



— HIGHER EDUCATION LAW ALERT —

Supreme Court Orders Reconsideration of Constitutionality of Race-Conscious University Admissions Policy

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On June 24, the United States Supreme Court issued its long-anticipated decision in *Fisher v. University of Texas*. In a 7-1 ruling (Justice Kagan recused herself) the Court sent the case back to the Fifth Circuit Court of Appeals to reconsider, under a “strict scrutiny” analysis, the constitutionality of the race-conscious admissions policy used by the University of Texas (University).

The decision was an enormous surprise and major disappointment for both sides of the affirmative action issue in higher education admissions. While technically, the University and similar affirmative action programs can continue, university administrators and their counsel are left with no clear and easy-to-apply rule of law to guide admissions policies going forward.

This is reflected in the fact that the lone dissenter, Justice Ginsberg, would have upheld the lower court decisions endorsing the entire admissions program. Concurring Justices Scalia and Thomas indicated that they would vote to strike down race-conscious admission plans in a future case.

The case was filed by Abigail Fisher, a white woman who claimed the University denied her admission in 2008 based on her race in violation of the Equal Protection Clause of the Fourteenth Amendment. The University program at issue admits most students under race-neutral criteria, accepting all students in the state who graduate in the top 10% of their high school class. For example, in 2008, 90% of the incoming freshmen were admitted based on their status as Texas residents, with the “Top 10 rule” filling 88% of the seats allotted to Texas residents and only 1,216 seats for non-top 10% residents. The Texas Top 10 program has produced significant racial and ethnic diversity. In recent years, approximately 25% of freshmen who enrolled under the program were Hispanic and 6 % were black; during the same period, 38% of all Texans were Hispanic and 12% were black.

But the University supplements its admissions process with a race-conscious system. The non-top 10% students compete for admission based on an Academic Index (AI) and a Personal Achievement Index (PAI). While race is one of many factors in the PAI, none of them are considered individually or given separate numerical values to be added together. Rather, the applicant’s file is evaluated as a whole, to provide the fullest possible understanding of the student as a person and to place his or her achievements in context.

The Fifth Circuit Court of Appeals granted summary judgment to the University, finding that its policy complied with the Supreme Court’s 2003 decision in *Grutter* rejecting constitutional challenges to the University of Michigan Law School’s admissions program. In fact, the court found that “it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*,” and “as long as *Grutter* remains good law, UT’s current admissions program remains constitutional.”

In an opinion by Justice Kennedy, however, the Supreme Court remanded the case to the Fifth Circuit to apply “strict scrutiny” to the question of whether the University “offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.” The majority found that some deference should be given to the University’s “judgment that such racial and ethnic diversity is essential to its educational mission” as long as diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision.

Once the University establishes that its goal of diversity is consistent with strict scrutiny, however, it must prove that the means it chose to attain that diversity are narrowly tailored to its goal. Under the Supreme Court’s decision, on this point the University receives no deference. It is at all times the University’s obligation to demonstrate that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” Strict scrutiny requires a university to verify that it is “necessary” to use race to achieve the educational benefits of diversity, in order to satisfy a reviewing court that no workable race-neutral alternatives would produce the educational benefits of diversity.

It was on this second prong of the strict scrutiny analysis that the Supreme Court held that the lower courts erred. The Fifth Circuit held that Fisher could challenge only whether the University’s decision to use race as an admissions factor “was made in good faith.” On remand, the Fifth Circuit must assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.

This requirement could endanger the University’s program and will likely result in extensive litigation. As a practical matter, the new scrutiny ordered by the high court could require extensive proceedings at the trial level, making challenges to other programs very costly for both sides.

The precise consequences of the decision, which applies to all public colleges and universities, will take some time to come into focus. Further, under Title VI of the Civil Rights Act of 1964, which forbids racial discrimination in programs that receive federal money, most private institutions of higher education would seem to be covered as well.

The Supreme Court will hear another affirmative action case, *Schuetz v. Coalition to Defend Affirmative Action*, next term. *Schuetz* raises the issue of whether states violate equal protection by banning affirmative action programs outright.

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