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Commentary

***355 STRICT SCRUTINY & FISHER: THE COURT'S DECISION AND ITS IMPLICATIONS [FN1]**

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During the 2012–2013 U.S. Supreme Court term, higher education institutions held on tight to see if the Court would overturn race–conscious admissions allowed less than ten years ago in *Grutter v. Bollinger*. [FN1] Although Justice Sandra Day O'Connor mentioned in *Grutter* that affirmative action policies may no longer be needed in twenty–five years, no one suspected that the Court would take on this question again so soon. [FN2] The fact that they did led many to predict that the Court would overturn the use of race–conscious admissions. [FN3] Although the Court upheld its prior precedent that diversity in higher education is a compelling state interest, it found that the lower court did not properly review the University's admissions process under the strict scrutiny standard; and therefore, the case was remanded for the lower court to determine if the admissions process is narrowly tailored to accomplish the legitimate goal of diversity. [FN4]

In *Fisher*, the Fifth Circuit deferred to the University when considering whether it had acted in good faith and placed the burden on Fisher to prove that it had not. [FN5] Justice Kennedy, who authored the Supreme Court decision, argued that under *Grutter*, it is the burden of the University to show that its admissions program is narrowly tailored to achieve the benefits of diversity. [FN6] *356 While it continued to support that student body diversity is a compelling state interest, the Court did appear more skeptical about the use of race in the University's admissions policy. Specifically, the Court did not find that the University had demonstrated compliance with the very demanding legal standard of strict scrutiny. The case needs to be reanalyzed under a more stringent standard of review. Thus, the Court did not settle the constitutionality of the University's admissions plan.

To examine the implications of the decision, the article will briefly review race–conscious admissions decisions prior to *Fisher* and provide background on the *Fisher* case and ruling. It also discusses the strict scrutiny standard of judicial review and how it will impact the outcome of the case in the lower court. Will strict scrutiny be used to force institutions to explain their admissions process step–by–step or will it further support the lower court's prior decision? Furthermore, this article discusses how the use of social science might play a role in determining whether the admissions policy is narrowly tailored and how expert testimony will be critical when the lower court applies this standard of judicial review. This article then briefly expands on the implications the decision has on higher education, K–12 schools, private universities and the hiring of faculty and teachers.

Legal Background and Prior Race–Conscious Admissions Cases

Those who have been denied admission to an educational program and claim discrimination because of race have argued that these programs violate the Equal Protection Clause of the Fourteenth Amendment because they consider race in admitting students. The Equal Protection Clause states that “no State shall ... deny to any person within its jurisdiction the equal protection of the laws,” [FN7] or in other words, “similar individuals ... be dealt with in a similar manner by the government.” [FN8]

Under the Equal Protection Clause, courts apply one of three standards of judicial review (i.e., strict scrutiny, mid-level scrutiny, and rational basis) to determine the constitutionality of a government policy. [FN9] Because race was at issue in the *Fisher* case, Courts employed strict scrutiny when they decided whether the University of Texas at Austin's admissions policy was constitutional. Strict scrutiny is the highest standard of review used by the courts and the most difficult to satisfy. In addition to race, strict scrutiny is also used in matters concerning discrimination based on national origin, religion, and alienage. Under this standard, the government must first illustrate that its policy to treat people differently is justified by a compelling state interest. [FN10] As seen below, the Court in *Fisher* first determined whether promoting diversity in higher education is a “compelling governmental interest.” Second, the Court decided whether the University of Texas at Austin's admissions policy is “narrowly tailored.” To be constitutional, a policy employing racial classifications must satisfy both parts. [FN11] The Supreme Court found that *357 the University satisfied the first prong but could not rule on the second prong because the lower courts did not properly analyze it under the more stringent strict scrutiny standard.

Regents of the University of California v. Bakke

The Supreme Court has made prior decisions with regard to race-conscious admissions. One of the first cases to address race in university admissions, *Regents of the University of California v. Bakke*, focused on the University of California Davis Medical School's consideration of race as part of its admissions applications. [FN12] Allan Bakke, a white male who was rejected twice by the medical school, alleged that he was denied admission because of his race and the admissions program violated the Equal Protection Clause. [FN13] Bakke argued that the medical school accepted less qualified racial minority applicants by strictly setting aside sixteen out of 100 seats for disadvantaged racial minority students. As a result, Bakke further claimed that the minority students who filled these sixteen spots had lower GPAs and test scores than otherwise rejected white students. [FN14]

The California state courts and U.S. Supreme Court found the medical school's race-conscious policy to be unconstitutional. [FN15] The U.S. Supreme Court stressed that the medical school could not reserve a specific number of seats to be filled only by minorities. [FN16] However, the U.S. Supreme Court reversed the lower court's ruling that race could never be considered a factor in admissions programs. [FN17] Justice Powell noted that future leaders who are well-versed and exposed to diversity are important for the nation, and it is a compelling state interest to have a broader definition of diversity where race and ethnicity are important factors along with other qualifications and characteristics. [FN18] In addition, it is permissible for an admissions program to consider diversity holistically while examining an application. [FN19] However, some universities were still unclear whether or to what extent race could be used in admissions programs since four different federal courts addressed race-conscious admissions or scholarship programs after the *Bakke* case. [FN20]

Grutter v. Bollinger & Gratz v. Bollinger

Grutter v. Bollinger and *Gratz v. Bollinger* later clarified this confusion. In *Grutter*, Justice O'Connor wrote the majority opinion upholding the *358 admissions program at the University of Michigan Law School. [FN21] In this 5–4 decision, the Supreme Court reversed the lower court's judgment that enjoined the University from considering the race of the applicant. [FN22] The *Grutter* Court adopted Justice Powell's vision in *Bakke*, allowing the review of a wide variety of qualifications where race was only one of many factors considered. [FN23] The Court upheld *Bakke* in reasoning that student body diversity is a compelling state interest that could be used in university admissions if procedures are narrowly tailored. [FN24]

