



Fisher v. University of Texas

The U.S. Supreme Court Again Takes on
Higher Education Admissions

College Board Forum
Miami, Florida
October 24, 2012

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Session Overview

- I. Legal and Policy Landscape
- II. *Fisher*: The Case and Key Issues
- III. The Amicus Brief Effort
- IV. Strategies and Action Steps to Consider
- V. Conclusion

I. Legal and Policy Landscape

General Overview

Major Points of Legal Action: Looking Backwards vs. Looking Forward

Remedying Unlawful Discrimination

- ❑ Federal requirement for de jure higher education systems and institutions to eliminate vestiges of discrimination
 - Foundations in *Brown v. Board of Education* → *U.S. v. Fordice* (1992)
- ❑ Movement from traditional legal "remedial" focus to more open-ended goals ('70s forward...)
 - Elimination of societal discrimination
 - Elimination of discriminatory effects of past practices
- ❑ Federal agency and court action regarding race-conscious practices, including
 - *Podberesky v. Kirwan* (4th Cir. 1994)
 - *Hopwood v. Texas* (5th Cir. 1996)

Pursuit of Educational Benefits of Diversity

- ❑ *Bakke* (1978)
 - Powell: Obtaining educational benefits of diversity is a "permissible goal for an institution of higher education"
- ❑ Federal agency and court action, including
 - U.S. Department of Education Race-Based Financial Aid Policy (1994)
 - *Hopwood v. Texas* (5th Cir. 1996) vs. other federal circuits
- ❑ *Grutter/Gratz* (2003)
- ❑ *Parents Involved in Community Schools* (2007)
 - Louisville and Seattle School Districts
- ❑ *Fisher v. Univ. of Texas* (5th Cir. 2011), cert. granted; oral arguments: October 10, 2012

General Overview

Strict Scrutiny = Compelling Interest + Narrow Tailoring

- ☑ Strict scrutiny is the legal test used by courts to evaluate action taken by all public institutions *and* all private institutions that receive federal funds when they treat persons differently because of their race, ethnicity, or national origin.
- ☑ The strict scrutiny standard establishes two key questions that must be addressed when pursuing race-/ethnicity-conscious practices:
 1. Is there a **compelling interest** that justifies the practice? (the ends/goals)
 2. Is the practice in question **narrowly tailored**? (the means to realize the goals)
 - a. Are race-conscious measures necessary to achieve goals?
 - b. Does the use of race-conscious measures have consequential impact, advancing goals?
 - c. Is the policy well calibrated so that it is neither over- not under-inclusive?
 - Is the use of the policy flexible?
 - What is the impact of the policy on equally-meritorious, non-qualifying candidates?
 - d. What is the process of review and refinement over time and is there an end in sight?

Background: Cases and the Court

The Changing Composition of the U.S. Supreme Court...

2003 (University of Michigan cases)



GINSBURG

STEVENS

SOUTER

BREYER

O'CONNOR

KENNEDY

REHNQUIST

SCALIA

THOMAS

GRUTTER MAJORITY (2003)

GRATZ MAJORITY (2003)

2012 (*Fisher*)



GINSBURG

KAGAN
(Recused in *Fisher*)

