No. 06-A-678

# IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

JENNIFER GRANHOLM, as Governor of the State of Michigan, et al,

- and –

MIKE COX, in his capacity as Attorney General of Michigan, and ERIC RUSSELL,

Respondents,

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## MICHIGAN ATTORNEY GENERAL MICHAEL A. COX'S RESPONSE TO PETITIONERS' MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND TO REINSTATE THE TEMPORARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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## STATEMENT OF THE CASE

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 Michigan Constitution[2], 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.

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[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.

[2] Under the Michigan Constitution, this section took effect at 12:01 a.m. on December 23, 2007. See Const 1963, art 12, § 2. Proposal 2 is hereinafter referred to as § 26 throughout this brief.

(7) 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.

(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.

On November 8, 2006, Petitioners filed their complaint for injunctive and declaratory relief.[3] The original 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. Petitioners requested that 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 the court determines appropriate. The named Defendants were Governor Jennifer Granholm, in her official capacity, and the University Defendants, i.e. - Regents of the University of Michigan, the Michigan State University Board of Trustees, and the Wayne State University Board of Governors.

On December 11, 2006, the University Defendants filed a cross claim with the district court against Defendant Governor Granholm seeking declaratory and injunctive relief. In the cross claim the University Defendants asserted a violation of their alleged First Amendment right of academic freedom to admit a class that best meets their academic goals during the current admissions cycle if they implemented § 26 upon the section's effective date, December 23, 2006.

[3] Petitioners include civil rights organizations, prospective applicants, and union organizations.

Among other issues, the University Defendant asserted that they had already began both their admissions and financial aid cycles and made some decisions before the Michigan voters passed § 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 apply different polices than announced as applicable to this cycle. The University Defendants requested a declaratory judgment to allow them to continue using their existing admissions and financial aid policies through the end of the current cycle, an injunction enjoining the application of § 26 to their current admissions and financial cycle, and otherwise declaring their rights and responsibilities under the Amendment in light of federal law.

The University Defendants also filed a motion for preliminary injunction and requested an expedited hearing. The University Defendants sought to enjoin the application of § 26 to their current admissions and financial aid cycles, which would allow them to continue to use their existing admissions and financial aid policies through the end of the current cycle or until the district court enters its declaratory judgment.

On December 14, 2006, Michigan Attorney General Michael A. Cox 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. Petitioners then filed an amended complaint on December 17, 2006.

Recognizing the unique situation confronting the University Defendants 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 injunction. This is what, in the Attorney General's opinion, distinguished the

injunctive request on the University Defendants' 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 Petitioners, the University Defendants as cross claimants, the Governor, and the Attorney General stipulated to the entry of a temporary injunction enjoining the application of § 26 to the University Defendants' current admissions and financial aid cycles, which 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 Eric Russell and Toward a Fair Michigan (TAFM), filed a motion to intervene as defendants in the complaint and cross claim.[4] They did not file a motion for immediate consideration of their intervention motion until December 19, 2006.

Also, on December 19, 2006, the district court entered an order granting the injunction and dismissing the cross claim as stipulated to by the parties Petitioners, the Defendant/Cross Plaintiff Universities, the Defendant/Cross Defendant Governor, and Intervening Defendant Attorney General Cox.

Two days later, on December 21, 2006, the proposed intervenors Russell and TAFM filed notices 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." The United States

[4] Motions to Intervene were also filed by the City of Lansing, Michigan Civil Rights Initiative Committee and the American Civil Rights Foundation. However, these parties did not move for a stay at the appellate level.

Court of Appeals for the Sixth Circuit ordered that responses to this emergency motion to be filed by December 28, 2006. Russell and TAFM also filed an appeal of the temporary injunction order.

Subsequently, on December 27, 2006, the district court granted in part and denied in part Russell and TAFM's motion to intervene. The district court denied the motion with respect to TFAM, 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 Russell, concluding that he has an individual interest that would not be adequately represented by the existing parties.