After deciding that diversity was compelling, the Court addressed whether the law school's program was narrowly tailored and not overly broad. [FN25] The Court required admissions programs to consider other criteria beyond grades and test scores, such as letters of recommendation; the quality of the undergraduate institution; the applicant's personal statement; and whether the applicant chose challenging undergraduate courses. [FN26] Holistic review of diversity may include an admitted student who lived or traveled widely abroad, one who is fluent in several languages, or one who has an exceptional record in community service. [FN27] Narrow tailoring does not require that “exhaustion of every conceivable race–neutral alternative” be attempted before a race–conscious policy is implemented, but it does require that universities consider race–neutral plans in good faith. [FN28] This approach to admitting students survived the strict scrutiny test. [FN29]

As mentioned, it was also noteworthy that the Court proposed that race–conscious admissions programs have a termination point by stating that the Court “assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter ... ” [FN30] Justice O'Connor suggested, “We expect that 25 years from now the use of racial preferences will no longer be necessary to further the interest approved today.” [FN31]

The 6–3 *Gratz* decision was issued the same day as *Grutter*, but the majority in *Gratz* struck down the undergraduate admissions program at the University of Michigan because it was not narrowly tailored. [FN32] The Court held that the automatic designation of twenty points to every applicant from an “underrepresented minority” group was not a holistic approach as noted by Justice Powell. [FN33] It relied too heavily on race, was not flexible, and was found to violate the Equal Protection Clause. Race–conscious admissions programs cannot include a quota system that insulates certain applicants from competition with others based on race or ethnicity. [FN34] The law school's admissions program satisfied *Bakke* because it considered each applicant as an *359 individual, looking at how each may contribute to the diversity of the school and using race and ethnicity only as a “plus” in addition to other characteristics. [FN35] With these two decisions, the Supreme Court affirmed that having a diverse student body is a compelling interest.

Background and Ruling on *Fisher*

Abigail Fisher, a white Texas resident, claimed that she was denied admission to the University of Texas at Austin in 2008 as a result of her race. She alleged that the University violated her rights to Equal Protection under the Fourteenth Amendment in addition to other civil rights statutes.

The Fisher background

The University of Texas at Austin considers race only as a factor among many and currently admits students through a two–step process. [FN36] First, under Texas House Bill 588, the Top Ten Percent Law grants automatic admission to any public college or university in Texas to all students who graduate in the top 10% of their

Texas high school class. [FN37] Second, after the *Grutter v. Bollinger* decision, the University adopted a program that explicitly considered race as one of many “plus factors” that each candidate contributes to the learning environment. [FN38] This program asks students to identify their race among five predefined racial categories. As a component, race is not assigned a numerical value, but it is a meaningful factor. [FN39] The various plus factors are then plotted on a grid and students above a specific threshold are admitted while the others are not. [FN40] The flagship campus of the Texas state university system had 29,501 applicants in 2008, from which 12,843 were admitted and 6,715 accepted and enrolled. [FN41]

In response to a decline in minority student enrollment as a result of the decision in *Hopwood v. Texas*, [FN42] a Fifth Circuit case in which several white students successfully challenged race-conscious admissions policies at a Texas law school, the Texas state legislature enacted House Bill 588. As mentioned above, this legislation is still in effect, and guarantees admission to any public university in Texas, including the University of Texas at Austin, to all students graduating in the top 10% of their high school class, providing that they attend an accredited high school in Texas. [FN43] Interestingly, this legislation also suggests that public universities should consider a variety of other factors in admissions decisions for students falling outside the top 10% of their graduating classes. Of course, post-*Hopwood*, race was not included among these factors, but socioeconomic status, bilingual proficiency, and whether a student would be the first in his/her family to attend college were listed as factors worthy of consideration. [FN44] According to statistics cited by Justice *360 Kennedy in the *Fisher* opinion, after the Top Ten Percent Law was enacted, minority student enrollment at the University of Texas did increase, though only slightly, by 0.4% for African American students and by 2.4% for Latino students. [FN45]

Because the University used the *Grutter* based race-conscious admissions process after admitting students through the Texas-legislated Top Ten Percent Law, Fisher claimed that she was discriminated in violation of the Equal Protection Clause of the Fourteenth Amendment. [FN46] The United States District Court heard the case in 2009 and found that the University's policy was constitutional. [FN47] The Fifth Circuit Court of Appeals affirmed in favor of the University and found that the policy was not akin to an illegal quota or racial balancing. [FN48] The Court of Appeals held that *Grutter* required courts to give substantial deference to the University to define the diversity benefits that serve as a compelling state interest and to determine whether its admission plan is narrowly tailored to achieve this goal. As such, the Court of Appeals held that the University followed *Grutter*, considered race as one of many attributes of a student's application, and the admissions plan was constitutional. A rehearing *en banc* was denied.

After the Supreme Court granted certiorari and agreed to hear the case, it held 7–1 that the lower court had failed to apply strict scrutiny when determining whether the University of Texas at Austin's admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. The Court therefore vacated the lower court's decision and remanded the case back to the Fifth Circuit to be decided in light of the guidance provided in the Supreme Court's opinion. [FN49] Was this simply a way for the Supreme Court to force the lower court to make it more difficult for higher education institutions to implement race-conscious admissions plans or might the lower court simply find that expert testimony from the University of Texas at Austin is sufficient to find that the policy is narrowly tailored to the task of maintaining student body diversity, therefore upholding the constitutionality of its race-conscious admissions plan? Although Fisher attended and graduated from Louisiana State University, she stayed very much involved with the case.

