AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY

The Fisher Case and What it Means

INTRODUCTION

CASE HISTORY

CASE HISTORY

- Abigail Fisher is a white female who was denied admission to the University of Texas at Austin ("UT") for the entering class of 2008.
- At the time of her application, UT used two processes for evaluating applications for admission:
  - The Top Ten Percent Plan: under this process, any Texas high school student in the top ten percent of his/her class was automatically admitted to UT.
  - Academic Index/Personal Achievement Indices: under this process, applicants' standardized test scores and grade point averages were measured with application essay scores and other relevant factors. One of the many factors considered was the applicant's race. This was considered to be a "holistic" approach.
    - The goal under these evaluation systems was to create a diverse student body.
- On April 7, 2008, Fisher filed suit in the Western District of Texas challenging the admissions process as a violation of the Equal Protection Clause of the Fourteenth Amendment and various federal statutes.

CASE HISTORY

- In her initial Complaint, Fisher sought an injunction barring UT from continuing to use these admissions processes. The district court ruled, however, that Fisher was not entitled to an injunction because she did not plan on reapplying to UT.
- Proceeding to the merits, the District Court granted summary judgment in favor of UT on August 17, 2008.
  - In reaching its determination, the District Court applied the standard for analyzing the validity of college admissions programs set forth by the Supreme Court in *Grutter v. Bolinger*, known as strict scrutiny. In *Grutter*, the Supreme Court stated a university may account for race in its admissions process so long as the use of race was part of a more holistic approach. Further, a university must consider all race-neutral alternatives before accounting for race.
- According to the court, UT had a compelling interest in promoting and maintaining a diverse campus. UT's use of race was but one of many factors used in order to achieve this goal. Thus, UT admissions process did not impermissibly use race as a factor.

CASE HISTORY

- Following the District Court's ruling, Fisher appealed to the Court of Appeals for the Fifth Circuit.
  - Fisher renewed her argument that UT's plan as a whole violated the Equal Protection Clause.
  - Fisher contended that the race-neutral Top Ten Percent plan would have been sufficient to achieve the goal of a diverse student body. As a result, UT should be precluded from further considering race for the applicants who were not automatically admitted under the Top Ten Percent plan.
- On January 18, 2011, the Fifth Circuit affirmed the District Court's ruling.
  - First, the court upheld the use of race in the Academic Index/Personal Achievement Indices plan as constitutional under *Grutter*. In reaching its conclusion, the Fifth Circuit gave deference to UT's belief that diversity was a compelling interest in filling out its student body and the holistic approach was narrowly tailored to serve that interest.
  - The court then refuted Fisher's argument that the Top Ten Percent Plan was sufficient to achieve racial diversity, and therefore the Academic Index/Personal Achievement Indices were unnecessary and unconstitutional. While the court conceded that the Top Ten Percent Plan furthered diversity, it rejected the notion that the Plan alone resulted in the admission of a sufficient number of minorities.
  - The achievement of a "critical mass" of diversity is not reflected by a percentage of minorities enrolled in a student body. Rather, critical mass must be looked at as part of a greater overall picture, taking into account various educational goals on campus. In fashioning its admissions policies, UT engaged in a good-faith effort to create a system that would best promote the achievement of a critical mass.

CASE HISTORY

- On September 15, 2011, Fisher filed a petition for a writ of certiorari with the Supreme Court. The Court granted the petition on February 21, 2012, with oral argument set for October 10, 2012.
- The Supreme Court issued its opinion on June 24, 2013, reversing the Fifth Circuit's Opinion and remanding the case for further proceedings.
- Rather than reaching a sweeping conclusion on the use of race in college admissions, the Court took issue with the standard applied by the Fifth Circuit.
  - It was error, the Court ruled, for the Fifth Circuit to give deference to UT's "good faith" finding that race had to be considered in order to achieve a "critical mass." According to the Court, "strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good-faith consideration of workable race-neutral alternatives."
  - In reaching their decisions, the lower courts did not conduct the required in-depth analysis strict scrutiny demands. As a result, the case was remanded back to the Fifth Circuit in order to re-evaluate Fisher's claim under the proper standard.

CASE HISTORY

- On remand, the Fifth Circuit applied the more demanding standard and once again affirmed the District Court's holding.
- The court gave particular attention to the results produced by the holistic Academic Index/Personal Achievement Indices approach, noting that a greater percentage of white applicants were admitted than minority. Given that white applicants had, on average, far higher standardized test scores, a system that solely used test scores could have resulted in "an all-white enterprise."
- The court then turned its attention to numerous race-neutral programs, including community outreach and establishing scholarships, adopted by UT in addition to the Top Ten Percent Plan. Despite such broad efforts, the percentage of minority students in the student body remained largely stagnant.
  - In response, UT conducted an in-depth analysis of its policies and potential alternatives so that it may better achieve a diverse student body. The result was the holistic approach it adopted.
- Therefore, the use of the holistic approach, in tandem with the Top Ten Percent Plan, was necessary to achieve a diverse student body and the UT's policies did not violate the Equal Protection Clause.

