



College admissions under fire as top court takes affirmative action case

Education Law

By [Emily P. Bothfeld](#) and [Francesca M. Simoncelli](#)

Emily P. Bothfeld of Robbins Schwartz practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. Francesca M. Simoncelli also of Robbins Schwartz practices in the area of labor and employment. She counsels school districts regarding grievances, arbitrations, collective bargaining and other traditional labor issues.

POSTED March 10, 2022 1:19 PM

The U.S. Supreme Court has announced that it will hear a lawsuit challenging Harvard University's student admission policy, which considers race as one factor among many in making admission decisions, signaling a possible end to affirmative action in college and university student admission practices.

The lawsuit, which dates back to 2014, was brought by Students for Fair Admissions (SFFA), a self-described "nonprofit membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional." The crux of SFFA's argument is that Harvard discriminates against Asian Americans in that its admissions process has the effect of admitting less qualified Black and Hispanic students to the detriment of Asian American students.

In September 2019, the U.S. District Court for the District of Massachusetts held that Harvard's student admission policy passes constitutional muster by adequately satisfying the dictates of strict scrutiny — that is, the policy is narrowly tailored to serve a compelling interest. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 197, 199, 201, 204 (D. Mass. 2019).

SFFA appealed, and in November 2020, the U.S. Court of Appeals for the 1st Circuit upheld the District Court's ruling, holding that the university's limited use of race in its admissions process survives strict scrutiny. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 980 F.3d 157, 184–88 (1st Cir. 2020). In so ruling, the court found that Harvard had met its burden to establish that the university had a compelling interest to further diversity which was clearly identified, definite and precise, as required under existing precedent.

Not surprisingly, SFFA filed a petition for certiorari with respect to the 1st Circuit's ruling. Along with its petition for certiorari concerning the Harvard case, SFFA also asked the Supreme Court to hear another case it filed against the University of North Carolina at Chapel Hill (UNC) in November 2021, in which SFFA similarly asked the court to find UNC's admissions policy unconstitutional.

On Jan. 24, the Supreme Court granted certiorari and consolidated the Harvard and UNC cases for oral argument, effectively agreeing to reconsider the role of race in college admissions. The



admission process in order to create a more diverse student body in its Law School, 539 U.S. 306, 342 (2003). Through its decision in *Grutter* and numerous other affirmative action cases, the Supreme Court has consistently recognized that higher education institutions may consider race in the admissions process so long as the process is narrowly tailored to serve a compelling interest, such as campus diversity.

The most recent example of the Supreme Court upholding a race-based admissions program occurred in 2016, when the court examined the University of Texas at Austin's student admission process and permitted the university to continue considering race as a factor in admissions for purposes of ensuring a diverse student body on campus. Thus, the Supreme Court's hearing of the Harvard and UNC cases represents a reexamining of approximately 43 years of precedent.

Harvard University has publicly stated that SFFA's challenge puts higher education institutions' freedom to create diverse campus communities at risk. UNC has issued statements emphasizing that its current admissions program allows for a deliberate and thoughtful evaluation of each student. Although the court's consideration of the two cases has been consolidated, Harvard and UNC are distinct in that Harvard is a private institution and UNC is a public, state university. While both Harvard and UNC are subject to Title VI of the Civil Rights Act of 1964, as a public institution, UNC is also subject to the Equal Protection Clause of the 14th Amendment, which means that depending on the scope of the court's decision and analysis, its ruling potentially could have a different impact on public institutions than on private institutions receiving federal funding.

The current conservative make-up of the Supreme Court justices has many believing that race-based affirmative action may be ruled unconstitutional when the court hears the case. This outcome would result in significant ramifications for colleges and universities that utilize affirmative action and could fundamentally reshape the issue of admissions in higher education.

Following SFFA's filing of its petition for certiorari in the Harvard case, the Supreme Court asked the Biden administration to submit an amicus brief setting forth its position on whether certiorari should be granted. On Dec. 8, 2021, the U.S. Department of Justice filed the requested amicus brief, in which it expressed overwhelming support for Harvard's admissions process and opined that the Supreme Court should not grant review to consider overruling its longstanding precedent on affirmative action. The position set out in the department's amicus brief is in stark contrast to that of the previous administration, which strongly opposed affirmative action programs.

The consolidated cases will likely be argued early in the 2022-2023 term, with a decision to be issued in the spring or summer of 2023.