The Fisher ruling

The *Fisher* Court reaffirmed the constitutionality of admissions programs “considering racial minority status as a positive or favorable factor in a university’s admissions process, with the goal of achieving the educational benefits of a more diverse student body.” [FN50] In addition, as outlined in *Gratz* and *Grutter*, this admissions process must undergo the strictest standard of judicial review. [FN51] Justice Powell stated in *Bakke* that “the university [must] demonstrate with clarity that its purpose or interest is both constitutionally *361 permissible and substantial, and that its use of the classification is necessary” to reach the goal of its purpose. [FN52]

In the *Fisher* opinion, Justice Kennedy agreed with the lower court that the University has the expertise and experience to determine how diversity would best serve its academic goals; however, the deference that the lower court gave to the University on how it implemented this admissions plan was misplaced. [FN53] Kennedy writes, “... there must be a further judicial determination that the admission process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored.” [FN54] Kennedy made sure that on this point, the University is to receive no deference. [FN55] Determining whether or not the plan was narrowly tailored would have required the lower court to deeply examine the admissions plan to find that the plan in question was necessary to achieve these goals and that there was no other alternative.

The Court of Appeals wrote that it was “ill-equipped” to determine whether or not the plan was narrowly tailored and that it would only review whether or not the University made a good faith effort to consider alternatives. [FN56] Kennedy asserted that the judicial review conducted in *Grutter* was proper and that the environment in higher education does not change the narrow tailoring analysis just because the objective seems appropriate. [FN57] As a result, the strict scrutiny review of this case in the Fifth Circuit was not exhaustive and deferred the narrow tailoring analysis to the University’s good faith without considering evidence sufficiently. [FN58]

While Justice Kennedy’s majority opinion in *Fisher* did not go so far as to overrule the use of race-conscious admissions policies upheld in the previous *Grutter* decision, concurrences from Justices Scalia and Thomas suggest their support for doing just that. Both state clearly that they would overrule *Grutter*, and Justice Thomas expands on his reasoning, asserting that use of racial classifications in admissions processes amounts to unconstitutional racial discrimination and that “the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest.” [FN59] Where the majority opinion follows *Grutter* and other decisions in asserting that public universities continue to have a compelling interest in recruiting and maintaining diverse students, Justice Thomas contends that any potential benefits are drastically outweighed by admissions policies that amount to racial discrimination. [FN60]

In her dissent, Justice Ginsburg argues that the University of Texas’ admissions policy does not require further judicial review and its use of race as a factor continues to serve an important purpose in helping the university to increase the educational benefits of diversity. [FN61] Furthermore, she argues *362 that supposedly race-neutral policies, such as Texas’ Top Ten Percent Law, which are generally considered to be less discriminatory alternatives to admissions plans that clearly identify race as a factor, are actually by no means race-neutral. Using the example of the Texas law, she reasons that such policies were crafted in response to the state’s context of continued *de facto* segregation in many neighborhoods and schools, and “[i]t is race consciousness, not blindness to race that drives such plans.” [FN62] Thus, she claims that it is preferable to allow universities to continue to consider race as a factor in admissions, since the race-neutral alternatives to achieve diversity are neither as effective nor in fact race neutral. [FN63]

In November 2013 the Fifth Circuit Court of Appeals heard the case again. The appeals court gave the attorneys a list of questions to consider at this next level. The list of questions addressed everything from whether the case is now moot because Fisher graduated from another law school to whether the appeals court or district court should hear the next round, among other questions. This court might rule on the constitutionality of the plan or it may send the case down to the district court to determine additional facts involving the plan. Attorneys for Fisher are urging the appeals court to rule on the case while the University is hoping that the case is sent back to the district court in order to gather additional facts about the admissions policy. [FN64]

Strict Scrutiny and the Application of Social Science Research in *Fisher*

Strict scrutiny is the most demanding or difficult test U.S. courts apply. It is used to determine whether a government action violates a fundamental right or discriminates based on a suspect classification such as race or religion. As noted, to pass strict scrutiny, and therefore be held constitutional, a government action must be both based on a 'compelling interest' and be 'narrowly tailored' to satisfy that interest. These demanding requirements are a way for the judicial system to 'stack the deck' against government action that is likely to unfairly discriminate or deprive citizens of their basic rights. Such actions must be the least restrictive or least harmful way for the government to accomplish a crucial or essential goal. The strict scrutiny test employs demanding language, and Justice Kennedy warned that the test "must not be strict in theory but feeble in fact." [FN65] Strict scrutiny must be strictly applied by courts.

In *Fisher*, the Supreme Court reiterated that its prior decision in *Grutter* required that racial classifications like those used in affirmative action admissions policies must pass strict scrutiny. [FN66] But both *Grutter* and another prior Supreme Court decision regarding affirmative action in admissions, *Bakke*, deferred to the 'educational judgment' of university administrators when determining whether student body diversity is a compelling governmental interest. [FN67] This means that under *Grutter*, when courts assess the first *363 prong of the strict scrutiny test, they can defer to the professional judgment of school officials. The *Fisher* Court emphasized that the parties did not ask the Court to review that holding, [FN68] perhaps indicating that if they had, the Court might have overturned that portion of *Bakke* and *Grutter*, preventing courts from deferring to school administrators' educational expertise when applying the compelling interest prong of the strict scrutiny test. But for now at least, deference to administrators' judgment is permissible when evaluating the compelling-interest prong of the strict scrutiny test.

Leaving deference intact for the compelling-interest prong, the Court instead seized on the lower court's deference to the educational expertise of school administrators when applying the second prong of the strict scrutiny test. The second prong considers whether the University's affirmative action plans are narrowly tailored to achieve the school's diversity goals. The Court in *Fisher* relied on its prior opinion in *Grutter* to emphasize that the narrowly tailored determination is to be made by the Court. [FN69] "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.... strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." [FN70] Because the lower court deferred to the judgment of school administrators by presuming that they acted in good faith when they designed their admissions policies, the Court held that the lower court had failed to follow *Grutter*'s requirement that courts apply strict scrutiny and determine for themselves whether particular admissions practices are narrowly tailored to meet diversity goals. [FN71]

This raises the question of how courts should treat expert evidence and social science research when applying strict scrutiny. Why does *Grutter* allow courts to defer to educational expertise when applying the compelling-interest prong of the strict scrutiny test, and *Fisher* prohibit courts from applying the same deference under the narrowly tailored prong of the test? Perhaps it is simply because the *Fisher* Court was not asked to review the deference at issue in the first prong. Or perhaps educational expertise is legitimately more relevant to the first prong of the test than the second. These questions may arise in future affirmative action cases.

