



The Fifth Circuit Court of Appeal's Second Ruling in *Fisher v. University of Texas* The Decision and Its Implications

July 31, 2014

Prepared on Behalf of the College Board's Access & Diversity Collaborative

On July 15, 2014, in its second ruling on the case, a three-judge panel from the Fifth Circuit Court of Appeals rendered a 2-1 decision in *Fisher v. University of Texas at Austin*, holding that the consideration of race or ethnicity by the University of Texas at Austin's (UT) in its admission program was narrowly tailored to achieve UT's compelling educational interests and, therefore, justified under applicable constitutional standards.¹ The Fifth Circuit reheard the case after the U.S. Supreme Court determined in June 2013 that the Fifth Circuit, in its first ruling, had not subjected the university's consideration of race to the required "strict judicial scrutiny" that applies whenever race-conscious policies are challenged.²

This legal update provides a brief review of the background and procedural history of the case, a detailed analysis of the ruling, and key takeaways for practitioners and policymakers.

Background and Procedural History

After being denied admission to UT in 2008, Abigail Fisher sued, alleging that UT's admission policy discriminated against her on the basis of race. UT's admission policy included two main components: (1) automatic admission for all Texas students who graduated in the top ten percent of their high school classes, as mandated by the state's "Top Ten Percent Plan;" and (2) a holistic, individualized review process, which included consideration of many factors including race and ethnicity for all other

¹ *Fisher v. University of Texas at Austin*, No. 09-50822 (5th Cir. July 15, 2014), available at: <http://www.ca5.uscourts.gov/opinions/pub/09/09-50822-CV2.pdf>.

² For a full case analysis of the Supreme Court's decision in *Fisher*, see Understanding *Fisher v. the University of Texas*: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say About Diversity and the Use of Race and Ethnicity in College Admissions (College Board 2013), <http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/diversity-collaborative-understanding-fisher.pdf>. See also Arthur Coleman and Teresa Taylor, *Emphasis Added: Fisher v. University of Texas at Austin and Its Practical Implications for Institutions of Higher Education*, THE FUTURE OF AFFIRMATIVE ACTION (ed. Richard Kahlenberg) (Lumina Foundation and Century Foundation 2014), http://www.educationcounsel.com/docudepot/4_Emphasis-Added.pdf.

applicants.³ In the 2008 UT admission cycle, approximately 80 percent of students were admitted through the Top Ten Percent Plan and approximately 20 percent were admitted through the holistic review process.

The federal district court that first heard Fisher's case upheld UT's admission policy under principles for the strict scrutiny analysis established in the U.S. Supreme Court's decision in *Grutter v. Bollinger* (2003), which built on Justice Powell's opinion in *Regents of the University of California v. Bakke* (1978).⁴ The district court was affirmed by a unanimous three judge panel from the Fifth Circuit. Though he joined the majority based on existing precedent, Fifth Circuit Judge Emilio Garza wrote a special concurrence to the decision inviting Supreme Court review, questioning the *Grutter* holding and contending that *Grutter's* identification of educational benefits of diversity as a compelling interest rested on hypothesis, speculation, and intuition. He concluded that the Supreme Court's "failing" was that "it approved the use of race in university admissions as a compelling state interest at all." He also found that *Grutter's* narrow tailoring analysis set "a peculiarly low bar" for institutions.

The U.S. Supreme Court accepted Fisher's appeal and, in a 7-1 ruling,⁵ reaffirmed that the educational benefits of diversity are a compelling interest, but concluded that the Fifth Circuit had afforded unwarranted deference to UT in its evaluation of the means by which UT sought to attain its diversity goals. It did not rule on the merits of UT's admission policy and remanded the case back to the Fifth Circuit for resolution under the strict judicial scrutiny standard clarified by its *Fisher* decision.

The Ruling

Following a new round of briefing from the parties and additional oral arguments, the Fifth Circuit rendered a 2-1 decision, once again upholding UT's admission policy.

The court concluded that UT's limited race-conscious holistic review process reflected a necessary step in achieving its particular diversity goals. This was particularly so given the substantial impact of the "mechanical," "single dimension" Top Ten Percent Plan that "standing alone . . . was not a workable means of achieving" the robust, multifaceted diversity sought by UT. Because the holistic review process provided an avenue for admitting highly competitive students "of unique talents and backgrounds who [could] enrich the diversity of the student body in distinct ways," the court deemed it

³ For a complete review of the facts in *Fisher* (including a detailed look at UT's admission process) and the Fifth Circuit's first decision, see Legal Update: *Fisher v. University of Texas* Case Summary (College Board 2011), http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/fisher_v_univ_texas_final.pdf.

