No. 06A-678

**IN THE SUPREME COURT OF THE UNITED STATES**

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,

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.

On Application to Vacate Stay Issued by
the United States Court of Appeals for the Sixth Circuit

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

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

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## INTRODUCTION

At the last election, the people of Michigan voted overwhelmingly to amend their state constitution to bar their State institutions, expressly including their public universities and schools, from discriminating or granting preferences on the basis of race, sex, color, ethnicity, or national origin in public employment, education, or contracting. Applicants, plaintiffs below, seek to vacate a stay pending appeal granted by the Sixth Circuit and to thereby reinstate a temporary injunction issued by the district court that enjoined the application of the new amendment—Proposal 2—to three (and only three) of Michigan's state universities' current admissions and financial aid cycles. Applicants fall far short of satisfying the demanding showing they must make as a prerequisite to obtaining the extraordinary relief that they seek, and their application should be denied.

First, although applicants contend that this Court should review their claims that Proposal 2 falls afoul of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, they fail to establish any meaningful likelihood that four Justices would vote to grant review of their claims. As an initial matter, applicants have failed to identify an appropriate vehicle for reviewing these claims. Both the temporary injunction entered by the district court and the Sixth Circuit's stay of that injunction pending appeal are interim, interlocutory orders. Neither court has reached a final decision on the merits of applicants' claims, and proceedings are currently pending in both courts. Furthermore, the temporary injunction that applicants' seek to reinstate was not entered at applicants' request or on applicants' claims, but rather was entered on a cross-claim brought by the state universities that did not raise the claims that applicants urge as candidates for certiorari review. Indeed, applicants have not at anytime moved for a preliminary injunction on

their claims in the courts below. And to make matters worse, the district court's preliminary injunction is hopelessly flawed and due to be reversed on various grounds that have nothing to do with applicants' claims.

Even if the proceedings below did present a clean vehicle for reviewing applicants' claims, moreover, those claims would be unlikely candidates for certiorari. The Sixth Circuit's analysis is fully consistent with the decisions of this Court. It is also consistent, as applicants themselves concede, with the conclusions of the Ninth Circuit—the only other court of appeals, to date, to address the constitutionality of a state constitutional amendment barring discrimination or preferences on the basis of race, sex, color, ethnicity, or national origin.

Second, even if this court did grant certiorari, it is most unlikely that five justices would agree with applicants' claims on the merits. The Equal Protection Clause, Title VI, and Title IX, after all, prohibit classifications on the basis of suspect categories such as race and sex absent the most weighty of justifications and the most careful of tailoring. In arguing that these provisions prohibit the people of Michigan from eliminating such presumptively unlawful classifications, altogether applicants would turn these laws on their heads. It is most unlikely that five Justices of this Court would follow applicants' lead.

Third, the equities do not support applicants' requested relief. Although applicants urge consideration of the plight of potential students who would be accepted into Michigan's state universities but for the adoption of Proposal 2, it is evident that for each such student there is also another student who would be accepted if Proposal 2 is allowed to take effect in accordance with its terms and the will of the people of Michigan and who will be denied admission if the Sixth Circuit's stay is vacated and the district court's temporary injunction reinstated. Furthermore, the sovereign right of the people of Michigan to govern themselves and to

determine the bounds within which their state government will operate is an interest of the highest order that counsels heavily against the extraordinary relief sought by applicants here.

Ten years ago, the full Court refused, without recorded dissent, to stay the Ninth Circuit's decision sustaining the constitutionality of Proposition 209, California's constitutional amendment on which Proposal 2 is modeled. *See Coal. for Econ. Equity v. Wilson*, 521 U.S. 1141 (1997); *City & County of San Francisco v. Wilson*, 521 U.S. 1141 (1997). Thereafter it denied the petition for writ of certiorari to review the Ninth Circuit's decision, again without recorded dissent. *See Coal. for Econ. Equity v. Wilson*, 522 U.S. 963 (1997). Applicants' offer no persuasive justification for charting a different course here. Indeed, the most salient difference between the contexts then and now is that the Ninth Circuit's decision presented a relatively clean vehicle for considering the validity of Proposition 209, while the procedural posture in this case bristles with obstacles counseling against review.

For all of these reasons, and as demonstrated more fully below, applicants' request to vacate the Sixth Circuit's stay and reinstate the district court's temporary injunction should be denied.

## PRELIMINARY STATEMENT

On November 7, 2006, the voters of Michigan approved by a large majority a statewide ballot initiative—Proposal 2—that amended the Michigan Constitution. *See* Application, Ex. A (6th Cir. Op.) at 2. As relevant here, Proposal 2 provides that the State of Michigan, as well as "[t]he 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." Application, Ex. E (Proposal 2) ¶¶ 1. As also relevant here, Proposal 2 further provides that it "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.* ¶ 4.

Under the Michigan Constitution, Proposal 2 was scheduled to take effect on December 23, 2006. *See* Application, Ex. A (6th Cir. Op.) at 1. On November 8, 2006, one day after the election, applicants filed a lawsuit against the Governor of Michigan, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University, seeking both a declaratory judgment that Proposal 2 violated the federal Constitution and was preempted by federal statute and a permanent injunction against its enforcement. Applicants did not file, and to date have not filed, a motion seeking a temporary restraining order or a preliminary injunction against the enforcement of Proposal 2. *See id.* at 3.

