Nos. 06-2640/06-2642

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; et al.,

Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Defendants-Appellees,

MICHAEL A. COX, Attorney General of the State of Michigan

Intervening Defendant – Appellee,

and

ERIC RUSSELL; TOWARD A FAIR MICHIGAN,

Proposed Intervenors-Defendants – Appellants.

_____,

INTERVENING DEFENDANT-APPELLEE ATTORNEY GENERAL MIKE COX'S RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

Michael A. Cox
Attorney General

Margaret A. Nelson (P30342)
Heather S. Meingast (P55439)
Joseph E. Potchen (P49501)

Assistant Attorneys General
Co-Counsel of Record
Attorneys for Intervening Defendant-Appellee
Attorney General Mike Cox
Public Employment, Elections & Tort Defense
PO Box 30736
Lansing, Michigan 48909
517.373.6434

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Statement of Facts

On November 7, 2006, Michigan voters overwhelmingly approved passage of Proposal 2, which amended the Michigan Constitution to prohibit the granting of preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.[1] Proposal 2, now art 1, § 26 of the 1963 Constitution, provides:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1.
>
> (4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
>
> (5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
>
> (6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.
>
> (7) This section shall be self-executing. If any part or parts of this section are

[1] The Amendment passed overwhelmingly on November 7, 2006, with 2,141,010 citizens voting in favor of the proposal, and 1,555,691 citizens voting against the proposal, or by 57.9 % to 42.1%. See http://miboecfr.nictusa.com/election/results/06GEN/90000002.html.

> found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.
>
> (8) This section applies only to action taken after the effective date of this section.
>
> (9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

Under the Michigan Constitution, this section takes effect at 12:01 a.m. on December 23, 2007.[2]

On November 8, 2006, Plaintiffs filed a complaint for injunctive and declaratory relief raising a facial challenge to § 26 of the Michigan Constitution, previously Proposal 2. The complaint alleged equal protection and First Amendment challenges under the federal constitution. The complaint also asserted that § 26 is preempted by Titles VI and VII of the Civil Rights Act of 1964, and Title XI of the education Amendments of 1972. Plaintiffs requested the district court declare § 26 unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, and permanently enjoin Defendants from eliminating any affirmative action plans and granting any other relief it determines appropriate. The complaint named as defendants Governor Jennifer Granholm, in her official capacity, the Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors.[3]

On December 11, 2006, the University Defendants filed a cross claim with the district court against defendant Governor Granholm seeking declaratory and injunctive relief. The cross claim asserted a violation of the Universities' alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle

[2] See Const 1963, art 12, § 2.
[3] Although Plaintiffs filed their suit the day after the election, they did not serve the Governor until December 8, 2006.

if the Universities are required to implement § 26 upon the section's effective date ---- 12:01 a.m. December 23, 2006.[4] Among other issues, the Universities asserted they had already begun both their admissions and financial aid cycles, with some decisions being made prior to the passage of § 26. They alleged that to implement § 26 in the middle of that cycle would require them to apply different polices to applicants within the same cycle and different polices than they have announced as applicable to this cycle. The Universities requested a judgment declaring that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

The Universities also filed a motion for preliminary injunction and requested an expedited hearing in the matter. The Universities sought a preliminary injunction enjoining the application of § 26 to their current admissions and financial aid cycles to preserve the status quo and allow the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the Court enters its declaratory judgment.

On December 14, 2006, the Attorney General filed a motion to intervene with the district court and sought an expedited hearing on the motion. The district court granted the Attorney General's motion the same day. Plaintiffs then filed an amended complaint on December 17, 2006.

Recognizing the unique situation confronting the Universities in their admissions processes that began as early as July 2006, and in fairness to the student applicants whose choices and applications were made well in advance of the adoption of Proposal 2, the Attorney General agreed that the equities weighed in favor of a narrowly drawn six month temporary

[4] See Const 1963, art 12, § 2 providing for the effective date of § 26.

injunction. This is what, in the Attorney General's opinion, distinguished the injunctive request on the Universities' cross claim from all other issues, such as contracting and hiring. This decision was also strategic in that any stipulated injunctive relief was dependent on dismissal of the Universities' cross claim. On December 18, 2006, the University Defendants, the Governor, and the Attorney General agreed to the entry of a temporary injunction that would enjoin the application of § 26 to the University Defendants regarding the current admissions and financial aid cycles, and would expire no later than 12:01 a.m., July 1, 2007. The University Defendants also agreed to dismiss their cross claim filed against Governor Granholm in its entirety, with prejudice as to the injunctive relief. These parties filed their stipulated agreement with the district court.

Also on December 18, 2006, Proposed Intervenors-Appellants Eric Russell and Toward a Fair Michigan, filed a motion to intervene as defendants in the complaint and cross claim. They did not file a motion for immediate consideration along with the motion to intervene.

On December 19, 2006, the district court entered an order granting the injunction and dismissing the cross claim as stipulated to by the parties ---- Plaintiffs, the Defendant/Cross Plaintiff Universities, the Defendant/Cross Defendant Governor, and Defendant Attorney General Cox. On the same day, Proposed Intervenors-Appellants Eric Russell and Toward a Fair Michigan, recognizing their strategic error in failing to originally request immediate consideration of their motion to intervene, filed a motion to expedite hearing on their motion to intervene and for a stay pending appeal of the order granting the injunction.

Two days later, on December 21, 2006, the Proposed Intervenors filed a notice of appeal, and pleadings entitled "Emergency Motion for a Stay Pending Appeal" and a "Petition for Writ of Mandamus or Prohibition to Order the US District Court for the Eastern District of Michigan

to Lift the Injunction it Issued on December 19, 2006." On December 26, 2006, this Court entered an order directing the parties to respond to the Proposed Intervenor's emergency motion by December 28, 2006.

Subsequently, on December 27, 2006, the district court granted in part and denied in part the Proposed Intervenors motion to intervene. The district court denied the motion with respect to the organization, Toward a Fair Michigan, concluding that its interests in the litigation would be adequately represented by the Attorney General. The district court, however, granted the motion with respect to Eric Russell, concluding that he has an individual interest that will not be adequately represented by the existing parties because he seeks the immediate implementation of § 26. (See Opinion and Order granting in part and denying in part motions to intervene, 12/27/06, pp 14-15.)

Pursuant to this Court's order, the Attorney General now files his response in opposition to the emergency motion for stay pending appeal.

