Wicomico High School Nicholas Nguyen and Kaia Harrison Fisher v. UT Appellate Brief Entry

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Table of Cited Authorities:

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Statement of Argument:

Race Conscious Affirmative Action is consistent with the United States' Constitution's Equal Protection Clause of the Fourteenth Amendment because it provides the disadvantaged minorities of this nation with the chance to have the same opportunities and experiences as majorities, which will help them become successful and productive members of society. When it comes to education and getting into a good college, minorities typically

have a difficult time. With race conscious affirmative action, minorities are given the leg up that they need to put them on the same level as majorities. It doesn't put them above everyone else like people who oppose race conscious affirmative action says it does. The University of Texas at Austin's admissions process has not infringed on any clause or statute of any law. Therefore, the only one at fault is Abigail Fisher who claims that the university has infringed on her rights and she is using the Equal Protection Clause to back her up. Six reasons as to how race conscious affirmative action is consistent with the Equal Protection Clause of the Fourteenth Amendment is because of the benefits of diversity on college campuses, the background and effects of the Fourteenth Amendment, the history of race conscious affirmative action in the United States, the precedents of the Supreme Court's rulings pertaining to race conscious affirmative actions, UT meeting strict scrutiny, and colorblind society.

Argument:

The first reason that the University of Texas' holistic review, which considers race as just one of many factors, is justified by the 14th amendment is because UT wants to promote diversity which will benefit the students in many ways. Diversity benefits the students by giving them a real microcosm of the world and the reality of the work force. Students will most likely work with people of different color and different backgrounds. The University of Texas' diversity will prepare the students by giving them an open mind and being tolerant of people different from
them before they set out into the workforce. Studies from numerous organizations including the
American Council on Education and the American Association of University Professors state
that diversity on universities' campuses and in the workforce increases performance due to relatability and tolerance. Holistic review and the Top 10% Plan are able to tweak the student
demographics and make it so that the student population is diverse. It follows the Executive Order 11246 (1965) which insures that all races have an equal opportunity in the work force
which includes government contractors. The executive order was implemented to increase diversity for better work performance. The act of UT's Holistic review makes the Executive Order 11246 possible. Holistic review allows more diversity on campus which means that more minorities can have a college education and an equal opportunity with whites to become successful. If all races have an equal opportunity in the work force, the Executive Order
11246 has fulfilled its purpose which is to give all races an equal opportunity to be successful
in the workforce. The workforce was biased by hiring white workers over colored workers so

the executive order changed that which connects back to an equal chance of getting a college education in which gives the student an equal chance of thriving in the workforce. The University of Texas at Austin hasn't always had a varied student population. UT has recorded their demographics for many years. The demographics before they started to use race as one of the factors, the vast majority of their students were white. But the Supreme Court Case Schuette vs. Coalition to Defend Affirmative Action (2014) ruled that ratifying an amendment to stop racial and sex preference does not infringe on the 14th amendment of the Constitution. Holistic review stops racial preference by making sure that the student population does not have a majority of one race making it unfair, therefore not infringing on the 14th Amendment which is stated in the precedent. Therefore, UT switching to their holistic review in response to the majority of Caucasians at the University stops the racial preference of Caucasians. Therefore, the precedent at hand supports holistic review for the sake of diversity. The Supreme Court case Grutter v. Bollinger (2003) ruled that universities can consider race a factor as long as it's not the only one. Holistic review uses socio-economic situation, academic achievements, class rank, and many more factors, not only race. Therefore, holistic review is constitutional on the basis of Grutter v. Bollinger and UT can still use it in their best interest. There are many precedents and statutes that support the process of holistic review therefore, their holistic review does align with the 14th Amendment.