On December 29, 2006, a panel of the Sixth Circuit Court of Appeals entered its Opinion granting the emergency motion and staying the temporary injunction. (Petitioners' Exhibit A). The other appeals filed by various proposed intervenors and TFAM's and Russell's merits appeal of the temporary injunction, Court of Appeals, remain pending with the Court of Appeals.[5]

Petitioners have not sought any relief in the appellate court from the stay entered December 29, 2006. Rather, on January 8, 2007, Petitioners filed the instant motion seeking to dissolve the appellate court's stay and reinstate the district court's temporary injunction.

On January 10, 2007, the University of Michigan announced its decision to remove race and gender as factors to be considered in admissions decisions for the current school year.[6] Also, Michigan State University announced that it has made adjustments to provide greater assurance that its current admissions decisions are made in a manner that does not discriminate or grant

[5] Additionally, on January 8, 2007, Proposed Intervenor-Plaintiff-Appellee DeCarto Draper filed an Emergency Motion to Intervene and Petition for Rehearing or Rehearing En Banc in the Sixth Circuit Court Appeals. This motion is also still pending in the appellate court.

[6] See http:/www.umich.edu/pres/speeches/070110prop2.html. (last visited 1/13/07).

preference in violation of § 26.[7] Wayne State University apparently does not consider race and gender in its undergraduate programs and it recently adjusted its admissions policies for its law school to eliminate race and gender as factors in their current admissions practices.[8]

[7] See http:/president.msu.edu/prop2response/updates/index.php?updates. (last visited 1/13/07).
[8] See http:/www.media.wayne.edu/ (last visited 1/13/07) (Referencing statement of WSU Vice President and General Council, Louis Lessem in 1/4/07 Detroit Free Press article).

## JURISDICTION

Petitioners request a stay of an interlocutory order of the Court of Appeals, not a final judgment. Petitioners assert that the Circuit Justice has jurisdiction under 28 USC 2101(f) and 28 USC 1651. These statutes provide jurisdiction over a stay application where a Court of Appeals has rendered a judgment disposition of a case before it, and the losing litigant seeks a stay of that judgment pending the filing of a petition for writ of certiorari.[9] Petitioners reliance on these statutes, however, is misplaced and the Circuit Justice lacks jurisdiction to consider this application.

First, Petitioners fail to show the irreparable harm required to support the exercise of jurisdiction over this application. While the interlocutory nature of the order being challenged does not necessarily preclude the exercise of jurisdiction, as then Justice Rehnquist, circuit justice for the Ninth Circuit, noted in *Coleman v PACCAR Inc, et al*, that jurisdiction must, necessarily, be exercised both cautiously and narrowly[10]:

> [A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the state, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.

Justice Rehnquist emphasized that jurisdiction should only be exercised, and the interim relief sought only be granted, where the effect of the appellate decision granting the stay is "shown to

[9] *Coleman v PACCAR Inc, et al*, 424 US 1301, 1302; 96 S Ct 845; 47 L Ed 2d 67 (1976).
[10] *Coleman*, 424 US at 1304. See also: *Garcia-Mir, et al v Smith, Attorney General of the United States, et al* , 469 US 1311, 1313 -14; 105 S Ct 948; 83 L Ed 2d 901 (1985); *Western Airlines, Ince, et al v International Brotherhood of Teamsters, et al* , 480 US 1301; 107 S Ct 1515; 94 L Ed 2d 744 (1987).

pose a danger if irreparable harm impairing the Court's ability to provide full relief in the event it ultimately reviews the action of the Court of Appeals on the merits . . . ."[11]

Second, Petitioners further fail to establish the likelihood of a grant of certiorari from the merits decision of the Court of Appeals on the injunctive order itself. Indeed, in *Coalition For Economic Equity, et al v Wilson, et al,* the Supreme Court previously denied a petition for writ of certiorari in a case that raised the same or similar constitutional challenges asserted in this case.[12]

[11] *Coleman,* 424 US at 1305; *Garcia-Mir,* 469 US at 1313.
[12] *Coalition For Economic Equity, et al v Wilson, et al,* 122 F3d 692 (CA 9 1997), cert den, 522 US 963 (1997).

