Molly Austin, Peter Sukamto, Fisher v Texas Respondent Brief

ORAL ARGUMENT: https://www.youtube.com/watch?v=jPJyxCLPnB0

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STATEMENT OF ARGUMENT

The 14th amendment protects against racial discrimination and thus, race conscious affirmative action must be judged on the classification of strict scrutiny. Compelling state interest satisfied by narrowly tailored means must be proven. The courts have established that the compelling state interest is diversity. Grutter v. Bollinger, 539 U.S. 306 (2003), see also Regents of the University of California v. Bakke, 438 U.S. 265 (1878).

Narrowly tailored does not mean "exhaustion of every conceivable race-neutral alternative." Grutter, supra, at 339. It does require serious consideration of efficient race-neutral alternatives to satisfy narrowly tailored, which the University of Texas (UT) has shown.

Socio-economic or geographic affirmative action are efficient because neither method can guarantee diversity. Because Texan high schools are racially segregated, the Top Ten Percent Plan increases the representation of Blacks and Hispanics but at low rates. The Top Ten Percent Plan does not increase representation of Asian Americans or other minorities underrepresented in the state. Race Conscious affirmative action is the most efficient way to increase minority representation. Automatic admission also takes away from individualized assessments necessary to assemble a student body that is diverse among many value factors such as: leadership qualities, work or community service experience, unique talents or socioeconomics. Race is just an added "plus" among these other qualities.

Race conscious affirmative action is the best method for achieving diversity because it does not does so with as little discrimination as possible, flexibility in its methods, and a limit of duration of the relief.

1. THE COURTS HAVE ESTABLISHED THAT THE COMPELLING STATE INTEREST NEEDED TO SATISFY STRICT SCRUTINY IS DIVERSITY

    1. Race conscious affirmative action satisfies a strict scrutiny analysis

Race conscious affirmative action involves racial discrimination by state governments. The constitutional principle involved is the 14th amendment's equal protection clause which declares that "no state shall…deny to any person within its jurisdiction the equal protection of the laws". Racial discrimination is within the most protected classification of equal protection. Such discriminatory action by the universities admissions policy is only justified and found to be legal, if it is"necessary to further a compelling interest" and if such action "satisfies the narrow tailoring test" as defined by the courts. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (internal quotation marks omitted).

    2. Diversity is the compelling state interest

The first component to satisfying strict scrutiny is proving a compelling state interest. At an undergraduate and graduate level, "tradition and experience lend support to the view that the contribution of diversity is substantial". Regents of the University of California v. Bakke, 438 U.S. 265, 313 (1878). Powell's ruling in Bakke introduced diversity as the compelling state interest in race conscious affirmative action, though it was not the opinion of a majority of the court. In 2003, O'Connor endorsed Powell's opinion and declared diversity a compelling state interest in the majority opinion. Grutter v. Bollinger, 539 U.S. 306, 325 (2003). The "educational benefits", skills and understanding developed from "exposure to widely diverse people, cultures, ideas, and viewpoints," that justify diversity are found to be needed and valued in today's global society. Grutter, 539 U.S. at 330.

2. THE STRATEGY BY WHICH RACE CONSCIOUS AFFIRMATIVE ACTION IS EMPLOYED IS FITTED TO THE REQUIREMENTS OF NARROWLY TAILORED

The method by which the government achieves a compelling state interest must be narrowly tailored. Narrowly tailored, however, does not mean using discriminatory means

is the absolute only way to satisfy the interest. Rather, means are found to be narrowly tailored if, in their context, they satisfy certain elements of restraint.

Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context.

Grutter v. Bollinger, 539 U.S., at 308. The application of narrowly tailored in race conscious affirmative action in the admissions process can vary from other applications in racial discrimination questions, but follows similar principles based on context. Based on the rulings of several previous cases, narrowly tailored is found to have 3 general requirements. In order to be narrowly tailored, government action must be as least discriminatory as possible, show

flexibility in its application, and have formal limits that restrict the action only to its intended purpose.

