HIGHER EDUCATION
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Race in Admissions after *Students for Fair Admissions, Inc. v. Harvard*

On June 29, 2023, the U.S. Supreme Court issued its long-awaited decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[1] The Court considered the admissions practices of Harvard College and University of North Carolina (UNC) and found that neither could withstand the "strict scrutiny" demanded for race-based admissions decisions. Although nominally about these two particular admissions programs, the Court's rationale for its ruling leaves virtually no possibility that race-based admissions practices will withstand judicial challenge.

Harvard and UNC's Admissions Programs: Harvard and UNC's admissions policies considered the race of the applicant. At Harvard, the admissions committee made a conscious effort to ensure there would not be a "dramatic drop-off" in its minority acceptance rate in any year. Additionally, an applicant's race was among one of only a few factors considered at the very end of the admissions process (legacy and athlete statuses being among the others) as Harvard determined its final admissions cohort. At UNC, an applicant's minority race could earn the applicant a "plus" factor in the ratings process. The impact of the race "plus" factor could be "significant" in the decision to admit the student or not.

The Court's Ruling: The Court explained that an admissions policy that factors race must pass "strict scrutiny" analysis. "Strict scrutiny" is a multipart test: Are the means used "further compelling government interests" and, if yes, are they "'narrowly tailored—meaning 'necessary' to achieve that interest.'" In reviewing its own precedent, the Court acknowledged that it had, in the past, accepted that the goal of "obtaining the educational benefits that flow from a racially diverse student body" was a sufficiently compelling interest. However, the majority of justices in this *SFFA v. Harvard* decision drew upon significant cautionary language in those prior decisions, such as "a university's freedom was not unlimited," and that certain approaches, such as a quota system, have consistently been held to be impermissible. The Court explained that its precedent on race-conscious admissions practices always presumed these practices would have a reasonable end point. To that point, in 2003, although upholding race-conscious admissions practices, the Court had announced, "'[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.'"

The *SFFA v. Harvard* decision struck down both Harvard and UNC's admissions processes on the grounds they: (1) fail strict scrutiny; (2) use race as a "negative" against certain groups and also as a stereotype; and (3) have no end point.[2]

First, as to strict scrutiny, the Court concluded that both Harvard and UNC point to what the Court characterizes as amorphous, immeasurable goals, such as "training future leaders in the public and private sectors," which "cannot be subjected to meaningful judicial review" and therefore cannot survive strict scrutiny. Likewise, as to the second strict scrutiny prong—whether the means are

1 https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf. Most internal citations have been omitted from this memo.

2 The Court notes that this decision does not apply to United States Military Academies, as their interests are not addressed in the context of this case.

narrowly tailored to achieve the compelling interest—the Court concluded that the institutions "fail to articulate a meaningful connection between the means they employ and the goals they pursue."

Second, and arguably even more significantly, the Court held these admissions practices failed in that they employ race as a "negative." The Court noted the admissions process is a "zero-sum" proposition: There are a limited number of seats in any admissions class, and an applicant either is or is not admitted. That being the case, the Court went on to find that an applicant's race being a positive or "plus" factor for them necessarily means that the race of an applicant of a non-favored demographic group is a negative. The Court also concluded that what it perceived as a practice of equating diversity of race with diversity of viewpoint fails as impermissible stereotyping.

Finally, the Court emphasized the admissions programs at issue, and the justifications and means they employ, have no '"logical end point.'" The institutions argued (among other things) that their programs will end when they achieve "'meaningful representation and meaningful diversity,'" but while they attempted to assert that this approach was not numbers-based, the Court concluded that it indeed is, which the Court held is "well established" as being "patently unconstitutional," and, per the Court, essentially guarantees "that race will always be relevant."

The Impact of the Decision

It is difficult to overstate the impact of the *SFFA v. Harvard* decision within the context of admissions decisions. For decades, the nation's highest court had found permissible a limited, constrained consideration of race in the college and university admissions decision-making processes. The Court's *SFFA v. Harvard* decision is the practical end to this.

The Court did not hold that race could never be a lawful factor in admissions. However, the standards articulated in *SFFA v. Harvard* set the bar so high as to make nearly impossible the future use of race as a lawful admissions criterion. With this decision, the Court rejects as impermissibly amorphous and immeasurable the societal interests that previously had been accepted, and the Court finds impermissibly stereotypical the assumption that racial diversity equates to diversity of academic discussion. The Court dismisses as similarly immeasurable benefits of diversity not dependent on viewpoint diversity, such as enhancing appreciation, respect and empathy and cross-racial understanding and learning to live with others of different backgrounds and experiences.

Further, the Court's "zero-sum" analysis is especially consequential. The Court reasons that, if one applicant's race is a *positive* for them in the admissions process, the inescapable analog is that another applicant's different race is a *negative* for them in the admissions process. The majority of the Court finds no way to reconcile such a result as anything other than unlawful race discrimination. This, then, is the unsolvable puzzle for any institution that seeks to isolate race as a factor in its admissions process.

Despite this, the Court's ruling does not foreclose entirely an admissions process that is conscious of other factors that may in some instances have a correlation to race, nor does it mandate that institutions shield themselves from any knowledge of an applicant's race. For instance, the Court's decision expressly acknowledges that colleges and universities may consider challenges overcome by students in their lived experiences that contribute to the individual personal characteristics and qualities they may bring to a campus community, including how race affected their life, "be it through discrimination, inspiration or otherwise." Thus, an institution could elicit this sort of information in an essay response and consider such characteristics a factor in favor of the applicant, provided that it

does not do so based on their race per se. Among other things, this means that an institution may need to treat an applicant who overcame the adverse impact of discrimination similarly to an applicant who overcame arguably comparable challenges such as poverty, homelessness, refugee status, etc. Similarly, an institution could consider socio-economic disadvantage or other life circumstance that may explain why an applicant's academic performance in high school is not indicative of their fullest potential (*e.g.*, significant family hardships) or, at the other end of the spectrum, a student with unusually enriching life experiences (*e.g.*, a student fluent in multiple languages who has spent summers abroad or has culturally significant knowledge, talents or interests). The needle to be threaded is to ensure that these considerations are not a subterfuge or proxy for the consideration of race.

The *SFFA v. Harvard* decision also does not foreclose the possibility of other measures designed to create a diverse student body, such as targeted recruiting efforts to draw a more diverse applicant pool. Such practices may well be the next frontier of admissions litigation, but for now they remain potentially permissible if designed and implemented properly.

Yesterday, the Department of Education (DOE) released a fact sheet responding to the decision. In the fact sheet, the DOE promises to issue guidance documents within the next 45 days setting forth diversity-related admissions practices that remain legal despite the U.S. Supreme Court's ruling.

Colleges and universities face a new legal landscape. The admissions process must be re-examined carefully in light of this landmark U.S. Supreme Court decision. Bond's experienced higher education practice is prepared to provide institutionally tailored advice and counsel.

For more information on how this decision impacts your institution, either in its admissions process or other campus programs and resources, please contact Lisa Feldman, Laura Harshbarger, Phil Zaccheo or any Bond higher education attorney with whom you are in regular contact.

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