Groups Urge 5th Circ. To Rehear UT Affirmative Action Case

By Kelly Knaub
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More than a dozen conservative nonprofit legal groups and others have urged the Fifth Circuit to reconsider its ruling that the University of Texas at Austin's policy of race-conscious admissions is constitutional under the Fourteenth Amendment.

The American Center for Law and Justice, the Cato Institute, Judicial Watch Inc. and other interested groups and individuals asked the appeals court this week to rehear its **July decision** in the case, which was brought by Abigail Fisher, an unsuccessful applicant who claimed she was discriminated against because she is white. Fisher filed a petition for rehearing en banc last week.

While arguments in support of an en banc hearing varied among the petitioners, the American Center for Law and Justice contended that the university's admissions policy depends upon the use of arbitrary racial labeling.

"When the government forbids the differential treatment of individuals on the basis of racial labels, it properly sets itself against race discrimination," the American Center for Law wrote in its Wednesday brief. "But when the government undertakes to treat people differentially on the basis of racial labels, it encounters a huge difficulty: Such labeling is ultimately incoherent, as racial categories are both arbitrary and porous."

Applying the exacting scrutiny demanded by the U.S. Supreme Court **last June** to determine whether the university's affirmative action policies are "narrowly tailored" to achieve a diverse student body encompassing a "broad array of qualifications and characteristics," the appeals court — in a 2-1 opinion — again found that the university is permitted to consider race in its admissions programs.

Circuit Judge Patrick E. Higginbotham, writing for the majority, said that denying the University of Texas its limited use of race in its search for holistic diversity would "hobble the richness of the educational experience," contradicting the plain teachings of Regents of the University of California v. Bakke and Grutter v. Bollinger — landmark Supreme Court decisions upholding affirmative action in college admissions.

Under the university's affirmative action admissions policy, race is not itself assigned a numerical value for each applicant, but the university says it has committed itself to reaching a "critical mass" of racial minority enrollment on campus.

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.

Combining Texas' admissions policy with the top 10 percent rule had the effect of unlawfully discriminating against equally qualified white applicants, according to Fisher.

Last June, the high court ruled that the district court and Fifth Circuit gave too much deference to the university's "critical mass" target, ruling that it should have been more rigorously scrutinized.

Fisher sought admission to the school in 2008 and then claimed that she was turned down despite having academic credentials that were better than those of many admitted minority candidates.

Fisher and another woman filed suit in April 2008, claiming that the university's admissions policies discriminated against them in violation of the Fourteenth Amendment and federal civil rights statutes. The University of Texas at Austin won summary judgment from the trial court, a decision later affirmed by the Fifth Circuit.

"The constitutional laziness and deference the panel majority showed is striking," Ilya Shapiro, attorney at the Cato Institute, told Law360 on Thursday. "The Fifth Circuit should hear this case en banc and correct the errors made by the panel majority, which contradict circuit precedent in various ways."

Attorneys for American Center for Law and Justice, Judicial Watch Inc., Fisher and the university did not immediately return a request for comment Thursday.

Fisher is represented by Thomas R. McCarthy, Claire Evans, Bert W. Rein and William Consovoy of Wiley Rein LLP and by Paul Terrill of The Terrill Firm PC.

The university is represented by James C. Ho of Gibson Dunn, by Gregory G. Garre and Maureen E. Mahoney of Latham & Watkins LLP, by Lori A. McGill of Quinn Emanuel Urquhart & Sullivan LLP, by Joseph D. Hughes of Klein DeNatale Goldner Cooper Rosenlieb & Kimball LLP and by Solicitor General of Texas Jonathan F. Mitchell.

American Center for Law and Justice is represented by Jay Alan Sekulow and Walter M. Weber.

The Cato Institute is represented by David B. Rivkin, Mark W. DeLaquil and Andrew M. Grossman of BakerHostetler LLP and by Ilya Shapiro.

Judicial Watch Inc. is represented by Paul J. Orfanedes and Chris Fedeli.

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.