CASE HISTORY

- Once again, Fisher sought relief from the Supreme Court. On February 10, 2015, she filed her second writ of certiorari with the Court, which was granted on June 29, 2015.

- The Court heard oral argument from the parties and amici on Wednesday, December 9, 2015. A decision is expected next year.

OVERVIEW OF AMICUS BRIEF

STANDING AND MOOTNESS

FISHER LACKS STANDING

- She didn't suffer an "injury in fact."
  - Must suffer a concrete, particularized "injury in fact" that
  - Bears a causal connection to the alleged misconduct, and
  - That a favorable court decision is likely to redress.
- Issue is Moot.

INJURY IN FACT – CONCRETE AND PARTICULARIZED

- Concrete -- Fisher wasn't in the group that was subjected to holistic review.
- Particularized -- Just because it looks like a class action doesn't make it so.
- Constitutional Harm? -- inability to compete on equal footing.
  - Race not considered
  - Statistical significance

CAUSAL CONNECTION TO ALLEGED MISCONDUCT

- Causal Connection
  - Denial of admission.
  - But HER race wasn't considered.
  - No causal connection between payment of admission fee and consideration of race AND consideration of race did not make her more likely to apply to UT.

- Alleged Misconduct
  - Did program meet Strict Scrutiny standard of review?
  - Lower court said "yes" on remand.

FAVORABLE COURT LIKELY TO REDRESS (REMEDY)

- What remedies are available?
  - Refund of application fee
  - Admit her
  - Difference in earnings

MOOTNESS

- No live case or controversy
  - Fisher graduated and is gainfully employed in the field of her degree.
- Texas v. Lesage (1999)
  - When a plaintiff seeing forward-looking relief challenges a discrete governmental decision as based on an impermissible criterion, and the facts show the government would have made the same decision regardless, there is no liability and no cognizable injury.

STANDARD OF REVIEW

AFFIRMATIVE ACTION PROGRAMS SHOULD BE SUBJECT TO A LESSER STANDARD OF REVIEW

- The history of the Fourteenth Amendment supports a distinction between benign and invidious use of race.
- The Court can appropriately analyze benign classifications differently from invidious classifications using a spectrum approach.
- The Court has modified the expressed level of scrutiny based on its valuation of the State's interest.
- Properly valuing the State's interest better explains the Court's decisions in Equal Protection cases.

HISTORY OF FOURTEENTH AMENDMENT

- The Fourteenth Amendment was intended to eliminate discrimination against African Americans.
- The Equal Protection Clause was used to target invidious discrimination.

HISTORY OF FOURTEENTH AMENDMENT

- Post-Civil War southern states pass black codes.
- Congress passes Civil Rights Act of 1866.
- Framers intended to enshrine the rights of African Americans in the Constitution
  - "[B]y declaring all our people United States citizens. . . declaring that the States shall not deny them equal protection of these equal laws, and then declaring that Congress shall have power . . . to enforce the enjoyment of these privileges of citizenship by seeing to it that the laws do not abridge them nor the States withhold protection to them." Cong. Globe, 42d Cong., 1st Sess. app. 68 (1871).

HISTORY OF FOURTEENTH AMENDMENT

- Federal courts struck down laws that discriminated against African Americans.
  - *Strauder v. West Virginia*,100 U.S. 303 (1880)
  - *Bush v. Kentucky*, 107 U.S. 110 (1883)
  - *Neal v. Delaware*, 103 U.S. 370 (1881)

HISTORY OF FOURTEENTH AMENDMENT

- Legislative and social history support a different standard for affirmative action programs.
- The Freedman's Bureau Acts of 1865 and 1866.
- General Oliver Howard, Commissioner of the Freedman's Bureau

  "The most urgent want of the freedmen was a practical education; and from the first I have devoted more attention to this than to any other branch of my work."

THE SPECTRUM APPROACH TO REVIEW

- Benign and invidious classifications are distinguishable.
- Historically the Supreme Court noted this difference.
  - *Loving v. Virginia*, 388 U.S. 1 (1967)
  - *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)
  - *Fullilove v. Klutznick*, 488 U.S. 448 (1980)

THE SPECTRUM APPROACH TO REVIEW

- The Court reverses course on benign programs.

- "Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

THE SPECTRUM APPROACH TO REVIEW

- Applying strict scrutiny to benign programs raises legitimate concerns.
  - "engine of oppression" v. "desire to foster equality" – Justice Stevens
  - "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated." – Justice Ginsberg

THE SPECTRUM APPROACH TO REVIEW

- A spectrum approach recognizes gradations in programs and intent.
- Allows for consistency between protected classes.
- Under the current state of the law, it is harder to remedy race than sex discrimination through affirmative action, even though the Fourteenth Amendment was intended to benefit African Americans.