Argument

I. Neither Intervenor-Defendant Eric Russell nor non-party Toward a Fair Michigan is entitled to a stay pending appeal.

A. Standard of Review

Deciding a motion for a stay pending appeal requires balancing four factors: (1) the likelihood that the party seeking the stay will prevail on the merits on appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[5] In addition, the Court must keep in mind that "a movant seeking a stay pending a review on the merit's of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal."[6]

B. This Court lacks jurisdiction to entertain Intervenor-Defendant Russell's and non-party Toward a Fair Michigan's emergency motion for stay pending appeal.

The Attorney General submits that this Court does not have jurisdiction to entertain the emergency motion for stay pending appeal of the injunction issued in the cross claim. Generally, only parties to an action have standing to appeal.[7] A non-party may properly become a party for purposes of appealing an adverse final judgment by intervening in the action.[8] The District Court granted Intervener-Defendant Russell's motion to intervene, and he is now a party to the underlying complaint but not the cross claim in which the injunction was entered because that claim was dismissed on December 19, 2006. So, although Russell is now a party to the

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[5] *Michigan Coalition of Radioactive Material Users, Inc v Griepentrog*, 945 F2d 150, 153 (CA 6, 1991); *In re DeLorean Motor Co*, 755 F2d 1223, 1228 (CA 6, 1985).
[6] *Griepentrog*, 945 F2d at 153.
[7] *Marino v Ortiz*, 484 US 301, 304; 108 S Ct 586, 587; 98 L Ed 2d 629 (1988) (per curiam).
[8] *Marino*, 484 US at 304; *Stringfellow v Concerned Neighbors in Action*, 480 US 370, 375; 107 S Ct 1177, 1182; 94 L Ed 2d 389 (1987).

underlying complaint, he still is not a party for purposes of appealing the injunction issued in the cross claim. The same is true with respect to Toward a Fair Michigan, since the District Court denied its motion to intervene with respect to both actions.

Russell and Toward a Fair Michigan rely on this Court's decision in *Americans United for Separation of Church and State v City of Grand Rapids* to establish jurisdiction (or standing as they have addressed the issue in their motion).[9] There, the plaintiffs brought suit against the City of Grand Rapids seeking to enjoin the city from granting a permit to a Jewish organization, the Chabad House, to erect a large menorah in a public plaza to celebrate the season of Chanukah, a Holiday lasting eight days in December.[10] The district court granted the injunction on December 5, and upon learning that the city was not going to appeal, Chabad House filed a motion to intervene in the district court.[11] On December 7, the district court scheduled a hearing on the motion to intervene for December 18, at the end of Chanukah.[12] On December 10, Chabad House "appealed what it called a denial of its right to intervene, and assuming it could intervene, filed a notice of appeal from the decision granting an injunction, and sought a stay," with this Court.[13]

A panel of this Court, first determined that Chabad House could intervene as of right under FR Civ P 24(a)[14]:

> We believe that Chabad meets all necessary requirements to qualify for intervention as of right. First, Chabad's application is clearly timely. Second, Chabad has an interest in the property that is the subject of the suit. Chabad owns the menorah, the disposition of which during Chanukah the plaintiffs are

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[9] *Americans United for Separation of Church and State v City of Grand Rapids*, 922 F2d 303, 305-06 (CA 6, 1990).
[10] *Americans United,* 922 F2d at 305.
[11] *Americans United,* 922 F2d at 305.
[12] *Americans United,* 922 F2d at 305.
[13] *Americans United,* 922 F2d at 305.
[14] *Americans United,* 922 F2d at 305-306 (internal citations omitted).

> attempting to control. Any property owner has an interest in the disposition of his property during a particular span of time, and the fact that the property and the owner before us are inherently religious does not change that fact. Third, Chabad would be impaired or impeded in protecting its interest in the disposition of its menorah if it is not a party to this case. The court will decide whether it can place its menorah in Calder Plaza during the eight days of Chanukah, and Chabad would be prevented from so placing the menorah even if it were not a party. Fourth, Chabad's interest is not being adequately protected by any current party. The plaintiffs are clearly adversaries to Chabad's interest, and Chabad's original defender, the city of Grand Rapids, has abandoned that role by its failure to appeal. We agree with the District of Columbia Circuit that a decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest. The City's decision in this case effectively would destroy Chabad's ability to place its menorah in Calder Plaza during Chanukah absent Chabad's entry into this suit as an intervenor.

The Court then turned to the issue of whether it could hold that Chabad House was entitled to intervene since it did not "have a formal denial of Chabad's application before" it. The Court concluded that the district court's delay in deciding the motion was the "practical equivalent of a denial" of the motion to intervene because Chabad House's interests would be virtually non-existent by the date of the hearing[15]:

> Chabad's interest in this case will disappear when Chanukah ends. Grand Rapids's failure to appeal placed that interest at risk by removing from the action the only party who could argue to the court that the placement of Chabad's menorah in the Plaza for Chanukah was not unconstitutional. Delaying a hearing on Chabad's application until its interest is almost non-existent is tantamount to denying it. The spirit of Rule 24(a)(2), if not its letter, requires us to treat any order of a district court as a denial of an application to intervene that has the same effect on the intervenor's interest as would an outright denial.

This Court then determined that it would expedite the case and permit Chabad House "to combine and appeal from the district court's injunction simultaneously with the application to intervene that permits them to make such an appeal"[16]:

> We note that had the district court granted Chabad's motion, as we hold that it should have, the court's order of injunction would be appealable as an

[15] *Americans United,* 922 F2d at 306.
[16] *Americans United,* 922 F2d at 306.

> interlocutory order. 28 USC 1292(a)(1). As Chabad's interest dissipates with every passing day, we would fail to enforce the purpose of Rule 24(a) if we did not permit it to appeal this decision in a timely fashion that permits it to protect that interest. The stay motions are therefore properly before us.

The Court then addressed the merits of the motion for staying pending appeal under the relevant four factors, and ultimately stayed the injunction.

