



**Diversity in the Balance, Part I:
Key Educational Principles from Amicus Briefs Filed in
*Fisher v. University of Texas***

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*The 2012-13 term of the U.S. Supreme Court is the third term in a decade in which the Court will have addressed issues of race in education. This frequency is striking given that prior to 2003, a quarter of a century had passed since the Court considered the lawfulness of the consideration of racial preferences in education. With the Court poised to expand upon its recent rulings—Grutter v. Bollinger and Gratz v. Bollinger in 2003; and Parents Involved in Community Schools v. Seattle School District in 2007—this two-part series **Diversity in the Balance** provides in Part I an overview of the current case before the Court and key education arguments pressed by the dozens of education institutions and organizations that have filed supportive briefs on behalf of the University of Texas, which may inform institutional perspectives regarding policy-related strategies; and in Part II more concrete guidance regarding prospective steps that institutions may consider during the months in which the Court is preparing its decision.*

On October 10, 2012, the United States Supreme Court heard oral arguments in a challenge to the University of Texas at Austin's admissions policy, which includes a consideration of race as part of a holistic assessment of applicants. Lower federal courts, applying the Supreme Court's 2003 decision of *Grutter v. Bollinger* (which affirmed the lawfulness of the University of Michigan law school's race-conscious admission policy and held that the educational benefits of diversity can justify the limited consideration of race when making admissions decisions), upheld the challenged undergraduate admissions policy, finding that it "map[ped] on *Grutter*" in its evaluation of each application, "using a holistic, multi-factor approach, in which race [was] but one of many considerations."¹ The Supreme Court's decision to take the *Fisher v. University of Texas* case likely signals its intent to reassess issues of race-conscious policies and practices in higher education raised in the *Grutter* decision.

Given the stakes present in this case, it is no surprise that the Court received a significant number of amicus (friend of the court) briefs (92 in total). Seventeen briefs were filed in support of Fisher, the woman challenging the University policy; these briefs included those filed by libertarian public interest groups, individual members of the United States Commission on Civil Rights, and an Asian American organization. Seventy-three briefs were filed in support of

¹ See *Fisher v. Univ. of Texas*, 644 F.3d 301 (5th Cir. 2011). For a summary analysis of the January 18, 2011, opinion of the Fifth Circuit Court of Appeals, see Coleman and Lipper, *Legal Update: Fisher v. University of Texas Case Summary*, available at http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/fisher_v_univ_texas_final.pdf.

the University of Texas (University), including briefs filed by the United States and 17 states and territories; members of the federal and Texas legislatures; educational organizations (including the College Board) and at least 117 colleges and universities; military and national security officials; a majority of the Fortune 100 companies; 21 small business owners and associations; social science researchers and empirical scholars; and multiple Asian and Pacific Islander American organizations.²

Many of the points made by the amici were raised during the Supreme Court oral arguments. This paper distills many of the key educational principles and core arguments raised in the amicus briefs filed in support of the University, which may inform institutional perspectives regarding policy-related strategies both before and following a *Fisher* decision.

Although each amicus brief offered unique insight aligned with specific amici perspectives and areas of expertise, certain core themes emerged. These include the following:

- 1. The benefits of diversity, including "must-have skills" (critical and complex thinking, problem solving, communication, collaboration, creativity, innovation, transmission of cultural norms, and interpersonal and social skills), are even more important in the 21st century than they may have been in the past.**

Numerous briefs connected the demands of a 21st-century American society and global economy with educational benefits of diversity, including racial diversity, which include improved cross-racial understanding to help break down racial stereotypes, the enabling of students to better understand persons of different races, the promotion of learning outcomes, the better preparation of students for an increasingly diverse workforce and society, and the better preparation of students as professionals (as recognized by the Court in 2003). Briefs noted that the fastest growing industries in the United States demand skills that are best cultivated in diverse learning environments, including developing unique and creative approaches to problem-solving that integrate different perspectives. Others noted that the health care needs of our increasingly diverse population demand physicians with emotional intelligence, cultural competence, empathy, and the ability to understand, value, and accept disparate viewpoints. And certain briefs contended that our mission-critical national security interests are best served by individuals with collaboration skills, foreign language capabilities, and regional experiences.

