Implications from *Fisher II*

The U.S. Supreme Court's Guidance for Institutions of Higher Education Regarding Race-Conscious Enrollment Practices

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On June 23, 2016, the U.S. Supreme Court's second decision in *Fisher v. University of Texas at Austin* upheld the University of Texas's (UT) race-conscious[1] admissions program under federal law.[2] In its analysis of UT's policy and practice, the Court provided additional insight and guidance regarding the kind of action necessary to comply with federal nondiscrimination law.[3] This document provides an analysis of the decision, followed by in-depth guidance on the key takeaways and implications for institutional policy and practice.

KEY TAKEAWAYS

The following lessons and clarifications can and should guide institutional planning and action:

1. **Goals and objectives associated student body diversity should be sufficiently precise**, without resorting to numbers only, and based on evidence-centered academic judgments. (pp. 8–10)
2. **Institution-specific evidence should support the necessity of using race-conscious methods** for achieving these goals. (pp. 10–13)
    a. The entire spectrum of related enrollment policies and practices — from outreach to financial aid — should inform an institution's conclusion that other "workable" race-neutral efforts alone will not achieve its goals.
    b. Race-conscious policies should have evidence of meaningful, if limited, positive impact on the achievement of the institution's goals.
3. **Holistic review remains a cornerstone** for race-conscious admissions because it reflects flexible consideration of race through individualized evaluation and an institution's unique mission. (pp. 13–16)
4. Institutions have an "**ongoing obligation to engage in constant deliberation** and continued reflection" regarding their admissions and related policies. The decision to consider race in enrollment decisions cannot be an isolated, one-time occurrence. (pp. 16–18)
5. The **broader social context** counsels that institutions should use Fisher II as an impetus for recommitting to their institutional goals. (pp. 18–19)

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1 This analysis intends "race-conscious" as a term for brevity. It is inclusive of the consideration of race, ethnicity, and national origin because the three share the same federal legal protections.

2 Fisher v. Univ. of Texas at Austin, 579 U.S. ___ (2016), available at http://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf [hereinafter "Fisher II"].

3 This analysis is provided for informational and policy planning purposes only. It does not constitute specific legal advice. Legal counsel should be consulted to address institution-specific legal questions or other issues. It also builds on our prior *Fisher II* Q&A, available here: https://secure-media.collegeboard.org/digitalServices/pdf/diversity/college-board-fisher-v-university-texas-faq.pdf.

The Court's *Fisher II* Ruling

Fisher has taken a long road.[4] It was originally filed in 2008, when two white women alleged that UT's race-conscious holistic review admissions policy discriminated against them on the basis of race.[5] Since then, the case has been heard in a district court, in the Fifth Circuit Court of Appeals twice, and in the U.S. Supreme Court twice (a rarity). Along the way, UT and its admissions policies have been subject to significant legal, political, research, and public scrutiny.

On June 23, 2016, however, the case met its end. In its second hearing of the case, the U.S. Supreme Court affirmed the lower court's decision by a 4-3 vote, finding that UT's race-conscious admissions program was lawful under the Equal Protection Clause at the time of Abigail Fisher's application in 2008.[6] Justice Kennedy authored the majority opinion, joined by Justices Breyer, Ginsburg, and Sotomayor. Justice Alito, Chief Justice Roberts, and Justice Thomas dissented.

In the opinion, the Court first restated the "three controlling principles" from *Fisher I*:[7]

1. **Strict scrutiny applies to race-conscious policies.** This means that an institution of higher education must demonstrate both a compelling interest in its race-conscious policy *and* means that are narrowly tailored to achieve that interest.
2. **Institutions receive limited deference on ends.** Courts owe "some, but not complete, deference" to an institution's "reasoned, principled" academic judgment based on its "experience and expertise," that "a diverse student body would serve its educational goals."[8] At the same time, an institution may not set a goal that involves a "fixed quota or otherwise specified percentage of a particular group merely because of its race or ethnic origin."[9]
3. **Institutions receive no deference on means.** The institution bears the "heavy" burden of "proving a 'nonracial approach' would not promote its interest in the educational benefits of diversity 'about as well and at tolerable administrative expense.'"[10] At the same time, the institution

4 For a complete review of the facts in *Fisher* and the Fifth Circuit's decision, see Understanding *Fisher v. the University of Texas* (July 9, 2013), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/diversity-collaborative-understanding-fisher.pdf; Legal Update: *Fisher v. University of Texas* Case Summary (College Board 2011), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/fisher_v_univ_texas_final.pdf.
5 UT's policy includes two components: (1) the state's "Top Ten Percent" Law, which automatically admitted all Texas students who graduated in the top ten percent of their high school classes; and (2) a holistic review process for all other applicants that included consideration of race/ethnicity as one factor among many. The lawsuit only alleged discrimination occurred in the second part of the policy.
6 Only seven justices participated in the decision due to Justice Scalia's death and Justice Kagan's recusal likely due to her prior involvement in early rounds of the case as U.S. Solicitor General.
7 Fisher II at *6.
8 Id. at *7 (quoting Fisher I at __ (slip. op. at 9)).
9 Id. (quoting Fisher I at __ (slip. op. at 9)).
10 Id. at *7, *13.

