# Supreme Court Restricts Use of Race in College Admissions; Decision Could Impact Employers as Well

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On June 29, 2023, the United States Supreme Court issued a landmark ruling sharply restricting the use of race in college admissions. The Court's decision immediately reshaped the landscape of student affirmative action measures in higher education, and employers may face similar challenges to voluntary affirmative action employment going forward.

**The Court's Decision**

The Court's decision involved a challenge to the student admissions practices at Harvard University and the University of North Carolina. At both schools, race was one factor that decision-makers considered when evaluating an applicant's file. A non-profit organization called Students for Fair Admission (SFFA) argued that this practice violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by discriminating against white and Asian students in favor of Black and Hispanic students. The schools contended that their admission programs were lawful under prior Supreme Court affirmative action cases, including a 2003 decision, *Grutter v. Bollinger*, in which the Court held that it was permissible for colleges to weigh an applicant's race as a "plus" factor as part of an individualized holistic assessment of an applicant to achieve the compelling goal of generating the educational benefits of a diverse study body.

By a 6-to-3 vote, the Court rejected the schools' arguments. Writing for the majority, Chief Justice John Roberts held that both the Harvard and UNC admission programs violated the Equal Protection Clause, which requires equal protection under the law without regard to race, color or nationality. The Court did not expressly overturn its past cases but held that the Harvard and UNC programs did not satisfy the "strict scrutiny" standard necessary to make race-based decisions lawful under the Equal Protection Clause. The majority explained that its past precedent provides that, to survive strict scrutiny, a race-based admissions program must further a compelling government interest, be narrowly tailored to achieve that interest, involve measures that can be subject to meaningful court review, and be limited in time with some endpoint. Noting that the Court had previously recognized the educational benefits stemming from a diverse student body as a compelling government interest, the Court nevertheless rejected the Harvard and UNC Programs. It held that, while diversity of students is a commendable goal, the rationales offered by the schools for their

affirmative action policies - producing "engaged and productive citizens," enhancing respect and empathy, and training future leaders - were simply not measurable or concrete enough for the Court to meaningfully analyze the programs or to justify the use of race in the admissions process. In addition, the Court noted that admissions programs cannot involve negative racial stereotyping or use race as a negative, but that the Harvard and UNC programs made the impermissible assumption that someone's race necessarily meant that their perspectives and thoughts will align with that race and that Harvard and UNC's practice of favoring Black and Hispanic applicants necessarily meant that having a different race was used as a negative factor in admissions. The Court also noted that its prior precedent stated that affirmative action should no longer be needed by about 2028 and that the Harvard and UNC programs had no sunset provisions. The Court made clear that its decision applies equally to both public and private institutions.

**Impact on Colleges and Universities**

While the Court's ruling marks the end of any college or university admissions program that uses an applicant's race as a "plus" or other determinative factor in the decision-making process, the majority stopped short of saying that schools could not consider a student's race in other ways. Chief Justice Roberts stated that the Court's decision does not prohibit "universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise" - a distinction likely to lead to an increased focus on race in entrance essays at schools seeking ways to diversify their student body without violating the Court's new affirmative action rules. Schools may also elect to focus on other socioeconomic factors, such as income, in making admissions decisions.

The Court's decision may have ripple effects in higher education beyond the admissions process. For example, opponents of race-conscious practices may seek to extend the Court's logic to scholarships that give preferences to, or are exclusively available to, racial minorities. Anticipating these challenges, some schools have already announced that they will no longer consider race in scholarships in the wake of the Court's Harvard/UNC decision.

**Implications for Employers**

Because the Court's decision was limited to college admissions, its implications for employers are not entirely clear.

The Fourteenth Amendment does not apply to private employers, and Title VII of the Civil Rights Act of 1964 - not Title VI - governs employment practices. Given these different legal frameworks, it may be that lower courts interpret voluntary affirmative action measures differently in the employment versus higher education context. In addition, federal government contractors are legally required to engage in certain non-voluntary affirmative action measures in employment and those obligations continue. On the other hand, it is

possible that the Court's decision might be cited as persuasive, non-binding authority to challenge employer voluntary affirmative action programs that involve consideration of race as a plus or determinative factor in connection with hiring or other employment decisions. As such, employers should confer with legal counsel in an effort to avoid future legal challenges, especially if lower courts begin to interpret the Supreme Court's decision as a broad statement about the use of race in other contexts. Employers should also anticipate that the Court's landmark ruling may prompt their job applicants, employees, customers, clients, and community members to focus more intently on the sometimes controversial issue of diversity initiatives and voluntary affirmative action in the workplace. Therefore, businesses and other organizations should consider how best to discuss their policies and practices in light of the significant shift in the legal and cultural landscape prompted by the Court's affirmative action decision.

It is also important to consider what does or does not constitute voluntary affirmative action. Voluntary affirmative action programs involve the use of race as an actual decision-making factor, but many diversity initiatives stop short of this. For example, a diversity initiative focused on widening and diversifying an employer's recruitment and candidate pools to promote diversity but that still has hiring decisions made without regard to race should not be impacted by the Court's ruling. Indeed, in a statement released after the Court's decision, Equal Employment Opportunity Commission (EEOC) Chair Charlotte Burrows noted that the ruling "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background." As the EEOC Chair explained, "It 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." Again, however, it would be prudent to review diversity practices and policies, particularly those involving any use of voluntary affirmative action, with legal counsel.