SUMMARY OF THE SUPREME COURT'S DECISIONS

in *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina (2023)*

Lawyers' Committee for Civil Rights Under Law | August 2023

ON JUNE 29, 2023, the Supreme Court decided *Students for Fair Admissions v. President and Fellows of Harvard College* ("SFFA v. Harvard") and *Students for Fair Admissions v. University of North Carolina* ("SFFA v. UNC"), holding that Harvard's and UNC's race-conscious admissions[1] programs violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Despite the headlines of most news outlets proclaiming the death of affirmative action, the Court *did not* hold that all race-conscious admissions programs are unconstitutional. However, the decisions do undermine precedent, making it more difficult for universities to pursue race-conscious admissions.

This summary helps explain what the Court did say in its complex ruling, and perhaps more importantly, what it did not say, on affirmative action in college admissions.

The Lawyers' Committee, together with co-counsel, represented student-intervenors in the UNC case and argued that case before the Supreme Court; and amici in the Harvard case.

I. Background on the Harvard and UNC Cases

On November 17, 2014, SFFA brought separate cases against Harvard, the oldest private university in the country, and UNC, the oldest public university in the country, alleging that their race-conscious admissions programs were unlawful under the Equal Protection Clause and Title VI. Essentially, they raised two types of claims: first, they argued that the programs failed to follow the Supreme Court's precedent, set forth in *Grutter v. Bollinger*, 539 U.S. 306 (2003), by engaging in prohibited practices like racial balancing, using race as a predominant factor, or failing to use race-neutral means before considering race; and second, they argued that the *Grutter* precedent should be overruled, claiming that any explicit consideration of race violates the Fourteenth Amendment and Title VI.[2]

Traditionally, the Court has allowed colleges to consider race as a factor in admissions only under limited circumstances, such as when those programs satisfy its *strict scrutiny* framework. Under this framework, a university may consider race-conscious programs if it has a *compelling interest* to do so that can be achieved through *narrowly tailored* means. In *Grutter*, the Supreme Court held that the University of Michigan Law School's race-conscious admissions program—that considered race as one factor among many in a holistic review process—satisfied this strict scrutiny standard.[3] In reaching this decision, the Court recognized that colleges: 1) have a compelling interest in the educational benefits of a diverse student body, including a racially diverse student body; and 2) programs that consider applicants on their individual characteristics, and do not use quotas or racial-balancing, are narrowly tailored to accomplish that interest when there are no effective race-neutral alternatives available. As recently as 2016, the Supreme Court affirmed this framework in *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) ("*Fisher II*"), finding that UT-Austin's race-conscious admissions program, which similarly considered race as part of a holistic individual review, satisfied strict scrutiny.

Recognizing this precedent, the federal district courts in *SFFA v. Harvard* and *SFFA v. UNC*, after extensive briefing and weeks-long bench trials, issued exhaustive opinions finding that Harvard's and UNC's race-conscious admissions programs satisfied strict scrutiny. *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019); *SFFA v. UNC*, 567 F. Supp. 3d 580 (M.D.N.C. 2021). Both courts found that the universities

1 For purposes of this publication, the term "race-conscious admissions" refers to admissions programs that expressly include race as a factor in admissions for certain racial and ethnic groups identified as underrepresented at the respective campus.

2 SFFA also alleged that Harvard intentionally discriminated against Asian American students and favored white, Black and Latinx students. The opinion did not expressly address this claim.

3 This framework for judging race-conscious admissions was first articulated twenty-five years earlier by Justice Powell in *Regents of Univ. of Calif. v. Bakke,* 438 U.S. 265 (1978).

pursued legitimate, measurable, and compelling interests in student body diversity and that they only considered race as one factor among many others on an individual basis and never as a negative for any applicant. The U.S. Court of Appeals for the First Circuit affirmed the district court's decision in *SFFA v. Harvard*, 980 F.3d 157 (1st Cir. 2020). The U.S. Court of Appeals for the Fourth Circuit did not have the opportunity to assess the district court's decision in *SFFA v. UNC*, which SFFA appealed directly to the United States Supreme Court.

