Updates

On June 29, 2023, the U.S. Supreme Court issued its landmark decision in two cases challenging universities' consideration of race as a factor in student admissions: *Students for Fair Admissions v. President and Fellows of Harvard College*; and *Students for Fair Admissions v. University of North Carolina*. By a 6-3 vote, the Court determined that the admissions programs at Harvard and the University of North Carolina violated the Fourteenth Amendment by giving weight to students' race.

The decision will affect admissions policies at higher education institutions across the country, both public and private. Chief Justice Roberts wrote the opinion for the majority, stressing the need for colleges and universities to use race-neutral criteria to make admissions decisions. And while the majority's opinion was expressly limited to the university setting, the decision also has potential implications for private entities in a landscape where diversity and equity have become a cultural focus.

In this Update, we build on our prior Update by explaining the decision and answering some of the pressing questions that it raises moving forward.

What aspects of Harvard's and UNC's admissions policies did the Court take issue with?

In its decision, the Court found that UNC's use of race as a factor in its admissions policies violated the Fourteenth Amendment's Equal Protection Clause, and Harvard similarly violated Title VI of the Civil Rights Act of 1964. (The Court has long interpreted Title VI's anti-discrimination requirement to be co-extensive with the requirements of the Equal Protection Clause, and the Court in *Harvard* declined to alter that interpretation). The Court framed its analysis by stating that the "core purpose" of the Equal Protection Clause was to eliminate "all governmentally imposed discrimination based on race." And on that understanding of the Equal Protection Clause, *any* government consideration of race must satisfy a searching review standard known as "strict scrutiny." The Court ultimately concluded that the universities had "fallen short" in demonstrating that their consideration of race in admissions policies both: (1) served a compelling governmental purpose, and (2) were narrowly tailored to achieve that interest.

The Court took particular issue with the universities' justifications for their use of race as a factor in admissions, which the Court found to lack measurability. The Court stated that although the educational benefits of a diverse student body—such as preparing students to enter a pluralistic society and enriching students' learning experiences—were "commendable goals," those objectives were not "sufficiently coherent for purposes of strict scrutiny."

The Court further held that the universities' consideration of race in their admissions programs amounted to impermissible negative racial stereotyping. The Court reasoned that, by grounding admissions policies in racial considerations, the universities perpetuated racial stereotypes and failed to treat applicants as complete individuals (as opposed to mere members of a racial group). Equating this stereotyping to other instances of historical discrimination, the majority held that consideration of race in admissions policies perpetuates unequal treatment and violates the Equal Protection Clause.

The Court also took issue with the lack of any planned endpoints for the universities' affirmative action programs. Drawing on *Grutter v. Bollinger*, the 2003 case that had upheld the University of Michigan Law School's holistic consideration of race in its admissions process, the Court explained that affirmative action had previously survived constitutional review *only* because it had a "logical endpoint." The Court held that, because the universities' admissions programs did not clearly articulate when or if they would ever wind down, they failed *Grutter*'s direction that they must be limited in temporal scope.

Will it still be possible for universities to develop a diverse student body following this landmark decision?

The primary impact of the decision is that higher education institutions will no longer be allowed to use an applicant's race, by itself, as a selection factor in admissions. Notably, the Court did not completely foreclose universities from considering race as part of a broader discussion of an applicant's personal story. The Court

stated that "nothing in this 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." Thus, although a university's admissions process may not select or cull applicants based on their race, individual applicants are entitled to reveal their racial identity and describe how their identity has affected their lives. The Court's opinion holds that universities are, in turn, entitled to give weight to those student statements but *may not* use them to consider race alone as a factor. That is, universities may give an applicant credit for overcoming racial adversity but not for solely being a member of a particular race. The plaintiffs that won *Students for Fair Admissions* have already announced that they will be watching universities' implementation of this decision closely and that they will be prepared to bring suit against administrators that attempt to use personal statements to recreate their prior affirmative action programs.

Other means of achieving a diverse matriculating class also remain, at least for now. University admissions largely follow a three-part track: recruitment, selection, and yield efforts. Although the decision greatly affects the use of race in the selection portion of the admissions process, the decision does not forbid universities from engaging in concerted preselection recruiting efforts of diverse applicants. Additionally, post-admission yield efforts, which involve targeted appeals to already-admitted applicants, appear to be permitted under the Court's framework.

Unresolved for now is the use of race-neutral selection bases that are designed to influence diversity. An important recent Court of Appeals for the Fourth Circuit decision bears watching. In *Coalition for Thomas Jefferson v. Fairfax County School Board*, the Fourth Circuit, which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina, upheld facially race-neutral high school admissions procedures that granted priority to students coming from underrepresented middle schools and with low-income backgrounds who had engaged in community service or student leadership. We will continue to track this case for any further legal updates.

How does this case fit within the broader, national back-and-forth surrounding DEI initiatives?

The Supreme Court's landmark decision ending the use of race as a factor in university admissions has coincided with a broader set of legislative limitations on DEI initiatives nationwide. Recently, Florida and Texas each passed a raft of restrictions on their public universities that limit the use of state funds for DEI offices and DEI-related educational efforts. Tennessee and North Dakota have followed suit with similar legislation, and 17 other states have introduced bills aimed at restricting DEI efforts. Even before this decision, university DEI efforts were facing a sudden expansion of state-level pushback.

