

“One Michigan” at the Crossroads:

*An Assessment of the Impact of Proposal 06-02
By the Michigan Civil Rights Commission*

March 7, 2007

*Prepared for
Governor Jennifer M. Granholm*



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF CIVIL RIGHTS
EXECUTIVE

LINDA V. PARKER
DIRECTOR

March 6, 2007

Mohammed Abdrabboh, Chair
Michigan Civil Rights Commission
110 W. Michigan
Suite 900
Lansing, MI 48933

Re: Report of Michigan Department of Civil Rights on Proposal 06-02

Dear Mr. Chair:

Attached is the Report of the Michigan Department of Civil Rights which has been prepared pursuant to the Commission request regarding Governor Jennifer M. Granholm's Executive Directive No. 2006-7, regarding Proposal 06-02.

This Report is being submitted for the Commission's consideration and approval.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Linda V. Parker".

Linda V. Parker
Director



STATE OF MICHIGAN
MICHIGAN CIVIL RIGHTS COMMISSION

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GOVERNOR

March 7, 2007

Hon. Jennifer M. Granholm
Governor, State of Michigan
Executive Office
111 S. Capitol Ave.
George W. Romney State Office Building
Lansing, MI 48933

Re: Report of Michigan Civil Rights Commission on Proposal 06-02

Dear Governor Granholm:

On November 9, 2006, you issued Executive Directive 2006-7 to the Michigan Civil Rights Commission ("MCRC"), charging the MCRC with investigating how the passage and implementation of Proposal 2 will impact state laws and regulations, state educational institutions and programs, and state economic development efforts.

Moreover, the Executive Directive stated – as we strongly believe – that while the “Governor is responsible to take care that the laws be faithfully executed...the continued promotion of diversity in Michigan is a vital component in the state’s educational efforts and an important aspect of Michigan’s economic development efforts.” Additionally, the Executive Directive asks the MCRC to make findings and issue a comprehensive report, containing administrative and legislative recommendations for how state agencies can continue to promote the compelling state interest of diversity, within the framework of Proposal 2.

It was entirely appropriate that the MCRC be given this charge as the MCRC is a constitutional body, created by Article V, Section 29, with the power and duty to investigate civil rights violations, “[a]nd to secure the equal protection of those rights without discrimination.”

And we proudly accepted that challenge.

Following an exhaustive review of all state statutes, policies and programs relevant to our charge, a set of recommendations have been crafted that we believe would satisfy the new

restrictions imposed on our state by Proposal 2 while maintaining our core commitment to diversity, fairness and equal opportunity.

The MCRC deeply appreciates your long-standing personal and professional commitment to equality, fairness and civil rights. Most importantly, we appreciate your faith and trust in the MCRC and the Michigan Department of Civil Rights as state institutions created with the unique responsibilities of protecting and advocating for the civil rights of all Michiganders without fear or favor.

Thank you for your courage, commitment and leadership on civil rights and fairness in these most difficult of times.

Sincerely,

Mohammed Abdrabboh
Chair

ACKNOWLEDGEMENTS

The Michigan Civil Rights Commission (“Commission”) delegated the authority to complete the work under Executive Directive 2006-7 to the Michigan Department of Civil Rights (“MDCR”).

The Michigan Civil Rights Commission and MDCR wish to thank the 17 state departments and six agencies, each of which undertook great effort to be prepared to meet with the review team and made time to ensure that the operations of the departments were well understood.

There are a number of individuals and institutions who deserve our acknowledgment and our deepest gratitude for contributing their knowledge, time, and experience in the development of the Report. Unfortunately, we can not name everyone who so generously offered us assistance, although we most certainly appreciate all their help and support. We would however, like to offer a special thanks to the Leadership Conference for Civil Rights in Washington, D.C., and to all of those individuals from the states of Washington and California who were so generous with their time in sharing with us the experiences that they encountered when initiatives similar to Proposal 2 passed in their states.

Their quiet determination, unbreakable spirit and unrelenting commitment to ensuring that their states’ maintain their commitments to equal opportunity and fairness has been not only an inspiration; but a lesson to us all.

Finally, the Commission is grateful for the tireless work of MDCR staff attorneys Sylvia Elliott and George Wirth, and Michigan Women’s Commission Director Judy Karandjeff. Their professionalism and dedication to not only protecting but advocating

for the civil rights of all of Michigan's residents is truly one of our states' most valuable, if under appreciated assets.

The Commission further wishes to acknowledge and thank Gloria Gonzales, Harold Core, Trevor W. Coleman and Shawn Sanford for doing all that was necessary to ensure that this Report was issued. This team worked tirelessly under the strong leadership and unwavering commitment of Director Linda V. Parker.

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By the Michigan Civil Rights Commission

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“Just as we seek diversity in our economy, we must embrace human diversity in our communities, schools and workplaces. There’s no question, diversity matters. It defines the global marketplace. When we bring together people of different backgrounds and different ways of seeing the world, we spark innovation...and innovation creates huge dividends. If we fully embrace the mosaic that is Michigan, our diversity will help fuel our economic transformation. And do you know what else? As we face these economic tides, we have to remember that we are all in this state together. We did not arrive here in the same way or at the same time, but we are all here together, headed toward the same destination. We are One Michigan.”

Honorable Jennifer M. Granholm
Governor, State of Michigan
State of the State Address, February 6, 2007

EXECUTIVE SUMMARY

By Executive Directive 2006-7, Jennifer M. Granholm, Governor of the State of Michigan, directed the Michigan Civil Rights Commission to investigate the impact of the adoption of Proposal 06-02, issue a report detailing its findings, and offer specific recommendations. See Executive Directive 2006-7, (Attachment 1). The MCRC carried out this task of reviewing Proposal 2 and its application to state government through the Michigan Department of Civil Rights (“MDCR”) (Attachment 2). This Report is the result of three months of investigation, including in-depth meetings with seventeen (17) state departments,¹ six (6) other state agencies, contact with the Michigan Council for University Presidents, a detailed review of state statutes which mention key terms, and a review of best practices in other states.

¹ The Department of State declined an interview, and the Department of Attorney General did not respond to our request for an interview.

This Report does not constitute legal advice. It is the Michigan Civil Rights Commission's ("MCRC") policy response to the Governor pursuant to Executive Directive No. 2006-7. Final decisions on the application of Proposal 06-02 must be done on a case-by-case basis in consultation with legal counsel.²

That being said, the MCRC was established under Article V, Section 29 of the Michigan Constitution as a quasi-judicial body with the authority to investigate alleged instances of discrimination against any person in the enjoyment of civil rights guaranteed by law, to make legal findings, award damages when appropriate, and to secure the equal protection of the laws without discrimination.

At the outset, we make the following findings:

1. We believe, based on our reading of the amendment, that Proposal 2 does not eliminate *all* affirmative action and affirmative action programs but only those that grant preferential treatment based on race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting.
2. Proposal 2 does not end equal opportunity or the critical pursuit of diversity and inclusion in the State of Michigan. Neither does it mean that the terms "race" or "sex" are banished from the official state vocabulary, as it relates to the state's decision-making process. This latter point was in fact acknowledged by proponents of Proposal 2 during the campaign to place the initiative on the Michigan ballot. The Michigan Civil Rights Initiative ("MCRI"), the key proponent organization of Proposal 2, wrote the following on its webpage made available to Michigan voters during the campaign, on a page titled "Big Myths about MCRI,"³

“(1) Myth: MCRI ‘ends all affirmative action.’

(2) Fact: MCRI makes it unconstitutional to pick winners and losers based **solely** on race and sex.” (emphasis added)

This statement by MCRI, in our view, indicates that race and sex may still be used under certain circumstances. If this were not the case, Proposal 2 could, and still may be, struck down by the courts as placing an unconstitutional burden on protected groups seeking

² For state agencies, that would be the Department of Attorney General.

³ Big Myths About MCRI, MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE, available at, <http://www.Michigancivilrights.org/media/MCRI-Myths.pdf> (last visited Feb. 9, 2007).

beneficial legislation.⁴ There is legal precedent from the U.S. Supreme Court that race and sex may be used as one of a number of factors in the state's decision-making process, if the objective serves a compelling state interest, such as diversity in higher education, and is narrowly tailored to achieve the objective sought.⁵ We do not believe that Proposal 2 has overturned the referenced U.S. Supreme Court precedent.

3. The ballot language for Proposal 2 stated that it would ban affirmative action programs that gave preferential treatment to groups or individuals based on race, sex, color, ethnicity, or national origin. The amendment is titled "Affirmative Action," however, the text of the new amendment does not reference the terms "affirmative action" or "affirmative action plans." Many affirmative action plans or programs do not contain preferences and would therefore not be in violation of Proposal 2. (See Section II (B), herein.)
4. The term "preferential treatment" is new to Michigan constitutional law, unlike the term "discrimination" which is well-settled by Michigan courts. "Preferential treatment" will be subject to continuing judicial review.
5. MDCR met with seventeen state departments and six other state agencies. As a result, it has been determined that none of these state departments or agencies, with the exception of Michigan Department of Transportation (MDOT) and Michigan Department of Environmental Quality (DEQ) uses an affirmative action program or plan that grants "preferential treatment" in its employment or contracting decisions. Both MDOT and DEQ have federal contracts that require the use of affirmative action programs.
6. The MDCR reviewed 45 state programs relating to the operation of public employment, public education, and public contracting that may be affected by the adoption of Proposal 2. As a result of this review, we believe eight (8), or 18% of the programs may be in jeopardy. The programs are: Collective Bargaining Agreements, Commission on Spanish Speaking Affairs, Foster Care, Higher Education Programs, Minority-Owned and Women-Owned Businesses, Minority Student Grants, Single Business Tax Credit, and Special Needs Adoption. Some of these programs may be preserved by eliminating reference to race, sex, color, ethnicity, and national origin and expanding the program's scope or eligibility criteria using race/gender-neutral terms. (Refer to Section VI., Identification of State Laws That May Be Affected By the Adoption of Proposal 2; and VIII., Recommendations for Maintaining Diversity and Economic Growth in State Government in the Aftermath of Proposal 2, for more details.)
7. Due to time limitations, we were unable to meet with state institutions of higher learning or public school districts, nor have we conducted in-depth review of their policies, procedures, or programs.
8. Proposal 2, by its own terms, has limited application. It only applies to government institutions. It has no application in the private sector.

⁴ Hunter v. Erickson, 393 U.S. 385 (1969)

⁵ Grutter v. Bollinger, 539 U.S. 306 (2003)

9. As expressly articulated in the language of the amendment, Proposal 2 only applies to government institutions in the areas of contracts, employment, and education. It does not apply to the general operations of government.
10. Under President Lyndon B. Johnson's September 28, 1965 Executive Order No. 11246, (Attachment 3) the U.S. government has mandated diversity in employment for federal contractors, including state agencies, doing contractual work for a federal agency, if that contractor or subcontractor receives over fifty thousand dollars (\$50,000) in federal funds for contractual work, and has over fifty (50) employees. This federal diversity requirement is not nullified or invalidated by Proposal 2.
11. By its own terms, Proposal 2 does not apply to any government institution that receives *any* federal funding now, or which plans to establish a program that would make it *eligible* to receive federal funding in the *future*, if the federal appropriation has affirmative action requirements attached to it.
12. Proposal 2 does not apply to bona fide occupational qualifications ("BFOQ") based on sex.
13. Any court judgment, or judicial consent decree in force before December 23, 2006, is not affected by Proposal 2.
14. State agencies are permitted and in some instances are required, to keep statistics on race and sex.
15. State agencies may conduct outreach to groups based on race, sex, color, ethnicity, or national origin so long as that outreach is not exclusive to groups based on race, sex, color, ethnicity, or national origin.
16. If the preference is based on disability Proposal 2 does not apply.
17. Proposal 2 does not apply to religious organizations or programs.

I. BACKGROUND

A. The History of Proposal 2

Proposal 2 did not arise in a vacuum. It was and is part of a national strategy largely promoted by California businessman Ward Connerly.

