria... Russell "would be eligible to receive those scholarships." This evidence remains unrebutted.

Id. (citations omitted). Thus, the sum total of the district court's findings and analysis on this issue is as follows: (1) prior to Proposal 2, Wayne State, in award-ing scholarships, considered race, ethnicity, and gender; (2) after Proposal 2, Wayne State renegotiated *some* scholarships-no mention of the open factual question of the status of the other scholarships-to comply with Proposal 2; (3) this evidence is undisputed; (4) therefore, there is no possibility that Mr. Russell's interest in nondiscriminatory consideration for scholarships could be impaired if Proposal 2 were invalidated. Obviously, the district court's conclusion is a non se-quitur.

Moreover, because the Plaintiffs seek to invalidate Proposal 2, the relevant question is not whether Mr. Russell's interest in competing on equal footing for these scholarships would be impaired with Proposal 2 in place, but rather what might happen if Proposal 2 is invalidated. On this point, the district court made no findings, and thus its con-clusion that no genuine issue of material fact exists as to impairment is wholly unsupported. The established fact, recognized by the district court, is that prior to Proposal 2, Wayne State granted scholarship aid on the basis of race and gender. Given the Universities' consistent efforts to preserve the use of race and gender preferences, it blinks reality to conclude that there is no potential for reinstatement of such a policy should the Plaintiffs succeed in this suit.[FN15] And that potential is all that need exist for Mr. Russell to qualify as an intervenor. The Cantrell Plaintiffs did not even come close to showing an absence of such poten-tial.

> FN15. Although the district court did not include it in its analysis or reasoning, the following statement by Dean Wu was also in the record:
> Q. And if at any time... Proposal 2 were rescinded or enjoined in any way, do you anticipate that the donor groups would again request that their scholarships be slotted or devoted to minority students
>
> A. I have no way of predicting what the behavior of individual do-nors would be, but ... [w]e would not expect even if Prop 2 were struck down... that we would go back and renegotiate the agree-ments.
>
> Doc. 182, Ex. 7 at 239:24-240:13. Even had the district court considered this evi-dence, it would not have been sufficient to demonstrate the total absence of poten-tial impairment. As Dean Wu admitted, he could not predict, or control, donor be-havior. And given that "[n]ew scholarships are being created all the time," id. at 237:15-16, and that donors had previously established scholarships with race and gender preferences, the likelihood of future attempts to establish scholarships em-ploying race and gender preferences is high. Indeed, at one of Wayne State's fel-low schools, the University of Michigan, the alumni responded to Proposal 2 by establishing a shadow financial-aid system that would award monies based on race and gender, a fact that Mr. Russell pointed out to the district court in his response. See Doc. 182 at 9 n.4 (citing Chris Herring, "Alumni Assoc, to give aid to minorities," The Michigan Daily, Oct. 18, 2007 (reporting that "[t]he Alumni Asso-cia-tion of the University of Michigan plans to hand out scholarships based on race and gender by next fall" in an effort "intended to limit the effect of Proposal 2")). Dean Wu offered no testimony regarding whether Wayne State would reject such proposals. And given that he did not testify as to whether he had the authority to make final decisions regarding scholarships, and that he was already slated to leave the deanship at the time of his deposition, Wu Dep., Doc. 182-8, at 137:8-15, his broad statement regarding the school's future plans holds little predictive value.
>
> Moreover, given that the Cantrell Plaintiffs alleged injury is the inability to lobby for race and gender pre-ferences at the local level, it is certain that their vic-tory in this litigation will impair Mr. Russell's corres-ponding interest in not having to lobby at the local level for a nondiscriminatory regime.

(b) ***Need-Based Financial Aid***

As to need-based financial aid, the district court flatly found that "[i]t is un-clear whether race was considered in the context of need-based financial aid before Proposal 2; there is in fact no evidence on the point." *Coalition V,* 539 F.

