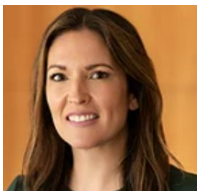
Supreme Court Hears Oral Argument in Challenge to Harvard and UNC Race-Conscious Admission Programs

A Practical Guidance® Article by Ami Wynne, Larry Turner, Sharon Masling, Emily DeSmedt, John Lee, and Pierce Blue, Morgan Lewis & Bockius LLP

Ami Wynne
Morgan Lewis & Bockius LLP

Larry Turner
Morgan Lewis & Bockius LLP

Sharon Masling
Morgan Lewis & Bockius LLP



Emily DeSmedt
Morgan Lewis & Bockius LLP

John Lee
Morgan Lewis & Bockius LLP

Pierce Blue
Morgan Lewis & Bockius LLP

The U.S. Supreme Court on October 31 debated the legality of race-conscious admission programs used by Harvard University and the University of North Carolina. The decisions in these highly watched cases could have broad consequences for diversity, equity, and inclusion practices in a range of sectors.

The central question in both cases is whether the Supreme Court should overturn its prior rulings and find that institutions of higher education cannot use race as a factor in admissions programs. While that question is ostensibly limited to higher education, the manner in which the Supreme Court rules could affect a range of strategies used to advance diversity, equity, and inclusion (DEI) in employment, contracting, grantmaking, and more.

Case Background

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in any program or activity receiving federal financial assistance. The Equal Protection and Due Process Clauses of the US Constitution further prohibit federal and state governments from discriminating on the basis of race except when furthering a compelling government interest and using the least restrictive means available.

Harvard, the University of North Carolina (UNC), and most colleges and universities are subject to Title VI because they receive federal financial assistance, such as research grants and federal student aid. UNC and other state universities are also subject to the limits imposed by the US Constitution because they are state actors.

In the 1978 seminal case *Regents of the University of California v. Bakke*, the Supreme Court found that a college or university could lawfully consider an applicant's race without violating Title VI or the US Constitution if the university was seeking to further student diversity and race was one factor among many considered in a holistic evaluation of the candidate. That analysis practically barred universities from using racial quotas but permitted a range of race-conscious recruitment and admission programs.

The Supreme Court reaffirmed that holding in 2003 in *Grutter v. Bollinger* and again in 2016 in *Fisher v. University of Texas*.

Students for Fair Admission Inc., a legal advocacy group seeking to end the use of race in university admission programs, filed the cases against Harvard and UNC. They contend that Harvard's program violates Title VI by using race as factor in admissions and limiting Asian American acceptance rates compared to other similarly qualified students through "racial balancing." They similarly allege that UNC's process violates Title VI and the US Constitution by considering race.

Both Harvard and UNC argue that their programs are consistent with the standards set in prior Supreme Court cases. UNC further argues that it has tried other race-neutral methods for furthering student diversity and those efforts have failed, leaving the race-conscious program as the only effective way for them to pursue diversity.

Harvard's program was upheld by a federal district court and the US Court of Appeals for the First Circuit prior to reaching the Supreme Court. UNC's program was approved by a federal district court, but Students for Fair Admission appealed the case directly to the Supreme Court before the Fourth Circuit could consider it.

Issues Raised at Oral Argument

The Supreme Court heard separate arguments in the cases to permit Justice Ketanji Brown Jackson to participate in the UNC argument, as Justice Jackson was recused from the Harvard case due to her prior service on the Harvard board of overseers.

The justices focused on a number of issues in their questions to counsel during the five-hour hearing, including the following:

- **How do you advance diversity without considering race?** Considerable discussion concerned how universities can advance diversity if they are not permitted to consider race in any form. For instance, could they consider an admissions essay that tied the applicant's race to other life experiences and skills? Could they give preference to applications from descendants of slaves, or children of immigrants?
- **When is diversity achieved?** The conservative justices closely questioned how UNC and Harvard defined diversity and at what point they could say they achieved their diversity goals related to race.
- **Were any applicants harmed by the admission process at UNC or Harvard?** Harvard and UNC both stressed that they never used race as a determinative factor in admissions and instead considered it as one of many elements in a holistic analysis of a candidate. Justice Jackson questioned whether this constituted a concrete and remediable harm, especially as neither university required that applicants disclose their race.

There were also extended discussions on the importance of diversity in higher education to other institutions, such as employers and the military, and the potentially broad impact a decision to overrule *Grutter* would have.

Potential Implications for Other Sectors

The decisions in these cases will likely have significant consequences for DEI programs in higher education and other sectors, particularly in employment and charitable programs.

Students for Fair Admissions argues in both cases that Title VI and the US Constitution prohibit any consideration of race in university admission programs. It urges the Court to revoke its prior precedent recognizing that colleges and universities have a compelling interest in furthering student diversity and adopt a "color-blind" reading of the law that rules out the use of race in all but the most limited scenarios.

At least one amicus organization, the America First Legal Foundation, is urging the Supreme Court to rule that Title VI prohibits any consideration of race as a statutory matter. In addition to overturning the Court's prior rulings on the use of race in higher education, that approach would call into question other precedents where the Supreme Court has found that consideration of race as a form of affirmative action is permissible under federal anti-discrimination statutes.

