The U.S. Supreme Court's Second Ruling in *Fisher v. University of Texas*:

Preliminary Q&A on the Decision and Its Possible Implications

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Prepared on Behalf of the College Board's Access & Diversity Collaborative

On June 23, 2016, the U.S. Supreme Court (the Court) announced its second decision in *Fisher v. University of Texas at Austin*, which upheld the University of Texas's (UT) race-conscious[1] admissions program under federal law. Notably, in affirming prior Court precedent, the decision also provided significant insight regarding policy development considerations and key evidence, which should inform the efforts of public and private institutions that consider race in enrollment practices moving forward.

This preliminary Q&A 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.[2] After a brief review of the background and procedural history of the case, it answers 11 key questions that practitioners and policymakers may have at this time.

We plan to release more detailed guidance on the decision and its implications in the coming weeks.

Background and Procedural History

In June 2013, by a 7-1 margin, the Court reversed the Fifth Circuit's decision upholding UT"s race-

[1] This Q&A intends "race-conscious" as a term for brevity. It is inclusive of the consideration of race, ethnicity, and national origin because the three share the same federal legal protections.
[2] This Q&A 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.

conscious admission policy under federal law, but returned the case to the lower court for further analysis pursuant to a more rigorous "strict scrutiny" analysis than had been applied by the lower court in round one.[3] The majority did not rule on the merits of UT's admission policy in that opinion.

In July 2014, the Fifth Circuit once again upheld UT's race-conscious admission policy applying strict scrutiny principles, based on the Court's 2013 ruling.[4]

On June 29, 2015, the U.S. Supreme Court agreed to hear the case again. Eighty-five amicus briefs representing 1,869 total signatories were filed, with the majority supporting UT.[5]

On December 9, 2015, the U.S. Supreme Court heard oral arguments on the case. It issued its decision on June 23, 2016.

The Ruling and Its Possible Implications

1. What did the Court rule? How did the Justices vote?

By a vote of 4-3, the U.S. Supreme Court upheld the Fifth Circuit's decision, finding that UT's race-conscious admissions program was lawful under the Equal Protection Clause at the time of Abigail Fisher's application in 2003-04. Justice Kennedy authored the majority opinion, joined by Justices Breyer, Ginsburg, and Sotomayor. Justice Alito wrote a lengthy dissent, joined by Chief Justice Roberts and Justice Thomas. Justice Thomas wrote his own brief dissent, as well, to reaffirm his view that "a State's use of race in higher education admissions decisions is categorically prohibited." Justice Kagan took no part in the decision, presumably due to her prior involvement in early rounds of the case as U.S. Solicitor General.

2. Does the Court's opinion preserve the existing federal legal framework based on *Bakke, Grutter, Gratz*, and *Fisher I*?

Yes. The decision preserves this legal framework. Justice Kennedy also emphasized at the outset that, though it "took no position on the constitutionality of [UT's] admissions program," the Court's 2013 *Fisher I* decision established three key principles within this longer legal history, controlling here: (1) reaffirming that strict scrutiny applies to the use of race in admissions; (2) confirming, with respect to goals, the

[3] The Access & Diversity Collaborative's (ADC) summary of governing legal principles and that decision can be found here and our more in-depth article (a chapter in 2014's *The New Affirmative Action)* can be found here.
[4] The ADC's summary and analysis of that decision can be found here.
[5] The ADC's summary and analysis of the amicus briefs in *Fisher II* is available on pp. 7-8 of our issue brief on preparing for *Fisher II*, available here.

importance and primacy of academic judgment when an institution decides that "a diverse student body would serve its educational goals"; and (3) clarifying, with respect to means, that "no deference is owed [to an institution by a court] when determining whether the use of race is narrowly tailored."

