No. 06A678

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, BRITTANYT 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,

On Motion to Dissolve Stay of the
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, AND THE BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY IN RESPONSE TO PETITIONER'S MOTION TO DISSOLVE STAY AND REINSTATE INJUNCTION

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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Petitioners have filed a 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 ("Motion"). This Court directed responses to this Motion to be filed by this date. Respondents the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University (the "Universities") file this Response in order to provide the Court with important additional background information regarding the proceedings below.

I. The Universities' Cross-Claim and Motion

Petitioners aver that "[the University of] 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 a racially diverse class in fall 2007." (Mot. 3) The Motion does not describe how and why these affidavits came to be filed. The Universities believe that background information would be helpful to the Court in addressing the Motion.

On November 7, 2006, the Michigan Constitution was amended to include a lengthy section providing that no state entity, including the Universities, shall "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" (the "Amendment").[1] By operation of Michigan law, the Amendment was scheduled to become effective on December 23, 2006.[2]

Existing controversies regarding the validity and effect of the Amendment escalated after its passage. On November 8, Petitioners filed the instant lawsuit, naming the Universities as

[1] The complete text of the Amendment is attached as Ex. A.

[2] Mich. Const. 1963, art. XII, § 2 provides that an amendment becomes effective "at the end of 45 days after the date of the election at which it was approved."

defendants. On November 9, the Governor issued a directive instructing the Michigan Civil Rights Commission to "investigate the impact" of the Amendment, including "upon state educational institutions and educational programs," and to issue a report within 90 days.[3] Issues requiring clarification included the extent to which the Amendment prohibited the consideration of such factors as race and gender[4] and the extent to which the Amendment affected conduct initiated before its effective date.[5]

In light of the certainty of litigation involving the Amendment and the chance that the courts might ultimately interpret it as forbidding all consideration of such factors as race and gender (except where the Amendment specifically allows), the Universities launched extraordinary efforts to analyze their admissions and financial aid programs and find new approaches that might allow them to maintain diverse learning environments without looking to such factors.[6] The Universities' own experiences, and those of other institutions, provided good reasons to doubt that such means existed,[7] but the Universities nevertheless elected not to seek any broad or long-term injunctive relief from the courts.

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[3] Exec. Directive No. 2006-7.

[4] By its own terms the Amendment does not eliminate all such consideration. The Amendment allows it, for example, "to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state" (Section 4) or where "bona fide qualifications based on sex are reasonably necessary to the normal operation of public employment, public education, or public contracting" (Section 5). Further, the Amendment allows the consideration of such factors if prohibiting it would bring the Amendment into conflict with "the United States Constitution or federal law" (Section 7) or would have the effect of invalidating an existing "court order or consent decree" (Section 9).

[5] The Amendment states that it "applies only to action taken after [its] effective date" and that it "does not invalidate any court order or consent decree that is in force as of the effective date." Amendment, ¶¶ 8, 9. Neither the Michigan Civil Rights Commission nor the courts have yet interpreted either of these provisions.

[6] For example, University of Michigan President Coleman and Provost Sullivan created a task force charged with "leav[ing] no stone unturned as [the institution] explores ways to encourage diversity within the boundaries of the law." *See* affidavit of Teresa Sullivan attached as Ex. C.

[7] The elimination of affirmative action that directly considers race and ethnicity has led to dramatic declines in minority enrollments at flagship institutions – especially for African-Americans, especially in graduate professional schools, and especially in the first year after affirmative action

Unfortunately, the Universities had a specific and immediate crisis that could not await the clarifications that the Michigan Civil Rights Commission and the federal and state courts will ultimately provide. Months before the effective date of the Amendment, the Universities designed, implemented, trained personnel around, and publicly announced their admissions and financial aid policies. Those policies were developed in reliance on this Court's holding, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that universities have a right, grounded in the First Amendment, to select their students and that they may, in the course of doing so, give some consideration to factors such as race. The Amendment was scheduled to become effective in the midst of the admissions and financial aid cycle to which those policies applied.[8]

The Universities had profound worries that abandoning these policies in the middle of this cycle would have dire consequences. Doing so would require the Universities to guess (perhaps incorrectly) at how the courts will ultimately interpret the Amendment. It would require them to apply different rules to applicants within the same cycle: their existing rules, based on guidance from this Court, and new rules, which may reflect mistaken understandings of the law. The Sixth Circuit recognized the legitimacy of these concerns, noting that the Universities had "offer[ed] 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." (Op.13.)

