No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER,

Plaintiff - Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Defendants - Appellees

On Appeal from the United States District Court
Western District of Texas, Austin Division
1:08-cv-00263-SS, Sam Sparks, Judge Presiding

PROPOSED SCHEDULE FOR SUPPLEMENTAL BRIEFING AND RESPONSE TO APPELLEES' STATEMENT CONCERNING FURTHER PROCEEDINGS ON REMAND

Appellant Abigail Fisher ("Appellant") opposes Appellee University of Texas's ("UT") suggestion that this case be remanded to the district court and instead requests that this Court set a supplemental briefing schedule to execute the Supreme Court's mandate and expedite this Court's resolution of the constitutional issue under the correct legal standard. By permitting the filing of opening briefs not to exceed 7000 words not later than 30 days after entry of a scheduling Order and simultaneous reply briefs not to exceed 3500 not later than 20 days thereafter,

this Court can faithfully execute the Supreme Court's mandate with fairness to the parties. In contrast, remanding to the district court violates the Supreme Court's express instruction that whether UT can meet its strict-scrutiny burden "is a question for the Court of Appeals in the first instance." *Fisher v. University of Texas*, 570 U.S. ____, No. 11-345, Slip Op. 13 (U.S. June 24, 2013).

1. On June 24, 2013, the Supreme Court issued an opinion in this case vacating this Court's prior judgment and remanding the case to this Court "for further proceedings consistent with [its] opinion." Slip. Op. 13. The transmittal to this Court of the Supreme Court's opinion is equivalent to the issuance of its mandate to a state court. *See* Supreme Court Rule 45.3. The Supreme Court's instruction to this Court on remand is clear and unequivocal: "the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." Slip. Op. 13. This assessment "is a question for the Court of Appeals in the first instance" and "further proceedings [must be] consistent with [the] opinion." *Id.*

2. Under the mandate rule governing proceedings on remand from a superior court, the Supreme Court's instructions are binding. *See LULAC v. City of Boerne*, 675 F.3d 433, 438 (5th Cir. 2012) ("It is well established that an 'inferior court has no power or authority to deviate from the mandate issued by an

appellate court.'") (quoting *Briggs v. Penn R.R. Co.*, 334 U.S. 304, 306 (1948)). An inferior court "cannot vary [a mandate], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895). The only course "consistent" with the Supreme Court's mandate is for the "Court of Appeals" to apply the correct strict scrutiny standard to the summary judgment record "in the first instance." Slip Op. 13.

3. Because the Supreme Court indicated that "fairness to the litigants" requires "that the admissions process … be considered and judged under a correct analysis," Slip Op. 12-13, Appellant believes that this Court should give the parties an opportunity to present their views on this question. Because the litigants are fully versed in that record and the relevant precedent, and given this case is now more than five years old, Appellant's proposed schedule is fair, reasonable, and appropriately tailored to expeditious resolution.

4. None of UT's arguments for remanding this case to the district court has merit. UT first incorrectly argues that the Supreme Court's opinion permits such action. Statement at 4. UT relies repeatedly on the statement that "fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under the correct analysis."

Slip. Op. 12-13; *see* Statement at 4. But UT shuts its eyes to the Supreme Court's instruction that this fairness shall be achieved by having *this* Court—not the district court—conduct that inquiry. The Supreme Court's opinion, in the very same paragraph on which UT relies, states that "*the Court of Appeals must* assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity" and emphasizes that this "is a question *for the Court of Appeals in the first instance*." *Id*. at 13 (emphasis added); *see also id*. at 4 (Ginsberg, J., dissenting) ("[T]he Court vacates the Court of Appeals' judgment and remands *for the Court of Appeals* to 'assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.'") (emphasis added)).

UT claims there is "no reason to read" those statements as barring a remand to the District Court to conduct this analysis first. Statement at 4. But the overriding reason, regardless of what strikes UT as the approach best suited to its goal, is the language used by the Supreme Court itself and the unambiguous duty the opinion's language imposes on this Court under the mandate rule. *See, e.g.*, *Williams v. Johnson*, --- F.3d ---, No. 07-56127, slip op. at 3 (9th Cir. July 3, 2013) (Reinhardt, J., concurring); *id*. at 5-6 (Kozinski, C.J., concurring).

UT then speculates, contradicting the premise of its own summary judgment motion, that "factual questions or disputes may arise on remand" and the district court "could resolve any such issues and take new evidence as warranted" whereas "this Court could not." Statement at 4. The mandate rule also forecloses this argument. The opinion makes clear that the question being remanded is "[w]hether *this record*—and not simple … assurances of good intention—is sufficient" to sustain UT's admissions program against constitutional challenge. Slip Op. 13 (emphasis added) (citation omitted).

Moreover, the rationale for and operation of UT's racial preferences in admission are fully presented in the existing record and UT has always contended that whether its admissions program can survive strict scrutiny is appropriately resolved on cross-motions for summary judgment. *See* Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. and in Opp. to Pls.' Mot. for Partial Summ. J., *Fisher v. University of Texas at Austin*, No. 1:08-CV-00263-SS (filed Feb. 23, 2009), at 2 ("[T]his case presents no genuine issue of material fact."); Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J., *Fisher v. University of Texas at Austin*, No. 1:08-CV-00263-SS (filed April 13, 2009), at 1 ("To begin with, the parties agree that there is no genuine issue of material fact and that summary judgment is appropriate."); Am. Tr. of All Pending Matters Before the Hon. Sam Sparks, *Fisher v. University of Texas at Austin*, No. 1:08-CV-00263-SS (June 12, 2009), at

41:9-10 ("The facts of this case are undisputed. Everybody agrees on that.") (Mr. Ho). There are no further factual issues to address.

