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Divided SCOTUS Considers Affirmative Action Again

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The legitimacy of the University of Texas at Austin's affirmative action program for admissions was still very much up in the air following heated oral arguments at the U.S. Supreme Court Dec. 9, and it could be for some time.

This is the second high court trip for the case, after the justices first took it up in Fisher v. University of Texas at Austin, 81 U.S.L.W. 4503, 2013 BL 167358 (U.S. June 24, 2013).

The case, however, has implications beyond just the University of Texas at Austin. Universities across the country will be looking to what the court says in this case, U.S. Solicitor General Donald B. Verrilli Jr. said. Verrilli argued on behalf of the U.S. as amicus curiae supporting the university.

But it wasn't clear that those universities would get much guidance from the court, as some justices suggested that the case should have gone back to the district court for more fact finding before heading back to the Supreme Court.

Justice Anthony M. Kennedy, who is considered a critical vote in this case, said, “we're just arguing the same case.”

Getting to Four

If the justices do get to the merits of the case, the university, which won below, will only need four votes to win.

That's because Justice Elena Kagan, whose office weighed in on the case while she was Solicitor General, is recused.

Justices Ruth Bader Ginsburg and Sonia Sotomayor seemed like reliable votes for the university, with Justice Stephen G. Breyer leaning that way too.

But a clear fourth vote didn't emerge during oral arguments.

Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Samuel A. Alito Jr. were critical of the university's affirmative action programs, doubting that the "extraordinary power" to use race was actually necessary here.

Although Justice Clarence Thomas was characteristically silent during oral argument, he wrote that the use of race in university admissions should be "categorically prohibited" in Fisher I.

The outcome, therefore, seems to turn on Kennedy. Kennedy has never slammed the door on affirmative action programs, but he's never voted to uphold one either, Cato Institute's Ilya Shapiro, who filed an amicus brief in the case, told Bloomberg BNA Sept. 1 (84 U.S.L.W. 337, 9/15/15).

Death by a Thousand Cuts

Verrilli said that university affirmative action programs aren't just important for the universities and their student bodies.

Diverse graduates are "imperative" to the effectiveness and "the very legitimacy" of the military, he said.

Verrilli also noted that several large companies filed amicus briefs in support of the university here.

"Corporate America has told you that having a workforce that is able to function effectively in diverse situations is critical," he told the justices.

Breyer agreed, noting that the briefs in the case "suggest that people in the universities and elsewhere are worried" that the court will "kill affirmative action through a death by a thousand cuts."

"We promised in Fisher I that we wouldn't," Breyer said, noting that the narrow 7–1 opinion "reflected no one's views perfectly."

Holistic Review

"Fisher I obviously put together a court of people who don't agree necessarily on affirmative action," Breyer said, but the court generally agreed that the university had to do a better job of articulating why it needed to consider race.

In order to use race, the university had to show that "no workable race-neutral alternatives" would produce the benefits of diversity, the court said in Fisher I.

So why won't other race-neutral alternatives work, Breyer asked Latham & Watkins LLP's Gregory G. Garre, who argued for the university.

Garre said the university uses other race-neutral admissions methods, most notably a “Top 10 Percent” plan mandated by Texas law.

Under that plan, the university automatically admits Texas students that graduate in the top 10 percent of their high school class. Admissions under the program are capped by law at 75 percent of the total class.

Race, therefore, is only a factor in the remaining 25 percent of spots, Garre said.

The Texas legislature adopted the Top 10 Percent plan in order to increase diversity at the university.

Ginsburg explained that although technically race-neutral, race works in the background of the program.

The plan is “so obviously driven by one thing only, and that thing is race,” she said. “It's totally dependent upon having racially segregated neighborhoods, racially segregated schools, and it operates as a disincentive for a minority student to step out of that segregated community and attempt to get an integrated education,” Ginsburg said.

The “way that the Top 10 Percent law admits minority students is by admitting those students from the lower-performing, racially identifiable schools,” Garre said.

So it actually produced less diversity in that the university wasn't “getting a variety of perspectives among African-Americans or Hispanics,” he said.

Therefore, with regard to the remaining 25 percent of spots, the university undergoes a “holistic” review of applicants, where race is one of many factors considered, Garre said.

Physics Diversity?

That reasoning is based on a “really pernicious stereotype,” Alito said.

The argument suggests that “there is something deficient about the African-American students and the Hispanic students who are admitted under the Top 10 Percent plan,” Alito said.

“It's kind of the assumption that if a black student or a Hispanic student is admitted as part of the Top 10 Percent plan, it has to be because that student didn't have to compete against very many whites and Asians,” he said.

Garre responded that the determination that the holistic review was a “necessary complement” was based on the “obvious way in which the Top 10 Percent plan operates.”

He added that without considering race in that holistic review, the admissions for the remaining 25 percent of seats “would approach an all white enterprise.”

“What unique perspective does a minority student bring to a physics class,” Roberts wanted to know.

Garre responded that the Supreme Court has already considered that question, and held that educational diversity is a compelling interest permitting the use of race in admissions, most notably in Grutter v. Bollinger, 539 U.S. 306 (2003).

Numbers Matter

Putting that aside, Alito wanted to know how many people were admitted under the holistic review that wouldn't have been if race wasn't considered.

“Given the contextualized and individualized nature of that inquiry, that's going to be difficult,” Garre said.

But he said black and Hispanic enrollment “doubled from 2002 to 2008 from about 3 percent to about 6 percent” under the holistic review.

That doesn't distinguish the number of students that would have been admitted even if race wasn't considered, Alito said.

Kennedy said the exact number of students admitted because of race is the kind of thing that the court should know.

Both the “litigants, and frankly this court, have been denied the advantage and the perspective that would be gained if there would be additional fact-finding under the instructions that Fisher [I] sought to give,” he said.

“The number is important to me,” Roberts said.

At “some point the actual benefit of the program turns out to be not really worth the very difficult decision to allow race to be considered if at the end of the day it generates” a small number, Roberts said. “And I'm trying to figure out what that number is,” he said.

Critical Mass?

Arguing for Abigail Fisher, the student denied admission to the university, Bert W. Rein, of Wiley Rein LLP, Washington, said the dissenting judge below tried to calculate that number.

The judge “made different assumptions,” and determined that it was a “very small number,” Rein said.

The judge's “most realistic estimate was that it would yield only 15 African-Americans and 40 Hispanic students in a class of 6,000. So we're talking about a very small effect,” Rein said.

That doesn't come close to impacting the so-called critical mass needed to ensure that a vibrant exchange of ideas is occurring on campus, he said.

But Breyer said the university wasn't using a critical mass approach, but instead making "a diversity-related judgment of what is necessary," taking into account several other, race-neutral factors.

Will It End?

Roberts, however, wondered when that necessity would end.

"Grutter said that we did not expect these sort of programs to be around in 25 years, and that was 12 years ago. Are we going to hit the deadline," Roberts asked.

He added that it was important in Grutter that these were temporary programs, because "we're talking about giving you the extraordinary power to consider race in making important decisions."

This "can't go on forever," Roberts said. When "do you think your program will be done?"