

June 23, 2016

**To: Deans of United States Dental Schools
Directors of Advanced Dental Education Programs
Directors of Allied Dental Education Programs
ADEA Board of Directors
ADEA Legislative Advisory Committee**

**From: Richard W. Valachovic, D.M.D., M.P.H., ADEA President and CEO
Yvonne Knight, J.D., ADEA Chief Advocacy Officer**

Re: Supreme Court Ruling in *Fisher v. University of Texas at Austin*

On June 23, the U.S. Supreme Court (“Court”), in a 4-3 [decision](#) in *Fisher v. University of Texas at Austin* (“Fisher”), held that the race-conscious admissions program used by the University of Texas at Austin (“UT”) was lawful under the Equal Protection Clause of the Fourteenth Amendment. This memorandum provides background on *Fisher*, the issues reviewed and a synopsis of the recent ruling.

Background

In 2008, Abigail Fisher was denied admission to UT’s freshman undergraduate class and sued alleging that UT’s consideration of race as part of its holistic review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. Abigail Fisher’s suit focused on UT’s admissions process, which offers admission to any student who graduates from a Texas high school in the top 10% of their class. UT then fills the remainder of its incoming freshman class by combining an applicant’s “Academic Index,” consisting of SAT scores and high school academic performance, along with the “Personal Achievement Index,” a holistic review containing numerous factors, including race.

Fisher I made its way through lower courts and finally to the Supreme Court in 2013, ADEA was a signatory to an [amicus brief](#) in support of UT. In a 7-1 [decision](#), the Court held that UT may consider race as a factor as part of its holistic review used to admit a portion of its undergraduate entering class. However, the court emphasized that UT’s ability to consider race was subject to the “strict scrutiny”¹ standard and sent the case back to lower court for further consideration. In remanding the case, the Court stated, “. . . strict scrutiny must be applied to any admissions program using racial categories or classifications.”²

¹ The strict scrutiny standard of judicial review is based on the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has applied this standard to laws or policies that impinge on a right explicitly protected by the U.S. Constitution.

² *Fisher*, 133 S. Ct. at 2419.

On July 24, 2015, the lower court, U.S. Court of Appeals for the Fifth Circuit [held](#) that UT had met the strict scrutiny standard, leading the plaintiff, Abigail Fisher, to once again appeal to the U.S. Supreme Court.

The Court heard oral arguments in *Fisher II* on Dec. 9, 2015 again ADEA joined other higher education organizations in an [amicus brief](#) in support of UT. This time the issue presented to the Court was whether the Fifth Circuit's re-endorsement of UT's use of racial preferences in undergraduate admission decisions can be sustained under the Court's decisions interpreting the Equal Protection Clause. On June 23, the Court affirmed the Fifth Circuit's ruling in *Fisher II* validating the merits of "limited use of race in [UT's] search for holistic diversity" in college admissions.

The Ruling

In a 4-3, [decision](#) Justice Kennedy wrote the majority opinion of the Court in *Fisher II*, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Alito filed a dissenting opinion in which Justices Thomas and Roberts joined. Justice Kagan recused herself.

Rebutting Abigail Fisher's arguments against UT's admissions process, Justice Kennedy wrote, ". . . the compelling interest that justifies consideration of a race in college admission is not an interest in enrolling a certain number of minority students, but an interest in obtaining the educational benefits that flow from student body diversity." Furthermore, Kennedy reasoned, ". . . 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." However, along with the permission to consider race in a holistic admissions process, Kennedy notes, "It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies."

Take Away

The *status quo* survives, although narrowly written, the Court held that universities may use race as one factor in a holistic admissions review process, but such deference is not without boundaries. The Court provides guidance: data should be used to scrutinize the fairness of admissions programs; there should be an assessment as to whether changing demographics have undermined the need for a race-conscious policy; and there should be an assessment, both positive and negative, of the affirmative action measures it deems necessary. Lastly, the Court admonishes that there is a "continuing obligation to satisfy the strict scrutiny burden."

Please consult counsel to determine how your institution might be affected by the ruling in this case. If we can be of assistance in this matter, contact Yvonne Knight, J.D., ADEA Chief Advocacy Officer at KnightY@adea.org.