1. Race conscious admissions policies are tailored to use no more discrimination than necessary

" In determining whether race-conscious remedies are appropriate" and narrowly tailored, the "efficacy of alternative remedies" are considered. United States v. Paradise, 480 U.S. 149, 171 (1987); Fullilove v. Klutznick, 448 U.S., at 510 (Powell, J concurring). Considering alternative methods that don't use discrimination to achieve a government interest is a major component to narrowly tailored. The courts have shown, however, that narrowly tailored does not "require exhaustion of every conceivable race-neutral alternative." Grutter v. Bollinger, 539 U.S., at 339.

1. UT has given a serious consideration to race-neutral alternatives

The school is required to show a "serious, good faith consideration of workable race-neutral alternatives," Id. at 339, and the efficiency and cost of those alternatives. Remedies resulting in a "dramatic sacrifice of diversity [or] the academic quality" Id. at 340, to the school would be inconsistent with efficient alternative methods needed to satisfy narrowly tailored. UT's use of the Top Ten Percent Law, a race neutral policy, brings about diversity by enrolling the top students of majorly segregated high schools. Though the Ten Percent Law improves racial diversity, it is not an efficient enough alternative method to rule out race

conscious affirmative action on the grounds of narrowly tailored. Minority races who do not constitute the majority in any high school are vastly underrepresented under the Top Ten Percent Law.

According the the US 2014 Census, Texas is 38.6% Hispanic, 12.5% Black, and 43.5% white. The UT Office of Enrollment Management and Analysis, however, found that in 2008-2009 only 5.6% of African Americans and 19.9% of Hispanics were admitted. 52.3% of students admitted to the freshman class that year were white and 81% of the total students were admitted under the Ten Percent Plan. Because the Ten Percent Plan makes up a majority of the incoming class and in addition, high schools are highly segregated among races, the percent of students admitted should be reasonably close to the percent present in the Texas. Hispanics and Blacks, however, are admitted at half that, showing that the Top Ten percent plan, while increasing minority representation is still a system that favors white applicants.

Though the race conscious admissions policy admits only up to .92% of African Americans and 2.5% Hispanics, a nominal percentage in comparison to the 25.5% total of both races, it is all the more needed to admit races not prevalent in Texas. Texas is only 4.5% Asian, 0.1% Native Hawaiian or Pacific Islander, and 1.0% American Indian or Alaskan Native. Despite a small representation of 4.5% in Texas, Asian Americans made up 18.6% of the incoming class in 2008, nearly that of Latinos. Because state representation is so low, admission for most Asian americans was not through the Top Ten Percent Plan. .3% were Native American which, while small, is still higher that state representation and 3.1% were International students.

Race conscious affirmative action is necessary at UT for admittance of students not highly represented in the Texas population. The Top Ten percent may improve diversity but is still admitting white students at a rate higher than state population.Characterization of race-conscious affirmative action and the Top Ten Percent Plan is mischaracterized by the plaintiff in a number of ways. Even if the percentage of African-American and Hispanic students exceeds that of the percentage obtained under the critical mass policy at the University of Michigan in Grutter, racial diversity is more than just a significant percentage of a few races or ethnicity. To say diversity is the prevalence of two minority races is a blinkered exclusion of a plethora of cultures and experiences stemming from every other race or ethnicity. The Top Ten percent plan does not increase admittance of Asian Americans or Native Americans and only admits Hispanics and Blacks at half the rate of state representation. The Top Ten Percent Plan, taking up 81% of admissions spots, limits the amount of students admitted from out of state as well International students. Without

race conscious affirmative action, many minorities will continue to be under represented and have to fight for the 19% of seats or less in the future.

In addition, the Ten Percent Law prohibits UT from "conducting the individualized assessments necessary to assemble a student body that is not just

racially diverse, but diverse along all the qualities valued by the university". Grutter at 340. The Personal Achievement Index could consider a variety of factors including leadership qualities, extracurricular activities, honors, awards, essays, work experience, community service, socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and finally, race. All these factors are considered to attribute to different opinions and represent different demographics that, when put together, help the school achieve holistic diversity from a variety of applicants admitted. "The classification at issue must "fit" with greater precision than any alternative means", Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986), at 280, n. 6 (internal quotation marks in original). Consideration of diverse qualities, including race, is most fitted to UT's desire to have a wide variety of diversity that the Ten Percent Law can not guarantee because it is not individualized. The Top Ten Percent Law shows bona fide consideration of race neutral alternatives by UT, however, it sacrifices individualized and holistic diversity. Race conscious affirmative action has proved to be the most fitted and efficient method for improving racial minority representation as well as diversity of other factors.

