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Affirmative Action: What Did We Learn from the Oral Argument and What's Next?

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Yesterday, the US Supreme Court heard oral argument in two cases—*Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*—concerning the consideration of race in college admissions. Students for Fair Admissions (SFFA), the petitioner in both cases, argued that Harvard College and the University of North Carolina (UNC) engage in racial discrimination against Asian-American applicants. The cases present the Court with the question of whether to overrule *Grutter* and other precedents permitting the consideration of race in admissions for the purposes of furthering student body diversity. If the Court were to do so, it would represent a sea-change for university admissions policies.

Oral argument—which stretched nearly five hours—indicated a sharply divided Court, but a majority of Justices appeared poised to overrule *Grutter* and thus prohibit the explicit use of race in college admissions. While some Justices seemed open to the use of race-neutral factors in admissions that might ultimately result in racial diversity, a clear majority expressed their concern that under the current doctrine, the explicit consideration of race in admissions could continue forever. Justices Sotomayor, Kagan, and Jackson emphasized the costs that retreating from the Court's precedents would have—in terms of reduced student-body diversity and the follow-on effects from that decrease in diversity—but those opinions were distinctly in the minority. A decision is expected by the end of June 2023.

The Legal and Factual Backdrop

The Supreme Court will decide the SFFA cases against a backdrop of more than 40 years of precedent—most notably *Bakke*, *Grutter*, and *Fisher*—permitting the use of race in university admissions within certain limits.[1]

Together, these cases established three key principles that have guided colleges and universities in designing their admissions practices. *First*, schools may have "a compelling interest in attaining a diverse student body," which permits the consideration of race consistent with the Equal Protection Clause and Title VI.[2] *Second*, schools may permissibly seek to enroll a "critical mass" of underrepresented groups—a concept "defined by reference to the educational benefits that diversity is designed to produce."[3] Although "critical mass" may involve "some attention to numbers," it does not allow a fixed number or percentage that must be attained or cannot be exceeded, nor does it insulate particular individuals from comparison with all other candidates for the available openings at a school or program.[4] *Third*, because race-conscious admissions programs are subject to strict scrutiny, they must be "narrowly tailored to achieve the educational benefits that flow from diversity."[5] In practice, "narrow tailoring" has required schools to consider workable race-neutral alternatives to achieve diversity, and the admissions program must provide for flexible and individualized review of applicants, must not unduly burden students of any racial group, and must contemplate that the consideration of

race is limited in time and subject to periodic review.[6]

SFFA's Lawsuits

Yesterday's argument at the Supreme Court represented the culmination of nearly eight years of litigation between the parties. In 2014, SFFA filed lawsuits against Harvard and UNC. In both suits, SFFA claims Asian-American applicants were denied undergraduate admission as a result of race-conscious admissions programs that benefit certain minority groups but disadvantage Asian Americans. SFFA thus argued that Harvard (a private school) had violated Title VI of the Civil Rights Act of 1964[7] through its admissions policy, and UNC (a public school) had violated both Title VI and the Equal Protection Clause.[8]

The universities prevailed below, and at the Supreme Court, SFFA makes two main arguments. *First*, SFFA asserts that *Grutter* should be overruled and that under both the Equal Protection Clause and Title VI, colleges and universities may not consider race as a factor in admissions.[9] *Second*, SFFA contends that even under existing precedent, Harvard and UNC's use of race is unlawful. SFFA argues that Harvard penalizes Asian-American applicants, engages in racial balancing, overemphasizes race, and rejected workable race-neutral alternatives.[10] As to UNC, SFFA argues that the school rejected a race-neutral alternative on the ground that it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or in the educational benefits of overall student-body diversity.[11]

What We Learned from Oral Argument

Although it is always risky to read the tea leaves and predict an outcome, the lengthy arguments yielded five important takeaways:

***Overruling* Grutter.** The Court appears poised to overrule in whole or in part the *Grutter* line of cases and bar the explicit use of race in college admissions. It is not hard to count to five votes for that outcome. Justice Thomas expressed skepticism that diversity on campus was a cognizable interest—let alone a compelling one. Justice Alito, who authored a lengthy dissent in *Fisher*, reiterated many of his longstanding critiques. Justice Gorsuch and Chief Justice Roberts voiced concern about the discrimination against Asian-American applicants—and, historically, Jewish applicants—that is possible under a system of holistic review. Justices Kavanaugh and Barrett focused on the Court's prediction in *Grutter* "that 25 years from now, the use of racial preferences will no longer be necessary."[12] On that view, eliminating race-conscious admissions might be characterized as consistent with a self-destruct button within *Grutter* itself, as opposed to overruling the decision. But regardless of the exact rationale the Court uses, Grutter as it exists today—with its approval of the explicit use of race in admissions provided a school can satisfy strict scrutiny—seems unlikely to remain the law after the Court issues its opinion.

Alternative Resolutions. While overruling *Grutter* may be the most likely outcome, it is not the only one. The Court could find, for example, that the lower courts applied *Grutter* incorrectly, and that Harvard and UNC's race-conscious admissions programs fail *Grutter*'s narrow-tailoring requirement. Indeed, the Solicitor General, as well as counsel for Harvard, reminded the Court that it could remand on that basis. Alternatively, the Court could tweak rather than toss the *Grutter* framework—for instance, by picking up Justice Thomas's line of questioning and paring back the deference afforded to universities to articulate the benefits of diversity. Or the Court could follow Justice Gorsuch's lead and consider whether at least part of the answer might lie in Title VI rather than the constitutional questions posed by the Equal Protection Clause.

