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YEARS



**IMPACT OF THE HARVARD / UNC
DECISION ON DEI AND ESG:
CONSIDERATIONS FOR COLLEGES AND
UNIVERSITIES, EMPLOYERS, AND OTHER
ORGANIZATIONS**

July 11, 2023

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Presenters



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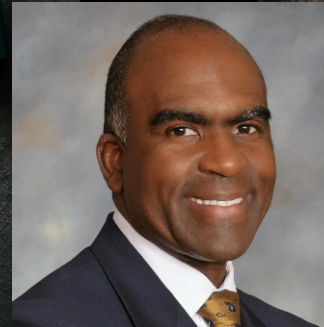
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AGENDA

- 1. Analysis of the Decision**
- 2. Potential Implications for Higher Education and Beyond**
- 3. Takeaways and Next Steps**





SCOTUS:
Affirmative Action in College
Admissions Is Unconstitutional

Students for Fair Admissions (SFFA)
v.
Harvard & UNC

Relevant Precedent

Regents v. Bakke (1978)



- Plurality
- Use of race must be “precisely tailored to serve a compelling governmental interest”
- Justice Powell: “attainment of a diverse student body” is a compelling interest

Grutter v. Bollinger (2003)



- Compelling interest in “a diverse student body”
- “The Court expects that **25 years from now**, the use of racial preferences **will no longer be necessary** to further the interest approved today”
- “Plus” factor only

Fisher v. Univ. of Texas (2016)

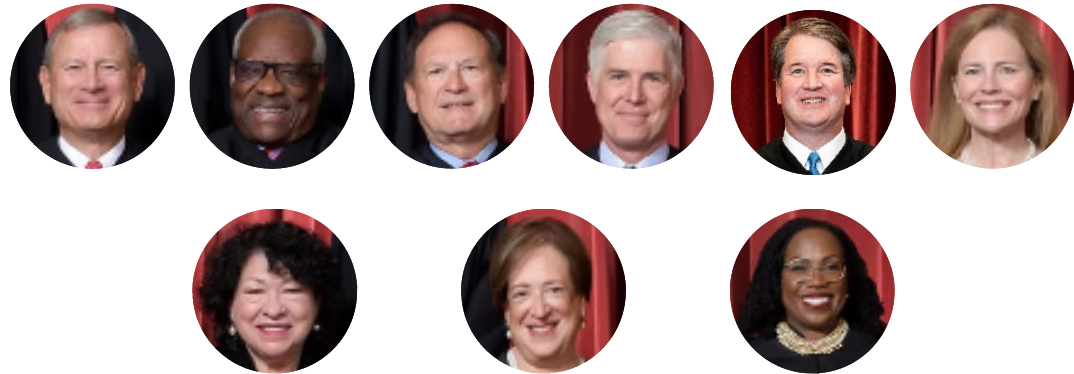


- “[A]sserting an interest in the educational benefits of diversity writ large is insufficient. ... [G]oals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”

SFFA v. Harvard & UNC

Race-Based College Admissions Fail Strict Scrutiny

- Split along ideological lines (6–3)
- No precedent **expressly** overruled
- Equal Protection Clause (UNC)
- Title VI (Harvard)



The Court's Issues with Harvard & UNC's Programs



1. Immeasurable goals
2. Lack of fit between means and goals
3. Necessarily use race in a "negative manner"
4. Perpetuate stereotypes
5. No meaningful end points

Some Race-Related Considerations Allowed

- **Universities** may consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”
- **Governmental interests that can justify the use of race-conscious decision-making:**
 - Remedying specific identified instances of past illegal discrimination
 - Avoiding imminent and serious risks to human safety in prisons



A person wearing a graduation cap and gown is being lifted into the air by another person. Both individuals are making peace signs with their hands. The background is a sunset over a body of water, with the sun low on the horizon, creating a warm, golden glow. The scene is silhouetted against the bright sky.