On December 11, the University defendants filed a cross-claim against the Governor, seeking a declaration "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 a temporary injunction allowing them to do so. On the same day they filed a motion for a preliminary injunction seeking the same relief. *See id.* at 3.

Three days later, the Michigan Attorney General filed a motion to intervene, which was granted the same day. *See id.* On December 18, the Governor, the Attorney General, the University defendants/cross-claimants, and the applicants filed a stipulation with the district court providing that Proposal 2 be enjoined "through the end of the current admissions and financial aid cycles" and that "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."

Application, Ex. C (stipulation) at 3. The following day, acting pursuant to this stipulation, the district court entered an order enjoining the application of Proposal 2 to the Universities' current admissions and financial aid cycles and dismissing with prejudice cross-claimants' claim for injunctive relief. Application, Ex. B (Dist. Ct. Order) at 3.

In the meantime, respondent Eric Russell, a white male who has applied to the University of Michigan School of Law for admission in the fall of 2007, had filed a motion seeking to intervene in the case on December 18. The next day, after the district court entered its temporary injunction, Russell filed a motion requesting that the court rule on the motion to intervene by December 21 and stay the order enjoining Proposal 2 before December 23 (the date Proposal 2 would otherwise take effect). *See* Application, Ex. A (6th Cir. Op.) at 4.

Having heard nothing from the district court on either motion, Russell filed a notice of appeal with the district court on December 21 and an emergency motion for a stay pending that appeal with the Sixth Circuit on December 22. Five days later the district court granted Russell's motion to intervene, and Russell filed an amended notice of appeal the next day. *Id.* at 5

On December 29, the Sixth Circuit granted Russell's motion for an emergency stay pending appeal. Applying the traditional factors for evaluating such a motion, the Sixth Circuit concluded that the district court's injunction would likely be reversed on appeal. The Sixth Circuit reasoned that the district court's order was flawed on its own terms and did not contain a sufficient ground for prohibiting Proposal 2 from going into effect, *see id.* at 6-7, that the Universities' cross-claim and motion for a preliminary injunction failed to supply a federal ground for enjoining Proposal 2, *see id.* at 7-8, and that the responses to the stay motion filed in the Sixth Circuit by the other parties to the case, including applicants, likewise failed to support the injunction, *see id.* at 8-12. As part of the last inquiry, the Sixth Circuit considered whether

the claims urged by applicants here, though not raised by the cross-claim, could provide an alternative ground for sustaining the district court's injunction. *See id.* at 9-12. Having concluded that Russell had a strong likelihood of obtaining reversal of the district court's injunction, the Sixth Circuit next considered whether the other stay factors weighed against granting the stay and concluded that they did not. In particular, the Sixth Circuit found that "[t]he irreparable-harm inquiry in the end does not strongly favor one party or another," *id.* at 12, but that public interest ultimately favored "the will of the people of Michigan being effected in accordance with Michigan law," *id.*

Although it considered the likelihood that Russell would succeed in obtaining reversal of the district court's order in connection with its resolution of the stay motion, the Sixth Circuit made clear "that the merits of the appeal of the order granting the preliminary injunction . . . are not before this panel." *Id.* at 5. Accordingly, Russell's appeal of the district court's order remains pending in the Sixth Circuit. Furthermore, applicants' claims remain pending in the district court—indeed, on January 5, 2007, the district court entered a scheduling order contemplating further pleadings, discovery, and ultimate resolution, possibly by trial, of the merits of applicants' claims. *See* Ex. A. Despite the pendency of the Sixth Circuit appeal and the district court proceedings on their claims, on January 8, 2007, applicants' filed a motion with the Justice Stevens, as Circuit Justice for the Sixth Circuit, seeking to have the Sixth Circuit's interim stay dissolved and the district court's temporary injunction reinstated. Respondent Russell respectfully files this response in accordance with the direction issued by Justice Stevens on January 10.

## ARGUMENT

As the applicants recognize, this Court or a Circuit Justice may grant a stay of a judgment entered below only where applicants (1) "establish that there is a 'reasonable probability' that four Justices will" vote to grant certiorari, (2) "show that there is a 'fair prospect' that a majority of the Court will conclude that the decision below was erroneous," and (3) "demonstrate that irreparable harm will result from a denial of the stay. . . ." In addition, "[i]n close cases it may be appropriate to balance the equities[ — to] explor[e] the relative harms" to applicant and respondent, as well as the interests of the public at large. *See* Application at 4 (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). Where, as here, applicants seek to vacate a court of appeals' stay of a district court's order, the second requirement "must be modified, of course: there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision." *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers).

Furthermore, it is "well established that a Circuit Justice should not disturb, 'except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it.' " *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (quoting *O'Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)). "A Court of Appeals' decision to enter a stay is entitled to great deference . . . ." *O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1304 (1980) (Stevens, J., in chambers), and the power to dissolve such a stay "is to be exercised 'with the greatest of caution and should be reserved for exceptional circumstances.' " *id.* (quoting *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). Among other things, a Circuit Justice will not vacate such a stay unless "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." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

As explained below, applicants plainly do not satisfy these standards. Accordingly, their application to vacate the stay pending appeal entered by the Sixth Circuit should be denied.

