ALABAMA POLICY INSTITUTE

GUIDE TO THE ISSUES

Fisher v. University of Texas at Austin

Background

On June 23, 2016, the Supreme Court handed down its decision in *Fisher v. University of Texas at Austin*, a case challenging the use of racial preferences in admissions decisions at public universities.[1]

The case was brought on behalf of Abigail Fisher, a white student who was denied admission to the University of Texas at Austin in 2008.[2] Fisher sued the university, arguing that its admissions policy—which treats applicants differently based on their race, giving preferential treatment to racial minorities—violates the equal protection guaranteed by the Constitution.[3]

The University of Texas at Austin uses two different programs to determine which applicants are admitted as students. Under the first program, the university uses a meritocratic approach, where applicants are admitted automatically if they graduate in the top 10% of their class at a high school in the state.[4] Under the second program, the university uses a "holistic" approach, where applicants are admitted based on a number of factors, both academic and non-academic, with race being a "meaningful factor."[5]

In the past, the Supreme Court had controversially upheld affirmative-action admissions programs at public universities that took race into account—so long as the program did not amount to a quota system and race was only one of several factors taken into account—based on the belief that universities have "a compelling interest in attaining a diverse student body."[6]

Decision

The Supreme Court ruled that the University of Texas at Austin's race-conscious admissions program was constitutional "because it was designed in a narrow way to improve diversity on campus."[7]

ISSUE SNAPSHOT

- Abigail Fisher, a white student who was denied admission to the University of Texas at Austin, challenged the use of racial preferences in admissions decisions at public universities.
- The Supreme Court ruled in favor of the University of Texas at Austin, giving supporters of affirmative action a major victory.

Justice Anthony Kennedy wrote the majority opinion, which was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor.[8] Justice Kennedy concluded: "A university is in large part defined by those intangible qualities which are incapable of objective measurement but which make for greatness. Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."[9]

Justice Samuel Alito wrote an impassioned dissenting opinion, which was joined by Chief Justice John Roberts and Justice Clarence Thomas.[10] Justice Alito noted that the University of Texas at Austin "has never provided any coherent explanation for its asserted need to discriminate on the basis of race," and that its incoherent explanation "relies on a series of unsupported and noxious racial assumptions."[11] Justice Alito, delivering his dissent by reading it aloud from the bench, was emphatic: "This is affirmative action gone berserk."[12]

In addition to joining Justice Alito's dissenting opinion, Justice Thomas also added a short dissenting opinion of

his own.[13] His purpose in writing separately, Justice Thomas explained, was to reaffirm an important point that he had made in an earlier opinion: "that a state's use of race in higher education admissions decisions is categorically prohibited by the [Constitution]."[14] He continued: "The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[15] "That constitutional imperative," he added, "does not change in the face of a 'faddish theor[y]' that racial discrimination may produce 'educational benefits.'"[16] Justice Thomas ended by stating that he would rule in favor of Abigail Fisher—and that he would overrule the precedent that enabled the majority opinion.[17]

Implications

When the 2016 term of the Supreme Court began, advocates of affirmative action took it for granted that their cause would suffer setbacks.[18] Indeed, they "entered the term simply hoping the [Supreme Court] would not use the case to ban *all* uses of affirmative action."[19] With Justice Elena Kagan having recused herself from the case (she had worked on it in her previous role as solicitor general), the liberal members of the Court appeared to only have three votes.[20] Moreover, the admissions program at the University of Texas at Austin "had been perceived by legal experts to be especially vulnerable to challenges because it augmented a unique admissions plan—guaranteeing acceptance to the top students in each Texas high school—that on its own ensures diversity."[21] As Justin Driver, a law professor at the University of Chicago, put it: "If even this program survives scrutiny, it is extraordinarily difficult to believe that the [Supreme Court] will be prepared to strike down any university's affirmative-action program anytime soon."[22]