> is not required to exhaust "every conceivable race-neutral alternative" or "to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups."[11]

The Court then observed that UT's "program is *sui generis*" (or, as the Fifth Circuit described it, a "unique creature" that offers "no template for others") because it included both a holistic review program *and* an automatic admissions plan.[12] This was a clear signal that the decision itself would be grounded in the unique facts of the case.

The Court then explained why it had not remanded the case for further fact-finding at a lower court. Because the complaint against UT's policy solely focused on holistic review, the Court observed that an "unusual consequence" had arisen: "The component of the University's admission policy that had the largest impact on [Abigail Fisher's] chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan."[13] As a result, the Court accepted the percent plan "somewhat artificially, as a given premise," without much in the record about, e.g., "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review."[14] Because the race-conscious holistic review policy had only been in operation for three years when Fisher applied in 2008, the Court believed that additional information in a remand "might yield little insight."[15]

Moving to the heart of the decision, the Court addressed and rejected each of Fisher's arguments that UT's policy should be found unconstitutional. The Court chose to structure the decision not through its own general strict scrutiny framework, but in response to Fisher's particular challenges in light of that framework. The chart reviews this analysis in more detail.

11 Id. at *7–8 (quoting Grutter, 539 U.S. at 339).
12 Id. at *8; Fisher v. Univ. of Texas, 758 F. 3d 633, 659 (5th Cir. 2014).
13 Fisher II at *8.
14 Id. at *9.
15 Id. The Court also observed that UT had no ability to change the legislatively established percent plan, so had "no reason to keep extensive data on the Plan or the students admitted under it — particularly in the years before Fisher I clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review."

Fisher's Claim 1: UT "has not articulated its compelling interest with sufficient clarity."			
General rules	An institution makes an inherently complex academic judgment in "defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."[16] This "is not, as [Fisher] seems to suggest, a goal that can or should be reduced to pure numbers."[17] Still, an institution's goals cannot be "elusory or amorphous — they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."[18]	UT's case	Using both anecdotal and statistical evidence, UT articulated its interest with a "reasoned, principled explanation" of its specific interests in creating a diverse student body,[19] including: • "Destruction of stereotypes." • "Promotion of cross-racial understanding." • "Preparation of a student body 'for an increasingly diverse workforce and society.'" • "Cultivation of a set of leaders with legitimacy in the eyes of the citizenry." • "An academic environment that offers a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders."
Fisher's Claim 2: UT "already achieved critical mass by 2003 using the Top Ten Percent Plan and race neutral holistic review."			
General rules	An institution "bears a heavy burden" to show that it "had not obtained the educational benefits of diversity before [turning] to a race-conscious plan."[20]	UT's case	UT developed a 39-page policy proposal after a year of study and deliberation with "significant evidence, both statistical and anecdotal" to show that it had not yet reached critical mass, including: • Demographic data showing "consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002."[21] • Reports that minority students in 1996–2002 "experienced feelings of loneliness and isolation."[22] • Data that showed very low African-American and Hispanic representation in the large majority of classrooms.[23]

16 Id. at *19.
17 Id. at *12.
18 Id.
19 Id. at *13.
20 Id. at *13–14.
21 Id. at *14. The Court specifically noted, "Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives."
22 Id. at *14–15.
23 Id. at *15.

Fisher's Claim 3: UT's race conscious policy "has had only a minimal impact in advancing the [University's] compelling interest."			
General rules	An institution should be able to show a "meaningful, if still limited, effect on student body diversity" as a result of its race-conscious policy.[24] But it does not fail the narrow tailoring test if the impact of its race-conscious policy is minor.[25]	UT's case	In 2003, before UT considered race in admissions, "11 percent of the enrolled through holistic review were Hispanic and 3.5 percent were African American."[26] By 2007, after it reinstated the consideration of race, "16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African American . . . increases . . . of 54 percent and 94 percent, respectively."[27]
Fisher's Claim 4: UT had "numerous other available race neutral means," including increased outreach, adding weight to academic and socioeconomic factors in the holistic review process, or admitting more or all students through the percent plan.			
General rules	An institution has the burden of showing that it did not have additional "available" and "workable" race-neutral alternatives to the consideration of race.[28] But it does not need "to choose between a diverse student body and a reputation for academic excellence."[29]	UT's case	UT showed that, despite seven years of trying, each of the suggested alternatives were not workable alternatives: • UT "already had intensified its outreach efforts" to minority students through "three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events."[30] • UT "tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors." • Given the percent plan's history and stated purpose of increasing minority enrollment, Fisher "cannot assert simply that increasing [UT's] reliance on a percentage plan would make its admissions policy more race neutral."[31] • UT was not bound to "sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students" through greater reliance on "class rank alone" in the percent plan.[32]

24 Id.
25 Id. ("The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.")
26 Id.
27 Id.
28 Id. at *19.
29 Id. at *16.
30 Id.
31 Id. at *17.
32 Id.

