UNIVERSITY OF CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

July 11, 2016

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SUMMARY

On June 23, 2016, the United States Supreme Court found the University of Texas at Austin undergraduate admissions program to be lawful under the Equal Protection Clause and reaffirmed that colleges and universities have a compelling constitutional interest in achieving "the educational benefits that flow from student body diversity."

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SUPREME COURT UPHOLDS RACE-CONSCIOUS ADMISSIONS PROGRAM IN *FISHER II*

On June 23, 2016, the United States Supreme Court concluded that the University of Texas at Austin ("UT") undergraduate admissions program was lawful under the Constitution's Equal Protection Clause in *Fisher v. University of Texas at Austin (Fisher II)*. The 4-3 majority found that UT had articulated compelling "concrete and precise goals" served by the program's inclusion of race as a factor, including "the destruction of stereotypes," "the promotion of cross-racial understanding," and providing 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 for future leaders." The Court next held that UT had provided a "reasoned and principled explanation" for its decision to pursue these goals. Specifically, UT had produced a 39-page proposal after completing a year-long study that concluded that the use of race-neutral policies had not been successful in achieving these goals. Moreover, the Court noted that, under the UT policy, "race is 'but a factor of a factor of a factor' in the holistic-review calculus" used in admissions decisions.

Factual Background and Litigation History

As noted in a previous Legal Advisory (available here), Texas' "Top Ten Percent Law" – similar to the University of California's Eligibility in the Local Context Program – guarantees public college admission to students who graduate from a Texas high school in the top 10 percent of their class. UT fills a significant majority of each entering class through the Top Ten Percent Plan (currently up to 75 percent). It admits the remaining 25 percent of the incoming class based on its application of a combination of two measures: an Academic Index (AI) and a Personal Achievement Index (PAI). UT inserted race as one of the many factors to be considered in the PAI.

Abigail Fisher, a Caucasian applicant who was not in the top 10 percent of her class, was denied admission to the 2008 entering class. She filed a lawsuit alleging that UT's consideration of race disadvantaged her in violation of her constitutional right to equal protection. In 2013, the Supreme Court heard the case – *Fisher I* – and vacated the Fifth Circuit's decision, finding that the appellate court had applied the wrong level of judicial scrutiny when it upheld UT's admissions policy. The Supreme Court sent the case back to the Fifth Circuit, which then affirmed summary judgment in UT's favor once again. The Supreme Court then agreed to hear the case a second time.

Key Points in the Supreme Court's Decision

- *The legal framework for Fisher's equal protection claim*: The Court applied the three key criteria set forth in *Fisher I*: (1) a university must meet the "strict scrutiny" standard by establishing that it has a compelling interest in considering race as a factor in its admissions policy and that considering race is necessary to achieve this purpose; (2) courts should defer, though not completely, to a university's academic decision to create an admissions policy aimed at pursuing the educational benefits that flow from diversity in the student body; and (3) the university must demonstrate that available and workable race-neutral alternatives will not achieve its goals of increasing diversity.

- *Diversity is a compelling interest*: The Court reaffirmed its previous decisions that colleges and universities have a compelling constitutional

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"*Fisher II* does not directly affect UC's admissions policies, however, as Proposition 209 still precludes employing preferential treatment on the basis of race in public education in California."

interest in achieving "the educational benefits that flow from student body diversity." The Court further stated that "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."

- *No workable alternatives*: In order to meet strict scrutiny, a university must demonstrate that its use of race is necessary, in other words, that no "workable race-neutral alternatives would produce the educational benefits of diversity." The Court found that UT met this standard by "conduct[ing] months of study and deliberation, including retreats, interviews, [and] review of data." The Court also noted UT's use of "broad demographic data," nuanced quantitative classroom data, and evidence that minority students admitted prior to the implementation of its present undergraduate admissions policy "experienced feelings of loneliness and isolation."

- *Continuing obligation to reevaluate*: The Court stressed that its "affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement." Instead, it stated that UT has a "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances." The University must continue to use the data it collects 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."

Impact on the University of California

In November, University of California President Janet Napolitano and the Chancellors submitted an amicus brief in *Fisher II* in support of UT's position. The brief described how, despite UC's extensive "effort and experimentation" with race-neutral UC admissions, the University's enrollment of underrepresented minority students falls short of reflecting the rich diversity of California's population. (More on the amicus brief is available here.) *Fisher II* does not directly affect UC's admissions policies, however, as Proposition 209 still precludes employing preferential treatment on the basis of race in public education in California.