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SUPREME COURT TO TAKE UP AFFIRMATIVE ACTION CASE

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Probably the most highly anticipated case to be taken up by the U.S. Supreme Court for its 2012-13 term, which begins Oct. 1, is the affirmative action lawsuit involving a white college applicant who was rejected for admission at University of Texas at Austin.

The term may also be characterized by controversial topics related to cases not presently on the docket, but which could be added: the legality of gay marriage and proper implementation of the Voting Rights Act.

"The biggest case in the term, at least in terms of its popularity and its prominence, is of course the Fisher affirmative action case," said Thomas C. Goldstein, author of the widely read SCOTUSblog.

Fisher v. University of Texas is the case brought by Abigail N. Fisher, who did not meet the University of Texas at Austin's cutoff for automatic admission to its undergraduate program. She was also denied admission from within the general pool of applicants, for which it is the university's policy to include race as a deciding factor.
Fisher sued the school in 2008, claiming that the race-based admissions policy was unconstitutional.

The Court could fail to resolve the case for two procedural reasons: After UT Austin rejected Fisher, she matriculated to Louisiana State University, raising the question of whether the case is a live issue any longer. Second, Justice Elena Kagan has recused herself from the case. Before she recused herself, National Review Online pointed out that doing so would open the door for a 4–4 tie on the ruling.

But Fisher's alma mater and Kagan's recusal are unlikely to make a difference due to Justices Anthony Kennedy and Samuel A. Alito, Jr.'s history of suspicion toward affirmative action and other race-based programs, Goldstein said.

Fisher is successor to the decade-old affirmative action lawsuits *Grutter v. Bollinger* and *Gratz v. Bollinger*, known together as *Grutter* and *Gratz*. "The big difference between them is not really the facts, but the fact that Grutter and Gratz were decided when Justice [Sandra Day] O'Connor was on the Supreme Court," he said. "Her seat for these purposes has been taken by Justice Alito, who has substantially greater skepticism about the role of race in governmental decision-making."

As it stands, given the likely conservative tilt of the court in this decision, it's likely the UT program is going to be in "big trouble" over its race-based admissions policy, Goldstein said. Such a Supreme Court ruling would at least ratchet back, if not fully reverse, the loose affirmative action parameters established by *Grutter* and *Gratz*, he said.
Goldstein was accompanied by Paul Clement at a discussion last Tuesday of the Supreme Court Terms October 2012 and 2013, hosted by the conservative think tank The Heritage Foundation.

Clement, who represented the challengers to the Patient Protection and Affordable Care Act in last term's Supreme Court case, discussed two issues not on the docket that the Court may be forced to take up: Section 5 of the Voting Rights Act of 1965 and the legality of the Defense of Marriage Act (DOMA).

Voting Rights Act
The Department of Justice has used the provision in the Voting Rights Act to block Republican-led drives for laws that would require voters to present photo identification at polls in several states, The New York Times reported in March.

Under Section 5 of Voting Rights Act, certain states and localities are required to prove to the Department of Justice that proposed changes in voting eligibility laws do not discriminate against voters based on race or nationality.

Ilya Shapiro, constitutional scholar at The Cato Institute, wrote a blog post announcing an amicus, or "friend of the court" brief in support of two challenges to Section 5 in August. "Because Section 5's burdens are no longer justified by 'current needs,' they fail to satisfy the Court's requirements for 'appropriate' enforcement legislation. In other words, Section 5's early success quickly obviated its legitimacy," according to the post.

In the voter ID law cases, the DOJ argued that Hispanic voters disproportionately lack driver's licenses or other forms of identification.

Gay marriage lawsuit appeals

The Court may not be able to avoid wrestling with the issue of gay marriage legality, which is not on the docket, after receiving a large number of appeals from lower courts for this term.

Among the highly contested cases is California's Proposition 8, a ballot initiative to eliminate the rights of same-sex couples to marry, but DOMA is most likely to take center stage in determining the constitutionality of gay marriage, Clement said.

"You have this extraordinary situation where the federal government is not defending the constitutionality of the Defense of Marriage Act, but is continuing to enforce the Defense of Marriage Act," he said.

As a result, a torrent of certiorari petitions, which ask the high court to review lower court decisions, from various circuits around the country, as well as from the House of Representatives, have made the Supreme Court likely to take up DOMA in this term, Clement said.

Civil liberties issues

Two cases on the Supreme Court's docket will address the validity of the law enforcement's implementation of search and detention powers, respectively, in light of the Fourth Amendment's protections against unwarranted search and seizure.

In *Florida v. Jardines*, Miami police used a trained drug-sniffing dog's indication as probable cause to obtain a search warrant on Joelis Jardines's home. Jardines's lawyer argued that the use of the dog was an unconstitutional intrusion on the privacy of the home. A similar case also on the docket deals with dogs sniffing the exterior of vehicles.

Another case that has arisen out of the war on drugs is *Bailey v. United States*. In the 1981 case*Michigan v. Summers*, the Supreme Court ruled that police may detain a homeowner who is present while they search his home for illegal substances. Since then, the police have used this ruling to justify detaining the current petitioner, Chunon L. Bailey, after he left his home, arresting him, bringing him back to his home, and then holding him there on indefinite terms while they searched the location, Goldstein said.

The case of *Clapper v. Amnesty International USA* challenges the constitutionality of electronic surveillance amendments to the Foreign Intelligence Surveillance Act. The Justices will decide not if the practice of electronic wiretapping is constitutional, but whether individuals can challenge it in court in the first place. The Supreme Court will hear arguments on Oct. 29.

Two more cases look at the issue of privacy, but these will do so in situations of law enforcement gathering blood and tissue samples from an individual for evidence.

In *Maryland v. King*, the Court will look at whether the government can administer a warrantless DNA test to a suspect who has not been convicted of a crime.

Last week, the Justices added the second case, *Missouri v. McNeely*. In it, they will consider whether the exigent circumstances exception to the Fourth Amendment allows for a law enforcement officer to obtain a nonconsensual, warrantless blood sample from a drunk driver.