High court looks at race in college admissions

Contributed by MARK SHERMAN
Tuesday, 09 October 2012
Last Updated Tuesday, 09 October 2012

WASHINGTON (AP) _
Nine years after the Supreme Court said colleges and universities can use race in their quest for diverse student bodies, the justices have put this divisive social issue back on their agenda in the middle of a presidential election campaign.

Nine years is a blink of the eye on a court where justices can look back two centuries for legal precedents. But with an ascendant conservative majority, the high court in arguments Wednesday will weigh whether to limit or even rule out taking race into account in college admissions.

The justices will be looking at the University of Texas program that is used to help fill the last quarter or so of its incoming freshman classes. Race is one of many factors considered by admissions officers. The rest of the roughly 7,100 freshman spots automatically go to Texans who graduated in the top 8 percent of their high school classes.

A white Texan, Abigail Fisher, sued the university after she was denied a spot in 2008.

The simplest explanation for why affirmative action is back on the court's calendar so soon after its 2003 decision in Grutter v. Bollinger is that the author of that opinion, Sandra Day O'Connor, has retired. Her successor, Justice Samuel Alito, has been highly skeptical of any use of racial preference.

Justice Anthony Kennedy, a dissenter in the 2003 decision, probably holds the deciding vote, and he, too, has never voted in favor of racial preference.

As a result, said Supreme Court lawyer Thomas Goldstein, ``No matter what the court does, it is quite likely that the UT program is going to be in big trouble.''

The challenge to the Texas plan has gained traction in part because the university has produced significant diversity by automatically offering about three-quarters of its spots to graduates in the top 10 percent of their Texas high schools, under a 1990s state law signed by then-Gov. George W. Bush. The admissions program has been changed so that now only the top 8 percent gain automatic admission.

More than eight in ten African-American and Latino students who enrolled at the flagship campus in Austin last year were automatically admitted, according to university statistics. Even among the rest, both sides acknowledge that the use of race is modest.

In all, black and Hispanic students made up more than a quarter of the incoming freshmen class. White students constituted less than half the entering class when students with Asian backgrounds and other minorites were added in.

``For decades, the defense of racial preferences was, `We'd love to find a way to get diversity without using race, but it's just not possible. There's just no other way.' And Texas found another way,'' said Richard Kahlenburg, a senior fellow at the Century Foundation and prominent advocate of class-based affirmative action.

The university says the extra measure of diversity it gets from the slots outside automatic admission is crucial because too many of its classrooms have only token minority representation, at best. At the same time, Texas argues that race is one of many factors considered and that it ``is impossible to tell whether an applicant's race was a tipping factor.''

The Obama administration, 57 of the Fortune 100 companies and large numbers of public and private colleges that could be affected by the outcome are backing the Texas program. Among the benefits of affirmative action, the administration argues, is that it creates a

pipeline for a diverse officer corps that it called ``essential to the military's operational readiness.'' In 2003, the court cited the importance of a similar message from military leaders.

But lawyers for Fisher, of Sugar Land, Texas, said the race-blind method under which the university automatically admits most of its students has been successful. They say Fisher, who has since graduated from Louisiana State University, was excluded because of her race, and they point to a handful of African-American and Latino students who were admitted with lower scores than hers.

``If any state action should respect racial equality, it is university admission,'' Fisher's lawyers said in their written submission to the court.

The university says that a fuller picture of the process shows that white students with lower scores also were admitted, while many more minority students with higher scores than Fisher also were not offered admission.

The case also raises several contentious side issues, including whether affirmative-action programs hurt the very people they are supposed to be helping. A new book by law professor Richard Sander and journalist Stuart Taylor argues that ``large preferences often place students in environments where they can neither learn nor compete effectively, even though these same students would thrive had they gone to less competitive but still quite good schools.''

Their book, ``Mismatch,'' says these students are set up to fail, getting lower grades and dropping out more often than white students with similar backgrounds.

Taylor and Sander, a law professor at the University of California at Los Angeles, point to statistics in California to support their argument. After voters changed the state constitution to outlaw racial preferences, UCLA saw significant declines in enrollment by black and Hispanic students.

But the number of African-American and Latino graduates was unchanged for the five classes after the ban when compared to the five years before the change in state law, they said.

The dozens of legal briefs in the Texas case also highlight a debate over whether racial preference programs actually limit the number of students from Asian backgrounds, who are disproportionately represented in student bodies relative to their share of the population.

The university says Asian-American enrollment has increased under the policy that is being challenged. The numbers would be even higher if Texas stopped factoring in race, Fisher and others say.