Nos. 06-2640, 06-2642, 06-2653

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ALL MEANS NECESSARY, et al.,

Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, et al.,

Defendants-Appellees,

and
ERIC RUSSELL and TOWARD A FAIR MICHIGAN,

Proposed Intervenor-Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Michigan
Honorable David M. Lawson, District Judge

RESPONSE BRIEF OF MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE AND AMERICAN CIVIL RIGHTS FOUNDATION TO THE EMERGENCY MOTION FOR A STAY PENDING APPEAL IN SUPPORT OF APPELLANTS ERIC RUSSELL AND TOWARD A FAIR MICHIGAN

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of the 6th Cir. R. 26.1 on page 2 of this form. Sign and date this form.

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary, et al.

v.

Jennifer Granholm, et al.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, American Civil Rights Foundation
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makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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Not to the knowledge of American Civil Rights Foundation.

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Date

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Signature of Counsel

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INTERESTS OF MCRIC AND ACRF

MCRIC, through its treasurer and Chairperson Leon Drolet, registered with the Michigan Secretary of State as the official Ballot Question Committee for Proposal 2, for the purpose of reporting all campaign statements as required by Michigan law. MCRIC was also the source of information in favor of MCRI as published by the website www.michiganedusource.org.

MCRIC was formed by the coauthors of MCRI and other Michigan residents who want to eradicate the use of race, ethnicity, or sex in public decision making. MCRIC, its members, and its Executive Director, Jennifer Gratz, have been at the forefront of the protracted campaign to adopt MCRI and are committed to achieving the passage of laws that prohibit the use of race, sex, or ethnicity in any public education, public contracting, or public employment context. Jennifer Gratz was the named plaintiff in the recent United States Supreme Court decision that prohibited the University of Michigan from automatically awarding 20 points to minority applicants to its undergraduate school. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

ACRF is a nonprofit public benefit corporation, with members who are Michigan residents, that has been created to monitor and enforce laws that preclude government use of race, sex, or ethnicity, in public contracting, public education, or public employment. ACRF seeks to intervene in this lawsuit on behalf of itself and its individual members, some of whom are Michigan citizens, residents, and taxpayers,

and who will be subject to, and will expect the State to comply with the mandates of equal treatment and equal opportunity embodied within the Michigan Civil Rights Initiative.

INTRODUCTION AND STATEMENT OF THE CASE

On November 7, 2006, Michigan voters adopted Proposal 06-2, commonly referred to as the Michigan Civil Rights Initiative (MCRI), or Proposal 2, which adds Article I, section 26, to the Michigan Constitution. Proposal 2 passed by the "landslide" margin of 58% to 42%. (Michigan Secretary of State website http://www.mich.gov/sos/0,1607,7-127-1633---,00.html, under the link to "2006 General Election Results" last accessed on December 10, 2006.)

On November 8, 2006, Plaintiffs filed a lawsuit challenging the constitutionality of Proposal 2, claiming that Proposal 2 is inconsistent with the Fourteenth Amendment, the Civil Rights Act of 1964, and that it violates the university defendants' First Amendment rights.

On December 11, 2006, the Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University (Universities) made clear their allegiances in the instant lawsuit in which they are named defendants by filing a cross-claim for Declaratory Relief and Request for Preliminary Injunction, asking for an Order that allows them to ignore Proposal 2 until the end of the current admissions cycle. On December 18, 2006, a motion to

intervene was filed by Eric Russell and the group Toward A Fair Michigan. (Eric Russell's motion to intervene was granted by the District Court on December 28, 2006. Dkt. # 55.) The then-existing parties also filed with the District Court on December 18, a stipulated injunction whereby the university defendants' cross-claim was dismissed and Proposal 2 would not be enforced against the university defendants until July 1, 2007. Also on December 18, 2006, as proposed intervenors, MCRIC and ACRF filed an opposition to the injunctive relief sought by university defendants. (Dkt. # 29.) On December 19, 2006, The District Court entered an Order approving the stipulated injunction. On or about December 21, Eric Russell filed an Emergency Motion for Stay Pending Appeal and Writ of Mandamus directing the District Court to lift the stipulated injunction. This court ordered briefing by the four original parties to be accomplished by 3:00 p.m. December 28, 2006, with any reply brief due by 1:00 p.m. December 29, 2006 - and directing the parties to address the plaintiffs' likelihood of success on the merits of the underlying action.