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ended. The University of Texas Law School enrolled only four black first-year students, and Berkeley's Law School only one, in the year after affirmative action ended at those schools. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 272 n.93 (1999). Minority enrollment in selective state universities in Texas and California has since increased somewhat, in part because of creative efforts by educators in those states, in part because of surges in the minority population. Minority enrollment continues to fall further behind minority population growth. *See generally* Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tulane L. Rev. 176, 1800-03, 1813-17 (2004). These data show the difficulty of achieving a diverse class with race-neutral means even in the long run.

[8] For most of the Universities' units, this cycle began early last fall and will end this May.

But the Universities' concerns did not end there. They recognized that such a mid-cycle change would require them to apply different standards than were announced and relied upon by applicants, counselors, and others. Further, they believed that an abrupt shift of this nature would deprive them of their academic freedom right, recognized by this Court, to admit during this single admissions cycle a class whose members, as a group, they thought would contribute the most to a rich and diverse learning environment.[9] Constructing and implementing effective new processes would take thorough and thoughtful analysis, hard work, and time; immediate mid-cycle application of the Amendment simply did not allow for any of this.

On these singular facts, the Universities decided to file a cross-claim against the Governor seeking a declaratory judgment and a preliminary injunction that would temporarily preserve the status quo.[10] The preliminary injunctive relief sought by the Universities asked only for the opportunity to complete this admissions and financial aid cycle under their existing policies. The Universities filed their cross-claim and motion on December 11, 2006.

The Universities supported their Motion with the affidavits of University of Michigan Provost Sullivan (Ex. C), Michigan State University Provost Wilcox (Ex. D), and Wayne State University Provost Barrett (Ex. E). Those affidavits described the deeply disruptive effect that a mid-cycle change in admissions and financial aid policies would have on the Universities' ability to build a Fall 2007 entering class according to the pedagogical principles endorsed by *Grutter*. They

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[9] This actually provided two bases for requesting relief. First, the Amendment itself directs implementation of its provisions only to the extent permitted by "the United States Constitution and federal law." The Amendment thus acknowledged that, in the event of a conflict, federal law would prevail. Amendment, ¶ 7. Second, this same result follows from the Supremacy Clause, which provides that under these circumstances the federal principle takes precedence. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

[10] This approach made perfect procedural sense. "[P]rior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

also described the adverse impact a mid-cycle change would likely have on the Universities' reputations for fair and consistent treatment of applicants within a cycle.[11]

For example, the affidavit of Provost Sullivan stated that such an abrupt mid-cycle change would – with respect to the University of Michigan Ann Arbor campus alone – require more than 130 different units to abandon their established and widely disseminated policies, identify and implement new policies to achieve their specific missions and goals while also attempting to generate a diverse class without considering factors like race and gender, train their admissions counselors and faculty committees and recruiters about these new policies, and share information about these changes with the public — all by December 23.[12]

The affidavit of Michigan State University Provost Wilcox raised serious concerns about the impact of such an abrupt change in connection with financial aid. Provost Wilcox noted that changing the university's financial award process mid-cycle would pose an extreme burden on the institution, and, more importantly, on its prospective and current students. Provost Wilcox also noted that even a temporary reduction in available financial aid resources due to changes or reviews prompted by the Amendment could impose a significant burden on incoming and continuing students. Finally, Provost Wilcox indicated that with respect to the university's admission cycle, "[s]ince 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

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[11] *See* note 26, *below*.

[12] Each unit, typically through its governing faculty, sets its own policies and procedures designed to achieve its particular educational mission. These policies share the overarching goal of excellence that makes U of M one of the world's premier educational institutions. But those policies also vary widely in a number of respects, including with regard to whether and how they consider factors like race and gender as part of their holistic review process. Some units do not consider certain factors (for example, gender) because their applicant pool naturally yields a class diverse in that respect. Other units, however, must consider such factors in their holistic review to ensure a rich array of backgrounds and experiences in each class. (*See* Ex. C.)

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." (Ex. D.)