II. The Supreme Court's Majority Decisions in Harvard and UNC

In its decisions issued on June 29, 2023, the Supreme Court found that Harvard's and UNC's admissions programs violate the Equal Protection Clause and Title VI[4] because they fail to satisfy strict scrutiny. Though the majority posited that its strict scrutiny analysis of admission programs aligns with its prior decision in *Grutter*, the Court's articulation of this standard makes it much harder for colleges to craft permissible race-conscious programs.[5]

The Court grounds its decision in a narrow and misguided historical overview of the Fourteenth Amendment, ignoring the substantial history of the Equal Protection Clause showing Congress's intent both to repel the subjugation of Black people to advance opportunity for Black people. Indeed, Congress rejected language in proposed amendments that were more aligned with colorblindness. Nevertheless, the Court concludes that the Equal Protection Clause was enacted to ensure colorblindness and authorized racial classifications only under narrow circumstances that could survive their articulation of strict scrutiny, such as race-based remedial plans and plans that avoid imminent and serious risks to safety in prisons.

The Court relies on its own twisted historical understanding to tighten the requirements of the *Grutter* standard even while ostensibly keeping with precedent. For example, in its decision, the Court confirms that for schools to explicitly consider race in admissions, they must have a compelling interest in that consideration. In *Grutter* and *Fisher II*, the Court held that higher education institutions have a compelling interest in the educational benefits of diversity, such as promoting cross-racial understanding, breaking down racial stereotypes, increasing learning outcomes, and preparing students to work in a diverse workplace. In both the Harvard and UNC cases, the district courts respectively found both universities had a legitimate interest in these educational benefits and were adequately assessing this interest. SFFA presented no evidence disputing these findings. **Yet, the Supreme Court holds that the universities' stated interests—described similarly as the interests articulated in *Grutter and Fisher II*—could not be compelling because they are too imprecise for measurement.** As a result, the Court concludes that the goals articulated by Harvard and UNC are "commendable" but "are not sufficiently coherent for the purposes of strict scrutiny."

The Court also finds that the race-conscious admissions programs are not narrowly tailored to the school's stated compelling interests. In doing so, the Court identifies four characteristics that a race-conscious admissions program must meet to be narrowly tailored.

- **First, the Court states that there must be a "meaningful connection between the means they employ and the goals they pursue."** Harvard's and UNC's programs lack this connection because their means, *i.e.*, the racial categories the schools use to identify the diversity of their class, are "imprecise" and "plainly overbroad." The Court notes, for example, that the "Asian" category is overbroad because it includes, without distinguishing, East Asian and South Asian students. It also critiqued that the categories do not clarify what option students from the Middle East should choose.
- **Second, the Court holds that race-conscious programs must not use race as a negative.** The Court found that Harvard's and UNC's programs fail to meet this requirement because their programs allowed for a tip or a plus to be given to an applicant based on their race alone. According to the Court, using race in this manner inherently allows for the negative use of race because in the "zero-sum" environment of admissions, a "benefit provided to some applicants but

4 The Court explained in a footnote that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." It concluded that since neither party challenged whether Title VI and the Equal Protection Clause should be interpreted in this way, it proceeded under the assumption that it would apply the same standard to both schools' admissions policies.

5 This heightening of the requirements of strict scrutiny in the context of higher education admissions is undoubtedly what led Justice Sotomayor, in her forceful dissent, to state that the Court's decision "is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny 'fatal in fact.'" Similarly, Justice Thomas also appears to believe that this Court's decision "makes clear that *Grutter* is, for all intents and purposes, overruled." However, as noted by Justice Sotomayor, the Court did not engage in the required analysis to formally overturn precedent. Accordingly, colleges may want to continue to research ways to create race-conscious admissions programs within the confines described by the Court.

not to others necessarily advantages the former group at the expense of the latter."

- **Third, the Court rules that race-conscious admissions programs must not use race in a way that reinforces racial stereotypes.** Harvard's and UNC's programs did not meet this factor because their programs, according to the Court, provided preferences to students "on the basis of race alone." This resulted in a system that rests on the "pernicious stereotype that a black student can usually bring something that a white person cannot offer," which is impermissible.
- **The fourth and final characteristic of a lawful race-conscious admissions program is that it has a "logical end point."** Harvard's and UNC's programs lacked such endpoints because the schools' proposed endpoints, such as when "there is meaningful representation and [] diversity" on their campuses, could not be measured to determine when they were met.