Supp. 2d at 971. Given that the Universities campaigned zealously against passage of Pro posal 2 and fought to maintain their use of racial and gender preferences even after its enactment,[FN16] the factual question of whether, in the absence of a legal mandate to do otherwise, they used such preferences in distributing need-based aid is highly relevant to determining whether the law school would revert back to a system of considering such factors should Proposal 2 be struck down. *Cf. Akers v. McGinnis,* 352 F.3d 1030, 1035 (6th Cir. 2003) (a party that has ceased challenged conduct faces "heavy burden" in establishing that the party "cannot reasonably be expected to start up again"). This is especially true here, where actual cessation of the use of racial and gender preferences occurred solely because of Mr. Russell's litigation efforts. *Cf. Northland Family Planning Clinic, Inc. v. Cox,* 487 F.3d 323, 342-43 (6th Cir. 2007) ("that burden is increased by the fact that the voluntary cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed"). Thus, on a critical issue, the Cantrell Plaintiffs failed to show a total absence of a material question of fact and therefore did not carry their burden on summary judgment. Moreover, the district court found that the Cantrell Plaintiffs submitted no evidence on this issue-a total failure of proof-and therefore cannot possibly be said to have carried the burden of showing mootness.

> FN16. As the district court found at the outset of this case: "The University defendants plainly oppose Proposal 2 as evidenced by their cross-claim in this action contesting the constitutionality of the amendment and seeking the delay of its implementation." *Coalition I,* 240 F.R.D. at 376.

Moreover, while the district court's assertion that there existed no evidence on this point was true to the extent that the Cantrell Plaintiffs failed to submit documentary evidence or deposition testimony, the court ignored the admissions on file relevant to this question. The Universities, including Wayne State, admitted that their financial-aid policies prior to Proposal 2 *did* mandate consideration of factors prohibited by Proposal 2. For example, in their very first filing submitted in this case, a cross-claim against Governor Granholm, the Universities admitted:

Months before the current cycle began the Universities put their admissions *and financial aid policies* in place in reliance on the Supreme Court's reaf-firmation... that they have... [a] right... to ... *give some consideration to [] factors such as race.* Before the current cycle began the Universities de-voted substantial time and energy to training their admissions *and financial aid* personnel about those policies and to disseminating information about those policies to the public.... [T]he Universities have already made thousands of decisions applying those policies and processes during this cycle.

Doc. 2 at 4-5 (emphasis added). Numerous similar admissions, made to both this Court and the Supreme Court during the course of this litigation, are set out in the margin.[FN17] Such "admissions in the pleadings are generally binding on the parties" both "before the trial court [and] ... on appeal," and they "eliminate the need for evidence on the subject matter of the admission, as admitted facts are no longer at issue." *Ferguson v. Neighborhood Housing Servs., Inc.,* 780 F.2d 549, 550-51 (6th Cir. 1986). *See also Purgess v. Scharrock,* 33 F.3d 134, 144 (2d Cir. 1994). While the Universities' statements do not specify as between need-based financial aid and scholarships, given that all reasonable inferences must be drawn in Mr. Russell's favor, and that Appellees faced a heavy burden, these admissions at least establish the clear likelihood that race and gender were considered in need-based financial-aid decisions and thus establish that a genuine issue of material fact exists.

> FN17. *See* Univ. Defs./Appellees' Combined Response/Opp. to Emergency Mot. to Stay Pending Appeal and Pet. for Writ of Mandamus, *Coalition II,* 473 F.3d 237 (Nos. 06-2640, 06-2642), at 1-2 ("The Universities had previously designed, implemented, trained personnel around, and publicly announced their admissions *and financial aid policies,* which were developed in specific reliance on the Supreme Court's reaffirmation... that they have the right... *to... give some consideration to factors such as race."*) (emphasis added); *id.* at 21 ("Many months ago the Universities designed, implemented and trained personnel around their admission and financial aid policies, which were developed in reliance on the Supreme Court's reaffirmation that they... may... give some consideration to factors such as race....); *id.* at 28 (arguing that the Universities cannot render "their present admissions and financial aid practices" compliant with Proposal 2); *id.* at 36-37 (stating that the use of race preferences as deemed permissible by the Supreme Court "describes the admissions and financial aid decision-making of the Universities"); *id.* at 43 ("Those who applied to and sought admission to

