

Top court narrows affirmative action

In a 7-1 ruling, the justices return a college admissions case to lower courts, saying schools must undergo 'strict scrutiny' to justify their diversity goals.

By: Eleanor Chute – June 25, 2013

The U.S. Supreme Court has kept alive the use of affirmative action in college admissions, but it has made clear schools must undergo "strict scrutiny" to prove that they need to consider race to meet diversity goals.

The high court ruled, 7-1, Monday in a case involving a white woman, Abigail Noel Fisher, who challenged the race-conscious admissions policies at the University of Texas at Austin after she was rejected in 2008.

The justices sent the case back to the lower courts, saying the lower courts had not applied "the correct standard of strict scrutiny."

Ken Gormley, dean of the Duquesne University Law School, gave this analogy: The high court has "simply reaffirmed the rules of the football game and blown the whistle on this play because they think the lower courts didn't handle it properly. ...

"In fact, it is a rather striking pronouncement by the court that we are not going to disturb the prior precedents in the area."

Precedents, also involving white potential students, include the 1978 case involving Allan Bakke and the University of California at Davis and the 2003 case involving Barbara Grutter and the University of Michigan at Ann Arbor.

Grutter permits the use of race as one of many "plus factors" in evaluating an individual applicant.

Justice Anthony Kennedy wrote the opinion for the majority. Justices Antonin Scalia and Clarence Thomas each wrote a concurring opinion.

Justice Ruth Bader Ginsburg dissented, saying she believes the appeals court already had completed its inquiry and that its ruling in support of the university should have been affirmed.

Justice Elena Kagan did not participate in the decision.

The court noted that each applicant must be evaluated as an individual and that race or ethnicity cannot be the defining feature of the application nor can a certain percentage be set.

The majority opinion stated that attaining a diverse student body "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."

It noted the university must prove in court "that the means chosen by the university to attain diversity are narrowly tailored to that goal."

The majority wrote that "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."

The high court stated that the appeals court said the petitioner could challenge only whether the decision to reintroduce race into admissions was made in good faith.

After oral arguments last year some expected the high court to strike down affirmative action.

Instead, the court gave a narrow ruling that gave each side cause to find something positive.

Edward Blum of the Project on Fair Representation of Alexandria, Va., which provided counsel for Ms. Fisher, issued a statement from her saying, "I am grateful to the justices for moving the nation closer to the day when a student's race isn't used at all in college admissions."

Ilya Shapiro, senior fellow in constitutional studies at the CATO Institute in Washington, D.C., which filed a friend of the court brief on Ms. Fisher's side, said in an interview, "Practically, in

the long term, it's going to make it harder for public education institutions to use race. It will be hard for them to prove that racial preferences are narrowly tailored to achieving educational diversity."

Bill Powers, president of the University of Texas at Austin, issued a statement saying the school is "encouraged" by the ruling and believes the university's policy can withstand strict scrutiny.

"We remain committed to assembling a student body at the University of Texas at Austin that provides the educational benefits of diversity on campus while respecting the rights of all students and acting within the constitutional framework established by the court," he stated.

In a telephone news conference with leaders of other civil rights organizations, Wade Henderson, president and CEO of the Leadership Conference on Civil and Human Rights, called the decision a victory in working to build a more inclusive education system.

In the news conference, Sherrilyn Ifill, president and director-counsel for the NAACP Legal Defense and Educational Fund, said she was "gratified" the high court "reaffirmed the principles of equal protection" and said she believes the University of Texas -- and others -- can meet the "sharper and tighter" standard set by the court.

With this decision, Michael Foreman, a law professor who is director of Penn State University's Civil Rights Appellate Clinic, said Penn State doesn't use race in admissions, but "for most public institutions, I think they will go back to the extent that they're using race."

At one point, the University of Texas at Austin stopped considering race in admissions, but it returned to using "explicit consideration of race" in 2004, the court stated.