Proposition 209, known as the California Civil Rights Initiative which has virtually the same language as Michigan's Proposal 2, passed on November 6, 1996, with fifty five percent (55%) of the vote. It became Article I, Section 31 of the California Constitution. The only difference between Proposition 209 and Proposal 2 is that the University of Michigan, Michigan State University and Wayne State University were named in the ballot language of Proposal 2. The proposals are otherwise basically identical.

In the 1998 general election, the voters of Washington State passed Voter Initiative 200 ("I-200"), which is very similar to Proposition 209 and Proposal 2. The major difference is that I-200 was adopted by the voters of Washington as a state statute, not as a part of that state's constitution.⁶

In a June 23, 2003 ruling of the U.S. Supreme Court in *Grutter v. Bollinger*,⁷ the Court affirmed the use of race as one of many factors that may be used by admissions officers at the University of Michigan Law School. Justice Sandra Day O'Connor, writing for the majority, identified diversity in the classroom as a compelling state interest, and further found that the Law School's admissions program was narrowly tailored in achieving its aims.⁸

⁶ Wash. Rev. Code § 49.60.400 (1999).

⁷ *Grutter*, 539 U.S. 306.

⁸ *Id.*

In response to the *Grutter* decision, just two (2) weeks later, on July 8, 2003, Ward Connerly came to Ann Arbor to announce that he would mount a petition drive to put an anti-affirmative action measure on the ballot in Michigan, similar to Proposition 209.

The MCRI's campaign was, from the beginning, plagued by serial and substantial irregularities. Federal District Judge Arthur Tarnow ruled that:

[M]CRI and its circulators engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action. At the evidentiary hearing and oral argument conducted in this Court, neither the state defendants nor the MCRI defendants presented an adequate defense either to the facts set forth in the Michigan Civil Rights Commission's Report or to the testimony elicited during the evidentiary hearing. The evidence overwhelmingly favors a finding that the MCRI defendants engaged in voter fraud.⁹

Nevertheless, the ballot language was submitted to the Michigan State Board of Canvassers ("BOC") for approval as mandated under Michigan Election Law.¹⁰ The BOC deadlocked on the issue, declining to approve the ballot initiative because of the evidence of fraud, and called for further investigation. Yet, the state Court of Appeals¹¹ and state Supreme Court¹² by-passed the BOC and ordered that Proposal 2 be placed on the November 7, 2006 general election ballot, despite the evidence of MCRI's fraudulent practices and despite MCRI's failure to obtain BOC approval, as required by law.

The language for Proposal 2 was drafted by the Secretary of State's Bureau of Elections and eventually approved on January 20, 2006. It reads as follows:

A PROPOSAL TO AMEND THE STATE CONSTITUTION TO BAN AFFIRMATIVE ACTION PROGRAMS THAT GIVE PREFERENTIAL TREATMENT TO GROUPS OR INDIVIDUALS BASED ON THEIR RACE, GENDER, COLOR, ETHNICITY OR NATIONAL ORIGIN FOR PUBLIC EMPLOYMENT, EDUCATION, OR CONTRACTING PURPOSES.

⁹ Operation King's Dream v. Connerly, Slip Copy, 2006 WL2514115 (E.D. Mich.) (emphasis added).

¹⁰ Mich. Comp. Laws Ann. § 168.474 et. seq. (2006).

¹¹ Mich. Civ. Rights Initiative v. Bd. Of State Canvassers, 268 Mich. App. 506 (2005).

¹² Mich. Civ. Rights Initiative v. Bd. Of State Canvassers, 475 Mich. 903 (2006).

The proposed constitutional amendment would:

- Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local government, public colleges and universities, community colleges and school districts.
- Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin. (A separate provision of the state constitution already prohibits discrimination on the basis of race, color, or national origin.)

Should this proposal be adopted? Yes or No

The electorate voted to adopt this language, which amends the 1963 Michigan Constitution, to become Article I, Section 26 in the following manner:

Affirmative Action Programs.¹³

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

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

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

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

¹³ The caption of Art. I section 26 states “Affirmative Action.” We believe that this is misleading and improperly titled, as the electorate voted on banning “preferential treatment.” There remain many forms of affirmative action that are perfectly legal under Proposal 2, such as conducting outreach efforts.

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

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

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

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

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

B. Michigan's Progressive History

The people of Michigan have had a long and distinguished history of progressive government in the areas of civil and human rights. Set forth below are highlights of this proud tradition.

Michigan became, for many enslaved people, the final stop on the "Underground Railroad." Thousands of those enslaved in the pre-civil war South, walked hundreds of miles – mostly at night – from safe-house to safe-house, following the north star and courageous leaders like Sojourner Truth, to Michigan. The journey was fraught with peril from beginning to end. Often, the preferred route from southern states was to reach western Michigan locations such as Cassopolis and Battle Creek. Some remained in western Michigan. Others moved on to Detroit, known in Underground Railroad parlance as the "Midnight Station," where they would brave the choppy waters of the Detroit River in the dead of night, in shaky boats, and cross over into Canada.

It was Michigan's U.S. Senator Jacob Howard who introduced the 13th Amendment to the U.S. Constitution, abolishing slavery. He worked tirelessly for its passage until it was finally adopted in 1865.

In 1963, during Robert F. Kennedy's tenure as U.S. Attorney General, Michigan Attorney General Frank J. Kelley was one of the first state attorneys general in the U. S. to establish a Civil Rights and Civil Liberties Division within his office.

Michigan's Elliott-Larsen Civil Rights Act¹⁴ was signed into law by Governor William Milliken on January 13, 1977. It is regarded by many in the civil rights community as the leading statute of its type in America in the protection of civil rights, "[p]rohibit[ing] discriminatory practices, policies, and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, height, weight, familial status, or marital status, ... [and] to prescribe the powers and duties of the civil rights commission and the department of civil rights...."¹⁵

The Michigan Civil Rights Commission was formed in 1963 as part of Michigan's newly revised constitution. Article V, § 29 of the state constitution establishes the MCRC's authority to investigate claims of discrimination, and to "[s]ecure the equal protection of such civil rights without such discrimination." Michigan is the only state in the United States that has a civil rights commission that is constitutionally empowered.

As a candidate for Governor in the 2002 election, Michigan Attorney General Jennifer Granholm fended off what many observers characterized as unprecedented race-baiting political attacks from her general election opponent. She won the election, becoming Michigan's first

¹⁴ 1976 MICH. PUB. ACTS. 453, as amended.

¹⁵ *Id.*

female Governor, campaigning with the theme “One Michigan.” It was a successful appeal for unity to the Michigan electorate.

Today, Michigan is, according to the studies, the third most segregated state in the nation; it has one of the most segregated educational systems and is ranked third in the nation for hate crimes.¹⁶

Clearly, we have made progress, but unfortunately, discrimination is still alive and well in Michigan. It is a myth that we live in a color-blind society.

C. The Legal Environment

(i) General Overview of Equal Opportunity Law

President John F. Kennedy used the term “affirmative action” for the first time in a 1961 Executive Order¹⁷ (“EO”) directed at federal contractors for fairness in hiring. But it was his successor, President Lyndon B. Johnson’s EO 11246, issued in 1965, (Attachment 3) that gave affirmative action a lasting framework for federal contractors’ hiring practices. EO 11246 requires all federal contractors and subcontractors to expand employment opportunities for minorities and to abide by explicit non-discrimination policies. It was amended in 1966 to include women. It remains in place today, and applies to any entity that employs fifty (50) people or more, and which receives over fifty-thousand dollars (\$50,000) for federal contracting.

The U.S. Supreme Court in *Regents of the University of California v. Bakke*,¹⁸ invalidated the University of California Medical School’s affirmative action program which reserved eighteen percent 18% of the entering class for minority students. At the same time, the Court ruled that race may legally be used as a factor in the admissions process.

¹⁶ See Expert Testimony of Thomas Sugrue, offered in *Gratz v. Bollinger*, No. 97-75321 (ED Michigan) part VIII; *Separate Worlds: Racial Segregation and Racial Isolation*.”

¹⁷ Exec. Order No. 10925.

¹⁸ 438 U.S. 912 (1978).

Two years later, in *Fullilove v. Klutznick*,¹⁹ the High Court held that Congress has the authority to require state and local construction contractors who receive federal funds to set-aside ten percent (10%) of their purchases, for goods and services from minority business enterprises.

In *Wygant v. Jackson Board of Education*,²⁰ the Supreme Court invalidated a local school district's plan to favor some minority faculty over non-minority faculty members in layoffs. The following year, the Court upheld the Alabama Public Safety Department's diversity program in *United States v. Paradise*,²¹ where a qualified African American police officer would be promoted for every white officer promoted. The Court reasoned that the program was narrowly tailored, and was necessary to remedy the "blatant and continuous" history of discrimination in the Department.

In *City of Richmond v. Croson*,²² the Supreme Court struck down the city's set-aside program for minority contractors. The Court held that the program was not supported by legislative hearings which should have set forth a history of discrimination in Richmond's contracting practices, and that it was not narrowly tailored to meet a compelling state interest. However, in the same case, the Court declared that federal minority set-aside programs were lawful since an extensive underlying record of discrimination in federal contracting had been established through Congressional hearings. Furthermore, the Court held that Congress and the federal government have more authority to utilize race-conscious remedies than states and localities, pursuant to the 5th and 14th Amendments.

¹⁹ 448 U.S. 448 (1980).

²⁰ 478 U.S. 1014 (1986).

²¹ 480 U.S. 149 (1987).

²² 488 U.S. 469 (1989).

In a 1992 case, *United States v. Fordice*,²³ the Supreme Court held that the state's race neutral programs were not enough to overcome Mississippi's history of segregation in its public university system.

In 1994, the Supreme Court ruled that a federal equal opportunity set-aside program for construction contracts was constitutional so long as it served a compelling state interest, such as remedying discrimination in the construction industry, and was narrowly tailored to meet its objectives.²⁴

As indicated earlier, in 2003, the University of Michigan ("U of M") was involved in two (2) major affirmative action cases. In *Gratz v. Bollinger*,²⁵ the Supreme Court ruled that the University of Michigan's use of race as a factor in undergraduate admissions did serve the compelling government interest of diversity in higher education, but that its point system was not narrowly tailored (i.e. too rigid). Whereas in *Grutter v. Bollinger*,²⁶ the Court upheld U of M Law School's more flexible admissions program, using race as a factor.

(ii) Current Status of Proposal 2 Litigation in Michigan

A number of legal actions have been filed in Michigan's federal and state courts, involving different aspects of Proposal 2. In light of these cases, the ultimate fate of Proposal 2 is unsettled. Proposal 2, is less than four months old. It is now, and will continue to be, subject to judicial scrutiny. This is how our Constitution evolves in Michigan. For more than two centuries courts have analyzed, interpreted and applied the text of the United States Constitution. Michigan's Constitution evolves in the same manner. It is our charge and both the charge and right of others to ensure that this new amendment is interpreted consistent with controlling law,

²³ 505 U.S. 717 (1992).

²⁴ *Adarand Constructor, Inc. v. Peña*, 513 U.S. 1012 (1994).

²⁵ 539 U.S. 244 (2003).

²⁶ 539 U.S. 306 (2003).

including U.S. Supreme Court decisions, and in furtherance of the principles of equality and equal protection of the laws.

D. Equal Opportunity Litigation in California and Washington

Following the passage of Proposition 209 in California on November 6, 1996, a series of lawsuits were filed seeking to interpret the language of the amendment which by its terms, was to affect affirmative action programs in public employment, education, and contracting.²⁷ Two (2) years later, Washington State passed a similar law which had a slightly less dramatic impact on the state.²⁸ We believe it is necessary and instructive to see how judges in those states applied the law of those proposals to specific government programs. That being said, state court decisions from other states and federal court decisions outside the Sixth Circuit, are not binding on Michigan courts. And our judges, applying Michigan and federal law may very well come to different conclusions. The decisions from California and Washington will be discussed throughout the following sections of this Report.

II. Judicial Review of Proposal 2

A. Interpreting Constitutional Amendments in Michigan

Article I, Section 26 of the Michigan Constitution, by the enactment of Proposal 2, contains language which must be analyzed to determine, as you have required, its impact on state laws, regulations, and economic interests.

