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U.S. Supreme Court Overturns Affirmative Action in College Admissions: Considerations for Independent Schools

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On June 29, 2023, the U.S. Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* held that the race-based affirmative action programs at Harvard College ("Harvard") and the University of North Carolina ("UNC") violated the Equal Protection Clause of the Fourteenth Amendment. In so doing, the Court struck down the use of race-based affirmative action in college admissions.

The decision addressed two cases brought by Students for Fair Admissions, Inc. ("SFFA") claiming that Harvard and UNC discriminated against White and/or Asian Americans by considering race as part of their holistic admissions programs. While both schools admitted that they considered race as one of many factors throughout their admissions process, the schools maintained that their policies adhered to U.S. Supreme Court precedent on this issue holding that educational diversity is a compelling interest that justifies taking account of race as one factor among many in college admissions decisions.

Harvard and UNC asserted several goals as justifications for their affirmative action programs, including, among other things, "producing new knowledge stemming from diverse outlooks," preparing graduates to "adapt to an increasingly pluralistic society," and "promoting the robust exchange of ideas." The Court stated that while these goals are laudable, they were too amorphous to pass muster under the strict scrutiny standard, the standard for reviewing race-based action under the Fourteenth Amendment (i.e., the program must be "narrowly tailored to serve a compelling governmental interest").

In the majority opinion, Chief Justice Roberts clarified that "nothing 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." However, Chief Justice Roberts warned that "universities may not simply establish through application essays or other means the regime we hold unlawful today."

The decision is grounded in the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, both of which do not apply to private pre-K through 12 schools that do not accept federal funding. However, non-public primary and secondary schools could be next to face legal challenge with respect to the use of race in admissions processes; race-based scholarships; recruitment practices; and broader DEI efforts. Plaintiffs may try to sue a private primary or secondary school that does not accept federal funding and ground their argument in other statutes that do apply to private schools such as Section 1981 of the Civil Rights Act of 1866, which prohibits non-public schools from engaging in race discrimination, and or City and State laws that prohibit discrimination. Additionally, private schools that are tax-exempt under section 501(c)(3) of the Internal Revenue Code are required to have racially non-discriminatory policies as to their students. Further, IRS Procedure 75-50 requires schools to review enabling documents such as bylaws and charters to determine if they have adopted and complied with such policies and to include a statement of racial non-discrimination in all school brochures and catalogues concerning student admissions, programs and scholarships.

There is also a concern that schools, like all employers, may eventually face scrutiny for their employment race-based recruiting and DEI practices, because the language of Title VII of the Civil Rights Act, which

applies in the employment context, is similar to the language of Title VI, which was relied on by the Supreme Court.

Given the Supreme Court's ruling regarding Harvard and UNC's affirmative action programs, to avoid being the target of future legal challenges, K-12 schools should review their internal admissions policies, applications, and diversity programs and statements to avoid running afoul of this most recent decision.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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