IN THE UNITED STATES COUR TOF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, *et al.*,	:	
Plaintiffs-Appellees,	:	App. No. 06-2642
v.	:	
JENNIFER GRANHOLM, *et al.*,	:	
Defendants-Appellees,	:	
and	:	
ERIC RUSSELL, *et al.*,	:	
Intervener-Defendants-Appellants	:	

PLAINTIFFS-APPELLEES' BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS AND THE MOTION FOR A STAY

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INTRODUCTION

Plaintiffs Josie Hyman and Alejandra Cruz are applying to the University of Michigan Law School. Josie Hyman is a young, black, recent graduate of the University of California at Berkeley with a 3.9 GPA. Alejandra Cruz is a young, Latina, recent graduate of the University of California at Berkeley with a 3.5 GPA. Neither Ms. Hyman nor Ms. Cruz will be admitted to the University of Michigan Law School if the injunction agreed upon by plaintiffs, the defendant universities, the Attorney General, and the Governor is vacated. Ms. Hyman, Ms. Cruz, and scores of other black and Latino students will face immediate irreparable harm if intervener Russell's motion is granted.

What is at stake in this case is whether the Josie Hymans and the Alejandra Cruzes of this nation are afforded equal opportunity to become lawyers and doctors, or face discriminatory treatment that relegates them to second-class citizenship. The intervener-defendant's imagined loss of rights cannot receive greater respect than the real rights and opportunities of these women.

Proposal 2 has deeply divided the State of Michigan. As the United States District Court found, the proponents of Proposal 2 achieved their place on the ballot by widespread and systematic fraud, much of it directed against black voters.[1] In the end, the vote for Proposal 2 was extremely polarized: 65 percent of white voters supported it, while 85 percent of black voters opposed it.[2]

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[1] *Operation King's Dream, et. al, v Ward Connerly, et. al*, 2006 WL 2514155 (2006)(Tarnow, J)(unpublished), *app pending* Nos 06-2144, 06-2258.

[2] "America Votes 2006," CNN.com/ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html.

The plaintiffs filed suit on the day after the election and filed a First Amended Complaint elaborating the initial claims on December 17, 2006. For the reasons summarized here and set forth in more detail below, the plaintiffs assert that they have an excellent chance of prevailing on the merits of the four counts of their First Amended Complaint that relate to the admission of students at the defendant universities.

In Count I, the plaintiffs assert that Proposal 2 violates the Equal Protection Clause because it permanently requires racial minorities and women to seek future accommodations on admissions—which the proponents of Proposal 2 misleadingly call "preferences"—at a statewide level and by means of an arduous referendum campaign to amend the Constitution. Every other class of citizens is simply required to petition the faculty and administration.

As described in more detail below, on facts essentially identical to those presented here, the Supreme Court has repeatedly held that such a requirement violates the Equal Protection Clause of the Fourteenth Amendment. Under that Clause, the State cannot, as Proposal 2 does, allow children of alumni, lesbians and gay men, Grosse Pointe residents, athletes, and numerous other groups to secure special consideration for admission simply by winning a vote of a faculty or a governing board—while permanently shutting that door to minorities and women and requiring them to wage a statewide campaign before they may obtain accommodations in the admission process based on race, national origin or sex.

In Counts II and III, the plaintiffs assert that Proposal 2 is preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 because it will deny minority access to higher education in Michigan, essentially

destroying an entire generation of work in desegregating the top universities in the State. In Count IV, the plaintiffs assert that Proposal 2 violates the First Amendment by its intrusion into academic decisions that are at the core of the universities' mission—interests long-protected by the shield of the First Amendment protections for our nation's educational leaders.

In accord with the suggestion in this Court's order, the plaintiffs will spend the remainder of this brief establishing that they have far more than a reasonable likelihood of success on the merits. That law—which is well known to all the parties to this litigation—formed the backdrop for the decision to enter a stay so that the fundamental constitutional issues at stake could be resolved.

