Appellant Brief Abigail Fisher

Del Valle High School Case
Arguments for the Appellant

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Table of Cited Authorities

Fourteenth Amendment
Grutter v Bollinger, 539, U.S. 306 (2003)
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Statement of Argument

Section One of the 14th Amendment states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
A 2008 graduate of Stephen F. Austin High School in Sugarland Texas, Abigail Fisher, applied to the University of Texas during her senior year. Fisher was in the top 12% and had a 3.59 GPA on a 4.0 scale, plus she had an 1180 score on her SAT. UT had adopted Texas HB 588 that allowed state universities to admit the top 10% of each high school graduating class automatically. Eighty-one percent of the 2008 freshman class at UT entered under this Top Ten rule.
Because Fisher wasn't in the Top Ten at SFA H.S. she had to apply for admissions and was later denied admission to the University of Texas. The University of Texas had set up a new criteria after Grutter v Bollinger which included racial background as a factor. Fisher

contended that because preference was given to minority candidates, she was denied admission to the school on the basis of her race which was against the 14th amendment.

Resolved: Is race conscious affirmative action consistent with Fourteenth Amendment to the United States Constitution?

Case Arguments for the Appellant

The Appellant in this case, Abigail Fisher, has five major arguments against the proposition that race conscious affirmative action is consistent with the Fourteenth Amendment to the United States Constitution.

I. The Fourteenth Amendment Can Not Be Used Against Itself

First, there is the Fourteenth Amendment itself. The XIV Amendment Section 1 states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In this process of college selection, if a college or university were going to use race conscious affirmative action, consistent with Fourteenth Amendment to the United States Constitution, they would have allow each person that was denied admission to their school full due process and allow them the ability to see exactly (full transparency) why they were denied. Without transparency and with race as part of the criteria, the Appellee cannot claim they acted in accordance with the Fourteenth Amendment simply by excreting that statement without showing the exact due process it uses for every single person who applied to that school. Compliancy with the Fourteenth Amendment is essential here because the University of Texas is a state run institution of higher learning. By denying a person admission without showing complete transparency it is in violation of the due process clause of the Fourteenth Amendment.

II. The Use of Race Goes against the Fourteenth Amendment

Second, the use of race as a qualification for admission goes against the purpose of the Fourteenth Amendment in the first place. This idea of taking from one group and giving to another group goes against the intent of the Fourteenth Amendment. The Fourteenth Amendment was an outgrowth of concern over the treatment of the freed males by the Southern States. In 1864 during a debate on the enactment of the Freedmen's Bureau,

Representative Thomas A Hendricks Democrat of Indiana, expressed these exact beliefs on the unconstitutionality of such legislation. He believed that affirmative action measures in the Freedmen's Bureau legislation, particularly the taking of ex-Confederate land for the use of freedmen's education, was beyond what Congress was constitutionally capable of doing and a violation of the separation of powers. According to the Congressional Record, "The Select Committee on Freedmen's Affairs was established on December 6, 1865, with the mandate that "so much of the President's message as relates to freedmen shall be referred; and all reports and papers concerning freedmen shall be referred to them, with the liberty to report by bill or otherwise." At the opening of the second session of the same Congress (39th), the committee was continued as a standing committee with the same jurisdiction." The Freedman Affairs Committee existed as a separate Select Committee under the House Judiciary Committee until 1875. At the opening of the 44th Congress (1875), Representative J. G. Blaine, Speaker of the House, observed that the recent amendments to the Constitution ensured "that there is no longer any distinction between American citizens; that we are all equal before the law; and that all legislation respecting the rights of any person should go through the regular standing committees." This is an essential argument that can be applied here. Eighty-nine years before the Civil Rights Act of 1964, the U.S. Congress noted that special treatment for people should no longer go through a special committee but it should go through the entire Congress. Note that Speaker Blaine was not saying that equality was a reality but he was saying that equal treatment of all people was reality. Speaker Blaine was saying that temporary use of inequality to make things more equal should become much more transparent. By using race as a qualification for admission, even if it's a qualification, the University of Texas created a compliancy issue with the due process part of the amendment. Accordingly to afford one person equal access is great but to do it because you deny another due process is not legal according to the exact law Appellee is trying to uphold here today. You simply cannot claim you are promoting equal access or equal opportunity for some by denying other people that same access because of their race without due process.

III. What Is The Purpose of the Admissions Office and Admission Selection

Third, what is the purpose of the admissions selection in the first place? If the purpose of the admissions selection is to select highly qualified candidates who will attend the University or College then should race even be a question? Is the University looking for the best possible candidate to attend or are they looking for something different? If they are looking for quotas, diversity numbers, or certain ethnic groups- then make that a part of the official guidelines of the school or University. The Admissions Office of the University should be able to do their job without a Federal Government telling them who to select or not to select. This is not an Admissions Office it is an Office of Social Engineering. If we are truly to become a color blind society we cannot allow race to be a factor here. Just like

Congressman Hendricks argued in 1864, you cannot take away from one and give to another and call it even. This is not due process. This is not equal opportunity for all. This is not a way to run a college, University or Nation. The University of Minnesota -Morris Admission Office explained their purpose in 2003, "The function of the Office of Admissions is to contact, admit, and enroll prospective students while building the image of UMM. In conjunction with this function, the Office of Admissions develops programs that will enable these students to secure the benefits of a liberal arts education at UMM, regardless of their family resources. Also, it is our goal to enroll students with a profile that equips them to meet the challenges of a high quality, undergraduate institution." Note that the goal is enroll students with a profile that equips them to meet the challenges of a high quality, undergraduate education- not promote social engineering. It is when we try to promote the social engineering that we take away from both the student and the University.

