Education

Affirmative Action up for Judgment? US Supreme Court Grants Cases Seeking to Prohibit Consideration of Race in College Admissions

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Introduction

Yesterday, the Supreme Court agreed to hear a pair of cases asking the Court to overrule its precedents governing the consideration of race in college admissions. One case concerns admissions at Harvard College, and the other concerns admissions at the University of North Carolina. In both cases, the petitioner, Students for Fair Admissions (SFFA), alleged that the university engaged in racial discrimination against Asian-American applicants. And in each case, the lower courts rejected those claims after a full trial. SFFA petitioned for certiorari and asked the Court to reconsider and overrule its key precedent, *Grutter v. Bollinger*, 539 U.S. 306 (2003), which permits universities to consider race as one factor among many in a holistic admissions evaluation. The grant suggests that the Court is willing to reconsider its precedents in this area, and it may result in additional limitations or an outright prohibition on the consideration of race in college admissions. The cases will likely be argued in the fall, and a decision is expected by the end of June 2023.

Background

The Supreme Court's grant of certiorari marks the latest development in a seven-year dispute between SFFA and Harvard College. In 2014, the non-profit group filed a lawsuit in federal court, alleging that Harvard's policies violate Title VI by intentionally discriminating against Asian Americans through its use of race as a factor in admissions.[1] In ruling for Harvard on all counts, a federal district court determined that Harvard's admissions policy was consistent with Supreme Court precedent and advanced the college's fundamental interest in diversity. Specifically, the court held that "[t]he evidence at trial was clear that a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community."[2] On appeal, the First Circuit affirmed the district court's ruling.[3]

In 2014, SFFA also filed a lawsuit against the University of North Carolina at Chapel Hill, similarly alleging that the use of race in its admission policy violated the Equal Protection Clause and Title VI. On October 18, 2021, a federal district court determined that UNC met its burden of demonstrating that "its undergraduate admissions program withstands strict scrutiny and is therefore constitutionally permissible."[4] SFFA filed an appeal in November 2021, which is currently pending before the Fourth Circuit, and, as discussed below, also asked the Supreme Court to grant review ahead of the Fourth Circuit's consideration.

Questions Before the Court

In February 2021, SFFA filed a petition for review of the First Circuit's decision. In November 2021, SFFA also filed a petition asking the Court to review the North Carolina decision ahead of the Fourth Circuit's review. The primary focus of both petitions was whether the Court should revisit and overrule its precedents governing the consideration of race in college admissions. The Court's leading precedent in this area is *Grutter*, which allows a college to consider race as one factor among many as part of the admissions inquiry. Under *Grutter*, an admissions policy "may consider race or ethnicity only as a 'plus' in a particular applicant's file; *i.e.*, it must be flexible enough to consider all pertinent

elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[5] Since *Grutter*, the Court has emphasized that although race may be considered, such practices are subject to strict scrutiny, and "the university must show that its use of race is narrowly tailored to achieve its permissible goals."[6]

The petitions ask the Court to overrule *Grutter*, which SFFA says "improperly afford[s] broad deference to university administrators to pursue a diversity interest that is far from compelling" and "endorse[s] racial objectives that are amorphous and unmeasurable and thus incapable of narrow tailoring."[7] The Supreme Court initially asked for the views of the Solicitor General of the United States (the office that represents the United States in the Supreme Court) about whether review should be granted. In December 2021, the Solicitor General recommended that review be denied because there was no split of authority in the lower courts on these issues and no basis for overruling Court precedent. The Court subsequently considered the petitions at several conferences and ultimately granted them both yesterday, January 24, 2021.

What's next?

Briefing on the merits will take place over the spring and early summer, with oral argument to follow likely in October 2022. We expect a decision by the end of June 2023.

It is difficult to predict the outcome of the cases, but the Court's decision to grant suggests that the Court may be willing to revisit its precedents in this area. At one extreme, the Court could largely maintain its existing precedents and continue allowing race to be considered holistically in the admissions process. At the other extreme, the Court could largely prohibit the use of race in the admissions process and reject the diversity rationale that has been foundational to its affirmative action decisions. In this scenario, the Court may adopt the plaintiff's "race-neutral alternatives" to achieving student body diversity.[8] Such alternatives include "placing greater emphasis on socioeconomic factors" and/or, in the case of public universities, "affording a community-based preference" that guarantees a certain percentage of students admission to state universities from each high school in the state.[9] The Court may also pursue a path outlined in a dissent by Justice Alito, joined by the Chief Justice and Justice Thomas, in the *Fisher* case. There, those three justices would have required colleges to make a far more detailed and specific showing as to why consideration of race was necessary in admissions. "[The university] has failed to define its interest in using racial preferences with clarity … and [the university] cannot satisfy strict scrutiny."[10]

No matter the outcome, whether the Court allows or restricts race as a factor in the admissions process, colleges and universities should expect to undergo a careful calibration of their policies to ensure compliance. Given the expected timing of the Court's decision in June 2023, the upcoming admissions cycle may not be directly affected. However, colleges and universities should not wait to take action. Even while we await the Court's decision, colleges and universities should consider more robust study and documentation of the measurable benefits that a racially diverse student body advances and of the narrowly tailored way that those benefits are pursued. Colleges and universities should also prepare for a possible future in which race is not a legitimate consideration in their admissions processes and should consider available alternatives to building diverse classes of students.

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[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard Coll.), Case No. 1:14-cv-14176-DJC, 397 F. Supp. 3d 126 (D. Mass. 2019).
[2] *Id.* at 133.
[3] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 196 (1st Cir. 2020).
[4] *Students for Fair Admissions, Inc. v. University of North Carolina*, Case No. 1:14-cv-00954-LCB-JLW (M.D.N.C. Oct. 18, 2021).
[5] *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).
[6] *Fisher v. University of Texas*, 136 S. Ct. 2198, 2208 (2016).
[7] S*tudents for Fair Admissions, Inc. v. University of North Carolina*, Petition for Writ of Certiorari Before Judgment at 3(Nov. 11, 2021).
[8] *Students for Fair Admissions, Inc.*, Case No. 1:14-cv-14176-DJC, Complaint at ¶ 305 (D. Mass. Nov. 17, 2014).
[9] *Id.* at ¶¶ 306, 313, 314.
[10] *Fisher*, 136 S. Ct. at 2222 (Alito, J., dissenting).