It is interesting to note that of the expert amicus briefs filed in *Fisher* that relied on social science research, the research generally related to whether diversity was a compelling interest, and not to whether race-conscious admissions practices were narrowly tailored to accomplish diversity goals. Rather than permitting deference in the first prong of the strict scrutiny test and completely prohibiting it in the second, perhaps courts could find a balance between judicial scrutiny and educational expertise. Although courts should not abandon strict scrutiny and completely defer to experts, strict scrutiny does not require that judges make their decisions independent of expert evidence. A court's findings regarding both compelling governmental interest and narrow tailoring should be based upon the expert evidence *364 available in the record. Such reliance on available evidence need not detract from the application of strict scrutiny.

On remand, the lower court could still find that the University of Texas' policies were narrowly tailored, as Justice Ginsburg suggested in her dissent. [FN72] Justice Ginsburg disagreed with the majority, finding instead that the lower court's "thorough opinions" had adequately applied strict scrutiny when they held that the policy in question was narrowly tailored. The lower court now needs to satisfy the Supreme Court to show that it does not defer the narrow tailoring review of the plan to the University's good-faith statement. Therefore, the lower court may require the University to present evidence and expert testimony on how the admissions plan is narrowly tailored, or the lower court may merely clarify in its judgment how it finds that the plan is narrowly tailored through its strict judicial review.

Indeed, after another round in the lower courts, this case could again turn up at the Supreme Court. In the interim, universities that use race-conscious admissions policies may wonder what they can do to ensure their plan meets the rigorous strict scrutiny requirements. We argue that the use of research within the context of the university could assist in trying to demonstrate that the affirmative action plan is narrowly tailored.

An economist, law professor and sociologist argued in a law review article that few affirmative action plans can be described as carefully designed. [FN73] They note how social science methods may assist in narrowly tailoring an affirmative action plan to meet the high bar of strict scrutiny within the context of using affirmative action to remedy the past effects of racial discrimination. Within their article, they contend that an affirmative action program "designed with the benefit of social science methods" could pass strict scrutiny review. [FN74]

The researchers use the Fifth Circuit's *Hopwood v. Texas* decision as a case in point. In *Hopwood*, the Fifth Circuit rejected the law school's race-conscious admissions policy because it was not narrowly tailored to address the effects of past discrimination. The *Hopwood* court held that there was not strong evidence in the record to demonstrate that the law school applicants still carry the effects of past discrimination. Without providing appropriate evidence, the court reasoned that the university's claims were based on speculation. [FN75] Similar to the arguments made by these researchers, if universities that consider race were to take an approach that relies on an empirical basis, it may help the court find that the plan is narrowly tailored. [FN76] In other words, through the use of social science research universities should attempt to produce sufficient evidence that their plans are narrowly tailored. Specifically universities should use data to demonstrate why race-neutral policies

were ineffective and how the race-conscious policy is narrowly tailored. Of course what the Court considers being evidence remains to be seen. It is *365 obvious though, the universities will need to work hard to justify the use of race in admissions. They will need to demonstrate that using race is necessary to achieve the benefits of diversity.

****366 Implications to Higher Education***

Just as higher education institutions thought that their admissions policies complied with federal law, the decision in *Fisher* now puts them on guard and in limbo. Although it is clear that diversity is a compelling state interest, colleges and universities are unclear what they must do for their policies to be considered narrowly tailored, because the Supreme Court did not spell out how to review admissions plans under the second prong and left this task to the Fifth Circuit. As such, all is in pause.

In the meantime, because the Court required that all litigated admissions plans must pass the narrowly tailored prong of strict scrutiny and how much deference an institution is afforded is in question, it opens the flood gates for denied applicants to question whether their denied admissions were due to an unconstitutional plan. In order to prove that its admissions plan is constitutional, an institution will have to show how other race-neutral alternatives will not achieve its goal of diversity. Institutional research data will be essential to make the case that not only has the institution explored race-neutral plans to achieve its goal, but also that the implementation of the practice attains the sufficient amount of racial diversity within its broader diversity aims. The College Board issued guidance after the *Fisher* decision to assist institutions in examining their internal admissions policies. Among the tips, they recommend that institutions review their admissions policies to determine if they can achieve their goals through the use of race-neutral plans, and if not, a good documentation of the review will be helpful when defending it. [FN77] In addition, institutions will need to collect institutional data and periodically review whether the need exists and persists. [FN78]

The *Fisher* decision may have allowed race-conscious policies to survive; however, it definitely places additional burdens on colleges and universities. In addition, the remand back to the Fifth Circuit has some predicting that the courts will make race-conscious admissions more difficult to justify. This is a cue for university administrators to explore race-neutral alternatives. [FN79]

The Implication of *Fisher* in Other Contexts

Although the *Fisher* decision has major implications for public universities, its outcome will likely have an impact on other areas as well. We next briefly examine what affects *Fisher* would have on K-12 education, private colleges and universities, and in hiring teachers and professors.

Implications to K-12 Education

In addition to the precedents set in cases like *Bakke*, *Grutter*, and *Gratz*, the Court in *Fisher* also followed reasoning from its split decision in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*. [FN80] While the previous cases, like *Fisher*, focused on the use of racial classifications in admission to institutions of higher education, at issue in *PICS* were student assignment plans designed to balance the racial compositions of K-12 public schools in Seattle and Louisville. [FN81] The following section will provide a brief background on *PICS*, as well as discussion of the Court's ruling in this case, leading to some insights on how the *PICS* ruling

factored into the *Fisher* opinion and, ultimately, to some potential implications of the *Fisher* ruling on K–12 educational contexts.

