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June 29, 2023

THE SUPREME COURT LIMITS THE USE OF RACE IN COLLEGE ADMISSIONS: POTENTIAL IMPACT ON WORKPLACE DIVERSITY PROGRAMS

To Our Clients and Friends:

Earlier today, the Supreme Court released its much-anticipated decisions in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*. By a 6–3 vote, the Supreme Court held that Harvard's and the University of North Carolina's use of race in their admissions processes violated the Equal Protection Clause and Title VI of the Civil Rights Act. Chief Justice Roberts wrote the majority opinion.

Although the majority opinion does not explicitly modify existing law governing employers' consideration of the race of their employees (or job applicants), the decisions nevertheless have important strategic and atmospheric ramifications for employers. In particular, the Court's broad rulings in favor of race neutrality and harsh criticism of affirmative action in the college setting could accelerate the trend of reverse-discrimination claims.

As a formal matter, the Supreme Court's decision does not change existing law governing employers' use of race in employment decisions. But existing law already circumscribes employers' ability to use race-based decision-making, even in pursuit of diversity goals.

I. Background

Students for Fair Admissions ("SFFA"), an organization dedicated to ending the use of race in college admissions, brought two lawsuits that were considered together at the Supreme Court. One lawsuit challenged Harvard's use of race in admissions on the ground that it violates Title VI, which prohibits race discrimination in programs or activities receiving federal assistance (including private colleges that accept federal funds). *SFFA v. Harvard*, No. 20-1199. The second lawsuit challenged the University of North Carolina's use of race in the admissions process on the ground that it violates the Equal Protection Clause, which applies only to state actors (e.g., public universities). *SFFA v. University of North Carolina*, No. 21-707. The plaintiffs argued, and the defendants did not meaningfully contest, that the law governing the use of race in college admissions under Title VI and the Equal Protection Clause is the same.

Prior to today's decisions, the law governing colleges' use of race in admissions was set forth in two Supreme Court cases decided on the same day in 2003: *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Grutter*, the Supreme Court upheld a law school's consideration of applicants' race as a "'plus' factor . . . in the context of its individualized inquiry into

the possible diversity contributions of all applicants." 539 U.S. at 341. In *Gratz*, the Supreme Court struck down a university's consideration of race pursuant to a mechanical formula that "automatically distribute[d] 20 points . . . to every single 'underrepresented minority' applicant solely because of race." 539 U.S. at 271.

SFFA asked the Court to overrule *Grutter* and adopt a categorical rule that colleges cannot consider applicants' race in making admissions decisions. It also argued that Harvard's and North Carolina's use of race is unlawful even under *Grutter* because both colleges allegedly engage in racial balancing, discriminate against Asian-American applicants, and reject race-neutral alternatives that would achieve the colleges' diversity goals.

II. Analysis

A. The Supreme Court's Opinion

The Supreme Court held that both Harvard and UNC's affirmative-action programs violated the Fourteenth Amendment's Equal Protection Clause. In a footnote, the Court explained that the Equal Protection Clause analysis applies to Harvard by way of Title VI, 42 U.S.C. § 2000d, which prohibits "any educational program or activity receiving Federal financial assistance" from discriminating on the basis of race. Because "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," the Court "evaluate[d] Harvard's admissions programs under the standards of the Equal Protection Clause."

Applying strict scrutiny, the Court asked whether universities could "make admissions decisions that turn on an applicant's race." The Court emphasized that *Grutter*, which was decided in 2003, predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." The Court explained that college affirmative-action programs "must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end."

The Court then determined that Harvard and UNC's admissions programs are unconstitutional for several reasons. *First*, the Court concluded that universities' asserted interests in "training future leaders," "better educating [their] students through diversity," and "enhancing … cross-racial understanding and breaking down stereotypes" were "not sufficiently coherent for purposes of strict scrutiny." *Second*, the Court found no "meaningful connection between the means [the universities] employ and the goals they pursue." The Court concluded that racial categories were "plainly overbroad" by, for instance, "grouping together all Asian students" or by employing "arbitrary or undefined" terms such as "Hispanic." *Third*, the Court held that the universities impermissibly used race as a "negative" and a "stereotype." Because college admissions "are zero-sum," the Court held, a racial preference "provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Finally*, the Court observed that the universities' use of race lacked a "logical end point."

The Court's opinion employs broad language against racial preferences, reasoning that "[e]liminating racial discrimination means eliminating all of it." As such, universities and colleges can no longer consider race in admissions decisions (subject to a narrow exception for remediating past

discrimination). But the Court clarified 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 it through discrimination, inspiration, or otherwise," as long as the student is "treated based on his or her experiences as an individual—not on the basis of race." The Court also made clear, however, that "universities may not simply establish through application essays or other means the regime we hold unlawful today."

