The Sixth Circuit strikes down the amendment to Michigan's Constitution that prohibits granting preferential treatment in college admissions based on race.

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Last week, a divided panel of the Sixth Circuit struck down section 26 of article I of Michigan's Constitution. Section 26, which was adopted by Michigan voters in 2006 by a margin of 58% to 42%, provided that no public college, public university, community college, or school district shall "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting." According to Judge Cole, writing for himself and Judge Daughtrey in *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, this provision of the Michigan Constitution impermissibly restructured the political process governing admissions policies at state schools. This restructuring occurred, the panel explained, because an individual seeking to challenge an admissions policy that does not relate to race can seek a change through a variety of steps (such as lobbying the admissions committee directly, or petitioning a university's dean or board), but an individual challenging a race-based admissions policy would have to begin by repealing the constitutional amendment.

Based on two U.S. Supreme Court decisions—*Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969)—Judge Cole concluded that the strict scrutiny applied to enactments that change the governmental decisionmaking process for determinations with a racial focus. The 2006 amendment was therefore invalid under this equal-protection, political-process argument because "proponents of race-conscious admissions policies now have to obtain the approval of the Michigan electorate *and* (if they are successful) the admissions units or other university powers, whereas proponents of other admissions policies need only the support of the latter." This restructuring, in the majority's view, moved the decisionmaking authority to a new and more remote level of government and therefore burdened future attempts to implement race-conscious admissions policies.

Judge Gibbons dissented. She first noted the history behind the amendment, including the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Supreme Court held that the University of Michigan Law School used race in a permissible, narrowly tailored way in its admissions process in pursuit of diversity, but where the Supreme Court also explained that "race-conscious admissions policies must be limited in time" because a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Judge Gibbons concluded that the amendment did not restructure political processes in a manner forbidden by *Washington* and *Hunter* because state university admissions are not political processes in the first place. The faculty admissions committees and individual faculty members (that is, those who set the admissions policies) are not politically accountable to the people of Michigan. Further, the amendment did not deprive some local constituency of its political influence because the universities covered by the amendment were state-wide universities. "Having *no* direct or indirect influence on the bodies vested with authority to set admissions standards—the faculty committees—the people of Michigan made a political change at the *only* level of government actually available to them as voters." "The Michigan electorate," Judge Gibbons concluded, "as

opposed to choosing a more complex structure for lawmaking, employed *the one* method available to exert electoral pressure on the mechanisms of government." Judge Gibbons also concluded that the amendment did not violate the Equal Protection Clause under traditional analysis, an issue the majority did not need to reach.

Attorney General Bill Schuette has indicated that the state will appeal the issue en banc, according to this *Detroit Free Press* article. At least one commentator thinks the Supreme Court is reasonably likely to take the case if the Sixth Circuit does not reverse it en banc.