STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ERIC RUSSELL, individually and on behalf of all similarly-situated persons, and TOWARD A FAIR MICHIGAN, a Michigan non-profit corporation, Plaintiffs, v. DAVID A. BRANDON, LAURENCE B. DEITCH, OLIVIA P. MAYNARD, REBECCA MCGOWAN, ANDREA FISHER NEWMAN, ANDREW C. RICHNER, S. MARTIN TAYLOR, KATHERINE E. WHITE, MARY SUE COLEMAN, in their official capacities, THE REGENTS OF THE UNIVERSITY OF MICHIGAN and JENNIFER GRANHOLM, in her official capacity as Governor of Michigan, Defendants.	Hon. Melinda Morris No- 07-01 AZ

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MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

On November 7, 2006, a large majority of the voters of the State of Michigan adopted Proposal 2, which became Article I, Section 26 of the Michigan Constitution. Among other things, Clause 1 of Section 26 provides that "[t]he University of Michigan … shall not discriminate against, *or grant preferential treatment to*, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public

education, or public contracting." MICH. CONST. art. 1, § 26 (emphasis added). Section 26 is self-executing and became effective on December 23, 2006.

On December 29, 2006, the U.S. Court of Appeals for the Sixth Circuit granted an emergency stay of a temporary injunction entered by a federal district court that would have enjoined the enforcement of Section 26 for six months. In its ruling, the Sixth Circuit emphasized that "state courts, not federal courts, have the final say on the meaning of state laws" and that "[t]he state courts assuredly have authority" to enforce or enjoin this new provision of Michigan law. *Coalition to Defend Affirmative Action, et al. v. Granholm, et al.*, Nos. 06-2640, 06-2642, slip op. at 13 (6th Cir. Dec. 29, 2006) ("Slip op.") (attached as Exhibit 1). In keeping with the Sixth Circuit's directive that Michigan's courts are the proper forum to address the legality and interpretation of Section 26, Plaintiffs Eric Russell and Toward A Fair Michigan ("TAFM"), who intervened as defendants in the federal lawsuit, seek a prompt adjudication of the meaning and validity of Section 26, including a preliminary injunction to compel the University of Michigan to cease considering race (or any other prohibited ground) as a factor in its admissions and financial aid decisions. *See* Mich. Court Rule 3.310(A)-(B). In support, Plaintiffs state as follows:

STATEMENT OF THE CASE

In this action, Plaintiffs ask this Court simply to confirm the obvious: that newly enacted Section 26 of Article I of the Michigan Constitution, which is expressly applicable to the University of Michigan ("the University") and explicitly bans preferential treatment on the basis of race and other prohibited factors, in fact prohibits the University of Michigan from granting preferential treatment on the basis of those factors. The University's recent, and concretely

expressed, recalcitrance toward this duly enacted law has created an urgent need for this Court to issue a declaration of the University's duties and compel its compliance with the law.

Prior to the passage of Section 26, no one expressed any doubt as to its meaning. Specifically, during the vigorous and highly publicized debates about Section 26, there was universal agreement that the Amendment would bring to an end the University of Michigan's racially preferential admissions program, which sparked a nationwide debate during the litigation that terminated in the Supreme Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Indeed, the University's race-conscious admissions policies were the chief focus of the public debate that led up to the passage of Section 26 by the decisive margin of 16 percent of the voters. *See* Peggy Walsh-Sarnecki & Lori Higgins, *Affirmative Action: A lot at Stake if Ban is Passed: Critics See Proposition as Threat to Progress*, DETROIT FREE PRESS, Oct. 29, 2006, at NWS 14 ("The most contentious debate is over whether U-M [the University of Michigan], the state's flagship university, would become an enclave of white privilege without affirmative action.").

At that time, prior to Section 26's passage, the governing officials of the University of Michigan openly acknowledged that Section 26 would terminate the University's use of race as a factor in admissions and financial aid decisions. In expressing vigorous opposition to Proposal 2, for example, President of the University of Michigan and Defendant Mary Sue Coleman stated, "At the heart of the debate [over Proposal 2] is the argument that giving a leg up to minority students is not only justified, but also crucial to maintaining a strong learning environment. . . ." *See* Marisa Schultz, *Calif. Offers Window into Race Ban's Impact*, THE DETROIT NEWS (Michigan), Oct. 20, 2006, at 1A. Again, out of concern to preserve the University's race-conscious admissions policies, Defendant Coleman publicly urged that the passage of Proposal 2 would be "a huge mistake," and asserted that "[t]his is the wrong time to

