



Preparing for the *Fisher* Decision: Are You Ready?

An Access and Diversity Collaborative Policy and Communications Guide

May 8, 2013

Purpose and Overview

This Guide has been prepared to help higher education institutions and organizations prepare for the United States Supreme Court's upcoming *Fisher v. University of Texas* decision. It provides:

- ◆ **Background:** A brief introduction to the case and overview of key *Fisher* issues
- ◆ **Action Focus:**
 - Actions to consider now, as you prepare for the decision; and actions that you should be prepared to take when the decision is announced
 - The Access & Diversity Collaborative's "Decision Day" communications strategy and support for higher education organizations and institutions
- ◆ **Messaging Support:** Messaging platforms to reference as you craft institutional and organizational responses to the decision

The Access & Diversity Collaborative [ADC] extends its thanks to its sponsors and partners who have contributed to the development of this Guide, including through a March 25 convening where leaders from the full spectrum of higher education organizations helped identify key "on the ground" issues and institutional needs addressed in this Guide.¹

¹ *Participating higher education organizations included:* American Association for the Advancement of Science, American Association of Collegiate Registrars and Admissions Officers, American Council on Education, Association of American Colleges and Universities, **Association of American Medical Colleges**, Association of Public and Land-Grant Universities, Enrollment Planning Network, Educational Testing Service, **Graduate Management Admission Council**, Institute for Higher Education Policy, **Law School Admissions Council**, **National Association for College Admission Counseling**, **National Association of College and University Attorneys**, and National School Boards Association. *Participating institutions of higher education included:* Amherst College, Bates College, **Florida State University**, **Rice University**, Smith College, University of Florida, **University of Georgia**, **University of Maryland – College Park**, **University of North Carolina – Chapel Hill**, **University of Southern California** (Center for Enrollment Research, Policy, and Practice), **University of Texas – Austin**, and University of Washington. *Other participants included:* the American Civil Liberties Union, Asian American Justice Center, Asian American Legal Defense and Education Fund, LatinoJustice PRLDEF, Lawyers' Committee for Civil Rights Under Law, MALDEF, NAACP LDF, and National Women's Law Center. (**Bold text** indicates an ADC sponsoring or cooperating organization or institution.)

Background: A Brief Overview of *Fisher*

The U.S. Supreme Court is expected to issue a decision in *Fisher v. University of Texas* by the end of June 2013. A case that presents a challenge to UT's race-conscious admissions policy, *Fisher* is unlike the landmark 2003 decisions of *Grutter v. Bollinger* and *Gratz v. Bollinger*, where the question of the consideration of race and ethnicity as part of an individualized, holistic review process was central. The key question in *Fisher* appears to be one about when the consideration of race in admissions is, in the first instance, necessary—and therefore justifiable, independent of the underlying admissions approach. The issue of critical mass also has been central to the parties' arguments.²

UT reinstated the consideration of race in its admissions process in the context of Texas' Top 10% Plan (a facially race-neutral plan) in 2005, which had resulted in an increase of underrepresented minority students on campus. The question in this context: Was the reinstatement of race as a factor in admissions necessary in light of UT's diversity goals?³

The Court's re-examination of race in admissions issues in this case raises the prospect that it could reconsider key principles of relevant non-discrimination law as it affects college admissions practices, considered long-settled.

What is currently allowable under the University of Michigan cases, *Grutter* and *Gratz*?

Under the Supreme Court's current precedent, race- and ethnicity-conscious diversity-related enrollment policies that are not aimed at remedying an institution's own discrimination:

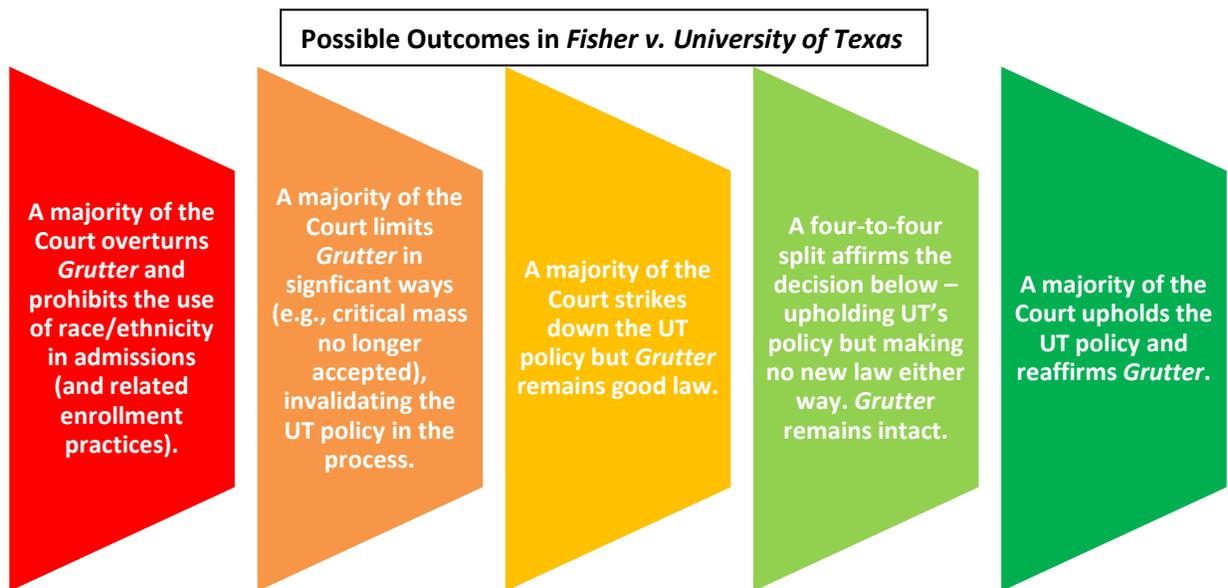
- ◆ Must directly align with and support mission-driven educational goals, with strong foundations in experience and research;
- ◆ Must reflect a "tight fit" between ends and means, with race-conscious policies being necessary, having demonstrable positive impact, and being neither over-nor under-inclusive in the way in which race/ethnicity is factored into the policy design.