MCRIC and ACRF submit the following brief to show that plaintiffs have not–and can not–show the likelihood of success necessary to sustain the injunctive relief ordered by the District Court.

It should not go without comment that it was within the context of an appealed Order granting injunctive relief that the Ninth Circuit rejected nearly identical arguments directed at a functionally identical state constitutional amendment passed in

California in 1996, Proposition 209, in Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

ARGUMENT

I

THE UNIVERSITIES HAVE NOT SHOWN A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THE FIRST AMENDMENT DOES NOT CONFER UPON THEM AN UNASSAILABLE RIGHT TO EMPLOY RACIAL CLASSIFICATIONS

In order to obtain the relief requested, the Sixth Circuit requires that the Universities show a *strong* likelihood of success on the merits. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). Also, the proof required for a plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion. *Id.* at 739. Universities claim a likelihood of success on the merits based on asserted "academic freedom" rights under the First Amendment, which rights purportedly include the right to the selection of the student body. Universities' Motion at 8. Such a right has never been recognized in either First Amendment or Equal Protection jurisprudence. A disciplined examination of cases making reference to the First Amendment in the university context shows that Universities do not make the significant distinction between First Amendment <u>interests</u> and First Amendment <u>rights</u>.

As an initial matter, this case is not about the extent to which the federal

constitution allows or prohibits race and sex based classifications. This case is about whether a State may limit race and sex based classifications that might be allowable under the federal constitution. The fact that the State Constitution of Michigan may afford greater protections than the Federal Constitution is "well established and is based on fundamental constitutional doctrine and principles of federalism." *Woodland v. Mich. Citizens Lobby*, 378 N.W.2d 337, 343 (Mich. 1985) (citing *Oregon v. Hass*, 420 U.S. 714 (1975)); *Cooper v. California*, 386 U.S. 58 (1967). Thus, the Michigan Constitution has been interpreted as affording broader protection of some individual rights also guaranteed by the Federal Constitution's Bill of Rights. *See*, *e.g.*, *People v. Jankowski*, 289 N.W.2d 674 (Mich. 1980) (double jeopardy provision of Michigan constitution broader than Fifth Amendment); *People v. Beavers*, 227 N.W.2d 511 (Mich. 1975) (unreasonable searches and seizures). Having established that Michigan has established broader protections than those granted by the federal constitution in other areas of the law, the question arises whether the First Amendment bars the people of Michigan from creating broader protections from racial discrimination and/or preferences than are allowed under the Federal Equal Protection Clause. The answer is no. There is nothing in the United States Constitution, including the First Amendment, that prohibits a State from adopting a law that forbids or repeals the use of racial classifications—even if they are narrowly tailored toward achieving a compelling state interest. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d at 708.

Universities state that "[a] long and unbroken line of United States Supreme Court cases has recognized that institutions of higher education enjoy academic freedom rights grounded in the First Amendment and that these rights include the selection of the student body." Universities' Motion at 8. However, Universities are unable to point to any Supreme Court holdings that bestow upon public universities any rights arising from the First Amendment–much less the right to unfettered use of racial classifications in selecting their student bodies. In fact, the Supreme Court has been crystal clear that although universities are free to choose their student bodies, "constitutional limitations protecting individual rights may not be disregarded." *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978)).

Both of the cases cited by the universities in their request for injunctive relief (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967)) dealt with the First Amendment rights of individuals with university affiliations–not the First Amendment rights of the universities themselves. *Sweezy* and *Keyishian* are of no help to universities in their search for institutional First Amendment rights.

