

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN (FISHER II) **FREQUENTLY ASKED QUESTIONS**

Q. What is *Fisher v. University of Texas at Austin*?

A. It is a series of challenges in the federal courts by Abigail Fisher against the University of Texas at Austin (UT), arguing its admissions policy, which considers race as a factor, violates the Equal Protection of the Fourteenth Amendment.

Q. How does UT's admissions process work?

A. The University of Texas at Austin utilizes a "blended" admissions system, with two distinct components:

1. Automatic admissions through the **Top Ten Percent Plan**:

A large majority of UT students of all races are admitted through the Top Ten Percent Plan, a state law that guarantees admission for Texas students in the top ten percent of their high school class. The year that Fisher, the plaintiff in this case, applied to UT, 81% of Texas residents in the incoming class were admitted because they were in the top ten percent. The Texas Legislature later passed a law to cap Top Ten Percent admissions at 75% of the class, beginning in 2011.

2. An **individualized, holistic review** of the contents of student applications:

To fill the remaining spots, UT conducts a holistic review of each application through a system that safeguards individualized assessment throughout the entire process. Grades and test scores are important factors, but UT has recognized that grades and standardized tests tell only a part of each applicant's story. To that end, UT takes into account more than a dozen factors that exemplify who the student is and what her future potential may be. These factors include personal essays, leadership qualities, extracurricular activities, community service, family responsibilities, family and school socio-economic status, whether the applicant comes from a single-parent home, whether she worked during high school, whether languages other than English are spoken in her home, and race, among others.

While the combination of these two particular components is relatively unique among institutions of higher education, it is quite common for colleges and universities to use both facially race-neutral and race-conscious criteria in their admissions processes. In fact, the holistic component of UT's admissions policy is very similar to the approach that is used by many selective colleges and universities throughout the country and that was upheld by the Supreme Court in *Grutter v. Bollinger*. If anything makes UT's policy unique, it is that the University has not only considered, but aggressively utilized, a robust set of race-neutral tools, including the Top Ten Percent Plan, which determine the make-up of the vast majority of UT's student body.

Q. Didn't the U.S. Supreme Court already hear *Fisher v. University of Texas at Austin* in 2013?

A. Yes. However, when the Supreme Court heard *Fisher v. University of Texas at Austin* (*Fisher I*) in 2013, the Court determined the Court of Appeals below did not exact a sufficiently demanding analysis of the admissions policy and returned the case to the Court of Appeals for reconsideration. Specifically, the Supreme Court concluded that the Court of Appeals did not evaluate whether the admissions policy was “narrowly tailored to further compelling governmental interests,” as required by the precedential decisions of *Regents of the University of California v. Bakke* (1978) and *Grutter v. Bollinger* (2003). In doing so, the U.S. Supreme Court gave the Court of Appeals another opportunity to consider the case, taking into account the appropriate standard of review.

While the U.S. Supreme Court in sent the case back to the Court of Appeals for a new decision, it did not upset any of its previous rulings regarding the constitutionality of race-conscious admissions programs in *Fisher I*. In fact, the Court cited to *Grutter* and *Bakke* two landmark decisions affirming the importance of diversity and inclusion in higher education, when instructing the Court of Appeals below.

Q. Why are *Grutter* and *Bakke* so important?

A. Because these decisions by the U.S. Supreme Court ruled that a diverse student body provides educational benefits and that colleges may pursue tailored, equal opportunity policies to ensure their student bodies are both academically qualified and broadly diverse.

Almost 35 years ago in *Bakke* (1978), Justice Powell, who cast the deciding vote, recognized that all students—and the country as a whole—benefit from diversity in higher education. He emphasized that “nothing less than the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”

After *Bakke*, America’s colleges and universities broadly adopted race-conscious admissions policies to obtain the educational benefits of diversity. While *Gratz v. Bollinger* – agreeing with a challenge to the University of Michigan points-driven undergraduate admissions program – proved to be a setback, the Supreme Court issued the imperative and instructive decision of *Grutter v. Bollinger* on the same day in June 2003. In *Grutter*, the Court affirmed that colleges and universities have a “compelling interest” in obtaining the educational benefits of diversity. *Grutter* clearly articulated the importance of providing pathways to leadership and opportunity for students of all races and emphasized the advantages of broad diversity on college campus, noting that discussions are “livelier, more spirited, and simply more enlightening and interesting” in diverse classrooms.