But before addressing the chance of success on the merits, a word on the other factors justifying the stay is in order. As set forth by the three universities, there are approximately 160 different admissions systems for the different graduate, professional, and undergraduate schools in those three universities. In addition, the universities have numerous funds and grants that have restrictions that may be affected by Proposal 2. Most of those schools have already admitted substantial portions of their classes, with other applications already evaluated or partially evaluated under the preexisting system. It would create chaos to change those systems in mid-stream.

As set forth below, the plaintiffs assert that Proposal 2 will never go into effect because it blatantly violates the federal constitution and federal laws. This Court need not reach that issue now. But it should sustain the stay and the agreement entered into by the plaintiffs, by the defendant universities, the Governor, and by the Attorney General—who is and has been an ardent and vocal supporter of Proposal 2.

Now that the District Court has granted Mr. Russell's motion for intervention, he has a right on remand to move to dissolve or amend that order. This Court should deny his request for a stay and dismiss the petition for mandamus because his requests are wrong from the beginning and are now moot in any event.

ARGUMENT

I

PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Proposal 2 establishes a separate and far more onerous standard for political participation to achieve governmental benefit for black, Latino, and Native American people and women, the result of which would be a denial of access to public higher education for minorities in Michigan.

In striking down the results of a statewide referendum in Colorado, the Supreme Court, by Justice Kennedy, held that "A law declaring that in general it shall be more difficult for one group of citizens than all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v Evans*, 517 US 620, 633-634 (1996).

That is precisely what Proposal 2 does. It creates a separate and unequal political procedure for black people, Latino/as, and Native Americans—and women of all races—to achieve changes in university admission procedures that would give those groups the governmental benefit of special consideration.

Under Proposal 2, children of alumni, residents of particular cities, lesbians and gay men, veterans, and artists may secure special consideration in admissions the way it has been done in Michigan for generations: by discussions with the faculties and

administrations of Michigan's universities. Proposal 2 closes those doors to minorities and women. In order for minorities and women to seek special consideration in university admissions based on race, national origin or sex, they must now wage a statewide campaign to amend the Constitution of the State of Michigan, something no other class of people is required to do.

As the experience of Proposition 209 in California makes clear, the separate and unequal political procedures created by Proposal 2 will lead to a denial of access to higher education for minorities in Michigan. It will also perpetuate and deepen the virtual exclusion of women from science, engineering and other disciplines which are increasingly vital to our future. See infra, at 13-17. Proposal 2 would set up exactly the type of inequality before the law that the Fourteenth Amendment prohibits, and the result would be the type of exclusion from education and civic life that the Civil War amendments aimed to prohibit.

Under the governing decisions of the Supreme Court, a majority may elect new regents who, subject to the restrictions of federal law, may change policies that the electorate does not support. But a majority may not amend the Constitution so as to make it permanently more difficult for minorities to fight for their interests and to win future votes under the same procedures that others use to protect their interests.

As that is precisely what Proposal 2 has done, it is unconstitutional under a series of Supreme Court decisions that are essentially identical to the facts presented here.

B. Proposal 2 violates repeated holdings of the Supreme Court of the United States.

Justice Kennedy's majority Opinion in *Romer* was based on prior decisions by the United States Supreme Court directly holding that "…the State may no more

disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter v Erickson*, 393 US 385, 392-393 (1969). *Accord. Washington v Seattle School District No. 1*, 458 US 457, 470 (1982); *Romer, supra,* 517 US at 625. These precedents require that Proposal 2 be struck down as a violation of the Equal Protection Clause of the Fourteenth Amendment.