### A. This Court Is Extremely Unlikely to Grant Certiorari.

It is extremely unlikely that four Justices will vote to grant certiorari to review applicants' claims. As an initial matter, the proceedings below do not present an appropriate vehicle for Supreme Court review of applicants' claims. Furthermore, applicants have failed to establish that the Sixth Circuit's preliminary analysis of their claims conflicts with either Supreme Court precedent or the decision of any other court of appeals. Finally, as discussed more fully in the next section, applicants' claims lack merit.

#### 1. The procedural posture below presents substantial obstacles to review of applicants' claims.

The Sixth Circuit's decision staying the district court's preliminary injunction does not present an appropriate vehicle for Supreme Court review of applicants' claims. The Sixth Circuit's decision to stay the district court's preliminary injunction is quintessentially interlocutory: the Sixth Circuit's order represents only an interim decision to stay the district court's preliminary injunction pending appeal, not a final ruling reversing the district court's order, which itself was interlocutory. *See* Application, Ex. A (6th Cir. Op.) at 5 ("Let us be clear that the merits of the appeal of the order granting the preliminary injunction . . . are not before this panel."). Indeed, applicants frankly concede that they do not intend to seek Supreme Court review of that decision. *See* Application at 3 ("[P]laintiffs have not yet filed a petition for certiorari and do not intend to do so until the completion of proceedings in the Sixth Circuit.").

Furthermore, the Sixth Circuit's stay order would present the same vehicle problems, detailed below, that would be presented by a potential Sixth Circuit decision reversing or vacating the district court's preliminary injunction.

Nor would a potential decision by the Sixth Circuit reversing or vacating the district court's preliminary injunction present an appropriate vehicle for reviewing applicants' claims. Not only was the district court's ruling interlocutory—litigation on the merits of applicants' claims is proceeding in the district court and no final order of any sort has yet been entered or is likely to be entered by the district court anytime soon—it did not even represent a traditional preliminary injunction. On the contrary, it represented only a temporary interim measure that will almost certainly expire by its own terms before Sixth Circuit and Supreme Court review could be completed. *See* Application, Ex. B (Dist. Ct. Order) at 3 ("This injunction shall expire at 12:01 a.m. on July 1, 2007, unless it is vacated by the Court before that date.").

Moreover, the district court's injunction was not entered on *the claims of applicants* (plaintiffs below) but on *a cross-claim brought by some of the defendants* (the Universities). That cross-claim did not raise the Equal Protection, Title VI, and Title IX issues that applicants urge as appropriate for review by this Court. Although the Sixth Circuit engaged in a preliminary analysis of these claims in the course of considering whether it could form an alternative ground for affirming the district court's injunction, applicants did not and have not at anytime moved for a preliminary injunction on their claims.

Furthermore, the district court's preliminary injunction is irredeemably flawed, and therefore due to be reversed or vacated, in a variety of ways that are wholly unrelated to the merits of applicants' claims. First, as the Sixth Circuit recognized, the district court order

granted interim relief on the University defendants' cross-claim pursuant to a stipulation that also destroyed a critical basis for the injunction:

> 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.

Application, Ex. A (6th Cir. Op.) at 8; *see also* Application, Ex. C (stipulation) at 3.

Second, in contravention of Federal Rule of Civil Procedure 52(a), which requires that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action," the district court made no findings regarding the University cross-claimants' likelihood of success on the merits, irreparable injury, harm to others, or the public interest. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985) ("Rule 52 requires a district court to make specific findings concerning each of these four factors unless fewer are dispositive of the issue."); *Six Clinic Holding Corp. v. Cafcomp Sys.*, 119 F.3d 393, 399 (6th Cir. 1997) (same); *see also* Application, Ex. A (6th Cir. Op.) at 6 ("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 . . ."). Significantly, although the injunction was entered pursuant to stipulation, "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." Application, Ex. A (6th Cir. Op.) at 7.

Third, the only finding entered by the district court in support of the injunction—"that the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives . . . ." Application, Ex. B (Dist. Ct. Order) at 3—is belied by its subsequent conclusion, made in connection with its order granting Russell intervention as of right, that intervener Russell's "individual interest . . . *may not* be taken into account by the present parties." Application, Ex. A (6th Cir. Op.) at 7 (quoting district court order). As the Sixth Circuit explained, the latter conclusion "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." Application, Ex. A (6th Cir. Op.) at 7. Thus, "[i]n the final analysis, the only articulated basis provided for the injunction . . . is not true and thus does not suffice to sustain the injunction." *Id.* at 7. Indeed, the district court's entry of a stipulated injunction affecting the rights of objecting third parties without affording those parties "a full and fair opportunity" to contest the request for injunctive relief represents another independent flaw requiring reversal of the district court's stipulated order. *United States v. City of Hialeah*, 140 F.3d 968, 976 (11th Cir. 1998); *see also Martin v. Wilks*, 490 U.S. 755, 761-62, 768 (1989).

For all of these reasons, neither the Sixth Circuit's decision staying the district court's interim injunction pending appeal nor a potential Sixth Circuit decision reversing or vacating that injunction would present an appropriate vehicle for addressing applicants' claims. On this ground alone, it is unlikely that four Justices would vote to grant certiorari, even assuming the issues raised by applicants' claims were worthy of certiorari review.