The second reason that race conscious affirmative action is consistent with the Equal Protection Clause is because of the background and effect of the creation of the Fourteenth Amendment. The Fourteenth Amendment was ratified during the Reconstruction Era to get rid of the Black Codes that had been passed in the South. The other two amendments that were passed were the Thirteenth Amendment which ended slavery and the Fifteenth Amendment that said no government shall deny anyone the right to vote based on race, color, etc. The Fourteenth Amendment was passed by the Thirty-ninth Congress and was ratified on July 9, 1868. It states that: "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." Black Codes were statutes passed in 1865 in order to limit the rights of African-Americans after they were freed from slavery by the Emancipation Proclamation (1863). This led to a movement led by the Republican Party to provide assistance to the newly freed slaves so they could survive as freemen. This led to the ideas of the creation of many different types of affirmative action which led to the passing of Act of March 3, 1865, ch.90, § 1, 1866 Stat. 508, which created the Freedman's Bureau. The Freedmen's Bureau, a governmental entity organized under the War Department, was responsible for providing life essentials such as health care and rations to newly freed slaves, destitute citizens, and refugees. The Freedmen's Bureau was most successful in providing educational opportunities for over 100,000 freedmen and their

descendants. It also created courts in some areas where freedmen could bring their complaints, the Bureau adjudicated disputes, and overturned other courts' discriminatory rulings. The Freedman's Bureau was only supposed to last for one year but in July of 1866 for the second try Congress was able to expand the life and powers of the Bureau for another two years after they overrode President Andrew Johnson's second veto of the Act of July 16, 1866. When the two years were up the Act of July 25, 1868 was passed and it required that on January 1, 1869 most of the Bureau's officers were to be removed from all states and the Bureau's activities were to stop except for their educational efforts. The Freedmen's Bureau and Affirmative Action however are not unconstitutional because it is giving African-Americans the leg up that they need to finally be treated like equals and to remove some of the burden and debt that is owed to them by slavery. It is not denying any other group their rights to equality nor is it taking some of them away. Slavery is an unrepayable debt and it is up to all governments, state, local, and national, to try and make up for it and fix the negative effects that it has caused.

The third reason is that all race conscious affirmative actions are connected and related to holistic review. Holistic review corrects a 200-year-old problem in the United States. That problem was at first slavery, but then evolved into civil rights. The civil rights problem evolved into the need of diversity. The Thirteenth Amendment banned slavery in the United States and then created many legislative acts that helped the newly freed slaves. African-Americans became citizens of the United States however their rights were not equal to their white counterparts. Brown v. Board of Education of Topeka overruled Plessy v. Ferguson which stated segregation was constitutional as long as it was separate but equal. The ruling now mandated integration of all segregated schools in the United States. Integration was implemented but the mentality of segregation was still prominent in the south. At UT white students were the majority for a very long time. UT became technically segregated because it didn't allow any more students of other races in due to the fact it reached its maximum capacity. The University creates a student handbook every year that states the demographics of the population that year. The 1975's handbook showed that Caucasians were the majority of the school accounting for more than 80% of the student population. Therefore, it adopted holistic review in which has been justified by Grutter v. Bollinger (2003). After the Texas House Bill 588 was passed, which included the Top 10% plan and holistic review, the diversity at UT increased in high numbers. The 2005's student handbook stated that whites made up 57% of the population and the remaining was minorities. The string of injustices acted against minorities, especially African-Americans, contributed to the creation of various affirmative actions so that everyone would be able to have the same aspects of life like voting. Affirmative actions were made to respond to the white dominance in all aspects of life. Since past race conscious affirmative actions which included the Freedmen's Bureau were not ruled unconstitutional, holistic review is constitutional because of the same goals it wanted for minorities.