In *Hunter*, the electorate of Akron, Ohio adopted a charter amendment that prohibited the City Council from passing any ordinance that regulated the use, sale or other disposition of real estate on "the basis of race, color, religion, national origin or ancestry" without first submitting that ordinance to a vote of the electorate. *Hunter, supra,* 393 US at 387. As the City charter allowed the council alone to adopt ordinances regulating real estate transactions with respect to any other criteria (e.g., children, pets, etc.), only legislation relating to race, religion and national origin had to run the "gauntlet" of a referendum. *Id*., at 390-391.

On its face, the Charter amendment "treat[ed] Negro and white, Jew and Gentile in an identical manner." But the Court rightly held that "the reality is that the law's impact falls on the minority" that would "normally benefit from laws barring racial and religious discrimination." *Id,* at 391. The Court concluded that the law could be justified only if the City demonstrated a compelling interest to support it:[3]

[3] Hunter did not differentiate between race, national origin and gender. *See Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir.1993) ("governmental preferences based on either race or national origin are subject to the same analysis"). Gender requires an "exceedingly persuasive justification." *U.S. v. Virginia*, 518 U.S. 515, 531. ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action")

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, [citations omitted], racial classifications are inherently suspect [citations omitted] and are subject to the most rigid scrutiny.

Id, at 391-392.

The Court sharply rejected the City's claim that the charter amendment reflected a decision to "move slowly in a delicate area." It then said that the City had invidiously discriminated against racial and religious minorities in violation of the Fourteenth Amendment "by requiring those groups to go through a far more arduous procedure in order to enact legislation on their behalf." *Id.*, at 393.

The parallel with Proposal 2 is obvious: it is only accommodations based on race, sex, or national origin that have to run the gauntlet of a statewide referendum before they are incorporated into the admission standards of the defendant universities. As in *Hunter*, such a permanent relegation of discrimination issues—and only discrimination issues—to such an arduous procedure violates the Equal Protection Clause in the most literal sense.

Seattle School District No. 1 is even closer on the facts. In that case, Seattle's school board had voluntarily adopted a busing plan to achieve some measure of racial integration—just as the University of Michigan had voluntarily adopted an affirmative action plan to achieve some measure of racial integration in its student body. Like the opponents of affirmative action at Michigan, those who lost in the political process before the Seattle school board sponsored a statewide referendum to overturn the voluntary busing plan. By referendum vote, they won, as the electorate of the State of Washington adopted a statute that declared that children could only be transported beyond their neighborhood school for certain enumerated purposes, of which racial desegregation was not one.

Under that statute, as under Proposal 2, racial minorities could only secure a plan to achieve integration by sponsoring a state-wide referendum to amend the Constitution. Finding that racial minorities could legitimately consider voluntary busing as a measure that furthered their interests, the Court held that the initiative violated the Equal Protection Clause by imposing a separate and unequal burden on minorities who sought legislation to further their interest:

> Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs-including programs involving student assignment and desegregation-was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. [Citation omitted] After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."
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> *Id*, 458 US at 479-480.

The Court held that a statute subjecting laws regulating desegregation plans to a special procedure was by definition a suspect classification that could be justified, if at all, only by the most compelling reasons:

> A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." [citation omitted] And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.
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> *Id*, 458 US at 485.

Finding no justification for the Washington statute, the Court concluded that the courts of the United States had a *duty* to strike down that referendum precisely because it denied the democratic rights of the minority:

> But when the political process or the decision-making mechanism used to *address* racially conscious legislation-and only such legislation-is singled out for peculiar

> and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' [citations omitted]. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." [citation omitted]. In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."
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> *Id*, 458 US at 485-486.

For exactly the same reason, the District Court and ultimately this Court have a duty to strike down Proposal 2 because it relegates black people, other minorities and women to "such a position of political powerlessness as to command extraordinary protection form the majoritarian political process." *Id*.