Russell and Toward a Fair Michigan are apparently arguing that under *Americans United*, this Court should, in the context of the instant motion, first conclude that they were entitled to intervene in the cross claim before the injunction was entered and the cross claim dismissed, and second allow them to appeal the injunction, which would make Russell's and Towards a Fair Michigan's motion for stay properly before the Court. The Attorney General submits that the *Americans United* decision is either inapplicable or distinguishable under the facts of the instant case. In *Americans United*, there was still an action to intervene in at the time of the "appeal." Here, rightly (or wrongly as asserted by Russell and Toward a Fair Michigan), the cross claim was dismissed per agreement of the parties and an injunction was entered at the same time the proposed Intervenors filed their motion to expedite the hearing on their motion. Russell and Toward a Fair Michigan simply came in too late with respect to the cross claim.[17] Thus, they cannot be accorded intervener status with respect to the cross claim for purposes of challenging the injunction. The *Americans United* decision thus does not provide Russell and Towards a Fair Michigan a jurisdictional hook in the context of this particular case, and this Court is without jurisdiction to entertain the emergency motion for stay pending appeal.

[17] Again, the cross claim was filed a week before Russell and Toward a Fair Michigan moved to intervene, and they do not claim that they did not have notice of the cross claim.

C. Neither Eric Russell nor Toward a Fair Michigan can establish the requisite factors warranting the grant of a stay pending appeal by this Court with respect to the temporary injunction issued by the District Court.

Again, in order to receive a stay pending appeal, Russell and Toward a Fair Michigan must demonstrate (1) the likelihood that they will prevail on the merits of the appeal; (2) the likelihood that they will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[18]

With respect to the first element, the Attorney General submits that Russell and Towards a Fair Michigan have not demonstrated a likelihood that they will prevail on the merits of the appeal since there is no proper appeal before this Court of the injunction agreed to by the parties in the cross claim, which has been dismissed. Moreover, the injunction reflects an equitable resolution of the cross claim and request for injunctive relief by the universities under the unique and particular limited circumstances pertaining to their current admissions cycle.

Second, neither Russell nor Toward a Fair Michigan will be irreparably harmed should this Court deny the motion to stay. While Russell asserts that he has applied to the University of Michigan Law School, he has not received a determination with respect to his application and there is no reason to believe at this point in time that he will not be accepted, or that his application will be rejected as a result of the application of an admissions policy instituted by the law school rather than a determination that he is unqualified on other bases such as grades or LSAT score. With respect to the organization, Towards a Fair Michigan has not demonstrated an irreparable harm. It simply alleges that it "has had a drain on its resources, its ability to perform its organization tasks it undertakes blocked, and its efforts to see the will of the people of Michigan enforced, hampered by the . . . effect of the December 19 Order." (Emergency

[18] *Griepentrog*, 945 F2d at 153.

Motion for Stay, p 7.) These generic and nonspecific assertions do not support a finding of irreparable harm for purposes of imposing a stay pending appeal.

Third, there will be harm to others should the Court grant a stay. The parties agreed to the injunction because of the difficulties, inequities, and unfairness that likely will occur if the Universities are forced to implement § 26 in mid-stream of the current admissions and particularly the financial aid cycles.[19] Finally, with respect to the public interest, the Attorney General agrees that the public has a substantial interest in seeing a voter-approved, constitutional provision enforced. Section 26 is now in effect and will be enforced. That said, the Attorney General maintains that allowing the Defendant Universities a narrowly drawn six-month reprieve from changing only its admissions and financial aid policies mid-stream to comply with § 26 also comports with the public interest based on the unique equities involved. Thus, an analysis of these four factors weighs against granting Russell's and Toward a Fair Michigan's emergency motion for stay pending appeal.

II. Plaintiffs are not likely to succeed on the merits of their underlying Amended Complaint because the Court should abstain from exercising jurisdiction, the Plaintiffs lack standing to assert the claims brought, the claims are not ripe for review, and the Amended Complaint otherwise fails to state a claim upon which relief may be granted.

A. Standard of Review

The district court did not consider or address the Plaintiffs' likelihood of success on the merits of the underlying complaint because that issue was not before it for consideration as the parties to the cross claim filed in this matter stipulated to entry of a temporary injunction and

[19] See, e.g., *Coalition for Economic Equity v Wilson*, 1996 US Dist LEXIS 19975 (Court granted temporary restraining order against defendant university from implementing or enforcing California Proposition 209).

dismissal of that cross claim. This Court's December 26, 2006 Order, though, directed the parties to "address the plaintiffs' likelihood of success on the merits of the underlying action."

B. The district court should abstain from rendering any decision in this case under *Pullman* Abstention.

In general, federal courts are bound to adjudicate all controversies that are properly before them.[20] However, there are exceptions. The Supreme Court has explained that "abstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'"[21] In *Railroad Comm'n of Texas v Pullman Comm*, the Supreme Court held that federal court abstention is justified where state court adjudication of an issue under state law would be determinative of related federal claims.[22] The Sixth Circuit has established two requirements for *Pullman* abstention: an unclear state law and the likelihood that a clarification of the state law would obviate the necessity of deciding the federal claim question.[23] Thus, the classic reason to apply the *Pullman* abstention doctrine is where the remanded state-law question is an independent and unsettled issue best decided by the state courts.[24]

Plaintiffs filed the instant lawsuit within hours of the passage of § 26, and no state court has had an opportunity to review this new constitutional provision. The scope, application, and interpretation of § 26 are independent and unsettled questions of law that would be best decided by the Michigan state courts. Specifically, subsection (7) of § 26 provides:

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[20] See, e.g., *New Orleans Pub Serv, Inc v Council of New Orleans*, 491 US 350, 358-59; 105 L Ed 2d 298; 109 S Ct 2506 (1989).
[21] *Colorado River Water Conservation District v United States*, 424 US 800, 814; 47 L Ed 2d 483; 96 S Ct 1236 (1976)(quoting *County of Allegheny v Frank Mashuda Co*, 360 US 185, 189; 79 S Ct 1060; 3 L Ed 2d 1163 (1959)).
[22] *Railroad Comm'n of Texas v Pullman Co*, 312 US 496, 501; 61 S Ct 643; 85 L Ed 971 (1941).
[23] *Tyler v Collins*, 709 F2d 1106, 1108 (CA 6, 1983).
[24] See *Harris County Comm'rs Court v Moore*, 420 US 77, 83-84; 43 L Ed 2d 32; 95 S Ct 870 (1974).

> This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

The meaning, interpretation, and scope of the Amendment and, particularly, to be accorded the exemptions contained in § 26 as ratified by the People of Michigan, would be best resolved by the state courts. The state court's interpretation of these issues could significantly affect the resolution of the federal claims, and, in fact, the state courts are capable of resolving the federal claims. [25] The district court should therefore abstain from rendering a decision on the underlying complaint.

