No. 09-50822

In the United States Court of Appeals for the Fifth Circuit

ABIGAIL 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

APPELLEES' STATEMENT CONCERNING FURTHER PROCEEDINGS ON REMAND

This case returns to this Court on remand from the Supreme Court, which called for "the courts that heard th[is] case" to reconsider the constitutionality of the University of Texas at Austin (UT)'s 2005 admissions policy under the strict scrutiny analysis described by the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which the Court made clear it was taking "as given" in *Fisher*. *See Fisher v. University of Texas*, 570 U.S. __, No. 11-345, Slip Op. 13 (U.S. June 24, 2013). Although UT believes that the existing summary judgment record establishes the constitutionality of UT's 2005 admissions policy under the Supreme Court's

decisions, UT submits that the most appropriate course is for this Court to remand the case to the District Court to reconsider the case in the first instance.[*]

ARGUMENT

1. Taking its prior decisions in *Grutter* and *Regents of University of California v. Bakke*, 438 U.S. 265, 305 (1978), "as given for purposes of deciding this case," Slip Op. at 5, the Supreme Court reiterated in its decision in this case that "strict scrutiny must be applied to any admissions program using racial categories or classifications," *id.* at 9; *see id.* at 5-8 (discussing *Grutter* and *Bakke*). To satisfy strict scrutiny, such programs must be "narrowly tailored to further compelling governmental interests." *Id.* at 8 (quoting *Grutter*).

The Supreme Court first recognized that, under *Grutter* and *Bakke*, "attainment of a diverse student body … is a constitutionally permissible goal for an institution of higher education." *Id*. at 9 (quoting *Bakke*, 438 U.S. at 311-12 (separate opinion)). The Court further held that "the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, 'based on its experience and expertise,' that a diverse student body would serve its educational goals." *Id.* (quoting District Court decision).

Next, the Court considered narrow tailoring. "On this point," the Court stated, "the University receives no deference," though the Court added that "a

[*] Counsel for plaintiff has indicated that plaintiff intends to timely oppose this request.

court *can* take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Id*. at 10 (emphasis added). The Court then concluded that "[t]he District Court and Court of Appeals [had] confined the strict scrutiny analysis in too narrow a way by deferring to the University's good faith in its use of racial classifications." *Id.* at 12.

Because the Court believed that the District Court and this Court had not properly applied the analysis called for by *Grutter* and *Bakke*, the Court vacated this Court's judgment and remanded, explaining 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 under a correct analysis." *Id.* at 12-13. The Court expressed no opinion, however, as to whether the current summary judgment record establishes that UT's policy is narrowly tailored. *Id*. at 13. ("Whether this record—and not 'simple … assurance of good intention'—is sufficient is a question for the Court of Appeals in the first instance.").

2. Consistent with its typical practice, the Supreme Court did not specify whether the case should be returned to the District Court and, instead, simply "remanded for further proceedings consistent with this opinion." *Id.* But for two overriding reasons, UT believes that remanding the case to the District Court would be the most natural and appropriate course.

First, the Court stated in its decision that both the District Court and Court of Appeals had applied an incorrect standard. *Id.* at 12-13. Not only does the same "fairness to … the *courts* that heard the case" (*id.* at 13 (emphasis added)) require that the District Court be given an opportunity to reconsider its decision in light of the Supreme Court's decision in *Fisher*, but this Court undoubtedly would benefit from the District Court's initial consideration of the case in light of *Fisher* before reconsidering the case itself. In addition, factual questions or disputes may arise on remand, especially depending on how plaintiff seeks to characterize the Supreme Court's ruling. The District Court could resolve any such issues and take new evidence as warranted; this Court could not. *See id.* at 13 (noting that *Grutter* was decided following extensive factual development and trial).

The Supreme Court also stated in its decision that, "in determining whether summary judgment in favor of the University would be appropriate, 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." *Id.* at 13. But there is no reason to read that sentence as barring the common-sense step of remanding this case to the District Court for it to conduct this analysis first, and that course is consistent with the Supreme Court's observation that the case should be remanded in "fairness to the litigants and *courts* that heard the case," *id.* at 13 (emphasis added).

Second, there are grave questions—accentuated by events since this Court considered this case in 2011—concerning whether this case may proceed at all. Those issues are more appropriate for the District Court in the first instance. Ms. Fisher—the sole remaining plaintiff—graduated from another university in May 2012. That is significant, because—with her graduation—her forward-looking claims for injunctive and declaratory relief indisputably have dropped out of the case. All that remains is plaintiff's request for a refund of her $100 application fee and associated application expenses. J.A. 65a (Amended Compl. ¶104) (available at (http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf). But such application "damages" bear no relation to the part of the admissions policy that she has challenged. Plaintiff would have had to pay the $100 admissions fee and any associated application expenses even if the policy had not considered race at all, and, indeed, even if she had been admitted to UT. *See Steel Co. v. Citizens for Better Env't,* 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court").

In addition, the summary judgment record is uncontradicted that plaintiff would not have been admitted to UT's fall 2008 class even if she had had a perfect Personal Achievement Score—and, therefore, no matter what her race. J.A. 415a-416a (Declaration of Admissions Director Kedra B. Ishop ¶ 18). Because this fact refutes any showing that plaintiff was personally injured by the challenged

consideration of race, her claim fails at the threshold—whether this failure is deemed a defect in standing or an inability to establish liability. *See, e.g.*, *Texas v. Lesage*, 528 U.S. 18, 468 (1999) (per curiam) ("[W]here a plaintiff challenges a discrete government decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.").

Because these defects (and others) were not a focal point of the prior appeal and have been underscored by events post-dating that appeal (*e.g.*, plaintiff's graduation from college), it makes sense to have the District Court consider these issues in the first instance. That conclusion is bolstered by the fact that, in the Supreme Court, plaintiff pointed to the District Court's order bifurcating the liability and any remedy determinations in this case and argued that this order prevents the courts from considering such fatal threshold defects. In UT's view, that is incorrect. But in any event, the District Court is in a better position to make that assessment in the first instance, since it would pertain at least in part to the intent and scope of the District Court's own bifurcation order.

CONCLUSION

WHEREFORE, UT respectfully suggests that this Court remand the case to the District Court for the Western District of Texas for further proceedings.

Dated: July 23, 2013

Respectfully submitted,

/s/ Gregory G. Garre

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd 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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