



The Access and Diversity Collaborative

"Decision Day" Key Questions¹

Regarding the United States Supreme Court's Decision in *Fisher v. University of Texas*

On June 24, 2013, the U.S. Supreme Court announced its decision in *Fisher v. University of Texas at Austin*, the first challenge heard by the Supreme Court to the use of race in college admissions since the Court's 2003 decisions regarding the University of Michigan, *Grutter v. Bollinger* and *Gratz v. Bollinger*.² The Justices did not overrule or change the underlying standard established in *Grutter*, which held that an institution of higher education can have a race-conscious admissions policy provided that it is narrowly tailored to meet the institution's compelling interest in the educational benefits of diversity. The Court also made clear, however, that institutions have the burden of demonstrating that their admissions policies and practices meet this standard, including providing proof that available, workable race neutral alternatives would be insufficient to produce the educational benefits sought by the institution.

The following set of preliminary answers to key questions is intended to provide clear, concise guidance on important points and key takeaways to assist institutional and organizational leaders in crafting their immediate responses to the decision and strategies moving forward. This is a working document, and may be refined and reframed as we engage more deeply with the opinion.

- 1. Does the Court's opinion dramatically alter the long-settled legal principles and framework for analysis that has guided the consideration of race and ethnicity in admissions in higher education (per *Bakke* (1978); and *Grutter* and *Gratz* (2003)). If so, what are the major points of departure from prior precedent?**

The Court maintained the same "strict scrutiny" analysis as applies to all cases involving classifications based on race or ethnicity. Per *Grutter*, in the context of the use of race in admissions, institutions are permitted to identify a compelling interest in the educational benefits of diversity and may include race as one factor among many in a holistic, individualized review of applicants – so long as they can prove that any race-conscious policies and practices are narrowly tailored to this compelling interest. The Court did clarify that institutions have the "ultimate burden" in this narrow tailoring analysis and reviewing courts must make an independent review of the evidence without deferring to institutional judgment. (See Question 3 for additional discussion on this point.)

¹ The Collaborative thanks the members of its "Fisher Rapid Response" team for their assistance: Josh Civin (NAACP LDF), Terry Hartle (American Council on Education), David Hawkins (National Association for College Admission Counseling), Damon Hewitt (NAACP LDF), Debra Humphreys (Association of American Colleges and Universities), Jamie Lewis Keith (University of Florida), Ada Meloy (American Council on Education), Michael Reilly (American Association of Collegiate Registrars and Admissions Officers), Frank Trinity (American Association of Medical Colleges).

² The Court's opinion is available here: http://www.supremecourt.gov/opinions/12pdf/11-345_l5gm.pdf.

2. Does the U.S. Supreme Court in *Fisher* affirm that the educational benefits of diversity remain a compelling interest under federal law?

The Court presumed that *Grutter* remains good law and the educational benefits of diversity may be a compelling interest, with the majority opinion observing that "[t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." (The opinion did note, however, that "disagreement" existed regarding "whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity.")

3. Does the U.S. Supreme Court in *Fisher* affirm that race and ethnicity can still be considered as important factors (among others) in higher education admissions decisions? If so, under what circumstances?

By continuing to accept *Grutter* as the ruling standard and framework, the Court affirmed that race and ethnicity may be taken into account in admissions as one factor among many in an individualized, holistic review of applicants.

Though it did not upset this basic legal framework, the Court in *Fisher* clarified what it expects an institution and a reviewing court to do with regard to the narrow tailoring analysis that applies to the means by which an institution of higher education achieves its compelling educational interest in the racial aspects of broad diversity. The Court made clear that the "ultimate burden" is on the institution to prove to the court that its chosen means to attain the educational benefits of diversity – in design and implementation – are narrowly tailored, including a demonstration that, "before turning to racial classifications . . . available, workable race-neutral alternatives do not suffice."

Moreover, the Court gave an admonition to reviewing courts to make an independent, "searching examination" of the evidence provided by the institution. Courts are not permitted to defer to institutional judgment about the *means* of achieving diversity, though deference is acceptable as to an institution's judgment about the *ends* (i.e., the goals) of achieving diversity. In other words, courts must make an independent judgment on the institution's policies and practices – and cannot assume that an institution's good faith attempt is sufficient to meet the requirements of strict scrutiny.

The Court noted that "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative . . . [but does] require a court to examine [a case] with care," without deferring to the institution's judgment. Relevant factors for institutions to consider in their decision may include whether a race-neutral alternative "could promote the substantial interest about as well [as the race-conscious policy or practice] and at tolerable administrative expense."

