Fisher v. University of Texas at Austin et al. (579 US ___) (2016)*

Justice Kennedy delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

I

[In 1997,] the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. [...] Consistent with *Hopwood* [*v. Texas*, 78 F. 3d 932], race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to *Hopwood* as well. It enacted H. B. 588, commonly known as the Top Ten Percent Law. [...] [T]he Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State. [...] The University used this admissions system until 2003, when this Court decided the companion cases of *Grutter v. Bollinger*, 539 U. S. 306 , and *Gratz v. Bollinger*, 539 U. S. 244. [...] In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*'s categorical prohibition. [...]

In the wake of *Grutter*, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body . . . to all of the University's undergraduate students." [...] The University concluded that its admissions policy was not providing these benefits. To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration[.] After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day. [...]

25 percent or so of the incoming class [...] continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components[: scores on two essays and] a full-file review that results in another 1-to-6 score, the "Personal Achievement Score" or PAS. [The PAS also includes] the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race. [...]

Once the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for

*Note: This majority opinion has been edited from the original text by Travis Braidwood for classroom use. The full case text can be found here: < https://supreme.justia.com/cases/federal/us/579/14-981/ >. Footnotes match those used in the original Supreme Court slip opinion.

admission, and then admit all of the applicants who are above that cutoff point. [...] Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS. [...]

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. [...]

This Court granted certiorari and vacated the judgment of the Court of Appeals, *Fisher v. University of Tex. at Austin*, 570 U. S. ___ (2013) (*Fisher I*), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard. [...] Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. 758 F. 3d 633. This Court granted certiorari for a second time, 576 U. S. ___ (2015), and now affirms.

II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "because racial characteristics so seldom provide a relevant basis for disparate treatment," *Richmond v. J. A. Croson Co*., 488 U. S. 469, 505 (1989) , "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I* [.] Strict scrutiny requires the university to demonstrate with clarity that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.' "

Second, *Fisher I* confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper[.]" A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage[.]

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals[.] A university, *Fisher I* explained, bears the burden of proving a "nonracial approach[,]" [t]hough "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative[,]" it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." [quoting *Fisher I*]

III

The University's program [...] combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: [i]t seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*. [...]

While studies undertaken over the eight years since then may be of significant value in determining the constitutionality of the University's current admissions policy, that evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008. If the Court were to remand, therefore, further factfinding would be limited to a narrow 3-year

sample, review of which might yield little insight. [...] Under the circumstances of this case, then, a remand would do nothing more than prolong a suit that has already persisted for eight years[.] Here, [...] the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students [i.e. as] means of obtaining "the educational benefits that flow from student body diversity." *Fisher I*[.] A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them. [Here, the] record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals[:] the destruction of stereotypes, the " 'promot[ion of] cross-racial understanding,' " the preparation of a student body " 'for an increasingly diverse workforce and society,' " and the " 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.' "[...] All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases. [...]

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. [...]

Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data,"[...], and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity[.] The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. [For example,] the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. [The court then goes on to list more evidence, see the spip opinion at pages 14-15]. In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. [...]

Third, petitioner argues that considering race was not necessary because such consideration has had only a " 'minimal impact' in advancing the [University's] compelling interest." [...] Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American[], by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class. [...]

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. [However,] none of her proposed alternatives was

a workable means for the University to attain the benefits of diversity it sought. [T]he University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried [enhanced consideration of other factors.] And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*[.]

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. [...] Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I*[.] "It is race consciousness, not blindness to race, that drives such plans." *Ibid*. [...]

[Moreover a] system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis[.] These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. [...] At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz*[.]

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. [...] In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means. *Fisher I*[.]

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." *Sweatt v. Painter*, 339 U. S. 629, 634 (1950). [...]

The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice Kagan took no part in the consideration or decision of this case.