NADOHE STATEMENT
Chief Diversity Officers: Leading and Engaging in Campus Deliberations on Post-*Fisher* Admissions Strategies

Executive Summary

1. Our intent in this document is to provide NADOHE members with practical information and strategies to lead and engage in campus deliberations on admissions strategies.

2. We are encouraging our membership to gain a deeper understanding of the issues presented in the *Fisher* decision, and to be to be prepared to act as thought leaders and advocates for diversity on our campuses.

3. A university with a compelling interest in diversity must prove that its admissions process is narrowly tailored to its goal. The reviewing court must be satisfied that "no workable race neutral alternatives would produce the educational benefits of diversity."

4. Educate yourself on the *Fisher* case and the standard being applied by the court and what is meant by race neutral alternatives.

5. Review your institution's mission statement to ensure diversity is an institutional imperative.

6. Identify campus research, both quantitative and qualitative, that emphasizes the educational benefits of diversity on students, faculty, and staff within your institution.

7. Re-evaluate policies and processes made post-*Grutter* to determine what has been successful and what challenges still remain.

8. Consult with colleagues in the NADOHE network who use "workable" race neutral alternatives in their admissions processes.

9. Cultivate relationships with lawyers, such as the university's general counsel or outside counsel, admissions officers, deans, vice presidents and other diversity stakeholders.

10. Advise your university or college president to make statements in support of diversity during key campus events such as new student orientation this fall.

The NADOHE Statement: *Chief Diversity Officers: Leading and Engaging in Campus Deliberations on Post-Fisher Admissions Strategies*, was co-authored by Paulette Granberry Russell, Rosemary E. Kilkenny, Archie W. Ervin, Roger L. Worthington, Raji S.A. Rhys, and Benjamin D. Reese. We gratefully acknowledge Camille Jackson for her role in editing the statement.

Introduction

On June 24, 2013, the U.S. Supreme issued its opinion in *Fisher v University of Texas at Austin*, 570 U.S. ___, (2013). The Court left intact its earlier ruling that diversity in higher education is a compelling national interest, and maintains the standard for review where race is a consideration in post-secondary admissions.

As stated by Jonathan Alger, president of James Madison University, the decision, " … simply calls on the Fifth Circuit Court of Appeals to apply a deeper inquiry into whether the University of Texas has sufficiently met its burden to justify its particular program in which race is one of many factors."

The National Association of Diversity Officers in Higher Education (NADOHE) remains firm in its resolve that equal opportunity in education in this nation is a fundamental right and that the consideration of race as a factor in admissions, consistent with the law, is essential in advancing diversity and inclusive excellence in U.S. higher education. **NADOHE serves as the preeminent voice for chief diversity officers in higher education by supporting their leadership and engagement of senior administration officials, especially at this critical time.**

Our intent in this document is to provide NADOHE members with practical information and strategies that can be utilized to lead and engage in campus deliberations on admissions strategies post-*Grutter*. It is imperative that we continue to be zealous advocates for maintaining and increasing the diversity of students within our campus communities -- and as CDOs, we are well positioned to do just that.

NADOHE continues to follow the broad range of debate regarding the impact of the Court's opinion. We are encouraging our membership to gain a deeper understanding of the issues presented in the recent decision in the Fisher case, including position statements, research, and learning opportunities that are being offered by various higher education associations, including the American Council on Education (ACE), Association of American Colleges and Universities (AAC&U), the College Board's Access and Diversity Collaborative , and the National Association of College and University Attorneys (NACUA).[1]

Immediately after the Court issued its opinion, NADOHE President Benjamin D. Reese, convened an ad hoc team of senior CDOs[2] charged with reviewing the *Fisher* opinion, news accounts, responses of the leading higher education associations, and reactions of legal scholars and diversity practitioners.

