Nos. 06-2640, 06-2642

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION: et al.,

Plaintiffs-Appellees,

v.

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

Defendants- Appellees,

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

Intervening Defendant - Apellee,

and

ERIC RUSSELL: TOWARD A FAIR MICHIGAN,

Intervenors-Defendants-Appellants.

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDNING APPEAL

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W., Suite 300
Washington, D.C. 20036
Telephone: 202-833-8400

Charles J. Cooper
Michael W. Kirk
COOPER & KIRK, PLLC
555 Eleventh Street, N.W., Suite 750
Washington, D.C. 20004
Telephone: 202-220-9600
Facsimile: 202-220-9601

Counsel for Intervenors-Defendants-Appellants

Kerry L. Morgan
PENTIUK, COUVEREUR & KOBILJAK
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, MI 48192
Telephone: 734-281-7100

Table of Contents

TABLE OF AUTHORITIES

Cases **Page(s)**

Statues

Rules

Other

INTRODUCTION

On November 7, 2006, the voters of Michigan overwhelmingly decided to forbid, by a state constitutional amendment no less, their public institutions from considering "race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." MICHIGAN CONST., art I. § 26. With respect specifically to the "University of Michigan, Michigan State University, [and] Wayne State University," ["the University defendants"] Section 26 provides that these and other Michigan educational institutions "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of" the prohibited criteria. The meaning of this simple prohibition is clear and straightforward. Indeed, even the University defendants – in a refreshing burst of candor amidst their feigned "uncertainty" and "confusion" over the meaning of Section 26 – acknowledge that it "purports to prohibit the Universities from, *inter alia*, considering race in admission." Univ. Br. 2.

Intervenor Russell is an applicant for admission to the University of Michigan School of Law. He seeks nothing more, nor less, than to have his application and the applications of other candidates considered without regard to race, as Section 26 requires. But Section 26's nondiscrimination command has been preliminarily enjoined by the court below, thus freeing the University defendants to continue their policy of granting preferential treatment to minority applicants on the basis of race. The district court enjoined operation of Section 26 until July 2007, without making any inquiry into whether it violated, or likely violated, some federal constitutional or statutory norm. Nor did the court below inquire into the other familiar factors governing preliminary injunctive relief. Rather, it entered the preliminary injunction sought by the University defendants solely because it had been agreed to by the other state defendants. In other words, the defendant Governor, the University defendants, and the intervening defendant

Attorney General – the very public officials obliged to obey and enforce Section 26 – agreed among themselves instead to ignore Section 26's nondiscrimination command during the current admissions cycle, until July 2007. The court below, "find[ing] that the interests of all parties and the public are represented adequately through the state defendants," approved the stipulation the day after it was presented.

The district court plainly abused its discretion by entering the stipulated preliminary injunction without making any inquiry into the familiar factors governing such extraordinary relief. The court was bound to satisfy itself as to both the legal basis of and the practical necessity for enjoining the operation of the duly enacted amendment to the Michigan Constitution. Its failure to do so, standing alone, requires that the preliminary injunction be vacated. The same result obtains, we submit, if this Court chooses now to make the required inquiry itself, *de novo*, for it is clear that the stipulated preliminary injunction fails each of the familiar tests governing such extraordinary relief.

First, the University defendants' claim has no chance whatever of succeeding on the merits. The bottom line is that the University defendants, as subordinate organs of the *State*, have no constitutional rights of any kind *as against the State itself.* The *Grutter* Court held that "student body diversity is a compelling *state* interest that can justify the use of race in university admissions." *Grutter v Bollinger,* 539 U.S. 306, 325 (2003) (emphasis added). And nothing in the federal Constitution somehow disables the people of Michigan, the state's ultimate sovereign authority,[1] from determining that their public educational institutions will no longer be permitted to use racial admission preferences to promote the *State's* interest in diverse student enrollments.

[1] "All political power is inherent in the people." MICHIGAN CONST. art. I, § 1.

Indeed, federal courts lack jurisdiction to adjudicate internecine policy disputes between a state and its subordinate governmental organs.

Nor have the Plaintiffs-Appellees asserted colorable federal constitutional or statutory claims against enforcement of Section 26. Section 26 prohibits Michigan public institutions from considering the race of any citizen, minority or nonminority, and thus simply eliminates racially preferential admissions policies that are themselves presumptively invalid under the Equal Protection Clause. This reaffirmation of the Equal Protection Clause's central purpose surely cannot violate the Equal Protection Clause. The Fourteenth Amendment does not mandate efforts to evade the Fourteenth Amendment's core principle, and laws eliminating presumptively invalid racial classifications surely cannot themselves be presumptively invalid racial classifications. Moreover, Section 26 is constitutional because it is simply a statewide substantive change in preference policy which in no way alters or burdens minorities' access to the political process. This conclusion is required by Court of Appeals and Supreme Court precedent expressly stating that statewide measures to end official racial preferences pose no constitutional problem. Again, the bottom line is that federal constitutional and statutory norms barely *permit* states to use race classifications; they surely do not *require* it do to so.

Given that the University defendants and the Plaintiff-Appellees have failed to raise even a colorable, let alone a winning, challenge to the constitutional validity of Section 26, this Court's review of the district court's preliminary injunction order should have ended here. But the preliminary injunction, in any event, fares no better under the balance of harms inquiry. The University defendants complain at length about how many admissions officers they have and how well trained they are to apply the University defendants' racially preferential admissions criteria and policies. But nowhere do they explain the difficulty in simply issuing, and

implementing, a directive requiring admissions officers to cease considering race (and the other prohibited criteria) in deciding whom to admit. After all, they obviously know how to disregard race in the admissions process, for they accord no such "plus factor" or other racial preference in evaluating the applications of nonminority candidates, who make up the large bulk of the applicant pool. The University defendants and their personnel need only treat all applications in this same race-neutral way. The University defendants' purported admissions "crisis" is thus transparently contrived. In any event, if there is any substance to their claim of harm, it is of their own making, the University defendants had plenty of time to prepare to comply with Section 26 during the highly publicized and contentious, year-long public debate that preceded its passage at the ballot.

In contrast to the University defendants, Intervenor Russell will suffer concrete irreparable harm *now* if the preliminary injunction is not vacated or at least stayed. He is entitled, under Section 26, to have his application to the University of Michigan Law School considered in a race-neutral admissions process. The public interest, too, is vindicated only if Section 26 is applied immediately and in full, as the public itself has ordained through the democratic process.

I. THERE IS A STRONG LIKELIHOOD THAT THE INJUNCTION WILL BE VACATED ON THE MERITS.

A. This Court has Jurisdiction.

The Attorney General argues that movants cannot appeal the preliminary injunction because they are not "parties" to the cross-claim and, as a result, this Court lacks a "jurisdictional hook." AG Br. 9. This argument fails because Mr. Russell is now a party, and like any other party, has the right to appeal the entry of a preliminary injunction. 28 U.S.C. § 1292(a) (granting jurisdiction to the courts of appeals to hear appeals of interlocutory orders entering injunctive

relief). The Attorney General's argument to the contrary is not very clear, but is apparently based either on the fact that the cross-claim was "dismissed" prior to the time that movants filed their notice of appeal or that their motion to intervene (filed one week after the cross-claim was first filed and only hours after it became apparent that Attorney General Cox would not represent their interests) was "too late." AG Br. 9. Not surprisingly, the Attorney General has not found any authority to support this argument. There are many things wrong with it.

First, the federal rules do not provide for intervention with respect to "claims" or "counterclaims" or "cross-claims," but rather with respect to "actions." *See* FED. R. CIV. P. 24(a) ("anyone shall be permitted to intervene in an *action*") (emphasis added). Those who intervene as of right under Rule 24(a) have full party status. *Alvarado v. J.C. Penny Co., Inc.*, 997 F.2d 803, 805 (10th Cir. 1993) (" '[w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party' ") (quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985)); *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir. 1977) ("an intervenor ... may appeal from an appealable order unless the intervention has been specially limited to forbid it"). Since original parties can appeal interlocutory injunctions that affect them, so can parties who intervene as of right. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court."); *Ass'n of Banks In Insurance v. Duryee*, 270 F.3d 397, 402-03 (6th Cir. 2001) (insurance groups had right to appeal judgment affecting Ohio regulations of banks' insurance business because "[w]hen considering whether the intervenor-defendants have standing to appeal, our focus is on the injury caused by the judgment rather than the injury caused by the underlying

facts" and because "the judgment of the district court has the effect of easing restrictions on the entry of national banks into the Ohio insurance arena").[2]

Second, while the cross-claim may have been dismissed, the University defendants' agreement to dismiss it is hardly surprising because they received all of the relief sought in the cross-claim. The cross-claim only *sought* a declaration and an injunction providing for a *temporary* reprieve from the application of the Amendment; and that is exactly the injunction the University Defendants obtained. The litigation with respect to the cross-claim may have been "over," just as it was "over" in *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990), when the district court entered the injunction plaintiff had sought against the City of Grand Rapids precluding it from allowing Chabad to place a menorah on public property. (It is not clear from the facts in *Grand Rapids* whether the district court entered a final judgment on plaintiff's claim there, but that could hardly have affected this Court's analysis.) Courts frequently allow intervention for purposes of appeal when a case is "over," and no one has ever thought that there is a jurisdictional bar to doing so. *See generally United States. v. Perry*, 360 F.3d 519, 526-27 & n.5 (6th Cir. 2004) (describing various cases upholding post-judgment appeals by non-parties).[3]

Third, if the Attorney General means to suggest that the motion to intervene was untimely, *see* AG Br. 9 & n.17; Univ. Br. 7-8, 17, his argument is foreclosed by the district

---

[2] This Court *does* lack jurisdiction to consider the arguments advanced by the Attorney General and the University Defendants that the trial court erred in granting Mr. Russell's intervention motion because such orders are not appealable as of right. *See* 7C Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1923 ("An order granting leave to intervene is not final and is not appealable as of right").

[3] Accordingly, the University defendants' suggestion that Mr. Russell "has no right to relitigate what has already been determined in adversary [sic] litigation with the Attorney General," Univ. Br. 6-7 n.1, is just wrong.

court's subsequent ruling to the contrary in granting Mr. Russell's intervention motion. Movants sought to intervene just seven days after the Universities filed their cross-claim, four days after the Attorney General moved to intervene, and just hours after the December 18 stipulation was filed. Similarly, the other parties suggest that Russell and TAFM should be faulted for having moved to expedite their motion to intervene on December 19 instead of December 18. *See, e.g.*, Univ. Br. 17. But, of course, movants had no way of knowing that the district court would enter an injunction the next day against a part of the Michigan Constitution based on the bare agreement of the Governor, the Attorney General, and the plaintiffs without any analysis of the traditional injunction factors and without providing movants the opportunity to respond.

