Preparing for *Fisher II*

An Issue Brief from the Access & Diversity Collaborative

February 2016 (v.2)

This fifth brief in the Access & Diversity Collaborative (ADC) Issue Brief series addresses the anticipated U.S. Supreme Court's second decision on *Fisher v. University of Texas at Austin (2013) (Fisher II)*, with guidance for institutions of higher education to consider as they prepare for that decision. It includes guidance on practical steps to prepare for the decision, an analysis of the amicus briefs filed in this round of Supreme Court litigation, and important insights from oral arguments and the parties' briefs that can help inform institutional dialogue and action.[1] (Note: The *Perspective* piece has been updated to respond to Justice Antonin Scalia's death on February 12, 2016.)

Also, as with *Fisher I*, the ADC is planning a comprehensive response strategy, outlined in the graphic below. Many of these efforts will be conducted in partnership with ADC sponsoring organizations.

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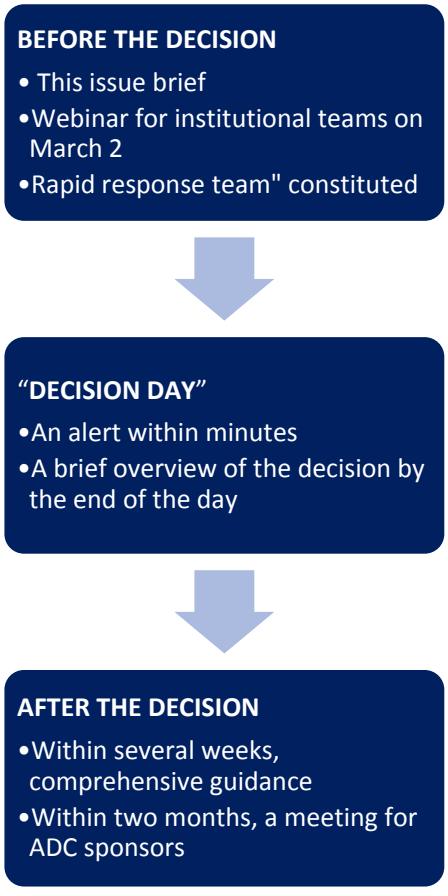


1. This issue brief is intended for informational and policy planning purposes only and does not constitute specific legal advice. Local counsel should be consulted to address institution-specific legal questions or issues.

PERSPECTIVE

Preparing for *Fisher II* on Your Campus

By Terri Taylor and Art Coleman

The U.S. Supreme Court is expected to issue a second decision in *Fisher v. University of Texas at Austin* by the end of June 2016. It is possible, however, that the decision will come sooner. This article unpacks the issues at play, previews possible outcomes, and provides recommendations for developing an institutional action plan.

Unpacking the Issues at Play

Though the facts and parties have not changed since *Fisher* was first before the Court in 2013, arguments in *Fisher II* have shifted in significant ways. Race-neutrals strategies — perhaps the headline from *Fisher I* — have all but vanished from lead arguments (likely because UT presented a forceful case to the Fifth Circuit of the depth and breadth of its race-neutral efforts). Instead, this round of argument reflects significant discussion of UT's goals and objectives associated with diversity, along with the nature of its holistic review process.

From the beginning, UT has asserted its interest in the educational benefits of diversity as a "compelling interest" that justifies the limited use of race in admissions. UT used several indicators to assess whether those goals were being met, including enrollment trends, evidence of racial isolation, and campus climate (including faculty and student feedback), and how the educational benefits of diversity were experienced (or not) in the classroom. UT identified three central challenges: (1) little socioeconomic diversity within racial minority groups, (2) a lack of racial diversity in small, discussion-oriented classrooms, and (3) a drop in minority enrollment (especially among African American students) that led to increased racial isolation for those groups. These suggested that UT had not yet reached its diversity goals and that its limited use of race in admissions continued to be justified. UT reiterates this history in this most recent round of arguments.

In contrast, Ms. Fisher argues this round that the three indicators were UT's overarching *goals*, not simply indicators by which UT tracked its progress toward achieving the educational benefits of diversity for all students. She then reasons that, because none of these interests rises to the level of necessity that the court demands, UT's use of race in its holistic review process is unconstitutional.

