

Case Nos. 08-1387, 08-1389, 08-1534, 09-1111

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

Plaintiffs/Appellants (08-1387)/Cross-Appellees, Plaintiffs (08-1389/09-1111)

CHASE CANTRELL, et al.,

Plaintiffs-Appellees (08-1389), Plaintiffs-Appellants (09-1111)

v.

REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES
OF MICHIGAN STATE UNIVERSITY, et al.,

Defendants-Appellees/Cross-Appellants (08-1534), Defendants (08-1389/09-1111)

BILL SCHUETTE, MICHIGAN ATTORNEY GENERAL,

Intervenor-Defendant-Appellee (08-1387/09-1111)

ERIC RUSSELL,

Intervenor-Defendant-Appellant (08-1389)

JENNIFER GRATZ,

Proposed Intervenor-Appellant (08-1389)

On Appeal from the United States District Court
For the Eastern District of Michigan

**DEFENDANTS-APPELLEES/CROSS-APPELLANTS BOARD OF
GOVERNORS OF WAYNE STATE UNIVERSITY AND IRVIN REID'S
SUPPLEMENTAL BRIEF ON EN BANC REVIEW**

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Defendants-Appellants Board of Governors of Wayne State University and Irvin D. Reid (collectively "Wayne" or "Wayne Defendant-Appellants") certifies that neither of these parties is a subsidiary or affiliate of a publicly-owned corporation, and that no publicly-owned corporation not a party to this appeal has a financial interest in the outcome of this matter.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to the Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), the Wayne Defendants-Appellants hereby respectfully request oral argument on their cross-appeal. The Wayne Defendants-Appellants' cross-appeal raises the important and foundational question of whether the Wayne and the other Universities are properly named as parties in the action brought by the Coalition Plaintiffs-Appellants. The Wayne Defendants-Appellants further note that the Plaintiffs-Appellants have requested oral argument with respect to their appeal.

JURISDICTIONAL STATEMENT

The Wayne Defendants-Appellants adopt and incorporate by reference the jurisdictional statement of Defendants-Appellants Regents of the University of Michigan, the Board of Trustees of Michigan State University, Mary Sue Coleman, and Lou Anna K. Simon (collectively "other University Defendants").

STATEMENT OF ISSUES

1. Whether Wayne's governing board has retained authority over admissions matters such that its admissions policies and procedures are "political processes" under the *Hunter/Seattle* test.

2. Whether the District Court erred in declining to dismiss the Universities from this case because they are not necessary or appropriate parties to this litigation.

INTRODUCTION

While Wayne adopts in substantial part the positions taken by the other University Defendants, including the position that the Court should reverse the District Court's holding that Wayne or any of the University Defendants are proper parties to the case, we write separately as to the nature of admissions processes at Wayne. As demonstrated below, the public record abundantly establishes that the Board of Governors of Wayne is now, and historically has been, actively engaged in decisionmaking and oversight of admissions matters, and has retained its authority in that area. The Board's authority and responsibility for such matters is set forth in the University's governing statutes, and is well documented in practice. A characterization that the Board of Governors of Wayne has completely and irrevocably delegated authority for admissions matters is factually erroneous. Accordingly, the Wayne Defendants assert that under the "*Hunter/Seattle*"¹ test described by the Panel majority, Wayne's admissions processes are "political processes."

¹ The *Hunter/Seattle* test is based upon the Supreme Court decisions of *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), and defines a "political process" as one involving governmental decisionmaking. Panel Op. at 19.

STATEMENT OF THE CASE

Wayne adopts and incorporates by reference the Statement of the Case as set forth by the other University Defendants in their separate brief. Wayne offers an additional statement of the procedural history as it applies to the question of whether the Universities' admissions processes, and specifically Wayne's admissions processes, are political processes. This question is a foundational premise to the potentially dispositive argument proffered by the Plaintiffs and addressed by the District Court and prior Panel of the Court of Appeals.

This case involves a challenge to the 2007 modifications to Article I, section 26 of the Michigan Constitution ("Proposal 2"). One of the key claims advanced by the Plaintiffs at the District Court level and on appeal is that Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities. The Plaintiffs argue that: 1) Proposal 2 has a "racial focus" because the affirmative action policies it prohibits inure primarily to the benefit of racial minorities; 2) the Universities' admissions systems are "political processes"; and 3) Proposal 2 reorders these political processes to place special burdens on racial minorities by placing the authority to effect any racially-focused university admissions policies at the most remote level of state government, the Michigan Constitution, while the authority to effect other forms of admissions policies remains at the much more readily accessible University level. The Michigan

Attorney General argues that the Universities' admissions systems are not "political processes" and that Proposal 2 therefore did not alter Michigan's political structure as argued by the Plaintiffs.

