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U.S. Supreme Court Set to Rehear University of Texas Affirmative Action Case

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Recently, the U.S. Supreme Court announced it would revisit *Fisher v. Texas*, the affirmative action case it initially heard in 2013. The first time it heard the case, the Court remanded the case to the lower court to determine the issue of whether the University of Texas' affirmative action program was constitutional. Now, after the Fifth Circuit has upheld the University's policy for a second time under heightened scrutiny, many commentators believe that the U.S. Supreme Court will finally be forced to squarely address the affirmative action issue when the case goes up on appeal. That remains to be seen since the Roberts Court has found other ways of disposing of difficult cases without necessarily addressing the matter head-on.

Race-based affirmative action programs have faced controversy since they first were introduced to higher education in the 1970s. Proponents of affirmative action policies argue that these types of policies have resulted in a significant increase in minority attendance at both colleges and universities. However, critics believe it is impossible to delineate between the so-called "benign" affirmative action racism and malicious racism, and therefore argue all raced-based classifications should be highly suspect. Chief among these critics is Justice Thomas, who has adamantly declared that affirmative action is an insidious and extremely harmful way to classify individuals on the basis of race. With the reconsideration of *Fisher* comes a distinct possibility the critics will prevail, and these policies will be eradicated in public colleges and graduate institutions as unconstitutional discrimination.

In the underlying facts of the case, the University of Texas at Austin rejected Abigail Fisher's admission to the school in 2008. At the time, the University maintained a policy whereby admission was automatically granted to students in the top 10% of every high school class, and the remaining fraction of admissions consist of students who are "holistically" evaluated by a number factors, race being one of them. Fisher, a white woman, claims applicants of lower academic quality were admitted to the school because of their race, which, in turn, she argues violates the Equal Protection Clause of the Fourteenth Amendment.

On appeal, the U.S. Supreme Court will reconsider its currently governing affirmative action precedent, *Grutter v. Bolinger*. In this case, the Court held that institutions of higher education are permitted to have affirmative action programs in order to diversify their student body. However, commentators note the political climate of the Court has shifted since the 2003 *Grutter* decision, which will potentially lead to a drastic altering or altogether overruling of the case.

If the Court rules in Fisher's favor, affirmative action policies may effectively be eradicated in higher education institutions nationwide. Institutions should keep a close eye on the course of this case, as it has the ability to have significant practical as well as legal implications.

If you or your institution has any questions or concerns regarding employment or education-related issues, please contact Hayley B. Dryer at hdryer@cullenanddykman.com or at 516-357-3745.

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