close school doors to talented and qualified young people." Walsh-Sarnecki & Higgins, at NWS 14. In fact, University of Michigan officials calculated and touted the precise extent to which they expected minority enrollments in their University to drop after the Amendment took effect: " 'If affirmative action were eliminated, the combined enrollment of black, Native American and Hispanic students would be about 4 to 6 percent. It's now about 14 percent,' said Julie Peterson**,** associate vice president for media relations [for the University of Michigan]. 'In California, that's precisely what happened.' " *Id.*; *see also* Schultz, at 1A ("If Proposal 2 passes, University of Michigan officials predict their combined black, Hispanic and Native American enrollments would go from about 12-14 percent of the student body to about 4-6 percent."). Indeed, Ms. Peterson's reference to "what happened" "in California" demonstrates that University officials clearly understood that Proposal 2 would have the same meaning and effect as the parallel provision that California voters adopted in 1996 as Proposition 209, thus banning race-conscious admissions policies in California's public universities. *See* Walsh-Sarnecki & Higgins, at NWS 14.

In short, prior to the passage of Proposal 2, University officials had no doubt about its clear and unambiguous meaning and its implications for their race-conscious admissions programs. In fact, on November 8, 2006, the day after Proposal 2 became Article I, Section 26 of the Michigan Constitution, Defendant Mary Sue Coleman unequivocally reaffirmed that Section 26 had rendered unlawful the University's race-conscious admissions program, stating that "I am deeply disappointed that the voters of our state have rejected affirmative action." *University of Michigan President Coleman: "Diversity Matters at Michigan,"* U.S. STATES NEWS, Nov. 8, 2006 (full text of Defendant Coleman's Nov. 8 speech); *see also id.* (acknowledging "the handcuffs that Proposal 2 attempts to place on our reach for greater

diversity"). She also reaffirmed her clear understanding that the legal effect of Section 26 was identical to that of Proposition 209 in California. *See id.* ("I should add that [an alumna] lives in California, a state whose voters banned affirmative action 10 years ago. It has been a horribly failed experiment that has dramatically weakened the diversity of the state's most selective universities."). She repeatedly expressed disdain for the will of the voters who adopted Section 26: "[Section 26] is an experiment that we cannot, and will not, allow to take seed here at Michigan. I will not stand by while the very heart and soul of this great university is threatened." *Id.* She made clear that the full weight of authority of the University's public officials—notwithstanding their duty of fidelity to Michigan law—stood behind her defiance for the Michigan Constitution: "I am joined on these steps by the executive officers and deans of our university. We are united on this. You have my word as president that we will fight for what we believe in, and that is holding open the doors of this university to all people." *Id.* Defendant Coleman pledged: "Today, I have directed our General Counsel to consider every legal option available to us.… I have asked our attorneys for their full and undivided support in defending diversity at the University of Michigan. I will immediately begin exploring legal action concerning this initiative.… Let me say that again: I am fully and completely committed to building diversity at Michigan, and *I will do whatever it takes*." *Id.* (emphasis added).

The same day as Defendant Coleman's defiant speech, a group of plaintiffs filed suit against the University in federal court, challenging Section 26 under the federal Constitution. Those plaintiffs named as defendants both University officials and the Governor of Michigan in their official capacities. Subsequently in the same lawsuit, on December 11, 2006, the University defendants (including the Regents of the University of Michigan, who are Defendants here) brought a cross-claim against the Governor in her official capacity. In a breathtaking

departure from the numerous prior public statements of University officials acknowledging the plain import of Section 26, the cross-claimants took the facially preposterous position that the meaning of Section 26 was *unclear* as to their admissions policies: "Serious controversies exist regarding the validity, meaning, impact, and application of the Amendment. … [M]any, including the Universities, are uncertain about its reach." Cross-Claim of the Regents of the University of Michigan, *et al.* for Declaratory Judgment in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al.*, No. 2:06-cv-15024 (E.D. Mich. filed Dec. 11, 2006) ("Univ. Cross-Claim") (attached as Exhibit 2) at ¶ 5. In the cross-claim, despite their prior acknowledgement of the straightforward proposition that Section 26 simply abolished the use of race as a factor in public university admissions, the Universities now took the position that they were at a loss to discern any fixed meaning at all in the Amendment, and thus that it could not be enforced against them without "the clarifications that will ultimately be provided by this Court, other courts, and the [Michigan] Civil Rights Commission." *Id.* ¶ 7. They also took the position that they had a First Amendment right, guaranteed against the State (despite the fact that they are *state* officials), to disregard Section 26 if it *were* interpreted to abolish racial preferences. *Id.* ¶¶ 9, 13. They asserted that it would be administratively too difficult to implement the new requirements of the Michigan Constitution in the midst of the current "admissions cycle," *id.* ¶ 13, and that it would be unfair to treat applicants accepted or rejected prior to Section 26's effective date differently than those considered after that date. *Id.* ¶¶ 11-12. In short, they provided a flurry of reasons, none convincing, why they should be allowed to ignore the Michigan Constitution for at least six months.

