

Higher Education Alert: Supreme Court Upholds Affirmative Action in Higher Education

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The much-anticipated news is here: The U.S. Supreme Court has upheld the constitutionality of the race-conscious admissions program at the University of Texas ("UT") on a four-to-three vote. The court's majority opinion makes plain, however, that, as circumstances change, higher education institutions have a "continuing obligation" to analyze their admissions programs and demonstrate compliance with the court's demanding, and yet still somewhat unclear, constitutional test. Accordingly, colleges and universities must continue to tread carefully when considering and adopting race-conscious admissions plans.

Fisher Has Implications for All Colleges and Universities

The Supreme Court's June 23, 2016 opinion in *Fisher v. University of Texas at Austin* is the second time that the court has weighed in on the constitutionality of UT's affirmative action program under the U.S. Constitution's Equal Protection Clause. While *Fisher* involved a public university, all higher education institutions are impacted by the case. The Equal Protection Clause ordinarily applies only to public entities like UT, but Title VI of the Civil Rights Act of 1964 prohibits *all* colleges and universities that receive federal financial aid funds from discriminating based on race. In enforcing Title VI, the U.S. Department of Education and federal courts typically rely on Equal Protection cases to determine a private institution's obligations. Accordingly, *Fisher* should serve as a guidepost to all institutions considering an affirmative action plan.

History of *Fisher*

The Supreme Court's recent *Fisher* ruling follows a long factual and legal history. Before 1996, UT's student admissions process gave preference to racial minorities. In *Hopwood v. Texas* (1996), however, the 5th U.S. Circuit Court of Appeals declared that *any* consideration of race in public college admissions was unconstitutional. In response, UT eliminated its use of race in admissions, and the Texas legislature enacted the "Top Ten Percent" law, which reserves up to seventy-five percent of the freshman class at Texas public universities for in-state students who graduate in the top 10 percent of their high school class.



In 2003, the Supreme Court issued a ruling that effectively reversed *Hopwood*. Specifically, in *Grutter v. Bollinger*, the court upheld an admissions program that afforded each applicant with a "holistic" individualized consideration that included race as a "plus factor." After *Grutter*, UT reevaluated its admissions program and decided that race-neutral policies were not producing sufficient student diversity. UT adopted a program similar to the one in *Grutter* for the portion of its freshman class not filled by the Top Ten Percent law. UT's system consists of an individualized, holistic review of each applicant that includes the scoring of students on an "Academic Index" and "Personal Achievement Index (PAI)." Race plays a small role in one component of the PAI.

In 2008, UT denied admission to Abigail Fisher, a white student who did not graduate in the top ten percent of her Texas high school class. Fisher responded by challenging the constitutionality of UT's admissions process. Fisher's case reached the Supreme Court for the first time in 2013 ("*Fisher I*"), and, at that time, the court held that the 5th Circuit Court of Appeals had applied the incorrect legal standard in reviewing the case. Accordingly, the court remanded the case for reconsideration by the 5th Circuit under the correct legal standard. Following this remand, the 5th Circuit upheld UT's admission program, after which the Supreme Court accepted review of Fisher's case for the second time ("*Fisher II*").

Supreme Court's Analysis in *Fisher II*

In *Fisher II*, the Supreme Court upheld the constitutionality of UT's admissions program. In doing so, the court affirmed past rulings holding that, to be lawful, a race-based admissions program must "withstand strict scrutiny." According to the court, "strict scrutiny" is a demanding test that rarely permits racial classifications—even those considered "benign" based on a goal of assisting disadvantaged minorities. Strict scrutiny requires an institution to demonstrate: (1) that its interest in educational diversity is substantial and compelling; and (2) that its admissions program is "necessary" to accomplish its interest and "narrowly tailored." With respect to the first factor, federal courts will give "some, but not complete" deference to a university's judgment that it has a substantial interest in educational diversity. However, courts may not defer to the university's determination that a race-conscious admissions program is necessary and narrowly tailored.

In ruling for UT, the Supreme Court rejected Fisher's four-pronged attack on UT's program. First, Fisher argued that UT did not sufficiently articulate a compelling interest in educational diversity, because it could not specifically quantify the number of diverse students needed to achieve a sufficient "critical mass" of diverse students. In response, the court noted that it has previously recognized diversity in education as a compelling state interest. It further held that, while a university's diversity goals cannot be "elusory or amorphous," they also cannot involve racial quotas. The court held, therefore, that UT need not and could

not lawfully frame its interest in diversity in the form of a specific enrollment figure. The court concluded that UT provided a "reasoned, principled explanation" of its decision to pursue educational diversity, stressing a year-long study by UT that found that race-neutral measures had not obtained sufficient diversity. The court also observed that UT's identification of the benefits of educational diversity largely aligned with the court's prior holdings, namely:

- Promotion of cross-racial understanding;
- Breaking down racial stereotypes;
- Promotion of a better understanding of persons of different races;
- Better preparation of students for an increasingly diverse workplace and society;
- Robust exchange of ideas; and
- Exposure to differing cultures.