or financial aid from the Universities did so with the expectation that their materials would be evaluated under the policies in place for that cycle. They prepared those materials with the understanding, for example, that their distinctive experiences as a woman... or as... [an] African American... might receive some consideration."); Br. of the Regents of the Univ. of Michigan, The Bd. of Trustees of Mich. State Univ., and the Bd. of Governors of Wayne State Univ. in Response to Petr's Mot. to Dissolve Stay and Reinstate Inj., *Coal, to Defend Affirmative Action v. Granholm,* 549 U.S. 1176 (2007) (No. 06A678), at 3 ("Months before the effective date of the Amendment, the Universities designed, implemented, trained personnel around, and publicly announced their admissions and financial aid policies. Those policies were developed... to... give some consideration to factors such as race."); *id.* at 17 ("The Sixth Circuit stay, and the urgent need to proceed with admissions and financial aid processes, forced the Universities to move into a 'safe harbor' and begin making decisions during this cycle without considering factors such as race and gender.") (attached as Addendum 2).

Nonetheless, the district court found the following two statements-and onland only the following two statements the then-dean of Wayne State Law School sufficient to demonstrate a total absence of a genuine issue of material fact as to potential impairment: (1) that, at present (that is, with Proposal 2 in effect), "[ilace will not affect any financial aid decision made as to Eric Russell or any other student"; and (2) that "he has no reason to believe this would change in the event Proposal 2 were invalidated." *Coalition* V, 539 F. Supp. 2d at 971 (quotation marks omitted). These scant snippets of testimony are hardly suggestive of the absence of genuine issues of material fact. First, they fail to establish whether Wayne State considered race, gender, and ethnicity for need-based financial aid prior to Proposal 2. Second, Dean Wu's statement that under Proposal 2 Mr. Russell would receive equal treatment is irrelevant is obviously true if Wayne State is complying with the law as it now stands, and the very purpose of Mr. Russell's intervention is to defend that state of affairs from the legal challenges mounted by the Plaintiffs in these cases. Third, as noted above, Dean Wu's lone statement that he had no reason to believe Wayne State would adopt a different regime is insufficient in light of the well-settled principle, in the even more stringent context of Article III standing, "that a defendant's voluntary cessation of a challenged practice" is inherently suspect and thus does not moot the legal issues related to the practice. *City of Mes quite v. Aladdin's Castle,* 455 U.S. 283, 289 (1982); *Northland,* 487 F.3d at 342.[FN18] Dean Wu's statement is especially insufficient in light of the fact that Michigan's universities, including Wayne State and its officials: (1) employed racial, ethnic, and gender preferences prior to Proposal 2's enactment; (2) vocally campaigned against the ballot measure;[FN19] (3) fought against Proposal 2's implementation in this very litigation by stipulating to an injunction that this Court found had no basis in federal law; (4) maintained, all the way to the Supreme Court, that they have a First Amendment right to impose racial and gender preferences, presumably because they intended to maintain those policies if they were successful in that claim; and, (5) despite their formal status as Defendants in this case, not only refused to defend Proposal 2 against the Plaintiffs' challenges, but aided Plaintiffs' litigation efforts at every step.

FN18. Moreover, Dean Wu's tenure at Wayne State ended shortly after his deposition, so there is a real possibility that the new administration holds a very different opinion about what path the school would likely follow if Proposal 2 were struck down. Wu Dep., Doc. 182-8, at 137:8-15; Doc. 182 at 11 (citing Frank W. Wu, Personal Announcement, April 10, 2007, http:// deanwublog.classcaster.org/blog/general/2007/04/10/personal_ announcemen t.).

FN19. *See, e.g.,* Wu Dep. 52:14-16, Doc 222-7, at 16 ("It would be fair to characterize the presentations I gave as hostile to Proposal 2.").