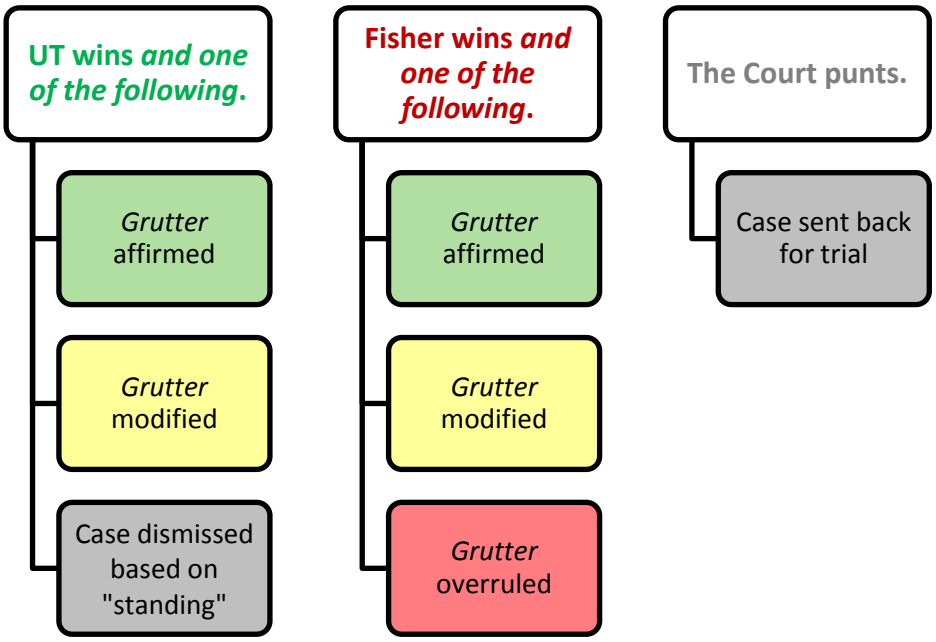
The details of UT's holistic review process also received additional attention in this round from the parties and the amici alike (more information about amici arguments is provided on pages 7–9). Amid statements from Ms. Fisher that each applicant is "branded" by race, UT describes in detail how it assesses applicants as *whole* individuals, not just members of a particular racial or ethnic group. At the same time, UT argued — quoting Justice Kennedy — that "[j]ust as reducing an individual to an assigned racial identity demeans his dignity . . . so does ignoring that an individual's race may shape his experience and viewpoints."[2]

These are only a few of the various issues that the Court has to consider. UT asserts that Ms. Fisher lacks "standing" to bring a suit (given that she has already completed her undergraduate education and her "remedy" in the case is the refunding of a $100 application fee), so the Court should dismiss it. Additionally, there is the issue of whether Ms. Fisher's arguments are fully aligned. For example, she calls out UT for "branding" applicants by race, and then chastises UT for not seeing larger returns on its minority enrollment through the use of race.

2. Brief for Respondents at 36, *Fisher v. University of Texas at Austin*, (No. 14-981).

Previewing Possible Outcomes

Though the exact nature of the Court's decision cannot be predicted with any degree of certainty, the range of possible outcomes is known, as reflected below — from significant change (in red) to the preservation of the status quo (in green). (Because Justice Kagan has recused herself and Justice Scalia has passed away, only seven Justices will cast votes in the decision.)



Importantly, for institutions of higher education other than UT, ***whether* UT wins or loses is, in some respects, potentially less important than *how* UT wins or loses**. The Court may deliver a narrow, fact-based decision that has limited relevance to most other institutions of higher education. (As the Fifth Circuit recognized, the UT admissions process is a "unique creature.") Or the Court could issue a sweeping ruling, affecting the current regime that guides the work of institutions throughout the U.S. (The ADC has written on why we think the former is more likely.[3])

Given his role in *Fisher I* and his position as the Court's "swing vote," ***Justice Kennedy will likely be the key to the Fisher II decision***. *Fisher I* represented the assembly of a broad coalition of seven liberal, moderate, and conservative Justices to preserve the *Grutter* framework. How Justice Kennedy negotiates the various interests at play — while staying within his own conception of how strict scrutiny for race-conscious admissions should operate — will likely be a key to the decision. (Notably, during oral arguments Justice Kennedy appeared to be seeking a reason to send the case back for additional fact finding at the trial level, but ultimately seemed to convince himself that such fact finding would not fundamentally alter the issues at play.)