Many of these bills—the Florida and Texas laws included—are heavily focused on reducing the dissemination of "divisive concepts" drawn from antiracism trainings and literature, such as ideas of racial guilt and unconscious biases. Some of the recent DEI bills appear to derive their list of "divisive concepts" from President Trump's 2020 Executive Order on Combating Race and Sex Stereotyping. While these programs were not before the Supreme Court in *Students for Fair Admissions*, the majority and dissenting opinions pointedly disagree on the appropriate means of considering past discrimination in society and the means necessary to ensure full equality.

Were there any indications from the various justices that the broader employment context (Title VII) will change following this decision?

While *Students for Fair Admissions* does not *directly* affect employers' efforts to increase diversity and equity within the workplace, Justices Thomas and Gorsuch would hold that any attempt by private employers to make use of protected classifications could be unlawful. Justice Gorsuch's concurring opinion overtly links the requirements for universities under Title VI to the requirements for employers outlined under Title VII. When discussing university admissions practices, Justice Gorsuch notes that Congress made employment discrimination unlawful "[j]ust next door, in Title VII" and that both Title VI and Title VII codify "individual equality, without regard to race." The Justice goes on to note "that everything said here about the meaning of Title VI tracks this Court's precedent in *Bostock* interpreting materially identical language in Title VII."

Does the decision affect corporate DEI programs?

Hundreds of U.S. businesses joined in various briefs supporting the university positions. Citing the need to ensure a pipeline of diverse talent, those businesses argued that dedication to diversity is an essential corporate pillar. At the same time, many forces have taken aim at the dedication to diversity and will point to this decision as a blow to DEI efforts.

The majority opinion does not address corporate DEI programs. As noted above, Title VII forbids the use of protected categories in employment decisions. Employment decisions that are overtly made on protected bases ran afoul of the law before and after the university admissions decisions.

Notwithstanding the lack of a direct tie between university admissions practices and corporate diversity programs, the decision's broad criticism of considering race in the university context means that employers should carefully review other policies where protected classes are at play. Such a review should include statistical workplace evaluations of underutilization and underrepresentation within working groups to ensure that diversity efforts are tailored to the needs of the individual organization. Broadly, some efforts appear to continue to remain lawful. These include programs geared towards ensuring that workplaces remain open and welcoming to applicants and employees, recruiting diverse candidates for job openings, maintaining affinity groups, encouraging the use of diverse suppliers, and publicly reporting statistics related to diversity. Other efforts, such as publicly setting diversity targets and goals, are likely to come under increased scrutiny and should be reviewed closely.

In what ways are federal contractors likely to be affected by *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*?

The Supreme Court's decision does not directly affect federal contractors. While last week's decision has been framed as striking down affirmative action, federal contractor affirmative action obligations were not before the Court. In addition, affirmative action requirements and opportunities under federal law differ significantly from those in the university context.

Most federal contractors are obligated to not only follow nondiscrimination requirements under federal law but also to engage in affirmative action for women, minorities, veterans, and individuals with disabilities. Those requirements broadly require that contractors conduct regular numerical analyses of their workplaces related to, among other areas, hiring and workforce representation. Where groups are underutilized, the affirmative action requirements mandate that employers set goals and make efforts to increase representation. Importantly, those requirements strictly forbid the use of quotas and prevent them from making employment decisions based on a protected category, such as race.

The majority opinion does not call this program into question. Indeed, the opinion specifically (and perhaps intentionally) stays away from using the term "affirmative action." Rather, it focuses squarely on university admissions practices.

Opponents of affirmative action may focus on Justice Thomas's concurring opinion, which places such policies alongside "other conception[s] of equity" as a mere repackaging of "discrimination on the basis of race." Moreover, opponents of these federal contractor obligations will likely focus on another decision from last week, *Biden v. Nebraska*, which struck down the Biden administration's student loan forgiveness program and marks the Court's latest decision invalidating a federal administrative program as exceeding the agency's statutory authority. Federal contractor affirmative-action obligations on contractors are predominantly found in regulations issued under the Federal Property and Administrative Services Act of 1949. Because that Act does not specifically authorize affirmative action obligations, those obligations could be in the crosshairs of opponents following the loan forgiveness decision.

How should employers respond?

While the Supreme Court's decision centers on educational affirmative action, employers should refrain from quickly dismissing the decision as irrelevant to the workplace. Now is the time for employers to proactively revisit their diversity efforts to ensure compliance and reduce the potential indirect effects of the Supreme Court's decision.

Employers can begin by reviewing their workplace DEI programs and policies to ensure they do not run afoul of existing requirements under Title VII and other applicable employment anti-discrimination laws. Under Title VII, DEI initiatives may not involve racial quotas or encourage employment decisions that favor members of a particular protected class. Beyond confirming compliance, employers may also consider documenting the purposes and rationale behind their DEI initiatives. Taking these additional steps will help employers navigate the current environment of increased state-legislative scrutiny of DEI efforts and other special emphasis programs.

Finally, beyond legal compliance, employers should also consider employee morale and the future of the company's reputation. The Supreme Court's majority opinion and dissenting viewpoints highlight the cultural landscape and breadth of opinions that employers will need to navigate when making changes to any existing DEI policies. Given the changing nature of federal and state law on DEI issues, employers are strongly encouraged to seek advice from outside counsel for ongoing guidance on the latest legal developments.

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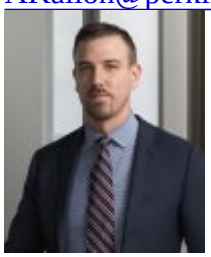

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