In *PICS*, the Court considered two similar cases together, where both plaintiffs alleged violations of their rights to equal protection under the Fourteenth Amendment resulting from student assignment plans that factored students' racial identities into their school placements. [FN82] In both cases, students were denied placements in their preferred public schools due to the school districts' use of racial classifications as they placed students, in order to achieve greater racial balance among schools. Seattle School District No. 1, one of the defendant districts, classified students as either white or nonwhite, while the Jefferson County Board of Education, the other defendant, classified students as black or “other.” While Seattle schools had no history of *de jure* segregation, the Louisville school district had been under a court–ordered desegregation decree until 2000, when it was determined that unitary status had been achieved. [FN83] The Ninth Circuit (Seattle) and the Sixth Circuit (Louisville) courts ruled in favor of the school districts, finding that the school districts' use of racial classifications in student assignment plans were narrowly tailored to meet a compelling interest in racial diversity. [FN84]

The Supreme Court, however, reversed and remanded the cases together in a plurality decision. The Court found the school districts' race–based student assignment plans to be unconstitutional for several reasons, focusing on whether the districts' means for achieving diversity were narrowly tailored to meet a compelling interest. [FN85] Justice Kennedy delivered the opinion as the swing vote, agreeing with Justices Roberts, Scalia, Thomas and Alito that the districts' placement plans for students based on race were not narrowly tailored, since race was not used as one of many factors in making these decisions (as in *Grutter*), but rather was the deciding factor. [FN86] Furthermore, they found that the school districts failed to consider race–neutral alternative means of achieving diversity, that there was no compelling interest in remedying *de jure* school segregation in either district, and that each school district relied on rather limited notions of diversity. [FN87] However, Justice *367 Kennedy also wrote in agreement with the four dissenting justices, Breyer, Stevens, Souter and Ginsburg, that public school districts do have compelling interests in enhancing diversity among schools and reducing racial isolation, and that they may consider other, less discriminatory methods to achieve these goals. [FN88]

The Court's ruling in *Fisher* follows the *PICS* decision by reiterating the notion that institutions of public education must consider workable race–neutral plans to achieve diversity among students and that any admissions policies that use a student's race as a factor for decision making must be narrowly tailored. The majority opinion in *Fisher*, also delivered by Justice Kennedy, echoes the reasoning from both *PICS* and *Grutter* that diversity among students does provide educational benefit, [FN89] but the *Fisher* decision further emphasizes that any process using racial classifications to enhance student body diversity will be subject to strict legal scrutiny and deference to determine the narrow tailoring prong is not proper. [FN90]

While the ruling in *Fisher* may have more direct implications for institutions of higher education, there still exists a potential for impact on student diversity efforts in K–12 public schools. In recognition of this potential, the National School Boards Association (NSBA) joined the College Board in submitting an amicus brief in support of the University of Texas and other defendants in the case. [FN91] The NSBA is a large nonprofit organization representing the interests of local school board members through its state associations, providing research and advocacy for public schools. The NSBA and the College Board were joined by eleven other organizations in this brief, including several more that represent the interests of K–12 leaders and educators, such as the American Association of School Administrators, the Council of Great City Schools, the National Association of Secondary School Principals, and the Public Education Network. The support from these kinds of organizations

demonstrates K–12 education leaders' concerns about how the *Fisher* decision could affect public schools' plans to increase or maintain student diversity.

As stated in this brief, racial and ethnic diversity continue to be important factors contributing to the quality of education in both K–12 and postsecondary settings. “[D]iversity not only contributes to the achievement of students, it also contributes positively to the development of citizenship traits, transmission of cultural norms, and growth of interpersonal and social skills that students will need to be productive and thriving citizens of a democratic nation.” [FN92] Recognizing the important role of diverse student populations in public schools, the brief urges the Court to uphold the University of Texas' use of racial classifications in the admissions process. This is based on the understanding, stemming from the decisions in *Bakke*, *Grutter*, *Gratz*, and particularly *PICS*, that limitations placed on race–conscious decision making in university admissions could render public school districts “unwilling to voluntarily explore avenues for diversity in their classrooms that could both diminish the harms of racial isolation and enhance the benefits of diversity for all students.” [FN93] Although the ruling in *Fisher* does not necessarily change the lens through which courts would examine K–12 school districts' policies aimed at promoting diversity, it may be advisable for education leaders to reexamine such policies to ensure that race–neutral alternatives were considered and that any plans employing racial classifications are narrowly tailored to meet a compelling interest.

The U.S. Department of Education's Office for Civil Rights has issued guidance for K–12 public schools on how to use racial considerations to achieve diversity in ways that will be consistent with the ruling in *PICS*. [FN94] These recommendations, published in 2011, use the *PICS* decision as a legal framework, and they generally will still apply with regard to the *Fisher* ruling, although it may be difficult for K–12 schools to craft narrowly tailored race–conscious policies that would withstand strict legal scrutiny. In concert with the opinions in both *PICS* and *Fisher*, the OCR guidance emphasizes the benefits of diversity in public education and the importance of minimizing racial isolation among schools. As echoed in the Court's rulings on this issue, the OCR suggests that schools and districts must consider race–neutral alternatives to achieve diversity before using racial classifications as factors in student placement and that race should not be used as the “defining feature” of a student for purposes of placement or admissions decisions. [FN95] Furthermore, it is suggested that school districts' diversity initiatives should be periodically reviewed, in order to ensure that processes and policies remain constitutionally sound. Ultimately, the recent ruling in *Fisher v. Texas* indicates that while public school districts should make efforts to promote student diversity and minimize racial isolation, the processes by which they do so are subject to strict legal scrutiny. Whether this decision will result in additional legal challenges to K–12 diversity plans and policies, such as that which occurred in *PICS*, will remain to be seen, but for now the legal framework used to analyze such cases remains the same.