Race-Neutral Alternatives. Much of the argument focused on race-neutral alternatives: what are they and how can they be used? Justice Gorsuch seized on the notion that universities should be required to dispense with legacy, donor, and athletic preferences prior to using race-conscious ones. Other Justices asked whether consideration of socioeconomic status or personal essays highlighting experiences related to race, such as overcoming racial discrimination, might deliver racial diversity

without direct consideration of race. And both Justices and advocates wrestled with how to consider the constitutionality of facially race-neutral alternatives that were adopted, at least in part, for race-conscious reasons.

Scope of the Ruling. Although the Court's decision will likely extend to all college and university admissions, it could include certain carveouts, or it could extend even broader than admissions. For example, given the Solicitor General's support for race-conscious admissions in the service academies—and the Court's seeming reluctance to second-guess the government's prerogative in that domain—the Court could theoretically exclude those institutions from a broader holding. Or the decision could extend more broadly: Justice Barrett raised the prospect that the Court's decision may have consequences for "post-admission" campus programs such as affinity housing.

The Likely Dissenters. Justices Jackson, Kagan, and Sotomayor made clear that any decision overturning *Grutter* would be accompanied by a vigorous dissent. The critiques were many and varied. Justice Jackson questioned whether the record indicated a redressable harm sufficient for Article III standing. Justice Kagan—in a refrain echoed by the Solicitor General—emphasized the societal importance of diversity on college campuses and beyond, and the harm that would be done by overruling *Grutter*. Justice Sotomayor pressed SFFA's counsel on how overruling *Grutter* could be squared with the original understanding of the Reconstruction Amendments and their post-ratification history, including the Freedmen's Bureau.

What's Next?

Timing. It is likely that the Court's decisions in these cases will come out in June and not before. Early in the UNC argument, Justice Kavanaugh signaled this expectation when he stated that "it's going to be too late to do anything about" the "current admissions cycle." As the argument progressed, the Justices' questioning further confirmed the Court's sharp divisions. There certainly will be a dissenting opinion, with all the back-and-forth revisions necessary for each side to respond to the other. And the various rationales for reversal at the root of questions from the Court's conservative wing suggest that some Justices in the majority may issue separate concurrences. While colleges and universities should not wait to begin preparations for a very different legal landscape, the time it will take for a final set of opinions to issue likely means that they can largely complete this year's admissions cycle governed by the Court's current precedents.

Race-Conscious Admissions in Higher Education. It is very likely that institutions of higher education will need to reformulate their admissions policies to eliminate the explicit consideration of race. Accordingly, colleges and universities with a commitment to racial diversity (and all the educational benefits racial diversity brings) will need to seriously consider how to use facially neutral alternatives that will nonetheless result in a racially diverse class. This process has two components: (i) identifying aspects of colleges and universities' current admissions policies that must be jettisoned, and (ii) identifying certain race-neutral preferences to add or augment. Much of this work can be done now, though additional preferential factors that are highly correlated with race will need to be assessed in conjunction with the Court's forthcoming opinions. Colleges and universities can expect this area to remain highly litigated, so they must be careful in developing and implementing any new policies and generating a record along the way.

Diversity, Equity, and Inclusion (DEI). As the Solicitor General warned at argument, "it's absolutely the case that the business community, that every aspect of society would feel … the shockwaves if this Court were to retreat from *Grutter* now." These shockwaves will not be limited to a reduced pipeline of diverse graduates who have been trained in diverse environments; they will also take the form of litigation, legislation, and government enforcement efforts aimed at eradicating policies and practices that stray from the logic of the Court's rulings. We do not expect the majority opinions in the *SFFA* cases to address businesses' DEI efforts directly, but if the universities lose, we do expect those opinions to be the first dominos to fall in a broader effort to dismantle programs throughout society that consider race and other protected characteristics. If, for example, the Court rules that Title VI bars university recipients of federal funds from considering race in admissions, it would not be difficult to extend the same reasoning to corporate recipients of federal funds that similarly consider race when

allocating limited resources—whether in recruitment, hiring, professional development, or otherwise. Before the *SFFA* decisions are issued, it is important for organizations across industries to take proactive steps to understand their existing DEI efforts, evaluate their efficacy, and analyze potential alternative means of achieving the same objectives.

Jenner & Block's Education Practice Group has extensive experience in counseling clients on issues related to race and admissions. Likewise, in anticipation of the SFFA decisions, Jenner's newly-created DEI Protection Task Force is developing creative, strategic, and tailored solutions for clients across industries to advance their DEI goals while minimizing legal risk.

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[1] *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265; *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 377 (2016).

[2] *Grutter*, 539 U.S. 328 (2003).

[3[*Id.* at 330.

[4] *Id.* at 335-36 (internal quotation marks and alterations omitted).

[5] *Fisher*, 579 U.S. at 377 (internal quotation marks omitted).

[6] *Grutter*, 539 U.S. at 334-43.

[7] *See* 42 U.S.C. § 2000d.

[8] *See* U.S. Const. amend. XIV.

[9] *See* Brief for Petitioner at 49, *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, Nos. 20-1199, 21-707 (U.S. May 2, 2022), 2022 WL 2918946.

[10] *Id.* at 71-72.

[11] *Id.* at 83.

[12] 539 U.S. at 343.