A New Supreme Court Challenge to Affirmative Action in University Admissions

By the summer of 2023, affirmative action in higher education may come to an end. In 1978, through *Regents of the University of California v Bakke,* the Supreme Court endorsed affirmative action, often referred to as holistic admissions, which provides a tip for students based on their race to promote diversity in university classrooms. The Court subsequently affirmed that decision in 2 other legal challenges, *Grutter v Bollinger* in 2003 and *Fisher v University of Texas* in 2016. Now, the Court has agreed to review lower court decisions in 2 cases, *Students for Fair Admissions Inc v President & Fellows of Harvard College* and *Students for Fair Admissions Inc v University of North Carolina,* which have directed renewed attention to holistic admissions policies. These consolidated cases will be heard during the Court’s October 2022 term, with a decision expected by the summer of 2023.

Some legal scholars have predicted that the Court’s decision in these cases (referred to hereafter as *Harvard College* and *University of North Carolina*) will spell the demise of holistic admissions in higher education. The petitioner, Students for Fair Admissions, is a nonprofit organization led by Edward Blum that opposes racial classification and preferences in university admissions. In *Harvard College,* the Court will address 2 questions: (1) whether the Supreme Court should overrule *Grutter v Bollinger* and determine that institutions of higher education cannot use race as a factor in admissions and (2) whether Harvard College violated Title VI of the Civil Rights Act of 1964 by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race, and rejecting race-neutral alternatives. Title VI forbids racial discrimination by any program receiving federal financial assistance.

In *University of North Carolina,* the Court will also address 2 questions: (1) whether the Court should overrule *Grutter v Bollinger* and (2) whether a university can reject a race-neutral alternative without proving that the alternative would sacrifice the educational benefits of student-body diversity.

The *Harvard College* and *University of North Carolina* cases have already been decided by lower courts, and in both cases, the lower courts ruled for the institutions. Because Harvard College is a private institution, its questions were addressed on a statutory basis (ie, Title VI of the Civil Rights Act). University of North Carolina is a public institution, so its questions were addressed on a constitutional basis (ie, the Equal Protection of the Laws Clause of the Fourteenth Amendment of the US Constitution), but Title VI also applies to the university. In her opinion for the First Circuit in the *Harvard College* case, Judge Sandra Lynch wrote, “Title VI’s protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment.” Thus, in the Supreme Court cases, there will be no meaningful distinction between the protections regarding racial classifications in Title VI and the Equal Protection of the Laws Clause.

For medical schools, the ruling will affect not only the diversity of medical school classes, but also the diversity of the nation’s physician workforce. The composition of the workforce should mirror the society that it serves, but that goal will be more difficult to accomplish without holistic admissions policies for medical schools. Thus, the stakes are quite high.

Because the cases involve racial categories, strict scrutiny will be applied in the Court’s decisions. To survive strict scrutiny, 2 criteria must be met: (1) there must be a compelling interest in pursuing a holistic admissions policy, and (2) the policy must be narrowly tailored to achieve the result. In the lower courts, universities were judged to have a compelling interest in achieving diversity through the application of their holistic admissions policies. Consistent with Supreme Court precedent, the institutions’ use of race in admissions must also be narrowly tailored to meet the...
stated objective of achieving diversity. An admissions program is not narrowly tailored if: (1) it involves quotas or racial balancing, (2) it uses race as a mechanical tipping factor, or (3) it uses race despite the option of race-neutral alternatives. In both the Harvard College and University of North Carolina cases, the lower courts judged that the holistic admissions programs were narrowly tailored and therefore constitutionally permissible.

There is, however, considerable doubt that the Supreme Court will agree. If the Court were to rule against holistic admissions policies, what might be the Court’s legal reasoning?

The Court could decide that the universities do not have a compelling interest in pursuing diversity with race-based admissions policies. Soon after he became Chief Justice of the United States, John Roberts wrote the opinion for the Court in Parents Involved in Community Schools v Seattle School District No. 1.

To prevent the recurrence of segregation in its public schools, Seattle employed a racial tiebreaking approach for student assignment to public high schools. The Court ruled, based on the Equal Protection of the Laws Clause of the Fourteenth Amendment, that the school district did not have a compelling interest in preventing racial imbalance and that the plan was not narrowly tailored. Chief Justice Roberts wrote, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Although Parents Involved pertained to public high schools and not universities, in Harvard College and University of North Carolina, the Court could overrule precedent in deciding that the universities do not have a compelling interest to justify race-based admissions. In Grutter v Bollinger, Justice Sandra Day O’Connor wrote, “The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” That proposed time limit will expire in 2028, perhaps close enough for this Court. Also, the Harvard College and University of North Carolina cases may be decided by just 8 justices. If she is confirmed, Judge Ketanji Brown Jackson may need to recuse herself because she serves on the Harvard Board of Overseers.

Even if the Court determines that the universities do have a compelling interest in achieving diversity, the Court could rule that the holistic admissions policies are not narrowly tailored because they involve racial balancing, use race as a mechanical tipping factor, or race-neutral alternatives have not been pursued. After examining each of these 3 factors, the lower courts ruled that the universities’ holistic admissions policies fulfilled these criteria for narrow tailoring.

However, an additional requirement for narrow tailoring may be applicable in the Harvard College case. Justice O’Connor wrote in her opinion in Grutter v Bollinger, “We acknowledge that there are serious problems of justice connected with the idea of preference itself. Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group.” If the Court determines that Harvard College discriminated against Asian American applicants as alleged, its holistic admissions program may then be judged not to be narrowly tailored.

Affirmative action in higher education is once more in the balance. The viability of holistic admissions policies will depend on whether they can survive strict scrutiny, particularly the requirement for narrow tailoring. The Court’s decision in this case will be consequential, if not historic, for universities, their medical schools, and the composition of the physician workforce.
REFERENCES