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Supreme Court to Revisit Affirmative Action in College Admissions

By O. Andrew F. Wilson – October 22, 2015

This term, the U.S. Supreme Court will reconsider the role of race in college admissions when it hears arguments in *Fisher v. University of Texas at Austin*. This will be the second time the Court has considered UT Austin's admission process. The fact that the Court has chosen to review the case a second time suggests that it may be poised to deliver a substantial decision in this evolving area.

Abigail Fisher, who is Caucasian, challenges UT Austin's denial of her admission and argues that its consideration of race among the criteria for admission violates the Fourteenth Amendment. The school's process involves two tracks. First, about 80 percent of students are accepted pursuant to Texas's Top Ten Percent Law that provides automatic admission for the top 10 percent of students from each Texas high school that complies with certain standards. The remaining students are admitted through a "holistic" selection process that ranks applicants using both an Academic Index (calculated using standardized test scores, class rank, and high school course work) and a Personal Achievement Index (calculated using two required essays, the applicant's extracurricular activities, honors, awards, community service, personal circumstances, and race). The university's basis for including race in this latter calculation is to achieve its goal of obtaining a "critical mass" of minority students.

In *Fisher I,* the Supreme Court previously reversed the Fifth Circuit's determination that UT Austin's process met strict scrutiny on the grounds that the appellate court had been too deferential to the university in judging whether its process met its stated goal. The high court did not disturb the conclusion from *Bakke* that the "attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." But it held that the standard from *Gratz* and*Grutter*—that race may only be considered by an admissions process that can withstand strict scrutiny—must be applied without deference to educational institutions. The Court acknowledged the compelling interest in the educational benefits that flow from a diverse student body but held, "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts."

On remand, the Fifth Circuit's majority held that UT Austin's program satisfied this non-deferential standard because of the school's "necessary use of race in a holistic process and the want of workable alternatives." The majority also dismissed the criticism that "critical mass" was not a numerically defined threshold on the grounds that the school's process had the permissible goal of "achieving the educational benefits of diversity within that university's distinct mission, not seeking a percentage of minority students that reaches some arbitrary size." But Judge Garza, writing in dissent, faulted the university for failing to adequately define its goal of obtaining a "critical mass." In addition, he reasoned that "the majority's failure to make a meaningful inquiry into the nature of 'critical mass' constitutes precisely . . . [the] deference" rejected by the Supreme Court in *Fisher I.*

At first, *Fisher II* seems like an unlikely candidate for advancing the Court's affirmative-action jurisprudence. As the majority of the Fifth Circuit observed, there are strong threshold standing questions including that—regardless of how her race was considered— the petitioner's Academic Index would have prevented her admission and the fact that she has now completed a degree from another undergraduate institution. In addition, as Justice Kagan is recused, only eight of the justices will preside over the decision.

Despite these issues, and its previous review, the fact that the Court has decided to revisit *Fisher* this term portends a more substantial decision on affirmative action. On one end of the spectrum, the Court could answer Judge Garza's critique and explain how universities should define racial objectives that satisfy non-deferential strict scrutiny. On the other end, however, some commentators have speculated that a second review of UT Austin's program—which the Fifth Circuit described as "nearly indistinguishable from the University of Michigan Law School's program in *Grutter*"—signals a willingness to overrule G*rutter* entirely and reverse its holding that universities may consider race in admissions as part of a holistic review process. Regardless of where the Court lands on this spectrum, the coming decision promises a material development in the law on race and admissions under the Fourteenth Amendment.

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O. Andrew F. Wilson is a partner with Emery Celli Brinckerhoff & Abady LLP in New York, NY.