THE STATE'S INTEREST OFTEN DRIVES THE LEVEL OF REVIEW

- The Court has not applied a strict tiered approach in its most contested cases.
- Strict in theory, fatal in fact.
- *Grutter v. Bollinger*, 539 U.S. 306 (2003)
- *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)
- *Romer v. Evans*, 517 U.S. 620 (1996)

THE STATE'S INTEREST OFTEN DRIVES THE LEVEL OF REVIEW

- "The decision generally turns on the character of the right involved, the individual interest at stake, and the strength of the government interest tugging the other way. I would not assign heavy weight to the labels. I don't think the Court routinely uses them in reaching its decision. The decisions are often reached without resorting to preconceived labels, and then fitted into the tiers." *An Open Discussion With Justice Ruth Bader Ginsburg*, 36 Conn. L. Rev. 1033 (2004)

THE STATE'S INTEREST OFTEN DRIVES THE LEVEL OF REVIEW

- Level of Scrutiny ("LS") = Basis of Classification ("BC")
  - Strict Scrutiny = 2
  - Intermediate Scrutiny = 1
  - Rational Basis = 0
- LS = BC – Government Interest ("GI")
- *Grutter*: 1.5 = 2 - 0.5
- *Cleburne*: .8 = 0 – (-0.8)
- These formulae demonstrate the inherent flaw in a tiered analysis:
  - Defining the level of scrutiny based on one variable ignores the competing interests of the state that are necessary considerations for any reasoned decision.

BENIGN AND INVIDIOUS CLASSIFICATIONS ARE DIFFERENT

- The consistency that the Court espouses would disregard the difference between a “No Trespassing” sign and a welcome mat. It would treat a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in ‘consistency’ does not justify treating differences as though they were similarities.

HOLISTIC REVIEW IS NOT AN IMPERMISSIBLE RACIAL PREFERENCE

UT'S ADMISSION SYSTEM HAS BEEN PORTRAYED AS USING "RACIAL PREFERENCES"

No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

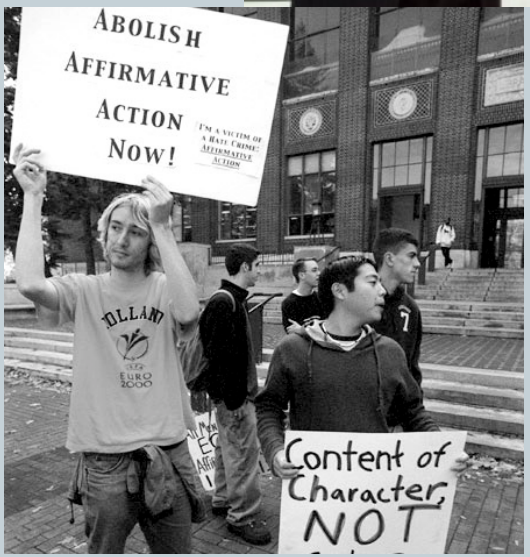
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).



IT DOES NOT!

APPENDIX N — DEFENDANTS' STATEMENT OF FACTS, FILED FEBRUARY 23, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. 1:08-CV-00263-SS

ABIGAIL NOEL FISHER, and
RACHEL MULTER MICHALEWICZ,

Plaintiffs,

UNIVERSITY OF TEXAS AT AUSTIN; et al.,

Defendants.

13. The decision to admit one particular applicant over another within the same selection pool turns on one or more of the following three factors: (1) high school class rank ("HSR"), (2) Academic Index ("AI"), and (3) Personal Achievement Index ("PAI").

. . . .

14. The first two factors (class rank and AI) are based solely on an applicant's academic performance. *2008 Top 10 Report* at 2. The third factor (PAI) is a number derived from scoring the applicant's admissions essays and an admissions officer's holistic review of an applicant's entire application file.

. . . .

27. For those applicants who are neither automatically admitted into their first-choice academic program on the basis of superior academic performance alone, nor presumptively denied admission due to a low PGPA (see discussion of "C" group applicants below), UT Austin admissions officials undertake a holistic review of the entire application file to determine an applicant's PAI.

. . . .

29. The PAI is determined based on a weighted average of scores the applicant receives for each of the two required essays and a "personal achievement" score given to the applicant based on a holistic review of the file, with slightly greater weight given to the personal achievement score. . . . . For each component, the applicant receives a score on a scale of 1 to 6, with 6 being the highest score possible. Ishop Aff.

. . . .

45. Every applicant is awarded a personal achievement score of 1-6 based on the reader's holistic evaluation of the applicant's demonstrated leadership qualities, extracurricular activities, honors and awards, work experience, community service, and a variety of special circumstances. . . . .

All components are considered in the context of the applicant's entire file, and no numerical value is ever assigned to any of the individual factors that may make up the personal achievement score.

. . . .

49. At no time is any individual factor ever determinative. . . . . And consideration of race, in the context of an entire application, can benefit any applicant, regardless of race.

. . . .

98. File readers are trained to consider race in conjunction with an applicant's demonstrated sense of cultural awareness. . . . .
Depending on the content of the application, race can positively impact the holistic evaluation of any applicant, including Caucasian applicants, or may have no impact whatsoever.

. . . .

100. No admissions officer or anyone else at UT Austin monitors the racial or ethnic composition of the group of admitted students at any time during the admissions process in order to consider whether an applicant will be admitted.

