

# One Minute Memo<sup>®</sup>



## Supreme Court Hears Oral Arguments On Legality Of Affirmative Action In Higher Education

On Wednesday, October 10, 2012, the United States Supreme Court heard oral arguments in *Fisher v. University of Texas*, No. 11-345, a case which challenges the use of race as a factor in the University of Texas's (the "University") admissions process. After Petitioner Abigail Fisher was denied undergraduate admission to the University, she filed suit alleging that the University's admissions process violated her constitutional and legal rights on the basis of her race. The University utilized a holistic admissions process to supplement the state-mandated diversity initiative that guaranteed automatic admission to any Texas student who ranked in the top ten percent ("Top Ten Percent") of their high school class. Petitioner Fisher was not eligible for admission to the University through the Texas Top Ten Percent program, and therefore entered a separate pool of applicants who were evaluated under the holistic admissions process in which race is but one of numerous factors considered by the University. The federal district court and the United States Court of Appeals for the Fifth Circuit, finding no violation of the constitution or federal laws, ruled in favor of the University of Texas.

The main focus of the oral arguments was framed by the Supreme Court's most recent ruling on affirmative action in higher education, *Grutter v. Bollinger*, No. 02-241 (June 23, 2003) ("*Grutter*"), in which the Court held, in a 5-4 decision, that academic diversity is a compelling state interest that justifies narrowly tailored consideration of race in college admissions. Central to the Court's decision in *Grutter* was its declaration that a public university can make some limited use of race to achieve a "critical mass" in a diverse student body. Not surprisingly, the crux of the oral arguments, and the questions posed by the Justices, centered on this concept of "critical mass" as a measure of racial diversity.

During oral argument, Petitioner Fisher's counsel made clear that he was not advocating that *Grutter* be reversed. Instead, he argued that the policy utilized by the University of Texas went beyond the bounds of what is permitted under *Grutter*. Specifically, Petitioner argued that the University of Texas was already achieving a diverse student body without having to consider race as a result of Texas's Top Ten Percent law. Petitioner further argued that even if the University were permitted under *Grutter* to seek academic diversity beyond that produced by the Top Ten Percent law, the University had not defined the measures to establish when "critical mass" would be achieved.

For its part, the University of Texas argued that the Court should affirm the constitutionality of its admissions policy because the plan uses race as only one factor among many and this was precisely the type of plan upheld by the Court in *Grutter*. In addition, the University's admissions policy is a necessary counterpart to the state's Top Ten Percent law in its efforts to achieve "critical mass."

One other noteworthy development was the slight detour in the beginning of the argument from a focus on substantive issues to the more procedural question of whether Petitioner even had the right to bring this lawsuit because she did not suffer any injury (referred to as "standing") given that she had since graduated from another school. Though the argument moved fairly quickly away from the technical question of standing to a discussion of the merits, the Court's focus on the issue of standing is not insignificant. The Court could decide that Petitioner had no right to even bring the lawsuit, and reserve judgment on the merits of affirmative action on admissions practices for a future case.

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Although the Court's decision in *Grutter* is less than a decade old, the make-up of the Supreme Court has changed since then. Most notably, Justice Sandra Day O'Connor, and Justice John Paul Stevens, members of the *Grutter* majority, have both since retired. In addition, Justice Elena Kagan, is taking no part in deciding *Fisher* because she recused herself from deciding this case. This is significant because it means the case was heard and will be decided by eight (8) Justices, rather than nine (9). With an even number of Justices deciding the case, it is plausible that the Justices will be split four-to-four on the merits of the case. In the event of a four-to-four split, the Fifth Circuit's decision would be upheld.

It is not clear whether the Court's decision in *Grutter* and affirmative action practices in college admissions may survive, but there is some indication that the Court may provide more guidance on when and how colleges and universities may consider race in their admissions programs. We will keep you updated on any developments as they occur and will provide more in-depth analysis once the Supreme Court reaches a decision.

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If you have questions about this One Minute Memo, legal issues in Higher Education or Affirmative Action, please contact the *Seyfarth* attorney with whom you work or any attorney on our *OFCCP & Affirmative Action Compliance Team*.



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