The decision in *Fisher v. University of Texas at Austin* further entrenches—and, in fact, encourages the expansion of—affirmative-action programs at universities across the United States. In the words of Laurence Tribe, a law professor at Harvard and a staunch supporter of affirmative action: "No decision since *Brown v. Board of Education* has been as important as *Fisher* will prove to be."[23] That is an overstatement, but there can be no denying that the *Fisher* decision is significant. The extent of its significance could soon be seen, as there are cases pending that challenge the affirmative-action programs at other universities, including Harvard University and the University of North Carolina at Chapel Hill.[24]

The absence of Justice Antonin Scalia, who passed away in February, was consequential in *Fisher*. As has been observed, "had Justice Scalia still been on the court, he almost certainly would have provided an additional vote to the conservative justices who dissented."[25] That would have produced a 4–4 tie and prevented the national precedent that *Fisher* created.[26] The Supreme Court—and the United States—suffer without him.

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1 Fisher v. University of Texas at Austin (*Fisher II*), No. 14-981, slip op. (U.S. June 23, 2016), http://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf [http://perma.cc/QT78-6DTX]. This is the second appearance of the case before the Supreme Court. *See* Fisher v. University of Texas at Austin (*Fisher I*), 133 S. Ct. 2411 (2013) (vacating the judgment of the U.S. Court of Appeals for the Fifth Circuit, and remanding the case for further consideration under a much more demanding standard of review known as "strict scrutiny").

2 Jess Bravin & Douglas Belkin, "Court Revisits Texas Case," *Wall Street Journal*, Dec. 7, 2015, at A3.

3 *Fisher I*, 133 S. Ct. at 2411.

4 *Id.* at 2416.

5 *Id.* at 2415–16.

6 Grutter v. Bollinger, 539 U.S. 306, 328 (2003); *see also* Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of University of California v. Bakke, 438 U.S. 265 (1978).

7 Jess Bravin & Brent Kendall, "Supreme Court Upholds Affirmative Action in University Admissions," *Wall Street Journal* (June 23, 2016), http://www.wsj.com/articles/supreme-court-upholds-affirmative-action-in-university-admissions-1466691615 [http://perma.cc/EKP3-RNP7].

8 Fisher v. University of Texas at Austin (*Fisher II*), No. 14-981, slip op. at 3 (U.S. June 23, 2016), http://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf [http://perma.cc/QT78-6DTX].

9 *Id.* at 19 (internal quotation marks omitted) (citation omitted) (quoting Sweatt v. Painter, 339 U. S. 629, 634 (1950)).

10 *Id.* at 1 (opinion of Alito, J., dissenting).

11 *Id.* at 51.

12 Adam Liptak, "Supreme Court Upholds Affirmative Action Program at University of Texas," *New York Times* (June 23, 2016), http://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html [http://perma.cc/LHD6-5DLS]. The same line is slightly different as rendered in the opinion. *See Fisher II*, slip op. at 32 (opinion of Alito, J., dissenting) ("This is affirmative action gone wild.").

13 *Fisher II*, slip op. at 1 (opinion of Thomas, J., dissenting).

14 *Id.* (internal quotation marks omitted) (quoting Fisher v. University of Texas at Austin (*Fisher I*), 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring)).

[15] *Id.* (quoting Fisher v. University of Texas at Austin (*Fisher I*), 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring) (quoting Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part))).
[16] *Id.* (quoting Fisher v. University of Texas at Austin (*Fisher I*), 133 S. Ct. 2411, 2424, 2428 (2013) (Thomas, J., concurring)).
[17] *See id.*
[18] *See* Robert Barnes, "Supreme Court Upholds University of Texas Affirmative-Action Admissions," *Washington Post* (June 23, 2016), http://www.washingtonpost.com/politics/courts_law/supreme-court-upholds-university-of-texas-affirmative-action-admissions/2016/06/23/513bcc10-394d-11e6-8f7c-d4c723a2becb_story.html [http://perma.cc/C2R6-U6F8].
[19] *Id.* (emphasis added).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Liptak, *supra* note 12.
[24] *See* Bravin & Kendall, *supra* note 7.
[25] *See id.*
[26] *Id.*