C. Mr. Russell Is Not Adequately Represented by Other Parties to the Litigation

Precedent from both the Supreme Court and this Court teach that a proposed intervenor "need show only that there is a *potential* for inadequate representation," and the burden is "minimal." *Grutter v. Bollinger,* 188 F.3d 394, 400 (6th Cir. 1999) (quoting *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972)). *See also Coalition III,* 501 F.3d at 787 (noting that proposed intervenors "need not show that representation won't be inadequate, only that the *potential* exists that the Attorney General will not make all of their arguments"). On its motion for summary judgment, it

was the Cantrell Plaintiffs' burden to show that there was no genuine issue of material fact regarding whether such a minimal showing of potential inadequacy could be made. *Hutt,* 914 F.2d at 792. In the portion of its opinion dealing with this prong, the district court failed to acknowledge that only a potential for inadequate representation need exist and that the burden of showing such a potential is minimal. Moreover, as with the impairment prong, the district court must be reversed because it failed to recognize that the initial burden was on the Cantrell Plaintiffs and that that burden was a heavy one given that the nature of the challenge is akin to a mootness question.

In any case, the district court erred in concluding that the Attorney General adequately represents Mr. Russell's interest. Both this Court and the district court already decided the adequacy question once, finding that the Attorney General's stipulation to the preliminary injunction barring enforcement of Proposal 2 demon-strated not only the potential for, but the actual existence of, inadequate representa-tion. *See Coalition I,* 240 F.R.D. at 376-77; *Coalition II,* 473 F.3d at 243-45. As this Court forcefully explained, it was an "understatement" to say that Mr. Rus-sell's 'individual interest... *may not* be taken into account by the present par-ties."' *Coalition II,* 473 F.3d at 245. Instead, his interest already *had been* inade-quately represented:

Subsequent events confirm[ed] that the stipulated injunction did not account for the concerns of all interested parties.... The parties [in-cluding the Attorney General] knew of Russell's opposition to the stipulated injunction, to say nothing of the opposition to the injunc-tion by other interested groups seeking to intervene in the case (in-cluding the propo-nent of Proposal 2), and nonetheless proceeded to seek its entry.

Id. There is no need to speculate about whether it is possible that the Attorney General might fail to represent Mr. Russell-that possibility was already reality. It thus follows, as Judge Kennedy aptly observed in September 2007, that "[t]he pro-cedural history of this case indicates that this potentiality exists." *Coalition III,* 501 F.3d at 788 (Kennedy, J., concurring in part and dissenting in part).[FN20] An in-tervenor once bitten is entitled to be twice shy.

> FN20. The majority in *Coalition III* did not reach the question of adequacy of representation. *Id.* at 783 (majority op.).

Despite this recent history, the district court concluded that because "it now appears that the attorney general has resolved to defend the measure," Mr. Rus-sell's interest is adequately represented. *Coalition V,* 539 F. Supp. 2d at 971. But the Attorney General's position on the constitutionality of Proposal 2 has not changed; he defended the validity of the amendment even as he entered the stipu lated injunction suspending its enforcement. *See Coalition II,* 473 F.3d at 247 ("Far from raising doubts about the validity of the amendment under federal law, the Attorney General thoroughly explains why it *does not* violate the Federal Con-stitution or any federal statutes."). Nonetheless, the Attorney Gen-eral-citing what he deemed "the equities" of the situation confronting the State-chose to enter the stipulation with the Plaintiffs and withhold enforcement.[FN21] And future considera-tion of always-shifting equities-political, pragmatic, economic, or otherwise-ight well lead him to adopt something other than a complete and robust defense of Proposal 2, such as a willingness to settle the case or to support a narrow con-struction of Proposal 2, such as that called for by other State actors. *See* Universi-ties' Resp. to Russell's Stay Mot., Appeal Nos. 06-2640, 2642, at 29 (arguing that Proposal 2 is ambiguous and race and gender preference policies used in 2006 do not violate Proposal 2). Given that the Attorney General has adopted such a course once, it defies logic to conclude, on the basis of one round of briefing in the district court, that there is *no possibility* that he will do so again.[FN22] And that is all that is needed to meet the "minimal" requirement of inadequate representation: the mere *potential* of inadequacy.

