No. _____

IN THE SUPREME COURT OF THE UNITED STATES

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND TO FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQUOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HYMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCALS 207, 214, 312, 836, 1642, AND 2920, AND THE DEFEND AFFIRMATIVE ACTION PARTY

Petitioners,

v.

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

-and-

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

Respondents,

PETITIONERS' MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND TO REINSTATE THE TEMPORARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

The petitioners move for an order to stay the Sixth Circuit's December 29, 2006, Opinion and Order (Ex. A) which had stayed, pending appeal, a temporary injunction entered by the United States District Court for the Eastern District of Michigan on December 18, 2006 (Ex. B).

The issues in this case are of fundamental national importance. In *Grutter v Bollinger*, 539 U.S. 306 (2003), this Court held that the University of Michigan had the right to implement an affirmative action plan in order to assure that it had a racially diverse student body. But immediately after that decision, the opponents of that decision began gathering signatures on a petition to amend the Constitution of the State of Michigan to ban affirmative action.

The state election officials placed the proposed amendment on the ballot even though the backers of that amendment had obtained a high percentage of the required signatures by defrauding black, Latino/a, and white voters.[1] In the election itself, whites voted for Proposal 2 by a two-to-one margin, while blacks voted against it by over 85 percent.[2] But because Michigan is 83 percent white, the Proposal passed by a 58 percent majority.

On November 8, the day after the election, the petitioners, who include black and Latino/a applicants for admission to the defendant universities, filed this action, asserting that Proposal 2 violated the First and Fourteenth Amendments to the Constitution of the

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[1] *Operation King's Dream, et. al. v Connerly, et. al*, 2006 WL 2514115 (E.D. Mich 2006)(Tarnow, J), *app pending*, 6th Cir. Nos. 06-2144, 06-2258.

[2] Eighty-five percent of black citizens voted No on Proposal 2. "America Votes 2006," CNN.com/ ELECTION/2006/pages/results/states/MI/I/01/epolls.0.html.

United States, Title VI of the Civil Rights Act of 1964, 42 USC s. 2000d, and Title IX of the Education Amendments of 1972, 20 USC s. 1681.

On December 17, 2006, which was six days before Proposal 2 took effect, the petitioners, the Governor of Michigan, the Attorney General, and the governing boards of the defendant universities agreed to the entry of a temporary injunction that allowed the three universities to continue using their admissions and financial aid policies until the current admission cycle ended on July 1, 2007 (Ex. C). On December 18, the District Court issued a brief Opinion that approved the entry of the requested injunction (Ex B).

Meanwhile, however, Eric Russell, a white applicant to the University of Michigan Law School, filed a motion to intervene on December 17. On December 22, Russell filed a petition for mandamus and an emergency application for a stay with the Sixth Circuit. After ordering briefs to be submitted in less than 48 hours, a panel of the Sixth Circuit issued a published opinion staying the District Court's injunction primarily because, it said, the plaintiffs had little likelihood of success on their federal claims (Ex A, p. 13).

The Sixth Circuit is dead wrong. As is set forth below, the panel departed from three governing decisions by this Court and two federal statutes in reaching the conclusion that the petitioner had weak federal claims.

This badly-flawed order has already had devastating consequences. The University of Michigan has been forced to suspend all admissions for the class that will enter in August 2007. It will soon be forced to resume admissions, but Michigan's Provost and the Provosts of the other two state universities have submitted uncontradicted

affidavits stating that they can not devise and implement a new plan for admitting students that will allow the admission of racially diverse classes in fall 2007 (Ex. D).

As Michigan's Provost states, over half of the applications for the entering class have not yet been considered (Ex. D). For those minority students unfortunate enough to be in that half, the Sixth Circuit's order has closed the doors of the University of Michigan and of the graduate and professional schools at all three of the defendant universities.

The petitioners are without remedy except in this Court. As is set forth below, there is a high likelihood that this Court will grant certiorari and reverse the decision of the Sixth Circuit. The petitioners ask this Court to issue a stay and to reinstate the injunction issued by the District Court so that the legal challenges to Proposal 2 (Ex. E) can proceed, so that the admissions systems can, if necessary, be revised in a deliberate way, and so that black and other minority students will not have their lives altered fundamentally before this Court is even able to rule on the fundamental issues presented by this case.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. s. 2101(f) and 28 U.S.C s. 1651.

In this case, the plaintiffs have not yet filed a petition for certiorari and do not intend to do so until the completion of proceedings in the Sixth Circuit. But as former Chief Justice William Rehnquist wrote, this Court has jurisdiction to dissolve the stay because the case will very likely be reviewed by this Court and because the stay issued below is both demonstrably wrong and irreparable damaging:

> The closest opinions in point seem to be the in-chambers opinions of my Brother Marshall in *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973), and of Mr. Justice

> Black in *Meredith v. Fair,* 83 S.Ct. 10, 9 L.Ed.2d 43 (1962). Both opinions considered on their merits motions to vacate interlocutory stays issued by a judge or panel of judges of a Court of Appeals; in *Holtzman* the motion was denied and in *Meredith* it was granted. I think the sense of the two opinions, and likewise that of Mr. Justice Douglas' dissent in *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973), is that a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay. A narrower rule would leave the party without any practicable remedy for an interlocutory order of a court of appeals which was ex hypothesi both wrong and irreparably damaging; [footnote omitted] a broader rule would permit a single Justice of this Court to simply second-guess a three-judge panel of the court of appeals in the application of principles with respect to which there was no dispute.
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> *Coleman v PACCAR, Inc.*, 424 U.S. 1301, 1303-1304 (1976)(Rehnquist, J., in chambers)

STANDARDS FOR GRANTING RELIEF

The petitioners must meet four familiar standards in order to be entitled to a stay of the stay entered by the Sixth Circuit:

1. The petitioners must establish that there is a "reasonable probability" that four Justices will consider the certiorari issue sufficiently meritorious to grant certiorari;

2. The petitioners must show that there is a "fair prospect" that a majority of the Court will conclude that the decision below was erroneous on the merits;

3. The petitioners must demonstrate that irreparable harm will result from the denial of a stay by this Court;

4. In close cases, it may be appropriate to balance the equities, by exploring relative harms to the parties and to the public at large.

Rostker v Goldberg, 448 U.S. 1306, 1308 (1980)(Brennan, J., in chambers).

As set forth below, the petitioners meet each of these standards. Because the Sixth Circuit panel explicitly rested its decision on the probability of success on the merits--even going so far as to say that the decision would have been different if it had assessed that probability differently (Ex A, p. 13)--the petitioners will concentrate on the first two factors, discussing each together in the first section of this motion. The petitioners will then set forth the irreparable harm that will result if the Sixth Circuit's stay is not lifted.

THERE IS A REASONABLE PROBABILITY THAT THE COURT WILL GRANT CERTIORARI AND MORE THAN A FAIR CHANCE THAT THE COURT WILL REVERSE THE RULING BELOW

A. Proposal 2 establishes a far more onerous procedure that minorities alone must follow in seeking changes in admission and academic standards at the defendant universities.

1. The unequal and unlawful political process established by Proposal 2.

Ten years ago, this Court struck down a state Constitutional provision adopted by a state referendum that prevented local cities and towns from enacting ordinances to protect lesbians and gay men against discrimination. As the Court held, "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)(Kennedy, J).

Twenty years ago, the Court struck down a state constitutional amendment that allowed local school boards to use busing for any purpose except for racial desegregation. The Court struck down the amendment because it discriminatorily required minorities alone to win approval in a statewide referendum in order to implement busing plans designed to achieve the integration of the public schools. Again, the Court held that

> 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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> *Washington v Seattle School District No. 1,* 458 US 457, 485-486 (1982).

Forty years ago, the Court first established the principle that underlay *Romer* and *Seattle School District* when it struck down a City charter amendment that required the City Council to submit ordinances addressing racial and religious discrimination in housing--and only those subjects--to a vote of the citizens. The Court held 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).

Proposal 2 does precisely what this Court has condemned for almost forty years.

From the Michigan Constitution of 1850 forward, the governing boards of the University of Michigan and, later, of Michigan State University and Wayne State University, have had full control over the selection of students, the disbursement of financial aid, the adoption of a curriculum, and the promulgation of academic standards for the respective institutions. See, e.g., *Sterling v Regents of the University of Michigan*, 110 Mich. 369 (1896); Mich. Const. 1963, art. 8, sec. 5. The governing board of the defendant universities is 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).

Before the adoption of Proposal 2, *any* group seeking a change in admission or other academic standards had only to approach the faculties and, if necessary, the governing boards of the defendant universities in order to secure a definitive decision on its proposals.

After the adoption of Proposal 2, however, there are now separate and unequal procedures. Sports fans, the children of alumni, the residents of particular cities, lesbians and gay men, veterans, artists and almost every group other than racial minorities still needs only to approach the faculties and, if necessary, the governing boards in order to secure a change that will benefit its interests. But racial or national minorities and women must now follow a distinctly second-class procedure.

They--and they alone--may not secure *any* change in admission standards, graduation requirements, or any other academic standard if the opponents of that change can successfully stigmatize it as "preferential treatment" based on race, national origin, or gender.

The separate and unequal procedure does not stop there. If *any other* group secures a change in an academic standard--including for example a *real* preference for athletes or the sons and daughters of alumni--the issue stops with the regents, the trustees or the board of governors. *See Sterling, supra.* If, however, a racial or national minority secures a change, that change is subject to challenge in state court if an individual allegedly aggrieved by it decides to file an action.

That is no small burden. The prevailing academic standards, including grade point averages and test scores, are inherently imprecise and are permeated with multiple levels of discrimination. *Grutter, supra,* 539 U.S. at 345-346, 369-370 (2003)(Breyer and Ginsburg, JJ, concurring, and Thomas and Scalia, JJ, dissenting). On standards affecting race, national origin or gender *alone*, however, Proposal 2 requires state trial courts to wade into the academic thicket and decide whether a standard is "preferential" to a particular group or individual.

If the judges (or juries) determine the standard to be "preferential treatment," the universities would be liable for damages--and minorities would be deprived of the change unless they successfully waged a statewide referendum to amend the Constitution.

As is obvious, after Proposal 2, the gauntlet that minority students or women have to run is far more onerous than the procedure that any other group has to follow in order to secure change that it sees as in its interest.

The procedural burdens inevitably mean a loss of substantive rights. By subjecting the universities to the constant threat of lawsuits, Proposal 2 puts a constant downward pressure on the ability of the universities to continue the affirmative action programs that were won in the 1960s. It means that racial or national minorities and women have little or no chance of defending those gains through the normal legal channels.