The affidavit of Wayne State University Provost Barrett focused on that institution's graduate school, which is one of the largest in the nation and admits over 3200 students each academic year into over 250 different masters, doctoral and post-baccalaureate programs. Provost Barrett indicated that the university had already received literally thousands of applications that were in various stages of review by numerous administrative and faculty panels, pursuant to a broad range of existing admissions standards and criteria. Provost Barrett emphasized that it would be extraordinarily difficult for the university to ensure the review of all of these programs and their admissions practices in light of the Amendment, determine whether any changes were necessary, make such changes to comply with the new law, train its admissions staff and faculty members to implement those changes and, finally, to notify prospective applicants of the change – all by the effective date of the Amendment.

II. The Entry of the Injunction

Petitioners state that "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 admissions cycle ended on July 1, 2007." (Mot. 2.) Again, the Universities believe the Court should have a full procedural history before it.

As noted above, the Universities filed their cross-claim, motion, and request for expedited consideration of their motion on December 11, 2006. On December 12, 2006, the District Court placed the Universities' motion on an expedited briefing schedule, requiring responses by December 18, 2006. Michigan Attorney General Mike Cox – who vigorously supported the Amendment during the 2006 election season – filed a Motion to Intervene, together with a Motion

for Expedited Consideration. On December 14, the District Court granted the Attorney General's intervention. The effective date of the Amendment and the expedited nature of these proceedings were a matter of public record.

After extensive discussions and negotiations, on December 18 all the existing parties to the litigation submitted a stipulation to the District Court that in pertinent part provided as follows:

> 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 . . . .[13]

This stipulation was endorsed by every party then before the District Court. Further, the citizens of Michigan were represented in and bound by this stipulation. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 693 n.32 (1979) ("[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and they, 'in their public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'")

On December 18, *after* the parties had negotiated and reached an agreement, *after* the Governor and the Attorney General had made their judgments about what was in the best interest of the citizens of Michigan and had bound them by their stipulation, and *after* the parties had submitted their stipulation to the District Court, a University of Michigan Law School applicant named Eric Russell and an organization called Toward a Fair Michigan ("TAFM") filed a motion to

[13] A copy of the stipulation is attached as Ex. F.

intervene in the case. They did not seek expedited consideration of that motion. On the morning of December 19, the District Court entered a Temporary Injunction that, consistent with the stipulation, enjoined application of the Amendment to the Universities' admissions and financial aid policies until July 1, 2007, and dismissed the Universities' cross-claim. *After* the District Court entered this Order, Russell and TAFM filed a motion to expedite consideration of their request for intervention and asked for a stay.

The District Court did not immediately rule on their motion and so, on December 21, Russell and TAFM filed a notice of appeal with the Sixth Circuit.[14] On December 22, they filed an Emergency Motion for a Stay Pending Appeal and a Petition for Writ of Mandamus. On December 26, the Sixth Circuit ordered the Universities to file a brief within forty-eight hours. The Sixth Circuit asked all parties to brief the likelihood of success on the merits for *all* of the underlying claims advanced by *all* parties; this, of course, included claims that had received no substantive briefing before the District Court.

III. The Sixth Circuit Decision

The question properly before the Sixth Circuit was not whether the Amendment would ultimately pass constitutional muster. Indeed, to try to resolve such an exceptionally important and complex question in the context of an emergency motion with expedited briefing, no oral argument and limited factual and legal development would be imprudent and unnecessary. As this Court has recognized with respect to its own review:

> In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. ... We therefore affirm the action taken by the District Court in granting interim relief.
>
> In doing so, we intimate no view as to the ultimate merits of appellee's contentions. The record in this case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments. While the District

[14] On December 27, while the appeal was pending in the Sixth Circuit, the District Court issued an order granting Russell's motion to intervene but denying TAFM's motion.

> Court's swift action is understandable in view of the deadline which it faced, the resulting record was simply insufficient to allow that court to consider fully the grave, far-reaching constitutional questions presented.

Brown v. Chote, 411 U.S. 452, 457 (1973); *see also University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."). Of course, the same principles hold true with respect to the Sixth Circuit's review of the order entered here.