Similarly, neither *Bakke* nor *Grutter* provide the universities with the First Amendment rights they seek to invoke. In *Bakke*, Justice Powell approved of the University of California's use of race on the sole ground of the university's interest in

attaining a diverse student body. *Bakke*, 438 U.S. at 311. Justice Powell's analysis was grounded in academic freedom "that has long been viewed as a special concern of the First Amendment." *Id*. at 312. Justice Powell used this First Amendment concern with academic freedom to justify deferring to a university's judgment regarding who should attend the university. *Id.* at 312-13. Thus, the most that can be gleaned from *Bakke* is that First Amendment concerns may justify deference to public university's judgment regarding admissions. This is far from establishing a First Amendment right to use racial classifications regardless of a state constitutional provision that bans the use of such classifications.

The *Grutter* decision likewise provides no support for a First Amendment right to use racial classifications unencumbered by the strict scrutiny that accompanies the use of racial classifications. *See*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The section of the *Grutter* decision that contains the academic freedom discussion begins with the question of "whether the Law School's use of race is justified by a compelling state interest." *Grutter*, 539 U.S. at 327. In answer to that question, the Court says: "[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within* constitutionally prescribed limits." *Id.* at 328 (emphasis added). Thus, the Court was not laying out a First Amendment freedom enjoyed by the law school. Rather, the Court discussed First Amendment principles in determining whether or not the law school's interest in

obtaining educational benefits from a diverse student body constituted a compelling state interest. *Id.* at 328-33.

The Court's recent decision in *Gratz v. Bollinger*, 539 U.S. 244, also reveals the flaw in the claim that Proposal 2 violates the Universities' First Amendment rights. After acknowledging that the law school had a compelling interest in obtaining a diverse student body in *Grutter*, the notion that the First Amendment paved the way for unrestricted racial classifications was dashed by the court's simultaneous decision in *Gratz* that prohibited automatic preferences based on the race of the applicant. In *Gratz*, the First Amendment clearly did not provide the University of Michigan with either a shield or a sword with which it could utilize racial classifications based only on its ideas of how a diverse student body is beneficial.

Bakke, *Grutter*, and *Gratz* do not support Universities' claim of an institutional academic freedom that is granted by the First Amendment. Therefore, a state constitutional amendment that mandates abandonment of all classifications based on race does not violate the First Amendment.

Because plaintiffs and universities confuse First Amendment <u>interests</u> with First Amendment <u>rights</u> and fail to recognize that states are not prohibited from adopting broader protections than are otherwise allowable under the federal constitution, plaintiffs and universities have not demonstrated the required likelihood of success in the underlying action.

II

PLAINTIFFS HAVE NOT DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE CLAIM THAT PROPOSAL 2 VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Reduced to its essence, Plaintiffs' claim is a simple one; Proposal 2 violates the Fourteenth Amendment's command that each person be accorded equal protection of the laws. Plaintiffs argue that Proposal 2 "unlawfully burdens women and minorities with amending the state constitution before they alone can petition duly-elected officials for redress of grievances, including a redress of grievances regarding the racial and sexual integration of public education and employment." However, Proposal 2 contains no language that can be construed as a barrier to obtaining redress for violation of a person's civil rights. Plaintiffs' position is that the Fourteenth Amendment establishes the right to be given preferential treatment by the state based upon race. In making this argument, Plaintiffs ignore that there is no right to seek legislation which gives race-based preferences to individuals or groups.

In reviewing California's Proposition 209, a measure that amended California's constitution to prohibit race-based discrimination and preferences, the Ninth Circuit stated:

> To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is

> constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

Coal. for Econ. Equity, 122 F.3d at 709.

The United States Supreme Court has held that laws classifying people on the basis of race are presumptively unconstitutional and that race-conscious laws are analyzed under strict scrutiny and may only be upheld if supported by a compelling state interest. *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion); *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 227.

