UNIVERSITY OF CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

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SUMMARY

Supreme Court decision opens the door for more state affirmative action bans. The University's experience under Proposition 209 will be central to the national debate about these measures.

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U.S. SUPREME COURT UPHOLDS MICHIGAN'S AFFIRMATIVE ACTION BAN

The United States Supreme Court recently upheld Michigan's constitutional amendment banning affirmative action, holding that it did not violate the Fourteenth Amendment right to equal protection. *Schuette v. Coalition to Defend Affirmative Action,* 2014 WL 1577512 (Apr. 22, 2014). The University of California's President and Chancellors had submitted an amicus brief discussing the University's experience under California's similar ban, Proposition 209, highlighting the impact Proposition 209 has had on underrepresented minority students and the limited success of the University's efforts to increase diversity through race-neutral measures only. The amicus brief can be seen here.

As the Ninth Circuit Court of Appeals has already upheld Proposition 209 against similar equal protection arguments, the Supreme Court's opinion in *Schuette* does not change the legal parameters for the University's efforts to increase the diversity of its students, faculty, and staff. It does, however, open the door to other states to consider similar affirmative action bans, and the University's experience under Proposition 209 will be central to the national debate about these measures. For a further discussion of the Ninth Circuit decision and of the history of Schuette, see our December 2012 advisory.

The *Schuette* decision turned on the Court's analysis of the "political process" doctrine, which makes certain forms of political restructuring unconstitutional. The Sixth Circuit had relied on this doctrine to strike the Michigan ban, ruling that race-conscious admissions policies primarily benefited racial minorities and that the ban impermissibly required proponents of such policies – but not proponents of other policies – to undertake the arduous process of constitutional amendment to effect their goal. Six Justices voted to reverse this decision, holding that the political restructuring doctrine did not apply to prohibit Michigan's ban, though the Justices were split three ways as to why. Justice Kennedy, joined by the Chief Justice and Justice Alito, reasoned that the doctrine prohibited only political restrictions designed or likely to be used to encourage infliction of injury on the basis of race; Justice Scalia, joined by Justice Thomas, concluded that the cases establishing the doctrine should be overruled entirely; and Justice Breyer took the position that the doctrine did not apply where the decision-making was moved from an unelected administrative body (faculty and administrators setting admissions policy) to a politically responsive one, the Michigan voters.

The University of California's *amicus* brief is discussed in the dissenting opinion authored by Justice Sotomayor and joined by Justice Ginsburg. The dissent cites the immediate and precipitous decline in the admission and enrollment rates of underrepresented minority students after Proposition 209, particularly on certain UC campuses; the special impact on black students; and the declines in enrollment of underrepresented minority students in professional and graduate schools. The dissent also notes that these declines occurred despite substantial efforts by the University of California to increase diversity in race-neutral ways during a period in which underrepresented minority populations increased significantly in California.

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Schuette opens the door for more states to adopt affirmative action bans like Michigan's and California's. In states that do not follow that path, the holdings of *Fisher v. University of Texas at Austin* still govern. Thus, in states without an affirmative action ban, racial classifications remain permissible if narrowly tailored to further compelling governmental interests, and diversity in education is still recognized as a compelling interest.

In California, *Schuette* likely forecloses a reconsideration of Proposition 209's constitutionality on the basis of the political process doctrine. The Office of the General Counsel, which includes our campus counsel, is available as a resource as we continue to develop and improve diversity strategies within the parameters of the law.