Affirmative Action Back at the Supreme Court, With a Twist

By Ariane de Vogue

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The Supreme Court will take up affirmative action Tuesday in a case challenging Michigan's ban on race-conscious admissions policies at public universities.

Unlike recent cases in which the high court has examined a particular plan at a public university, however, this case looks at affirmative action from a different perspective: a state's total ban on racial preferences in higher education.

"The people of Michigan concluded that not having affirmative action in higher education was the best policy for the state," says state Attorney General Bill Schuette says in defending Proposal 2, the ballot initiative that passed in 2006 with 58 percent of the vote and amended the state Constitution.

In court papers, Schuette says that even though the Supreme Court allows race-conscious admissions policies in very narrow circumstances, his state decided to pass the ban.

"Nothing in the Constitution bars the people of Michigan from making that choice," he writes.

A collection of individuals and interest groups, including the ACLU and the Coalition to Defend Affirmative Action, challenged Proposal 2 and won their case in the U.S. Court of Appeals for the Sixth Circuit in Cincinnati.

The deeply divided appeals court invalidated the ballot initiative in March of 2012, holding that it placed a special burden on minorities within the governmental process in violation of the Equal Protection Clause.

In essence, the court said that individuals who want a school to consider nonracial factors such as legacy status, geographic origin and athletic skills in its admission plan have the ability to lobby the popularly elected governing boards of the schools. But those black, Latino and other minority citizens who seek to restore the consideration of race as one factor in admissions are blocked from any lobbying by Proposal 2. Their only recourse is the notably difficult and expensive task of attempting to repeal the state constitutional amendment.

“Because less onerous avenues to effect political change remain open to those advocating consideration of nonracial factors in admissions decision, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment,” Judge R. Guy Cole Jr. wrote for the majority.

The ruling prompted a fierce dissent from Judge Jeffrey S. Sutton, among others, who pointed out that the U.S. Supreme Court has upheld race-conscious admissions plans on an extremely narrow basis.

“If racial preferences are only occasionally and barely constitutional,” Sutton said, “it cannot be the case that they are always required. A state that wishes to treat citizens of all races and nationalities equally is free as a matter of its own law to do so.”

Sutton rejected the notion that Proposal 2 puts a special burden on minorities. “The words of the amendment place no burden on anyone, and indeed are designed to prohibit the State from burdening one racial group relative to another,” he writes.

Ilya Shapiro of the libertarian Cato Institute in Washington has filed a brief in support of Schuette and believes the Supreme Court – by a wide margin – will reverse the 6th Circuit decision.

“In no conceivable world can the Equal Protection Clause – the constitutional provision that bans racial discrimination – prohibit a state law that bans racial discrimination. The Supreme Court should and almost certainly will reverse the lower court’s ridiculous judgment to the contrary, and will likely do so with a great degree of unanimity,” Shapiro says.

Mark Rosenbaum, a lawyer for the ACLU who’s challenging the constitutionality of Michigan’s amendment, targets what he says are two starkly different playing fields. One is for those interested in asking a school to consider nonracial factors, and another is for those interested in asking the school to consider racial preferences.

He writes in court briefs that Proposal 2 shuts off access to the ordinary political process for those advocating constitutionally permissible race-conscious policies, “even though those ordinary political processes remain fully open and available to advocates for consideration of other nonracial factors or criteria.”

“Proposal 2 actually contributes to the racial divide and instead of healing the nation’s wounds, it actually opens them up.” Rosenbaum says.

California passed a similar ban in 1996 that was upheld by the courts. Rosenbaum worries that if the Supreme Court rules in favor of Schuette, other states might follow suit.

Lawyers for the Regents of the University of Michigan have filed a brief supporting the challengers. They write that between 2004 and 2006, before Proposal 2, the numbers of entering African-American freshman at the University of Michigan ranged from a low of 330 to a high of

443. After the passage of Proposal 2, from 2007 to 2009, entering African American freshmen ranged from a low of 289 to a high of 374.

Only eight justices will hear Schuette v. Coalition to Defend Affirmative Action because Justice Elena Kagan has been recused, presumably because she dealt with the case in her previous job as U.S. solicitor general. A 4-4 result would uphold the lower court decision and represent a victory for supporters of affirmative action, but no new precedent would be set.