CLIENT NEWS BRIEF

U.S. Supreme Court Reaffirms "Strict Scrutiny" Standard Governing the Use of Race in Public College and University Admissions

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In *Fisher v. University of Texas at Austin* (June 23, 2016) No. 14-981 579 U.S. __ [2016 U.S. LEXIS 4059], the United States Supreme Court reiterated its 2013 holding that public higher education institutions may only consider an applicant's race in deciding whether to admit that student if the method by which race is considered is narrowly tailored to meet a compelling state interest (this standards is known as "strict scrutiny"). While courts are entitled to take at face value a higher education institution's determination that the achievement of the benefits of a racially diverse student body is central to the school's educational program, the institution must still show that the consideration of race meets the strict scrutiny test.

Fisher was originally filed by a Caucasian woman who was denied admission to the University of Texas at Austin's undergraduate program in 2008. (*Fisher v. University of Texas at Austin* (2013) 133 S. Ct. 2411; see 2013 Client News Brief No. 37.) Believing that less qualified applicants were admitted over her due to their race, Fisher sued the university, claiming that the school's use of race in admissions violated her Fourteenth Amendment right to equal protection of the laws. In the 2008 iteration of the case, the Supreme Court ultimately returned the case back to the lower court to determine whether the university's plan to use race in admissions met the strict scrutiny standard without deference to the university's position.

In the *Fisher* case's second and most recent trip to the nation's highest court, the Supreme Court held that the university's race-conscious admissions program is lawful under the Fourteenth Amendment's Equal Protection Clause. The court set out three controlling principles for assessing the constitutionality of a public university's affirmative action program. First, a university must show "with clarity" that its purpose or interest in a racially diverse student body is both constitutionally permissible and substantial, and that its use of racial classifications is necessary to achieve that purpose. Specifically, the court held that the purposes of providing an academic environment that offers a robust exchange of ideas, exposure to different cultures, preparation for the challenges of an increasingly diverse workforce and acquisition of competencies required of future leaders qualify as compelling interests.

Second, the decision to pursue the educational benefits that flow from student body diversity cannot not be executed by imposing a fixed quota or otherwise defining diversity as some specified percentage of a particular racial group.

Third, a university must show that a nonracial approach would not promote its interest in the educational benefits of diversity, and that its race-conscious program would promote that interest, at an acceptable administrative expense. This third prong "does not require exhaustion of every conceivable race-neutral alternative," but does require colleges and universities to meet the burden of demonstrating that available and workable race-neutral alternatives are inadequate.

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Fisher clarifies the very limited measure of deference afforded to public colleges and universities regarding the use of race in admissions. Though courts may defer to the institutions' reasonable articulations of their compelling interest in using race in admissions, courts will heavily scrutinize the means by which those institutions achieve their goal. As a result, public colleges and universities should review their admissions practices to ensure they comply with the Supreme Court's rulings in *Fisher*.

Please note that distinct from federal constitutional equal protection principles covered in *Fisher*, the California Constitution, article 1, section 31, subdivision (a), put in place through voter approval of Proposition 209, prohibits discrimination or the granting of preference to any individual based on race, sex, color, national ethnicity or national origin in the operation of public education. The most recent judicial opinion involving Proposition 209 was handed down in 2009. In *American Civil Rights Foundation v. Berkeley Unified School District* (2009) 172 Cal.App.4th 207, the California Court of Appeal held that a school district's consideration of neighborhood demographics in student assignment for the purposes of achieving social diversity does not violate Proposition 209. This opinion confirms that Proposition 209 is not an absolute bar to consideration of race in policies aimed at achieving social diversity in schools.

If you have any questions regarding the *Fisher* decisions or higher education legal issues in general, or application of California's Proposition 209 to K-12 or higher education public schools, please contact the authors of this Client News Brief or an attorney at one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.