Fisher II also provides significant new insight regarding ways in which higher education institutions can (and should) satisfy federal standards. In particular, the Court provided an extensive analysis of UT's specific processes associated with its policy development, quantitative and qualitative evidence informing its judgments regarding its challenged policy, and other relevant institutional commitments. Even as the Court recognized the unique nature of the facts presented in *Fisher II,* its discussion of evidence can meaningfully inform the efforts of other institutions that are pursuing the educational benefits of diversity through race-conscious enrollment practices.

3. Did the U.S. Supreme Court affirm that the educational benefits of diversity remain a compelling interest under federal law?

Yes. The majority affirmed that "the educational benefits that flow from student body diversity" may justify a race-conscious admissions policy, provided that the institution "gives a reasoned, principled explanation for its decision." Moreover, it reiterated that, if challenged, "deference must be given [by courts] to the University's conclusion, based on its experience and expertise." But the majority also noted that "enrolling a certain number of minority students" does not qualify as a compelling interest to justify race-conscious admissions policies under federal law.

In reaching this decision, the majority observed that UT "articulated concrete and precise goals" that "mirror the compelling interest this Court has approved in its prior cases." Specifically, these goals included:

- “Destruction of stereotypes.”
- “Promotion of cross-racial understanding.”
- “Preparation of a student body ‘for an increasingly diverse workforce and society.”
- “Cultivation of a set of leaders with legitimacy in the eyes of the citizenry.”
- “An academic environment that offers a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.”

The Court also noted with approval that these goals were supported by a 39-page proposal (the result of a yearlong study of many sources of "statistical and anecdotal" evidence and information) and affidavits from various admissions officers who articulated "the same, consistent" explanation for their race-conscious

policy. It also cautioned that UT must continue this effort, instructing, "Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."

4. Did the U.S. Supreme Court affirm that race can still be considered in higher education admissions and enrollment decisions? If so, under what circumstances?

Yes. The majority affirmed that race could still be considered in enrollment decisions, though it also repeatedly noted that, despite some deference regarding the establishment and articulation of goals, "the University bears a heavy burden" in justifying this practice — and will receive no deference from courts regarding the methods by which it attempts to meet those goals. As the opinion's conclusion observes, "But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."

The majority also affirmed the value of holistic review generally, in part because it can preserve the dignity of individual applicants' unique strengths, abilities, and interests. As the majority observed, "any single metric . . . will capture certain types of people and miss others" and "privileging one characteristic above all others does not lead to a diverse student body."[6] Holistic review allows for the consideration of multiple factors and pieces of information to reach individualized judgments. And the majority appeared to accept that different institutions could design different enrollment processes to suit their mission, context, and goals.

In this case, the majority noted the following factors with approval:

- **UT's use of race was necessary:**
    - UT provided "significant evidence, both statistical and anecdotal," that the race-neutral admissions policy was not creating the student body diversity it sought. This included demographic data that showed consistent decreases in minority enrollment (including African-American, Hispanic, and Asian-American students), minority student feelings of

[6] To illustrate this point, the majority observed:

> Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

loneliness and isolation, and qualitative data that showed an absence of racial diversity in most classrooms.

- Notably, the Court discussed the impact that UT's reintroduction of the use of race in holistic admissions decisions had on its student body diversity, observing:

> In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American . . . In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases — of 54 percent and 94 percent, respectively — show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class. In any event, it is not a failure of narrow tailoring."

- **UT's use of race was flexible:**
  - UT used race as a "factor of a factor of a factor in the holistic-review calculus." Other personal factors considered include "the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, [and] the language spoken at the applicant's home."
  - UT's "consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities."
- **UT's use of race had a minimal adverse impact on non-beneficiaries:**
  - UT limited the consideration of race "at one stage and one stage only" in the broader holistic review phase (the calculation of the "Personal Achievement Score"). Moreover, "the admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race."
  - UT's application essay readers and full application file readers who assign Personal Achievement Scores "undergo extensive training to ensure that they are scoring applicants consistently." Also, UT's Admissions Office "undertakes regular 'reliability analyses' to measure the frequency of readers scoring within one point of each other." Together, these twin efforts "aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer readers the file."
- **UT's use of race was subject to periodic review:**
  - UT "engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program." But the Court cautioned, "Going forward, that assessment must be

undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan."

