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# Client Alert: The Supreme Court Strikes Down Race-Conscious Admissions Programs: Key Takeaways for Higher Education and Corporate DEI Programs

**Publications**

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On June 29, 2023, the Supreme Court issued its decision in *Students for Fair Admissions (SFFA) v. President & Fellows of Harvard College* and *SFFA v. University of North Carolina*. In a 6-3 decision[1] authored by Chief Justice Roberts, the Court held that race-conscious admissions programs at Harvard and UNC violate the US Constitution's Equal Protection Clause. While the Equal Protection Clause applies only to government actors, the Court noted that it would continue to interpret Title VI coextensively with the Equal Protection Clause, thus applying the same standards to private institutions that receive federal funds.[2] While the decision did not formally overrule the key precedents that previously allowed race-conscious admissions, it applied the "strict scrutiny" standard that governs race-conscious programs in a way that will be very difficult for educational institutions and other entities to satisfy.

## Background and Court's Decision

Students for Fair Admissions, an organization whose members "believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional,"[3] filed suit against Harvard and UNC in 2014.[4] After both universities prevailed in the lower courts,[5] the Supreme Court granted certiorari in order to decide whether *Grutter v. Bollinger*,[6] which held that institutions of higher education could use race as a factor in admissions, remained good law.

In his opinion for the Court, the Chief Justice first explained the legal standard for evaluating challenges to race-conscious programs under the Equal Protection Clause: strict scrutiny. That standard is demanding, and it requires that a racial classification be narrowly tailored to further a compelling government interest.[7] Despite the Court's prior decisions holding that holistic admissions programs that consider race as one factor among many can satisfy that standard,[8] the Court rejected diversity as a compelling interest for the purposes of strict scrutiny. The Chief Justice wrote that although diversity may be "commendable," it is too amorphous and unmeasurable for a

court to assess.[9] Importantly, the opinion also cast doubt on other potential justifications for race-conscious admissions, noting the Court's past rejection of a compelling interest in remedying past societal discrimination and expressing skepticism toward a justification that would rely on an institution's own history of past racial discrimination to justify the consideration of race today.[10]

Even had Harvard and UNC asserted a compelling interest, the Court added, they failed to establish a meaningful connection between the means used and goals sought, i.e., they did not satisfy the narrow-tailoring requirement of the strict scrutiny inquiry.[11] The Court was not convinced that the universities had shown a connection between their diversity interests and their race-conscious admissions policies, criticizing the racial classifications employed by the schools as both overbroad and underinclusive.[12]

The Court did not stop there. It also held that race-conscious admissions programs "may never use race as a stereotype or negative, and—at some point—they must end."[13] The Court held that both Harvard and UNC failed these requirements: (1) by considering "race for race's sake," they impermissibly stereotyped applicants on the basis of race by assuming all students of a certain race must think alike or at least differently from non-minority students;[14] (2) because college admissions is a zero-sum game, preferencing applicants of one race necessarily means disadvantaging those of another;[15] and (3) the race-conscious admissions programs "lack[ed] a logical end point" and, on the universities' justifications, could continue indefinitely.[16] The Court also rejected the universities' suggestion that, at minimum, race-conscious admissions policies should be permitted until at least 2028, based on the Court's statement in its 2003 *Grutter* opinion that "25 years from now, the use of racial preferences will no longer be necessary."[17]

Two additional aspects of the majority opinion are worth highlighting. First, the majority opinion explicitly excepted US military academies from its holding "in light of the potentially distinct interests that military academies may present."[18] This carve-out responded to the position of the United States as *amicus curiae* asserting that race-conscious admissions programs further a compelling interest in national security, among other important objectives. Second, the Chief Justice concluded the majority opinion by explicitly stating that the opinion should not be construed "as prohibiting universities from considering an applicant's discussion of how race affected his or her life."[19] Although this statement clarifies that applicants can continue to share aspects of their life that are important to them, and universities can continue to consider an applicant's unique life experience, the opinion warned that "what cannot be done directly cannot be done indirectly," i.e., a university cannot use essays or other evaluative tools as an end-run around the Court's decision.[20] This statement will doubtlessly result in disputes over future admissions policies for years to come.

In addition to the majority opinion, there were three concurrences and two dissents. Of note, Justice Thomas, writing only for himself, suggested the Court's limitation on the use of race could

extend beyond admissions, including race-based housing and programming at colleges and universities.[21] He also broadly criticized programs aimed at "equity," a discussion that litigants could rely on to attack DEI programs beyond the higher education context.[22] Justice Thomas also stated directly what the majority opinion suggested indirectly: "The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so."[23] Justice Gorsuch's concurrence, joined by Justice Thomas, would interpret Title VI separately from the Equal Protection Clause and would apply a higher standard for Title VI, essentially arguing that Title VI *per se* outlaws any intentional differential treatment on the basis of race.[24] Under Justice Gorsuch's reading, a court would not even subject a race-conscious admissions policy challenged under Title VI to strict scrutiny; instead, an institution's differential treatment on the basis of race could never be permissible. The final concurrence, by Justice Kavanaugh, focused on *Grutter*'s 25-year timeline, explaining his view that the decision permitted affirmative action for only one more generation and that time had now passed.[25]