C. The district court should decline to exercise jurisdiction over Plaintiffs' amended complaint for declaratory judgment because it fails to meet the standards for issuance of the requested relief and the five factors to be considered by the court in determining whether to exercise jurisdiction.

The Declaratory Judgment Act provides that in a case of actual controversy, a competent court may "declare the rights and other legal relations" of a party "whether or not further relief is or could be sought."[26] While the Act empowers the district court to entertain these actions, it does not compel it to exercise "the jurisdiction thus granted to it."[27] In other words, where the district court has jurisdiction to hear a declaratory judgment claim, the power to do so is discretionary and the court may refuse to hear such a claim.[28]

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[25] It is understood that state courts can generally adequately address federal constitutional claims. See *Butler v Alabama Judicial Inquiry Comm'n*, 261 F3d 1154, 1159 (CA 11, 2001).
[26] 28 USC § 2201; *Public Service Comm'n of Utah v Wycoff*, 344 US 237, 241; 97 L Ed 291; 73 S Ct 236 (1952).
[27] *Wilton v Seven Falls Co*, 515 US 277, 282; 132 L #d 2d 214; 115 S Ct 2137 (1995).
[28] *Foundation For Interior Design Education Research v Savannah College of Art & Design*, 244 F3d 521, 526 (CA 6, 2001); *Brillhart v Excess Ins Co of Mexican*, 316 US 491, 494; 62 S Ct 1173; 86 L Ed 1620 (1942); *Grand Trunk Western RR Co v Consolidated Rail Corp*, 746 F2d 323, 326 (CA 6, 1984) (quoting E. Borchard, DECLARATORY JUDGMENTS 299 (2d Ed 1941)).

In assessing whether to exercise its discretion to accept jurisdiction in a declaratory judgment action, a district court considers five specific factors[29]:

> (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

Analysis of several of these factors supports a decision by the district court to decline to exercise jurisdiction over the amended complaint.

It is unlikely that a judgment on the amended complaint will settle the controversy or clarify the legal relations at issues regarding Plaintiffs' claims due to the broad and ambiguous nature of the alleged relations between the parties. In addition, a declaratory action would increase friction between the federal courts and the state courts, and encroach on state jurisdiction to interpret a newly coined constitutional provision passed by popular initiative. Finally, a better remedy exists in allowing this matter to be presented to the state courts, which are fully capable of resolving important issues efficiently. Under these circumstances, the district court should exercise its discretion and refuse to entertain Plaintiffs' amended complaint.

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[29] *Scottsdale Ins Co v Roumph,* 211 F3d 964, 965, 968 (CA 6, 2000) (quoting *Omaha Prop & Cas Ins Co v Johnson,* 923 F2d 446, 447-448 (CA 6, 1991); *Foundation for Interior Design Edu v Research Savannah College,* 244 F3d 521, 526 (CA 6, 2001); *Aetna Casualty & Surety Co v Sunshine Corp,* 74 F3d 685, 688 (CA 6, 1996).

D. Plaintiffs lack standing to bring the asserted equal protection, First Amendment, and preemption claims.

Jurisdiction, including standing, is "'assessed under the facts existing when the complaint is filed.'"[30] In order to meet the standing requirements derived from Article III, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and, (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[31] The litigant must clearly and specifically set forth facts sufficient to satisfy all of these standing requirements.[32]

Article III judicial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'"[33] The Supreme Court has adhered to the rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[34] The rule presumes that the party with the right has the prerequisite incentive to challenge governmental action with the necessary zeal and appropriate presentation.[35] It represents a "healthy concern that if the claim is brought by someone other than one at whom the

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[30] *Cleveland Branch, NAACP v City of Parma*, 263 F3d 513, 524 (CA 6, 2001)(quoting *Lujan v Defenders of Wildlife*, 504 US 555, 570 n4; 112 S Ct 2130; 119 L Ed 2d 351 (1992)).
[31] *Cleveland Branch*, 263 F3d at 523-24 (quoting *Friends of the Earth, Inc v Laidlaw Envtl Servs*, 528 US 167, 180-81; 120 S Ct 693; 145 L Ed 2d 610 (2000)).
[32] *Whitmore v Arkansas*, 495 US 149, 155; 110 S Ct 1717; 109 L Ed 2d 135 (1990).
[33] *Warth v Seldin*, 422 US 490, 499; 395 S Ct 2197; 145 L Ed 2d 34 (1973) (quoting *Linda R S v Richard D*, 410 US 614, 617; 93 S Ct 1146; 35 L Ed 2d 536 (1973)).
[34] *Warth*, 422 US at 499.
[35] *Warth*, 422 US at 500.

constitutional protection is aimed,"[36] federal courts might be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[37]

Here, Plaintiffs are a collection of various organizations, unions and individuals opposed to the implementation of art 1, § 26. Essentially, they can be divided into two distinct groups: organizational Plaintiffs and individual Plaintiffs. None of these groups, however, have standing to sue and their amended complaint should be dismissed.

1. The organizational Plaintiffs lack standing since they have not alleged facts showing a concrete and particularized injury in fact.

To bring suit on behalf of its members, an organization must show "'its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'"[38]

In this action, the organizational Plaintiffs consist of the following entities: (1) Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary; (2) United for Equality and Affirmative Action Legal Defense Fund; (3) Rainbow Push Coalition; (4) AFSCME Local 207; (5) AFSCME Local 214; (6) AFSCME Local 312; (7) AFSCME Local 836; (8) AFSCME Local 1642; (9) AFSCME Local 2920; and (10) the Defend Affirmative Action Party. They all are organizations apparently attempting to sue on behalf of their membership. (Amended Complaint, ¶¶ 10-12, 24-25.) The first three

[36] *Secretary of State of Md v Joseph H Munson Co*, 467 US 947, 955, n 5; 104 S Ct 2839; 81 L Ed 2d 786 (1984).
[37] *Warth*, 422 US at 500.
[38] *Cleveland Branch*, 263 F3d at 524 (quoting *Friends of the Earth, Inc*, 528 US at 181).

organizational Plaintiffs are groups committed to fighting for civil rights and affirmative action. (Amended Complaint, ¶¶ 10-12, 25.) The union organizational Plaintiffs, according to the Amended Complaint, are "labor organizations with large minority memberships who stand to suffer discrimination in the absence of affirmative action." (Amended Complaint, ¶ 24.)