Implications to Private Colleges and Universities

Private universities and colleges also will likely have paid close attention to the *Fisher* decision. Although the Equal Protection Clause would not apply to private universities because there is no state action involved, Title VI of the Civil Rights Act of 1964 requires that all institutions that receive federal funds not discriminate. The vast majority of private colleges and universities receive federal funds. In an amicus curiae brief submitted by 37 highly selective private universities in support of the University of Texas in the *Fisher* case, the private universities wrote that Title VI has an identical application to public and private institutions. [FN96] Their amicus brief cited two *369 U.S. Supreme Court decisions that applied Title IX of the Education Amendments of 1972, which was patterned on Title VI, to a private institution. [FN97] It is clear that the *Fisher* decision

would have an impact on private colleges and universities.

To illustrate, in 1996 private colleges and universities were affected by the Fifth Circuit's *Hopwood v. Texas*, which banned race-conscious admissions policies in Texas, Louisiana, and Mississippi. Even though this decision was focused on the University of Texas, its ban on affirmative action included private and public universities (e.g., Rice University) within the Fifth Circuit. If *Fisher* had been decided another way (e.g., overruling *Grutter*), private institutions throughout the U.S. might have been required to use race-neutral alternatives in assembling a diverse class. The amici argued that these 'alternatives' to race as touted by Abigail Fisher are "impracticable and illusory for smaller institutions." [FN98] Such an outcome would have had a dramatic effect on selective universities that have invested many resources in recruiting and admitting a diverse student body. Specifically, selective private schools share some similarities with other elite public schools in that each applicant is generally considered in a very holistic way, considering a wide array of factors. These institutions often have well-staffed admissions offices where each application is reviewed by multiple readers who have a discussion about the individual applicant.

In an amicus brief submitted by Columbia, Cornell, Georgetown, Rice and Vanderbilt on behalf of the University of Michigan in 2003 during the *Grutter* and *Gratz* litigation, the private universities stressed the need "to give a high level of deference to the good faith admissions decisions of public and private universities around the nation and the unconstitutional impact on academic freedom of any ruling failing to do so." [FN99] While university officials have been given some leeway after *Grutter* to utilize their professional judgment in university admissions decisions, *Fisher* seems to suggest that deference is by no means absolute. Specifically, the *Fisher* decision created a great amount of uncertainty with regard to deference among university administrators. To illustrate, the Court stressed that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." [FN100] As such, when the case was remanded to the Fifth Circuit in order to apply an appropriate strict scrutiny standard, it is clear that the University may no longer take the same approach it took in 2011, when the Fifth Circuit "presume[d] the University acted in good faith" and would not "second-guess the merits of the University's decision." [FN101]

*370 Private universities that consider race in admissions are most likely relieved that the Court upheld the central tenets in *Grutter*. Indeed, Kennedy repeatedly quoted the Court's language in both *Grutter* and *Bakke*, highlighting the important educational goals of diversity in higher education. As long as private institutions can demonstrate why race needs to be considered in a very holistic way (and race-neutral plans were not successful), they should be able to continue their very personalized approach to considering race as one of many factors in admissions. To be certain, private universities will watch what happens when *Fisher* is on remand with great interest. Further guidance from the Fifth Circuit will assist private universities in narrowly tailoring their admissions plans.

Implications for Hiring

The *Fisher* decision may have some implications in other important areas such as hiring university faculty and K-12 educators. After the *Grutter* decision, the Civil Rights Project issued the "Joint Statement of Constitutional Law Scholars," which argued for the diversity rationale in other contexts. It states:

Although the Supreme Court has yet to address the constitutionality of diversity-based affirmative action programs outside of higher education admissions, language in the *Grutter* decision reveals the Court's support

for the importance of diversity in other contexts, including K–12 education, as well as employment and business. The Court notes expressly that the benefits of affirmative action 'are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.' [FN102]

The statement contends that *Grutter* and *Gratz* suggest that promoting diversity in higher education may justify the use of race-conscious hiring policies when such plans are “carefully designed and consider race as part of a flexible and individualized review of all applicants.” [FN103]

While the Joint Statement of Scholars makes strong arguments, Title VII of the Civil Rights Act of 1964 creates an obstacle to considering race in hiring decisions. Title VII prohibits employers (with more than fifteen employees) from discriminating on the basis of race, color, religion, sex, or national origin in hiring. [FN104] However, under Title VII, Congress has permitted a Bona Fide Occupational Qualification (BFOQ) exception, which in rare instances, allows employers to discriminate and not violate Title VII. [FN105] The BFOQ is generally only permissible when it is considered reasonably *371 necessary for the normal operation of a business. Thus far, these rare instances have generally involved religion, sex, or national origin but not race. For example, if a university needed to hire a locker room attendant for the women's room, it would be permissible to hire only a female employee. Likewise, if a Catholic school wanted to hire only Catholic teachers, it would be permissible to do so.

Despite the fact that the Court has not recognized race as a BFOQ, some legal scholars have argued that race might be considered a recognized BFOQ. [FN106] Specifically, these scholars posit that it might still be permissible despite the narrow BFOQ exception. For example, Rebecca Hanner White suggests *Grutter* might allow for deference to an employer's consideration of race in hiring under the diversity rationale. [FN107] Of course, *Fisher's* discussion of deference casts doubt on this argument.

Also, related to race in hiring were arguments made on behalf of America's largest corporations, which addressed the importance of diversity in higher education in an amicus brief. [FN108] The brief highlighted that more diverse graduates will lead to greater diversity in the workplace. Specifically, during the *Grutter* and *Fisher* litigation major corporations made arguments that were included in amicus curiae briefs that diversity in the workforce is important to serving an international market and reaching racially and ethnically diverse communities. [FN109] In a brief filed by Fortune–100 Companies and other leading American Businesses in the *Fisher* case, the amici stressed that they are “directly affected by the admissions policies at UT and similar colleges and universities.” [FN110] They also argued for the importance of diversity in higher education as it relates to America's largest businesses. Many of these same arguments are applicable within hiring faculty and teachers. It remains to be seen how *Fisher* might be relied upon in future litigation involving the consideration of race in hiring.

