Fisher v. University of Texas at Austin
Overview: Amicus Curiae Brief Filed by the AERA, et al.¹

Angelo Ancheta, J.D., M.P.A.

Background

In Fisher v. University of Texas at Austin, the United States Supreme Court will decide the constitutionality of the race-conscious undergraduate admissions policy at the University of Texas at Austin. The plaintiff in the Fisher case is challenging the legality of the policy under current law and is also seeking to overturn the Supreme Court’s 2003 ruling in Grutter v. Bollinger, where the Court upheld the admissions policy at the University of Michigan Law School and ruled that student body diversity is a compelling interest that can justify the limited use of race in admissions.

The Grutter Court relied on scientific evidence showing that student body diversity leads to important educational benefits, and the Court cited the AERA’s amicus curiae brief in Grutter, as well as the findings of other leading researchers. Recent research findings continue to support the Court’s ruling and further underscore the importance of diversity and the necessity of race-conscious admissions policies.

The admissions policy used by the University of Texas at Austin is virtually identical to the one upheld in 2003 at the University of Michigan. Race or ethnicity is one factor among several that can be considered in a holistic review process. However, the University of Texas also uses a “percent plan” that offers automatic admission to Texas students who finish in the highest percentiles of their high school graduating classes. The percent plan does yield significant numbers of minority students, but the University has determined that the plan is insufficient to attain a diverse student body. Fisher argues that the percent plan is sufficient and the race-conscious policy is thus unconstitutional.

Because the composition of the Court has changed since 2003, the Justices may revisit the basic constitutional questions and modify or even overrule the earlier ruling in Grutter. It is also possible that the Court will leave the Grutter ruling intact, but will decide that the particular policy at the University of Texas either complies or does not comply with the Grutter standards.

Only eight of the nine Justices will be deciding the Fisher case (Justice Elena Kagan has recused herself because of her past involvement in the case as Solicitor General), so there may be a 4-4 tie vote in the case. A tie vote would leave intact the lower court ruling by the U.S. Court of Appeals for the Fifth Circuit, which upheld the University of Texas’s admissions policy.

AERA et al. Amicus Curiae Brief

The amicus curiae brief filed in support of the University by the AERA and other leading research associations² focuses on two basic legal questions:

¹ Prepared for AERA Media Briefing on Fisher v. University of Texas, Austin, Briefing on AERA et al. Amicus Brief On Strength of the Science, September, 27, 2012; Washington, DC.

² Additional signatories are the American Association for the Advancement of Science, the American Sociological Association, the American Statistical Association, the Association for the Study of Higher Education, the Law and Society Association, the Linguistic Society of America, and the National Academy of Engineering.
(1) Is the University’s interest in student body diversity sufficiently important to be a compelling governmental interest?

(2) If so, is the University’s race-conscious admissions policy narrowly tailored to its interest in diversity?

The Court in *Grutter v. Bollinger* made clear that the interest in student body diversity is compelling, and cited multiple sources, including research findings, to support its ruling. Social science research on the benefits of diversity remains strongly supportive of the University’s interest, and has expanded significantly since *Grutter*. The AERA brief highlights many of these recent findings.

Whether the University’s policy is narrowly tailored focuses on the necessity of using race in admissions and is a question tied closely to the facts of the case. Research findings are also relevant because they show how race-neutral policies such as the Texas’s top-ten-percent admissions plan are not sufficient to create diverse student bodies; research also shows how the removal of race-conscious admissions policies can have adverse effects on campus diversity. The AERA brief also addresses a number of these key questions.

**Research Findings on the Compelling Interest in Student Body Diversity**

The AERA, et al. brief highlights three lines of research that support the compelling interest in student body diversity:

1. Research continues to show that student body diversity leads to important educational benefits. Among these benefits are:
   - Improvements in intergroup contact and increased cross-racial interaction among students (e.g., Chang et al. 2004; Denson & Chang, 2009; Pettigrew & Tropp, 2006)
   - Reductions in prejudice (e.g., Pettigrew & Tropp, 2008)
   - Improvements in cognitive abilities, critical thinking skills, and self-confidence (e.g., Antonio et al., 2004; Hurtado, 2005; Bowman, 2010)
   - Greater civic engagement (e.g., Engberg, 2007; Gurin et al., 2004; Bowman, 2011)
   - Enhancement of skills needed for professional development and leadership (e.g., Jayakumar, 2008; Bowman et al., 2011)
   - Improved classroom environments (e.g., Deo, 2011; Pitt & Packard, 2012)

