No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the drafters and sponsors of Michigan's Proposal 2, a successful popular initiative amending the Michigan Constitution to prohibit discrimination by the state on the basis of race or sex, have a right under Federal Rule of Civil Procedure, Rule 24(a) to intervene in federal court in post-election litigation challenging the constitutionality of that initiative.

2. Whether elected officials who vigorously opposed Proposal 2 may be deemed to adequately represent the interests of the initiative's drafters and sponsors, for purposes of denying those drafters and sponsors intervention as of right under Rule 24(a) to defend the constitutionality of Proposal 2.

PARTIES TO THE PROCEEDINGS

Petitioner Michigan Civil Rights Initiative Committee is the registered Ballot Question Committee formed by the drafters, sponsors, and supporters of Article I, Section 26, of the Michigan Constitution (Proposal 2). Petitioner was an appellant below.

Petitioner American Civil Rights Foundation is a California nonprofit public interest corporation with members in Michigan. Petitioner was an appellant below.

The Respondents in this Court are: Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Deneshea Richey, Stasia Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turquoise Wise-King, Brandon Flannigan, Josie Hyman, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young, Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 836, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmation Action Party. They were plaintiff/appellees below.

The Respondents in this Court are: Chase Cantrell, Melinda Nestor, Chidimma Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Toniesha Jones, Seger Weisberg, Jay Robinson, Casey R. Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, and Mark C. Carter II. They were plaintiff/appellees below.

Other Respondents in this Court are: Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official capacity as President of the University of Michigan, Lou Anna K. Simon, in her official capacity as President of Michigan State University, and Irvin D. Reid, in his official capacity as President of Wayne State University. They were defendant/appellees below.

The Respondents in this case are: Michael Cox, in his Official Capacity as Attorney General of the State of Michigan and Eric Russell. They were defendant-intervenors below.

Governor Jennifer Granholm, in her Official Capacity as Governor of the State of Michigan, was a named a defendant below. She was dismissed from the consolidated actions below on August 15, 2007, and September 6, 2007.

CORPORATE DISCLOSURE STATEMENT

Petitioner Michigan Civil Rights Initiative Committee is the registered Ballot Question Committee formed by the drafters, sponsors, and supporters of Article I, Section 26, of the Michigan

Constitution (Proposal 2). It has no parent company, and no publicly held companies hold any stock of the Petitioner.

Petitioner American Civil Rights Foundation is a California nonprofit public interest corporation with members in Michigan. It has no parent company, and no publicly held companies hold any stock of the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michigan Civil Rights Initiative Committee and American Civil Rights Foundation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The initial opinion denying Petitioners' motion to intervene under Federal Rule of Civil Procedure, Rule 24(a) is reported at 240 F.R.D. 368 (E.D. Mich. 2006) and reproduced in the Appendix (App.) at B. The decision of the court of appeals affirming denial of intervention is reported at 501 F.3d 775 (6th Cir. 2007), and is reproduced in the Appendix at A. Rehearing and rehearing en banc denied December 17, 2007, is reproduced in the Appendix at C.

JURISDICTION

The Sixth Circuit denied rehearing and rehearing en banc on December 17, 2007. App. C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965) ("In view of our decision herein, we think that section 1254(1) permits us to review the orders denying intervention.").

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure, Rule 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) 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.

STATEMENT OF THE CASE

A. The People of Michigan Overwhelmingly Vote to End Official Discrimination by Enacting Proposal 2

On November 7, 2006, the voters of Michigan reaffirmed their commitment to the principles of racial equality and nondiscrimination by adopting the Michigan Civil Rights Initiative, by 57.9% of the vote. App. A-8. This measure, which adds Article I, Section 26, to the Michigan Constitution, prohibits the State of Michigan and its political subdivisions, including universities, colleges, and school districts, from discriminating against or granting preferential

treatment to any individual or group on the basis of race, sex, ethnicity, color, or national origin in public contracting, public education, and public employment. The initiative appeared on the ballot as Proposal 06-2, commonly referred to as Proposal 2 (Proposal 2 or Section 26). The full text of Article I, Section 26, is set out at App. E. The measure became effective on December 23, 2006.

Proposal 2 was drafted and sponsored by Petitioners, the Michigan Civil Rights Initiative Committee (MCRIC) and the American Civil Rights Foundation (ACRF). Proposal 2 was the voters of Michigan's response to this Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003), which allowed the University of Michigan to grant preferences to African American, Hispanic, and Native American applicants in its admissions decisions.