In Michigan, the three rules for interpreting constitutional amendments are slightly different than that of typical statutory construction. The first, and most significant rule is the rule of “common understanding” described by Justice Cooley:

²⁷ Cal. Const. art. I, § 31 (a).

²⁸ WASH. REV. CODE § 49.60.400(1) (1999); See Zachary Gorchow, *California, Washington Give Clues to Impact of Proposal 2*, DETROIT FREE PRESS, Nov. 29, 2006.

A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed it, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.²⁹

If the common understanding of the people cannot be determined because the provision is ambiguous, then the second rule applies. “The circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered.”³⁰ More specifically, “[i]n construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.”³¹

The final rule of constitutional construction is that “wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does.”³²

As detailed below, the term “discrimination” is well-settled under federal and state constitutional law, and has been interpreted by our state’s courts. Conversely, the term “preferential treatment” is a newcomer to judicial review in our state.

B. Defining “Discrimination” and “Preferential Treatment”

The U.S. Supreme Court, in *Bakke* and *Grutter* ruled that diversity in higher education constitutes a “compelling state interest” and allows for the use of race as a factor in the admissions process. We are aware that a compelling state interest is not equivalent to a fundamental constitutional right. As a general rule, affirmative action programs are permissive,

²⁹ THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 81 (6th ed. 1890); *Traverse City School District v. Attorney General*, 185 N.W.2d 9 (Mich. 1971).

³⁰ *Traverse City School Dist.*, 185 N.W.2d at 14.

³¹ *Id.* (quoting *Kearney v. Board of State Auditors*, 155 N.W. 510, 512 (Mich. 1915)); *see also Traverse City School Dist.*, 185 N.W.2d at 14.

³² *Traverse City School Dist.*, 185 N.W. 2d at 14.

not mandatory. The electorate or a governmental entity may vote or legislate to ban affirmative action, as was the case with Proposal 2, and Proposition 209, and Initiative 200.

Nevertheless, there are several reasons supporting our belief that Proposal 2, in its application, may be legally problematic, and why *Bakke* and *Grutter* are still good law.

Proposal 2 states that it bans “discrimination” and that it bans “preferential treatment.” These terms have different, if not conflicting, meanings.

There is a full body of law in Michigan discussing the term “discrimination.” The term is already in the 1963 Constitution under Article I, Section 2, which prohibits discrimination on the basis of “religion, race, color, or national origin.”

Perhaps the most important consequence of note is that Proposal 2 includes the classification of sex and ethnicity as prohibited forms of discrimination in the Michigan Constitution for the first time.

In *Michigan Department of Civil Rights v. Waterford Township Department of Parks & Recreation*,³³ and *Neal v. Michigan Department of Corrections*,³⁴ Michigan courts ruled that discrimination 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...”³⁵

Again, Justice O’Conner in *Grutter*, ruled that diversity in higher education was not just an important government interest, but that it was a compelling state interest.

The term “preferential treatment” is subject to multiple interpretations and appeared for the first time in the Michigan Constitution on December 23, 2006. It has no history of

³³ 425 Mich 173 (1986).

³⁴ 232 Mich. App. 730 (1998).

³⁵ *Id.* At 741.

interpretation by our courts and courts around the country have interpreted “preferential treatment” in various ways. It is our position that consideration of race, sex, color, ethnicity, or national origin as one of many factors in public education programs, does not constitute an illegal preference or grant “preferential treatment.” Therefore, we would not adopt the radically restrictive view that would equate the “consideration” of such factors with granting “preferential treatment.”

Universities in our state continue to use affirmative action programs that give preferences to athletes, legacies, and students from different geographic regions, students from certain select schools, and so forth. Yet, Proposal 2 singles out students based on race, sex, color, ethnicity, and national origin and prohibits our universities from extending the same type of affirmative action benefits offered to these and other students. Proposal 2 allows for preferential treatment for some students, but not for others. This double standard seems to us to be in direct conflict with existing federal law.³⁶

That being said, the preferences given to athletes and legacies in the admissions process could be viewed as “irrational line drawing.” Thus, we believe more careful analysis is required, in consultation with counsel, to address this inconsistency.

When interpreting the Constitution, our courts have tried to achieve symmetry in reading one section of the Constitution with another. Moreover, as referenced above, an important rule of constitutional construction requires that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. Therefore, Proposal 2’s use of the term “preferential treatment” must be reconciled with the long-standing history of settled Michigan case law dealing with the term “discrimination.”

³⁶ *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington Seattle School District No. 1*, 458 U.S. 457 (1982); *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

For these reasons, we must look to the circumstances leading up to, and the purpose for adopting the amendment. We believe that the people of Michigan, and the proponents of Proposal 2, as evidenced by their statements regarding the ballot proposal, did not intend to outlaw all forms of affirmative action programs. Additionally, in accordance with the final rule of constitutional construction, Proposal 2 must be interpreted in such a way as to not violate the Equal Protection Clause of the U.S. Constitution.

III. Charge of Executive Directive 2006-7

A. How Affected Public Institutions may Continue to Promote Diversity and Equal Opportunity in the Operation of Public Education, Public Contracting and Public Employment

(i) Meetings With State Agencies

During the months of December, 2006 and January and February 2007, the MDCR met with the heads of state agencies and their staffs. The agencies were well-prepared and committed to the goal of diversity.

We conducted interviews with the following state agencies: Department of Education, Department of Labor and Economic Growth, Department of Treasury, Department of Community Health, Department of Agriculture, Department of State Police, Department of History, Arts and Libraries, Department of Corrections, Michigan Economic Development Corporation, Department of Management and Budget, Department of Human Services, Department of Transportation, Office of the State Employer, Department of Information Technology, Department of Civil Service, Bureau of State Lottery, Michigan Gaming Control Board, Office of the Budget, Department of Natural Resources, Department of Environmental Quality, Department of Military and Veterans Affairs, Michigan Women's Commission and

Department of Civil Rights. The Department of Attorney General and the Department of State were contacted. The Department of State declined to participate in our interview process, and the Department of Attorney General didn't respond.

We observed at the outset of nearly every meeting that there is much uncertainty as to what Proposal 2 means and what impact it might have on each state agency. We also learned that there is a fairly uniform commitment in state government to equal opportunity and diversity.

(ii) State Employment

A common thread we found during our departmental and agency interviews was that each has the authority to make employment decisions, but they all do so under the centralized guidelines established by the state Civil Service Commission ("CSC"). If funding for a position becomes available, the department or agency will determine the appropriate duties and proposed classification and level for the position. The proposed position must then be reviewed and approved by the Department of Civil Service (DCS). The position will be created by DCS if it meets the classification concepts (established by DCS). If a position is already established and becomes vacant, the department or agency may fill the vacancy if the duties continue to reflect the originally approved establishment. The state department or agency and DCS will then post or advertise the position to the general public, typically for 7 to 10 days on the DCS website, and in other respects, such as through universities, job fairs, and various print media. Some positions that are difficult to fill are recruited on an almost continuous basis (e.g., nurses, corrections officers and social service workers). The department or agency is responsible for development of a candidate pool made up from the applicants that meet the minimum education and experience requirements for the position. Applicant résumés that meet the minimum education and experience requirements are either screened by use of screening criteria determined by the

department or agency, or a candidate pool is selected at random by the department or agency. The department or agency then typically conducts job interviews based on competencies or selection criteria.

No state department or agency we interviewed uses an affirmative action program or plan that grants “preferential treatment” as a component in its employment decisions.

According to James Farrell, State Personnel Director, the state’s workforce of 53,470 employees is changing rapidly. Pursuant to the State Retirement Act³⁷ forty-nine percent (49%) of all state employees will be eligible to retire in ten (10) years. Twenty-nine percent (29%) are eligible to retire now.

While the annual turn-over rate in state government is low, between 5.5 and 5.8%, impending retirements will present state departments and agencies with a host of hiring decisions in the near future.

It became clear to us that there are many opportunities for more inclusion and diversity outreach in the public contracting and public employment areas. Those opportunities are specifically addressed in the “*Recommendations*” section of this Report.

Through our interview with the Office of the State Employer, we found that there are certain collective bargaining agreements that contain affirmative action language which could potentially trigger Proposal 2 concerns. These agreements must be reviewed, as our reading of well established labor law prohibits any unilateral modification of a labor contract, absent coming to mutual agreement through collective bargaining.

We strongly believe that diversity outreach can be structured in such a way as to comply with Proposal 2. If the outreach program is not exclusive and does not grant preferential treatment to any group, then Proposal 2 will not be violated. The California Supreme Court

³⁷ MICH. COMP. LAWS ANN. § 38.1 et. seq. (2006).

came to the same conclusion regarding Proposition 209 in *Hi-Voltage Wire Works, Inc. v. City of San Jose*.³⁸ The court reviewed a city's affirmative action program that gave preferences to contractors who submitted bids for city contracts that utilized a certain percentage of minority and women-owned subcontractors. While the court found that the bidding scheme violated Proposition 209 because it granted preferences, it also found that not all outreach programs violated Proposition 209.³⁹ "Plainly, the voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification."⁴⁰ Ultimately, this leaves the door open to modify or create diversity programs to focus on outreach to underrepresented populations.

(iii) State Contracting

There were several common threads which arose in every meeting we conducted with a state department or agency. First, we found with respect to purchasing decisions, each follows the guidelines set forth by the Department of Management and Budget ("DMB"). DMB is the fulcrum for all state contracting decisions under the Management and Budget Act.⁴¹ Under this Act, state departments or agencies can make purchases for goods and services, on their own, for purchases of twenty-five thousand dollars (\$25,000) or less following DMB guidelines. One example is a simple office supply need, such as paper. Typically, the department or agency will use the lowest bidder, seeking out quotes from suppliers (again, per DMB guidelines). Or, it may simply purchase the item off the state Purchasing Division's master list of approved vendors who have provided the state with quotes for certain goods and services, if vendors for the needed item are on the list.

³⁸ 12 P. 3d 1068 (Cal. 2000).

³⁹ *Id.* At 1085.

⁴⁰ *Id.*

⁴¹ MICH. COMP. LAW ANN. § 18.1101 (2006).

If the proposed purchase involves, for example, a consulting service, where price is one of a number of factors that must be evaluated, the state agencies again follow DMB guidelines for determining “Best Value.” This may include a number of factors set forth in the Request for Proposals (“RFP”) that are sent out to potential bidders. The RFP generally includes factors such as price, experience, responsiveness to the proposal, record of integrity in the industry, staffing, financial wherewithal, and so forth. For purchases of more than twenty-five thousand dollars (\$25,000), the state agencies submit the requisition and specifications directly to DMB’s Purchasing Division for processing.

No state department or agency we interviewed uses affirmative action criteria that grant preferential treatment in either their low bid, or RFP process.

We found that with respect to purchasing decisions, the state agencies follow the guidelines set forth by DMB.

We found some of California’s contracting schemes to be enlightening. As discussed earlier, the California Supreme Court in *Hi-Voltage* found that contracting schemes that granted preferences to Minority Business Enterprises (“MBEs”) or Women Business Enterprises (“WBEs”) violated Proposition 209, but outreach programs were permissible.⁴² The court also found that it was not a violation of Proposition 209 to grant preferences to “economically disadvantaged” businesses.⁴³ Nor was it a violation of Proposition 209 to have Reporting requirements on the use of MBEs and WBEs in public contracts because this, according to the court, serves a legitimate governmental purpose of ensuring the underutilization of MBEs and WBEs was not due to discriminatory hiring practices.⁴⁴ The State of California now offers a five

⁴² *Hi-Voltage*, 12 P.3d 1068.

⁴³ *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (3rd Dist. 2001).

⁴⁴ *Id.* at 38.

percent bid preference on solicitations from all small businesses, which tend to include many MBEs and WBEs.⁴⁵

(iv) Public Educational Institutions

Subsection (1) of Proposal 2 applies to public schools. It includes the state's public universities and colleges, public community colleges, and public school districts. It states that these specified institutions:

[s]hall 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.⁴⁶

It should be noted at the outset that private educational institutions in Michigan are expressly exempt from this section.

1. Generally

It is our belief and hope that the public education system in Michigan is committed to preserving and promoting diversity. Following the passage of Proposal 2, many state universities initiated plans to operate within the parameters of the new law.

