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The Supreme Court Denies Certiorari in *Coalition for TJ v. Fairfax County School Board*: What This Means for Colleges and Universities

Client Alerts

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On February 20, 2024, the Supreme Court denied certiorari in a closely watched case, *Coalition for TJ v. Fairfax County School Board*, challenging the admissions policies of Thomas Jefferson High School for Science and Technology, a prestigious magnet school in Virginia. The challenged policies have the intent and effect of capturing diversity but are formally race-neutral. This made the case widely viewed as a potential follow-up to the Supreme Court's decision last year in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[1] which struck down expressly race-conscious admissions programs at Harvard and the University of North Carolina at Chapel Hill. The denial of certiorari signals that the Supreme Court is not yet ready to take on another fight over diversity in admissions, but a forceful dissent from Justices Alito and Thomas may signal to lower courts that they should scrutinize even race-neutral admissions programs until the Supreme Court decides to revisit them.

Background

In 2020, Thomas Jefferson High School for Science and Technology changed its admissions program from a test-based model to a holistic model that it said was intended to increase socioeconomic diversity at the school. The policy change had the effect of nearly quadrupling admissions offers made to Black and Hispanic students (and decreasing the offers made to Asian American students, though Asian American students still represented a higher percentage of the accepted students than of the applicant pool). Parents of applicants challenged the policy in federal district court, arguing that the new policy violated the Constitution's Equal Protection Clause. Their challenge raises critical questions about what legal standards apply to admissions programs that have the intent and effect of capturing racial diversity but are formally race-neutral. Because the Supreme Court generally applies the same legal standards to cases challenging public school admissions programs under the Equal Protection Clause and private school admissions programs

under Title VI, the case implicates strategies for public and private institutions alike as they seek to admit a racially diverse class.

The Supreme Court's decision not to take the case leaves the Fourth Circuit's decision upholding the policy in place. In a 2-1 decision issued last year before *Students for Fair Admissions* was decided, the Fourth Circuit rejected arguments that the admissions program either intentionally discriminates against Asian American students or disproportionately impacts them.[2] Judge Heytens, a Biden appointee, joined the majority opinion and also wrote separately to "underscore" the "troubling consequences" of accepting the challengers' claim.[3] Judge Heytens explained that the challengers were effectively arguing that the admissions policy was unconstitutional either because "Asian American applicants, as a group, appear somewhat less likely to be admitted under the current policy than under the race-neutral policy it replaced" or because "the [school board] hoped it would increase the number of Black and Hispanic students at [the school]".[4] Accepting either argument, however, would require "major alterations to current law" and make it "difficult to alter *any* existing policy, even those that have a real (perhaps unintentional) disparate impact on some groups".[5] Judge Rushing, a Trump appointee, dissented in the case. She would have held that the admissions program *did* violate the rights of Asian American students under the Equal Protection Clause because the school board "intended to alter the racial composition of the school" by reducing admissions offers to Asian students "while increasing enrollment of every other racial group".[6]

Denial of Certiorari

Justice Alito and Justice Thomas dissented from the denial of certiorari, echoing Judge Rushing's dissent in the Fourth Circuit.[7] Justice Alito's dissenting opinion, which Justice Thomas joined, accused the Fourth Circuit of holding that "intentional discrimination is constitutional so long as it is not too severe."[8] Justice Alito cited *Arlington Heights v. Metropolitan Housing Development Corp.*, explaining that a formally race-neutral policy (like the admissions policy at issue in this case) can nonetheless violate the Equal Protection Clause if it is adopted for a "racially discriminatory intent or purpose".[9] Challengers may demonstrate such discriminatory intent or purpose "by proffering a combination of direct and circumstantial evidence".[10] Per Justice Alito, *Arlington Heights* identified "four factors that, among others, have a bearing on the assessment of circumstantial evidence": the historical background of the law; the sequence of events leading up to its enactment, including any departures from the "normal" legislative process; the law's legislative history; and any disparate impact on a particular racial group.[11]

Justice Alito viewed the Fourth Circuit's analysis of this last factor—disparate impact on Asian American students—as legally erroneous. The Fourth Circuit should have compared an Asian American applicant's chance of admission under the new policy to her chance under the old one, instead of comparing, as the Fourth Circuit did, the percentage of admissions offers made to Asian American students under the new program to the percentage of Asian American students in the

body of applicants.[12] According to Justice Alito, that reasoning "completely distorted the meaning of disparate impact"; "worked a grave injustice on diligent young people who yearn to make a better future for themselves, their families, and our society"; and was "a virus that may spread if not promptly eliminated".[13]

Key Takeaways:

- For now, in the first full admissions cycle following the Supreme Court's decision in *Students for Fair Admissions,* race-neutral admissions policies that have the effect of increasing racial diversity remain permissible. However, such policies require careful consideration and implementation in order to mitigate legal risk.
    - Strategies that, taken together, the Fourth Circuit found not to violate the Equal Protection Clause include reserving a certain number of seats in a class for the top performers from each of the district's middle schools while leaving the remaining seats for students outside the top at their schools and considering, as part of a holistic model, students' special education status, eligibility for free or reduced-price meals, status as English-language learners, and attendance at historically underrepresented public middle schools.
    - The Fourth Circuit, in upholding the admissions program, deemed it significant that decisionmakers had essentially followed their regular policymaking procedures and timelines in adopting the new admissions policy;[14] consistently framed the purpose of their policy in race-neutral terms and tailored the mechanics of the policy to that purpose; and did not justify their chosen policy with demographic models.[15] The court also found it important that decisionmakers' unofficial communications displayed not animus but concern for Asian American students.[16]
- The issues presented in this case are still likely to make their way to the Supreme Court at some point in the future. It is possible that the Supreme Court denied certiorari in this case simply because it wished to avoid deciding another high-profile admissions case so soon after *Students for Fair Admissions.* There are already similar cases in the pipeline that the Court will have to decide whether or not to take up. For example, the First Circuit recently decided *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for Boston*,[17] a case litigated by the same law firm representing the challenges in *Coalition for TJ*, and resolved by the appellate court in favor of the school district. This decision is already on the Supreme Court's radar, as evidenced by the fact that Justice Alito cited it in his dissent from the denial of certiorari.

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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 (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] 143 S. Ct. 2141 (2023).

[2] *Coalition for TJ v. Fairfax. Cnty. Sch. Bd.*, 68 F.4th 864, 871 (4th Cir. 2023).

[3] *Id.* at 888 (Heytens, J., concurring).

[4] *Id.* at 890-91.

[5] *Id.*

[6] *Id.* at 892 (Rushing, J., dissenting).

[7] *See Coalition for TJ v. Fairfax County School Board*, No. 23-170, slip op. at 1 (Feb. 20, 2024).

[8] *Id.* (Alito, J., dissenting).

[9] *Id.* (citing Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265-69 (1977)).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 7-8.

[13] *Id.* at 7, 9.

[14] *Coalition for TJ*, 68 F.4th at 884.

[15] *Id.* at 889-90.

[16] *Id.* at 889.

[17] 89 F.4th 46 (1st Cir. 2023).

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