**2. The Sixth Circuit's decision does not conflict with this Court's precedents or the decision of any other court of appeals.**

Even in the absence of the numerous vehicle problems noted above, applicants' claims would be unlikely candidates for certiorari review. Contrary to applicants' suggestion, neither the Sixth Circuit's conclusion that applicants are unlikely to succeed on the merits of their claims nor a potential holding definitively rejecting those claims would present a conflict with the decisions of this Court. And applicants do not contend that the Sixth Circuit's preliminary analysis or a potential definitive holding would conflict with a decision of any other court of appeals. To the contrary, applicants concede that "there is not yet a split in the circuits." Application at 13.

Applicants do, however, contend that the Sixth Circuit's preliminary analysis of their Equal Protection claim conflicts with this Court's decisions in *Romer v. Evans*, 517 U.S. 620, 633-34 (1996), *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969). The Sixth Circuit, however, specifically addressed and distinguished these decisions, explaining, among other things:

> 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. . . . 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,' an action that does not violate the Equal Protection Clause.

Application, Ex. A (6th Cir. Op.) at 11 (quoting *Crawford v. Board of Education*, 458 U.S. 527, 538 (1982)) (emphases in original). This analysis is plainly correct.

As the Sixth Circuit intimated, this Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral

fashion, race-related matters." *Crawford*, 458 U.S. at 538. In *Crawford*, the Supreme Court considered an amendment to the California Constitution that prohibited state courts from assigning students except as a remedy for a specific equal protection violation. *Id.* at 532. In the face of an equal protection challenge similar to that raised here by applicants, the Supreme Court held that the amendment did not employ a racial classification and thus did not violate the Equal Protection Clause. "The simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Id.* at 539. The Supreme Court held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Id.* at 538.

In suggesting that Proposal 2 is invalid under *Romer*, *Washington*, and *Hunter*, applicants ignore the holding of *Crawford*. Applicants suggest that any effort by the state to treat racial and gender issues differently from other classifications constitutes an impermissible classification that triggers application of the *Hunter* doctrine. But as the Ninth Circuit explained in detail in the course of addressing the same challenge to Proposition 209—a state constitutional amendment essentially identical to Proposal 2—those cases are not inconsistent with a statewide ban on state-sponsored discrimination. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

In *Washington* itself, the Supreme Court recognized that the *Hunter* doctrine "does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible classification." *Washington*, 458 U.S. at 485. Justice Powell's *Washington* dissent, as if directly forecasting the adoption of Proposition 209 and Proposal 2, argued that the majority opinion

could be misconstrued to invalidate statewide bans on affirmative action programs by state and local agencies:

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

*Washington*, 458 U.S. at 498 n.14 (Powell, J., dissenting). The majority responded to this argument by explaining that it "evidence[s] a basic misunderstanding of our decision. . . . [I]t is evident . . . that *the horribles paraded by the dissent*, post, at 498-499 n.14 *which have nothing to do with the ability of minorities to participate in the process of self-government* are *entirely unrelated* to this case." *Id.* at 480 n.23 (emphasis added). Thus, the Court's opinion in *Washington* plainly stated that it did not in any way foreclose the ability of states to address racial preferences through statewide efforts. *See also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 n.1 (1978) (Stevens, J., concurring and dissenting) ("It is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court."). Moreover, in his concurrence in *Crawford*, Justice Blackmun, the author of *Washington*, explicitly stated that he could not "rul[e] for petitioners on a *Hunter* theory [because it] seemingly would mean that *statutory affirmative-action* or antidiscrimination programs never could be repealed . . . ." *Crawford*, 458 U.S. at 546-47 (Blackmun, J., concurring) (emphasis added).

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

> When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral fashion race-related and gender-related matters. It does not isolate race or gender

> antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.

122 F.3d at 707.

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

For this reason, applicants' reliance upon *Romer v. Evans*, 517 U.S. 620 (1996), is also misplaced. As the Sixth Circuit has explained, the Colorado law at issue there "could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of government for any type of victimization or abuse which they might suffer by either private or public actors." *Equality Found. v. Cincinnati*, 128 F.3d 289, 296 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998). Indeed, "Colorado Amendment 2 ominously threatened to reduce an entire segment of the state's population to the status of virtual

non-citizens (or even non-persons) without legal rights under any and every type of state law. . . ." *Id.* Thus, *Romer* confirms, rather than undermines, the long-standing principle that denials of equal protection involve classifications that treat individuals differently. *See also Coalition*, 122 F.3d at 707-08 ("In *Romer*, Colorado's Amendment 2 denied homosexuals the ability to obtain 'protection against discrimination,' thus classifying homosexuals 'not to further a proper legislative end but to make them unequal to everyone else.' ") (citation omitted).

With respect to the University defendants' admissions policies, there is an additional reason why Proposal 2 does not run afoul of *Romer*, *Washington*, or *Hunter*. In *Washington*, the Court invalidated the state law at issue there because it burdened minority interests "by lodging decisionmaking authority over the question at a new and remote level of government." 458 U.S. at 483. Specifically, the law at issue in *Washington* had removed responsibility from local school boards and removed it to the state legislature. The Supreme Court noted that " '[no] single tradition in public education is more deeply rooted than local control over the operation of schools . . . .' " 458 U.S. at 481 (quoting *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)).