Until recently, the only compelling interest recognized by the Court as sufficient to support a racial classification is the remedying of past discrimination. However, in *Grutter v. Bollinger*, 539 U.S. 306, the Supreme Court expanded the canon of compelling state interests when it deferred to the University of Michigan Law School's judgment that diversity was essential to its educational mission, and held that the law school had a compelling interest in attaining a diverse student body. *Id.* at 328. Of course, the *Grutter* decision did not come close to requiring the law school, the state, or any other entity, to use racial or sexual classifications in order to achieve their target level of viewpoint diversity.

In fact, the Court's decision in *Gratz v. Bollinger*, 539 U.S. 244, issued the same day as the *Grutter* decision, held that the University of Michigan's admissions policy

of awarding an additional 20 points (out of the required 100 for admission) to minority applicants violates the equal protection rights of non-minorities because it was not narrowly tailored to achieve the interest in viewpoint diversity that the university claimed justified their program. *Id.* at 270. If the Fourteenth Amendment required the preferential treatment Plaintiffs seek herein, the University of Michigan's admissions policy would not have violated the equal protection rights of non-minorities. From the *Gratz* decision we learn that Plaintiffs ask too much of the Fourteenth Amendment—it simply does not require the utilization of racial classifications as a blanket response to societal discrimination that would have to apply in order to maintain Plaintiffs' action against Proposal 2.

There is no political "right" for any racial or ethnic group to seek laws that discriminate on the basis of race. Even in those narrowly circumscribed instances in which limited race-conscious programs are permitted in order to remedy specific instances of past discrimination, the race-conscious programs are not the product of pure legislative action. Instead, the Court has required factual findings, supported by a strong basis in evidence. *Croson*, 488 U.S. at 501-02; *Wygant v. Jackson Bd of Education*, 476 U.S. 267, 277 (1986). The Court has looked behind the findings, not granting the usual deference to legislative findings. *Shaw v. Hunt*, 517 U.S. 899, 908-909 (1996). *Croson*, 488 U.S. at 500-01.

In *Crawford v. Bd. of Educ. of the City of L.A.*, 458 U.S. 527 (1982), the Supreme Court held that Proposition 1, a California initiative constitutional amendment that prohibited state courts from ordering mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause, did not violate the Fourteenth Amendment. *Id.* at 529-30. The Court rejected arguments that Proposition 1, which adopted the Equal Protection Clause of the Fourteenth Amendment, could violate the very same provision. *Id.* at 530. Or, as Justice Blackmun phrased it, "I cannot conclude that the repeal of a state-created right . . . 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' " *Id.* at 547 (Blackmun, J., concurring) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)).

The Ninth Circuit, in reviewing Proposition 209, recognized that it amended the California constitution to "prohibit state discrimination against or preferential treatment to any person on account of race or gender." *Coal. for Econ. Equity*, 122 F.3d at 702. Where the plaintiffs in *Coal. for Econ. Equity* challenged Proposition 209 on Fourteenth Amendment grounds, the Ninth Circuit stated:

> Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.

Id. The Ninth Circuit concluded that,

> Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race of gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.

Id. Likewise, Proposal 2's prohibition on classifying individuals by race or sex does not violate the Equal Protection Clause of the Fourteenth Amendment.

In *Austin Black Contractors Ass'n v. City of Austin, Texas*, 78 F.3d 185 (5th Cir. 1996), the Fifth Circuit concluded that the Austin Black Contractors Association did not have "a constitutional cause of action against the City for failure to implement an affirmative action program." *Id.* at 186. The Fifth Circuit stated that "[i]n making this ruling, we join the numerous other circuits that have previously determined that the Fourteenth Amendment does not require affirmative action." *Id.* (citing *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 415 (7th Cir. 1988); *NAACP, Detroit Branch v. Detroit Police Officers Ass'n*, 821 F.2d 328, 331 (6th Cir. 1987); *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181, 187 (4th Cir. 1985), *vacated on other grounds*, 488 U.S. 469 (1989); *Associated Gen. Contractors of Cal. v. S.F. Unified Sch. Dist.*, 616 F.2d 1381 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980). "That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Coal. for Econ. Equity*, 122 F.3d at 708.