Conclusion

Interestingly in *Fisher*, Justice Kennedy referred to the race-conscious policy upheld in *Grutter* as being “limited in time.” [FN111] Justice O'Connor mentioned in *Grutter* that these kinds of policies might not be needed a quarter decade later. However, the Court reviewed the *Fisher* case only ten years after *Grutter*. This caught the attention of many observers who worried *372 that the Supreme Court would overturn the consideration of diversity in admissions processes.

The Court, at least in the short term, upheld the central holding in *Grutter* that diversity is a compelling state interest. What remains uncertain is how the strict scrutiny issue will be resolved on remand because the Court failed to offer specific guidance on how a university might satisfy strict scrutiny when using a race-conscious plan. Is the Supreme Court trying to overturn race-conscious admissions without directly overturning *Grutter*? There is no doubt that the Court's remand makes it more difficult for higher education institutions to use race-conscious admissions without fearing litigation. While the lower court examines this question, university admissions officers around the country will indeed struggle to narrowly tailor their race-conscious admissions plans.

[FN1] The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 299 Ed.Law Rep. [355] (January 30, 2014).

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[FN3]. 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 [177 Ed.Law Rep. [801]] (2003).

[FN4]. See Suzanne E. Eckes, David H.K. Nguyen, & Jessica Ulm, *Fisher v. University of Texas: The Potential for Social Science Research in Race-Conscious Admissions*, 288 ED. LAW REP. 1 (2013). It should be noted that some attorneys do not believe the twenty-five year timeline is a binding rule and have argued that Justice O'Connor's suggestion is dicta or commentary in the opinion. See Washington Times, *Justice's '25 Years' Holds Potential for More Lawsuits* (June 24, 2003), <http://www.washingtontimes.com/news/2003/jun/24/20030624-102135-8209r/?page=all>.

[FN5]. See *id.*

[FN6]. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 [293 Ed.Law Rep. [588]] (2013).

[FN7]. *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 [250 Ed.Law Rep. [298]] (W.D. Tex. 2009).

[FN8]. See *Fisher*, 133 S.Ct. at 2420.

[FN9]. U.S. CONST. amend. XIV, § 1.

[FN10]. R. ROTUNDA & J. NOWAK, TREATISE CONSTITUTIONAL LAW § 18.2 at 208 (3d ed. 1999).

[FN11]. See generally, K. SULLIVAN & G. GUNTHER, CONSTITUTIONAL LAW (17th ed. 2010).

[FN12]. See *id.*

[FN13]. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

[FN14]. 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (“*Bakke*”).

[FN15]. *Id.* at 266.

[FN16]. See *id.*

[FN17]. Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go from Gratz and*

Grutter? 33 J.L. & Educ. 21, 23 (2004).

[FN16]. See *Bakke*, 438 U.S. at 277.

[FN17]. *Id.* at 320.

[FN18]. *Id.* at 313.

[FN19]. *Id.* at 318.

[FN20]. See, e.g., *Podberesky v. Kirwan* 38 F.3d 147 [95 Ed.Law Rep. [52]] (4th Cir. 1994) (finding that University of Maryland's scholarship program for African-American students was not narrowly tailored); *Hopwood v. Texas* 78 F.3d 932 [107 Ed.Law Rep. [552]] (5th Cir. 1996) (finding university's race-conscious admissions policy unconstitutional); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 [149 Ed.Law Rep. [347]] (9th Cir. 2000) (upholding university's race-conscious admissions policy); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 [156 Ed.Law Rep. [829]] (11th Cir. 2001) (finding university's race-conscious admissions policy unconstitutional).

[FN21]. See *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 [177 Ed.Law Rep. [801]] (2003).

[FN22]. *Id.* at 325 (citing *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

[FN23]. *Id.* at 312.

[FN24]. *Id.* at 320–25.

[FN25]. *Id.*

[FN26]. See *id.* at 339.

[FN27]. See *id.* at 340.

[FN28]. *Id.*

[FN29]. See Eckes, *supra* note 15.

[FN30]. See *Grutter*, 539 U.S. at 344–347.

[FN31]. *Id.*

[FN32]. See *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 [177 Ed.Law Rep. [851]] (2003)

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[FN33]. *Id.* at 250–60.

[FN34]. See *Grutter*, 539 U.S. at 327.

[FN35]. *Id.* at 328.

[FN36]. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2413, 133 S.Ct. 2411 [293 Ed.Law Rep. [588]] (2013)

[FN37]. **Tex.** Educ.Code Ann. § 51.803 (West 2009) (“**Texas** Top Ten Percent Law”).

[FN38]. *See Fisher*, 133 S.Ct. at 2413.

[FN39]. *See id.*

[FN40]. *See id.*

[FN41]. *Id.* at 2415.

[FN42]. *Hopwood v. Tex.*, 78 F.3d 932 [107 Ed.Law Rep. [552]] (5th Cir. 1996).

[FN43]. **Tex.** Educ. Code Ann. § 51.803 (West 2009).

[FN44]. **Tex.** Educ. Code Ann. § 51.805 (West 2009).

[FN45]. *See Fisher*, 133 S. Ct. at 2416.

[FN46]. *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 [250 Ed.Law Rep. [298]] (W.D. **Tex.** 2009).

[FN47]. *See id.*

[FN48]. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 [264 Ed.Law Rep. [564]] (5th Cir. 2011).

[FN49]. *Fisher*, 133 S.Ct. 2411.

[FN50]. *Id.* at 2417.

[FN51]. *Id.*

[FN52]. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

[FN53]. *Fisher*, 133 S.Ct. 2411.