In *Romer*, the Court reaffirmed yet again the holdings of *Hunter* and *Seattle School District.* Aided by John Roberts, the current Chief Justice of the United States Supreme Court, the plaintiffs in that case asserted that a Colorado referendum that amended the State Constitution to prohibit local units of government from enacting statutes that banned discrimination against lesbians and gay men violated the Equal Protection Clause under *Hunter* and *Seattle School District.* Citing those decisions and a few of the most historic decisions by the Supreme Court, Justice Kennedy declared the Colorado law unconstitutional because it required homosexuals—and no one else—to seek protection at a state level if protection was to be had:

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt v Painter*, 339 US 629, 635 (1950) (quoting *Shelley v Kraemer*, 334 US 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for

> disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' " *Skinner v Oklahoma ex rel. Williamson,* 316 US 535, 541(1942), quoting *Yick Wo v Hopkins,* 118 US 356, 369 (1886).
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> *Romer*, 517 US at 633-634.

By every reasonable standard—and by the unbroken weight of Supreme Court precedent—Proposal 2 is *not* within our Constitutional tradition. Under Proposal 2, alumni may secure preferences for their children; sports fans may secure preference for athletes; residents may secure preferences for citizens of Michigan—all by a simple vote of the faculty at a particular school. But black people, Latino/as, Native Americans and women may not secure lawful "preferences" without running the gauntlet of a statewide campaign.

Hunter, Seattle School District and *Romer* are *directly* on point. As Justice Kennedy and countless others have declared, requiring minorities and minorities alone to amend the constitution in order to seek change is denial of equal protection of the laws in the most literal sense. Plaintiffs submit that they have not only a reasonable likelihood of success on the merits—but a reasonable likelihood of success on a motion for judgment on the pleadings.

B. Ninth Circuit precedent does not lessen the plaintiff's chance for success on the merits.

The plaintiffs assert that they have far more than a reasonable likelihood of success with full knowledge that the Ninth Circuit rejected a similar challenge to the

essentially identical terms of California's Proposition 209. See *Coalition for Economic Equity v Wilson*, 122 F 3d 692 (CA 9 1997), *cert den* 522 US 963 (1997).[4]

At the outset, that decision did not even represent the considered view of the Ninth Circuit in 1997. As a review of the decision itself demonstrates, the three Justices on the panel opined that Proposition 209 complied with the *Hunter-Romer* line of cases for reasons that will discussed in a moment. But four Justices, dissenting from the denial of a rehearing en banc, declared that Proposition 209 violated the Equal Protection Clause under the *Hunter-Romer* line of cases. Id, Of the Justices in the Ninth Circuit who expressed an opinion on the constitutionality of Proposition 209 in 1997, the majority found it unconstitutional.

More fundamentally, whatever validity the *Coalition for Economic Equity* decision had in 1997, it has none today. As stated in its Opinion, the panel refused to apply the *Hunter-Seattle School District-Romer* line of cases on the premise that "preferences" for admission to colleges on the basis of race, national origin or gender are either inconsistent with the Equal Protection Clause or barely permitted by it. According to the panel, "Impediments to preferential treatment do not deny equal protection." *Id*, at 708.

But in 2003, six Justices of the United States Supreme Court held that a university had a right grounded in the First Amendment to grant what the Court called "preferences"[5] to racial minorities in order to achieve a diverse student body. *Grutter v*

[4] Before the Supreme Court accepted certiorari in the Michigan cases in 2002, it denied the writ in almost every case involving affirmative action.

[5] While the plaintiffs will occasionally adopt the word "preference" in this section of the brief for purposes of making the disparity in political procedure evident, they maintain their general objection to calling affirmative action a "preference." The word suggests

Bollinger, 539 US 306 (2003).[6] After that holding, the panel decision in *Coalition for Economic Equity* lost all validity. The whole point of *Hunter, Seattle School District* and *Romer* is that the political procedures that the citizens use to choose between lawful policies must be equally open to all, including minorities.

