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Affirmative Action: A Mock Supreme Court Opinion on Abigail Noel Fisher v. University of Texas at Austin

By: Collin Marino, *Arcadia University*

Affirmative Action has been the cause of legal debate since its inception in the early 1960s. Though some view these policies as a means of equaling the playing field between the minority and the majority, there are those who see these policies as greatly disadvantaging the majority as well. This is exactly the scenario which brought about the Supreme Court case of *Abigail Noel Fisher v. University of Texas at Austin*. Abigail Fisher applied to the University of Texas and was denied admission, something she felt was due to the University's affirmative action policies. The Court, in theory, has used quasi-strict scrutiny to determine whether or not the policies adopted by the various universities or organizations are constitutional. This is the test that should be used in the Court's opinion of *Fisher v. University of Texas at Austin*, and this test will further the constitutionality of the University of Texas' AI/PAI system.

Before 1997, the in-state admissions process of the University of Texas at Austin (UT) considered only two factors: (1) an applicant's Academic Index (AI), which was computed from standardized test scores and high school class rank; and (2) the applicant's race. Race was often a "controlling factor in admissions." (App. at 5) (citing, App. 162a.). What this means is that, often, University's would grant admission simply due to the race of the applicants, possibly regardless of

academic standing or standardized test scores. The use of race in the PAI system ended with the Fifth Circuit Court's decision in *Hopwood v Texas*, 78 F.3d. 932 (5th Cir. 1996). In an effort to maintain the rates of minority enrollment it had before the *Hopwood* decision was passed, the University of Texas decided to adjust its criteria for admission. In 1997, UT developed its AI-based admissions calculus with a new Personal Achievement Index (PAI).

The PAI system consisted of a weighted average of two written essays and a "personal achievement score." The PAI "measures a student's leadership and work experience, awards, extracurricular activities, community service," and "special circumstances." These special circumstances—including being raised in a single-parent, non-English speaking, or socioeconomically disadvantaged home environment or assuming significant family responsibilities—tended to "disproportionately affect minority candidates." *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011)

Coexistent with the PAI system created by UT, the Texas Legislature passed the Top 10% law as their own response to the *Hopwood* decision. This law required UT to grant automatic admission to any Texas high school student graduating in the top 10% of their class. This plan took effect for the first time in

the 1998 admissions cycle. In addition to the Top 10% law, UT's AI/PAI system would be used to (1) fill those seats in the entering class that were not taken up by those admitted through the Top 10% and (2) determine program placement for all students of the incoming freshman class. The combined effect of the Top 10% Law and the AI/PAI system steadily increased African-American and Hispanic admissions. In 1999, UT announced that its "enrollment levels for African American and Hispanic freshman... returned to those of 1996, the year before the *Hopwood* decision."

On June 23, 2003, the same day the Supreme Court announced its decision in *Grutter v. Bollinger*¹, UT announced that it would "modify its admission procedures to ... combine the benefits of the Top 10% Law with affirmative action programs that can produce even greater diversity." *Grutter v. Bollinger*, 539 U.S. 306, (2003). This modification was a proposal, created in 2004, to re-consider race in the admissions process, and it was approved by the University's Board of Regents that same year. This proposal was set forth for two reasons (1) to overcome "significant differences between the racial and ethnic makeup of [UT's] undergraduate population and the state's population and (2) to achieve classroom diversity. The 2004 Proposal was designed so that UT could achieve the same interest that this Court had just reaffirmed was compelling in *Grutter*—the "educational values of diversity."

UT determined that the study and the demographic imbalance between its freshman class and the overall demographic of the state showed that they had not yet met a "critical mass" of diversity. The 2004 Proposal also claimed that although the race-neutral policies—such as the Top 10% law—had been

useful in obtaining a strong academic student body, it failed to improve to overall diversity in the classroom. The proposal was approved by the Regents and in 2004, UT reintroduced racial preferences by adding race to the list of possible "special circumstances" that make up a major component of the PAI. This policy was first introduced with the admissions class of 2005.

