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BALLOT PROPOSAL  
06-2

An Overview

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## **PROPOSAL 06-2**

On November 7, 2006, Michigan voters will decide whether to adopt a constitutional amendment prohibiting public institutions from using affirmative action programs that grant preferential treatment on the basis of race or sex in employment, education, or contracting. The result of a petition drive, Proposal 06-2 will appear on the ballot as follows:

### ***A PROPOSAL TO AMEND THE STATE CONSTITUTION TO BAN AFFIRMATIVE ACTION PROGRAMS THAT GIVE PREFERENTIAL TREATMENT TO GROUPS OR INDIVIDUALS BASED ON THEIR RACE, GENDER, COLOR, ETHNICITY OR NATIONAL ORIGIN FOR PUBLIC EMPLOYMENT, EDUCATION OR CONTRACTING PURPOSES***

*The proposed constitutional amendment would:*

- *Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts.*
- *Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin. (A separate provision of the state constitution already prohibits discrimination on the basis of race, color or national origin.)*

*Should this proposal be adopted?*

If a majority of the electors vote "yes", Proposal 06-2 will add Section 26 to Article I of the State Constitution.

### **Existing Law**

Michigan's Elliott-Larsen Civil Rights Act prohibits discrimination in employment, education, public services, and public accommodations on the basis of race, sex, color, national origin, age, height, weight, religion, or marital status. The Federal Civil Rights Act prohibits employment discrimination based on race, color, religion, sex, or national origin; prohibits sex discrimination in educational programs receiving Federal funding; and contains other antidiscrimination provisions. The State Constitution prohibits discrimination because of religion, race, color, or national origin in the "enjoyment of civil and political rights", and both the State and U.S. Constitutions guarantee equal protection under the law.

Various decisions of the U.S. Supreme Court have determined the extent to which government may use affirmative action programs. In higher education, a school may use minority status as one factor contributing to student-body diversity, but may not give a fixed number of points or use a minority quota. In government employment and contracting, programs using minority status as a criterion must show a compelling governmental interest (such as remedying the effects of past discrimination).

### **Impact of Proposal 06-2**

The primary impact of Proposal 06-2 would result from its language stating that public institutions "shall not...grant preferential treatment" based on race, sex, color, ethnicity, or national origin in the operation of public employment, education, or contracting. Although the proposed constitutional amendment itself does not use the term "affirmative action", government at all levels and public schools would no longer be allowed to implement what are commonly referred to as affirmative action policies.

If the ballot proposal were approved, a number of existing programs and practices likely would become illegal. These include, for example, public university programs that explicitly consider race, gender, ethnicity, or national origin in admissions, and that target scholarships to minority students. Less clear is whether the amendment would prevent outreach efforts that focus on women or minorities but do not exclude others.

To some extent, it can be determined what the proposed amendment would *not* do. According to its language, Article I, Section 26 would not:

- Prohibit action that must be taken to establish or maintain eligibility for any Federal program, if ineligibility would result in a loss of Federal funds to the State.
- Prohibit bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- Invalidate any court order or consent decree in force on the effective date of the section.

Section 26 also states that it would apply only to action taken after the effective date of the section. In addition, it would apply only to *public* institutions. It would not directly affect private sector affirmative action programs, or impose new limitations on private discrimination. The amendment also would not prohibit programs that give preferential treatment on the basis of such factors as socioeconomic status or geography. Further, the amendment would apply only to public employment, education, and contracting; it does not mention public programs in other areas, such as health care services.

If the ballot proposal is approved, it is very likely that the courts will have to determine whether the amendment outlaws an individual program, or whether a particular practice will be allowed to continue.