In closing, the Court underscored that UT's work is not done, and that it has an "ongoing obligation to engage in constant deliberation and continued refection regarding its admissions policies."[33] The Court also noted that UT "has a special opportunity to learn and to teach" about enrollment policies.[34] And it specifically encouraged UT to use its own data for three purposes: "to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."[35]

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, wrote a vigorous dissent that was more than twice the length of the majority opinion. It expressed several concerns, including his views that UT:

- Lacked transparency in its decision-making process to reintroduce consideration of race into admissions.
- Did not present sufficient evidence to support its policies, particularly on the link between applicants selected in the admissions process and their specific contributions to the educational benefits of diversity on campus.
- Used a "covert" holistic review process that masked what role race really plays in its decisions.
- Only valued a certain type of "diverse" applicant (e.g., minority students from wealthy families).

When the opinion was announced by the Court, Justice Alito took the somewhat rare step of reading a summary of his dissent from the bench to register his strong disapproval of the Court's decision — describing it as "affirmative action gone berserk."[36] Justice Thomas wrote his own brief dissent, as well, to reaffirm his view that "a State's use of race in higher education admissions decisions is categorically prohibited."

33 Id. at *19–20.
34 Id. at *19.
35 Id. at *19.
36 Adam Liptak, "Supreme Court Upholds Affirmative Action Program at University of Texas," *The New York Times*, June 23, 2016, http://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html.

Fisher II in Context: Implications for Institutions of Higher Education

This section explains what the Court's *Fisher II* ruling likely means for public and private institutions of higher education[37] that consider race or ethnicity when evaluating and conferring opportunities to candidates in their enrollment practices. Though focused on UT's unique admission model, the Court took pains to draw out lessons that could easily apply more broadly. The Court advised, in turn, that "public universities, like the States themselves, can serve as 'laboratories for experimentation,'" and advised that UT "has a special opportunity to learn and teach" from its experiences in this case.[38]

Fisher II specifically acknowledged the "sensitive balance" that must be struck between institutional autonomy and institutional respect for individual student identity.[39] The Court did recognize that student body diversity is among the "intangible characteristics" that are "central to [institutional] identity and educational mission."[40] But institutions also must address the "enduring challenge to our Nation's educational system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."[41]

Illustrating how to strike that balance, *Fisher II* shines a light on institutional evidence and processes that can lead to success in a legal challenge. Under *Fisher II*, institutions of higher education should ensure that mission-aligned, race-conscious enrollment policies are supported by well-articulated policies grounded in research and evidence, and subject to a process of review and evaluation over time. Meeting the Court's expectations requires a dual focus: well-articulated ends (goals and objectives) *and* means (methods of achieving those aims), each supported by appropriate evidence. UT's success in *Fisher II* should not be understood as evidence of Court retrenchment from the rigors of strict scrutiny that call for this kind of evidence. To the contrary, each point of focus in the Court's analysis reflects an ongoing recognition of the need for institutions to engage in a sustained, robust commitment to the design, implementation, and refinement (as warranted) of race-conscious enrollment policies over time. Indeed, UT itself engaged in seven years of experimentation with neutral alternatives followed by another year of deliberation on the necessity of reintroducing race-conscious holistic review. Though this exact effort is not a new requirement for all institutions undertaking race-conscious admissions, it illustrates the kind of effort expected under

37 Though the majority opinion mostly speaks to public institutions, prior Supreme Court and federal agency decisions (including *Grutter*) affirm that these legal obligations apply to race-conscious policies at both public institutions and private institutions that receive federal funding. E.g., Grutter v. Bollinger, 539 U.S. 306, 334 (2003). ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 U. S. C. ß1981 also fail.")
38 Fisher II at *19.
39 Id.
40 Id.
41 Id.

federal nondiscrimination law.

The *Fisher II* ruling builds on a substantial body of federal case law that spans decades. In *Bakke*, the Supreme Court first posited the concept of the educational benefits of diversity as a compelling interest justifying race-conscious admission practices.[42] A quarter century later, in *Grutter* and *Gratz*, the Court expanded on that concept to establish an analytical framework to guide institutional decision-making.[43] A decade after that (and just three years ago), the Court amplified on the meaning of elements of the *Grutter* framework in *Fisher I*, especially the importance of race-neutral strategies.[44] (*Fisher II* does not mention but leaves in place the 2014 decision in *Schuette* to uphold Michigan's voter initiative that forbade the use of race in enrollment decisions at the state's public institutions.[45])

1. Goals and objectives associated student body diversity should be sufficiently precise, without resorting to numbers only, and based on evidence-centered academic judgments.