Petitioners MCRIC and ACRF were at the forefront of the protracted campaign to adopt Proposal 2. The Sixth Circuit decision describes their significant interest in this lawsuit, in part, as follows:

> The MCRI[C], headed by Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 [] (2003), is registered with the Michigan Secretary of State as the official ballot-question committee for Proposal 2 . . . . The ACRF is a public-interest corporation dedicated to eradicating sex and race preferences throughout the United States . . . . The MCRI[C] and ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006 general election ballot and to

> see that the Michigan voters approved Proposal 2. The district court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts."

App. A-14.

Proposal 2 was highly controversial and efforts to get it onto the ballot involved three pre-ballot lawsuits in state and federal courts. In *Coal. to Defend Affirmative Action & Integration & Fight for Equality By Any Means Necessary (BAMN) v. Bd. of State Canvassers*, 686 N.W.2d 287 (Mich. Ct. App. 2004), BAMN challenged the Board of State Canvassers' approval of the form of the petition. In *Michigan Civil Rights Initiative v. Bd. of State Canvassers*, 708 N.W.2d 139 (Mich. Ct. App. 2005), MCRIC challenged the Board of State Canvassers' failure to certify the initiative petitions for placement on the November, 2006, ballot. In *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007), Ward Connerly and Jennifer Gratz, members of ACRF and MCRIC, among others, were named defendants in a challenge to the placement of Proposal 2 on the general election ballot. Many of the same plaintiffs in these pre-ballot lawsuits are plaintiffs in the case at bar's post-ballot challenge to Proposal 2 on constitutional grounds. As noted by the Sixth Circuit, MCRIC and ACRF were "instrumental in Proposal 2's path to the ballot and ultimate approval." App. A-18.

B. The Legality of Proposal 2 Is Immediately Challenged in Federal Court, with Ideological Opponents of the Measure Named as Both Plaintiffs and Defendants

The day after the election, the constitutionality of Proposal 2 was challenged in federal court by many of the same plaintiffs, including BAMN, who were involved in the pre-ballot litigation. The lawsuit named as defendants (many of whom are the same elected officials who opposed Proposal 2) including: Jennifer Granholm, the Governor of Michigan; Regents of the University of Michigan; the Board of Trustees of Michigan State University; and the Board of Governors of Wayne State University.[1] The lawsuit seeks declaratory judgment that Proposal 2 is unconstitutional under the First and Fourteenth Amendments, in violation of Titles VI, VII, and IX of the Civil Rights Act of 1964, and Executive Order 11246, and for a preliminary and permanent injunction against its enforcement.

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[1] On November 8, 2006, Mary Sue Coleman, the President of the University of Michigan, gave a public address vowing to "do whatever it takes" to maintain the same number of underrepresented racial minorities at the university that were admitted when they were allowed to consider race directly in admission decisions. *See, e.g.*, Steve Chapman, *University of Michigan v. the People*, Chicago Tribune, Nov. 23, 2006, at 19 ("Her message was that the school would do 'whatever it takes' to delay, frustrate and circumvent the clearly expressed will of the public."). Governor Granholm opposed Proposal 2 during the campaign. App. B-17; *see also*, http://www.michigan.gov/som/0,1607,7-192–155904–,00.html (last visited Mar. 5, 2008) ("I am sad and disappointed voters said yes to Proposal 2.").

On December 11, 2006, the University Defendants filed a cross claim against Governor Granholm seeking a preliminary injunction permitting them to continue using existing admissions and financial aid through the end of their current cycle and filed a motion for preliminary injunction.[2] App. B-4. That same day, Governor Granholm formally requested the Attorney General to provide her with legal representation in the lawsuit. *Id.* The Attorney General created a conflict wall recognizing a potential legal conflict because of differing political positions taken on Proposal 2 during the preelection campaign.

Two days later, the plaintiffs filed a Certificate of Service showing service of the complaint on Governor Granholm was accomplished.

