Impact of SCOTUS Affirmative Action Ruling on Employers

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July 5, 2023

Key Takeaways:

- In *Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, the U.S. Supreme Court overturned its past precedent and held that the goal of achieving a diverse student body cannot justify using race as a "plus factor" in college admissions and doing so violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.
- Unlike in higher education, diversity has never been a permissible justification for affirmative action in the employment context. The use of affirmative action in employment is rarely lawful under Title VII absent a remedial justification.
- In the absence of a written affirmative action plan that meets the requirements of Title VII, employers should not use race or sex as a "plus factor" to improve workplace diversity.
- Based on the Court's concerns that EEO-1 categories are both over- and under-inclusive measures of whether a population is truly diverse, employers may want to revisit their representation goals and metrics to decide whether they should be updated or changed.
- Finally, as has always been the case in the employment context, diversity initiatives should be designed to expand opportunity for underrepresented groups without also negatively impacting hiring and advancement opportunities for those in other groups. Thus, employers should focus on expanding their sourcing and recruiting efforts to achieve a diverse pool, rather than using programs or other diversity strategies that consider race, ethnicity or sex at any point in the selection process.

The Court's Affirmative Action Ruling

For years, Harvard's and the University of North Carolina (UNC)'s admissions programs have used race as a plus factor when making admissions decisions. In *Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, Nos. 20-1199, 21-707 (the "Harvard Opinion"), the United States Supreme Court granted certiorari to consider whether UNC's and Harvard's admissions programs violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 USC § 2000d ("Title VI"), respectively.

The Equal Protection Clause provides that no State "shall deny to any person … the equal protection of the law." Under the Equal Protection Clause, race discrimination in public education has been unconstitutional since 1950, which includes discrimination by public universities like UNC. Private institutions like Harvard that receive federal funding for their programs and activities are also prohibited from engaging in race discrimination under Title VI. As an initial matter, and relying on its prior precedent, the Court stated that discrimination by an academic institution that violates the Equal Protection Clause also violates Title VI. Accordingly, the Court analyzed both UNC's and Harvard's admissions programs under the Constitution's Equal Protection Clause.

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After reiterating that the "core purpose" of the Equal Protection Clause is to do away with governmentally-imposed race discrimination, the Court applied the two-part "strict scrutiny" test to decide whether an exception should be made to the Constitution's guarantee of Equal Protection. Under this test, the Court first considered whether the use of race in college admissions furthers a "compelling governmental interest," and found it did not. The Court then analyzed whether UNC's and Harvard's use of race was "narrowly tailored,"—in other words, "necessary"—to achieve their stated compelling interests. Again, the Court found it was not.

Compelling Governmental Interest

Previously, a divided Supreme Court had held that the benefit gained from a racially diverse student body "was a constitutionally permissible" compelling interest, as long as race was used only as a "plus factor" in weighing a candidate's qualifications. In the Harvard Opinion, the Court began its analysis by explaining that, outside the context of higher education, only two interests have been found sufficiently compelling to justify racial classifications: (i) remedying specific, identified instances of past unlawful discrimination; and (ii) avoiding imminent and serious risk to human safety in prisons (race riots). In both circumstances, the Court noted, the stated goals were sufficiently measurable and concrete to permit judicial review and determine when the racial classification had served its intended purpose. For instance, citing *Franks v. Bowman*—a seminal Title VII of the Civil Rights Act of 1964 ("Title VII") case holding that retroactive seniority is an essential component of "make whole" relief for victims of employment discrimination—"one can measure whether a race-based benefit has made members of the discriminated class whole for the injuries they suffered." By contrast, the Court found that the goals articulated by Harvard and UNC—which include training future leaders, promoting a robust exchange of ideas, preparing productive citizens and leaders, promoting cross-racial understanding and breaking down barriers—are not sufficiently compelling because they are incapable of measurement and a reviewing court would have no way of determining when the goals had been reached.

The Court also noted that Harvard and UNC did not seek to justify their affirmative action programs based on evidence of their own past discrimination and rejected the notion that affirmative action could be justified to remedy the effects of societal discrimination at large, which would impose disadvantages on individuals who bear no responsibility for the harm purportedly suffered by the beneficiaries of affirmative action.

Narrowly Tailored or "Necessary" to Achieve the Governmental Interest

The Court also found that Harvard's and UNC's use of race as a plus factor in college admissions is not "narrowly tailored" to achieve their articulated interests. The Court explained that to make this showing, the use of race must be tailored to achieving the stated compelling interest within a reasonable time period and without unduly harming the interests of non-minorities. The Court further explained the narrow tailoring requirement guards against several potential harms, including: (i) illegitimate stereotyping, such as the assumption that all minorities share the same viewpoint on an issue; (ii) race being used not only as a plus, but also as a negative factor to discriminate against those who are not the beneficiaries of the preference; and (iii) indefinite or permanent racial preferences that do not have an ascertainable endpoint. The Court then explained why Harvard's and UNC's programs failed this standard.