Here, by contrast, at least with respect to the governance of the University defendants, Section 26 did not affect the level of government at which the University defendants' policies were set. It is well-established that the Universities are arms of the state of Michigan. *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 998 (6th Cir. 1987); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986). They are considered to be "the State" both under state law and under federal constitutional law. *See* MICH. COMP. LAWS § 691.1401(c) (" 'State' . . . includes every public university and college of the state, whether established as a constitutional corporation or otherwise."); *Estate of Ritter v. Univ. of Mich.*, 851 F.2d 846, 850 (6th Cir. 1988) (holding that "the Board of Regents of the University of Michigan is, as an arm of the State,

immune under the eleventh amendment from suit in federal district court . . . ."); *Weisbord v. Mich. State Univ.*, 495 F. Supp. 1347, 1356-57 (W.D. Mich. 1980) (detailing the extensive public character of Michigan State University and concluding that "[n]othing in the charter of Michigan State University states or implies that it is anything other than a state institution entitled to the privileges and immunities of the state . . . ."), *cited in Hall v. Medical College of Ohio*, 742 F.2d 299, 301 (6th Cir. 1984); *Johnson-Brown v. Wayne State Univ.*, No. 98-1001, 1999 U.S. App. LEXIS 4751, at *3 (6th Cir. Mar. 17, 1999) (holding that "[Wayne State] University is considered to be the 'state' for government liability purposes"). Indeed, the regents of the Universities who are entrusted under state law with the governance of the Universities are elected on a statewide basis. Thus, the political process for effectuating change in policy takes place at the state level. Proposal 2 does nothing to change this political reality and thus in no way places decisionmaking at a "new and remote level of government."

Nor do applicants' identify any decisions from other courts of appeals that conflict with the Sixth Circuit's preliminary analysis of their claims under the Equal Protection Clause, Title VI, and Title IX. As the discussion above makes clear, the Sixth Circuit's equal protection analysis is fully consistent with the analysis of the Ninth Circuit, the only other court of appeals to address the constitutionality of a state constitutional amendment barring discrimination or preferences based on race, sex, color, ethnicity, or national origin. And although the Ninth Circuit did not address whether such an amendment was preempted by Title VI or Title IX, that was because even the district court in that case—which had erroneously held that Proposition 209 violated the Equal Protection Clause—had already squarely rejected this argument:

> The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless

> there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.

*Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1518 (N.D. Cal. 1996) (vacated and remanded on other grounds, 122 F.3d 692 (9th Cir. 1997)); *see also id.* at 1519 ("The statutory language, agency interpretation, and legislative history of Titles VI and IX do not establish that Congress intended to preserve voluntary race- and gender-conscious affirmative action as an option for entities covered by the two statutes."); *Coalition for Econ. Equity*, 122 F.3d at 709, n.19 (noting that plaintiffs' did not cross-appeal from the rejection of their Title VI and Title IX claims). Applicants claim there is a split in the circuits because "five judges dissented from the [Ninth Circuit's] denial of rehearing en banc . . ." Application at 13, overlooks the fact that the majority of the active nonrecused judges on the Ninth Circuit voted to *deny* rehearing en banc. *See Coal. for Econ. Equity*, 122 F.3d at 711.

**3. The Sixth Circuit's analysis is correct on the merits.**

As the discussion of *Crawford*, *Romer*, *Washington*, and *Hunter* makes clear, and as discussed more fully in the next section, the Sixth Circuit's preliminary analysis of applicants' substantive claims is correct. This consideration, as well, counsels against certiorari review.

In sum, then, it is unlikely that four Justices will vote to grant certiorari to review either the Sixth Circuit's decision staying the district court's interim injunction or a potential Sixth Circuit decision vacating or reversing that injunction. Indeed this Court voted, without recorded dissent, to deny certiorari review of the Ninth Circuit's decision sustaining the constitutionality of Proposition 209. *See Coal. for Econ. Equity v. Wilson* 522 U.S. 692 (1997). The context there differed from the current context in only one relevant respect: the Ninth Circuit's decision represented a much cleaner vehicle than is present here for considering the constitutionality, under the federal constitution, of a state constitutional amendment prohibiting discrimination or

preferences on the basis of race, sex, color, ethnicity, or national origin. *See also Drifka v. Brainard*, 89 S. Ct. 434 (1968) (Douglas, J., in chambers) (denying stay application presenting legal issues on which the Court had previously denied review where "issue is not more clearly presented here than it was in the earlier cases").

### B. It Is Highly Unlikely That This Court Would Agree with the District Court's Decision.

Furthermore, there is not a significant possibility that a majority of the Court eventually will agree with the District Court's decision granting interim injunctive relief. *Children*, 448 U.S. at 1330. On the contrary, it is highly unlikely that five Justices would vote to sustain that decision. *See Rostker*, 448 U.S. at 1309 (Circuit Justice's task "is not to determine [his or her] own view on the merits, but rather to determine the prospect of [affirmance] by this Court as a whole"); *Holtzman*, 414 U.S. at 1313 (similar). Not only, as discussed above, is the district court's decision subject to reversal on various grounds unrelated to the merits of applicants' claims, a majority of this Court would likely reject those claims on the merits.

#### 1. Applicants' equal protection claim lacks merit.

As demonstrated above, the Sixth Circuit properly distinguished this Court's decisions in *Romer*, *Washington*, and *Hunter*. Once these decisions are placed to the side, applicants' equal protection claim plainly lacks merit. The Sixth Circuit's analysis on this point bears repeating at length:

> 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* [*v. Bollinger*, 539 U.S. 306 (2003)], it is true, says that States may still 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 barely *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; . . . 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, . . . and surely a State may end racial preferences some years before [it] 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. . . . 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.

