Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Attys React To High Court's Affirmative Action Ruling

Law360, New York (June 24, 2013, 6:54 PM ET) -- The U.S. Supreme Court held Monday that the University of Texas at Austin had failed to prove its race-conscious admissions process satisfied strict constitutional standards. Here, attorneys weigh in with Law360 on the ruling's impact.

Nathan A. Adams, Holland & Knight LLP
"The practical effect of the Supreme Court's ruling in [Fisher v. University of Texas] will be to require universities to re-examine whether the means they have chosen to achieve the benefits of student body diversity is narrowly tailored. Likely, this will require articulating some threshold when the courts can recognize the objective is met, although not as a percentage of a particular group merely due to race or ethnic origin. Additionally, it will require universities to give renewed consideration to race-neutral admissions alternatives especially, but not merely in states with top 10 admission programs."

Natasha J. Baker, Hirschfeld Kraemer LLP
"In Fisher v. University of Texas, the U.S. Supreme Court vacated the Fifth Circuit Court of Appeal's decision, which had upheld the university's consideration of race as a factor in admissions. When racial classifications are used, they must meet the test for strict scrutiny, which requires a compelling state interest. Further, any classifications must be narrowly tailored to achieve a compelling state interest. Per the majority, the university had been given too much deference regarding whether its plan was 'narrowly tailored to achieve its stated goal' — a more diverse student body. The Fifth Circuit must review the case again."

Martha Davis, Northeastern University School of Law
"Given that Justice [Elena] Kagan was recused from the case, this has to be seen as a victory for the University of Texas and an extension of time for continued use of modest affirmative action measures in higher education. But the clock continues to tick, and the result in Fisher indicates that the Texas approach may ultimately be in trouble if it returns to the high court. Nevertheless, Grutter [v. Bollinger] remains good law, and universities now have another few years to develop new, ever more finely tuned methodologies that will ensure racial diversity while avoiding use of racial classifications."

Robert L. Duston, Saul Ewing LLP
"The impact will be substantial. The court narrowly interpreted 'diversity' as a legitimate public interest in the limited context of admission, but reaffirmed that 'diversity' could not be defined by racial or ethnic percentage. The court broadly reaffirmed the application of [the] equal protection analysis developed in public contracting and other contexts outside higher education, which must be applied with no deference to the institution's judgment. Schools essentially have the burden of proving that race-neutral alternatives will not achieve the desired objectives. Many public schools will fail this test. The implications for private universities could be more significant."

Daryl Lapp, Edwards Wildman Palmer LLP
"The Fisher decision is quite narrow. If there is anything new here, it is the clarification that a university is entitled to deference only as to the first prong of the strict scrutiny analysis (that a racially [or] ethnically diverse student body serves a compelling interest), and not the second prong (whether the means chosen to achieve that interest in fact are specifically and narrowly tailored to do so in a way that ensures each applicant is reviewed individually and that race [or] ethnicity is not the defining feature of an application). The fact that the court's decision was 7-1 is a clear indication that this was not a controversial or groundbreaking decision."

Robin Lenhardt, Fordham Law School
"Today's decision in Fisher v. Texas may give the Fifth Circuit Court of Appeals the next word on the UT admissions program, to the extent that it vacates and remands the case. But it shows the Supreme Court very much engaged in the conversation about racial diversity in higher education and the strategies that institutions of higher education and states like Texas can constitutionally deploy to expand educational opportunity and prepare students for participation and leadership in our society. For universities committed to providing their students with an education that emphasizes broad diversity, it is a clear victory."

Ada Meloy, American Council on Education
"The ruling affirmed the educational benefits of diversity on college and university campuses, allowing institutions to continue considering race and ethnicity as one factor in the admissions process as long as they show their plans are precisely tailored and necessary to achieve their goals. The Fisher decision has the potential to affect any college or university that considers race and ethnicity in the admissions process. It will take time to analyze the ruling, but institutions that do use race and ethnicity as a factor should review their admissions policies to make sure they can document why that is necessary."