None of the organizational Plaintiffs, however, allege any concrete and particularized injury-in-fact. The allegations in the Amended Complaint are devoid of any identifiable injury and there is nothing concrete and particularized about the speculative injury to the organizations or their members. Nor is there anything concrete and particularized about the speculative injury to the hypothetical class of persons Plaintiffs' claim to represent. Accordingly, the organizational Plaintiffs lack standing.

While the Supreme Court recognizes "that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another,"[39] there are express limits to this exception to general standing principles. In *Kowalski v Tesmer*, the Court observed that it has "limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. Second, we have considered whether there is a 'hindrance' to the possessor's ability to protect his own interests."[40] The *Tesmer* Court observed that the Court has "been quite forgiving with these criteria in certain circumstances[41]:

> "Within the context of the First Amendment," for example, "the Court has enunciated other concerns that justify a lessening of prudential limitations on standing." And "[i]n several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." Beyond

[39] *Kowalski v Tesmer*, 543 US 125, 130; 125 S Ct 564; 160 L Ed 2d 519 (2004).
[40] *Tesmer*, 543 US at 130 (internal citations omitted).
[41] *Tesmer*, 543 US at 130 (internal citations omitted).

> these examples--none of which is implicated here--we have not looked favorably upon third-party standing.

Again, in this case, the organizational Plaintiffs fail to allege facts showing they meet the requirements to establish third party standing. They have not alleged facts establishing a 'close' relationship with a person who possesses any right to challenge the application of the amendment. Nor have they shown that there is a 'hindrance' to the possessor's ability to protect his own interests.

2. The individual Plaintiffs lack standing since they fail to allege facts showing an actual or imminent injury in fact and their claims are entirely speculative.

The second half of the "injury in fact" test requires that the party seeking future relief from the provisions of an allegedly unconstitutional law show "actual or imminent" as opposed to "conjectural or hypothetical" harm from its application.[42] Where a petitioner seeks declaratory or injunctive relief, it is insufficient that he has been injured in the past; "he must instead show a very significant possibility of future harm in order to have standing."[43]

The individual Plaintiffs can be subdivided into three categories: (a) those in some stage of the application process to a defendant University; (b) those who "plan" to apply for admission to one of the defendant Universities "in the future," and (c) a petition circulator. Individual Plaintiffs Beautie Mitchell, Christopher Sutton, Stasia Brown, Josie Hyman, and Alejandra Cruz, are Plaintiffs who are allegedly in the process of applying to a Defendant University or have applied to one of Defendant Universities. (Amended Complaint, ¶¶ 13-16.) Individual Plaintiffs Turquoise Wise-King, Shanae Tatum, Calvin Jevon Cochran, Lashelle Benjamin, Deneshea Richey, Michael Gibson, Laquay Johnson, Brandon Flannigan, Kahleif Henry, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany

[42] *Lujan*, 504 US at 560.
[43] *Bras v California Public Utilities Com'n*, 59 F3d 869, 873 (CA 9, 1995).

Jones, Courtney Drake, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Williams Frazier, Dante Dixon, Candice Young, Tristan Taylor, Jerell Erves, Maricruz Lopez, Issamar Camacho, and Adarene Hoag, are individuals who allegedly intend to apply to one of the Defendant Universities' undergraduate or graduate schools. (Amended Complaint, ¶¶ 17-22.)[44] Individual Plaintiff Joseph Henry Reed.was a petition circulator for Proposal 2. The complaint does not state what Plaintiff Reed's interests are in this lawsuit. (Amended Complaint, ¶ 23.)

While the individual Plaintiffs may have some personal stake in the outcome of this litigation, they fail to establish that they have suffered a concrete and particularized injury that is either actual or imminent, as opposed to merely "conjectural" or "hypothetical." Neither the group of applicants nor those intending to apply have established or can establish with any certainty that they would be admitted even with the application of preferences. Nor is there any indication that their race will be any factor in the decision to admit them to a Defendant University. They may be admitted without any consideration of race whatsoever. Finally, simply being a petition circulator does not establish standing to seek the relief set forth in this lawsuit. Moreover, even if the Court were to find that the individuals Plaintiffs pled an adequate "injury" for standing purposes, they have not shown that their allege injury is "likely" as opposed to merely "speculative." Accordingly, the individual Plaintiffs do not have standing to pursue the claims set forth in their first amended complaint and this action should be dismissed.

E. Plaintiffs fail to state a claim upon which relief may be granted.

Plaintiffs' amended complaint asserts five causes of action: a violation of the Fourteenth Amendment's Equal Protection Clause premised on a theory of "political structure" equal

[44] With the exception of Plaintiff Hoag, who is white, the remaining individual Plaintiffs are either of African American or Latin American descent according to the Amended Complaint.

protection (Count One); a claim that Title VI of the Civil Rights Act of 1964 preempts the Amendment (Count Two); a claim that Title IX of the Education Amendments of 1972 preempts the Amendment (Count Three); a claim that Title VII of the Civil Rights Act of 1964 preempts the Amendment (Count Four); and, a claim the Amendment violates the First Amendment. Each of these claims fails as a matter of law.

1. Equal Protection (Count One)

Plaintiffs assert a constitutional violation grounded in "political structure" equal protection analysis. (Amended Complaint, ¶¶ 78-81.) Premised on the Supreme Court's decisions in *Hunter v Erickson*[45] and *Washington v Seattle School District,*[46] Plaintiffs contend that § 26 unconstitutionally restructures the political process because "racial minorities, students or applicants from particular national origins, and women may not petition the faculty and administration at the defendant universities for changes in admission and hiring that either are or could be labeled as 'preferences.'" (Amended Complaint, ¶78.) These allegations fail to state a claim within the context of *Hunter* and *Washington.* First, § 26 does not reorder the political process for obtaining changes in admissions practices. The proponents of this Amendment used the state-wide referendum; the proponents of preferences may do the same. Second, under this "political structure" analysis, reallocation of political decisionmaking violates equal protection only when there is evidence of purposeful racial discrimination, similar to "conventional" equal protection analysis.[47]

Here, Plaintiffs do not make any showing of purposeful discrimination in support of this claim. Further, no such showing is possible as § 26 does not obstruct minorities or others from

