LEGAL UPDATES PUBLISHED: JUNE 28, 2013

Affirmative Action in the Higher Education Admissions Process: Less Deference to Judgment of University Officials

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On June 24, 2013, the Supreme Court released its opinion in *Fisher v. University of Texas*, a case that challenged the University of Texas at Austin's consideration of race in its undergraduate admissions process. *Fisher* presented an opportunity for the court to further limit (or perhaps prohibit) the use of race-conscious admissions policies in higher education. However, in a 7-1 decision, the Supreme Court remanded the case to the U.S. Court of Appeals, Fifth Circuit, for further consideration in light of that court's failure to apply the appropriate level of "strict scrutiny" to the university's policy. *Fisher* keeps in place the Supreme Court's prior precedent in *Grutter v. Bollinger* (2003), which permits the use of race in admissions under limited circumstances. But *Fisher* ensures that, from here forward, lower courts will analyze race-conscious admissions programs with greater scrutiny that gives less deference to the judgment of university officials.

In *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan Law School's race-conscious admissions policy that was intended to help achieve a "critical mass" of underrepresented minorities in the law school. In *Grutter*, the court used the "strict scrutiny" standard to evaluate whether the policy: (1) served a compelling governmental interest; and (2) was narrowly tailored to achieve that interest. The court held that diversity in the law school's educational programs was a compelling interest and that the law school's race-conscious admissions policy was narrowly tailored to achieve that interest because, rather than using quotas or a fixed-point system, it considered race along with all other admissions factors in a highly individualized review of each applicant.

Fisher is the first case since *Grutter* in which the court has addressed the use of race in the admissions process. The plaintiff Abigail Fisher, a white female who was denied admission to the University of Texas at Austin, challenged as unconstitutional the university's two-tiered admissions program by which the university admits all high school seniors ranked in the top 10 percent of their high school classes and considers race as a factor in admission for the remainder of the in-state freshman class. Along with race, the university considers community service, work experience, extracurricular activities, awards and other factors. Fisher did not explicitly ask the Supreme Court to overrule its prior precedent in *Grutter*. Instead, she argued that the second-tier of the university's admissions policy is not narrowly tailored to achieve the compelling interest of diversity because the first-tier of the program – automatic admission for high-ranking seniors – creates sufficient diversity in and of itself.

The trial court and Fifth Circuit determined that the university's race-conscious admissions policy complied with *Grutter* and was not unconstitutional. In so doing, those courts deferred to the good faith judgment of the university with respect to both whether racial diversity in the university is a compelling interest and whether the race-conscious admissions policy is narrowly tailored to achieve that interest. In other words, the lower courts held that, for Fisher to show the university's race-conscious admissions policy was unconstitutional, she had to demonstrate that the university did not adopt the race-conscious admissions policy in good faith.

The Supreme Court reversed, holding that the lower courts gave improper deference to the judgment of the university. Under the strict scrutiny standard, explained Justice Anthony Kennedy writing for the majority, courts may defer to an institution's judgment regarding whether diversity in its educational programs is a compelling interest. However, courts may *not* defer to an institution's judgment with respect to whether a race-conscious admissions policy is narrowly tailored to achieve that interest. Instead, "it is for the courts, not for university administrators, to ensure that 'the means chosen to accomplish the government's asserted purpose [in diversity] must be specially and narrowly framed to accomplish that purpose.' " This narrow tailoring "requires that the reviewing court verify that it is 'necessary' for the university to use race to achieve the educational benefits of diversity." The court also held that, "Although 'narrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,' strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.' "

Ultimately, the Supreme Court held that the lower courts "improperly confined the strict scrutiny inquiry in too narrow a way by deferring to the university's good faith in its use of racial classifications." As a result, the Supreme Court remanded the case to the Fifth Circuit and directed it to re-examine the constitutionality of the university's race-conscious admissions policy under the more exacting standard.

What This Means to You

Although *Fisher* leaves in tact *Grutter*'s holding that higher education institutions may, in limited circumstances, consider race as one of many factors in a holistic admissions determination, *Fisher* makes clear that lower courts cannot defer to an institution's determination that a race-conscious admissions policy is truly necessary to achieve educational diversity. Instead, lower courts must independently determine whether an institution has considered, and legitimately rejected, other race-neutral methods of achieving diversity.

All institutions of higher education with race-conscious admissions policies should review those policies to ensure compliance with the standards set forth in *Grutter*, as considered in light of the exacting standard articulated by *Fisher*. This means institutions should, at a minimum, (1) re-evaluate and reconfirm their determination that racial diversity in their educational programs is a compelling interest; (2) consider whether there are race-neutral means of achieving such diversity (such as admissions criteria that focus on economic diversity, language skills, single-parent families, etc.); and (3) if the institution determines only a race-conscious policy can further the interest of diversity, ensure that its policy considers race as one of many factors without using quotas or point systems. Institutions should document all levels of this analysis so that if their race-conscious admissions policy is challenged, there is a record documenting the process the institution followed in arriving at decisions, the alternatives that were considered and rejected, and the ways in which the chosen approach helps to achieve diversity.

Contact Information

If you have questions or require more information, please contact your Husch Blackwell attorney, Hayley Hanson at 816.983.8377 or Derek Teeter at 816.983.8331.

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