Because the Fourteenth Amendment merely permits, but does not require, the use of racial preferences, a constitutional amendment such as Proposal 2 that prohibits such preferences cannot violate the Fourteenth Amendment.

III

PLAINTIFFS HAVE NOT DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE CLAIM THAT PROPOSAL 2 VIOLATES TITLE VI, VII, OR XI OF THE CIVIL RIGHTS ACT OF 1964

Plaintiffs claim that Proposal 2 conflicts with federal law because its prohibition against race-based preferential treatment interferes with public employers' voluntary compliance with the objectives of Title VII of the Civil Rights Act of 1964.[1] Plaintiffs' arguments fail.

Under the Supremacy Clause of the United States Constitution, federal law only preempts those state laws that conflict directly with a federal law or that obstruct the goals the federal law seeks to achieve. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Felder v. Casey*, 487 U.S. 131, 137 (1988); *Nash v. Florida*

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[1] Curiously, the Plaintiffs contend that Proposal 2 is preempted by Titles VI and IX of the Civil Rights Act of 1964. To the extent that compliance with Proposal 2 would conflict with Titles VI and/or IX, with a resulting loss of federal funds, Proposal 2 is inapplicable because Subsection (4) of Proposal 2 specifically 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." Thus, this section will only address any claimed conflict between Proposal 2 and Title VII.

Indus. Comm'n, 389 U.S. 235, 240 (1967). "'In two sections of the 1964 Civil Rights Act, §§ 708 and 1104, Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law.'" *Coal. for Econ. Equity*, 122 F.3d at 710 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (plurality opinion)). The identical language of Proposal 2 that appears in California's Proposition 209 was found by the Ninth Circuit to not be pre-empted 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, '[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.'" *Coal. for Econ. Equity*, 122 F.3d at 710 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

In enacting Title VII, Congress emphasized that private, voluntary efforts on the part of employers were an important mechanism to abolish the existing racial hierarchy. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 204 (1979). Although Congress recognized the importance of voluntary antidiscrimination efforts, Title VII does not require the use of racial preferences. *Id.* at 206.

> 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.

Johnson v. Transp. Agency, 480 U.S. 616, 644 (1987) (Stevens, J., concurring).

> Lower federal courts have consistently recognized that Title VII does not require employers to adopt discriminatory preference programs.[2] "Thus, *Weber* and *Johnson* both permit the T[ennessee] V[alley] A[uthority] to follow an affirmative action plan which targets the hiring of women and minorities.
>
> These cases do not hold, however, that such preferences are mandatory or that once an employer undertakes a voluntary plan it will be liable for a Title VII violation for every deviation.

Liao v. Tenn. Valley Auth., 867 F.2d 1366, 1369 (11th Cir. 1989); *Bratton v. City of Detroit*, 704 F.2d 878, 883 (6th Cir. 1983) ("The Court considered the terms and policies of Title VII and concluded that, although private employers were not required to implement affirmative remedial programs to offset prior racial imbalances, the Act does not prohibit voluntary race-conscious actions which are consistent with the antidiscrimination policy of the statute."); *Yatvin*, 840 F.2d at 415 ("The Constitution and Title VII have been held, with exceptions irrelevant here, to permit affirmative action; they do not require it.").

Proposal 2 is a mirror reflection of the protections provided by the Civil Rights Act. 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. Proposal

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[2] There can be no serious argument that Title VII preempts Proposal 2 with regard to public contracting or public education, since Title VII only applies to employment practices of employers, not to contracting or admissions policies. 42 U.S.C. § 2000e-2.

2's restatement of Title VII's prohibition on racial discrimination in these areas can hardly be considered a contradiction of Title VII.

The language of Section 703(j) of Title VII illuminates Congress' desire not to force race- and gender-conscious preference programs on employers as the sole means of complying with Title VII. Section 703(j) states:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin . . . .

42 U.S.C. 2000e-2(j).

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, Senators Case and Clark, submitted an interpretative memorandum in support of Title VII, stating "[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force." *Local 28 of the Sheet Metal Workers' Int'l Ass'n*. v. E.E.O.C., 478 U.S. 421, 459 (2986) (quoting 110 Cong. Rec. 7213 (1964)). Senator Humphrey, 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." 110 Cong. Rec. 6549 (1964).

An interpretation of Title VII that would prohibit a state from exercising its discretion to repeal the same race-based preference programs that it had voluntarily enacted decades earlier, would be inconsistent with congressional intent. Because Proposal 2 is consistent with federal policy underlying Title VII, it is not preempted.

IV

THE UNIVERSITIES FAIL TO ESTABLISH THAT TEMPORARY ADMINISTRATIVE BURDENS CONSTITUTE IRREPARABLE INJURY

Before this Court may grant pretrial equitable relief, the Universities must demonstrate that Proposal 2 would expose them to some significant risk of irreparable injury if the relief is denied. *Abney v. Amgen, Inc.*, 443 F.3d 540, 546-547 (6th Cir. 2006). "[T]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citation omitted) ("[b]ecause injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges . . . a real and immediate—as opposed to a merely conjectural or hypothetical—threat of *future* injury.").

Here, the Universities can show no irreparable injury from the implementation of Proposal 2. Their complaints are speculative and point only to the administrative inconveniences associated with modifying an admissions process. Indeed, if any burdens are present, such as the lack of training of personnel, they are caused by the

Universities administrators' own lack of preparation, exacerbated by their efforts to enjoin the implementation of Proposal 2. Such deficiencies, if any, are temporary and therefore, not irreparable.

Proposal 2 was approved by 58 percent of voters in the November 7 election. It into effect on December 23, 2006, 45 days after the election. Although the Universities have known about Proposal 2 for three years, they now claim that they are unable to implement its mandates in a timely manner.[3] According to the Universities, the 45 day time period creates problems with respect to training admissions personnel. Temporary administrative inconveniences, which administrators are paid to anticipate and solve, do not constitute irreparable harm.[4]

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[3] For three years, the citizens of Michigan have been aware Proposal 2, which would prohibit the Universities from using race or sex as a factor in the admissions process. In December, 2003, MCRI sought approval from the Board of State Canvassers to form the petition to amend the Michigan constitution by adding a new section. *Coal. to Defend Affirmative Action & Integration v. Bd. of State Canvassers*, 686 N.W.2d 287, 289 (Mich. Ct. App. 2004). Since then, the petition stated, in pertinent part:

> 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.

Id.

[4] In contrast to the Universities in Michigan, the University of California with ten campuses throughout the state indicated its intention of implementing Proposition 209

Implementing Proposal 2 does not require the Universities to begin the training of admissions personnel from scratch. Certainly, the Universities' administration could instruct the admissions personnel to eliminate any consideration of race, ethnicity of national origin, or sex in admission. This could be accomplished in a few hours. Wayne State University Law School (WSU) has already implemented this administrative change which became effective on December 22.

Moreover, Proposal 2 will not impact those students who are admitted to the Universities or who have been awarded financial aid prior to December 22. Proposal 2, section 8 states: "This section applies only to action taken after the effective date of this section." Proposal 2 should, however, apply to all applications where a final decision was not reached by December 22, 2006.

As WSU Law School demonstrates, the Universities have the administrative abilities to comply with Proposal 2 on much shorter notice than the *additional* six months provided by the stipulated injunction. Because the injuries the Universities claim are administrative inconveniences, the Universities fail to demonstrate the required immediate and imminent injury as a result of Michigan voters approving Proposal 2.

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immediately. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1520 (N.D. Cal. 1996).

