Appellant Brief

In the Supreme Court of the United States

March Term, 2016

ABIGAIL NOEL FISHER, PETITIONER

V.

UNIVERSITY OF TEXAS AT AUSTIN, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

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QUESTION PRESENTED

IS RACE-CONSCIOUS AFFIRMATIVE ACTION CONSISTENT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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Statement of Argument

The Fourteenth Amendment of the United States Constitution does not allow race conscious affirmative action in higher education admissions. The Fourteenth Amendment's Equal Protection Clause protects individuals against racial discrimination. The Equal Protection Clause specifically states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The precedent for affirmative action put forth in *Grutter v. Bollinger 539 U.S. 306* is that of the strict scrutiny standard that must be applied to all matters of racial discrimination. The University of Texas at Austin's ("UT") admissions policy does not fit the standard that must be met: narrowly tailored and a compelling state interest. UT's justification for using affirmative action to diversify the student body is setup in the form of a quota system. UT's definition of classroom diversity is: two African-American students; two Hispanic students; and two Asian-American students, originally proposed in UT's "Proposal to Consider Race and Ethnicity in Admissions" (the "Proposal"). Diversity under this definition is unobtainable and fails to pass strict scrutiny because of the use of a quota system. Although diversity is a compelling state interest, UT's admissions policy, as described in the Proposal, is a quota system and does not consider diversity to be of top importance, otherwise the university would put a "critical mass" system into place. UT's current admissions system violates the Equal Protection Clause of the Fourteenth Amendment by determining an individual's admission based on their race to satisfy UT's racial quota.

Argument

1. **I. UT's policy does not comply with the strict scrutiny standard.**

Before even the rise of the Civil Rights Movement in the 1960's, minority groups have been striving to create a foundation of equality in America. Martin Luther King Jr. advocated, "I look to a day when people will not be judged by the color of their skin, but by the content of their character." (I have a dream speech). UT's current admissions system counteracts modern equality philosophy, and further, is a violation of the strict scrutiny standard. Currently, racially discriminatory policies by the government must satisfy strict scrutiny, which was first alluded to in *United States v. Carolene Products Co., 304 U.S. 144.* All cases must pass a two part assessment in order to be constitutional regarding race: narrowly tailored and a compelling state interest.

The current standard that universities must uphold when considering racial classification for admission is narrow tailoring, "meaning no broader than necessary to achieve its goal" (Cornell). UT has put into place a system of affirmative action that amounts to a de facto quota system which was ruled unconstitutional in *Regents of University of California v. Bakke, 438 U.S. 265*. UT currently defines classroom diversity as at least, "more than one African-American student, more than one Hispanic student, and more than one Asian-American student" in each classroom. *Fisher v. University of Texas at Austin, 133 S. Ct. 2411*. UT's admissions policy thus violates the *Bakke* prohibition against a quota system, wherein diversity is only reachable when there are six minority students in each class. This six student quota was originally decided from UT's Proposal which was conducted by only looking at race and no other factors. This un-holistic approach causes UT to disavow any admissions factors other than race when striving to diversify the student body.

It is unclear why UT created its admissions system that considers race as a factor. They stated just two justifications: have UT mirror the diversity demographics in the state of Texas; and "classroom diversity". The Texas Department of State Health Services estimated the Texas population in 2008 as approximately 11 million Caucasians, 2.8 million African-Americans, and 9 million Hispanics. UT's justification for affirmative action is not upheld with the actual data taken, and as a result, the diversity of Texas is not fairly represented. The true population mean of Hispanics in Texas is far above the projected population represented in the classroom diversity quota. If the minority groups of Texas were fairly represented at UT, then the critical mass theory affirmed in *Grutter* would be used to ensure the system is narrowly tailored. *Grutter* also affirms that, "To be narrowly tailored, a race-conscious admissions program cannot use a quota system..."

The Fifth District Court and United States Court of Appeals have deemed UT's affirmative action system narrowly tailored because it is a virtually holistic system and is periodically reviewed (App. 307a-08a, 313a-14a.). When data is observed, such as the 2008 Texas population sample, the representation of minority races is not proportionate to that of the quota set by UT to establish diversity. UT's quota system is a clear violation of the strict scrutiny standard and does not pass the narrowly tailored requirement. UT fails to provide sufficient supporting evidence for using racial preference in admissions.

2. **Affirmative action violates the Equal Protection Clause of the Fourteenth Amendment if it is not narrowly tailored.**

The Equal Protection Clause states that no state shall, "...deny to any person the equal protection of the laws." While the Fourteenth Amendment's original intention upon ratification was the rights and liberties of African-Americans, the U.S. Supreme Court has interpreted this clause to apply to all racial discrimination.