At the District Court level, the Court rejected the Michigan Attorney General's argument that the Universities' admissions systems were not political processes. RE 166 at 49. The District Court nonetheless granted summary judgment against the Plaintiffs on other grounds. *Id.* at 55.²

On appeal, the Panel considered whether the Universities' admissions processes were political processes as previously defined by the United States Supreme Court. In concluding that the Universities' admissions systems were political processes, the majority of the Panel observed that the Universities' respective governing boards were elected by the public, that under the Michigan Constitution they have plenary control over the administration and finances of their respective institutions, and that each board has adopted governing policy in admissions matters. Panel Op. at 21.

While recognizing the broad authority of the university boards, the dissent concluded that in practice "the governing boards have fully delegated the responsibility for establishing admissions standards to several program-specific

² Because Wayne asserts that it is not a proper party to this action and has not asserted a position on the overall constitutionality of Proposal 2, further discussion of the District Court's grounds for dismissal is left to the properly joined parties.

administrative units within each institution, which set admissions criteria through informal processes that can include a faculty vote.” *Id.* at 49. The dissent referenced, among others, a statement by the former dean of the Wayne law school that “only the faculty at the law school has the authority to approve the admissions policy” at the school, and his view that the law school admissions policy is not subject to the approval of the Board of Governors. *Id.* at 50. The dissent opined, “Each institution’s board may superficially have ‘plenary authority over its respective institution’ but the ultimate authority to set admissions policy rests exclusively with each program-specific faculty within the university.” *Id.* The dissent elaborated: “As they currently stand, the faculty admissions committees are islands unto themselves, vested with the full and unreviewed authority to set admissions policy for their respective university programs.” *Id.* at 52.

In fact, Wayne State University's governing statutes and the actions of the Board of Governors do not support the dissent's statements and conclusions. Rather, ample evidence confirms that admissions matters at the University remain within the active authority of the Board of Governors. Wayne State University, like the other Universities, has an obvious interest in ensuring that its governance is correctly understood and portrayed. Wayne believes that in a case of this moment, it is essential that this Court’s opinion be predicated on an accurate factual basis.

STATEMENT OF FACTS

The Wayne State University Defendants adopt and incorporate by reference the Statement of Facts set forth by the other University Defendants in their supplemental brief.

ARGUMENT

A. The Wayne State University Board of Governors, Like the Other University Defendants, Retains Authority Over and Involvement In Admissions-Related Matters.

1. Laws and University Policies Evidence the Board's Authority

As provided under Article VIII, section 5 of the Constitution of the State of Michigan, the members of the governing board of Wayne State University and their successors in office constitute a “body corporate” known as the Board of Governors of Wayne State University. Mich. Const. art. VIII, § 5. The Board consists of eight members elected by the people of the State of Michigan for eight-year terms. Each appointee holds office until completion of the term and a successor has been nominated and elected in statewide elections. Each board elects the institution’s president and has “supervision of its institution and the control and direction of all expenditures from the institution's funds.” *Id.*

In the case of Wayne, the Board of Governors’ policies are designated as “statutes” and are codified as “Wayne State University Code Annotated”

("WSUCA"). They are available at <http://bog.wayne.edu/code>.³ WSUCA contains many provisions addressing and setting admissions standards and related criteria. These include policies governing undergraduate admissions (WSUCA 2.34.09), graduate admissions (WSUCA 2.34.12), transfer students (WSUCA 2.34.04), undergraduate student retention (WSUCA 2.13), undergraduate probation (WSUCA 2.34.11), grading policy (WSUCA 2.34.07), financial aid (WSUCA 2.34.01), undergraduate general education requirements (WSUCA 2.43.03), and requirements for a baccalaureate degree (WSUCA 2.43.11). The Board has expressly reserved solely to itself the authority to establish and terminate degrees and to establish the principal requirements for earning degrees, while delegating to