V

THE BALANCE OF EQUITIES AND THE PUBLIC'S INTEREST IN THE TIMELY IMPLEMENTATION OF PROPOSAL 2 IS OVERWHELMINGLY OPPOSED TO GRANTING INJUNCTIVE RELIEF

Even assuming that the Universities have raised a question regarding the administrative burdens of implementing Proposal 2, the Court must consider whether granting the injunction will cause substantial harm to others. *Abney*, 443 F.3d at 546. The balance of equities is clearly in favor of requiring Universities to comply with Proposal 2 without delay. As discussed above in Part IV, although Universities claim temporary administrative inconvenience in complying with the voters' wishes in eliminating race as a factor in student admissions, temporary administrative inconveniences, which administrators are paid to anticipate and solve, do not constitute irreparable harm.

On the other hand, there is a judicially recognized injury to the entire body politic of the State of Michigan should this Court enjoin a popularly enacted initiative. A state suffers a form of irreparable injury whenever an enactment of its people or their representatives is enjoined. *New Motor Vehicle Bd. of the State of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., Circuit Justice) ("[I]t also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, its suffers a form of irreparable injury"). An

injunction against operation of an amendment to the organic law of the state thwarts the lawful exercise of the people's sovereignty in a way that is uniquely injurious. This is all the more true when, as here, the amendment has the purpose and effect of eliminating race- and sex-based discrimination and preferences in public employment, contracting, and education.

When Proposition 209 was adopted by the voters in California adding Article I, section 31, to the state constitution, plaintiffs immediately sought a temporary restraining order and preliminary injunction. The operative provision of Proposition 209 is identical to Proposal 2. Proposition 209 was hauled into federal court the day after it was adopted and the district court issued a preliminary injunction. The Ninth Circuit Court of Appeals has warned, "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy." *Coal. for Econ. Equity v. Wilson*, 122 F.3d at 699. The Ninth Circuit further explained, "[f]or this federal tribunal to tell the people of California that their one-day-old, never-applied-law violates the Constitution, we must have more than a vague inkling of what the law actually does." *Id.* at 700.

Support for Proposal 2 was simply overwhelming. Showing strong dissatisfaction with the use of race by the state and its political subdivisions, 58% of

voters supported Proposal 2.[5] By approving Proposal 2, Michigan citizens chose to command its state government, including the Universities, to treat everyone equally without regard to race. However, the Universities seek to reject this voter-approved equal treatment command on grounds of administrative inconvenience. Given that the voters of this state have expressed their strong desire for a change in the manner students are admitted to the state's public universities, this Court would impose a substantial hardship on Michigan's democratic institutions by enjoining Proposal 2 on speculative grounds.

Furthermore, Universities appear to acknowledge a willingness to implement Proposal 2 at the end of the current admissions cycle. Universities' Motion at 3 (stating "[a]ll the Universities ask for here is the ability to complete this admissions and financial aid cycle under their existing policies."). It is therefore difficult to understand how implementing Proposal 2 will result in the type of irreparable harm that is being threatened when the Universities will be implementing it in July even if the requested injunctive relief is granted.

In addition, there are strong public interests in ensuring that applicants applying to Michigan's public universities are treated equally without regard to their race or sex.

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[5] *See* Michigan Secretary of State website, last accessed on December 15, 2006: www.mich.gov/sos/0,1607,7-127-1633---,00.html, under the link to "2006 General Election Results".

For three years, the Universities have been on notice that Proposal 2 would eliminate race and sex based discrimination and preferences in the admissions process. When Proposal 2 was adopted November 7, the Universities waited until December 11, before seeking equitable relief from this Court. If this Court grants their relief, it would create serious hardship to the thousands of students who applied to the Universities after Proposal 2 was adopted and relied upon an admissions process that was free of race- and sex-based discrimination and preferences. These students have a strong interest in ensuring that their applications are reviewed consistent with the equal treatment commands of Proposal 2.