Q. What happened after the Supreme Court returned *Fisher* to the court below?

A. After *Fisher I*, the Court of Appeals for the Fifth Circuit reheard the case, evaluated the University’s admissions policies with a more exacting standard, and, in July 2014, once again ruled in favor of the University of Texas. The Court of Appeals determined that diversity was a compelling interest and that the admissions policy chosen by the University to attain diversity was narrowly tailored to that goal.

In finding that the two-step admissions process was both necessary and appropriately narrow, the Court of Appeals determined that the Top Ten Percent Program alone, despite being facially race-neutral, would ironically resemble a quota program, which is explicitly prohibited in *Bakke* and *Grutter*. The Court found this would be the case with the Top Ten Percent Program alone, due to the unfortunate reality of segregation in Texas public schools. The Court of Appeals found that the second step in the admissions process, the holistic review, was essential to preventing the University's program from becoming a mere quota system and that it was as small a part of the policy as possible while still adding an critical but modest amount of diversity on factors beyond merely race.

Following the Fifth Circuit decision, Abigail Fisher appealed the 2014 decision to the U.S. Supreme Court, arguing that the Appeals Court again deferred to the University and failed to independently review the need for any consideration of race in admissions.

On June 29, 2015, the Supreme Court granted Fisher's petition for review and will therefore hear *Fisher II* in the upcoming term

Q. What is different, if anything, between *Fisher I* and *Fisher II*?

A. In *Fisher I*, the Supreme Court merely restated the requirements of existing precedent and instructed the Court of Appeals below to re-evaluate the program with the correct standard.

Now, in *Fisher II*, the Supreme Court will evaluate whether the Court of Appeal's re-approval of the University admission policy can be sustained. This will likely be a review of whether the U.S. Court of Appeals properly applied the "strict scrutiny" standard, and the Court could itself perform a strict scrutiny analysis of the UT program.

In the event the Court goes beyond this narrow set of questions regarding the UT program, it is unlikely yet possible that the decision in *Fisher II* will impact the entire spectrum of university admissions policies. Because each University's program is unique, the precedential decisions of *Bakke* and *Grutter* counsel in favor of individualized review of specific programs. Nonetheless, the Court's evaluation of UT's specific program may touch on the doctrine of strict scrutiny as applied to admissions policies more generally and may have implications for other programs.

As a matter of policy and practice, the Court's evaluation of the UT program in *Fisher II* will impact programs across the nation as colleges and universities work to comply with stringent review standards and with the Court's precedent.

Q. Is *Fisher v. University of Texas at Austin* the only active challenge to affirmative action?

A. No. In late 2014, an organization created to combat affirmative action, Students for Fair Admissions, Inc. (SFFA), filed suit against Harvard and the University of North Carolina at Chapel Hill (UNC). SFFA is the same driving force behind *Fisher I* and *Fisher II*, as well as *Shelby County v. Holder*, the Supreme Court decision gutting a key provision of the Voting Rights Act).

SFFA brought the challenge against UNC alleging that UNC is violating the rights of SFFA member students by "employing racially and ethnically discriminatory policies and procedures in administering [its] undergraduate admissions program." Specifically, SFFA claims that UNC,

as a public institution, is in violation of the Equal Protection Clause of the Fourteenth Amendment, as well as several provisions of the Civil Rights Act of 1964. Similarly, SFFA has brought a challenge against Harvard's admissions program alleging it is similarly "racially and ethnically discriminatory," but because it is a private institution, SFFA's claim hinges alone on Title VI of the Civil Rights Act of 1964.

Unfortunately, these cases are but two challenges in a long history of challenges to inclusive and holistic admissions policies, and it is possible that SFFA and other individuals and organizations may mount additional challenges to affirmative action in the future.