B. The District Court's Order Granting The Injunction Should Be Reviewed *De Novo*, Not For Abuse Of Discretion.

The Universities argue that the district court's order granting the preliminary injunction should be reviewed "under an abuse of discretion standard" that "affords great deference to the district court." Univ. Br. at 11. On the contrary, no deference to the district court's decision is warranted in this case, for several reasons. First, as we demonstrate below, the district court lacked jurisdiction over the Universities' cross-claim on which the injunction was based. This jurisdictional error is reviewed de novo, *Rodriguez v. Tenn. Laborers Health and Welfare Fund*, 463 F.3d 473, 475 (6th Cir. 2006), and without jurisdiction the district court had no power to enter any injunction of any sort. Second, even if the district court had jurisdiction, the question of the injunction's propriety would turn almost entirely on questions of law that are likewise reviewed de novo. *See Coalition for Economic. Equality v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997) ("We review the legal issues underlying a decision to grant an injunction de novo, as well as the conclusion that plaintiffs are likely to succeed on the merits of those issues."). To put the same point another way, an error of law, which is determined de novo, is an abuse of discretion

per se—as one case cited by the University defendants points out. *United States v. Colahan*, 635 F.2d 564, 566 (6th Cir. 1980) ("[I]f the district court erred as a matter of law, ... such would be an abuse of discretion.").

More importantly, even if these considerations are put aside, the district court's ruling is not entitled to any deference. The district court did not analyze the traditional four factors governing the issuance of injunctive relief, or even permit any adverse party comment, let alone to take discovery, on the extravagant factual allegations made by the University defendants. This failure to apply the traditional four factors was itself an abuse of discretion. *Six Clinic Holding Corp. v. Cafcomp Sys.*, 119 F.3d 393, 399 (6th Cir. 1997) ("A district court is *required* to make *specific findings* concerning each of the four factors, unless fewer factors are dispositive of the issue.") (emphases added). There is no indication that the district court engaged in any serious scrutiny of the adequacy or fairness of its sweeping injunction to affected third parties. On the contrary, the district court simply approved the joint proposal of the state defendants—the Governor, the Attorney General, and the University defendants—who mutually agreed to relieve themselves of their duty to obey and enforce, at least for the time being, duly enacted Michigan law, without any inquiry into the legal basis or need for the stipulated injunction. Unlike the case cited by the Universities, which involved the dissolution of a pre-existing stipulated order that was *contested* by one of the parties, *Colahan*, 635 F.2d at 565-66, the circumstances of this case thus reek of potential, and perhaps actual, collusion.

As multiple Courts of Appeals have noted, the federal courts must be especially vigilant in policing stipulated orders or consent decrees that allow state officials to circumvent democratic processes to effect changes in state law that they could not otherwise achieve. *See, e.g.*, *Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (plurality opinion)

("[T]he court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the office-holder."); *League of United Latin American Citizens v. Clements,* 999 F.2d 831, 846 (5th Cir. 1993) (en banc) ("Courts must be especially cautious when [state officials] seek to achieve by consent decree what they cannot achieve by their own authority. Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court."). For the district court to accept the stipulated agreement wholesale, without any independent determination that it was supported by "a substantial federal claim," and to throw the full weight of federal judicial authority behind it, was an abuse of discretion.[4]

C. The District Court Erred by Granting Injunctive Relief Because the University Defendants' Cross-Claim Was Plainly Without Merit and the Court Below Lacked Jurisdiction to Consider It.

The University defendants brought their cross-claim on December 11 against the Governor in her official capacity. *See* Cross-Claim of the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University, at 2. The cross-claim included a single count, and the sole relief requested was an injunction preventing the enforcement of Section 26 against the University Defendants during the current admissions cycle. The stated basis for the cross-claim was that enforcement of Section 26 "would result in the loss of [the University defendants'] First

[4] As shown in movants' initial papers, there was no cross-claim on which the court below could enter its injunction. Motion at 12-13. The University Defendants essentially argue that the stipulation they and the other parties signed, calling for dismissal "pursuant to Rule 41(a)(1) and 41(c)," was not actually a Rule 41(a)(1) stipulation. Univ. Br. 13-14. That provision calls for automatic dismissal "without order of court." FED. R. CIV. P. 41(a)(1). It is distinguished from Rule 41(a)(2), entitled "By Order Of Court." Of course, if the parties were actually moving for dismissal pursuant to Rule 41(a)(2), they could have just said so, and made an appropriate motion.

Amendment-based academic freedom right to admit a class that best meets their academic goals during this cycle." *Id.* ¶ 13. On the same day, the University defendants filed a motion for preliminary injunctive relief, seeking the same thing – to enjoin the enforcement of Section 26 "through the end of the current cycle." Univ. P.I. Mot., at 6. The Universities' motion was the only request for injunctive relief filed by any party in the district court at any time. Moreover, in their district court brief in support of this motion, the Universities' argument for their likelihood of success on the merits was based, entirely and exclusively, on their putative "First Amendment-based academic freedom right to select and enroll the student body that best achieves their educational missions." Univ. P.I. Br. at 12; *see also* Univ. Br. at 21-27.

On December 18, before the district court had ruled on our motion to intervene, the other parties to the case filed a three-paragraph stipulation with respect to the Universities' cross-claim. They stipulated that the enforcement of Section 26 against the Universities' admissions and financial aid policies should be enjoined until July 1, 2007, and that, in exchange, the Universities' cross-claim would be dismissed. Stipulation for Entry of Order, at 3. The next day, before ruling on our motion to intervene, the district court "approve[d] the stipulation," enjoined the enforcement of Section 26 against the Universities until July 1, and (putatively) dismissed the Universities' cross-claim. Amended Order Granting Temporary Injunction and Dismissing Cross-Claim, at 3.

1. The Fourteenth Amendment does not confer rights on a state university that may be asserted against the State.

A venerable line of authority holds that a subdivision of a State, such as a municipality or a state university, may not assert constitutional rights against the State that creates it. In *Trustees of Dartmouth College v. Woodward*, considering whether the Contracts Clause governed relations between Dartmouth College and the State, Chief Justice Marshall wrote: "The general

correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted." 17 U.S. 518, 629 (1819); *see also id.* at 628 (holding that an interpretation of the Contracts Clause that would grant rights to a "civil institution[]" against its creating State "would be an unprofitable and vexatious interference with the internal concerns of the State [and] would unnecessarily and unwisely embarrass its legislation," and that "the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit"). Likewise, in *City of Trenton v. New Jersey*, the Supreme Court found "no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey," and thus held that "[t]he power of the State, unrestrained by the contract clause or the *Fourteenth Amendment*, over the rights and property of cities ... cannot be questioned." 262 U.S. 182, 192 (1937) (emphasis added). Again, in holding that the Equal Protection Clause had no application to the enforcement of a state statute against a subdivision of the State, Justice Cardozo explained for the Court that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams v. Baltimore*, 289 U.S. 36, 40 (1933).

In keeping with this line of authority, this Court has squarely held that "because municipal bodies are essentially creatures of the state and because the state retains the inherent power to alter, change or even to abolish them in accordance with the state's constitution and laws made thereunder, the United States Constitution simply does not concern itself with matters of internal disagreements between a state and subdivisions created by it ... for this area involves

matters which the state is uniquely competent to resolve." *Kelley v. Metro. Bd. of Educ.*, 836 F.2d 986, 998 (6th Cir. 1987) (quoting *S. Macomb Disp. Auth. v. Washington*, 790 F.2d 500, 507 (6th Cir. 1986) (Engel, J., concurring)).

Thus, the federal Constitution imposes no restraints on the application of state constitutional provisions and statutes to subdivisions or "creatures" of those states. "The nature of the relationship between a public corporation and its creating state has led the [Supreme] Court to conclude that a municipal corporation cannot invoke the protection of the Fourteenth Amendment against its own state, and is prevented from attacking the constitutionality of state legislation on the grounds that its own rights have been impaired." *S. Macomb*, 790 F.2d at 504 (citation and quotation marks omitted). "Political subdivisions of a State may not challenge the validity of a state statute under the Fourteenth Amendment." *New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973). "It is well-settled that a political subdivision may not bring a federal suit against its parent state based on rights secured through the Fourteenth Amendment." *Brandon Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998).

To be sure, "[t]here may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation." *S. Macomb*, 790 F.2d at 504. Most notably, when a local official believes he is subject to contradictory commands by state and federal law, he may challenge the state law under the Supremacy Clause, to vindicate his oath to uphold the federal Constitution. *See id.* (citing cases); *Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968). Here, of course, the Universities have made no claim that the First Amendment *commands* them to disregard the requirements of Section 26, only that it *permits* them to do so. *See* Univ. Br. 20 (asserting a "First Amendment, academic *freedom* right") (emphasis added). The Universities' oblique

suggestion that their First Amendment claim really arises under the Supremacy Clause, *see* Univ. Br. at 29, is thus beside the point. *See Branson Sch. Dist. RE-82*, 161 F.3d at 629-30 (noting that "a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights," though it may assert a claim that "a federal statute[] trumps any contradictory state law through the operation of the Supremacy Clause").

In addition, on occasion, some courts have entertained even constitutional challenges to state statutes brought by school districts when the school districts were asserting, not their own Fourteenth Amendment rights, but those *of their students*. *See, e.g., Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). But a creature of the State may not claim any freedom to disobey state law on the basis of a purported Fourteenth Amendment right that it asserts "in *its own* right." *S. Macomb*, 790 F.2d at 505; *Kelley*, 836 F.2d at 998 (emphasis added). For example, in distinguishing *Seattle School District*, this Court explained in *Kelley* that "[a] local school board can have an agency of the state enjoined from taking a step that would tend to deprive the local body's school students of their constitutional right to attend nonsegregated schools, but that is not our case. In our case the claimant ... has sued *solely in its own right*." 836 F.2d at 998 (emphasis added) (citations, alteration, and quotation marks omitted); *see also United States v. Alabama*, 791 F.2d 1450, 1456 n.5 (11th Cir. 1986)("We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator."). Likewise here, the "First Amendment-based academic freedom right to select and enroll the student body that best achieves their educational missions," Universities' P.I. Br. at 12, is clearly asserted "in [the Universities'] own right." 836 F.2d at 998; 790 F.2d at 505. To suggest that the

"right to select and enroll" a particular "student body" inheres in the *applicants* of the University would be nonsense—though the applicants would probably be delighted to hear that they have a First Amendment right to select themselves for admission.