> FN21. *See* Attorney General Mike Cox's Resp. in Opp. to Emergency Mot. for Stay Pending Appeal, *Coa-lition II,* 473 F.3d 237 (Nos. 06-2640, 06-2642), at 3; Attorney General Mike Cox's Resp. in Opp. to Pet. for Writ of Mandamus, *id.,* at 2.

> FN22. Indeed, the district court's telling choice of words-that "it now *appears* that the attorney general has resolved to defend the measure" implies uncertainty about the Attorney General's posture.

Indeed, despite this Court's recognition of the importance of Mr. Russell's interest and its admonition "that the stipulated injunction did not account for the concerns of all interested parties," *Coalition II,* 473 F.3d at 245, it appears that the Attorney General *still* discounts the significance of Mr. Russell's particular interest in nondiscriminatory evaluation of his applications. As recently as February of this year, in a filing before the district court, the Attorney General characterized Mr. Russell's interest and success in securing nondiscriminatory consideration of his admissions application as "purely technical" and "de minimis." Attorney General Michael A. Cox's Resp. in Opp. to Eric Russell's Mot. for Attorney's Fees, Doc. 267, at 6.

The district court supported its legal conclusion regarding the adequacy of representation with only one factual finding: "the two summary judgment motions [(Mr. Russell's and the Attorney General's)] duplicate each other." *Coalition V,* 539 F. Supp. 2d at 971. Not only is this finding factually erroneous, it is legally insufficient to support the court's conclusion.

First, even if the briefs of Mr. Russell and the Attorney General were carbon copies, the fact that two parties might advance similar or even precisely the same argument at a given phase of litigation does not mean that the potential for inade-quate representation dissipates. As already noted, the Attorney General's consid-eration of the "equities" of this case might change, as it already has at least once, and he might abandon or trim some of his legal arguments. Indeed, the Attorney General noted in his brief to this Court that application of Proposal 2 in the educa-tional realm presents different equities than application in "all other" areas, "such as contracting and hiring." *Cox Coalition II Mandamus* Resp. at 3-4. But Mr. Russell maintains that the equities are the same, and he is especially interested in full and robust application of Proposal 2 in the educational realm. As Judge Ken-nedy has correctly noted, "a more zealous litigation approach," such as the one fa-vored by Mr. Russell, "could significantly alter the enforcement and ultimately the interpretation of this constitutional amendment." *Coalition III,* 501 F.3d at 788 (Kennedy, J., concurring in part and dissenting in part).[FN23]

> FN23. Judge Kennedy also rightly noted that "the conflict wall set up across the Attorney General's office at the request of the Governor further indicates that dif-ferent interpretations of this provision and its interaction with federal constitutional and statutory law are possible; the [private intervenor's] interpretation could be more expansive than that of the existing parties." *Id.*

Second, the district court wholly ignored, in its opinion dismissing Mr. Rus-sell, that he was the *only* defendant to seek factual discovery and to present expert opinion evidence, and thus would have been the only defendant prepared to ad-dress the factual and expert arguments made by the Plaintiffs if the case had pro-ceeded to trial. This omission is especially peculiar given that the district court's merits opinion, issued on the same day, recognized that Mr. Russell, but not the Attorney General, "challenges the underlying assumption that preferential treat-ment is good for racial minorities... submit[ting] the declaration" of an expert in support of this assertion. *Coalition IV,* 539 F. Supp. 2d at 938-39. In any event, Mr. Russell's efforts show that he was and is willing to expend resources and ef-fort, to pursue strategies, and to present arguments in defense of Proposal 2 that the Attorney General is not willing to expend, pursue, and present.[FN24] Again, as Judge Kennedy has correctly explained, these "more zealous litigation approaches]" could significantly affect this case. *Coalition III,* 501 F.3d at 788 (Kennedy, J., concurring in part and dissenting in part). *See also Grutter,* 539 U.S. at 318 (not-ing that the district court heard "extensive" factual and expert testimony in an equal protection challenge to Michigan law school's admissions policy); id. at 330 (relying on evidence produced at district court level).