IV. The Top Ten Percent Rule Is Discriminatory And Against the Fourteenth Amendment

Fourth, the entire Top Ten Percent Rule is discriminatory and against the Fourteenth Amendment itself. The top 10 percent rule is a provision that allows for all Texas high school students who finished in the top 10 percent of their graduating class to be guaranteed admission at any public university in the state. In 1997, the Texas Legislature approved HB 588 by created by Rep. Irma Rangel, D-Kingsville. This bill was a direct response to the 1996 Hopwood v. Texas decision by the Fifth Circuit Court of Appeals, which prohibited Texas universities from considering race in their admissions and financial aid decisions. Rep. Rangel wanted to promote ethnic diversity at Texas colleges and universities. The concept behind that fact was that ethnic diversity was becoming larger and larger in high schools all across the state of Texas so if more high school students were to attend College then more of those students would be diverse. The problem was that this concept was based on some faulty science. The Top Ten percent sounds equal but is it really? Ten percent of a graduating class of 30 would be three and Ten percent of graduating class of 1500 would be 150 but no one considered would the people in group of 30 be as qualified as the people in the group of 150?

This was the exact problem that was a subject of UT- Austin complaint in 2009. UT had worked with the Texas Legislature to pass SB 175. In fact they testified in committee for the bill. The House Research Organization Report 2009 stated, "SB 175 would maintain the benefits of the Top Ten Percent Law while giving universities the flexibility they need to carry out their duty to all students in Texas. The admissions process of any university is an exercise both in selecting qualified students with a high probability of achieving success and in crafting an entering class that serves the university's mission. Higher education experts and administrators are well aware of the urgent need in Texas to expand higher education opportunities to all citizens, especially those who have historically suffered from

discrimination. Since the enactment of the Top Ten Percent Law, however, universities have been required to admit all applicants who graduated in the top ten percent of their high school class, which has had significant negative consequences that the bill would address. Texas universities should address the needs of all Texans, including the other 90 percent. Many topnotch students whose GPA does not rank them in the top ten percent are being overlooked, even though they are extremely well-prepared and successful students. This is especially true for those in large urban high schools where academic competition is fierce. Until additional tier one institutions are established in the state, the law is forcing many top-notch students who are not in the top ten percent to out-of-state universities, creating a brain-drain of excellent students that should be in Texas institutions. Current law requires state universities to admit certain students based on a single criterion—class rank—that limits an institution's flexibility and creates a one-dimensional, unhealthy academic environment.

According to a report from the National Association for College Admission Counseling in 2006, the top four factors in admission decisions at all colleges and universities are: grades in college preparatory courses; the strength of curriculum; admission test scores; and overall grades. Class rank is listed 6th in the order of importance. Basing admission on this single criterion deprives a campus of a well-rounded freshman class that reflects the diversity and excellence of the state. Texas' flagship campuses are losing control of enrollment through the number of slots they must dedicate to top ten percent admissions. One of the state's flagships schools, the University of Texas at Austin, is particularly burdened by the current law. According to university officials, among incoming freshman students from Texas high schools, 81 percent were automatically admitted in the fall of 2008. By 2009, that number is expected to be 86 percent. If the law is not amended, by 2013 UT-Austin would be forced to reject all high school applicants who were not top ten percent graduates. In 2008, about 26,000 high school students graduated in the top ten percent of their class, and UT-Austin simply could not handle all of them if they applied. An entering freshman class at UT-Austin is from 7,000 to 7,200 students — a number that university officials do not want to increase. Increasing the size of the freshman class would be an irresponsible decision because all undergraduates would suffer. It would not be academically responsible to increase the number of students at UT Austin when its student-to-faculty ratio already is too high. Other peer institutions have a much lower student to faculty ratio than UT-Austin. The Top Ten Percent law was enacted to respond to the Hopwood decision that said race could not be used as a factor in college admissions. The Legislature struggled for a solution that was merit-based and fair. Now that the U.S. Supreme Court has decided that race can be an element in a list of admissions criteria, universities no longer need such a rigid policy to help promote diversity."