The fourth reason that race conscious affirmative action is consistent with the Equal Protection Clause of the Fourteenth Amendment is because the Supreme Court has already declared race conscious affirmative action, and affirmative action in general, constitutional with all of its previous cases dealing with this issue depending on how it was used. In all their cases they have decided and explained which uses of affirmative action were constitutional and which weren't. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978) the Supreme Court ruled that race is allowed to be used in higher education as long as it is one of many admissions criteria and isn't purposely discriminating against anyone. Affirmative action isn't used to discriminate against any one group it is used to assist minorities who are in need of help. This is what the University of Texas is using race for in their admissions process. They aren't setting aside any specific spots for minorities, which would look like they were discriminating against Caucasians which is a violation of the Civil Rights Act of 1964, they are just trying to achieve diversity for their student body. In Grutter v. Bollinger, 539 U.S. 306 (2003) a Caucasian female named Barbara Grutter had a 3.8 undergraduate GPA and a 161 LSAT score. She applied to the University of Michigan Law School in which she was denied admission. The school uses race as a factor to help achieve diversity among their student body. In a 5-4 to vote the Supreme Court ruled in favor of the university saying that no acceptance or rejection is based solely on race. This case is just like the Abigail Fisher v. University of Texas at Austin case. Abigail wasn't rejected because she was Caucasian she was rejected because of her grades. UT doesn't reject or accept you solely on your race, they just look at race at the very, very, very end of the admissions process. The examination of these two cases affirm both Universities are using race the exact same way, to achieve diversity not to exclude other groups. In Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) the Supreme Court went further into detail explaining race affirmative action. The Court decided that the case decisions of Grutter v. Bollinger and Gratz v. Bollinger do not apply to public high school students only ones of higher education. They decided that racial diversity isn't a compelling interest that can justify the use of race in selecting students for admission to public high schools and they decided that the use of a racial tiebreaker in a district that allows students to freely choose where they want to go to high school violates the Equal Protection Clause. The Supreme Court said that this was different from Grutter because the only goal of this was just to have" racial diversity" and they weren't trying to achieve holistic diversity in their education. The district had not tried any other tactic to achieve the diversity they wanted. UT on the other hand tried other things to achieve diversity and they weren't successful. UT is using race affirmative action to achieve diversity in their education and in their student body and not just in their races that they have on campus. The University of Texas is trying to make a change in the United States and they are starting with their students. As long as affirmative action is following strict scrutiny it is acceptable. With the case of Ricci v. DeStefano, 129 S. Ct. 2658 (2009) the Supreme Court

ended up deciding in a 5-4 majority that "the workplace be an environment free of discrimination, where race is not a barrier to opportunity." The Court said that New Haven failed to provide a "strong basis in evidence" that failing to get rid of the exam's results would have subjected it to liability. There was also no evidence provided that an equally-valid, less-discriminatory alternative was available. This use of affirmative action isn't acceptable neither constitutional because it violates Title VII of the Civil Rights Act of 1964 which prohibits discrimination in the workplace. Unlike UT the fire department couldn't prove that what they were doing would be helpful and they had no evidence for support. The test showed that there were just more Caucasian candidates than minority candidates that were ready, skilled, and deserved to be promoted. Both groups had the same opportunities, it was just that the majority group that came out on top. In the recent case of Schuette v. Coalition to Defend Affirmative Action (12-682) (2014) a three-justice plurality in the Supreme Court said that Michigan's governor wanting to alter the state's constitution to prohibit all sex-and race-based preferences in public education, employment, and contracting did not violate the Equal Protection Clause and that this case was more about whether or not state voters can choose to prohibit the use of race preferences in governmental decisions, specifically dealing with school admissions, which they do because this is a democracy and the power is in the voters. Justice Sonia Sotomayor however voted that this case does violate the Equal Protection Clause because when a governmental action is focused solely on race it places an even greater burden on minorities than the ones they already have which is why we have the Equal Protection Clause of the Fourteenth Amendment to keep this from happening. Affirmative action was created to help those who need the leg up and assistance to be treated equal, which is mostly women and minorities. Taking sex and race-based preferences out of employment, education, and contracting can decrease the chance for groups like these to have the same opportunities as men and majorities. Like with the University of Texas, when they took race away from admissions the number of minority enrollments dropped significantly. With the use of race in their admissions process minority enrollments have increased and soon they will reach their goal of diversity. Since the Court ruled in favor of the people it shows that they support affirmative action and that they should side with the university because of all these cases and more. Affirmative action is just the Equal Protection Clause put into action which makes it constitutional, as long as it meets the strict scrutiny.

