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Civil Rights Update

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U.S. Supreme Court Upholds Application of Strict Scrutiny of Racial Classifications in Higher Education Admissions Decisions

In *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), the United States Supreme Court addressed whether "race-conscious" admissions plans are a legitimate constitutional means of securing student-body diversity in higher education. Eight months after oral arguments, the court published its opinion and remanded the case to the U.S. Court of Appeals for the Fifth Circuit on the basis that it had improperly applied strict scrutiny; that is, it had failed to determine whether "race-neutral alternatives" had been considered that would have achieved diversity sufficient to meet the goals of the defendant University of Texas (the University).

Following the Supreme Court decision in *Grutter v. Bollinger*, 539 U.S. 982, 124 S. Ct. 35 (2003), which upheld the constitutionality of an admissions program that considers race as one of many "plus factors," the University adopted an admissions program whereby applicants were asked to classify themselves from among five predefined racial categories. *Fisher*, 133 S. Ct. at 2417. Under the program, race was not given an explicit numerical value, yet it was undisputed that race was considered as a "meaningful factor." *Id.*

In 2008, Abigail Fisher, a Caucasian female, applied for admission to the University under the race-conscious program and was rejected. *Id.* As a result, Ms. Fisher sued the University in federal court, alleging that the University's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

The United States District Court for the Western District of Texas granted summary judgment, upholding the legality of the University's admission program. *Id.* On appeal, the Fifth Circuit affirmed, holding that, under *Grutter*, courts are required to give substantial deference to a university's determination that a compelling interest exists in the educational benefit of diversity and that its specific plan is narrowly tailored to achieve the goal of educational diversity. *Id.*

In a 7-1 opinion, with Justice Elena Kagan recusing herself, the Supreme Court vacated the Fifth Circuit's decision and remanded the case for further consideration. *Fisher*, 133 S. Ct. at 2414. Writing for the majority, Justice Anthony Kennedy began the opinion by reiterating that racial classifications must withstand strict scrutiny, "when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" *Id.* at 2417 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)).

Looking to the first prong of the strict scrutiny analysis, the Court noted that the attainment of a diverse student body is a constitutionally permissible goal under *Grutter*. *Id.* at 2413. The type of diversity that can

withstand strict scrutiny, however, is that which "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* (citing *Bakke*, 438 U.S. at 315). On this point, the Court held that, under *Grutter*, both the district court and the court of appeals were correct in affording deference to the University's "educational judgment" that such diversity is "essential to its educational mission." *Id.* at 2419.

Looking to the second prong, however, the Court noted that it remains the University's obligation to establish that its race-conscious admissions plan is narrowly tailored to achieve the goal of educational diversity. *Id.* at 2419-20. There are two requirements that must be met for the University to show that its plan was narrowly tailored. First, the University must prove that its admissions process "ensure[s] 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." *Fisher*, 133 S. Ct. at 2418. The second requirement is that the University must show that its use of race to obtain the benefits of educational diversity is "necessary" (that is, that the University could not achieve the diversity it seeks without the use of racial classifications). *Id.* at 2420.

It is under this prong of strict scrutiny that the Court found error in the Fifth Circuit's decision. Rather than analyzing the validity of the University's admissions plan under a strict scrutiny analysis—requiring the University to prove that its plan was narrowly tailored—the court of appeals instead gave deference to the University's determination that its decision to include "race as a factor in admissions was made in good faith." *Id.*

The Court noted that "strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id.* at 2421. As a result, the Court vacated summary judgment and remanded to the Fifth Circuit for a determination of "whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.* at 2434.

Justice Antonin Scalia filed a one-paragraph concurring opinion stating that he adheres to the view he expressed in *Grutter*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring) (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)). Because Ms. Fisher, however, was not asking the Court to overrule the holding of *Grutter* —that a compelling interest in the educational benefits of diversity can justify racial preferences in university admissions—Justice Scalia joined the Court's opinion in full. *Id.* at 2422 (Scalia, J., concurring).

Justice Clarence Thomas filed a much lengthier concurring opinion. Although he agreed with the majority that the court of appeals did not correctly apply strict scrutiny, he wrote separately to explain that he would overrule *Grutter v. Bollinger* on the ground that the use of race in higher education admissions decisions is "categorically prohibited" by the Equal Protection Clause. *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