There are no disfavored policies that the courts may exempt from those cases. Moreover, even if there were, a policy that the Supreme Court has now held is grounded in the First Amendment and consistent with the Fourteenth Amendment is clearly not a policy that may be exempted from the *Hunter* holdings. In declaring that *Hunter*, *Seattle School District* and *Romer* did not apply to Proposition 209 because the judges thought so-called racial preferences were an unwise policy, the Ninth Circuit panel engaged in judicial legislation of the worst sort.[7]

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that there is some neutral system in play and that affirmative action is a deviation from that neutral system. But as almost everyone now concedes, the admission system without affirmative action is not neutral because minority students receive an inferior elementary and secondary education and because the standardized testing used by almost all schools has an unfair discriminatory impact on minority students. See e.g., *Grutter, supra*, at 345-346 (Breyer and Ginsburg, JJ, concurring) and at 369-370 (Thomas and Scallia, JJ, dissenting). In view of the reality of American life, any claim that blacks, Latino/as or Native Americans--or in a different way, women of all races--receive a "preference" in university admissions is ludicrous on its face. Put simply, the children of Detroit do not enjoy a "preference" over the children of Birmingham in securing admission to any of the defendant universities.

[6] Justice Kennedy joined the five Justice majority in *Grutter* in holding that the University of Michigan could grant "preferences" based on race in order to achieve a diverse student body. He dissented only from the particular form of the "preferences" used by the University.

[7] The panel that decided Coalition for Economic Equity also attempted to stuff the facts into the holding of *Crawford v Board of Education of the City of Los Angeles*, 458 US 527 (1982). In that case, the California Supreme Court had previously held that the equal protection clause of the state constitution barred both de jure and de facto segregation. To avoid busing in Los Angeles, the voters passed an amendment to the Constitution that declared that a court did not have the power to order busing except where the Fourteenth Amendment required that busing. The Supreme Court affirmed that law and held that the

Least of all may judges place a lawful policy in a disfavored class and say citizens need not have an equal right to fight for the adoption of that policy because the judges do not like it. Many judges undoubtedly did not like the fair housing policy in Akron, the busing policy in Seattle, or the gay rights ordinances in Colorado. But under the decisions set forth above, they had a duty to strike down the laws at issue in those cases because minorities had the right to fight for the adoption of legislation by the same procedures that were open to everyone else.

Within the constitutional limits set by *Grutter* and *Gratz v Bollinger,* 539 US 244 (2003), whether affirmative action is desirable is to be determined not by judges but by elected officials operating under a political procedure that is equally open to all. If the proponents of every other change in admission policies may secure a change by obtaining a vote of the faculties or governing boards—and there is no doubt that the governing boards have plenary authority over admissions[8]—minorities and women must have the right to secure a change in admission procedures *through the same procedure*.

In declaring as a matter of State constitutional law that the faculty or governing board of a state university may not adopt admission "preferences" based on race, national origin or gender—but that they may adopt admission preferences based on any other

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repeal or modification of a statewide law by another statewide law did not violate the federal Equal Protection Clause. There simply was no question in Crawford of the different political procedures available for racial and non-racial issues that is the fatal defect of California's Proposition 209 and Michigan's Proposal 2.

[8] The Michigan Supreme Court has held that the governing boards of the defendant universities are the "highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature. *Federated Publications, Inc. v Board of Trustees of Michigan State University*, 460 Mich 75, 496 n 8 (1999).

criteria—Proposal 2 violates the fundamental holdings of *Hunter, Seattle School District,* and *Romer*.

In view of the enormous strength of the arguments against them, the Universities, the Governor, and the Attorney General rightly agreed to a six-month stay of the effect of Proposal 2. Forcing the universities to attempt to comply with a law in the middle of an admissions cycle where the law itself is patently unconstitutional is not something that this Court, or any court, should order.

II

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 PREEMPT THE OPERATION OF PROPOSAL 2 INSOFAR AS THE ADMISSION OF STUDENTS AT STATE UNIVERSITIES IS CONCERNED.