The next day, on December 14, 2006, MCRIC and ACRF filed their motion to intervene under Federal Rule of Civil Procedure, Rule 24, along with a motion to dismiss the complaint under Rule 12(b)(6). They sought intervention in this lawsuit as drafters and sponsors of Proposal 2 and on behalf of their individual members, some of whom are Michigan citizens, residents, and taxpayers who will be subject to, and will expect the State to comply with, the mandates of equal treatment and equal opportunity embodied within Section 26. On that same day, Attorney General Michael Cox filed his motion to intervene purportedly claiming to represent the People of Michigan. App. B-5. The Attorney General's motion was granted that same day and the district court ordered him to file his answer to the University

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[2] The cross-claim was dismissed with prejudice. App. B-5.

Defendants' motion for preliminary injunction on or before December 18, 2006. *Id.*

While waiting for the district court to rule on their motion to intervene, MCRIC and ACRF filed an opposition to the University Defendants' motion for preliminary injunction on December 18, 2006, and on December 19, 2006, they filed a request to expedite the hearing on their motion to intervene.

Unknown to MCRIC and ACRF, on December 18, 2006, the parties to the lawsuit along with the Attorney General entered into a stipulation consenting to an injunction suspending enforcement of Proposal 2 as it relates to the University Defendants and stipulating to the dismissal of the Universities' cross-claim. *Id.*

Also unknown to MCRIC and ACRF, on December 19, 2006, without a hearing and without a determination of the likelihood of success on the merits or any consideration of the public interest, the district court enjoined Proposal 2, consistent with the parties' stipulation, as it relates to the University Defendants' current admissions and financial aid cycles until July 1, 2007. The district court found that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation."

C. The District Court Denies Petitioners' Motion to Intervene

It was not until December 27, 2006, that the district court denied MCRIC's and ACRF's motion to intervene as of right and by permission. The lower court recognized that "whether these organizations

[MCRIC and ACRF] have a sufficient interest in the outcome of this litigation is perhaps a close one." App. at B-14.

Nonetheless, the court found the Petitioners' motion to intervene was not timely, that they lacked substantial legal interest in the litigation, and that the Michigan Attorney General would adequately represent their interests. App. B-17, 18.

D. A Sharply Divided Sixth Circuit Panel Affirmed the District Court Holding That the Drafters and Sponsors of Proposal 2 Lacked a Substantial Legal Interest to Defend its Constitutionality in a Post-Election Challenge

On December 29, 2006, MCRIC and ACRF requested an expedited appeal of the order denying their motion to intervene. The Sixth Circuit granted their motion on January 9, 2007. On September 6, 2007, the Sixth Circuit affirmed the lower court finding that once the initiative is adopted, MCRIC and ACRF no longer have a substantial legal interest—but just a general ideological interest in seeing Proposal 2 defended and enforced, which is shared by the entire Michigan citizenry. App. A-19. Although the defendants in the underlying action are elected officials who opposed Proposal 2 prior to adoption and an intervening Attorney General who is an elected official that entered into a stipulation to enjoin Proposal 2, the Sixth Circuit said that it was the state's responsibility to enforce and defend the new law.

The dissent found that MCRIC and ACRF have a substantial legal interest and easily meet the other Rule 24(a) factors:

> When the government has passed a law, it can be trusted to administer it. When, as here, however, government did not pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

App. A-28 (Kennedy, C.J., concurring in part and dissenting in part). Although the majority opinion did not address the remaining intervention as-of-right elements, App. A-22, the dissent found that

> (1) the district court abused its discretion when it determined that the motion to intervene was not timely, (2) the ability of MCRIC and ACRF to protect its substantial legal interest may be impaired in the absence of intervention, and (3) that the Attorney General, as well as the other parties in the case, might not adequately represent that interest.

App. A-30 (Kennedy, C.J., concurring in part and dissenting in part).

Although MCRIC and ACRF were denied intervention, they continue to defend Section 26 as amici curiae. They filed an amicus brief in *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006), and in the federal district court to support motions to dismiss and/or for summary judgment on January 18, 2008. Although the plaintiffs opposed their intervention, Ward Connerly of ACRF and Jennifer Gratz of MCRIC have been deposed and were required to produce documents.

Judgment was entered on September 6, 2007. On December 17, 2007, the petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Proposal 2, the Michigan Civil Rights Initiative, was a highly contentious citizen initiative to prohibit the state and its political subdivisions from using race and sex in public contracting, public education, and public employment. Many of the same plaintiffs and their attorneys appeared in both the pre- and post-election challenges to the initiative. *Compare Operation King's Dream*, 501 F.3d 584, with this post-election challenge. Although the plaintiffs who opposed the citizen initiative in the pre-election challenges are allowed to file and prosecute post-election challenges, the measure's drafters and sponsors may be heard only by intervening in post-election lawsuits.