2. Race neutral alternatives, such as use of socioeconomic class and geographic affirmative action as a mean to achieve diversity is insufficient.

To deem racially based affirmative action as unconstitutional would leave few options for colleges to achieve the diversity they desire. In fact, universities such as the University of Texas have already explored such options in addition to racially based affirmative action. This, of course, includes the Top Ten Percent Law. The Top Ten Percent Law seeks to achieve diversity through admitting students from across the state, essentially using geographic origin as a form of affirmative action. However, while this does increase diversity because the state's schools are predominantly segregated, UT maintains that the Top Ten Percent Law is insufficient to achieve the diversity it needs. Specifically, that the Top Ten Percent Law fails to achieve "diversity within diversity." Fisher v. University of Texas, 758 F.3d 633 (5th Cir. 2014) at 57. That is, that the Top Ten Percent Law will not acquire the varying nuances of particular races that the university is seeking to be represented on campus. Relying on geographic based affirmative action fails to find the "diversity within diversity" because it excludes race as a factor within college admissions. Bakke 438 US 265 (1978) at 315 states, "racial or ethnic origin is but a single, though important,

element"(emphasis added). Simply put, excluding race as a whole makes it impossible to achieve racial diversity. It fails to use affirmative action holistically through excluding race as one of many factors in admitting students to college.

In addition, socioeconomic class based affirmative action actually works against achieving a racially diverse population of minorities. Studies from the University of Maryland show that low-income White Americans would benefit more from color blind admissions with socioeconomic affirmative action than low-income Black Americans. According to their study, for families with incomes below thirty thousand dollars annually, the number of White Americans students who score above six hundred on each category of the SAT outnumber Black American students thirteen to one. Meaning, that if race is not considered, most college admission spots where socioeconomic status is a factor would go to White Americans.

2. Race conscious admissions policies are flexible and holistic.

Another element to consider with narrowly tailored is the flexibility of race conscious policy. United States v. Paradise, 480 U.S. 149, 171 (1987); Fullilove v. Klutznick, 448 U.S., at 510 (Powell, J concurring). Flexibility when considering race in admissions protects from the sole use of race to accept or deny a student, whether this be in favor of a student of a minority race or not.

1. Race is only a "plus" to admissions

When "race or ethnic background" is considered in the admissions process, "it may be deemed a "plus" in a particular applicant's file" because of the "potential contribution to diversity without the factor of race being decisive. The system must be "flexible enough to consider all pertinent elements of diversity". Regents of the University of California v. Bakke, 438 U.S., at 317 (internal quotation marks in original). Race only being one potential "plus" to diversity, in consideration with other "special circumstances" used by UT makes the admissions system narrowly tailored. Individual consideration is given to each applicant, in comparison to an automatic amount of points to "every single "underrepresented minority" applicant solely because of race"(internal quotation marks in original). For these reasons the courts found this system used by the University of Michigan's undergraduate admissions not to be narrowly tailored. Gratz v. Bollinger, 539 U.S. 244 (2003). There can be "no mechanical, predetermined diversity "bonuses" based on race or ethnicity" but rather consideration of the bonus as an individual's additive element. Grutter, supra, at 337 (internal quotation marks in original).

The use of race as a "plus" must also be flexible. There is a definite correlation between "achieving the benefits to be derived from a diverse student body" and the number of students who are of racial minorities. Despite this association, the courts believe "a minimum number" cannot be set, but when evaluating an application the university should keep the "distribution among many types and categories of students" in mind. Bakke, supra, at 323-324.

Grutter upheld the use of a critical mass that is not defined in specific "terms of numbers or percentages" but as numbers "such that underrepresented minority students do not feel isolated or like spokespersons for their race." Id. at 319.