Note this last sentence. The University of Texas cannot have it both ways. They cannot

argue that race should be a qualification then in the same breath say it isn't. The University of Texas asked the Legislature to do nothing more than what Abigail Fisher is asking today- to do what is fair and right. It is not fair or right to allow to unprepared students automatic admission to college and let well prepared students not attend. All we are asking for here is the same scrutiny that University of Texas asked the State Legislature in 2009. That is fair correct? If the University of Texas noted that the burden they faced in 2008 (the year that Abigail Fisher) would have entered as a freshman was 81% (Top Ten Automatically Qualified Freshman) they would then have to agree with in 2015 that was burden for them. Instead in 2014 the University of Texas argued UT Austin argued that Fisher lacks standing because (i) she graduated from another university in May 2012, thus rendering her claims for injunctive and declaratory relief moot, and (ii) there is no causal relationship between any use of race in the decision to deny Fisher admission and the $100 application fee—a nonrefundable expense faced by all applicants that puts at issue whether Fisher suffered monetary injury.

Both of these arguments are key to this particular Appellant point here. Cross apply that fact that the University of Texas testified before the Texas State Legislature in 2009 that Top Ten Rule needed to be changed. Cross apply the fact that Admission Office should be allowing students who are to successfully graduate as their candidates to attend their school. Cross apply the fact that by graduating from another institution of higher learning- Abigail Fisher took apart the entirety of the University of Texas case stating that her scores were not high enough to insure that she would do well in school. Abigail Fisher is the best reason why the University of Texas was able to lower its cap- the State Legislature wanted to attract students like Abigail Fisher to their campus. She graduated within four years, sued a major University and has gone to the U.S. State Supreme Court twice. What other students in the freshman class of 2012 that entered the University of Texas in the fall of 2008 can say this? The answer is none. The best reason to vote for Abigail Fisher is that she actually proves what the University of Texas was arguing in 2009- the Top Ten Rule is discriminatory and not in the benefit of the University of Texas or their students.

V. The Unintended Consequences Of Laws and Court Cases Results In More Discrimination

Fifth, the unintended consequences of the aftermath of HB 588 and SB 175, Top Ten Rule, and Grutter v Bollinger are seen in increased discrimination for the very students that these alleged rules or bills were trying to help. In 2001, Texas Monthly Magazine published an article by Patricia Hart, entitled The Imperfect 10. The opening paragraph of the article could easily be as relevant today as it was almost fifteen years ago, "Twelve years ago Fort Worth attorney William D. Ratliff scouted the local schools to find the best environment for his son, who was starting kindergarten. He settled on Trinity Valley

School, a private school renowned for its rigorous curriculum and small class sizes. It was the natural choice for a father determined to provide the best education for his son. Last year Ratliff removed his son from Trinity Valley and enrolled him for his senior year in Arlington Heights, the public high school for Ratliff's southwest Tarrant County neighborhood. Why the upheaval? Because Trinity Valley doesn't rank the 87 students in its graduating class, his son couldn't be in the top 10 percent. But at Arlington Heights, the younger Ratliff's grade point average will easily earn him a spot in the top 10 percent and the precious entitlement that comes with a high class ranking." Some parents and some high schools have become super competitive. These schools are offering their students' opportunities like college level classes in almost areas- P.E., electives, Foreign Languages, and all the core classes. Other schools are offering Early College Start- obtaining an Associate's Degree in College even before you graduate from High School. Still other colleges are offering programs that offer opportunities for almost a three years' worth of work in college for their high school graduates. Instead of making things more equal HB 588 and SB 175 have made things more uneven and the unintended consequence of race consciousness admissions has been to hurt schools that are poor or unable to offer all of these other programs. This includes many inner city poorer high schools and the poor rural high schools all across the state of Texas. The untold story here is that if you go to program that offers you a great deal- you will learn a great deal more if you go to school that offers you not nearly as much- you can still get into the school because of the Top Ten rule but you chance of graduation from that institution is diminished. How can students who come from poverty and limited opportunities compete against people who have unlimited opportunities- the answer is a difficult one to face and much more difficult to answer. The real discrimination here is against the poor people who have to send their students to public schools, who think that their students who prepared to go to college because they were accepted only to find out that once in college they were not prepared. This is the discrimination that State and the University of Texas should be addressing. Why do we allow in our society our tax dollars to support state institutions which reinforce discrimination? High Schools that provide their students with second class educations and Universities that reinforce this by simply complying with the laws passed by the State Legislature that they were supporting. No child should be discriminated against in the United States. These are not just our words but the words of the Speaker of House in 1875 when he said, "There is no longer any distinction between American citizens."

VI. Prayer

We pray that you vote against the lower court ruling and uphold the rights of Abigail Fisher who has done nothing but fought of the rights of students across this great state and nation to stand up and say no to discrimination. Discrimination by poor schools, discrimination by race, and discrimination by failure of our institutions of higher learning to be

transparent and upfront with parents, students, and tax payers- the University of Texas clearly should have admitted Abigail Fisher in 2008. Her graduation from another University in 2012 proved this. The University of Texas in 2009 lobbied and changed the Top Ten Percent rule because they thought it limited their ability to attract good candidates. These are not our words these are their words and you know we agree with them. After weighing these facts the only conclusion can be to vote to end this discrimination right here and right now and vote for Abigail Fisher

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