In the decision below, the Sixth Circuit affirmed the denial of intervention as of right under Rule 24(a)(2), denying the drafters and sponsors of Proposal 2 any opportunity to defend their initiative, even though the court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts." Apps. A-15 & B-14. The lower court reasoned that once the initiative had been approved by the voters, the measure's drafters and sponsors have only a "generic interest" in its defense against legal attack. The defense and enforcement of Proposal 2 must be

"entrusted" to elected state officials, even if those very officials had vigorously opposed the philosophy and objectives of the initiative during the campaign.

In contrast, the dissent recognized that the decision below rested on precedent that "altered the Rule 24(a) landscape." App. A-25 (Kennedy, C.J., concurring in part and dissenting in part). Moreover, the dissent noted that the majority's confidence that public officials can be "entrusted" with the defense of initiatives they oppose was misplaced.

> When the government has passed a law, it can be trusted to administer it. When, as here, however, a government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

App. A-28. The dissent reasoned:

> [I]t follows that *some* representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in [*Wash. State Bldg. & Constr. Trades Council, AFL-CIO v.*] *Spellman*, [684 F. 2d 627 (9th Cir. 1982)] that the sponsor of the measure should be that representative.

App. A-29.

This case squarely raises the important, recurring question of whether drafters and sponsors of ballot initiatives who have expended time and money in supporting and defending their initiatives in the pre-

election arena, should be permitted under Rule 24(a)(2) to defend their newly-adopted laws when they are challenged in post-election lawsuits. Other circuits permit drafters and sponsors to intervene as of right in actions challenging the laws they worked so hard to bring into existence. In the decision below, the Sixth Circuit comes into conflict with decisions of the Ninth Circuit and other courts, in ruling that upon passage of a ballot initiative, the measure's drafters and sponsors have no greater interest in defending the validity of the newly adopted law than the general public, and are not entitled as a matter of right to intervene in an action challenging the legality of the measure.

If the opinion below is allowed to stand, it will have a chilling impact on citizens' use of the initiative process as a mode of political expression. For this reason, and because the Federal Circuit Courts of Appeals are hopelessly divided on whether the drafters and sponsors of ballot initiatives have a substantial legal interest sufficient to support intervention as a matter of right, this Court should grant the Petition and establish doctrinal uniformity on this crucial issue.

I

THERE IS A DIRECT CONFLICT BETWEEN THE SIXTH AND NINTH CIRCUITS ON WHETHER THE SPONSORS OF CITIZEN INITIATIVES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(a)

This Court has rarely considered what type of interest applicants must show to intervene as of right under Rule 24(a)(2), since the Court amended the provision in 1966. Given the lack of guidance from this

Court, the primary responsibility for interpreting the requisite interest has fallen to the lower courts. Unsurprisingly, however, the advisory committee notes and a "paucity of [this Court's] decision[s] on intervention of right have resulted in widely varying interpretations of the Rule 24(a) requirements." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. Chi. L. Rev. 279, 283 (1990); *accord*, Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 416 ("[T]he federal judiciary has experienced considerable difficulty in delineating exactly what applicants must demonstrate to intervene of right."). This case raises an important and recurring question of whether sponsors of a popular initiative have an interest in the outcome of litigation challenging the measure's constitutionality that is sufficient to allow the group to intervene in such litigation as a matter of right. Attempting to resolve this question has led to a sharp split between the Sixth and Ninth Circuit Courts of Appeals.

Rule 24(a)(2) provides that intervention 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 evaluating these criteria, the Sixth Circuit recognizes that intervention as of right 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. App. A-13 (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)). The Sixth Circuit also recognizes that Rule 24 "should be broadly construed in favor of potential intervenors." *Id.*

Yet, in applying these factors to the drafters and sponsors of Proposal 2, the Sixth Circuit found that Petitioners lacked an interest sufficient to warrant intervention in an action challenging the law that came into existence primarily because of their efforts. MCRIC's and ACRF's "status as organizations involved in the process leading to the adoption of Proposal 2 is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by Proposal 2." App. A-18. The court opined that unless an initiative's sponsors are "regulated by the new law, . . . [they have] only a general ideological interest in the lawsuit." *Id.*