Abigail Noel Fisher was a white female from the state of Texas. She applied for undergraduate admission to the University of Texas in 2008. Fisher was not in the top ten percent of her class, which would have guaranteed her admission into the school under the Top 10% law. Because of this, she was forced to compete for admission with other non-Top Ten Percent in-state applicants. The University of Texas denied Fisher's application. She then enrolled at, and graduated from, Louisiana State University (LSU). After being denied admission to UT in 2008, Fisher filed suit in the Western District of Texas for damages and injunctive relief to challenge UT's use of race in admissions under the Equal Protection Clause of the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964.

The Equal Protection Clause of the 14th Amendment to the Constitution provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., AMDT. 14 § 2. When this Court analyzes a case under Equal Protection it must ask itself four things (1) How is the government drawing a distinction among people, (2) How does it discriminate?, (3) What level of scrutiny applies?, and (4) Does government action need that level of scrutiny? The third question provides the Supreme Court's root for analysis regarding classifications that distinguish protected classes.

¹ *Grutter v. Bollinger* upheld the use of affirmative action in collegiate admissions. The Court was asked to review whether the admissions policies used by the University of Michigan, in which race was allowed to be considered as a factor of admissions, was constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Court has three different levels of scrutiny that it uses to review state or federal distinctions of classes, and each of these levels has its own requirements that a statute, policy, or law must satisfy in order to be held constitutional. The Supreme Court of the United States has consistently held that any discrimination by the government based on race “must be analyzed by a reviewing court under strict scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Thus, the statute must serve a compelling state interest and be narrowly tailored to that interest. Strict scrutiny is applied to all racial classifications in order to “smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant the use of a highly suspect tool.” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Although all uses of race-based discrimination by the government are to be analyzed under strict scrutiny, not every action by the government is invalidated by this analysis. The fact that a certain law may be racially discriminatory “says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.” *Peña*, 515 U.S. at 230, 115 S.Ct. 2097. As long as the law or statute serves a compelling state interest and is narrowly tailored to that interest, it will pass strict scrutiny every time and will be considered a valid law under the constitutional guarantee of equal protection.

For the past two decades, however, this Court has been applying another form of scrutiny in its decisions in Affirmative Action cases, such as *Grutter* and *Bakke*. This form, which has often been labeled quasi-strict scrutiny, does not look into whether the issue is narrowly tailored. Rather, so long as the Affirmative Action program serves to pro-

mote diversity but not create a direct, but-for causal link between the suspect class and the underlying benefits sought, then the discrimination serves a compelling state interest and the means are substantially related to that interest. Quasi-strict scrutiny will only apply to Affirmative Action cases where the discrimination is being used facially. For example, the Top 10% plan would not fall under this level of scrutiny since it applies to all races, not one suspect class. The Top 10% plan may have this result, and may very well have this purpose, but because this affects all races across the board, is neutral on its face, and benefits all suspect classes and/or races, then it shall not be above rational relation.

Under strict scrutiny alone, which requires the statute in question to serve a compelling state interest and also be narrowly tailored, the AI/PAI system created by UT would fail under the requirement for narrow tailoring. Narrowly tailored requires that there be no other way the objective could be reached. In the context of Affirmative Action, being narrowly tailored is possible in theory but impossible in action, as Affirmative Action applies to all colleges and universities across the United States, each with their varying size and popularity. What may be considered a “diversity goal” at one college or university may not be the same at another. Here, the Top 10% law was created to achieve diversity at UT, as was the AI/PAI system created by UT themselves. These two systems were created to achieve the goal of diversity at UT, yet neither can pass muster as narrowly tailored because neither one is the only way to achieve diversity. While never formally pronounced, this alternative level of quasi-scrutiny has in theory been applied in the previous rulings of this Court, such as *Bakke* and *Grutter*, and we will be well served to apply it in this case.

The Court believes that under quasi-strict scrutiny, the requirement that the process must serve a compelling state or government interest is met by the AI/PAI system created by UT. As stated above, this Court has endorsed Justice Powell's view, in *Grutter* specifically, that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Petitioner argues that UT never clearly articulated a compelling interest in educational diversity. As Respondent points out, "UT simply seeks minority students with different backgrounds, different experiences, and different perspectives. That is precisely the diversity that this Court has held universities have a compelling interest in seeking." (Rep. at 15). In light of this, the Court endorses Justice Powell's view in *Marks*, and on that endorsement, agrees with the Respondent's point on the compelling interest of the University. This Court, as well as other institutions in this country, has noted that student body diversity, in and of itself, is a compelling state interest. This is due to the added benefits, some of which UT even mentioned in their 2004 Proposal, that are accomplished with diversity. Some of these benefits, as mentioned by UT itself, of the AI/PAI system is that it seeks to "provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society". (Rep. at 26).

