UNIVERSITY OF CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

December 12, 2012

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SUMMARY

A recent U.S. Court of Appeals decision holding Michigan's anti-affirmative action law unconstitutional may lead the U.S. Supreme Court to review the constitutionality of California's Proposition 209.

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MICHIGAN'S AFFIRMATIVE ACTION BAN DECLARED UNCONSTITUTIONAL BY FULL SIXTH CIRCUIT COURT OF APPEALS

The full U.S. Court of Appeals for the Sixth Circuit has held that Michigan's constitutional amendment to ban affirmative action, "Proposal 2," violates the Fourteenth Amendment right to equal protection. *Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 2012 WL 5519918 (6th Cir. Nov. 15, 2012). The case does not affect the validity of California's Proposition 209 and the legal context for the University of California's admissions practices; however, the conflicting conclusions of the Sixth Circuit and the Ninth Circuit, which upheld Proposition 209 against similar arguments, increase the likelihood that the United States Supreme Court will review the Sixth Circuit decision. If that occurs, the Supreme Court's decision would then apply to any further consideration of Proposition 209.

Like Proposition 209, Proposal 2 was a voter-approved initiative that amended the state constitution to prohibit race- and sex-based preferences in public education, employment, and contracting. Its language was essentially identical to that of Proposition 209. Various interest groups and individuals sued Michigan's public university systems and governor to block enforcement of the law. Last year, a 3-judge panel of the Sixth Circuit held Proposal 2 to be unconstitutional. Upon the state's motion, the Sixth Circuit granted *en banc* review by the full court.

The full Sixth Circuit also held that Proposal 2 impermissibly restructured the political process along racial lines. Applying the "political process" analysis set forth in the Supreme Court cases *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court found that (1) race-conscious admissions policies primarily benefitted racial minorities and (2) Proposal 2 reordered the political process by requiring proponents of race-conscious admissions policies – but not proponents of other policies – to undertake the arduous process of constitutional amendment to effect their goal.

The Sixth Circuit explicitly rejected the reasoning used by the Ninth Circuit in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), which upheld Proposition 209. In reaching its decision, the Ninth Circuit characterized affirmative action as a "preference" rather than a "right" and concluded that *Hunter* and *Seattle* did not apply because they only assured equal access to the political process in order to protect "rights."

The Sixth Circuit also declined to address the constitutional status of race-conscious university admissions policies, as opposed to the process by which such policies are adopted. That separate but related issue is currently before the United States Supreme Court in *Fisher v. University of Texas at Austin*, a case in which the University of California filed an amicus brief.

Because the Sixth Circuit's and Ninth Circuit's decisions conflict on whether a constitutional amendment banning affirmative action is constitutional, the Supreme Court may exercise its discretion to hear the Sixth Circuit case and use it as an opportunity to resolve this conflict. The State of Michigan has already petitioned the Supreme Court to do so, and the Sixth Circuit has stayed its order until the Court decides. If the Court decides to hear the case, that would likely happen in the next Court term, which begins in October 2013.