## ARGUMENT

### I. PETITIONERS FAIL TO MEET THE STANDARDS FOR GRANTING AN APPLICATION FOR STAY

When deciding a traditional application for stay of a *final* judgment of a Court of Appeals, certain factors are to be considered by the Circuit Justice[13]:

> Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below – both on the merits and on the proper interim disposition of the case – are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to "balance the equities' – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Because of the interlocutory nature of the stay order at issue here, the Circuit Justice should consider the likelihood that "the parties may be seriously and irreparably injured by the stay" and should be convinced, that the Court of Appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay."[14]

Here, Russell and TAFM sought a stay of a temporary and limited injunction that by its terms would expire at 12:01 a.m. July 1, 2007. The temporary injunction addressed assertions by the University Defendants in their cross claim that they could not fairly and quickly implement the changes in their admissions criteria required by § 26 in the middle of their admissions and financial aid cycle. Because of the unique equities presented by the University Defendants'

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[13] *Rosketer v Goldberg*, 448 US 1306, 1308; 101 S Ct 1; 65 L Ed 2d 1098 (1980) (internal citations omitted).
[14] *Coleman*, 424 US at 1304.

claim, and for strategic reasons, the Attorney General and the parties stipulated to the temporary and limited injunction.

In deciding Russell and TAFM's emergency motion for stay, the Court of Appeals, applied a four-factor standard much like the one for determining whether to issue a preliminary injunction: 1) the likelihood that the party seeking the stay will prevail on the merits of the 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. (Ex A, 12/29/06 Opinion, p 6) The Court of Appeals concluded each of these factors weighed in favor of granting the stay.

In addressing the likelihood of success on the appeal of the temporary injunction, the Court of Appeals noted that there were several ways to look at the likelihood that the district court's preliminary injunction order will be upheld on appeal , "and each of them holds little promise that we will be able to uphold the order." (Ex A, p 6) The panel closely scrutinized the order finding it facially invalid and flawed on its own terms. Notably, Petitioners do not discuss this aspect of the Court of Appeal's decision and do not present any grounds for concluding that this aspect of the decision presents any grounds for relief.

The Court of Appeals next concluded from the record that "the stipulated injunction does not account for the concerns of all interested parties – namely, the district court's December 27 order granting Russell intervention as of right." (Ex A, p 6) The panel noted that in permitting Russell to intervene as a party, his "individual interest . . . *may* not be taken into account by the present parties." (Ex A, p 7, citing Intervention Order at 15 (emphasis added)).

The panel next concluded that the University Defendants' cross claim and motion for preliminary injunction do not supply a basis for enjoining the law "on the ground it violates

federal constitutional or statutory law." Further, as the panel noted, "the premise for granting [the temporary injunction] no longer exists." (Ex A, p 8). The University Defendants' cross claim was dismissed in exchange for the stipulated injunction. Therefore, the district court no longer had any claim or basis for granting relief to the University Defendants. Again, Petitioners fail to address this aspect of the panel's decision and do not provide any grounds to support the opposite conclusion or result.

Next, the Court of Appeals thoroughly addressed the merits of both the University Defendants' and the Petitioners' claims that § 26 violates the First Amendment and the Equal Protection Clause and Petitioners' claims that Title VI and Title IX preempt § 26. It is this aspect of the decision that Petitioners contend supports their application and they focus on the merits of their claims in an attempt to establish error by the Court of Appeals. Petitioners' arguments, however, are unpersuasive and unconvincing with respect to whether the Court of Appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay."[15]

### A. Petitioners fail to establish a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari to review the merits of the district court's temporary injunction.