⁴ Under federal law, race- or ethnicity-based classifications are inherently suspect, disfavored by courts, and subject to "strict scrutiny," the most rigorous standard of judicial review. Strict scrutiny requires all public institutions and all private institutions that receive federal funding only to use race or ethnicity as a factor in conferring benefits or opportunities to students if they can establish that such race- and ethnicity-conscious policies or practices serve a "compelling state interest" and are "narrowly tailored" to serve that interest. Strict scrutiny should not apply to policies and practices that are inclusive and do not result in excluding individuals based on their race or ethnicity. U.S. Const. amend XIV; § 1; 42 U.S.C. § 2000d; *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Understanding Fisher*, note 2 above.

⁵ Justice Kagan was recused from the case, resulting in only eight of nine Justices participating in *Fisher*.

"a necessary and enabling component of the Top Ten Percent Plan" that "complements [Top Ten admittees'] contributions to diversity – mitigating in an important way the effects of a single dimension process." The court observed that including race and ethnicity as "a factor of a factor" in this highly competitive process was important because lingering gaps in standardized test scores among racial and ethnic student groups may have caused holistic review to otherwise "approach an all-white enterprise."

In response to the U.S. Supreme Court's critique of its previous examination of UT's consideration of race-neutral alternatives, the Fifth Circuit documented a variety of race-neutral policies pursued by UT (including the Top Ten Percent Plan) that, alone, had not yielded UT's desired diversity.

Notably, the *Fisher* decision is rooted in the highly fact- and context-specific nature of the case, with the court referring to UT's admissions policy as a "unique creature" that offers "no template for others."

In his dissent, Judge Garza focused his critique of the majority ruling on UT's failure to "define with clarity" its goals and objectives as a foundation for evaluating its race-conscious holistic review policy. More specifically, he argued that the majority failed to "make a meaningful inquiry" into the "critical mass" that UT asserted as its diversity objective – finding UT's articulation of its interests to be "unknown, unmeasurable, or unclear." At the same time, though he found that UT had failed to justify its race-conscious policy, he acknowledged the possibility that "a public university [could] define its diversity ends adequately for a court to verify narrow tailoring with the requisite exacting scrutiny" – reflecting a shift from his concurrence in the Fifth Circuit's first hearing of the case.

The Fifth Circuit's decision is binding only within its jurisdiction (Louisiana, Mississippi, and Texas), but may be persuasive in the other jurisdictions. And the decision may not be final. On July 30, 2014, Fisher's attorneys filed an appeal to the full Fifth Circuit for "en banc" review.⁶ Eventually, the decision could even return to the U.S. Supreme Court, if the Court decides to hear the case again.

Key elements of the Fifth Circuit's 2014 *Fisher* ruling include:

- 1. Affirmation of the compelling interest reflected in UT's diversity goals, which are "defined by reference to the educational benefits that diversity is designed to produce."** The court reaffirmed the diversity-related educational benefits of: (a) improved educational quality; (b) preparation for students as professionals in a global marketplace; and (c) enhancement of civic readiness.
- 2. Rejection of a numbers-exclusive focus as a condition of sanctioning UT's critical mass objectives.** While recognizing the relevance of numbers to a judgment regarding critical mass, the court affirmed UT's critical mass focus – defined "by reference to a broader view of diversity" reflected in the holistic review of its individual applicants. In the court's view (and consistent with UT's argument), critical mass could not reflect "achievement of a certain quota of minority students."⁷

⁶ In the last round of litigation, the full Fifth Circuit declined to hear Fisher's appeal. She then appealed directly to the Supreme Court.

⁷ The court's conclusions were almost certainly guided by UT's briefs, which described UT's annual review of progress toward its critical mass objectives on "various data points including but not limited to enrollment figures; evidence of racial isolation and the racial climate on campus (which includes reports of racially hostile or insensitive conduct), including feedback from faculty and students; and other data including the educational benefits of diversity experienced in the classroom." Supplemental Brief for Appellees, *Fisher v. Univ. of Texas at Austin* (No. 09-50822), at 48, available at: <http://www.utexas.edu/vp/irla/Documents/2013-10-25-UT->

