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Client Alert
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THE SUPREME COURT ENDS AFFIRMATIVE ACTION IN HIGHER EDUCATION

On June 29, 2023, the Supreme Court of the United States (the "Court") issued its decision in the twin cases of Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina (collectively, "Students for Fair Admissions, Inc."). In a majority opinion authored by Chief Justice John Roberts, the Court found that Harvard College's ("Harvard") and the University of North Carolina's ("UNC") race-based admissions programs violated the Equal Protection Clause of the Fourteenth Amendment (the "EP Clause") of the United States Constitution. This decision ends the Court's established, though always uneasy, acceptance of affirmative action in higher education and stands to dramatically alter college admissions across the country.

Key Factual Background
Both Harvard and UNC maintained admissions processes that took applicants' race into account. In Harvard's four-step process, race is a consideration at every step of the process with a stated goal of ensuring that Harvard does not experience a "'dramatic drop-off' in minority admissions from the prior class." UNC's two-step process requires the consideration of an applicant's race at the first step and permits it at the second. The Court noted, however, that the first-step decisions "are, in most cases, 'provisionally final.'"

In 2014, petitioner Students for Fair Admissions, Inc. ("SFFA") was founded as a nonprofit organization. By November 2014, SFFA had filed separate lawsuits against Harvard and UNC alleging that their race-based admissions programs violated Title VI of the Civil Rights Act of 1964 ("Title VI") and the EP Clause.

Case Overview
Title VI applies to virtually all colleges and universities that receive federal funding, including private institutions such as Harvard. Title VI's prohibition on race-based discrimination is analyzed under the principles of the EP Clause. The EP Clause makes it unlawful to "deny to any person . . . the equal protection of the laws." Framing the issue before them as "whether a university may make admissions decisions that turn on an applicant's race," the Court began with a review of the history of affirmative action in higher education. The Court first considered affirmative action in Regents of University of California v. Bakke in 1978. At that time, Justice Lewis Powell led a splintered Court to establish the framework for permissible affirmative action that has persisted until now. That framework, cemented in the 2003 Grutter v. Bollinger decision,

recognized that a university's interest in "obtaining the educational benefits that flow from a racially diverse student body" was a compelling and constitutionally permissible one. Accordingly, universities could consider an applicant's race in a limited manner that did not involve illegitimate stereotyping or the use of race as a "negative" factor which harmed nonminority applicants. Additionally, the Court cautioned that race-based admissions programs must have an end point, with Justice Sandra Day O'Connor opining that such programs would no longer be necessary in twenty-five years' time. At the time of Students for Fair Admissions, Inc., twenty years had passed since Grutter.

Turning to Harvard's and UNC's race-based admissions systems, the Court concluded that they violated the EP Clause for three reasons. First, they failed to pass muster under the Court's strict scrutiny standard of review because they lacked sufficiently measurable objectives to permit the use of race. Second, they impermissibly used race as a stereotype or negative factor. Third, they lack an end point. Accordingly, a 6-3 majority of the Court invalidated both admissions systems.

The Court began its analysis by finding that Harvard and UNC failed to operate their race-based admissions programs in a sufficiently measurable manner, noting that goals such as "training future leaders" were "not sufficiently coherent for purposes of strict scrutiny." Specifically, the Court found that it was unable to measure the goals the two universities claimed were served by their admissions programs, nor was it able to discern "a meaningful connection between the means they employ and the goals they pursue." Declining to defer to the two universities, the Court concluded that their race-based admissions programs could not pass strict scrutiny.

The Court next analyzed whether the race-based admissions programs used race as a "negative" or for stereotyping, both impermissible uses under the EP Clause. Reasoning that "[c]ollege admissions are zero-sum," the Court found that race-based admissions programs use race as a negative in that they necessarily exclude applicants who would otherwise be admitted because of their race (e.g., "Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard"). The Court also concluded that such programs involve racial stereotyping as they inherently find a benefit "in race for race's sake" (i.e., "when a university admits students 'on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike' . . . at the very least alike in the sense of being different from nonminority students.").

The Court's final consideration was whether either race-based admissions program had a logical end point as required by Grutter. By Harvard's and UNC's own admission, their programs lacked

Client Alert
July 10, 2023

any such end point, and neither university offered any "reason to believe that [they] will—even acting in good faith—comply with the Equal Protection Clause any time soon."

Unsurprisingly, given the charged subject matter of this decision, the Court was divided 6-3 along ideological lines and the Court's liberal justices wrote lengthy dissents decrying the end of affirmative action and largely taking the position that the Fourteenth Amendment permits the use of explicitly race-conscious measures in order to remedy the effects of societal discrimination and remain necessary to make up for higher education's history of excluding minorities. As Justice Sotomayor lamented in dissent, "The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in higher education, the very foundation of our democratic government and pluralistic society."

Ultimately, the Court struck down the Harvard and UNC admissions programs for violating the EP Clause because of their express reliance on race as a factor. However, the Court did clarify that programs may continue to "consider[] an applicant's discussion of how race affected his or her own life," so long as such consideration does "not simply establish through application essays or other means the regime we hold unlawful today."

Impact on Higher Education in Massachusetts

The most pressing takeaway from the Court's decision is also the most obvious: affirmative action in higher education as it was practiced by many institutions is largely abolished. While some states already prohibit the consideration of race in college admissions, Massachusetts is not one of them and the Students for Fair Admissions, Inc. decision will likely have a significant impact in the Commonwealth for both students and institutions of higher education. Institutions will need to evaluate their admissions programs and, if they are unlawfully race-based in the wake of this decision, revise them.

Public and private colleges and universities may not consider race expressly, but they may continue to factor an individual's race into that individual's personal experiences, such as in the case of an applicant's admission essay discussing how they overcame adversity they faced because of their race, or how their heritage or culture motivated them to assume a leadership role or achieve a certain goal. However, the Court goes out of its way to caution that such considerations of personal experiences must not be made as an end run around the EP Clause, warning that what 'cannot be done directly, cannot be done indirectly.' In other words, the Court explains, a student must be treated based on their experiences as an individual and the benefit said experiences might bring to that individual or to the institution, and not based on race itself.

Client Alert
July 10, 2023

Finally, it is important to note that Students for Fair Admissions, Inc. does not prohibit the use of non-race based factors such as family income level, geography, and similar economic factors in making admissions decisions or advancing an institution's goal of promoting a diverse student body. Nevertheless, institutions would be well-advised to consider how such factors may be scrutinized as a potential proxy for race or challenged in the future, given the Court's strict construction of the EP Clause and the Court's insistence that the EP Clause guarantees that an individual student is treated based on "his or her experiences as an individual – not on the basis of race."

It remains to be seen whether additional litigation may follow as institutions of higher education navigate the new admissions landscape and revamp admissions standards in the wake of this decision.

This Client Alert was prepared by Joseph Proctor. This Alert was reviewed by Kier Wachterhauser, Nan ONeill, and Arthur Murphy. If you have any questions about this issue, please contact the attorney responsible for your account, or call (617) 479-5000.

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