History of UT's Admission (Fifth Reason):

When the University of Texas first opened in 1883 it was an all-white school. The university didn't start admitting African-Americans until the summer of 1950 after the case ruling of Sweatt v. Painter. In Sweatt v. Painter the school was ordered to let in Heman Marian Sweatt, the grandson of an African-American slave, after he was denied admission to the school just because of his race. Sweatt was represented by Thurgood Marshall and the case was taken all the way to the Supreme Court where it was unanimously ruled that under the

Equal Protection Clause he had to be admitted. This case paved the way to Brown v. BOE four years later. These two cases led to UT's interest in achieving lots of diversity at the university. UT is using race conscious affirmative action to create a student body that is meritorious and diverse in multiple educational ways. UT believes that in order to receive the best college education and to be ready for the workforce you need a great deal of exposure to all the different ideas and cultures that there are in this world so you have a sense of what you will be facing when you graduate from college. They also believe that their students need to know that there isn't just one minority or majority voice in this world. After the Sweatt v. Painter case race became a big part of the admissions policy which led to a federal appeals court ruling against UT's law school's practice of using race as a factor in its admissions process in 1996 in the court case Hopwood v. Texas. When the school stopped using race the amount of minority enrollment admissions dropped. In order to achieve the diversity that UT and the state of Texas so desperately desired Texas House Bill 588, also known as the 10% law, was passed in 1997. The 10% law started with the 1998 class admissions and stated that any Texas high school graduate who was ranked in the top 10% of their high school class was guaranteed admission to the university. This was thought at first to be a great plan, but in the end it ended up hurting African-Americans', Hispanics' and other minorities' chances of getting admitted because most of Texas' public high schools are still segregated. In the Fall of 2002 the Freshman class' percentages of minorities were 3.4% African-Americans and 14.3% Hispanics which were lower than they were in 1996, the last year before the 10% law was passed. Two years later it was 4.5% African-Americans and 16.9% Hispanics. In 2004 due to these continuous low turnouts even after the passing of Texas House Bill 588 the University proposed to add race to the admissions policy to help increase UT's diversity which was inspired by the 2003 Grutter v. Bollinger case. Diversity isn't something that is just wanted by the school's officials, it is also wanted by faculty and students just as much as it is wanted by the school officials which was found out during a survey that was conducted. The survey was done to see how the students and faculty felt about having a very diverse student body and to have evidence to show to the university's College Board that diversity is something that is widely supported and wanted. We need to live in a colorblind society and we can't do that if we don't have diversity. Also with the Grutter case Justice Sandra Day O'Connor predicted that the use of race in admissions wouldn't need to be used after about 25 years because diversity should be achieved by then. Her statement supports the theory that the use of race in admissions won't be a lifetime long thing which is what some people were worried about.

Following the Requirements of Strict Scrutiny:

Race conscious affirmative action is permitted by the Fourteenth Amendment's Equal Protection Clause because of the Supreme Court's race classification standards. In order for something dealing with race to be constitutional under the Equal Protection Clause it must meet strict scrutiny, which UT's admissions policy does. In order to meet strict scrutiny UT

has to be using race for a very compelling governmental reason and it has to be used in the least restrictive way possible. Race hasn't become the only factor that is looked at now that it has been added to admissions. The university's officials are still looking at an applicant's high school transcripts, the application essays, their college transcripts, their SAT or ACT scores, letters of recommendation and so much more. Race has been added to the admissions process just to help with the diversity of the school not to exclude whites from getting admitted. The petitioner, Abigail Fisher, was in the bottom 90% of her class which means that she had to physically apply for admission to UT. Those who don't get in automatically under the 10% plan have their applications scored and plotted on a matrix based on school or major. The axes are the AI and PAI scores, this is where it is decided who gets cut and who is admitted, race and names are not included. PAI scores are based on the two essays and the PAS and are rated on a 1-6 scale. They are based on the university's holistic consideration of six equally-weighted factors which are leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances. Race comes into play under the special circumstance factor and benefits any of the applicants, not just minorities. Since race is a factor of a factor of a factor of the admissions policy it completely follows the criteria of strict scrutiny, which says that the use of race must have narrowly tailored the law to achieve its goal. Meaning that is has to be used in the least restrictive way which it is because it comes in at the very end and not the very beginning process. It also doesn't change the whole entire thing. Abigail was denied admission because she received an AI score of 3.1 and a PAI score below 6 and due to her low AI score and the tough competition she was rejected, not because she was Caucasian. She was also rejected from a summer program that only one African-American and four Hispanics with lower combined scores than the petitioners were accepted to the summer program along with 42 Caucasians with combined AI/PAI scores identical to or lower. There were also 168 African-Americans and Hispanic who had combined AI/PAI scores that were identical or higher than the petitioner's that were denied admission.

