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Texas University's Race Admissions Policy Is Debated Before a Federal Court

By MANNY FERNANDEZ

AUSTIN, Tex. — An affirmative-action program at the University of Texas at Austin that takes applicants' race into account was unnecessary because the campus had achieved a "critical mass" of minority students, lawyers for the white applicant who sued the university told a federal appeals court here on Wednesday in a case with high stakes for the future of race-conscious admissions policies at public colleges and universities.

University lawyers denied a critical mass of underrepresented students had been reached. They said the institution was entitled to supplement its race-neutral admissions policies with ones that take race into account to achieve diversity. But the reaction of the appeals judges, who expressed skepticism at times about the manner in which the university applied race-conscious decisions and the university's abstract definition of "critical mass," illustrated the complex path for the Texas flagship university, as it tries to show that its admissions program was necessary.

Bert Rein, the lawyer for the white applicant, Abigail Fisher, said the university had no numerical standards to determine when its student body was sufficiently diverse. "They have no metric," he said. " 'We know it when we see it.' That's the university's position."

The lawyers for Ms. Fisher, the university and minority student groups appeared before the United States Court of Appeals for the Fifth Circuit on Wednesday to sort through a tangle of new legal issues raised by the Supreme Court Court sent the case back to the Fifth Circuit, instructing it to apply a greater degree of scrutiny to the ur conscious admissions program.

The decision, while generally upholding the use of race as a factor in the program, jeopardized the future

by instructing courts to use tougher standards and to verify that race-neutral alternatives were not available to the university.

On Wednesday, the question of whether the university had any race-neutral alternatives available, and whether the campus had reached a so-called critical mass of minority students, was the focus of debate.

The Fifth Circuit judges, who appeared equally skeptical of some of the arguments made by Ms. Fisher's lawyer, wondered aloud whether they should send the case back to a district court. They listened to arguments from all sides without making any rulings. A decision is not likely to come for weeks or months.

Lawyers for the university as well as those representing black and Hispanic students argued that there were no race-neutral alternatives available that would allow it to achieve the benefits of diversity.

Many black students, they argued, experienced racial isolation on campus between 1997 and 2004, when the university did not consider race in admissions. During that period, they said, African-Americans never made up more than 4.5 percent of any freshman class.

The case was filed by Ms. Fisher, who said that because she is white the University of Texas had denied her admission in 2008. The university said she would not have been admitted even without any policies focused on diversity. She has since graduated from Louisiana State University.

When the appeals court first heard Ms. Fisher's case in 2011, it upheld the admissions program, saying it had been authorized by the Supreme Court's 2003 decision in Grutter v. Bollinger. That decision, by a 5-to-4 vote, said that public colleges and universities could not use point systems or quotas to increase minority enrollment but could take race into account in vaguer ways. But the Supreme Court was not satisfied with the Fifth Circuit's analysis. In its 7-to-1 decision in June, it told the court to take a more skeptical look at the university's admissions practices.

Justice Anthony M. Kennedy, writing for the majority, reaffirmed that educational diversity is an interest sufficient to overcome the general ban on racial classifications by the government. But he added that public universities must have good reasons for the particular methods they use to achieve that goal. They must, he wrote, show that "available, workable race-neutral alternatives do not suffice" before taking account of race in admissions decisions.

On the issue of critical mass, Gregory Garre, the university's lawyer, described it to the judges as an abstract process that met Supreme Court standards, and was based on data on minority admissions as well as faculty observations. The Supreme Court has used the term to describe a university's qualitative rather than quantitative assessment of whether it has achieved sufficient diversity.

William C. Powers Jr., the university's president, expressed concern about the effect that losing the case would have. "It would be a setback to diversity, not just at the University of Texas, but at universities across the country," he said after the hearing.

Adam Liptak contributed reporting from Washington.