ROPES & GRAY

ALERT

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Supreme Court Rules Against University Affirmative Action Policies: Implications for Employers

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Earlier today, the U.S. Supreme Court ruled in Students for *Fair Admissions, Inc. v. President and Fellows of Harvard College* that Harvard University's and the University of North Carolina's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment. The 6-3 majority opinion held the race-conscious admissions programs at Harvard and UNC to be unconstitutional.

Below is a summary of the decision, as well as developing points for employers to watch.

Background

In *SFFA v. Harvard*, Students for Fair Admissions, a non-profit advocacy organization, sued Harvard University in federal district court in Massachusetts, alleging that Harvard violated Title VI of the Civil Rights Act of 1964 by discriminating against Asian American applicants on the basis of race. A similar action was filed against UNC in the District Court for the Middle District of North Carolina. Both lower courts ruled in favor of the universities. Today, the Supreme Court issued an opinion, authored by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, reversing and concluding in favor of the challengers. Applying constitutional strict scrutiny, the Court examined (1) whether the universities' use of race as a factor in admissions furthered compelling governmental interests, and (2) whether the use of race was narrowly tailored to achieve those interests.

The Opinion and Dissents of the Court

The Court's stated guiding principle was that "Eliminating racial discrimination means eliminating all of it" (a contention the dissent scrutinized). Ultimately, it found that, while Harvard and UNC had articulated "commendable goals" such as promoting a robust marketplace of ideas, "[those goals were] not sufficiently coherent for purposes of strict scrutiny." Furthermore, the Court held that the means applied to achieve the stated interests were not narrowly tailored to achieve the interests; assigning students to racial categories and making admissions decisions based on them was held to be both imprecise and overbroad. Writing for the majority, Justice Roberts stated that:

> "[W]e have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment."

Justices Gorsuch, Thomas, and Kavanaugh each filed concurring opinions in which they (1) highlighted that they viewed previous Supreme Court precedent as creating an unjustifiable carveout for universities from the application of the Equal Protection Clause, (2) argued that the Court's decision is firmly and clearly rooted in colorblind goals and the history of the Thirteenth and Fourteenth Amendments, and (3) contended that the decision was consistent with Supreme Court precedent because prior precedent holds that racial classifications must be temporary in duration in order to remain sufficiently narrowly tailored and pass strict scrutiny.

The majority opinion did not engage in any interpretation of Title VI of the Civil Rights Act of 1964 (which governs educational institutions receiving federal funding), the law under which Harvard was sued. This is because, the Court

said, past cases held that any conduct that violates the Equal Protection Clause of the Fourteenth Amendment also violates Title VI, and "no party asks us to reconsider" that precedent.

Justice Gorsuch, joined only by Justice Thomas, analyzed Title VI as distinct from the Equal Protection Clause, concluding as a matter of statutory interpretation that the universities' admissions policies violated Title VI. He went on to compare Title VI to Title VII of the Civil Rights Act, which prohibits discrimination by private employers, writing: "If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful…for an employer…to discriminate against any individual…because of such individual's race, color, religion, sex, or national origin." Notably, however, the majority opinion made no reference to Title VII.

Justice Sotomayor filed the chief dissenting opinion, which was joined by Justices Kagan and Jackson. The dissent wrote that American society is not in fact colorblind and that the principle of considering race in university admissions decisions had for decades empowered schools to promote diversity and in turn create more equal opportunities for students of diverse races.

Going Forward

While momentous for colleges and universities, the Court's holding today does not, on its face, apply beyond that context. The Court's holding is limited to colleges and universities, and in fact, the Court signaled that different considerations may apply—and a different result could be obtained—in other contexts, such as military academies. The holding does not implicate corporate hiring programs or private employers' diversity efforts, which are subject to Title VII of the Civil Rights Act of 1964, not the Equal Protection Clause of the Fourteenth Amendment. Indeed, the majority opinion did not take this opportunity to denounce "diversity" as a compelling interest generally, as some had predicted it might.

Furthermore, the Court expressly allowed the universities to continue to consider race in admissions decisions, albeit in a narrower and more tailored way. First, the Court agreed that, while the educational interests articulated by Harvard and UNC were not narrowly tailored enough (at least as stated), they were still commendable. Second, the Court made clear that universities may consider how race might have affected an individual applicant's qualifications for admission, so long as this consideration is specific to the applicant and not based on broad racial categories or stereotypes, for example, a university may consider an applicant's demonstrated courage in overcoming racial discrimination.

Going forward, although this case does not directly impact private employer hiring policies, we anticipate that opponents of corporate diversity initiatives will try to extend this case's reasoning to the Title VII context and will continue to challenge perceived "reverse" discrimination. We do not interpret the Supreme Court's decision to require any lessening of employers' open commitment to the value of diversity in their workforces. We do, however, recommend that employers continue to follow developments in this area and to consider, with the advice of counsel, how to closely tailor hiring and diversity initiatives to the company's values and business needs.

We will be closely following developments as the lower courts further interpret this important decision.

Please contact Douglas Brayley, Peter Erichsen, Douglas Hallward-Driemeier or any member of the Ropes & Gray's team for further guidance or advice.