Potential Implications for Higher Education and Beyond

Implications for Colleges & Universities

- Racial diversity on campus is still a permissible goal, but institutions cannot use racial identity itself as a factor in the admissions process
- Evaluating adjustments to the admissions process and criteria based on the Court's ruling
- This decision will embolden plaintiffs to challenges to other aspects of the educational setting



Next Steps for Colleges & Universities

- In what ways, if any, does our admissions process consider race or ethnicity, and what changes, if any, should be implemented now?
- How do our mission, goals and messaging as they relate to diversity align with the Court's ruling?
- What education and training may be necessary for admissions officers and other key stakeholders?



Implications for Employers

- No immediate impact on private employer DEI efforts.
- Analyze each employment discrimination statute separately according to its own text and body of law.
- This decision will embolden plaintiffs and legal advocacy groups to bring challenges to employer DEI efforts.



Recent Statements by a Conservative Legal Group

"America First Legal is holding corporate America accountable for illegally engaging in discriminatory employment practices that penalize Americans based on race and sex."

"Now is the time to wage lawfare against the DEI colossus."

"The Supreme Court ruling is a warning to corporate elites to stop foisting their liberal agenda on the nation." – Scott Shepard, director of the National Center for Public Policy Research's Free Enterprise Project.

America First Legal has already filed civil rights complaints with the EEOC against Yum! Brands, Twilio, Starbucks, Morgan Stanley, Lyft, and other large corporations.

The group has previously sent letters to corporations such as American Airlines and McDonald's urging them to change their hiring and promotion policies.

Next Steps for Employers

- Companies have adopted widely varying DEI programs/strategies, and the risk is fact-specific.
- **Key Questions:**
 - ✓ What programs or strategies consider race, gender or other protected characteristics?
 - ✓ What is the business rationale for those programs?
 - ✓ Have we conducted appropriate statistical analyses under direction of counsel to assess legal risk?
 - ✓ What programs or strategies might employees or litigants misinterpret as providing a benefit on the basis of race or other protected characteristics?



Implications for Federal Contractor Employers

- Executive Order (EO) 11246 requires certain federal contractors to create affirmative action programs that focus on the recruitment, hiring, promotion, and retention of women and minority employees
- “Affirmative action” under EO 11246 is not used in the same sense as “affirmative action” in the Harvard/UNC cases
- Plans under EO 11246 should remain enforceable – but continue to monitor



Implications for Race-Conscious Contracting

- Federal law (Section 1981) prohibits granting contracts or more favorable contractual terms on the basis of race.
- Many organizations seek to contract with minority and women-owned business enterprises and/or have supplier diversity programs and initiatives.
- We are seeing more challenges to diversity programs under Section 1981.





Implications for Grantmaking & Investing

- We could see similar challenges to
 - Nonprofit foundations, educational institutions, and/or government actors who seek to provide grants or benefits to underrepresented groups or minority-led organizations
 - Investment firms and funds who seek to invest with minority-led funds or fund managers or otherwise base investment decisions on factors related to gender, race, or ethnicity

Assessing Contracts, Investments, and Grants

- Questions to ask:
 - Does the program create a contract?
 - Does the program actually grant benefits on the basis of race or other protected characteristics?
 - Is the program protected by the First Amendment?



A photograph showing five hands of different skin tones (dark brown, medium brown, light brown, and two shades of white) resting on a dark wooden surface. The hands are arranged in a row, with the fingers slightly spread. The lighting is soft, highlighting the textures of the skin and the wood grain. A watch is visible on the leftmost hand.