In their brief seeking a preliminary injunction on their cross-claim, moreover, the Universities repeatedly argued that the language of Section 26 was murky and inscrutable. *See*

Motion of the Regents of the University of Michigan, *et al.* for Preliminary Injunctive Relief in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al.*, No. 2:06-cv-15024 (E.D. Mich., filed Dec. 11, 2006) ("Univ. P.I. Br.") (attached as Exhibit 3) at 1 (referring to the prospect that "the Amendment may ultimately be … interpreted as removing most consideration of factors like race and gender from governmental decision-making" as a mere "possibility."); *id.* 3 (arguing that forcing the Universities to comply with Section 26 would "require the Universities to guess (perhaps incorrectly) at how the courts will interpret the Amendment."); *id.* 13 ("Because the Amendment has not yet been interpreted by the courts … the Universities have no specific guidance as to how they should proceed."); *id.* 15 (arguing that "this Court … may ultimately conclude that, properly interpreted, the Amendment does not prohibit the Universities' existing admissions and financial aid policies …."); *id.* 15-19 (arguing that the ban on "preferential treatment" does not, in fact, ban preferential treatment); *id.* 19 ("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."). In the same vein, an affidavit of a University official filed in support of the cross-claim alleged that the language of Section 26 was simply too puzzling to be implemented. *See* Affidavit of Teresa Sullivan ¶ 18 (attached as Exhibit 4) ("[B]ecause of the uncertainty surrounding the implications of Proposal 2 for these types of aid programs generally, immense hardships would ensue ….").

Soon after the filing of this cross-claim, the state officials who were parties to the federal lawsuit—the University officials, the Governor, and the Attorney General as intervenor—colluded in a stipulation that Section 26 should not apply to the Universities' admissions and financial aid policies until July 2007 (despite its clear effective date of December 23, 2006). On

the basis of that stipulation, the federal district court granted a temporary injunction preventing the enforcement of Section 26 against the Universities until July 2007. Plaintiffs Russell and TAFM, intervening in that case, sought a stay of this temporary injunction to the Sixth Circuit, which stayed the injunction as having no possible basis in federal law. Slip op. at 2. In their brief to the Sixth Circuit, the University Defendants again argued that Section 26 did *not* plainly bar the use of racial preferences in public university admissions.[1] On the contrary, the Universities now asserted even more strongly that, on the *best* interpretation of Section 26, it would have *no effect whatsoever* on their admissions and financial aid policies. *See* University Defendants/Appellees' Combined Response/Opposition to Emergency Motion to Stay Pending Appeal and Petition for Writ of Mandamus in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al.*, Nos. 06-2640/06-2642 (6th Cir. filed Dec. 28, 2006) ("Univ. App. Br.") (attached as Exhibit 5) at 29-37; *id.* 36-37 ("[T]here are very sound reasons to believe that a court or the Civil Rights Commission may ultimately interpret the 'preferential treatment' provision of the Amendment ... 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."). In the few short weeks between Defendant Coleman's speech on November 8 and the University's Sixth Circuit brief filed on December 29, the University's position on the meaning of Section 26 had undergone a dramatic evolution—from ironclad certainty that Section 26 would abolish the University's racial preference programs, through a newly professed

[1] *See* Univ. App. Br. 1 ("Michigan's public institutions will serve its citizens best when they have a clear understanding of the requirements and limitations of the State's new constitutional amendment. That clear understanding will not be achieved until the conclusion of the judicial process."); *id.* 2 ("Forcing the Universities during this admissions cycle to guess as to the Amendment's requirements ... would have severe and quintessentially irreparable consequences: it would force the Universities, on pain of potential liability for making a wrong guess …."); *id.* 3 (arguing that the intervenors had appealed "despite ... the uncertainty about the Amendment's meaning and effect"); *id.* 13 ("[T]he meaning of the Amendment is sufficiently unclear so as to cast serious doubt upon Petitioner's receiving their proposed interpretation.").

uncertainty and confusion about its import, and finally to a guarded assurance that Section 26 should *not* be interpreted to abolish the racial preferences.

