

## 7.13: FISHER v. UNIVERSITY OF TEXAS AT AUSTIN, ET AL

The following U.S. Supreme Court case provides some guidance on the Court's interpretation of the law regarding sexual harassment in the workplace.

### SUPREME COURT OF THE UNITED STATES

#### FISHER v. UNIVERSITY OF TEXAS AT AUSTIN, ET AL

579 U. S. \_\_\_\_ (2016)

(Case Syllabus edited by the Author)

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Texas at Austin (University) uses an undergraduate admissions system containing two components. First, as required by the State's Top Ten Percent Law, it offers admission to any students who graduate from a Texas high school in the top 10% of their class. It then fills the remainder of its incoming freshman class, some 25%, by combining an applicant's "Academic Index"—the student's SAT score and high school academic performance—with the applicant's "Personal Achievement Index," a holistic review containing numerous factors, including race. The University adopted its current admissions process in 2004, after a year-long-study of its admissions process—undertaken in the wake of *Grutter v. Bollinger*, 539 U. S. 306, and *Gratz v. Bollinger*, 539 U. S. 244 led it to conclude that its prior race-neutral system did not reach its goal of providing the educational benefits of diversity to its undergraduate students.

Petitioner Abigail Fisher, who was not in the top 10% of her high school class, was denied admission to the University's 2008 freshman class. She filed suit, alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University's favor, and the Fifth Circuit affirmed. This Court vacated the judgment, *Fisher v. University of Tex. at Austin*, 570 U. S. \_\_\_\_ (*Fisher I*), and remanded the case to the Court of Appeals, so the University's program could be evaluated under the proper strict scrutiny standard. On remand, the Fifth Circuit again affirmed the entry of summary judgment for the University.

*Held:*

The race-conscious admissions program in use at the time of petitioner's application is lawful under the Equal Protection Clause.

(a) *Fisher I* sets out three controlling principles relevant to assessing the constitutionality of a public university's affirmative action program. First, a university may not consider race "unless the admissions process can withstand strict scrutiny," *i.e.*, it must show that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary" to accomplish that purpose. 570 U. S., at \_\_\_\_\_. Second, "the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." Third, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school bears the burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice.

(b) The University's approach to admissions gives rise to an unusual consequence here. The component with the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but the Top Ten Percent Plan. Because petitioner did not challenge the percentage part of the plan, the record is devoid of evidence of its impact on diversity. Remand for further fact finding would serve little purpose, however, because at the time of petitioner's application, the current plan had been in effect only three years and, in any event, the University lacked authority to alter the percentage plan, which was mandated by the Texas Legislature. These circumstances refute any criticism that the University did not make good faith efforts to comply with the law. The University, however, does have a continuing obligation to satisfy the strict scrutiny burden: by periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests.

(c) Drawing all reasonable inferences in her favor, petitioner has not shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

(1) Petitioner claims that the University has not articulated its compelling interest with sufficient clarity because it has failed to state more precisely what level of minority enrollment would constitute a “critical mass.” However, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students, but an interest in obtaining “the educational benefits that flow from student body diversity.” *Fisher I*, 570 U. S., at \_\_\_\_\_. 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.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them. The record here reveals that the University articulated concrete and precise goals—*e.g.*, ending stereotypes, promoting “cross-racial understanding,” preparing students for “an increasingly diverse workforce and society,” and cultivating leaders with “legitimacy in the eyes of the citizenry”—that mirror the compelling interest this Court has approved in prior cases. It also gave a “reasoned, principled explanation” for its decision, in a 39-page proposal written after a year-long study revealed that its race-neutral policies and programs did not meet its goals.

(2) Petitioner also claims that the University need not consider race because it had already “achieved critical mass” by 2003 under the Top Ten Percent Plan and race-neutral holistic review. The record, however, reveals that the University studied and deliberated for months, concluding that race-neutral programs had not achieved the University’s diversity goals, a conclusion supported by significant statistical and anecdotal evidence.

(3) Petitioner argues further that it was unnecessary to consider race because such consideration had only a minor impact on the number of minority students the school admitted. But the record shows that the consideration of race has had a meaningful, if still limited, effect on freshman class diversity. That race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

(4) Finally, petitioner argues that there were numerous other race-neutral means to achieve the University’s goals. However, as the record reveals, none of those alternatives was a workable means of attaining the University’s educational goals, as of the time of her application.

758 F. 3d 633, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

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