The Chief Justice's opinion for the Court was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Justices Kagan, Sotomayor, and Jackson dissented. Justices Thomas, Gorsuch, and Kavanaugh wrote separate opinions concurring in the Court's decision. Justices Sotomayor and Justice Jackson wrote dissenting opinions.

B. Existing law governing reverse-discrimination claims against employers

Even prior to the *SFFA* decisions, an employer's consideration of the race of its employees, contractors, or applicants was already subject to close scrutiny under Title VII and Section 1981. "Without some other justification, . . . race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race." *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009).

Supreme Court precedent allows a defendant to defeat a reverse-discrimination claim under Section 1981 or Title VII by demonstrating that the defendant acted pursuant to a valid affirmative-action plan. *See, e.g.*, *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 626–27 (1987); *see also, e.g.*, *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate,* 470 F.3d 827, 836–40 (9th Cir. 2006) (en banc) (applying *Johnson* in Section 1981 case). If a defendant invokes the affirmative-action defense (under Title VII or Section 1981), then the plaintiff bears the burden of proving that the "justification is pretextual and the plan is invalid." *Johnson*, 480 U.S. at 626–27.

"[A] valid affirmative action plan should satisfy two general conditions." *Shea v. Kerry*, 796 F.3d 42, 57 (D.C. Cir. 2015). First, the plan must be remedial and rest "on an adequate factual predicate justifying its adoption, such as a 'manifest imbalance' in a 'traditionally segregated job category.'" *Id.* (quoting *Johnson*, 480 U.S. at 631) (alteration omitted). "Second, a valid plan refrains from 'unnecessarily trammeling the rights of white employees.'" *Shea*, 796 F.3d at 57 (quoting *Johnson*, 480 U.S. at 637–38 (alterations omitted)). A valid affirmative-action plan "seeks to achieve full representation for the particular purpose of remedying past discrimination," but cannot seek "proportional diversity for its own sake" or seek to "maintain racial balance." *Id.* at 61.

In addition, plaintiffs alleging discrimination under Title VII or Section 1981 must show that they were harmed in some way. For example, Title VII generally requires a plaintiff to show that discrimination affected "his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Courts often interpret this to mean a plaintiff must show a concrete and objective "adverse employment action," *e.g.*, *Davis v. Legal Services Alabama, Inc.*, 19 F.4th 1261, 1265 (11th Cir. 2021) (quotation marks omitted), although other courts have indicated that in some circumstances less tangible harms might be sufficient, *see, e.g.*, *Chambers v. District of Columbia*, 35 F.4th 870, 874–79 (D.C. Cir.

2022) (en banc). Under these standards, many employers lawfully seek to promote diversity, equity, inclusion, and equal opportunity through certain types of training, outreach, recruitment, pipeline development, and other means.

III. Implications for employers' diversity programs

The Supreme Court's decisions in the *SFFA* case were made in the unique context of college admissions and were based on the Equal Protection Clause, not Title VII or Section 1981, with the assumption, uncontested by the parties, that the analysis would be the same under both the Equal Protection Clause and Title VI. As such, they do not explicitly change existing law governing reverse-discrimination claims in the context of private employment or private employers' diversity programs for those private employers not subject to Title VI (*i.e.*, those who do not receive qualifying federal funds). Still, courts often interpret Title VI (at issue in the case against Harvard) to be consistent with Title VII and Section 1981, so there is some risk that lower courts will apply the Court's decision in the employment context. Justice Gorsuch's concurrence highlights this risk, observing that Title VI and Title VII use "the same terms" and have "the same meaning."

EEOC Chair Charlotte A. Burrows released an official statement stating that today's decisions do "not address employer efforts to foster diverse and inclusive workforces." EEOC Commissioner Andrea Lucas published an article reiterating a view she has previously expressed, which is that race-based decisionmaking is already presumptively illegal for employers, and stating that the Court's opinion "brings the rules governing higher education into closer parallel with the more restrictive standards of federal employment law." She recommended that "employers review their compliance with existing limitations on race- and sex-conscious diversity initiatives" and ensure they are not relying on "now outdated" precedent.

Against that backdrop, the Court's decision could have important strategic and atmospheric consequences for employers' diversity efforts. The Court's holdings likely will encourage additional litigation. Plaintiffs' firms and conservative public-interest groups likely will bring reverse race-discrimination claims against some employers with well-publicized diversity programs. Government authorities such as state attorneys general might also increase enforcement efforts.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Blaine Evanson, Jessica Brown, Molly Senger, Matt Gregory, and Josh Zuckerman.

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