Developing an Institutional Action Plan

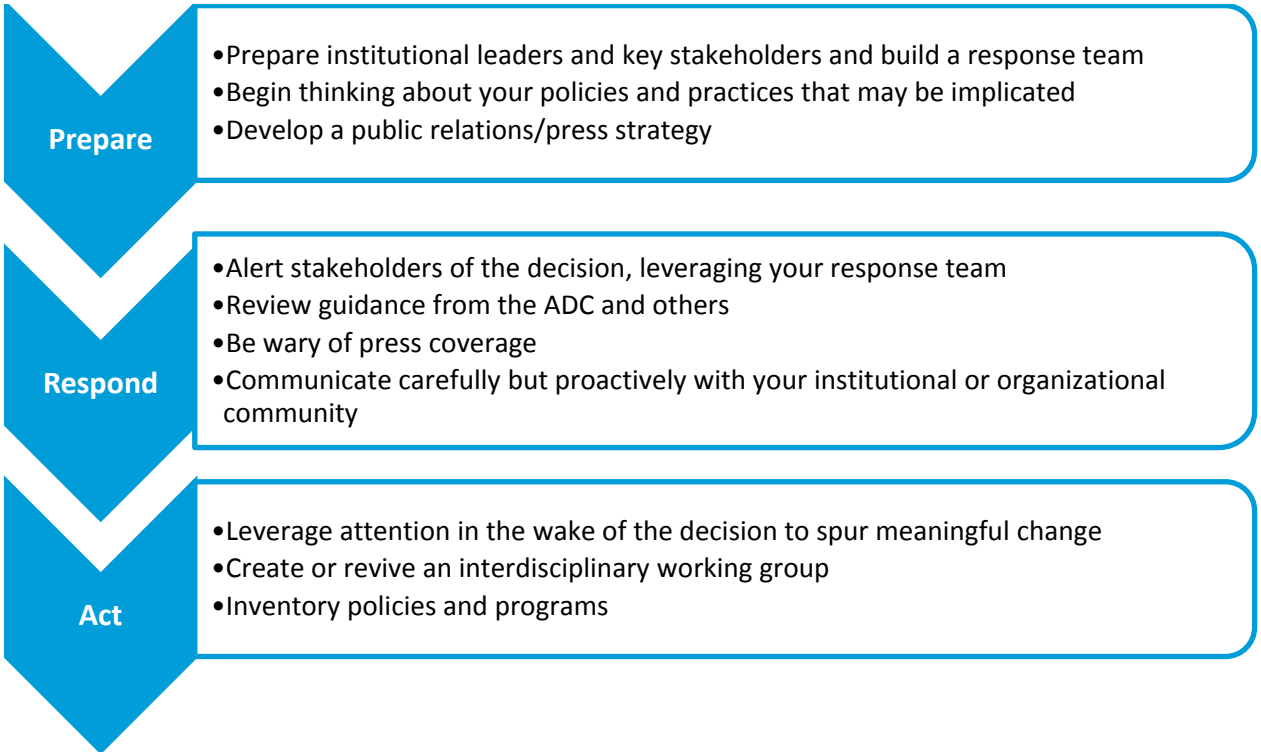
Though *Fisher* is about admissions, the decision has the potential to affect other enrollment practices in financial aid and scholarships, outreach and recruitment, and more. It is also important to remember that the Court's *Fisher II* decision will govern the two new cases against Harvard University and the University of North Carolina. Institutions should be prepared to monitor these issues for the foreseeable future. And, to the extent

3. For a more detailed analysis about why we think a more limited outcome is likely, see Art Coleman, *Fisher v. University of Texas: No Funeral for Affirmative Action,* LATEST COUNSEL (Oct. 1, 2015), educationcounsel.com/fisher-v-university-of-texas-no-funeral-for-affirmative-action/.

that the decision has broad implications for public and private institutions beyond UT, institutions should prepare to give those changes immediate focus and deliberation; policy changes may be necessary in the 2016-17 admissions cycle.

Institutions should carefully review and assess any final ruling by the Court in light of their policies and practices to determine whether or not changes are needed. Institutional and organizational leaders in higher education need time to assess the decision and its implications with practitioners, lawyers, faculty, and other stakeholders. Steps should be taken now to prepare for these conversations to take place as soon as the decision comes down. Remember that the better prepared your institution or organization is now, the easier it will be to respond in an effective and strategic way when the decision comes down.

The graphic below outlines recommended steps that institutions should take to prepare for, respond to, and act on the Court's *Fisher II* decision, each described in more detail below.



Preparing for the Decision

Because there will be no meaningful advance notice prior to the *Fisher* decision being announced, higher education leaders should plan in advance to understand the array of decisions that will likely need to be made during the day the decision comes down and those immediately following. Several key questions to consider are provided below.

- **Prepare institutional leaders and key stakeholders and build a response team** — Are your institutional leaders and key staff aware *now* that a decision is coming, and that it will likely require their prompt attention? Do they understand the general parameters and issues in the case? Are they poised to evaluate the case and prepare for any action that may ultimately be needed to continue to achieve important access and diversity goals? Do you have a response team in place for "decision day"? Potential individuals to include in this process are:
  - ***Institutional leadership***, particularly those with a professional interest in the result. This will depend on each institution's unique executive composition, but may include the president,

provost, public affairs officials, enrollment vice-president, admissions dean, and general counsel.
    - ***Board members or trustees*** who may be likely to receive inquiries even if they are not intimately aware of the case or its result. It may be prudent to identify a single representative of the board of trustees as the designated board contact.
    - ***Faculty members*** who are involved in campus diversity and inclusion efforts and/or have professional interests in the research basis for institutional policies and practices.
    - ***Colleagues in business and government*** (e.g., state higher education executive officers, system heads) who are connected to your diversity efforts, including those who may be willing and able to offer support, depending on whether or how the decision affects your policy regime.