The scope of our investigation did not include a review of programs administered by institutions of higher learning or public school districts. Time limitations did not permit a comprehensive examination of these programs in order to assess the impact of Proposal 2. In assessing the impact on education, there are many factors to consider and care must be given not to generalize. There is not one answer that applies to every employment, admission, or scholarship scenario - - each must be individually assessed. Having said this, we stand ready to assist state universities and public school districts in assessing the impact of Proposal 2 on their operations.

⁴⁵ CAL. GOV'T. CODE §§ 14835-14836 (2005).

⁴⁶ MICH CONST. art. I § 26(1).

Within Article I, Section 26 are several exemptions from the general ban on discrimination or preferential treatment in the operation of public employment, public education, or public contracting that may apply to education. The amendment by omission exempts private sector, religious organizations, and operations for the disabled. The other exemptions are contained in subsection 4, 5, and 9. Subsections 5 and 9 will be discussed later in this Report.

Subsection 4 of Article I, Section 26 explicitly exempts programs that are necessary to "establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." There are many federal statutes and regulations which, in appropriate circumstances, require government entities to consider race or sex, or engage in affirmative action. These federal statutes and regulations are not changed by the amendment. For example:

- Title IX of the 1972 Education Amendments to the Civil Rights Act prohibits educational programs and institutions that receive federal funds from discriminating on the basis of sex. Therefore, sex-conscious programs required by Title IX should be exempt because failure to comply with Title IX could lead to termination of federal funding.⁴⁷
- Title VI of the Civil Rights Act of 1964 prohibits programs and institutions receiving federal assistance from discriminating on the basis of race, color, or national origin. In certain circumstances, federal agencies have the discretion to promulgate regulations that require affirmative action and pass these requirements on to universities or other recipients of federal funds.
- Executive Order 11246, as amended requires covered employers (contractors and subcontractors) to refrain from discrimination and engage in affirmative steps to ensure

⁴⁷ *Statewide Issues on the November General Election Ballot, Proposal 2006-02; Michigan Civil Rights Initiative*, CITIZENS RESEARCH COUNCIL OF MICHIGAN, September 2006, at 25 available at <http://www.crcmich.org/PUBLICAT/2000s/2006/rpt343.pdf> (last visited Feb.20, 2007).

that applicants and employees receive equal employment opportunity regardless of race, color, religion, sex, and/or national origin. Recipients of these funds risk having its contracts canceled, terminated, or suspended in whole or in part, and may be declared ineligible for future government contracts for failure to comply with 11246. Therefore, the amendment does not change the requirement that covered employers:

- * are prohibited from discriminating in such employment practices as recruitment, rates of pay, upgrading, layoff, promotion, selection for training.

- * may not make distinctions based on race, color religion, sex, or national origin in recruitment or advertising efforts, employment opportunities, wages, hours, job classifications, seniority, retirement ages, or job fringe benefits.

- * may establish an Affirmative Action Plan that will describe the policies, practices, and procedures that they will use to ensure that all qualified applicants and employees receive equal opportunities for employment and advancement.

2. Admissions and Enrollment

Arguably, the largest impact that California's Proposition 209 had on that state's educational system was the elimination of affirmative action programs for admission to state colleges and universities. In the aftermath of Proposition 209, numerous outreach programs designed to maintain diversity, did not have the effect that many university officials had hoped. A study conducted in 2003, found that the outreach programs designed for the University of California "have made progress toward [the original goals that were set] although advancement varie[d] across programs and racial/ethnic groups Progress toward increasing eligible program graduates [was] more rapid for all students combined than for the subset of students

from underrepresented backgrounds.”⁴⁸ More importantly, the overall goal, which was to maintain diversity in higher education, has dramatically failed. From 1996 to 2006, the number of minority freshmen registrants at the University of California at Berkeley fell 65%.⁴⁹ The University of California at Los Angeles was similar, with its minority freshmen enrollment falling 45% from 1996 to 2006.⁵⁰

Michigan’s public educational institutions will face a huge challenge in maintaining diversity under Proposal 2.

3. Exemption for Michigan Indian Tuition Waiver

The State of Michigan provides a tuition waiver for North American Indians in Michigan public community colleges or public universities, and at tribal community colleges participating in the tuition waiver program.⁵¹

The U.S. Supreme Court has uniformly held that statutes dealing with members of recognized tribes are **not** based on impermissible classifications such as race.⁵² Instead, such statutes are based on the unique legal and political status of indigenous Indian tribes that are recognized by and enjoy a trust relationship with the United States. This is the basis for the Supreme Court's unanimous decision in *Morton v. Mancari*.⁵³

⁴⁸ UC Outreach, Forging California’s Future, *supra* note 60 at 22.

⁴⁹ *New Freshman Registrants by Ethnicity, Fall 1996-Fall 2006*, UNIVERSITY OF CALIFORNIA, BERKELEY OFFICE OF STUDENT RESEARCH, available at <https://osr2.berkeley.edu/newfroshtrend.html> (last visited Jan. 17, 2007).

⁵⁰ Elaine Korry, *Black Student Enrollment at UCLA Plunges*, NATIONAL PUBLIC RADIO, July 24, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5563891> (last visited Jan.17, 2007).

⁵¹ MICH.COMP. LAWS ANN. § 390.1251 (West 2006). The full text of the law states: Waiver of tuition for North American Indians; qualifications; participation of federal tribally controlled community college; eligibility for reimbursement. Sec. 1.

- (1) A Michigan public community college of public university or a federal tribally controlled community college described in subsection (2) shall waive tuition for any North American Indian who qualifies for admission as a full-time, part-time, or summer school student, and is a legal resident of the state for not less than 12 consecutive months.
- (2) A federal tribally controlled community college may participate in the tuition waiver program under this act and be eligible for reimbursement under section 2a if it meets all of the following:
 - (a) Is recognized under the tribally controlled community college assistance act of 1978, Public Law 95-471, 92 Stat. 1325.
 - (b) Is determined by the Department of Education to meet the requirements for accreditation by a recognized regional accrediting body.

⁵² See *U.S. v. Antelope*, 430 U.S. 641, 464 (1977).

⁵³ 417 U.S. 535,551-552 (1974).

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (“BIA”) brought a class-action lawsuit challenging a statutory employment preference for Indians in the BIA. The Supreme Court explained that the employment preferences did not constitute “racial discrimination,” or even a “racial” preference because the preference, as applied, is granted to Indians as members of quasi-sovereign tribal entities.⁵⁴

Because the Michigan Indian Tuition Waiver (“MITW”) – like the employment preference in *Mancari* – is also based on a political relationship, it should not be considered a racial classification under Proposal 2. The Michigan legislature amended the MITW to clarify that it was intended to apply only to members of federally-recognized tribes by adding the following language:

For the purposes of this act, “North American Indian” means a person who is not less than 1/4 blood quantum Indian **and** certified by a person’s tribal association.⁵⁵

This means that there might be American Indians who meet the quantum blood test but who are not members of recognized tribes. Those individuals may not be eligible for benefits under the MITW because they do not belong to a distinct political community as required under the MITW. The Michigan Supreme Court has likewise acknowledged that Indian tribes are distinct political communities with governmental sovereignty.⁵⁶

This tuition waiver remains valid under Proposal 2 because it does not grant preferential treatment based on race, sex, color, ethnicity, or national origin. We conclude that because the United States Supreme Court has specifically held that tribal status is a **political category** based on the relationship between the federal government and the tribes as sovereign entities, it is a

⁵⁴ 417 U.S. 535, 553-54 (1974).

⁵⁵ MICH. COMP. LAWS. ANN. § 390.1252 (West 2006).

⁵⁶ Taxpayers of Michigan Against Casinos v. State, 685 N.W.2d 221, 227 (Mich 2004).

political classification, not a racial classification, and therefore does not violate Proposal 2. (Please see Attachment 4 for further analysis.)

4. Scholarships

Perhaps the most troublesome issue for public education is scholarships that are sex specific, targeted for minorities, or based on ethnicity. It is highly probable that such scholarships whether private or publicly funded, would violate the preferential treatment provisions of Proposal 2. Some would argue that privately funded scholarships are exempt from Proposal 2 because they are not funded with state dollars. However, if the scholarship is administered by the public school or university, then state dollars are being utilized to disperse the scholarship which makes the state a participant in the activity. Thus, in order to preserve scholarships expressly geared toward students based on race, sex, color, ethnicity, or national origin, we believe that some alternative method for administering the scholarships must be developed that removes the involvement of state funded schools.

IV. ADDITIONAL OPPORTUNITIES TO PROMOTE DIVERSITY AND EQUAL OPPORTUNITY IN THE STATE OF MICHIGAN

A. Exemption for Federal Funding

Subsection Section (4) of Proposal 2 sets forth an exemption for federal funds. Specifically it provides:

This section does not prohibit action that must be taken to establish or maintain eligibility for any federal programs if ineligibility would result in a loss of federal funds to the state.⁵⁷

There are two (2) clauses in this section. The first clause, states that Proposal 2 does not apply if a state agency needs to implement an affirmative action program in order to “establish

⁵⁷ MICH CONST. art. I § 26 (4).

... eligibility” for federal dollars, if those federal dollars have affirmative action requirements attached to them.

For example, assume hypothetically that the State Department of Agriculture is not presently receiving, but is nevertheless eligible to receive, federal dollars with affirmative action requirements attached, earmarked for the assistance of African American farmers. Under the first clause of section (4), the Agriculture Department must establish an affirmative action program, if it wants to qualify for these federal funds.

We have received from the United States Congress a list of federal programs with affirmative action requirements as a condition to receiving such dollars. The Michigan Department of Civil Rights will make this list available to all state departments and agencies and recommends that each examines this list to determine whether there are federal dollars that Michigan is not currently receiving but, in fact, is eligible to receive. If establishing an affirmative action program is a pre-requisite to eligibility, Proposal 2 specifically provides an exemption and as a result, Michigan state departments and agencies may become eligible to receive such funding. This federal funding exemption to Proposal 2, could simultaneously bring both increased diversity and increased economic development to our state.

The second clause, “maintain eligibility,” indicates that if a state agency receives a federal appropriation, and affirmative action guidelines are attached to the appropriation, Proposal 2 does not stand in the way of, or prohibit the state from carrying out the federal affirmative action requirements.

For example, the U.S. Department of Transportation (“USDOT”) requires agencies it funds, like the Michigan Department of Transportation (“MDOT”), to utilize minority and women-owned firms (“MBEs, WBEs”) in certain road or infrastructure projects. MDOT must

carry out these federal affirmative action requirements, or it risks losing millions of dollars in federal appropriations.

Further, we believe that if MDOT transfers these federal dollars, with affirmative action requirements, to other state agencies (known as an “inter-departmental transfer”), or transfers them (known as a “pass through”) to other units of government at the county or local level, those same MBE and WBE requirements remain obligatory for the ultimate recipient of the funds.

We have conferred with the staff attorney for the United States House Judiciary Subcommittee on the Constitution and Civil Rights. He has made it plain that federal money, and the requirements attached to it, remains federal money, no matter how many times those funds are transferred. In fact, the federal government’s appropriations are quite often audited by the federal granting agency to verify how the dollars have been spent, and whether such expenditures have been made in accordance with the appropriation requirements. The Judiciary Subcommittee staff attorney further informed us that if the recipient is not in compliance, the federal government reserves the right to ask for a return of those funds.

Michigan puts at risk millions of dollars in federal funds in the event that the above-stated federal requirements are not respected. Furthermore, under the plain language of Proposal 2, Michigan could be losing out on millions more in federal funds by not establishing equal opportunity programs to become eligible for federal money it could receive in the future.

B. Exemption for Bona Fide Occupation Qualifications Based on Sex

Subsection (5) of Article I Section 26 outlines an exemption for Bona Fide Occupational Qualifications (“BFOQ”) based on sex. The precise language is as follows:

Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operations of public employment, public education, or public contracting.⁵⁸

This subsection recognizes that in certain circumstances state agencies will need the flexibility to have women perform particular job assignments, and conversely to have men perform particular job assignments. For example, the state Department of Corrections has a policy of assigning women guards to women prisoners. This is not only legal under Proposal 2, but there is a court order⁵⁹ which mandates this practice for the safety and security of the guards and the prisoners.