In light of this record, it is perfectly clear that the University's rapidly evolving position on the import of that text is part of its strategic campaign to "do whatever it takes" to resist Section 26's pellucid meaning, as Defendant Coleman vowed to do. "Whatever it takes" evidently includes ignoring Section 26's nondiscrimination command on the basis of a disingenuous assertion that the University is simply acting on its own good-faith understanding of the meaning (or lack of clarity) of Section 26. The University's professed confusion about the import of Section 26 is thus nothing more than a pretext for its manifest intention to refuse to comply with the Amendment's plain meaning during the current admissions cycle, and beyond.

This recalcitrance is compounded by the fact that Defendant Granholm has given every conceivable indication that, despite her "responsib[ility] to enforce the laws of the State of Michigan," Univ. Cross-Claim ¶ 3, she has no intention of enforcing Section 26 as written against the Universities during the current year. Defendant Granholm was a vocal and vigorous opponent of the passage of Section 26. *See, e.g.*, Chris Christoff, *Granholm, Proposal 2 Wins May Seem at Odds*, DETROIT FREE PRESS, Nov. 9, 2006, at NWS 10 (noting that "Granholm vociferously opposed" Proposal 2). In a pre-election legal bid to keep Proposal 2 off the ballot, Defendant Granholm filed an amicus brief on behalf of the same organization that has now sued her in the *Coalition to Defend Affirmative Action* proceedings to enjoin Section 26's enforcement. *See* Peter Schmidt, *A Referendum on Race Divides Michigan*, CHRONICLE OF HIGHER EDUCATION, Oct. 27, 2006, at 21 ("Lawyers for the group [By Any Means Necessary] have fought mightily to keep Proposal 2 from going before voters … [through] a federal lawsuit seeking to block a vote on Proposal 2. Gov. Jennifer M. Granholm, a Democrat, submitted a

separate brief supporting that litigation."). As a named defendant in the *Coalition* litigation, she called on Attorney General Cox, who had been an outspoken supporter of Proposal 2, to supply her with state attorneys separated from the Attorney General with a conflicts wall. In the federal courts, she repeatedly advocated for the University Defendants' implausible view that the meaning of Section 26 was so inscrutable as to foreclose its immediate enforcement.[2] And, most ominously of all, she joined in the collusive agreement with other state officials, including the University Defendants, to enjoin the enforcement of Section 26 against the Universities until July 2007—despite the Amendment's explicit effective date of December 23, 2006—an injunction for which the U.S. Court of Appeals for the Sixth Circuit was "unable to identify any tenable basis under federal law." Slip. op. at 1. In sum, it is manifest that Defendant Granholm has no immediate intention (nor any discernible long-term intention) to enforce the terms of Section 26 abolishing the University's use of racial preferences.

Plaintiff Eric Russell currently has an application pending to the University of Michigan Law School. Every single day that the University continues down its current path of professing doubt as to Section 26's import as an excuse to continue its race-conscious selection policies, Plaintiff Russell suffers the risk of having his application, and the applications of competing applicants, considered on the basis of the University's race-based criteria. Such race-based consideration imposes on him an irreparable injury in flagrant violation of the Michigan

[2] *See, e.g.*, Cross-Defendant's Answer to Cross-Plaintiff' Motion for Declaratory Judgment & Preliminary Injunctive Relief in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al*., No. 2:06-cv-15024 (E.D. Mich. filed Dec. 18, 2006) (attached as Exhibit 6) at 4 ("Cross-Defendant concurs with Cross-Plaintiffs' request for a declaratory judgment and preliminary injunction allowing the continued use of existing admissions and financial aid policies through the end of this cycle."); Governor Granholm's Response in Opposition to Emergency Motions for a Stay Pending Appeal and Petition for Writ of Mandamus in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al*., Nos. 06-2640/06-2642 (6th Cir. filed Dec. 28, 2006) (attached as Exhibit 7) at 8 ("As the Universities discuss in their motion for preliminary injunctive relief, the effect of Mich Const 1963, art I, § 26 is, at this point, uncertain."); *id.* 9 ("[T]o what extent, if any, the Universities may continue to use race as a factor in its [*sic*] admissions policies … and still comply with Mich Const 1963, art I, § 26, is … uncertain"); *id.* 10 (referring to "the uncertainty of the reach and effect of Mich Const 1963, art I, § 26" and asserting that "the effect of the new provision is uncertain," to argue that the Universities should be excused from any compliance obligations during the current admissions cycle).

