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, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

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

and

Case No. 2-06-CV-15024

Hon. David M. Lawson

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

_____/

SCHEFF & WASHINGTON, PC
George B. Washington (P26201)
Shanta Driver (P65007)
645 Griswold, Suite 1817
Detroit, MI 48226
(313) 963-1921
Attorneys for Plaintiffs

BUTZEL LONG, PC
Leonard M. Niehoff (P36695)
Philip J. Kessler (P15921)
Christopher M. Taylor (P63780)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants/Cross-Plaintiffs the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University

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MOTION 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 FOR PRELIMINARY INJUNCTIVE RELIEF

Defendants/Cross-Plaintiffs, 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"), pursuant to Fed.R.Civ.P. 65(a) or, in the alternative, 65(b), hereby respectfully request that this Court grant the limited and preliminary injunctive relief requested for the following reasons:

1. Through the cross-claim underlying this motion the Universities seek a declaratory judgment that determines their rights and responsibilities under Article I, § 26 of the Michigan

Constitution, an amendment passed on November 7, 2006 and with an effective date of December 23, 2006 (the "Amendment").

2. The Amendment has nine sections, is among the longest provisions of the Michigan Constitution, and includes a number of legal terms. Serious controversies exist regarding the validity, meaning, impact, and application of the Amendment. Inconsistent statements have been made about its constitutionality and its consequences and many, including the Universities, are uncertain of its reach. The Governor has requested an interpretation of the Amendment from the Civil Rights Commission. The Universities have special reason for concern about these controversies and uncertainties because they are specifically named in paragraph 1 of the Amendment.

3. The Amendment implicates federal law. It incorporates whole bodies of federal law by reference, including "federal programs," "federal law," and the "United States Constitution." Further, paragraph 7 of the Amendment provides that "[i]f any part or parts of this section are found to be in conflict with the United States Constitution or federal law, this section shall be implemented to the maximum extent that the United States Constitution and federal law permit." The Supremacy Clause of the United States Constitution similarly provides that, in the event of a conflict, federal law takes precedence over state law.

4. The Universities have a particular and immediate crisis that cannot await the clarifications that will ultimately be provided by this Court, other courts, and the Civil Rights Commission.

5. The Amendment becomes effective in the midst of the Universities' current admissions and financial aid cycle. For most colleges, schools, departments, and programs within the Universities those cycles run from the early fall through the spring.

6. Months before the current cycle began the Universities put their admissions and financial aid policies in place in reliance on the Supreme Court's reaffirmation in *Grutter v Bollinger*, 539 U.S. 306 (2003) that they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors such as race.

7. Before the current cycle began the Universities devoted substantial time and energy to training their admissions and financial aid personnel about those policies and to disseminating information about those policies to the public.

8. Individuals have applied for admission and have requested financial aid in reliance upon these announced policies. The Universities have not yet made decisions with respect to many of the applications and requests received to date. But the Universities have already made thousands of decisions applying those policies and processes during this cycle.

9. Forcing the Universities to abandon their existing admissions and financial aid policies in the midst of this cycle would require them to apply different policies to applicants within the same cycle and different policies than they have announced.

10. Moreover, because the Universities cannot by December 23 discover, evaluate, develop, implement, and train personnel around a new approach to admissions and financial aid that will yield a diverse student body, forcing the Universities to abandon their existing policies on that date would result in the loss of their First Amendment-based academic freedom right to admit the class that best meets their academic goals during this cycle.

11. In deciding whether to issue a preliminary injunction, a federal court considers (a) the likelihood the party seeking the injunction will prevail on the merits; (b) the danger the party seeking the injunction will suffer irreparable injury if the injunction is not issued; (c) the risk the party seeking the injunction would be harmed more by the absence of an injunction than the

opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued. All these factors weigh heavily in favor of granting the limited preliminary injunction requested here.

12. There is a substantial likelihood the Universities will prevail on the merits of their claim with respect to the current cycle. The United States Supreme Court has long recognized a university's First Amendment-based academic freedom right to admit those students they believe, in the exercise of their educational judgment, will contribute most to a rich and diverse learning environment. Compelling the Universities to cease their present admissions and financial aid policies mid-cycle would deprive them of that right.

13. The Universities will suffer irreparable harm absent the requested injunction. The deprivation of their First Amendment-based right constitutes such harm. In addition, once the Universities have finished assembling their classes during this cycle they can hardly re-assemble them to remedy the effects of having wrongfully been forced to abandon their policies. Finally, forcing the Universities to abandon their existing policies on December 23, before the Amendment has been the subject of careful judicial interpretation, would compel these institutions to apply different standards – and perhaps the wrong standards – in making decisions after that date but during the same cycle.

14. The balance of harms favors the very limited and preliminary injunctive relief requested here. Michigan constitutional amendments are not immediately effective, and any abstract or speculative "injury" resulting from a modest additional delay is plainly outweighed by the immediate, concrete, and irreparable harm the Universities will suffer absent an injunction. Further, it is not even clear that the Amendment, by its own terms, prohibits the Universities from continuing to use their admissions and financial aid policies through the end of this cycle.

