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Race & Admissions: Round 2 at Supreme Court

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When the U.S. Supreme Court hears a second round of arguments Dec. 9 on the use of racial factors in admitting new students at the University of Texas, it will mostly—but not totally—be a case of déjà vu all over again.

Positions taken may be slightly different, but the lineup of lawyers set to argue in Fisher v. University of Texas at Austin will be the same as three years ago: Bert Rein of Wiley Rein, for applicant Abigail Fisher, former solicitor general Gregory Garre for the university, and Solicitor General Donald Verrilli Jr. for the United States, in support of the university.

The court's ruling in "Fisher I" stopped short of overturning the University of Texas program, which uses race as a factor in evaluating applicants for a portion of available slots in the incoming class. The justices sent the case back to the U.S. Court of Appeals for the Fifth Circuit, which reaffirmed its view that the policy was constitutional—tailored to the university's compelling interest in diversity.

Now that the case has returned to the high court, Rein said the university is acting as if the first Fisher ruling never happened. "Their brief is all about Grutter, not Fisher I," said Rein, a founding partner of Washington's Wiley Rein. In the 2003's Grutter v. Bollinger, the high court upheld a University of Michigan affirmative action program that the University of Texas asserts is similar to its own.

Rein also sees disagreement between the university's defense of its program and the solicitor general's emphasis in the government's brief on the need for universities to provide "concrete measures" that prove the consideration of race in admissions is necessary. "The briefs don't match up," Rein said.

Garre, chairman of Latham & Watkins' Supreme Court and appellate practice, declined to comment in advance of the argument. His brief asserts that Fisher has "completely retooled her challenge to UT's admissions policy" by attacking the university's claim of a "compelling interest" in diversity.

The lineup of amicus briefs also mirrors the 2012 briefing. Sixty-six briefs were filed to support of the University of Texas, and Fisher's amicus briefs total 14, both close to the 2012 number. "We're not trying to lobby the court," Rein said.

What follows are highlights of briefs (with links) from both sides.

BRIEFS SUPPORTING ABIGAIL FISHER

Pacific Legal Foundation: "Despite over 60 years of opinions from this court denouncing and attempting to cabin the use of race by government, racial admissions preferences are widely used and rarely scaled back. … Public universities are using racial criteria to favor preferred minority applicants and to turn away applicants representing disfavored races." —Joshua Thompson, Pacific Legal Foundation

Cato Institute: "The University of Texas's race-conscious admissions system fails to satisfy narrow-tailoring requirements because it is arbitrary, opaque, and incapable of generating the evidence necessary to allow searching judicial review. … It is, in fact, well documented that universities have used holistic review to achieve outright racial balancing, including reducing Jewish enrollment, implementing de facto quotas for preferred minority groups, and capping admissions of Asian-American applicants." —David Rivkin Jr., Baker & Hostetler

Asian American Legal Foundation: "Amici are greatly distressed by and find offensive the decision of the Fifth Circuit upholding the race-based admission program at UT. Contrary to that court's depiction of the issue as 'white' versus 'minority,' in fact, it is Asian American students, the members of a historically oppressed minority, who comprise the group most harmed by the program." —Gordon Fauth Jr., Litigation Law Group, Alameda, California

BRIEFS SUPPORTING UNIVERSITY OF TEXAS

36 former military leaders: "University admissions policies, including those at the University of Texas at Austin, determine the makeup of our officer corps. As was true when Grutter was decided, our military cannot achieve a racially diverse officer corps if universities are required to turn a blind eye toward race." —Michael Purpura, Carlsmith Ball

Fortune 100 companies: "The principles established in Grutter and Fisher I are more important today than ever. For amici to succeed in their businesses, they must be able to hire highly trained employees of all races, religions, cultures, and economic backgrounds. … Within the confines of a rigorous constitutional analysis, there must be room for a university to decide that a particular approach to admissions is necessary to achieve important educational goals." —David DeBruin, Jenner & Block

University of Michigan: "Despite persistent and varied efforts to increase student-body racial and ethnic diversity by race-neutral means; despite committed efforts by University faculty, staff, students, and alumni to conduct race-neutral recruiting and admissions programs; and despite admissions consideration and extensive financial aid for socioeconomically disadvantaged students, admission and enrollment of underrepresented minority students have fallen precipitously in many of U-M's schools and colleges since Proposal 2 [banning affirmative action in the state] was enacted." —John Elwood, Vinson & Elkins