The question before the Sixth Circuit was whether the District Court had abused its discretion in granting the narrow and stipulated injunctive relief provided by its order. *Blue Cross & Blue Shield Mut. of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997). "[T]he district court's weighing and balancing of the equities is overruled only in the rarest of cases." *Six Clinics Holding Corporation, II v. Cafcomp Systems, Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) (internal quotations and citations omitted). As this Court recognized in *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973), "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable .... In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests."

Within hours after receiving substantial briefs from four sets of parties with a variety of conflicting interests, the Sixth Circuit, in an opinion that did not include the words "abuse of discretion" and instead turned on the merits of the difficult and serious federal constitutional issues raised by this case, announced that there was not "any likelihood of prevailing in invalidating this

state initiative on federal grounds." (Op. 2.)[15] The Court explicitly stated that its "decision ultimately turns on the likelihood of success on the merits" and that "[i]f [it] saw the merits differently, [it] would likely treat the stay motion differently as well." (Op. 13) (internal quotation marks omitted).

Success on the merits is only one of the four elements to be considered and balanced by the District Court in deciding whether to enter a preliminary injunction.[16] No one factor is dispositive:

> [A] finding that the movant has not established a strong probability of success on the merits will not preclude a court from exercising its discretion to issue a preliminary injunction if the movant has, at minimum, shown serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued.

Six Clinics, *supra*, at 399-400 (internal quotations and citations omitted). Further, the requirement to consider the likelihood of success on the merits does not mean that the court must or should attempt to resolve, even preliminarily, complex and difficult legal or factual questions. Instead, it need only assess whether the merits (legal and factual) are sufficiently weighty to merit further careful inquiry:

> [I]t is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.

Id. at 402.

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[15] A copy of the Opinion is attached as Ex. B.

[16] The four factors to be balanced are: (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. *See Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). Similarly, in determining whether to stay the preliminary injunction, the Sixth Circuit was required to balance (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." Op. 5-6, quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

The Universities had argued that the immediate application of the Amendment interfered with their academic freedom right to select the sort of excellent and diverse student body they thought best served their academic goals.[17] The Universities pointed out that that this right was firmly rooted in a long line of cases from this Court, beginning with *Sweezy v. New Hampshire*, 354 U.S. 234 (1957),[18] and including *Keyishian v. Board of Regents of the Univ. of the State of New York*, 385 U.S. 589 (1967),[19] *Regents of University of California v. Bakke*, 438 U.S. 265 (1978),[20] *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985),[21] and *Grutter, supra.*[22] *Sweezy* and

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[17] The Universities did not advance below, and do not address here, the equal protection or preemption claims advanced by Petitioners.

[18] In *Sweezy*, this Court held that an economist could not be compelled to respond to a government inquiry into certain lectures he had given at a university. A plurality of this Court concluded that there was "unquestionably" an "invasion of liberties in the areas of academic freedom and political expression — areas in which government should be extremely reticent to tread." *Id.* at 249. In a concurring opinion, Justice Frankfurter observed that "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262. Justice Frankfurter further recognized: "four essential freedoms of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (internal quotation marks omitted).

[19] In *Keyishian*, two faculty members refused to comply with a state law that required them to sign a statement disclaiming any connection with the Communist Party. This Court quoted *Sweezy* at length and held the law unconstitutionally vague and overbroad, emphasizing that any law "so closely touching our most precious freedoms" had to be precise in nature because "First Amendment freedoms need breathing space to survive." *Id.* (citations omitted). This Court emphasized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment .... The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* at 603 (citations omitted). Thus, by 1967 this Court had fully incorporated academic freedom into its First Amendment jurisprudence.

[20] In *Bakke*, Justice Powell announced the judgment of a fragmented Court. He recognized that one interest identified by the University — "attain[ing] a diverse student body" — implicated the University's academic freedom rights and was therefore "compelling." *Id.* at 311. Justice Powell relied heavily on *Sweezy* and *Keyishian*. He recognized that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment" and that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* at 312-14.

[21] In *Ewing*, this Court upheld the University of Michigan's decision not to readmit a student to a medical program, stressing its "reluctance to trench on the prerogatives of state and local educational institutions" and its "responsibility to safeguard their academic freedom, 'a special

Keyishian show that this right is good against states that create state universities; *Bakke, Ewing* and *Grutter* show that this same right applies to the process of admitting students. Just last term, while holding that most state employees speaking within the scope of their official duties have no free-speech rights against the state that employs them, the majority distinguished and reserved that question with respect to "expression related to academic scholarship or classroom instruction." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006). The majority recognized the argument that such speech "implicates additional constitutional interests"; the dissenters recognized that "universities occupy a special niche in our constitutional tradition." *Id.* at 1970 (Souter, J., dissenting) (quoting *Grutter* at 329.)

