Significant Take-Aways From Fisher v. University of Texas, June 23, 2016

In Fisher v. University of Texas, 579 U.S.__, 136 S.Ct. 2198 (2016)(Fisher II), the U.S. Supreme Court, in a 4-3 decision written by Justice Kennedy, applied “strict judicial scrutiny” and firmly upheld University of Texas at Austin’s (UT) admissions process involving holistic review of applications representing 25 percent of its freshman class. UT’s holistic review includes minimal and varied consideration of race as one of many “relevant features” that provide “context” for an application, for both racial minorities and others. UT fills 75 percent of its freshman class with students who are in the top 10 percent of their Texas high school class. Applicants who are not from Texas or who are not in the top 10 percent of their Texas high school class are subject to holistic review.

This is the second time the Court heard Ms. Fisher’s case. The first time, in Fisher v. University of Texas, 570 U.S.__, 133 S. Ct. 2411 (2013)(Fisher I), the Court emphasized that strict judicial scrutiny applies whenever race is considered in making admissions (and likely other benefit-conferring) decisions, but did not rule on whether UT had satisfied the requirements of strict scrutiny. Rather, the Court in Fisher I made clear what this standard means, explained the kind of evidence institutions of higher education (IHE) are required to produce to satisfy it, and remanded the case to the U.S. Court of Appeals for the Fifth Circuit with instructions to evaluate UT’s admissions process under that standard.

Below is a summary of important holdings and considerations of the Fisher II decision. The opinion is a decisive victory for holistic review and the value of broad diversity in higher education, but affirms the serious, evidence-based justification that Fisher I holds must be amassed before race may be considered in admissions and likely in decisions on other educational benefits.

Note that IHEs in states where use of race in admissions is prohibited by state law are still subject to those prohibitions. Also note that this case does not address the different legal standards that apply to employment decisions such as faculty hiring and benefits in employment.

Key points in the Fisher II opinion:

- Any admissions process that considers race in any manner is subject to “strict judicial scrutiny”. (This principle applies to consideration of race in admissions and in awarding other educational benefits as well. The factual context and burdens on non-minorities may be different, though, in some non-admissions programs.)

- The Court does not change the substance of its prior holdings, including its Fisher I decision, which makes clear where the burden lies in satisfying the two prongs of strict scrutiny:

  - **(Prong 1) Demonstrating a compelling, legally recognized objective, which may be the educational benefits (outcomes) that derive from broad (not just racial) student body diversity. Under this prong, courts must give an IHE some (not total) discretion to determine the institution’s educational mission and the student body composition that is needed to achieve it. (This educational discretion is within the “special concerns of First Amendment” cited by the Court in Fisher I and reaching back to Sweezy v. New Hampshire, 354 U. S. 234, 263 (1957).) The IHE satisfies its burden if it articulates a “reasoned, principled explanation” for why, in its judgment, logic, and experience, broad student body diversity is important to achieving its educational mission and the particular educational and societal outcomes it seeks in furtherance of that mission.
Demonstrating narrow tailoring of the means to achieve the IHE’s compelling interest—i.e., that it is necessary for the IHE to consider race to achieve the racial component of broad diversity and the related compelling educational-mission-tied objective and outcomes. Under this prong an IHE must provide evidence that “available and workable” neutral alternatives cannot alone achieve the necessary diversity “about as well [as considering race] and at a tolerable administrative expense.” Under this prong, an IHE may not merely assert a good faith belief or opinion that neutral strategies will not suffice, and “no deference is owed” to the IHE. Institutions must put forward evidence of necessity to consider race (inadequacy of neutral strategies), by seriously considering and using neutral strategies and assessing their effects. IHEs will not satisfy their burden by merely asserting good faith opinions.

However, importantly, the decision takes a small step toward restoring the more “positive tone” of the Court’s decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003)(University of Michigan’s law school admissions case), and a small step away from the more “forbidding tone” of its Fisher I decision.

For example, in elaborating on the first (goals) prong of strict scrutiny, the Court emphasizes that, an IHE “is in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness.’….Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.” The IHE must articulate the reasons, but once it does, the Court defers to educational judgment and the importance of allowing IHEs to “serve as ‘laboratories of experimentation.’”

The Court also clarifies that determining whether a “critical mass” of minorities has been achieved in the student body to derive educational benefits for all students does not require—and in fact Equal Protection would prohibit—establishing a numerical goal for minorities that is anything like a race-based quota. Rather, the Court endorses a robust, deliberative process, on a “constant” and ongoing basis, to assess whether the diversity that has been achieved is enough to achieve “sufficiently measurable” not too “amorphous” compelling educational goals (part of the prong 1 analysis). The Court speaks approvingly of the educational goals of eliminating stereotyping and isolation, promoting a “robust exchange of ideas,” preparing all students with multi-cultural knowledge and skills to work and be contributing citizens and legitimate leaders in a diverse society after graduation, and promoting racial understanding. Admissions strategies must be adjusted based on this continuous assessment of whether “critical mass” and the related goals have been achieved.