Constitution. Under these circumstances, he is entitled to a preliminary injunction directing the University to cease its continued reliance on race (or any other prohibited ground) as a factor in its admissions and financial aid decisions, and a prompt declaratory judgment that the University cannot consider race or other prohibited factors under Section 26.

ARGUMENT

In deciding whether to grant preliminary injunctive relief, Michigan courts consider the traditional four equitable factors governing the granting of injunctions: (1) "the strength of the applicant's demonstration that the applicant is likely to prevail on the merits," (2) "demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted," (3) "whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted," and (4) "harm to the public interest if an injunction issues." *State Employees Ass'n v. Department of Mental Health*, 365 N.W.2d 93, 96 (Mich. 1985).

A. Plaintiffs have a strong likelihood of success on the merits.

"In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Mich. Court Rule 2.605(A)(1). On the facts recounted above, it is clear that an "actual controversy" exists between Plaintiffs and the University, which has given every indication that it is currently employing, and plans to continue employing, racial preferences in its admissions and financial aid decisions. Moreover, Plaintiffs' assertions that Section 26 prohibits the University's use of racial preferences by its plain terms, and that this prohibition is valid under federal law, are unimpeachable. Plaintiffs thus have an overwhelming likelihood of success on the merits.

1. Section 26 prohibits the use of race in public university admissions.

It is perfectly clear that Section 26 prohibits the use of race as a factor in public university decisions regarding admissions and the allocation of financial aid. Despite the University's disingenuous position to the contrary, Section 26 could not be clearer: it prohibits the Universities from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual on the basis of race, sex, color, ethnicity or national origin …" in the course of making admissions decisions. As the Universities themselves ultimately admit, the Amendment "purports to prohibit the Universities from, *inter alia*, considering race in admission …." Univ. App. Br. 2. In the context of making admissions decisions, there is no mystery as to what the Universities must do to comply with Michigan's Constitution. They must evaluate competing candidates for admission without regard to their race and sex; they may not accord any advantage – any "plus" factor – to any candidate based on the forbidden criteria.

As Attorney General Cox has noted, Section 26 "is identical" to California's Proposition 209. Intervening Defendant-Appellee Attorney General Mike Cox's Response in Opposition to Emergency Motion for Stay Pending Appeal in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al.*, Nos. 06-2640/06-2642 (6th Cir. filed Dec. 28, 2006) (attached as Exhibit 8) at 21. Indeed, the operative language of the two provisions is very similar. *Compare* MICH. CONST. art. I, § 26 *with* CAL. CONST. art. I, § 31. As the Universities have admitted in their federal-court filings, "Proposition 209 … was interpreted as barring the consideration of race in admissions." Univ. App. Br. 41 n.25; *see also* Univ. P.I. Br. 16-17.

The Universities' alternative interpretation of Section 26 is simply frivolous. The Universities assert that prohibitions against "discrimination" have been understood to permit the use of forbidden criteria like race or gender when narrowly tailored to advancing a compelling

state interest, and they suggest that Section 26 may be interpreted to include a like exception to its prohibition against preferences based on race or gender, such that the prohibition would not reach "conduct narrowly tailored to advance a compelling state interest." Univ. App. Br. 36.

This Orwellian argument—that Section 26's ban on "preferential treatment" does not ban preferential treatment—must be rejected because it rests on the demonstrably false premise that "discrimination" and "preferential treatment" mean precisely the same thing. It is a fundamental canon of interpretation that different terms in the same provision of law are to be given different meanings. *See, e.g., Herald Co. v. Eastern Mich. Univ. Bd. of Regents*, 719 N.W.2d 19, 23-24 (Mich. 2006) ("To effectuate the intent of the Legislature, a court interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage."). The Unviersity's interpretation of "preferential treatment" as including nothing more, and nothing less, than "discrimination" would render the former phrase "nugatory or surplusage." It is clear that, even if the University's racial preferences do not constitute "discrimination"—a point that Plaintiffs do not concede—those preferences plainly constitute "preferential treatment," and are therefore unconstitutional under Section 26.