California's Proposition 209, from which Proposal 2 is copied, stands as the shining example of the Brave New World that the backers of Proposal 2 seek to bring to Michigan. As set forth in detail below, black and Latino/a students have been virtually run out of the most selective graduate and professional schools in that State. Similarly, in

its most selective undergraduate colleges, the number of black, Latino/as, and Native American students has dropped by 50 percent or more--and is now far below the percentage of those groups among the young people or the high school graduates in that State. See infra, at 16-17.

In issuing an Opinion six hours after briefing was completed, the Sixth Circuit has decreed that Michigan must follow the same road. Unlike California, however, which at least had a year to plan how to deal with the devastating effects of Proposition 209, the Court of Appeals has declared that Michigan has to enter the Brave New World cold turkey.

2. There is a high probability that this Court will review and reverse the decision of the Sixth Circuit.

The Sixth Circuit candidly stated that its stay of the district court's injunction turned essentially on its view that the plaintiffs had asserted "weak federal claims," and that if it saw the merits differently, "we would likely treat the stay motion differently as well." (Ex A, p. 13).

With all due respect, if the Sixth Circuit had more candidly approached *Hunter*, *Seattle School District* and *Romer*, this petition would not be necessary, for it is the Sixth Circuit's reasons for departing from those cases that are extremely weak and, indeed, non-existent.

The panel offers three reasons. First, it says, "the classes burdened by [Proposal 2]" make up a "majority of the Michigan population," and the "majority," it says, needs no protection against discrimination in the political process (Ex A, p. 11). Second, it claims, in *Hunter*, *Seattle*, and *Romer*, the minorities sought protection against discrimination, while here they seek "preferences," which, it says, lifts this case out of the

protection of *Hunter* altogether (Ex A, p. 11). Third, the panel claims, Proposal 2 does not reallocate the "political structure of Michigan" but is "akin to the 'repeal of race-related legislation or policies that were not required by the Federal Constitution..." (Ex A, p. 11, citing *Crawford v Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538 (1982)).

None of these reasons has *any* merit.

To begin with, Proposal 2 imposes special burdens on discrete and insular minorities--blacks, Latino/as and Native Americans. Together, these groups make up no more than 17 percent of Michigan's population. Separately they make up from 1 to 12 percent of its population. No one will be deceived by an attempt to convert these discrete minorities into a majority by adding white women (or perhaps Catholics) to the total and then saying that Proposal 2 burdens a majority of the population. As the black, Latino/a and Native American students know well, Proposal 2 burdens discrete minorities--and as such it is clearly subject to *Hunter's* requirement that racial distinctions in political procedures be justified by a compelling state interest, which is completely absent here.

Moreover, as to women, one can not, as the Sixth Circuit panel did, exempt them from the protections of *Hunter, Seattle School District* and *Romer* simply because they are always and everywhere a slight majority of the population. As the Court has held, the reality is what counts, *Hunter*, *supra.*, 393 US at 391, and the reality is that women remain a distinctly disadvantaged group in our society and there is neither a "compelling reason" nor "persuasive justification" for relegating them to a separate and unequal political procedure for defending their rights.

The Sixth Circuit's second reason for departing from *Hunter*, *Seattle School District* and *Romer* has even less merit. *Grutter* makes clear that racial and national minorities have a *right* to fight for "affirmative action" policies and that the universities have a *right* "grounded in the First Amendment" to adopt such policies without violating the Fourteenth Amendment. After paying lip service to *Grutter*, however, the Sixth Circuit panel labels affirmative action plans "racial preferences" and asserts that the right to fight for what *it* calls "preferences" is a outside the pale of interests protected by the Fourteenth Amendment (Ex A, p. 11).

To begin with, the petitioners are not fighting for preferences. Anyone who is familiar with Michigan knows that there is a broad and well-traveled highway between the gleaming, well-staffed schools in the City's white suburbs and the universities in Ann Arbor and East Lansing. But between the dilapidated, understaffed schools of Detroit and those same cities, there is only a narrow path, strewn with obstacles. The petitioners are fighting to keep that path open. They are fighting not for preferences, but for equality.

The backers of Proposal 2 and the Sixth Circuit panel obviously do not agree with that characterization. But the judges, at least, should recognize that the *political rights* of a minority can not be defined by the labels that the opponents of the minority place on its proposals. The opponents of the fight for a fair housing ordinance in Akron, for busing in Seattle, and for lesbian and gay rights in Colorado labeled all of those fights as efforts to win "preferences," "special privileges," and the like. In fact, every civil rights measure of the last century was labeled a "preference" or an attempt to gain "special privileges" by those who opposed it.

As *Hunter*, *Seattle School District* and *Romer* have held, however, the majority may not deprive a minority of equal political rights by affixing a prejorative label to the minority's proposals. As the *Seattle* Court held, if the substantive proposals advanced by the minority comply with the United States Constitution, the desirability and efficacy of those policies are "matters to be resolved through [a] political process" that does not discriminate against minorities in the procedure that it must follow to achieve "legislation in its interest." *Seattle School District, supra*, 458 U.S. at 474. [3] Like the Ninth Circuit panel before it, the Sixth Circuit panel erred grievously by departing from the equal procedures mandated by *Hunter*, *Seattle School District* and *Romer* simply because the judges on those panels did not approve of lawful affirmative action policies that the minority was fighting to protect. See *Coalition for Economic Equity v Wilson*, 122 F 3d 692 (CA 9 1997), *cert den* 522 US 963 (1997).[4]

Third, and finally, the Sixth Circuit panel's claim that Proposal 2 did not "reallocate power" is disingenuous at best (Ex A, at 11, citing *Crawford, supra*, 458 U.S. at 538). Before Proposal 2, the Regents, the Trustees, and the Board of Governors had full power to implement admissions policies, including any affirmative action plan that was lawful under the United States Constitution. After Proposal 2, however, the governing boards, no longer have full power over one set of issues alone--issues that

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[3] As the dissenters in *Seattle* recognized, the principle announced in those decisions specifically applied to attempts to ban affirmative action plans:

> ...[I]f the admissions committee of a state law school devised an affirmative action plan that came under fire, the Court would apparently find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies.

Id., 458 U.S. at 498 (Powell, J, dissenting).

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

relate to racial or national minorities or to women. On those issues--*and on those issues alone*--there are substantive and procedural restrictions on their power that may be enforced by the state judiciary and that may only be set aside by another referendum of the people.

If the Regents, the Trustees or the Governors had voted to eliminate an affirmative action plan, it would not have been subject to challenge under *Hunter* because it would have left the political structure intact, making it possible to reverse the defeat at the next meeting or at the next election for the governing board. Proposal 2, however, changes the political structure so as to make it impossible for minorities to correct the devastating change in admission policies at the next meeting or at the next election of the board.

As Justice Kennedy said, "It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 US at 633-634. As this law has previously existed in only one circuit--the Ninth--there is not yet a split in the circuits. But there is clearly sharp division over this most fundamental of issues.

In the Ninth Circuit, five judges dissented from the denial of rehearing en banc and expressed the view that Proposition 209 violated the holdings of *Hunter*, *Seattle School District* and *Romer*. See *Coal. for Economic Equity, supra*, 122 F 3d at 711-718 (Schroeder, Pregerson, Norris, Tashima, and Hawkins, JJ, dissenting from denial of rehearing en banc). Only three judges rejected that challenge to Proposition 209. *Id.*, at 704-709 (O'Scannlain, Leavy, Kleinfeld, JJ).

The Sixth Circuit will be similarly split. And if Mr. Connerly carries through on his pledge to enact proposals in other states in 2008, there will be more splits.

Given the intensity of minority sentiment in favor of affirmative action--and the need to resolve this issue before Mr. Connerly sponsors more divisive referendums on his unconstitutional proposal--the petitioners submit that this Court should and in all probability will accept a petition for certiorari to resolve the fundamental constitutional challenge to those amendments.[5]

B. Title VI preempts Proposal 2 in governing admissions to universities.

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 U.S.C. s. 2000d.

Acting pursuant to the statute, the United States Department of Education has promulgated regulations that specify the conditions for the receipt of federal funds. 42 U.S.C. s. 2000d-1; 34 CFR s. 100.4(a). As one of those conditions, 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*

[5] The failure of the Court to grant the writ in *Coalition for Economic Equity* is not dispositive. Before the Supreme Court accepted certiorari in the Michigan cases in 2002, it denied the writ in almost every case involving affirmative action. Moreover, what was once a local issue confined to one state is now clearly a national issue.

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.

34 CFR s. 100.3(b)(2)(emphasis added).

There is no question that the defendant universities receive substantial federal funds.

Nor is there any real question that if Proposal 2 eliminates the universities' affirmative action programs, the existing admission systems will have the "effect of defeating or substantially impairing accomplishment of the objectives of the [universities] as respects [black, Latino/a, and Native American students." 34 CFR 100.3(b)(2).

In California, the equivalent ban on affirmative action has excluded thousands of black, Latino/a, and Native American students from the major universities of that State. The enrollment of black freshmen at UCLA, for example, has plummeted from nearly 300 in 1994, to 96 in 2006, with many of those being scholarship athletes. Bunche Center for African American Studies at UCLA, "'Merit' Matters: Race, Myth & UCLA Admissions," p. 1, 6. Similarly, in the first year that Proposition 209 took effect at the University of California at Berkeley, the percentage of black, Chicano, Native American and Latino students dropped by over 55 percent. Bob Laird, *The Case for Affirmative Action* (Berkeley, CA: Bay Tree Publishing), pp 115-116,125.[6]

The effect has been more severe in the graduate and professional schools. At Berkeley's Boalt Hall Law School, the first class to enter after Proposition 209 had one black student—compared to 20 in the last class that entered before Proposition 209 took

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

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.

As its backers have essentially conceded, Proposal 2 would inevitably have the same effect in Michigan. Eighty three percent of black students in Michigan are in segregated schools and 64 percent are in intensely segregated schools. As a result of that segregation, the pool of black and Latino/a students applying to the defendant universities has lower median grade point averages and test scores than the pool of white students applying to the same schools. According to the Dean's testimony in *Grutter*—testimony that has never been challenged by the opponents of affirmative action—if affirmative action were removed from the existing system, the enrollment of underrepresented minorities at the Law School would drop to a "token number." *Grutter v Bollinger*, 288 F 3d 732, 737-738 (CA 6 2002), *aff'd* 539 US 306 (2003).

In its decision in this case, the Sixth Circuit panel properly recognized that Title VI preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." (Ex A, at 12, citing *Cal. Fed. Sav. & Loan Ass'n v Guerra*, 479 U.S. 272, 281 (1987)(plurality)). Similarly, it properly recognized that Proposal 2 "did 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." (Ex A, at 12, citing Mich. Const. art 1, s. 26(4)).