The remaining justices collectively penned two dissents. Justice Sotomayor wrote a full-throated rejection of the majority's opinion as ahistorical, contrary to precedent, and "grounded in the illusion that racial inequality was a problem of a different generation."[26] She explained that the majority's holding is designed to render strict scrutiny "fatal in fact" by intentionally setting parameters no college or university could satisfy.[27] Importantly regarding strategies institutions may turn to in the wake of the decision, Justice Sotomayor pointed to statements made by justices in the majority that support the continued permissibility of "holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications."[28] Justice Jackson highlighted the ongoing racial disparities in America and the historical role of race-based programs in addressing these disparities, countering Justice Thomas's view of a "colorblind" Constitution.[29]

## Key Takeaways

### For Institutions of Higher Education

- ***Current programs must change.*** The Court's rigorous legal standard for admissions policies that consider race by itself is extremely difficult to meet. Colleges and universities must pivot away from "check-the-box" racial diversity and toward race-neutral strategies or a more contextual consideration of an individual applicant's experience of race.

- ***The ruling is effective immediately***. The Supreme Court's decision does not give any grace period for colleges and universities; the time for compliance is now. Institutions should be mindful of how they discuss the role of race in the admissions process in both internal and external communications, starting immediately.

- ***Institutions need not blind themselves to all race-related information.*** When reviewing candidates for admission, institutions can still consider an applicant's individual characteristics, including how race has affected their life personally. However, the Court's decision makes clear that it will be highly suspicious of institutions using essays or other means to achieve the same result as the current regime. Institutions should consider how and why they solicit certain racial information from candidates and take steps to separate their tracking of race-based data from the actual selection process.

- ***The decision's implications extend beyond admissions.*** Though the opinion only explicitly discusses admissions, its broad language (and especially Justice Thomas's concurrence) could implicate many other programs at colleges and universities, including race-conscious scholarships, affinity housing, and more. Challenges to these programs will likely intensify.

**For Corporations**

- ***Expect further attacks on DEI programs.*** The majority opinion does not explicitly address broader DEI programs that are increasingly subject to legal challenge. However, the broad language of the opinion and its deep skepticism of the use of racial classifications creates risk for all race-conscious programs. Jenner & Block's Organizational Values and Strategy Task Force is currently tracking numerous anti-DEI cases making their way through the lower courts, as well as government investigations and agency enforcement actions that threaten corporate DEI efforts. This opinion will add momentum to these attacks.

- ***The benefits offered by a DEI program affect legal risk.*** The majority opinion emphasizes the significance of the benefit conferred by college admissions and the zero-sum nature of the admissions process. DEI programs that are not zero-sum or that confer a less tangible benefit may present lower legal risk.

- ***Consider broadening eligibility criteria for DEI programs.*** Programs that consider applicants' unique life experiences and forms of diversity beyond race will generally be easier to defend than race-conscious DEI programs. Corporations should consider reframing their current DEI programs along these lines.

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients' DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. We are currently working with clients, including institutions of higher education and corporations, on ways to maintain diversity in the evolving legal landscape. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress

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## Footnotes

[1] Justice Jackson had served on the Harvard University Board of Overseers, so she recused herself from *SFFA v. Harvard* and only participated in *SFFA v. UNC*.

[2] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"), No. 20-1199, slip op. at 6 n.2 (U.S. June 29, 2023).

[3] *About*, Students for Fair Admissions, https://studentsforfairadmissions.org/about (last visited June 30, 2023).

[4] *SFFA* at 6.

[5] *Id.*

[6] 539 U.S. 306 (2003).

[7] *SFFA* at 15-16.

[8] *See id.* at 16-21.

[9] *Id.* at 22-24.

[10] *Id.* at 36 n.8.

[11] *Id.* at 24-26.

[12] *Id.* at 25.

[13] *Id.* at 22.

[14] *Id.* at 28-29.

[15] *Id.* at 27-28.

[16] *Id.* at 30-34.

[17] *Id.* at 33.

[18] *Id.* at 22 n.4.

[19] *Id.* at 39.

[20] *Id.*

[21] *Id.* at 45-46 (Thomas, J., concurring).

[22] *Id.* at 32, 48 (Thomas, J., concurring).

[23] *Id.* at 29 (Thomas, J., concurring).

[24] *Id.*at 1-4, 22-25 (Gorsuch, J., concurring).

[25] *Id.* at 3-8 (Kavanaugh, J., concurring).

[26] *Id.* at 17 (Sotomayor, J., dissenting).

[27] *Id.* at 51 (Sotomayor, J., dissenting).

[28] Id. at 49-50 (Sotomayor J., dissenting).

[29] *Id.* at 2 (Jackson, J., dissenting).

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