UT'S HOLISTIC REVIEW

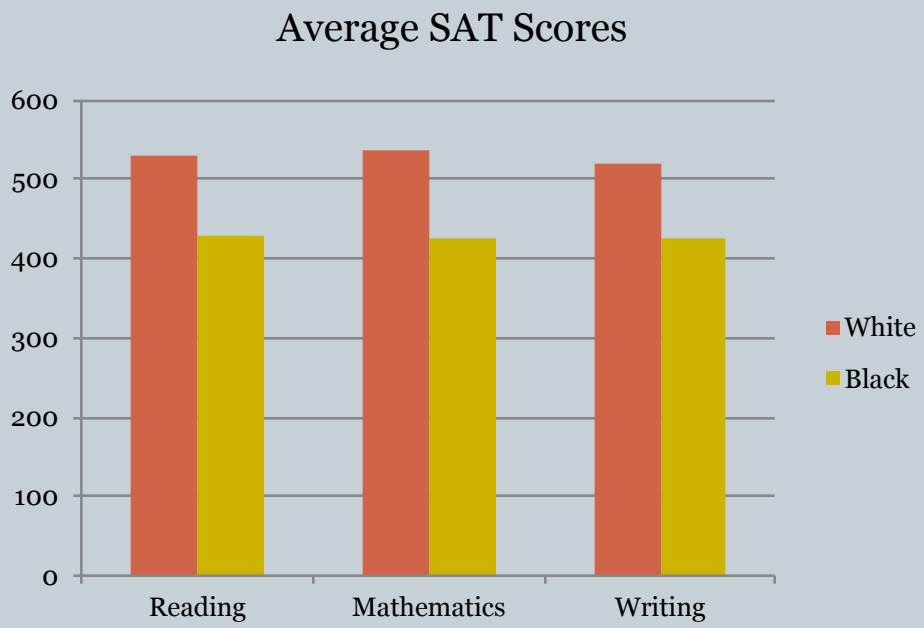
- Only used for applicants whose class rank and academic performance index does not justify admission on those criteria alone.
- Applied through a Personal Achievement Index ("PAI") that considers a variety of individualized factors including leadership qualities, extracurricular activities, honors and awards, work experience, community service, and various "special circumstances" that include, but not are limited to, race.
- No numerical "plus score" assigned based on race.
- Part of a "holistic" review that considers all special circumstances and results in a single score on a 1-6 scale.
- Race may or may not be deemed a relevant special circumstance in any individual case.
- Consideration of race can benefit applicants of any race, including Caucasians.

UT'S SYSTEM IS NOT ONLY FAIR, BUT ESSENTIAL TO ENSURING EQUAL OPPORTUNITY

- The admission criteria do not unfairly discriminate against applicants of any particular race.
- Measured consideration of race is essential to mitigate the effects of other biased admission criteria, including test scores.

COLLEGE ADMISSION TESTS HAVE SERIOUS RACIAL BIASES

- The race gap in average test scores is persistent and dramatic.
- Average SAT scores for African-American college applicants are approximately 100 points lower than the average scores for White applicants.
- In statistical terms, the size of this gap is larger than the disparities in some of the most celebrated Supreme Court discrimination cases.