Institutions that consider race in enrollment decisions must establish that such action serves a compelling interest linked to the educational benefits of diversity.[46] An institution should describe what educational benefits student body diversity (including but not limited to racial diversity) is intended to produce *and* how those benefits support the institution's unique mission. This type of articulation helps the institution ensure, as it must, that its goals are not "elusory or amorphous."[47] Institutions should also identify "sufficiently measurable" objectives to assess progress toward goals and to support review and evaluation over time.

Institutions may well include numerical indicators such as overall student body demographics and how those demographics may change in different institutional settings (e.g., classrooms, living communities). But institutions should not reduce these aims "to pure numbers"; after all, institutions are prohibited from using quotas in setting admissions goals.[48] Other factors such as student experiences, campus climate, and academic outcomes may also come into play. Indeed, the Court explained that institutions need not "specify the particular level of minority enrollment" sufficient for obtaining the educational benefits of diversity.[49]

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42 Regents of the University of California v. Bakke 438 U.S. 265 (1978).
43 Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244.
44 Fisher v. Univ. of Texas, 570 U.S. ___, 133 S. Ct. 2411 (2013).
45 Schuette v. Coalition to Defend Affirmative Action, 572 U.S. ___, 134 S. Ct. 1623 (2014).
46 Echoing prior decisions, the Court recognized the importance of institutional mission and unique context as foundations for decision-making as it appeared to accept that different institutions could design different enrollment policies to suit their mission, context, and goals.
47 Fisher II at *12.
48 Id.
49 Id.

With a rich mix of statistical and anecdotal support, UT described the specific benefits that it sought and identified specific indicators to track its progress toward achieving its goals (see chart on page 4 of this guidance). These indicators included many sources of information, including demographic data, reports from minority students on campus, statistical analysis of UT classroom enrollment patterns, and statewide data on low racial/ethnic diversity in key professions (e.g., architects, engineers, teachers, and lawyers). Moreover, statements from a range of UT leaders, administrators, and other stakeholders served as evidence that policies had been implemented as they were designed.

To create a "reasoned, principled explanation" of goals and objectives, an institution can follow UT's lead through the following steps.

- **Create a clear statement** of the institution's interest in student body diversity, specific expected educational benefits from that diversity, and the indicators that the institution plans to use to track its progress toward meeting those goals.
- **Gather institution-specific research and information** to support that statement. National studies and examples from other institutions may also complement and inform an institution's own evidence base.
- **Equip institutional leaders, administrators, and stakeholders to articulate a common sense of purpose** that bring the policy statement to life.
- **Establish a team** to steer the process that includes multiple stakeholders and answers to institutional leaders (e.g., the president and board of trustees).
- **Consider how to adapt institution-wide goals into specific policies for different institutional units**, including undergraduate, graduate, and professional schools and colleges.[50]

50 Though not at issue *in Fisher II*, it is worth noting that UT's policy also included specific discussion of changes to admissions policies for UT's 14 colleges and schools (including first-time enrollees and transfer students), with each providing similar but context-driven judgments and rationales. Supp. Joint Appx. SJA 1a-42a, available at https://utexas.app.box.com/s/waq1kuhoq7vt3kaywom7p15d92rlu0cd.

Critical Mass: Some Deference is Due

In *Fisher II*, the Court appears to have resolved a key lingering question about critical mass, concluding that UT's objectives associated with critical mass fall well within the compelling interest prong of the strict scrutiny analysis. Thus, the Court seems to agree that critical mass is not a "one-size-fits-all" bright line but a flexible, contextual benchmark that can inform judgments about whether an institution has "enough" diversity to achieve desired educational benefits. An institution's unique context should guide the determination of what critical mass means and how it is assessed over time. Research and experience support this result by confirming the significant role that local geography, history, demographics, and student educational experiences play in shaping the contours of an institution's pool of likely matriculants.[51]

2. Institution-specific evidence should support the necessity of using race-conscious methods for achieving these goals.

Once evidence of a compelling interest is established, institutions must then justify their race-conscious practices by demonstrating the necessity of the consideration of race, including the efficacy of race-neutral strategies and the actual impact of the race-conscious policy on the achievement of institutional goals.

a. The entire spectrum of related enrollment policies and practices — from outreach to financial aid — should inform an institution's conclusion that other "workable" race-neutral efforts alone will not achieve its goals.

Fisher has long been centered on the question of the necessity of its race-conscious policy, particularly because UT had a seven-year period of race-neutral admissions and was able to maintain a significant level of racial diversity in its student body during that time.[52] To demonstrate the necessity of its race-conscious policy, UT was able to demonstrate that demographics alone did not tell the whole story: As minority enrollment (especially of African Americans) dropped in this time period, minority students on campus

51 See, e.g., Teresa Taylor, Jeffrey Milem, and Arthur Coleman, "Bridging the Research to Practice Gap," 13–16 (2016), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-bridging-the-research-to-practice-gap.pdf.

