Written by **Alex Newman** on August 17, 2012

# Obama Admin. Urges Supreme Court to Uphold Racial Preferences

The Obama administration filed a brief this week urging the Supreme Court to uphold controversial racial preferences and affirmative action in public, federally subsidized university admissions, claiming that the government has a "vital" interest in perpetuating the use of race-based quotas and that the practice does not violate the U.S. Constitution's "equal protection" clause. The case, *Fisher v. University of Texas*, surrounds a white student who alleged that she was unconstitutionally denied admission due to her race.

Plaintiff Abigail Fisher claims that in 2008, she suffered from illegal discrimination when the University of Texas at Austin rejected her application in favor of less-qualified applicants who happened to be of a minority race. Because racial affirmative-action policies are aimed at increasing so-called "diversity," however, the university and the federal government argue that the use of race as a factor in admissions should be permissible despite the Fourteenth Amendment.

The government "has a vital interest in drawing its personnel — many of whom will eventually become its civilian and military leaders — from a well-qualified and diverse pool of university and service-academy graduates of all backgrounds who possess the understanding of diversity that is necessary to govern and defend the United States," U.S. Solicitor General Donald Verrilli, Jr. wrote in the government's brief supporting the affirmative-action schemes of the University of Texas.

Lawyers from five federal departments co-signed the brief along with disgraced Attorney General Eric Holder's Justice Department. Despite claims that America had entered a post-racial era with the election of President Obama, the administration is essentially arguing that an applicant's race can offer insight into his or her potential value to the government and higher-education institutions.

"Race is one of many characteristics (including socioeconomic status, work experience and other factors) that admissions officials may consider in evaluating the contributions that an applicant would make to the university," the government's brief claimed. "Race is one of a number of contextual factors that provide a more complete understanding of the applicant's record and experiences."

The Supreme Court last ruled on the issue of racial quotas in university admissions almost a decade ago, when five justices sided with the University of Michigan's use of race as a criterion for admissions in the *Grutter v. Bollinger* case. According to the 5-4 ruling, government has a "compelling" interest in relying on racial preferences to advance so-called "diversity," so affirmative action is constitutional.

Since that decision, however, some justices who supported race-based affirmative action have been replaced by more conservative judges. Meanwhile, Justice Elena Kagan will not rule on the issue because of her role as the administration's Solicitor General when it filed a previous brief in the case supporting racial preferences.

Two lower federal courts have already ruled in favor of the University of Texas, citing *Grutter v. Bollinger*. However, Fisher and her supporters say it is time for the Supreme Court to overturn that flawed decision and stop considering an applicant's race in admission decisions when the Constitution mandates "equal protection of the laws." The high court agreed in February to hear the case.

Critics of affirmative action often argue that discriminating on the basis of irrelevant characteristics such as skin color in hiring or admission policies is inherently racist. If a public university wishes to accept unconstitutional federal funding — another important issue not addressed in the case — opponents of affirmative action say discrimination should be prohibited. Of course, many people who happen to be black or Hispanic oppose the use of racial quotas as well, arguing that it perpetuates racism while diminishing the accomplishments and abilities of racial minorities — at least in terms of public perception.

Siding with Fisher against the University of Texas, the Pacific Legal Foundation also filed a brief with the Supreme Court urging it to reject racial discrimination once and for all. Other organizations that joined the brief include Project 21, the Center for Equal Opportunity, the American Civil Rights Institute, and the National Association of Scholars.

"[N]o proffered benefit can justify the high costs of racial discrimination. Therein lies the error with the Grutter Court's compelling interest finding," the brief states, adding that overturning "racially discriminatory" policies would not cause any legitimate harm. "Diversity cannot be viewed in a vacuum as an abstract good; constitutional scrutiny arises because of the means — racial classifications."

On top of that, the alleged benefits stemming from a "diverse student body" are actually "an invention of politically interested social scientists," the brief argues. "Put simply, until Grutter, this Court had never found a social science exception to the Equal Protection Clause. The social science foundation of Grutter was never sound, has grown shakier with contrary empirical findings and crumbles in light of evidence that universities have thrived without racial preferences."

In addition to joining the brief on Fisher's behalf, Project 21, a leading organization for black conservatives sponsored by the liberty-minded National Center for Public Policy Research, publicly slammed officially sanctioned racial discrimination. A statement announcing Project 21's decision to get involved in the case featured two spokespeople for the organization slamming race-based affirmative action.

"It's pure illogic that people think you can fight fire with fire and not get anything but scorched earth," said Project 21's Jerome Hudson. "Chief Justice Roberts said it best in 2007 when he wrote that 'the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.' We are either an affirmative action America, where some of us are held to a lower standard based on things such as skin color, or we are equal under the law and free to succeed or fail on our merits. It is mutually exclusive."

Project 21 spokeswoman Shelby Emmett, meanwhile, blasted the entire foundation of race-based affirmative action, saying the Fisher case exists because there are still people who "believe differences in pigment equate to diversity." Pointing out that the Supreme Court had ruled in the Grutter case that obtaining the alleged "benefits" of a racially diverse student body was constitutional, Emmett also attacked the premise as dangerous.

"Sadly, this type of ideology — that race matters — is the exact way of thinking that almost destroyed our nation," Emmett explained in a statement. "If anything, diversity today should be based on ideas,

thoughts and one's ability to think differently than those around them. It should not be based on checking a box that says they fit some social construct of race."

The Fisher case will be heard by the Supreme Court in October. Analysts remain divided about how it might rule. With Kagan sitting out, some believe the controversial case may result in an evenly split 4-4 decision. If that were to happen, the federal appeals court ruling upholding the racial policies of the University of Texas would stand. Critics say such an outcome would be an unconstitutional disgrace.

*Photo of the Gregory Gymnasium at the University of Texas at Austin.*

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