AFTER AFFIRMATIVE ACTION

AAUP webinar July 18, 2023

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Note: These materials are intended to provide general information, not binding legal guidance. if you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

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COLLECTIVE COMMITMENT TO DIVERSITY IN HIGHER ED

- The AAUP maintains its commitment to the crucial goal of ensuring that a diverse range of students have access to America's colleges and universities.

- The AAUP pledges to work with faculty, college and university administrations, and social justice organizations to make this goal a reality.

- AAUP Diversity in Higher Education Resource webpage:

https://www.aaup.org/issues/diversity-higher-education

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US SUPREME COURT DECISION (June 29, 2023)

SFA v. Harvard University and SFA v. University of North Carolina

6–3 decision holding: **Race-conscious admissions policies** used by Harvard and UNC **violate the 14TH Amendment's Equal Protection Clause** and **Title VI** of the Civil Rights Act of 1964.

The Court's decision **overturns more than 40 years of SCOTUS precedents** permitting colleges/universities to adopt admissions programs that consider an applicant's race as part of a holistic evaluation process.

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MORE THAN 40 YEARS OF SCOTUS PRECEDENTS OVERTURNED

Bakke (1978), *Grutter* (2003), *Fisher* I and II (2013/2016):

- **The goal of achieving a diverse student body is a compelling interest**, i.e. multiple benefits flowing from having a diversity student body;
- **A holistic evaluation process** furthers that compelling interest by **considering race as one positive factor** in admissions decisions.

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The Supreme Court majority concluded that:

- Harvard and UNC did not meet the 14th Amendment Equal Protection Clause strict scrutiny test, requiring that they prove that their race-conscious admissions program "furthers compelling governmental interests" and that the use of race is "narrowly tailored" ("necessary") to achieve that interest.
- Educational benefits that flow from achieving a diverse student body are "commendable goals," but are not compelling;
- Harvard and UNC's admissions programs: (1) lacked measurable objectives; (2) used race to disadvantage and to stereotype students; and (3) had no end date or other goal to mark a stopping point.

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"[N]othing 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."

BUT:

- "The student must be treated based on his or her experiences as an individual—not on the basis of race."
- "A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university."

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SFA v. Harvard University and SFA v. University of North Carolina
DISSENTING OPINIONS

SCOTUS **Dissenting** opinion (J. **Sotomayor**, joined by J. Kagan, J. Jackson):

"[T]he Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society."

"To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch."

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SCOTUS **Dissenting** opinion (J. **Jackson**, joined by J. Sotomayor, J. Kagan):

"With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems."

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MOVING FORWARD:
ACHIEVING DIVERSITY OF STUDENT BODY IN COLLEGES AND UNIVERSITIES

- "comprehensive review process" (see, University of California system)
- socioeconomic diversity
- geographic diversity
- first-generation college applicants
- recruitment from community colleges
- standardized tests optional/not required for application
- recruitment from a broad range of high schools (e.g., H.S. in economically disadvantaged areas)
- percent plans (e.g., admitting top-9% of students from HS into public universities; UC system)
- increase financial assistance and support
- eliminating/reducing legacy admissions and recruitment of athletes
- DEI to create inclusive climate and provide supportive resources for students admitted to the college/university.

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FUTURE CHALLENGES BY OPPONENTS OF AFFIRMATIVE ACTION

We can expect attempts in the courts and in state legislatures to extend *Harvard/UNC* to higher education programs such as:

- scholarships
- financial aid
- employment decisions/actions
- DEI (e.g. mandatory DEI training for faculty and students; DEI faculty statements, etc.)

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