

UC Legal – Office of the General Counsel

TO THE REGENTS OF THE UNIVERSITY OF CALIFORNIA:

ACTION ITEM

For Meeting of September 17, 2020

ADOPTION OF REGENTS POLICY PROHIBITING USE OF QUOTAS AND CAPS IN UNIVERSITY CONTRACTING, EMPLOYMENT AND ADMISSIONS

EXECUTIVE SUMMARY

This is the second of two items planned by the University’s Provost and General Counsel to provide the Regents with an overview of the context for the University’s diversity efforts within the constraints of Proposition 209, the potential impact on those efforts if Proposition 16 were to be approved by the voters, and the significant limitations that would continue to exist under the federal and State Constitutions and federal and State statutes with regard to race and gender-conscious measures, even if Proposition 16 were to pass and result in the repeal of Proposition 209. This item seeks approval of a new Regents policy prohibiting the use of racial or gender quotas that impose a fixed number that must be attained, or caps that cannot be exceeded, in University admissions, contracting, and employment. The policy would be effective regardless of whether California voters approve Proposition 16 in the November 2020 election.

RECOMMENDATION

The President of the University recommends that the Board of Regents adopt Regents Policy Prohibiting Use of Quotas and Caps in University Contracting, Employment and Admissions as shown in Attachment 1.

BACKGROUND

Proposition 16 is a constitutional amendment on the November 2020 ballot that would repeal Article I, Section 31 of the California State Constitution, passed in 1996 as Proposition 209. Proposition 209 prohibits discrimination and preferential treatment in public employment, public education, and public contracting on account of a person’s or group’s race, sex, color, ethnicity, or national origin. Proposition 209 banned the use of policies involving race or gender-conscious preferences in California. If Proposition 16 passes and repeals Proposition 209, the University of California—within the limits of the federal and State Constitutions and federal and State statutes—would be free to consider, develop and use race or gender-conscious policies in admissions, employment, and public contracting.

Under the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964,¹ government entities' use of race-conscious policies in admissions, employment, and public contracting are subject to "strict scrutiny", the most rigorous standard of judicial review. To meet the strict scrutiny standard, the program must serve a compelling governmental interest and must be narrowly tailored to further that interest. Perhaps the clearest violation of the requirement that a policy be narrowly tailored is the use of strict racial quotas. This federal ban on strict quotas similarly precludes the use of unlawful numerical goals and rigid set-asides in admissions, employment and public contracting. Federal law also addresses certain gender-conscious policies under "intermediate scrutiny", which requires that the policy be substantially related to an important government interest. The policy proposed here reaffirms that any efforts by the University to revise its admissions, contracting, or employment processes shall be carried out in accordance with federal and State Constitutions and federal and State statutes² and shall not include quotas that impose a fixed number which must be attained or caps that cannot be exceeded.³

Admissions

The Supreme Court has decided numerous cases involving the use of race-conscious admissions practices in higher education, holding that such policies are subject to the most rigorous type of judicial review—"strict scrutiny."⁴ (Strict scrutiny should not apply to policies and practices that are "race-neutral".)

For a university to meet the strict scrutiny test in the context of admissions practices, it must establish:

A compelling interest, which is a fundamental and significant objective that must be established in order to warrant maintaining lawful race-conscious programs that confer opportunities or benefits to students. Federal courts have recognized a limited number of interests that can be sufficiently compelling to justify the consideration of race or ethnicity in a higher education setting, including a university's mission-based interest in promoting the educational benefits of diversity among its students. In *Fisher v. Univ. of Tex. (Fisher II)*, the Supreme Court indicated that courts should defer, though not completely, to a

¹ The Fourteenth Amendment prohibits any state actor, including public institutions of higher education, from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. Title VI prohibits discrimination on the basis of race or ethnicity "under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

² For example, Title VI, Title VII, Title IX, Constitution of the State of California 1879 Art. I, § 7; Cal. Pub. Contract Code §§ 10500.5, 10501, and 10508.5, California Fair Employment and Housing Act.

³ See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989); *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616 (1987).

⁴ *Richmond*, 488 U.S. at 551 (Marshall, J., dissenting) ("Today, for the first time, a majority of the Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures."). See also *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 309-10 (2013) (citing *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) for the proposition that "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny").

university's academic decision to create an admissions policy aimed at pursuing the educational benefits that flow from diversity in the student body.⁵

Narrow tailoring, which refers to the requirement that the means used to achieve the compelling interest “fit” that interest precisely, with race or ethnicity considered only in the most limited manner possible to achieve compelling goals. Federal courts examine several interrelated criteria to determine whether a given program is narrowly tailored, including: necessity of using race or ethnicity, flexibility of the program, burden imposed on non-beneficiaries of the racial/ethnic consideration, and whether the policy has an end point and is subject to periodic review.⁶ With regard to necessity, a university must demonstrate that its use of race is necessary, in other words, that no “workable race-neutral alternatives would produce the educational benefits of diversity.”⁷ In *Fisher II*, for example, the Supreme Court found that the University of Texas (UT) at Austin met this standard by “conduct[ing] months of study and deliberation, including retreats, interviews, [and] review of data” before implementing race-conscious policies.⁸ The Supreme Court also noted UT’s use of “broad demographic data,” nuanced quantitative classroom data, and evidence that minority students admitted prior to the implementation of its present undergraduate admissions policy “experienced feelings of loneliness and isolation.”⁹