- **Begin thinking about the policies and practices that are likely implicated by *Fisher*** — Has your institution begun discussing the potential impact of *Fisher,* and inventoried the potential enrollment policies and practices that may be affected by the decision? Will you be ready to begin a thoughtful evaluation of those policies in light of the decision relatively soon after the decision comes down?

- **Develop a public affairs and press strategy** — Do you want to issue a statement when the decision arrives? Is anyone in your institution or organization likely to be tapped by reporters for a quote? To whom should inquiries be directed if received? Are there colleagues in business or government who may be useful allies?

Responding to the Decision

A successful response effort on "decision day" can position an institution for the right action steps later on in the process. Some important steps include:

- **Alert stakeholders to the decision**, **leveraging your response team built in advance of the decision.** Make sure that each member of the team is clear about their responsibilities. This team may also be the foundation for a longer-term working group that will manage the institution's longer- term action planning (described in more detail below).

- **Review guidance from the ADC and other organizations.** Institutions should not feel that they have to analyze the decision on their own, and should leverage the ADC and others to help ground their understanding of the decision and its practical impact.

- **Be wary of press coverage.** The press will have a strong interest in this case, but they don't always get it right in the rush to create headlines. This may be especially true if multiple opinions are issued or the decision includes both good and bad news (e.g., UT loses but the *Grutter* framework is preserved).

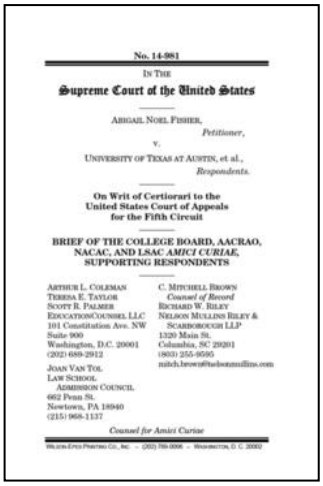
- **Communicate carefully but proactively with your institutional or organizational community.** Significant public attention will be paid to the decision and institutions have an important opportunity to communicate their mission and commitment to diversity, regardless of what the Court decides. Some messaging guideposts include:
    - ***Avoid both over- and under-reaction to the decision***. First impressions can be deceiving. The texture and details of Court opinions — which cannot be fully assessed in a matter of minutes or a few hours — should be fully understood before issuing statements or making policy decisions that are too categorical or extreme.
    - ***Let mission be your guide*****.** Nothing in the Court's opinion is likely to undermine the validity or integrity of institutional commitments to promote access and achieve the educational benefits of diversity. Framing reactions to the decision (whatever they may be) in light of your core mission-related goals is a good starting point.

- ***Confirm your intention to act within the law***. Issues of long-term credibility and reputation are associated with responses to decisions like *Fisher,* and in that context, it is important to maintain a sense of the "long game." An underlying commitment to achieve institutional goals within whatever legal parameters exist — explicit or implicit — is important.

Acting on the Decision

Though "decision day" will get the most public attention, the real work for institutions will be in the weeks, months, and years afterward. Though each institution should create its own unique action plan, some initial steps likely include:

- **Leverage attention in the wake of the decision to spur meaningful change.** Institutional leaders may be engaged in these issues more fully in the wake of the *Fisher II* decision — particularly given other campus pressures urging greater inclusion on campus — which means that additional resources and investments may be available.
- **Create or revive an interdisciplinary working group.** The institution's response team can be an important starting point for the creation of a standing working group. The team should be large enough to include each stakeholder group, but small enough that the group can make decisions and work toward change. The counsel's office may be a good place to manage the effort, though lawyers should be closely connected with practitioners so that the legal risks of pursuing a potential strategy are balanced by the risks of not meeting the institution's goals. Also, the team may want to establish structures for broader community engagement with student, faculty, alumni, and employer groups to create understanding and buy-in for the institution's strategies.
- **Inventory policies and programs.** The *Fisher II* decision — whatever form it takes — presents an important opportunity to inventory and assess all policies and programs that contribute to an institution's diversity goals to determine what's working (and not working). This may be one of the first action steps that the working group undertakes. After all, the inventory can encourage greater institutional coherence and connectivity as leadership examines the degree to which discrete policies align with each other, profit from synergies and avoid inefficiencies, and reaffirm the institution's commitment to student diversity.



No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COLLEGE BOARD, AACRAO, NACAC, AND LSAC *AMICI CURIAE* SUPPORTING RESPONDENTS

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Resource Spotlight: **Fisher II Amicus Brief**

On behalf of the College Board, AACRAO, LSAC, and NACAC, EducationCounsel filed this amicus brief with the U.S. Supreme Court in its second hearing of *Fisher v. University of Texas at Austin*. The brief underscores the importance of institutional mission and academic judgment and provides a detailed examination of holistic review admissions processes (including research and practice foundations that apply to institutions' unique models).