In sharp contrast, when the Ninth Circuit evaluated the criteria of Rule 24(a), that Circuit concluded that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of the measure it had sponsored. *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied sub nom., Don't Waste Wash. Legal Def. Found. v. Washington*, 461 U.S. 913 (1983). In *Spellman*, a challenge was brought against a Washington statute adopted by initiative that closed the borders of Washington to the entry of radioactive waste

originating outside the state. Don't Waste Washington (DWW), a public interest group that sponsored the challenged initiative, sought to intervene in the lawsuit challenging the new law. Although intervention of right was denied to DWW by the district court, the Ninth Circuit reversed, holding:

> Denial of DWW's motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a).

Id. at 629-30.

This was not an isolated ruling; rather, it embodies the well established precedent of the Ninth Circuit. For example, *Spellman* was cited with approval in *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980). *Freeman* involved a suit by the States of Idaho and Arizona against the General Services Administration, challenging the procedures for ratification of the Equal Rights Amendment. The National Organization of Women (NOW) sought to intervene pursuant to Rule 24(a). The district court denied NOW's motion, but the Ninth Circuit reversed, holding that "NOW has such an interest in the continued vitality of ERA, which would as a practical matter be significantly impaired by an adverse decision and which is incompletely represented here." *Freeman*, 625 F.2d at 887.

Similarly, in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983), a public interest

group was found to have a substantial interest in defending the legality of a measure it had supported. *Id.* There the Audubon Society, which had supported the creation of a conservation area in Idaho, sought to intervene in an action challenging the federal statute that created that conservation area. *Id.* The Ninth Circuit held that the group had a protectable interest in defending the creation of the conservation area. "[A] public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported." *Id.* The court recognized that an adverse decision against the conservation area "would impair the society's interest in the preservation of birds and their habitats," an interest the conservation area was designed to protect. *Id.* at 528.

Until 2007, the Sixth Circuit was in accord with the Ninth Circuit and cited Ninth Circuit decisions for the proposition that a "public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). That changed when the Sixth Circuit handed down *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), *cert. denied sub nom., Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc.*, 128 S. Ct. 873 (2008). In that case, the Sixth Circuit found that an advocacy organization opposing abortion was not entitled to intervene as of right in an action challenging the constitutionality of legislation enacted by the Michigan Legislature. *Id.* at 327. To the majority below, this outcome "control[led]" its disposition of the present

case. App. A-15, 16. It is true, however, as the dissent below points out, that "the majority can only rely on *Northland Family Planning* because that case fundamentally altered the Rule 24(a) landscape." App. A-25 (Kennedy, C.J., concurring in part and dissenting in part). Prior Sixth Circuit 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.* Nevertheless, the Sixth Circuit's current jurisprudence, as exemplified by *Northland Family Planning* and now the case at bar, is in irreconcilable conflict with the Ninth Circuit's precedent of *Spellman*, *Freeman*, and *Sagebrush Rebellion*.

The direct and dramatic conflict between the Sixth and Ninth Circuits over whether sponsors of popular initiatives are entitled to intervene as of right to defend those measures in post-election constitutional challenges is an issue of major national significance that can only be—and must be—resolved by this Court.

II

CONTRARY TO THE MAJORITY BELOW, ELECTED OFFICIALS CAN NOT BE PRESUMED TO ADEQUATELY REPRESENT THE INTERESTS OF THE SPONSORS OF PROPOSAL 2 FOR PURPOSES OF DENYING INTERVENTION UNDER RULE 24(a)

The initiative process exists to give the people an alternative means to express their political will when elected officials prove unable or unwilling to effectuate it. When the people of a state resort to the initiative

process to amend their state's constitution, this fact is prima facie evidence that the electorate lacks confidence in their elected representatives and public officials to adopt or apply the policies in question. Evidence of such a division between the expressed interests of the people and those of political office holders is especially compelling in cases like the one at bar, in which the state's top elected officials have aligned themselves *against* Proposal 2, despite its overwhelming support among the electorate.