In dismissing the Universities' claims as "improbable," the Sixth Circuit asserted that the Universities had "mistake[n] interests grounded in the First Amendment — including their interests in selecting student bodies — with First Amendment rights." (Op. 9) The Court cited no authority for this characterization of the existing academic freedom jurisprudence. In fact, institutional academic freedom rights – including the right to select the student body – were so clear and entrenched by the 1980's that this Court made the following passing observation in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy*): "Nor do we question the right of the

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concern of the First Amendment.'" *Id.* at 226 (citing *Keyishian*). This Court observed that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.* at n.12 (citations omitted). Quoting *Sweezy*, this Court again emphasized that the discretion to determine who may be admitted to study is one of the "four essential freedoms" of a university. *Id.*

[22] *Grutter* specifically endorsed Justice Powell's opinion in *Bakke*, concluded that the University of Michigan Law School had a compelling interest in achieving a diverse student body, and acknowledged that this compelling interest arose from the institution's First Amendment-"grounded" academic freedom right. As this Court noted in *Grutter*, "We have long recognized that, given the importance of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition ... Justice Powell [in *Bakke*] invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.'" *Id.* at 330. *See also Gratz v. Bollinger*, 539 U.S. 244, 268 (2003).

University to make academic judgments as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *See also Id.* at 277-78 (Stevens, J., concurring) (expressing concern that the majority's opinion "may needlessly undermine the academic freedom of public universities").

The Sixth Circuit also concluded that it is "by no means clear" that state universities have such rights against the state. *Id.* The question before the Sixth Circuit was not, however, whether the Universities' claims were "clear," but whether the Universities had raised "a fair ground for litigation and thus for more deliberate investigation." *Six Clinics, supra* at 402. Almost fifty years of academic freedom decisions from this Court certainly suggested that this case raised a "fair ground for litigation" in the federal arena.

The Sixth Circuit concluded its discussion of this issue by relying on this Court's ruling in *Grutter.* The Court appears to have reasoned as follows: *Grutter* urged universities to consider alternative methods for achieving diversity; *Grutter* would not have done so if universities have a First Amendment academic freedom right to select their student body; therefore, universities have no such right. (*See* Op. 9.) A university's claim of freedom to achieve an academic goal, however, is surely stronger than its claim of freedom to use a particular means in pursuing that goal; if alternative means can be found, the universities' claims would be weaker. It is undisputed that immediate application of the Amendment did not afford adequate opportunity to explore alternative means during this admissions and financial aid cycle. The relative strength of the universities' claims mattered in *Bakke* and *Grutter* as well as here. Those cases urged universities to consider alternatives because their academic freedom right conflicted with *a competing right protected under federal law* – the right guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Indeed, *Bakke* and *Grutter* reflect this Court's effort to strike the correct balance between these

competing federal rights. In the District Court, the Universities simply argued that the immediate application of the Amendment upset this delicate balance – and prevented the Universities from exercising their academic freedom right to admit the class they thought best suited their academic goals – during this cycle.

As discussed, the Sixth Circuit focused its analysis on the question of likelihood of success on the merits. The Court did, however, address the other factors – the likelihood that the moving party will be irreparably harmed absent a stay; the prospect that others will be harmed if the court grants the stay; and the public interest in granting the stay.[23] The Court found that the "irreparable injury factors do not meaningfully favor one set of parties over the other":

> 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).

(Op. 12.)

This analysis failed to recognize that the harm to the Universities was supported by the record, immediate and certain, while the harm to the other side was none of those things. Properly framed, the inquiry into irreparable harm strongly favored the Universities.

Undisputed evidence in the record established that the Universities could not immediately modify their admissions policies in a way that would allow them to achieve their academic goals.