The Legal Context for the *Fisher* Decision

> "Consistent with the Court's previous rulings *Regents of the University of California* v. *Bakke* and *Grutter* v. *Bollinger*, the Court has upheld the value of diversity in promoting important educational benefits, in addressing racial isolation and stereotypes, and in preparing students for leadership in a diverse society. At the same time, the Court has reinforced its earlier rulings that university admissions policies must be narrowly tailored and necessary to advance the compelling interest in diversity."
>
> Joint Statement of Constitutional Law Scholars
> June 25, 2013

The Supreme Court used the standard of strict scrutiny[3] in its review of cases involving the consideration of race as a factor in making a determination on admissions[4] and applied this standard in *Fisher*. The Court recognized and agreed that the lower courts in *Fisher* were correct in finding that *Grutter* calls for deference to the university's experience and expertise about its educational mission.

However, once the university asserts a compelling interest in diversity, it must prove that the means (i.e., the admissions process) it chooses to attain that diversity are narrowly tailored to its goal.

The reviewing court has an obligation to verify that it is necessary for the university to use race to achieve the educational benefits of diversity and must ultimately be satisfied that "no workable race neutral alternatives would produce the educational benefits of diversity."

The Supreme Court further stated that the court (in Fifth circuit) is obligated to determine, and the university to demonstrate, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."

Issues to Think About Moving Forward

As noted above, the Court did not disturb prior rulings finding diversity to be a compelling governmental interest, which is one prong of the two-prong strict scrutiny analysis. The Court has remanded the case to determine whether the university satisfied the narrowly tailored requirement of the strict scrutiny analysis.

Educate yourself on the *Fisher* case and the standard being applied by the Court and what is meant by race neutral alternatives. We must effectively advocate for "staying the course" at our respective institutions.

Make sure diversity is included in the mission statement

Reaffirm your institution's commitment to diversity and affirmative action by reviewing its mission statement to ensure diversity is an institutional imperative (i.e., compelling interest). If diversity is not mentioned propose a revision.

In addition, you may be able to identify other institutional documents such as the university's strategic plan or statements by the president and/or trustees that justify and support why diversity is a compelling interest.

Make the connection to life after graduation

The statement must include the connection between diversity and the importance of preparing students for life after graduation.

> Sample Text:
>
> "*… an educational environment teeming with a broad range of experiences, backgrounds and viewpoints creates the richest learning outcomes for our students. This kind of environment produces fully-developed thinkers who, as active members of society, have the abilities to solve complex real-world problems upon their graduation."*
>
> -- Richard H. Brodhead
> President, Duke University

Research findings on diversity

Identify campus research, both quantitative and qualitative, that emphasizes the educational benefits of diversity on students, faculty, and staff within your institution. Such research forms the basis for advocating for the continued need to consider race as one of many factors for admission. Findings can appear in climate surveys, student satisfaction surveys and documented outcomes of student cross cultural engagement initiatives. Research can show the impact of inclusive learning environments in and outside of the classroom.

Also, utilize the same empirical research that formed the basis for persuading the Supreme Court that diversity is a compelling interest (refer to briefs in *Fisher* and *Grutter/Gratz, 2003).* This research can be used in combination with your campus-based empirical evidence.

Re-evaluate policies and processes

Carefully consider what defines "workable" race neutral alternatives as applied in the context of your institution. In this post-*Grutter era*, colleges and universities must engage in a review of their diversity efforts to bring policies and practices in line with the court's "strict scrutiny" and "narrowly tailored" standard of analysis. Revisit changes made in your admissions policies and processes and evaluate the successes and challenges in maintaining and increasing a diverse student body.

Consider "workable" race neutral alternatives

Consult with colleagues from states that have laws that prohibit "granting preferential treatment" on the basis of race in admissions for additional strategies that may present "workable" race neutral alternatives in admissions.[i]

The resources listed below outline various perspectives on the case, principles in support for maintaining a commitment to achieve a more diverse student body, and suggest race neutral alternatives. However, as noted above, such approaches are contextual and may or may not constitute a workable alternative for your institution.

Enhancing Strategic Partnerships

In seeking an opportunity to discuss practical strategies for moving forward in light of the *Fisher* holding, foster a team-based approach by building a trusting relationship with key stakeholders including:

College/University Legal Counsel

You may already have a relationship with the university counsel who handles discrimination and harassment complaints. Use this relationship to initiate discussions on issues that might arise in the context of diversity in student admissions. Seek the advice of general or outside counsel on the impact of *Fisher* -- but also share your concerns about the future of diversity efforts on your campus.