First, the Court observed no connection between the purported educational benefits of diversity and the means being employed by Harvard and UNC to achieve those benefits. Both schools' affirmative action programs consider race and ethnicity in admissions to avoid a drop off in minority student representation using the six US Census and EEO-1 categories: (i) Asian, (ii) Native American or Pacific Islander, (iii) Hispanic, (iv) White, (v) African American and (vi) Native American. The Court found, however, that maintaining student representation in the six EEO-1 categories does not actually advance the stated goals of diversity because the six categories are overbroad (such as by grouping all Asian applicants together and ignoring whether South Asian or East Asian students are adequately represented), arbitrary (such as by measuring Hispanic student representation as a

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homogenous group without any regard for country of origin), and under inclusive (such as by having no category for applicants of Middle Eastern descent, and counting them as White under the six categories).

Second, the Court concluded that race is being used by UNC and Harvard not only as a plus factor, but also as a negative factor because college admissions is a zero sum game—the more a plus factor is used to admit Black and Hispanic students, the fewer slots the school has available to admit White or Asian students. The Court highlighted that both Harvard and UNC agreed that without affirmative action the demographics of the accepted class would meaningfully change.

Third, the Court found that Harvard's and UNC's rationales for affirmative action relied on the stereotyped assumption that there is a characteristic minority viewpoint. In the Court's view, judging people by the color of their skin, when those of the same race or national origin may have little in common besides their skin color, demeans their dignity and worth.

Fourth, the Court held that the affirmative action programs at UNC and Harvard have no logical end point. Rather than implementing strict and measurable benchmarks, the universities stated they would end affirmative action when "meaningful diversity" is achieved on college campuses. In practice, however, Harvard relied on its prior year's Black and Hispanic representation when setting admissions goals each year, and UNC based its admissions goals on the Black and Hispanic representation each year in the general population of North Carolina. The Court characterized both approaches as impermissible "racial balancing" that would assure race always was relevant and the goal of eliminating race in admissions would never be achieved.

A Constitutionally Permissible Approach

The Court concluded by explaining that universities can still achieve a diverse student body by considering applicants' explanations of how their lives have been affected by race "be it through discrimination, inspiration, or otherwise." Universities can also consider how a student's heritage or culture shaped their motivations and accomplishments. But, the Court cautioned, any admissions preferences must be tied to a student's unique ability to contribute, and judge them as individuals based on their unique experiences rather than based on their race.

The Impact of the Court's Opinion on Employers

The Court's Harvard Opinion does not directly apply to private employers. This is because the Equal Protection Clause applies only to federal and state actors like UNC, and the protections from discrimination under Title VI apply only to recipients of federal funding such as Harvard.

Moreover, unlike in higher education, in the employment context affirmative action that involves racial or gender preferences to achieve diversity has never been a permissible justification. Rather, under Title VII, race- or gender-conscious affirmative action by private employers (including government contractors) is generally unlawful in the absence of a remedial purpose.[1] Thus, although the Harvard Opinion does not change the landscape for private employers, where the use of affirmative action is already extremely limited, employers should anticipate increased scrutiny and challenges to their workplace affirmative action plans and diversity initiatives. Thus, employers should review their practices to ensure they are being carried out in a manner that is not vulnerable to attack under Title VII and the Harvard Court's teachings.

Impact of the Harvard Opinion on Workplace Affirmative Action

Title VII, as amended, prohibits employment discrimination on the basis of race, color, national origin, sex and religion. In 1979, the Supreme Court held that Title VII does not prohibit "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories" but noted that the affirmative

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action plan in question was permissible because it did not require the discharge of white workers and their replacement with new black hires; did not create an absolute bar to the advancement of white employees (half of those trained in the program would be white); and was a temporary measure intended simply to eliminate the manifest racial imbalance (as opposed to maintaining racial balance). *United Steelworkers of America v. Weber, 443 U.S. 193 (1979)*.

