



5th Circ. Urged To Ax UT's Race-Conscious Admissions Policy

By **Linda Chiem**

Law360, New York (October 11, 2013, 4:54 PM ET) -- Public policy think tanks and advocacy groups told the Fifth Circuit on Friday that the University of Texas at Austin has failed to prove that its race-conscious admissions process satisfies strict constitutional standards as it reconsiders the Abigail Fisher case remanded by the [U.S. Supreme Court](#).

In a pair of amici curiae briefs filed with the Fifth Circuit, the [Cato Institute](#), the American Civil Rights Institute, the [Pacific Legal Foundation](#) and other groups urged the appeals court to reject the university's racial classification scheme for student admissions as unconstitutional in the suit launched by Fisher, an applicant who claimed she was denied admission to the university because she was white.

"Strict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose,'" the Cato Institute says in its 43-page brief. "Because the university has failed to do so, this court must reject its use of racial classifications."

The institute says the evidence demonstrates that the university cannot verify that it's necessary to use race to achieve the educational benefits of diversity.

"The concerns that motivate this requirement — racial neutrality, individual dignity and accountability — apply with special force to public universities' use of racial classifications to achieve 'diversity,' a vague and potentially limitless goal that may provide cover for politically motivated or invidious discrimination," Cato says.

Also, the Pacific Legal Foundation and other groups said strict scrutiny requires a university to prove that no workable race-neutral alternatives would achieve the educational benefits of a diverse student body. There are a variety of race-neutral alternatives, including class-based preferences, first generation preferences, new financial aid opportunities, increased recruitment at underrepresented elementary schools and high schools, and expanded transfer programs, they said.

“Because there is no evidence UT pursued these alternatives, and because UT cannot demonstrate that these race-neutral options are inadequate, UT’s race-conscious admissions policy does not satisfy strict scrutiny,” they said in their 31-page brief.

The U.S. Supreme Court [held in June](#) that the Fifth Circuit failed to determine whether the university's affirmative action policies were "narrowly tailored" to achieve a diverse student body encompassing a "broad array of qualifications and characteristics" and sent the [Fisher case](#) back for further review.

The university had claimed that its admissions process was meant to supplement a 1997 state law that guarantees automatic admission for high school graduates in the top 10 percent of their classes to Texas' public universities. By itself, the top 10 percent rule did not fully meet the goal of a diverse student body, according to the university.

But Fisher said the university's use of race violated her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. Fisher claims that while the university has a legitimate interest in establishing a diverse student population, Texas' consideration of race in admissions is neither necessary nor appropriate.

The Cato Institute is represented by David B. Rivkin and Andrew M. Grossman of [BakerHostetler](#) and in-house by Ilya Shapiro. The other groups are represented by Meriem L. Hubbard, Joshua P. Thompson and Anastasia P. Boden of the Pacific Legal Foundation.

Fisher is represented by Bert Walter Rein, William Consovoy, Claire Evans and Thomas R. McCarthy of [Wiley Rein LLP](#) and Paul M. Terrill III of Terrill Firm PC.

University of Texas at Austin is represented by Gregory George Garre, Lori Ann Alvino McGill and Maureen E. Mahoney of [Latham & Watkins LLP](#) and James C. Ho of [Gibson Dunn](#).

The case is Abigail Noel Fisher v. University of Texas at Austin et al., case number [09-50822](#), in the U.S. Court of Appeals for the Fifth Circuit.