[45] *Hunter v Erickson,* 393 US 385; 89 S Ct 557; 21 L Ed 2d 616 (1969).
[46] *Washington v Seattle School District,* 458 US 457; 102 S Ct 3187; 73 L Ed 2d 896 (1982).
[47] *Washington,* 458 US at 484-485; *Valieria v Davis, et al,* 307 F3d 1036, 1040 (CA 9, 2002).

seeking protection against unequal treatment unlike the ordinance reviewed in *Hunter* or the student assignment and desegregation policy at issue in *Washington.* The language and purpose of § 26 is to eliminate preferential treatment in public contracting, employment and university admissions. This Amendment does not reallocate the authority to address only a racial or gender problem "from the existing decisionmaking body, in such a way as to burden minority interests."[48]

The Ninth Circuit has also rejected the identical "political structure" equal protection attack on California's Proposition 209, an amendment to that State's constitution that is identical to § 26. In *The Coalition for Economic Equity, et al v Wilson,* the Ninth Circuit asked the telling question, "Can a statewide ballot initiative deny equal protection to members of a group that constitute a majority of the electorate that enacted it?" [49] The Ninth Circuit answered, "No," stating[50]:

> When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather it prohibits all race and gender preferences by state entities.

The same conclusion is required as to § 26. Like the California case, Plaintiffs here challenge § 26 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. Impediments to preferential treatment do not deny equal protection.[51] Thus, Plaintiffs have no equal protection rights against political obstruction to

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[48] *Valeria,* 307 F3d at 1041.
[49] *The Coalition for Economic Equity v Wilson,* 122 F3d 692, 704 (CA 9, 1997).
[50] *Coalition for Economic Equity,* 122 F3d at 707.
[51] *Coalition for Economic Equity,* 122 F3d at 708.

preferential treatment. Unlike the ordinance in *Hunter* and the policy at issue in *Washington,* § 26 does not create political obstructions to equal treatment. As the Ninth Circuit noted, "While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms."[52]

Plaintiffs' equal protection claim is premised on just such preferential treatment and, therefore, fails as a matter law.

2. Preemption (Counts Two, Three and Four)

The preemption doctrine arises out of the Supremacy Clause in Article VI of the United States Constitution, which dictates that federal law is the supreme law of the land.[53] Courts, however, should not lightly presume preemption.[54] In Counts Two, Three and Four of the Amended Complaint, Plaintiff assert that Titles VI, VII and IX preempt art 1, § 26**.** While Plaintiffs do not claim express preemption, they allege a type of implied preemption generally known as conflict preemption. (Amended Complaint ¶ ¶ 88-89, 94 and 100). Conflict preemption occurs either where it is impossible to comply with both federal and state law, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as reflected in the language, structure, and underlying goals of the federal statute at issue.[55]

Plaintiffs, however, fail to allege sufficient facts to support their preemption claims. Not only does § 26 contain express language specifically limiting the scope of the Amendment, but Congress also made clear that the Civil Rights Act of 1964 only preempts state laws if there

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[52] *Coalition for Economic Equity*, 307 F3d at 708.
[53] See *Fidelity Federal Savings and Loan Ass'n v de la Cuesta*, 458 US 141, 153; 102 S Ct 3014; 73 L Ed 2d 664 (1982).
[54] *California Federal S & L Assoc v Guerra*, 479 US 272, 280-281; 107 S Ct 683; 93 L Ed 2d 613 (1987).
[55] *de la Cuesta*, 458 US at 153.

is an actual conflict. Plaintiffs fail to allege facts showing that the Amendment's elimination of discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin, make compliance with federal law a "physical impossibility" or somehow creates an "obstacle" in accomplishing the purpose of the mentioned federal laws. Section 26 is actually consistent with federal law and as such, it is not preempted.

a. Art 1, § 26 contains a specific provision assuring that it does not conflict with the federal Civil Rights statutes.

Subsection (4) of § 26 states: "This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state."[56] Since a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words, it is clear that Plaintiffs' preemption arguments fail. While Title VI and Title IX apply to recipients of federal financial assistance, § 26 does not make compliance with those federal laws impossible nor does it stand as an obstacle to the accomplishment of the purposes of those federal laws. Subsection (4) assures that there is no conflict between the Amendment and the Civil Rights Act.

Recently, the California Court of Appeals, interpreting the same language as contained in subsection (4), found that the subsection specifically allows for certain affirmative action under narrow circumstances.[57] The Court explicitly recognized that the language does not require a state entity to become ineligible for federal funds before it can lawfully implement a race-based

[56] Const 1963, art 1, § 26(4).
[57] *C & C Construction Inc v Sacramento Municipal Utility District*, 122 Cal App 4th 284; 18 Cal Rptr 3d 715 (2004), reviewing art 1, § 31(e) of the California constitution.

affirmative action program required by federal law if it would interfere with the entity's ability to establish eligibility for federal money.[58]

Accordingly, since there is a specific provision in the new Amendment that avoids the conflict problems that Plaintiffs assert, Counts Two and Three fail for this reason alone.

b. Titles VI, VII and IX do not preempt § 26 since the Amendment does not require acts that are contrary to those federal laws.

Sections 708 and 1104 of the Civil Rights Act make clear that state laws will be preempted only if they actually conflict with federal law.[59] The Supreme Court recognizes that the preemptive powers of sections 708 and 1104 are narrow in scope.[60] Section 708 of Title VII provides[61]:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present of future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Section 1104 of Title IX also generally limits the preemptive effect of all titles of the Civil Rights Act:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.[62]

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[58] *C & C Construction,* 122 Cal App 4th at 299. (It should be noted, however, that where there is no evidence that a race-neutral program could not satisfy the requirements to maintain federal funding, certain affirmative action programs would be unconstitutional. Thus, although there is an exception to § 26's ban on discrimination and preferences for programs required to maintain federal funding, the public entities covered by the Amendment are required to comply with both federal law and the new constitutional Amendment, where possible.)
[59] *Coalition for Economic Equity*, 122 F3d at 710.
[60] *California Federal S & L Assoc v Guerra*, 479 US at 282-83.
[61] 42 USC § 2000e-7.
[62] 42 USC § 2000h-4.

The Ninth Circuit has found the identical language of § 26 not to be preempted by Title VII: "Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII. Quite the contrary, discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." [63] Moreover, the mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretations, does not require preemption of a state law that prohibits affirmative action.[64] Since § 26 does not require acts that are contrary to Titles VI, VII or IX, preemption does not apply and Counts Two, Three and Four fail.

c. The federal Civil Rights laws do not preempt but rather are consistent with § 26 because they all seek to eliminate illegal discrimination and preferences.