52 Abigail Fisher's brief notes, for example, "During the period from 1998 to 2008, the percentage of African-American and Hispanic students who enrolled in the incoming freshman class increased from 16.2% to 25.5%." Brief for Petitioner at 10, Fisher v. Univ. of Texas, No. 14-981 (Sept. 3, 2015), available at http://www.scotusblog.com/wp-content/uploads/2015/09/14-981_pet.authcheckdam.pdf.

reported feelings of loneliness and isolation *and* UT found that the majority of classrooms had no more than "token" minority student representation. These conditions led UT to conclude that, though the numbers suggested that it had achieved student body diversity broadly, it was not yet reaping the expected *educational benefits* of that diversity in its academic community.

UT supported this conclusion by showing that these shortcomings persisted despite its use of a broad range of race-neutral enrollment policies and practices, including significantly expanded recruitment efforts and new race-neutral scholarships intended to promote broad diversity. Thus, UT completely diffused Fisher's arguments that UT could meet its goals using only race-neutral efforts and met the key questions posed by the Court in *Fisher I*.

The lessons for other institutions in this area are twofold:

- **Gather quantitative and qualitative data that speak to the institution's own context.** Institutions should use multiple sources of evidence to examine the question of necessity — particularly those that can provide the educational policy complement and nuance to raw demographic data. And, despite their value, it is not enough to cite national or general studies and/or the experiences of other institutions. An institution must be able to speak to its particular context and experience with its diversity goals and strategies to achieve them.
- **Use race-neutral strategies throughout the enrollment spectrum as a complement to race-conscious policies.** UT was able to diffuse Fisher's claims that other race-neutral strategies were available because of the significant race-neutral efforts already pursued, many of which Fisher proposed as alternatives. Similarly, other institutions should be ready to explain the many ways in which they seek to achieve their broad diversity goals, particularly efforts that demonstrate the institution's efforts beyond reliance on the admissions decision itself (e.g., recruitment and outreach, financial aid and scholarships, and the many factors considered in admissions).

Percent Plans: Not a Panacea

Writing for the Majority, Justice Kennedy has now confirmed that the advancement of percent plans is not a panacea, legally or educationally, for the achievement of institutional diversity goals. Its remarkable discussion of percent plans was expressly informed by Justice Ginsburg's dissent in *Fisher I*.[53] This reflects the recognition that, given its reliance on racially segregated neighborhoods and schools, the Texas percent plan's "basic purpose . . . is to boost minority enrollment," and therefore cannot be understood as a truly "race-neutral" strategy.[54] Justice Kennedy further dismissed the idea that simply using a percent plan for most or all applicants would achieve UT's diversity goals because, even if it would increase minority enrollment, that "would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students."[55] This discussion should serve as a salve for public institutions in other states facing similar arguments and a boon to researchers and advocates who have made similar arguments for years.[56]

b. Race-conscious policies should have evidence of meaningful, if limited, positive impact on the achievement of the institution's goals.

The Court provided significant new clarity on how the impact of race-conscious policies helps demonstrate their need. The Court observed with approval that, after reintroducing race as a factor, UT's holistic review process made small (in absolute numbers) but measurable and meaningful (in percentages) gains in enhancing student body racial diversity.[57] The Court concluded that the "limited" effect of race served as evidence of its "role in only a small portion of admissions decisions" — a "hallmark of narrow tailoring, not evidence of unconstitutionality."[58]

53 Justice Ginsburg was the sole dissenter in *Fisher I* because she would have approved UT's plan in the Court's first hearing rather than sending it back for reconsideration by the Fifth Circuit.
54 Fisher II at *17.
55 Id.
56 Taylor, Milem, and Coleman, *supra* note 51, at 21–22.
57 It is worth noting that the Court accepted UT's interpretation of its impact data (in terms of changes within the pool of applicants within the smaller holistic review pool) rather than Fisher's alternative (in terms of changes within the overall admitted student pool from the percent plan and holistic review). Specifically, UT showed that, between 2003 and 2007, the number of Hispanic and African-American Texas residents admitted through the holistic review rose from 11 to 16.9 percent and 3.5 to 6.8 percent, respectively. Id. On the other hand, channeling Fisher's briefs, Justice Alito observed with disdain that the consideration of race was "determinative for only 15 African-American students and 18 Hispanic students in 2008 (representing 0.2% and 0.3%, respectively, of the total enrolled first-time freshmen from Texas high schools)." Id. at *41 (Alito, J., dissenting).
58 Fisher II at *15.