Finally, UT argues that the matter should be remanded to the district court so that it can again delay resolution by attempting to contest Ms. Fisher's standing and damages claims. Statement at 5-6. While UT would prefer to extend the remand proceedings as long as possible, its effort to do so is doubly barred. First, "[t]he mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). To the extent UT asserts that these remedial issues have a jurisdictional dimension, they were *necessarily* decided against UT when the Supreme Court reached the merits of Ms. Fisher's claims and none of the facts have since changed. *See Northport Health Services of Arkansas, LLC v. Rutherford*, 605 F.3d 483, 490 (8th Cir. 2010) ("Even if no party challenged diversity jurisdiction, that the Supreme Court did not even discuss the issue is telling because in other cases it has noted that federal courts are obligated to consider lack of subject matter jurisdiction *sua sponte*.") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998) (other citations omitted)). UT's argument that these issues "were not a focal point of the prior appeal," Statement at 6, is thus beside the point.

UT's argument also is inaccurate. UT argued these issues extensively in its Brief in Opposition to Certiorari ("BIO") and raised them again in its brief before the Supreme Court on the merits. *See* BIO 6-22; Respondents' Brief 17 n.6. Moreover, the Supreme Court did not overlook these arguments; they were discussed extensively during oral argument. *Fisher v. University of Texas*, No. 11-345, Oral Argument Tr. 3-8 (Oct. 10, 2012). Yet not one Justice adopted UT's argument that Ms. Fisher lacked standing or lacked a viable claim for damages. Hence, the Supreme Court implicitly resolved these purportedly jurisdictional challenges against UT and relitigation is foreclosed.

The arguments that UT now rehashes also were thoroughly debunked at the certiorari stage. *See* Appellant's Reply in Support of Petition for Certiorari ("Reply") at 1-8. Indeed, the argument that Ms. Fisher lacks a viable damages remedy was so persuasively refuted that UT conceded in its merits brief that a damages claim is "still alive in this case." Respondents' Br. 17 n.6. It is disconcerting that UT would resurrect an argument on remand that it waived before the Supreme Court without so informing this Court. And, UT's standing argument follows a similarly disturbing course. Setting aside that whether Ms. Fisher would have been admitted is a question of relief, *see Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978), and thus subject to the bifurcation order, *see* Reply at 2, the argument contradicts UT's representations below that it

could not evaluate whether Ms. Fisher would have been admitted without rerunning its entire admissions process, *see* Opp. to Mot. For Prelim. Injunction, *Fisher v. University of Texas*, No. 08-263, at 12 (W.D. Tex. May 5, 2008).

Second, relitigation is barred by the law of the case doctrine. "Generally, the law of the case doctrine precludes reexamination by the appellate court on a subsequent appeal of an issue of law or fact decided on a previous appeal." *United States v. Agofsky*, 516 F.3d 280, 283 (5th Cir. 2008). This Court has already ruled that Ms. Fisher has "standing to challenge [her] rejection and to seek money damages for [her] injury." *Fisher v. University of Texas*, 631 F.3d 213, 217 (5th Cir. 2011). UT suggests that "events since this Court considered this case in 2011," *viz.*, Ms. Fisher's graduation from LSU, alter the analysis. Statement at 5. That too is incorrect. By the time this Court heard the appeal in 2011, Ms. Fisher had "den[ied] intention to reapply to UT." *Fisher*, 631 F.3d at 217. She thus remains in precisely the same legal and factual posture with regard to available remedies as she did when this Court established the law that by circuit rule must govern further proceedings in this appeal.

5. The Supreme Court's opinion in this case provides important guidance to admissions officials on the stringent constitutional review they must pass if they seek to continue using race as an admissions criterion in pursuit of the academic benefits of diversity. This Court's fulfillment of the Supreme Court's

mandate to review UT's admissions policy under the correct legal standard will give concrete embodiment to rigorous strict scrutiny and aid admissions officials in determining whether race preferences continue to be constitutionally viable in specific circumstances. Rather than welcoming the opportunity to obtain definitive guidance expeditiously, UT seeks procedures that will delay or evade its day of reckoning and are sadly reminiscent of the obstructive tactics once employed to continue racial discrimination against the underrepresented minorities UT now claims to champion. History teaches that such tactics ultimately may persuade the courts that the difficulty of weeding out unconstitutional admissions programs on a case-by-case basis under judicially supervised strict scrutiny outweighs any marginal educational benefit of racial preferences.

CONCLUSION

WHEREFORE, Appellant requests that the Court reject UT's suggestion that the case be remanded to the district court and instead carry out the Supreme Court's mandate by ordering briefing under the following proposed schedule: (1) the parties be required to submit their initial briefs within 30 days of entry of a scheduling Order; (2) the parties be required to submit their reply briefs within 20 days thereafter; and (3) such initial briefs shall not exceed 7000 words and reply briefs shall not exceed 3500 words.

Respectfully Submitted,

July 24, 2013

/s/ Bert W. Rein

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2013, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court via the ECF system and transmitted to counsel registered to receive electronic service. I also caused a true and correct copy of the foregoing to be delivered via first-class mail to the following counsel of record not registered to receive electronic service:

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