³ Because Wayne and the other University Defendants are constitutionally-created entities, and the status of their governing boards has been recognized as "the highest form of juristic person known to the law . . . which, within the scope of its functions is co-ordinate with and equal to that of the legislature," Panel Op. 47, *quoting Bd. of Regents of the Univ. of Mich. v. Auditor Gen.*, 132 N.W. 1037, 1039 (Mich. 1911), the Court may take notice of their statutes, bylaws, and proceedings as legislative facts, similar to the manner in which the Court could consider the enactment of a legislative body. *See* Fed. R. Evid. 201, Notes of Advisory Committee. If the Court deems necessary, however, Federal Rule of Evidence 201 provides for the Court to take judicial notice of adjudicative facts (facts particular to the parties) that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)(2). The Court may take judicial notice on its own, and must take judicial notice if a party requests it and provides the Court the necessary information. Fed. R. Evid. 201(c). Wayne requests that the Court take judicial notice of the statutes, bylaws, and proceedings of the governing boards, and affirms that these documents are public documents published by the Universities as identified throughout their briefs.

the president operational program decisions. (WSUCA 2.43.01.010, 020.)

Amendments to WSUCA are accomplished by vote of the Board.

While faculty play an important advisory role in recommending educational policy,⁴ they do not control admissions. Their role is advisory. “After consultation with the College or School, the President or his/her designee is authorized to establish specific admissions standards for degree programs” (WSUCA 2.34.09.090). To the extent admissions committees have a role in establishing admissions practices at the school or college level, it is only by subdelegation of Board authority from the President:

“The Board of Governors authorizes the President to subdelegate the authority vested in him/her by this statute. No authority whatever is vested in any person to exercise any of the authority granted by the Board of Governors except pursuant to a specific subdelegation by the President.”

(WSUCA 2.43.01.040.) The President being elected by and answerable to the Board, and the Board retaining the authority to amend the statutes and by-laws, the Board does not relinquish authority by virtue of any such subdelegation.⁵

⁴ The Board of Governors recognizes both a Graduate Council (2.22.01) and a Faculty Senate (2.26.04), and through these bodies receives valuable advice on matters of educational policy.

⁵ The Wayne statutes and Board of Governors by-laws specify the President's relationship to the Board. *See* WSUCA at 2.12.01.020; *See also*; By-laws of the Board of Governors, section 2.2, at <http://bog.wayne.edu/files/by-laws.pdf> (last visited December 14, 2011).

The Board of Governors has structured itself to optimize its continuing engagement in University affairs, including admissions and other academic matters. The by-laws establish standing committees for the purpose of reviewing and making recommendations to the Board concerning various University matters. See By-laws of the Board of Governors, section 3.1, at <http://bog.wayne.edu/files/by-laws.pdf> (last visited December 14, 2011). The Board's Academic Affairs Committee is responsible for reviewing and making recommendations to the Board regarding academic and educational policies and goals. *Id.* The Board's Student Affairs Committee is responsible for reviewing and making recommendations to the Board regarding student matters. *Id.*⁶ These committees are key vehicles for the Board's exercise of authority over and involvement in admissions-related matters.

2. Board Practices Evidence the Board's Authority and Engagement

As shown by Board and Committee Minutes, the Board of Governors, through its Academic Affairs Committee and its Student Affairs Committee, engages in robust and regular review of administrative actions involving admissions policy and related matters. The minutes reflect that the Board votes on changes to admissions criteria, that it approves admissions criteria as a part of

⁶ The Board also maintains standing committees for budget and finance, and for personnel.

its consideration and voting on the establishment of new academic programs, and that the Board is otherwise actively and regularly involved in shaping matters directly involving or related to student admissions.

a. **The Board Votes on Recommended Changes to Established Admissions Standards**

On several occasions, the Board has voted on proposed changes to program-specific admissions criteria. *See, e.g.*, April 30, 2008 Board of Governors Academic Affairs Committee Meeting Minutes,⁷ available at http://www.bog.wayne.edu/meetings/2008/04-30/academicaffairs_0408_itemyz.pdf (last visited December 20, 2011) (recommendation to revise guidelines for establishment of honors curricula, proposal including admissions criteria); August 4, 2010 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://www.bog.wayne.edu/meetings/2010/08-04/> (last visited December 14, 2011) (recommendation to modify honor point criteria for graduate admission); *see also*, September 29, 2010 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://www.bog.wayne.edu/meetings/2010/09-29/index.php> (last visited December 14, 2011) (recommendation to modify maximum number of transfer credits in certain cases where articulation agreements render modification