The longstanding doctrine that political subdivisions cannot assert constitutional claims against their parent States not only forecloses the merits of such claims, but restricts the very jurisdiction of the federal courts to consider them. The Supreme Court has made clear that, not only are such claims without merit, but the political subdivision lacks standing to assert them: "Being but creatures of the State, municipal corporations have no *standing* to invoke ... the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 441 (1939) (emphasis added). Thus, in *Kelley*, this Court stated that "[f]ederal courts *may not be called upon* ... to adjudicate an internal dispute between a local governmental entity and the very state that created it," 836 F.3d at 998 (emphasis added)—thus implying, not merely an elaboration on the nature of the political subdivision's rights, but a statement about the power of the federal courts to consider such disputes at all. Other courts have asserted this jurisdictional limitation more explicitly. In *Stanley v. Darlington Co. Sch. Dist.*, citing *Kelley*, Judge Niemeyer wrote that "no federal court had *jurisdiction* to involve itself further in the internal affairs of state government and apportion the costs of providing the ordered relief among the state's departments and political subdivisions." 84 F.3d 707, 717 (4th Cir. 1996) (emphasis added). *See also Housing Auth. of the Kaw Tribe of Indians v. City of Ponca City,* 952 F.2d 1183, 1188 (10th Cir. 1991) (holding that a political subdivision lacked standing to sue under 42 U.S.C. § 1983 because "a political subdivision may not lodge constitutional complaints against its creating state"); *Moore, Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983) (rejecting an equal protection challenge

against a state statute because "political subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds"); *United States v. Alabama*, 791 F.2d at 1456 (holding that the court lacked jurisdiction because Alabama State University "ha[d] no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment"); *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973); *but see Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (arguing that "*Hunter*, *Trenton*, and allied cases are substantive holdings that the Constitution does not interfere in states' internal political organization," rather than jurisdictional holdings).

It is abundantly clear that this substantive and jurisdictional bar on constitutional claims by arms of the State against the State extends to claims by state *universities* as well as other "creatures of the State." As the Eleventh Circuit stated, "the law is clear that [Alabama State University], as a creature of the State, may not raise a Fourteenth Amendment claim under Section 1983." *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *see also id.* at 1456 n.6 ("ASU has no Fourteenth Amendment rights"). And there can be no doubt that the University defendants in this case—the University of Michigan, Michigan State University, and Wayne State University—are "creatures of the State." *Kelley*, 836 F.2d at 998; *Alabama*, 791 F.2d at 1455. They are considered to be "the State" both under state law and under federal constitutional law. *See* MICH. COMP. LAWS § 691.1401(c) (" 'State' ... includes every public university and college of the state, whether established as a constitutional corporation or otherwise."); *Estate of Ritter v. University of Michigan*, 851 F.2d 846, 851 (6th Cir. 1988) (holding that "the Board of Regents of the University of Michigan is, as an arm of the State, immune under the eleventh amendment from suit in federal district court"); *Weisbord v. Michigan State University*, 495 F. Supp. 1347, 1356-57 (W.D. Mich. 1980) (detailing the

extensive public character of Michigan State University and concluding that "[n]othing in the charter of Michigan State University states or implies that it is anything other than a state institution entitled to the privileges and immunities of the state"), *cited in Hall v. Medical College of Ohio*, 742 F.2d 299, 301 (6th Cir. 1984); *Johnson-Brown v. Wayne State University*, 1999 U.S. App. LEXIS 4751, at *3 (6th Cir.) (holding that "[Wayne State] University is considered to be the 'state' for government liability purposes").

Therefore, the University defendants simply cannot assert, against their parent State,[5] their putative "First Amendment, academic freedom right [to] build entering classes that best comport with their academic goals." Univ. Br. at 20. This putative "First Amendment, academic freedom right," if it exists at all, *but see infra*, would be applicable against the State only by incorporation in the Due Process Clause of the Fourteenth Amendment. *See Stromberg v. California*, 283 U.S. 359, 368 (1931). But the state universities have no rights to assert under the Fourteenth Amendment against the State that created them, and therefore no standing to bring such illusory claims.

2. The Supreme Court has recognized only a First Amendment academic-freedom *interest* of the State, not an independent *right* held by its creature universities.

Contrary to this longstanding recognition that creatures of the State, such as the University defendants in this case, possess no independent constitutional rights that they may assert against their parent State, the University defendants argue that the Supreme Court has "reaffirm[ed], in *Grutter v. Bollinger*, that they have the right, grounded in the First Amendment,

[5] It makes no difference that the University defendants brought their cross-claim against the Governor in her official capacity, rather than against the State itself. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that a suit against a state official in his representative capacity is considered a suit against the official's office, which "is no different from a suit against the State itself"); *Branson Sch. Dist. RE-82*, 161 F.3d at 628.

to select their students and may, in the course of doing so, give some consideration to factors such as race and to compose a diverse student body"—even when the voters of the State have adopted a contrary policy. Univ. Br. 21. This assertion badly misreads the Supreme Court's statements on "academic freedom" in *Grutter* and the other cases cited by the Universities. In perfect accord with the Supreme Court's uncontradicted line of authority from *Trustees of Dartmouth College* onward, *Grutter* and like cases have never recognized any First Amendment "right" to academic freedom that may be asserted *by a public university against its parent State*. On the contrary, far from adopting any such extraordinary position—which would abrogate *Dartmouth College* and its progeny *sub silentio*, and essentially grant the State constitutional rights against itself—the Supreme Court has repeatedly emphasized that the "First Amendment-based academic freedom right" asserted by the Universities is not a "right" at all, but an "*interest*" that is *possessed by the State*. Because it is possessed by the State, of course, it cannot be asserted *against* the State—in particular, it cannot be asserted against the democratically adopted legal constraints that the voters of Michigan have chosen to place on the discretion of their state actors, including their public university admissions committees.

One need look no further than *Grutter* to confirm this conclusion. Justice O'Connor's opinion for the Court in *Grutter* repeatedly emphasized that the "academic freedom" that permitted public universities to consider race as a "plus" factor in university admissions was possessed *by the State*: "[T]oday we endorse Justice Powell's view that student body diversity is a compelling *state* interest that can justify the use of race in university admissions." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (emphasis added). From the outset of its analysis, the Court stressed that the University was being considered as a *state* actor, *see id.* at 326 ("The Equal Protection Clause provides that no *State* shall 'deny to any person within its jurisdiction the

equal protection of the laws.' ") (emphasis added). Indeed, if the University had not been a state actor subject to the strictures of the Fourteenth Amendment, the question of its use of race in admissions would have been, as it were, academic. It was essential to the Court's analysis, therefore, that the interest in selecting students to promote a diverse student body was held by the State. Otherwise, that interest could not be invoked to justify the State's use of race-conscious admissions procedures.

The Court's "conclusion that *the Law School* has a compelling interest in a diverse student body," *id.* at 330, was in no way distinct from its acceptance of "the principle of student body diversity as a compelling *state* interest," *ib.* (both emphases added). Nor could it have been. On the contrary, the Court repeatedly stressed that the "constitutional dimension, grounded in the First Amendment, of educational autonomy" possessed by public universities, and the "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits," generated a *state governmental* interest when applied to a state governmental institution like a public university, *id.* at 328, 330. *See id.* at 326 (noting that "*government* may treat people differently because of their race only for the most compelling reasons"); *id.* (noting that "all racial classifications imposed by *government* must be analyzed by a reviewing court under strict scrutiny"); *id.* (noting that the question was whether there existed "compelling *governmental* interests"); *id.* ("We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [*government*] is pursuing a goal important enough to warrant use of a highly suspect tool.") (brackets in original); *id.* at 326-27 (noting that the Court was considering "*governmental* uses of race"); *id.* at 327 ("When race-based action is necessary to further a compelling *governmental* interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also

satisfied."); *id.* (noting that the Court was "reviewing race-based *governmental* action"); *id.* ("[W]e turn to the question whether the Law School's use of race is justified by a compelling *state* interest.") (all emphases added). In fact, the University of Michigan did not ask for the Court to recognize any "First Amendment-based" right distinct from the interest held by the State: "In other words, the Law School asks us to recognize, in the context of higher education, a compelling *state* interest in student body diversity." *Id.* at 328 (emphasis added).

In short, the Supreme Court in *Grutter* had no occasion to reconsider its longstanding holding that political subdivisions, such as state universities, cannot assert Fourteenth Amendment rights against their parent States. The Court was not asked to recognize such a freestanding right, independent of its relationship to the state interest in a diverse body, and there was certainly no indication that the Court intended to effect a radical departure from two centuries of consistent doctrine and practice since *Trustees of Dartmouth College*. To the contrary, the Court explicitly linked its reliance on the purported First Amendment interest that the Universities now seek to assert *against* the State to its recognition of an interest *held by* the State: "In announcing the principle of student body diversity as a compelling *state* interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy." *Id.* at 330 (emphasis added).

Justice Powell's opinion in *Bakke* is precisely to the same effect. Like Justice O'Connor, Justice Powell emphasized from the outset that his consideration of a public university's interest in selecting its student body arose only in the context of justifying potentially unconstitutional race-based discrimination *by the State*. *See Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 287 (1975) ("Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrators of state universities are reviewable under the Fourteenth Amendment."). And

Justice Powell's opinion repeatedly emphasized that he was considering each of the justifications asserted by the University for its race-based admissions program as a distinct *state* interest. *See id.* at 307 (noting that "[t]he *State* certainly has a legitimate and substantial interest in ameliorating ... the disabling effects of identified discrimination," but holding that it did not justify the race-based admissions program); *id.* at 308 ("[I]t cannot be said that the *government* has any greater interest in helping one individual than in refraining from harming another."); *id.* at 310 (noting that "a *State's* interest in facilitating the health care of its citizens [may be] sufficiently compelling to support the use of a suspect classification," but holding that it was not so in this case) (emphases added). This was no less true for the fourth proposed state interest that Justice Powell considered, namely "the attainment of a diverse student body." *Id.* at 311. He repeatedly described this interest as one held by the State—indeed, it would have been irrelevant to his equal protection analysis if it had been held by any entity besides the State. *See id.* at 315 (asserting that "petitioner's argument ... misconceives the nature of the *state* interest that would justify consideration of race or ethnic background"); *id.* ("The diversity that furthers a compelling *state* interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."); *id.* (describing "the *state* interest in genuine diversity"); *id.* at 320 ("[W]hen a *State's* distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial *state* interest.") (emphases added). Just as in *Grutter*, Justice Powell relied on "[a]cademic freedom ... as a special concern of the First Amendment" only in order to identify "a compelling *state* interest" in achieving a diverse student body. *Id.* at 312, 315. In fact, he expressly disavowed

the notion that "academic freedom" was a "specifically enumerated constitutional right." *Id.* at 312.

