Advisory

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The Impact of *Fisher v. University of Texas* on Affirmative Action

What guidance can educational institutions glean from the Court's long-awaited decision in *Fisher v. University of Texas at Austin* (No. 11-345), which reversed a decision upholding the University's use of race in its undergraduate admissions policies? The Court's narrow, compromise decision let stand the basic principle established in *Grutter v. Bollinger*, 539 U.S.306 (2003), that the benefits of a diverse student body can be a compelling interest, but left the door open to a future challenge to that principle. While significant issues concerning the use of race in admissions, and perhaps in other programs as well, remain unresolved, Fisher does provide some direction.

Abigail Fisher, a white applicant denied admission, sued the University claiming that its consideration of race in its admissions process violated the Constitution. The aspect of the University's admissions process that she challenged was adopted in the wake of, and was devised specifically to conform to, the Supreme Court's earlier decision in *Grutter*. The policy included consideration of an applicant's race as part of a complicated, holistic evaluation of many aspects of an applicant's background and experience -- to help the University achieve the benefits of a racially diverse student body.

Justice Kennedy wrote for a 7-1 majority, with Justice Ginsburg in dissent and Justice Kagan having recused herself. Justice Kennedy reaffirmed the principle established in *Grutter* that the educational benefits of a racially diverse student body could be a compelling interest and that it is appropriate for a court to defer to a university's judgment that diversity is essential to its educational mission. However, under the required constitutional standard of strict scrutiny, a university still must prove that its consideration of race in admissions is a narrowly tailored means to achieve diversity. On this point, Kennedy emphasized that courts must give no deference to the university. On the contrary, it is the court's job to conduct a searching inquiry to determine whether the consideration of race is in fact narrowly tailored. That inquiry, in turn, requires a determination that "no workable race-neutral alternatives would produce the educational benefits of diversity."

The Fifth Circuit erred in upholding the University's policy by deferring to the University's judgment and presuming that the University acted in good faith in considering race as a factor in its admissions process. That approach, according to the Court, is inconsistent with the core purpose of strict scrutiny, which does not allow a court to defer to a school's "good faith" use of race without a close analysis of whether race-neutral alternatives might be sufficient.

The Court made it clear that it accepted *Grutter's* conclusion that a racially diverse student body can be a compelling interest only because neither party had asked the Court to revisit that part of the *Grutter* decision. That leaves open the possibility

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of a future, broader challenge to any use of race in the admissions process. In their concurring opinions, Justice Scalia suggested, and Justice Thomas made clear, that they would be willing to overturn *Grutter*. Justice Ginsburg's dissent argued that the University's admissions policy should be upheld under *Grutter* because it flexibly considered race as part of a holistic approach and adopted that policy only after an extensive review determined that race-neutral alternatives would be inadequate.

What are the implications for colleges and universities, and perhaps other public institutions?

- Achieving the educational benefits of a diverse student body, including racial diversity, remains for now a legitimate and compelling interest. To the extent race can be considered in admissions, it still must be only one of many factors considered as part of a holistic approach with an individualized review of applicants.

- It will, however, be more difficult for institutions to support race-conscious admissions policies, because they must prove that race-neutral alternatives would be inadequate to achieve the educational benefits of a diverse student body, and courts may not defer to schools' educational expertise in deciding that issue. Proof other than an educational institution's experience and intuitive knowledge will be required.

- The Court in *Fisher* did not address the following question, though it was briefed and argued in the case: How does an institution and a reviewing court determine when race-conscious admissions programs have achieved a "critical mass" of minority students that is needed to achieve the benefits of diversity, without crossing the line and establishing an unconstitutional quota? It is preferable for an institution to be vague about this issue in its policies, rather than risk the claim that it has effectively set numerical goals for racial diversity.

- Smaller institutions that do not need to establish admissions guidelines that expressly take race into account face far less risk. When an institution can state that it follows an admissions policy that does not mention race, it will be difficult for a rejected applicant to prove that the institution nonetheless considered race *sub rosa*.

- There is no reason to think that the principles articulated in *Fisher* and earlier cases will be limited to admissions. Any consideration of race in administering financial aid and scholarships, or in supporting student clubs or programming, is likely to be subject to the same narrow tailoring inquiry – can the institution demonstrate that it has thoroughly examined race-neutral alternatives and determined that they would not achieve the educational benefits of diversity that the institution is pursuing?

The last chapter on these questions has not yet been written. In fact, the Supreme Court has already agreed to take up affirmative action next year in *Schuette v. Coalition to Defend Affirmative Action* (No. 12-682). The question in that case is whether a Michigan state constitutional provision that bars state entities from considering race or sex in admissions and hiring decisions violates the federal constitution.

Stay tuned.