

# MINNESOTA LAWYER



Carl Warren

## Panel: Affirmative action is at a crucial point

By: Barbara L. Jones February 25, 2016 0

The good news about affirmative action, at least to Professor Carl Warren, is that it is still alive. It's limping along, but it's not dead.

At least until the U.S. Supreme Court decides *Fisher v. University of Texas at Austin*, which could change, compromise, improve or end affirmative action, at least in the college admission field. The case was the subject of a panel discussion on Wednesday, Feb. 24, sponsored by the Minnesota State Bar Association and the Minnesota Association of Black Lawyers.

"We are at a very crucial point. Justice [Antonin] Scalia's death raised the stakes even higher. This is a defining moment," said Warren, professor of clinical education and civil rights at the University of Minnesota Law School.

The panel was moderated by Keisha Mayes of Gray Plant Mooty, and other panelists were Ngeri Azuewah, a student at the University of St. Thomas School of Law, and Amran Farah of the Waldeck Law Firm.

### What's the value to a physics class?

*Fisher* has been in litigation for 10 years. It followed the U.S. Supreme Court's opinion in *Grutter v. Bollinger* in 2003, where the court held that the University of Michigan Law School had a compelling interest in obtaining the educational benefits that flow from a diverse student body. It further held that the law school could use race as one among many factors in admissions to admit a diverse student body and that it could seek to achieve a critical mass of minority students in order to accomplish that goal.

The University of Texas has a two-part admission program. It admits all Texas residents who rank in the top 10 percent of their high school class. For the remainder of the class, UT undertakes a "whole-file" review of applications. This process allows the school to consider additional criteria, such as essays, leadership qualities, extracurricular activities, awards, work experience, community service, family responsibilities, socio-economic status, languages spoken in the home, and — as of 2005 — race.

*Fisher I* went to the high court in 2013 and the court held that the Equal Protection Clause of the 14th Amendment permitted consideration of race under a strict scrutiny standard. It was remanded back to the District Court which upheld its prior ruling, and affirmed by the Court of Appeals. Now it is back at the Supreme Court, having been argued on Dec. 9. *Fisher's* position is that the university did not meet the strict scrutiny standard — narrowly tailored



Keisha Mayes

to a compelling state interest. She does not challenge the state's compelling interest in the composition of student bodies.

Since Justice Elena Kagan has recused from the case and Scalia has died, it will be heard by a seven-member court, which raises even more questions about the outcome. Many are concerned by the tenor of the questioning at the high court, particularly Chief Justice John Roberts' question about the value of a diverse student body in a physics class. In response, nearly 2000 physicists signed an open letter to the court saying "The implication that physics or 'hard sciences' are somehow divorced from the social realities of racism in our society is completely fallacious. ... Minority students in a classroom are not there to be at the service of enhancing the experience of white students."

Scalia also remarked during the argument that "There are those who contend that it does not benefit African-Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a slower-track school where they do well."

On Scalia and Roberts, Warren asserted, "These are not the delusions of someone who thinks that we are living in a post-racial society. It's much more malevolent than that."

The use of race and affirmative action has been carried to an illogical conclusion, Warren continued. As Roberts' question about physics revealed, the question has become how diversity benefits others, not the minority student. Furthermore, the context of the 14th Amendment is the benefit to minorities and in particular former slaves.

Mayes agreed that "we are at a crossroads," and pointed out that the other side of the debate is "that there is something about a classroom. It's not about a diverse point of view on physics. It's about the experience."

Farah said the benefit to the classroom, and other walks of life, is simply the presence of someone who is diverse. A black woman who wears a headscarf, she said, "I don't even have to say anything. I'm black and I'm Muslim. Uh-oh, the dynamic changes. ... The benefit is that you get comfortable with our presence... Don't ignore why you need me," she said.

Nigeri said, "Why do I have to validate my presence? That's something we encounter time and time again. It's embarrassing we have to talk about it."