Harlan Institute Entry by Newman, Evan and Armstrong, Henry

FISHER V. UNIVERSITY OF TEXAS

Brief for the Respondent

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Table of Cited Authorities:

Opportunity Cost of Admission Preferences Espenshade Chung June 2005

Statement of Argument:

Affirmative action is a policy that was created and has been adopted by most top-tier universities with some lower-end universities and colleges also adopting the policy. Affirmative action is the policy of weighting racial minority as an overly positive factor in admission decisions. As expected, the policy has been under heavy scrutiny as of the past few years, yet the fact remains the current affirmative action policy is the most narrowly tailored policy possible that still accomplishes student body diversity – a proven compelling state interest.

Abigail Fisher, a 2008 graduate of Stephen Austin High School in Sugar Land, Texas applied to UT Austin during her senior year. In 1997 a House Bill was passed in Texas that ensures all students that graduate in the top 10% of their high school class gain automatic admittance to all state-funded universities – this includes UT Austin.

Abigail Fisher was not in the top 10% of her class and thus had to apply for admission, which is granted through a process of holistic review. Sadly, Abigail Fisher was denied admission from UT Austin. After hearing that racial background is a factor in the holistic review process, Abigail took to court, contending that because preference was given to minority candidates, she was denied admission to the school on the basis of her race. Abigail argues that affirmative action is creating a racial barrier that is in direct conflict with the 14th amendment.

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

Argument:

I. Racial diversity has been proven to be a compelling state interest and removing affirmative action would decrease diversity

In the Supreme Court Case Regents of the University of California v. Bakke, 438 U. S. 265, Justice Powell wrote in his opinion that "the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests." id. at 53, 553 P.2d at 1165 and that Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." Id., at 311. As of 2010, racial diversity in the physician workforce is far from accurately reflecting the racial diversity of this country. According to American Medical Association's Diversity in the Physician Workforce: Facts and Figures 2010, 1 in 8 Americans is African American, yet only 1 in 15 doctors is. And though 1 in 6 Americans identifies as Hispanic/Latino, only 1 in 20 doctors does. These facts help to understand and support Justice Powell's opinion and the precedent that he has set.

Further supporting the claim that affirmative action is both a compelling state interest and the best way to promote racial diversity in schools is a study done by Princeton University over the class of 1997. They employed micro-simulation analysis and used data from over 124,000 students across the country to come to the startling conclusion that "...eliminating affirmative action would reduce acceptance rates for African-American and Hispanic applicants by as much as one-half to two-thirds and have an equivalent impact on the proportion of underrepresented minority students in the admitted class." Critics of Affirmative Action argue that by terminating the practice, all of those spots that are "unfairly" handed out to minorities would go to majority students who are more qualified. However, according to the same study, "White applicants would benefit very little by removing racial and ethnic preferences; the white acceptance rate would increase by roughly 0.5 percentage points."

These facts help to prove the point that Affirmative Action is necessary for racial diversity in schools with African-American and Hispanic acceptance rates dropping around 40% without the practice in place. It has also proven to have very little adverse impact with only a 0.5% increase in White acceptance rates.

II. Affirmative Action is Narrowly Tailored and Passes the Strict Scrutiny Standard

The goals of the 14th are similar to those of affirmative action as both their goals are to promote equality in schools and subsequently in the workplace, giving qualified racial minorities an advantage over qualified racial majorities. The practice that has fallen under scrutiny in the past years is that of "Holistic review," a policy that almost all of the top US Universities have adopted and are still using. Holistic review seeks to look at prospective students not as a number made up of GPA, test scores, and letters of recommendation, but instead as a person with a diverse background that seeks challenges through extracurriculars and choice of classes. Students, however, have become increasingly frustrated with the system as it does take into account racial background. Universities prefer to trend towards a campus that is diverse in ideas, some of which can only be fostered by certain racial and socioeconomic backgrounds.

In the past few years dissent culture has been on the rise. The insane growth of the internet has given people a voice, and led many to no longer accept wrongs that they have been faced with. Affirmative action has been the target of many of these complaints, most of which from racial majorities who feel they have been negatively affected by the practice.

In Fisher v. Texas argued in front of the supreme court, Justice Kennedy in the 7-1 majority opinion held that, "the Court of Appeals did not hold the University's admission policies to a standard of strict scrutiny, so the judgment was incorrect." 570 US _ (2013). This opinion sent the case back to the court of appeals to be ruled under strict scrutiny, the standard for all affirmative action cases.

Policies that are examined under the strict scrutiny standard have to prove two things: that they were put in place to further a compelling state interest, and that the policy in place is narrowly tailored to achieve that interest.

As stated in a previous argument, Regents of the University of California v. Bakke 438 U. S. 265, has produced an opinion written by Justice Powell that confirms diversity among students is a compelling state interest.

This leaves only one part of the strict scrutiny standard to be argued: is affirmative action narrowly tailored with the least possible adverse impact?