Leading the wave of equal protection cases was *Brown v. Board of Education of Topeka 347 U.S. 483*, stating that separate but equal was inherently unequal. This case equalized the education system by integrating schools and guaranteeing the same standard of education for white and black students.

Twenty years later, the case of *Bakke* held that quota systems, even if used in the interest of diversity to carry out affirmative action, are unconstitutional because they were too mechanical, and applicants such as *Bakke* got into the medical school or were rejected solely on the basis of race. Universities were allowed to consider race when evaluating prospective students for admission, but the use of quotas was strictly forbidden.

In *Gratz v. Bollinger 539 U.S. 244,* the Supreme Court held that the University of Michigan's preferential treatment for minorities in undergraduate admissions violated the Equal Protection Clause. The automatic awarding of one-fifth of the points needed to guarantee admission to every single "underrepresented minority" applicant solely because of race was not narrowly tailored and did not provide the individualized consideration for admission considered in *Bakke*.

contract, the prime contractor would receive additional compensation if it hired small businesses controlled by "socially and economically disadvantaged individuals." Thus, there was an incentive to hire a business controlled by a person of minority status. Furthermore, this ruling held that race is not a sufficient condition for an assumption of disadvantage and the award of favored treatment. In addition, proof of past injury does not in itself establish the suffering of present or future injury.

In *Parents Involved in Community Schools v. Seattle School District 551 U.S. 701*, race was used as the second most important factor when determining a tie breaker. The Supreme Court recognized that the Seattle School District had a compelling state interest to achieve diversity and avoid racial isolation, but struck down the district's assignment plan finding that it was not narrowly tailored. Furthermore, the Court held that the tiebreaker plan was actually targeted toward racial balancing instead of educational benefits from racial diversity.

The similarities in all of these cases are that they unequally apply the law to those of

different races and ethnicities. The key word is equal. The very nature of affirmative action seems motivated by a desire to grant reparations for past crimes and wrongdoings by the United States government. Nevertheless, affirmative action, ironically, is inconsistent with the Fourteenth Amendment and violates the Equal Protection Clause.

Brown v. Board guaranteed that students of all races would have access to the same level of education, attempting to ensure that the Equal Protection Clause would be upheld. In *Bakke,* the Supreme Court struck down quotas because it didn't allow for students to be evaluated individually. In *Gratz,* the automated point system based on race mirrored the quota system's lack of individual consideration, and students were admitted, or not, solely based on their race. Similarly, UT's classroom quota system lacks the same individual consideration of applicants. Moreover, in *Parents v. Seattle*, the lack of narrow tailoring in their tiebreaker plan, where race is a deciding factor in what school a child attends, mirrors that of UT's affirmative action system. *Adarand* parallels UT's affirmative action system. In both cases, minorities were awarded favorable treatment, whether it was in consideration for college admission or an offer for employment. Furthermore, under the *Adarand* ruling, race is not a sufficient condition for the award of favored treatment, i.e. affirmative action. Affirmative action, without narrow tailoring, systematically guarantees that those of a minority race are given favorable treatment, solely on the basis of race.

Proposed standard

Under the standard of strict scrutiny, all racially discriminatory policies set by government or a college admissions office must pass narrowly tailored and compelling state interest.

Conclusion

The affirmative action system at UT does not comply with the strict scrutiny standard. Furthermore, affirmative action violates the Equal Protection Clause of the Fourteenth Amendment. UT has created a quota system in order to define diversity. This system is unconstitutional under *Bakke* because all quotas were deemed unconstitutional. Under strict scrutiny, UT is not narrowly tailoring its affirmative action system. In addition, having a system of affirmative action that is not narrowly tailored is not consistent with the Fourteenth Amendment and violates the Equal Protection Clause. Under equal protection, all U.S. citizens are guaranteed equal protection under the law. Consequently, UT's system of affirmative action specifically favors those of a minority race, giving them additional privileges above the norm. This results in unequal treatment under the law. Remaining

consistent with the Supreme Court's decision in *Adarand v. Pena,* race is not a sufficient condition for the award of favorable treatment, and affirmative action amounts to favorable treatment.

In the case of *Fisher v. Texas*, the Supreme Court should rule that the UT's current system of affirmative action is unconstitutional. UT's use of a quota system is consistent with the precedent set in *Bakke,* which forbids the use of quotas to guarantee diversity. Furthermore, the Supreme Court should rule that a system of affirmative action that is not narrowly tailored violates the Equal Protection Clause because it grants minority students admission to college solely on the basis of race, without consideration on an individual level. The Supreme Court should rule in favor of the respondent, Abigail Fisher because UT's system of affirmative action clearly violates the strict scrutiny standard and the Equal Protection Clause.