A. Title VI preempts Proposal 2's ban on preferences based on race or national origin.

Title VI of the Civil Rights Act of 1964 provides as follows:

> 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 USC 2000d.

In Section 2, Congress authorized each agency that disbursed federal funds to promulgate rules and regulations that enforced Title VI's mandate on the recipients of federal funds. 42 USC 2000d-1.

Acting pursuant to that authorization, the United States Department of Education has promulgated regulations that require recipients of federal funds to certify as a condition of their receipt that they have complied with all of the requirements of 34 CFR Part 100. 34 CFR 100.4(a). Among the other requirements in Part 100, the Department

has prohibited recipients from using any criteria or methods of selection that have the *effect* of subjecting persons to discrimination on account of race or color or that have the *effect* of substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin:

> A recipient, in determining the types of services, financial aid, or other benefits or facilities that will be provided under any such program, or the class of individuals to whom….such services, financial aid, other benefits, or facilities will be provided under any such program, may not, directly or through contractual arrangements, utilize criteria or methods of administration *that 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 respects individuals of a particular race, color or national origin.*
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> 34 CFR 100.3(b)(2)(emphasis added).

The regulations further authorize recipients to use affirmative action even if they have not previously discriminated in order to "…overcome the effects of conditions which resulted in limiting participation of persons of a particular race, color, or national origin." 34 CFR 100.3(b)(6)(ii).

The Civil Rights Act of 1964 specifically carved out space for state laws that enforced the purposes of that Act. But it also provided that the Act preempted local laws that were inconsistent with the purposes of this Act, or of any provision thereof:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.
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> 42 USC 2000h-4.

In interpreting that provision in the context of state pregnancy laws that provided greater protection than Title VII, the Supreme Court held that the Civil Rights Act provided a

floor beneath which protection could not drop, not a ceiling beyond which it may not rise. *California Fed Savings and Loan Assoc v Guerra*, 479 US 272, 285 (1987).

There is no question that Proposal 2 erodes the base level of protection provided by Title VI. In California, the implementation of Proposition 209's ban on "racial preferences" has had the effect of excluding thousands of black, Latino/a, and Native American students from universities that receive substantial federal aid. In Los Angeles County, for example, which has the second largest population of black citizens in the United States, the enrollment of black freshmen at UCLA has plummeted from nearly 300 in 1994, to 96 in 2006, with 20 of those 96 being recruited scholarship athletes. Bunche Center for African American Studies at UCLA, "'Merit' Matters: Race, Myth & UCLA Admissions," p. 1, 6.

The University of California at Berkeley reports the same disastrous drop in the enrollment of underrepresented minorities. In 1997, the last class admitted with affirmative action was 6.8 percent black, .8 percent Native American, 12.7 percent Chicano and 2.7 percent Latino/a, for a total of 23.1 percent. As 39.1 percent of high school graduates in California were underrepresented minorities in that year, even with affirmative action, Berkeley admitted those students at roughly half the rate it admitted white and Asian students. Bob Laird, *The Case for Affirmative Action* (Berkeley, CA: Bay Tree Publishing), pp 115-116.[9]

In the first year that Proposition 209 took effect, the percentage of black, Chicano, Native American and Latino students dropped by over 55 percent. Laird, *supra*, p 125. In the first three classes after Proposition 209, 20 percent of the black students on campus

[9] Laird was the chief admissions officer at UC Berkeley both before and after the passage of Proposition 209.

and a much higher percent of black men on campus were scholarship athletes. *Id*, p 127. The numbers recovered somewhat, but the overall admission of underrepresented minorities dropped from 15 to 40 percent, at the same time that the percentage of high school graduates who were underrepresented minorities was rapidly growing. Laird, *supra*, pp 134-136.