Jeremy Paul, Northeastern University School of Law
"Today's Supreme Court ruling in Fisher affirmed the core principle of affirmative action jurisprudence that 'student body diversity is a compelling state interest that can justify the use of race in university admissions.' But it sends a clear signal that admissions programs must be narrowly tailored to achieve the desired diversity objective. The court's opinion demands that universities devote considerable attention to possible race-neutral alternatives before choosing to use race as an admissions factor. The court, however, reached no conclusion on the constitutionality of the Texas plan at issue. Accordingly, all that can be said now is that the window for admissions programs aimed at producing a diverse student body remains open, but perhaps not quite as wide as it was before today's ruling."

Andrew Pincus, Mayer Brown LLP
"The Supreme Court today reiterated its long-held view that the goal of securing for all students the many educational benefits that flow from a diverse student body 'is a constitutionally permissible goal for an institution of higher learning' — quoting Justice [Lewis F.] Powell's opinion in the [Regents of the University of California v.] Bakke case. The court strongly reaffirmed Grutter's framework for assessing consideration of race as one among many factors in a university's admissions criteria. Far from overturning or limiting Grutter, as many predicted, the court instead reaffirmed that Grutter is the governing standard and concluded that the lower courts were wrong only because they had misapplied Grutter."

Kerry Alan Scanlon, Kaye Scholer LLP
"The Supreme Court took another step in tightening the reins on universities trying to achieve a more representative student mix, but did not overturn the recognition that there is a compelling interest in educational diversity. It did not, as some feared, fundamentally reshape the law on affirmative action in higher education."

Charles S. Sims, Proskauer Rose LLP
"The nation's highly selective colleges and universities dodged a bullet today. The Supreme Court's decision in Fisher v. Texas retains the framework that selective colleges and universities have lived under since 1976. Today's decision applies, and does not displace, the two controlling decisions in this field, Bakke v. University of California (from 1978) and Grutter v. Bollinger (the University of Michigan case from 2003). The kind of full-file, holistic review which characterizes admissions at highly selective institutions is not condemned by today's decision and need not be displaced. That the decision today was joined by Justices [Stephen] Breyer and [Sonia] Sotomayor confirms just how narrow the decision in is."

Robert Toone, Foley Hoag LLP
"Substantively, a fairly straight line can be drawn from Bakke to the University of Michigan cases to Fisher. Student diversity remains a compelling interest. Procedurally, however, the ground has shifted. In Bakke, Justice Powell held that universities are entitled to academic freedom and a presumption of good faith. In Fisher, the court rejected that presumption and held that "the higher education dynamic" does not change the strict scrutiny analysis 'applicable in other contexts.' Perhaps most surprising, the court suggested that future challenges may require resolution by trial, not summary judgment. The law remains settled, but universities' litigation exposure has increased."

Annette Tyman, Seyfarth Shaw LLP
"The most remarkable part of the Fisher decision isn't the outcome — it's the 7-1 vote. Despite widespread speculation, there were no 'gutting' pronouncements about affirmative action programs, and a diverse student body remains a compelling interest permitting the use of race in the admissions process. State universities that do so, however, must meet the tough burden of showing that its admission process is: (1) individualized, (2) 'necessary' to achieve the educational benefits of diversity, and (3) not achievable through a race-neutral alternative. Whether the University of Texas will be able to make such a showing goes back to the Fifth Circuit."

Allan Van Fleet, McDermott Will & Emery LLP
"We do not agree with Justice [Clarence] Thomas that UT's use of race today is just as invidious as it was in 1950. Heman Sweatt [the plaintiff in a 1950 Supreme Court case challenging segregation in education] was denied admission to UT for the sole 'fact that he is a negro.' The Supreme Court ordered that he be admitted because the separate law school Texas created for African Americans was unequal to UT, in part because it prevented Sweatt from interacting with racial groups that made up some 85 percent of the population of the state. He therefore would not have the benefit, as Justice Tom Clark (the only Texan to serve on the court) said, of a 'greater variety of minds, backgrounds and opinions.' UT today considers race as just one small factor in its holistic review, in order to create that greater variety. Justice Thomas cited the reasons UT gave in 1950 to keep the races apart; UT today tries to bring them together."

--Editing by Kat Laskowski.