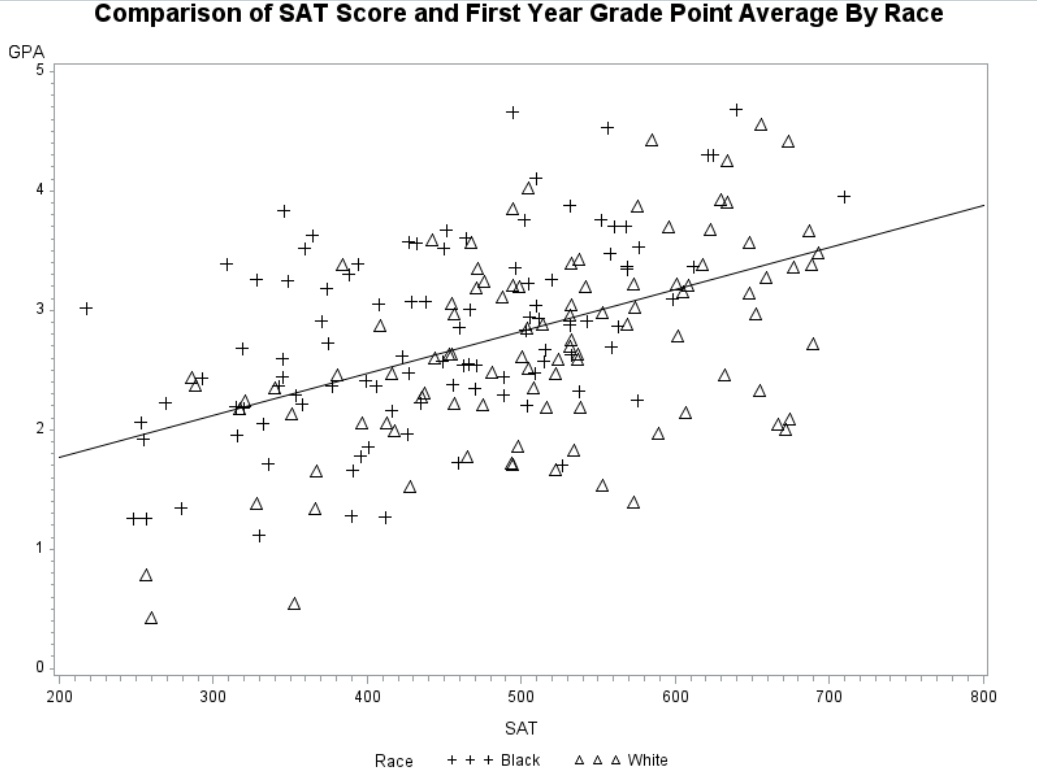
THE PREDICTIVE VALUE OF ADMISSIONS TESTS DOES NOT JUSTIFY THEIR ADVERSE IMPACT

- On a scale of 0 to 1, the predicted correlation between SAT scores and academic success, measured by first year college GPA, is 0.53.

- Many applicants with high SAT scores will not perform as well as lower-scoring applicants.

THE COST OF ADVERSE IMPACT

- A randomly drawn sample of 200 applicants (100 White and 100 Black), reflecting average test scores by race and overall correlation to first-year GPA, highlights the problem.

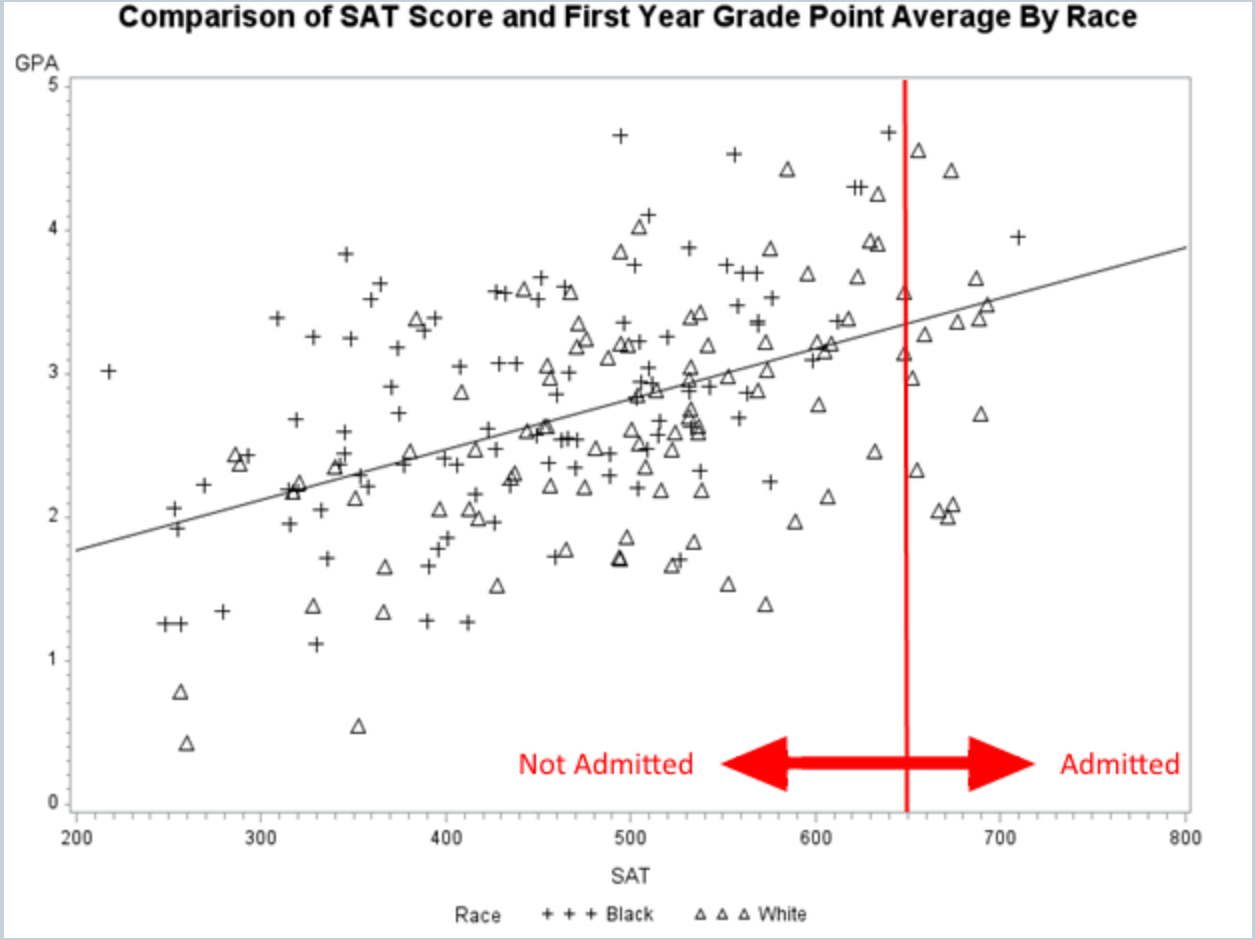


THE COST OF ADVERSE IMPACT

- Admission decisions based solely on test scores will admit more Whites than Blacks.
- Many of the Whites admitted on this basis will end up with lower achievement levels than the Black applicants who were excluded.
- In fact, because there is no reason to believe in the aggregate that Black students are inherently less capable of academic success, the average predicted GPA of Black applicants who are admitted, and the average predicted GPA of Black applicants who are not admitted, will be higher than the corresponding averages for Whites.