3. **Affirmation that UT's holistic review process was lawful**, because it:
- ◆ Admitted students of all races and ethnicities, as well as those with unique talents, backgrounds, and life experiences, thereby mitigating the effects of the "single dimension" Top Ten Percent Plan that was based only on high school class rank
 - ◆ Supplemented the Top Ten Percent Plan "allow[ing] selection of an overwhelming number of students by facially neutral measures, and for the remainder race [was] only a factor of factors"
 - ◆ Was "nearly indistinguishable" from the University of Michigan Law School's program, upheld in *Grutter*, with its focus on individualized review of each applicant based on a wide array of factors designed to achieve "multi-dimensional" diversity
 - ◆ Admitted only "highly qualified" and "competitive" students
4. **Affirmation that UT's consideration of race in its holistic review process was necessary**. The court concluded that the holistic review process made "the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission." The court also observed that the "low numbers" of underrepresented minority students yielded by the holistic review was the process's "strength, not its weakness."⁸
5. **Recognition that UT satisfied its burden with respect to the consideration and pursuit of race-neutral strategies**, including:
- ◆ The Top Ten Percent Plan, a facially-neutral process through which the vast majority of students were admitted
 - ◆ Outreach "targeting under-represented demographics, including the over half of Texas high school graduates that are African-American or Hispanic"
 - ◆ Scholarships awarded based on socio-economic and/or first generation status
 - ◆ Expansion of UT's recruitment and outreach efforts "by increasing its recruitment budget by \$500,000, by adding three regional admissions centers in Dallas, San Antonio, and Harlingen [a "significant investment" with 13 new staff members], by engaging in outreach programs that brought prospective students to UT Austin for daylong or overnight visits, and by hosting multi-day campus conferences for high school counselors"

[Fisher.Supp.Br.pdf](#). On the issue of examining critical mass within individual classrooms, citing a UT classroom diversity study that showed that "African-American and Hispanic students were nearly non-existent in thousands of classes," UT explained that, though it "never pursued classroom diversity as a discrete interest or endpoint . . . this palpable lack of diversity in the classrooms – one of many factors UT considered – underscored that UT had not yet fully realized the educational benefits of diversity." *Id.* at 46.

In dissent, while Judge Garza agreed that critical mass "does not require a precise numerical definition," he asserted that "clarity" regarding institutional goals was essential, and that meaningful strict scrutiny review required "concrete targets" and knowable ends upon which to gauge the sufficiency of race-conscious means. He concluded that UT's "nebulous amalgam of factors – enrollment data, racial isolation, racial climate, and 'the educational benefits of diversity'" was a "bare submission" that "beg[ged] for the deference that is irreconcilable with 'meaningful' judicial review."

⁸ In dissent, Judge Garza challenged the necessity of using race and ethnicity in a holistic review program that only admitted 216 African-American and Latino students in an entering class of 6,322, objecting that UT "failed to explain *how* this small group contributes to its 'critical mass' objective."

- ◆ Creation of the Financial Aid Outreach Group "to visit high schools to help prospective students 'understand the financial support offered' . . . and 'to convince low income students that money should not be a barrier to attending college'"

Notably, in line with the Supreme Court's instruction that an institution is not bound to exhaust "every *conceivable* race-neutral alternative," the court concluded that – contrary to Fisher's argument – UT was not bound to replace consideration of race and ethnicity entirely with consideration of socio-economic status. (The court briefly reviewed evidence that socio-economic status is not a proxy for race and ethnicity and observed, "*Bakke* accepts that skin color matters – it disadvantages and ought not be relevant but it is.")

Key Takeaways

The Fifth Circuit's new decision may itself be a "unique creature," with its conclusions inextricable from the details of UT's admission policy. Nevertheless, the decision is worth examining for those lessons and questions that have relevance for other institutions and the broader field. These include:

1. The educational benefits of diversity remain a compelling interest that may justify race- and ethnicity-conscious policies and practices in appropriate circumstances.

Consistent with principles emanating from the U.S. Supreme Court's decisions in *Bakke*, *Grutter*, *Gratz*, and *Fisher*, the Fifth Circuit's decision illustrates that institutions may pursue appropriately designed race- and ethnicity-conscious policies to achieve the educational benefits of diversity. Indeed, the decision illustrates (in the Supreme Court's parlance) that while strict scrutiny may be "strict in theory" it is neither "feeble" nor "fatal in fact."

