Justices duck major ruling on affirmative action

By Lawrence Hurley – June 24th, 2013

The U.S. Supreme Court avoided a major ruling on affirmative action in college student admissions on Monday, but warned that university policies that take race into account could be more vulnerable to legal challenges in the future.

In a lopsided 7-1 vote that few expected, the justices sent a case about the policy at the University of Texas at Austin back to a lower court for reconsideration.

That means Abigail Fisher, a white woman from suburban Houston, will have a second chance to argue that she was wrongly rejected entry to the university while minority students with similar grades and test scores were admitted thanks to the admissions policy.

To the relief of affirmative action supporters, the high court left intact existing court precedent that allows for limited consideration of race in university admissions.

Elaborating on how its previous rulings should be interpreted, the Supreme Court ruled that when an appeals court rehears the case, it must show less deference to the university when analyzing whether the policy violated the Constitution's guarantee of equal protection That means the University of Texas program still hangs in the balance.

Lee Bollinger, the president of Columbia University and a leading affirmative action supporter, said the ruling would likely further embolden opponents of such programs.

"People who are opposed to this are very determined," he said. "I would fully anticipate challenges continuing."

The justices' tussle with this divisive issue reflects a political debate that has been ongoing since President John Kennedy's administration of the early 1960s over the sort of "affirmative action" to be taken to help blacks and other minorities.

The Supreme Court has been at the center of disputes over when universities may consider applicants' race since 1978, when it forbade quotas in its groundbreaking Bakke case decision but said schools could weigh race with other factors.

Many court-watchers, basing their predictions on October's oral arguments and the court's more conservative makeup since the last big decision on the matter in 2003, had thought the Texas program was doomed and the court might cut back on the use of affirmative action - admissions preferences that benefit minorities to diversify student enrollment - in broader terms.

In an opinion by Justice Anthony Kennedy, the court sent a warning to affirmative action advocates that they will need ironclad legal arguments to justify such programs in the future if they are to survive legal challenges.

The 5th U.S. Circuit Court of Appeals in New Orleans, which upheld the program the first time it considered it, must now scrutinize the policy even more closely, including consideration of whether the university could have used a race-neutral alternative, Kennedy said.

The university "must make a showing that its plan is narrowly tailored to achieve the only interest that this court has approved in this context," Kennedy wrote.

Under court precedent, that would mean a program that takes into account a broad array of qualifications and characteristics "of which racial or ethnic origin is but a single though important element."

Liberal Justice Ruth Bader Ginsburg wrote the sole dissenting opinion, saying she would have upheld the Texas program.

The Supreme Court avoided making a decision on whether to overturn the 2003 ruling, Grutter v. Bollinger, written by the retired Justice Sandra Day O'Connor that let universities use race in admissions as one factor among others that make particular applicants more desirable.

"It's a relief," said Jon Greenbaum, chief counsel for the Lawyers' Committee for Civil Rights Under Law, which filed a brief backing the university in the case. The court reiterated that "colleges can use affirmative action plans that consider race when it is necessary to achieve diversity," he added.

'ADDED SOME TEETH'

While the Grutter decision remains on the books, conservative critics of affirmative action had reason to be pleased because of Kennedy's instructions to lower courts on how to interpret it. "He added some teeth to Grutter," said Ilya Shapiro, a lawyer at the libertarian Cato Institute.

The University of Texas at Austin fills most of its freshman classes by granting automatic admission to in-state students in the top 10 percent of their high school classes.

A year after the 2003 Grutter ruling, the university decided it had leeway to consider race more directly. Now, for the slots not already filled by the top 10 percent, it considers an applicant's race as one of many factors.

Fisher, who has since graduated from Louisiana State University, said that her race kept her from being admitted and that the top 10 percent rule was enough to improve diversity.

Having won the opportunity to be heard again in the appeals court, Fisher said in a statement that she was "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."

"We're encouraged by the Supreme Court's ruling in this case," Bill Powers, the president of the University of Texas at Austin, said in a statement, adding that school officials believe their policy can survive another round of litigation.

Even with no sweeping ruling, the court sent a pointed reminder to judges that they must "actively and skeptically review government programs that allocate benefits or burdens according to race," said Jennifer Mason McAward, a law professor at Notre Dame Law School who once clerked for O'Connor.

Partly due to the language Kennedy used about the appeals court's earlier ruling, the judges rehearing the Texas case "might be skeptical" about the university's arguments that it needs more than just the 10 percent program, McAward said.

Some believe the university still can prevail. Its lawyers must "more fully explain" why the university wanted the level of diversity it was aiming for, said Sherrilyn Ifill, president of the National Association for the Advancement of Colored People's Legal Defense and Educational Fund, which supports the program.

Justice Elena Kagan, believed to be a supporter of affirmative action, recused herself from the case, presumably because she had worked on it as U.S. solicitor general under President Barack Obama.

Monday's ruling will put the spotlight on an affirmative action case on the docket for the Supreme Court's next term, which starts in October. That case concerns a Michigan law that bans any affirmative action in public college admissions.

The case decided Monday is Fisher v. University of Texas at Austin et al, U.S. Supreme Court, No. 11-345.