A. Both the Majority and Dissent Below Recognized That the Substantiality of Petitioners' Legal Interest in This Litigation Is Closely Tied Up With Whether Michigan's Elected Officials Can Adequately Represent and Protect That Interest

The court below twice states that its ruling was limited to determining that Petitioners lacked the requisite substantial legal interest in the subject matter of this litigation to warrant intervention under Rule 24(a). App. A-13, 18. Yet, in fact this holding—and the contrary opinion of the dissent—is closely wrapped up with the question of whether elected officials who oppose a popular initiative can adequately represent the interests of the measure's sponsors, as is required by Rule 24(a), if those sponsors are to be denied intervention of right.

The majority below was confident that, "in a challenge to the constitutionality of an already-enacted statute . . . the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." App. A-17 (quoting *Northland*

Family Planning, 487 F.3d at 345). *Because* of the majority's sanguine view that matters of enforceability could be "entrusted for the most part to the government," Petitioners' interest in defending the constitutionality of Proposal 2 was found to be insufficiently substantial to merit intervention as of right. *Id.*

In contrast, the dissent below recognized that "the groups here have raised reasons why they cannot rely on the office of the Michigan Attorney General to vigorously advocate the constitutionality of Proposal 2." App. A-25. And *because* of this recognition that the state's officials cannot adequately represent Petitioners' interests, the dissent found that Petitioners have a substantial legal interest in defending the constitutionality of Proposal 2 sufficient to warrant intervention of right. App. A-30. The special place of the initiative process in our American democracy supports Judge Kennedy's dissent.

B. Popularly Enacted Initiatives Are Distinct from Laws Adopted Through the Legislative Process and When Such Citizen-Adopted Laws Are Challenged in Court, Elected Officials Cannot Be Presumed to Adequately Represent the Interests of the Drafters and Sponsors of Those Laws

Ordinarily, there is a presumption that when the government is a party to a lawsuit in its representative capacity, it will protect the interests of all citizens, including public interest groups. Vreeland, *supra*, at 284. But that presumption falters when a law is adopted by initiative—essentially a means of circumventing Legislatures and elected officials.

Initiatives are enacted because the mainstream political process has become unresponsive to the popular will. K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 833 (2006). No matter how disillusioned they may be with a state's political establishment, voters can reasonably rely upon an initiative's drafters and sponsors to defend the newly adopted law. When a successful initiative's sponsors are not allowed to intervene as of right to defend the measure's legality, the people no longer have a champion to uphold their exercise of the political process.[3] Any judge who disagrees with the political policies embodied in an initiative amendment can cripple the measure's chances of being upheld in court by blocking the initiative's sponsors from participating in its legal defense.

When sponsors of initiatives are not allowed to intervene in their defense as of right, there is a palpable risk that the newly adopted law will be emasculated by stipulated dispositions among the putatively—but not actually—adverse parties to a

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[3] Many initiatives center on public rights and their resolution will affect numerous individuals and entities. When there are legal challenges to initiatives after they have been adopted, these types of "public law cases usually involve high stakes and widespread impacts, their adjudication often 'call[s] for adequate representation in the proceedings of the range of interests that will be affected by them.' Public interest groups have been instrumental in filling this role." Vreeland, *supra*, at 280-81 (citation omitted). Further, unlike private disputes, remedies in these types of cases focus not just on the dispute between the parties, but on remedies that are forward looking and affect large numbers of people in society. Danielle R. Holley, *The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 Case W. Res. L. Rev. 103, 125 (2003).

legal challenge. "While one hopes that such backroom dealings are the rare exception, similar conflicts arise whenever the institution or counsel charged with defending a policy includes elements opposed to that policy." Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 316 (1999).

This risk is not diminished even if the particular individuals in office support the new law at the time a challenge is filed. Litigating the constitutionality of a popularly enacted initiative to a final appellate disposition in federal court can take years, and a change in office-holders while a lawsuit is pending can doom the measure if incoming officials oppose it on political grounds. This was implicitly recognized by the Ninth Circuit in *Sagebrush Rebellion*, a decision that rested in part on a change in the Department of Interior's political perspective and on the new Secretary's prior association with legal counsel for the opponents of the challenged measure. 713 F.2d at 528.