In framing the educational benefits of diversity as a matter of institutional policy, institutions of higher education should reflect upon the very similar benefits affirmed by the Supreme Court in *Grutter* and re-affirmed by the Fifth Circuit in *Fisher*: improved teaching and learning; preparation for the workforce in a global economy; and civic readiness. Where appropriate, institutions should connect these broad benefits to their specific missions and accompanying educational goals. Medical schools, for example, have connected their diversity goals with the need to provide medical care to diverse populations, particularly underserved populations.⁹

⁹ See, e.g., Roadmap to Diversity: Key Legal and Educational Policy Foundations for Medical Schools (1st ed., AAMC 2008), <https://members.aamc.org/eweb/upload/Roadmap%20to%20Diversity%20Key%20Lergal.pdf>.

2. Critical mass, a contextual benchmark for success on achievement of diversity-related goals, may be assessed and informed by objective and subjective evidence. The issue, however, remains one of significant debate.

When determining whether to re-institute a race-conscious holistic review process after the Supreme Court's 2003 *Grutter* decision,¹⁰ UT "based its critical mass determination on several data points, including hard data on minority admissions, enrollment, and racial isolation at UT, as well as discussion with students about their own experiences at UT and faculty observations."¹¹ Elaborating, UT called attention to the "jarring evidence of racial isolation," including evidence that "African American and Hispanic students were nearly non-existent in thousands of classes." This body of evidence led UT to determine that its critical mass objectives were not being met by neutral strategies alone and that a modest inclusion of race and ethnicity as "a factor of factors" was a necessary part of the holistic review process. UT continues to assess annually its critical mass objectives using multiple sources of evidence related to enrollment and campus climate, thus connecting the action of the admissions office with the educational work of the institution at large.

The absence in UT's critical mass formulation of a "clear and definite articulation of its goal" resulting in "undefined ends" led, at least in part, dissenting Judge Garza to reject its policy on the grounds that a reviewing court could not fulfill its duty in fully applying strict scrutiny standards. The majority did not directly address this critique. With the *Fisher* majority and dissenting opinions echoing the majority and dissenting opinions in *Grutter*, this debate is likely to continue for some time.

There are some key guideposts for institutions on critical mass. For an institution pursuing race-conscious policies, it is not enough to identify the attainment of the educational benefits of diversity as part of the institutional mission without also determining accompanying objectives (i.e., how success against that goal should be assessed). Institutions should ensure that their desired outcomes are clearly framed with sufficient precision so that they have adequate baselines upon which to gauge the success of their policies over time – and that the evidence they amass can justify the continuing consideration of race as part of a holistic review process. The decision in *Fisher* indicates that institutions may use different data and information sources and then assess goals and objectives accordingly.

3. Consideration and pursuit of neutral strategies are essential. Institutions should establish a comprehensive inventory of race-conscious and -neutral strategies (and the relevant evaluation of each with respect to diversity goals) to establish the necessity of pursuing race-conscious strategies because "available, workable race-neutral alternatives [alone] do not suffice."

As described above, the court specifically examined UT's array of neutral strategies beyond the Top Ten Percent Plan, including outreach, recruitment, and scholarship efforts, many of which were targeted specifically at low income and underserved students (in the Texas context, these students also tend to be racial and ethnic minorities).

¹⁰ From 1997 to 2003, UT was governed by the Fifth Circuit's *Hopwood* decision, which forbid the consideration of race and ethnicity in admission but was eventually overruled by *Grutter*. *Hopwood* only applied in the Fifth Circuit's jurisdiction (Louisiana, Mississippi, and Texas).

¹¹ Supplemental Brief for Appellees, note 7 above, at 33-34.

The task of cataloguing race-conscious and race-neutral strategies to demonstrate a cohesive, comprehensive diversity policy should be broadly instructive to institutions. All policies and practices that contribute to the achievement of an institution's diversity goals should be examined individually and collectively for their effectiveness and impact. But it is unlikely that UT's race-neutral approach can (or should) serve as a blueprint for the vast majority of race-conscious institutions because of the significant, state-mandated role that the Top Ten Percent Plan played in UT's admission policy. Moreover, UT's case was enhanced by a history in which it was required to use an entirely race-neutral admission program for six years¹² – meaning that it could more easily "demonstrate, *before* turning to racial classifications, that available, workable neutral alternatives do not suffice" (emphasis added). Institutions should consider UT as a reference point, rather than a model, and undertake their own race-neutral analyses with their own contexts and histories front and center.¹³

4. A race-conscious holistic review process should result in the admission of students who are individually deemed qualified and likely to succeed, with qualities and backgrounds that can contribute to student diversity.

