No. 07-1182

In The Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,

Petitioners,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION and IMMIGRANT RIGHTS and FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,

Plaintiffs and Respondents,

And

JENNIFER GRANHOLM, et al.,

Defendants and Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully moves this Court, pursuant to Supreme Court Rule 37, for leave to file the accompanying *amicus curiae* brief in support of Petitioners. Petitioners, Michigan Civil Rights Initiative Committee and American Civil Rights Foundation, granted consent to MSLF to file this *amicus* brief. Plaintiffs-Respondents and Defendants-Respondents did not respond to MSLF's request for consent to file this brief.

MSLF is a non-profit, public interest legal foundation that litigates in the public interest to promote and protect individual liberties guaranteed by the United States Constitution. It also litigates to ensure limited and ethical government that functions within the confines of lawful statutes and the Constitution. Moreover, MSLF has a long history of litigating in the areas of individual liberties and limited and ethical government.

MSLF's representation of "Yes" on Proposition 200 also provides a valuable perspective to this Court. "Yes" on Proposition 200 is an advocacy group that initiated, defended, and ultimately passed a ballot initiative in Arizona, but, in a case that reached this Court, was unable to intervene in one of the subsequent lawsuits challenging the measure's constitutionality. *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5

(2006). "Yes" on Proposition 200 sought to intervene so that Proposition 200 would not be debilitated by a half-hearted legal defense, but was ultimately denied intervention. However, the Ninth Circuit recognized that "Yes" on Proposition 200 had an interest sufficient to intervene. *See Gonzalez v. Arizona,* 485 F.3d 1041, 1051-52 (9th Cir. 2007) ("intervenor satisfied the first three parts of the Rule 24(a)(2) test"). *Amicus Curiae*'s experience will assist this Court as it considers this petition.

Respectfully submitted,

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Dated: April 17, 2008

QUESTIONS PRESENTED

1. Whether the Sixth Circuit's departure from settled precedent in *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007), was an erroneous interpretation of federal intervention standards that should be corrected by this Court?

2. Whether this Court should clarify the federal intervention standards to hold that a public interest group, as a matter of right, may intervene in an action challenging the legality of a measure that it initiated and supported?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

MSLF respectfully submits this *Amicus Curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 27(2)(a) a Motion For Leave to File an *Amicus Curiae* Brief precedes this brief.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the Courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals, who live and work in almost every State of the country, including the State of Michigan.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The Petitioners have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus Curiae hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case. *See* Petitioners' Brief at 1-2.

SUMMARY OF THE ARGUMENT

The ballot initiative process is one of the few mechanisms for direct democracy in the United States. It permits disenfranchised citizens to marshal the public will and make legislative changes when their elected officials fail to heed their demands. As one of the most important participants in the process, an initiative's sponsors work at the grassroots level to draft the measure, promote its presence on the ballot, and advocate for its ultimate passage. In many cases, an initiative owes its very existence to its sponsors.

In spite of this, the Sixth Circuit has held that an initiative's sponsors do not have a sufficient interest to intervene in a lawsuit challenging the constitutionality of their enactment. Instead, the Sixth Circuit has held that defense of the initiative must be entrusted to state officials, even when these officials vehemently opposed the initiative. Despite a clear conflict of interest on the part of the government, in this case, Michigan's elected officials, the Sixth Circuit tersely held that "the public interest in the enforceability is entrusted for the most part to the government. . . . [because] [w]hen the government has

passed a law it can be trusted to administer it." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 786 (6th Cir. 2007).

Amicus Curiae urge this Court to reassess this presumption. The Sixth Circuit's *pro forma* interpretation of The Federal Rules of Civil Procedure, Rule 24 not only excludes the most knowledgeable and committed party from the litigation, but also conflicts with Supreme Court, Ninth Circuit, and its own precedent. In fact, *Amicus Curiae* suggest that this Court adopt a bright-line rule permitting an initiative's sponsors to intervene in litigation challenging the constitutionality of their enactment as a matter of right.