But then the panel stopped. It did not even *acknowledge* the sharp drop in minority enrollment that would occur if Proposal 2 were placed in effect. Still less did it make any determination whether the loss of 50 to 80 percent of minority students conflicted with Title VI and of its implementing regulations. Without even considering

the devastating *actual effect* that the loss of affirmative action would have on the enrollment of minority students, the Sixth Circuit panel asserted that Proposal "reinforces [the goal of Title VI] by prohibiting state universities from ... granting preferential treatment on the basis of race." (Ex A, p. 12). According to the panel, so long as the State *proclaims* that it does not discriminate, it does not matter whether there are any black, Latino/a or Native American students at all.

But that is *not* the standard set by Title VI and its implementing regulations. The question before the Sixth Circuit and this Court is whether those regulations mean what they say--and whether the courts will strike down a state law that has an effect that clearly violates the words and purpose of those regulations. Those questions are of great importance to the country, and will become more important if Mr. Connerly carries through on his threat to impose these laws on the minorities of other states.

In "ruling" on that question--*without ever addressing it*--the Sixth Circuit committed an error that this Court will have to review.

C. 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 s. 1681.

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

Proposition 209 eliminated these programs in California, and the backers of Proposal 2 will attempt to eliminate them in Michigan. Again, there are issues of great moment to the country that will have to be decided by this Court.

THE COURT SHOULD GRANT THE STAY TO PREVENT IRREPARABLE HARM TO THE PLAINTIFFS, TO THE UNIVERSITIES, AND TO THE PEOPLE OF THE STATE OF MICHIGAN

The Sixth Circuit panel ruled in splendid isolation from the actual facts of this case. Having decided that the plaintiff had little chance of success on the merits six hours after the briefs were submitted, the panel rushed to rule on every aspect of the request for an injunction. In fact, it issued a ruling that seeks to prevent any federal court from issuing an injunction against *any* aspect of the implementation of Proposal 2.

Even though the District Court entered an order that was stipulated to by the two chief law enforcement officials of the State--one of whom was an ardent supporter of Proposal 2--the panel showed no deference to their considered judgment or to that of the

District Court. It did not remand for a hearing on the alleged defects in the findings of an agreed-upon injunction--and it did not remand Mr. Russell to the District Court to assert his claims there. Instead, the panel ruled on legal claims that the District Court had never had a chance to rule upon--and it entered findings on irreparable harm even though there had never been hearing on the question of what harm would accrue if the injunction were dissolved.

Even without a hearing, however, the harm that will result is clear.

The harm to the plaintiffs is severe and obvious. As it happened in California and as it will happen in Michigan, in that part of the class still to be admitted, the enrollment of black, Latino/a and Native American students will fall from 50 to 80 percent. There are 130 separate admissions systems at the University of Michigan alone. Without time to plan for a new admissions system in each of these schools, the provosts say that it will not be possible to devise an alternative admission system that will admit any semblance of a racially diverse class (Ex. D).

Many black, Latino/a, and Native American students who would have been admitted with affirmative action will not be admitted now. Indeed for many, the harm will be compounded by the fact that if their high school had processed their transcripts before December 22, they would have been admitted. For students who have faced segregated education and discrimination for their entire lives, the blow will be bitter--and the harm may not be repairable.

Nor will the harm be limited to those minority students who are rejected this year. For those who follow behind them in segregated high schools across the State, the

dashing of hopes and the anger will mean that many otherwise qualified minority students will not even apply to the defendant universities in the future.

The irreparable harm does not stop with the students, however. For well over a generation, the universities of the State and of the Nation have attempted to open their doors to talented black, Latino/a and Native American students. In pursuing that goal, Justice O'Connor has described how the universities have furthered the interests of the Nation as a whole:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." [citation omitted] Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.
>
> *Grutter, supra*, 539 US at 332-333.

In Proposal 2 goes forward, it will destroy the efforts of the State and the Nation to secure a set of leaders with "legitimacy in the eyes of the citizenry."

Failing even to mention this harm to the public interest, the panel concluded that the public interest lies in the will of the people of Michigan being effected in accordance with Michigan law" (Ex A, p. 13). But even the vast majority of the white population of Michigan--which provided essentially all of the votes that supported Proposal 2--does not want chaos or the resegregation of its universities. And even if that majority wanted it, it has no right to relegate black and Latino/a citizens to permanently second-class political rights or to force the universities to violate the federal civil rights acts.

To repeat Justice Kennedy's words, "It is not within our constitutional tradition to enact laws of this sort." *Romer, supra*, 517 U.S. at 633-634. This law has condemned racial minorities to "such a position of political powerless as to command extraordinary protection from the majoritarian political process." *Seattle School District, supra,* 458 U.S. at 486.

As countless others have done before the black and Latino/a students of Michigan turn to this Court for that extraordinary protection. They ask this Court to dissolve the stay entered by the Sixth Circuit, to reinstate the temporary injunction entered by the District Court, and to order the District Court and the Sixth Circuit to decide the validity of Proposal 2 forthwith so that this Court may review the issues and strike down a law that undermines basic democratic rights and the efforts to secure a racially-integrated future for our universities and our Nation.

By Petitioners' Attorneys,

BY: _____

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Dated: January 8, 2007

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EXHIBIT A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0476p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,
Plaintiffs-Appellees,

v.

JENNIFER GRANHOLM, et al.,
Defendants-Appellees,

MICHAEL COX, Attorney General,
Intervenor-Defendant,

ERIC RUSSELL,
Intervenor-Appellant,

TOWARD A FAIR MICHIGAN,
Proposed Intervenor-Appellant.

No. 06-2640

ERIC RUSSELL; TOWARD A FAIR MICHIGAN,
Petitioners.

No. 06-2642

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Decided and Filed: December 29, 2006

Before: SUHRHEINRICH, BATCHELDER, and SUTTON, Circuit Judges.

OPINION

SUTTON, Circuit Judge. On November 7, 2006, the people of Michigan approved a statewide ballot initiative—Proposal 2—which amended the Michigan Constitution to prohibit discrimination or preferential treatment based on race or gender in the operation of public employment, public education or public contracting in the State. Under the Michigan Constitution, the proposal was scheduled to go into effect on December 23, 2006. At stake today is whether the federal courts should permit this state initiative to go into effect or whether we should preliminarily enjoin it in part—in the part, that is, that applies to public universities and to all applicants to those universities. While the Michigan state courts remain free to suspend enforcement of Proposal 2 under state law for all manner of reasons, including those urged upon us here—uncertainty about the meaning of the law, uncertainty about the law's impact on current admissions policies and uncertainty about changing admissions policies in the middle of the current enrollment season—we

are unable to identify any tenable basis under federal law for suspending the law's enforcement. The First and Fourteenth Amendments to the United States Constitution, to be sure, *permit* States to use racial and gender preferences under narrowly defined circumstances. But they do not *mandate* them, and accordingly they do not prohibit a State from eliminating them. In the absence of any likelihood of prevailing in invalidating this state initiative on federal grounds, we have no choice but to permit its enforcement in accordance with the state-law framework that gave it birth.

I.

Legal and policy debates about admissions preferences in the university setting are not new to the people of Michigan. In 2003, the Supreme Court invalidated the University of Michigan's race-based admissions preferences in *Gratz v. Bollinger*, 539 U.S. 244, and it upheld the University of Michigan School of Law's race-based admissions preferences in *Grutter v. Bollinger*, 539 U.S. 306. In apparent response to those decisions, the Michigan Civil Rights Initiative, the executive director of which is Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, began a campaign to place a proposal on the state ballot that would amend the Michigan Constitution to prohibit race- and gender-based preferences in public employment, education and contracting. *See* The Michigan Civil Rights Initiative, http://www.michigancivilrights.org (last visited Dec. 26, 2006).

A.

On January 6, 2005, Gratz announced that her organization had obtained enough signatures under Michigan law to place its proposal—technically named Proposal 06-2 but commonly referred to as Proposal 2—on the statewide ballot. *See* http://www.michigancivilrights.org/media/JG-10605-remarks.pdf (last visited Dec. 26, 2006). The Michigan Board of State Canvassers eventually approved the ballot language for Proposal 2, which would amend Article I, § 26 of the Michigan Constitution if approved.

On November 7, 2006, the people of Michigan voted in favor of Proposal 2. Fifty-eight percent of the voters supported it, and 42% opposed it. *See* Michigan Department of State, 2006 Official Michigan General Election Results, http://miboecfr.nictusa.com/election/results/06GEN/90000002.html (last visited Dec. 26, 2006).

The constitutional amendment contains several pertinent provisions. *First*: "The University of Michigan, Michigan State University, Wayne State University and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const. art. 1, § 26.

Second: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.*

Third: "This section"—namely the amendment—"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." *Id.*

Fourth: "The remedies available for violations of this section shall be the same . . . as are otherwise available for violations of Michigan anti-discrimination law." *Id.*; *see, e.g.*, Mich. Const. art. VIII, § 2; Mich. Comp. Laws § 37.2101 *et seq.* (the Elliot-Larsen Civil Rights Act).

Fifth: "This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section." Mich. Const. art. I, § 26.

Sixth: "This section does not invalidate any court order or consent decree that is in force as of the effective date of this section." *Id.*

Seventh: In accordance with the Michigan Constitution, the amendment was scheduled to go into effect 45 days after the election, which is to say December 23, 2006. *See* Mich. Const. art. XII, § 2.

On November 8, 2006, one day after the election, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality By Any Means Necessary, along with other organizations and individuals opposed to Proposal 2 (collectively, the "plaintiffs"), filed a lawsuit against (1) Jennifer Granholm, the Governor of Michigan, and (2) the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University (collectively, the "Universities"), seeking a declaratory judgment that the amendment was invalid and a permanent injunction against its enforcement. They filed the lawsuit in the Southern Division of the Eastern District of Michigan. In their amended complaint, plaintiffs contended that Proposal 2 violates two federal constitutional provisions (the First and Fourteenth Amendments), three federal civil rights statutes (Title VI, Title VII and Title IX) and one presidential order (Executive Order 11246). To date, plaintiffs have not independently filed a motion for a preliminary injunction or a temporary restraining order against enforcement of Proposal 2.

On December 11, the Universities filed a cross-claim against Governor Granholm, seeking (1) a declaratory judgment "that under federal law the Universities may continue to use their existing admissions and financial aid policies through the end of the current [enrollment] cycle" and (2) a preliminary injunction that "allows the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle." In support of their requests, the Universities noted that: (1) "[s]erious controversies exist regarding the validity, meaning, impact, and application of the Amendment"; (2) "[t]he Governor has requested an interpretation of the Amendment from the [state] Civil Rights Commission" in 90 days, but they cannot await the Commission's decision given the effective date (December 23) of the law; (3) "[t]he Amendment becomes effective in the midst of the Universities' current admission and financial aid cycle," which generally "run[s] from the early fall through the spring"; and (4) "[f]orcing the Universities to abandon their existing admissions and financial aid policies in the midst of this cycle would require them to apply different policies to applicants within the same cycle and different policies than they have announced" to the public.