> FN24. The Attorney General has not given any indication that, in the event of a remand, he will mount a factual defense of Proposal 2.

Third, even a cas ual comparison of the Attorney General's summary judg-ment filings, Mr. Russell's summary judgment filings, and the district court's mer-its opinion reveals that it is simply untrue that the briefs were duplicative. Indeed, in its merits opinion, the district court explicitly relied on arguments and authori-ties advanced *only* by Mr. Russell. For example:

* In its analysis of the Coalition Plaintiffs' "conventional" equal protection challenge, the district court relied on the Supreme Court's holdings in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), yet only Mr. Russell, not the Attorney General, cited and discussed this case in his summary judgment briefing. *Compare* *Coalition IV*, 539 F. Supp. 2d at 948-49 (citing *Adarand* to reject the Coalition Plaintiffs' request that the court "look at the 'reality of the situation... including evidence of *de facto* segregation"), *with* Eric Russell's Mot. for Summ. J. ("Russell SJ Mot."), Doc. 202, at 20 (citing *Adarand* for the proposition that "while the Equal Protection Clause may sometimes permit the narrow use of ex-press racial classifications to remedy past *de jure* segregation... it does not permit the freewheeling use of racial classifications as a general rem-edy for perceived social inequities of the sort alleged by the Coalition Plaintiffs[]").
* Likewise, the district court held that this Court's decision in *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986), foreclosed the Coalition Plaintiffs' argument that Proposal 2 has a discriminatory intent, noting that "the par-ties have cited no authority that undercuts *Arthur's* precedential applica-tion to a traditional equal protection challenge." *Coalition IV*, 539 F. Supp. 2d at 950; see also *id.* at 952. Only Mr. Russell, and not the Attor ney General, cited *Arthur* and made this argument in the summary judg-ment briefing. *See* Russell SJ Mot. at 13-14; Eric Russell's Reply in Support of His Mot. for Summ. J. ("Russell SJ Reply"), Doc. 239, at 7 n.2.[FN25]

> FN25. The district court also suggested that the Sixth Circuit "expressed doubts" about *Arthur in* *Buckeye Comm. Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 638 n.2 (2001), *rev'd* 538 U.S. 188 (2003). *See* *Coalition IV*, 539 F. Supp. 2d at 950. Once again, only Mr. Russell, and not the Attorney General, cited and addressed *Buckeye* in the summary judgment papers. *See* Russell SJ Mot. at 14-15 n.3; Russell SJ Reply at 7 n.2.

* In concluding that "the demonstration of discriminatory purpose ... vexes the *Coalition* plaintiffs and dooms their conventional equal protec-tion argument," the district court "based" its holding "on the evidence presented," namely the deposition testimony of Ward Connerly that the only way we're going to close this academic gap between black and La-tino on the one hand and Asian and white on the other, is not to keep pa-pering over it with preferences, but to apply the tough love that's neces-sary to get black and Latino students up to the bar.'" *Coalition* IV, 539 F. Supp. 2d at 952. It was Mr. Russell, not the Attorney General, who brought this *exact* quote to the court's attention at the summary judgment phase. *See* Russell SJ Reply at 9-10.
* In further rebuffing the Coalition Plaintiffs' argument, the district court stated: "To impugn the motives of 58% of Michigan's electorate, in the absence of extraordinary circumstances which do not exist here, simply is not warranted on this record." *Coalition IV*, 539 F. Supp. 2d at 952. This bears a striking resemblance to an argument that can be found *only* in Mr. Russell's briefing: "To suggest that the only possible motivation for vot-ing in favor of Proposal 2 was *invidious discrimination* against racial mi-norities would be a vile insult to 58 percent of Michigan's voters." Rus-sell SJ Mot. at 16.[FN26]

> FN26. In discussing the vote over Proposal 2, the court also relied on testimony provided by Mr. Russell's election expert. *See id.* at 932 (citing Russell Resp. to Cantrell Mot. for Summ. J., Doc. 221-2 (Wilson Decl.)).