5. Is the Court's ruling applicable to both public and private institutions?

Yes. Though the majority opinion mostly speaks to UT and other public institutions, prior Supreme Court and federal agency decisions (including *Grutter*) affirm that these legal obligations apply to race-conscious policies at both public institutions and private institutions that receive federal funding.[7]

6. Does the Court's ruling specifically reference or otherwise implicate other enrollment practices (e.g., financial aid, scholarships, recruitment, outreach)?

Yes and no. For the first time, the Court identified a broad range of specific race-neutral strategies used to bolster an institution's diversity efforts that reflect the breadth of the enrollment spectrum. It noted with approval that UT had undertaken the following efforts: (1) the "many ways in which it had already intensified its outreach efforts" to African-American and Hispanic applicants in particular; (2) three new race-neutral scholarship programs; (3) new regional admissions centers; (4) a $500,000 increase in its recruitment budget; and (5) the organization of more than 1,000 recruitment events. (Each of these race-neutral efforts took place in addition to UT's many race-neutral factors that may inform the admission decision itself.)

At the same time, it did not directly address the specific application of federal nondiscrimination principles to other practices, such as financial aid, recruitment, and outreach.

7. What did Justice Alito's dissent say and what might this mean for future cases?

More than twice the length of the majority opinion, Justice Alito's vigorous dissent expressed several concerns, including his views that:

- UT lacked transparency in its decision-making process to reintroduce consideration of race into admissions.
- UT did not present sufficient evidence to support its policies, particularly on the link between applicants selected in the admissions process and their specific contributions to the educational benefits of diversity on campus.

[7] E.g., Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 U. S. C. ß1981 also fail.")

- UT's holistic review process was a "black box" and that it was unclear what role race really plays in decisions.
- UT only valued a certain type of "diverse" applicant (e.g., minority students from wealthy families).

Justice Alito took the somewhat rare step of reading a summary of his dissent from the bench to register his strong disapproval of the Court's decision — describing it as "affirmative action gone berserk." The strength of this dissent may have implications for future decisions, given the other cases pending in federal courts and new complaints filed with federal agencies that ask many of the same questions.

8. Did the Court speak to the unique facts of the *Fisher* case?

Yes, the UT-specific context was a theme throughout the decision, including — for the first time — a discussion of the Top Ten Percent Plan. Borrowing from Justice Ginsburg's dissent in *Fisher I* — Justice Kennedy observed, "[T]he Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are adopted with racially segregated neighborhoods and schools front and center stage."

The majority also observed that UT has a special opportunity to teach, learn, and lead the higher education community after this experience. Specifically:

> The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

9. When will the Court's ruling take effect? Does it affect students who have already been admitted/who are already enrolled at my institution?

Fisher II takes immediate effect for all institutions that consider race in admissions or other enrollment decisions. But it should not require retroactively changing admissions decisions made during or before the 2015-16 cycle.

10. What's next for the case – and for these legal issues generally?

The *Fisher* case itself has now ended, as the plaintiffs have exhausted all possible means for appeal. But these legal issues will continue to evolve, particularly because at least two federal courts cases are pending against other institutions (Harvard University and the University of North Carolina) and a new complaint has been filed with the U.S. Department of Education's Office for Civil Rights against three other institutions (Brown University, Dartmouth University, and Yale University).

11. I still have questions. Will additional guidance be coming?

The Access & Diversity Collaborative (ADC) will provide a detailed summary and analysis of the case by early July. A free webinar will be offered on July 14, 12–1 p.m. ET. And we will continue to engage with ADC institutional and organizational sponsors (and other stakeholders) throughout the summer to frame key strategies for moving forward in a way that preserves mission-driven diversity policies in a legally sustainable way.

About the Access & 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 the College Board's Access & Diversity Collaborative online.

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