The Court's brief discussion regarding the issue of impact suggests that institutions would be wise to:

- **Collect data that establish that race-conscious policies have a meaningful impact on institutional goals.** Examining changing demographics in an institution's pool of possible applicants, admitted students, and enrolled students is likely to be essential, including analyses of trends over time. Especially for institutions that, unlike UT, have not had a period of using solely race-neutral admissions, it may also be prudent to run different scenarios using data tools and modeling to forecast what changes in admitted student pools would likely come as a result of solely race-neutral admissions policies (e.g., percent plans, heavier weight on socio-economic and/or first generation status).
- **Ensure that the effect of race-conscious policies is not so overwhelming that it suggests impermissible admissions judgments.** In *Gratz*, one of the Court's major concerns with the University of Michigan's undergraduate admission policy was that the points scheme "had the effect of making the factor of race . . . decisive for virtually every minimally qualified underrepresented minority applicant."[59] Monitoring trends over time — including how the likelihood of admission may be different for students in different racial groups — can help an institution not only appropriately limit the use of race but also to be more aware of possible objections that could arise.

3. Holistic review remains a cornerstone for race-conscious admissions because it reflects flexible consideration of race through individualized evaluation and an institution's unique mission.

The *Fisher II* Court did not expressly address the federal legal principles specifically relevant to holistic review — in part, likely because that ground was already well covered by *Bakke*, *Grutter*, and *Gratz.* Still, it was clear that the features of UT's holistic policy played a large part in UT's victory.

Perhaps most importantly, the Court recognized that holistic review allows for individualized consideration of different applicants' unique strengths, abilities, and backgrounds. Holistic review served as a reflection of UT's authentic interest in broad student body diversity, including but not limited to race, and respect for the unique identities that each applicant may represent. Thus, holistic review served as a tool to strike the "sensitive balance" between institutional mission and respect for the individual.[60] Those features addressed the Court's concern with the "enduring challenge to our Nation's education system to reconcile

59 Gratz at 272 (internal citations omitted).
60 Fisher II at *19.

the pursuit of diversity with the constitutional promise of equal treatment and dignity" for the individual.[61] This also helps explain why UT did not attempt to answer the question of whether it could tell whether a student had been admitted because race factored into the admissions decision. Statements from UT admissions officials explained that admissions decisions were based on a holistic judgment about the individual applicant as a whole.[62]

Still, UT was very clear about *how* race fit into its holistic review process: "at one stage and one stage only — the calculation of the [Personal Achievement Score]."[63] As a result, the Court had no doubt that "race is but a factor of a factor of a factor in the holistic-review calculus."[64] In the end, the Court was able to dismiss concerns from Fisher and some of her amici — which Justice Alito's dissent also latched onto — that the process was a "black box" that secretly put the thumb on the scale for race in constitutionally impermissible ways.[65]

The Court also took care to mention that UT's full-file and essay readers alike "undergo extensive training to ensure that they are scoring applicants consistently."[66] UT's Admissions Office also checked decisions on the back-end through "regular reliability analyses" to ensure that applications were scored consistently across different readers.[67] Together, the training and reliability analyses gave the Court confidence that UT was working "to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file."[68]

Finally, the Court recognized the inconsistency between the nuanced, multifaceted diversity goals established by UT and any simplistic view of merit embedded in the admission process. As Justice Kennedy observed in the context of the percent plan discussion, "any single metric . . . will capture certain types of people and miss others" and "privileging one characteristic above all others does not lead to a diverse student body."[69] Citing *Grutter*, he concluded that percent plans "may preclude the university from

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61 Id.
62 E.g., Deposition of Kedra Ishop (October 6, 2008), Joint Appx. 220a, available at https://utexas.app.box.com/s/1zook5nive0l1wtsqzrfk1wjg3h6tfbj. ("[Question from Fisher's attorney] And can you explain to me how race is considered in that process? [Answer from Ishop] Race is contextual, just like every other part of the applicant's file . . . Q. Could you give me an example where race would have some impact on an applicant's personal achievement score? A. To be honest, not really. When we read files and when we're trained to read files, we read them in the context of the applicant pool . . . It's impossible to say — to give you an example — of a particular student because it's all contextual.")
63 Fisher II at *5.
64 Id.
65 E.g., Fisher II at *46 (Alito, J., dissenting) (alleging that "UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014").
66 Fisher II at *4.
67 Id.
68 Id. at *5.
69 Id. at *17. To further illustrate this point, the Court observed:

conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[70]

Although institutions need not mimic UT's process exactly, they should be prepared to explain how race fits into their holistic review decision-making process in a way that laypeople (and federal judges) can understand. This implicates the following actions:

- **Create appropriate transparency about the admissions process, particularly with respect to the institution's conception of merit and use of race.** At minimum, an institution's internal admissions policies and training materials should articulate the factors used in holistic review and how those factors are assessed to make a final admissions decision. This should include specific discussion of how race fits into the decision-making process. Race should not operate as a separate, stand-alone factor or preference in the process. It should also not result in separating applicants into different pools by race or otherwise treating all applicants from a particular racial group in exactly the same way. Instead, race should serve as one factor among many that help an institution understand and contextualize an applicant's unique background, abilities, interests, and likelihood of success at the institution to reach a holistic judgment. Greater public transparency about the admission process — though not a requirement from the Court — may also help institutions deflect concerns from the "court of public opinion."
- **Ensure that all admitted applicants are deemed academically qualified for the institution**. Academic indicators serve an essential role in the holistic admissions process for selective institutions. And multiple factors can inform judgments about academic preparedness, such as GPA, standardized test scores, high school curriculum, and a student's ability to take advantages of the academic opportunities available at his or her high school. (Conducting validation studies can be an important strategy to confirm the predictiveness of different high school academic indicators on likelihood of postsecondary success.) Institutions should take care that "secondary" factors such as race, gender, or socioeconomic status do not call into question their judgments about admitting only those students who are likely to succeed.

> Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

70 Id. at *18 (quoting Grutter, 539 U.S. at 340).

- **Establish process guardrails to ensure that the holistic review policy is being implemented consistently and reliably.** This should include training for all admissions staff and readers, including guidance on how race should and should not be used. Including legal counsel in these discussions or in the development of training materials may be a good strategy to ensure effective communication of legal standards and to create stronger partnerships between admissions and the counsel's office. Institutions should also take care to check to make sure that admissions staff members and readers are appropriately following training guidance through reliability analyses or other means to compare results across different staff members and readers.
- **Illustrate the process with anecdotes and other qualitative evidence.** In addition to the statistical and demographic data that should be collected, institutions can make their policies easier to understand through examples of how different students were assessed through the holistic review process. These examples can be helpful for internal work — e.g., training admissions staff and readers, reporting admissions results to institutional leadership — as well as helping external audiences understand and appreciate the often-confusing admissions process. It may be especially important to illustrate how race is used flexibly through the process, including examples that may challenge common stereotypes. The University of Michigan Law School admissions policy upheld in *Grutter* and the Princeton undergraduate admission policy reviewed and approved by the U.S. Department of Education's Office for Civil Rights are particularly strong illustrations of this approach.[71]

4. Institutions have an "ongoing obligation to engage in constant deliberation and continued reflection" regarding their admissions and related policies. The decision to consider race in enrollment decisions cannot be an isolated, one-time occurrence. And the process over time should be documented.

Notably emphasizing a central tenet of federal nondiscrimination law, the Court cautioned throughout its opinion that UT must remain steadfast in its admission policy periodic review efforts. It noted with approval that UT reassessed the need to consider race in 2009 (two years after it was reinstated), but made very clear that this one-time effort was not enough for UT to continue to carry its burden in the future.[72] Going

71 College Board, "A Diversity Action Blueprint: Policy Parameters and Model Practices for Higher Education Institutions," 21–34 (2010) (reviews University of Michigan Law School admissions policy), available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/10b_2699_diversity_action_blueprint_web_100922.pdf; College Board and EducationCounsel, "Preparing for Fisher II," 12–13, ADC Issue Brief (Feb. 2016 v.2) (discusses Princeton University's undergraduate admissions policy), available at http://educationcounsel.com/?publication=college-board-access-diversity-issue-brief-preparing-fisher-ii.

72 Id. at *19 ("The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement.").

into much more detail than in past admissions decisions, Justice Kennedy explained the type of undertaking at UT the Court would expect to see:

- **Regular evaluation.** UT has a "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program . . . Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan."[73] The Court indicated that, when adequate years of data are available, this assessment should examine the interaction and relative effectiveness of the percent plan and holistic review in producing students who later contribute to UT's diversity goals for all students.
- **Attend to *broad* diversity.** "As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values."[74]
- **Close attention to the necessity of continuing to use race-conscious policies.** "Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."[75]

The Court's guidance easily applies to other institutions, as well. They should:

- **Establish a continual process of review and evaluation.** This should optimally involve some annual assessment and more robust analysis over the course of several admission cycles. It is important that this process not be solely focused on the admission process itself. Just as policies and practices in other realms of enrollment may bear on judgments about admission policies, scholarship, financial aid, recruitment, and outreach policies should be regularly assessed, particularly where they involve considerations of race. Even more broadly, consider what is happening *before* students apply and *after* students enroll. Including legal counsel, student affairs, academic affairs, and other stakeholders in this process may make holistic assessment more robust and effective.
- **Ground the process in evidence.** Using the institution's measurable objectives (including both quantitative and qualitative indicators) as a starting point, institutions should tap into a wide range of sources to assess progress toward achieving institutional goals. Again, different types of quantitative and qualitative data and information can and should factor into the process. Student body demographics alone likely do not capture the full picture. Partnering with the institutional

73 Fisher II at *10.
74 Id. at *10–11.
75 Id. at *11.

research office and utilizing existing assessment tools (e.g., student course evaluations, student/faculty/staff climate surveys, and alumni engagement surveys) are likely to be essential steps in this effort.

Goodbye to *Grutter*'s 25-Year Horizon?