15. The injunction sought here would serve the public interest. The public has no interest in depriving the Universities of their First Amendment-based academic freedom right by forcing them to abandon suddenly and disruptively their policies during this admissions and financial aid cycle. Nor does the public have an interest in discrediting the Universities by forcing them to change their policies mid-stream. Finally, the public has no interest in undermining (and the Amendment itself does not deny) the many benefits that the Supreme Court has held follow when universities admit diverse classes, including promoting "cross-racial understanding," "break[ing] down racial stereotypes," enabling students "to better understand persons of different races," preparing students "for an increasingly diverse workforce and society," and keeping higher education "accessible to all individuals regardless of race or ethnicity" and "available to all segments of American society, including people of all races and ethnicities."

16. This Court holds its expansive and flexible equity powers for just such occasions. Equity allows this Court to look to the practical realities and necessities at issue here and to achieve a result that is necessary, fair, and workable. That is precisely what the Universities seek.

17. On December 8, 2006, consent to the relief requested was sought from counsel for Cross-Defendant, who indicated that they are unable to take a position at this time.

WHEREFORE, the Universities request that this Court enter a preliminary injunction that preserves the status quo and allows the Universities to continue to use their existing admissions and financial aid policies through the end of the current cycle or until this Court enters the requested declaratory judgment; if the Court cannot rule on this request for a preliminary injunction before December 22, then the Universities alternatively request a temporary restraining order with notice to preserve the status quo from December 22 until the Court can rule on the request for preliminary injunction.

Respectfully submitted,

BUTZEL LONG, PC

By: /s/ Leonard M. Niehoff
Leonard M. Niehoff (P36695)
Philip J. Kessler (P15921)
Christopher M. Taylor (P63780)
350 S. Main Street, Suite 300
Ann Arbor, Michigan 48104
(734) 995-3110

Attorneys for Defendants/Cross-Plaintiffs the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University

Dated: December 11, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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SCHEFF & WASHINGTON, PC
George B. Washington (P26201)
Shanta Driver (P65007)
645 Griswold, Suite 1817
Detroit, MI 48226
(313) 963-1921
Attorneys for Plaintiffs

BUTZEL LONG, PC
Leonard M. Niehoff (P36695)
Philip J. Kessler (P15921)
Christopher M. Taylor (P63780)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants/Cross-Plaintiffs the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University

_____/

BRIEF IN SUPPORT OF MOTION OF DEFENDANTS/CROSS-PLAINTIFFS THE REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY AND THE BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

On November 7, 2006, the Michigan Constitution was amended to include a section providing that no state entity 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"). The Amendment becomes effective on December 23, 2006.[1]

Serious controversies exist regarding the validity and effect of the Amendment. Inconsistent statements have been made about its constitutionality and its consequences; many are uncertain of its reach.[2] The Governor has issued a directive instructing the 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] That report, the underlying case here, and the other cases likely to follow will eventually resolve many if not all of these controversies.

Out of respect for the voters, and in light of the possibility that the Amendment may ultimately be upheld against all challenges and interpreted as removing most consideration of factors like race and gender from governmental decision-making,[4] Defendants/Cross-Plaintiffs (the

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[1] Art. XII, § 2 of the Michigan Constitution provides that an amendment becomes effective "at the end of 45 days after the date of the election at which it was approved." The forty-sixth day after November 7 is December 23. A copy of the full text of the Amendment is attached as Exhibit A.

[2] For example, a page on the website of the Michigan Civil Rights Initiative, which advocated for the Amendment, stated as follows: "Myth: MCRI 'ends all affirmative action.' Fact: MCRI makes it unconstitutional to pick winners and losers based *solely* on race and sex." *See* www.michigancivilrights.org (emphasis supplied). Since Cross-Plaintiffs' existing policies do not "pick winners and losers based solely on race" (or on any other single criterion, for that matter) these statements suggest that the Amendment does not reach the type of admissions and financial aid programs the Universities have in place. In contrast, some proponents of the Amendment (including the Executive Director of the MCRI) have made statements suggesting the Universities will need to change their policies in light of the Amendment. *See*, *e.g.*, T. Lewin, "Michigan Rejects Affirmative Action, and Backers Sue," *The New York Times*, November 9, 2006., at 16P. Newspaper reports reflect confusion over whether the Amendment has an impact on everything from federal highway set-aside programs to nonprofit programs for girls in math and science. *See* P. Egan, "Affirmative Action Backlash," *The Detroit News*, November 9, 2006, at 16A and "Michigan Voters Back Affirmative Action," National Public Radio / All Things Considered, November 10, 2006.

[3] *See* Exec. Directive No. 2006-7, attached as Exhibit B.

[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

"Universities") have launched extraordinary efforts to attempt to find new approaches to admissions and financial aid that will allow them to maintain diverse learning environments without looking to such factors.[5] The Universities' own experiences, and those of other institutions, provide good reasons to doubt that such means exist.[6] Still, because the Universities do not yet know whether their renewed and exhaustive investigation of this issue will yield a promising approach, they do not seek any broad or long-term injunctive relief. Rather, the Universities' Cross-Complaint, filed with this motion, seeks only a declaratory judgment that determines their rights and responsibilities under the Amendment.[7]

Unfortunately, the Universities have a specific and immediate crisis that cannot await the clarifications that will ultimately be provided by this Court, other courts, and the Civil Rights Commission. Months ago the Universities designed, implemented, trained personnel around, and publicly announced their admissions and financial aid policies, which were developed in reliance on the Supreme Court's reaffirmation in *Grutter v Bollinger*, 539 U.S. 306 (2003) that they have the right, grounded in the First Amendment, to select their students and may, in the course of doing so,

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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] For example, University of Michigan President Coleman and Provost Sullivan have 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 Exhibit C.