Assembling the right kind of evidence demonstrating the right design and effectiveness of race-/ethnicity-conscious policies over time is essential—necessitating the required process of ongoing, periodic review and evaluation.

² The *Grutter* decision endorsed designing admissions to achieve a "critical mass" to ensure – without adopting a quota or specific percentage – 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 [an institution's] mission."

³ For a complete summary of the issues presented in this case, see Legal Update: *Fisher v. University of Texas* Case Summary (May 2011): http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/fisher_v_univ_texas_final.pdf.

Though the exact nature of the Court's decision cannot be predicted, the graphic below provides an illustration of the range of possible outcomes, from significant change (in red) to the preservation of the status quo (in green). (Note that Justice Kagan has recused herself from the decision, meaning that only eight Justices will be involved in the decision.)



Key points to look for in the *Fisher* decision include:

1. Whether *Grutter* and *Gratz* are affirmed in totality, overruled, or—somewhere in the mix—undercut? What did the Court say about its prior precedent?

This will be the most telling indicator of Court directions. Is it embracing the legal regime reflected in past cases, or making the justification for race-/ethnicity-conscious action more difficult?

2. What did Justice Kennedy say?

Past decisions and positions by individual Justices strongly suggest that Justice Kennedy will be the "swing vote" in *Fisher*. This matters because he is on the record in previous cases related to race in education as not fully agreeing with either his more "conservative" colleagues or more "liberal" Members of the Court. Thus, as in a 2007 case involving elementary and secondary education, Justice Kennedy's views could tip the scales such that there is no clear, comprehensive majority opinion by any single group of five Justices. (Indeed, the picture becomes even more challenging to gauge, given that Justice Kagan is recused from voting in this case.)

3. Did the Court alter the basic legal framework (the "strict scrutiny" analysis); change underlying elements of that analysis previously endorsed by the Court (such as critical mass); or alter relevant evidentiary standards associated with thresholds of proof?

The answers to these questions will be central to legal and policy implications for what colleges and universities can (or must) continue to do—and what (if anything) they can no longer do—in the wake of the decision.

4. How broad is the decision's impact? What type of institutional policies and practices are implicated?

While the clear focus in *Fisher* is on admissions (as it was in *Grutter* and *Gratz*), the ramifications of the decision (as before) likely will shed light on key principles of non-discrimination law that will inform other enrollment practices ranging from financial aid to recruiting, and more. But, as they say, the devil will be in the details.

Action Focus: Preparing for the *Fisher* decision

While the *Fisher* decision may affect institutional policy and practice for both public and private institutions, it is important not to rush to a conclusion on the impact of the decision and whether or not changes in policy or practice are needed. Institutional and organizational leaders in higher education — both policy-makers and lawyers — need time to thoughtfully assess the decision.

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. Consider the following action steps and key questions as you prepare:

1. **Develop a press strategy** – Do you want to issue a statement? Is anyone in your institution or organization likely to be tapped by reporters (including those who are local) for a statement? To whom should inquiries be directed if received? Are there colleagues in business or government who may be useful allies, particularly if the decision is unfavorable? Should you be briefing them now?
2. **Prepare institutional leaders and key staff** – 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?
3. **Begin thinking about the policies and practices that are likely implicated by *Fisher*** – Has your institution begun discussing the potential impact of *Fisher*, and identifying 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?

Action Focus: Steps to be prepared to take when the *Fisher* decision comes down

Because there will be no meaningful advance notice prior to the *Fisher* decision being announced, understanding the array of decisions that will likely need to be made during the day the decision comes down is a key planning step for higher education leaders.