Application, Ex. A (6th Cir. Op.) at 9-10. We respectfully submit that a majority of this Court—which upheld the constitutionality of the University of Michigan Law School's affirmative action program in *Grutter* by a bare majority while striking down the University's undergraduate affirmative action program in *Gratz v. Bollinger*, 539 U.S. 244 (2003)—would agree with the

Sixth Circuit's analysis and decline to hold that such programs are compelled by the Equal Protection Clause.

**2. Applicants' Title VI claim lacks merit.**

It is also extremely unlikely that a majority of this Court would hold that Proposal 2 is preempted by Title VI. Any potential preemption under Title VI is expressly limited by section 1104 of the Civil Rights Act of 1964, which provides that

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

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

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

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

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

Proposal 2, of course, does not draw any racial classifications whatsoever, let alone classifications that would violate the Equal Protection Clause. On the contrary, it prohibits classifications based on race, sex, or other constitutionally suspect bases. Accordingly, section 26 is fully consistent with the plain language and evident purposes of Title VI. Indeed, applicants do not seriously argue that the text of Title VI itself requires the University defendants to grant preferences based on any of the categories with respect to which it, like Proposal 2, prohibits discrimination.

Rather, applicants invoke regulations promulgated under section 602 of Title VI, 42 U.S.C. § 2000d-1, in support of their preemption argument. In particular, they rely on 34 C.F.R. § 100.3(b)(2), which purports to bar recipients of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin." Assuming, arguendo, that this regulation is valid—*but see Sandoval*, 532 U.S. at 281-82 (explaining that dictum and opinions of individual justices suggesting that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups . . ." are "in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination . . ." but declining to resolve this

tension because "petitioners have not challenged the regulations here")—it provides no basis for concluding that Title VI preempts Proposal 2.

As an initial matter—as applicants' acknowledge, *see* Application at 16—Proposal 2 expressly provides that it "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." Application, Ex. E (Proposal 2) ¶ 4. Accordingly, by its plain terms Proposal 2 eliminates any conflict that might otherwise exist between Proposal 2 and Title VI or regulations validly promulgated thereunder.

Furthermore, section 1104 expressly preserves state laws from preemption unless they are "inconsistent with any of the purposes *of this Act*, or any provision *thereof*." (Emphases added.) Actions that do not amount to intentional discrimination are not inconsistent with the provisions of Title VI itself, however, even if they have a disparate impact. *See, e.g., Sandoval*, 532 U.S. at 281 (absent intentional discrimination, "activities that have a disparate impact on racial groups . . . are permissible under § 601"). Accordingly, this Court has made clear that "disparate impact regulations do not simply apply § 601 – since they indeed forbid conduct that § 601 permits." *Id.* at 285; *see also id.* at 286 n.6 ("§ 601 permits the very behavior that the regulations forbid."). And although actions prohibited by disparate impact regulations may be inconsistent with the policy reflected in those regulations, they are not inconsistent with any purpose *of Title VI*. As this Court has explained, " 'If, as five members of the Court concluded in *Bakke* [and as the Court confirmed in *Sandoval*], the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.' " *Sandoval*, 532 U.S. at 286 n.6 (quoting *Guardians Assn. v. Civil Serv. Comm'n of*

*New York City*, 463 U.S. 582, 613 (1983)) (O'Connor, J., concurring in judgment) (first alteration added).

In all events, Proposal 2 is not inconsistent with 34 C.F.R. § 100.3(b)(2). That regulation bars the use of "criteria or methods of administration" that have a disparate impact on members of a particular race, color, or national origin or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to such persons. Proposal 2, however, does not require the Universities to adopt any particular criterion or method of administration, let alone a criterion or method that has a disparate impact on, or has the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to, members of a protected class. On the contrary, it simply prohibits one type of criteria or methods—criteria or methods that grant preferences based on race, sex, color, ethnicity, or national origin. To the extent applicants assert that the disparate impact regulation *requires* race-based and other similar preferences in view of the enrollment disparities that applicants assert would otherwise necessarily result, their view is contrary to that of Congress as expressed in the context of Title VII – the context where the disparate impact doctrine originated and where Congress has carefully codified that doctrine. *Compare* 42 U.S.C. § 2000e-2(k) (codifying burden of proof for disparate impact cases), *with* 42 U.S.C. § 2000e-2(j) ("Nothing contained in this title . . . shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer . . . in comparison with the total number or percentage of persons of such race, color,

religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.").

In short, Proposal 2 "does not prevent [the Universities] from complying with both the federal law . . . and the state law." *California Federal*, 479 U.S. at 290-91. Accordingly applicants' claim that Proposal 2 is preempted by Title VI will almost certainly be rejected by a majority of this Court.

