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Insights

U.S. Supreme Court Holds Race-Conscious Admissions Processes Unconstitutional

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On June 29, 2023, the U.S. Supreme Court ruled in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admission v. University of North Carolina* that the use of race as a factor in college admissions violates the United States Constitution. In 6-2 and 6-3 decisions, the Court held that the affirmative action admissions policies of Harvard College ("Harvard") and University of North Carolina ("UNC") violate the Equal Protection Clause of the Fourteenth Amendment[1] (collectively "Decision"). Though addressing the admission policies at Harvard and UNC, this decision will reach throughout institutions of higher education and likely into other areas where race has influenced the decision process. We offer some background on this case and some suggested steps education institutions and other impacted organizations should consider.

I. The Decision

Based on Supreme Court precedent established before the Decision, race discrimination is unconstitutional unless it satisfies a standard known as "strict scrutiny." To satisfy this standard, the discrimination must be "narrowly tailored" to effectuate a "compelling government interest." Historically, the Court held that factoring race directly into admissions decisions met this high threshold. In fact, the Decision does not overturn the precedent in *Grutter v. Bollinger*.[2] However, the Court noted that for the *Grutter* Court, the consideration of race in college admissions must have an end point and predicted that the necessity of such considerations would conclude within 25 years. In the Decision, the Court noted that it is now "(t)wenty years later, (and) no end is in sight." The Court found that neither UNC nor Harvard had any insight into when their race-based admissions programs would end and that these programs did not have a "logical end point."

The Court ruled in the Decision that although UNC and Harvard had "well intentioned" and "good faith" admissions systems, the manners by which UNC and Harvard incorporated race in admissions decisions were not narrowly tailored, nor did such practices – even if narrowly tailored – further a compelling government interest. The Court found that the UNC and Harvard admission programs failed to "articulate a meaningful connection between the means they employ and the goals they pursue." In finding the use of race insufficiently tailored, the Court described the racial classifications as simultaneously over and underinclusive. The classifications were overinclusive, for example, by straightforwardly classifying all Asian applicants as Asian instead of respecting regional and cultural differences. The Court found it unreasonable to assume that Iraqi and Chinese applicants contribute similarly towards a school objective because they are both Asian. In finding the classifications underinclusive as well, the Court noted the school policies adopted by Harvard and UNC would favor a 15% Latino population over a 10% Latino population, even if students in the 15% were all from Mexico and students in the 10% were from 10 different countries. These characteristics, in the view of the Court, rendered the schools' methodology insufficiently tailored to achieve their stated purpose. Further, with respect to that purpose, the Court found that, while "plainly worthy," the various interests at play (including training future leaders in cross-racial understanding, and enhancing respect, among other educational benefits) were too "vague and immeasurable" to constitute compelling government interests.

The Court found that, though the Equal Protection Clause commands that race may never be used as a "negative" to disadvantage a category of applicants, the way in which Harvard was considering race in admissions actually led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. The race-based admissions programs of both UNC and Harvard give some students preferred status on the basis of their race alone, thus disadvantaging persons of another race or ethnicity. The Court explained that "[t]he entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play violin poorly or well."

The Decision does not preclude consideration of race in all circumstances. The majority opinion by Chief Justice Roberts acknowledged that the impact of an applicant's personal experiences with racial issues could be considered as part of that person's application. Also, the Court did not explicitly overrule its prior precedents about affirmative action, such as the *Grutter* case, though Justice Thomas (in a concurring opinion) noted that *Grutter* "is, for all intents and purposes, overruled." By not overruling the earlier precedents, a carefully structured admissions policy might still be able to satisfy the "strict scrutiny" standard followed by the Court, even though the policies at Harvard and UNC failed to do just that.

II. Potential Impacts to Educational Institutions

Based on the Decision, educational institutions are now, as a practical matter, prohibited from including race (and proxies for race) as a basis for admission. However, specific qualities, experiences, and other attributes associated with an applicant's race may still be considered as a basis of admission. For example, awarding admission to a Hispanic student because he or she, as part of their personal story, "overcame racial discrimination" can be constitutionally sound, while basing admission – even in part – on the fact that the applicant is Hispanic is unconstitutional. The Court specifically explained that "nothing in the opinion should 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."

Until now, many educational institutions relied on race-conscious admissions to achieve diversity objectives for their student bodies as part of a belief that diversity is a worthy goal. The loss of race-based affirmative action will affect those institutions and those students admitted on this basis. Educational institutions with few seats and high selectivity will particularly feel their pursuit of diversity hamstrung by the elimination of race-conscious admissions.

Thus, education institutions should take the following steps:

1. Carefully examine their own admissions programs to determine whether any consideration of race is conducted in a manner that falls within the exceptions recognized in the Decision – for example, allowing consideration of how an applicant indicates that race has impacted his or her life but not basing admission decisions on the race of that applicant.

2. Carefully examine their scholarship decision process to determine whether their decision matrix uses race as a consideration and if so whether such processes are similarly tailored.

3. Target diversity in their admissions decisions through other methods such as questions or essays about an applicant's personal successes, hardships, experiences, and perspectives, including the impact of race on those personal experiences.

4. Solicit applications from a diverse applicant pool, including considering an applicant's generational status as a college student and socioeconomic status.

5. Prepare messaging to students regarding the educational institution's Diversity, Equity and Inclusion (DEI) initiatives and how the institution plans to move forward in promoting DEI as an institution.

The struggle to influence the admission policies of education institutions will not end with the Decision. A group of civil rights organizations filed a complaint on July 3, 2023 with the Department of Education against Harvard's policy of giving preferential treatment to legacy applicants. In response to the Decision, the Biden administration, based on statements from Education Secretary Miguel Cardona, will provide standards for admissions policies that will achieve diversity initiatives. Education institutions may need to work differently and harder than before the

Decision, but diversity initiatives are still viable.

It is important that educational institutions understand their policies and ensure that they satisfy the requirements of the Equal Protection Clause. If your educational institution has questions or concerns about how the Decision affects your institution, please contact **Elizabeth M. Roberson**, **Deborah J. Daniels**, **Robert A. Greising**, or another one of our Education and School Law Professionals, for assistance.

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[1] *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*, No. 20-1199; *Students for Fair Admissions, Inc. v. Univ. of North Carolina, et al.*, No. 21-707.

[2] 539 U.S. 306 (2003).