Fifth Circuit Issues Important Ruling on Affirmative Action in Higher Education

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Earlier this week, in *Fisher v. University of Texas*, a divided panel of the U.S. Court of Appeals for the Fifth Circuit upheld the constitutionality of the undergraduate admissions program at the University of Texas at Austin. Applying the less deferential standard of review mandated by the U.S. Supreme Court in 2013, the Fifth Circuit ruled that UT's consideration of race in admissions is constitutional because it is narrowly tailored to obtain the educational benefits of diversity and there are no workable race-neutral alternatives that will achieve that goal. Although the Fifth Circuit's ruling binds only colleges and universities in Texas, Mississippi, and Louisiana, its analysis will likely be viewed as persuasive by other courts hearing challenges to affirmative action programs. However, the ruling may give the Supreme Court another opportunity to strike down such programs altogether.

Many college and university administrators expected the Supreme Court to invalidate all consideration of college applicants' race when it first ruled in the *Fisher* case in June 2013. Instead, seven of the eight non-recused justices joined in an opinion that appeared to preserve the status quo and accepted the Court's earlier affirmative action rulings as given. At the same time, the Supreme Court's opinion made it harder to defend race-conscious admissions programs in several ways: by requiring each school to articulate a "reasoned, principled explanation" for its interest in the educational benefits of diversity, limiting the deference that courts will apply in reviewing challenged admissions procedures, requiring schools to prove the absence of workable race-neutral alternatives, and discouraging the expeditious resolution of lawsuits through summary judgment.

The Supreme Court remanded *Fisher* and instructed the Fifth Circuit to determine whether UT had "offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." On Tuesday, the Fifth Circuit held that UT had indeed passed this demanding test. First, the court found that between 1997 and 2004 UT and the Texas legislature had attempted a broad range of race-neutral measures to achieve the diversity essential to its education mission, without success. These measures include the so-called Top Ten Percent Plan, which guarantees Texas residents graduating in the top 10% of their high school class admission to any public university in Texas and, as the Fifth Circuit observed, relies on "increasing resegregation in Texas public schools" to boost minority enrollment in college. (A modified version of this plan remains in effect in Texas today.) UT also initiated scholarship programs targeting under-represented and low-income populations and first-generation students and expanded outreach, recruitment, and financial-aid efforts. Despite these efforts, UT failed to achieve the "critical mass" of African-American and Hispanic students it sought. Second, the Fifth Circuit found that UT's consideration of race in its search for "holistic diversity" is limited, narrowly tailored, and consistent with programs previously upheld by the Supreme Court. Judge Emilio Garza dissented, arguing that UT failed to adequately define its goal of obtaining a "critical mass" of student diversity and that the majority was too deferential to UT on the issue of narrow tailoring.

This week's ruling is unlikely to be the last word on the constitutionality of UT's program. The plaintiff may ask for a rehearing before the 15 active judges on the Fifth Circuit. She may also appeal the case once again to the Supreme Court. Neither court would be obligated to rehear the case. However, the Supreme Court's ruling in *Schuette v. Coalition to Defend Affirmative Action* earlier this year demonstrates that the justices remain bitterly divided about the future of race-conscious policies in higher education. Some justices, like Justices Scalia and Thomas, believe they should end now. Others, like Justice Sotomayor, believe they remain essential "to achieve a diverse student body when race-neutral alternatives have failed." On the other hand, UT's unusually extensive record of race-neutral alternatives and the limited scope of its race-conscious program continue to make this case a poor vehicle for advocates seeking to undo affirmative action in higher education altogether. The next big case may involve a college or university that is not so well prepared for litigation.

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On behalf of our client the Asian American Legal Defense and Education Fund, a leading civil rights organization, Foley Hoag filed amicus briefs in the U.S. Supreme Court and U.S. Court of Appeals for the Fifth Circuit urging those courts to affirm the constitutionality of the undergraduate admissions program at the University of Texas.

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