2. Research studies examining the harms associated with racial isolation and tokenism reinforce the University’s interest in obtaining a diverse student body. Among the harms addressed by increased diversity are:
   - Stereotyping (e.g., Harper & Hurtado, 2007)
   - Stereotype threat (increased pressure on groups arising from negative stereotypes that leads to poor performance on tests and other measures) (e.g., Steele, 2010; Logel et al., 2012; Walton & Spencer, 2009)
   - Micro aggressions (day-to-day verbal and non-verbal slights and insults) (e.g., McCabe, 2009; Smith, 2011)
   - Overt discrimination and subordination (e.g., Hurtado & Ruiz, 2012)
Problems of tokenism, stereotyping, and microaggression are commonplace in programs and fields with low numbers of minorities or women, particularly in STEM fields (science, technology, engineering, and mathematics) (e.g., Chang et al., 2011; Museus et al., 2011; Ong et al., 2011)

3. Research studies demonstrate that the purported harms to minority students associated with race-conscious admissions are inconsistent with recent findings and lack a solid empirical basis:

- **Stigma**: The claim that stigma increases under affirmative action programs is contradicted by a number of recent studies. Recent research indicates that stigma among minority students is *lower* in states with race-conscious admissions. (Bowen, 2010; Onwuachi-Willig et al., 2008)

- **Mismatch Hypothesis**: The claim that minority students suffer academic harms when their admissions credentials do not “match” their institutions finds limited support in the scientific literature. Research on undergraduates as well as on professional schools shows that minority students attain higher grades and have higher graduation rates from attending more selective institutions. (e.g., Alon&Tienda, 2005; Bowen et al., 2009; Fischer & Massey, 2007; Ayres & Brooks, 2005; Chambers et al., 2005)

- Numerous studies show that minority students gain significant educational and economic benefits through their attendance at selective institutions—including higher graduation rates and increased earnings and labor force participation following graduation. (e.g., Bowen et al., 2009; Melguizo, 2008; Small &Winship, 2007; Long, 2010).

**Research Findings on Narrow Tailoring**

The AERA brief is one of several briefs addressing the narrow tailoring question. Briefs such as the one filed by 444 American Social Science Researchers summarize findings which show that the University’s race-neutral policies, including its percent plan and its outreach policies, have been insufficient to generate a diverse body. Research also shows that states such as California and Michigan that have enacted bans on race-conscious admissions have seen severe declines in minority student enrollments that have compromised student diversity and led to problems of racial isolation and tokenism. The AERA brief specifically addresses two narrow tailoring points:

1. **“Critical Mass”**: The plaintiff in *Fisher* argues that trying to obtain a “critical mass” of minority students to achieve student body diversity is inherently unconstitutional, even though critical mass was fully endorsed by the *Grutter* Court. According to the plaintiff, critical mass is either undefined and ambiguous, or it amounts to an unlawful quota.

   Scientific research has not identified a number or percentage that would constitute critical mass, and the Court has made clear that critical mass is not fixed. Instead, critical mass is defined by the educational benefits yielded by sufficient minority numbers, and the University has found those benefits to be severely lacking without race-conscious admissions.

2. **Race-Neutral Policies are Insufficient**: The *Grutter* Court highlighted many of the problems with percent plans, including their inapplicability outside of undergraduate admissions and their inherent inflexibility, which can actually hinder diversity. Recent research also demonstrates the insufficiency of percent plans and other race-neutral policies:
• The Texas ten-percent-plan is an ineffective proxy for race-conscious plans, and the plan has not restored Latino and African American representation at the Texas flagship universities (Long & Tienda, 2008; Harris & Tienda, 2010)

• Application rates of minority students dropped after race-conscious policies in Texas were banned in 1996, and have not returned to previous levels with the percent plan (Harris & Tienda, 2010)

• Predictive models of percent plans show that minority enrollments would decline if percent plans were applied nationwide (Howell, 2010)

• Applying admissions policies based on socioeconomic status or family income would likely yield declines in minority student enrollment (e.g., Holzer & Neumark, 2006; Krueger, et al., 2006).