* The Attorney General did not submit a reply brief responding to the ar-guments made by the Cantrell and Coalition Plaintiffs, whereas Mr. Rus-sell did submit such a brief-a fact the district explicitly noted in its mer-its opinion but neglected to mention in its opinion dismissing Mr. Rus-sell. *See* *Coalition IV*, 539 F. Supp. 2d at 939.

In light of these facts, the district court's statement that Mr. Russell's participation as a defendant in the case was "a mere make-weight that adds nothing of substance to the debate," *Coalition V*, 539 F. Supp. 2d at 971, is demonstrably erroneous and, indeed, baffling.

The district court's dismissal of Mr. Russell thus runs directly afoul of this Court's holding in *Grutter* that minority applicants to the University of Michigan were entitled to intervene to defend the University's use of racial preferences in admissions and financial aid even though the University itself was vigorously de-fending those policies. 188 F.3d at

401. Emphasizing that only a showing of "*po-tential* for inadequate representation" was necessary, this Court held that the pro-posed intervenors crossed that threshold because they "presented legitimate and reasonable concerns about whether the University will present particular defenses of the contested race-conscious admissions policies." *Id.* at 400-01. "[T]he pro-posed intervenors are not required to show that the representation will in fact be inadequate. Indeed, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's argu-ments." *Id.* at 400. Specifically, this Court "f[ou]nd persuasive [intervenors'] ar-gument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Id.* at 401.

Mr. Russell's case for inadequate representation is far more compelling than that of the *Grutter* intervenors, for he does not merely have "reasonable concerns" that it may be "unlikely" that the Attorney General will present some of Mr. Rus-sell's legal arguments and his factual defense. As demonstrated, it is *certain* that the Attorney General will not. The Attorney General did not present in his sum-mary judgment briefs several of the arguments made by Mr. Rus-sell-arguments that the district court relied on in upholding Proposal 2. And the Attorney General did not seek fact or expert discovery and would be ill-prepared to put on such evi-dence were this case remanded for trial. It is Defen-dant-Intervenor Russell alone who is prepared to do this. Incredibly, it is this very fact-that Mr. Russell sought to investigate and counter the factual and expert assertions presented by both sets of Plaintiffs while the Attorney General did not offer such a defense-that the Cantrell Plaintiffs cited to *support* their motion for summary judgment as to Mr. Russell. Doc 172. at 13.[FN27]

> FN27. In a discovery dispute below, the Universities, who supported the Cantrell Plaintiffs' motion for summary judgment as to Mr. Russell, also admitted that "no other party has requested the documents [Mr. Russell] demands." Doc. 178 at 3, 5, 6.

It is also important to recall that in *Grutter* this Court accepted the interve-nors' argument that the University of Michigan was "subject to internal and exter-nal institutional pressures that may prevent it from articulating some of the de-fenses...that the proposed intervenors intend to present." *Grutter*, 188 F.3d at 400. In particular, the Court observed that the University was unlikely to present evi-dence of its own alleged "past discrimination." *Id* at 401. In this case, the "inter-nal and external institutional pressures" preventing Michigan's public defendants from presenting Mr. Russell's factual defense are equally compelling. The factual defense that Mr. Russell alone is prepared to present (were this case to go to trial) likewise implicates past discrimination of the Defendants, but he is also prepared to show that the regimes of racial preferences formerly used by Michigan's public Universities-and which those Universities, in obvious league with the Plaintiffs, have actively defended and sought to resurrect in this very lawsuit-are syste-mati-cally harming underrepresented minorities *now.* In other words, Mr. Russell's de-fense of Proposal 2 implicates the current and recent policies and practices of Michigan's public universities, and will show that those universities' policies of racial and gender classifications have systematically injured the very parties they were supposedly de-signed to help. The "institutional pressures" that prevent Michigan's public officials from contending that Michigan's institutions of higher education have been systematically injuring racial minorities are, if anything, far greater than those that prevented a public admission of past discrimination in *Grut-ter.*

In short, given that on a motion for summary judgment the underlying sub-stantive law defines what is material-here the minimal burden to show potential inadequacy of representation-and that all reasonable inferences must be drawn in favor of the non-moving party, the district court plainly erred in concluding, on this record, that there was no pos-sibility that the Attorney General would fail to fully and adequately represent Mr. Russell's particular interest, much less that there was no genuine issue of material fact as to this issue.