RESEARCH YOU CAN USE
Themes from the *Fisher II* Amicus Briefs

As with *Grutter, Gratz,* and *Fisher I*, *Fisher II* prompted a significant amicus effort. Eighty-five total briefs with 1,869 total signatories were filed, the vast majority supporting UT.

On the pro-UT side, 65 briefs were filed with 1,843 total signatories (141 more than in *Fisher I*) that represented a broad coalition of 20 states, 72 colleges and universities, hundreds of researchers, 49 businesses, 36 military leaders, and scores of organizations (including leading higher education organizations, religious groups, and civil rights organizations). Highlights include:

A focus on the holistic review process, including why it matters for the achievement of institutional goals and how race fits into decision making.

- The College Board, AACRAO, LSAC, and NACAC brief focuses specifically on explaining common principles for holistic review admissions processes. It discusses the important connection between mission and admissions, the many academic and nonacademic factors that holistic review can encompass, the role of professional judgment, the attention to individual decisions and the overall creation of the class, the role of evaluation, and the connection to broader "enrollment management" systems. On the use of race, it concludes, "While discrimination on the basis of race or ethnicity is proscribed by the Constitution, the Constitution does not require complete disregard of whether race has affected an individual's journey in life. If any one factor considered in an individual's application were removed, the individual would be different. It is a constellation of factors, not any one, that defines an individual applicant and drives an admission decision that is both educationally sound and consistent with this Court's precedent."
- Eight leading public universities write to explain how their "unique situations on their campuses and in the communities they serve" guide their efforts. Those in "relatively homogenous geographic areas . . . seek to increase diversity to expose their students to a more diverse community." Those in "diverse geographic areas . . . seek to increase diversity so that the students they train in particular fields better reflect the diversity of the communities they call home." They also observe that different degree programs may have different diversity goals to prepare students for different fields. They also identify how each institution had periodically reviewed its admissions practices and diversity goals, including through an external diversity assessment, student attitudes surveys, and academic-unit-level reporting.
- Thirty-eight private, highly selective liberal arts colleges write that holistic review has been essential to creating geographic, socioeconomic, racial/ethnic, and other forms of diversity within their small student populations. To build the class, they "decide which set of qualified applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society." The brief cites Amherst's 14 factors for holistic review as an example of how the holistic review process allows it to achieve these goals. The brief also encourages the Court to consider the impact of its decision on all types of institutions, observing that none of the race-neutral alternatives that Ms. Fisher suggested "could conceivably work at small, highly selective schools."
- The Ivies and other highly selective institutions explain that, though their specific processes differ, they all "review extensive information regarding the characteristics, life experiences, accomplishments, and talents of each applicant, to assess both the applicant's academic potential and the contribution that the applicant may make to the class as a whole." They emphasize that "a 'race-blind' version of holistic review" would be "wholly antithetical" to the holistic approach and the practical challenges to more mechanical processes (including the "mathematical infeasibility" of percent plans in their contexts).
- Ten leading private research universities that focus on STEM fields echo similar ideas, emphasizing that "holistic review is based on the principle that truly valuable diversity emphasizes quality over quantity

and substance over form." They also observe, "While workable race-neutral approaches are part of the admissions toolkit for universities, amici have found that such race-neutral efforts alone do not provide the level of diversity necessary to further their educational goals."

- The two institutions facing lawsuits of their own filed briefs, too. Harvard University describes how it "has committed extraordinary resources to a labor-intensive admissions process that aims to consider every dimension of the perspective each individual applicant might bring to campus, including the applicant's race or ethnicity." The University of North Carolina cautions against the oversimplification of "multi-faceted, highly individualized decision-making" in admissions that could come from certain race-neutral alternatives (e.g., percent plans).
- The Association of American Medical Schools and other health care organizations emphasize the important role that race-conscious holistic admissions programs have played in allowing medical schools to meet their obligations to their students and society at large. To "produce a class of physicians best equipped to serve *all* of society," the brief argues, "[t]here is no proven substitute for this individualized, holistic review that may consider an applicant's race and ethnicity along with all other factors that make up his or her background."
- Robert Post and Martha Minow — deans of Yale and Harvard Law Schools, respectively — write that, through holistic review, "We recognize the dignity of each individual applicant and evaluate him or her accordingly. A rule that would forbid us to consider race in the admissions process would undermine this dignity by censoring the voices and experiences of individual applicants." The dignity argument is also part of the broader advocacy effort, and is likely directed squarely at Justice Kennedy, whose 2015 marriage equality decision centered on the idea that the Constitution protects the dignity inherent in individual choices and identity.

A reiteration of the longstanding importance of academic freedom for American institutions, including the ability to define goals for the student body, and the need for states to be able to design the solutions that work best for their contexts.