In further support of their requests for declaratory and injunctive relief, the Universities argued that "[t]he Amendment implicates federal law." "It incorporates," they noted, "whole bodies of federal law by reference, including 'federal programs,' 'federal law,' and the 'United States Constitution.'" The Universities, they added, "put their admissions and financial aid policies in place in reliance on the Supreme Court's reaffirmation in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors . . . as race." On the same day, they filed a motion for a preliminary injunction, seeking the same thing—to enjoin the enforcement of Proposal 2 through the end of the current admissions cycle.

On December 14, three days after the Universities filed their cross-claim, the Michigan Attorney General, Michael Cox, filed a motion to intervene in the lawsuit. *See* Fed. R. Civ. P. 24. The district court granted the Attorney General's motion to intervene that same day.

On December 18, the three sets of parties to the cross-claim—the Governor, the Attorney General, the Universities—and the plaintiffs in the underlying action filed a stipulation with the district court, which reads in part:

> It is hereby stipulated, by and between the parties that this Court may order as follows:
>
> (1) that the application of Const[.] 1963, art[.] [I], § 26 to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;
>
> (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim . . .
>
> . . .

Stipulation at 3.

That same day, matters grew more complicated when an individual and an interest group sought to intervene in the case. The individual was Eric Russell, a white male who has applied to the University of Michigan School of Law for admission in the fall of 2007, Affidavit of Eric Russell, at 1; the organization was Toward A Fair Michigan ("TAFM"), a non-profit entity "whose mission is to further understanding of equal opportunity issues involved in guaranteeing civil rights for all citizens," Affidavit of William Allen, at 1.

On December 19, the district court issued what it labeled a "temporary injunction." Consistent with the stipulation entered into by the Governor, the Attorney General, the Universities and the plaintiffs, the court enjoined application of Proposal 2 to the Universities' admissions and financial-aid policies until July 1, 2007, and dismissed the Universities' cross-claim. Dist. Ct. Order at 3. In essence, then, the cross-claimants dismissed their claim for an ordinary preliminary injunction in exchange for the stipulated 194-day injunction. However the injunction is labeled, it remains a preliminary injunction, albeit one of finite duration.

That same day, Russell and TAFM filed a motion urging the district court to rule on their motion to intervene by December 21 and requesting a stay of the order enjoining enforcement of Proposal 2 before its effective date—December 23.

B.

On December 21, having heard nothing from the district court on their intervention or stay motions, Russell and TAFM filed a notice of appeal to this court. The next day, they filed in this court an "Emergency Motion for a Stay Pending Appeal" of the district court's preliminary injunction and a Petition for a Writ of Mandamus directing the district court to grant their motion to intervene and to vacate its preliminary injunction.

On December 26, we issued an order giving the parties to the cross-claim (the Governor, the Attorney General, the Universities) as well as the plaintiffs in the underlying action an opportunity to file responses to the motions by December 28. The order also gave Russell and TAFM an opportunity to file a reply brief by December 29. The City of Lansing, the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee each moved this court for leave to respond to Russell's motion and attached briefs to their motions. Because the district court has now denied their motions to intervene, and the denials have not been resolved on appeal, these entities are not parties to this action. Nonetheless, we have considered their filings as we would the filings of *amici curiae*.

On December 27, the district court ruled on the motions to intervene. It granted Russell's motion and denied TAFM's motion both as of right and by permission. At the same time, it denied motions to intervene filed by the City of Lansing (Michigan), the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee. The district court has not ruled on Russell's motion for a stay pending appeal.

On December 28, Russell and TAFM filed an amended notice of appeal with respect to the preliminary injunction issued by the district court on December 19. TAFM also appealed the denial of its motion to intervene (No. 06-2656), as did the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee (No. 06-2653) and the City of Lansing (No. 06-2658).

C.

Let us be clear that the merits of the appeal of the order granting the preliminary injunction and the appeals of the orders denying the motions to intervene are not before this panel. In addition to the Petition for a Writ of Mandamus, the only matter presently before this panel is the motion filed by Eric Russell under his previously filed appeal, titled "Emergency Motion for a Stay Pending Appeal," asking us to stay the district court's preliminary injunction—in other words, to allow article I, section 26 of the Michigan Constitution to take immediate effect—until such time as Russell's appeal can be decided on the merits.

II.

As an initial matter, Russell plainly may challenge the validity of the preliminary injunction. He has standing to participate in the case because he has applied for admission to the University of Michigan School of Law for matriculation in 2007 and accordingly has a direct interest in whether Proposal 2 applies to the Law School's admissions decisions this year. And he may intervene as of right in the case for one of two reasons. Either the district court's failure to address his meritorious intervention motion before the effective date of Proposal 2 on December 23 amounted to an effective denial of the motion, which we may correct on appeal (and indeed have done so before in a similar setting), *see Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990), and which we may review on an interlocutory basis, *see Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). Or the district court's order granting the intervention motion on December 27 permitted Russell to file a new notice of appeal, which he did on December 28 and which allowed him to seek immediate review of the preliminary injunction. Either way, Russell is now a party in the case; he has filed a notice of appeal with respect to the preliminary injunction; we have jurisdiction over an interlocutory appeal from a preliminary injunction, 28 U.S.C. § 1292(a); he has filed a Motion for an Emergency Stay Pending Appeal; and we may review the stay motion in connection with our authority over the appeal of the preliminary injunction.

III.

Our standard for reviewing a motion for a stay pending appeal is a familiar one. Much like the standard for determining whether to issue a preliminary injunction, *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (per curiam), we consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). All four factors are not prerequisites but are interconnected considerations that must be balanced together. *Id.*

A.

There are several ways to look at the likelihood that the district court's preliminary injunction order will be upheld on appeal, and each of them holds little promise that we will be able to uphold the order. *First*, the order itself does not contain a sufficient ground for prohibiting Proposal 2 from going into effect. By its terms, the order rests on two grounds: (1) "a stipulation from all parties to the case"—which at that time included the plaintiffs in the underlying action, the Universities, the Governor and the Attorney General—"consenting" to the preliminary injunction sought by the Universities, and (2) the court's conclusion "that the interests of all parties and the public are represented adequately" by these parties. Order at 3. The order does not contain any discussion of the federal-law grounds for granting an injunction. It does not contain any evidentiary findings concerning the need for immediate relief. And it does not address the four factors for granting a preliminary injunction: the Universities' likelihood of success on the merits of their cross-claim; the risk of irreparable injury to affected parties with or without the preliminary injunction; and the public interest. *See Six Clinic Holding Corp. II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997) ("requir[ing]" a district court "to make specific findings concerning each of the four factors"); *United States v. Sch. Dist. of Ferndale, Mich.*, 577 F.2d 1339, 1352 (6th Cir. 1978) (vacating district court's preliminary-injunction ruling because among other reasons the district court "failed to make an express finding as to probability of success on the merits").

Whether stipulated injunctions concerning the federal constitutionality of a state law—indeed a state constitutional amendment—are a good idea, bad idea or even a permissible idea need not detain us in gauging the merits of this stay motion. *See 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."); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) ("Judicial approval . . . may not be obtained for an agreement which is . . . contrary to the public interest."). The fact remains that this stipulated injunction was flawed on its own terms. From the day it was entered (December 19), it could not be said that the injunction furthered "the interests of all parties and the public." By December 18, it was clear that at least one member of the public (Eric Russell) did not support the suspension of Proposal 2 because by then he (and others) had filed a motion to intervene as of right in the lawsuit precisely because he (and others) disagreed with the parties' stipulated injunction—in his case because it would jeopardize his efforts to gain admission to the Law School in the 2007 first-year class.

Subsequent events confirm that the stipulated injunction did not account for the concerns of all interested parties—namely, the district court's December 27 order granting Russell intervention as of right. Intervention Order at 15; *see* Fed. R. Civ. P. 24(a) (requiring intervention as of right

when the individual has "an interest" in the case and "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties"). In permitting Russell to intervene as a party in the case, the trial court concluded that his "individual interest . . . *may not* be taken into account by the present parties." Intervention Order at 15 (emphasis added). That seems to be an understatement. The parties knew of Russell's opposition to the stipulated injunction, to say nothing of the opposition to the injunction by other interested groups seeking to intervene in the case (including the proponent of Proposal 2), and nonetheless proceeded to seek its entry. Even now, the closest they have come to accounting for his interests in the case is to say that "he is free to reapply" if the Law School denies him admission this year. Universities' Br. at 38. In the final analysis, the only articulated basis provided for the injunction—that it furthered "the interests of all parties and the public"—is not true and thus does not suffice to sustain the injunction.

Second, even if we look behind the court's December 19 order to the Universities' cross-claim and motion for a preliminary injunction, these filings do not supply a basis for enjoining the law on the ground that it violates federal constitutional or statutory law. Most of these pleadings deal with irreparable-harm and public-interest arguments: the difficulty of changing admissions and financial-aid policies in the midst of an enrollment cycle, uncertainty over the meaning of the amendment under state law and the delay that will occur before the Michigan Civil Rights Commission acts on the Governor's request to interpret the amendment within 90 days—all good-faith reasons for seeking delay, to be sure, but none of them pertinent to establishing a federal ground for suspending the law. As to that point, the Universities' request for a preliminary injunction says just one thing—that they have a First Amendment right to continue using race- and gender-based preferences. (More on that argument later.) The salient point, however, is that the request for a stipulated injunction was not premised on any agreement, or even suggestion, that Proposal 2 violated any federal law—constitutional or otherwise. That of course is because the Attorney General has taken the position that Proposal 2 is perfectly constitutional and the Governor has not yet taken any position on the issue.

Also unhelpful is the Universities' position that the federal courts should "determin[e] their rights and responsibilities under the Amendment" and delay the effective date of the law until that task has been completed. Cross-Claim at 5. This suggestion looks at the problem through the wrong end of the lens. State courts and state agencies (such as the Michigan Civil Rights Commission) generally get the first (and ultimately the last) crack at interpreting a state law—which is why uncertainty over the meaning of a state law often counsels in favor of a federal court staying its hand until the state courts have had a chance to construe the law. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). We know of no authority (and none has been supplied to us) saying that uncertainty over the meaning of a state law by itself supplies a basis for a federal court to suspend the law's effective date.

That the meaning of the amendment could be affected by the meaning of certain federal statutes, as the Universities also complained, does not change matters. Cross-Claim at 4. The Universities never explained what those federal laws were or exactly how they would affect the meaning of the amendment. But even if the Universities had suggested, say, that Title VI of the Civil Rights Act of 1964 might conflict with Proposal 2 under certain constructions of the amendment and certain constructions of Title VI, that would not give a federal court license to suspend the amendment. One would first want to know how the State was implementing the amendment before undertaking the task of determining whether that interpretation conflicted with some yet-to-be-determined construction of Title VI.