⁷ Website addresses for documentation of Board meetings link to the meeting agendas, from which the referenced documents can be selected.

appropriate). Decisions to modify established admission-related criteria are clearly subject to Board review and are not isolated from the Board's influence or authority.

b. **The Board Votes upon Admission Criteria in Connection with Reviewing Proposed New Academic Programs**

The Board regularly reviews and passes upon admissions requirements in the course of voting on broader issues, such as the implementation of new academic programs at the University. While not exhaustive of the many times the Board has been called to approve or modify academic programs between 2005 and the present, representative examples include:

- Consideration of proposed admission requirements in connection with a vote whether to institute a proposed Doctor of Physical Therapy program; *see, e.g.*, January 19, 2005 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://www.bog.wayne.edu/meetings/2005/01-19/> (last visited December 14, 2011);
- Consideration of proposed admission requirements in connection with a vote whether to institute a proposed Master of Science in Alternative Energy Technologies program; *see* June 8, 2005 Board of Governors Academic Affairs Committee Meeting Minutes, available at:

- <http://www.bog.wayne.edu/meetings/2005/06-08/> (last visited December 14, 2011);
- Consideration of proposed admission requirements in connection with a vote whether to institute a proposed Master of Arts program with major in Marriage and Family Psychology; *see* January 30, 2008 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://www.bog.wayne.edu/meetings/2008/01-30/> (last visited December 14, 2011); and
 - Consideration of proposed admission requirements in connection with a vote whether to institute a proposed Graduate Certificate Program in Complementary Therapies in Health Care; *see* April 20, 2011 Board of Governors Academic Affairs Committee Meeting Minutes, available at: <http://bog.wayne.edu/meetings/2011/04-20/index.php> (last visited December 14, 2011).

c. **The Board is Otherwise Engaged and Instrumental in Shaping Admissions Policy**

In a university as large and complex as Wayne, the Board necessarily delegates operational detail to others. The Board pays close and detailed attention to the progress and outcome of such engagement, and Board committees are actively and routinely engaged with regard to admissions-related matters. Such

involvement has taken place on a longstanding basis. Examples include the Board's consideration of:

- The relationship between alternative admissions programs and retention; *see*, July 20, 2005 Board of Governors Academic Affairs Committee minutes and Student Success and Retention Report, available at <http://www.bog.wayne.edu/meetings/2005/07-20/> (last visited December 20, 2011); , September 13, 2006 Board of Governors Student Affairs Committee minutes and Retention Report, available at <http://www.bog.wayne.edu/meetings/2006/09-13/> (last visited December 14, 2011);
- Alternative admissions policies; *see*, September 13, 2006 Board of Governors Student Affairs Committee Meeting Minutes and report, available at <http://www.bog.wayne.edu/meetings/2006/09-13/> (last visited December 14, 2011);
- The potential impact of modifying admissions criteria for the Honors Program on diversity; *see, e.g.*, March 21, 2007 Board of Governors Academic Affairs Committee Meeting Minutes, available at <http://www.bog.wayne.edu/meetings/2007/03-21/> (last visited December 14, 2011);

- The need to enhance provisional admissions programs and monitor general admissions standards to improve retention; *see*, January 22, 2009 Board of Governors Student Affairs Committee Meeting Minutes and Retention Report, available at <http://www.bog.wayne.edu/meetings/2009/01-22/> (last visited December 21, 2011);
- Potential modifications to curricula of certain programs to allow for the acceptance of a higher number of applicants; *see, e.g.*, March 9, 2011 Board of Governors Academic Affairs Committee Meeting Minutes, available at <http://www.bog.wayne.edu/meetings/2011/03-09/index.php> (last visited December 14, 2011) (the potential for rotating nursing students in hospitals to allow for acceptance of additional applicants);
- The number of high school graduates applying for admission to particular programs; *see, e.g.*, April 20, 2011 Board of Governors Academic Affairs Committee Meeting Minutes, available at <http://bog.wayne.edu/meetings/2011/04-20/index.php> (last visited December 14, 2011);

- Regular review of a multitude of additional issues related to student admissions, enrollment, and retention, which occurs at numerous board meetings every academic year.⁸

This active and robust engagement, continuing over a period of years, demonstrates that the Wayne State University Board of Governors has not completely and irrevocably delegated away its authority over this important area of University operations.

