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Earlier this week, the United States Supreme Court announced its decision in *Fisher v. University of Texas*, a challenge to the University of Texas at Austin's (UT) consideration of race in its undergraduate admissions process. Justice Kennedy wrote the opinion for the Court, which was joined by all the other justices except for Justice Ginsburg (who dissented) and Justice Kagan (who did not participate). The Court did not decide whether the Texas plan passed constitutional muster and instead remanded the case to the lower courts for more work. The opinion is nonetheless worthy of note in at least two respects: its reaffirmation of the importance of student body diversity and its discussion of the means by which universities may seek to achieve that diversity.

*Legal Framework*

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, government decisions that involve the consideration of race are subject to what the courts call "strict scrutiny": the goal being served must be "compelling" and the means "narrowly tailored" to serve that goal.

Until *Fisher*, the Court had twice previously considered how the Equal Protection Clause applies to race-conscious admissions programs at colleges and universities. The first was in its 1978 decision in *Regents of the Univ. of Calif. v. Bakke.* The Court was substantially divided, but Justice Powell wrote what the *Fisher* Court characterized as the "principal opinion." Applying strict scrutiny, Justice Powell found that the educational benefits of a diverse student body represented a compelling and constitutionally protected interest. Turning to the means by which colleges and universities could seek to achieve that diversity, Justice Powell made clear that racial quotas were impermissible, as were separate admissions tracks for minority and non-minority applicants. Citing to the Harvard College admissions process, however, he determined that the constitution permitted the consideration of race as one factor in an individualized review of each candidate.

In its 2003 Michigan cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court affirmed what Justice Powell had written in *Bakke*: student body diversity is a compelling government interest permitting the consideration of race as part of a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." Broad-brush, mechanistic approaches that treat all underrepresented minorities monolithically (in *Gratz*, a 20-point bonus in a system in which 100 points guaranteed admission) are impermissible, however, because they "ensure[] that the diversity contributions of applicants cannot be individually assessed."

*Fisher*

Since 2005, UT has followed a unique two-stage admissions process: first, under state law, Texas high school students who graduate in the top 10% of their class are guaranteed admission (the "Ten Percent Plan"), a guarantee that fills a large majority of its undergraduate student body. Second, the seats left open after that first stage are filled through a process that considers all aspects of each application, including the applicant's race. UT designed its second-stage review to mirror the approach previously approved by the Supreme Court in *Bakke* and *Grutter*: a holistic, individualized review of the entirety of each application in which race is one factor among many, not determinative on its own.

Abigail Fisher is a Caucasian woman who applied to the University of Texas at Austin in 2008. She was not admitted, either under the Top Ten Percent plan or under the individualized review process. She brought suit, alleging that but for the consideration of race in the individualized review process, she would have been admitted; that is, she claimed that her race was held against her, with the result that she was denied a place at UT that she would otherwise have been granted. Relying on the Supreme Court's prior decisions, the lower courts ruled that the admissions plan passed constitutional scrutiny and found in favor of the University of Texas.

Fisher sought and was granted review by the Supreme Court.

In resolving Fisher's claims, the Court left untouched the long-standing precedent that "'the attainment of a diverse student body ... is a constitutionally permissible goal for an institution of higher education.'" In doing so, the Court cited *Grutter*'s observation that a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer."

These aspects of the Court's decision are of central importance to Harvard. As noted in the *amicus* brief we and other universities filed in *Fisher*:

> Decades of experience with admissions policies based on the Harvard Plan, *Bakke*, and *Grutter* have convinced [Harvard and other signatories to the brief] that the quality of their students' education is greatly enriched if the student body is diverse in many ways – including racial and ethnic diversity. Diversity encourages students to question their assumptions, to understand that wisdom and contributions to society may be found where not expected, and to gain an appreciation of the complexity of the modern world. In these ways, diversity bolsters the unique role of higher education in "preparing students for work and citizenship" and training "our Nation's leaders" for success in a heterogeneous society.

The Supreme Court, however, was concerned by the approach taken by the lower courts when examining the Texas plan for "narrow tailoring." Most centrally, the justices held that the good faith of a university does not determine whether an admissions plan meets the narrowly tailored standard. Although the courts can "take account of a university's experience and expertise in adopting or rejecting certain admissions processes," it is the responsibility of the courts, and not "university administrators, to ensure that '[t]he means chosen to accomplish the [government's] asserted purpose [are] specifically and narrowly framed to accomplish that purpose.'" In the Court's view, this was the central mistake made by the lower courts: rather than conducting their own independent examination, the district and appeals

courts "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith."

The Court therefore remanded the case to the lower court with instructions to re-evaluate whether the Texas plan meets the narrow tailoring requirements. The *Fisher* opinion offered at least two points of guidance concerning the substantive standards informing that review.

First, the Court repeated its instruction in *Bakke* and *Grutter* that a narrowly tailored admission plan must involve the individualized assessment of each candidate where race is one factor among many. "[I]t remains the University's obligation to demonstrate, and the Judiciary's obligation to determine, 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."

Second, the Court returned to *Grutter's* observation that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." The *Fisher* Court understood this to mean that, for a plan to pass constitutional muster, the university must show that "no workable race-neutral alternatives would produce the educational benefits of diversity."

The Court's opinion leaves much work for the parties and the lower courts to do in assessing the validity of UT's admissions program. Much of that effort is likely to focus on facts specific to Texas, although the lower courts will likely need to interpret the narrowly tailored standards articulated by the Supreme Court in evaluating the school's admissions process. The OGC will be following those proceedings with care. We will also work directly with Harvard's schools to answer any questions they may have about *Fisher.*

Links to the Court's opinion in *Fisher* and Harvard's amicus brief follow:

Decision

Amicus Brief