SOTOMAYER

BREYER

ALITO

KENNEDY

ROBERTS

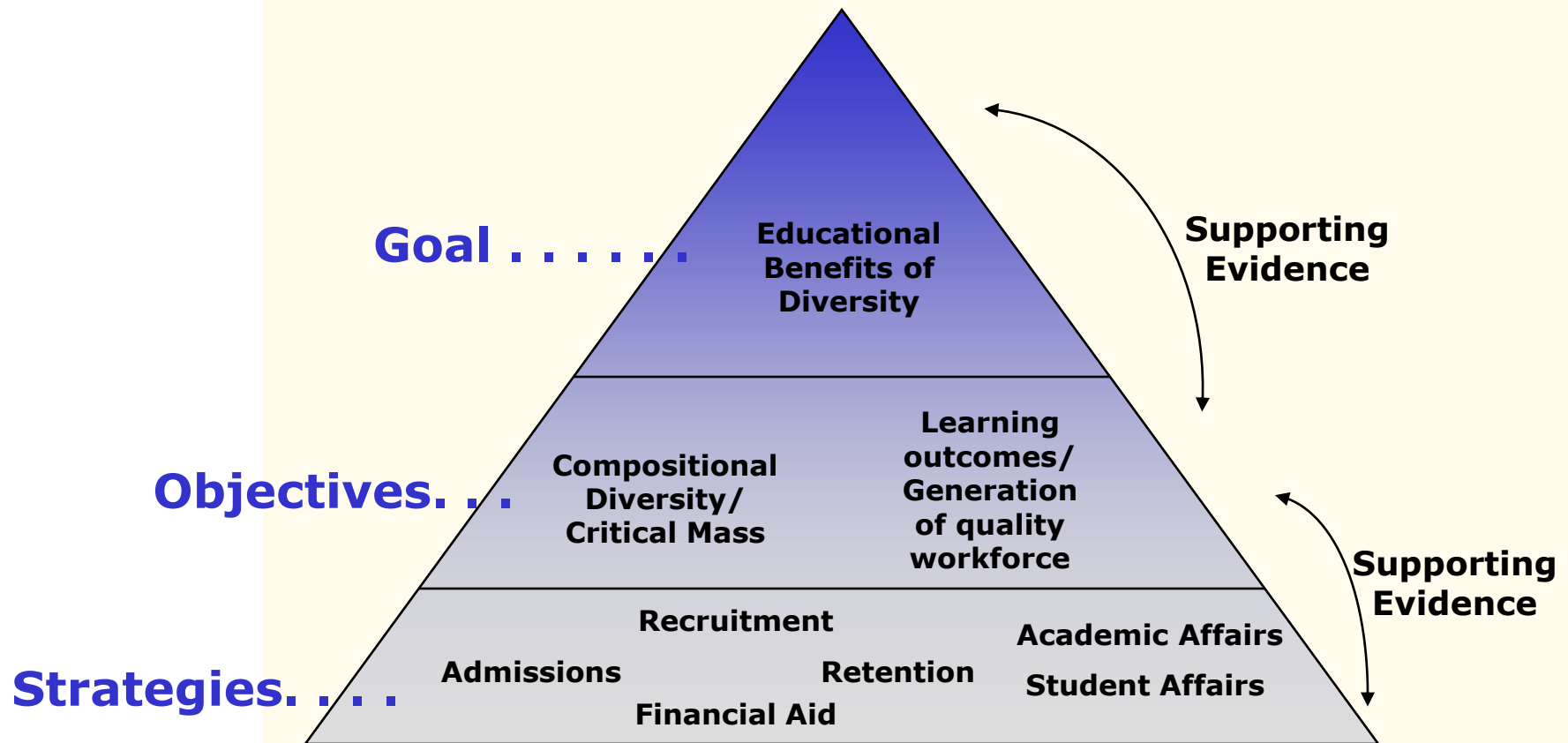
SCALIA

THOMAS

PICS V. SEATTLE S.D. MAJORITY (2007)

Reflections on *Grutter*

Educationally sound and legally defensible race-/ethnicity-conscious practices are the product of a well-designed, institutionally aligned, and integrated process that connects means to ends.



II. *Fisher*: The Case and Key Issues

A. Overview of the Case

B. Key Issues Before the Supreme Court

A. Overview of the Case

Key Facts: Admissions at the University of Texas-Austin

- ❑ **Hopwood (1996) → Top 10% Law in 1997**
 - Mandates that Texas high school seniors in the top 10% of their classes automatically be admitted to a Texas state university
- ❑ **Grutter (2003) → Reintroduction of race consideration in 2004**
- ❑ **UT-Austin Admissions Policy Today:**
 - 90% of all freshman seats awarded to Texas residents; in 2008, 81% of entering UT class admitted under Top 10% law
 - Remaining Texas residents compete for admission based on Academic (AI) and Personal Achievement (PAI) indices:
 - ❖ AI: Standardized test scores and class rank
 - ❖ PAI: Leadership qualities, awards and honors, work experience, involvement in extracurricular and community service activities, and special circumstances (SES, family status, standardized test scores compared to high school average, and race)

