FP SCOTUS Predictions: Supreme Court Set to Scrap Affirmative Action Admissions in Education

Insights
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The United States Supreme Court is poised to decide the future of race-conscious admissions in higher education – and potentially alter the landscape of affirmative action in education across the country. At issue in two pending companion cases are the admissions processes at Harvard College and the University of North Carolina that both consider race as one factor among many in their holistic evaluation of undergraduate applicants. These cases have wide-ranging implications, potentially affecting every higher education institution in the country and forcing them to rework fundamental aspects of their admissions processes, while also being instructive to k-12 independent and private schools with similar admissions processes. Our prediction? We expect SCOTUS will rule that colleges and universities can no longer consider race in their admissions processes. From there, we anticipate courts would look to these cases as persuasive with respect to k-12 admissions. This Insight takes a closer look at these cases, provides our full predictions, and offers a roadmap to prepare for the expected groundbreaking change.

What Are These Cases About?

Currently, higher educational institutions can consider race as part of a holistic review of applicants in an effort to create a diverse student body. The use of race as a factor in the admissions process has been a permissible approach, in some form or fashion, since 1978. This practice is more commonly viewed as "affirmative action" in the admissions process.

However, the two cases – *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* – ask the Supreme Court to consider challenges to affirmative action programs in the higher education landscape. Students for Fair Admissions (SFFA) – the plaintiff in both cases – argues that the schools' consideration of race as a part of a holistic review of applicants to cultivate a diverse student body unlawfully discriminates against applicants on the basis of race.

SFFA is an amalgamation of college and university applicants and prospective applicants and their families. While it serves as the same plaintiff in both cases, the claims for racial discrimination in each are under two separate legal theories.

- It alleges that Harvard violates Title VI of the Civil Rights Act, which bars colleges and universities that receive federal funding from discriminating on the basis of race, because Asian-

American applicants are less likely to be selected for admission than similarly qualified White, Black, or Hispanic applicants. It also alleges Harvard violates Title VI by engaging in racial balancing of its student population, overemphasizing race as an admissions factor, and rejecting workable race-neutral alternative criteria during the admissions process.

- It alleges that the University of North Carolina, as a public university, violates the Equal Protection Clause of the Fourteenth Amendment, which bars government entities from discriminating on the basis of race, by using a race-conscious admissions process when doing so is not necessary to achieve a diverse student body. This case also considers whether a university can reject a race-neutral alternative admission criteria if the criteria would change the racial composition of the student body, without the university having to prove that the criteria sacrifices the quality of students' education or the educational and social benefits of a diverse student body.

At stake is the potential that the Court will overturn its long-standing precedent of affirming the constitutionality of the use of race in college admissions. In 1978, the Court held in *University of California Regents v. Bakke* that the use of race as a factor in admissions for achievement of a diverse student body is constitutionally permissible. Then again in 2003, the Court held in *Grutter v. Bollinger* that the University of Michigan Law School was permitted to consider race in its admissions process as part of its efforts to assemble a diverse student body. More recently in 2013, the Court considered and affirmed the use of race-conscious processes in undergraduate admissions in *Fisher v. University of Texas at Austin*.

Did the Justices Show Their Cards at Oral Argument?

Oral arguments in this case, heard on October 31, were lengthy to say the least. In roughly six hours of questions and answers, the Court explored many hypotheticals, delved into legal rabbit holes of all kinds, and covered a lot of ground. Trying to recap all that was discussed at the Court would require more space than we have here, but several aspects of the oral arguments deserve specific attention and a more searching look.

25-Year Timeframe

Perhaps the single most discussed topic at oral argument was the famous – or perhaps infamous – 25-year time horizon outlined in the 2003 *Grutter* case. Justice O'Connor's majority opinion in that case stated that the Court expected that race-conscious admissions policies would no longer be necessary for colleges and universities "in 25 years" to achieve the diversity they were seeking. At the recent oral arguments, there were conflicting views on whether this meant that colleges and universities *must* use race-neutral or colorblind admissions systems by 2028 or whether the 25-year timeline was a projection of when race-conscious admissions would no *longer be necessary* to ensure diversity in higher education.

The advocates arguing in favor of race-conscious admissions, including Solicitor General Elizabeth Prelogar, were not able to articulate an exact timeframe where race-conscious admissions would not be necessary to achieve a critical mass of diversity. This indefiniteness certainly seemed to rankle several of the more conservative Justices, including Chief Justice Roberts and Justices Barrett and Kavanaugh.

Future Forecasting

There were a number of questions about how to handle higher education admissions in a post-race-conscious admissions world. This signaled that some of the Justices were leaning toward doing away with affirmative action in college admissions.