IV. Mr. Russell Qualifies for Permissive Intervention

Even if this Court finds that the court below was correct in dismissing Mr. Russell as an intervenor of right, Mr. Russell should still be permitted to continue as a party to this case as a permissive intervenor. When Mr. Russell first

sought to enter this case, he moved for both intervention as of right and permissive interven-tion. See Doc. 27 at 10-11. Because the district court granted intervention of right, it did not rule at that time on permissive intervention. The court's later dismissal of Mr. Russell from the case was effectively a delayed denial of his motion to in-tervene permissively. *See* *Coalition II,* 473 F.3d at 244 (finding that "the district court's failure to address [Mr. Russell's] meritorious intervention motion... amounted to an effective denial of the motion") (citing *Americans United for Separation of Church & State v. City of Grand Rapids,* 922 F.2d 303, 306 (6th Cir. 1990)). This decision should be reversed.

The district court offered no explanation for denying Mr. Russell's request for permissive intervention, a practice this Court has held to be an abuse of discre-tion that alone necessitates a remand. *See* *Mich. State,* 103 F.3d at 1248; *Liberte Capital Group, LLC v. Capwill,* 126 Fed. Appx. 214, 221 (6th Cir. 2005).

A remand is unnecessary, however, because the record provides ample basis for this Court to hold that Mr. Russell qualifies for permissive intervention. As noted above, the district court found that although Mr. Russell still has "a substan tial legal interest" in this litigation sufficient to satisfy the first prong of Rule 24(a), he "failed to satisfy the impairment element." *See* *Coalition V,* 539 F. Supp. 2d at 969. The same was true of the intervenors in *Liberte,* 126 Fed. App. at 219, but this Court held that permissive intervention should have been granted because (1) the intervenors presented a question of law or fact in common and (2) the interven-tion would not "result in undue delay or excessive prejudice to the original parties in the case," *id.* at 220-21. So too here. Mr. Russell easily satisfies the test for permissive intervention, which is available to "anyone" whose "claim or defense" has "a common question of law or fact" with "the main action." Fed. R. Civ. P. 24(b). Mr. Russell's interest in nondiscriminatory consideration of his financial-aid application, and his defenses of Proposal 2, obviously have issues of both fact and law in common with the main action. And far from causing undue delay and excessive prejudice, Mr. Russell's participation in the case has served to ensure that issues are fully developed and that arguments and evidence critical to the both the district court's and this Court's prior rulings have been made.[FN28]

> FN28. Paradoxically, the Plaintiffs' argued below, and have reiterated in the course of opposing his motion to participate in the merits appeal, that Mr. Russell's continued participation is prejudicial both because (1) he raises issues and arguments separate and apart from those raised by the Attorney General and (2) his participation is duplicative. These dueling propositions serve to underscore the feigned nature of the Plaintiffs' exasperation and to betray the real reason that they seek so urgently to eliminate Mr. Russell from this case. We suggest that Plaintiffs have not expended enormous resources, and consumed substantial time and energy of this Court and the district court, for the purpose of dismissing a "make-weight" defendant whose "duplicative" arguments could safely be ignored.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and Mr. Russell should be reinstated as an intervenor in this case.

COALITION TO DEFEND AFFIRMATIVE ACTION, et al., Plaintiffs-Appellees, Chase CANTRELL, et al., Plaintiffs-Appellees, v. THE REGENTS OF THE UNIVERSITY OF MICHIGAN, et al., Defendants-Appellees, Eric RUSSELL, Defendant-Intervenor-Appellant.
2009 WL 1439513 (C.A.6) (Appellate Brief)

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