A. Overview of the Case

The Fifth Circuit Decision (2011)

- ❑ 5th Circuit panel (of 3) unanimously concludes that University of Texas race-conscious admissions policy comports with *Grutter* and is lawful.
- ❑ *Major issue addressed*: Whether UT's consideration of race was necessary—as required for narrow tailoring (under strict scrutiny principles)—in light of the effect of the State's "Top Ten Percent Law," which had resulted in increased minority enrollment.
 - Key issue is not one of "holistic review," per se, as in *Grutter* and *Gratz*.

A. Overview of the Case

The Amicus Brief Effort

- ❑ Seventeen briefs were filed in support of Fisher, including briefs by:
 - Libertarian public interest groups
 - Individual members of the U.S. Commission on Civil Rights
 - Asian American Legal Foundation
- ❑ Seventy-three briefs were filed in support of the University of Texas, including briefs filed by:
 - The United States and 17 states and territories
 - Members of the federal and Texas legislatures
 - Education organizations and at least 117 colleges and universities
 - Military and national security officials
 - 57 Fortune 100 and other American businesses and 21 small business owners and associations
 - Social science researchers and empirical scholars
 - Multiple Asian and Pacific Islander American organizations
- ❑ Two briefs were filed in support of neither Fisher nor the University

B. Key Issues Before the Supreme Court

As Briefed by Fisher and the University of Texas

1. **Necessity? Material Impact?**
2. **Critical Mass—What Is It?**
3. **Overrule *Grutter*???**

1. Necessity? What's the Impact?

Out of the Closet

- ❑ The issue of necessity—to justify race-, ethnicity-, or gender-conscious-action has historically focused on how significant the gap or deficit to be filled is, and how that may justify such conscious action.
- ❑ In 2007, for the first time, the U.S. Supreme Court squarely addressed a different dimension of that question—one that had been present in past opinions, but addressed only in passing, if at all:
 - In *PICS v. Seattle Schools*, the Court ruled that the consideration of race was not "necessary" given its "minimal effect" on student diversity.
 - Seattle: 52 students affected; Jefferson County: 3% of all school assignments affected. VS.
 - University of Michigan: law school more than tripled minority representation with race-conscious admissions program...from 4 to 14.5% of the entering class.

1. Necessity? What's the Impact?

Is there material positive impact that results from the challenged preference?

University of Texas Position

- ❑ "The nuanced and modest constitutional impact of race...is...a constitutional virtue, not a vice."
 - **Consideration of race has impact: 20% of black admits and 15% of Hispanic admits were offered admission through a full-file review**
- ❑ Race-neutral alternative (Top 10% Law) is insufficient
 - Hurts academic selectivity, reducing admissions to just a single criteria, foreclosing consideration of other academic criteria (quality of high school, course load, performance on standardized tests)
 - Undermines efforts to achieve diversity in broad sense and limits *within* group diversity

Fisher Position

- ❑ UT fails to demonstrate that using race is necessary to further a compelling interest in student body diversity
- ❑ Use of race-conscious consideration led to only minimal additional minority enrollment - "impact is negligible"/"trivial gains"
 - **Increasing African American enrollment by 60 and Hispanic enrollment by 204, when compared to pre-policy numbers**
 - UT cannot identify any applicant where race was the deciding factor)
- ❑ Limited results of UT's consideration of race shows that race-neutral means would be effective

2. Critical Mass: What Is It?

Key Policy Parameters from *Grutter*

- ☑ Premised on the need to attract sufficient numbers of underrepresented students that will advance educational goals—based on institution-specific research and data
 - To ensure the “presence of ‘meaningful numbers’...of ‘students from groups which have been historically discriminated against....’ and who are “particularly likely to have experiences and perspectives of special importance to [its] mission.” An individual assessment that includes but is not limited to race of the individual.

