UNIVERSITY OF CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

Legal Advisory

June 27, 2013

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SUMMARY

U.S. Supreme Court leaves intact its prior holdings regarding race-conscious admissions programs and defers ruling specifically on UT's program.

If you have any questions regarding the issues raised by the *Fisher v. University of Texas at Austin, et al.* decision, please contact:

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SUPREME COURT ISSUES NARROW RULING FOR FURTHER REVIEW OF RACE-CONSCIOUS ADMISSIONS PROGRAM

On June 24, 2013, the United States Supreme Court in *Fisher v. University of Texas at Austin, et al.* followed its prior cases in holding that (1) having a diverse university student body is a constitutionally permissible goal but (2) courts must still carefully examine racial classifications in admissions programs to ensure that they are narrowly tailored to that goal. The Supreme Court did not rule on whether the University of Texas' undergraduate admissions program met this standard but instead sent the case back to the Fifth Circuit Court of Appeals to decide in light of the Court's ruling.

Factual Background of UT's Admissions Procedures

In response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which prohibited the consideration of race in admissions, UT implemented a holistic "Personal Achievement Index" (PAI), which considered various race-neutral factors to assess applicants. The Texas legislature also adopted a "Top Ten Percent Law" – similar to the University of California's Eligibility in the Local Context program – that ensured the top 10% of Texas high school graduates who met certain admission standards to a public state college. These admissions processes generally returned the percentages of African-American and Hispanic entering freshmen at UT to pre-*Hopwood* levels. After the Supreme Court held in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that race could be one of many factors considered in an admissions program, UT adopted a third admissions program in 2004 that added race as a component of the PAI score. UT relied in part on a study showing that smaller undergraduate classes lacked significant enrollment by racial minorities and on anecdotal reports from students about their classroom interactions. UT concluded it lacked a "critical mass" of minority students and needed to consider race to remedy this deficiency. Abigail Fisher, a Caucasian applicant denied admission to the 2008 entering class, filed a lawsuit alleging that consideration of race violated her constitutional right to equal protection. The District Court and Fifth Circuit Court of Appeals upheld UT's policies as complying with *Grutter,* and the Supreme Court granted review.

Key Points in the Supreme Court's Decision

- *The legal framework for Fisher's equal protection claim*: The Court's broader equal protection jurisprudence has held that government action using racial classifications is "inherently suspect" and must be subjected to "the most rigid scrutiny" (called "strict scrutiny"). Specifically, racial classifications are permissible only if "narrowly tailored to further compelling governmental interests."

- *Diversity is still a compelling interest*: The Court acknowledged prior decisions holding that a diverse student body serves permissible objectives such as "enhanced classroom dialogue and the lessening of racial isolation and stereotypes." Noting that Fisher had not challenged this point in her petition, the Court left intact the holding that "a university's educational judgment that such diversity is essential to its educational mission is one to which we defer."

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"[B]efore turning to racial classifications, universitites must be able to demonstrate that available and workable race-neutral alternatives are not sufficient to achieve their diversity objectives."

- *Consideration of race must be "narrowly tailored"*: Although diversity is a permissible goal, "the University receives no deference" as to whether its processes are narrowly tailored to that goal. While "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes," the court must still determine that "each applicant is evaluated as an individual" and that race is not "the defining feature of his or her application."

- *Consideration of race must also be necessary*: While schools do not have to exhaust "every conceivable race-neutral alternative," they must still demonstrate that "no workable race-neutral alternatives would produce the educational benefits of diversity. If a nonracial approach…could promote the substantial interest about as well and at tolerable administrative expense,…then the university may not consider race." The Court did not elaborate on what alternatives could be "workable" or what expenses could be "tolerable."

Impact on the University of California

Fisher does not directly affect the University of California's admissions policies, as Proposition 209 still precludes employing race-conscious measures in public education. However, President Yudof and the Chancellors submitted an amicus brief in *Fisher* describing UC's experience with race-neutral admissions strategies after Proposition 209. (See http://www.universityofcalifornia.edu/news/article/28178.) The results of such strategies will be important in light of the Court's requirement that, before turning to racial classifications, universities must be able to demonstrate that available and workable race-neutral alternatives are not sufficient to achieve their diversity objectives.

Another case currently pending before the Supreme Court, *Schuette v. Coalition to Defend Affirmative Action,* will specifically examine the constitutionality of measures such as Proposition 209. As reported in our December 12, 2012 Legal Advisory, *Schuette* concerns Michigan's Proposal 2, a voter-approved initiative with language essentially identical to that of Proposition 209. The Supreme Court's decision in that case – expected in the next year – would apply to any further consideration of Proposition 209.