- "Diversity as an institutional priority and point of focus comes as no surprise, given that many of our nation's fastest-growing economic sectors require that workers have higher levels of reasoning, problem-solving, and interpersonal skills—skills enhanced by experiences among diverse peers." —*College Board*
- "In the medical education environment, these benefits are particularly important because public health is at stake, not just business interests. A diverse student body helps to

² Two briefs were filed in support of neither *Fisher* nor the University.

promote the empathy, emotional intelligence, and cultural competence required of physicians and other health care professionals. Medical students who are educated in a diverse student body report that they are better able to work with patients of diverse backgrounds." –*Association of American Medical Colleges (AAMC)*

- "[P]eople who have been educated in a diverse setting make valuable contributions to the workforce in several important ways. Such graduates have an increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking; they are better equipped to understand a wider variety of consumer needs, including needs specific to particular groups, and thus to develop products and services that appeal to a variety of consumers and to market those offerings in appealing ways; they are better able to work productively with business partners, employees, and clients in the United States." –*Fortune-100 and Other Leading American Businesses*
- For the United States military, a highly qualified and racially diverse officer corps is not a lofty ideal. It is a mission-critical national security interest...Diversity of skills, including foreign language skills, and knowledge of other cultures, as well as the ability to collaborate and even culturally empathize with different kinds of people, all are critical to an optimally effective modern military leadership." –*Lt. Gen. Julius W. Becton, Jr., et al. (Retired generals)*
- "In [STEM] fields, which depend on creative insights to solve problems, and where graduates will work in a highly globalized market, a lack of the diversity among the student population detracts from the educational experience of both minority and nonminority students who are enrolled." –*California Institute of Technology, et al. (Cal Tech)*

2. An institution's academic freedom should include its design of a mission-oriented admissions process to best achieve institutional goals.

Determining what kinds of student diversity an institution wishes to pursue is an academic judgment that depends on institutional mission. Indeed, numerous briefs emphasized the academic freedoms long recognized by the U.S. Supreme Court for American colleges and universities that include the decision regarding "who may be admitted to study." Briefs noted that admissions judgments, including regarding the educational benefits of diversity on campus, were within the core expertise of institutions of higher education and dependent on each institution's definition of its own mission.

- "'[W]ho may be admitted to study' is paradigmatic academic judgment...Petitioner's arguments threaten to undermine the institutional pluralism this Court and the other Branches [of government] have been so careful to preserve." –*American Council on Higher Education*
- "Judgments about educational benefits are necessarily at the core of the expertise of universities and inevitably implicate the First Amendment interests in a university's definition of its own educational mission." –*Brown University, et al.*

- "When universities employ the kind of individualized, holistic assessment of applicants that this Court's precedent endorses, their subjective determinations about the likely contribution of one candidate or another to the university's academic mission are entitled to deference. When student admissions are the product of such assessments, it is impossible for courts to say that a particular disappointed applicant should have been admitted and another denied admission. Those choices ultimately reflect the university's fundamental First Amendment interest in academic freedom." –*Cal Tech*

3. Educational judgments regarding admission involve many student qualities and characteristics, may include race and ethnicity, and may be different for different types of schools.

Many briefs stressed the comprehensive nature of a holistic review admissions process that considers a myriad of student metrics, attributes, and experiences when composing an incoming class. Characteristics include rural, urban, or other life experiences; military, extracurricular, or community service; employment; family background and family economic circumstances (including socioeconomic status); unique family profiles; and particular skills and interests. Briefs also noted that there was no one-size-fits-all solution (including percentage plans like the one present in Texas) that institutions of higher education might employ to amass a diverse student body.

- "Beyond the question of who is qualified (and, therefore, likely to succeed), the focus on who should be admitted implicates a significantly expanded examination of background qualities, characteristics, and experiences that can and do inform judgments about what a student may be able to bring to an institution to enrich the learning and growth of peers. Among them are: life experiences including overcoming adversity or hardships, military experience, community service-related experiences, and the like; family backgrounds including first-generation college-going experience, family economic circumstances, and unique family profiles; particular skills and interests including artistic talents, interests in science, etc.; and characteristics emblematic of other diversity factors, including race, ethnicity, geographic origin, socio-economic status, and life experiences in different cultural settings or in diverse learning environments." –*College Board*
- "In order to select candidates who embody these diverse viewpoints, medical schools consider factors that can include rural or urban backgrounds, bachelor's degrees in the sciences or liberal arts, unusual life experiences or journeys, and disparate racial and economic backgrounds, among others." –*AAMC*

4. The consideration of race/ethnicity is about far more than checking a box.

Race and ethnicity were acknowledged as one important component of student diversity but not in isolation; rather, many briefs called attention to the way race can contextualize and inform other metrics, attributes, and experiences of the individual applicant. In other words, briefs noted that an individual's racial or ethnic identity often is intertwined with other important personal qualities. Rather than merely a designation on an application, race can be

reflected in discussions of backgrounds, life experiences, and the like – including in essays designed to elicit how the student sees himself or herself in light of contributions that can be expected from the applicant and through personal interviews that assess how the applicant's background would contribute to the campus culture and, ultimately, to a culturally competent workforce.