The harm to minority students was even greater in the graduate schools of the University of California. The most dramatic fall was at Berkeley's Boalt Hall Law School where the entering freshman class in 1997 included one black student—compared to 20 in the last class that entered before Proposition 209 took effect. Laird, *supra*, p 109. In medicine, law, and other elite schools, the numbers were uneven, but the overall trend was unmistakably down. Laird, *supra*, pp 108-112.

The same factors that led to such drastic declines in the enrollment of underrepresented minorities in California's top public colleges are present in Michigan as well. Eighty three percent of black students in Michigan study in segregated schools. Sixty-four percent study in intensely segregated schools—that is, schools where enrollment is from 90 to 100 percent black. As separate schools are not now, never have been, and never can be equal schools, *Brown v Board of Education*, 347 U.S. 483, 495 (1954), black students applying to the defendant universities necessarily have lower median grade point averages and lower median test scores than white students applying to the same schools.

In Michigan, Proposal 2 will lead to the same results. According to this Court's finding in *Grutter*—a finding that Mr. Russell's attorneys have never challenged—if affirmative action were simply removed from the existing system, the enrollment of

underrepresented minorities at the Law School would immediately drop to a token number. *Grutter v Bollinger*, 288 F 3d 732, 737-738 (CA 6 2002), *aff'd* 539 US 306 (2003). An entire generation of effort to eliminate racial disparities and segregation at the Law School would be wiped out.

As documented in Justice O'Connor's Opinion in *Grutter* and in the bitter experience of the admissions offices at Berkeley and UCLA, it is impossible to enroll a significant number of underrepresented minorities in the top colleges in Michigan or, especially, in its graduate and professional programs without using affirmative action to level the playing field.

Title VI, like Title VII, has as one of its purposes the stimulation of voluntary efforts by educational institutions to evaluate their own performance and to undertake voluntary efforts to eliminate the "vestiges of an unfortunate and ignominious page in this country's history." *United Steelworkers v Weber*, 443 US 193, 204(1979). More directly, Title VI, like Title VII, prohibits actions that have the "*effect* of subjecting individuals to discrimination because of their race, color or national origin" and the *effect* of "defeating or substantially impairing accomplishment of the objectives of the [educational] program as respects individuals of a particular race, color or national origin." See 34 CFR 100.3(b)(2) and 42 USC 2000d. If implemented, Proposal 2, like Proposition 209 before it, will violate the letter and spirit of those regulations.

For those reasons, Title VI preempts the operation of Proposal 2 in the admission of underrepresented minorities at the defendant universities.

B. Title IX preempts Proposal 2's ban on gender "preferences."

With exceptions not relevant here, Title IX prohibits any recipient of federal funds from denying persons a place in any educational program receiving federal financial assistance:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,..
>
> 20 USC 1681.

As with Title VI, each department that disburses federal funds is directed to promulgate regulations to enforce Title IX. 20 USC 1682.

As with Title VI, the Department of Education has promulgated regulations that require recipients of federal funds to avoid the use of any criterion for admission that has the effect of discriminating on account of sex, 34 CFR 106.21(b)(2). The regulations further authorize and in some cases require recipients to undertake additional recruitment and other affirmative steps to ensure that women may participate on an equal basis with men in the program. 34 CFR 106.23(a).

According to the University of Michigan, only some of its schools use gender in their affirmative action programs. For example, the Women in Science and Engineering (WISE) Program promotes the advancement of women in the sciences and engineering, where women are substantially underrepresented. Proposal 2 would eliminate these programs.

III

PROPOSAL 2 VIOLATES THE FIRST AMENDMENT RIGHTS OF THE UNIVERSITIES AND OF THE STUDENTS.

In the McCarthy period, various government agencies launched investigations of the universities, who taught at them, what they taught, and who studied with which teachers. At key points in those investigations, the agencies summoned teachers and students and asked them about their affiliations, their beliefs, their actions, and their lectures and presentations. In striking down those investigations and questions, the United States Supreme Court clearly held that the universities and the teachers and students in those universities had a First Amendment right to freedom of speech, association and assembly—all of which were included in the right of academic freedom.