Admissions Officers

Build a relationship with your admissions office or enrollment management and request a meeting to gain a better understanding of the admissions process. Recognize there may be reticence if the relationship does not currently exist. It is important to be well versed in the admission trends among underrepresented minorities at your institution.

Be prepared to outline what has been identified as race neutral alternatives and thoroughly discuss the various recruiting approaches in the context of your institution.

Take into consideration enrollment trends for the various racial/ethnic student demographics. For example, ask if there has been an increase or decrease in the numbers for the different categories of underrepresented minority students pre- and post-*Grutter*? Are certain admissions recruiting approaches more successful for certain demographics than others?

You can draw comparisons if you have baseline data on what has been happening on your campus post-*Grutter.* This will help determine if post-*Grutter* modifications to admissions criteria were effective. If not, perhaps there are other race neutral options that should be considered and employed.

Senior Administration

Consider forming a leadership union with top university officials including the CDO, VP/General Counsel, VP of Public Affairs and the Dean of Admissions. Together the group can analyze the impact of the *Fisher* decision on the institution and identify strategies for expanded outreach and recruiting efforts. Furthermore, the group can propose recommendations to the President or Provost on workable race neutral admissions approaches.

What to Anticipate in the Coming Months

Greater scrutiny internally and externally should be anticipated and expected. It is our collective responsibility to be prepared to act as thought leaders and advocates for diversity on our campuses.

Less risk taking

The chilling effect of the *Fisher* case may mean less "risk taking" on the part of the institution or opponents to diversity efforts. Encourage your senior executives to take appropriate risks that foster the greatest diversity.

Remember: This is an admissions case, and while strict scrutiny applies to other aspects of college/university efforts where race has been a consideration, the assumption is that institutional efforts post-*Grutter* were instituted consistent with the strict scrutiny standard.

Further challenges

Be assured that *Fisher* is a precursor to further challenges. However, it should not be interpreted as the death knell to advancing diversity among out student body or our broader diversity efforts now and into the future.

Reaffirmation and commitment to diversity

As your university's president gives his or her state of the university address at the beginning of the academic year to new students and parents at orientation, or addresses the university's board of directors at its first meeting of the academic year, he or she should seize the opportunity to incorporate a statement to reaffirm diversity. Encourage her or him to expound on the many benefits of a diverse campus and have other university leaders echo a similar message at other major campus events.

In Conclusion

We ask that CDOs provide pro-active, institutional leadership at this critical juncture, drawing on the knowledge and influence of senior officials to help advocate, foster and maintain the greatest diversity among students, staff and faculty.

RESOURCES

Abigail Noel Fisher; Rachel Multer Michalewicz v. University of Texas at Austin. March 12, 2010. Retrieved from http://www.justice.gov/crt/about/app/briefs/fisher_appellee_brief.pdf

Association of American Colleges and Universities. Statement of the American Association for Affirmative Action on The Supreme Court's Decision in the Fisher v. University of Texas Case. June 24, 2013. Retrieved from http://www.affirmativeaction.org/node/177

Association of American Colleges and Universities. Diversity in Higher Education Remains an Essential National Priority. June 30, 2013. Retrieved from http://www.aacu.org/about/statements/documents/DiversityHigherEdStatement30June13.pdf

Civil Rights Project, The. Joint Statement of Constitutional Law Scholars. June 25, 2013. Retrieved from http://civilrightsproject.ucla.edu/legal-developments/legal-briefs/statement-of-nation2019s-leading-constitutional-law-scholars-on-u.s.-supreme-court2019s-affirmative-action-ruling-1/legal-scholars-fisher-statement-2013.pdf

Civil Rights Project, The. The Research Basis for Affirmative Action: A Statement by Leading Researchers. July 10, 2013. Retrieved from http://civilrightsproject.ucla.edu/legal-developments/legal-briefs/placeholder-statement-of-social-scientists-on-research-literature-for-affirmative-action/