ARGUMENT IN SUPPORT OF PETITION

Amicus Curiae urges this Court to grant this petition to preserve the efficacy of the initiative process as a means of expressing popular will. Current intervention standards often exclude the proponents of a ballot initiative from the litigation that follows its adoption based on a presumption that state government officials will, merely by virtue of their positions, adequately defend these ballot measures. However, in many cases, the same state officials charged with defending the constitutionality of these laws vehemently opposed them during the initiative process. This conflict of interest could be mitigated through the intervention process.

Absent the ability to defend their measures in Court, an initiative's sponsors can often do little more than hope that their efforts will be defended and implemented according to their vision and the will of the voters. *Amicus Curiae* and Petitioners seek to clarify the federal rules and permit intervention in cases such as this one, so that those who conceptualize, promote, and foster the development of a ballot initiative can have their voices heard when the measure is challenged in Court.

A. THE INITIATIVE PROCESS

The ballot initiative process is essentially a democratic safety valve that permits the populace to express its collective will when the legislature is unresponsive. "A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative." *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005). In fact, the very purpose behind initiative and referendum is to "enable the voters to establish their supremacy over a corrupt and captured representative process." Julian N. Eule, *Judicial Review Of Direct Democracy*, 99 Yale L. J. 1503, 1545 and n. 182 (May 1990). *See also* James E. Castello, *Note, The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 Calif. L. Rev. 491 (1986). As one of the few mechanisms for direct democracy in the United States, the initiative process mobilizes the power of citizens and enables them to develop and

enact legislation when their representatives fail to fulfill their duties to their constituents.

The first statewide initiative appeared on Oregon's ballot in 1904; today, 24 states have an initiative process. *See* Initiative & Referendum Institute, *Initiative Use, 1904-2005*, available *at* http://www.iandrinstitute.org/Usage.htm, last visited April 11, 2008. From 1904 to 2005, these states collectively placed 2,153 statewide measures on the ballot and adopted 877 (41%) of them. *Id.* The popularity of the initiative process has varied throughout American history, with usage peaking from 1910-1919 during which time 271 initiatives were adopted and hitting its nadir in 1960-1969 when only 98 initiatives were approved. In 1978, with the passage of California's Proposition 13, the initiative process became popular once again. Today, its usage has leveled-off at approximately 70 per two-year cycle and continues to be a frequently-used tool of effectuating the popular will. *Id.*

While the initiative process may be one of the most direct forms of representative government, the very nature of the initiative process often results in an odd irony. Successful initiatives frequently materialize when elected officials fail to address political issues considered important by their constituency. Thereafter, community groups or other advocacy organizations work to counteract legislative inertia through the initiative process by placing measures on the ballot and battling for their passage. In many cases, state officials vocally and visibly oppose these measures and work to defeat the initiatives at the polls.

If the initiative is successful, and the resulting law is challenged, the same state officials who had opposed the initiative then become ostensible defendants. Suddenly, those who had opposed the measure, become the measure's purported advocates. It is in cases such as these where intervention by the proponents of the initiative not only makes sense but also is mandated.

B. THIS COURT SHOULD OVERRULE THE SIXTH CIRCUIT'S DEPARTURE FROM SETTLED PRECEDENT IN *NORTHLAND FAMILY PLANNING*

Intervention permits an outsider with an interest in a lawsuit to enter as a party though the outsider has not been named as a party by the original litigants. Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 7C Fed. Prac. & Proc. Civ. 3d § 1901 (2008). Rule 24(a)(2) entitles a third party to participate in a litigation if he can establish, with fair probability, that the representation is inadequate. Fed. R. Civ. P. 24(a)(2), advisory committee notes. Rule 24(a)(2) provides that intervention as of right shall be granted to anyone who

> claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

In the Sixth Circuit, as in every other federal circuit, intervention must be granted if a proposed intervenor establishes four elements: (1) the motion to intervene is timely; (2) the intervenor has a substantial legal interest in the subject matter of the case; (3) its ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the Court may not adequately represent its interest. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999).