For another example, in elaborating on the second (narrow tailoring of means/admissions strategies) prong of strict scrutiny, the Court affirms that “a university bears a heavy burden” that it could not achieve the student body composition and related educational benefits of diversity without considering race (at all or as much). But the Court makes clear that a combination of anecdotal evidence (such as retreats, interviews and deliberative discussion over a period of time among educators and students) as well as data (such as demographics on the stagnation of minorities enrolling and of isolation of minorities in the student body), combined with evidence that many race neutral strategies have been and are being used, their effects are being measured, neutral approaches cannot alone achieve the diversity needed, and limited race-based approaches have a meaningful, positive effect, can satisfy the narrow tailoring prong. The Court emphasizes that the IHE does not need to use neutral strategies that would change its competitiveness or “reputation for excellence,” and that “it is not a failure of narrow tailoring for the impact of racial consideration to be minor,” as long as it is “meaningful.” The Court notes that UT achieved a meaningful 54 percent increase in Hispanic students and 94 percent increase in
October 31, 2016

African American students in the freshman class by considering race in its holistic review, although the absolute numerical increase was small.

- It is remarkable that the Court cites approvingly UT’s employment of a full range of enrollment management strategies, many of them race-neutral and all of them working in concert, to achieve its diversity aims. These included recruitment and outreach efforts, scholarship, and other programs. Admissions programs do not work alone and should not be assessed in isolation.

- Applying the Court’s reasoning, it is helpful in satisfying both prongs of strict scrutiny for an IHE to determine and articulate and then to demonstrate that it not only seeks broad student body diversity, but also uses such diversity, for particular educational and societal outcomes (prong 1): to create multicultural experiences for students, enhance their understanding of people from different backgrounds, and prepare all students for a diverse and global society. It is not diversity for diversity’s sake, or general proclamations about the educational benefits of diversity, that is endorsed by the Court as a compelling educational goal. Rather the compelling interest in broad student body diversity exists because such diversity is needed and used to confer articulable educational benefits on all students. To serve a compelling interest, diversity must have an impact, contributing to educational outcomes. And for race-based means to be necessary to achieve diversity and its related educational outcomes (prong 2), neutral approaches must be shown to be inadequate alone, but to be used and to be effective in concert with the limited race-based approach.

- The Court rejected the notion that an IHE must rely only on grade point average, as the top 10 percent plan does, to admit the entire class. It observed that considering only class rank might result in more racial diversity (depending on the demographics of high schools). But class rank alone would exclude many attributes and considerations of individuals that an IHE may determine contribute to a rich educational environment and lead to a meaningful assessment of applicants—among them, artistic, athletic ability and other talents, compelling reasons for lower grades one year in high school.

- A cautionary note arising from the decision has to do with the unusual factual context of the decision, including limited use of race and the weight of evidence that UT amassed of necessity to consider race.

- The Court notes that UT’s consideration of race is extremely light, affecting about 25 percent of its admitted freshman class, who are subject to holistic review—being a flexibly and individually applied factor among many others that provides context in assessing personal qualities of students whose grades and test scores meet threshold standards, without any numerical rating. Also, the admissions staff who ultimately make specific admissions decisions are unaware of the racial composition of the applicant pool when they make their decision of where to draw the line in admitting students.1

- In addition, the Court makes a point of the fact that UT spent seven years not considering race at all. UT employed many neutral alternatives throughout that time, and continues to do so. Then, after the seven years of abstaining from considering race, UT spent a year of in depth study, deliberation in retreats, interviews and surveys, and collected relevant data (including data showing stagnation of

1 Under UT’s holistic review, an applicant receives an Academic Index (AI) based on grades and SAT scores, and a Personal Achievement Index (PAI) that addresses six factors, including socio-economic background, geography, and “special circumstances.” Special circumstances take into consideration seven attributes one of which is race, and none of which has a numerical value attached to it. Race is used as a context for understanding the applicant’s experience. Admissions staff decide where to draw the line for admissions in combinations of AI and PAI, without knowing racial make-up in each combination. In 2008 when Fisher was denied admission with a 3.1 AI, only individuals with above a 3.5 AI were admitted. So minorities who were admitted under holistic review had higher AIs than Fisher.
October 31, 2016

minorities applying to UT), resulting in a 39-page proposal documenting the effects of neutral strategies and need to consider race, before UT resumed considering race even lightly in the admissions process. These facts, together added up to sufficient proof of necessity to consider race. The Court does not provide guidance on how much consideration and use of neutral alternatives or how much deliberative study and data gathering are enough to satisfy narrow tailoring by establishing the need to consider race as one of many factors.

- The Court also cites to Justice Ginsburg’s dissent in Fisher I, that the “top 10 percent plan” is not necessarily race-neutral when its purpose is to increase racial diversity. Relying more heavily on facially neutral strategies that do not have an authentic, mission-tied objective apart from preferring certain races, will likely not be more constitutionally acceptable or avoid strict scrutiny. On the other hand, when there is an authentic, neutral purpose—such as increasing access to higher education for those from low socioeconomic backgrounds—the fact that increasing racial diversity is an ancillary and welcome benefit, does not make the strategy race-based and does not subject it to strict scrutiny. The Court makes clearer that having a facially race neutral strategy whose aim is to increase racial diversity, is likely not neutral.

- Also, the majority's shift in tone is slim. The next appointment to the Supreme Court could restore weight to the more skeptical and forbidding tone of Fisher 1. It is important to devote real effort to building an evidentiary foundation to justify any consideration of race in admissions, and likely other enrollment management strategies. But the value of broad diversity at institutions of higher education and the ability for serious institutions to amass evidence of need to employ a full range of strategies including limited race-based ones—short of scientific proof—is affirmed.