The other cases on which the University defendants rely provide even less support for their extraordinary position that the First Amendment grants them protection against application of State constitutional requirements. *Sweezy* and *Keyishian* each involved a lawsuit by an *individual* academic against the State for interference with *individual* First Amendment rights. *Sweezy*, to begin with, expressly linked the petitioner's interest in academic freedom to his individual First Amendment right to political expression and association. *See Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957) (holding that "there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression," and that "petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms"). Nothing in *Sweezy* could possibly be construed as an endorsement of the notion that a public university has First Amendment rights against its parent State—on the contrary, the *Sweezy* Court was concerned with the question whether "legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of *individuals*." 354 U.S. at 245; *see also id.* at 250 ("Equally manifest as a fundamental principle of a democratic society is political freedom of the *individual*.") (emphases added).

And the statements about academic freedom in Justice Frankfurter's separate concurrence in *Sweezy* must be read in the same light. Justice Frankfurter reasoned that the petitioner's *personal* First Amendment rights received heightened protection because of his participation in the academic community; he did not posit a new, freestanding constitutional right held by the public university's governing body. *See id.* at 264 (noting that petitioner "refused to answer, despite court order, the following questions on the ground that, by inquiring into the activities of

a lawful political organization, they infringed upon the inviolability of *the right to privacy in his political thoughts, actions and associations*"); *id.* at 265 (resting on "the inviolability of privacy belonging to *a citizen's* political loyalties"); *id.* at 266-67 ("[T]his is a conclusion based on a judicial judgment in balancing two contending principles—*the right of a citizen to political privacy*, as protected by the Fourteenth Amendment, and the right of the State to self-protection.") (emphases added). In short, Justice Frankfurter's lofty paean to the values of academic freedom—including his lengthy quotation from the South African scholars who listed "to determine for itself ... who may be admitted to study" under the "the four essential freedoms of a university," *id.* at 263 (quoting The Open Universities in South Africa 10-12)—was entirely devoted to explaining why "the right of a *citizen* to political privacy, as protected by the Fourteenth Amendment," *id.* at 266-67 (emphasis added), should receive heightened protection in the academic context. Justice Frankfurter had nothing whatsoever to say about the ability of a state university to assert constitutional rights against its parent State.

The Universities' reliance on *Keyishian v. Bd. of Regents* fares no better. Just like *Sweezy*, *Keyishian* involved a First Amendment challenge brought by individual teachers against state anti-subversion measures—specifically, a requirement that each individual teacher certify that he was not a Communist. *See* 385 U.S. 589, 592 (1967). As in *Sweezy*, to be sure, the Court emphasized academic freedom, but only to enhance the importance of the *individual* constitutional liberties that were threatened. Thus, noting that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," the Court stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 603. In other words, the fact that the *individual* appellants worked in "the community of American schools" rendered all the "more vital" the protection of their

individual "constitutional freedoms." Just as in *Sweezy*, the First Amendment's "special concern" for academic freedom, *id.* at 603, was not a source of freestanding rights to be held by a public institution, but only heightened the protection afforded to pre-existing, individually held constitutional rights. And just as in *Sweezy*, *Grutter,* and *Bakke*, the Court had no occasion to revisit or revise its longstanding doctrine that public universities hold no constitutional rights against their parent States.

Worst of all is the Universities' reliance on *Regents of University of Michigan v. Ewing.* That case did not involve any First Amendment issue at all, but only a substantive due process claim brought by a student *against* the University of Michigan, alleging that the University's decision to dismiss him for failure to pass a standardized test constituted arbitrary state action. 474 U.S. 214, 217 (1985). Nothing in *Ewing* could possibly support the Universities' assertion of a First Amendment right, against their own parent State, to discriminate on the basis of race in admissions and financial aid. Though the Court stated that "judges ... should show great respect for the faculty's professional judgment, *id.* at 225, it is perfectly clear that the Court was referring to nothing more than the highly understandable reluctance of federal courts to scrutinize faculty judgments about students' academic fitness under the aegis of the substantive due process clause. *See id.* at 226 (noting that federal judges are not suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions" regarding individual students' fitness). *Ewing* imposed absolutely no restriction on a State's ability to create academic and non-academic criteria for

admission to its public universities, and certainly provided no support for the novel theory that a public university can assert constitutional claims against its own parent State.[6]

3. Section 26 Does Not Implicate the First Amendment Interest in Academic Freedom Recognized by the Supreme Court.

Even if the Universities possessed an independent First Amendment right that they could assert against the State, it would have no conceivable application to Section 26. By forbidding race-based discrimination in the admissions process, Section 26 imposes a restriction on university admissions that is both content-neutral and transparent to any academic qualifications. As just noted, the Supreme Court in *Ewing* explained that the supposed "essential freedom" to determine "who may be admitted to study," which the South African scholars quoted by Justice Frankfurter attributed to universities, refers at most only to selection of students "*on academic grounds*." 474 U.S. at 226 n.12 (emphasis added) (citation omitted). Discriminating or providing preferential treatment on the basis of race is not an "academic ground," and it has nothing to do with academic qualifications, so even Justice Frankfurter's most sweeping dictum on academic freedom has no application to Section 26. In any event, there is no conceivable First Amendment right for a state university to be free from state regulations of its admissions

[6] The Universities' reliance on *Ewing* is particularly ironic in that the University of Michigan actually took the position before the Supreme Court in that case that it could not be sued *because it was indistinguishable from the State*. "The University's petition for certiorari also presented the question whether the Eleventh Amendment constituted a complete bar to the action because it was brought against the 'Board of Regents of the University of Michigan,' a body corporate." 474 U.S. at 221 n.6. This position was no doubt in keeping with the University of Michigan's countless assertions of sovereign immunity in other lawsuits. Clearly all of the Universities here would like to have their cake and eat it too—to reap the benefits of sovereign status when it suits them, while retaining the latitude to assert rights against the State when it does not. But it goes beyond irony, to sheer chutzpah, for the University of Michigan to rely on a case in which it took the position that it could not be sued because it was *not* distinct from the State, to support its argument that it can sue the State because it *is* distinct from the State.

process on the basis of academic and non-academic criteria such as geography, state residency, or high school performance – and the Supreme Court has certainly never recognized one.

On the contrary, the Supreme Court in *Grutter* openly contemplated the possibility that a State could even impose *academic* criteria on the admission to its public universities, by discussing "'percentage plans,' recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State." *Grutter*, 539 U.S. at 340. Academic qualifications, as well as other content-neutral restrictions for admission to state universities, evidently, are fair game for state regulation irrespective of any illusory First Amendment "right" of public universities to select whomever they please for admission. *A fortiori*, the First Amendment imposes no restriction on the State's ability to restrict the use of *race* in public university admissions, within the extremely narrow range permitted by *Grutter*'s interpretation of the Equal Protection Clause. To paraphrase the Judge O'Scannlain, the First Amendment does not guarantee what the Equal Protection Clause barely permits. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997).[7]

[7] The plaintiffs-appellees present a parallel argument that Section 26 threatens to violate the Universities' academic freedom under the First Amendment. Pl. Br. 20-22. They also throw into the mix an unsupported claim, not raised by the Universities, that Section 26 is unconstitutionally vague, *id.* at 22—as well as a histrionic comparison of Section 26 with McCarthyism, complete with colorful prediction of "a racial witchhunt like the political witchhunts of the 1950s," *id.* at 20, 22-23. We need not address these claims because the plaintiffs-appellees plainly lack third-party standing to assert constitutional rights on behalf of the Universities. For third-party standing, the Supreme Court requires that "there must be some hindrance to the third party's ability to protect his or her own interests," *Powers v. Ohio*, 499 U.S. 400, 411 (1991). No such "hindrance" could possibly be found in this case, where the Universities are actual parties and are vigorously (though wrong-headedly) asserting their own perceived interests.

4. The District Court Erred by Failing to Consider the Effects of the Injunction on Third Parties.

In our Stay Motion, we demonstrated that we were likely to succeed in showing that that the December 19 Order must be vacated because the district court adopted the stipulated injunction agreed to by the Plaintiffs, the University defendants, the Governor, and the Attorney General without considering the effects of that injunction on third parties or even allowing third parties affected by the injunction an opportunity to be heard on whether the injunction should be issued. Stay Mot. at 14-15. The University defendants claim that the district court had no obligation to consider the effect of the injunction on parties other than the signatories to the stipulation; and in support of this argument they claim that the cases we rely upon "are glaringly distinct [in that] they involve *class actions,* with the 'interested parties' being class members whose rights in settlement derive specifically from Fed. R. Civ. P. 23(e)(1)(C)." Univ. Br. 18 (emphasis in original).

The short answer to the University defendants' argument is that its premise is demonstrably false. As even a cursory review of the authorities cited in our Stay Motion demonstrates, at least four of the decisions establishing the district court's responsibility to consider the effects on third parties of an agreed order providing for injunctive relief did *not* involve class actions. *See, e.g., United States v. City of Miami,* 664 F.2d 435 (5th Cir. 1981) (*en banc*); *United States v. City of Hialeah,* 140 F.3d 968 (11th Cir. 1998); *Donovan v. Robbins,* 752 F.2d 1170 (7th Cir. 1985); *United States v Michigan,* 680 F. Supp. 928, 947 (W.D. Mich. 1987). Thus, the decisions in these cases in no way rested upon the requirements of Rule 23 or any other rules governing class actions. Moreover, contrary to the University defendants' suggestion, the relevant analyses in the cases we cited that *did* involve class actions did not turn upon the special procedural requirements of Rule 23. *See, e.g., Martin v. Wilks,* 490 U.S. 755, 768 (1989);

Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983); *In re Masters Mates & Pilots Pension Plan,* 957 F.2d 1020, 1025 (2d Cir. 1992).