Moreover, as the Universities conceded in federal court, "'[t]he primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.'" Univ. P.I. Br. 15 (quoting *County of Wayne v. Hathcock*, 471 Mich. 445, 468 (2004)). As recounted above, it was the universal understanding of Michigan voters—including of the most vigorous opponents of Section 26, such as the University—that it would outlaw the University's use of racial preferences. *See also, e.g.*, http://www.michigan.gov/documents/Bal_Lang_MCRI_152610_7.pdf (ballot summary language that appeared on every ballot stated that Proposal 2 would "[b]an public institutions from using

affirmative action programs that give preferential treatment to groups or individuals based on their race"). Hence "the intent of the people by whom [Section 26] was ratified" was to abolish those preferences. Contrary to the University's interpretive legerdemain with respect to Section 26, then, "the sense most obvious to the common understanding" and "[t]he interpretation that … the great mass of the people themselves, would give it" is obviously that it prohibits the University's use of race as a factor in admissions and financial aid. *County of Wayne v. Hathcock*, 471 Mich. at 468 (quoting *Traverse City School Dist. v. Attorney General*, 384 Mich. 390, 405 (1971), quoting COOLEY'S CONSTITUTIONAL LIMITATIONS 81).

Another sure indicator that the University's interpretation is unfaithful to Section 26 is that it would imply that the adoption of Section 26 changed exactly nothing with respect to race or gender—under pre-Amendment law, after all, racial and gender preferences that satisfied strict scrutiny passed muster under both the federal and Michigan Constitutions. In addition to rendering the phrase "preferential treatment" "nugatory and surplusage," then, the University's creative interpretation would render the *entire provision* nugatory and surplusage. *See Herald Co.*, 719 N.W.2d at 23-24.

In sum, as shown above, the University's claimed uncertainty about the meaning of Section 26 is but a pretext for its effort to evade, or at least delay, compliance with Section 26's nondiscrimination command.

2. Section 26's prohibition on racial preferences is valid under federal law.

The University's position that Section 26 may be invalid under the U.S. Constitution is plainly without merit. In *Coalition to Defend Affirmative Action*, a unanimous panel of the Sixth Circuit rejected the Universities' constitutional arguments down the line. *See* Slip op. at 8-9 (rejecting the Universities' claim that Section 26 violates their First Amendment rights); *id.* 9-11

(rejecting the claim that Section 26 violates the Equal Protection Clause). Likewise, the Sixth Circuit squarely rejected alternative claims that Section 26 was preempted by federal statutes. *See id.* 11-12 (rejecting the argument that Title VI of the Civil Rights Act preempts Section 26); *id.* 12 (same for Title IX). For the reasons stated in plaintiffs' brief before the Sixth Circuit, *see* Reply in Support of Emergency Motion for Stay Pending Appeal in *Coalition to Defend Affirmative Action, et al. v. Grandholm, et al*., Nos. 06-2640/06-2642 (6th Cir. filed Dec. 29, 2006) ("Reply Br.") (attached as Exhibit 9) at 16-25, 35-49, and for the reasons stated in the Sixth Circuit's opinion on the subject, the University has no plausible argument that Section 26's prohibition of racial preferences runs afoul of any federal law.

In sum, plaintiffs' likelihood of success on the merits in this declaratory judgment action is overwhelming. This factor is alone sufficient to justify preliminary equitable relief.

B. Plaintiffs will suffer irreparable injury without a preliminary injunction.

In *Board of Regents of the University of California v. Bakke*, the U.S. Supreme Court recognized that the inability to compete for a public-university admissions slot on a race-neutral footing was an independent injury sufficient to satisfy the standing requirements of Article III. 438 U.S. 265, 280 n.14 (1978) (recognizing "an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race"). Plaintiff Russell faces the increasing risk of suffering this injury every day that his application remains pending before the University's Law School. At any time, the University may consider his application on its current racially tilted standard, comparing him against minority applicants whose applications have been given a "plus" factor on the basis of race. This race-based consideration would inflict on him an irreparable injury of constitutional dimensions which, according to the Supreme Court, would not be rectified *even if he is admitted*

to the Law School. *See id.* (holding that Bakke suffered injury regardless of whether he was admitted to the U.C. Davis Medical School, because "[t]he question of Bakke's admission *vel non* is merely one of relief"). Plaintiff Russell thus faces the continuous, ongoing prospect of imminent, irreparable injury.