In light of the continuous wave of challenges, LDF has been active for nearly 40 years in defending and supporting institutional policies aimed at achieving narrowly-tailored diversity and inclusion. Whether as an amicus, intervenor, or an active voice in the media and on the ground, LDF has played a critical role in protecting admissions policies in key cases, including the historic *Bakke*, *Grutter*, *Gratz*, and *Fisher I*.

Moving forward, LDF anticipates continuing this active role in *Fisher II*, the challenges against UNC and Harvard, and in other attacks on equal educational opportunity and crucial admissions policies in higher education. It will be imperative to continue to defend each institution's program as current and potentially additional challenges to affirmative action develop.

Q. What are the benefits of equal opportunity and diversity at colleges and universities?

A. In *Grutter*, the Supreme Court recognized the significant educational benefits of diversity – not just for students of color, but for all students and for our entire country. The Court said that discussions are "livelier, more spirited, and simply more enlightening and interesting" in diverse classrooms, and in *Fisher I* confirmed a diverse student body "enhanced classroom dialogue."

A diverse college experience better prepares students to participate in our nation's civic life and globalizing economy. For many students, college is the first time they have meaningful opportunities to interact learn with people from vastly different backgrounds. As the Court noted in *Fisher I*, attaining a diverse student body is important to "the lessening of racial isolation and stereotypes," which in turn is essential to improving community and civic life.

Grutter also recognized the critical importance of assuring that the pathways to leadership and opportunity provided by our nation's colleges and universities are "visibly open" to all segments of our diverse society. The American dream should be within reach of every child.

Additional FAQs on the University of Texas Admissions Program

Q. What role does race play in UT's holistic review?

A. In UT's holistic review, race is considered – in the words of the district court – as “a factor of a factor of a factor of a factor.”

Each applicant receives an Academic Index and a Personal Achievement Index. Race plays no role in the Academic Index Score, which is the product of GPA and SAT scores. The Personal Achievement Index is based on two essays and a Personal Achievement Score.

The Personal Achievement Score ranges from 1 to 6, and is based on holistic consideration of the applicant's leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances.

The special circumstances factor of the Personal Achievement Score is based on consideration of a range of factors, including in addition to race: the socio-economic status of the applicant's family; the socio-economic status of the applicant's high school; whether the applicant is from a single-parent home; whether a language other than English is spoken at home; family responsibilities; and the applicant's SAT score compared to the average score of the applicant's high school.

No automatic advantage or value is assigned to any PAS factor. Each applicant is considered as a whole person, and race is considered in conjunction with all other factors, not in isolation.

After the files of the non-top-10% applicants are scored, they are plotted on a matrix for the school or major for which admission is sought, with the Academic Index on one axis and the Personal Achievement Index on the other. After considering the number of students in each cell and the available spaces for a particular major, admissions officers draw a stair-step line on the matrix, dividing the cells of applicants who will be admitted from those that will be denied. For each cell, admission is an all-or-nothing proposition: all the applicants in a cell are either admitted or denied.

Q. Is the case about quotas?

A. No. This case has nothing to do with quotas. Quotas have been banned for more than three decades. The University of Texas carefully tailored its admissions program to follow the law the Supreme Court laid down in *Grutter* and a line of cases saying that race could be considered in college admissions as one of many factors. UT does not set aside any spaces for minority candidates; nor does it assign fixed points based on race. Nor does the school track the number of students it is admitting by race during the admissions process.

Q. How did the level of African-American and Hispanic student enrollment change at UT after it started considering race as one of many factors in its holistic admissions process?

A. After UT once again began considering race as a factor in its holistic admissions process (starting with the 2005 freshman class), African-American and Hispanic/Latino freshmen increased. In 2004, the last year UT did not consider race in its admissions process, just 4.5% of the freshman class was African-American and 16.9% was Latino. In 2008, the year that Fisher applied, 5.6% of the freshmen class was African American and 19.9% was Latino. Thus, there was an approximately 25% rise in percentage of students in UT's freshman class who were

African American, and an approximately 17% rise in the percentage who were Latino. These increases had a significant impact on African-American and Latino representation and participation in campus life and help to alleviate the isolation of African American and Latino students. In addition, classroom diversity also improved.