[FN54]. *See id.*

[FN55]. *See id.*

[FN56]. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 [264 Ed.Law Rep. [564]] (5th Cir. 2011).

[FN57]. *Fisher*, 133 S.Ct. 2411.

[FN58]. *Id.*

[FN59]. *Id.* at 2413.

[FN60]. *Id.* at 2422–2433.

[FN61]. *Id.* at 2433–2435.

[FN62]. *Id.* at 2433.

[FN63]. *Id.*

[FN64]. Lyle Denniston, Next Round in **Fisher** Case, SCOTUSBLOG (Sep. 12, 2013), <http://www.scotusblog.com/2013/09/next-round-in-fisher-case/>

[FN65]. *Id.* at 2421.

[FN66]. *Id.* at 2419.

[FN67]. *Id.*

[FN68]. *Id.*

[FN69]. *Id.* at 2421.

[FN70]. *Id.* at 2420.

[FN71]. *Id.* at 2421.

[FN72]. *Id.* at 2432–2434.

[FN73]. Clark D. Cunningham, Glenn C. Loury, and John David Skrentny, *Passing Strict Scrutiny: Using Social Science To Design Affirmative Action Programs*, 90 GEO. L. J. 835 (2002).

[FN74]. *Id.* at 838.

[FN75]. 78 F.3d 932, 950 [107 Ed.Law Rep. [552]] (5th Cir. 1996).

[FN76]. *See* Cunningham, *supra* note 73 at 837–838.

[FN77]. *Understanding Fisher v. University of Texas: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say About Diversity and the Use of Race and Ethnicity in College Admissions*, (College Board, New York, N.Y.), July 9, 2013, <https://diversitycolaborative.collegeboard.org/sites/default/files/document-library/diversity-collaborative-understanding-fisher.pdf>.

[FN78]. *Id.*

[FN79]. *See* T.K. Daniel & Scott Greytak, *Requiem for Affirmative Action in Higher Education: Case Analysis Leading to Fisher v. University of Texas at Austin*, 274 ED. LAW REP. 539 (2012).

[FN80]. 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 [220 Ed.Law Rep. [84]] (2007).

[FN81]. *See id.*

[FN82]. *See id.*

[FN83]. *See id.*

[FN84]. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162 [202 Ed. Law Rep. [549]] (9th Cir. 2005), *McFarland v. Jefferson Cnty. Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005).

[FN85]. *Parents Involved*, 551 U.S. 701.

[FN86]. *Id.* at 719.

[FN87]. *Id.* at 723.

[FN88]. *Id.* at 788.

[FN89]. *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2414 [293 Ed.Law Rep. [588]] (2013) (citing *Bakke*, 438 U.S. at 287).

[FN90]. *Id.*

[FN91]. Brief for The College Board and the National School Boards Association, et al. as Amici Curiae Supporting Respondents, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) (No. 11–345).

[FN92]. *Id.* at 7.

[FN93]. *Id.* at 36.

[FN94]. *Guidance on the voluntary use of race to achieve diversity and avoid racial isolation in elementary and secondary schools*, (U.S. Department of Education, Office for Civil Rights), 2011, <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html>.

[FN95]. *See id.*

[FN96]. *See* Brief for Amherst College et al. as Amici Curiae Supporting Respondent, *Fisher v. Univ. of Tex.*, 133 S.Ct. 2411, 186 L.Ed.2d 474 [293 Ed.Law Rep. [588]] (2013) (No. 11–345).

[FN97]. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1978); *Grove City Coll. v. Bell*, 465 U.S. 555, 566–67, 104 S.Ct. 1211, 79 L.Ed.2d 516 [15 Ed.Law Rep. [1079]] (1984).

[FN98]. Brief for the Respondent, *supra* note 96, at 2.

[FN99]. Brief of Amici Curiae of Brown Univ. et al. as Amici Curiae Supporting Respondent, *Fisher v. Univ. of Tex.*, 133 S.Ct. 2411, 186 L.Ed.2d 474 [293 Ed.Law Rep. [588]] (2013) (No. 11–345).

[FN100]. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420, 186 L.Ed.2d 474 [293 Ed.Law Rep. [588]] (2013).

[FN101]. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 [264 Ed.Law Rep. [564]] (5th Cir. **Tex.** 2011).

[FN102]. Civil Rights Project, *Joint Statement of Constitutional Law Scholars*, <http://civilrightsproject.ucla.edu/legal-developments/court-decisions/joint-statement-of-constitutional-law-scholars>.

[FN103]. *Id.*

[FN104]. For additional information on the consideration of race in employment decisions, see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 [32 Ed.Law Rep. [20]] (1989); *Taxman v. Board of Educ. of the Twp. of Piscataway*, 91 F.3d 1547 [111 Ed.Law Rep. [696]] (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, 117 S.Ct. 2506, 138 L.Ed.2d 1010 [122 Ed.Law Rep. [389]] (1997), *cert. dismissed*, 522 U.S. 1010, 118 S.Ct. 595, 139 L.Ed.2d 431 [122 Ed.Law Rep. [570]] (1997).

[FN105]. See 42 U.S.C. § 2000e–2(e) (2013).

[FN106]. See Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385 (2003) (arguing for a “prevention justification” under Title VII).

[FN107]. Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263 (2003); see also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1036, 1111–15 (2006) (positing that the consideration of race could be permissible under both the U.S. Constitution and Title VII).

[FN108]. Brief for Amici Curiae of Fortune–100 and Other Leading American Businesses Supporting Respondent, *Fisher v. Univ. of Tex.*, 133 S.Ct. 2411, 186 L.Ed.2d 474 [293 Ed.Law Rep. [588]] (2013) (No. 11–345).

[FN109]. *Id.*

[FN110]. *Id.* at 2.

[FN111]. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422, 186 L.Ed.2d 474 [293 Ed.Law Rep. [588]] (2013).

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