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Plaintiffs: 'Fisher v. UT' Kroll Report Shows School's Arguments Are 'A Sham'

By Miriam Rozen
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The Cato Institute has cited a recent Kroll Inc. investigation into the University of Texas at Austin's admissions practices as uncovering evidence that shows the school's arguments against longtime plaintiff Abigail Fisher are "a sham."

The Cato Institute made that argument in its recently filed friend of the court brief, supporting Fisher's petition to have her discrimination allegations against UT reheard by the U.S. Supreme Court.

Fisher, a white woman who was denied UT admission in 2008, filed her cert petition with the nation's highest court on Feb. 13, after the U.S. Court of Appeals for the Fifth Circuit denied her a rehearing on Nov. 12, 2015.

The Cato Institute brief, filed March 16, specifically focuses on the "holds" that the Kroll report identified as regularly placed on applications by UT's president, Bill Powers, and his staff.

Those holds led to actions that show as a conceit UT's assertion that its "holistic review" of applications achieves "carefully calibrated" diversity, the brief argues. UT needs to show careful calibrations to satisfy the "strict scrutiny" standard for the use of race in university admissions considerations set by the 2003 Supreme Court ruling in Grutter v. Bollinger.

"The record shows that the university uses race in an ad hoc fashion, entirely divorced [from] its stated justification," the brief states.

The brief also cites Powers' comments in a National Law Journal article in which the UT president describes the consideration of race as important "to attain demographic parity, overcome societal discrimination, and combat misperceptions regarding the university's reputation." The brief argues that all of those Powers-cited reasons are "forbidden purposes," according to the Grutter ruling.

The Fifth Circuit failed to see through UT's "pretext" in its most recent review of Fisher's claim, the brief states.

UT has an April 15 deadline to file a response to Fisher's petition.

Case History

In its Nov. 12, 2014, ruling, the Fifth Circuit refused to rehear Fisher v. UT, leaving standing an opinion issued by a divided three-judge panel, which allows UT to use race "as a factor of a factor" in admissions decisions.

Before that, Fisher v. UT already had a long and winding history, starting with her suit after UT denied her admission, an outcome that was due to her white race, Fisher claims.

Both a district court and the Fifth Circuit ruled for UT. But when Fisher appealed to the Supreme Court, the nation's highest court overturned the lower court ruling. Justice Anthony Kennedy wrote for the 7-1 majority that the Fifth Circuit "did not hold the university to the demanding burden of strict scrutiny articulated" in previous court decisions as governing race-based admissions. The high court remanded Fisher to the lower courts for further development of the evidentiary record.

In its subsequent ruling, the three-judge panel of the Fifth Circuit, after more briefing and oral arguments, reaffirmed its support of the UT admissions policy even under the heightened standard.

"We are persuaded that to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience" in contradiction of Supreme Court precedents that found diversity a permissible government goal, the majority opinion, written by Judge Patrick Higginbotham, stated.

When it denied Fisher an en banc rehearing, the majority of 10 judges offered no explanation for the ruling. The minority, however, expressed in a dissenting opinion why they thought the full court should look at Fisher again. The dissent was written by Judge Emilio M. Garza, and was joined by Judges Edith Brown Clement, Edith H. Jones, Priscilla R. Owen, and Jerry E. Smith.

"Clearly the panel majority dutifully bows to [the Supreme Court ruling in] Fisher's requirements, but then fails to conduct the strict scrutiny analysis it requires," Garza wrote in the dissent. By not providing "a clear definition" of its "end goal," Garza wrote, UT "eliminates any chance that this court could conduct the 'most rigid scrutiny' of its race-conscious admissions program."

UT Systems officials commissioned the Kroll report after a long-running battle among some UT regents, Texas legislators and UT administrators in part about the admissions process. In their report, issued in February, the Kroll investigators concluded that UT officials had not openly presented the use of holds in the admissions process.

"Although the practice of holds and exercise of presidential discretion over admissions may not violate any existing law, rule or policy, it is an aspect of the admissions process that does not appear in UT-Austin's public representations," the report states.

The report also notes, however, that the number of less-qualified applicants who benefited from the hold system "appears to be relatively small," or about 73 such applicants enrolled from 2009 to 2014.