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SCOTUS Strikes Down Affirmative Action in College Admissions as Unconstitutional, Raising Questions About the Impact on Employment Policies

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On June 29, 2023, the U.S. Supreme Court, in a 6-3 decision, held that the race-conscious admissions systems used by Harvard College (Harvard) and the University of North Carolina (UNC) are unconstitutional, prohibiting the consideration of an applicant's race when making an admission decision. The practice of considering an applicant's race when making an admission decision had previously been recognized by the court as lawful for 45 years.

In two separate but related lawsuits against Harvard and UNC, the Students for Fair Admissions, Inc., a nonprofit organization whose stated purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law," argued that taking an applicant's race into account when making an admission decision violates, respectively, Title VI of the Civil Rights Act of 1964, which prohibits discrimination by any program or activity receiving Federal financial assistance and the Equal Protection Clause of the Fourteenth Amendment, which guarantees equal protection of the laws for all, regardless of race or color. Given its view that discrimination by an institution that accepts federal funds which violates the Equal Protection Clause also violates the Title VI, the court evaluated both universities' admissions systems under the Equal Protection Clause.

Stressing that the "core purpose" of the Equal Protection Clause is to eliminate all governmentally imposed discrimination based on race, the court agreed. In reaching its decision, the court conducted a two-step "strict scrutiny" analysis of the universities' admissions systems, which must be employed whenever exceptions to the Equal Protection Clause are raised. The Court relied heavily on its prior decisions in *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 206 (2003), in which the court identified limits on the

use of race-conscious practices in college admissions (*i.e.*, no race-based quotas allowed, race can only operate as a "plus" in a particular applicant's file and cannot unduly harm nonminority applicants, and the practices must eventually end).

Applying these standards to the admissions practices used by Harvard and UNC, the court expressed its view that the universities failed to clearly articulate a meaningful connection between their continued use of racial preferences and their stated interest in diversity, particularly where the statistics presented by expert witnesses supported that the universities' practices operated to help minority applicants at nonminority applicants' expense. Specifically, the court pointed to statistics presented by expert witnesses, which supported a disparity between the percentage of black applicants admitted compared to white or Asian applicants within the same academic deciles (*i.e.*, top 10 percent of the applicant's class).

Notably, however, the court stated that nothing actually prohibits universities from considering "an applicant's *discussion* of how race affected his or her life, be it through discrimination, inspiration, or otherwise." To that end, the consideration of race in the admissions process is not eliminated entirely, and this perceived "loophole" in the court's decision provides a way to continue advancing diversity, equity, and inclusion interests. Indeed, Harvard has already issued a statement apparently acknowledging this loophole and reaffirming its commitment to diversity in its student body. Other universities, including law schools, also issued statements ahead of the court's June 29th decision, suggesting they already were preparing for the impacts of any decision to eliminate affirmative action.

While the potential implications of this decision in the higher education context are more clear,[1] the potential impact of this decision in the employment context are decidedly less so. Following the court's decision, the U.S. EEOC Chair Charlotte A. Burrows, expressed concern regarding the impact of the decision on universities' ability "to provide a diverse pipeline of talent for recruitment and hiring," but observed that "[i]t remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace." This decision on affirmative action in the higher education context likely will have a less significant impact on the diversity initiatives of private employers. However, the decision is grounded in constitutional issues and signals greater jeopardy for government-mandated affirmative action, such as under Executive Order 11246, which requires affirmative action plans for certain government contractors and subcontractors to address the under-utilization of minorities.

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[1] *See* https://www.usnews.com/news/top-news/articles/2023-06-29/post-affirmative-action-these-law-schools-may-provide-path-for-others (discussing the initial significant drop in admissions of Black, Hispanic, and Native American first-year students at the University of Michigan Law School and the University of California, Berkeley School of Law following affirmative action bans)

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