- ☑ Not defined with reference to rigid, numerical targets or goals (no quotas!)
 - Not the equivalent of seeking a “specific number of students of particular races” or seeking “a hard and fast number” of students.

2. Critical Mass: Numbers? Classroom?

University of Texas Position

- ❑ UT policy lacks elements (that Kennedy) disliked in *Grutter*:
 - No race-based target established
 - No automatic value assigned for race
 - Racial/ethnic composition is not monitored during admissions cycle
- ❑ **Focus on critical mass at classroom level to determine whether students are realizing the educational benefits of diversity** (black and Hispanic students nearly nonexistent in thousands of classes)
- ❑ Determination requires trained educator judgment to ascertain and calibrate the environment in which students are educated

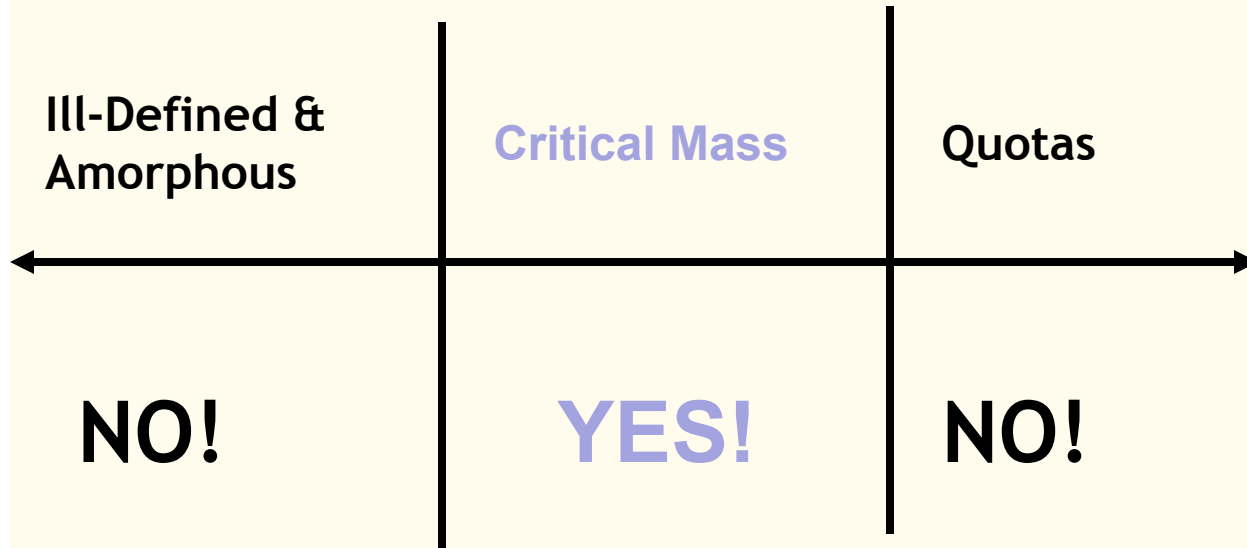
Fisher Position

- ❑ UT's claimed interest in classroom diversity cannot be implemented in a narrowly tailored way
 - Proper base to measure critical mass = student body
 - **Classroom diversity benchmark "would promote the use of race in perpetuity" and "justify racial engineering at every stage of the university experience"**
- ❑ Even if UT allowed to focus on classroom diversity, **UT has made no effort to define a percentage of underrepresented students that achieve critical mass (no educational target)**
- ❑ Critical mass should be URM as a whole, not separate racial groups
- ❑ UT's use of race is not narrowly tailored because it is over-inclusive: Hispanics in Texas \neq URM

2. Critical Mass



Something more than I know it when I see it?



3. *Grutter* to be Overruled?

Fisher to the Supreme Court

"To the extent [*Grutter*] can be read to permit the Fifth Circuit's effective abandonment of strict scrutiny...[t]he Court should expressly clarify or overrule *Grutter to the extent needed* to bring clarity to the law and restore the integrity of strict scrutiny review in the higher educational setting." (emphasis added)

- Interpretative difficulties
- Unworkable in practice and perpetuating hostilities
- *Grutter* has not created reliance because universities are not required to consider race in admissions
- *Grutter* established to be temporary

- Brief of Petitioner Abigail Noel Fisher (May 21, 2012)

3. *Grutter* to be Overruled?

