Virtual Supreme Court- Maria Jaramillo and Emma J. N. Formanek

ABIGAIL FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

Appellant Brief

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TABLE OF AUTHORITIES

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STATEMENT OF ARGUMENT

The consideration of race in undergraduate admissions decisions is permitted by the Fourteenth Amendment. It's equal protection clause expressly prohibits a state from denying any person within its jurisdiction equal protection of law. This court has repeatedly emphasized that the consideration of race in admissions programs is essential to that.

First, Regents of the University of California v. Bakke,438 US 265 (1978), directly addresses the question considered here. It reaffirmed that diversity is a compelling interest to be considered in university admissions, as long as it's through holistic review.

Second, Due to United States historically segregated universities, diversity remains a compelling interest. Its consideration works to negate existing discrimination against groups that today's society still hold a prejudicial outlook.

Third Fisher I 570 US (2013) stated that it is the duty of the lower court to decide whether there are no race neutral alternatives to achieve the same benefits of diversity. Fisher v. Texas, 09 F. 50822 (5th Cir. 2014) ruling decided that there aren't, therefore there must be a compelling interest to consider race.

Fourth UT Austin considers race as a part of holistic review of an applicant. During Fisher's year of application many people of her same racial background with lower test scores were admitted, as well as many people from racial minorities who had better grades and test scores that were denied.

ARGUMENT

1. THIS COURT HAS LONG RECOGNISED THAT THE INTENTION THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE WAS TO PROTECT HISTORICALLY MISTREATED DEMOGRAPHICS.

    1. This Court Has Recognized The Consideration Of Race In Admissions Programs Is Essential.

The Fourteenth Amendment expressly states that it will not "deny to any person within its jurisdiction the equal protection of the laws." This was emplaced in order to empower African-Americans that had been historically segregated and discriminated against. In order to remedy and assist them; certain privileges and rights were given to them by the Freedmen's Bureau in the Act of March 3, 1865, ch. 90, § 1, 1866 Stat. 508. After four years, in January of 1869,Act of July 25, 1868, ch. 245, § 2, the activities of the Bureau ceased, but the Educational department continued the activities provided by law or in the Educational department's case until bankruptcy. It was recognized that certain inequalities still had to be addressed with the educational system. President Andrew Johnson in 1867 passed the Act of June 21, 1866, ch. 130, § 2, 1866 Stat. 69 creating the Larger College of Liberal Arts and Medicine for freedmen where everyone was also able to be accepted regardless of race and gender. In order to reach equality and diversity representative of the

to have equal representation proportionate to the population.

    2. The Court Has Long Recognized That The Assigning Of A Quota System Is Unconstitutional

The University of Texas has longed taken into consideration the importance of a diverse class where students do not feel isolated. In order to achieve diversity representative of the population and promotive of an accepting environment; the University of Texas has taken steps to increase the admission of minority students through the ten percent plan where students from Texas high schools that rank in the top 10 percent of their class are automatically admitted which makes up approximately 80% of the incoming class excluding those Texas' schools that do not rank and out-of-state students. The other 20% are

applicants who are reviewed under a holistic review process. As stated in Regents of the University of California v. Bakke,438 US 265 (1978) a quota system is unconstitutional under the equal protection clause, but race can be considered in a factor among many for the purpose of achieving a diverse student body. The University of Texas' holistic review process takes into consideration factors such as grades, test scores, experiences, and race is just one among many as was decided in Grutter v Bollinger,539 U.S.306(2003) that the consideration of race was approved so long as it underwent a holistic review process. When deciding the acceptance of students into the University of Texas through this process, the University of Texas has no specific quota for the number of students from minorities they want to accept therefore following legal standards.

3. The Assignment of Points During The Admissions Process is Unconstitutional

The University of Texas' holistic review process is done by trained admissions officer that reviews the entirety of an applicant. It looks at the applicant as a whole which counteracts the purely grade directed aspect of the top ten percent law in which race is only one factor among many used to review a student in their totality. UT's holistic review process goes under a system called the Personal Achievement Score(PAS) where six factors are considered for review. One of these factors is special circumstances which is broken down into seven attribute, one of which is race. When UT considers race, it is based on context from the applicant's file looking at how the applicant fair in their own and another's world. From there, no individual PAS factor is given any value numerically or is a determining factor for an applicant. Such as that in Gratz v Bollinger,539 US 244 (2003), where being of a certain race gained an applicant 20 or ⅕ of points needed to be accepted. When taking into consideration the person as a whole and looking at race taking into account personal context as only one factor among many, it does not assign points or give preference to any student regardless of any particular race.

2. UNIVERSITIES IN THE UNITED STATES HAVE HISTORICALLY BEEN SEGREGATED. AS A CONSEQUENCE TODAY'S SOCIETY STILL HOLDS A PREJUDICIAL OUTLOOK TOWARDS MANY DEMOGRAPHICS. THE CONSIDERATION OF RACE IN ADMISSIONS PROGRAMS WORKS TO NEGATE THIS EXISTING DISCRIMINATION.