But these raw numbers only begin to tell the story. Research confirms that increases in the enrollment of African-American and Latino students, even on a relatively small scale, have a multiplier effect. A recent study of selective universities found that even a one percentage point increase in the share of students of color is associated with a 3 or 4% increase in the odds of interacting with students of different racial backgrounds. Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009).

Moreover, UT's race-conscious holistic review also increases the degree of diversity *within* the African-American community at UT.

Q. Is UT's consideration of race limited to African Americans and Latinos?

A. No. Because of the contextualized way in which race is considered in UT's holistic admissions process, it is undisputed that consideration of race may benefit *any* applicant (even non-minorities) – just as race ultimately may have no impact whatsoever for any given applicant (even an underrepresented minority).

For instance, without the ability to consider race in its holistic admissions process, UT could not decide, for instance, that a non-Top Ten Percent white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective. Yet, such individuals – along with African Americans and Latinos who are, for example, talented debaters or musicians – are precisely the type of students who can help the University promote its goals of increasing cross-racial understanding, breaking down racial stereotypes and, ultimately, creating an educational environment where students feel free to develop their individuality.

Q. As part of this case, will the Supreme Court also examine any other factor that might be considered by admissions officers at colleges in America, such as gender, religion, whether a family member donated to the school, attended the school or has other connections?

A. No, race is the only factor that is under review.

While legacy admissions at some schools have attracted attention, UT is among the universities that do not consider whether an applicant's parent attended the school.

In her attack on UT's admissions, Fisher has singled out race – even in the very modest way it is considered – as the *only* aspect of a student's background that must be ignored in college admissions. The lawsuit does not challenge the use of any other factor in admissions at UT or other colleges in the United States. In this way, Fisher's challenge misses the point of a holistic admissions process and fails to heed the constitutional principles established by the Supreme Court in *Grutter v. Bollinger*.

Q. Why isn't socio-economic status alone sufficient to achieve diversity at UT?

A. We know from experience that relying upon socio-economic status alone is insufficient. Between 1997 and 2004, UT was prohibited from using race-conscious admissions, as a result of the U.S. Court of Appeals for the Fifth Circuit's 1996 decision in *Hopwood v. Texas*. During that period, UT took full advantage of race-neutral measures, including expanded outreach, scholarships, and a state law guaranteeing admission for all Texas residents ranked at the top of their high school graduating class. UT also instituted individualized review for applicants not admitted through the Top Ten Percent Plan. From 1997 through 2004, that whole-file review included the socio-economic status of applicants' families, extracurricular activities, community service, leadership qualities, and multiple other factors – but it did not consider race.

Despite all of these race-neutral efforts, however, African Americans never comprised more than 4.5% of the entering first-year class – despite making up 12-13% of high school graduates in Texas and over 10% of the state's workforce. This significant discrepancy limited UT's ability to realize the educational benefits of diversity and was not conducive to training the leaders of tomorrow.

Q. How are Asian-American students affected by UT's race-conscious admissions policy?

A. Asian-American enrollment has not declined since UT started considering race as a factor in 2005. To the contrary, it has increased in many of the freshmen classes since 2004-5.

Furthermore, it is important to understand that Asian Americans are not a monolith. The Asian-American community includes many diverse backgrounds and cultures including Chinese, Japanese, Korean, Vietnamese, Thai, Laotian, Cambodian, etc. UT's policy is flexible enough to take into account the racial background of any applicant, including an Asian-American student, based on her unique background and experience. Moreover, all students, including Asian Americans, benefit from exposure to a broad diversity of peers in the classroom and throughout the campus. As social science research confirms, all students, including Asian Americans, benefit from and contribute to diverse learning environments. For instance, increasing cross-racial interactions improves learning while also breaking down stereotypes of Asian Americans and other groups.

For these reasons, the Asian American Legal Defense and Education Fund along with 18 other Asian-American organizations, as well as the Asian American Justice Center along with 74 other Asian-American organizations filed or joined amicus in support of UT's admissions policy.

Q. How do you know when use of race in admissions is no longer necessary?

A. The Supreme Court has recognized that there must be a "meaningful representation" – or, to use *Grutter's* shorthand, "a critical mass" – of underrepresented minority students. Such a critical mass is necessary because "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to [a university's] mission, and less likely to be admitted in meaningful numbers [based] on criteria that ignore those experiences."