UT's Response

"The Court should decline petitioner's far-reaching request to reopen and overrule *Bakke* and *Grutter*."

- Outside the scope of question presented, which asks Court to review UT's policy under existing precedent
- Legitimate expectations established just nine years ago, with reaffirmation in *Parents Involved* (2007)
- Profoundly important societal interests remain
- Institutional reliance vs. abrupt, destabilizing reversal
- Workable standard: Court's own reliance and three decades of implementation, including by U.S. Department of Education

- Brief of Respondent University of Texas (August 6, 2012)

III. The Amicus Brief Effort

The College Board Amicus Brief

"Friend of the Court" Brief

Major Points:

1. 21st century education goals to advance economic success and promote our democracy's vitality are furthered by diversity.
2. Educational judgments in the admissions process that involve many student qualities and characteristics - reflecting determinations of merit aligned with mission, based on a wide range of factors, that may include the consideration of race/ethnicity as part of an individualized, holistic review - are essential foundations for attaining mission-driven educational excellence.
3. *Grutter* establishes a balanced and workable framework that should be preserved.

Joined by the National School Boards Association (NSBA), the American Association of College Registrars and Admissions Officers (AACRAO), the National Association for College Admission Counseling (NACAC), and nine other organizations.

The Amicus Brief of the United States

"Friend of the Court" Brief

Major Points:

1. Given both the global economy and the nation's security, the United States - including its armed services and federal agencies - has a critical interest in ensuring that institutions are able to provide the educational benefits of diversity.
2. UT's consideration of race in admissions is constitutional - supported by a compelling interest and but one factor in the holistic review of applicants.

"Friend of the Court" Briefs: Key Points

1. Benefits of diversity are essential for student success in the 21st century.
 - Key skills include: Critical and complex thinking, problem solving, communication, collaboration, creativity, innovation, transmission of cultural norms, interpersonal and social skills, etc.
 - ❑ *Workplace preparation - fastest growing industries demand skills inculcated in diverse learning environments - College Board*
 - ❑ *Health care needs of increasingly diverse population demand empathy; emotional intelligence; cultural competence; ability to understand, value, and accept disparate viewpoints - AAMC*
 - ❑ *Business requires unique and creative approaches to problem-solving by integrating different perspectives - Fortune 100*
 - ❑ *Mission-critical national security interest depend on collaboration skills, foreign language capabilities, and regional experiences - Retired generals*
 - ❑ *STEM fields depend on creative insights to solve problems and graduates who can work in highly globalized market - Cal Tech et al.*

"Friend of the Court" Briefs: Key Points

2. Diversity and merit are interrelated and reinforcing.

- ❑ *Merit is based on a wide range of mission-aligned factors*

- Mix of criteria include grades, test scores, Advanced Placement performance, class rank, strength of curriculum, accomplishments, evidence of drive and initiative, life experiences (overcoming hardship or adversity, military experience, community service, jobs), family background, and other diversity factors (race, ethnicity, geographic origin, SES status, and life experiences in different cultural settings or in diverse learning environments)

- College Board

- ❑ *Merit requires more than academic competence; it also requires integrity, altruism, self-management, interpersonal and teamwork skills - AAMC*

"Friend of the Court" Briefs: Key Points

"Friend of the Court" Briefs

3. Diversity, as pursued in admissions, is multi-faceted, involving many student qualities and characteristics (that may include race and ethnicity).
 - ❑ *Characteristics include rural or urban background, bachelor's degrees in science or liberal arts, unusual life experiences, disparate racial or ethnic backgrounds - AAMC*
 - ❑ *Characteristics include life experiences, military or community service, family background and family economic circumstances, unique family profiles, skills and interests - College Board*