In addressing a similar preemption challenge to California's Proposition 209, the California Supreme Court applied the United States Supreme Court's analysis of Title VII, recognizing that regardless of the complainant's race, the "same standards" prohibiting employment discrimination applied[65]:

> The Supreme Court's early interpretation of Title VII emphasized several factors: The purpose of Title VII was to ensure equal opportunity for all. Thus, discriminatory practices were forbidden irrespective of the victim's race. Relief could take the form of restitution to individual victims, including those establishing that an employer's pattern and practice of discrimination deterred their applications for employment. It could also be remedial, to eradicate the effects of specific discriminatory practices, but courts had no obligation or authority to require any particular affirmative hiring or other employment practices. In other words, consistent with congressional intent, the court's construction confirmed and reinforced the role of government as color-blind in these matters.

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[63] *Coalition for Economic Equity*, 122 F3d at 710.
[64] *Hi-Voltage Wire Works, Inc v City of San Jose*, 24 Cal 4th 537, 569; 101 Cal Rptr 2d 653 (2000), citing *Coalition for Economic Equity v Wilson*, 946 F Supp 1480, 1517 n 49 (1996), vacated in part and remanded by *Coalition for Economic Equity v Wilson*, 122 F3d 692 (CA 9, 1997).
[65] *Hi-Voltage Wire Works*, 24 Cal 4th at 551 (2000).

In fact, the Supreme Court has made clear that, "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[66]

In more recent years, Title VII analysis has expanded to allow certain voluntary efforts to eliminate the present effects of past discrimination.[67] Yet, even in these cases, the Supreme Court recognizes that Title VII does not require the use of racial preferences. “It remains clear that the Act does not require any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to permit the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted.” [68]

When discussing California's constitutional amendment that mirrors § 26, the California Supreme Court noted that[69]:

> By virtue of the initiative process, the California electorate "set a different course" from that charted by the courts since *Weber* and *Price*. "Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender." The ballot arguments--from which we draw our historical perspective--make clear that in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, "to achieve equality of [public employment, education, and contracting] opportunities" and to remove "barriers [that] operate invidiously to discriminate on the basis of racial or

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[66] *Griggs v. Duke Power Co*, 401 US 424, 430-431; 91 S Ct 849; 28 L Ed 2d 158 (1971).
[67] *United Steelworkers of America, AFL-CIO-CLC v Weber*, 443 US 193, 204; 99 S Ct 2721; 61 L Ed 2d 480 (1979); *Johnson v Transp Agency*, 480 US 616; 107 S Ct 1442; 94 L Ed 2d 615 (1987).
[68] *Johnson v Transp Agency*, 480 US at 644 (1987) (Stevens, J., concurring).
[69] *Hi-Voltage*, 24 Cal 4th at 670-71.

> other impermissible classification." In short, the electorate desired to restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: " 'Basing present discrimination on past discrimination is obviously not right.'"

Nothing in Title VII suggests that Congress intended to leave government with less latitude under Title VII than private employers.[70] Since § 26 directly reflects the protections provided by the Civil Rights Act, there is no preemption. The people of the State of Michigan decided that the best way to provide equal opportunity is to eliminate all discrimination and preferences based on race and gender. The new constitutional Amendment that restates the federal Civil Rights laws prohibition on illegal racial or gender discrimination in these areas can hardly be considered a contradiction of those federal laws.

Moreover, the legislative history of Title VII removes any possible doubt as to whether Congress intended to force employers to implement race- and sex-based preference programs. The lead proponents of Title VII in the Senate submitted an interpretative memorandum in support stating "[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force."[71] Another proponent of Title VII, stated that "[c]ontrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance." [72]

Chief Justice Burger, dissenting in *Steelworkers v Weber*, noted that the legislative history established that the Civil Rights Act "was conceived and enacted to make discrimination against any individual illegal, and I fail to see how 'voluntary compliance' with the no-

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[70] *Local No. 93, Int'l Ass'n of Firefighters v Cleveland*, 478 US 501, 520 n10; 106 S Ct 3063; 92 L Ed 2d 405 (1986).
[71] *Local 28 of the Sheet Metal Workers' Int'l Ass'n v EEOC*, 478 US 421,459; 106 S Ct 3019, 92 L Ed 2d 344 (1986) (quoting 110 Cong Rec 7213 (1964)).
[72] 110 Cong. Rec. 6549 (1964).

discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others."[73] Similarly, Justice Rehnquist, also dissenting in *Steelworkers v Weber*, recognized that one of the bipartisan floor managers of the civil rights bill in the Senate "stated that 'nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.'"[74]

An interpretation of Title VII that would prohibit a state from exercising its discretion to repeal the same race or gender based preference programs that it had voluntarily enacted decades earlier, would be inconsistent with congressional intent. Because § 26 is consistent with the federal Civil Rights laws, it is not preempted.

3. First Amendment (Count Five)

In this claim, Plaintiffs assert that the Amendment violates the University Defendants' First Amendment right of "academic freedom" recognized in *Grutter v Bollilnger*.[75] Plaintiffs, as prospective students at the graduate or undergraduate defendant Universities, attempt to assert this claim as "beneficiaries" of the asserted right when they seek admission. As argued above, Plaintiffs lack standing to assert this constitutional right vicariously. Additionally, this right of academic freedom does not conflict with § 26 nor otherwise render it unconstitutional.

In *Grutter v Bollinger*, the Supreme Court observed in its discussion of the Equal Protection Clause that "[w]e are a 'free people whose institutions are founded upon the doctrine

[73] *Weber*, 433 US at 218.
[74] *Weber*, 433 US at 237.
[75] *Grutter v Bollinger*, 539 US 306, 331; 123 S Ct 2325; 156 L Ed 2d 304 (2003).

of equality.'"[76] The People of Michigan have exercised their freedom, and consistent with the Equal Protection Clause and the Supreme Court's unequivocal statement that "race-conscious admissions policies must be limited in time," voted to prohibit such policies as of November 7, 2006. Despite the clear import of the decision in *Grutter*, the Plaintiffs assert that a right exists under the First Amendment pursuant to which the Universities may use race as a factor in their admissions process regardless of § 26. Such a "right" has never been recognized in either First Amendment or Equal Protection jurisprudence, and certainly was not recognized in *Grutter* or its companion case *Gratz v Bollinger*, or in the seminal affirmative action case *Regents of the University of California v Bakke*.[77] Even a cursory review of cases referring to the First Amendment in the university context reveals that the Plaintiffs' attempt to reclassify this issue as one of "academic freedom" rather than one of equal protection is without merit.

