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MEMORANDUM

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TO School District Clients and Friends

FROM Maree Sneed
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SUBJECT **Supreme Court Decides *Fisher v. University of Texas at Austin***

On June 24, in a highly anticipated ruling, the Supreme Court held in *Fisher v. University of Texas at Austin* that the University of Texas must affirmatively demonstrate that its consideration of race in admissions is necessary to achieve the educational benefits of diversity. The decision's impact on K-12 education is uncertain. The majority opinion is narrower than many had expected, and it leaves existing doctrine largely intact. At the same time, the Court's emphasis on defendants' burden of proof and searching judicial review signals that future defense of race-conscious policies will require a substantial evidentiary showing. The decision ultimately may lead to greater judicial scrutiny of race-conscious measures in both higher education and K-12 education.

In *Fisher*, the Court elaborated on the requirements set forth in its 2003 *Grutter v. Bollinger* and *Gratz v. Bollinger* rulings concerning race-conscious admissions at the University of Michigan. The petitioner in *Fisher*, a white applicant denied admission to the University of Texas, challenged UT's consideration of race to attain additional diversity above that achieved by the Texas Ten Percent Law, which guarantees admission to students who graduate in the top ten percent of their high school class. The University asserted that it needed to consider race to achieve the "critical mass" of minority students that produces the educational benefits that flow from a diverse student body. In an opinion by Justice Kennedy and joined by the Chief Justice and Justices Alito, Breyer, Scalia, Sotomayor, and Thomas, the Court considered the University of Texas's implementation of its race-conscious admissions policy.

The Court began its inquiry by taking *Grutter* and *Gratz* "as given," noting that the petitioner had not urged it to overrule those cases. It then asked whether the University was using race to pursue a compelling governmental interest. On this question, the Court deferred to the University's judgment that attainment of a diverse student body is essential to the University's educational mission. Diversity, in other words, remains a compelling interest for institutions of higher education.

Moving to narrow tailoring, the Court underscored the burden of proof. The University bears the burden to demonstrate that the means used to attain diversity are narrowly tailored and "receives no deference" on this issue. Although a court may "take account of a university's experience and expertise in adopting or rejecting certain admissions processes," it remains "at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine," that narrow tailoring is satisfied.

While the Court noted that, under *Grutter* and *Gratz*, narrow tailoring demands that each applicant be "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," the Court did not discuss this aspect of the test. Instead, it focused on a second requirement: The use of race must be "'necessary' to achieve the educational benefits of diversity." That component of narrow tailoring requires the institution to prove, and the court independently to "verify," that "sufficient diversity" cannot be achieved without using racial classifications. Universities need not exhaust "every *conceivable* race-neutral alternative." But they must give "serious, good-faith consideration [to] workable race-neutral alternatives." Before sanctioning a race-conscious admissions policy, a court must be "satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."

On this question, the Court appears to have left some room for lower courts to exercise judgment. Courts comparing potential admissions processes must ask whether race-neutral means would achieve the educational benefits of diversity "about as well" as race-conscious means, at "tolerable administrative expense." If so, then the university "may not consider race." Strict scrutiny "imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, race-neutral alternatives do not suffice."

Rather than applying these principles to the facts before it, the Court vacated the judgment and remanded "so that the admissions process can be considered and judged under a correct analysis." The lower courts, it said, had unduly deferred to the University of Texas's good faith. Instead of accepting the University's word that it uses race in a permissible way, the courts should have given "close analysis to the evidence of how the process works in practice." That lapse, in the majority's view, undermined the court of appeals' judgment.

Fisher focuses on higher education and does not directly address the obligations of school districts. The decision's impact on K-12 education therefore may not come into full focus for some time. A few preliminary observations are still possible. First, the Supreme Court's analysis in *Fisher* appears to be consistent with *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007), and the federal government's 2011 Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools. The basic framework for judging the legality of race-conscious measures does not appear to have changed. Measures that were previously subject to strict scrutiny will likely continue to be subject to strict scrutiny; and measures that were not subject to strict scrutiny will likely remain exempt.

Second, the Supreme Court's close attention to burdens of proof suggests that universities must be prepared to offer evidence demonstrating that they considered the available race-neutral means of attaining the educational benefits of diversity, and that none of those alternative means would work "about as well" as race-conscious means. School districts that use race-based classifications may be subject to a similar burden. An institution that anticipates litigation over its policies should be prepared to submit enough documentary and testimonial evidence to satisfy a court that no available, workable race-neutral alternatives would achieve its goals "about as well" as race-conscious means.

We are available to respond to questions.

If you have any questions about the *Fisher* decision, please do not hesitate to contact Maree Sneed (maree.sneed@hoganlovells.com or 202-637-6416) or David Ginn (david.ginn@hoganlovells.com or 202- 637- 5797).