[6] For example, from 1983 to 1995 under-represented minority enrollment at the University of California-Berkeley increased from 2793 students to 5257. Enrollment of under-represented minorities began a precipitous decline after Proposition 209 passed and was interpreted as barring the consideration of race in admissions. In 1997, for example, only one African-American enrolled as a first-year student at Berkeley's School of Law (Boalt Hall). By 2001, minority enrollment at Berkeley had fallen to 3975 students. It has subsequently increased to some extent, with minority enrollment in 2006 standing at 4623, still down about 12% from pre-Proposition 209 figures. 2006 African-American enrollment stands at 1174 students, down roughly 24%. *See* University of California-Berkeley Office of Student Research report, at http://osr.berkeley.edu.

[7] Michigan universities have previously sought judicial guidance regarding the constitutionality of laws by bringing a declaratory judgment action. *See Regents of the Univ. of Michigan v. State of Michigan*, 395 Mich. 52 (1975). In that case, these Universities brought a declaratory judgment action to resolve questions concerning the constitutionality of certain provisions of the Appropriation Act of 1971.

give some consideration to factors such as race. The Amendment becomes effective in the midst of the cycle to which these policies apply, which, for most of the Universities' units, began early this fall and will end next May.

Forcing the Universities to abandon these policies in the middle of this cycle would have dire consequences. It would require the Universities to guess (perhaps incorrectly) at how the courts will interpret the Amendment. It would require them to apply different rules to applicants within the same cycle: their existing rules, based on guidance from the Supreme Court, and new rules, which may reflect mistaken understandings of the law. It would require them to apply different standards than were announced and relied upon by applicants, counselors, and others. And it would deprive the Universities of their academic freedom right, recognized under the federal Constitution, to admit those students they believe will contribute the most to a rich and diverse learning environment.

On these singular facts, a preliminary injunction is necessary to preserve the status quo until a declaratory judgment can be entered after full and fair procedure (or until the Universities can design new policies for future cycles). "[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). If the Court cannot rule on the preliminary injunction motion before December 22, then the Universities alternatively request a temporary restraining order with notice to preserve the status quo until the Court can do so.[8]

In order to avoid any misunderstanding, the Universities wish to underscore the very limited nature of the injunctive relief sought in this motion. All the Universities ask for here is the ability to complete this admissions and financial aid cycle under their existing policies. As time passes,

[8] Even a temporary restraining order *without notice* can last for twenty days. *See* Fed. R. Civ. P. 65(b). And this limitation does not apply to a temporary restraining order issued *with notice*.

greater clarity will emerge and it may become apparent that no further relief is required: the courts will interpret the Amendment, the Universities will have the opportunity to "leave no stone unturned" in seeking new approaches, and those processes may provide answers that accommodate the goals of both the Amendment and the Universities. Unfortunately, that time of clarity has not arrived and the Universities therefore urgently need the relief requested.

FACTUAL BACKGROUND[9]

The following facts provide a sense of the complexity of the Universities' admissions systems and financial aid programs; they also demonstrate the serious consequences that would follow from an abrupt change in those policies in the midst of this cycle.

The University of Michigan

The University of Michigan ("UM") has more than 130 distinct units that handle admissions decisions at its Ann Arbor campus alone. 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 UM 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.

By summer of this year each unit had established the policies applicable to this admissions cycle, which for most units runs from September through May. Those units devoted substantial time and energy to training their application readers, admissions counselors, faculty committees, and recruiters about their policies and the legal guidance afforded by the United States Supreme

[9] These facts are set forth in greater detail in the affidavits of UM Provost Sullivan (Exhibit C), MSU Provost Wilcox (Exhibit D), and WSU Provost Barrett (Exhibit E).

Court. They widely disseminated information about their admissions policies to prospective students, parents, and high school counselors; for instance, at the undergraduate level alone approximately 50,000 students attended various events this year to learn about the admissions policies and procedures of UM-Ann Arbor, and the UM Office of Undergraduate Admissions has reviewed its admissions guidelines with literally hundreds of high school counselors.

An abrupt mid-cycle change would have dramatic consequences for UM. Focusing solely on the UM Ann Arbor campus, it would require more than 130 different units to abandon their established and widely disseminated policies, identify and implement new policies that 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. It would, in short, require something virtually impossible.

Michigan State University

By December 23, Michigan State University ("MSU") expects that it will have offered undergraduate admission to more than 9,000 students, over half of its projected admission target. MSU applicants reasonably expect that they will be judged by the same admission standards – regardless of whether they apply before or after December 23. The implementation of the Amendment on December 23, however, would understandably lead to the perception by its more than 24,000 freshman applicants that they were judged by different standards. In addition to its concerns over the practical difficulties associated with mid-cycle adjustments, MSU therefore also worries that its reputation for fairness would suffer significantly, now and for years to come.