The Plaintiffs assert that under Grutter and its predecessors, public universities have a First Amendment right to determine their academic standards and the criteria for admission, specifically, the admission of students of diverse races and national origins and from both genders. (Amended Complaint, ¶106) Plaintiffs contend §26 invades this right and "violates the First Amendment rights of the universities and of the students who attend those universities." (Amended Complaint, ¶ 107) This allegation fails on several grounds. First, § 26 does not bar diversity and does not bar the universities from admitting a diverse student body. Rather, § 26 prohibits preferential treatment based on class status, itself a form of discrimination, in achieving that diversity. Second, none of the Plaintiffs are yet admitted to the graduate or undergraduate programs to which they intend to apply, nor is there any certainty they will be admitted in the

[76] *Grutter*, 539 US at 331 (quoting *Loving v Virginia*, 388 US 1, 11; 87 S Ct 1817; 18 L Ed 2d 1010 (1967) (internal quotation marks and citation omitted)).
[77] *Gratz v Bollinger*, 539 US 244; 156 L Ed 2d 257; 123 S Ct 2411 (2003); *Regents of the University of California v Bakke*, 438 US 265; 98 S Ct 2733; 57 L Ed 2d 750 (1978).

future with or without the preferential treatment barred by § 26. Again, as argued above, this is an ill-disguised attempt to assert a "right" that does not flow to these Plaintiffs and for which they lack standing to pursue. Third, the asserted First Amendment right is not as expansive as alleged and must be applied in the context of other constitutional guarantees, here, specifically, that of equal protection.

For example, the Supreme Court has consistently subjected racial classifications to an equal protection analysis, and has only upheld these classifications if they survive strict scrutiny.[78] Case precedent thus requires that § 26's impact on public universities be analyzed under the line of Supreme Court cases, including *Grutter*, that subject race-conscious classifications to strict scrutiny under the Equal Protection Clause—not cases interpreting the scope of the First Amendment.

In *Grutter*, the Court adopted Justice Powell's opinion in *Bakke* and concluded that the University of Michigan law school had a compelling state interest for Equal Protection Clause purposes in "attaining a diverse student body."[79] The exact language of the *Grutter* Court bears repeating here[80]:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School *is no less strict* for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within constitutionally prescribed limits*.
>
> We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a *compelling state interest*,

[78] See, e.g., *Grutter*, 539 US at 326-328, 343.
[79] *Grutter*, 539 US at 328.
[80] *Grutter*, 539 US at 328-330 (internal citations omitted) (emphasis added).

> Justice Powell invoked our cases recognizing a *constitutional dimension, grounded in the First Amendment, of educational autonomy*: "The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission." Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission . . . .

Nowhere in this passage does the Grutter Court clarify or establish that universities have a First Amendment right of equal weight or which surpasses the Equal Protection Clause – nor does Bakke stand for that proposition. In other words, a university may not exercise this First Amendment right in a manner that violates the Equal Protection Clause.

In *Bakke*, Justice Powell cited *Sweezy v New Hampshire* for the principle that the freedom to choose "who may be admitted to study" is one of the "essential freedoms" that constitute "academic freedom."[81] Guided by that principle, Justice Powell concluded that a university's judgment that a diverse student body yields educational benefits renders the attainment of a diverse student body constitutionally permissible.[82] Even so, Justice Powell recognized and warned universities that "*constitutional limitations protecting individual rights may not be disregarded*."[83] Thus, the compelling interest in achieving diversity is a separate and distinct concept from the use of racial classifications in order to achieve such diversity. Justice Powell employed the concept of academic freedom only to demonstrate why pursuing diversity could be considered a compelling state interest for purposes of the Equal Protection Clause.[84]

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[81] *Bakke*, 438 US at 312, citing *Sweezy v New Hampshire*, 354 US 234, 263 (1957).
[82] *Bakke*, 438 US at 312-313.
[83] *Bakke*, 438 US at 314 (emphasis added).
[84] *Bakke*, 438 US at 306, 312-315.

The *Grutter* Court similarly separated the concept of First Amendment "academic freedom" from the use of racial classifications to achieve diversity by specifically holding that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions *to further a compelling interest in obtaining the educational benefits that flow from a diverse student body*."[85] The Court observed that its holding was "in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within constitutionally prescribed limits*."[86] *Grutter* was thus not defining a First Amendment right enjoyed by the law school or other universities that outweighs equal protection principles. Rather, the Court discussed First Amendment principles in determining whether the law school's interest in obtaining educational benefits from a diverse student body constituted a compelling state interest for the purpose of satisfying the Equal Protection Clause.[87] Indeed, it defies logic to suggest that the Court, which acknowledged the "'serious problems of justice connected with the idea of preference itself,'" and refused to "enshrin[e] a permanent justification for racial preferences" within the context of the Equal Protection Clause, somehow enshrined a similar justification within the context of the First Amendment.[88]

Neither *Bakke* nor *Grutter* support the Plaintiffs' claim of a First Amendment "right" to use racial, gender or national origin classifications in order to obtain a diverse student body. Thus, the Plaintiffs' claim that § 26 is unconstitutional under a First Amendment analysis fails as a matter of law.

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[85] *Grutter*, 539 US at 326-329, 343.
[86] *Grutter*, 539 US at 328 (internal citation omitted) (emphasis added).
[87] *Grutter*, 539 US at 328-333. Moreover, the Supreme Court's companion decision in *Gratz* further deflates the Universities' claim that § 26 violates their First Amendment "rights," since that Court found unconstitutional automatic preferences based on the race of the applicant despite the fact that student body diversity can be a compelling state interest under *Grutter*.
[88] *Grutter*, 539 US at 341-342 (internal citation omitted).

Conclusion and Relief Sought

For the reasons set forth above, the proposed intervernors' Emergency Motion For Stay pending appeal should be denied.

Respectfully submitted,

Michael A. Cox
Attorney General

Margaret A. Nelson (P30342)
Heather S. Meingast (P55439)
Joseph E. Potchen (P49501)
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Intervening Defendant-Appellee
Attorney General Mike Cox
PO Box 30736
Lansing, Michigan 48909
517.373.6434

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