**Fisher v. University of Texas at Austin II**  
Overview: Amicus Curiae Brief Filed by AERA et al.

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

**Background**

In *Fisher v. University of Texas at Austin*, the United States Supreme Court will address the constitutionality of the race-conscious undergraduate admissions policy at the University of Texas at Austin. The plaintiff in *Fisher* has challenged the legality of the policy under current law and has sought 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 amicus curiae brief of the American Educational Research Association (AERA), as well as the findings of other 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 top 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, among other things, that the University’s interest in pursuing diversity is not compelling, and that, even if it were compelling, the University’s percent plan is a sufficient means to attain a diverse student body.

In a previous appeal of the *Fisher* case, the Supreme Court reaffirmed its holding in *Grutter* that promoting student body diversity is a compelling interest, but the Court ruled that a lower court did not apply the correct legal standard in reviewing the University of Texas admissions policy and remanded the case to the court below. Applying a strict standard of review, the U.S. Court of Appeals for the Fifth Circuit upheld the policy’s constitutionality in 2014. *Fisher* is now arguing that the Fifth Circuit’s ruling should be reversed.

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 upholding the University of Texas’s admissions policy.

**AERA et al. Amicus Curiae Brief**

As they did in the first *Fisher* appeal to the Supreme Court, the AERA and other leading research organizations\(^1\) have filed an amicus curiae brief highlighting the relevant research evidence supporting the University of Texas’s diversity interest and race-conscious admissions.

The AERA et al. amicus curiae brief focuses on two core legal questions:

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 Supreme Court in *Grutter v. Bollinger* made clear that the interest in student body diversity is compelling, and cited multiple sources, including scientific research findings, to support its ruling. The Court reaffirmed *Grutter*’s holding in the first *Fisher* appeal, but the plaintiff continues to argue that the University’s interest is not compelling. Social science research on the benefits of diversity remains strongly supportive of the University’s interest, and has expanded since *Grutter* and *Fisher I*. 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 tied closely to the facts of the case. Research findings are highly relevant because they show how race-neutral policies such as the University of Texas’s percent plan or alternative policies using class-based admissions are not sufficient to create racially diverse student bodies. The AERA brief addresses a number of these key points. (Other amicus curiae briefs filed in the *Fisher* case, particularly the Brief of 823 Social Scientists, cover the narrow tailoring issue in greater depth.)

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

To support the compelling interest in diversity, the AERA et al. brief focuses on multiple lines of research, highlighting literature that has been published since the first *Fisher* litigation:

\(^{1}\)Additional signatories are the American Association for the Advancement of Science, the American Anthropological Association, the American Sociological Association, the American Political Science 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. 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. 2006; Denson & Chang, 2015; Pettigrew & Tropp, 2006)
- Improvements in cognitive abilities, critical thinking skills, and self-confidence (e.g., Antonio et al., 2004; Hurtado, 2005; Luo & Jamieson-Drake, 2009; Bowman, 2010)
- Greater civic engagement (e.g., Bowman, 2011)
- Improved classroom environments and intergroup dialogues (e.g., Deo, 2011; Pitt & Packard, 2012; Gurin et al., 2013)

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., Thompson & Sekaquaptewa, 2002; Jayakumar, 2015)
- 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)
- Overt discrimination and subordination (e.g., Hurtado & Ruiz, 2012; Hurtado & Ruiz Alvarado, 2015; Stotzer & Hossellman, 2012)

3. 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 undefined and ambiguous, or it amounts to an unlawful quota.

Contrary to the plaintiff’s assertion, “critical mass” is not a fixed number or percentage, and the literature suggests that it must be examined dynamically and contextually. Relevant factors to assess how critical mass promotes diversity include a campus’s racial climate, its historical legacies and institutional signals, impediments to productive interactions, and the nature of cross-racial interactions (Garces & Jayakumar, 2014).

4. Promoting diversity along multiple dimensions, including the intersection of race and class (sometimes framed as “intra-racial diversity” or “diversity within diversity”), is fully supported by legal precedent and the research literature (Carbado, 2013; Harpalani, 2012). Research shows that socioeconomic diversity in tandem with racial diversity can lead to improved cross-racial interactions and learning (Park et al., 2013).
5. Research studies refute claims that race-conscious admissions policies harm minority students:

- **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 studies 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 students at professional schools shows that minority students have higher graduation rates from attending more selective institutions (e.g., Kidder & Lempert, 2015; Kidder & Onwauchi-Willig, 2014; Bowen et al., 2009; Fischer & Massey, 2007; Cortes, 2010).
  
  - 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., Long, 2010; Dale & Krueger, 2014; Wolfe & Fletcher, 2013).

**Research Findings on Narrow Tailoring**

The AERA et al. brief is one of several briefs addressing the narrow tailoring question. Briefs such as the one filed by 823 Social Scientists summarize findings that show that the University’s race-neutral policies, including its percent plan and its outreach policies, have been insufficient to generate a racially diverse body. 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 (Flores & Horn, 2015; Horn & Flores, 2012; 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, 2012).

• Predictive models of percent plans show that minority enrollments would decline if percent plans were applied nationwide (Howell, 2010; Blume & Long, 2014).

• Applying admissions policies based on socioeconomic status or family income, while promoting student diversity along economic lines, is likely to produce declines in minority student enrollments (e.g., Holzer & Neumark, 2006; Krueger et al., 2006; Alon, 2015; Reardon et al., 2015).

References


Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?* 96 Calif. L. Rev. 1299 (2008)


