U.S. Supreme Court Decision In *Schuette* Bolsters Oklahoma's Prohibition Against Preferential Treatment Based On Race, Color, Sex, Ethnicity Or National Origin In Public Employment, Contracting, Or Education.

By Adam Doverspike

Background

In 2003, despite the Constitutional prohibition on racial discrimination, the U.S. Supreme Court in *Grutter v. Bollinger* permitted the University of Michigan to consider applicants' race to ensure a diverse student body. In response to *Grutter*, the voters of Michigan passed Proposition 2, a statewide ban on race and sex preferences in public school admissions, government contracting, and public employment. A pro-affirmative action group challenged the initiative in federal court on the grounds that it reorganized the political process in a way that disadvantaged minority groups, and thus violated the federal Equal Protection Clause.

Schuette v. Coalition to Defend Affirmative Action et al. (No. 12-682)

On April 22, 2014, the Supreme Court rejected that challenge 6-2. The Court stopped short of declaring the "political process" doctrine dead, a position adopted by only two Justices. Justice Kennedy's opinion for three justices controlled the case and substantially narrowed the doctrine without providing much guidance for lower courts to apply going forward.

Justice Kennedy was quick to note that the case was "not about the constitutionality, or the merits, of race-conscious admission policies," but rather about who decides whether to use race-conscious policies. Ultimately, Justice Kennedy and the Court held that voters may choose to require colorblindness in their state officials without violating the federal Equal Protection Clause.

Schuette does not change the Court's current jurisprudence that the federal constitution does not bar universities from considering race in admissions so long as schools do so in a way that is narrowly tailored to a compelling government interest. Currently, the two compelling interests blessed by the Court are: (1) remedying past discrimination by the institution choosing to consider race, and (2) creating a diverse educational environment. *See Grutter*; *Fisher v. University of Texas*.

Schuette dispels any notion that such race-conscious affirmative action is required by the federal constitution, and it permits states to opt out of race-conscious affirmative action. When considered alongside *Parents Involved v. Seattle School Dist. No. 1* and *Fisher*, the Roberts Court continues to pressure universities to look for race-neutral alternatives to achieve their diversity goals.

Schuette will likely encourage opponents of racial preferences to bring initiatives and referendums endorsing an end to race-conscious admissions and racial preferences in public contracting and

employment in more states. Already voters in six states have passed state constitutional bans on racial preferences: California, Michigan, Washington, Nebraska, Arizona, and Oklahoma. *Schuette* makes any federal constitutional challenge against those existing bans futile.

Oklahoma's Civil Rights Initiative

In 2012, Oklahoma voters passed State Question 759, that reads, in part:

> The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting.

Okla. Const. Art. 2, §36A. The Oklahoma Civil Rights Initiative applies to state agencies, counties, cities, and all non-federal government entities. Oklahoma's constitutional amendment is the most recent of the six. While no cases involving this amendment have been resolved yet, other states with similar provisions have required state actors to stop using race-conscious policies. The California Supreme Court unanimously struck down a city contracting affirmative action program that required general contractors to treat minority and female-owned subcontractors differently than other subcontractors. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). Similarly, Michigan's Attorney General determined a city commission policy that granted bid discounts to disadvantaged business violated Proposition 2 because it included a presumption that minority and female owned businesses were disadvantaged. Mich. Attorney General Op. No. 2707 (Apr. 9, 2007).

Oklahoma educational institutions must ensure they do not grant preferential treatment to individuals based on race or sex. In Michigan, public university admissions were at the forefront of the political battle. Remarkably, race-conscious admission policies at the University of Michigan alone spawned three Supreme Court cases in 11 years: *Gratz v. Bollinger*, *Grutter*, and *Schuette*. In Oklahoma, the major public universities assert that they do not give preferential treatment based on race or sex, and instead use other tools to meet their diversity goals.

The Oklahoma Civil Rights Initiative does not apply to private entities, which may continue to grant preferential treatment based on race and sex so long as they do not violate anti-discrimination laws. But any governmental entity that grants preferential treatment, or maintains an affirmative action plan related to employment decisions or its contracting practices, should review its procedures to ensure compliance with the Oklahoma Civil Rights Initiative and its narrow exceptions. After *Schuette*, the state ban on governmental racial preferences is unlikely to be overturned.

1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217
(918) 595-4800
adoverspike@gablelaw.com
www.gablelaw.com