It is important to note that under certain circumstances, the Elliott-Larsen Civil Rights Act (“ELCRA”) may exempt employment discrimination from its general prohibition. The Act reads:

A person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. Upon sufficient showing, the commission may grant an exemption to the appropriate section of this article. An employer may have a bona fide occupational qualification on the basis of religion, nation origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.⁶⁰

The Michigan Civil Rights Commission will continue to accept requests for BFOQs from public and private employers. Since the MCRC is the entity that has the authority to grant a BFOQ

⁵⁸ MICH CONST. art. I § 26(5).

⁵⁹ *Everson, et. al. v. MI Dept. Of Corr's, et.al.*, 391 F. 3rd 737 (6th Cir. 2004)

⁶⁰ MICH. COMP. LAWS ANN. § 37.2208 (2006).

exemption, this process should be made known throughout Michigan government agencies and other public employers.

As the necessity to provide a BFOQ exemption to public employers for effective operations of an entity becomes an imperative, it should be underscored that the ELCRA does not provide for a race-based BFOQ exemption. This restriction may create issues for some public employers. For example, a law enforcement agency may find operations curtailed if undercover functions are hampered by such prohibitions and with no recourse to a BFOQ defense.

It is therefore recommended that an amendment to ELCRA allowing for race as a BFOQ be explored.

V. PROPOSED TEST TO BE APPLIED

In this section we have developed a test based upon our reading of Proposal 2 and applicable law that could be of use to public entities seeking to determine the applicability of .Proposal 2 to a specific situation. Specifically, this test is intended to be a useful tool in assessing the applicability of Proposal 2 to government actions in the areas of education, contracting, and employment. The test, if utilized, should be applied on a case-by-case basis and with the advice of legal counsel.

1. Determine whether the entity is a public or private institution. Proposal 2 does not apply to the private sector.

“Public” includes public schools, state agencies, and local units of government (“public agencies”). We believe the receipt of public grants or funding by a private entity does not bring the private entity into Proposal 2’s jurisdiction.

Public

Private

If the answer is “private,” Proposal 2 does not apply.

2. If it is a “public” entity, determine whether the specific action or law involves:
- A. Public education? (Our view is that “public education” involves matriculating towards a degree or diploma.)

_____ _____
Yes No

- B. Public employment?

_____ _____
Yes No

- C. Public contracting?

_____ _____
Yes No

If the public entity does not admit students for the purpose of matriculation toward a degree or certificate, hire employees, or award contracts, Proposal 2 does not apply. If the answer to one of the above three categories is “yes,” proceed to Number 3, regarding exclusivity.

3. Is the program open to all?

_____ _____
Yes No

If the answer is yes, and the program is open to all, or is non-exclusive, Proposal 2 does not apply. Outreach to groups based on race, sex, color, ethnicity or national origin is permissible, so long as that outreach is not exclusive to groups on these bases. If the answer is “no,” proceed to Number 4, to determine if the public entity grants “preferential treatment” based on race, sex, color, ethnicity, or national origin.

4. Does the public entity make decisions or grant preferential treatment in which the defining factor is race, sex, color, ethnicity, or national origin?

* Race

Yes No

* Sex

Yes No

*Color

Yes No

* Ethnicity

Yes No

* National Origin

Yes No

If the answer is yes, proceed to Number 5 to determine if an exemption to Proposal 2 applies. As stated previously in this Report, “preferential treatment” has not yet been defined by Michigan courts. Again, it is advised that the entity consult with legal counsel.

5. Does the public entity receive federal funds, even as a “pass-through,” or as an “inter-departmental transfer,” which contain affirmative action requirements?

Yes No

If the answer is “yes,” carefully review those requirements to determine compliance requirements. In certain instances, the federal appropriation requires the public entity to utilize minority or women contractors on the project, or to engage in targeted outreach. Such a federal requirement is an exemption under subsection (4) Proposal 2.

6. In the future, does the public entity plan on applying for a federal appropriation or program that contains affirmative action requirements?

Yes No

If the public entity identifies such a program for federal funding, and if the program requires the public entity to establish an affirmative action program to be, in the words of Proposal 2, “eligible” to receive those funds, the public entity may implement such a diversity program as an exemption to Proposal 2, so as not to “[r]esult in a loss of federal funds to the state.

7. Does the public entity keep statistics on the number of contracts or jobs being awarded or educational services being provided by categories of race, sex, color, ethnicity, or national origin?

_____ _____
Yes No

Other states’ courts have ruled that keeping statistics based on the above categories is legal if it is for the purpose of assessing the public entity’s non-discrimination policies. Some federal contracts require keeping statistics on race, sex, color ethnicity or national origin. However, this is an unsettled area under Michigan law.

8. Does the public entity use a bona fide occupational qualification (“BFOQ”) based on sex that is “[r]easonably necessary to the normal operations of public employment, public education, or public contracting?”

_____ _____
Yes No

For example, the state Department of Corrections has a policy of assigning women guards to women prisoners. If the public entity has such a BFOQ, it is an exemption from Proposal 2.

9. Is the public entity required to utilize an affirmative action program as a result of a court order or consent decree that was issued prior to December 23, 2006?

_____ _____
Yes No

If “yes,” then this is a recognized exemption under Proposal 2, and Proposal 2 would not apply.

If this test has revealed preferential treatment based on race, sex, color, ethnicity, or national origin in public employment, contracting, or education and that an exemption to the preferential treatment does not apply, the public entity should immediately consult with legal counsel.

VI. IDENTIFICATION OF STATE LAWS

The scope of review of our investigation was limited to state statutes and programs identified in our interviews with state departments and agencies. There are likely other programs that are administered by state departments and agencies that are not discussed in this Report. We recommend that the test referenced in Section V of the Report, be utilized and that consultation with legal counsel be undertaken.

Julie Clement, Assistant Professor of Law at Thomas A. Cooley Law School, prepared a report on the potential impact of Proposal 2 on existing Michigan statutes and submitted it to the Michigan Law Revision Commission. Professor Clement presented her report to the Michigan Law Revision Commission on October 31, 2006.

In conducting our investigation of the potential impact of Proposal 2 on state government, we reviewed Professor Clement's conclusions. Part A of this section includes a list of statutes she concluded would probably be declared constitutionally permissible under Proposal 2, and we agree. Part B of this section contains additional statutes from Professor Clement's Report as well as statutes we discovered during our investigation that would appear "on their face" to violate Proposal 2, however, we have concluded that they do not for the reasons set forth in that section. Part C of this section contains additional statutes that appear to violate Proposal 2.

A. Statutes That Appear Permissible Under Proposal 2

The following statutes contain or reference the terms, race, sex, color, ethnicity, national origin or minority, however, we have concluded these statutes would not violate proposal 2.

Redistricting plans

- MCL Sections 3.54; 4.2005

Management and Budget Act

- MCL Sections 18.1206a; 18.1458

Elliott-Larsen Civil Rights Act

- MCL Sections 37.2101 *et seq.*; 37.2202; 37.2209; 37.2402(c); 37.2502; 37.2602

State Housing Development Authority Act

- MCL Sections 125.1432; 125.1444c

Pollution Control

- MCL Section 324.5708(2)

Vital Statistics

- MCL Section 326.38

Mental Health Code

- MCL Sections 30.1124; 330.1164

Public Health Code

- MCL Sections 333.2208(2); 333.2823; 333.2830; 333.2835; 333.5114; 333.16239; 333.20194

Revised School Code

- MCL Section 380.1146

Department of Human Services

- MCL Section 400.130

Michigan Community Service Commission

- MCL Sections 408.222; 408.223

Worker's Disability Compensation Act

- MCL Section 418.700a

Michigan Gaming Control and Revenue Act

- MCL Sections 432.204; 432.205

Michigan Telecommunications Act

- MCL Section 484.2504

Insurance Code of 1956

- MCL Sections 500.838; 500.3519

Friend of the Court Act

- MCL Sections 552.504; 552.513

Foster care

- MCL Section 722.135

Michigan Penal Code

- MCL Sections 750.146; 750.147a; 750.147b

Corrections

- MCL Section 791.403(4)

B. Statutes That May Not Violate Proposal 2

The following statutes reference race, sex, color, ethnicity, national origin, or minority. However, we have concluded that these statutes would not violate Proposal 2 because they do not discriminate, create, or grant preferential treatment based on race, sex, color, ethnicity, or national origin in the operations of public employment, public contracting, or public education; or, because they meet an exception under the amendment. A statute with affirmative action guidelines that does not discriminate, create, or grant preferential treatment should be found to be constitutional.

Community Health

PA 300 of 2006

Chronic disease screening, referral, and counseling services for African American Male Health Initiative. *(PA 330 of 2006, Section 208, 1029)*

Smoking prevention program gives priority to pregnant women, women with young children and adolescents in allocating funds. *(PA 330 of 2006, section 1006)*

Maternal and child health grants to local health departments. *(PA 330 of 2006, section 1104)*

Supplemental nutrition program for low and moderate women, infants, and children (WIC) and administration costs for it. *(PA 330 of 2006, section 1101, 1151)*

Breast and cervical cancer treatment coverage for women up to 250% of FPL. *(PA 330 of 2006, section 1649)*

Funds to Community Mental Health Services programs to contract with providers that serve multi-cultural populations (Asian, Hispanic, Arab/Chaldean) and Michigan Inter-Tribal Council and Jewish Federation. (*PA 330 of 2006, section 403, 475*)

- The Department of Community Mental Health Services does not use affirmative action guidelines or grant preferential treatment in the **selection** of contractors who receive grants to provide health services.
- Although the services provided by the contractors may include health services that are sex or race specific, the services do not violate Proposal 2 because those **health services** are not based on public employment, contracting, or education.

Corrections

MCL 791.2111a(1)

Interstate Corrections Compact

The Director of Corrections may accept prisoners from other states and transfer Michigan prisoners to other states. However, the Director “shall endeavor to ensure that the transfers do not disproportionately affect groups of prisoners according to race, religion, color, creed, or national origin.”

- This provision would not violate Proposal 2 because it does not relate to public education, public employment, or public contracting.

County Roads

MCL 224.10

Equal Opportunity in Contracting

The County road commission is required to “take all reasonable steps to ensure minority business enterprises have the equal opportunity to compete and perform contracts or purchases of services, or both, for the county road commission.”

- This requirement would not violate Proposal 2 if the steps to ensure equal opportunity do not discriminate or grant preferential treatment under Proposal 2.

Division of Minority Business Enterprise

MCL 125.1221, 125.1222, 125.1224

Division of Minority Business Enterprise

The Division of Minority Business Enterprise is charged with providing a number of benefits to “minority business enterprises,” which include businesses owned by persons who have been disadvantaged by “cultural, racial, chronic economic circumstances or background, or other similar cause.” The programs and benefits referenced under MCL 124.1224, include technical, managerial and counseling services; comprehensive planning and programming; pursuit of federal funding; outreach; and others.

- ”Minority businesses” are defined in this statute as including businesses, “disadvantaged by chronic economic circumstances ... and other similar causes.” This definition of minority businesses is not premised exclusively on race, sex, color, ethnicity, or national origin. Therefore, these programs and benefits would not violate Proposal 2 as long as they are not given exclusively to businesses on the basis of race, sex, color, ethnicity, or national origin. See the *Recommendation* Section of this document for more details.
- Additionally, this provision may fall under the federal funding exemption of Proposal 2.
- These benefits constitute technical assistance or operations of government and are thus, further exempt from Proposal 2 as they do not constitute public contracting, employment, or education.

Elliott-Larsen Civil Rights Act

MCL 37.2208

ELCRA –bona fide occupational qualification exemption

An employer may “apply to the [Civil Rights Commission] for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise.”

- This provision would not violate Proposal 2 because subsection 5 of the amendment specifically exempts a BFOQ based on sex.

- Because national origin is not exempted under subsection 5, consultation with legal counsel is recommended as national origin is referenced elsewhere in the language of Proposal 2. This provision would not violate Proposal 2, because Proposal 2 does not apply to religion, age, height, or weight.

