ALERTS

US Supreme Court Issues Affirmative Action Decision

July 16, 2013

On June 24, 2013, the Supreme Court of the United States issued its long-awaited opinion in *Fisher v. University of Texas at Austin*, where the Court was asked to consider the constitutionality of a race-conscious admissions policy at the University of Texas at Austin. The case has been followed closely by colleges and universities concerned about what impact it might have on diversity and admissions.[1] In a 7-1 decision (Justice Kagan recused herself), the Court held that the United States Court of Appeals for the Fifth Circuit misapplied the "strict scrutiny" standard required by the Court's previous decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003)and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and therefore vacated the Circuit Court's decision and remanded the case so the Circuit Court could apply the correct standard.

According to the Court, "racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Fisher*, at 18 (quoting *Grutter*, 539 U.S., at 326). Thus, the inquiry involves two steps: a determination that there are "compelling governmental interests" involved, and a second determination of whether the means chosen are sufficiently "narrowly tailored" to meet that goal.

The *Fisher* opinion confirmed that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." *Id.* (quoting *Bakke,* 438 U.S., at 311-312). Further, the Court agreed with the lower court's decision to defer to the University's judgment "that a diverse student body would serve its educational goals,"

though the Court emphasized that there must still be "a reasoned, principled explanation for the academic decision." *Id.*, at 19. The Court took issue, however, with the lower court's analysis of the "narrow tailoring" prong. The Court stated that "the University receives no deference" in this analysis and criticized the lower court for "confin[ing] the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications," stating that, instead, a "searching examination" needs to be performed to ensure that race or ethnicity are merely considered in the application process, and not determinative or defining, and that no race-neutral alternatives could achieve similar results. *Fisher*, at 20-22.

Since the Court did not reach an actual conclusion on the constitutionality of the University of Texas' policy, much uncertainty remains as to what the *Fisher* decision means for educational institutions going forward. Both sides have claimed victory: affirmative action defenders pointing out that the Court did not find the current policies at the University of Texas unconstitutional and did not overrule affirmative action; opponents hopeful that it has set the stage for the lower court to reject its original ruling.

While *Fisher* and most of the affirmative action cases deal with college and graduate programs, their constitutional analysis will also be applied to public elementary and secondary school affirmative action programs. While independent schools need not comply with the constitutional principles addressed by the Court, we recommend continuing to watch the evolution of the *Fisher* case and affirmative action jurisprudence generally, as all schools should consider their rulings as best practices in drafting policies.

Authored by Mark E. Brossman and Donna Lazarus .

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] Schulte Roth & Zabel prepared an amicus brief on behalf of the Society of American Law Teachers in support of the University of Texas and race-based preference systems in the admissions context.

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