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Supreme Court Overturns Affirmative Action Precedent in Higher Education

Law and the Workplace on **June 29, 2023**

On June 29, 2023, the U.S. Supreme Court held in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199 (June 29, 2023), that the race-conscious admissions programs at one public and one private institution covered by Title VI of the Civil Rights Act violated the Equal Protection Clause of the Fourteenth Amendment. In a 6-3 decision, the Court held that the "race-based" admission systems used by the university-respondents – Harvard College ("Harvard") and the University of North Carolina ("U.N.C.") – were unlawful because, under the Court's prior decision in *Grutter v. Bollinger,* 539 U.S. 306 (2003) they: (i) did not have "sufficiently focused and measurable objectives warranting the use of race," (ii) used race as a "negative" or a "stereotype," and (iii) did not have clear durational endpoints.

Under the Court's precedent in *Grutter*, race may be considered as a factor in college admissions decisions if: (i) the use of race is narrowly tailored to achieve a compelling interest; and, (ii) race is meaningfully and holistically evaluated among other admissions factors. In *Students for Fair Admissions*, the Court held that Harvard and U.N.C. failed to satisfy their burden to "operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under… strict scrutiny." The university-respondents described their goals in considering race to include, among other things, "training future leaders in the public and private sectors," "producing new knowledge stemming from diverse outlooks," and "promoting the robust exchange of ideas," all of which the Court held, while commendable goals, were not compelling or narrowly-tailored enough to withstand a strict scrutiny review because "it is unclear how courts are supposed to measure any of these goals" and it would be difficult for courts to determine when those goals have been achieved and racial admissions decisions are unnecessary.

The Court found that the universities' admissions programs "fail to articulate a meaningful connection between" the methods they use to advance diversity and to "avoid the underrepresentation of minority groups," and their goal of achieving the educational benefits of diversity. Specifically, the Court found that the racial categories used to measure the composition of classes – Asian, Native Hawaiian or Pacific Islander, Hispanic, White, African American, Native American – were imprecise (*e.g.*, by being overbroad, arbitrary or undefined) and/or underinclusive. Because of "the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use."

In addition, the Court held that the university-respondents' admission systems did not "comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." In so holding, the Court explained that "college admissions are zero-sum" because a "benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." The Court also observed that using race as a "plus factor," alone, constituted stereotyping in contravention of the Equal Protection Clause.

Finally, the Court held that the university-respondents' admission programs violated the Equal Protection Clause because they "lack a 'logical end point.'" The Court explained that maintaining a race-based college admissions program that ends only once a certain level or percentage of diversity is achieved amounts to unlawful racial balancing under the Equal Protection Clause.

While the majority opinion found that respondents' race-based admissions programs were unlawful, it also noted that the Court's opinion should not "be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." That is, according to the opinion, a benefit can be given "to a student who overcame racial discrimination, for example" if the benefit is "tied to *that student's* courage and determination" and not solely on the basis of race.

In a concurring opinion, Justice Clarence Thomas contended that the Fourteenth Amendment has historically been a "colorblind" provision that prohibits differential treatment based on race. In a separate concurring opinion, to which Justice Thomas also joined, Justice Gorsuch argued that Title VI explicitly "prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin," regardless of the motive for such differential treatment.

Dissenting, Justice Sonia Sotomayor contended that the ratifiers of the Fourteenth Amendment understood the Equal Protection Clause to "permit[] consideration of race to achieve its goal." Justice Sotomayor argued that the Fourteenth Amendment was specifically enacted by Congress alongside "a number of race-conscious laws to fulfill the Amendment's promise of equality," and the law therefore allows for race-based admissions programs in order to achieve the compelling interest of a diverse student body.

Also dissenting, Justice Ketanji Brown Jackson maintained that because race has played a role in several legal regimes that have historically disadvantaged Black people, allowing colleges and universities to "consider race as one of many factors" is necessary in order to treat applicants on an equal basis, in light of the "historical privileges and disadvantages that each [applicant] was born with."

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While this decision arises in the context of Title VI of the Civil Rights Act (which applies to educational institutions that receive federal funding) and the Fourteenth Amendment (which applies to government actors), and therefore does not directly affect private employers, the impact, if any, that it will have on employers and employees remains to be seen. On that point, shortly after the decision was published, EEOC Chair Charlotte A. Burrows issued a statement affirming that private employers' DEI programs will not be impacted by the decision. Chair Burrows' states that the decision:

> "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

We will, of course, continue to monitor developments in this area, including whether, and how, those developments may impact workplaces in the future.

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