Rather, the decisions in both the class action cases and the non-class action cases rest upon straightforward notions of judicial power and fair notice – ultimately grounded in principles of due process, *see City of Hialeah,* 140 F.3d at 976 – that preclude courts from simply issuing agreed upon injunctions that materially affect the rights of objecting third parties without providing those third parties a full and fair opportunity to be heard and without independently examining the impact of the injunction upon such third parties. *See Martin,* 490 U.S. at 768 ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ... without that party's agreement.") (quoting *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. 501, 529 (1986)).[8] *See also City of Hialeah,* 140 F.3d at 984 ("The district court correctly rejected the Department of Justice's request to ram the proposed settlement down the throats of [non-signatories] without affording them a fair adjudication of their rights."); *City of Miami,* 664 F.2d at 447 ("A party potentially prejudiced by a [proposed consent] decree has a right to a judicial determination of the merits of his objection.") (Rubin, J., concurring).

Judged in accordance with these principles, the present motion does not present a difficult question. We are not asking the Court to delve into arguably troublesome questions regarding what kind of notice and opportunity to be heard must be afforded to unknown third parties who

---

[8] *See also id.* at 761-62 ("All agree that [it] is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.... This rule is part of our deep-rooted historic tradition that everyone should have his own day in court.... A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.") (citations and internal quotation marks omitted).

may potentially be affected by a proposed stipulated injunction. Rather, in this case, movants had sought to intervene in this case, for the express purpose of defending Section 26 and opposing the University defendants' request for a preliminary injunction, *before* the district court issued the December 19 Order. (Indeed, the intervention motion was filed within hours of the submission of the Stipulation to the court). Moreover, at the same time they moved to intervene – *i.e., before* the Court issued the injunction – movants also filed a brief in opposition to the University defendants' preliminary injunction motion.

Thus, for the 24 hours that the district court had the stipulated injunction before it, and before it issued any order with respect to that requested injunction, the district court was specifically on notice of that which was obvious in any event: that there were absent parties (1) who had not been privy to the negotiations that led to the stipulation; (2) whose vital interests would be adversely affected by any order enjoining the effectiveness or application of Section 26; (3) who therefore opposed the issuance of any such injunctive order; and (4) at least two of whom was seeking an opportunity to be heard on that very issue. Notwithstanding these undisputed facts, the district court, without considering (or even acknowledging) either the motion to intervene or their opposition to the request for preliminary injunction, and without engaging in *any* analysis of the standards governing requests for injunctive relief or the effect of the stipulated injunction on the rights of Petitioners or any other third party, summarily approved the stipulated injunction that had been submitted to it. Because that injunction unquestionably affects adversely the rights of Mr. Russell and all other nonminority applicants for admission to Michigan educational institutions, the district court committed reversible error by issuing the injunction in these circumstances.

It is no answer to suggest that at the time the December 19 Order was issued, movants technically were not yet parties to the lawsuit. As noted above, the district court was on notice at the time it issued the Order that movants were seeking intervention and were opposed to the entry of injunctive relied delaying the effectiveness of Section 26. That fact was all that was needed to trigger the district court's obligation to independently consider the propriety of issuing the requested injunction. In any event, movants can in no way be held responsible for the fact that the district court chose to act on the request for entry of the stipulated injunction before it considered their motion to intervene and their opposition to the request for an injunction. Movants sought to intervene within one week of the filing of the University defendants' preliminary injunction motion. Indeed, the district court subsequently granted intervention with respect to Mr. Russell, expressly finding that his intervention request was timely in light of the University defendants' December 11 request to delay the effectiveness of Section 26. December 27 Order at 9-10. In these circumstances, it is pure sophistry for the signatories to the stipulation to rely upon the district court's decision to act on the stipulation before it turned to our intervention motion as an excuse to pretend that the requested injunction had been agreed upon by all the "parties" to the litigation and to thereby justify the district court's issuance of the injunction without considering its merits.

The University defendants suggest that the district court did in fact "engage the substance" of the December 19 Order. Univ. Br. 19-20. Their only support evidence for this proposition are the facts that (1) the court "created its own order" and (2) the court stated that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives." *Id.* at 20 (quoting December 19 Order at 3). Both contentions border on the frivolous. As to the first, even a quick comparison of the stipulated

injunction with the December 19 Order shows that the district court made only trivial changes in wording that affected the substance of the stipulation not one iota.

As to the second contention, as we demonstrated in our Stay Motion, not only is the meaning of the district court's statement that the "interests" of the "parties" and the "public" were "represented adequately" by the "state defendants and their various elected representatives" cryptic at best, the relevant inquiry is not whether the interests of third parties were adequately represented, but whether the *terms* of the agreed injunction were fair to third parties. Stay Mot. at 16. For the reasons discussed above, there is absolutely no indication that the district court engaged in that type of substantive analysis before it issued the injunction. Finally, as the district court's December 27 intervention order itself makes clear, even on its own terms, the court's December 19 finding that the interests of the "public" were adequately represented by the state defendants is manifestly wrong. The district court made an express finding, when it granted Mr. Russell's motion to intervene, that *his* interest in the immediate implementation of Section 26 was *not* adequately represented by the state defendants. This finding naturally extends to any member of the public who intends to seek admission to a state university during the current enrollment period under the legal regime that was to be governed by Section 26.

In short, the district court erred when it effectively "merely sign[ed] on the line provided by the parties." *City of Miami,* 664 F.2d at 440-41 (Rubin, J., concurring). Because the stipulated injunction clearly affected the rights of objecting third parties, the court was required to afford the affected parties "a full and fair opportunity" to contest the request for injunctive relief. *City of Hialeah,* 140 F.3d at 976.

Finally, the University defendants argue, citing to *In re Certified Question from the U.S. District Court for the Eastern District of Michigan,* 638 N.W.2d 409 (Mich. 2002), that the

Attorney General has the authority to represent the interests of Michigan citizens in litigation and therefore to enter into litigation settlements that are binding upon those citizens. Univ. Br. 15-16, 18. This argument fails for several distinct, though related, reasons. First, the only question that the Supreme Court of Michigan purported to decide in *Certified Question* was whether "the Michigan Attorney General [had] the authority to bind/release claims of a Michigan *county* as part of a settlement agreement in an action that the Attorney general brought on behalf of the State of Michigan." 638 N.W.2d at 411 (emphasis added).[9] The court did not purport to decide the Attorney General's power to enter into settlements that are binding upon Michigan *citizens*, and it most certainly did not purport to decide that Michigan citizens have no right to challenge proposed settlements that include injunctions that are adverse to those citizens' legal rights.

Second, the Eleventh Circuit rejected a very similar claim in the *City of Hialeah* case. In that case, the "United States argue[d] that a consent decree that it negotiates carries a considerable presumption of validity because the Department of Justice represents the interests of all citizens." 140 F.3d at 984. The Court of Appeals had little trouble rejecting the suggestion that fact that the Department of Justice supposedly represented the interests of all citizens gave it license to "ram [a] proposed settlement agreement down the throats" of those "citizens" who were not parties to the settlement and who would be adversely affected by the settlement. *Id.* That holding applies with full force here.

Finally, any notion that the Attorney General adequately represents the interests of those individuals who have an interest in the immediate application, according to its terms, of the validly enacted law of the State is fatally undermined by the district court's manifestly correct, if

---

[9] *See also id.* at 415 ("[T]he structure of the sovereign state and the constitutional and statutory powers granted to the Attorney General dictate *that the county is ultimately subordinate to the state* where, as here, the Attorney General acted to bind the state as a whole in a matter clearly of state interest.") (emphasis added).

belated, decision to allow Mr. Russell to intervene. As noted, in its December 27 Order, the district court expressly found that the "other parties" to the lawsuit – which, of course, include the Attorney General – "do not represent" the position of those potential applicants, like Petitioner Russell, who seek the "implementation of [Section 26] *now*." December 27 Order at 15 (emphasis in original). The district court's recent order makes clear that, at least with respect to the issue of whether Section 26 should apply to the current enrollment period, the Attorney General, to the extent he represents the interests of any Michigan citizens, has chosen sides, and now represents only those citizens who may have an interest in delaying the effectiveness of the new law.

D. Plaintiff-Appellees Have No Claim for Injunctive Relief Before this Court, and Any Such Claim Would be Wholly Without Merit.

1. Plaintiffs-Appellees Have No Claim for Injunctive Relief Properly Before this Court.

This Court's December 26, 2006 Order directed the parties to "address the plaintiffs' likelihood of success on the merits of the underlying action." As demonstrated below, plaintiff-appellants' claims are wholly lacking in merit; accordingly plaintiff-appellants have no likelihood of success on the merits of the underlying action. Before turning to plaintiff-appellees' likelihood of success on the merits, we respectfully raise one preliminary concern. The December 26, 2006 Order did not explain the purpose for which briefing on this issue was requested. Plaintiff-appellees have not requested a preliminary injunction in the district court, and the district court did not consider, let alone enter findings relating to, plaintiff-appellees' likelihood of success on the merits, the existence of irreparable injury to plaintiff-appellees, or any of the other traditional factors governing the issuance of a preliminary injunction. Furthermore, the University defendants' request for a preliminary injunction did not rely upon or

assert any of the claims raised by plaintiff-appellees (other than the First Amendment claim), and no party has argued that the preliminary injunction entered by the district court may be left in place pending appeal or affirmed based on plaintiff-appellees' likelihood of success on their other claims. In the unlikely event that this Court has asked for briefing on plaintiffs' likelihood of success on the merits on their underlying claims in order to consider whether such likelihood could provide an alternative basis for affirming the district court's preliminary injunction or denying our request for a stay pending appeal, we respectfully submit that such a course of action would be highly improper.

First, the record in this case does not provide a predicate sufficient to support the preliminary injunction on this alternative ground. Federal Rule of Civil Procedure 52(a) provides that "in granting or refusing interlocutory injunctions the court shall ... set forth the findings of fact and conclusions of law which constitute the grounds of its action." *See also* FED. R. CIV. P. 65(d) ("Every order granting an injunction and every restraining order shall set forth the reasons for its issuance."). As this Court has recognized, "[f]our factors are particularly important in determining whether a preliminary injunction is proper: (1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction will harm others; and (4) whether the public interest would be served by the injunction." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). "Rule 52 requires a district court to make specific findings concerning each of these four factors unless fewer are dispositive of the issue." *Id.* Furthermore, while an order subject to the requirements of Rule 52(a) may be affirmed on alternative grounds, the "foundation" proffered in support of those grounds also "must meet the test of Rule 52(a)." *Knapp Shoes, Inc. v. Sylvania Shoe Manufacturing Corp.*, 15 F.3d 1222, 1228 (1st Cir. 1994).

