Patterson Belknap

**Employment Law and Tax-Exempt Organizations Alert**
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# Supreme Court Curtails Consideration of Race in Higher Education

On June 29, 2023, the Supreme Court ruled in *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc., v. University of North Carolina* (collectively "*SFFA*") that Harvard and the University of North Carolina ("UNC") violated the Equal Protection Clause of the Fourteenth Amendment by impermissibly considering race when making undergraduate admissions decisions. This ruling is likely to severely curtail the consideration of race in admissions by public schools and those private colleges and universities that accept federal funding.[1]

In this alert, we deliberately focus on Chief Justice Roberts's majority opinion, because it is the law and must be complied with. We recognize that many of our clients will want to understand how the reasoning of this decision may impact other areas of law outside the context of higher education, as well as how they can continue working to achieve their diversity, equity and inclusion goals in light of the Court's holdings. In the weeks and months ahead, Patterson Belknap will consider the impact of this decision on employers as well as on the grantmaking and other programs of not-for-profit organizations. For today, we summarize the majority opinion by Chief Justice Roberts and close by offering an initial analysis of the factors colleges and universities may still consider in making admissions decisions.

## I. The Majority Opinion:

### A. The Challenged Policies:

Writing for his six-justice majority, Chief Justice Roberts briefly summarized how race impacts admissions decisions at Harvard and UNC. Op. at 2–5. The Chief Justice explained that Harvard makes admissions decisions through a four-step process, each of which is race-conscious. *Id.* at 2–3. For instance, during the first step, each applicant receives an "overall" score ranging from 1 (best) to 6 (worst) from a "first reader," and those readers "can and do take an applicant's race into account" in assigning overall scores. *Id.* at 2 (internal quotations omitted here and below). The Court similarly concluded that UNC's two-step admissions process considers race at each step—first when admissions officers initially consider an applicant and then again when a "school review group" of veteran admissions officers evaluates the recommendation of the first reader. *Id.* at 4–5.

[1] While Harvard is a private university not bound by the Equal Protection Clause, like most private institutions of higher learning, it receives federal funds and so is required to comply with Title VI of the Civil Rights Act of 1964, which declares that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See* Op. at 6 and n. 2 (discussing 42 U.S.C. § 2000d). While the Court's opinion impacts all public and most private schools, the Court clarified that its opinion did not address race-conscious admissions in military academies, "in light of the potentially distinct interests that military academies may present." *Id.* at 22 n. 4.

## B. Legal Framework and Precedent:

After concluding that Students for Fair Admissions had standing to bring its lawsuits, the Court surveyed its equal protection jurisprudence from the ratification of the Fourteenth Amendment during Reconstruction in the nineteenth century through the civil rights era of the mid-twentieth century, concluding that "the core purpose of the Equal Protection Clause" is to "do[] away with all governmentally imposed discrimination based on race." *Id.* at 14. The Court then explained that "[a]ny exception to the Constitution's demand for equal protection must survive . . . strict scrutiny," a legal test that requires any racial classification to further a compelling governmental interest and to be narrowly tailored to achieve that interest. *Id.* at 15.

Chief Justice Roberts then reviewed the Supreme Court's precedent on the use of race in making admissions decisions, focusing on its 1978 decision in *Regents of University of California v. Bakke* and its 2003 decision in *Grutter v. Bollinger*. In *Bakke*, Justice Powell, writing only for himself, found that "obtaining the educational benefits that flow from a racially diverse student body" was a permissible goal for institutions of higher learning implementing affirmative action programs. *Id.* at 16–18. In *Grutter*, the broader Court agreed with Justice Powell that student body diversity was a compelling interest that could justify the use of racial classifications in higher education. *See id.* at 19. According to the Court, *Grutter*'s embrace of race-conscious admissions came with important caveats: (1) so as to avoid illegitimate stereotyping, schools may not use racial quotas or separate admissions tracks for different races; (2) race could be used as "plus" for admissions, but not as a negative; and (3) all race-based admissions programs "must end" at some point. *Id.* at 19–21.

## C. Holdings:

Having established that any use of race must further a compelling interest in diversity, that schools "may never use race as a stereotype or negative," and that any consideration of race in admissions must at some point end, the Court ruled that Harvard and UNC's admissions systems "fail[ed] each of these criteria" and so were invalid under the Fourteenth Amendment. *Id.* at 22.