As the Court of Appeal's noted, Petitioners and the University Defendants present only "weak federal claims." (Ex A, p 13). At least two of these "weak federal claims," (1) political structure equal protection and (2) statutory preemption, were presented to the United States Court of Appeals for the Ninth Circuit in the context of a preliminary injunction regarding California's Proposition 209, a proposal identical in all significant respects to Michigan's Proposal 2. The Ninth Circuit rejected the plaintiffs' claims and arguments in that case and

[15] *Coleman*, 424 US at 1304.

reversed the grant of a preliminary injunction. This Court denied certiorari.[16] Here, Petitioners present the identical equal protection and preemption claims. These claims did not compel the grant of certiorari in the California case and are unlikely to compel certiorari in the context of the temporary injunction at issue in this matter.

### B. The Court of Appeals' decision regarding the underlying merits of Petitioners' claim was not erroneous.

Petitioners argue that the panel erred in concluding that their federal claims were weak, and assert that they will likely succeed on the merits. Their argument is without merit and misapplies well-established law.

#### 1. Equal Protection

Petitioners 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*[17]and *Washington v Seattle School District,*[18] Petitioners 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.* Under the "political structure" analysis of these cases, reallocation of political decisionmaking violates equal protection only when there is evidence of purposeful racial discrimination, similar to "conventional" equal protection analysis.[19]

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[16]*Coalition For Economic Equity,*122 F3d 9, 642, 702-706, 708-710 (CA 9 1997), cert den, 522 US 963 (1997).
[17] *Hunter v Erickson,* 393 US 385; 89 S Ct 557; 21 L Ed 2d 616 (1969).
[18] *Washington v Seattle School District,* 458 US 457; 102 S Ct 3187; 73 L Ed 2d 896 (1982).
[19] *Washington,* 458 US at 484-485; *Valieria v Davis, et al,* 307 F3d 1036, 1040 (CA 9, 2002).

Here, Petitioners 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 seeking protection against unequal treatment unlike the ordinance reviewed in *Hunter* or the student assignment and desegregation policy at issue in *Washington.* The language of § 26 eliminates preferential treatment in decisions regarding the operation of public employment, public education and public contracting. This Michigan Constitutional 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."[20]

The Ninth Circuit rejected the identical "political structure" equal protection attack on California's Proposition 209, which § 26 was modeled after. In *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?" [21] The Ninth Circuit answered, "No," stating[22]:

> 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 regarding § 26. Like the California case, Petitioners challenge § 26 not as an impediment to protection against unequal treatment but as an impediment to

[20] *Valeria,* 307 F3d at 1041.
[21] *Coalition for Economic Equity,* 122 F3d at 704.
[22] *Coalition for Economic Equity,* 122 F3d at 707.

receiving preferential treatment. Impediments to preferential treatment do not deny equal protection.[23]

The Court of Appeals decision below that is at issue here, follows the same line of reasoning as the Ninth Circuit and draws a clear distinction between the laws at issue in *Hunter, Seattle,* and the later case of *Romer v Evans.*[24] (Ex A, pp 10, 11) The Sixth Circuit correctly concluded that the challenged enactments in those cases made it more difficult for minorities to obtain *protection* from discrimination through the political process. In contrast**,** under § 26, discrimination and preferential treatment based on race, sex, color, ethnicity and national origin are *prohibited.* As the Court of Appeals noted, these are fundamentally different concepts, compelling a different result than in *Hunter, Seattle,* and *Romer*. A difference Petitioners ignore. The Court of Appeals also recognized that, unlike the impermissible attempt to reallocate political authority in this trilogy of cases, § 26 "is more akin to the 'repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place,' *Crawford [v Bd of Ed of the City of Los Angeles]*, 458 US 527 at 538, an action that does not violate the Equal Protection Clause." (Ex A, p 11).

Rather, Petitioners seek to elevate preferential treatment, conduct the Equal Protection Clause may permit in some instances, to the status of conduct the Equal Protection Clause mandates. That concept was soundly rejected by the Ninth Circuit and now by the Court of Appeals below, and is one that should prove unlikely to persuade this Court to grant of a writ of certiorari.