Plainly the record in this case offers no foundation for affirming or leaving in place the preliminary injunction entered by the district court on the alternative ground that plaintiff-appellees were entitled to a preliminary injunction. The district court entered no findings on any of the factors relevant to whether plaintiff-appellees were entitled to such relief, no submissions were proffered to that court relating to those factors (except to the extent the University defendants' motion for a preliminary injunction raised arguments similar to plaintiff-appellees' First Amendment claim), and indeed the plaintiff-appellees' never even requested a preliminary injunction. Under these circumstances any reliance on plaintiff-appellees' likelihood of success of the merits on their other claims as a ground for affirming or leaving in place the preliminary injunction would be plainly unwarranted. *See, e.g.*, *United States v. School District of the City of Ferndale, Michigan*, 577 F.2d 1339, 1355 (6th Cir. 1978) ("We are reluctant, however, to decide on the merits of ordering a preliminary injunction when the defendants have yet to present evidence."); *Weitzman v. Stein*, 897 F.2d 653, 658 (2d Cir. 1990) (where district court's findings are inadequate, court should not proceed with review of injunction unless it can "discern enough solid facts from the record to enable [it] to render a decision") (internal quotations omitted); *Stewart Title Guaranty Co. v. Murphy*, 1998 U.S. App. LEXIS 27082, *3-*4 (9th Cir. October 20, 1998) (declining to affirm preliminary injunction on alternative grounds: "[i]n the absence of any district court findings ..., we lack the factual basis necessary to make this decision ourselves").

Second, because plaintiff-appellees have not sought a preliminary injunction and no party has suggested that the preliminary injunction entered below should be sustained or left in place on alternative grounds related to plaintiff-appellees' entitlement to a preliminary injunction, affirming or leaving in place the district court's preliminary injunction on such grounds would be

tantamount to granting an injunction *sua sponte*. Even assuming this Court has the power to proceed in that manner, *but cf. Weitzman*, 897 F.2d at 657 (questioning district court's power "to enter *sua sponte* a freeze order"), such unsolicited injunctive relief is in substantial tension with the requirement of Federal Rule of Civil Procedure 65(a) that "[n]o preliminary injunction shall be issued without notice to the adverse party." Accordingly, *sua sponte* injunctions are plainly disfavored. *See, e.g.*, *Weitzman*, 897 F.2d at 657-58 (reversing injunction entered *sua sponte*; *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252-54 (10th Cir. 2006) (reversing preliminary injunction entered *sua sponte*: "courts simply cannot issue injunctions without providing notice to the adverse party"); *cf. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82 (1999) (holding that court of appeals erred in addressing unappealed portion of preliminary injunction *sua sponte*).

For all of these reasons, and because plaintiff-appellees' claims lack merit in all events as we next explain, the merits of plaintiff-appellees' underlying complaint cannot provide an alternative basis for affirming the preliminary injunction or denying our motion for a stay pending appeal.

2. Plaintiffs-Appellees' Equal Protection Claim Fails on the Merits.

Plaintiff-appellees concede that Section 26 is indistinguishable from California's Proposition 209 which was upheld by the Ninth Circuit in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). Pl. Br. 10-11. The persuasive and thoroughgoing analysis of the Ninth Circuit's opinion is therefore equally applicable here, and Plaintiff-appellees have offered no basis for creating a circuit split.[10]

[10] Plaintiff-appellees make the bizarre argument that the panel decision in the Proposition 209 case "did not even represent the considered view of the Ninth Circuit in 1997" because four members of the Ninth Circuit dissented from the denial of rehearing en banc. Pl. Br. 11.

The Ninth Circuit began its analysis by noting that as a matter of conventional equal protection analysis, there could be no doubt that a law such as Section 26 that prohibits racial and gender discrimination is constitutional since the central purpose of the Equal Protection Clause " 'is the prevention of official conduct discriminating on the basis of race.' " 122 F.3d at 701-02 (quoting *Washington v. Davis,* 426 U.S. 229, 239 (1976)). Indeed, 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) (citation and footnote omitted). Therefore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). This principle obtains with equal force to minorities and nonminorities. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion).

Both Section 26 and California's Proposition 209 amended the respective state constitutions "simply to prohibit state discrimination or preferential treatment to any person on account of race or gender." 122 F.3d at 702. As the Ninth Circuit reasoned: "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.*

Nevertheless, as in the challenge to Proposition 209, plaintiff-appellees invoke the Supreme Court's political structure cases. *Id.* at 703. The Ninth Circuit properly concluded that this line of authority does not invalidate measures such as Proposition 209 and Section 26 that

---

Plaintiffs obviously ignored the fact that over twenty Ninth Circuit judges voted to deny rehearing en banc notwithstanding the views of the four dissenters.

prohibit racial and gender discrimination. The Supreme Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 538 (1982). In *Crawford,* the Supreme Court considered an amendment to the California Constitution that prohibited state courts from student assignment except as a remedy a specific equal protection violation. *Id.* at 532. In the face of an equal protection challenge similar to that raised here by plaintiff-appellees, the Supreme Court held that the amendment did not employ a racial classification and thus did not violate the Equal Protection Clause. "The simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539. The Supreme Court held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Id.* at 538.

Plaintiff-appellees urge this Court to ignore the holding of *Crawford* and to invalidate Section 26 under *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). Here, plaintiff-appellees suggest that any effort by the state to treat racial and gender issues differently from other classifications constitutes an impermissible classification that triggers application of the *Washington* doctrine. But as the Ninth Circuit explained in detail, those cases are not inconsistent with a statewide ban on state sponsored discrimination.

In *Washington* itself, the Supreme Court recognized that the *Hunter* doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." *Washington,* 458 U.S. at 485. Justice Powell's *Washington* dissent, as if directly

forecasting the adoption of Proposition 209 and Section 2, argued that the majority opinion could be misconstrued to invalidate statewide bans on affirmative action programs by state and local agencies:

> After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene.

Washington, 458 U.S. at 498 n.14 (Powell, J., dissenting). The majority responded to this argument by explaining that it "evidence[s] a basic misunderstanding of our decision. . . . [I]t is evident . . . that *the horribles paraded by the dissent*, post, at 498 n.14 -- *which have nothing to do with the ability of minorities to participate in the process of self-government* -- are *entirely unrelated* to this case." *Id.* at 480 n.23 (emphasis added). Thus, the Court's opinion in *Washington* plainly stated that it did not in any way foreclose the ability of states to address racial preferences through statewide efforts. Moreover, in his concurrence in *Crawford*, Justice Blackmun, the author of *Washington*, explicitly stated that he could not "rul[e] for petitioners on a *Hunter* theory [because it] seemingly would mean that *statutory affirmative-action* or antidiscrimination programs never could be repealed." *Crawford*, 458 U.S. at 546-47 (Blackmun, J., concurring) (emphasis added).

The Ninth Circuit correctly relied on this express limitation in *Washington* itself in upholding Proposition 209. The Ninth Circuit reasoned:

> 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.

122 F.3d at 707.

The Ninth Circuit went on to explain that even if a law does restructure the political process, it "can only deny equal protection if it burdens an individual's right to equal treatment." 122 F.3d at 707. The Supreme Court has made clear that "a denial of equal protection entails, at a minimum, a classification that treats individuals unequally." *Id.* (citing *Adarand*, 115 S. Ct. at 2111). Here, plaintiff-appellees rest their claim of injury on their inability to obtain preferential treatment. But, as the Ninth Circuit held, "[i]mpediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms." *Id.* at 708 (footnote omitted).

For this reason, Plaintiff-appellees reliance upon *Romer v. Evans*, 517 U.S. 620 (1996), is misplaced. As this Court has explained, the Colorado law at issue there "could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of government for any type of victimization or abuse which they might suffer by either private or public actors." *Equality Foundation v. Cincinnati*, 128 F.3d 289, 296 (6th Cir. 1997). Indeed, "Colorado Amendment 2 ominously threatened to reduce an entire segment of the state's population to the status of virtual non-citizens (or even non-persons) without legal rights under any and every type of state law. . . ." *Id.* Thus, *Romer* confirms, rather than undermines, the long-standing principle that denials of equal protection involve

classifications that treat individuals differently. *See also Coalition*, 122 F.3d at 707-08 ("In *Romer,* Colorado's Amendment 2 denied homosexuals the ability to obtain 'protection against discrimination,' thus classifying homosexuals 'not to further a proper legislative end but to make them unequal to everyone else.' ") (citation omitted).

With respect to the University defendants' admissions policies, there is an additional reason not to invalidate Section 26 under *Washington.* In *Washington*, the Court invalidated the state law at issue there because it burdened minority interests "by lodging decisionmaking authority over the question in at a new and remote level of government." 458 U.S. at 483. Specifically, the law at issue in *Washington* had removed responsibility from local school boards and removed it to the state legislature. The Supreme Court noted that "[no] single tradition in public education is more deeply rooted than local control over the operation of schools. . . ." 458 U.S. at 481 (quoting *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)).

Here, by contrast, at least with respect to the governance of the University defendants, Section 26 did not affect the level of government at which the University defendants' policies were set. It is well-established that the Universities are arms of the state of Michigan. *Kelley*, 836 F.2d at 998; *Alabama*, 791 F.2d at 1455. They are considered to be "the State" both under state law and under federal constitutional law. *See* MICH. COMP. LAWS § 691.1401(c) (" 'State' ... includes every public university and college of the state, whether established as a constitutional corporation or otherwise."); *Estate of Ritter v. University of Michigan*, 851 F.2d 846, 851 (6th Cir. 1988) (holding that "the Board of Regents of the University of Michigan is, as an arm of the State, immune under the eleventh amendment from suit in federal district court"); *Weisbord v. Michigan State University*, 495 F. Supp. 1347, 1356-57 (W.D. Mich. 1980) (detailing the extensive public character of Michigan State University and concluding that

"[n]othing in the charter of Michigan State University states or implies that it is anything other than a state institution entitled to the privileges and immunities of the state"), *cited in Hall v. Medical College of Ohio*, 742 F.2d 299, 301 (6th Cir. 1984); *Johnson-Brown v. Wayne State University*, 1999 U.S. App. LEXIS 4751, at *3 (6th Cir.) (holding that "[Wayne State] University is considered to be the 'state' for government liability purposes"). Indeed, the regents of the Universities who are entrusted under state law with the governance of the Universities are elected on a statewide basis. Thus, the political process for effectuating change in policy takes place at the state level. Section 26 does nothing to change this political reality and thus in no way places decisionmaking at a "new and remote level of government."