In the present case, notwithstanding Petitioners' "interest" in the survival of the initiative to which they gave legislative birth and their desire to be able to defend it, the Sixth Circuit denied intervention because Petitioners purportedly lacked a substantial legal interest in the lawsuit. *Granholm*, 501 F.3d at 783. The Court relied on *Northland Family Planning* and held that Petitioners' interest in the "enforceability of a statute in general [was] not cognizable as a substantial legal interest without the statute also regulating the organization or its members." *Id.* at 782 *citing Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 344 (6th Cir. 2007).

The Sixth Circuit's decision in the present case was not unanimous, however. In a vigorous dissent, Judge Kennedy sharply criticized the majority's reliance on *Northland Family Planning*, and *Northland*'s departure from settled precedent. *See Granholm*, 510 F.3d at 784-87. In his view, "[p]rior precedent was consistent in holding that interest was to be construed liberally and close cases should be

resolved in favor of recognizing an interest under Rule 24(a)." *Id.* at 785 *citing Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (internal quotations omitted). He also denounced *Northland Family Planning*'s "ignore[ance of] the basis for these holdings" and the Sixth Circuit's departure from years of consistent citation and approval of similar Ninth Circuit cases. *Granholm*, 510 F.3d at 784-85.

Judge Kennedy's reference to the Ninth Circuit is instructive because the Ninth Circuit requires only a "minimal burden" to intervene. *See Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir. 2003) *citing Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 (1972). The Ninth Circuit observes "practical and equitable considerations" and "generally interpret[s] the requirements broadly in favor of intervention." *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998). *See also United States ex rel. McGough v. Covington Techs. Co.,* 967 F.2d 1391, 1394 (9th Cir. 1992) ("Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we are guided primarily by practical considerations.") (internal quotation marks and citation omitted).

Until *Northland Family Planning*'s departure from precedent, the Sixth Circuit often looked to the Ninth Circuit's "minimal burden" standard for its precedents. For example, in *Michigan State AFL-CIO v. Miller*, the Sixth Circuit approvingly cited a Ninth Circuit holding that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that

legislation." *Miller,* 103 F.3d at 1245 *citing Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1397 (9th Cir. 1995); *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525, 527 (9th Cir. 1983); *see also State of Idaho v. Freeman,* 625 F.2d 886 (9th Cir. 1980). *Miller* recognized "a rather expansive notion of the interest sufficient to invoke intervention of right," *Miller*, 103 F.3d at 1246, and did not require a specific legal or equitable interest to satisfy Rule 24. *Id.*

This "minimal burden" standard is well-established in the Ninth Circuit. In *Idaho v. Freeman*, the Ninth Circuit granted intervention to the National Organization for Women (NOW) in a suit challenging procedures for ratifying the Equal Rights Amendment. *Freeman,* 625 F.2d at 886-87. The Ninth Circuit held that NOW's interest in the "continued vitality of the ERA" was sufficient to satisfy Rule 24(a). *Id.* at 887. Similarly, in *Sagebrush Rebellion, Inc. v. Watt*, the Ninth Circuit held that "a public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it ha[d] supported" because an adverse decision would impair the [public interest group's] interests. *Sagebrush*, 713 F.2d at 527.

Prior to *Northland Family Planning*'s departure from these settled precedents, the Sixth Circuit shared the Ninth Circuit's liberal construction of Rule 24(a). *See Miller*, 103 F.3d at 1246. *Amicus Curiae* thus urge this Court, at a minimum, to grant the petition to consider whether *Northland Family Planning* represents an inadvisable departure from precedent from

the Ninth Circuit's and this Court's "minimal burden" standard. In addition, *Amicus Curiae* urge this Court to adopt a bright-line rule that an initiative's sponsors may, as a matter of right, intervene in litigation challenging the constitutionality of their enactment. This will ensure the vitality of the initiative process and preserve its function as an effective means for disenfranchised citizens to express their popular will.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* respectfully requests that this Court grant the petition.

Respectfully submitted,

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