It should also be noted that after the United States Supreme Court ruled in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), that race-based discrimination in school admissions violated the constitutional rights of African-Americans, many public officials in the southern states responded with defiance, including "subterfuges that evaded or drastically slowed desegregation." Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1014 (1989). As another commentator observed: "[D]isobedience, disrespect and massive resistance to the mandates of the United States Supreme Court are relatively old historical concepts practiced . . . [when] states had ideological and sociological views contrary to the edicts and mandates of the Court." Demet, *A Trilogy of Massive Resistance*, 46 A.B.A.J. 294, 296 (1960) (as cited in *Pugach v. Dollinger*, 277 F.2d

739, 748 n.6 (2d Cir. 1960) (Clark, J., dissenting)). This concept of "massive resistance" to the mandate of Proposal 2 is being carried out by the Universities who are captives of ideological and sociological views contrary to Proposal 2. This Court should avoid such an outcome by refusing the Universities' late date request for an injunction.

Nevertheless, Universities make several stabs at manufacturing more weight for their injunction than the facts, the language of Proposal 2, or the law will support. As to Universities' argument that because there is already a delay in when Proposal 2 goes into effect, there is no weight to the State's interest in having its laws receive "immediate effect and enforcement." Universities' Motion at 14. However, the State's interest is in having its laws go into effect on the date that the law requires them to go into effect—whether immediately or on a date certain in the future. Universities may not infer from the brief delay provided by law that additional delays of months are inconsequential.

Also, Universities argue that Proposal 2 should not be read so as to "reach back in time and change what has already occurred." *Id.* On the contrary, if the State has in the past established policies that require the use of race and sex in public contracting, education, and employment, Proposal 2 is intended specifically to nullify those policies. Proposal 2 should not, however, be relied upon to disturb admissions or financial aid decisions made before its effective date.

Universities also argue that if Proposal 2 constitutes a "qualified" ban on "discrimination" as well as an "absolute" ban on "preferential treatment" then Proposal 2 is itself discriminatory by providing greater protection to majorities than to minorities. Universities' Motion at 19. However, this argument (a) establishes a false distinction between discrimination and preferences, and (b) fails to separate what is allowable under federal law (e.g., racial classifications that are narrowly tailored to achieve a compelling state interest), from what states are permitted to do under well-established doctrines of federalism and constitutional law (e.g., completely prohibit and/or repeal the state's use of race based distinctions and preferences).

The central purpose of the Equal Protection clause is "the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). The ultimate goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Thus, "[a]ny governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny." *Coal. of Econ. Equity*, 122 F.3d at 702. Also, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion). Thus, the United States Constitution does not distinguish between those who are benefited and those who are injured by racial classifications.

The constitution's application of strict scrutiny to racial classifications that are for the protection of minorities as well as for the protection of majorities explains the Universities' failure to cite to a single case in support of their argument that Proposal 2 protects majorities more than it protects minorities. It is disingenuous for Universities to concoct a patently untenable reading of Proposal 2 and argue that being construed in such a manner would lead to irreparable harm.

Universities' argument that Proposal 2 "draws a new irrational line" is similarly flawed in that it argues that states must guarantee the use of race-based classifications that are merely allowed under the federal Constitution. However, the fact that "the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Coal. for Econ. Equity*, 122 F.3d at 708. The goal of the Fourteenth Amendment is "a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). Thus,

> [t]o hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

Coal. for Econ. Equity, 122 F.3d at 709. Universities' argument that because affirmative action programs have been permitted, states are shackled in their attempt to ban them, is losing sight of the forest for the trees.

The constitutional violation that the Universities claim will lead to irreparable harm simply does not exist.

CONCLUSION

For the reasons set forth above the stipulated injunction entered by the District Court should be reversed.

DATED: December 28, 2006.

Respectfully submitted,

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By /s/ Alan W. Foutz
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 6,572 words.

/s/ Alan W. Foutz

ALAN W. FOUTZ

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONSE BRIEF OF MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE AND AMERICAN CIVIL RIGHTS FOUNDATION TO THE EMERGENCY MOTION FOR A STAY PENDING APPEAL IN SUPPORT OF APPELLANTS ERIC RUSSELL AND TOWARD A FAIR MICHIGAN** was filed with the Clerk this 28th day of December, 2006, via electronic filing and federal express to the following addresses:

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