In the face of the Ninth Circuit's compelling reasoning, the plaintiff-appellees suggest that a central premise of the Court's reasoning was overruled in *Grutter* and *Gratz*. Specifically, plaintiff-appellees note that the Ninth Circuit viewed racially discriminatory preferences as "barely permitted" by the Constitution. It is true that the Ninth Circuit observed, correctly: "That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." 122 F.3d at 708. But nothing in the Supreme Court's affirmative actions cases is to the contrary. The Supreme Court took great pains to emphasize that intentional racial discrimination by state actors—the denial of admission to nonminorities based on their race—is extraordinary, just as the Ninth Circuit had indicated. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("Because 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,' *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting), our review of whether such requirements have been met must entail ' "a most searching examination." ' *Adarand, supra*, at 223, (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273 (1986) (plurality opinion of

Powell, J.)).”). Nothing in the Supreme Court's Michigan cases remotely undermines the proposition that race based classifications are the exception not the rule in state action.

3. Plaintiffs-Appellees' Statutory Claims Fail on the Merits.

Plaintiff-appellees' claims that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 preempt Section 26 also plainly lack merit. Indeed, even the district court in *Coalition for Economic Equity v. Wilson*, despite its erroneous conclusions regarding the Equal Protection Clause and Title VII, rejected this preemption argument, explaining that “[t]he statutory language, agency interpretation, and legislative history of Titles VI and IX do not establish that Congress intended to preserve voluntary race- and gender-conscious affirmative action as an option for entities covered by the two statutes.” 946 F. Supp. 1480, 1519 (N.D. Cal. 1996) (vacated and remanded on other grounds, 122 F.3d 692 (9th Cir. 1997)).[11]

a. Title VI Does Not Preempt Section 26.

Any potential preemption under Title VI is expressly limited by section 1104 of the Civil Rights Act of 1964, which provides that

---

[11] In their response, plaintiff-appellees do not press their claim that Section 26 is preempted by Title VII of the Civil Rights Act of 1964. *Compare* Pl. Br. 14-19, *with* Compl. ¶¶ 96-101. Obviously Title VII, which governs employment, has no relevance to Section 26's application to the Universities' admissions programs at issue here. In all events, any claim that Title VII preempts Section 26 plainly lacks merit. *See, e.g.*, 42 U.S.C. § 2000e-7 (section 708) (“Nothing in this [subchapter (Title VII)] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this [subchapter].”); 42 U.S.C. § 2000e-2(j) (“Nothing contained in this [subchapter Title VII] shall be interpreted to require any [entity] 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 of such individual or group . . . .); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709-11 (9th Cir. 1997) (analyzing Title VII and concluding that “Title VII by its plain language does not pre-empt Proposition 209”).

> Nothing contained in any title of this Act [the Civil Rights Act of 1964] shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4. As the Supreme Court has explained, the legislative history of this provision makes clear that it was intended to provide "that state laws would not be preempted 'except to the extent there is a direct and positive conflict between such provisions [state law and federal civil rights law] so that the two cannot be reconciled or consistently stand together.' " *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 n.12 (1987) (quoting original draft of this provision and explaining that "there is no indication" that language ultimately adopted "altered the basic thrust of" this draft). Accordingly, the Court has concluded that in section 1104 and other provisions of the Civil Rights Act of 1964, "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law." *Id.* at 281 (discussing sections 1104 and 708). Because, as explained below, nothing in section 26 "actually conflict[s]" with Title VI, plaintiff-appellees' preemption claim plainly lacks merit.

Section 601, the operative provision of Title VI, provides that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. It is "beyond dispute" that this provision "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Title VI thus "proscribes only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." *Id.* (quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.)).

Section 26, of course, does not draw any racial classifications whatsoever, let alone classifications that would violate the Equal Protection Clause. On the contrary, it prohibits classifications based on race, sex, or other constitutionally suspect bases. Accordingly, section 26 is fully consistent with the plain language and evident purposes of Title VI. Indeed, plaintiffs-appellees do not seriously argue that the text of Title VI itself requires the University defendants to grant preferences based on any of the categories with respect to which it, like Section 26, prohibits discrimination. Rather, plaintiff-appellees invoke regulations promulgated under section 602 of Title VI, 42 U.S.C. § 2000d-1, in support of their preemption argument. In particular, they rely on regulations relating to affirmative action and criteria or methods which have a disparate impact on persons of a particular race, color, or national origin. As explained below, plaintiff-appellees' reliance on these regulations is foreclosed by precedent.

It is true that 34 C.F.R. § 100.3(6)(ii) states that "a recipient in administering a program *may* take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." (emphasis added.) As even the district court in *Coalition for Economic Equity* recognized, however:

> The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.

946 F. Supp. at 1518. Plainly the fact that 34 C.F.R. § 100.3(6)(ii) does not *require* race-neutrality does not mean that such neutrality is *prohibited*. *See California Federal*, 479 U.S. at 286-87.[12]

[12] Plaintiff-appellees properly do not rely on 34 C.F.R. § 100.3(6)(i), which provides that "[i]n administering a program regarding which the recipient has previously discriminated against

Plaintiff-appellees' reliance on 34 C.F.R. § 100.3(b)(2) is likewise unavailing. This regulation purports to bar recipients of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin." Even assuming, arguendo, that this regulation is valid and properly invoked by plaintiff-appellees—*but see Sandoval*, 532 U.S. at 281-82 (explaining that dictum and opinions of individual justices suggesting that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups" are "in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination" but declining to resolve this tension "because petitioners have not challenged the regulations here"); *id.* at 293 (holding that there is no "private right of action to enforce regulations promulgated under § 602")—it provides no basis for concluding that Title VI preempts Section 26.

As an initial matter, section 1104 expressly preserves state laws from preemption unless they are "inconsistent with any of the purposes *of this Act*, or any provision *thereof*." (Emphases

---

persons on the ground of race color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." Even assuming the "affirmative action" contemplated by this provision could require race-based preferences as a remedy, *but see Bazemore v. Friday*, 478 U.S. 385 (1986) (White, J., concurring) (suggesting recipient's "affirmative action to change its policy and to establish what is concededly a nondiscriminatory admissions system" satisfied regulation requiring "affirmative action" to overcome the effects of prior discrimination), plaintiff-appellees make no allegation that the Universities have engaged in invidious discrimination. Furthermore, even if this provision were to become applicable—if, for instance, the Department of Education or other federal grantor were to order affirmative action as a remedy for victims of discrimination by one or more of the Universities—Section 26 would pose no obstacle to such a remedy. *See id.* ¶ 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.").

added.) Actions that do not amount to intentional discrimination are not inconsistent with the provisions of Title VI itself, however, even if they have a disparate impact. *See, e.g., Sandoval*, 532 U.S. at 281 (absent intentional discrimination, "activities that have a disparate impact on racial groups . . . are permissible under § 601"). Accordingly, the Supreme Court has made clear that "disparate impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits." *Id.* at 285; *see also id.* at 286 n.6 ("§ 601 permits the very behavior that the regulations forbid."). And although actions prohibited by disparate impact regulations may be inconsistent with the policy reflected in those regulations, they are not inconsistent with any purpose *of Title VI.* As the Supreme Court has explained, " 'If, as five members of the Court concluded in *Bakke* [and as the Court confirmed in *Sandoval*], the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* ... do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.' " *Sandoval*, 532 U.S. at 286 n.6 (quoting *Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 613 (1983)) (O'Connor, J., concurring in judgment) (first alteration added; deletions and emphasis in original).

In all events, Section 26 is not inconsistent with 34 C.F.R. § 100.3(b)(2). That regulation bars the use of "criteria or methods of administration" that have a disparate impact on members of a particular race, color, or national origin. Section 26, however, does not require the Universities to adopt any particular criterion or method of administration, let alone a criterion or method that has a disparate impact on a protected class. On the contrary, it simply prohibits one type of criteria or methods—criteria or methods that grant preferences based on race, sex, color, ethnicity, or national origin. To the extent plaintiff-appellees assert that the disparate impact regulation *requires* race-based and other similar preferences in view of the enrollment disparities

that plaintiff-appellees assert would otherwise necessarily result, *see* Pl. Br. 17-18, their view is contrary to that of Congress as expressed in the context of Title VII—the context where the disparate impact doctrine originated and where Congress has carefully codified that doctrine. *Compare* 42 U.S.C. § 2000e-2(k) (codifying burden of proof for disparate impact cases), *with* 42 U.S.C. § 2000e-2(j) ("Nothing contained in this title . . . shall be interpreted to require any employer … to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer … in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.").[13]

In short, Section 26 "does not prevent [the Universities] from complying with both the federal law … and the state law." *California Federal*, 479 U.S. at 290-91. Accordingly plaintiff-appellees' argument that Section 26 is preempted by Title VI fails.

b. Title IX Does Not Preempt Section 26.

Although plaintiff-appellees acknowledge that the Universities make only limited use of gender-based preferences, they perfunctorily press their claim that Section 26 is also preempted by Title IX. *See* Pl. Br. 19. Title IX " 'was patterned after Title VI of the Civil Rights Act of 1964,' " *Sandoval*, 532 U.S. at 280 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), and the Supreme Court has indicated that like Title VI, Title IX prohibits only intentional

[13] Comparison of the plaintiff-appellees' vague assertions regarding the potential impact of Section 26 with the demanding procedural requirements for establishing a disparate impact claim set forth in § 2000e-2(k) further undermines plaintiff-appellees' claim that Section 26 conflicts with the disparate impact regulations.

discrimination, *see, e.g., Jackson v. Birmingham Board of Education*, 544 U.S. 167, 178 (2005) (holding that retaliation "falls within [Title IX's] prohibition of intentional discrimination on the basis of sex"). Furthermore, plaintiff-appellees' argument appears to rest primarily on regulations relating to affirmative action and disparate impact, purportedly promulgated pursuant to Title IX, that are essentially analogous to those they cite in support of their Title VI preemption argument. *See* 34 C.F.R. § 106.3(b) ("a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation [in an education program or activity] by persons of a particular sex"); *id.* § 106.21(b)(2) ("A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.").[14] Accordingly, plaintiff-appellees' Title IX preemption claim suffers from the same fatal defects discussed above. Furthermore, Title IX expressly provides:

> Nothing contained in subsection (a) of this section [the provision containing Title IX's operative prohibition of discrimination] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total

[14] Plaintiff-appellees also invoke 34 C.F.R. § 106.3(a), which provides that "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." Plaintiff-appellees do not allege that the Universities have engaged in sex-based discrimination, let alone that they have been found to have engaged in such discrimination. Furthermore, this provision does not mandate sex-based preferences in the event of such a finding but requires only "such remedial action as the Assistant Secretary deems necessary." *Id.* In the unlikely event that a situation arose where the Assistant Secretary properly determined that sex-based preferences were required as a remedy for discrimination by the Universities, Section 26 would not bar such preferences. *See id.* ¶ 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.").