There is no quota, target, or predetermined percentage of undergraduate enrollment that automatically produces these benefits; nor could there be, as the Supreme Court has directed repeatedly. For this reason, critical mass cannot be defined by simple numerical calculations alone. Rather, critical mass depends on the quality, as much as the quantity, of individual

students' cross-racial interactions, as well as the context and community in which the particular university is situated.

While critical mass is not a precise number, Fisher's lawsuit proposes to cap enrollment of underrepresented minority students at the level achieved prior to *Grutter* through race-neutral means alone. This approach seeks a quota of sorts that would artificially limit the degree of diversity on college campuses nationwide.

Q. What is the historical context for this case at the University of Texas at Austin?

A. UT's admissions policy was not developed on a blank historical slate. Instead, it arose out of a particular historical context. The history of official discrimination in primary and secondary education in Texas is well documented. For the better part of its first century of existence, UT, like other Texas colleges and universities, was racially segregated by law and no African Americans were allowed to enroll. The University's first African-American student, Heman Marion Sweatt, was not admitted until 1950 – and only after the Supreme Court's landmark ruling in *Sweatt v. Painter*. Sweatt's application to UT Law School was denied based solely upon his race. Represented by the NAACP Legal Defense Fund, Sweatt won his case before the Supreme Court and made history as UT's first African-American student. Despite years of working to overcome this legacy of exclusion, UT remains painfully aware of its history and the fact that it still has more work to do. Even today, as UT notes in its brief in this case, the perception lingers that “[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students.”

Q. Who has supported UT in this case?

A. The U.S. Supreme Court received an avalanche of 73 amici or “friend of the court” briefs supporting diversity in *Fisher I*, including over 100 institutions of higher education. The briefs came from the following, among others:

- 37 high-ranking retired military and defense officials (including three former chairmen of the Joint Chiefs of Staff—General Colin L. Powell, Admiral Michael G. Mullen and General Henry H. Shelton);
- 57 leading corporations, the United States, organizations representing students from diverse backgrounds;
- 444 prominent social scientists;
- the Anti-Defamation League;
- a large number of educational associations;
- over 100 colleges and universities (ranging from public flagship schools (e.g., University of North Carolina at Chapel Hill and the President and Chancellors of the University of California) to eight Catholic universities (e.g., Fordham, Georgetown, Notre Dame) to 37 private liberal arts colleges (e.g., Amherst, Oberlin, Wesleyan) and all of the Ivy League schools.
- Small business owners,
- 17 U.S. Senators;
- the National League of Cities;
- California and other states;

- major religious denominations;
- labor unions;
- the College Board;
- Teach for America;
- and civil and human rights organizations (e.g., the NAACP Legal Defense Fund, the Mexican American Legal Defense and Education Fund along with other Latino organizations, the Asian American Legal Defense and Education Fund, the Asian American Center for Advancing Justice (with 73 other Asian-American organizations), the National Women’s Law Center, the Leadership Conference for Civil and Human Rights, Advancement Project, the ACLU, and the American Jewish Committee).

All of the briefs, as well as other pertinent filings, are available at the University of Texas’s website: <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html>

Q. Would Fisher have been admitted to UT but for its consideration of race in admissions?

A. According to UT, Fisher would not have been admitted to UT’s Fall 2008 freshman class even if UT had not considered race as one factor among many in its holistic review.

Abigail Fisher applied for admission in Business Administration or Liberal Arts. She had a combined SAT score of 1180 out of 1600 and a cumulative 3.59 GPA.

Because Fisher was not in the top 10% of her high school class, her application was considered in the holistic review process. Petitioner’s Academic Index (a combination of her high school GPA and SAT scores) was 3.1, and she received a Personal Achievement Index score of less than 6 (the actual score is contained in a sealed brief, ECF No. 52).

Due to the stiff competition in 2008 and Fisher’s relatively low Academic Index, UT states that she would not have been admitted to the Fall 2008 freshman class even if she had received a perfect PAI score of 6.

Fisher attended and recently graduated from Louisiana State University.