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[23] *Coalition for Economic Equity*, 122 F3d at 708.
[24] *Romer v Evans,* 517 US 620; 116 S Ct 1620; 134 L Ed 2d 855 (1996)

### 2. Preemption – Title VI and Title IX

The preemption doctrine arises out of the Supremacy Clause in Article VI of the United States Constitution, that provides that federal law is the supreme law of the land.[25] Courts, however, do not lightly presume preemption.[26] Petitioners assert that Titles VI and IX preempt § 26**.** Petitioners' argument is premised on the concept of conflict preemption. This argument was soundly rejected by the Ninth Circuit in its *Coalition* case and by the Sixth Circuit below.

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.[27] The Court of Appeals properly rejected Petitioners' claim because 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 is an actual conflict. § 26's elimination of discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin, does not make compliance with the federal law a "physical impossibility". Nor does § 26 create an "obstacle" in accomplishing the purpose of the federal law. Rather, § 26 is consistent with federal law. As such, it is not preempted.

Further, § 26 contains language to assure that it does not conflict with federal law, language Petitioners' argument clearly ignores. Subsection (4) of § 26 states: "This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program,

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[25] 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).
[26] *California Federal S & L Assoc v Guerra*, 479 US 272, 280-281; 107 S Ct 683; 93 L Ed 2d 613 (1987).
[27] *de la Cuesta*, 458 US at 153.

if ineligibility would result in a loss of federal funds to the state."[28] Subsection (4) assures that there is no conflict between the Amendment and the Civil Rights Act.

The Court of Appeals analysis follows this same reasoning as did the Ninth Circuit when it addressed the same issue in the context of California's Proposition 209. Additionally, the California Court of Appeals recently reached the same conclusion in analyzing this same language.[29] Thus, as the Sixth Circuit concluded, by its terms § 26 eliminates any conflict with federal funding statutes like Title VI and Title IX. (Ex. A, p 12) Petitioners do not present any basis for concluding differently.

The Court of Appeals also properly concluded that § 26 does not thwart the purposes of either Title VI or Title IX and, in fact, reinforces and serves the objectives of both.

Sections 708 and 1104 of the Civil Rights Act make clear that a State law will be preempted only when it actually conflicts with federal law.[30] These preemptive powers are narrow in scope, though.[31] 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.[32] Since § 26 does not require acts that are contrary to Titles VI or IX, and in fact furthers the objectives of these federal statutes, preemption does not apply, as the Court of Appeals correctly determined.

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[28] Const 1963, art 1, § 26(4).
[29] *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.
[30] *Coalition for Economic Equity*, 122 F3d at 710.
[31] *California Federal S & L Assoc v Guerra*, 479 US at 282-83.
[32] *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*, 122 F3d 692.

### 3. First Amendment

Petitioners assert that § 26 violates the University Defendants' First Amendment right of "academic freedom" recognized most recently in *Grutter v Bollinger*.[33] Although most of the Petitioners have not actually applied to the undergraduate or graduate programs of the University Defendants, they are attempting to assert this claim as "beneficiaries" of the asserted right when they do seek admission.[34] Leaving aside the significant question of Petitioners' standing to bring this claim, the Court of Appeals decision that this right of academic freedom does not conflict with § 26 nor otherwise render it unconstitutional is consistent with the limitations recognized by this Court and the application of competing constitutional considerations.

In *Grutter v Bollinger*, this Court observed in its discussion of the Equal Protection Clause that "[w]e are a 'free people whose institutions are founded upon the doctrine of equality.'"[35] On November 7, 2006, Michigan citizens exercised their freedom and voted to prohibit race-conscious admissions policies. Despite the clear import of the decision in *Grutter*, the Petitioners assert that a separate 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*.[36] Even a cursory review of cases referring to the First Amendment in the university context reveals that

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[33] *Grutter v Bollinger*, 539 US 306, 331; 123 S Ct 2325; 156 L Ed 2d 304 (2003).

[34] According to the allegations in the amended complaint, the only individual who has actually applied to the University of Michigan is Stasia Brown. (Amended Complaint ¶14) The remaining individuals are "in the process of applying" or "plan to apply" to the Defendant Universities.

[35] *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)).