Serious concerns also arise in connection with financial aid. MSU awards over $405,000,000 in financial aid to support its 33,000 students, including federal, state, private, and university scholarships, loans, and grants. Changing MSU's financial award process mid-cycle

poses an extreme burden on MSU, and, more importantly, on its prospective and current students. Many incoming students may not be able to afford to attend MSU without aid. Students in the middle of their academic careers count on scholarship and other awards to complete their studies. 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. Implementation of the Amendment mid-cycle would also require MSU to employ extraordinary efforts to review its agreements with private donors. Corporations fund a variety of programs at MSU in an effort to seek a more diverse workforce, including scholarships, internships, and grants. MSU and these corporations would need to formulate new ways to preserve this goal – all in a matter of weeks.

Wayne State University

Wayne State University ("WSU") has one of the largest graduate schools in the nation. WSU admits over 3200 students each academic year into over 250 different masters, doctoral and postbaccalaureate programs. While graduate admissions are coordinated by the Graduate School administration, actual admission decisions are discipline-specific, and are made by the faculty in each individual graduate program. The criteria for admission are determined by the educational goals and mission of each program. Some programs are highly selective. Some are not. Many of these programs recognize the need to take constitutionally appropriate measures to promote diversity in their incoming class, while others achieve educational diversity without doing so.

The WSU graduate school admissions process began four months ago. Literally thousands of applications have been received and are now in various stages of review by numerous administrative and faculty panels, pursuant to a broad range of existing admissions standards and criteria. It would be extraordinarily difficult for WSU to ensure the review of all of these diverse 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 within the next few weeks.

ARGUMENT

In reviewing a request for a preliminary injunction federal courts consider four familiar factors: (1) the likelihood the party seeking the injunction will prevail on the merits; (2) the danger the party seeking the injunction will suffer irreparable injury if the injunction is not issued; (3) the risk the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued.[10] These are not prerequisites but factors to be balanced.[11] All of them weigh heavily in favor of granting the limited preliminary relief requested here.

Further, this Court holds its expansive and flexible equity powers for just such occasions. As the Supreme Court has noted, "[i]n shaping equity decrees, the trial court is vested with broad discretionary power." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). "Moreoever," the Court has added, "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." *Id.* The Universities seek only what is necessary, fair, and workable.

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[10] *See ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); *Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995).

[11] For example, the likelihood of success that must be demonstrated will vary inversely with the degree of injury the plaintiff will suffer absent an injunction. *See Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982); *see also Blackwelder Furniture Comp .of Statesville, Inc.*, v. *Seilig Mfg. Comp., Inc*., 550 F.2d 189, 198 (2nd Cir.1977)(stating that "even a 'possible' irreparable injury has been held to suffice if there is strong probability of success on the merits"). Thus, if a plaintiff fails to demonstrate a substantial likelihood of success on the merits the Court may still exercise its discretion to issue an injunction if the plaintiff demonstrates that the merits of its claim present serious questions that justify further investigation and that the irreparable harm it will suffer absent an injunction decidedly outweighs any potential harm to the defendant should the court issue an injunction. *See Friendship Materials*, 679 F.2d at 105.

I. Likelihood of Success on the Merits

A long and unbroken line of United States Supreme Court cases has recognized that institutions of higher education enjoy academic freedom rights grounded in the First Amendment and that these rights include the selection of the student body.[12]

Sweezy v. New Hampshire, 354 U.S. 234 (1957), initiated the Court's serious consideration of academic freedom. In that case, an economist declined to respond to a government inquiry into certain lectures he had given at a university. A plurality of the Court concluded that there was "unquestionably" an "invasion of [Sweezy's] liberties in the areas of academic freedom and political expression — areas in which government should be extremely reticent to tread." *Id.* at 249. The Court cautioned that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* at 250. In an often quoted concurring opinion, Justice Frankfurter observed that "[t]hese pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262. Justice Frankfurter observed that "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail the four essential freedoms of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (internal quotation marks omitted).

The Court next discussed academic freedom in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967). In that case, two faculty members

[12] A number of these cases involved public universities. *See* Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 300 (1989) ("A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.") As will be discussed, two of those cases specifically recognized the academic freedom rights of the University of Michigan and both of those cases related to university admissions decisions.

refused to comply with a state law that required them to sign a statement disclaiming any connection with the Communist Party as a condition to their continued employment. The Supreme Court quoted *Sweezy* at length and again invoked the principle of academic freedom:

> Our 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, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the "marketplace of ideas." 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). The Court 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). By 1967 the Supreme Court had thus fully incorporated the right of academic freedom into its First Amendment jurisprudence.

Academic freedom next received attention from the Supreme Court in the context of a conflict between a university's right to decide who may be admitted to study and the right to Equal Protection guaranteed by the Fourteenth Amendment. In *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the plaintiff challenged a racial set-aside program that reserved a specific number of seats in a medical school class for members of certain minority groups. A fragmented Court struck the program down.[13]

Justice Powell announced the judgment of the Court in an opinion in which he applied the "strict scrutiny" test of the Equal Protection Clause. Under this exacting standard, a governmental classification based on race can be justified only if it advances a compelling interest and is narrowly

[13] Four Justices would have upheld the program on the ground that the government can use race to "remedy disadvantages cast in minorities by past racial prejudice"; four voted to strike down the program on statutory grounds; and Justice Powell provided a fifth vote for invalidating the program but also for reversing the state court's injunction against any use of race whatsoever.

tailored to do so.[14] Justice Powell concluded 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*:

> The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body…
>
> The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. [I]t is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.
>
> Thus, in arguing that its universities must be accorded the right to select those students who will contribute most to the "robust exchange of ideas," petitioner invokes a countervailing interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.
>
> * * *
>
> Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded … As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.