The interest of UT, as stated above, is the overall interest in student body diversity at the university. When the 2004 Proposal was first considered, UT ran a study throughout the university in order to assess their current levels of diversity. According to the Respon-

dent, "UT's study showed that there were zero or one African-American students in 90% of the undergraduate classrooms of the most typical size (5-24 students). The classroom diversity study itself stated that UT's objective was the educational benefits of diversity, not some discrete "classroom diversity" target". (Rep. at 26, 27). UT is a large university in Texas, with many classrooms that fall within this "most typical size" that was surveyed. For there to be one, and sometimes not even one, African-American student in 90% of the classrooms is a grave cause for concern for UT and justifies a compelling interest for the university. We therefore find that this system passes the compelling interest requirement, and turn to consideration of substantial relation and the but-for test.

From the very beginning, it is evident that this system created by UT is substantially related to the interest of diversity at the University. Through the consideration of race in the application process, as well as the "special circumstances" aspect, it is evident that these aspects were implemented with the effect and purpose of increasing diversity at UT. Petitioner argues that "where racial classifications have only a 'minimal impact' in advancing the compelling interest, it 'casts doubt on the necessity of using such classifications' in the first place and demonstrates that race-neutral alternatives would have worked about as well. (App. at 46-47) (citing, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701. at 734 (2007)). We find this argument unpersuasive, and rather endorse Judge Garza's view, in his dissent in the Fifth Circuit, that "diversity cannot be gauged with reference to numbers alone," and "a race-conscious admissions plan need not have a 'dramatic or lopsided impact' on minority enrollment numbers to survive strict scrutiny".

Finally, when considering the but-for test, UT's policy must make sure that it serves to promote diversity, which this Court has already stated it does, but does not create a direct, but-for causal link between the suspect class and the underlying benefits sought. That benefit in this case being admission into the University of Texas. As the Respondent, UT, points out, its admissions process is "*not* all about race. UT appreciates that every student brings a lot of other diversity pieces with them. Race...simply provides a contextual background for the student's achievements... The point of holistic review is that [s]tudents ... are more than just their race." (Rep. at 34). Rather than using race in a situation where there is a direct causal link between the suspect class and the underlying benefits sought, such as the quota system, it is nothing more than an extra consideration for admission professionals to look at when making decisions for the remaining 25% of seats not covered by the Top 10% Rule. We therefore conclude our analysis. However, we also find that the UT Policy satisfies the but-for test and thus fully satisfies all three parts of the quasi-strict scrutiny.

In this case, the Supreme Court has been called on to determine whether the UT admissions policy is constitutional under the Equal Protection Clause of the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964. In this instance, a case arising due to Affirmative Action policy, we reaffirm our prior rulings and once again state that the appropriate test is that of quasi-strict scrutiny. It is therefore the determination of this Court, that the UT admissions policy serves a compelling state interest. As this Court has consistently found, and continues to find today, student body diversity is a compelling state interest. Furthermore, the plan is substantially related to that interest, as it was created for the purpose, and also has the effect of increasing diversity at the institution. To be sure, this plan does not serve as a but-for causal link between the suspect class and the underlying benefit sought, as we find that the use of race is just another consideration in the admissions process. In light of the above, the Supreme Court hold that the UT admissions policy, created for the purpose of increasing student body diversity, is nothing short of constitutional.

Table of Authorities²

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Brief for Respondent, Abigail Noel Fisher v. University of Texas at Austin, et al., 579 U.S. ____ (2016) (no. 14-981), 2015.

Reply Brief for Petitioner, Abigail Noel Fisher v. University of Texas at Austin, et al., 579 U.S. ____ (2016) (no. 14-981), 2015.

Const. amd. 14 § 2

² A table of authorities lists the references in a legal document, along with the numbers of the pages the references appear on. This legal opinion is not cited in Chicago Style formatting. Additionally, this mock majority opinion is authored by an undergraduate student serving as a justice in a Supreme Court simulation.