- The American Council on Education and 37 other higher education organizations underscores the role of institutional context in designing admissions processes, observing, "To compose an entering class is an art that requires educational judgment at every step." The brief also reminds the Court that American higher education's pluralism — a foundation of its strength — has been fostered and supported by "a tradition of government forbearance that is at least as old as the nation." It concludes, "For courts to override educators' reasoned judgment on how and what kinds of diversity yield educational benefit would truncate American colleges' and universities' historic right to assemble students in a way that fits the institutions' educational philosophies and context."

A review of the research foundations for institutional diversity efforts.

- The American Education Research Association and other leading research associations conclude that UT's actions were well supported by research. It focused in particular on research published since *Fisher I* which "has continued to identify student body diversity as the key to improving campus racial climates and to advancing the types of positive cross-racial interactions that lead to reduced prejudice and improved academic learning." It also observes that UT "is engaging in precisely the type of educational goal setting that this Court has endorsed and encouraged in *Grutter* and *Fisher I* . . . [by seeking] a student body that is diverse along multiple dimensions — race, ethnicity, and socioeconomic status included."
- A brief from 823 social scientists focuses particularly on the limitations of the race-neutral alternatives and the negative impact of race-neutral admissions policies on minority enrollment at public institutions that cannot consider race. It also observes, "Because race often operates subconsciously to shape attitudes and behavior, not allowing attention to race in admissions can harm race relations despite the hopeful but unsupported suggestion that it would have the opposite effect."

An emphasis on the real-world implications for diversity strategies.

- The University of Michigan chronicles its experience post-*Grutter* and post-voter initiative that banned the use of race in admissions. It concludes, "The University's nearly decade-long experiment in race-neutral admissions thus is a cautionary tale that underscores the compelling need for selective universities to be able to consider race as one of many background factors about applicants." Similarly, California writes that, because of Proposition 209, "the University of California has struggled to attain a level of racial diversity on its campuses that will achieve the educational benefits of a diverse student body" — despite significant diversity in the California student applicant pool. Both briefs, however, emphasize their continuing commitment to achieving their diversity goals, despite these policy limitations. As California observes, "Proposition 209 constitutes merely a choice about how to achieve diversity and does not reflect a lessening of California's commitment to student body diversity as an essential component of a comprehensive collegiate education."

On the "neutral" and pro-Fisher side, there were three briefs filed by individuals and 17 pro-Fisher briefs with 26 total signatories (53 fewer than in *Fisher I*), representing mostly individual researchers/public thinkers and conservative think tanks. Several of these themes have gained traction among conservative Justices and the broader public discourse. Highlights include:

Considering income and class in lieu of, or in addition to, race.

- Richard Kahlenberg writes pointedly, "Universities have long claimed that they 'give significant favorable consideration' to economically disadvantaged students in pursuit of socioeconomic alongside racial and ethnic diversity. But careful empirical research — from three sets of supporters of racial affirmative action — suggests that universities do not in fact do so, at least so long as direct racial preferences are available to them." He concludes that "a wealth of experience and empirical research on race-neutral strategies . . . suggests that they do a better job than racial preferences of producing meaningful levels of racial, ethnic, and socioeconomic diversity."

Complaints about the "black box" of admissions.

- The Cato Institute, channeling a common complaint about holistic review, argues, "Due to the black-box nature of the holistic review process, the University cannot show that its admissions readers do not treat race as 'the defining feature' of applications." Cato specifically asks the Court to issue "broadly applicable" guidance on holistic review to avoid an overly fact-based decision that "could perversely have little impact on the practices of schools that subject *all* applicants to race-based holistic review."
- The Asian American Legal Foundation and 117 other Asian American organizations write that Asian American students are routinely left out of these discussions but have "suffered the greatest harm under race-determinant admissions policies." They cite research that found stereotyping in the admissions processes at elite institutions that "downgrade Asian American applicants in holistic reviews."

The role of "mismatch" theory.

- Richard Sander writes, "It is important for the Court to be mindful of the strong potential for large racial preferences to be harmful to their intended beneficiaries, thus weakening the distinction between 'benign' and 'invidious' discrimination."

POLICY AND PRACTICE INSIGHTS

Key Questions from *Fisher II* Oral Arguments and Parties' Briefs

Both Ms. Fisher and the Supreme Court asked several questions of UT that other institutions would be well advised to consider in their own contexts. (We have lightly edited these quotes for clarity.)