The final reason is that a colorblind society would be the most ideal but is unrealistic. The effects of slavery in America, segregated schools, and the current growth of the "Black Lives Matter" movement prove minorities are still impacted in a negative way. If the United States transitioned immediately to a colorblind society, theoretically it would increase diversity. The reality is that the lingering effects of these past injustices are irreversible and will still be prominent in the United States for many years. Families pass down their racism and negative values throughout generations. A colorblind society will only fuel the white population's advantage in society because they are the majority in the United States. The Emancipation Proclamation freed the southern slaves in America on the basis that they were not property but people with human characteristics, but that led to post-slavery America which was filled with racism and segregation. Plessy v. Ferguson (1896) justified the unfair concept of segregation by saying it was allowed as long as it was separate but

equal. The federal government did not enforce the ruling as a whole. The federal government and the state governments only enforced the segregated aspect of the ruling, not the separate but equal statement. Whites and people of color were separated because whites thought they were inferior. Racism is the root of segregation and it continued throughout America until Brown v. BOE of Topeka (1954). Once segregation was deemed unconstitutional, racism and segregated mentality was still planted in the heart of American values. An example is Lau v. Nichols (1974) in which a school did not provide English lessons for students with Chinese descent. That butchered their chances of equal opportunity to participate in school activities because they could not speak English and they were not deemed worthy of instruction on the basis of their race. Racism and stereotyping fueled the Los Angeles race riots in 1992. Whites and minorities disliked each other because of the mentality that minorities were below whites. The recent tensions between African Americans and the predominantly white police force has sparked the debate of racial stereotyping in America. All of the racial discrimination in America has been linked to the white majority in America. The University of Texas at Austin has tried to become colorblind meaning they do not take in race as a factor. The result of colorblind admissions was a white majority in the student population. In 1975, the student population was 80% white. The colorblind admissions did not increase the equal opportunity of college education for all races. Therefore, UT had to implement Holistic Review and the Top 10% Plan in order to promote diversity and equal opportunity for a college education. Holistic Review was there to correct the ideal situation of a colorblind society.

Conclusion

Race conscious affirmative action is consistent with the United States' Equal Protection Clause of the Fourteenth Amendment because of the benefits diversity provides on college campuses, the background and effects of the creation of the Fourteenth Amendment, the history of race conscious affirmative action in the United States, the precedents of the Supreme Court's rulings on race conscious affirmative action and affirmative action in general, UT meeting strict scrutiny, and the theory of a colorblind society. Race conscious affirmative actions are consistent with the 14th Amendment on the basis that we all have the same blood, the same organs, and the same aspects that makes us human. Dealing with the case of Fisher v. University of Texas the Supreme Court should rule in favor of the University of Texas. The Supreme Court has already declared race conscious affirmative action constitutional with all of its previous cases dealing with this issue depending on how it was used. The University of Texas followed all the rules when they added race to their admissions' factors by making sure that it met the strict scrutiny requirements. When race was added to the admissions factors it did not become the biggest factor that decided whether or not an applicant was accepted and it came into play at the very end of the admissions process. The university is hoping to achieve a very diverse student body to help prepare their students for the world. They made sure they had a very compelling

governmental reason, which was achieving diversity in their student body, and they made sure that race was used in the least restrictive way possible, which it was because it wasn't factor in until everything else was such as grades, GPA, and their AI/PAI scores. Since minorities have equal protections under the law, it is also implied that they should have equal opportunities as if they were the majority. With holistic review, it allows more minorities to be more successful. The U.S has been founded on the mentality that people of the same characteristics are better than others. The U.S needs to grow past its differences and develop a sense of tolerance. Holistic review allows the University of Texas at Austin to evolve and to give a sense of acceptance of others. All humans are the same and no one should make one group inferior over the others. Whites made African Americans inferior with slavery and segregation. Those effects still linger today with racism and stereotypes. Minorities are still bombarded with racial insults and are harmed by racial bias in society. Race conscious affirmative actions tries to help minorities who are disadvantaged with anguishes given to them throughout their lives so they can be prosperous working members of society with no racial disadvantage.

Oral Argument Video: https://www.youtube.com/watch?v=d4kn8xuqByw

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