Second, Fisher argued that UT's use of race in admissions was unnecessary, because the Top Ten Percent law alone allowed UT to enroll a "critical mass" of minority students. The court held that a university bears a heavy burden to show that it cannot obtain the educational benefits of diversity without considering race. However, the court held that UT met this burden with demographic data of the composition of its classes, evidence about minorities' feelings of loneliness and isolation, and data regarding the number of classes with zero or one African-American or Hispanic students.

Third, Fisher argued that UT's consideration of race was not "necessary" because its race-conscious program had a minimal impact on diversity at UT. According to the dissenting opinion in *Fisher II*, UT's consideration of race was a determinative factor in admissions for a very small number of African-American and Hispanic students (.2% and .3%, respectively). The majority of the court found, however, that this fact meant that UT's program was narrowly tailored, as constitutionally required.

Finally and perhaps most significantly, the court rejected Fisher's arguments that there were numerous available and workable race-neutral alternatives to UT's admissions program. The court was persuaded by UT's evidence that it had failed to achieve sufficient racial diversity among students through increased outreach and recruiting efforts, more emphasis on socioeconomic factors, and use of a race-neutral holistic applicant review process.

Affirmative Action Lessons

Fisher II is a big win for colleges and universities that wish to pursue race-conscious admissions program. The case will not, however, end the debate—or the litigation—regarding the propriety of affirmative action plans. In the Supreme Court's words, "it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity." While the court ultimately upheld the continued use of affirmative action in higher education, it has stressed that "strict scrutiny" really is strict and that institutions must continually revisit and reevaluate the legitimacy of using any race-based admissions plan.

While there remain some open, unanswered questions following the court's ruling in *Fisher II*, colleges and universities considering affirmative action in admissions would be well-served to study the ruling, as well as the prior *Grutter* ruling, and to take the following steps:

1. **Analyze and Confirm a Compelling Interest in Diversity:** To prove the first element of a lawful affirmative action plan, an institution must be able to show that it has a substantial and compelling interest in achieving greater diversity in education. In *Fisher II*, the Supreme Court made clear that it will give "some" deference to a university's determination to pursue the educational benefits of diversity, but just how much deference remains unclear. Again, a university's goals cannot be "elusive or amorphous," but, at the same time, racial quotas are prohibited. As such, it remains unclear exactly how an institution should articulate its diversity goals. However, the court did accept UT's determination, based on a year-long study, that its race-neutral efforts had not obtained sufficient diversity to achieve the full benefits of diversity in education. The court also suggested that evidence regarding students' experience on campus, the proportion of the student body made up of minorities, and the number of classes with a small number of minority students can play a role, but that this data is "by no means dispositive." Accordingly, before undertaking to adopt an affirmative action plan, a higher education institution should carefully study, evaluate and document the current state of diversity in its student body; areas of underrepresentation; the impact of a lack of diversity on the various educational benefits of diversity; and the effectiveness or ineffectiveness of wholly race-neutral measures in achieving the institution's diversity goals.

2. **Narrowly Tailor Program to Goals:** To be lawful, an affirmative action plan must be both necessary and narrowly tailored. As noted above, *Fisher II* held that courts will not defer to an institution's view of whether an admissions program is necessary or narrowly tailored and that any program must withstand "strict scrutiny." Accordingly, before embarking on a race-based admissions program, an institution should carefully review and document all race-neutral measures used by or available to the institution and why such measures alone cannot achieve the institution's diversity goals. In addition, in determining how race will be used in an admissions process, an institution should be mindful that the *Grutter* and *Fisher II* rulings approved of processes that involved an individualized, holistic review of applicants, with race being only one of a multitude of factors used to make holistic admission decisions.

3. **Adopt a Written Plan:** Institutions would be well-served to formalize any race-based admissions program in a written plan. A written plan creates a vehicle through which an institution can ensure that it has appropriately considered and identified legitimate grounds on which to adopt a race-based admissions program. The plan also serves as a vehicle to communicate how the plan should be implemented to ensure it is applied in a "narrowly tailored" way.

4. **Have a Sunset Provision and Continually Reassess:** The Supreme Court has made clear that institutions must continually reassess the need for the use of race in college admissions. For example, changes in student body demographics or available race-neutral measures may make an existing race-based plan unnecessary going forward. Accordingly, institutions should adopt any race-based admissions program for a limited period only, adopting a sunset provision and reassessing the need for the program before deciding whether to extend it in its existing or a modified form.

5. **Train Personnel:** Institutions should train personnel that will be involved in considering, adopting or implementing any race-based admissions program to ensure that they know the legal limits on affirmative action and how to comply with those limits.

6. **Consider Areas Beyond Admissions:** While *Fisher II* arose in the student admissions context, affirmative action challenges can arise in other settings - such as in earmarked scholarships, endowments, or employment. *Fisher II* serves as a reminder to review all areas in which race-based decisions may be used within a college and university to ensure that such decisions are lawful.