[36] *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).

the Petitioners' attempt to reclassify this issue as one of "academic freedom" rather than one of equal protection is without merit.

The Petitioners 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. Petitioners argue that § 26 invades this right and violates the First Amendment rights of the universities and of the students who attend those universities. This argument 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 Petitioners 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 future with or without the preferential treatment barred by § 26. Their argument is an ill-disguised attempt to assert a "right" that does not flow to these Petitioners 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. The Court of Appeals correctly recognized these limitations on this asserted First Amendment right.

This Court has consistently subjected racial classifications to an equal protection analysis, and has only upheld these classifications if they survive strict scrutiny.[37] Case precedent thus requires that § 26's impact on public universities be analyzed under the line of this Court's 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.

[37] See, e.g., *Grutter*, 539 US at 326-328, 343.

In *Grutter*, while 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,"[38] it established boundaries for achieving that interest. The language in *Grutter* bears repeating here: "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*."[39] Contrary to Petitioners' argument, neither *Bakke* nor *Grutter* recognized a First Amendment right of equal weight or which surpasses the Equal Protection Clause. In other words, a university may not exercise this First Amendment right in a manner that violates the Equal Protection Clause.

Petitioners' reliance on *Sweezy v New Hampshire* is similarly misplaced.[40] While, Justice Powell's opinion in *Bakke* cites *Sweezy* for the principle that the freedom to choose "who may be admitted to study" is one of the "essential freedoms" that constitute "academic freedom,"[41] he recognized and warned universities that "*constitutional limitations protecting individual rights may not be disregarded*."[42] 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.[43]

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

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[38] *Grutter*, 539 US at 328.
[39] *Grutter*, 539 US at 328-330 (internal citations omitted) (emphasis added).
[40] *Sweezy v New Hampshire*, 354 US 234; 77 S Ct 1203; 1 L Ed 2d 1311 (1957).
[41] *Bakke*, 438 US at 312, citing *Sweezy*, 354 US at 263.
[42] *Bakke*, 438 US at 314 (emphasis added).
[43] *Bakke*, 438 US at 306, 312-315.

admissions decisions *to further a compelling interest in obtaining the educational benefits that flow from a diverse student body*."[44] 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*."[45] *Grutter* was thus not defining a First Amendment right enjoyed by the law school or other universities that outweighs or overcomes 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.[46] Indeed, it defies logic to suggest that the *Grutter* 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.[47]

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

### C. The stay entered by the Court of Appeals does not pose a danger of irreparable harm impairing this Court's ability to provide full relief in the event it ultimately reviews the action of the Court of Appeals on the merits.

The purpose of the temporary injunction was limited to delaying the application of § 26 to the University Defendants' current admissions and financial aid cycle, which had begun as

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[44] *Grutter*, 539 US at 326-329, 343.
[45] *Grutter*, 539 US at 328 (internal citation omitted) (emphasis added).
[46] *Grutter*, 539 US at 328-333. Moreover, this Court's companion decision in *Gratz* further deflates the University Defendants' claim that § 26 violates their First Amendment "rights," since the 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*.
[47] *Grutter*, 539 US at 341-342 (internal citation omitted).

early as July 2006. The University Defendants asserted in their cross claim that they were not able to quickly and fairly implement § 26; that some students had already been granted admission under the existing admissions criteria; and that changing admissions and financial aid factors midway through the admissions cycle would be unfair to the remaining student applicants and result in a class admitted under different criteria. The irreparable harm identified by the University Defendants included the varied admissions practices at each individual college or program within their systems; the inability to quickly change admissions factors and properly train admissions officials; and, the impact on pending student applicants. As of January 10, 2007, though, each University has publicly stated that its respective admissions criteria are now in compliance with § 26. Thus, the very reasons presented by the University Defendants, in support of the temporary injunction, no longer exist. The issue is moot.