- "[R]ace is not merely a designation on an application, but is reflected in discussions of backgrounds, life experiences and the like. For instance, essays designed to elicit how the student sees himself or herself in light of contributions that can be expected from an applicant often trigger discussion of racial and ethnic background, among other factors that may not otherwise surface in the admissions process." –*College Board*
- "Characteristics that make an individual particularly well-suited for the medical profession, such as resilience or the ability to overcome challenges, may in some cases be intertwined with an individual's race or ethnicity. When candidates have overcome great race-related challenges, obscuring or denying the realities of these challenges will hinder a full appreciation of the applicant's potential contributions....Unlike most undergraduate institutions, medical and other health professional schools have always considered and highly value personal interviews in order to learn what the applicant's background would contribute to a culturally competent workforce." –*AAMC*
- "The race of an applicant may place into context the applicant's other experiences or characteristics, and suggest whether the candidate will make a valuable contribution to the university's mission and the experience of other students." –*Cal Tech*
- If an applicant thinks his or her race or ethnicity is relevant to a holistic evaluation—which would hardly be surprising given that race remains a salient social factor—it is difficult to see how a university could blind itself to that factor while also gaining insight into each applicant and building a class that is more than the sum of its parts....[I]t would be extraordinary to conclude at this time that race is the single characteristic that universities may not consider in composing a student body that is diverse and excellent in many dimensions, not just academically. –*Brown University*

5. Diversity and merit are interrelated and reinforcing.

Merit is based on a wide range of factors considered in an institutional context. A determination of merit must be aligned with mission, based on a wide range of factors, and may include consideration of race/ethnicity as part of an individualized, holistic review. Briefs explained that merit requires more than academic competence and distinguished applicants who were qualified (for which there often is an oversupply) from those that ultimately are admitted.

- Decisions regarding student merit in the admissions process are grounded in educational judgments associated with a wide range of factors that may include consideration of a student's race or ethnicity...as part of individualized, holistic review." – *College Board*

- "Medical educators agree that success in medical school requires more than academic competence; it also requires integrity, altruism, self-management, interpersonal and teamwork skills, among other characteristics." –AAMC

6. The *Grutter* framework is still necessary and should be preserved. Colleges and universities are committed to its tenets and have invested time, resources, and energy in carrying it out with fidelity.

Briefs acknowledged and embraced the necessity of race-neutral alternatives in achieving diverse student bodies.³ These methods include pipeline programs, cross-institutional collaborations, academic enrichment programs, inclusive recruitment and outreach activities, and financial aid and scholarship opportunities. At the same time, the briefs found that race-neutral alternatives still are insufficient for producing the student bodies necessary to achieve the educational benefits of diversity. Without race-conscious policies, these briefs concluded, colleges and universities are less likely to realize the necessary racial diversity that provides all students with the teaching and learning environments that adequately prepare them for careers and adult citizenship.

Finally, countless briefs stressed that institutions of higher education, students, and parents have invested in and relied on the Court's guidance.

- "The balanced and workable *Grutter* framework should be preserved as it has been effectively implemented by education institutions to guide their policy development and ensure the attainment of compelling educational goals associated with diversity." –*College Board*
- "While many of these [race-neutral] programs and efforts [such as pipeline and academic enrichment] are helpful, on their own they are insufficient. Due to a multitude of factors outside of medical schools' influence or control, including economic forces, the past decade has not shown an overall increase in the percentages of underrepresented minorities nationwide that apply to medical school." –AAMC
- "And as was true when *Grutter* was decided, there are at present no race-neutral means for the military to fulfill its critical need for a highly qualified and diverse officer corps." –*Retired generals*
- "Not only have the colleges invested in reliance, so too have students and their parents. Current students and those matriculated for next year have expectations about being in a diverse community, and not being isolated." –*Amherst, et al.*

³ *Grutter* established that colleges and universities must consider race-neutral alternatives in good faith (and pursue them when appropriate), but need not exhaust every option or sacrifice broader educational goals before using race-conscious programs.

Conclusion

Taken together, the briefs filed by amicus supporting the University of Texas's position in *Fisher* affirm the importance of grounding diversity-related policies in carefully crafted, educationally sound principles and practices that are aligned with institutional missions.

For questions or additional information, please contact Arthur Coleman, Managing Partner, at art.coleman@educationcounsel.com or Katherine Lipper, Policy and Legal Advisor, at kate.lipper@educationcounsel.com.