In reaching the conclusion that admissions policy is set by program-specific faculty admissions committees which are not politically accountable to the people of Michigan, the dissent relied upon the deposition testimony of assistant dean Zearfoss of the University of Michigan Law School, and of Dean Wu of Wayne State University's law school, individuals not charged with knowledge of their respective Board's processes, and who testified with limited knowledge and

⁸ *See, e.g.*, Board of Governors Student Affairs or Academic Affairs Committee meeting minutes and reports from September 13, 2006 (student affairs and academic affairs); November 8, 2006 (student affairs); May 2, 2007 (student affairs); November 28, 2007 (student affairs); January 30, 2008 (student affairs); March 18, 2008 (student affairs); January 22, 2009 (student affairs); March 4, 2009 (student affairs); October 14, 2009 (academic affairs); December 9, 2009 (student affairs); March 24, 2010 (student affairs); September 29, 2010 (academic affairs); January 26, 2011 (academic affairs); March 9, 2011 (academic affairs); April 20, 2011 (academic affairs); and September 21, 2011 (academic affairs). Meeting minutes and reports available at: <http://bog.wayne.edu/meetings/index.php>. Non-exhaustive review of board meeting records indicates that the Board addresses issues related to student admission, enrollment, and/or retention on an average of three or more Board meetings per academic year.

experience outside of their immediate frame of reference. Panel Op. at 50. Indeed, Dean Wu testified over counsel's objection that he was not competent to answer legal questions as to university admissions policy.⁹ While faculty consultation is certainly involved in admissions decisions, it is simply not the case that the respective Universities' governing bodies have so fully delegated their authority over admissions matters to groups within the University as to make their own engagement peripheral to the process. Both by policy and practice, it is well borne out that Wayne State University's Board of Governors retains authority over, and remains actively involved in, matters relating to student admissions. Wayne State University submits that the factual predicate upon which the dissent relies is absent. The codified written authority, taken together with numerous examples of the Board's exercise of such authority, are, respectfully, far more reliable indicators of the processes in place at the University than is the testimony of such individuals.

⁹ The reliance upon this objectionable testimony is particularly troublesome in light of the fact that as a professional school, the law school's admissions policies are not readily analogized to admissions policies applicable to either graduate or undergraduate admissions.

B. The District Court Erred in Concluding that the Wayne State University and Other University Defendants Were Properly Joined in this Action.

Wayne shares the view of the other University Defendants that the District Court erred in declining to dismiss them from the case under Fed. R. Civ. P. Rule 21 as improper parties. While Wayne adopts and incorporates by reference the arguments set forth in the supplemental brief of the other University Defendants, Wayne's position, succinctly, is that the Coalition Plaintiffs' Complaint does not state any claim directed at Wayne or the other University Defendants, or demand any relief that these Defendants can provide. The Universities have no role in the adoption, implementation, or enforcement of Proposal 2, other than that like other public bodies, they are bound by Proposal 2 unless it is declared unconstitutional. If this Court grants the Plaintiffs request for injunctive and declaratory relief against enforcement of Proposal 2, the instruction must necessarily go to the Michigan Attorney General, inasmuch as the Attorney General is charged with the duty to enforce. Accordingly, dismissal is proper under Federal Rule of Civil Procedure Rule 21, which permits the dismissal of a party not properly joined in a case.

CONCLUSION

For the reasons set forth above and in the other University Defendants' supplemental brief, Wayne respectfully requests that this Court reverse the

determination of the District Court regarding whether it and the other University Defendants are properly joined, and dismiss all University Defendants from the case. Wayne respectfully requests that the Court take into consideration the Board of Governors' authority over and active and ongoing engagement in admissions matters as it evaluates whether this matter involves a 'political process' with respect to the constitutionality of Proposal 2.

Dated: December 23, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C), I hereby certify that this brief complies with the type, volume limitations of F.R.A.P. 32(a)(7)(B). Specifically, this brief contains 3,475 words (including footnotes), according to Microsoft Word's "word count" function.

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CERTIFICATE OF SERVICE

I, Stephanie R. Setterington, of the law firm of Varnum, hereby certify that on the 23rd day of December, 2011, a copy of Defendants-Appellees/Cross-Appellants Board of Governors of Wayne State University and Irvin Reid's Supplemental Brief on En Banc Review was served by electronic filing upon the parties of record.

Dated: December 23, 2011

By: /s/ Stephanie R. Setterington
Stephanie R. Setterington

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