

Race-Conscious Measures to Achieve Student Diversity Are in Jeopardy after Supreme Court Arguments

The dust and ashes have settled from October 31, 2022's five hours of fiery oral argument before the Supreme Court (the "Court") on challenges to Harvard's and the University of North Carolina's (the "UNC") use of race-conscious measures in student admissions. While the Court's decision is not expected to be released until June 2023, most legal and academic experts expect the Court to find that both universities violated Title VI and that UNC, as a public institution, also violated the Fourteenth Amendment's Equal Protection Clause by using race as a factor in their admission processes. If the Court so rules, it will erase over 40 years of legal precedent allowing for the limited use of race to obtain a diverse student body.

The Court's decision to hear both cases signaled that race-conscious initiatives were in danger and that the Court was ready to reexamine its prior decisions in *Regents of Univ. of California v. Bakke* (1978), *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas* (2016) all of which approved of the limited use of race in student admissions. The questions and comments posed by the Court's Majority during oral arguments on October 31st indicate that (1) "diversity" is in danger of losing its status of a compelling and lawful reason to utilize race and (2) the Court believes race-neutral admission measures can sufficiently address higher educational institutions' push for a diverse student body.

At oral argument, the Court's Majority expressed skepticism of the concept of diversity and how it can actually benefit education. Justice Thomas, on more than one occasion, stated, "I've heard the word 'diversity' quite a few times, but I don't have a clue what it means". The Majority also voiced concerns with how a college or university would know when the "benefits of a diverse student body have been achieved", potentially allowing for race-conscious measures to last far longer than the law contemplates. Justice Barrett commented that the *Grutter* decision, while allowing for the use of race in student admission programs, also states that the use of racial classifications is so dangerous that it must have a logical end point. She also noted Justice O'Connor's statement in *Grutter* expressing optimism that in 25 more years (2028), the use of racial preferences will no longer be necessary. It appears that this Court is not willing to wait another six years but is ready to jettison the use of race-conscious measures now.

The Court's Minority commented that both Harvard and UNC's student admissions programs, use race in an extremely limited manner, consistent with the Court's prior decisions in *Grutter* and *Fisher*. The Minority also expressed concern that the evidence presented establishes the real possibility of "a precipitous decline in minority admissions" should race-conscious measures be eliminated. Justice Kagan commented that "if these universities [select colleges and universities] are not racially diverse, than a broad range of other institutions such as businesses, law firms and senior military leaders are not going to be racially diverse either." In response to arguments from the Plaintiffs and comments from the Majority that the Fourteenth Amendment mandates that institutions be "color-blind", Justice Brown Jackson noted that the original purpose of the Fourteenth Amendment's Equal Protection Clause was to help and protect Blacks who were still facing discrimination and racism even though slavery had ended.

The Court Majority appear to believe that race-based initiative, no matter how limited, are no longer needed and appear ready to "close the door" on the use of race as a means to obtain the benefits of a diverse student body. Interestingly, the Majority took aim at both universities' Legacy, Child of



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Alumnus and Child of a Donor student admissions programs suggesting that by eliminating these “Legacy” programs the universities might be able to create more spaces to assemble a diverse student body. However, Harvard and UNC pushed back stating that selective universities, using only race-neutral programs, are having “major struggles” enrolling a sufficient number of African-American students to meet their educational diversity goals. While the Majority suggest that race-neutral programs, such as increased financial aid and outreach programs for low-income or first generation student applicants can achieve a diverse student body, both universities responded that these measures have been tried, but none work as well to create a diverse student body as their current race-conscious programs.

If, as it appears, the Court issues decisions ruling that Harvard and UNC’s use of race-conscious admission efforts are unlawful, it will certainly have an adverse impact on student diversity on college and university campuses. What remains an open question is whether the Court will issue a narrow decision addressing only the facts at issue before them or will it issue a broad ruling eliminating diversity as a reason to use race, not only in student admissions, but also in areas such as student financial aid, scholarships, student clubs or organizations. Moreover, will the Court be emboldened to state clearly that “diversity”, whether in higher education or in the workplace, does not constitute a compelling reason to consider race? Notably, the Majority, appear open to allowing the use of race-conscious admissions in the military academies and programs after hearing arguments about the importance of diversity among military leaders and the harm and tension that exists when the officer ranks are not diverse.

In light of the above, college and university leaders are advised to increase their discussions and “out-of-the-box” conversations on ways to ensure educational diversity among students if race can no longer be used. Finally, we can only hope that the Court’s decision will incentivize the exploration of new and creative DEI initiatives and a revamping of current DEI initiatives to obtain diversity, equity and inclusion in all needed spaces.