In making the classic statement for a Constitutional right of academic freedom, Justice Frankfurter quoted South African scholars protesting the suppression of freedom in the universities of that country. As he and they recognized, the suppression of intellectual freedom and the suppression of racial equality and integration often go hand in hand. According to those scholars and to Justice Frankfurter, the Nation must protect the unique role in a democratic society of the university and of its teachers and students:

> 'Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.
>
> '* * * It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'

> *Sweezy v State of New Hampshire*, 354 US 234, 263 (1957)(Frankfurter, J, concurring)(striking down attempt to interrogate a professor about his beliefs, his teachings, and his associations).

In *Keyishian v Board of Regents of the State University of New York*, 385 US 589 (1967), the Court sustained a challenge by faculty members to a New York law that required faculty members to provide information on their beliefs and associations. Again, the Court stressed the importance of academic freedom "which is of transcendent value to all of us and not merely to the teachers involved," and which is a "special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id*., at 603.

In *Regents of the Univ of Calif v Bakke*, 438 US 265 (1978), Justice Powell relied on those cases to hold that universities were immune from suit if they in good faith used race as one factor among many to pick students in order to assure a diverse intellectual and social environment on the campuses. In adopting that rationale to sustain the University of Michigan's affirmative action program, five Justices once again declared that "educational autonomy, which is grounded in the First Amendment" means that the university must have the right to "make its own judgments as to the selection of its student body." *Grutter*, *supra*, 539 US at 329.

Mr. Russell is plainly wrong in asserting that the First Amendment does not protect the universities and their students and faculties from officials or laws made by "the people" (Emerg Mot, 17-18). As *Sweezy*, *Keyishian, Bakke* and *Grutter* demonstrate, the First Amendment provides protection to the universities and to their students and teachers from blunt, arbitrary and invasive laws, court decrees, and

administrative orders—even if those laws emanate directly from the people or from those who have been elected by the people.

A public university is subject to democratic control by the election of its regents—but it is not helpless before every blunt law passed by the people or their representatives.

In this case, Proposal 2 fails the First Amendment as well as the Fourteenth by its selective regulation of only those aspects of admission related to race, national origin, and gender—all of which are suspect classes in themselves.

But there is yet another First Amendment defect in Proposal 2. As the Court has held in striking down inquiries about a teachers' associations and beliefs, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Keyishian, supra*, 385 US at 603-604. Just as the word "subversive" is unconstitutionally vague, so too is the term "preference."

Does "preference" mean something more than "discrimination," and, if so, what? Does it mean that the universities must admit students in lock-step based on their grade point averages and test scores? Is assessing individual scores in light of the admitted racial bias of the test and the known racial background of the applicant a "preference"—or is it simply a reasonable way to use an extremely imperfect instrument?

No one knows—or can know—the answers to those or hundreds of other similar questions, because the term "preference" is incurably vague.

But what is clear is that if the universities depart too far from what the plaintiffs view as the proper use of grades or test scores, there will be lawsuits, depositions about why this student or that was admitted, and, in general, a racial witchhunt like the political

witchhunt of the 1950s. The freedom of the universities to select their students—and the concomitant First Amendment rights of students and teachers—will be destroyed.

The plaintiffs submit both they and the universities have more than a reasonable likelihood of success on their challenge to this vague and selective attack upon vital First Amendment rights.

CONCLUSION

For the reasons stated, the plaintiffs-appellees ask the Court to deny the request for a writ of mandamus, to deny the stay, and to remand the intervener to the District Court where he may file such motions as he believes are just and equitable.

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CERTIFICATE OF SERVICE

George B. Washington hereby certifies that he served a copy of the Plaintiffs-Appellees' Brief in Opposition to the Emergency Motion for a Stay and the Petition for a Writ of Mandamus by FAX and e-mail to the following counsel for the parties and attempted intervenors:

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