MCL 37.2210

ELCRA – affirmative action exception for employment

“A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the [Civil Rights Commission] under rules of the commission and the commission approves the plan.”

- This statute would not violate Proposal 2 if the affirmative action plan of a public entity does not grant preferential treatment.
- Affirmative action plans of private employers are not subject to proposal 2.

MCL 37.2507

ELCRA – affirmative action exception for housing

“A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the [Civil Rights Commission] under rules of the commission and the commission approves the plan.”

- This statute does not violate Proposal 2 because it does not apply to public employment, education, or contracting.

**The Governor’s Advisory Council for Asian and Pacific American Affairs and
The Governor’s Advisory Council for Arab and Chaldean American Affairs**

Both of these Councils were created by Executive Orders. The members of these Councils are not public employees and do not receive compensation. They do not hire employees, issue contracts, or participate in public education.

- These Councils are not in violation of Proposal 2.

Highways

MCL 247.659b (3)(a)

Minority Business Enterprises

The State Department of Transportation is charged with creating a number of benefits to help minority business enterprises compete for contracts awarded by that Department. A “minority business enterprise” is a business owned by persons who have been disadvantaged by “cultural, racial, chronic economic circumstances or background, or other similar cause.” This is identical to the definition found in Michigan Compiled Laws section 125.1222.

- The provision of benefits to help minority business enterprises would not violate Proposal 2 as long as such benefits are not extended to minority business enterprises exclusively on the basis of race, sex, color, ethnicity, or national origin. For example, it would be a violation of Proposal 2 if such benefits were provided to businesses owned by persons disadvantaged by racial causes and not provided to businesses owned by persons disadvantaged by chronic economic circumstances.
- Additionally, this provision may fall under the federal funding exemption of Proposal 2.
- These benefits constitute technical assistance or operations of government and are thus, further exempt from Proposal 2 as they do not constitute public contracting, employment, or education.

History, Arts and Libraries

Michigan Council of Arts and Cultural Affairs eligible grantees. (Among the eligible grantees are ethnic heritage centers and museums.)

- This should not constitute a preference because the grants are made to institutions that serve the public and as a result, everyone is being served.
- Additionally, these grants do not relate to public education (as that term is defined in the Michigan Constitution), contracting, or employment.

Human Services

Black Child and Family Institute, Lansing

Multicultural Assimilation Funding (Provides grants to Arab, Chaldean, ACCESS, and other providers that serve ethnic populations.)

- The following programs would not violate Proposal 2 because the services offered are not exclusively offered to persons of a specific race, sex, color, ethnicity, or national origin. These services offered are not exclusive and may be utilized by anyone notwithstanding that the titles of the program may, on their face, suggest otherwise.

Indian Tribes

Indian tribal foster care: requires department to provide 50% reimbursement to Indian tribal governments for foster care expenditures for children not eligible for federal foster care cost sharing.

- This program would not violate Proposal 2 because it is not a preference based on race or national origin but rather a political status between the State of Michigan and the Indian Tribes.

Michigan Emergency Volunteers

MCL 32.651(6)

Membership in the Michigan Emergency Volunteers

The Department of Military and Veterans Affairs is required to “establish affirmative action guidelines for membership goals in the Michigan emergency volunteers” and to “take all steps necessary to carry out and implement those guidelines.”

- This statute would not violate Proposal 2 if the establishment of affirmative action guidelines for membership goals is limited to outreach that is not exclusive.

Michigan Strategic Act Fund

MCL 125.2063

Minority Venture Capital

The Center for Minority Venture Capital certifies minority venture capital companies that qualify for single business tax credits. A “minority venture capital company” is one that “makes investments solely in minority owned businesses, which is defined as one owned, controlled, and managed at least 50% by persons who are “black, [H]ispanic, oriental, [E]skimo, or an American Indian.”

- The process of certification does not violate Proposal 2 for two reasons. First, although certification is an operation of government, it does not fall under the categories of education, contracting, or employment.
- Second, keeping statistics under Proposal 2 has not yet been addressed by Michigan courts, but doing so is not prohibited under the language of Proposal 2. It is noteworthy, that courts in other states have approved keeping statistics on the basis of race, sex, color, ethnicity, and national origin for reasons such as confirming compliance with non-discrimination policies and requirements.

Michigan Women’s Commission

MCL 10.71

The Michigan Women’s Commission consists of 15 members broadly representative of all fields of interest to women. The composition of the Women’s Commission could and has included men as well as women. Powers and duties of the Commission include recommending methods of overcoming discrimination against women in public and private employment and civil and political rights. The duties further include the promotion of more effective methods for enabling women to develop their skills, continue their education, and to be retrained. The Commission also conducts studies of the status of women and takes surveys in fields that are of importance to women.

- This Commission does not violate Proposal 2 because Commissioners can be men or women and the Commission does not discriminate against or grant preferential treatment to men or women in public employment, public contracting, or public education.

Public Health Code

MCL 333.2221(f)

Affirmative action requirements within the Department of Community Health

The Department of Community Health is required to “[t]ake appropriate affirmative action to promote equal employment opportunity within the department and local health departments and to promote equal access to governmental financed health services to all individuals in the state in need of service.”

- The affirmative action to promote equal employment opportunity would not violate Proposal 2 if it does not grant preferential treatment. Furthermore, providing equal access to health services does not relate to the operation of public employment, public education, or public contracting.

Revised Judicature Act

MCL 600.8003(1)

Assignment of judges to the cyber court

In assigning judges to the state cyber court, the Michigan Supreme Court must “endeavor to reflect the ethnic and racial diversity of the state population and the statewide judicial bench when making the assignments under this subsection.”

- The Court may still “endeavor” to reflect the ethnic and racial diversity of the state in assigning judges if in doing so it does not grant preferential treatment.
- Note: This program is not currently in effect or funded.

Revised School Code

MCL 380.12771(1)(b)

Reporting and addressing sex-equity issues in education

Local school districts are required to address “sex equity issues” that arise as a result of the district’s annual Reporting requirements. Districts in which sex-equity issues are raised are required to address those issues “as part of the planning, development, implementation, evaluation, and updating of the school improvement plan of each school within the school district...” Under this provision, school districts that do not address these issues may, as an alternative, include the reason(s) why the issues were not addressed in the school improvement plan(s).

- This statute would not violate Proposal 2 because Reporting requirements alone do not constitute “discrimination” or “preferential treatment,” and “addressing sex-equity issues” would not be a violation of Proposal 2 if they are done in a way that does not grant preferential treatment.

School Aid Fund

MCL 388.1631a (8)

Provides for after-school tutoring for at-risk girls in grades 1-8

- This provision would not violate Proposal 2 because we believe that the program does not constitute “public education” as that term is currently defined in the Michigan Constitution. This after school tutoring program for at-risk girls, grades 1-8, does not offer matriculation towards a diploma or certificate. Furthermore, the contract can be awarded to a school district or a non-district agency, including agencies in the private sector.

MCL 388.1641

Bilingual instruction for students with limited English speaking abilities.

- Because the service provided is based on language and not race, ethnicity, or national origin it would not violate Proposal 2.

Single - Gender School, Class or Program

MCL 380.475

MCL 380.1146

A school district may establish and maintain a school, class or program within a school in which enrollment is limited to pupils of a single gender, if the school district also makes available to pupils a substantially equal coeducational school, class, or program and a substantially equal school, class, or program for pupils of the other gender.

- These provisions would not violate Proposal 2 on the basis of sex because both boys and girls have the same choices and opportunities.

State Housing Development Authority Act

MCL 125.1446

Affirmative action requirements on contractors for housing programs

With respect to housing programs that receive assistance under the Act, discrimination on the basis of “sex, race, religion, color, national origin, age, marital status, familial status, or disability” is prohibited. However, the Act requires contractors, subcontractors, and lending institutions to “take affirmative action to assure an equal opportunity for employment and borrowing.” It does not specify the action that must be taken.

- The first part of the act would not violate Proposal 2 as it does not relate to employment, education, or contracting.
- As to the section that relates to affirmative action in contracting, it would not violate Proposal 2 if the affirmative action does not discriminate or grant preferential treatment.

C. Statutes That Appear To Violate Proposal 2

The following statutes contain provisions which appear to discriminate or grant preferential treatment based on race, sex, color, ethnicity or national origin.

Collective Bargaining Agreements

Some State of Michigan collective bargaining agreements and perhaps collective bargaining agreements of other public entities, include affirmative action guidelines that grant preferential treatment. For example, in one UAW contract, "... the employer may layoff and recall out-of-line seniority because of gender" or, "maintain an existing affirmative action program in accordance with applicable law and approved in advance by the State Personnel Director."⁶¹

This application and analysis requires very careful consultation with labor counsel, because if it is determined that this language violates Proposal 2, employers and unions must be aware that under the Public Employment Relations Act⁶² it is an unfair labor practice to unilaterally change the terms of the collective bargaining agreement without engaging in collective bargaining, even if the [purpose of] the provision is to remedy past discrimination.⁶³

- The mere existence of affirmative action language in the collective bargaining agreement, does not necessarily violate Proposal 2. Again, consultation with counsel is required.

Foster Care

MCL 722.958

Foster parent resource centers

The Department of Human Services may establish "foster parent resource centers" as pilot projects. These centers are designed to assist foster parents, and particularly "children with special needs." Although, "children with special needs" is not defined within this Act, cross

⁶¹ Collective Bargaining Agreement UAW and Human Services Unit, 2005-2007, Article 12, Section D (6).

⁶² MICH. COMP. LAW ANN. § 423.216 (2006).

⁶³ Detroit Police Officers Association v. City of Detroit, 391 Mich. 44 (1974).

references to the Social Welfare Act suggest that the meaning provided there would apply to the Foster Care and Adoption Services Act as well.⁶⁴ (See MCL §400.115.)

- This provision appears to violate Proposal 2 if “children with special needs” is defined in the same manner as the term is defined in the same set of circumstances discussed in MCL Section 400.115.
- However, the project foster parent resource centers is not used by the Department of Human Services and therefore, no violation of Proposal 2 has occurred.

Higher Education

These programs are designed to increase participation of minority students and faculty in higher education. As currently written, these programs create a preference by limiting participation exclusively to certain groups based on race, sex, color, ethnicity, or national origin. For example, the Morris Hood Jr. Educator Development Program provides grant money to African-American and Latino college students who are majoring in K-12 education.

- King-Chavez-Parks Future Faculty Program
 - King-Chavez-Parks Morris Hood, Jr. Educator Development Program
 - King-Chavez-Parks Visiting Professor Program
 - King-Chavez Parks College Day Program
- These programs appear to violate Proposal 2 because the award is based on one of the prohibited categories (i.e., race, sex, color, ethnicity or national origin) which would create a preference.

Human Services

MCL 400.115, 115f, 115g, 115l, 115s

Adoption of a child with special needs

The Department of Human Services takes certain action to facilitate the adoption of a “child with special needs,” including payment of subsidies, payment of non-recurring adoption expenses, and entering into interstate compacts with agencies of other states. A “[c]hild with special needs” is one for whom the state has determined (among other factors), that “[a] specific factor

⁶⁴ MICH.COMP. LAWS ANN. § 400.115 (2006).

or condition ... exists with respect to the child so that it is reasonable to conclude that the child cannot be placed with an adoptive parent without providing adoption assistance under this act.”

Those factors or conditions can include “ethnic or family background” and “membership in a minority or sibling group.” The Act does not specify what is meant by “membership in a minority or sibling group” or “ethnic or family background.”

- Assuming that the payment of a subsidy is considered to be a form of public contracting, then the language in this provision appears to violate Proposal 2. Alternatively, the subsidy could be considered an operation of government and not subject to Proposal 2.

Labor and Economic Growth, Commission on Spanish-Speaking Affairs

The Commission on Spanish-Speaking Affairs acts as an advisory body to the Governor and legislature on programs and issues affecting people of Spanish-Speaking origin or descent. None of the Commission’s charges violate Proposal 2, however the Commission is restricted to members who are “Spanish-speaking and of Spanish-speaking Origin.”⁶⁵ Spanish-speaking person is defined as:

a person, including a migrant agricultural worker, who: has a Spanish surname; has a parent or grandparent of Mexican, Puerto Rican, Cuban, Central American, South American, or other Spanish origin or descent; uses Spanish as the primary language or mother tongue; is identified by an employer in an EEO-1 Report as a “Spanish-surnamed American,” or is regarded in the community as being of Mexican, Puerto Rican, Cuban, Central American, South American, or other Spanish origin or descent.⁶⁶

- We find that because a person must meet this definition to be a Commissioner, this section of the statute constitutes preferential treatment and therefore appears to violate Proposal 2.

