



June 24, 2016

The Supreme Court today announced its decision upholding as constitutional the admissions plan used by the University of Texas at Austin (UT). Justice Kennedy wrote the opinion for the Court, in a divided 4-3 decision. (Justice Kagan did not participate in the consideration of the case, and due to the death of Justice Scalia, there are presently only eight Justices on the Supreme Court.) *Fisher v. University of Texas (Fisher II)* was the second time in which the Court addressed a challenge to the University of Texas at Austin's consideration of race in its undergraduate admissions process. A summary of the earlier *Fisher I* decision and the legal framework surrounding this case are set forth in the OGC memorandum from June 2013.

UT's undergraduate admissions program is unusual. 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 UT's undergraduate student body. 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.

In considering, under the Fourteenth Amendment to the United States Constitution, the constitutionality of the consideration of race in UT's undergraduate admissions plan, the Court applied a test called "strict scrutiny": the goal being served must be "compelling" and the means "narrowly tailored" to serve that goal.

The Court in *Fisher II*, as it has done in the past, reiterated that achieving the educational benefits that flow from a diverse student body is a compelling interest. And the Court again emphasized that the university receives significant deference in deciding to pursue those educational benefits. "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."

The Court then turned to whether the means utilized by UT to achieve that goal were "narrowly tailored," or whether there were alternatives to the consideration of race in admissions through which UT could achieve the diversity it desired. In conducting this analysis, the Court looked to statistical analyses and demographic data on which UT had relied in determining that, without the consideration of race, it could not achieve the benefits of diversity it was seeking. The Court also looked to a number of factors that are unique to the UT system. These included the fact that the UT admissions plan had been in place for only a limited period of time before the lawsuit was brought, thereby limiting the available data from which to evaluate alternatives, and the fact that for a period of time, UT had not been permitted to consider race in admissions, circumstances that provided UT with some data from an alternative regime in which there was no consideration of race. Relying on this information, the Court determined that UT had satisfied its burden of establishing that, at the time it

adopted its admissions program, there were no “available and workable” alternative means through which the university could have met its educational goals.

The Court in *Fisher II* also rejected several arguments raised by Fisher in her appeal. Fisher had argued, for example, that UT should be compelled to identify the particular level of diversity it was seeking. The Court rejected that proposition. “[T]he compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students.” “Indeed,” the Court observed, “since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.”

The Court also rejected Fisher’s argument that UT could have (and should have) admitted the entire class based on class rank alone.

A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

The Court went on to note that “[c]lass rank is a single metric, and like any single metric, it will capture certain types of people and miss others. . . . [P]rivileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it.”

The Court did emphasize the importance of using data available to the university to assess the fairness of the admissions program and whether a race-conscious policy remains necessary, and to determine the effects of the consideration of race. Universities, the Court emphasized, have an “ongoing obligation to engage in constant deliberation and continued reflection” regarding their admissions policies.