  The Court's narrow tailoring analysis is particularly egregious for the way that it obscures and ignores the record painstakingly created at trial in both cases. For example, the Court's conclusion that Harvard's and UNC's programs used race as a stereotype starkly contradicts the testimony and other evidence provided by students and experts in both the Harvard and UNC cases. At trial, several students testified that the diversity created by these race-conscious programs broke down, rather than reinforced, stereotypes. For example, Hanna Watson, an alumna of UNC, testified that racial diversity in classes fostered "better feedback" and discussion, and that *intra*-racial diversity within UNC's Black community broke down stereotypes by showing that "[B]lackness is not a monolith." SFFA presented no student testimony suggesting otherwise.
- **At the end of its opinion, the Court does acknowledge that its decision does not affect the ability of universities to consider racialized experiences, such as when an applicant discusses "how race affected his or her life, be it through discrimination, inspiration, or otherwise."** While the Court did note that universities cannot assess such experiences in ways intended to circumvent the ruling, universities may continue to assess on an individualized basis an applicant's mention of race in essay questions and other parts of an application where a student may raise their race on an individualized basis.

III. Concurring and Dissenting Opinions

Almost every other member of the Court weighed in on the Court's majority opinion. Justice Kavanaugh's concurrence acknowledged, in part, that civil rights laws may be used to address barriers confronting underrepresented applicants of color and that race-neutral programs may be considered in overcoming past discrimination. In separate opinions, Justices Gorsuch and Thomas would have extended the Court's colorblind ruling to more extreme ends. For example, in Justice Gorsuch's concurring opinion, he argues that Title VI's language should be interpreted to preclude the use of race in admissions altogether. Similarly, Justice Thomas interprets the Equal Protection Clause to prohibit the government from using any race-based classifications, even when those classifications are used to help support people of color who have been historically and systematically denied access to government institutions.

The dissents by Justices Sotomayor and Jackson, on the other hand, highlight the ways that the majority and concurring opinions are detached from the record, as well as the history and purpose of the Equal Protection Clause and Title VI. Recounting the history of the Equal Protection Clause and several congressional race-conscious efforts enacted to bring greater equality to African Americans, Justice Sotomayor criticized the majority's "colorblind" framework for "subvert[ing] the constitutional guarantee of equal protection by further entrenching racial inequality in education." Justice Jackson doubled down on these arguments, discussing at length the historical, systematic discrimination against Black Americans and how this horrid legacy of inequality permeates society today. She wrote that "[p]ermitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise."

IV. What Colleges Can Do Now to Ensure Equitable Access and Opportunity

It is equally important to highlight what the Court did not say in its decision. As noted above, the Court's decision does not eliminate the consideration of race in the admissions process altogether. Students can still discuss, and schools may still consider, a student's individual racialized experiences in the context of their applications. Moreover, the Court left the door open for race-conscious admissions programs that can satisfy the, admittedly

difficult, standards it articulated.[6] And nothing in the decision affects the ability of colleges and universities to continue to pursue and support diversity on its campuses through other means, such as:

- Race-neutral alternative admissions programs that consider factors like high school class rank ("percentage plans"), socioeconomic status and wealth, overcoming adversity, and first-generation college student; in fact, Justices Kavanaugh, Gorsuch, and Thomas all acknowledged the permissibility of such programs.
- Increasing need-based aid, redefining "merit," and expanding targeted recruitment to underserved communities.
- Deconstructing barriers to admission for underrepresented students, such as reducing or eliminating reliance on standardized testing for admissions and scholarships, eliminating legacy preferences, and removing financial barriers to enrollment.
- Adopting Diversity, Equality, Inclusion and Access (DEIA) efforts and other measures that schools can use to ensure that all students feel like they belong on campus. This may include support for affinity groups, implementing accessible systems to report and meaningfully address experiences of prejudice and discrimination on campus, and strengthening recruitment and outreach to underrepresented faculty groups.

Schools can and should continue to use all the tools at their disposal to ensure that they are able to recruit, admit, support, and graduate a diverse and inclusive group of students commensurate with their respective missions and goals.

V. Conclusion

Anti-civil rights organizations will undoubtedly seek to use the Court's decision to further its agenda. In fact, it has already started. Only a few weeks after the decision, Ed Blum, president of SFFA, purportedly sent a letter to 150 colleges and universities providing an overly broad and inaccurate interpretation of the Court's holding and encouraging schools to practically eliminate the use of race in their admissions programs altogether. The Lawyers' Committee responded with its own letter, clarifying and explaining the effect of the Court's decision on college admissions.

These attacks will continue. This is why it is more important than ever for higher education institutions to recommit to efforts to ensure opportunity for all students. There is no silver bullet to assuring racial equity, access, and justice in higher education but there is plenty that higher education institutions can do to move us further in that direction. Our nation's future as a thriving multi-racial democracy for all depends on it.

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6 The Court also noted that its decision does not apply to race-conscious admissions programs at military academies, which may have "potentially distinct interests."