Immediate steps likely include:

Alert key stakeholders of the decision, including:

- ◆ *Institutional or organizational 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 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 or trustees to receive such inquiries.)
- ◆ *Alumni and campus interest groups* who may be concerned about the institution's commitment to access and diversity.
- ◆ *Colleagues in business and government* (e.g. SHEEOs, System heads) who are connected to your diversity efforts, including those who may be willing and able to offer messages of support, depending on whether or how the decision affects in the current legal landscape.

Carefully assess press coverage. The press will have a strong interest in this case, but as history on such matters confirms, they don't always get it right. This may be especially true in the immediate aftermath of the decision if (as many suspect) multiple opinions are handed down.

Assess how to communicate with your institutional or organizational community – and the public at large—in light of the decision. Steps may include:

- ◆ Drafting a stand-by statement for use in response to inquiries that focuses on the importance of – and the institution's continued commitment to – access and diversity goals, and that avoids a rushed interpretation of the decision
- ◆ Anticipating and preparing for inquiries from parents of students and applicants, as well as alumni and campus interest groups
- ◆ Depending on the outcome, considering a message directed to students, faculty and alumni

- ◆ Once time has allowed a thoughtful assessment of the decision, updating your website to align with your post-*Fisher* messaging

Also, keep your eyes out for ADC communications (described below)

Action Focus : The ADC's "Decision Day" Response Strategy and Support

Having hosted several convenings and conducted extensive outreach in the field to prepare for the *Fisher* decision, the ADC has developed a comprehensive response strategy that includes both immediate, real-time action, as well as a longer term strategy of support for institutions of higher education. For immediate purposes, the "Decision Day gameplan" that will support higher education institutions and organizations is essentially three-fold:

- 1. On the day the decision is handed down, the ADC will issue an alert** within minutes of the decision announcement (likely to be around 10:30 am ET). Within approximately four hours of the decision, the ADC will release a **brief overview of the decision**, addressing a number of key questions regarding the decision's likely impact on institutions.
- 2. On the day following the decision, the ADC will open a dedicated email address** (FisherQuestions@educationcounsel.com) for institutions and organizations to pose and receive answers to their questions related to *Fisher* in a short time frame.
- 3. Within 2-3 days of the decision, the ADC will release a comprehensive case summary and analysis of the Court's opinion, including if warranted by the decision, areas of most significant impact on institutional policy and practice.**

Messaging Support: Possible Communications Foundations

Regardless of the outcome of the case, institutions should be able to communicate why having broadly diverse student bodies and providing access to higher education are critical to the quality of education for all students and the strength of America's democracy and economic health, now and in the future. Institutional leadership should begin to prepare now so that all stakeholders and interested parties are able to respond wisely and constructively on short notice when the Court issues its decision—and to "do no harm" pending a careful evaluation of the case.

As with the other institutional and organizational decisions discussed in this Guide, judgments about a response to the *Fisher* decision are inherently institution- and organization-specific.

That said, there are common guideposts and themes that merit consideration as preparations for the *Fisher* decision are made.

Messaging Guideposts

To help set the right tone for all messaging, consider the following:

- 1. Avoid both over- and under-reaction to the decision.** What can appear at first blush to be a draconian ruling on the one hand, or a "business as usual" decision, on the other, may in fact be neither. 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 that are too categorical or extreme.
- 2. 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.
- 3. 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. (This, by the way, does not preclude a commitment to efforts to pursue changes in the law through established means.)

Messaging Themes

While each institution and organization is different, experience reflects that there may well be shared themes and values regarding access and diversity goals. As a general rule, these include:

- ◆ A commitment to continuing to expand access to and opportunities in higher education for students of all backgrounds; and
- ◆ The benefits of diversity on campus, in the workplace, and beyond – something that has been recognized by a wide-ranging group of stakeholders, including leaders in business, the military, educators, and students.

More concrete illustrations of this body of shared values, reflected among an array of briefs filed in the *Fisher* case, may serve as useful points of reference as institutional and organizational responses are crafted:

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 global and increasingly diverse society of the 21st century than they may have been in the past.

- "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, et al.
- "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 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, et al.
- "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." –Lt. Gen. Julius W. Becton, Jr., et al. (Retired generals)

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

- "Deference is owed educators' educationally derived conceptions of diversity because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified. How, for example, the mix of students affects learning involves considerations educators are best equipped to gauge. Such judgments require knowledge of campus and classroom dynamics, cognitive processes, and ways to nurture students' capacity for moral reasoning, along with other specialized knowledge in which educators are trained. These 'complex educational judgments' lie 'primarily within the expertise of the university.'" –American Council on Education, et al.

Educational judgments regarding admission involve many student qualities and characteristics, may include the roles that race and ethnicity play in the experience of every individual, and may be different for different types of schools.

- "Institutional pluralism, the hallmark of American higher education . . . has allowed our colleges and universities to become the envy of the world. To impose a single definition of diversity on all of higher education would conflict with the Court's precedents and undermine those benefits." –American Council on Education, et al.
- "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." –College Board, et al.
- "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." –AAMC, et al.

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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