"Friend of the Court" Briefs: Key Points

4. The consideration of race/ethnicity in admissions is about more than merely checking a box.
 - ❑ *Race 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*
 - ❑ *Considerations of race and ethnicity are intertwined with other important qualities/characteristics (e.g., resilience, overcoming challenges) such that it is impossible to insulate consideration of race and ethnicity from applicant's background...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*
 - ❑ *Race can contextualize other components of the individual - Cal Tech et al.*
 - ❑ *Extraordinary to conclude race is single characteristic colleges and universities cannot consider; how possible to be blind to race? - Brown et al.*

"Friend of the Court" Briefs: Key Points

5. The *Grutter* framework is necessary and workable, and should be preserved. Colleges and universities are committed to its tenets and have invested time, resources, and energy applying *Grutter* with fidelity.
- ❑ *Grutter is balanced and workable, and there is extensive evidence of institutional reliance, investment, and faithful application of its framework* - College Board
 - ❑ *Institutions, students, and parents have invested in and relied on the Court's guidance* - Amherst et al.
 - ❑ *Race-neutral alternatives (pipeline programs, institutional collaborations, academic enrichment programs, etc.) are necessary but not sufficient to achieve core goals* - AAMC
 - ❑ *Race-neutral diversity efforts (recruitment and outreach, scholarships) are important but serious shortcomings remain* - Retired generals

IV. Strategies and Action Steps to Consider

"What Do I Do Now??"

Policy and Practice Strategies and Action Steps—Now!

- ✓ Develop/update management plan associated with the review/evaluation of all diversity-related policies and programs (potentially) implicated by the Court's decision. Ensure institutional leadership and counsel are included.
- ✓ Conduct preliminary assessment of policy/practice issues in light of legal issues in *Fisher*, identifying possible areas of focus in advance of Court decision. Prepare for action, post-decision.

Policy and Practice Strategies and Action Steps—Now!

1. INVENTORY

- Collect/update (dust off?) inventory of all relevant policies and programs (outreach, recruitment, admission, financial aid/scholarship, etc.) to set the stage for prompt and effective review, based on Court's decision.

2. COLLECT EVIDENTIARY SUPPORT

- Consider the evidentiary basis that justifies any race-/ethnicity-conscious practices, including articulated needs or goals, and determine whether you might build a more substantial evidentiary basis through additional evidence collection

Policy and Practice Strategies and Action Steps—Now!

3. ASSESS

- Examine whether evidentiary basis supports your goals and is reflected in the design and implementation of policies/programs
- Consider whether policies are necessary and whether viable, neutral alternatives could suffice to reach objectives
- Identify gaps, deficits and key questions as a foundation for action

4. TAKE ACTION

- Take steps that will "set the stage" for more robust action, post-decision.
- Consider outreach to relevant stakeholders for awareness- and consensus-building during the pendency of the appeal.

V. Conclusion

Takeaways...

1. Never lose sight of goals

- You win with clear, educationally-grounded goals
- You lose with amorphous and unclear goals

2. Never take your eyes off the ball, even when you think the final buzzer has sounded.

- Law changes over time
- Developments regarding key evidence (data, research, experience) should inform policy judgments—good yesterday is not necessarily good tomorrow

3. Proactive engagement is a must.

- Embrace a forward- and outward-looking posture
- Engage with stakeholders beyond the usual suspects

Available Resources

The College Board's Access & Diversity Collaborative: <http://diversitycollaborative.collegeboard.org/>

1. The Access & Diversity Toolkit (2009)
2. Diversity Action Blueprint: Policy Parameters and Model Practices for Higher Education Institutions (2010)
3. Professional Development Video Series (2011...)
 - A. *Access and Diversity and the Law: Understanding the Legal and Policy Fundamentals*
 - B. *From Law to Policy Development: Setting the Stage for Action*

Contact Information

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EducationCounsel LLC, affiliated with Nelson Mullins Riley & Scarborough, LLP, provides higher education institutions and organizations with a wide variety of educational services, including diversity-related strategic planning, policy counseling and program evaluations; litigation support (including representation in OCR investigations); and staff/member training.

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