Takeaways and Next Steps

Takeaways

- Court did not change legal analysis under Title VII or Section 1981
- We can expect greater scrutiny/increased litigation risk
- It will take time for the law to evolve



Next Steps

- Conduct inventory of DEI practices, especially those that are race-exclusive or race-conscious
- Review messaging and communications
- Conduct refresher trainings
- Discuss level of risk tolerance with leadership
- Mitigate unnecessary risk

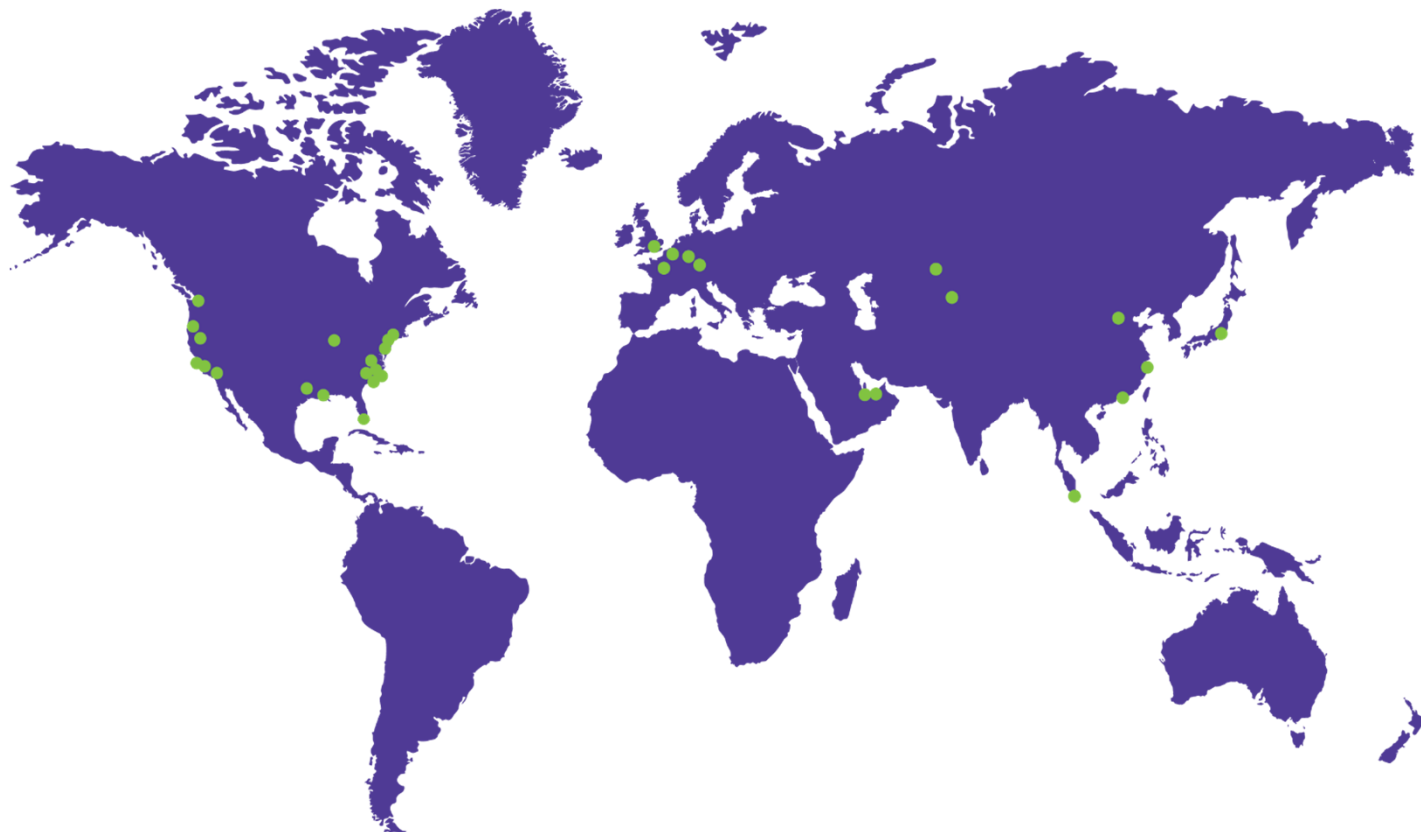


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