All of this is prelude to the most unusual feature of the stipulated injunction: the premise for granting it no longer exists. The Universities filed a cross-claim against the Governor (and effectively the Attorney General once he had intervened) seeking a declaration of "their rights and responsibilities" under Proposal 2 and a preliminary injunction until that had been done. But in return for the Attorney General's and Governor's stipulating to a preliminary injunction, the Universities agreed to dismiss the request for declaratory relief. So while the district court has suspended the effective date of the law, it no longer has the Universities' request (or any other request) before it for declaring the Universities' "rights and responsibilities" under the amendment—or for that matter any other explanation for enjoining the law, save for the fact that some interested parties want it stayed.

In view of this point, it puzzles us that the Attorney General, who stipulated to the entry of the preliminary injunction, now contends that we lack jurisdiction to entertain a motion to stay it. Why? Because, he says, the Universities' underlying cross-claim has now been dismissed and because the district court did not permit Russell to become a party to the case until after that dismissal. But of course Russell was allowed to intervene in the "action," Fed. R. Civ. P. 24(a), not a cross-claim, and that action is alive and well. The Attorney General, moreover, seems to ignore what would seem to be a corollary to his proposed interpretation of this sequence of events—namely that if the cross-claim had already been dismissed, there would no longer be any basis for a preliminary injunction, *see supra*, and the district court could not have undertaken the necessary inquiry into the parties' likelihood of success on the cross-claim, much less found that any such probability of success existed.

Third, the responses to the stay motion filed in our court by the four sets of parties to the stipulated injunction—the Governor, the Attorney General, the Universities and the plaintiffs in the underlying action—also do not support the injunction. While all four of them argue extensively about the hardships of complying with the law in the middle of the 2006-2007 admissions cycle, they do not offer tenable explanations for suspending Proposal 2 on the basis of federal law.

Far from raising doubts about the validity of the amendment under federal law, the Attorney General thoroughly explains why it *does not* violate the Federal Constitution or any federal statutes. While the Governor does not expressly defend the validity of the amendment in her appellate papers, neither does she say that it violates any federal law.

The First Amendment. In their response to the stay motion, the Universities argue that the amendment violates the First Amendment, specifically the Universities' right to select a diverse student body in the name of academic freedom. But it is one thing to defer to a state university's judgment in deciding who may attend that university—and to defer in the process to the university's academic freedom that "long has been viewed as a special concern of the First Amendment," *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)—in determining whether the university has run the gauntlet of defending presumptively unconstitutional racial classifications. It is quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences. Were it otherwise, as Russell points out, "state laws requiring colleges to give preferences to state residents or to admit those in the top 10% of their high school classes" would routinely violate the First Amendment. Stay Motion at 17.

The Universities mistake interests grounded in the First Amendment—including their interests in selecting student bodies—with First Amendment rights. It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. *See, e.g., Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819). One does not generally think of the First Amendment as protecting the State from the people but the other way

around—of the Amendment protecting individuals from the State. After all, *Bakke*, *Grutter* and *Gratz*—the lead cases upon which the Universities rely in claiming that Proposal 2 violates the First Amendment—involved constitutional challenges by individuals against States (or at least state officials). Even then, the States' invocation of the First Amendment in those cases hardly shows that the First Amendment trumps the Fourteenth. In *Bakke* and *Gratz*, the Court *invalidated* the racial preferences contained in the schools' admissions programs under the Equal Protection Clause. And while *Grutter* upheld the School of Law's use of racial classifications in making its admissions decisions, that was not because the First Amendment compelled it to do so. *Grutter* addresses academic freedom in the context of asking whether "the Law School's use of race is justified by a compelling state interest," 539 U.S. at 327, a question it answers by saying that its decision is "in keeping with our tradition of giving a degree of deference to a university's academic decisions, *within* constitutionally prescribed limits." *Id.* at 328 (emphasis added); *see Bakke*, 438 U.S. at 311–12 (opinion of Powell, J.) (stating that "the attainment of a diverse student body" is "a constitutionally permissible goal for an institution of higher education"). One of those "constitutionally prescribed limits," however, is the separate requirement of narrow tailoring—an inquiry that no one maintains may be satisfied simply by invoking a university's legitimate, but hardly dispositive, interest in academic freedom.

In discussing the narrow-tailoring requirement, moreover, *Grutter* urged universities to look to States that had eliminated the use of race in making admissions decisions to determine whether race-neutral ways of furthering the universities' interests in a diverse student body existed. *See* 539 U.S. at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). If, as the Universities maintain, the First Amendment prohibits States from eliminating racial preferences in admissions, one would not expect the Court to urge universities to consider the efficacy of state laws doing just that. No less strange, *Grutter* ends by explaining that affirmative action programs may not exist in perpetuity. Noting that it has been 25 years since *Bakke*, it remarked that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343. The First Amendment, by contrast, has no termination point, whether in 25, 50 or 250 years, making it improbable that the same Court that decided *Grutter* would hold that state universities have a First Amendment right to maintain racial preferences.

The Equal Protection Clause. The plaintiffs in the underlying action offer a host of other arguments for sustaining the preliminary injunction. In addition to invoking the First Amendment, they claim that the amendment likely violates the Equal Protection Clause of the Fourteenth Amendment. We do not agree.

In contending that the Equal Protection Clause compels what it presumptively prohibits, plaintiffs face a steep climb. The Clause prevents "official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 229 (1976), and on the basis of sex, *United States v. Virginia*, 518 U.S. 515 (1996), not official conduct that bans "discriminat[ion] against" or "preferential treatment to" individuals on the basis of race or sex—as Proposal 2 does.

If "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), and if racial distinctions "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (citations omitted), a state constitutional amendment designed to eliminate such "distinctions" in state government would seem to be an equal-protection virtue, not

an equal-protection vice. After all, the "color-blind" goal of the Equal Protection Clause, *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), 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), making it difficult to understand how the same constitutional provision could prohibit a State from doing away with race- and sex-based classifications sooner rather than later. *See Crawford v. Bd. of Educ. of the City of Los Angeles*, 458 U.S. 527, 538–39 (1982) ("[T]he 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.").

Grutter, it is true, says that States still may use racial classifications as a factor in school admissions when they can establish a compelling interest for doing so and when they can satisfy the demanding requirements of narrow tailoring. But *Grutter* never said, or even hinted, that state universities *must* do what they narrowly *may* do. Otherwise: the Court would not have directed state universities to look to "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law," to "draw on the most promising aspects of these race-neutral alternatives as they develop," 539 U.S. at 342; it would not have quoted in the next line of the opinion Justice Kennedy's concurrence in *United States v. Lopez*, 514 U.S. 549, 581 (1995), to the effect that "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"—such as looking for race-neutral methods of seeking diverse student bodies, *Grutter*, 539 U.S. at 343; and it would not have said that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," *id.* Surely a State may offer more equal protection than the Fourteenth Amendment requires, *see Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free *as a matter of its own law* to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards"), and surely a State may end racial preferences some years before they must do so. In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification.

Much the same is true of classifications based on gender. "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, 518 U.S. 515, 532 (1996) (internal footnote and citation omitted); *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("[O]ur Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today.") (internal quotation marks omitted). If the Equal Protection Clause gives "heightened" scrutiny to such distinctions, a State acts well within the letter and spirit of the Clause when it eliminates the risk of any such scrutiny by removing gender classifications altogether in its admissions programs.

In taking this path, we do not walk alone. In 1997, the Ninth Circuit rejected an Equal Protection challenge to a similar proposition passed by the people of California. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997). Like Proposal 2, Proposition 209 outlawed discrimination or preferential treatment "on the basis of race, sex, color, ethnicity, or national origin" in the realms of public employment, education and contracting. Cal. Const. art. I, § 31(a). Like the plaintiffs in our case, the plaintiffs in the Ninth Circuit case argued that the state initiative denied them equal protection of the laws by burdening their right to seek the benefits of existing affirmative action programs. *See Coal. for Econ. Equity*, 122 F.3d at 705. And like the Ninth Circuit, we find these arguments unpersuasive. *See id.* at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender."); *see id.* at 708 ("The controlling words, we must remember, are 'equal' and 'protection.' Impediments to preferential treatment do not deny equal protection.").

Attempting to head off this conclusion, plaintiffs contend that Proposal 2 violates their equal protection rights by placing an unfair political burden on women and minorities who "may now seek relief" in the form of the re-institution of race- and gender-based admissions preferences "only by mounting a statewide campaign to amend" the Michigan Constitution. Complaint at 17. Three Supreme Court cases, they argue, demonstrate that state and local governments may not restructure the political process to disadvantage or discriminate against minorities. *See Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Romer v. Evans*, 517 U.S. 620 (1996).

In all three cases, however, the Court determined that the laws at issue burdened minority interests in the political process in a way that Proposition 2 does not. *Hunter* addressed an amendment to Akron's city charter requiring Akron's city council to obtain majority approval by the city before implementing housing ordinances dealing with racial, religious or ancestral discrimination. Although the provision purported on its face to treat all races equally, in "reality," the Court held, "the law's impact falls on the minority" because the "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391. *Seattle* invoked *Hunter* to strike down a Washington State initiative preventing local school boards from using racially integrative busing. There the Court reasoned that the initiative "remove[d] authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." 458 U.S. at 474. *Romer* struck down an amendment to the Colorado constitution that prohibited local governments from acting to protect homosexuals from discrimination, an amendment that "impose[d] a special disability upon [homosexuals] alone." 517 U.S. at 631.

Unlike the laws invalidated in *Hunter*, *Seattle* and *Romer*, Proposal 2 does not burden minority interests and minority interests alone. The proposal prohibits the State from discriminating against or granting preferential treatment to individuals on the basis of "race, sex, color, ethnicity, or national origin." Mich. Const. art. I, § 26. No matter how one chooses to characterize the individuals and classes benefitted or burdened by this law, the classes burdened by the law according to plaintiffs—women and minorities—make up a majority of the Michigan population. As *Hunter* indicates, the "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391. Unlike the *Hunter* line of cases, then, Proposal 2 does not single out minority interests for this alleged burden but extends it to a majority of the people of the State.

Even were we to consider only the law's restrictions on racial preferences, this political-process claim still would not be likely to succeed. The challenged enactments in *Hunter*, *Seattle* and *Romer* made it more difficult for minorities to obtain *protection from discrimination* through the political process; here, by contrast, Proposal 2 purports to make it more difficult for minorities to obtain *racial preferences* through the political process. These are fundamentally different concepts. The *Hunter*, *Seattle* and *Romer* decisions, moreover, objected to a State's impermissible attempt to reallocate political authority. *See Seattle*, 458 U.S. at 470 (prohibiting a government from "explicitly using the *racial* nature of a decision to determine the decisionmaking process"). Instead of reallocating the political structure in the State of Michigan, Proposal 2 is more akin to the "repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place," *Crawford*, 458 U.S. at 538, an action that does not violate the Equal Protection Clause. *See generally Coal. for Econ. Equity*, 122 F.3d at 708 (reasoning that "[i]mpediments to preferential treatment do not deny equal protection").