Thus, in determining the requisite interest to intervene as of right, the distinction between a law generated by elected officials and one adopted by the voters is a compelling one. Yet the court below dismissed the difference between mere lobbying for legislation and drafting, sponsoring, and enacting a popular initiative as "razor-thin," App. A-20 n.2. Relying on *Northland Family Planning*, the Sixth Circuit held that Petitioners lacked an adequate legal interest to intervene, because once the initiative that they drafted, supported, and defended became law, their interest was converted into "only a general ideological interest in seeing that Michigan enforces Proposal 2." App. A-19. In contrast, the dissent

recognized that there is a vital distinction between a legislatively enacted statute in which "the public interest in its enforceability is entrusted for the most part to the government," and an exercise of the initiative process whereby the "government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (*arguably because their elected officials would not accede to their will*)." App. A-28 (emphasis added) (Kennedy, C.J., concurring in part and dissenting in part).

C. Since Michigan's Elected Officials Cannot Adequately Represent Petitioners' Interest in Upholding the Constitutionality of Proposal 2, Petitioners Have a Substantial Legal Interest in Participating in the Defense of the Measure They Sponsored, and Should Be Granted Intervention as of Right

The burden of showing that the interests of an initiative's sponsors are not adequately represented by public officials already participating in the litigation should be minimal. Although this Court has not addressed the issue since the 1966 amendments, its prior position was clear: "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). This standard was historically in accord with Sixth Circuit precedent, which recognized that "[o]ne is not required to show that the representation will in fact be inadequate. For

example, 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 arguments." *Miller*, 103 F.3d at 1247. A showing of *possibly* inadequate representation should be sufficient to meet this burden. *Linton v. Comm'r of Health & Env't, State of Tenn.*, 973 F.2d 1311, 1319 (6th Cir. 1992). Neither *Northland Family Planning* nor the decision below presents any compelling reason to *increase* this burden for sponsors of successful voter initiatives, such as Petitioners.

In the case at bar, Petitioners not only drafted Proposal 2, they were continually at the forefront of the protracted campaign to adopt the measure, defended it in pre-election litigation, and are committed to ensuring its constitutionality and timely implementation. Petitioner MCRIC was formed by the drafters, sponsors, and supporters of Proposal 2 to promote its adoption. It is registered with the Michigan Secretary of State as the official Ballot Question Committee for Proposal 2, for the purpose of reporting all campaign statements as required by Michigan law. Members of Petitioner ACRF helped draft, sponsor, and support Proposal 2. App. A-14, 15. As the Sixth Circuit recognizes, Proposal 2 "would not have reached the ballot without their efforts." App. A-15. Moreover, Petitioners have demonstrated a strong and continuing institutional interest in upholding and enforcing Proposal 2.

Both the district court and the Sixth Circuit found that the Michigan Attorney General, who was allowed to intervene in this action, will adequately represent the foregoing interests, thereby justifying the denial of Petitioners' application to intervene as of right. Yet

instead of vigorously defending the constitutionality of Section 26 and ensuring timely compliance with the law, the Attorney General promptly entered into a stipulation consenting to an injunction. This action shows his unwillingness to vigorously defend Proposal 2. Moreover, the Attorney General defended the district court's order enjoining Proposal 2 by filing a response in opposition to the emergency motion for stay pending appeal. The Attorney General argued "extensively about the hardships of complying with the law." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d at 247.

This record demonstrates that Petitioners have a reasonable basis for their apprehension that Michigan's elected officials do not share and will not adequately represent their interest in vigorously defending the constitutionality of Proposal 2. And since, under the reasoning of both the majority and the dissent below, the adequacy with which Petitioners' interests will be represented effectively determines the substantiality of those interests for purposes of granting intervention under Rule 24(a), this Court should grant the Petition and establish a uniform rule of law granting intervention as of right to Petitioners and all similarly situated sponsors of popular initiatives.

III

IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON THE EXERCISE OF POLITICAL EXPRESSION VIA THE INITIATIVE PROCESS

This case turns on the significance of the initiative process as a crucial element in America's democratic political system. The vast majority of this country's political participation is channeled through the representative process, whereby voters elect legislators and other officials to implement the popular will. But the system does not work perfectly, and when significant divergences arise between the will of the people and the outcome of representative politics, nearly half of the states, including Michigan, have provided a "safety valve" of direct democracy.[4] This is the function and importance of the initiative process.