Skepticism From Previous Dissenter

Justice Thomas, who was in the dissent in *Grutter*, expressed a considerable amount of skepticism of diversity as a legitimate rationale for colleges and universities. He stated that diversity is too ephemeral a concept and that it "seems to mean everything for everyone." He also questioned the direct educational benefits of diversity, wondering whether a "diverse" classroom yield better chemists or physicists.

Concern From Three Most Liberal Justices

The three most liberal justices pushed back significantly on the position taken by SFFA.

- Justice Kagan spoke critically of the SFFA brief, which in her words takes the position that "it just doesn't matter if our institutions look like America." She spoke of the pathways to leadership presented by higher education, and that if these pathways are not diverse, the leadership of the United States will not be either.
- Justice Sotomayor also was critical of the simulations presented by SFFA in its briefs, citing that the District Court found them to be not workable. In each simulation, she noted, the enrollment of Black applicants dropped by a significant margin.
- Justice Jackson raised an interesting hypothetical regarding the potential inability of students to discuss their cultural experiences in admissions essays. SFFA contended that this would only be permissible if such essays weren't used a proxy for race. But Justice Jackson suggested that allowing one student to speak on their experiences – a White applicant speaking about their family history going back several hundred years, for example – but another being precluded from doing so because of race – a Black applicant being restricted from doing so because of the necessary mention of slavery – could be an equal protection violation. She discussed how striking down affirmative action would lead admissions committees to "value" such a White applicant's history and culture while not being presented with any information about a Black applicant's history and culture.

Most Striking Moment of Arguments

Perhaps one of the most ear-grabbing moment of the argument came from the Solicitor General. During oral argument, she talked about the signaling effect of diversity and representation, and that having diversity in a given field can signal to an aspiring professional that such field is open to them. Solicitor General Prelogar cited the fact that in the November sitting of the Court, only 2 of 27 advocates before the Court were women. She stated that, "it would be reasonable for a woman to look at that and wonder, is that a path that's open to me, to be a Supreme Court advocate?"

FP SCOTUS Prediction: Expect Affirmative Action to Be Struck Down

Based on our analysis of the facts and briefs, as well as oral arguments in both cases, we expect that race-neutral or colorblind admissions for all higher education institutions will be the new law of the land.

The Court could accomplish this in one of two ways:

- the majority might overrule *Grutter* and other precedents upholding race-conscious admissions overtly; or
- the Court might allow *Grutter* to "expire" in accordance with the 25-year timeline set out in Justice O'Connor's opinion.

Regardless of how it happens, the wording of the majority and minority's written opinions will be critical in outlining the parameters for the use of race in the higher education admissions process moving forward. Although an explicit use of race as a factor in admissions will likely be unconstitutional after this ruling, there are a wide range of avenues for colleges and universities to consider the impact and role race has played in applicants' lives, as well as each applicant's individualized, racial experience. This is due to the fact that colleges and universities will still be able to continue to promote a holistic and individualized evaluation of its applicants.

What Should You Do in the Meantime?

We expect the opinion will be published as late as June, so hopefully admissions departments have some time to parse through the opinion and rework their approach before admissions season starts for the undergraduate class of 2029. Some initial considerations you should be prepared to tackle:

- Higher education institutions should prepare to reshape their admissions processes to comply with this new approach, assuming they do not already have colorblind admissions. That might be as simple as removing a checkbox from the application or as complex as reweighting the factors in a holistic review process.
- An interesting wrinkle to this is how to handle and consider discussions of race in application essays. We could have more guidance from the actual SCOTUS opinions on this matter to help

steer the future in this area.

- Reshaping admissions could also cause colleges and universities to trim the number of legacy admissions (including children of alumni and faculty), an issue that was hotly discussed throughout the oral argument.
- K-12 schools should be on standby, as the SCOTUS decisions could eventually trickle down to your admissions policies as well. This will be a process that will unfold over time, guided by district and appeals courts in the jurisdiction in which your campus is located. However, depending on how the opinions are written, K-12 schools may opt to take a more proactive approach and reshape their admissions processes as well.

Hopefully, the Court will offer robust guidance on how to navigate this potential new landscape. But as with many Supreme Court opinions, the lower courts will likely be tasked with interpreting the law and applying it to borderline cases over the next handful of years.