College Board. Preparing for the Fisher Decision: Are You Ready? An Access and Diversity Collaborative Policy and Communications Guide. May 8, 2013. Retrieved from https://diversitycollaborative.collegeboard.org/sites/default/files/document-library/adc-guide-planning-fisher-texas-050713_0.pdf

Journal of Blacks in Higher Education, The. Socioeconomic Affirmative Action Won't Create Racial Diversity on Campus. June 21, 2013. Retrieved from http://www.jbhe.com/2013/06/socioeconomic-affirmative-action-wont-create-racial-diversity-on-campus/

Kahlenberg, Richard. A Better Affirmative Action: A Century Foundation Report. Retrieved from http://tcf.org/assets/downloads/tcf-abaa.pdf

NADOHE. June 24, 2013. Response to the United States Supreme court Opinion of *Fisher* v. *Univ. of Texas at Austin.* Retrieved from *http://www.nadohe.org/news#fisher-response*

Opportunity Agenda, The. Affirmative Action Message Guidance: Discussing the Supreme Court's Ruling in Fisher v. University of Texas. June 2013. Retrieved from http://opportunityagenda.org/fisher_scdecision

University of Texas at Austin *Fisher* case briefs. Retrieved from http://www.utexas.edu/vp/irla/Fisher-V-Texas.html

U.S. Department of Education Office for Civil Rights. Achieving Diversity: Race-Neutral Alternatives In American Education. February 2004. Retrieved from http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html

U.S. Department of Justice & U.S. Department of Education. Guidance on the Voluntary Use Of Race To Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools. December 11, 2011. Retrieved from http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf

FOOTNOTES

[1] American Council on Education, http://tinyurl.com/m8f7tyu
Association of American Colleges and Universities, www.aacu.org
The College Board Access and Diversity Collaborative, http://tinyurl.com/n47ax22
National Association of College and University Attorneys, www.nacua.org

[2] Russell, Paulette Granberry, J.D. (Michigan State University); Kilkenny, Rosemary E., J.D. (Georgetown University); Ervin, Archie W., PhD. (Georgia Institute of Technology); Worthington, Roger L., PhD. (University of Missouri); Raji S.A. Rhys, PhD. (University of Arizona); and Reese, Benjamin D., PhD. (Duke University)

[3] Strict scrutiny is the most rigorous standard of judicial review and is based on the Equal Protection Clause of the Fourteenth Amendment. It is used by federal courts to determine whether certain types of laws or policies are unconstitutional. When it is argued that a law and policy discriminate on the basis of race, they are categorized as *suspect classifications* that are presumptively impermissible under the Fourteenth Amendment, unless it can be demonstrated through evidence that the law or policy is necessary to achieve a compelling interest (i.e., obtaining the educational benefits that flow from a diverse student body was found by the Supreme Court in *Bakke* and *Grutter* to be a compelling interest). Once it is demonstrated that the law or policy is necessary to achieve a compelling interest, it must then be demonstrated that the law or policy is narrowly tailored to achieve the intended result. In *Fisher*, the Supreme Court held:

> … The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." 539 U. S., at 333 (internal quotation marks omitted). True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id*., at 337.

Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. *Bakke, supra,* at 305. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral

alternatives." See *Grutter*, 539 U. S., at 339–340 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny. The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If "'a nonracial approach. . . could promote the substantial interest about as well and at tolerable administrative expense,'" *Wygant* v. *Jackson Bd. of Ed*., 476 U. S. 267, 280, n. 6 (1986) (quoting Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578–579 (1975)), then the university may not consider race. *Fisher*, 570 U. S. ____ (2013).

[4] "The Court concludes that the Court of Appeals did not hold the university to the demanding burden of strict scrutiny in *Grutter* and *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 365, 305 (1978) (opinion of Powell, J.). Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the university was incorrect. That decision is vacated, and the case is remanded for further proceedings." *Fisher*, 570 U.S. ___, (2013)

[5] CDOs in the following states may be helpful in discussing various approaches employed at their institutions: California, Washington, Michigan, Texas, Florida, Arizona and Nebraska. NADOHE CDO membership contact information for these states can be found at: www.nadohe.org/current-institutional-members