    1. The Ceasement Of Consideration Of Race In Admissions Policies Has Lead To Less Racially Diverse Student Bodies.

Hopwood v. Texas 78 F.3d 932 (5th Cir. 1996) dealt with race being considered in admissions to the University of Texas School of Law. It concluded that,

"(...) the law school may not use race as a factor in law school admissions."

Though this decision went directly against Bakke, it banned the consideration of race in all admissions policies in the 5th circuit. At the University of Texas School of Law specifically minority enrollment shrank dramatically. Black enrollment dropped more than 90% in the first year, from 38 to 4. Mexican-American enrollment dropped nearly 60%, from 64 to 26 American Bar Association, 1992-1998, Table C3-9899. Nationwide National Center for Education Statistics enrollment data Fessender, F., & Keller, J. (2015). How Minorities Have Fared in States With Affirmative Action Bans. New York Times. shows that in most states, where an affirmative action ban was imposed the enrollment percentage of black and hispanic students dropped compared to the state's percentage of black and hispanic college-aged citizens, and in the states where Affirmative Action was reinstated the percentage elevated. This shows that the consideration of race in admissions does have an effect on the diversity of a college student body.

1. Texas passed legislation aimed to create more diverse college experiences after Hopwood

In 1997, just a year after Hopwood, Texas passed Texas House Bill 588 which enacted the so called 10% rule. It stated,

"Each general academic teaching institution shall admit an applicant for admission to the institution as an undergraduate student if the applicant graduated in one of the two school years preceding the academic year for which the applicant is applying for admission from a public or private high school in this state accredited by a generally recognized accrediting organization with a grade point average in the top 10 percent of the student's high school graduating class."

This bill MMA C.S.H.B. 588 75(R)BILL ANALYSIS was enacted to,

"give all students across the state an opportunity to obtain a higher education, Texas colleges and universities need to target students from every region of the state, in rural and inner city areas, as well as students from varying socioeconomic backgrounds."

This shows that the Texas legislature, saw diversity on university campuses as a state interest, and was aware of the deficit created by Hopwood and saw it necessary to enact bill 588 in hopes that it would admit the students who did best in their given opportunities.

2. Texas Universities Have Historically Been Segregated.

    1. The first African-American student was admitted to a University of Texas a meer 66 years ago, and after a judicial battle.

Hermann Marion Sweatt was denied admissions to University of Texas School of Law, because of his race. The University would not admit a black student under Plessy v. Ferguson, 163 U.S. 537 (1896). In 1950 Sweatt appealed this decision Sweatt v. Painter, 339 U.S. 629 (1950), and became the first black student at a Texas University. As mentioned before Fessender, F., & Keller, J. (2015). How Minorities Have Fared in States With Affirmative Action Bans. New York Times. even now the percentage of African-American college aged Texas citizens is 3 times higher than the percentage of enrolled college students that are African-American.

3. Some Of The Most Educated And Unbiased Americans Make Racially Biased Commentary. A University Admissions Program Cannot Be Expected To Be Unbiased Without Considerations To Combat Inherent Bias.

Supreme Court justices are selected for their position for their ability to be apolitical and their legal formalism. However even these most apolitical of Americans make racially biased statements once in awhile. Justice Antonin Scalia is cited to have said Wang, Y. (2015, December 10). Where Justice Scalia got the idea that African Americans might be better off at 'slower-track' universities. The Washington Post.,

"(...) it does not benefit African Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school — a slower-track school where they do well."

He went on to say:

"One of the briefs pointed out that most of the black scientists in this country don't come from schools like the University of Texas.... They come from schools where they do not feel that they're being pushed ahead in classes that are too fast for them."

This comment of Scalia's implies that not only are African-Americans somehow "slower" in learning, but also that they can't make decisions for themselves. That is by saying that they can't tell when a school is too rigorous for them or can't look up online that their gpa or test

scores don't meet the required standard. University admissions counselors have not been trained their whole lives in legal formalism, and yet if race is disregarded from admissions programs, they will still be expected to make unbiased admissions decisions. Seeing as even a Supreme Court justice suggests by his speech that African-American students are "slower" in learning, university admissions counselors are not probable to be able to make admissions decisions objectively regardless of race. This creates a compelling interest for there to be a consideration combating this inherent bias.

4. . Minorities Students Feel A Disconnect With Their Student Body.

Universities in Texas still face racial problems within their own universities like in Texas A&M West, R. (16, February 18). Long road of U.S. race relations passes through Texas A&M campus. TribTalk.org. where it "has worked to dispel notions of a racially insensitive — if not hostile — campus". Although this is the main goal of many universities the enrollment of African-American students barely reaches five percent. The University of Texas at Austin, in the year of 2008 actually saw an increase from 4.2% to 4.4% of African-Americans enrolled. Still there is clear under representation at UT with the state's general population consisting of 11.9 African-Americans. Fisher, argues that race played a factor into how her PAS was calculated where the facts at hand indicate that the problem has nothing to do with intellectual ability but rather the problems faced with not making the top ten percent cut. Then we must ask ourselves this question why are we seeking minorities. In the last year, we have seen several cases where race played a factor of the uneasiness students felt within their own schools. That very unease was

"expressed by African-American students at Yale, UCLA, the University of Mississippi, the University of Maryland, Washington University and Ithaca College, in addition to high-profile incidents at the universities of Oklahoma and Missouri. Last December, then-U.S. Secretary of Education Arne Duncan reported that during his tenure, there were about 1,000 complaints of on-campus racial harassment."