In 2003's *Grutter* decision, Justice O'Connor famously observed that the Court "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[76] Though it quoted extensively from *Grutter* and heavily emphasized periodic review, the Court in *Fisher II* did not reference any specific time horizon for race-conscious policies. This may reflect some recognition that the research and evidence base for race-conscious has deepened since 2003, with practitioners and researchers alike concluding that success on institutional diversity goals will change over time as demographics, institutional priorities, and enrollment strategies evolve. So, just as institutions do not have free reign to enshrine race-conscious policies for all time, they also may have less pressure to wind down those practices by an arbitrary Court timeline.

5. The broader social context counsels that institutions should use *Fisher II* as an impetus for recommitting to their institutional goals.

The recent national dialogue around the role that race plays in society has come to campuses across the country in the form of student demonstrations, demands, and debate.

Student activism presents both a challenge and an opportunity. As the Court observed in *Fisher II*, institutional goals should be assessed not only through the diversity of the student body, but also on how that diversity is experienced: Do students feel included and able to participate fully in campus life? After all, the compelling interest at stake depends not on student body diversity as an end in itself but as a means toward improved teaching and learning, personal and intellectual development, better civic outcomes, and a lively campus environment where all individuals, ideas, and perspectives are welcomed.

These ideas are not new. Justice Powell observed in *Bakke* in 1978, "[I]t is not too much to say that our nation's future depends on leaders trained through wide exposure to the ideas and mores of students as

76 Grutter at 343.

diverse as this Nation of many peoples."[77] And, as Justice O'Connor continued in 2003's *Grutter*, such benefits of diversity are "substantial" and "not theoretical but real."[78] To obtain these benefits, higher education must walk the talk associated with them.

In this ever-evolving landscape, institutions should embrace the opportunity to listen, learn, and lead. Building understanding across *all* institutional stakeholder groups about the role of diversity in higher education and the key policies and practices necessary is essential to achieve associated educational benefits.

Conclusion

If *Fisher II* stands for anything, it is that evidence matters. To establish a persuasive case for its race-conscious holistic review policy, UT's process steps and academic judgments were informed by a rich mix of quantitative and qualitative evidence. The decision thus reinforces and illustrates decades of work by many institutions and their partners in policy, research, and law.

Institutions should also take heart in the Court's approval of typical higher education decision-making elements: creating committees, writing clear policies, identifying evidence, and getting buy-in from leadership. Like UT, the higher education sector may have a "special opportunity to learn and teach" other sectors in how to create diverse populations *and* leverage significant benefits as a result.

77 Bakke at 313.
78 Grutter at 330.

Advancing Diversity Goals: A Guide to Action

Institutions should consider the following principles and key steps to ensure legally sound and sustainable diversity and inclusion policies and practices:

Guiding Principles

An institution's mission is its polestar and should be the basis for the articulation of goals, objectives, and policy**.**

Institutions should look beyond admissions to the full enrollment spectrum (outreach, recruitment, financial aid, and retention) in both defining goals and practices and in collecting and using evidence to monitor outcomes.

Race- and ethnicity-conscious policies and practices implicate both diversity (the types of differences present within the student body) **and inclusion** (the degree to which all students feel welcome and able to contribute).

Action Steps

1. **Assemble the Right Teams.** Members should include representatives of all components of the enrollment spectrum.. Other stakeholders such as faculty, legal counsel, and institutional researchers (to name a few) will play important roles in many facets of this work.

2. **Establish and Document a Deliberative Process.** In addition to defining and documenting clear goals and objectives, the process should include an inventory of the set of strategies being used across the spectrum, including in-depth consideration of race-neutral strategies. There should be an explicit process for incorporating new evidence, and evaluating and adjusting policies and practices periodically, as events warrant.

3. **Amass, Review, and Document Relevant Evidence** including institution-specific data and research as well as broader research and information (both quantitative and qualitative). These data and evidence should drive policy alignment, effectiveness, and sustainability over time.

4. **Make Reasoned, Data-Driven Decisions** that arise from careful deliberation and that are informed by all the steps above. All decisions should be grounded in evidence and data relevant to the institution and its admissions and enrollment practices.

5. **Ensure Clarity and Coherence.** The policy statements should convey a clear statement of context sensitive, evidence-based, *educational* goals and strategies aligned with your institution's mission.

The **Access & Diversity Collaborative** is a major **College Board Advocacy & Policy Center** initiative was established in the immediate wake of the 2003 U.S. Supreme Court University of Michigan decisions to address the key questions of law, policy, and practice posed by higher education

leaders and enrollment officials. The Collaborative provides general policy, practice, legal, and strategic guidance to colleges, universities, and state systems of higher education to support their independent development and implementation of access- and diversity-related enrollment policies — principally through in-person seminars and workshops, published manuals and white papers/policy briefs, and professional development videos. For more information, please visit http://diversitycollaborative.collegeboard.org/.

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