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Supreme Court Prohibits Consideration of Race in College Admissions

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This morning, the Supreme Court of the United States issued a decision prohibiting direct consideration of race in college and university admissions. The Court held that the race-conscious admissions programs at Harvard University and the University of North Carolina violate the Equal Protection Clause of the Fourteenth Amendment, and the Court's reasoning effectively forecloses similar programs at other institutions. This marks a substantial shift in the Court's jurisprudence in this area and will require schools to carefully reconsider their admissions policies and practices. In addition to the initial analysis in this Update, please join us on July 18, at 12:00 p.m. CT for a detailed discussion of this ruling and its impact on your institution.

This issue came to the Supreme Court via a pair of companion cases filed by an advocacy organization called Students for Fair Admissions (SFFA). One case involved the admissions practices at Harvard University, a private institution, and the other involved admissions practices at the University of North Carolina (UNC), a public institution. Harvard utilizes a "whole person" review of applicants, in which race is one of many factors considered during the admissions evaluation. Specifically, Harvard uses a "tip system," which awards "tips" (a 1-6 rating in a variety of categories), which are plus-factors that could "tip" an applicant into the admitted class. Race is considered in this process, and under the program Asian Americans received the lowest scores on a "personal rating" category, despite the highest scores for academics and extracurriculars. SFFA sued, claiming systematic discrimination against Asian Americans in violation of Title VI of the Civil Rights Act of 1964.

UNC utilized a similar admissions process, conducting a holistic review of each student as an individual. Race and ethnicity are considered as one factor

among many and may give certain applicants a "plus" that tips the balance of an individual student toward admission. Because UNC is a public institution, SFFA asserted claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, claiming that UNC discriminates on the basis of race in its admissions decisions.

After losing in the lower courts, SFFA petitioned the Supreme Court for review in both cases, primarily arguing that the Supreme Court should overrule its prior precedents in this area and prohibit the consideration of race in admissions altogether. In January 2022, the Supreme Court granted review, with the parties—and several amici—submitting extensive briefing to the Court. The Court then heard oral argument in October 2022.

In a 6-3 decision authored by Chief Justice John Roberts, the Supreme Court held that the Harvard and UNC admissions programs violate the Equal Protection Clause.[1] Surveying the history of its Equal Protection cases, the Court put it succinctly: "Eliminating racial discrimination means eliminating all of it." Op. at 15. And the Court found these programs unconstitutional for multiple reasons. First, the educational benefits or "interests" the schools used to justify consideration of race in admissions—no matter how laudable—are too vague to ever be meaningfully evaluated by courts. Second, the means the institutions employed to satisfy their claimed interests were not well tailored because some racial classifications the institutions used were either overbroad or underinclusive, leaving out some racial or ethnic groups that would contribute to diversity. Third, because higher education admissions are effectively zero-sum, the benefit that some students received based on race necessarily had a negative impact on other students because of their race. Fourth, the direct use of race necessarily draws stereotypes about a person's characteristics without considering their individual circumstances. And fifth, the programs lack any "logical end point" and would seemingly continue indefinitely in the absence of the Court's intervention.

At the conclusion of the opinion, the Court clarified 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." Op. at 39. That said, "universities may not simply establish through application essays or other means the regime we hold unlawful today." *Id.* Drawing these lines will undoubtedly take time and more consideration in future cases throughout the country.

Justices Sotomayor and Jackson authored dissenting opinions, both joined by Justice Kagan. Justice Sotomayor criticized the Court for overruling "decades of precedent and impos[ing] a superficial rule of race blindness on the Nation." Sotomayor Dissent at 68. She expressed substantial concern for the implications of the decision, asserting that "[t]he majority's vision of race neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored." *Id.* Justice Jackson, noting that "[o]ur country has never been colorblind," asserted that the majority

opinion "stunts" the progress made toward racial equality "without any basis in law, history, logic, or justice." Jackson Dissent at 2.

What this means to you

For an in-depth discussion of how this decision impacts colleges and universities, please register for our webinar on July 18, at 12:00 p.m. CT.

Colleges and universities are now prohibited from expressly considering race in admission decisions. And attempts to elude the Court's opinion by the use of race proxies are likely foreclosed as well. These realities will likely require substantial revision of policies and practices at many institutions, as well as augmented training for admissions staff and admissions administrators. The full parameters and precise consequences of this decision are unlikely to be clear until more litigation occurs in the lower federal courts. That said, the Supreme Court has now squarely ruled that college and universities may no longer use race itself as a factor in admissions—schools should update their procedures accordingly.

In addition to admissions practices, the Court's decision may impact other areas in which institutions use race as a factor in decision making, including employment and scholarship aid. Given the Court's holding in the UNC case, public institutions should be particularly mindful of any other areas in which race is used as a factor. All institutions should carefully review their policies, practices, and training materials in light of these decisions.

Contact us

For more information about the implications of this ruling for your institution, please contact Michael Raupp, Derek Teeter, Julie Miceli, or your Husch Blackwell attorney.

Husch Blackwell regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please fill out this quick form if you would like to receive electronic updates and newsletters.

[1] Because Harvard is a private university, it is not governed by the Fourteenth Amendment. But the Title VI claim against Harvard is evaluated under the same legal framework as a Fourteenth Amendment claim, so the Court applied the same analysis to both schools.