

High Court Finds UT Austin Race-Conscious Admissions Process Constitutional

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In a 4-3 decision on Thursday, June 23, 2016, the United States Supreme Court upheld the University of Texas's (UT) race-conscious admissions program. The decision *addressed only UT's specific admissions policy in effect when Ms. Fisher was denied admission* in 2008, but for the third time in four decades confirms that race-conscious affirmative action admissions programs are not categorically unconstitutional. Rather, as set out in a pair of 2003 decisions (*Gratz v. Bollinger*, 539 U.S. 306, and *Grutter v. Bollinger*, 539 U.S. 306), narrowly-tailored race-conscious admissions policies may, as in this case, survive a "strict scrutiny" review under the U.S. Constitution. *Fisher v. University of Texas at Austin et al.*, No. 14-981 (June 23, 2016).

Justice Kennedy, in writing for the majority, explicitly distinguished between an institution's decision to pursue educational benefits of student body diversity, which is due considerable judicial deference, and the question of whether an institution's particular program is narrowly tailored to achieve that goal, which is due no judicial deference. Applying this standard, Justice Kennedy for the first time in his Court career found the program to be constitutional based on the University's ability to show that it had narrowly tailored the program to suit its compelling interest of providing its students with the educational benefits of a diverse student body. With this holding, the University of Texas's race-conscious admissions policy, which has been in effect since 2004, survived on its second trip to the Supreme Court.

The UT case began when Abigail Fisher brought suit in the United States District Court for the Western District of Texas alleging that the University's consideration of race placed Caucasians students at a disadvantage in the admissions process, in violation of the Equal Protection Clause. The District Court granted summary judgment in favor of the University, finding that the University's policy of considering race in evaluating applicants was narrowly tailored to further the compelling interest in obtaining a diverse student body. The Court of Appeals affirmed. The United States Supreme Court — in what is known as *Fisher I*, 133 S. Ct. 2411, 2415 (2013) — granted *certiorari*, vacating the Court of Appeal's decision finding that that court had improperly deferred to the University's "good faith" in assessing the constitutionality of the program, and remanded the case to the Circuit Court to assess the claims under the correct legal standard: strict scrutiny. The Court of Appeals again affirmed, and the United States Supreme Court granted *certiorari* for a second time.

At the center of the case was the University's use of a "Personal Achievement Index" as a component of its admissions process, which entailed a "holistic review containing numerous factors, including race." This specific evaluative method of the University's admission program was implemented in 2004, after the University determined that its previous race-neutral system was not successful in producing the educational benefit of a diverse student body. Under its new admissions process, the University uses a two-tiered system. First, the University automatically offers admission to any student who graduated from a Texas high school in the top 10% of their class as mandated by the Top Ten Percent Law that followed the 1996 case of *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. Texas 1996). The remainder of the class was filled by combining an applicant's "Academic Index" — the student's SAT score and high school academic performance - with an applicant's "Personal Index Score" — derived from an evaluation of an applicant's essays, letters of recommendation, leadership experience, and "special circumstances." The "special circumstances" included, among other things, the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibility, and race.

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In *Fisher II*, the Court has now upheld UT's admissions policy, holding that the University met its burden of showing that its admissions policy in use at the time that Abigail Fisher applied was narrowly tailored to fit a compelling state interest. In finding that the policy survived strict scrutiny, the Court relied on some points of particular importance: (1) that the University adequately set forth concrete and precise goals which included, amongst other things, the "educational value in diversity in the destruction of stereotypes, the promotion of cross-racial understanding, [and] the preparation of a student body for an increasing diverse workforce and society..." and (2) that race was not an instrumental factor and was only considered by the University after it determined that a race-neutral policy was not successful in achieving its goals.

The ruling on Thursday settles, at least for the relative future, the issue of the proper use of race in college admissions processes. University of Texas's plan was tailored to meet the requirements set forth by the Supreme Court in the 2003 *Grutter* and *Gratz* decisions that had considered admissions policies at the University of Michigan. The Supreme Court's affirmation of the University of Texas policy echoes continued approval of its earlier U. of Michigan decisions and acknowledgment that the University's policy fits within the parameters set forth in that case. In *Grutter*, the Supreme Court upheld the University of Michigan Law School's system, which was a holistic review that treated race as a relevant feature within the "broader context" of a student's application for admission.

In handing down this latest decision in a series of related rulings, the Court has now provided clearer guidance for universities and colleges to work with as they continue to refine their admissions policies. However, Justice Kennedy's majority decision went out of its way to stress that the decision was focused on the particularities of UT's admissions procedures as they existed in 2008. In particular, Ms. Fisher did not challenge UT's Top Ten Percent Plan and, thus, the Court could not know how that aspect of the program affects the diversity goal or how it might affect the program's constitutionality. Thus, Justice Kennedy noted that "[t]he fact that this case has been litigated on a somewhat artificial basis ... may limit its value for prospective guidance." Further, in affirming the lower court's decision, the Court charged the University with an ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policy. This expands on a concept suggested in former Justice Sandra Day O'Connor's decision in *Grutter* that institutions regularly revisit their race-conscious admissions policies.

The continued national discussion on how welcoming higher education is for racial minorities guarantees that colleges and universities will continue to focus on the proper boundaries for considering race as a factor in the admissions process. This decision helps set a framework that colleges and universities can work within to provide their students with an educationally diverse student body — a component that has been found by the courts to be an educational benefit.

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