A decision adopting either of those readings would have profound effects on DEI initiatives outside of higher education. As the HR Policy Association stressed in its amicus brief, diversity in college admissions is vital to maintaining a

continuing pipeline of highly educated and diverse candidates for employment. A ruling restricting the ability of colleges and universities to further diversity could reduce the pool of diverse talent available to employers.

In addition, if the Supreme Court concludes that Title VI or the US Constitution prohibits nearly all consideration of race, lower courts may feel compelled to read similar language in Title VII of the Civil Rights Act of 1964, Section 1981 of the Civil Rights Act of 1870, and other statutes more narrowly. That could call into question many common employer DEI hiring and recruitment programs. It would also create significant uncertainty regarding race-conscious charitable programs sponsored by corporations and nonprofit foundations as well as race-conscious contracts with third-party contractors.

The Court could also issue a narrower decision that does not rule out all consideration of race as a matter of statutory or constitutional law but finds that Harvard and UNC's programs overreach. A decision of that nature would likely still be viewed as a sign that consideration of race is only permissible in very limited circumstances.

Next Steps

The Supreme Court could issue a decision in this case any time between January and July 2023. In the interim, employers and nonprofits should evaluate their existing DEI hiring, recruitment, and advancement programs as well as any race-conscious charitable initiatives for risk. Useful race-neutral strategies for advancing diversity include:

- Expanding the pool of job or program applicants by rethinking where open positions are advertised, *how* qualifications for open positions or programs are described, and where recruiting and outreach programs are instituted
- Implementing effective training for hiring managers and selection officials on best practices for hiring and advancing diverse candidates —and—
- Including *efforts* to advance diversity, equity, and inclusion in performance evaluations rather than attainment of specific representation goals.

Related Content

Practice Notes

- Affirmative Action Programs and Diversity Initiatives: Key Considerations
- Affirmative Action Plans: OFCCP Compliance
- Federal Sector EEO Procedures: Strategic Considerations

Cases

- Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin, 37 F.4th 1078 (5th Cir. 2022)
- Grutter v. Bollinger, 539 U.S. 306 (2003)

Ami Wynne, Partner, Morgan Lewis & Bockius LLP

Ami N. Wynne's practice focuses on a wide range of employment matters, from litigation, to internal investigations and strategic employment counseling, to executive compensation and corporate transactions work. She regularly defends employers in employment discrimination, contract disputes, and employment-related cases in state and federal courts. A significant part of her practice also involves internal investigation, whistleblower, and related matters.

Larry Turner, Partner, Morgan Lewis & Bockius LLP

Larry Turner serves as co-leader of the Morgan Lewis workplace culture consulting practice and is the former co-leader of the firm's Diversity Committee. He counsels employers on corporate diversity initiatives, including best practices and litigation avoidance. He advises employers on building, maintaining, and evaluating diversity and inclusion efforts in a variety of industries, including but not limited to pharmaceutical, medical device, financial, and retail.

Sharon Masling, Partner, Morgan Lewis & Bockius LLP

Sharon Perley Masling, a leader of Morgan Lewis's Workplace Culture Consulting and Training Practice, helps companies and organizations create safe, respectful, diverse, and inclusive workplaces. Sharon also leads the firm's Reproductive Rights Task Force and developed and led the firm's COVID-19 Task Force. Having previously served as chief of staff and senior counsel to a commissioner at the Equal Employment Opportunity Commission (EEOC), Sharon provides insight on the enforcement of all employment civil rights laws and advises employers on employment discrimination issues.

Emily DeSmedt, Partner, Morgan Lewis & Bockius LLP

Emily Cuneo DeSmedt represents employers in a wide variety of employment-related matters, including the defense of wrongful termination, harassment, discrimination, and retaliation claims. Emily is recognized as a strategic, practical, and decisive litigator, who consistently achieves summary judgment dismissals and/or favorable settlements for her clients with minimal disruption to their internal business clients. She also handles internal investigations into complaints of alleged harassment, discrimination, workplace misconduct, and retaliation.

John Lee, Partner, Morgan Lewis & Bockius LLP

W. John Lee focuses his practice on complex employment litigation, representing employers in class and collective actions across the United States involving allegations of race and gender discrimination, wage and hour claims, as well as challenges to employer background check practices. He also litigates claims under the Sarbanes-Oxley and Dodd-Frank Acts, as well as state law whistleblower actions, in courts and before the US Department of Labor (DOL).

Pierce Blue, Of Counsel, Morgan Lewis & Bockius LLP

Edward (Pierce) Blue counsels clients on labor and employment matters, including compliance with the ADA, GINA, and Title VII, and helps clients create safe, respectful, diverse, and inclusive workplaces. Pierce is a leader of the firm's Reproductive Rights Task Force, member of the labor and employment practice's COVID-19 Task Force and works in collaboration with the workplace culture consulting and workplace government relations and regulation teams. As a former attorney-advisor to a commissioner at the US Equal Employment Opportunity Commission (EEOC) and a former labor policy advisor on Capitol Hill, Pierce provides insight into all aspects of employment civil rights policy and enforcement.