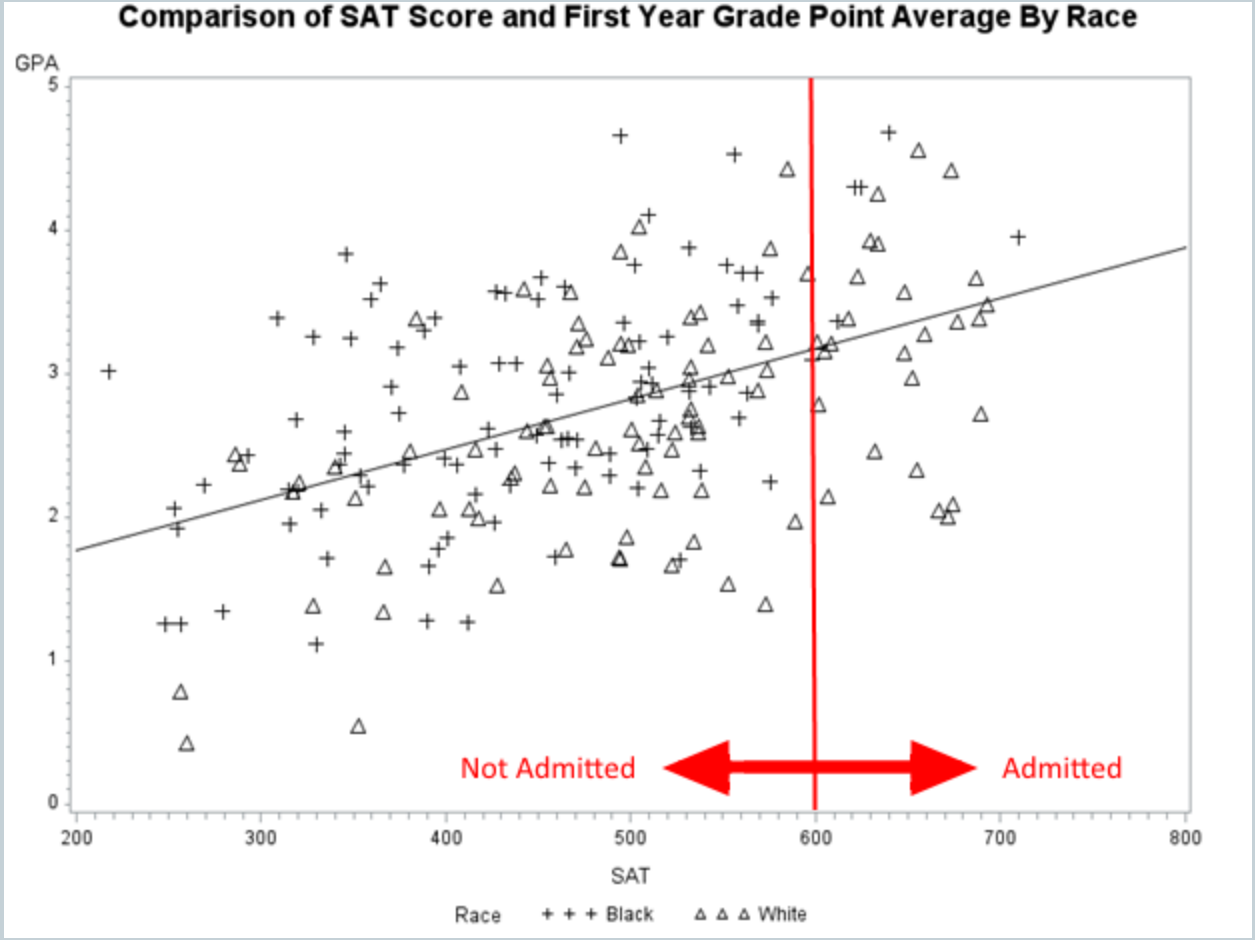
ADMISSION PATTERNS BASED ON TEST SCORES

- SAT Score Cutoff: 650
- White Admissions: 13
- Black Admissions: 1
- Average Predicted GPA for Admitted Students:
  - White: 3.11
  - Black: 3.95
- Average Predicted GPA for Students Not Admitted:
  - White: 2.65
  - Black: 2.79