### *i. Defendants failed to establish a compelling interest justifying the consideration of race:*

The Court articulated a rigorous test for justifying the use of race: "Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review." *Id*. at 26. The Court held that Harvard and UNC could not meet this standard because the objectives they sought to obtain through the consideration of race—goals like better educating students, promoting the robust exchanges of ideas, and fostering innovation and problem solving—were too amorphous to be subjected to judicial review. *See id.* at 22–26. While the majority opinion did not purport to hold that student body diversity can *never* be a compelling interest during the admissions process, following *SFFA*, universities have a higher burden to meet in order to justify the consideration of an applicant's race. As Justice Thomas put it in his concurrence: "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." Op., Thomas, J., concurring, at 29. This is plainly different from the *Bakke* standard, which rooted its holding that universities could pursue racial diversity in the context of academic freedom, which Justice Powell believed entitled universities to make their own judgments about the composition of their student body. *See* Op. at 17–18.

*ii. Defendants used race as a "negative" and as a "stereotype":*

The Court further held that Harvard and UNC "fail[ed] to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." *Id.* at 27. First, it found that the schools' policies of using race as a "plus" factor necessarily hurt other applicants because "[c]ollege admissions are zero-sum," such that "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* Second, the Court held that both schools impermissibly stereotyped students by considering "race for race's sake," that is, by considering race in an insufficiently particularized and individualized way that allowed some applicants to "obtain preferences on the basis of race alone." *See id.* at 28–29. These holdings strongly suggest that any systematic use of race *for the sake of increasing racial diversity* —even as a factor among other factors as part of a holistic admissions decision—is now unconstitutional because any possible "plus" to one prospective student will be understood to harm other applicants.

*iii. Defendants' consideration of race lacked a "logical end point":*

The Court also held that Defendants' admissions policies were unconstitutional because they had no expiration date. *Id.* at 30–34. In so holding, the Court interpreted its precedent in *Grutter* in an arguably novel manner to hold that all race-based admissions programs must eventually end—"despite whatever periodic reviews universities conduct[]" of those policies. *Id.* at 34.

## II. What Schools Can Still Consider:

Put these holdings together and *SFFA* undoubtably marks a major shift in the Supreme Court's jurisprudence on race in higher education and may well trigger broader changes in anti-discrimination laws. While the full impact of *SFFA* won't be clear for years—if not decades—the opinion itself provides substantial guidance on what colleges and universities can and cannot consider when admitting their students.

First, the Court concluded its opinion with an important caveat: "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." *Id.* at 39. Thus, schools seem free to conduct an individualized assessment of how race has shaped individual students. That is, admissions committees can assess the impact of race on an individual applicant's development, but not in the abstract. However, the Court also emphasized that schools "may not simply establish through application essays or other means the regime we hold unlawful today." *Id.*

Second, nothing in the opinion calls into question the ability of schools to consider many characteristics of applicants that do not directly implicate a protected class but may nonetheless promote diversity to some degree: for example, schools can still consider geographic diversity, parental income, athletic skill, artistic talent, or a student's first-generation- or legacy-status.[2]

[2] On Monday July 3, 2023, several civil rights groups filed a complaint with the U.S. Department of Education's Office of Civil Rights alleging that Harvard's legacy admissions process constitutes improper racial discrimination in that it disproportionately favors white students. We will continue to monitor developments with respect to this complaint.

Third, the Court cast serious doubt on whether schools can attempt to use race to remedy their own institution's history of racial discrimination. In a footnote, Chief Justice Roberts noted that no opinion of the Court has ever "permitted a remedial justification for race-based college admissions" and that schools with a history of discrimination—like Harvard and UNC—"should perhaps be the very *last* ones to be allowed to make race-based decisions." *Id.* at 36 n.8.

Finally, *SFFA* may call into question the consideration of other, non-racial protected characteristics in making admissions decisions. While various protected characteristics receive different degrees of protection under the law, the Court's holding that any use of race as a "plus" for one applicant also amounts to the use of race as a "negative" for others would logically apply to the use of plus factors for other protected traits like sex or sexual orientation. We will stay attuned to this issue.

## III. Closing Thoughts:

In the coming weeks and months, we will provide additional guidance through follow-on client alerts and CLEs focused on the impact of this decision, including with respect to its potential implications for employment and grantmaking decisions, as well as on DEI initiatives. We recognize that this decision is a momentous one—should you have any questions as to what it means for your organization, please do not hesitate to contact us.




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