> number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area.

20 U.S.C. § 1681(b). This provision plainly confirms that Section 26 does not conflict with Title IX. For all of these reasons, plaintiff-appellees' Title IX preemption claim fails.

II. THE BALANCE OF HARMS STRONGLY SUPPORTS ENTRY OF A STAY.

A. The Universities Have Not Demonstrated Irreparable Harm.

The Universities' claim of irreparable harm fails because they have not and cannot explain why their admissions officers cannot simply stop considering the race, sex, color, ethnicity or national origin in making admissions decisions. The Universities submitted abbreviated declarations describing their admissions processes, and explaining that admissions decisions are based upon "a broad range of criteria" identified by means of a "thorough, individualized, comprehensive, and holistic review of every complete application." Declaration of Teresa A. Sullivan ¶ 12 (attached as Exhibit C to Univ. Br.). To comply with the law, the Universities need only instruct their admissions personnel to eliminate any consideration of the specific criteria forbidden by Section 26: race, sex, color, ethnicity, or national origin. All other criteria considered as part of the "holistic review" may continue to be taken into account. While the Universities offer generalized claims about how many admissions officers they have and how much "training" they conduct, there is no explanation as to how the "training" relates to the narrow subject raised by Section 26 or why it would be difficult to "retrain" their admissions officers simply to eliminate the prohibited criteria. They obviously know how to disregard race in the admissions process, for they do not give any type of racial "plus" or other preference to their non-minority applicants, who comprise the vast bulk of their applicant pool. Simply put, the Universities' claim of irreparable harm fails because nowhere do they explain why they are

incapable of issuing a simple directive requiring admissions officers to cease considering race and gender in deciding whom to admit.

Moreover, any logistical problems that might arise from a mid-cycle elimination of the forbidden criteria are entirely of the Universities' own making. Section 26 did not suddenly spring into existence on December 23. It was the subject of an intense year-long political campaign in which the Universities vigorously participated. They were well aware of the possibility that Michigan's Constitution would forbid consideration of race and gender long before the current admissions cycle began, and could have (indeed, they had a duty to) undertaken whatever preparations were necessary to comply with the law.

The Universities' claim that the Supreme Court's decision in *Grutter* somehow gave rise to a reliance interest that justifies disregard for Michigan's constitution is without merit. As noted above, the Court's holding that the State had a compelling *interest* sufficient to defeat an Equal Protection claim brought against it could not have reasonably suggested that Universities had a *right* to ignore newly enacted law. In effect, the Universities appear to be asserting that their admissions plans somehow create an estoppel against the application of new law to them. There is obviously no support for such a radical notion in the law. Laws change all the time, and when they do, the new law must be obeyed – period.

The Universities' claim that application of Section 26 in the middle of the admissions cycle is somehow unfair also does not survive scrutiny. They argue that they have publicized their admissions process and criteria and applicants have relied upon their representations that they would grant preferences to underrepresented minorities. Here again, the University defendants appear to be suggesting that application of Section 26 should be estopped as to them. In any event, no applicant could have reasonably relied upon such statements because it was

known to all that Section 26, if enacted, would outlaw such preferences. In enacting Section 26, the people of Michigan concluded that the overriding unfairness arises from judging people by the color of their skin. The fact that the Universities may have admitted some candidates based on their past use of racial preferences during this cycle does not make it unfair to require them to stop doing it, as Section 26 does. Indeed, this argument ultimately reduces to the proposition that the State may never eliminate racial preferences because the same argument could be made based on the fact that the Universities employed racial preferences during the previous admissions cycles.

B. The Meaning of Section 26 is Perfectly Clear.

The Universities and the Governor repeatedly feign confusion as to the meaning of Section 26, to the point that the Universities claim that they would have to "guess as to what the Amendment requires them to do" if required to comply with the law. Univ. Br. 30; *see also id.* at 2; Gov. Br. 9-10. To the contrary, Section 26 could not be clearer: it prohibits the Universities from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin" in the course of making admissions decisions. As the Universities themselves ultimately admit, the Amendment "purports to prohibit the Universities from, *inter alia*, considering race in admission ...." Univ. Br. 2. In the context of making admissions decisions, there is no mystery as to what the Universities must do to comply with Michigan's Constitution. They must evaluate competing candidates for admission without regard to their race and sex; they may not accord any advantage – any "plus" factor – to any candidate based on the forbidden criteria.

As the Attorney General has noted, Section 26 "is identical" to California's Proposition 209. AG Stay Opp. Br. 21. Indeed, the operative language was consciously copied from the

California provisions by Section 26's sponsors. *See Operation King's Dream v. Connerly*, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006), slip op. at *10 (attached as Exhibit 1 to Gov. Br.). As the Universities admit, "Proposition 209 ... was interpreted as barring consideration of race in admissions." Univ. Br. 41, n.25; *see also* Pl. Br. 16-17.

The Universities' alternative interpretation of Section 26 is simply frivolous. The Universities assert that prohibitions against discrimination have been understood to permit the use of forbidden criteria like race or gender when narrowly tailored to advancing a compelling state interest, and they suggest that Section 26 may be interpreted to include a like exception to its prohibition against preferences based on race or gender, such that the prohibition would not reach "conduct narrowly tailored to advance a compelling state interest." Univ. Br. 36. Of course, this argument must fail because its premise is that the adoption of Section 26 changed exactly nothing – under pre-Amendment law, after all, racial and gender preferences that satisfied strict scrutiny passed muster under both the federal and Michigan Constitutions.

The Universities also claim that "[t]he confusion surrounding the Amendment was so great that the Governor directed the Civil Rights Commission to 'investigate the impact' of the Amendment 'upon state educational institutions and educational program....' " Univ. Br. 39-40. But the Governor's executive order (attached as Exhibit K to Univ. Br.) says nothing whatever suggesting any confusion about the meaning of Section 26. The Order straightforwardly describes the provision as prohibiting preferential treatment based on race, sex, and the other forbidden criteria, and directs the Civil Rights Commission to assess the impact of this provision and identify means by which the State may promote diversity without running afoul of Section 26. The Order simply does not request any clarification as to the meaning of the provision. Were any such clarification needed, the Governor would presumably seek the advice of the

Attorney General, the State's chief legal officer. *See* Mich. Comp. Law § 14.32 ("It shall be the duty of the attorney general, when required, to give his opinion on all questions of law submitted to him ... by the governor ...").

In the final analysis, the Universities cannot bring themselves to maintain the pretense that there is any ambiguity in the command of Section 26. "Out of respect for the voters," the Universities admit that they have begun a study of how they might accommodate their policy desires to the possibility that Section 26 may be held to require elimination of use of race and gender in admissions (with limited exceptions specified in the text of the Amendment). Univ. Br. 40. This admission reveals that the Universities have no need to "guess" as what the voters have ordained.

The University defendants' claimed uncertainty is a thinly veiled pretext for the their desperate effort to evade, or at least, delay compliance with Section 26's nondiscrimination command. One need only review the statement issued by University of Michigan President Mary Sue Coleman the day after the voters spoke to appreciate the University defendants' determination to do everything possible to avoid compliance with the law. *See* http://www.umich.edu/pres/speeches/061103div.html (pledging to devote "our full focus and energy as an institution" to the "cause" of "find[ing] ways to overcome the handcuffs Proposal 2 attempts to place on our reach for greater diversity").

C. Mr. Russell Will Suffer Irreparable Harm Absent a Stay.

In contrast to the Universities, Mr. Russell will suffer concrete irreparable harm *now* if a stay is not entered. He is entitled, under Section 26, to have his application to the University of Michigan Law School considered without regard to his race, and he is entitled to a level playing field on which none of his competitors for seats in the Law School are given any preference

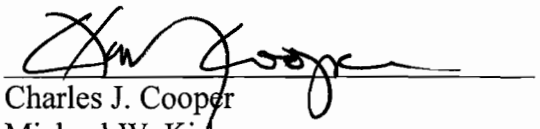
based on their race or gender. To be sure, Plaintiffs-Appellees make the same claim of harm if the preliminary injunction is not maintained, but the decisive difference is that the law – Section 26 – favors Mr. Russell's claim. Because, as shown above, plaintiffs-appellees have not established any likelihood they will exceed on the merits of their constitutional and statutory claims, their asserted harm is not cognizable. "With no constitutional injury on the merits as a matter of law, there is no threat of irreparable injury or hardship to tip the balance in plaintiffs' favor." *Coalition for Economic Equity*, 122 F.3d at 711.

CONCLUSION

For the foregoing reasons, and those set forth in our emergency motion, we respectfully submit that the Court should immediately stay the preliminary injunction entered by the district court pending appeal.

December 29, 2006

Respectfully submitted,



Charles J. Cooper
Michael W. Kirk

COOPER & KIRK, PLLC
555 Eleventh Street, N.W., Suite 750
Washington, D.C. 20004
(202) 220-9600

Kerry L. Morgan
PENTIUK, COUVEREUR & KOBILJAK
Edelson Building, Suite 200
2915 Biddle Avenue
Wyandotte, MI 48192
734-281-7100

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW Suite 300
Washington, DC 20036
Phone: (202) 833-8400

Certificate of Service

I hereby certify that on this 29th day of December 2006, I caused to be served a true and correct copy of the foregoing via overnight delivery and electronic mail upon the following:

George B. Washington
SCHEFF & WASHINGTON
Attorneys for Respondents BAMN, *et al.*
645 Griswold, Suite 1817
Detroit, MI 48226
(313) 963-1921
scheff@ameritech.com

James E. Long (P53251)
Michigan Department of Attorney General
Attorneys for Respondent Granholm
525 West Ottawa St.
Lansing, MI 48933
(517) 373-1111
longj@michigan.gov

Leonard M. Niehoff (P36695)
BUTZEL LONG, P.C.
Attorneys for Respondents the Regents of the University of Michigan, *et al.*
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
niehoff@butzel.com

Margaret A. Nelson (P30342)
Michigan Dept of Attorney General
Attorneys for Respondent Cox
525 West Ottawa St.
Lansing, MI 48933
(517) 373-6434
nelsonma@michigan.gov

John C. Brown