Finally, the Supreme Court has stressed that universities have a “continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances.”¹⁰ UT must continue to use the data it collects to “scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the race-conscious measures it deems necessary.”¹¹

Relatedly, the Supreme Court analyzes gender-conscious policies under intermediate, as opposed to strict scrutiny. Intermediate scrutiny requires that the policy be substantially related to an important government interest. The Supreme Court’s opinions in *United States v. Virginia* (“*VMP*”)¹² and *Mississippi University for Women v. Hogan*¹³ provide a framework to analyze colleges’ use of gender in admissions decisions. These opinions emphasize the need to conduct a searching judicial inquiry of the school’s asserted goal to ensure that the rationale does not rely on stereotypes about the capabilities of males and females.

Employment

Under federal law, including the Equal Protection Clause of the U.S. Constitution and Title VII of the Civil Rights Act of 1964, as amended, employers are prohibited from making employment

⁵ *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2208 (2016).

⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 538 U.S. 244 (2003)

⁷ *Fisher II* at 2218.

⁸ *Fisher II* at 2211.

⁹ *Fisher II* at 2212.

¹⁰ *Fisher II* at 2203.

¹¹ *Fisher II* at 2215.

¹² 518 U.S. 515 (1996).

¹³ 458 U.S. 718 (1982).

decisions because of an individual's race, color, national origin, or sex. Therefore, it is generally illegal to give an applicant or employee an advantage solely because of the applicant's race or gender. In certain limited cases, however, employers can adopt voluntary affirmative action programs to remedy the employer's past discrimination.

Under *United Steelworkers v. Weber*,¹⁴ *Johnson v. Transportation Agency, Santa Clara County, Cal.*,¹⁵ and their progeny, courts will consider five main factors in assessing the legality of an employer's voluntary, remedial affirmative action program:

1. they must be necessary to alleviate a manifest imbalance in a traditionally segregated job category,
2. they must be temporary and end when the goals have been met,
3. they must be flexible instead of imposing a rigid quota,
4. they must bear a reasonable relationship to the composition of the relevant labor market, and
5. they must not place an undue burden on individuals not benefited by the plan.

In order to avoid liability under employment discrimination laws for race-conscious employment policies, an employer first must show a history of racial segregation by that employer. In *City of Richmond v. J.A. Croson*, the Supreme Court held that "a generalized assertion that there has been past discrimination in an entire industry"¹⁶ is not particularized enough to meet a similar requirement. Only if an employer meets all of these requirements can it adopt remedial workplace race-conscious policies.

Federal contractors including the University may be subject to regulations administered by the U.S. Department of Labor's Office of Federal Contract Compliance Programs, which require such employers, *inter alia*, to prepare affirmative action plans that analyze how well they utilize racial and ethnic minorities and women and take affirmative steps to recruit and advance qualified minorities, women, persons with disabilities, and covered veterans. Such steps include training programs, outreach efforts, and other proactive efforts, but OFCCP regulations do not require or permit the use of race or gender in the making of specific employment decisions.

Public Contracting

The use of race and gender-conscious programs in public contracting are subject to the strict scrutiny test under the U.S. Constitution. The Supreme Court decision in *Croson* also governs public contracting. *Croson* and its progeny allow public entities to use race and gender-conscious measures in the award of public contracts only to the extent such measures serve a compelling governmental interest, and are narrowly tailored to advance that interest.

¹⁴ 433 U.S. 193 (1979).

¹⁵ 480 U.S. 616 (1987).

¹⁶ *Croson* at 498.

In *Croson*, the Supreme Court held that a mandatory set-aside for minority subcontractors violated the equal protection clause because there was no direct evidence of past discrimination on the part of the city, but also recognized that some forms of “narrowly tailored racial preference” might be necessary to remedy past actions of “deliberate exclusion” by the contracting entity. The Supreme Court recognized that governments have a compelling interest in “assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”¹⁷

Conclusion

Under federal law, a governmental entity’s use of race-conscious policies in admissions, employment, and public contracting are subject to “strict scrutiny”, a particularly searching form of judicial review. Although the passage of Proposition 16 would afford the University additional flexibility to consider and potentially implement race and gender-conscious measures, the University will continue to be subject to federal and State Constitutions and federal and State statutes requiring a showing that any race-conscious policies serve a compelling governmental interest and are narrowly tailored to further that interest and any gender-conscious policies are substantially related to an important government interest. Efforts to use race-conscious quotas that impose a fixed number that must be attained, or caps that cannot be exceeded,¹⁸ in admissions, employment, or contracting repeatedly have been struck down by the courts, and any such efforts by the University likely would suffer the same fate. It is prudent that the University acknowledge and reaffirm this reality and adopt the proposed Regents Policy Prohibiting Use of Quotas and Caps in University Contracting, Employment and Admissions, in the form as shown in Attachment 1.

Attachment: [Policy Prohibiting Use of Quotas and Caps in University Contracting, Employment and Admissions](#)

¹⁷ *Croson* at 469.

¹⁸ See generally *Grutter*; *Croson*; *Johnson*.