Title VI. Plaintiffs next argue that Title VI of the Civil Rights Act of 1964 preempts Proposal 2. But they face several obstacles in bringing the claim. For one, the Civil Rights Act says

that it may not 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. That means plaintiffs must establish a form of "conflict preemption," which is to say they must show either that "compliance with both federal and state regulations is a physical impossibility" or that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (plurality) (internal quotation marks omitted).

For another, Proposal 2 by its terms eliminates any conflict between it and federal-funding statutes like Title VI. "This section," the proposal says, "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." Mich. Const. art. I, § 26(4). And Title VI in turn says that "[n]o 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. What Title VI requires, in other words, Proposal 2 expressly allows—eliminating any conflict between the two laws.

Nor does Proposal 2 thwart the purposes of Title VI—"prevent[ing] discrimination in federally assisted programs." Pub. L. No. 88-352, 78 Stat. 241 (1964). Proposal 2 reinforces that goal by prohibiting state universities from discriminating, or granting preferential treatment, on the basis of race.

Title IX. Plaintiffs further contend that Title IX of the Education Amendments of 1972 preempts Proposal 2. This claim, too, holds little promise. Proposal 2, as shown, expressly avoids conflicts with federal-funding statutes like this one. Mich. Const. art. I, § 26(4). And by preventing discrimination on the basis of sex, Proposal 2 directly serves Title IX's objectives. *See* 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). (In their complaint, plaintiffs also relied on Title VII and an Executive Order, but they have not invoked these provisions in seeking to uphold the preliminary injunction.)

B.

Having determined that Russell has a strong likelihood of reversing the district court's preliminary injunction, we must consider whether the other stay factors militate against granting a stay. They do not. The irreparable-injury factors do not meaningfully favor one set of parties over the other. To the extent plaintiffs and the Universities maintain that irreparable harm will occur to them because Proposal 2 violates their federal constitutional rights, that does not help them. As we have shown, they have little likelihood of establishing that Proposal 2 violates the Federal Constitution.

What we have instead is a situation in which irreparable harm will befall one side or the other of the dispute no matter what we do. To respect university applicants who favor preferences this year is necessarily to slight those who oppose them—putting both equally at risk of disappointment when admissions decisions are made this year. And to respect the Universities' interest in preserving their current admissions and financial-aid programs during this enrollment cycle is necessarily to slight the public interest in permitting a statewide initiative to go into effect on the date that the Michigan Constitution requires. In short, "either party will suffer an irreparable injury if we rule against it." *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991). Nor can it fairly be said that Proposal 2 came as a sudden surprise to anyone. Efforts to pass the initiative began soon after the Supreme Court's decisions in *Grutter* and *Gratz*, and the initiative was passed

near the beginning of the 2006-2007 admissions cycle after a long debate about the merits of it. The irreparable-harm inquiry in the end does not strongly favor one party or another.

With respect to the fourth factor, "the public interest lies in a correct application" of the federal constitutional and statutory provisions upon which the claimants have brought this claim, *id.*, and ultimately (in view of our interpretation of those provisions) upon the will of the people of Michigan being effected in accordance with Michigan law. All of this said, our decision ultimately "turn[s] on the likelihood of success on the merits," *id.*, and our conviction that these are weak federal claims. If we saw the merits differently, we would likely treat the stay motion differently as well. *See Americans United*, 922 F.2d at 306.

* * * * *

Which leads us to our last point: this is an unusual way to use the federal courts. Ordinarily, one might wonder why a court would hesitate to delay the implementation of a state law for six months when the State's Governor, the State's Attorney General and its Universities stand together in urging its suspension. That is particularly so when they offer reasonable administrative grounds for the delay—uncertainty about how the law will be interpreted and uncertainty about applying it during this year's enrollment cycle. Yet none of those administrative grounds explains why the *federal courts* should delay the law's implementation on federal grounds. And none of those administrative grounds explains why a *federal court* should suspend the law while *it* declares the Universities' "rights and responsibilities" under the new state law—given that state courts, not federal courts, have the final say on the meaning of state laws and given that the only vehicle ever presented in this case for such a declaration of rights was the Universities' cross-claim, which they voluntarily dismissed.

All of this, however, strongly suggests that if an interim injunction should be granted in this case, it is the state courts, not the federal courts, that should grant it. The state courts assuredly have authority to delay the law's implementation during this enrollment cycle—either because the meaning of the law is unclear or because it will be administratively onerous to apply it immediately. If, as the state parties have maintained throughout this litigation, a stipulated injunction accounts for the concerns of all interested parties and the people of Michigan, one can rest assured that the state courts will see it that way as well. But if the state courts do not see it that way, that proves only that there is another side to the story, one that the federal courts should be prepared to respect.

IV.

For these reasons, the motion for a stay pending appeal of the district court's preliminary injunction is granted, and the petition for a writ of mandamus is dismissed as moot.

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES of any other public college or university, community college, or school district,

Defendants,

and

Case No. 06-15024
Hon. David M. Lawson

ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS-CLAIM IN PART

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.
_____/

ORDER GRANTING TEMPORARY INJUNCTION AND DISMISSING CROSS-CLAIM IN PART

This case was commenced on November 8, 2006 by several plaintiffs who claim that a recently-approved state constitutional amendment, Proposal 06-2, now known as Article 1, section 26 of the Michigan Constitution of 1963, that purports to bar the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring, contracting, and university admission decisions, violates the United States Constitution. On December 11, 2006, defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University filed a cross-claim against co-defendant Governor Jennifer Granholm seeking declaratory relief. The University parties also requested a preliminary injunction to delay the implementation of the state constitutional amendment until the current enrollment season is completed. Thereafter, the Michigan Attorney General sought permission to intervene as a defendant in the matter, together with a motion to expedite consideration of the motion to intervene, citing his "duty to defendant the constitutionality" of the ballot initiative. Mot. to

Intervene ¶ 13. The parties to the case either took no position or consented to the relief, and the Court granted the motion to intervene on December 14, 2006.

On December 18, 2006, the Court received a stipulation from all parties to the case, including intervening defendant Michigan Attorney General, consenting to the temporary injunctive relief sought by the cross-claimants (the University defendants), and agreeing to dismiss the portion of the cross-claim seeking a temporary injunction [dkt #26]. The Court finds that the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation.

Accordingly, it is **ORDERED** that the application of Article 1, section 26 of the Michigan Constitution of 1963 to the current admissions and financial aid policies of defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University is enjoined from this date through the end of the current admissions and financial aid cycles or until further order of the Court. This injunction shall expire at 12:01 a.m. on July 1, 2007, unless it is vacated by the Court before that date.

It is further **ORDERED** that the portion of the cross-claim by defendants Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University seeking temporary injunctive relief is **DISMISSED WITH PREJUDICE**. The cross-claimants may proceed on the remaining part of their cross-claim.

It is further **ORDERED** that each party shall bear its own fees and costs.

It is further **ORDERED** that the motion for preliminary injunction [dkt # 5] is **DISMISSED** as moot.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 19, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 19, 2006.

s/Felicia M. Moses
FELICIA M. MOSES

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUTTON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERRELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES OF any other public college or university, community college, or school district,

Defendants,

Case No. 2:06-CV-15024

Hon. David M. Lawson

MICHAEL A. COX, Attorney General for Michigan,

Intervenor-Defendant

and

The REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Cross-Plaintiffs

vs.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant,

MICHAEL A. COX, Attorney General for Michigan,

Intervenor Cross-Defendant.
_____/

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STIPULATION FOR ENTRY OF ORDER

It is hereby stipulated, by and between the parties that this Court may order as follows:

(1) that the application of Const 1963, art 1, § 26 to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;

(2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim, and

(3) that each party shall bear its own fees and costs.

The parties so stipulate.

s/Leonard M. Niehoff
Leonard M. Niehoff
Attorney for Cross-Plaintiffs

s/James E. Long (w/consent)
James E. Long
Assistant Attorney General
Attorney for Governor Granholm

s/Margaret A. Nelson (P30342)
Margaret A. Nelson (P30342)
Assistant Attorney General
Attorney for Attorney General Cox

s/George B. Washington
George B. Washington
Attorney for Plaintiffs

EXHIBIT D

AFFIDAVIT OF TERESA A. SULLIVAN

I, Teresa A. Sullivan, being duly sworn, hereby declare the following:

I. Background

1. I am the Provost and Executive Vice President for Academic Affairs at the University of Michigan (the "University"). I have served in that capacity since June 1, 2006. From 1981 until my appointment as Provost of the University, I served on the faculty at the University of Texas at Austin in sociology, women's studies, and law. From 1977 to 1981 I taught at the University of Chicago. From 1975 through 1977 I taught at the University of Texas at Austin. While at the University of Texas, I held a number of administrative positions, including chair of the Department of Sociology, Vice President and Graduate Dean, and Executive Vice Chancellor for Academic Affairs of the University of Texas System. I am a graduate of Michigan State University and received my Ph.D. in Sociology from the University of Chicago.

2. As Provost of the University, I serve as the chief academic officer and chief budget officer for the Ann Arbor campus of the University. My responsibility includes general oversight and supervision of the admissions and financial aid processes of each of the schools and colleges, the Office of Undergraduate Admissions, and the Office of Financial Aid, at the University's Ann Arbor campus.

II. Admissions

3. There are over 130 units that make undergraduate, transfer, professional, and graduate admissions decisions at the University's Ann Arbor campus.

4. Each unit at the University's Ann Arbor campus sets its own policies, procedures, and deadlines for admissions, and designs its admissions applications and processes to align with the individual unit's particular educational mission and goals. Moreover, to create a dynamic learning environment for all students, the faculty of each program, school, or college crafts their admissions policies to enable that unit to assemble a single class of students who are both highly qualified academically and who represent a wide range of backgrounds and experiences. Accordingly, an admissions decision with respect to any particular application is made based on a careful and holistic evaluation of the individual applicant's likely contribution to the class as a whole. Those policies vary widely in a number of ways, including with respect to how they seek to achieve diversity. Some of those units do not consider certain factors (for example, gender) because their applicant pool naturally yields a class diverse in that respect. Other units, by contrast, do consider such factors as part of their holistic review processes in order to ensure an array of backgrounds and experiences in each class.

5. By Summer 2006, the faculty of each unit across the Ann Arbor campus had established its admissions processes for the present cycle. The admissions cycle for each of these units typically runs from September through May.