**3. Applicants' Title IX claim lacks merit.**

Nor is it likely that a majority of this Court would embrace applicants' argument that Proposal 2 is preempted by Title IX. This statute " 'was patterned after Title VI of the Civil Rights Act of 1964,' " *Sandoval*, 532 U.S. at 280 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), and this Court has indicated that like Title VI, Title IX prohibits only intentional discrimination, *see, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (holding that retaliation "falls within [Title IX's] prohibition of intentional discrimination on the basis of sex"). Furthermore, applicants' argument appears to rest primarily on regulations relating to disparate impact, purportedly promulgated pursuant to Title IX, that are similar to those they cite in support of their Title VI preemption argument. *See* 34 C.F.R. § 106.21(b)(2) ("A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown

to be unavailable.").[1] Accordingly, applicants' Title IX preemption claim suffers from the same fatal defects discussed above. Furthermore, Title IX expressly provides:

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[1] Applicants also invoke 34 C.F.R. § 106.3(a), which provides that "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination," and 34 C.F.R. § 106.3(b), which provides that "a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation [in an education program or activity] by persons of a particular sex." As for section 106.3(a), applicants do not allege that the Universities have engaged in sex-based discrimination, let alone that they have been found to have engaged in such discrimination. Furthermore, this provision does not mandate sex-based preferences in the event of such a finding but requires only "such remedial action as the Assistant Secretary deems necessary." *Id.* In the unlikely event that a situation arose where the Assistant Secretary properly determined that sex-based preferences were required as a remedy for discrimination by the Universities, Proposal 2 would not bar such preferences. *See* Application, Ex. E (Proposal 2) ¶ 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."). As for section 106.3(b), the mere fact that this provision does not *require* gender-neutrality does not mean that such neutrality is *prohibited*. *See California Federal*, 479 U.S. at 286-87. *See also Coalition for Economic Equity*, 946 F. Supp. at 1518 ("The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action. Simply obstructing an action that is allowed under federal law does not, in itself, raise

> Nothing contained in subsection (a) of this section [the provision containing Title IX's operative prohibition of discrimination] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area . . . .

20 U.S.C. § 1681(b). This provision plainly confirms that Proposal 2 does not conflict with Title IX. For all of these reasons, it is highly unlikely that majority of this Court would embrace applicants' argument that Proposal 2 is preempted by Title IX.

### C. The Irreparable Harm Inquiry Does Not Favor Applicants.

Applicants' have likewise failed to demonstrate that the irreparable-harm inquiry supports vacating the Sixth Circuit's stay pending appeal. As an initial matter, applicants' claim that they will suffer irreparable injury if *this* Court does not grant extraordinary relief is difficult to reconcile with their failure at anytime to move for a preliminary injunction below. *Cf.* Supreme Ct. Rule 23.3 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."). Furthermore, because applicants' claims lack merit, the irreparable injury they allege must be discounted accordingly. *See Coalition for Economic Equity*, 122 F.3d at 711 ("With no constitutional injury on the merits as a matter of law, there is no threat of irreparable injury or hardship to tip the balance in plaintiffs' favor."). Finally, for every university applicant who would be admitted but for Proposition 2, there is another potential student who will be admitted if Proposition 2 is enforced according to its terms

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preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.").

but will be denied admittance if the Sixth Circuit's stay is vacated and the district court's temporary injunction reinstated. Thus, as the Sixth Circuit recognized, "[t]o 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." Application, Ex. A (6th Cir. Op.) at 12; *see also id.* (concluding that the "irreparable-harm inquiry in the end does not strongly favor one party or another").

### D. Other Considerations Support Denying the Application.

Because this is not "a close case," it is not necessary to " 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large" in order to deny applicants' request to vacate the Sixth Circuit's stay pending appeal. *Rostker*, 448 U.S. at 1308. Furthermore, because, as demonstrated above, applicants do not satisfy even the traditional factors requisite to obtaining relief, it is evident that they have failed to establish that this case presents the "weightiest considerations" and "exceptional circumstances" necessary to justify vacating the interim stay entered by the Sixth Circuit on a matter pending before it. *E.g.*, *Kleppe*, 429 U.S. at 1310; *O'Connor*, 449 U.S. at 1304.[2]

To the extent it is appropriate to consider these additional matters, we respectfully submit that the balance of equities and the weightiest of considerations counsel heavily *against* vacating

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[2] In light of their failure to establish that a majority of this Court would embrace their claims on the merits, it is also plain that applicants have failed to establish "that the court of appeals [was] demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304. In particular they have failed to show that the Sixth Circuit's preliminary conclusion that their claims had little likelihood of success on the merits was *demonstrably wrong*.

the Sixth Circuit's stay. As noted above, applicants' claim of irreparable injury to individuals seeking admission is balanced by the injury that will befall other potential students if Proposal 2's implementation is delayed. Furthermore, it is well-established that " '[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered . . . in balancing hardships.' " *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (quoting *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)). This presumption of constitutionality obtains with equal force to duly enacted state laws. *See, e.g., Town of Lockport v. Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259, 272 (1977). For this reason, "[a]ny time a State is enjoined from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Thus, were the Sixth Circuit's stay vacated and the district court's preliminary injunction thereby revived, the people of Michigan would suffer irreparable injury to their right to self-government. Indeed the intrusion into state and popular sovereignty is particularly palpable here, because the people of Michigan themselves adopted Proposal 2 as part of their state constitution.