Id at 312-314. Justice Powell concluded that the University's quota system failed the "narrow tailoring" part of the strict scrutiny inquiry but that a university could consider race as "one element in a range of factors" in making its admissions decisions. *Id.* at 314-315. *Bakke* thus struck a delicate balance between First and Fourteenth Amendment principles.

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Supreme Court again discussed the academic freedom implications of university admissions decisions. In that case,

[14] *See Grutter*, 539 U.S. at 326.

a student sued the University of Michigan after it declined to readmit him to a combined undergraduate and medical program. The Court rejected the student's claim, stressing its "reluctance to trench on the prerogatives of state and local educational institutions" and its "responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Id.* at 226 (citing *Keyishian*). The 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*, the 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.*[15]

This brings us to the Supreme Court's 2003 decision in *Grutter*, upholding the constitutionality of the University of Michigan Law School admissions program. *Grutter* specifically endorsed Justice Powell's opinion in *Bakke*, concluded that the 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:

> 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. In announcing the principle of student body diversity as a compelling state interest, 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.' From this premise, Justice Powell reasoned that by claiming 'the right to select those students who will contribute the most to the 'robust exchange of ideas,' a university 'seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.' Our conclusion that the [University of Michigan] Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission ….

[15] Indeed, by time the Court decided *Ewing* this aspect of the academic freedom right was clear and entrenched. This is reflected in this passing observation in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy*): "Nor do we question the right of the 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.'"

Id. at 330. *See also Gratz v. Bollinger*, 539 U.S. 244, 268 (2003).

These cases clearly establish that the Universities have an academic freedom right, grounded in the First Amendment, to make those admissions and financial aid decisions that, in their educational judgment, will yield a student body that can "contribute the most to the robust exchange of ideas." *Grutter*, 539 U.S. at 324. The Universities readily concede this right is not absolute. As *Bakke* and *Gratz* demonstrate, if the Universities consider race in making those decisions then the federal Equal Protection Clause requires them to do so in a narrowly tailored manner. Nevertheless, the Equal Protection Clause leaves them room to consider such factors in order to create a diverse learning environment and to provide their students with the "substantial," "laudable," "important," and "real" benefits such an environment affords. *Grutter*, 539 U.S. at 330-331.

The Amendment directs implementation of its provisions "to the maximum extent the United States Constitution and federal law permit" and acknowledges that, in the event of a conflict, the Constitution and federal law prevail. Amendment, ¶ 7. This is consistent with the dictates of 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.").

If, without guidance from this Court, the Universities were to cease mid-cycle on December 23 their present admissions and financial aid practices, they would be giving up a central element of their First Amendment-based academic freedom right to select and enroll the student body that best achieves their educational missions. For the reasons described above, the Universities could not possibly by December 23 discover, evaluate, develop, implement, and train personnel around a new approach to admissions and financial aid that would yield a comparably diverse class. As noted, the Universities have reasons to question whether they will be able to accomplish this goal — at least in

the relatively near future. That they cannot do so this instant, in the middle of an admissions and financial aid cycle, is irrefutable.

II. Irreparable Harm

Depriving the Universities of their First Amendment-based right to administer their existing policies through the conclusion of this admissions and financial aid cycle clearly inflicts irreparable harm upon them. After all, once the Universities have finished assembling their classes during this admissions and financial aid cycle they can hardly re-assemble them to remedy the effects of having wrongfully been forced to abandon their policies. Further, it is well settled 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).[16] Indeed, plaintiffs (like these Universities) who show a likelihood of success on the merits of a First Amendment-based claim "will almost certainly meet the second [prong of the test], since irreparable injury normally arises out of the deprivation" of constitutional rights. *ACLU v. Reno*, 929 F. Supp. 824, 866 (E.D. Pa. 1996

Forcing the Universities to abandon their existing policies on December 23 would result in another form of irreparable harm as well. Because the Amendment has not yet been interpreted by the courts (or the Civil Rights Commission, as the Governor has directed) the Universities have no specific guidance as to how they should proceed. As a result, any change implemented on December 23 might do more — or less — than the Amendment is ultimately interpreted as requiring. Therefore, applicants whose materials are considered after December 23 will not only be reviewed under a *different* standard than those earlier in the cycle; they may be reviewed under the *wrong* standard. This irreparably harms the Universities (who want to fulfill their compelling

[16] *See also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."); *ACORN v. Dearborn*, 696 F. Supp. 268, 271 (E.D. Mich. 1988) ("[W]here First Amendment interests are threatened, irreparable injury can be presumed. The First Amendment occupies a unique place in our pantheon of freedoms, and as such is entitled to particular protection.").

