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High Court Approves UT Policy

Affirmative action in admissions protected.

BY TONY MAURO

WINNING RACE: Attorney Gregory Garre, representing the University of Texas, speaks after arguments last December as university president Gregory Fenves, fourth from right, looks on.

The U.S. Supreme Court's surprise ruling on June 23 upholding the affirmative action program at the University of Texas may bring a pause—but not an end—to decades of attacks on race-conscious admissions policies nationwide.

In spite of earlier signals that the justices might end affirmative action altogether, Justice Anthony Kennedy, writing for the majority, reiterated that using race as one of many factors in admissions does not violate the Constitution's equal-protection guarantee.

"Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission," Justice Anthony Kennedy wrote in *Fisher v. University of Texas*. The decision was 4-3, with Justice Samuel Alito Jr. penning a vigorous 51-page dissent.

ABIGAIL FISHER

But Kennedy's deference, along with the court's bottom-line acceptance of the use of race as a factor among others in admitting students, drew applause from education officials who have pleaded for clear guidance from the court on the controversial issue.

"This now makes the fourth time in four decades that the Supreme Court has squarely upheld this vital principle," said Molly Corbett Broad, president of the American Council on Education, the leading organization of universities and colleges.

Affirmative-action supporters also saw in the ruling a turning point in the long legal attack by conservative groups against such policies.

"We hope that this decision will end the 30-year campaign by anti-affirmative activists to dismantle efforts by colleges and universities to provide access and opportunity

to students of all backgrounds," said Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund.

But that is unlikely. Edward Blum, president of the Project on Fair Representation, who funded the Texas case the high court decided, said on June 23 the decision was narrow enough that it will not affect pending litigation he has also mounted against affirmative action programs at Harvard University and the University of North Carolina.

"The University of Texas policies were so unique that the court focused on that, and neither Harvard nor the University of North Carolina programs are similar, so we don't think the litigation will be affected," Blum told The National Law Journal.

SHIFT SIGNALED?

The decision also represented a major shift on the court that signified, to some, the impact of Justice Antonin Scalia's death on the court's jurisprudence. Scalia, who died last February and who has not been replaced, was a strong opponent of affirmative action. Kennedy usually joined him and the court's other conservative members in opposing race-conscious government policies.

Kennedy did caution, "It is the university's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies," suggesting that even the Texas program could be challenged again.

Kennedy was joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor. Justices Alito and Clarence Thomas and Chief Justice John Roberts Jr. dissented.

"THE DECISION TODAY … RESTS ON PERNICIOUS ASSUMPTIONS ABOUT RACE."

—Supreme Court Justice Clarence Thomas

Alito summarized his lengthy dissent from the bench for 17 minutes, twice as long as Kennedy's summary of the majority opinion.

"What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong," Alito wrote.

Justice Clarence Thomas, the court's only African-American member, also wrote a dissent. "The court's decision today is irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents," Thomas said.

The ruling was a sequel to the high court's 2013 decision with the same name. Justice Elena Kagan did not take part in either ruling, presumably because of her involvement in the case as U.S. solicitor general before she joined the court in 2010.

Plaintiff Abigail Fisher, who is white, first challenged the program in 2008 after she was denied admission to the state university. She claimed the university's "holistic" admission program, which uses race as one of several factors in the admissions process for a portion of the incoming class of students, violated her right to equal protection of the laws.

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