# Supreme Court to Reconsider Affirmative Action in College Admissions

**February 24, 2012**

**By Pete Land and Kendra Berner**

The United States Supreme Court decided this week to review the constitutionality of a race-conscious admissions policy at the University of Texas at Austin. The Court's acceptance of this case, *Fisher v. University of Texas at Austin,* could result in a fundamental shift of existing constitutional standards that have allowed public and private higher education institutions to promote diversity of their student bodies through the consideration of race (among other factors) for more than a generation.

As first determined in 1978 and reaffirmed relatively recently in a pair of Supreme Court decisions in 2003 involving the University of Michigan, existing law allows colleges and universities to use race as one of several diversity factors in admitting students. Although one of the Court's 2003 decisions, *Grutter v. Bollinger,* predicted that consideration of race may not be necessary to achieve diversity among students after another 25 years, the *Fisher* case offers the Court an opportunity to re-examine that standard less than 10 years after deciding *Grutter*.

Proponents of affirmative action have two primary reasons to suspect that the Court could adopt a new standard that reduces or even prohibits consideration of race in admissions. First, the Court chose to review this case despite the absence of any split in authority from the various circuit courts of appeal that have applied the *Grutter* standards. Second, the Court's composition has changed in meaningful ways since *Grutter*, which was a closely decided, 5-to-4 ruling. The author of that decision, Justice Sandra Day O'Connor, has retired. Her replacement, Justice Samuel Alito, has been critical of the use of affirmative action. Chief Justice Rhenquist also left the bench after 2003, succeeded by Chief Justice John Roberts, who has since penned a decision expressing skepticism about race-conscious policies in the context of desegregation of public school districts. Although another recent addition to the Court, Justice Elena Kagan, is viewed as a potential proponent of affirmative action, she has recused herself from participating in this case because of her prior involvement at lower court stages on behalf of the Obama administration (in her former role as Solicitor General).

The Court will be reviewing an admissions policy that was adopted in two stages and involves two diversity-related components. The University of Texas at Austin's policy was created in large part pursuant to a diversity-oriented law passed by the Texas legislature in the mid-1990s, which requires the University to admit the top 10% of graduates from every high school in the state. This procedure increased the diversity of the University's student body. After *Grutter* was decided, the University adopted a second component to its admission policy for students not admitted under the Top Ten Percent Law, which includes consideration of race among many other factors. In the *Fisher* case, this second component of the policy was challenged by a white applicant who was outside the top 10% of her class and was denied admission. The applicant argued

that, because the University had achieved a fair measure of diversity through the race-neutral process required by the Top Ten Percent Law, the additional race-conscious measures were unconstitutional.

The Fifth Circuit Court of Appeals ruled that the University's policy complied with *Grutter* and was narrowly tailored to lead to admission of a critical mass of underrepresented minority students. In a lengthy concurring opinion, one justice agreed that the University's policy complied with *Grutter* but also questioned the wisdom of *Grutter*'s allowance of any racial preference in admissions to higher education institutions. In response to the plaintiff's request for rehearing *en banc,* the Fifth Circuit was closely divided (9 to 7 against rehearing), and the Chief Judge wrote a potentially meaningful dissent from the decision not to rehear the case. Addressing how the *Grutter* standard had been applied, the dissent argued that the original panel's opinion afforded too much deference to the University, failed to properly scrutinize the race-conscious policy when coupled with a race-neutral policy that already created a significantly diverse student body, and improperly considered the University's efforts to obtain diversity at the classroom level (instead of only within the general student population). It remains possible that the Supreme Court will opine on one or more of these narrower challenges to the UT policy rather than overhauling the very concept of affirmative action practices in student admissions.

The Court is expected to hear argument on the *Fisher v. University of Texas* case during its Fall 2012 term, which begins in October, and thus no ruling is expected until the end of this year. Although several states have prohibited public universities from using race as a factor in student admissions (including California and at least six others, not including Illinois), most public and private colleges and universities have been allowed to and have commonly used race as a factor to some degree in student admissions. Thus, any change to the standards articulated in *Grutter* could require significant policy changes.

## More Information

Kendra Berner
keb@franczek.com
312.786.6532

Peter G. Land
pgl@franczek.com
312.786.6522

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