interest in admitting a diverse class but do not want to run afoul of the law) and the applicants (who will, within the same cycle, have different standards applied to them — including standards that, through no fault of the Universities, may ultimately be found not to comport with the current state of the law).[17]

III. Weighing of Harms

It might be suggested that the requested injunction would injure the State's interest in having its laws receive immediate effect and enforcement. There are several problems with this argument. First, Michigan constitutional amendments do not take effect immediately;[18] the question is therefore not whether implementation of this Amendment should be delayed but whether it is appropriate to grant some modest additional delay with respect to this particular application of the Amendment in light of the high stakes and compelling equities. Second, any such abstract or speculative "injury" on the part of the State is plainly outweighed by the immediate, concrete, and irreparable harm to the Universities described above. Third, the argument that the injunction harms the State only makes sense if the Amendment actually prohibits the Universities from completing this cycle using their current policies — but there are sound reasons to doubt that it does so.

As an initial matter, two sections of the Amendment suggest it does not seek to reach back in time and change what has already occurred. Specifically, the Amendment states that it "applies only to action taken after [its] effective date" and that it "does not invalidate any court order or

[17] After the Fifth Circuit ruled that diversity was not a compelling interest in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the law school requested a stay of the ruling in order to allow it to seek Supreme Court review. Even though 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 caselaw. It notes that '[t]he prospect of changes in admission practices midstream — which would prejudice students applying at different times for entry into the 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).

[18] *See* Mich. Const. 1963, Art. XII, §§ 1 and 2.

consent decree that is in force as of the effective date." Amendment, ¶¶ 8, 9. Long before the Amendment's effective date, the Universities — in good faith reliance on the opinions and orders of the United States Supreme Court in *Grutter* and *Gratz* — implemented admissions and financial aid policies designed to operate to the end of the current cycle. These provisions suggest that the Amendment should not be read in a manner that extends its grasp back in time to rewrite those policies so they expire or change as of December 23. This interpretation has several qualities to commend it: it does no violence to the language of the Amendment — to the contrary, it gives effect to the Amendment's language; it avoids the dire consequences of an abrupt change; and it saves the Amendment from the unconstitutional application to this admissions and financial aid cycle described above.[19]

Further, this Court (or another court or the Civil Rights Commission) may ultimately conclude that, properly interpreted, the Amendment does not prohibit the Universities' existing admissions and financial aid policies — or that the Amendment requires only very modest changes in those policies. Settled rules of constitutional interpretation suggest this may be so. As emphasized above, the Universities do not here ask the Court to decide this broader issue; they ask only that the Court note that it might ultimately be determined that the Amendment allows the Universities to continue their use of these policies through the present cycle and beyond.

The Michigan Supreme Court has held that "the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified." *Wayne Co v. Hathcock*, 471 Mich. 445, 468 (2004). The Court has observed that, in discerning this intent, "if the constitution employs technical or legal terms of art, we are to construe

[19] The Michigan Supreme Court has repeatedly held that "whenever possible, an interpretation that does not create a constitutional invalidity is preferred to one that does." *Highway Comm'n v. Vanderkloot*, 392 Mich.. 59, 179 (1974), citing *Traverse City Sch. Dist. v. Attorney Genl.*, 384 Mich. 390 (1971).

those words in their technical, legal sense." *Id* at 469 (internal quotation marks omitted).[20] Thus, in *Hathcock* the Court held that "public use" is a "term of art" and that the Court could discern the "common understanding" of that term "only by delving into [the relevant] body of case law." *Id.* at 470. Similarly, in *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 468 Mich. 367 (2003), the Michigan Supreme Court held that the phrase "just compensation" was a legal term of art and that its meaning could be discerned only by canvassing legal precedent before 1963 to determine how an individual versed in the law before the Constitution's ratification would have understood the concept.[21]

If this "plain meaning" analysis yields an understanding of the provision then it is neither necessary nor appropriate for the Court to look to the circumstances surrounding its adoption. Review of such secondary sources is appropriate only if the "plain" (or, in the case of terms of art and technical terms, the "special") meaning of the language used is unclear and ambiguous.[22] A text is not "ambiguous" for these purposes simply because it requires a reasonable effort to parse.[23]

The Amendment uses two legal terms of art — "discriminate against" and "grant preferential treatment to" — of key importance here. A court charged with discerning their meaning would have to apply *Hathcock* and look at the relevant underlying case law.[24]

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[20] This distinguishes the approach taken in Michigan from that taken in California and Washington, other states that have adopted bans on "preferential treatment." In interpreting the words "discrimination" and "preferential treatment" courts in those states have looked primarily to their dictionary meaning. *See Certification from the United States Court of Appeals for the Ninth Circuit in Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wn.2nd 660, 685-686 (2003); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 559 (2000). Those cases accordingly offer no interpretive guidance here.

[21] *See also Studier v. Michigan Pub. Sch. Employees' Ret. Bd.* , 472 Mich. 642, 651-52 (2005)("[W]e apply the plain meaning of each term used therein at the time of ratification unless technical, legal terms were employed."); *Michigan United Conservation Clubs v. Dept. of Treasury*, 239 Mich. App. 70, 77 (1999)("Terms of art and technical terms should be given their special meanings.").