Goals and Objectives

- **What is your principled, reasoned explanation for [your] academic decision [to pursue diversity]?** (Justice Breyer, quoting *Fisher I*)
- **Can you give an example of what would be a sufficiently concrete criterion or set of criteria to achieve diversity**? (Justice Kennedy)
- **How does the University know when it has achieved its objective? . . . At what point does it say, "Ok, the plan has worked"?** (Chief Justice Roberts, who also observed, true to his opinion in *Parents Involved*, "At some point the actual benefit of the program turns out to be not really worth the very difficult decision to allow race to be considered if at the end of the day it generates a certain number. And I'm trying to figure out what that number is.")
- **Are there any critical mass studies that you can refer to . . . [that show] at what point you suddenly have enough of a mass?** (Justice Scalia)
- **Why did the combination of the Top 10% Plan and race-neutral holistic admissions not achieve a "critical mass" of minorities on UT's campus?** (Abigail Fisher's brief)
- **Where in the record can [the institution's] contemporaneous reasons and supporting evidence for [its] decision to use racial preference be found?** (Abigail Fisher's brief)
- **What does [the institution] mean by "diversity within diversity," how did [it] know that such diversity was lacking on its campus, and how will [it] know when it will be achieved?** (Abigail Fisher's brief)
- **Why does [the institution] emphasize "racial isolation" if it is pursuing "qualitative" diversity not "quantitative" diversity? If [the institution] is focused on numbers, how can an admissions system producing such miniscule gains in minority enrollment be narrowly tailored to achieve that objective?** (Abigail Fisher's brief)
- **How could race-neutral alternatives not work "about as well" given how ineffectual UT's system is in achieving these goals?** (Abigail Fisher's brief)

The Holistic Review Process

- **If you look at an individual person, can you tell whether that person was admitted solely because of race?** (Justice Alito)
- **Is there any evidence that the holistic review being used by [the institution] operates as a quota?** (Justice Kennedy)
- **Is [the institution] pursuing "classroom diversity" and is [its] admissions system narrowly tailored to achieve it?** (Abigail Fisher's brief)
- **Is [the institution] using racial preference to bring its student body more in balance with the [state's] demographics?** (Abigail Fisher's brief)

Curricular and Cocurricular Strategies

- **Could I come back to the issue of classroom diversity?** Because that does seem to me to be something that could be measured. (Justice Alito)
- **What unique perspective does a minority student bring to a physics class?** I'm just wondering what the benefits of diversity are in that situation? (Chief Justice Roberts)

Periodic Review

- **Are we going to hit the deadline? Is this going to be done in 12 years?** (Chief Justice Roberts)

OCR Corner

The U.S. Department of Education, Office for Civil Rights (OCR) posts a significant number of the resolution agreements with institutions of higher education and other recipients of federal funds. You can read these agreements here. Though not technically binding in other investigations, these case resolutions can provide key insights into the OCR's application of federal nondiscrimination rules. Our "OCR Corner" highlights notable OCR resolutions and policy letters related to diversity policy and practice.

Title VI Compliance Resolution re: Princeton University's Race-Conscious Holistic Review Process

OCR recently reviewed and resolved a complaint against Princeton University's undergraduate admissions program that alleged racial discrimination against Asian applicants. It provides a uniquely in-depth look at how race and ethnicity factor into Princeton's review process. Its focus on Asian applicants may be particularly timely, given new lawsuits brought against Harvard University and the University of North Carolina that allege discrimination against white and Asian students in the undergraduate admissions programs as well. The resolution letter is available here.

Background

OCR's investigation of Princeton's admissions process began in January 2008 and concluded in September 2015. The original impetus for the investigation was a 2006 complaint from an applicant of Chinese descent who alleged discrimination against him on the basis of his race and national origin. A second complaint was received in 2011 from the parents of an applicant of Indian descent who alleged discrimination against their child on the basis of his race and national origin *and* against all Indian Americans and other Asian Americans. (The second individual complaint was withdrawn in 2012, but the 2006 complaint and the class complaint remained for OCR to investigate.)

Compelling Interest

OCR started its investigation into Princeton's compelling interest in the educational benefits of diversity. It found language in Princeton's mission statement, supportive public statements from its president and in public materials, and institutional structures intended to promote its interest (e.g., a new committee on diversity).

Narrow Tailoring

OCR then examined several factors identified in Supreme Court precedent in *Grutter, Gratz,* and *Fisher I* to address whether Princeton's challenged admissions programs complied with the narrow tailoring prong of federal law.

1. **Individualized review.** OCR took a very close look at the holistic review process at Princeton, including processes, applications, and results. It found:
    a. **No grouping of applicants by race; no separate admissions tracks by race.** OCR found no evidence that Princeton ever sorted or grouped applicants by race or national origin at any point in the admissions process. Each applicant competed against all other applicants for admission. Within its review of 529 randomly selected applicant files, OCR found some comments that showed isolated assumptions about cultures and educational systems, but these were not focused on any single race or national origin group.
    b. **No quotas and no racial balancing.** OCR determined that Princeton placed no caps or limits based on race or national origin group. In fact, Princeton showed steady increases in the number of Asian admitted students (from 14.2 percent of the class of 2007 to 25.4 percent of the class of 2014). Admissions staff also did not monitor how many Asian applicants were being admitted (even though

such a practice remains legal under *Grutter*).