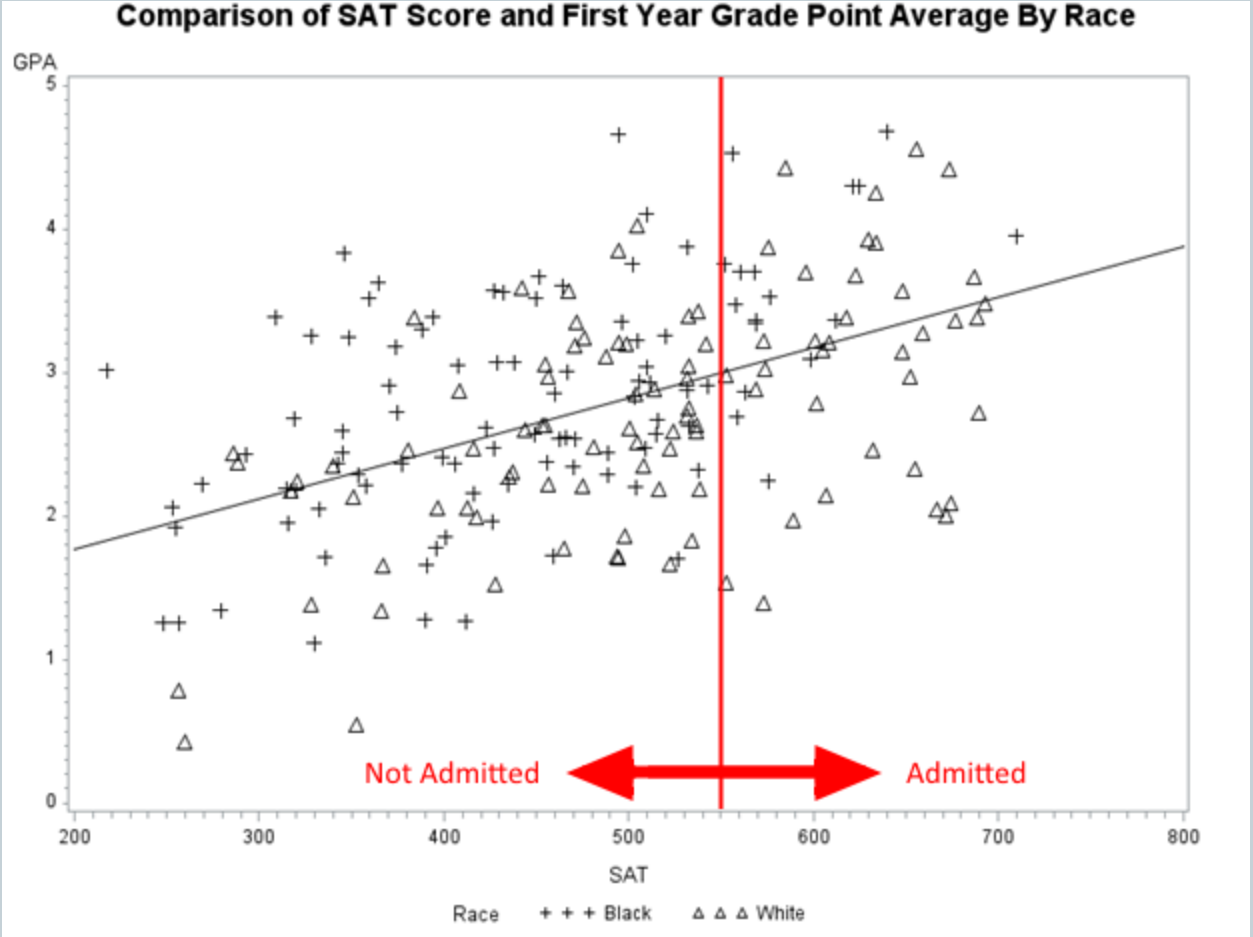
ADMISSION PATTERNS BASED ON TEST SCORES

- SAT Score Cutoff: 600
- White Admissions: 26
- Black Admissions: 5
- Average Predicted GPA for Admitted Students:
  - White: 3.20
  - Black: 4.12
- Average Predicted GPA for Students Not Admitted:
  - White: 2.54
  - Black: 2.73