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[23] The Sixth Circuit's view of the Universities' academic freedom claim necessarily affected its approach to the remaining factors. After all, had the Court recognized that the academic freedom issues raised by the Universities were "fair ground for litigation" then it would have had to address the authority from this Court recognizing that the loss of a First Amendment freedom, even for a minimal period of time, "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Russell, on the other hand, offered no evidence that he would be immediately and concretely affected by the preliminary injunction. Specifically, Russell offered no evidence that the outcome of his application (i.e., whether or not he was admitted) would be affected in any way by the continuation of the University of Michigan Law School's current admissions policy.[24] Of course, Russell could argue that subjecting him to a process that might ultimately be held unlawful caused some sort of injury in the abstract. But he did not provide the Sixth Circuit with any facts from which it could fairly infer that applying the existing University of Michigan Law School policy to him would result in any sort of concrete harm. Indeed, on this point he provided no facts at all other than that he had applied. Russell also offered no evidence that the injunction would have any effect on his rights vis-à-vis any other unit within the University of Michigan *or* Wayne State University *or* Michigan State University.

Furthermore, the Sixth Circuit's formulation of an abstract "public interest" in having the Amendment take immediate effect ignored the posture of the case before it: Eric Russell did not represent the citizens of the State of Michigan – the Governor and the Attorney General did.[25] And those officials had made their best judgments about whether a delay would serve the "public interest," had concluded that it would, and had therefore stipulated to the relief the Universities requested.[26]

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[24] Russell's remedial rights are sharply limited without such a showing. *Texas v. LeSage*, 528 U.S. 18 (1999).

[25] In addition, there could be no public interest in the "immediate" effectiveness of Michigan constitutional amendments because they do not take effect "immediately" in any event. *See* Mich. Const. 1963, Art. XII, §§ 1 and 2. The question was therefore not whether implementation of this Amendment should have been delayed but whether the District Court abused its discretion in grating a modest and narrow additional delay with respect to a particular application of the Amendment in light of the high stakes and compelling equities.

[26] The Sixth Circuit also stated that "the public interest lies in a correct application" of the law." *Id. at* 12. Of course, the public has no interest in applying a law in a manner that may violate the Constitution of the United States. *ACLU v. Reno*, 929 F. Supp. 824, 866 (E.D. Pa. 1996); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). The Universities did not advocate for an "incorrect" application of the law – they simply advocated, in light of compelling and undisputed

The approach of the Sixth Circuit here is difficult to reconcile with its approach in *Grutter,* where the Sixth Circuit *itself* stayed the effect of the District Court's ruling against the University of Michigan Law School, invoking many of the same considerations raised by the Universities here:

> The injunction now in place irreparably harms the University of Michigan and disrupts the selection of the 2001-2002 first-year law school class. The district court suggests that compliance with the injunction is a simple matter, and that the University is obliged to merely extend the remaining offers of admission without a consideration of the applicants' race. However, attempts to comply with the district court's injunction require the University to make decisions that may be subject to challenge. To create a new admissions policy in compliance with the injunction and to determine how many offers must be extended to fill the new class will take time. As they take this time to perform these tasks, defendants argue, the final decisions on applicants will be delayed. As a result, applicants are likely to accept admissions at other schools, thus diminishing the University's ability to compete with other selective law schools for highly qualified applicants. This harm cannot be undone and therefore is irreparable.

Grutter v. Bollinger, 247 F.3d 631, 633 (6th Cir. 2001). Similarly, in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), after the Fifth Circuit held that diversity was not a compelling interest, the University of Texas Law School requested a stay of the decision in order to allow it to seek Supreme Court review. Although the Fifth Circuit had unanimously ruled against the law school (and expressed confidence in that ruling), it granted a brief stay based largely on the law school's description of the irreparable harm it would otherwise incur. "[T]he law school points to the continuing uncertainty and confusion it faces while attempting to conduct an admissions program that is not in conflict with applicable case law. It notes that '[t]he prospect of changes in admission practices midstream — which would prejudice students applying at different times for entry into the

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facts, for a delay in the application of the Amendment to admissions and financial aid decisions made during the existing and partially complete cycle. Beyond this, however, the Sixth Circuit's treatment of the "public interest" factor ignored the importance of the orderly administration of these universities and their consistent treatment of applicants. Changing standards on these applicants mid-stream discredits these institutions, and results in irreparable harm to them and the public. *See George Washington Univ. v. District of Columbia*, 148 F. Supp. 2d 15 (D.D.C. 2001) (granting university's request for a preliminary injunction against the enforcement of a zoning board enrollment freeze that would have forced the institution to recant previous admissions offers and observing that "[t]he public has an interest in [the university's] reputation for integrity and fair dealing, and for its continued success as a premier university").

same academic class — is real.'" Order Granting Stay Until May 13, 1996, in *Hopwood v. Texas Litigation Documents, Part 2: Attorneys' Fees in District Court and First Appeal to the Fifth Circuit and U.S. Supreme Court* (1994-1996), Volume 2, Document 194 (compiled by Kumar Percy (Wm. S. Hein & Co. Inc. 2003)).