There is criticism that "whether the objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment". Id. at 391 (Kennedy J, dissenting)(internal quotation marks in original). A plus is given to all individuals based on their race, but the individual is further judged by his or her unique factors that amounts to the distinguished treatment of the individual separate from the collective of his or her race. Concerning critical mass, there is fault found in the notion that a critical mass is not subject to any specific values and that there is no measurable point at when a minority ceases to feel like a "spokesperson". The ambiguity of a critical mass, however, works to protect the individual from being judged solely on one aspect of the application because there is no need to satisfy a quota and it is legally defensible.

2. Race is one of many factors considered

Additionally, race conscious affirmative action is flexible it its analysis of race because it uses it as a factor holistically. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single, though important, element"(emphasis added). On the other hand, an admissions system that focuses "solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity". Bakke, supra, at 315. Diversity is a variety of viewpoints and experiences that come from many areas of differences including but not limited to racial, ethnic, geographic and socioeconomic. Within those subtypes qualities supporting "beneficial educational pluralism", including:

exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications [are] deemed important.

Id. at 317. See Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987) ("the Plan merely authorizes that consideration [of sex] be given to affirmative action concerns when evaluating qualified applicants.")

No factor on its own is important enough to be the single, deciding element in admission. The Personal Achievement Index that UT uses to evaluate

applicants never assesses one factor individually or gives a specific point value to a factor. The application is evaluated holistically and includes such factors that could contribute to diversity as work experience, leadership abilities, extracurricular activities and a variety of factors such as socioeconomic status, family status, and racial status that are considered "special circumstances". A variety of factors are on the "same footing for consideration, although not necessarily according them the same weight."Ibid. The weight of a certain factor is indistinguishable because it is given to concrete value. The weight it holds will also change depending "upon the "mix" both of the student body and the applicants for the incoming class". Id. at 318. Moreover, the use of a variety of factors that include race, none of which having an attributed weight but rather holistic insight into the applicant, justifies narrowly tailored means at obtaining a wholesome diversity interest.

3. Race conscious admissions policies satisfy durational limits

The courts must consider if race-conscious policies have a limit to the "duration of the relief". United States v. Paradise, 480 U.S., at 171; Fullilove v. Klutznick, supra, at 510 (Powell, J concurring). For the interest of diversity, the courts are satisfied with the use of "sunset provisions" or "periodic reviews to determine whether racial preferences are still necessary."Grutter, supra, at 324. The UT periodically reviews the status of diversity, finding minority representation to have increased after the implementation of a holistic diversity assessment, as well as monitoring the amount of students admitted under the Ten Percent Law. This is enough to satisfy the requirement for race-conscious affirmative action plans. In Grutter, the courts found the Law School's "word that it would like nothing better than to find a race-neutral admissions formula" is adequate enough to satisfy the durational limits requirement of narrowly tailored. Id. at 309-310. The courts have established their own prediction that in 25 years race-conscious affirmative action will not be necessary to satisfy diversity. Ibid.

In some cases it is more appropriate to have an end goal that limits the duration of race-conscious policies rather than a set durational limit. Economic

affirmative action plans can use race and sex as factors in hiring and promotions until the composition of a company's workforce resembles that of a local workforce. Steelworkers v. Weber, 443 U.S. 193, 216 (1979), An end goal works as a "temporary tool" to satisfy the interest of the company. Ibid. The end goal for diversity, however, is not related to specific numbers or percentages. Diversity should be broadly interpreted to include many special qualifications of applicants. It is also justly interpreted by broader means because, based on the aforementioned factors, race-conscious affirmative action imposes only moderate discrimination when used for diversity. For these reasons UT's holistic admissions policy should not be required to have an established end date or concrete measure of diversity. The acknowledgement of durational limits and commitment of the university to monitor ensuing conditions of diversity is enough to satisfy time constraint requirements for narrowly tailored actions.

CONCLUSION

The use of race conscious affirmative action satisfies the elements of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Based on the evidence above, the Courts should find that the compelling state interest of diversity and race conscious affirmative action as a narrowly tailored means of achieving that interest is constitutional and thus uphold the ruling of the Fifth Circuit Court of Appeals.