Moreover, every day Plaintiff Russell faces the ever-growing risk of the even more concrete injury—also recognized in *Bakke*—of having his application *rejected* due to the preferential treatment of other competing applicants on the basis of race. *See id.* (acknowledging the truism that Bakke would have shown injury if he had been able "to prove that he would have been admitted in the absence of the special program"). Even if Russell's application does not come up for consideration before an injunction is entered, the limited number of admission slots for which he is competing are evidently being filled, on a continuing daily basis, by applicants, many of whom have been granted preferential treatment. Each day, then, Russell suffers the irreparable injury of having his chances of admission to the 2007 class diminished on unconstitutional grounds.

C. Defendants will not suffer any countervailing harm if an injunction is granted.

In contrast to plaintiffs, Defendants face no cognizable harm if preliminary equitable relief is granted. As an initial matter, the University cannot show any irreparable harm on the basis of its strained interpretation of Section 26 or of its alleged First Amendment or other constitutional rights, because its legal position is untenable and any putative harm is therefore not cognizable. *See, e.g.*, *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997) ("With no constitutional injury on the merits as a matter of law, there is no threat of irreparable injury or hardship to tip the balance in plaintiffs' favor."). By parity of reasoning, the University cannot allege any irreparable harm on the basis of the administrative difficulties of

compliance with Section 26, because the administrative cost of complying with the law is likewise not a cognizable harm. Moreover, any putative difficulties of adjusting the University's admissions programs mid-cycle to comply with the law are plainly of its own making, because it had extensive advance notice that Section 26 would take effect and abundant time to prepare for that eventuality. *See, e.g.,* Slip op. at 12 ("Nor can it fairly be said that Proposal 2 came as a sudden surprise to anyone. Efforts to pass the initiative began soon after the Supreme Court's decisions in *Gratz* and *Grutter*, and the initiative was passed near the beginning of the 2006-2007 admissions cycle after a long debate about the merits of it."). In fact, the University was apparently preparing its legal plan to *challenge* the law during the months in advance of Section 26's passage, even while it was evidently neglecting its legal plan to *comply* with the law. *See, e.g.,* Walter Nowinski, *U. Michigan to Fight Affirmative Action Ban in Court*, MICHIGAN DAILY, Nov. 9, 2006 ("Because the potential impact of Proposal 2 has been known for months, many observers expected swift legal action by the University yesterday to maintain the continuity of this year's admissions process.").

Finally, even if such alleged administrative difficulties of compliance were cognizable at all and were not chargeable to the University's own dilatory tactics, the claim that compliance with Section 26 will cause any appreciable administrative difficulty is facially implausible. To comply with the law, the University needs only instruct its admissions personnel to eliminate any consideration of the specific criteria forbidden by Section 26: race, sex, color, ethnicity, or national origin. All other criteria considered as part of the "holistic review" may continue to be taken into account. *See* Affidavit of Teresa A. Sullivan ¶ 12 (attached as Exhibit C to Univ. App. Br.) (explaining that admissions decisions are based upon "a broad range of criteria" identified by means of a " 'thorough, individualized, comprehensive, and holistic review of every complete

application."). The University obviously knows how to disregard race in the admissions process, for it does not give any type of racial "plus" or other preference to its non-minority applicants, who comprise the vast bulk of its applicant pool. It thus has no basis to assert that treating minority applicants on the same footing will cause any appreciable difficulty.

D. The public interest clearly favors an injunction.

The public interest plainly favors Plaintiffs' request for preliminary equitable relief. The University has no tenable legal ground to object to the enforcement of Section 26, and so the quintessential public interest in having state officials comply with applicable state law must dominate the public-interest inquiry. *See, e.g.*, *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 693 (7th Cir. 1986) (recognizing the need "to vindicate the public interest in compliance with the law") (quotation omitted); *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983) (same); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (recognizing "the undifferentiated public interest in executive officers' compliance with the law"). Here, a large majority of the voters of Michigan have adopted a constitutional provision to abolish the University's consideration of race in its admissions and financial aid programs. The University has not, and cannot, put forth a single legal or practical argument why this popular referendum should not be implemented. The public interest overwhelmingly favors the law's immediate implementation.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request a preliminary injunction forbidding the University from considering race or any other prohibited ground as a factor in its admissions and financial aid decisions.

Respectfully submitted,

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