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## Supreme Court to Rule on State Affirmative Action Ban

The Supreme Court recently granted certiorari in another affirmative action case, *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, which addresses whether a state may amend its constitution to prohibit public universities and employers from using race- and sex-based considerations in admissions and hiring. Surprisingly, the Court took this case without awaiting the outcome of the already pending case involving the constitutionality of the race-conscious admissions practices of the University of Texas, *Fisher v. University of Texas at Austin*, 11-345. Together, the two cases could represent a sea change in the law on affirmative action in education.

The new case renews the debate over the race-based admissions practices of Michigan's public universities. In 2003, the Supreme Court upheld the University of Michigan Law School's race-based admissions preferences in *Grutter v. Bollinger*, 539 U.S. 306 (2003), focusing broadly on attracting a diverse student body, but struck down the University's more numerically rigid race-based preferences for undergraduate admissions in *Gratz v. Bollinger*, 539 U.S. 244 (2003). In response, Michigan voters approved a ballot initiative to amend the Michigan constitution to prohibit any race- or gender-based discrimination in public employment, contracting, or education, effectively precluding affirmative action in public education in that state.

An *en banc* panel of the Sixth Circuit invalidated the amendment in an 8-7 decision. The majority held that the amendment violated the "political-restructuring" theory of the Equal Protection clause because: (1) the amendment was racially focused and targeted affirmative action initiatives that would benefit minorities, and (2) the amendment reallocated political power by forcing a person seeking a race- or gender-based change in admissions policies to get a constitutional amendment passed, while permitting other changes in admissions policies – such as preferences for athletes or legacy applicants – to be pursued through other, far easier means.

The dissent argued that the decision placed a constitutionally questionable policy of racial preference entirely beyond the political process, relying on an equal protection doctrine that previously had been applied narrowly. In petitioning the Supreme Court to take the case, the Michigan Attorney General argued that the Sixth Circuit decision was unprecedented in that no court has held, apart from remedying past discrimination, that a state is required to engage in affirmative action.

While outcomes are difficult to predict, *Fisher* and *Schuette* could dramatically change affirmative action law. In *Fisher*, the Court could strike down the race-conscious admissions policy in Texas, which is intended to implement the principles articulated in *Grutter* and is

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similar to policies used by private universities. At oral argument, the Justices expressed skepticism about university officials striving for the type of broad diversity upheld by *Grutter*. The decision could affect private colleges and universities because Title VI of the 1964 Civil Rights Act prohibits discrimination by institutions receiving federal funds, and uses the same equal protection analysis in determining what constitutes discrimination. A decision in *Schuette* upholding the Michigan amendment would give states the right to ban affirmative action in a variety of ways, including, for example, state licensing and funding in higher education, which could affect private as well as public institutions.

Justice Kagan has recused herself from both *Fisher* and *Schuette*, leaving open the possibility of a 4-4 split in each case, which would leave in place both the University of Texas affirmative action practices and the lower court decision striking down the Michigan constitutional amendment barring affirmative action.

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