6. Each unit at the University widely advertises its admissions processes and deadlines to prospective applicants, their parents, and high school principals and counselors, including through websites and recruitment letters, as well as through open houses and fairs at high schools and colleges across the state and the country. Admitting offices to graduate programs actively recruit prospective applicants during the spring, summer, and fall, with events on the Ann Arbor campus and in cities around the state and the country. Many programs, especially in the sciences, send faculty and recruiters to attend scientific and disciplinary conferences, and distribute information about the University's graduate programs to interested students in attendance.

7. In addition, each unit spends hours training its admissions committees (comprised of application readers and admissions counselors at the undergraduate level, and faculty for graduate and professional programs) on the unit's established admissions processes. In particular, admissions committees are trained to evaluate each applicant's likely contribution to the creation of a dynamic learning environment in an individualized and holistic manner, consistent with the U.S. Supreme Court's guidance in the *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions.

8. Changing policies in the middle of an admissions/financial aid cycle would contradict information the University has widely disseminated. Prospective students, parents, and high school counselors, both nationally and internationally, were informed of the University's admissions guidelines and criteria well before the beginning of the current admissions cycle in Summer 2006. The application process, which is well underway for each unit, was begun using these published criteria and applications have been and will be submitted on the assurance that our admissions and enrollment decisions will be based on the criteria published prior to the commencement of the admissions cycle.

9. Given the complexity and number of units that make admissions decisions, I will not describe each unit's policies, processes, and experiences to date in detail. The following example from the undergraduate level, however, is generally representative of how units operate their admissions processes.

10. The Office of Undergraduate Admissions ("OUA"), which coordinates freshman admissions to all of the University's undergraduate programs at the Ann Arbor campus, receives the largest number of applications each year. These undergraduate programs are housed in six academic units: the School of Art & Design; the College of Engineering; the College of Literature, Science, and the Arts; the School of Music, Theatre & Dance; the School of Nursing, and the Division of Kinesiology.

11. The OUA admissions process is designed to further the University's compelling interest in achieving the educational benefits of a diverse student body in a manner consistent with the Supreme Court's decisions in *Gratz* and *Grutter*. To that end, at the beginning of each review cycle each of OUA's 56 readers and admissions counselors undergo an initial training period of approximately 20 to 50 hours, beginning in mid-August and concluding for the majority of staff by the first week in October. The training covers the guidelines for application evaluation for each of the schools and colleges for which OUA is responsible for evaluation and/or recruitment.

12. Each of OUA's trained and experienced readers and admissions counselors considers a broad range of criteria during their thorough, individualized, comprehensive, and holistic review of every complete application. For example, OUA's readers and admissions counselors consider factors that illustrate the student's academic achievements and potential, such as high school grades, standardized test scores, the choice of curriculum, and the student's educational environment. Other factors that are considered by the readers and counselors include, but are not limited to: geographic location, personal achievement, leadership, alumni connections, socioeconomic status, underrepresented minority identification, identification as a possible scholarship athlete, special skills or talents, unique experiences, the quality and content of the student's essay and short answers, and counselor and teacher recommendations. High school grades and test scores are important, but only in the context of the entire set of factors. Each application undergoes a minimum of two thorough, individualized, and holistic reviews.

13. By August 2, 2006, OUA had made available to prospective applicants the online application for undergraduate admission; the hard copy application was available by August 15, 2006. In addition, the OUA undertook a comprehensive effort to help explain the application process to prospective applicants. During Fall 2006, this effort included conducting 464 high school visits and attending 95 college fairs in the State of Michigan, as well as 1,452 high school visits and 217 college fairs around the country. A total of 12,062 in-state high school students and 37,700 out-of-state students attended these various events to learn more about the University's admissions policies and procedures. OUA also explained those policies and procedures to an additional 8,462 high school students (along with 11,976 parents) who attended on-campus visitation days between January and November 2006. Further, OUA reviewed its admissions guidelines with 350 Michigan high school counselors at a state-wide counselor conference in September 2006, and with 158 Michigan high school counselors at its Counselor Workshop in late October.

14. For those programs for which OUA handles admissions, each prospective student seeking admission for the 2007-2008 academic year is required to submit, along with the required application fee, a completed application, including two short-answer essays and a longer essay. Once the student submits these materials, the application is considered "live." In addition, applicants must request that the following information be submitted in support of their applications: a high school counselor recommendation; a teacher recommendation; and official ACT and/or SAT scores. Each high school counselor submitting a recommendation letter must also send OUA the applicant's official high school transcript and a completed copy of the high school's profile sheet, which asks for a variety of statistics about the school.

15. As early as August 2, 2006 – the very day the on-line application became available – prospective students had begun to apply to the University's various academic programs, throughout the Ann Arbor campus, for admission for the 2007-2008 academic year. Again by way of example, as of December 4, 2006, OUA has received approximately 16,000 applications for admission, from students all over the world, for the 2007-2008 school year; approximately 1,600 of those applications were received over the one-week period from November 27, 2006 through December 3rd. Of the approximately 16,000

applications received by December 4th, approximately 5,400 have been fully reviewed and approximately 3,100 students have been accepted for admission. In addition, approximately 6,000 applications have been fully completed by the student (and are therefore considered "live") but cannot yet be reviewed because they are missing one or more of the supporting materials to be submitted by the high school or by the educational testing agencies. An additional approximately 4,500 applications are completed but have not yet been fully reviewed by OUA's readers and admissions counselors; the remaining applications have been fully reviewed but a final enrollment management decision has not yet been issued. Based on its experience, OUA expects that it will receive approximately 4,000 additional applications between December 4th and December 22nd, for a total of approximately 20,000 applications by that date.

II. Financial Aid

16. The University recognizes the important role that financial aid plays in encouraging admitted students to enroll at the University and in enabling current students to complete their education. Accordingly, although the precise application deadlines may vary from program to program, the University's financial aid program deadlines generally correspond with the relevant admissions deadlines. Thus, the financial aid award cycle is already in progress. In fact, for many undergraduate aid programs, submission of an application for admission to OUA is used to consider that applicant's eligibility for a range of merit- and need-based award programs at the University.

17. On the Ann Arbor campus, the University administers more than 5,500 financial aid programs – private-, federal-, state-, and University-funded – as well as over 2,800 endowment programs that help to provide grant, loan, and fellowship support to its students. These financial aid programs have different eligibility criteria, application processes, and deadlines, but as with admissions, are each calibrated to serve important educational goals.

18. Many of the aid programs administered by the University do not consider race, ethnicity, gender, or national origin at all; other aid programs consider race, ethnicity, gender, or national origin as one of many factors in a manner consistent with the Supreme Court's guidance in the *Grutter* and *Gratz* decisions. Because the University's various aid programs work together and complement one another, and because of the uncertainty surrounding the implications of Proposal 2 for these types of aid programs generally, immense hardships would ensue – both to the University's prospective and current students and to the University itself – were the University required to alter its financial aid programs in the midst of the ongoing award cycle.

19. For example, financial aid is particularly important in encouraging admitted students to enroll at the University. Because many admitted students receive offers of funding from the University of Michigan and also from other universities to which they apply, the admissions offer is just the beginning of the process of attracting high-quality students to the University. Accordingly, financial aid deadlines are timed to follow the admissions processes very closely. Because of the role that financial aid plays in encouraging admitted students to enroll at the University, any uncertainty regarding the University's

ability to offer financial aid would have tremendous negative repercussions on the University's ability to attract and enroll high-quality applicants in its various programs.

III. General Efforts to Promote Diversity

20. Consistent with the Supreme Court's guidance in *Grutter* and *Gratz*, the University, through its faculty, regularly reviews its policies and procedures to ensure that they are consistent with the educational mission and goals of the University and of the relevant school, college, or program, as well as to determine the extent to which those faculty-set policies and procedures lawfully promote the creation of a dynamic learning environment of academically talented individuals from a variety of backgrounds. As a result, the University has made various revisions to its policies, including, for example, its undergraduate admissions policies. To date, however, the University has not identified any means, other than the consideration of race, ethnicity, and gender, among other factors, to achieve its compelling interest in diversity.

21. Since passage of Proposal 2, the University has redoubled its efforts to seek to promote a diverse and desegregated learning environment through means other than the consideration of race, ethnicity, gender, or national origin as one of many factors.

22. For example, since passage of Proposal 2, the University launched a "Diversity Blueprints" taskforce, which I head along with Lester P. Monts, Senior Vice Provost for Academic Affairs, and which will include students, staff, faculty, alumni and administrators. That taskforce is intended to encourage brainstorming and creative thinking among all segments of the University community on the question, "How can we maintain and enhance diversity at U-M in the years ahead?," and is charged with leaving no stone unturned as the University explores ways to encourage diversity within the boundaries of the law. The task force will seek specific input regarding faculty and staff recruitment, precollege/K-12 outreach, admissions, financial aid, mentoring/student success, climate, curriculum/classroom discussions, diversity research and assessment, and external funding opportunities. The ideas submitted in these areas may range from general insights to detailed plans, and all ideas will be considered regardless of how ambitious or unconventional they may seem. The taskforce expects to issue an interim report by February 2007, with a final report due in March 2007. The University will commit significant resources to some of the best and most promising recommendations that the Diversity Blueprints task force identifies in its report.

23. Given the complex nature of this undertaking and the experiences of those states that have banned public affirmative action through initiatives similar to Proposal 2, it is not possible for the University, by December 23rd, to craft new policies and procedures that will promote the University's recognized compelling interest in diversity – in the context of the particular educational mission, goals, and circumstances of each of the 130 units that makes admissions decisions – let alone to adequately educate its prospective students, parents, and high school counselors about the new guidelines, or to train its faculty and staff regarding implementation of those new policies and procedures by that date.

I hereby certify that the facts contained in this affidavit are true and correct to the best of my knowledge.

Teresa A. Sullivan

Subscribed and sworn to before me on this 11th day of December, 2006.

/s/ Kathleen D. Bauer

Notary Public, State of Michigan, County of Washtenaw.

My commission expires June 28, 2011.

Acting in the County of Washtenaw.

KATHLEEN D. BAUER
Notary Public, State of Michigan
County of Washtenaw
My Commission Expires Jun. 28, 2011
Acting in the County of Washtenaw

AFFIDAVIT OF KIM WILCOX

I, Kim A. Wilcox, being duly sworn, hereby declare the following:

1. I have served as Vice President and Provost of Michigan State University ("MSU") since August, 2005.

2. As Provost, I act as MSU's chief academic officer and chief budget officer. My responsibilities include general supervision of MSU's admissions and financial aid processes.

