Supreme Court: Voters' Initiative To End Affirmative Action Is Constitutional

Insights
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In a highly anticipated decision, the Supreme Court upheld Michigan's Proposal 2, which amended the Michigan Constitution to prohibit racial preferences in admissions to public schools and government programs.

In a 6-2 decision, the Supreme Court disagreed with the U.S. Court of Appeals for the 6th Circuit, which had ruled that the Michigan ballot initiative unduly burdened members of minority groups from achieving their goals in the political process. The Supreme Court concluded that Michigan's Proposal 2 did not violate the Equal Protection Clause of the Fourteenth Amendment and that states may repeal affirmative-action policies through state constitutional amendments. Schuette v. Coalition to Defend Affirmative Action.

Background: Michigan Law Broadly Barred Affirmative Action In The Public Sphere
The lawsuit stems from a 2006 voter initiative in which Michigan voters approved a measure to amend the state Constitution to prohibit the government from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The voter initiative, called the Michigan Civil Rights Initiative, effectively banned affirmative action at state schools.

Michigan enacted the measure just three years after the Supreme Court decided *Grutter v. Bollinger*, where in a 5-4 vote the Court held that the University of Michigan Law School could grant admissions preferences to minority applicants in the interest of fostering diversity for the entire study body. (*Grutter* barred the use of racial admissions quotas, however.)

A broad coalition of civil-liberties groups, including the NAACP and the ACLU, challenged Michigan's law banning affirmative action in the public sector. The district court upheld the constitutionality of Michigan's law, but the 6th Circuit reversed. Last year, the Supreme Court agreed to review the case.

The Ruling
The Supreme Court held that states may repeal affirmative-action policies through state constitutional amendments. The Supreme Court disagreed with the 6th Circuit that the Michigan

amendment violated equal-protection rights under the Fourteenth Amendment when race-based university admissions decisions were shifted from the university to the state.

Writing for the Court, Justice Kennedy stated "this case is not about how the debate about racial preferences should be resolved. It is about who may resolve it." Further, "deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor," but, according to Justice Kennedy, "that does not justify removing certain court-determined issues from the voters' reach. Democracy." To restrict Michigan voters from making their own decision on affirmative action would be "an unprecedented restriction on a fundamental right held not just by one person but by all in common."

A Lasting Impact On Future Voter Initiatives, Hiring, And Admissions

The latest decision continues a decade-long trend of retrenchment against affirmative action, with Michigan in the legal foreground. In 2003, the Supreme Court rendered decisions related to the University of Michigan's undergraduate and law school admissions processes in *Gratz v. Bollinger* and *Grutter v. Bollinger*. After *Gratz* and *Grutter* were handed down – authorizing (but not requiring) a limited use of race/ethnicity in admissions to achieve compelling mission-driven interests – a handful of states passed voter initiatives to adopt state constitutional amendments and laws that prohibit consideration of race or ethnicity by publicinstitutions in enrollment and other practices, such as hiring.

Besides Michigan's initiative, four other states – California, Nebraska, Arizona, and Oklahoma – implemented voter-initiated state constitutional bans. (Florida has adopted a similar ban relating to admissions through administrative regulation, although other practices are also influenced by an executive order; New Hampshire through a state statute; and Washington through a state statute initiated by a voter ballot initiative.)

Prior to this morning's Supreme Court decision, a federal circuit split existed on the issue of the constitutionality of state bans that prohibit the consideration of race in the admissions procedures at public institutions of higher education. Although the 6th Circuit rejected Michigan's law, a 9th Circuit judicial panel upheld a California proposition in 1997 – applying the same legal principles but reaching a different result. (Notably, the California proposition served as the foundation for the similarly worded Michigan ban.)

This morning's decision resolves the circuit split in favor of the state constitutional bans on affirmative-action policies in the public sphere. Other states are likely to follow Michigan's lead in adopting such voter initiatives precluding affirmative action in public-sector admissions and hiring. For more information on whether, and how, this decision might apply to your organization, contact your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice on any particular fact situation.