There is a compelling interest within this very argument that the universities need the holistic review system to obtain a critical mass of minorities.

3. PREVIOUS RULING DECIDED THAT THERE ARE NO RACE NEUTRAL ALTERNATIVES TO AFFIRMATIVE ACTION .Third Fisher I (2013)-570 US (2013) stated that it is the duty of the lower court to decide whether there are no race

neutral alternatives to achieve the same benefits of diversity. Fisher v. Texas, 09 F. 50822 (5th Cir. 2014) ruling decided that there aren't, therefore there must be a compelling interest to consider race in college admissions in order to bring about diversity.

1. The Supreme Court Previously Decided That The Lower Court Is To Reconsider Whether There Are Any Race Neutral Alternatives To Affirmative Affirmative Action

When Fisher's case first arrived at the Supreme Court, It was sent Back to The 5th circuit, saying,

"The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If "'a non-racial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" Wygant v. Jackson Bd. of Ed., 476 U. S. 267, 280, n. 6 (1986) (quoting Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578–579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." Fisher I (2013)-570 US (2013)

The burden to prove that there are no workable race-neutral alternatives to affirmative action ie. if there was was a compelling interest to use race as an admissions consideration was placed on University of Texas at Austin. Jurisdiction was given by the Supreme Court to The 5th circuit court of Appeals.

2. The 5th Circuit Court Of Appeals Saw Race Considerations Necessary In The Compelling Interest Of Maintaining A Diverse Student Body

.Fisher v. Texas, 09 F. 50822 (5th Cir. 2014) stated,

"In both Fisher and Grutter, the Supreme Court endorsed Justice Powell's conclusion that "attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education;" that in contrast to "[r]edressing past discrimination, . . . [t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes"; that the "academic mission of a university is a special concern of the First Amendment . . . [and part] of the business of a university [is] to provide that atmosphere which is most conducive to

speculation, experiment, and creation, and this in turn leads to the question of who may be admitted to study." It signifies that this compelling interest in "securing diversity's benefits . . . is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students." Rather, "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."

4. UT AUSTIN USES RACE AS PART OF A HOLISTIC REVIEW.

During Fisher's year of application many people of her same racial background with lower test scores were admitted, as well as many people from racial minorities who had better grades and test scores that were denied.

1. Fisher Lacked Qualifications.

In the case of Abigail Fisher, who did not qualify for the top ten percent law, her application underwent the holistic review process instead of being automatically admitted. That very year in 2008 when Fisher applied, 92% of the spots for freshman students were taken automatically by those who qualified in the top ten percent of in-state high school students. Her GPA of 3.59 and SAT score of 1180 were not extraordinary or worth particular merit in the application which did not help her personal achievement score. UT also took into account the two required essays, leadership, activities, service, and special circumstances. In the subgroup of the special circumstances, it includes the socio economic status of the student and the school from which they graduated from, whether they come from a single parent home or not, whether English was spoken at home, and race. Considering this was a highly competitive year for applicants at UT, it is evident that her unremarkable test scores and grades played a factor, and that other parts of her application may have been lacking as well. If race solely did somehow place one student above the other, then how could forty-two other white students with lower test scores and grades than Fisher be admitted while more than a hundred minority applicants with high test scores and grades than Fisher were denied. The fact of the matter is it would be impossible to go back and check if race somehow played a factor in her application because of UT's holistic review system. Race is not used to discriminate against any applicant it is simply used to evaluate different circumstances one applicant might have faced based on an individualized evaluation provided by the context of an application following the ruling of Grutter.

2. Fisher Lacks Claims For Compensation

In the case of Abigail Fisher, her admission was rejected at the University of Texas at Austin, but she was offered the option to study at one of the other University of Texas' campuses where if she maintained a GPA of 3.2 for her freshman year; she could attend the University of Texas at Austin the following year as a sophomore. She declined this option and went to LSU instead. Her desire to attend UT has become moot since she graduated from LSU and the request for application and associated expenses wouldn't help with the injuries she has claimed. In the instance of her application fees, she would have had to pay regardless of whether or not UT had accepted her application and there is no longer any chance of her attending UT since her graduation.

CONCLUSION

The consideration of race in undergraduate admissions decisions, when done holistically as one of many considerations is permitted by the Fourteenth Amendment's equal protection clause, because a want for diversity, and combating of remaining biases, provides a compelling state interest to consider race. For all of the reasons stated above, this Court should uphold the judgement of the Fifth Circuit Court of Appeals.

ORAL ARGUMENT: https://www.youtube.com/watch?v=W4oBg7Jj7LE&edit=vd

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