⁶⁵ MICH. COMP. LAWS ANN. § 18.302(2).

⁶⁶ *Id.* at § 18.301(d)

Minority-Owned and Women-Owned Businesses

MCL 450.771 et seq.

Minority-owned and Women-owned Businesses

This provision grants preferences to minority and women-owned businesses in procurements through the State's Executive Branch.

- This statute appears to violate Proposal 2 because it grants preferential treatment based upon race, sex, color, ethnicity, and national origin.

Minority Student Grant Program

MCL 333.2707

Minority Student Grant Program

The Public Health Code includes a minority student grant program. This program provides grants to “minority students enrolled in medical schools, nursing programs, or physician’s assistant programs” in return for a commitment to provide health care services in a “health resource shortage area” after completing the educational program.

- This statute appears to violate Proposal 2 if it grants preferential treatment based on race, sex, color, ethnicity, or national origin. The term “minority” is not defined in the Public Health Code.

Single Business Tax

MCL 208.36b

Single business tax credit

A company certified as a “minority venture capital company” is eligible for single business tax credits.

- If a minority venture capital company is eligible to receive single business tax credits that are available to minority and non-minority firms alike, this non-exclusivity would not violate Proposal 2. Minority venture capital firms cannot be excluded from these tax benefits.

- If the tax credit is granted in an exclusive manner to minority venture capital firms, this would appear to violate Proposal 2.
- Note: This section is repealed by Act 325 of 2006 effective December 31, 2007.

VII. PROPOSAL 2's IMPACT ON ECONOMIC DEVELOPMENT

Michigan is a state where not just the largest, but the only projected population growth in the next 20 years will be realized in racial and ethnic groups with the lowest levels of educational attainment.⁶⁷ Projected demographic changes coupled with Michigan's concerted effort to cultivate knowledge-based business as the state's predominant industry, demonstrates a need to expand access to higher education throughout minority populations.

A. Individual Wealth and Tax Implications for Educational Attainment in Michigan

Minority populations are overwhelmingly underrepresented in higher education. Insofar as educational attainment is strongly correlated with average earned wages, it is safe to presume that if all ethnic groups had the same educational attainment and earnings as whites, total personal income in Michigan would be approximately \$3.9 billion higher, and the state would realize an estimated \$1.4 billion in additional tax revenues.⁶⁸

The workforce in Michigan, and the country as a whole, is becoming increasingly diverse. The racial and ethnic groups driving this expanded diversity are the fastest growing and least educated segments of the population. If current trends continue and Michigan does not improve the education of all racial and ethnic groups, the skills of the workforce will not keep pace with the demands of the knowledge economy, and the incomes of Michigan residents will erode precipitously over the next two decades. The impact of failing to educate the fastest growing segments of the population will manifest as long-term structural problems associated

⁶⁷ Michigan Population Projections: 1995-2025, 6.

⁶⁸ National Center for Public Policy and Higher Education, Measuring Up Slide Show (2004).

with transitioning Michigan's economy, to one centered on knowledge-based industries with global stature.

B. A Diverse Workforce is Necessary if Michigan Hopes to Transition into a Knowledge-Based Economy

Today's private companies demand that colleges and universities provide a highly diverse, educated workforce in order to compete in the global economy. The ability of American businesses to thrive in the 21st Century depends in large part on our nation's response to the increasingly global and interconnected nature of the world economy. Cross-cultural competence is the single most important attribute for ensuring efficacy of future effective performance in a global marketplace in the future.⁶⁹ Employing and adhering to a business model that takes the importance of cross-cultural competence into account is essential for any entity hoping to profit from the broad and diverse market opportunities in the United States and around the globe.

Currently, more than \$600 billion in purchasing power is generated by minorities and more than one-third of all new entrants to the workforce are persons of color.⁷⁰ This amount of money, and the influence it exerts over future market success, will only continue to increase through growth in minority populations. Many of Michigan's economic leaders (General Motors, Daimler Chrysler, Kellogg, TRW, Steelcase, and Whirlpool) demonstrated the need for diversity in the Michigan economy by filing amicus briefs on behalf of the University of Michigan's affirmative action programs.⁷¹ These companies, whose economic futures are coupled with Michigan's as a whole, stated that they rely on affirmative action programs and have provided substantial financial support for minorities in higher education in order to fulfill their own need for a diverse workforce.⁷² These companies advocate pro-diversity programs because they

⁶⁹ K. Bikson & S.A. Law, *Rand Report on Global Preparedness and Human Resources: College and Corporate Perspective*, (1994).

⁷⁰ William G. Bowen, *The Compelling Need for Diversity in Higher Education*, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.).

⁷¹ *Grutter v. Bollinger*, "Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents," 1-2 (2003).

⁷² Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, 9.

require the talent and creativity of a workforce that is as diverse as the world around it, without which, they cannot succeed in the 21st Century.⁷³

The greatest hope for the future of Michigan's economy is to embrace education driven, and knowledge based industries of the 21st Century. As evidenced by expanding minority populations, the correlative relationship between average wages earned and increasing educational attainment, and the recognition by private business of the need to increase their cross-cultural competence; minority involvement serves as a powerful tool for Michigan to succeed in this economic transition, especially given the diverse composition of the state itself.

⁷³ Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, 5.

**VIII. RECOMMENDATIONS FOR MAINTAINING DIVERSITY
AND ECONOMIC GROWTH IN STATE
GOVERNMENT IN THE AFTERMATH OF PROPOSAL 2**

In response to your Executive Directive to identify ways in which diversity and equal opportunity may continue to be promoted, we offer the recommendations set forth below for your consideration. The recommendations are categorized by (A) Legislative, (B) Public Employment, (C) Public Education, (D) Public Contracting, and (E) Administrative. As we stated earlier, Proposal 2 does not apply to the disabled or to religious groups, thus recommendations do not extend to those areas.

A. Legislative

1. In the event that a Michigan state or federal court finds that petition circulators have engaged in a pattern of fraud to deceive voters about the meaning of a proposed state-wide ballot proposal, such a finding should disqualify the proposed petition from being placed on the ballot. Federal district judge Arthur Tarnow ruled that “[The Ward Connerly organization] and its circulators engaged in a pattern of fraud by deceiving voters into believing that the petition supported affirmative action.” Presently, fraud is not a bar to the ballot under the Michigan Election Law.⁷⁴ This disqualification from the ballot for deceiving voters could be enacted by an amendment to the Michigan Election Law by the Michigan Legislature. It is recommended that this legislation reforming the ballot initiative process, include provisions for input from the Secretary of State, the Board of State Canvassers, the MDCR, and complaints from the public.⁷⁵
2. It is recommended that the State Legislature should define “preference” as a decision based solely on race, sex, color, ethnicity, or national origin.
3. It is recommended that programs be established that address the problem of comparable worth in the State of Michigan where women, on average, earn 67 cents for every dollar that a man earns. Every local governmental jurisdiction should be required to examine whether its pay structures are giving “preferences” to male employees.
4. It is recommended that the State Legislature amend the State Constitution to remove the term “Affirmative Action” from the title of Article I, Section 26. The heading may be more appropriately titled “Discrimination and Preferences.”

⁷⁴ MICH. COMP. LAWS ANN. § 168.1 et. seq.

⁷⁵ See, Testimony of Mary Pollock, Legislative Vice President, Michigan National Organization for Women (“NOW”), before the Michigan Law Revision Commission, December 18, 2006.

5. It is recommended that the criteria for Commissioners appointed to the Commission on Spanish Speaking Affairs be revised to comply with Proposal 2.
6. It is recommended that the State Legislature amend the Minority Student Grant Program set forth at MCL Section 333.2707, to comply with Proposal 2, by redefining eligible students as “economically disadvantaged” students. Specific criteria for “economically disadvantaged” students should be developed in consultation with the Department of Community Health.
7. It is recommended that the State Legislature amend the qualifying criteria in the programs set forth below so that preferences that violate Proposal 2 are replaced with non-violative language. Such qualifying criteria could include factors relating to the economic disadvantage of eligible students.
 - King-Chavez-Parks Future Faculty Program
 - King-Chavez-Parks Morris Hood, Jr. Educator Development Program
 - King-Chavez-Parks Visiting Professor Program
 - King-Chavez Parks College Day Program
8. It is recommended that the State Legislature replace the current definition of “minority business enterprises” in various Michigan laws with a definition that excludes references to “cultural” and/or “racial” causes or any references to race, sex, color, ethnicity, or national origin. The redefined term should take into consideration factors that include economic status of the particular business.
9. It is recommended that the State Legislature amend the criteria for “adoption of a child with special needs,” set forth at MCL 400.115F (h) (ii). The amendment should exclude references to “membership in a minority group” and “ethnic background.”
10. It is recommended that the Single Business Tax Credit be amended in a manner that grants a tax credit exclusively to disadvantaged capital firms or emerging business enterprises, as those terms are proposed to be defined in Sections VIII D, 1 and 2.
11. It is recommended that the terms “minority-owned” and women-owned” businesses be excluded from existing Michigan law and replaced with the terms “emerging” or “disadvantaged” businesses, as appropriate, and as those terms are proposed to be defined in Sections VIII D 1 and 2.

B. Public Employment

1. It is recommended that the state Civil Service Commission (“CSC”) employ an expanded outreach for its notification of state job openings beyond the state website and traditionally-relied upon postings at the requesting state agency, by:
 - (a) developing a master list (print and electronic) of minority women and ethnic organizations; and

(b) making sure that these organizations are not excluded from state job opening notifications.

2. It is recommended that the CSC conduct at least semi-annual “Employment Conferences,” around the state, to explain:

(a) how the state hiring process works,

(b) what jobs will likely become available, and when – in light of projected retirements and consultation with state agencies, and

(c) what qualifications are required.

The CSC should develop a document, as well as a corresponding web-link, to the above-mentioned subsections (a)-(c) of this recommendation, which shall be made available to the general public.

3. It is recommended that the CSC continue to keep statistics on state employees including minority and female employment, and continue to share that data with state agencies.

4. It is recommended that the CSC and state agencies examine this data on a county or regional basis to determine whether minorities and women are being excluded from, or under-utilized in, certain job categories (i.e., managerial positions); and if this is the case, to develop outreach plans and partnerships with minority and women business organizations to develop best practices in this area.

5. It is recommended that by July 1, 2007, each state agency be required to establish a new and current EEO plan modeled after the Office of Federal Contract Compliance Programs Recommended Affirmative Action Guideline Plan.⁷⁶ (Attachment 6)

C. Public Education

1. It is recommended that outreach to, and partnerships with, K-12 schools be expanded to increase preparation for all students and address the achievement gap between students from different backgrounds.

2. It is recommended that the criteria used to define academic achievement be expanded to include qualitative factors such as improvement in academic performance.

3. It is recommended that admission/enrollment criteria be expanded to encompass a broader range of personal talents and achievements.

⁷⁶ *Sample Affirmative Action Program*, UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, available at <http://esa.dol.gov/esa/regs/compliance/ofccp/pdf/sampleap.pdf> (last visited Feb. 22, 2007).

4. It is recommended that the diversity aspect of the applicant pool be analyzed and that the selection process be monitored to ensure equal opportunity.
5. It is recommended that a consortium of higher educational institutions in the state be established to ensure that institutions work together to accomplish the same goals in promoting diversity.
6. It is recommended that colleges and universities focus more aggressive efforts on recruitment and retention of underrepresented classes of students, looking to programs in other states as models.
7. It is recommended that a non-profit, private entity or foundation be utilized to distribute and administer scholarships or financial aid based on race, color, sex, ethnicity, and/or national origin.