[22] *See*, *e.g.*, *Council of Orgs. v. Engler*, 455 Mich. 557, 569-70 (1997); *Michigan United Conservation Clubs*, 239 Mich. App. at 77 ("Only if the language of [the provision] admits of varying interpretations should this Court undertake an examination of the circumstances surrounding its ratification.").

[23] *See County Rd. Ass'n of Michigan v. Governor of Michigan*, 474 Mich. 11, 17 (2005).

[24] Courts will have to look to case law to understand the Amendment's meaning in any event. After all, the Amendment includes several other legal terms (e.g., "bona fide qualification") and even goes so far as to

Michigan has a substantial body of case law defining the phrase "discriminate against" because the existing equal protection provision of the Michigan Constitution (Art. I, § 2) uses precisely the same language, stating that no person shall be "discriminated against" in the exercise of their "civil or political rights" because of "religion, race, color, or national origin." (In fact, the Amendment must be read in conjunction with this language because it substantially expands the protections Article I, § 2 offers by adding the categories of "gender" and "ethnicity."[25]) Those cases define "discrimination" as follows:

> Discrimination, in constitutional terms, refers to baseless and irrational line drawing. There are occasions when regulatory lines are legitimately drawn on the basis of some of the protected categories … When there is a sufficiently important governmental interest and the classification is adequately related to that interest, it does not amount to discrimination to draw legislative lines on the basis of those classifications.

Dep't of Civil Rights ex rel. Forton v. Waterford Twp. Dep't of Parks & Recreation, 425 Mich. 173, 189 (1986) (emphasis supplied); *see also Neal v. Michigan Dept. of Corrs. (On Rehearing)*, 232 Mich. App. 730, 741 (1998) (holding different treatment is not considered "discrimination" when "the [different] treatment serves a sufficiently compelling governmental interest and is substantially related to the achievement of that interest"); *Alspaugh v. Commission on Law Enforcement Standards*, 246 Mich. App. 547, 555 (2001) (citing and quoting *Neal*). In short, "discrimination" — as a "constitutional term" — means "baseless and irrational line drawing" that cannot be justified by "a sufficiently important governmental interest."

Of course, the prohibition against discrimination has its roots in the Thirteenth, Fourteenth, and Fifteenth Amendments and the Civil Rights Acts of 1866, 1870, 1871, and 1875, all of which had as their "one pervading purpose" the "freedom" and "protection [from] oppression" of those

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incorporate whole bodies of law by explicit reference, for example alluding to "Michigan anti-discrimination law," "federal programs," "federal law," and even the entire "United States Constitution."

[25] The plain language of Article I, § 2 and the Amendment make this clear so the Court need not turn to any secondary sources on this issue. Still, it may be worth noting that the ballot proposal emphasized this expanded protection, stating that "[a] separate provision of the state constitution already prohibits discrimination on the basis of race, color or national origin."

liberated from slavery. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). This history made clear that the non-discrimination principle strongly protected members of the minority; it left open, however, the possibility that it less strongly protected members of the majority. In addressing that issue, courts and litigants began to use variations on the phrase "preferential treatment." Justice Powell, in his opinion in *Bakke*, equated preferential treatment with discrimination:

> If [the medical school's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Bakke, 438 U.S. at 307.[26]

Prohibitions against "preferential treatment" thus try to create an explicitly symmetrical approach to equal protection. They seek to make clear that whites should be no more subject to "baseless and irrational line drawing" than minorities. The Amendment, on its face, strives for just such symmetry, condemning "discrimination" and "preferential treatment" in the same breath and on the same terms. It uses the term of art "discriminate against," without offering any new definition of that term, and adds a parallel ban on "preferential treatment."

In light of the language of the Amendment and the settled meaning of these terms it would be very odd for a court to conclude that while the term "discrimination" excludes decisions made

[26] The relationship between these ideas is confirmed by their usage in *Gratz* itself. In that case, Plaintiffs alleged that the University's consideration of race gave "preferences" that favored others and therefore amounted to "racial discrimination" against them. *Gratz,* 539 U.S. at 252 ("We granted certiorari in this case to decide whether 'the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause'")("Petitioners' complaint was a class-action suit . . . for racial discrimination."). The Michigan courts have used the term in the same way. *See*, *e.g.*, *Lewis v. State of Michigan*, 464 Mich. 781, 783 (2001)("Plaintiff alleges that the State Police discriminated against him on the basis of race and sex [by virtue of a policy that would] in certain circumstances, give preferential treatment to minority and female candidates"); *Laitinen v. City of Saginaw*, 213 Mich App 130, 132 (1995)(holding that the plaintiff might make out a prima facie case of discrimination if he established that "minority job candidates were accorded preferential treatment in the selection process" but not reaching the defense that a lawful affirmative action plan justified this preferential treatment because the trial court had not decided that issue).

pursuant to a sufficiently important governmental interest the term "preferential treatment" does not. To the contrary, such an interpretation would construe this Amendment, which on its face seeks to create symmetry and balance within equal protection, as establishing a senseless asymmetry and imbalance instead. Further, if the ban on "discrimination" (which is historically associated with the protection of minorities) accommodates competing compelling interests and is therefore *qualified*, but the ban on "preferential treatment" (which is historically associated with the protection of non-minorities) gives no quarter to such interests and is therefore *absolute*,[27] then the Amendment itself would be discriminatory, providing greater protection to majorities than to minorities. Under such an interpretation, the Amendment does not *end* "irrational line drawing" but draws a new irrational line; it does not *end* discrimination and preferential treatment but spawns another instance of it.