FP Predictions: The Breakdown

- **Suzanne Bogdan:** 6-3 in the *North Carolina* case; 6-2 in the *Harvard* case**, both in favor of Students for Fair Admissions, with Chief Justice Roberts writing for the majority and Justice Kavanaugh authoring a concurring opinion. Justices Jackson (UNC) and Kagan (Harvard) will author dissenting opinions in the two cases.
- **Brian Guerinot**: 6-3 in the *North Carolina* case; 6-2 in the *Harvard* case**, both in favor of SFFA.
- **Julia Sherwood:** 6-3 in the *North Carolina* case; 6-2 in the *Harvard* case**, both in favor of SFFA, with Justice Alito writing for the majority, Chief Justice Roberts authoring a concurring opinion, and Justice Kagan authoring a dissenting opinion.
- **Kristin Smith:** 6-3 in the *North Carolina* case; 6-2 in the *Harvard* case**, both in favor of SFFA, with Justices Thomas and Alito splitting opinion-writing duties with dissenting opinions by Justices Jackson and Sotomayor, respectively.
- **Sheila Willis:** 6-3 in the *North Carolina* case; 6-2 in the *Harvard* case**, both in favor of SFFA, with Justice Thomas writing the majority and separate dissents by Justices Jackson, Kagan, and Sotomayor.

***(Justice Jackson recused herself from considering the Harvard case, as she is a member of the Harvard Board of Overseers.)*

Conclusion

Please consult your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Education Team to obtain practical advice and guidance on how to adapt your school policies to the changes we expect as a result of the SCOTUS decisions. We will continue to monitor the latest developments and provide updates as warranted, so you should ensure you are subscribed to Fisher

Phillips' Insight system to gather the most up-to-date information.

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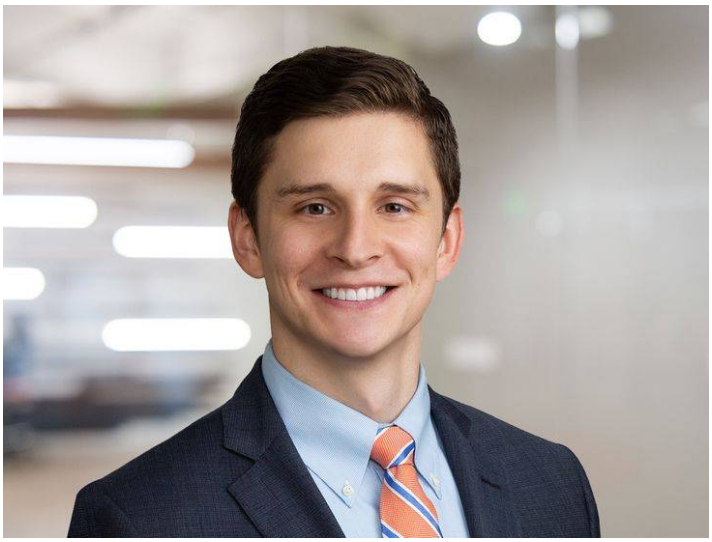

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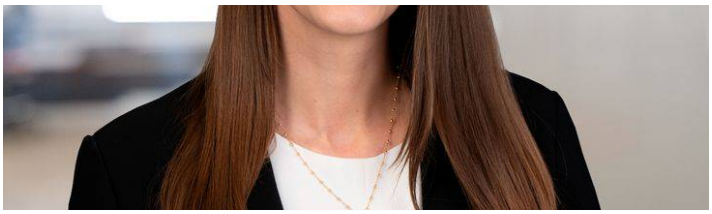

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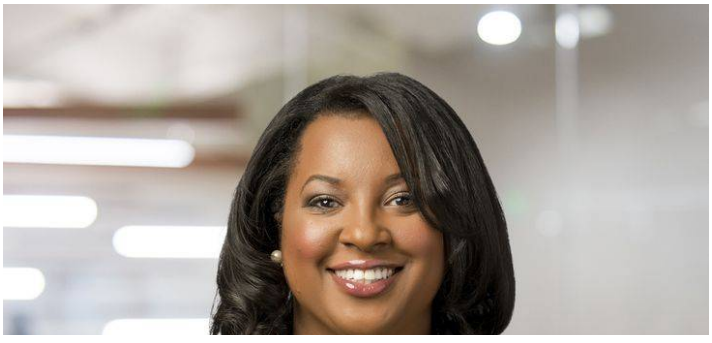

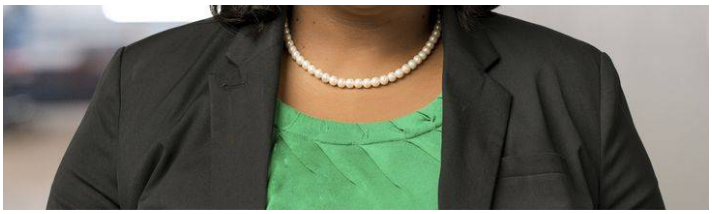

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