Potential Private Sector Implications of the Supreme Court's Affirmative Action Ruling

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The U.S. Supreme Court's landmark decision in the cases *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* upended prior precedent and held that the universities' consideration of race in their admissions systems — "however well intentioned and implemented in good faith" — violated the equal protection clause of the 14th Amendment.[1]

Key Reasoning Underlying the Court's Decision

The Court offered several rationales for its June 29, 2023, decision. In particular, it reasoned:

- The compelling interests proffered by the universities in support of their pursuit of the educational benefits of diversity — training future leaders, promoting the robust exchange of ideas and enhancing cross-racial understanding, among others — were not sufficiently "coherent" to permit meaningful judicial review under the rubric of strict scrutiny.
- Contrary to its prior precedents that expressly permitted the use of race as a "plus" factor, the Court also focused on the "zero-sum" nature of the admissions decision outcome and found that a benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.
- Race-conscious admissions programs inherently engage in stereotyping by permitting a preference on the basis of race alone.
- The admissions programs lacked a logical end point.

Despite the sweeping opinion disavowing the ability of the universities to use race as a factor in admissions going forward, in closing, the Court observed that nothing in its opinion prohibits universities from considering applicants' discussion of how race has affected their lives, so long as the information is concretely tied to qualities of character or unique ability that the applicants can contribute to the university. The Court expressly cautioned, however, that universities "may not simply establish through application essays or other means the regime" that the Court held unlawful.

Looking Ahead

On its face, the Court's opinion is limited to the specific context of higher education admissions and based on the equal protection clause and Title VI of the Civil Rights Act of 1964 (which applies the clause to an institution that accepts federal funds). Indeed, the Court expressly acknowledged that a different outcome could result in other contexts, such as military academies and employment.

Nevertheless, the broad language excoriating any preference on the basis of race alone will undoubtedly embolden those who seek to challenge the pursuit of the benefits of racial diversity, particularly in the context of binary outcomes such as the choice of one applicant over another. As Students for Fair Admissions' founder and president, Edward Blum, proclaimed following the Court ruling, the opinion overruled precedent and "marks the beginning of the restoration of the colorblind legal covenant that binds together our multi-racial, multi-ethnic nation."

[1] Lara Flath and Amy Van Gelder represented the University of North Carolina in this matter at trial and were part of the team representing the University of North Carolina through the Supreme Court proceedings.

As a result, even though it is not directly applicable, the decision could spur litigation in other contexts and have broader potential implications for the private sector.

Challenges to Employment Practices and Corporate Diversity, Equity and Inclusion Initiatives Under Title VII

Many employers seek to promote diversity in the workplace through various efforts including, but not limited to, hiring or promoting racially diverse candidates, and supporting affinity networks and mentorship programs. These employers may be concerned about how the Court's opinion impacts such workplace diversity, equity and inclusion (DEI) initiatives.

The Court's holding, however, did not interpret or address Title VII of the Civil Rights Act of 1964, which protects job applicants and employees against discrimination in employment. In fact, the Court recognized that, in the employment context, "courts can ask whether a race-based benefit makes members of the discriminated class 'whole for [the] injuries [they] suffered.'"

In other words, the Court did not touch its long-standing precedent allowing workplace affirmative action plans under Title VII to "break down old patterns of racial segregation and hierarchy." *United Steelworkers v. Weber*, 443 U.S. 193, 199 (1979). Along these lines, Equal Employment Opportunity Commission (EEOC) Chair Charlotte Burrows stated in a press release following the ruling 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." Likewise, the decision does not limit or in any other way impact the obligations of government contractors and subcontractors to create and maintain affirmative action plans.

The Court held in *Johnson v. Transportation Agency*, *Santa Clara County*, 480 U.S. 616 (1987), that Title VI and Title VII differed in significant respects, and that decisions interpreting the equal protection clause in the Title VI context cannot be directly transposed to the Title VII context. Nevertheless, as Justice Neil Gorsuch expressly noted in his solo concurrence, Title VI sits "just next door" to Title VII and contains "essentially identical terms." Thus, plaintiffs may seek to extend the Court's reasoning to workplace bias law and Title VII. And EEOC Commissioner Andrea Lucas cautioned just that in an interview with Fox News following the Court's decision: "If you are using race as any factor in your decision-making, you're already violating the law, and I expect that you are going to have a rising amount of challenges as this sort of raises that issue back to people's attention."

Given these indications, some employers (as well as colleges and universities) may look to other approaches. Some may create "adversity scales" that consider socioeconomic status, geography, and family or personal circumstances as they refine existing or develop new programs. For example, *The New York Times* recently reported that the University of California Davis School of Medicine has been using an adversity scale in its admissions process since 2012, considering factors such as "family income[s], whether applicants come from an underserved area, whether they help support their nuclear families and whether their parents went to college."

Similarly, in the wake of the Court's decision, President Biden advocated for implementing an adversity standard, "where colleges take into account the adversity a student has overcome when selecting among qualified applicants." But because the Court cautioned against attempts to circumvent its ruling, even these practices may be scrutinized to determine whether they indirectly consider individuals on the basis of race.

Securities and Shareholder Challenges to ESG and Board Diversity

Plaintiffs and activists may well attempt to invoke the Court's "zero-sum" reasoning to challenge corporate policies intended to designate a set percentage or number of leadership positions for women or minorities. As the Court noted, "in a process where applicants compete for a limited pool of spots, a tip for one race necessarily works as a penalty against other races." Similarly, plaintiffs may attempt to focus on policies or initiatives that explicitly account for race by implying that such policies necessarily result in unconstitutional "stereotyping."

It is worth noting, however, that the Court did not prohibit or even comment on efforts to recruit or expand consideration to a more racially diverse population of applicants. Thus, pipeline programs and programs designed to promote access are not directly impacted by the Court's decision.

While the Court's decision is limited to the higher education context, DEI programs and other general equity policies and value statements may face increased scrutiny going forward. Indeed, even before the Court's decision, activist groups representing shareholders had already initiated demands against *Fortune* 500 companies, insisting that they retract policies adopted in the name of DEI initiatives or face shareholder derivative litigation. Such demands seem likely to continue.

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Although the Court noted that goals such as training future leaders; preparing graduates to adapt to an increasingly pluralistic society; promoting the robust exchange of ideas; broadening and refining understanding; enhancing appreciation, respect, empathy and cross-racial understanding; and breaking down stereotypes were "commendable goals," they were not sufficiently coherent or measurable to survive its strict scrutiny test. Thus, while the goals of equity and diversity remain "laudable" in the Court's eyes, plaintiffs may seek to challenge vague or generalized racial diversity and equity goals as impermissible under strict scrutiny, particularly if they provide the justification for choosing one candidate over another in the context of hiring or promotion.

As a result, employers and companies should regularly review their DEI statements and goals when designing and implementing DEI programs, keeping in mind that the Court, and lower courts, may be more inclined to be critical of these programs in the future. Creative plaintiffs' lawyers, activists and public interest groups will certainly continue to explore additional hooks to leverage the Court's reinforced belief that "eliminating racial discrimination means eliminating all of it," and could be expected to seek broad discovery designed to show employers' and companies' underlying motives and intent.

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