Supreme Court Gives Boost To Affirmative Action Programs

Insights
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Today the U.S. Supreme Court held by a four to three vote that the University of Texas's use of racial preferences in undergraduate admissions did not violate the Equal Protection Clause of the Fourteenth Amendment, upholding the University's affirmative action program. The issue of affirmative action in higher education has now been considered five times by the Supreme Court and has produced some of the Court's most fractious decisions, today's being no exception. *Fisher v. University of Texas*.

Case Background: A Long and Winding Road
The issue in *Fisher* was whether the University of Texas's use of race in selecting its undergraduate class was constitutional. Abigail Fisher contended she was not admitted to the University because she is white; she claims that she would have been admitted if lower standards used for racial minorities were applied to her.

Before 2003, the University of Texas sought racial diversity on campus through what was dubbed the "Top 10 Percent Law." Under this policy, any student who finished in the top 10 percent of a graduating class in a Texas high school was eligible for automatic entry into the Austin institution as a freshman. The creation of this policy was the state legislature's attempt to reach a diversity goal using a strictly race-neutral formula after an earlier policy had been struck down by a federal appeals court in 1996.

But in 2003, the Supreme Court issued a ruling in *Grutter v. Bollinger* allowing the partial use of race in college admissions, so long as the affirmative action program met a "strict scrutiny" standard. University of Texas officials moved quickly to adopt their own *Grutter*-style policy. They called it a "holistic" plan, and while race was not the decisive factor, it was nevertheless an explicit consideration.

Fisher, who was not in the top 10 percent of her high school graduating class, applied unsuccessfully for entry to the University. Upon rejection, she challenged the *Grutter* like plan in court. The 5th Circuit Court of Appeals ruled in favor of the University, and Fisher appealed to the U.S. Supreme Court.

That case, also called *Fisher v. University of Texas*, was decided by the Supreme Court in 2013. In that case, the Supreme Court overturned the appeals court ruling and sent the matter back to the lower courts. The Court held that the 5th Circuit had not correctly applied the applicable "strict

scrutiny" standard. In so doing, the Supreme Court temporarily avoided the question of whether race could be used as a factor in public college admissions. The Court instead noted its previous decisions allowing for the limited use of race to be treated as a "given" (read more here).

For the past several years, the matter was again litigated in the lower courts, and the 5th Circuit Court of Appeals once again upheld the University's affirmative action program. The appeals court concluded that the program made only limited use of race in its admission process, and it served the University's interest in creating a racially and culturally diverse student body. The 5th Circuit ruled that, even applying the Supreme Court's strict scrutiny standard, the University's affirmative action program was consistent with previous Court precedent.

For the second time, Fisher had her day in the Supreme Court, which today issued its second opinion on the matter.

Supreme Court's Decision: Affirmative Action Can Be Used

The Court's majority agreed with the University of Texas determining that the University had articulated a compelling state interest in enacting its holistic admissions plan and that the plan was narrowly tailored to achieve that interest. In reaching its conclusion, the Court relied on a bevy of previous decisions where colleges and universities were afforded considerable deference to decide who can be a student. As Justice Kennedy, who wrote the majority opinion, noted: "A university is in large part defined by those intangible qualities which are incapable of objective measurement but which make for greatness. Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."

Of course, that deference has limits, namely, "the constitutional promise of equal treatment and dignity." However, the Court, after conducting a detailed review of Texas's plan which it described as "sui generis," (or unique) concluded that the following case-specific facts allowed the plan to survive a "strict scrutiny" review:

- In creating the holistic admissions plan, "the University articulated concrete and precise goals," including the educational value of diversity in "the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society . . . ." The Court noted that all of these served as compelling state interests.
- The University only resorted to using race "as a factor of a factor of a factor" following an extensive study which concluded that race-neutral policies had not been successful in meeting the goals in the preceding bullet point. This study included "retreats, interviews, and review of data" and concluded that sufficient racial diversity to effectuate those goals had been achieved.

Practical Takeaway of Today's Decision

Today's decision is a victory for colleges and universities at a time when institutions of higher

education are being challenged to enhance the on-campus experience of racial minorities. While the decision is clearly limited to the unique plan used by the University of Texas and great care still needs to be exercised by any institution explicitly using race in admissions decisions, the Court's decision provides yet another useful road map for schools to follow.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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