Fighting dirty to save affirmative action

Massive resistance to Supreme Court ruling could backfire on University of Texas.

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The higher education community breathed a deep sigh of relief in June when the Supreme Court declined to strike down affirmative action in college admissions in *Fisher v. University of Texas*. The near-unanimous Court (7-1, with Justice Kagan recused) recalibrated and restricted the manner by which schools can consider race without disturbing the precedent that allows the narrow use of racial preferences in order to ensure campus "diversity."

But that relief should be temporary because the University of Texas will be hard-pressed to meet the new, more demanding standards. The Supreme Court underlined that public institutions must overcome a high constitutional bar, "strict scrutiny" in legal terms, when they use race, which requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."

"The university must prove," Justice Kennedy wrote for the Court, "that the means chosen by the university to attain diversity are narrowly tailored."

The Supreme Court thus voided the pro-UT ruling by the U.S. Court of Appeals for the Fifth Circuit for being too deferential to the university. Regardless of administrators' experience in crafting admissions policies, courts, in this case, the Fifth Circuit, must determine whether the use of race really is necessary to achieve the educational benefits of diversity.

The University of Texas itself has proven that it's not, given that its Top-Ten Percent Plan — by which the top 10% (since changed to eight) of graduates in every high school in the state are guaranteed admission — had already created a campus with some of the highest "diversity" in nation. And UT's addition of racial preferences to that race-neutral policy, far from being narrowly tailored, is arbitrary. For example, UT justifies preferences to Hispanics by pointing to the need for a "critical mass" of such students, even as it denies preferences to Asians, who comprise a smaller part of the student body.

Apparently recognizing the weakness of its position, the university has different ideas on how to fulfill the Supreme Court's order sending the case back to the Fifth Circuit. Instead of briefing the court of appeals on how its racial preferences can survive strict scrutiny, UT's lawyers have asked that the case be sent back to the original district court in Austin. They want to relitigate pointless issues such as Abigail Fisher's standing to continue with her lawsuit and her damages claim.

These procedural points have already been raised and lost by UT, both at the Fifth Circuit and before the Supreme Court, which received extensive briefing and oral argument on both standing and damages but still declined to dismiss Fisher's case. One of the most basic

principles of legal process is that a party can't argue the same issue again and again to the same court in hopes of reaching a different answer.

Moreover, the Supreme Court's remand order couldn't be clearer. The justices ruled that "*the Court of Appeals* must assess whether the University has offered sufficient evidence that would prove that its admissions programs is narrowly tailored to achieve the educational benefit of diversity" and emphasized that this "is a question *for the Court of Appeals in the first instance*." Again, according to the basic operation of our legal system, there's no wiggle room.

There can be no explanation for the university's actions but that it's resorting to dubious legal filings in order to put off the day of reckoning. If it's somehow successful at this dodge, hundreds of Texas high school students over the next few years will be unfairly and unconstitutionally denied admission simply because they're the wrong race or ethnicity.

UT's prevarications come at a substantial cost, not only to those rejected students, but also to the taxpayers picking up the tab. Just last week, Texas Attorney General Greg Abbott informed the Fifth Circuit that his office was withdrawing from the case, so all further work defending the university will be conducted by an expensive Washington law firm.

There's an important lesson here: History teaches that evasive tactics by individual actors can persuade judges that the difficulty of weeding out unconstitutional admissions programs on a case-by-case basis outweighs any marginal benefit of racial preferences.

It's a lesson that UT may need to relearn the hard way. The educational establishment may rue the day it again decided to pursue massive resistance to a Supreme Court ruling on civil rights.