Admissions

3. Michigan State University has several different admitting units on its East Lansing campus. MSU's Office of Admissions reviews undergraduate freshman and transfer applications. Each of the professional schools, the College of Human Medicine, the College of Osteopathic Medicine, and the College of Veterinary Medicine, conducts its own review of applications and makes its own admission decisions. The Graduate School admission process takes place within individual graduate departments.

4. The admissions cycle typically begins in September/October and may run as late as June/July. Each admitting unit broadly distributes information about its admissions process, requirements, and deadlines publicly on web sites, by written communications (recruitment materials, correspondence), and through a wide array of public forums, including both on- and off-campus presentations, programs, and recruitment activities. Each of these admitting units determines its admissions standards. Application review committee members consider a multi-faceted list of academic and other factors that contribute to predicting success for the individual applicant and creating a vital learning environment.

5. A significant number of admission offers already has been made for Fall semester 2007. In some cases, these decisions have resulted from multiple committee reviews that have taken place over a period of up to three months. For example, by December 23, 2006, MSU expects that it will have offered admission to over 9000 undergraduate applicants, or 53% of its projected admission target. Any Proposal 2-related adjustment to the review process mid-cycle would likely lead to a delay in the remaining undergraduate admissions decisions. It is of even greater concern to me that such an adjustment, with its attendant publicity, might well lead to the perception by any number of the 24,000 freshman applicants that the MSU admission standards by which those admitted after December 23 are judged are inconsistent with the standards used for those admitted before that date. Since all applicants received the same information about the admissions process, and since many individuals have already been admitted under that process, it would be justifiable for applicants to believe that the same standards under which they submitted their applications should apply throughout the same admissions cycle. MSU's reputation will suffer irreparable harm as a result of any Proposal 2-triggered change to its admission process in the midst of this cycle. Further, our best efforts to implement any changes to the

undergraduate admissions process in future years will be suspect and subject to groundless challenge.

Financial Aid

6. Financial aid plays an important role in encouraging admitted students to enroll at MSU and in enabling current students to complete their education. MSU's financial aid programs extend the opportunity to attend MSU to those who otherwise might not be able to afford this education.

7. The financial aid award cycle for the 2007-2008 academic year already is underway. MSU administers in one academic year more than 190,000 financial aid awards, totaling over $ 405,000,000, to support its 33,000 students, including private-, federal-, state-, and University-funded grants, loans, and scholarships. MSU works hard to award all of its financial aid dollars to help maximize access to the University. This requires a complex process of assigning dollars from various funds to individual students. Eliminating just one potential funding source from this process would lead to an adjustment to MSU's entire financial aid award process. Furthermore, most financial aid recipients understandably expect to receive comparable aid packages from year-to-year. Even a temporary reduction in available resources due to changes or reviews prompted by Proposal 2 could impose a significant burden on these continuing students, and will likely cause an additional burden on MSU as it works to ensure comparability of support for all students in future years.

8. Financial aid is also critical to MSU's ability to attract and retain a diverse student body. This is important for all students on campus, not only because enrolling a diverse student body enhances the learning experience for all students, but also because all students benefit from the University's attractiveness to corporations which seek to recruit a talented and diverse workforce from among our graduates. Indeed, corporations sponsor numerous programs on campus at both the undergraduate and graduate levels, including scholarships, internships, and grants, because these donors view diversity as essential to the success of their corporate missions. This is evidenced by the number of brand name companies that attend the Diversity Career Fair every year (over 100 in 2006). The corporate representatives on MSU's Employer Partnership Program advisory board include 3M, Abbott Laboratories, Aetna, Boeing, Bosch, Dow, Ford, General Electric, IBM, Macy's, Microsoft, Norfolk Southern, Pfizer, Shell, and Siemens. Many of these companies target diversity-focused student organizations as part of their recruiting initiatives to ensure that their applicant pools have the broadest possible representation. Many "majority" students benefit from MSU's attractiveness as a school with a diverse population, in the same way that students from a variety of majors gain access to companies who target MSU's business and engineering graduates.

9. Although the majority of financial aid opportunities administered by MSU do not consider race, ethnicity, gender, or national origin at all, some do. MSU manages privately-funded loans and scholarship awards that require that special consideration or encouragement, of varying degrees, be given to individuals of a certain race, ethnicity, gender, or national origin. The overwhelming majority of the existing privately funded

scholarship awards have been funded via corporate and individual endowment and other written agreements. More than 2,000 written agreements between MSU and private donors exist. MSU must review each agreement to determine whether it involves a scholarship; whether the criteria for awarding the scholarship are compatible with Proposal 2; and whether the agreement contains any provision permitting a change in the criteria if any become illegal. Out of the more than 8,000 MSU scholarship awards funded through private dollars, MSU estimates that Proposal 2 could be construed to affect as few as 200. Nevertheless, reviewing all 2,000 agreements is a daunting task.

10. A comprehensive review of private donor agreements will result in varying degrees of change to the scholarships and funds that give special consideration or encouragement to individuals of a certain race, ethnicity, gender, or national origin. For some agreements, MSU will be required to file a court action. For other agreements, MSU will be required to contact the donor to formulate new ways to achieve the diversity the donor seeks. These efforts will be complicated when there are multiple donors or the donor is deceased or difficult to locate due to the passage of time. Given these many variables, it is unlikely that the MSU's efforts could be concluded in time to permit the affected funds to be used during the 2007-08 award cycle. Requiring this effort, especially in the middle of the financial aid award cycle, poses an immense burden on MSU and its private donors.

11. For MSU to undertake an intensive examination of private donor agreements in the middle of the 2007-08 award cycle, with the attendant delay in financial aid awards or reduction in the pool of financial aid available, would pose an extreme hardship on MSU and limit access to students requiring such funds to matriculate or remain at MSU. More importantly, implementation of Proposal 2 would pose a hardship on the incoming students who may not be able to afford to attend MSU without aid, as well as students in the middle of their academic careers who are counting on these scholarship awards to complete them.

I hereby certify that the facts contained in this affidavit are true and correct to the best of my knowledge.

Kim A. Wilcox

Subscribed and sworn to before me this 11th day of December, 2006.

Judith E. Pell
Notary Public
County of Ingham, Michigan
My Commission Expires: August 30, 2011

JUDITH E. PELL
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
My Commission Expires Aug. 30, 2011
Acting in the County of Ingham

AFFIDAVIT OF NANCY BARRETT

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

Being duly sworn, I, Nancy Barrett, state the following:

1. I am employed by Wayne State University as the Provost and Senior Vice President for Academic Affairs. I have been so employed since June 15, 2003. Prior to coming to Wayne, I was provost at the University of Alabama from 1996 to 2003 and provost at Western Michigan University from 1991 to 1996. I have a Bachelor's degree from Oberlin College and a Masters and PhD degrees in Economics from Harvard University.

2. As Provost, I am the senior academic officer at Wayne State University. I am responsible for both graduate and undergraduate education. My duties include supervising the deans of the 12 Colleges and Schools, planning, organizing, and advising academic units and programs, interacting with the academic Senate, supervising tenure and promotion, and directing budgetary and academic personnel issues. I also oversee selected Centers and Institutes, as well as the departments of Admissions and Financial Aid.

3. Wayne State's Graduate and Professional enrollment is one of the largest in the nation. The Graduate School administration establishes and maintains broad admissions parameters for admission to over 220 masters, doctoral and graduate/graduate certificate programs. Over 3200 students are admitted to participate in these programs annually.

4. Although the Graduate School maintains minimum requirements for admission, admissions decisions are primarily made by the faculty and administrators in the separate academic departments that teach these academic programs. The faculty of these departments may adopt and propose additional standards and criteria for admission as they deem educationally necessary and appropriate.

5. The standards and criteria for graduate admission correspond to the educational mission of the individual departments and may vary widely. Some disciplines are far more selective than others. Many of these programs recognize the need to take constitutionally appropriate measures to enhance diversity in their incoming classes while others are able to achieve educational diversity without doing so. Different departments may avail themselves of differing means by which to further educational diversity and to make other decisions involving the composition of their entering classes.

6. The admissions process for each of these units for the 2007-08 academic year began in August of 2006. Extensive training takes place for the admissions staff and faculty committees in order to comply with the current admissions standards for each department, college and school.

7. Wayne State and its colleges, schools and departments extensively market and advertise its academic programs and its admissions process to prospective students not only throughout Michigan but also throughout the nation and internationally. In addition to its many outreach programs, Wayne State representatives attend various open houses, college fairs and conferences to market its various programs to prospective students. This process is ongoing, but typically begins in August for the following academic year.

8. Wayne has received several thousand applications for admission to our graduate and professional schools in the 2007-08 academic year, and the process of reviewing these applications for possible admission next is well underway. Some students have already been admitted under existing admissions policies; in many other instances, the evaluation process leading to admission or denial of admission is in progress. Wayne will continue to receive applications for admission for graduate and professional programs in the 2007-08 academic year for the next several months.

9. Due to the decentralized nature of the admissions policies and the vast array of graduate programs available, Wayne State will be unable to review these policies entirely by December 22, 2006 to determine whether any of them fail to comply with Proposal 2. If Wayne determines that certain of these policies do not comply with Proposal 2, it will be extraordinarily difficult to implement timely changes consistent with Proposal 2 that will continue to promote educational diversity. Further, in light of the extensive amount of time it takes to train admissions staff and faculty on the changes with the admissions policy, it would be extremely difficult to train staff and faculty on any new changes to admissions policies by December 22, 2006.

10. Numerous reviews are underway outside the University to help understand the application of this very complex amendment. It is in everyone's interest that the various reviews interpreting Proposal 2 be completed prior to the Wayne State implementing any final changes, so Wayne State can be well informed by whatever guidance they might offer.

11. Wayne State offers many different types of financial support to its high graduate and undergraduate students, including scholarships, grants, loans and other

forms of financial aid. Although most financial support offered through the University is made available without consideration race, gender, ethnicity or national origin, to the extent it is made available to students who themselves have been admitted under policies that may require modification, it will be necessary to evaluate the continued availability of financial support. The abrupt loss of such financial support would be devastating to such students, and may be expected to deprive many of ongoing educational opportunities. If I am called to testify at a hearing in this matter, I have personal knowledge of the facts that I have stated above and I would be competent to give such testimony.

Nancy Barrett

Subscribed and sworn to this
11th day of December 2006.

Notary Public

[illegible]
Notary Public, State of Michigan
County of Wayne
My Commission Expires Aug. 31, 2011
Acting in the County of

EXHIBIT E

The amendment provides:

ARTICLE 1, SECTION 25:

Civil Rights.

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.

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

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

CERTIFICATE OF SERVICE

George B. Washington hereby certifies that he served a copy of the PETITIONERS' MOTION TO DISSOLVE THE STAY ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND TO REINSTATE THE TEMPORARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN on this day by Federal Express and e-mail to the following counsel for the parties:

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GEORGE B. WASHINGTON

Dated: January 9, 2006