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Forgotten issue in *Fisher*

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The Supreme Court should dismiss the affirmative action case it just heard, *Fisher v. University of Texas, Austin* on jurisdictional grounds. For decades, the conservative majority on the Supreme Court has restricted federal court jurisdiction by expanding sovereign immunity for state governments and limiting who

has standing to sue. Under these doctrines, Abigail Fisher's suit against the University of Texas must be dismissed. But will the conservative majority in a desire to limit or eliminate affirmative action ignore its own jurisdictional rulings?

In 2008, Abigail Fisher applied for admission as an undergraduate to the University of Texas, Austin. When she was denied admission, she enrolled at Louisiana State University and sued the University of Texas claiming that its affirmative action program discriminated against her as a white woman. Fisher did not bring this as a class action suit. The only other plaintiff has long since been dismissed from the litigation.

Fisher graduated from LSU in June 2012. In this way, her situation is exactly like that which occurred when the Supreme Court first heard an affirmative action case in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The plaintiff, a white male, applied for admission to the University of Washington Law School and was denied acceptance. He sued the school, contending that he was discriminated against because of the school's preferential treatment of minority candidates. The trial court issued a preliminary injunction admitting the plaintiff to law school while the case was pending.

By the time the case reached the U.S. Supreme Court, the plaintiff was in his final year of school and the school stipulated that the plaintiff would be allowed to complete his studies regardless of the outcome of the litigation. The Supreme Court held that the case was moot because "the controversy between the parties has thus clearly ceased to be definite and concrete and no longer touches the legal relations of parties having adverse legal interests."

Abigail Fisher maintains that her case is not moot because she is still seeking \$100 in damages: her application fee and the amount she paid in a housing deposit in the event she was admitted. The insurmountable problem is that the only defendants named in the suit are the University of Texas, a state university, and its officers who are sued in their "official capacity." The law is clear that the 11th Amendment and sovereign immunity bar suits for money damages against a state government or its officials who are sued in their official capacity for a constitutional violation. No exception exists that would allow such a claim for money damages and Fisher's claims for injunctive and declaratory relief no longer exist.

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SPECIAL REPORT

Top Neutrals



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Labor/Employment

Age discrimination claims allowed by Alameda judge

Former employees of Lawrence Livermore National Laboratory won the right late last week to bring age discrimination complaints before a jury.

Litigation

Federal judge allows California fraud lawsuits against Lehman executives to continue

California municipalities can continue to pursue claims of accounting fraud and securities violations against former executives and auditors of the bankrupt Lehman Brothers, but a judge significantly narrowed the case.

Government

Trial courts' funding to undergo close scrutiny by judicial branch

California's judicial branch is preparing to review state trial court funding, a 15-year-old system praised by some for helping courts in poorer counties and criticized by others as granting too much power to the Judicial Council and AOC.

Litigation

Lawsuit takes aim at state's limited regulation of fracking

Environmental groups filed a lawsuit Tuesday against the state, alleging it issues permits for oil and gas wells without adequate environmental review.

Judge hears arguments in "dancing toddler case"

A contentious battle over a YouTube video featuring a dancing toddler wound up in a San Jose federal courtroom Tuesday when a judge heard oral arguments on when companies can issue takedown notices for online content.

Legal Ethics & Professional Responsibility
Del Norte DA ethics trial puts judges on the witness stand

defendants named in the suit are the University of Texas, a state university, and its officers who are sued in their "official capacity."

Moreover, it is questionable whether Fisher has standing to bring the claim. The Supreme Court, in many cases, has said that a plaintiff has standing only if he or she can show an injury that was caused by the unconstitutional practice and is likely to be redressed by it. Fisher's injury is now solely the loss of money for the application and housing fee. But this injury was not caused by the University of Texas' affirmative action plan. She surely would have applied anyway.

In fact, in *Texas v. Lesage*, 528 U.S. 18 (1999), the court expressly distinguished between an affirmative action case seeking an injunction, prospective relief, as opposed to one seeking only money damages. The court said in the latter situation "the government's demonstration that it would have made the same decision about the discrimination precludes any finding of liability." In the U.S. District Court for the Western District of Texas, Texas demonstrated that Fisher would not have been accepted even if she had a perfect Personal Achievement Score.

The University of Texas and the many amicus briefs filed on its behalf barely raise this issue. In the University of Texas' brief this is mentioned only in a long footnote. It is baffling why Texas did not put more emphasis on this and seek to have the court dismiss the case on this basis. Some have speculated that Texas thought such arguments futile because it had raised them in opposing Supreme Court review and the court took the case anyway. But there are countless cases where the court grants review only to dismiss based on jurisdictional grounds. Besides, neither the sovereign immunity nor the standing arguments were directly presented in the opposition to certiorari.

Others have speculated that having prevailed in the U.S. District Court and 5th U.S. Circuit Court of Appeals, Texas does not want these decisions overturned and believes it can win in the Supreme Court. If so, Texas is making a huge gamble on Justice Anthony Kennedy, who in 25 years on the Supreme Court never has voted to uphold any affirmative action plan in any context.

But regardless of whether Texas emphasized sovereign immunity and standing, the justices are required to do so on their own because they are jurisdictional bars. At the oral argument last week, there were several questions raised about standing, but all were raised by the more liberal justices.

It surely should not be that sovereign immunity and standing are used by conservative justices only to dismiss civil rights and environmental claims and that these doctrines are ignored when they might keep the conservative justices from reaching a conservative result they desire. All of the justices on the court should recognize that *Fisher v. University of Texas, Austin* is not the proper vehicle for addressing the issue of affirmative action. Judicial restraint and caution seem especially important in an area like this where the court is considering one of the most divisive and difficult issues in all of constitutional law.

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State Bar prosecutors experienced an apparent setback Tuesday, when one of their ethics trial witnesses - an incumbent judge - appeared to shy away from one of their arguments against Del Norte County's district attorney.

Law Practice

Law firms attempt to deflect Heller clawback claims

Law firms facing "unfinished business" lawsuits from the Heller Ehrman LLP estate claim that they should not be held liable because clients make the final decision on which firms to hire.

Bar Associations

In first of 24 discipline cases returned by justices, State Bar Court takes hint to get tougher

Ruling in the first of 24 discipline plea deals remanded by the state Supreme Court, a State Bar judge imposed a much tougher sanction on a Rolling Hills Estates attorney.

Litigation

DLA Piper partner to mediate settlement talks over San Bruno pipeline explosion

Former U.S. Senator George J. Mitchell, a current DLA Piper partner and former chairman, will help mediate a series of settlement talks between the California Public Utilities Commission and Pacific Gas and Electric Co. over the September 2010 explosion of a natural gas pipeline in San Bruno.

Congressman objects to antitrust suit against Google

Days after the Federal Trade Commission circulated an internal memo that called for an antitrust suit against Google Inc., a Colorado Congressman raised objections.

Arguments set in appeal of Bratz doll ruling

A showdown in the long-running Bratz doll case - as Mattel Inc. appeals MGA Entertainment Inc.'s \$310 million trial court judgment - is set for Dec. 10 before the 9th Circuit.

Education

Longtime Santa Clara University School of Law dean stepping down

Donald Polden, who has served as dean at Santa Clara University School of Law since 2003, will step down at the end of this school year.

U.S. Supreme Court

Forgotten issue in *Fisher*

The only defendants named in the suit are the University of Texas, a state university, and its officers who are sued in their "official capacity." By **Erwin Chemerinsky** of UC Irvine School of Law