IV. Developments after the Sixth Circuit Decision

Petitioner's Motion states that "[t]he University of Michigan has been forced to suspend all admissions for the class that will enter in August 2007." (Mot. 2). This information is now outdated, and the Universities believe the Court should have a fuller record before it.

The Sixth Circuit stay, and the urgent need to proceed with admissions and financial aid processes, forced the Universities to move into a "safe harbor" and begin making decisions during this cycle without considering such factors as race and gender (except insofar as specific sections in the text of the Amendment allow it).[27] The Universities could not shut down admissions decisions for any length of time without risking the real possibility of failing to meet enrollment targets. Further, delaying financial aid determinations could interfere with the Universities' ability to attract and provide critical support to applicants. In addition, maintaining race-conscious programs that the Amendment's proponents claim are now proscribed by state law would expose the Universities to further litigation – indeed, Russell and TAFM have filed and persist in a state court action to enjoin the University of Michigan *despite* the school's announced change of policy. In sum, the Universities have done what circumstances have forced them to do, despite their profound and well-grounded concerns over the effect this abrupt mid-cycle change may have on their academic goals.

[27] *See* footnote 4, *supra.*

CONCLUSION

For the reasons set forth above, the Universities respectfully submit that (i) the District Court acted within its discretion in entering the stipulated Temporary Injunction and (ii) the Sixth Circuit erred in staying the narrow and time-limited relief afforded by that order.

Respectfully submitted,

BUTZEL LONG

Leonard Niehoff (w permission, Sheldon Klein)

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Attorneys for Respondents, The Regents of the University Of Michigan, The Board of Trustees of Michigan State University, The Board of Governors of Wayne State University

Dated: January 16, 2007

EXHIBIT A

ARTICLE I, SECTION 26: 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 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.

EXHIBIT B

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

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

EXHIBIT D

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

EXHIBIT E

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 1998 to 2003 and provost at Western Michigan University from 1991 to 1998. I have a Bachelor's degree from Goucher College and a Masters and PhD degrees in Economics from Harvard University.

2. As Provost, I am the senior academic official 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 250 masters, doctoral and postbaccalaureate 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 impose 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 class 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 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 year is well underway. Some students have already been admitted under existing admission policies; in many other instances, the evaluation process leading to admission or denial of admission is in process. Wayne will continue to receive applications for admission to 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 both graduate and undergraduate students, including scholarships, grants, loans and other

forms of financial aid. Although most financial support attained 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 modifications, 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 before me this
11th day of December 2006.

Notary Public

KWAMINA L. SEALS
Notary Public, State of Michigan
County of Wayne
My Commission Expires Aug. 31, 2011
Acting in the County of

EXHIBIT F

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

No. 06A678

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, BRITTANYT 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,

CERTIFICATE OF SERVICE

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Philip J. Kessler
Leonard M. Niehoff
Sheldon H. Klein
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(734) 213-3625
Attorneys for Regents of Univ. of Michigan Board of Trustees of Michigan State University and Board of Governors of Wayne State University

In accordance with Supreme Court Rule 29.5(c), I, Rachel R. Jaffe, hereby certify that the foregoing BRIEF OF THE REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, AND THE BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY IN RESPONSE TO PETITIONER'S MOTION TO DISSOLVE STAY AND REINSTATE INJUNCTION was filed with the Clerk on January 17, 2007, and served via first class mail and email (or fax, for counsel without an email address) on:

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I further certify that all parties required to be served have been served.

By _____
Rachel R. Jaffe

Sworn to and subscribed before me this 17th day of January, 2007.

_____
Tasha Harris
Notary Public
District of Columbia

My commission expires September 30, 2007.