The words used when describing the application process under affirmative action do not trend towards specificity. Instead, universities have employed words such as 'holistic' and phrases such as 'the bigger picture.' However, far from what the wording used might suggest, the policy and practice of affirmative action is as narrowly tailored as it can be.

In a study done by Princeton University over the class of 1997 and over 124,000 college students across the nation, they found that, "White applicants would benefit very little by removing racial and ethnic preferences; the white acceptance rate would increase by roughly 0.5 percentage points." Critics of affirmative action argue that spots 'unfairly' given to racial minorities are preventing their own successful admission. However, this study done by Princeton University seeks to disprove that.

A fact that must be noted is that the rulings surrounding affirmative action have been going through a slow evolution, one that leans in favor of affirmative action. In 1996 the court ruled that racial diversity was not a compelling state interest, "The undeniable message of Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), where the 5th Circuit held that establishing and maintaining a racially diverse student body is not a compelling interest for purposes of the Equal Protection Clause." However, as time has gone on and the remains of 19th century slavery continue to foster and grow, the supreme court has decided to take action and ruled that racial diversity is a compelling state interest in Bakke.

I hope to one day see a country where affirmative action is not necessary, where the income gap and socioeconomic status difference between races is zero. Justice O'Connor in Grutter v. Bollinger said that "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Sadly, as of today the practice of affirmative action is still alarmingly necessary and is currently the practice that provides the least adverse impact.

III. Student Body Diversity Extends Beyond Just Race

The Appellant holds that "The race-conscious admissions policy had a de minimis effect, at most adding 0.92% African-American enrollment and 2.5% Hispanic enrollment; that a slight contribution is not a "constitutionally meaningful" impact on student body diversity and is no more than an exercise in gratuitous racial engineering." Fisher fails to address both the fact that the court never specified a percentage of racial minorities that qualifies a school as officially "diverse" and that diversity extends beyond just that of race.

David Sacks and Peter Thiel of Stanford University argue that a truly diverse campus is created through a range of ideas and backgrounds, not just a range of skin colors. A range of ideas and student backgrounds will foster new ideas and promote acceptance to a much larger degree than simple racial diversity will. Our appellant's focus will center around mainly race however, it isn't just race that is taken into account for affirmative action but a range of experiences that needs to be considered. Taking in a holistic view of a student is the best way to promote diversity on campus as a person is a variety of factors that make up their profile besides only one factor, their skin.

IV. Affirmative action's intent was not made to discriminate against others

The reason that affirmative action is in the spotlight is the accusation of reverse racism, where past discrimination against certain minority groups does not justify present discrimination against non-minorities. What clearly needs to be stated is that affirmative action is driven by genuine desire to correct serious wrongs of the past, not to enact revenge. A similar government action to affirmative action was taken in the 1800's being the Freedmen's Bureau that tried to aid the newly freed slaves and was also not with the intent to put down any group. Mr. Charles Sumner, a Republican Senator from Massachusetts, put it best saying, "It is evident, then, that the freedmen are not idlers. They desire work. But in their helpless condition they have not the ability to obtain it without assistance. They are alone, friendless, and uninformed, The curse of slavery is still upon them. someone must take them by the hand; not to support them, but simply to help them to that

work which will support them…The intervention of the national Government is necessary. Without such intervention, many of these poor people, freed by our acts in the exercise of a military necessity, will be left to perish". The reason in aiding minorities back then was that their new rights would be violated because racism and prejudice towards minorities, which is something still very prevalent today, would not allow them to be seen as equals. Lastly, four Justices (Brennan, White, Marshall, and Buckmun) would have upheld the program of affirmative action against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice" Id., at 325 (JJ., concurring in judgement in part and dissenting in part).

Conclusion:

Ratified on July 9, 1868, the 14th amendment has since provided a backbone for the civil rights movement as well as accelerating our country on its path to racial equality. We, the respondent, hold that both the policy and practice of affirmative action is in line with the 14th amendment, specifically the equal protection clause which states that the United States will not "deny to any person within its jurisdiction the equal protection of the laws."

Affirmative action is a necessary policy that has been adopted and enacted across the country. It is the better of two evils: either suffer the calamitous consequences that come with a racially segregated country, or adopt a policy of affirmative action. Its effects have proven to be positive, having very little adverse impact according to a Princeton University study.

The supreme court case of Regents of the University of California v. Bakke, 438 U. S. 265 overturned the precedent set in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cementing racial diversity as a compelling state interest.

This evolution will come to an end with when racial diversity has naturally balanced after years of affirmative action policies, or when enough people petition to have it shut down.

For now, however, affirmative action is doing its job in ensuring racially diverse college campuses and workplaces with as little adverse impact as possible.

Our opponent may say this is not the case however, their argument is tunnel visioned on race alone instead of what's actually taken into account in affirmative action which is the "holistic view" of the applicant. Secondly affirmative action is created on the intent to help, not enact revenge. It's goal in trying to achieve an equal playing field for all races is effective and shows with increases in opportunities for minorities over the past years.