Justice Thomas began his concurrence by reminding the Court that strict scrutiny "has proven automatically fatal" in almost every case involving racial classifications. *Id.* (Thomas, J., concurring) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995)). The only two instances in which the Court has recognized a compelling government interest (which Justice Thomas refers to as a "pressing public necessity") sufficient to justify racial discrimination are (1) protecting national security, and (2) remedying past discrimination for which it is responsible. *Id.* at 2433 (Thomas, J., concurring); *Korematsu v. United States*, 323 U.S. 214 (1996); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Justice Thomas believed that *Grutter* should be overruled because "there is nothing 'pressing' or 'necessary' about obtaining whatever educational benefits may flow from racial diversity." *Fisher*, 133 S. Ct. at 2424 (Thomas, J., concurring). He declared that this same argument was advanced in support of racial segregation in the 1950s, and "just as the alleged educational benefits of segregation were insufficient to justify

racial discrimination then, . . . the alleged educational benefits of diversity cannot justify racial discrimination today." *Id.* at 2424-25 (Thomas, J., concurring) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

In support of his position, Justice Thomas cited *Davis v. School Board of Prince Edward County* (decided with *Brown v. Board of Education*) for the proposition that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. *Id.* at 2424-25 (Thomas, J., concurring). He explained that, in *Davis*, the school board had argued that if the Court were to find segregation unconstitutional, white students would stray toward private schools, thereby causing the eventual extinction of public schools. *Id.* at 2425 (Thomas, J., concurring). The Court rejected the argument and found the segregation plan unconstitutional. *Id.* (Thomas, J., concurring). Relying on *Davis*, Justice Thomas opined that if the Court actually were to apply strict scrutiny to the University's admissions policy, it would require Texas either to close the University or to completely remove race from the list of factors it may consider. *Id.* (Thomas, J., concurring).

Describing the University's arguments as "virtually identical" to arguments the Court rejected in the desegregation cases, Justice Thomas stated: "There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits." *Fisher*, 133 S. Ct. at 2428 (Thomas, J., concurring).

The final point Justice Thomas made in his concurrence was that the University's admissions plan actually hurts minorities by creating a "pervasive shifting effect." *Id.* at 2430 (Thomas, J., concurring). He explained that, under the admissions plan, the University admitted minorities who otherwise would have attended less selective colleges. *Id.* at 2431 (Thomas, J., concurring). As a result, those students were far less prepared than their non-minority classmates, and their underperformance was "all but inevitable." *Id.* (Thomas, J., concurring). According to Justice Thomas, even if minority students did excel at the University, they remained stamped with the "badge of inferiority" for having been admitted under a racially discriminatory admissions scheme. *Id.* at 2432 (Thomas, J., concurring).

Writing as the sole dissenter, Justice Ruth Bader Ginsburg stated that she would have affirmed the lower court's decision on the ground that the University's admissions plan was constitutional under *Grutter*. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). She explained that race was only flexibly considered as a "factor of a factor of a factor of a factor" in the admissions calculus. *Id.* at 2434 (Ginsburg, J., dissenting).

Ms. Fisher urged that Texas's Top Ten Percent Law—which grants automatic admission to any public state school (including the University) to all students within the top ten percent of their class at any Texas high school—and race-blind holistic review of each application would achieve significant diversity, such that the University must not be allowed to consider race as a factor in admissions. *Id.* at 2433 (Ginsburg, J., dissenting). Justice Ginsburg criticized these suggested "race-neutral alternatives," stating that "only an ostrich could regard [them] as race unconscious." *Id.* (Ginsburg, J., dissenting). She explained that Texas's Top Ten Percent Law was enacted as a result of "race consciousness," not blindness to race, because many school districts in Texas still are comprised of a single racial or ethnic group. *Id.* (Ginsburg, J., dissenting). Additionally, she felt that, if universities cannot consider race explicitly, "many may 'resort to camouflage' to 'maintain their minority enrollment.'" *Id.* at 2433-34 (Ginsburg, J., dissenting) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting)).

Regardless of her views on the purported race-neutral alternatives, Justice Ginsburg noted that the University conducted a yearlong review, through which it made the reasonable determination that these alternative options were insufficient to achieve the educational benefits of student-body diversity. *Fisher*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting). Relying on the holding of *Grutter*, Justice Ginsburg opined that no further determinations were required. *Id.* (Ginsburg, J., dissenting).

She finished her opinion by reiterating her longstanding view that government actors "need not be blind to the lingering effects of 'an overtly discriminatory past'" and that, among constitutionally permissible options,

"those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Id.* at 2433-34 (Ginsburg, J., dissenting) (quoting *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting)).

Despite the split of opinion on the bigger "affirmative action" picture, the fact remains that, on remand, the University not only will have to show that its particular plan considers all applicants as individuals, but also it must present evidence that no race-neutral alternatives are sufficient to achieve its desired student-body diversity. In the future, the "narrowly tailored" prong of strict scrutiny looks to be an imposing obstacle for those colleges and universities that seek to accomplish diversity through the use of race-conscious admissions plans.

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