D. Public Contracting

1. It is recommended that DMB develop a definition for a category of businesses called, Diversity Business Enterprises (“DBEs”). In doing so, DMB should consult with federal agencies and other states to determine best practices in this area.
2. The DBE definition should include businesses that are:
 - (a) Michigan-based,
 - (b) from “Economically Distressed” areas of the state,
 - (c) Small Business Enterprises (“SBEs”) – this term should be defined through best practices and experience at the federal and state level, including a cap on the amount of average annual gross receipts and number of employees, and
 - (d) “Emerging Business Enterprises” (“EBEs”) – this term should be defined through best practices and experience at the federal and state level. The Michigan Department of Treasury could be consulted for identification of businesses in the financial services sector.
3. It is recommended that the Department of Management and Budget (“DMB”) maintain a list of what goods and services it purchases during the year these purchases are made. The list should contain statistics on the number and percentage of DBEs, MBEs and WBEs that are receiving state contracts of \$25,000 or above DMB should regularly examine the list to determine if there are areas of state purchases where there is a lack of, or minimal inclusion of MBEs and WBEs. If a particular state agency stands out for lack of inclusion in its purchases, DMB should meet with the agency to determine whether appropriate outreach to DBEs, MBEs and WBEs is being conducted.

4. It is recommended that DMB, on at least a quarterly basis, convene a Purchasing Summit with outreach to MBEs and WBEs, contracting, and supplier groups, to explain:
 - (a) how the state purchasing process works – from the time a purchasing need arises, through the selection process,
 - (b) the requirements for participation,
 - (c) what goods and services are purchased,
 - (d) how state purchases are advertised.
5. DMB should solicit, from the Summit participants:
 - (a) what barriers exist to accessing the state’s purchasing system, and
 - (b) what strategies might be employed to reduce these barriers.
6. Once a category for DBEs has been adopted, it should be incorporated in DMB purchasing policies for all purchases of \$25,000 or more, and state agencies should use the DBE policy, when appropriate, for all of their purchases of less than \$25,000.
7. In determining “Best Value” criteria for purchases, it is recommended that DMB, when appropriate, include DBEs and EBEs, affording them a certain percentage of credit towards their overall bid score.
8. In determining “Best Value” for purchasing decisions, it is recommended that DMB develop a policy to award credit to non-DBE bidders who joint venture with or sub-contract to DBEs.
9. It is recommended that DMB monitor the specifications for purchases being submitted by state agencies, and consult with said state agencies to determine if they are excluding DBEs and EBEs who might otherwise qualify for proposed purchases.
10. It is recommended that state departments and agencies, on their own, keep statistics on the number of MBEs and WBEs being awarded contracts, to determine whether these firms are being excluded from their purchases.
11. It is recommended that DMB and state departments and agencies develop a partnership with minority and women business advocacy groups, to ensure that the state benefits from the broadest range of potential bidders on purchases.
12. It is recommended that the contracting officer for each state agency work with DMB to conduct outreach to identify potential minority and women contractors who would be added to the bidders contact list, and notified of up-coming contracts and pre-bid conferences – if applicable.

13. It is recommended that DMB establish a Supplier Diversity Program in the State of Michigan with goals and objectives to ensure fair and equal opportunities of participation for all vendor groups.
 - (a) Develop policies to support and promote the goals and objectives of the program.
 - (b) Develop strategies to drive and obtain the goals and objectives as well as identify barriers to equal opportunities to participate in public contracting.
 - (c) Develop and launch a tactical implementation plan that includes:
 - i. An internal and external communication plan on its Supplier Diversity Program.
 - ii. Training for all procurement staff.
 - iii. An outreach program for minority, women, disabled, and veteran-owned businesses.
 - iv. Continuance of the current outreach program for all small businesses.
 - v. A recognition award for agencies that promote and obtain supplier diversity goals and objectives.
 - (d) It is recommended that small business advocates within each state agency be designated to serve as a liaison between the agency and vendor community that proactively promote fair consideration of under-utilized vendor groups.
 - (e) Develop and publish a listing of certified minority, women, and disabled veteran-owned businesses, as well as other small businesses, by service/product group, to assist state agencies with outreach efforts to qualified vendors.
14. It is recommended that a Supplier Diversity Advisory Council be established in the State of Michigan that consists of internal stakeholders, representatives of state agencies, representatives of external stakeholder organizations, citizens, and the vendor community (representing women, minority, disabled veterans, and all other vendors – both large and small.)
 - (a) Develop a Mission and Vision Statement for the Council.
 - (b) Develop and promote a policy statement that “diversity includes all vendors.”
15. It is recommended that an annual Supplier Diversity Report to track the amount of dollars spent with minority, women, and disabled veteran-owned businesses, and all other vendors be developed. The Report should include the amount of dollars saved by utilizing minority, women, and disabled veteran-owned businesses.

16. It is recommended that DMB gather data on the availability and utilization of various qualified vendor groups by major service/product groups.
 - (a) Gather data regarding the percentage of available Michigan-based qualified women, minority, and disabled veteran-owned businesses, and all other potential vendors, by specific service/product groups.
 - (b) Determine the current percentage of utilization of qualified women, minority, and disabled veterans-owned businesses, and all other vendors, within the State of Michigan for specific service/product groups to establish a baseline, identify under-utilization of any specific vendor group, and set targets for improvement.
17. It is recommended that DMB conduct semi-annual Matchmaking Conferences to build relationships between large businesses and small businesses to promote sub-contracting opportunities.
18. It is recommended that a mentor-protégé program be developed and implemented. The program would team prospering companies that have proven competencies in business, technology, and the development of sophisticated business solutions with compatible smaller, emerging Michigan-based businesses, to increase their odds for success. Entrepreneurs would gain the tools and techniques to improve their operations, create valuable business alliances, and accelerate growth; and established companies would find new opportunities, partners, and markets.
19. It is recommended that DMB will partner with agencies in the private sector, to certify DBEs, and EBEs.
20. Until such a certification process is in place at the private sector level, it is recommended that qualifying DBEs and EBEs indicate their status, by sworn affidavit, in bids to the state.
21. It is recommended that DMB partner with agencies in the private sector to provide mentoring and technical assistance to DBEs and EBEs.

E. Administrative

1. It is recommended that each state agency be required to develop a Diversity Strategy and Plan (“DSP”) that is incorporated within the state agency’s Strategic Plan. The DSP should be required to include all quantitative data and benchmarks for Diversity Competency. Each state agency’s top management’s annual performance evaluation should be based – in part – on his or her Diversity Competency.⁷⁷

⁷⁷ U.S. GAO Study on Diversity Management and Practices (issued to U.S. Sen. Joe Lieberman).

2. It is recommended that each state agency be required to develop written outreach plans to enhance diversity in their educational, contracting, and hiring decisions. These plans should be coordinated with DMB and CSC. The final outreach plans should be submitted for review and consideration, to the Governor's office by May 1, 2007.
3. The outreach plans should be up-dated on an annual basis.
4. It is recommended that each state department and/or agency be required to have an Equal Employment Opportunity ("EEO") Coordinator who reports to the department director and who is responsible for, among other things, producing a diversity manual and conducting diversity training on an annual basis.
5. It is recommended that the MDCR shall coordinate and conduct training on equal opportunity and the value of diversity, for state departments and agency directors.
6. It is recommended that DMB, OSE, and DCS coordinate the Equal Opportunity Plans with MDCR; and those four (4) departments will jointly Report to the Governor on their progress, on a quarterly basis.
7. It is recommended that language in Collective Bargaining Agreements that violates Proposal 2 be removed from the Agreements, in conformity with the mutuality of bargaining requirements under state law.
8. It is recommended that each state department determine whether it is eligible for additional federal funding and adhere to all affirmative action requirements necessary for eligibility.

IX. CONCLUSION

Michigan is a special place, endowed with a variety of enviable resources; magnificent Great Lakes, excellent higher education institutions, and superb cultural and natural attractions.”⁷⁸ Equally enviable is Michigan’s long and distinguished history of progressive government in the areas of civil and human rights.

Michigan is also a State full of diversity; home to different races and religions, diverse cultures, languages, communities, ethnicities, businesses and geography. The economic necessity of effectively managing our diversity directly impacts our ability to successfully compete in the global marketplace. The social necessity of effectively managing our diversity is critical if we are to become “One Michigan,” an attractive place to live and raise our children and grandchildren.

Today, we are faced with two realities. The first reality is that of very real and continuing disparities and segregation in regards to both race and gender. The second reality is that on November 7, 2006 the people of Michigan voted to prohibit “...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.”

Michigan cannot afford for these two realities to be mutually exclusive. Together, we can and will promote diversity and equal opportunity in a way that is fair and just for everyone.

⁷⁸ “Michigan’s Defining Moment: Report of the Emergency Financial Advisory Panel,” February 2, 2007.

X. GLOSSARY OF TERMS

Affirmative action: A set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.⁷⁹

Affirmative action plan: A written plan designed to identify problem areas of under-representation and under-utilization, outline effective solutions to resolve the problem areas, measure the effectiveness of the solutions, and identify the needs for any future action. Many affirmative action plans or programs do not contain preferences and would therefore, not be in violation of Proposal 2. Attached is a copy of a sample affirmative action plan recommended by the U.S. Department of Labor, Office of Federal Contract Compliance Programs. This type of affirmative action plan does not contain preferences.

Bona Fide Occupational Qualification: A BFOQ exists where an employer can show that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. A BFOQ can be used to justify hiring a specific sex to work in an athletic locker room or housing unit where privacy or security is a legitimate concern. An employer under the jurisdiction of the Michigan Elliott-Larsen Civil Rights Act (“ELCRA”) may apply to the Michigan Civil Rights Commission for an exemption based on a BFOQ. Upon sufficient showing, the Commission may grant an exemption to Article 2 of the ELCRA. An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height, and weight without obtaining prior exemption from the Commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

Disadvantaged Business Enterprise: Commonly referred to as DBE. A business owned and operated by one or more socially and economically disadvantaged individuals. Socially and economically disadvantaged individuals include African Americans, Hispanic (Latino) Americans, Native Americans, Asian Pacific Americans, or Asian Indian Americans and any other minorities or individuals found to be disadvantaged by the U.S. Small Business Administration (SBA) under Section 8 (a) of the Small Business Act. (APTA)

EEO: Equal employment opportunity (EEO) laws prohibit specific types of job discrimination in certain workplaces. Subtopics: Age Discrimination, Disability, Ethnic/National Origin, Color, Race, Religion, Sex, Federal Financial Assistance Programs, Veterans, Immigration. (U.S. Department of Labor)

EEO plan: An affirmative action plan or program to achieve diversity. This plan would typically have goals but would not contain preferences.

⁷⁹ Black’s Law Dictionary, 8th Ed.

Ethnicity: Although the term “ethnicity” or “ethnic” appears in several Michigan statutes, this term has never been defined by the Michigan Legislature. It is not a protected basis of discrimination under ELCRA and could be subject to a vagueness challenge in its application under Proposal 2.

- Race or ethnic background may be deemed a "plus" in a particular applicant's file in the context of individualized consideration for each and every applicant.

- Harvard Plan.⁸⁰

In practice, diversity has meant that race has been a **factor** in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases ... Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.⁸¹

- Justice Harry Blackmun’s Opinion in *Bakke*:

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. [T]hese preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.⁸²

- Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.⁸³

Minority: In the context of the Constitution's guarantee of equal protection, minority refers to an identifiable and specially disadvantaged group.⁸⁴

Minority Business: There is no consistent definition in state statutes as to the definition of a minority owned business.

⁸⁰ *Bakke*, 438 U.S. 265.

⁸¹ *Id.* at 316.

⁸² *Id.* at 406.

⁸³ *Bakke*, 438 U.S. 265.

⁸⁴ Black’s Law Dictionary, 8th Ed.

Preference: The act of favoring one person or thing over another; the person or thing so favored.⁸⁵

- In both *Bakke* and *Grutter*, preference is associated with advantage or “favor.”⁸⁶
- 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.⁸⁷

⁸⁵ Black’s Law Dictionary, 8th Ed.

⁸⁶ *Grutter*, 539 U.S. 306; *Regents of the Univ. of Cal. V. Bakke*, 438 U.S. 265 (1978).

⁸⁷ *Bakke*, 438 U.S. 265.

Respectfully submitted,

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