Supreme Court Ends Affirmative Action in Higher Education

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The United States Supreme Court recently held that the race-based admissions programs of Harvard College and the University of North Carolina (UNC) violated the Equal Protection Clause of the Fourteenth Amendment. The Court's decision in *Students for Fair Admissions v. Harvard College/Students for Fair Admissions v. University of North Carolina* effectively ends decades of affirmative action in admissions for both public and private colleges and universities.

Affirmative action in college admissions has evolved over more than four decades. Over this time, the Supreme Court prohibited the use of racial quotas, but permitted considering race as a "plus" during the admissions process, so long as all pertinent elements of diversity were considered in light of each applicant's particular qualifications. In 2003, in *Grutter v. Bollinger*, the Court reiterated the constraints on race-based admission programs and emphasized that such programs may not result in illegitimate stereotyping or "unduly harm nonminority applicants" and would require continuous oversight. The Court portended that race-based admissions must end at some point – with the expectation that "25 years from now, the use of racial preferences will no longer be necessary."

In *Students for Fair Admissions*, the Court (in a 5-4 ruling) determined that the time to end racial preferences in admissions has come because "[e]liminating racial discrimination means eliminating all of it." Harvard and UNC argued that racial preferences were necessary to accomplish their goals of "training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens." The Court held such interests, while commendable, were incapable of meaningful judicial review as the question of whether a particular mix of minority students satisfies these goals is standardless.

The Court further found that Harvard and UNC failed to articulate a connection between "the means they employ and the goals they pursue." For example, to "avoid the underrepresentation of minority groups" Harvard and UNC measured the racial composition of their classes using six categories. The Court found the categories imprecise,

thereby undermining the goals instead of promoting them. The Court also found these admissions programs employed "offensive and demeaning" stereotyping that assumed all minority students, because of their race, think alike. Finally, the Court concluded that the admissions programs lacked a "logical end point" as required by *Grutter*.

Race may still be considered in certain, limited contexts.

The Court did not completely foreclose the consideration of race in the admissions process. An institution may still "consider [] an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." According to the Court, "A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experience as an individual—"not on the basis of race." It remains to be seen how colleges and universities can implement such consideration in a manner consistent with the Court's holding.

The Court also left open the possibility that some institutions may have distinct, compelling interests that withstand strict scrutiny. In this regard, the Court expressly declined to address the issue of race-based admissions programs in military academics, acknowledging the "potentially distinct interests that military academics may present." In his concurring opinion, Justice Thomas opined that this carve out will allow other institutions with distinct interests—*e.g.*, religious institutions—to challenge their ability to continue to consider race in their admissions programs.

The impact may extend beyond higher education.

Employers who consider race as a factor in the hiring process may also feel the impact of the Court's decision. While the Court did not expressly prohibit the consideration of race in general hiring practices, it may result in similar challenges.

Apart from hiring practices, the future of the workforce may change. Primary, intermediate, and secondary schools with application-based entrance processes that consider race as a factor will likely adjust their admissions practices to align with this ruling or face similar legal challenges. Any ripple effect may start as early as pre-kindergarten, ending at the pool of potential employees with post-secondary education. The full impact of the *Students for Fair Admissions* remains to be seen.

Contact your Vorys lawyer if you have questions about the Court's impact on affirmative action and other diversity, equity, and inclusion initiatives.