One of the strengths of UT's position, as reflected in the majority opinion, was the fact that the students admitted through UT's holistic review process all met "the competitive academic bar of admissions" and had "unique qualities that complement[ed] the contributions of the Top Ten Percent Plan admittees." In other words, all admitted students – whether admitted through the Top Ten Percent Plan or the holistic review process – were academically qualified to attend UT. After determining basic academic eligibility, UT's holistic review process involved individualized review of each applicant's file, with its focus on admitting students "with demonstrated qualities of leadership and sense of self" and with "unique talents and backgrounds" – qualities that the rigid Top Ten Percent Plan was incapable of assessing.

Institutions of higher education pursuing race-conscious holistic reviews should ensure that their file reviews focus on the full array of backgrounds and characteristics important to the fulfillment of institutional diversity goals. They should also establish basic academic eligibility for all students before assessing other experiences and attributes such as race and ethnicity.

¹² These six years refer to the time period (1997-2003) when UT was governed by the *Hopwood* decision. See note 10 above.

¹³ A September 2013 resolution agreement between the U.S. Department of Education's Office for Civil Rights and Rice University that approved Rice's limited use of race and ethnicity in its holistic admissions program may be instructive on this point. In reaching its conclusion, OCR examined a wide array of neutral strategies employed by Rice (e.g., enhancing recruitment efforts for underrepresented students, participation in more than 70 outreach programs, revising admissions metrics, expanding socioeconomic diversity, and offering scholarships specifically for students who can help bridge racial and cultural differences). Rice concluded that this wide array of strategies was not sufficient to meet its diversity goals – described specifically in the context of having "a critical mass of underrepresented students as would be necessary to develop a meaningful level of participation by those students in each of its nine residential colleges." (Like UT, Rice also was governed by *Hopwood* 1997-2003). Office for Civil Rights, U.S. Dep't of Education, Complaint Resolution for OCR Complaint #06052020 (Rice University) (Sept. 10, 2013). <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/06052020-a.html>.

5. Facts matter. The establishment of educationally sound, legally sustainable diversity policies is ultimately dependent on institution-specific evidence aligned with institutional mission.

The conceptualization and implementation of diversity programs are highly dependent on an institution's unique mission, context, and setting. (In fact, the U.S. Supreme Court in *Fisher* specifically acknowledged that even within a strict scrutiny analysis, courts should "take account of a university's experience and expertise in adopting or rejecting certain admissions processes.") As UT's efforts demonstrate, though an institution may be informed by other models and broad-based research may inform institutional judgments, it must base its decisions regarding its race-conscious practices on its own theory of action, logic, and supporting evidence.

There is no doubt that UT's holistic review process's similarity to that established by the University of Michigan Law School (approved by the U.S. Supreme Court in *Grutter*) contributed to the Fifth Circuit's decision. At the same time, however, the court observed that UT's policy is "a unique creature." Noting Justice O'Connor's observation in *Grutter* that "context matters," the court concludes that the combination of UT's percent plan, UT's limited holistic review process for those students not admitted through the percent plan, and the Texas context "offers no template for others."



Though a new chapter to the diversity legal canon has been added, the issues addressed in *Fisher* are far from over. Though UT has won the day for now, questions raised by Judge Garza's dissent echo those raised by Justice Kennedy's dissent in *Grutter*. Institutions should take heart that race-conscious programs may continue to be legally permissible when appropriately justified – including in a post-*Fisher* world. But institutions should not assume that the challenge of designing and implementing effective and legally permissible diversity strategies has subsided. Using the gift of time granted by the Supreme Court and now the Fifth Circuit in their *Fisher* decisions, institutions should work to ensure that their race-conscious diversity goals and accompanying strategies have appropriate support and justification – including a serious consideration and appropriate use of workable race-neutral strategies.

This guidance was prepared by EducationCounsel LLC on behalf of the College Board's Access & Diversity Collaborative. 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. For more information regarding the Collaborative, please visit <http://diversitycollaborative.collegeboard.org/>

The Collaborative is grateful to the members of its "Rapid Response Team" for their assistance in the preparation of this analysis: Jamie Lewis Keith, the University of Florida; Michael Reilly, American Association of Collegiate Registrars and Admissions Officers; Frank Trinity, Association of American Medical Colleges; Terry Hartle & Ada Meloy, American Council on Education; Debra Humphreys, Association of American Colleges and Universities; and David Hawkins, National Association for College Admission Counseling.

This guidance 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 issues.

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v. 1 July 31, 2014