It is these basic principles of federalism that have led the Court to treat a preliminary injunction of a state law as "an extraordinary and drastic remedy." *Mazurek v. Armstrong, et al.*, 117 S. Ct. 1865, 1867 (1997). Moreover, where such relief would "alter[ ] the legal *status quo*," it is particularly disfavored and is reserved for "extraordinary cases." *Turner Broad. Sys., Inc., et al. v. Federal Commc'ns Comm'n, et al.*, 507 U.S. 1301, 1302 (1993). Here, it is clear that "the *status quo* is that which the People have wrought, not that which unaccountable federal judges have imposed upon them." *Planned Parenthood v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997)

(Luttig, J., in chambers); *see also, e.g., Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL-CIO*, 473 U.S. 1301 (1985) (Burger, C.J., in chambers) (newly promulgated regulations that have not yet taken effect constitute the *status quo*). Thus, the traditional concern for preserving the legal *status quo* also weighs heavily against vacating the Sixth Circuit's stay.

* * *

For the foregoing reasons, the application to dissolve the stay entered by the Sixth Circuit and to reinstate the temporary injunction issued by the district court should be denied.

January 17, 2007

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2006, I caused to be served a true and correct copy of the foregoing via overnight delivery and electronic mail upon the following:

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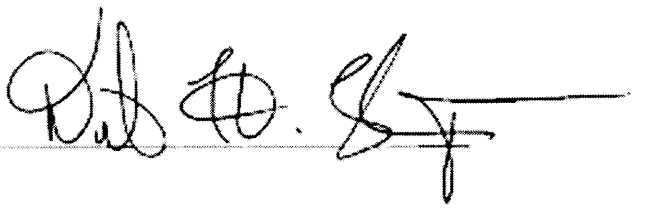

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, et al.,

Plaintiffs,

v.

JENNIFER GRANHOLM, REGENTS OF THE UNIVERSITY OF MICHIGAN, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, MICHAEL COX, ERIC RUSSELL, and the TRUSTEES OF any other public college or university, community college or school district,

Defendants,

Case Number 06-15024
Honorable David M. Lawson

-and-

CHASE CANTRELL, et al.,

Plaintiffs,

v.

JENNIFER GRANHOLM and MICHAEL COX,

Defendants.
_____/

CONSOLIDATED CASES

Case Number 06-15637
Honorable David M. Lawson

**ORDER CONSOLIDATING CASES, GRANTING ATTORNEY GENERAL'S MOTION TO INTERVENE, AND SETTING DATES**

On January 5, 2007, the Court held a joint conference with lead counsel for all of the parties in the above named cases. All parties agreed at the conference that the two cases should be consolidated, and the Court is convinced that judicial economy would be served by the consolidation of these matters for all purposes. The cases both come before the Court with common defendants

**EXHIBIT A**

and the plaintiffs in both challenge 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. The Court has further determined, and all parties agree, that the Michigan Attorney General, who is an intervening defendant in case number 06-15024, ought to intervene as a defendant in case number 06-15637. However, all parties who have now appeared in one of the cases shall be deemed to be participating in the consolidated cases.

Accordingly, it is **ORDERED** that the above-captioned cases are **CONSOLIDATED** for all purposes, up to and including trial and judgment.

It is further **ORDERED** that all further filings in these cases shall be docketed by the Clerk under **Case Number 06-15024**. The parties are instructed to use a double caption and include the designation "CONSOLIDATED CASES" in the caption.

It is further **ORDERED** that the Michigan Attorney General's motion to intervene in *Cantrell*, Case Number 06-15637 [dkt # 9], is **GRANTED**.

It is further **ORDERED** that the plaintiffs in the *Cantrell* case may file an amended complaint **on or before January 12, 2007**.

It is further **ORDERED** that answers to the complaints in both cases shall be filed **on or before January 26, 2007**.

It is further **ORDERED** that disclosure required by Federal Rule of Civil Procedure 26(a)(1)(A), (B) and (C) shall be served on opposing counsel, *but not filed with the Clerk*, on or before **January 30, 2007**.

It is further **ORDERED** that the plaintiffs in both cases shall serve on opposing counsel, *but not file with the Clerk*, a joint proposed stipulation of facts **on or before February 9, 2007**. The proposed stipulation shall be styled in separate, numbered paragraphs each containing a discrete fact per paragraph in simple, concise and direct language. The purpose of the proposed stipulation is to determine the extent to which discovery can be foreshortened or eliminated, and to provide a possible basis for a record for dispositive motions or a trial on stipulated facts. A courtesy copy shall be delivered to the Court's chambers.

It is further **ORDERED** that responses to the joint proposed stipulation of facts shall be served on opposing counsel, *but not filed with the Clerk*, **on or before February 28, 2007**. The responses shall identify which paragraphs in the proposed stipulation of facts will (1) be accepted, (2) be accepted with proposed modifications, (3) require discovery, or (4) be contested or challenged. A courtesy copy shall be delivered to the Court's chambers.

It is further **ORDERED** that the parties shall conduct a conference and submit a discovery plan to the Court's chambers pursuant to Federal Rule of Civil Procedure 26(f) **on or before March 14, 2007**.

It is further **ORDERED** that a status and scheduling conference will be held on **March 21, 2007 at 10:00 a.m.** Lead counsel for the parties are directed to attend. The appearance of co-counsel for the parties is not necessary for this conference. It is the Court's intention to conduct the conference for the purpose of reviewing the proposed stipulation of fact and responses, evaluating the parties' discovery plan, expediting discovery (if any is needed), and establishing deadlines for either filing dispositive motions or conducting a trial on stipulated facts.

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

Dated: January 5, 2007

**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 January 5, 2007.

s/Veverlyn Foster-Sims
VEVERLYN FOSTER-SIMS