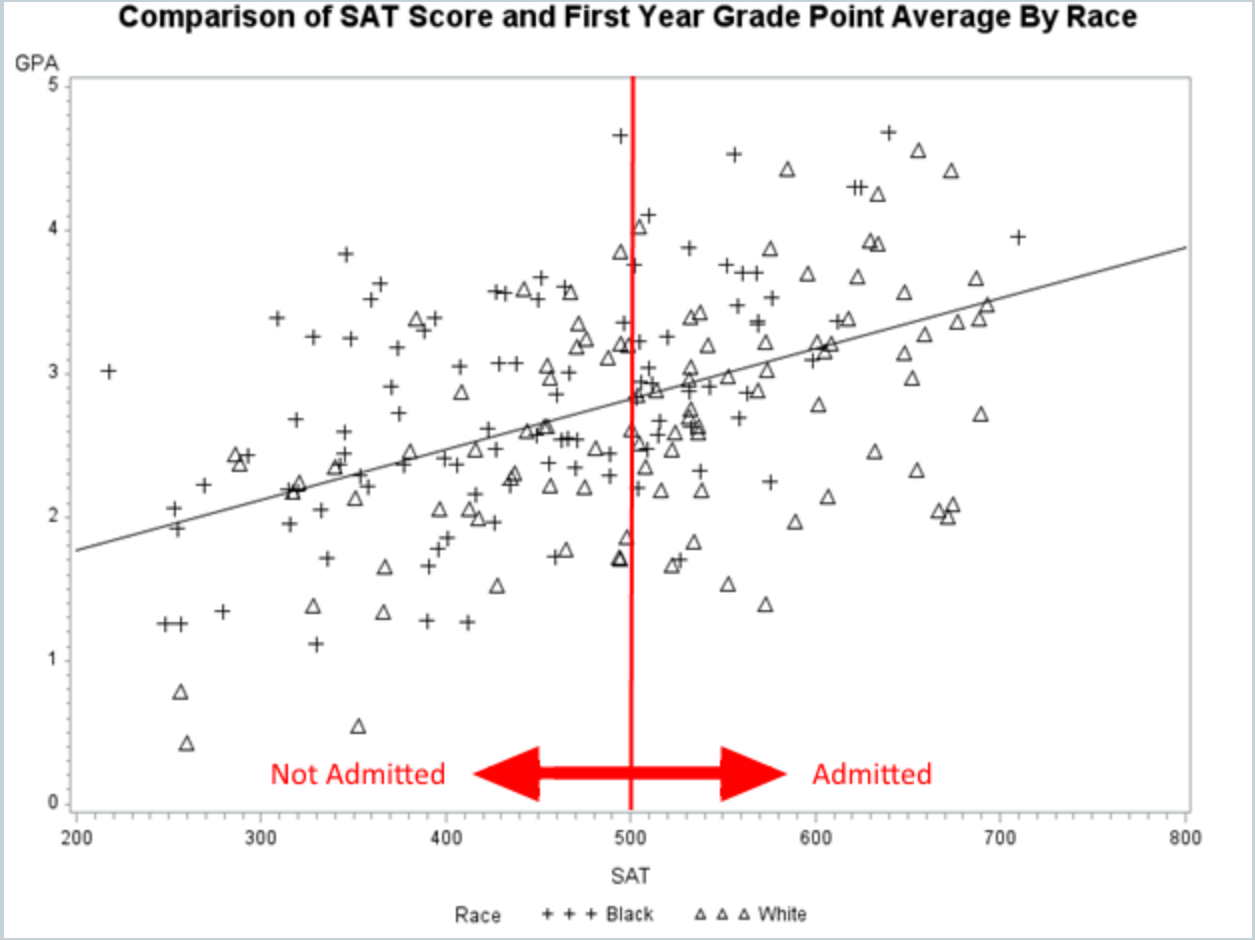
ADMISSION PATTERNS BASED ON TEST SCORES

- SAT Score Cutoff: 550
- White Admissions: 36
- Black Admissions: 17
- Average Predicted GPA for Admitted Students:
  - White: 3.12
  - Black: 3.58
- Average Predicted GPA for Students Not Admitted:
  - White: 2.48
  - Black: 2.64



ADMISSION PATTERNS BASED ON TEST SCORES

- SAT Score Cutoff: 500
- White Admissions: 57
- Black Admissions: 35
- Average Predicted GPA for Admitted Students:
  - White: 2.97
  - Black: 3.24
- Average Predicted GPA for Students Not Admitted:
  - White: 2.36
  - Black: 2.56



ORAL ARGUMENT

WHAT HAPPENED IN COURT?

- Racist comments?
  - Scalia - inarticulate description of “mismatch theory”
  - Roberts – diversity in physics
- Does consideration of race make a difference in numbers admitted?
- Expiration date on affirmative action programs.
- Bones thrown by Scalia and Breyer.
- Standing – Ginsburg
- Surprise – Alito acknowledges bias on tests!

POTENTIAL OUTCOMES AND IMPACT

THE "SCALIA FACTOR"

- We now have 7 Justices
- Kennedy's role is now more significant

POTENTIAL OUTCOMES

- Dismiss the case as moot.
- Uphold UT's admission practice as meeting strict scrutiny standard.
- Send case back to lower courts for more evidence.
- Strike down UT's admission practice as not meeting strict scrutiny standard.
- Declare race an impermissible factor in public university admissions.

POTENTIAL IMPACT

- If upheld, UT's admission practice will serve as model for other public institutions.
- If struck down, it will put a lot of pressure on other public institutions to modify/solidify their programs.
  - Define diversity objectives/critical mass.
  - Evaluate non-race-based programs that may increase diversity.
  - If non-race-based programs unsatisfactory, amass evidence that race-based programs will increase critical mass and narrowly tailored to achieve diverse results.
- If struck down, more limited impact in private institutions, <u>but</u>
  - same forces that sought to end affirmative action at UT will try and push holding further.

Q&A

AAAED thanks our attorneys

Matthew J Camardella, camardem@jacksonlewis.com
Marilynn Schuyler, schuyler@schuyleraap.com
Dean Sparlin, dsparlin@sparlinlaw.com
Joseph D. Weiner, jweiner@littler.com

AAAED's new address (same phone number):

1701 Pennsylvania Avenue, NW, Suite 206
Washington, DC 20006

(202) 349-9855

JOIN AAAED AT:
HTTP://WWW.AAAED.ORG/AAAED/JOIN_US.ASP