



## MEMORANDUM

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**DATE:** July 12, 2011

**TO:** Melissa A. Claramunt  
Civil Rights Specialist

**FROM:** Daniel M. Levy  
Director for Law and Policy

**SUBJECT:** Effect of 6<sup>th</sup> Circuit Opinion on MITW

As you are aware, the U.S. 6<sup>th</sup> Circuit Court of Appeals recently issued an opinion that overturns (at least in part) Michigan's ban on race and gender preferences (see attached for Department's reaction). We have subsequently received a number of inquiries about this decision specifically related to whether it will result in any change in the Michigan Indian Tuition Waiver (MITW) Act's eligibility requirements. **While I am not able to provide a definitive answer on whether the opinion might ultimately result in some change, for the time being, the answer is that it will not.**

There are certainly questions about the scope of the opinion, including whether it applies only to admissions decisions, to all decisions made by colleges and universities, or even more broadly to all decisions impacting universities. The reasoning by which the Court reached its opinion narrowly focuses on the way Proposal 2 "restructures the political process along racial lines and places special burdens on racial minorities" by causing there to be two different legal procedures for changing admissions policy with the procedure for changes related to race being much more burdensome. Because MITW's eligibility requirements fall outside the schools' policy control, it is not clear whether this reasoning applies at all. However, the Court then concludes "those portions of Proposal 2 that affect Michigan's public institutions of higher education violate the Equal Protection Clause." While the underlying reasoning might apply only to decisions made within the schools' political processes, it is impossible to argue that MITW eligibility does not "affect" those schools.

Further, the 6<sup>th</sup> Circuit orders that the district court to which the case is remanded "enter summary judgment in favor of the Plaintiff-Appellants." As a result of this broader language, there are some who argue the District Court order will ultimately be required to declare Proposal 2 (and thus Const. Art. 1, Sec. 16) as a whole to be invalidated.

What is clear, however, is that whatever the affect of 6<sup>th</sup> Circuit's opinion will be, it is not yet controlling. Specifically, the Michigan Attorney General has indicated that his office will be requesting a rehearing by the Circuit Court en banc, and this process stays any effect the opinion would otherwise have. Given the possibility that the opinion might change, and the certainty that it will in the end be given effect only by a District Court Order, (which is likely to at the very least provide additional clarity to the scope of the 6<sup>th</sup> Circuit's opinion), there is no benefit to our attempting to answer in the present what affect this opinion might have on MITW eligibility in the future.

Therefore, when you are contacted about the decision and whether additional students are now eligible to receive MITW as a result of the 6<sup>th</sup> Circuit's opinion, please advise them that all requirements remain as they were. Likewise, any requests for eligibility verification you receive should be processed exactly as they have been to date. Please also indicate that we continue to monitor the case and that if at any time in the future we are able to broaden MITW eligibility, those changes will be posted on our web site.

c: Director Krichbaum  
David Murley



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF CIVIL RIGHTS  
EXECUTIVE

DANIEL H. KRICHBAUM, PhD  
DIRECTOR

**For Immediate Release**

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**Michigan Department of Civil Rights Releases Statement on  
Federal Court Finding on Proposal 2**

Lansing—Earlier today, the Michigan Department of Civil Rights released the following statement:

"The Michigan Department of Civil Rights applauds the opinion of the US 6<sup>th</sup> Circuit Court of Appeals striking down the prohibition on any consideration of race or gender in university admissions decisions.

We believe the question of who comprises a student body is best made at the academic rather than the political level. A university's primary responsibility is the academic interests of those students who are admitted and preparing those students for the future. This decision removes the handcuffs that prevented Michigan's public universities from making decisions based upon those factors they believed to be in the best interests of the entire student body and the institutions as a whole.

At its core, today's decision trumpets a principle that is at the very heart of what makes America great. When new democracies are being born around the world, it is a bedrock principle we need to underscore and a lesson we hope they heed. America's strength grows from our constant efforts to balance majority rule and minority rights. The 6<sup>th</sup> Circuit today reminds us that minority rights cannot properly be determined based solely on popular vote. The decision is a truly appropriate way to begin the Independence Day weekend."

For more information on the Michigan Department of Civil Rights, please visit [www.michigan.gov/mdcr](http://www.michigan.gov/mdcr).

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