4. Is the Court's ruling applicable to both public and private institutions (where, in the latter case, institutions receive federal funding upon which federal compliance is conditioned)?

The Court did not address this issue in *Fisher*, but it has been longstanding precedent that Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, ethnicity, or national origin, is coextensive with the Fourteenth Amendment, and applies to both public institutions and private institutions that accept federal funding.

5. Does the Court's opinion specifically reference or otherwise implicate possible impact on other enrollment practices—financial aid, scholarships, recruitment, outreach, etc.?

The Court did not discuss enrollment practices beyond the admissions program at issue and the factual context of various other practices can make a difference. Nevertheless, *Fisher* sheds light on the Court's view of narrow tailoring and institutions would be prudent to consider the evidentiary foundation for the need to consider race in admissions and enrollment practices.

6. Will the Court's ruling affect students who have already been admitted/who are already enrolled at my institution?

The Court did not explicitly address this issue, though, generally, Court decisions do not apply retroactively. The bottom line is that Court did not change the prevailing legal standards for the consideration of race in admissions.

It is sound practice for institutions to reexamine their institutional admissions and enrollment practices in light of the Court's decision and ensure that a strong evidentiary basis exists for race-conscious admissions practices. Good practices that have been implemented since *Bakke* and *Grutter* should be continued, including the use of robust general and targeted outreach to build a broadly diverse applicant pool; the use of race-neutral criteria such as socio-economic background, a personal history of conduct of inclusion, and the presence of other barriers to opportunities in higher education; and consideration of any other race-neutral alternatives that will align with institutional mission but not prevent individualized, holistic review. In a context where these practices have been demonstrated as inadequate at achieving the racial component of broad diversity, institutions may consider race as one factor among many others through a holistic assessment of each individual applicant.

7. How did the Justices vote?

Justice Kennedy authored the majority (7-1) opinion, and was joined by all other Justices except Justice Ginsburg (who dissented and would have upheld the University of Texas's policy under *Grutter*) and Justice Kagan (who was recused from the case). Justices Scalia and Thomas wrote separate concurring opinions, both indicating that they would have gone further to limit or overrule *Grutter*. It is worth noting that no Justice who has joined the bench since the Michigan cases were decided in 2003 offered an independent written opinion to indicate his or her own view of the issues implicated in *Fisher*.

8. What's next for the case?

The Court did not decide whether the University of Texas at Austin met the strict scrutiny standard it described in *Fisher* and, instead, sent the case back to the Fifth Circuit for reconsideration in light of its decision. The Fifth Circuit must determine whether the University of Texas presented enough evidence for the court to adequately "assess whether the University has offered sufficient evidence that would provide that its admissions program is narrowly tailored to obtain the educational benefits of diversity." (Note that the Fifth Circuit's opinion, however, was based on cross motions for summary judgment, meaning that a full trial record was never created.) If the record is sufficient, the Fifth Circuit may decide the case in relatively short order. If the record is insufficient, however, more time may be needed for the parties, particularly the University, to develop evidence to support its policy for the district court.

In any event, it is likely to take some time for this part of the process to be completed.

9. What additional guidance will be forthcoming to help my institution understand and address issues of consequence with respect to enrollment policies and practices?

The Access & Diversity Collaborative will provide a detailed summary and analysis of the case by June 27, and will continue to engage with its institutional and organizational sponsors throughout the summer to frame key strategies for moving forward in a way that preserves mission-driven diversity policies in a legally sustainable way.

For particularly pressing questions, the Collaborative has established an email "hotline" (FisherQuestions@educationcounsel.com). Beginning at 9 am ET on June 25, institutions and organizations may send additional questions (not answered in this document) to the ADC legal team (staffed by EducationCounsel, LLC). Please allow 24 hours for a response.

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About the Access and Diversity Collaborative

The **Access & Diversity Collaborative** is a major **College Board Advocacy & Policy Center** initiative that 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/>.

EducationCounsel, LLC (an affiliate of Nelson Mullins Riley & Scarborough LLP) is the College Board's principal partner in providing strategic counsel and substantive content regarding the relevant legal, policy, and practice issues central to the ADC's mission. EducationCounsel is a mission-based education consulting firm that combines experience in policy, strategy, law, and advocacy to drive significant improvements in the U.S. education system from pre-K through college and career. EducationCounsel's work in higher education focuses on issues ranging from access and opportunity to those associated with quality and completion. For more information, please visit <http://educationcounsel.com/>.

This Guide and the Access & Diversity Collaborative's ongoing work are provided for informational and policy planning purposes only. They do not constitute specific legal advice. Legal counsel should be consulted to address institution-specific legal issues.

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