In sum, there are very sound reasons to believe that a court or the Civil Rights Commission may ultimately interpret the "preferential treatment" provision of the Amendment — like the "non-discrimination" provision of the Amendment and of Article I, § 2 — to exclude conduct narrowly tailored to advance a compelling state interest. This, of course, describes the admissions and financial aid decision-making of the Universities. It is therefore completely plausible that the Amendment may ultimately be construed as allowing the Universities to continue using the sort of admissions and financial aid policies they have in place now. Forcing the Universities to suffer irreparable harm, especially in view of this very real possibility, makes no sense at all.

IV. The Public Interest

The limited preliminary injunction sought here would serve the public interest. Neither the Government nor the public can claim an interest in applying a law in a manner that violates the

[27] *See Opelika v. Fort Smith*, 316 U.S. 584, 593 (1942), *rev'd on other grounds* 319 U.S. 103 (1943) ("The rights of which our Constitution speaks . . . are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument.").

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); *ACLU v. NSA / Cent. Sec. Serv.*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006). The public has no interest in depriving the Universities of their academic freedom right to build entering classes that best comport with their educational goals by forcing them to abandon their policies in the middle of this admissions and financial aid cycle.

The public does, however, have an interest in the integrity and well-being of these important state institutions, and in their reputation for consistent and reliable dealing with applicants. Those who applied to and sought financial aid from the Universities did so with the expectation that their materials would be evaluated under the policies in place for that cycle. They prepared those materials with the understanding, for example, that their distinctive experiences as a woman who had soldiered in an overwhelmingly male military unit or as the only African American in a suburban high school might receive some consideration. The Universities will still have such applications under consideration after December 22 because they are awaiting the receipt of materials over which neither they nor the student have control (for example, transcripts from other institutions). Changing standards on these applicants mid-stream discredits these institutions, to their harm and the harm of the public. *See George Washington Univ. v. District of Columbia*, 148 F. Supp. 2d 15 (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").

Finally, it should be noted that the Supreme Court in *Grutter* based its ruling in substantial part on the many benefits that follow when universities admit diverse classes, including promoting "cross-racial understanding," "break[ing] down racial stereotypes," enabling students "to better understand persons of different races," preparing students "for an increasingly diverse workforce

and society," and "ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities." *Grutter*, 539 U.S. at 330. The Amendment does not disclaim or dispute any of these "substantial," "important," "laudable," and "real" benefits. *Id.* To the contrary, the Amendment purports to advance the interests of equality. The limited injunction requested preserves all these benefits during this cycle and fosters a public interest enshrined in our hierarchy of shared values since *Brown v. Board of Education*, 347 U.S. 483 (1954).

CONCLUSION

The Amendment becomes effective on December 23. On that date it will be the law of the State of Michigan. But it will not be the only law. Like all laws, it will need to be interpreted, applied, and enforced in a manner respectful of competing principles. This poses a daunting challenge since the Amendment is among the longest in the Michigan Constitution and includes numerous terms that require clarification. Little wonder the Governor has requested a comprehensive interpretation from the Michigan Civil Rights Commission.

For today, this Court need not join those broad issues. Rather, the Court need only find that the law allows what common sense dictates: that the Universities — which adopted admissions and financial aid policies in the proper exercise of their rights, in connection with core educational functions, and in reliance on a recent United States Supreme Court decision — should not be forced to abandon those carefully crafted policies in the middle of a cycle and suffer irreparable harm simply because December 23 arrived. The Universities therefore respectfully request that the Court grant the very limited and preliminary relief requested here.

Respectfully submitted,

BUTZEL LONG, PC

/s/ Leonard M. Niehoff

Leonard M. Niehoff (P36695)
Philip J. Kessler (P15921)
Christopher M. Taylor (P63780)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants/Cross-Plaintiffs the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University

Dated: December 11, 2006

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, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

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

and

Case No. 2-06-CV-15024

Hon. David M. Lawson

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

_____/

SCHEFF & WASHINGTON, PC
George B. Washington (P26201)
Shanta Driver (P65007)
645 Griswold, Suite 1817
Detroit, MI 48226
(313) 963-1921
Attorneys for Plaintiffs

BUTZEL LONG, PC
Leonard M. Niehoff (P36695)
Philip J. Kessler (P15921)
Christopher M. Taylor (P63780)
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 995-3110
Attorneys for Defendants/Cross-Plaintiffs the Regents of the University of Michigan, the Board of Trustees of Michigan State University and the Board of Governors of Wayne State University

_____/

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: George B. Washington and Shanta Driver, SCHEFF & WASHINGTON, PC, 645 Griswold, Suite 1817, Detroit, MI 48226 and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Michelle M. Rick, Deputy Legal Counsel, Office of Legal Counsel, State of Michigan, Office of the Governor, PO Box 30013, Lansing, MI 48909.

/s/ Leonard M. Niehoff
350 S. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 213-3625
niehoff@butzel.com
P36695

162950