c. **Flexible use of race.** OCR provided a particularly clear and helpful description of how Princeton embraces *Grutter* and *Fisher I* guidance in the flexible use of race, observing:

[D]uring the University's admissions process, an applicant's race and national origin — if he or she offered that information — may or may not be considered, depending upon whether that information provides further context about an individual applicant. For example, an admissions officer might consider how race may have figured in the context of where a person was born, where a person grew up, and where he or she had gone to school. Race and national origin may also be considered if an applicant brings up those subjects in his or her essay. However, OCR found no evidence of the University giving an automatic "plus" for identifying as a particular race or national origin; nor did OCR find evidence of applicants given an automatic "minus" for belonging to a particular race or national origin. OCR also found no evidence of the University using a fixed formula to weigh an applicant's race or national origin.

In other words, the consideration of race or ethnicity in Princeton's holistic review process did not reduce "an individual to an assigned racial identity."[4] In fact, the opposite was true. Admissions professionals worked to understand the whole student and his or her unique story. As one part of a student's identity, race and national origin could play an important role in that process.

d. **Pursuit of a broad definition of diversity — and merit.** OCR concluded that Princeton sought a broad definition of diversity, for which race and national origin were but two possible elements. All applicants could describe how they believed they might contribute to diversity; and applications asked for information about extracurricular activities, employment, summer experiences, family background, artistic talents, athletic abilities, geographic residence, first-generation status, or significant hardships in life. Princeton also sought international diversity; no patterns based on country of origin were found in admissions statistics. Moreover, because admission to Princeton is so competitive, no single factor was predictive of admission, including perfect grades and test scores. Admittees among Asian applicants, for example, included a nationally recognized athlete with "only" a 3.45 GPA and others who had notable community service, work experience, and "distance traveled" along with relatively low GPAs and SAT scores. Meanwhile, hundreds of non-Asian valedictorians and more than 3,000 non-Asian students with a 4.0 GPA were not admitted.

Notably, OCR also found that Princeton trained admissions staff through formal and informal meetings at the start of each admissions cycle about the holistic review process, including how to evaluate different factors that may include race or national origin. Princeton's Office of the General Counsel also provided annual training to explain Supreme Court precedent on the use of race in admissions.

2. Effect on other students. OCR found that Princeton's holistic review process considered each applicant as an individual, with no different categories based on race or national origin. And Princeton pursued a broad definition of diversity that did not burden any one group, including Asian applicants.

3. Race-neutral strategies. Princeton was able to demonstrate a wide range of race-neutral strategies that enhance and complement its race-conscious admissions program. OCR highlighted several in its review:

a. Developmental programs. Princeton participates in several programs for promising low-income high school students, including the Princeton University Preparatory Program (a comprehensive college prep program for local high-achieving, low-income students), a Summer Journalism Program, the W. E. B. Dubois Scholars Institute summer program, the Princeton Prize in Race Relations, QuestBridge, and

4. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 795 (Kennedy, J., concurring in part and concurring in the judgment).

the Leadership Enterprise for a Diverse America.

b. **Recruitment and outreach.** Princeton admissions staff visited more than 400 high schools and hosted more than 60 evening information sessions in the U.S. for the class of 2010. Admissions staff made visits to high schools that had not received a Princeton visit before and participated in several community-sponsored events aimed at diverse populations of high school students. Princeton partners with more than 30 regional and national organizations (e.g., QuestBridge, College Match, Jack Kent Cooke Foundation Scholars). It also conducts extensive international outreach. Promoting its no-loan financial aid plan was an important message during these events.

4. **Limited in time and subject to periodic review.** OCR noted that Princeton annually reviews the admissions cycle, including the continuing need for the consideration of race and national origin. Participants in the annual review include the Dean of the College, the Dean of Admission, and the Committee on Undergraduate Admission and Financial Aid (which includes faculty, students, and administrators). This process has led to changes (e.g., using information about Pell eligibility to determine what applicants had overcome to achieve academic success).

In light of all of these factors, OCR concluded that there was no evidence indicating discrimination based on race or national origin, and that Princeton sufficiently presented evidence of its compelling interest in diversity and an admissions process that was narrowly tailored to meet that goal.

Upcoming Events

FEBRUARY 2016		
24–26	Dallas, Texas	College Board Southwestern Forum 2016
28–29	Washington, D.C.	NACAC Advocacy Meeting ➢ *Fisher II* session on Feb. 28
MARCH 2016		
2	Webinar	Preparing for Fisher II on Your Campus Webinar (3–4 p.m. ET)
12–15	San Francisco, Calif.	ACE Annual Meeting 2016 ➢ *Fisher II* session on March 15
20–23	Phoenix, Ariz.	AACRAO Annual Meeting 2016

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