In 1987, the Supreme Court extended lawful affirmative action under Title VII to sex-based preferences and established specific criteria that must be satisfied for affirmative action in employment to be considered lawful. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987). First, an affirmative action plan must be justified by a "manifest imbalance" reflecting an underrepresentation of minorities or women in "traditionally segregated job categories." Second, any race-based or gender-based preference in the plan must be properly tailored to cure the disparity without unnecessarily trammeling the interests of non-minorities or males. *Id.* at 631-32, 637-38. The Court explained that these limitations on affirmative action would "provide assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed." *Id.*

Consistent with the Supreme Court's teachings, the EEOC has implemented regulations under Title VII that place similar restrictions on affirmative action. In order for employers to engage in race-conscious or gender-conscious employment decisions, they must (i) have a written plan (which, in our experience, most employers do not have); (ii) engage in a reasonable self-analysis of the relevant employment practice, such as a specific hiring or promotion practice; (iii) have a reasonable basis to conclude from the self-analysis that the relevant employment practice has had an adverse effect on "previously excluded groups" or groups whose opportunities have been "artificially limited;" (iv) include reasonable action in the plan that is narrowly tailored to solve the problem identified without placing unnecessary restrictions on the workforce as a whole; and (v) ensure the plan is maintained no longer than necessary to achieve the plan's objective.

Based on the above, permissible affirmative action in the employment context is already extremely narrow. Courts have upheld affirmative action plans under Title VII only when they serve a remedial purpose and struck down affirmative action efforts under Title VII when premised on a non-remedial purpose, such as achieving or maintaining a diverse workforce. Employers who wish to develop written affirmative action plans should thus ensure that their plans are remedial, narrowly tailored to cure documented and identified statistical imbalances in specific jobs, temporary, and do not unduly harm non-beneficiaries of the preference.

Impact on Workplace Diversity Initiatives

Many workplace diversity initiatives include transparent goals and employment programs that take race, gender and ethnicity into account. Undoubtedly, the Harvard Opinion will result in more challenges to these initiatives. Thus, when implementing and updating diversity initiatives and programs, there are several important takeaways from the Harvard Opinion that employers should consider:

- ***Race or gender should not be used as a plus factor to improve workplace diversity***. As noted above, under Title VII, race or gender can only be used as a plus factor when an employer has a written affirmative action plan that is narrowly designed to remedy a "manifest imbalance" based on an employment practice (such as hiring or promotion) that has adversely affected "previously excluded groups." In the absence of this temporary and remedial justification, affirmative action violates Title VII for many of the same reasons set forth in the Supreme Court's Harvard Opinion.
- ***Race or sex should not be a factor when deciding who advances at any stage of the selection process***. Beyond sourcing and recruiting to ensure a diverse pool, diversity initiatives should not consider race or ethnicity at any point in the selection process. As an example, diverse slate requirements should be

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implemented in a manner where a candidate's gender, race or ethnicity is not being used to decide whose resume moves forwarded in the process, or who advances to the interview stage if doing so is at the expense of advancing a majority group candidate who would have made the cut absent the diversity requirement.

- ***Representation goals based on EEO-1 categories should be reconsidered***. The Supreme Court correctly points out that the six EEO-1 race and ethnicity categories are both over- and under-inclusive if they are being used to measure true diversity of thoughts, ideas and perspectives. Relying exclusively on EEO-1 categories to measure a company's diversity gains may also ignore important differences in other segments of the workforce that do not fit neatly within those six groups, such as those who identify as two or more races, as well as other aspects of diversity than may not be captured by race or ethnicity alone. The Court's decision highlights these concerns, which may draw into question the weight companies are placing on EEO-1 diversity metrics gains or losses.
- ***Diversity initiatives should not be a zero sum game***. Lawful diversity initiatives should be designed to expand opportunity for underrepresented groups without also negatively impacting hiring and advancement opportunities for those in the majority. Consistent with the Court's analysis of affirmative action in education, diversity initiatives that are a pathway to permanent employment, or advancement initiatives that provide a leg up on promotion, should not be open only to minorities or women because they could be recast as, ultimately, negatively impacting opportunities for the majority group. Thus, employers should establish carefully the criteria for diversity-based hiring and advancement programs, and focus on a potential participant's life experiences, which (based on the Harvard Opinion) can include how diverse characteristics of any kind have affected their lives, "be it through discrimination, inspiration, or otherwise." Employers might also consider documenting the reasons for their final selections so that it is clear the decisions were made for reasons other than the "inherent benefit in race *qua* race – in race for race's sake," which the Harvard Opinion describes as impermissible stereotyping.

Please contact a member of Akin's labor and employment team if you have any questions about how the Supreme Court's opinion or how it may impact your company's diversity initiatives.

If you have questions about this client alert, please contact any Akin lawyer or advisor below:

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[1] Under the Department of Labor's regulations implementing Executive Order 11246, certain government contractors are required to create and implement "affirmative action plans" that set placement goals for minorities and women based on an "underutilization" analysis. However, government contractors ***are not*** permitted to use racial or gender preferences to meet placement goals unless they also satisfy Title VII's requirements for voluntary affirmative action.

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