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Collegiate Affirmative Action Programs Restricted by SCOTUS Decision

The U.S. Supreme Court issued a 6-3 decision last week finding that the race-based admissions processes at Harvard University and the University of North Carolina are unconstitutional because they violate the Constitution's guarantee of equal protection.

The Supreme Court has historically permitted the limited use of race-based college admissions programs, beginning 45 years ago in the *Regents of the University of California v. Bakke* decision. In *Bakke*, the Supreme Court held that the educational benefits of a racially diverse student body were sufficient interests to survive the constitutional challenge of the use of a race-based admission program. Approximately 25 years later, in *Grutter v. Bollinger*, the Supreme Court again upheld the use of race-based admissions programs, adopting the reasoning in the *Bakke* decision, but adding the caveat that at some point these types of programs would come to an end.

The Court's June 29 opinion analyzed the race-based admissions processes for Harvard University, a private university, and UNC, a public university. Both Harvard and UNC's admissions processes take race (in addition to other factors) into consideration at several stages, including assigning numerical values to race and comparing the racial makeup of a prospective class with prior admitted classes.

The majority of the current Supreme Court ultimately held that Harvard and UNC's race-based admission programs violate the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment provides in pertinent part that no state shall "deny to any person . . . the equal protection of the laws." When examining whether a race-based program violates these Fourteenth Amendment

protections, courts use a two-step analysis known as the "strict scrutiny" test. First, a court examines whether the racial classification is used to further compelling interests. Second, is the court examines whether the use of race is "narrowly tailored" or "necessary" to achieve that compelling interest.

In their opinion, the Supreme Court majority determined that Harvard and UNC's race-based admissions programs failed to pass the strict scrutiny test. In support, the Court found that:

1. The universities claimed compelling reasons for the race-based admission programs (e.g., training future leaders, maintaining diverse outlooks, and preparing and engaging future citizens) are not sufficiently measurable for review by a court.
2. The universities fail to establish a meaningful connection between their stated interests/goals and the programs in place. Specifically, the Court points to overbroad racial categories (e.g., the Asian category is not broken down into South Asian or East Asian) and certain other racial categories that were not included (e.g., Middle Eastern).

In addition, the Supreme Court determined that, contrary to the Equal Protection Clause, these programs resulted in race being used as a negative against others. The Supreme Court specifically referenced the lower court's finding that Harvard's system negatively impacted admissions for Asian-American students, and that the programs are based on the premise that all persons that share a racial identity offer the same mindset, which the Court found to be improper stereotyping.

Lastly, pointing to their prior statements in *Grutter*, the Court held that the programs lack a "logical end point." The Court interprets *Grutter* as requiring universities to provide quantifiable goals that once reached, would indicate these race-based admissions programs must end. The universities raised several arguments in response:

1. That the end of the programs will occur once diversity and meaningful representation of all races is achieved on campuses. The Court found that comparing prior and prospective classes of students to measure this success is unconstitutional racial balancing.

2. That the programs would end when students receive the educational benefits of diversity on campuses. The Court disagreed with this point, finding that this is an immeasurable goal.
3. That the statement in *Grutter* that race-based programs, such as these, would no longer be needed in 25 years means that they should be allowed to continue until at least 2028. The Court decided that the 25-year timeframe was merely the *Grutter* Court's estimation.
4. That they conduct frequent reviews to determine whether the programs are still necessary so need endpoint is necessary. In response, the Court stated that periodic review does not salvage the unconstitutional nature of the programs.

Of note, the majority of the Court stated that, "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 in through discrimination, inspiration, or otherwise." This appears to leave the door open for the concept that while public and private universities can no longer use the type of race-based admissions programs described above, a prospective student's experiences based on race can still be a consideration during the admissions process if tied to character, attributes, abilities, or contributions to the university. The impact of this specific statement will be of particular interest moving forward.

At a minimum, the majority decision, which was written by Chief Justice John Roberts and joined by Justices Samuel Alito, Amy Coney Barrett, Neil Gorsuch, Brett Kavanaugh, and Clarence Thomas, will severely limit the use of affirmative action in college admissions going forward. Justice Sonia Sotomayor issued a strongly worded dissent joined by Justices Elena Kagan and Ketanji Brown Jackson, in which she maintained that majority "cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."

In the near future, based on a statement from the White House published on the same day the decision was issued, we can expect:

1. Guidance from the Biden administration on what admissions practices and programs the Executive Branch maintains are lawful;

2. A national summit on equal opportunity in higher education hosted by the U.S. Department of Education;
3. A Department of Education report on strategies for increasing diversity and educational opportunities;
4. Circulation of data regarding admissions and enrollment; and
5. Support to states and Tribal nations from the Department of Education to increase access to higher education.

Key Takeaways:

- Race-based admissions programs that consider a race demographic as a general factor or metric may be deemed unconstitutional, violating the Equal Protection Clause of the Fourteenth Amendment.
- Educational institutions should examine if the compelling reason for considering race in their admission programs is sufficiently measurable, that a connection for the compelling reason and the goals of the program exists, and that consideration of a race-based factor has an end date.
- Educational institutions can likely still consider race in the context of how a student's race has affected a prospective student's life if a student ties it to the student's character or attributes, essentially shifting the onus to the student to articulate how race impacted their life.

This client alert was drafted by Bethany Vanhooser*,* Sara Naylor*, and* Samuel Jackson*, attorneys in the Spencer Fane Nashville office. For more information about this issue, please visit* www.spencerfane.com*.*