Sometimes referred to as the "fourth branch of government," the initiative process complements the representative system "by bringing government closer to the people and making Legislatures more accountable." Jodi Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 Ann. Surv. Am. L. 1, 6-7. This exercise of direct democracy enables ordinary citizens to propose a law or constitutional amendment, place it on the ballot, and vote to adopt it, all without aid or interference by

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[4] Twenty-three states and the District of Columbia give their citizens some opportunity to bypass their Legislatures completely through citizen-initiatives and referendums. DuVivier, *supra*, at 833.

their Legislature. The initiative process may often be the last refuge of a disgruntled and disaffected electorate, since "initiatives are less encumbered by special interest influences than are representatives in state capitals." *Id.* at 7 (citing Thomas E. Cronin, *Direct Democracy: The Politics of the Initiative, Referendum and Recall* 8 (1989)). Probably for the same reason, "[p]olls consistently demonstrate that citizens like the initiative process *and trust its outcomes more than they trust legislation enacted by their representatives*." Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. Cal. L. Rev. 299, 310 (2007) (emphasis added).

The use of the initiative process has surged in recent decades. John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment*, 107 Colum. L. Rev. 1437, 1438 n.5 (2007) (between 1990 and November 2006, 680 initiatives appeared on state ballots). The subject matter of citizen initiatives is broad and often controversial.[5] About 40% of the measures pass, *id.* at 1443, whereupon they are commonly challenged in court on procedural and substantive grounds. *Id.* Typically, the plaintiffs in these challenges are the political and ideological opponents of the newly adopted initiatives, and the defendants are state officials charged with enforcing and defending the laws.

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[5] In November 2004, there were 162 statewide ballot propositions. These measures ranged from a constitutional amendment to ban gay marriage, to bond issues for stem cell research, to measures to legalize marijuana. John G. Matsusaka, *Direct Democracy Works*, 19 J. of Econ. Persp. 185 (2005).

Unfortunately, as a necessary corollary of the nature of the initiative process, elected state officials may have little stake in enforcing or defending popularly enacted initiatives that were adopted partly as an expression of dissatisfaction with the existing political establishment. Not infrequently—as is true in the case at bar—*both* the plaintiffs and defendants in post-election challenges may be political opponents of the new law. Under such circumstances, vigorous and capable defense of a challenged initiative is possible *only* if the measure's drafters and sponsors have the right to intervene in post-election litigation.

Foreclosing the sponsors of popular initiatives from intervention as of right to defend the measures they helped enact from attack by their opponents defeats the "safety valve" function of direct democracy. By turning over the defense of Proposal 2 to the very officials the voters sought to bypass, the decision below will have a profound chilling effect on the people's exercise of the initiative process as a form of political expression. The voters are intelligent enough to realize that "when state officials block initiatives by surreptitiously undermining them, they follow their own preferences rather than those of the voters, and they do so in ways designed to reduce accountability." Garrett & McCubbins, *supra*, at 309. The inescapable conclusion is that the voice of disaffected citizens will be excluded from the political process, just as it will be excluded from the federal courtroom.

The Ninth Circuit has recognized that the sound arguments in favor of allowing sponsors of citizen initiatives to intervene as of right are policy related,

and that allowing such intervention will have significant participatory externalities:[6]

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with *a practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 n.8 (9th Cir. 1995). The flip side of this coin is that a policy of *denying* intervention under Rule 24(a) deprives the citizen-supporters of initiatives of any voice in response to legal attacks by their ideological opponents—those who, by definition, could not command a majority at the polls. It is hard to imagine a more forceful repudiation of the democratic values the initiative process was designed to serve. At a time when America's democratic values are under

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[6] Even the granting of amicus status is insufficient in public law cases. Amicus status permits the public interest group a very limited role in the litigation. Amici do not participate in decree negotiations. More importantly, when a dispute centers on factual elements, "a party to the litigation is in a clearly superior position to insure that the range of issues and the evidence introduced in support of these issues conform to the viewpoint asserted by that party." Vreeland, *supra*, at 297 (citation omitted). Only parties to a suit have the opportunity to engage in discovery. *United States v. Stringfellow*, 783 F.2d 821, 828 (1986) ("[B]y engaging in independent discovery [the intervenor] might uncover facts that would affect the remedy in a manner favorable to it or would materially influence the settlement."). Here, although the drafters and supporters were denied intervention, they have been forced to submit to depositions and produce documents.

attack around the globe, a decision such as the one below, which can be expected to have a demoralizing and chilling effect on the use of democratic processes as a mode of political expression, cries out for review and redress by this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of certiorari.

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Respectfully submitted,

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