What’s On Deck: Court to Again Tackle Affirmative Action

by Donald Scarinci

As the justices continue their summer vacation, we will be previewing what’s to come when they return to the bench in October.

One of the first cases on deck involves affirmative action, which came before the Court last term in *Fisher v. Texas*. The Court surprised many by holding that the narrowly tailored use of race in admissions decisions did not violate the Equal Protection Clause.

Schuette v. Coalition to Defend Affirmative Action offers a very different spin on affirmative action. It involves an amendment to the Michigan state constitution banning racial preferences in public education, employment, or contracting. While Proposal 2 was approved by 58 percent of the state’s voters, it quickly met legal challenges by supporters of affirmative action.

The specific question before the Court is whether the amendment violates the Equal Protection Clause. The United State Court of Appeals for the Sixth Circuit previously ruled that it did, basing its decision on the political process doctrine. It holds that a law violates the Equal Protection Clause if it “(1) has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority’; and (2) reallocates political power or reorders the decision-making process in a way that places special burdens on a minority group’s ability to achieve its goals through that process.”

Applying this doctrine, the Sixth Circuit ruled that Proposal 2 runs afoul of the Constitution. “A student seeking to have her family’s alumni connections considered in her application to one of Michigan’s esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school’s governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state’s Constitution,” Judge R. Guy Cole Jr. wrote for the majority.

“The same cannot be said,” Judge Cole explained, “for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution — a lengthy, expensive and arduous process — to repeal the consequences of Proposal 2.”

The case has elicited amicus briefs from a wide range of organizations. While the ACLU defended the decision, groups like the Cato Institute have criticized the Sixth Circuit for interpreting the political process doctrine too broadly.

Several other states with similar laws will also be closely watching this case. The United States Court of Appeals for the Ninth Circuit previously upheld that the state’s prohibition on racial preferences in higher education. Oral arguments are scheduled for October 15.