Article III of the United States Constitution vests the federal courts with jurisdiction to address actual cases and controversies.[48] Under the "case or controversy" requirement, courts lack authority to issue a decision that does not affect the rights of the litigants,[49] and the courts have a "continuing obligation" to inquire whether there is a present controversy regarding which effective relief can be granted.[50] "'The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.'"[51] An appeal becomes moot if events have taken place during the pendancy of the appeal that make it "impossible for the court to grant 'any effectual relief whatever' . . . ."[52] Because the purpose and need for the temporary

[48] See US Const Art III, § 2.
[49] *Southwest Williamson County Cmty Assoc v Slater*, 243 F3d 270, 276 (CA 6, 2001).
[50] *Southwest*, 243 F3d at 276.
[51] *Bowman v Corr Corp of Am*, 350 F3d 537, 550 (CA 6, 2003), quoting *McPherson v Michigan High School Athletic Ass'n, Inc*, 119 F3d 453, 458 (CA 6, 1997).
[52] *Church of Scientology of California v United States*, 506 US 9, 12; 113 S Ct 447; 121 L Ed 2d 313 (1992) (internal citation omitted).

injunction sought by the University Defendants no longer exists, their is no present controversy and no effective relief can be granted.

Petitioners do not present any argument that supports a different conclusion on this question of irreparable harm than was reached by the Court of Appeals:

> What we have instead is a situation in which irreparable harm will befall one side or the other of the dispute no matter what we do. To respect university applicants who favor preferences this year is necessarily to slight those who oppose them – putting both equally at risk of disappointment when admissions decisions are made this year. And to respect the Universities' interest in preserving their current admissions and financial-aid programs during this enrollment cycle is necessarily to slight the public interest in permitting a statewide initiative to go into effect on the date that the Michigan Constitution requires. In short, "either party will suffer an irreparable injury if we rule against it."

(Ex A, pp 12-13)(internal citations omitted) The only lawful legal conclusion in this case is the one reached by the Court of Appeals: "The irreparable-harm inquiry in the end does not strongly favor one party or another." (Ex A, p 13) Petitioners do not present any argument in this application that supports a different conclusion.

**D. The equities do not weigh in favor of any one party.**

Like the irreparable harm analysis, a similar conclusion is warranted with respect to this factor. Mr. Russell's position, as well as others who are similarly situated, is no less compelling a Petitioners' position. The Circuit Justice should, thus, consider the public's interest in weighing the equities relevant to a stay. Clearly, as the Court of Appeals noted below, the public interest lies in a correct application of the federal constitution and statutory provisions on which the claims asserted here are based as well as a speedy implementation of the "will of the people." (Ex A, p 13) Given the legal infirmities of Petitioners' claims and the substantial likelihood that they will not succeed on the merits, the equities clearly weigh in the public's interest and thus in favor of the implementation of § 26.

## CONCLUSION AND RELIEF SOUGHT

This Court should deny Petitioner's application or motion to dissolve the stay issued by the Court of Appeals because they have failed to establish that this Court has jurisdiction to entertain the application since first they failed to show the irreparable harm necessary for this Court to exercise jurisdiction over the application, and second, they failed to establish the likelihood of a grant of certiorari from the merits of the Court of Appeals' decision on the injunctive order.

This Court should also deny Petitioners' application or motion because they have failed to establish the standards required for dissolving the stay entered by the Court of Appeals. Specifically, Petitioners fail to establish a reasonable probability that four justices will consider the issue sufficiently meritorious to grant certiorari to review the merits of the district court's temporary injunction. Also the Court of Appeals decision regarding the underlying merits of Petitioner's claim was not erroneous. Additionally, the stay entered by the Court of Appeals does not impose a danger of irreparable harm. Finally, the equities do not weigh in favor of any one party.

Respectfully submitted,

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Dated: January 17, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2007, I electronically filed the foregoing paper with the United States Supreme Court Clerk of the following: **MICHIGAN ATTORNEY GENERAL MICHAEL A. COX'S RESPONSE TO PETITIONERS' MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND TO REINSTATE THE TEMPORARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN:**
and on this same day, I emailed and caused to be mailed the foregoing document to the following counsel for the parties:

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