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STUDENTS FOR FAIR ADMISSIONS, AMES, AND CALIFORNIA EMPLOYERS

by KEITH W. CARLSON



Two years ago, the U.S. Supreme Court decided *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023).¹ Ostensibly, the decision was about collegiate admissions practices. It considered the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964—looking specifically at Harvard and UNC's affirmative-action programs in admissions. The Court addressed prominent earlier affirmative-action cases, including *Regents of Univ. of Cal. v. Bakke* (1978)² and the *Bollinger* cases (2003)³—effectively upending such admissions programs.

But those cases were all about state universities (UC, UNC, and Michigan) or private universities receiving federal funds, implicating Equal Protection and Title VI. Why then would *Students for Fair Admissions* matter for private employers covered by Title VII?

The answer was hinted at in the history provided by Chief Justice Roberts, discussing cases following *Brown v. Board of Ed.* (1955)⁴: “In the decades that followed, this Court continued to vindicate the Constitution’s pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and *businesses*; buses and trains; schools and juries were undone . . .” (emphasis added). But this history focused on “governmentally imposed discrimination” not private actors. In the very next paragraph, however, the Court’s reasoning turns more universal: “Eliminating racial discrimination means eliminating all of it . . . For ‘[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.’” Strict scrutiny would apply to any exceptions to this rule.

With the drive to eliminate race-discrimination since *Brown*, in *Bakke* (and later cases), the Court considered whether affirmative-action programs can co-exist with a ban on governmentally imposed discrimination. It was a close call from a very divided Court. The result was such programs, if carefully crafted, could be used to provide the educational benefit of a racially diverse class. But quotas and racial preferences were not allowed. Nevertheless, four dissenting Justices in *Bakke* believed the entire system violated Title VI. After *Bakke*, *Grutter v. Bollinger* did not produce a more united Court, but it did conclude that race-based admissions programs must “have a termination point” from their “deviation from the norm of equal treatment.” This led to Court’s famous prediction, in 2003, that race-based programs would be unnecessary in twenty-five years.

Twenty years later, however, the Court in *Students for Fair Admissions* found there was “no end in sight” to such programs. Indeed, in 1978, Harvard served as the *Bakke* Court’s model for admissions programs. But by 2023, Harvard had become a Respondent in *Students for Fair Admissions*. Moreover, the goals the schools sought and the methods they used did not satisfy the Court’s concerns regarding race-conscious

proceeded to launch a withering attack on the dissenters, who, he wrote, would seemingly seek unending race preferences: “Separate but equal is ‘*inherently* unequal,’ said Brown . . . It depends, says the dissent. That is a remarkable view of the judicial role—remarkably wrong.” After then saying the dissent’s viewpoint essentially led to the Civil War, the opinion quoted Justice Harlan back to the dissent: “There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”

Given the rather unequivocal rhetoric in the *Students for Fair Admissions* opinion, commentators immediately wondered how the high court could limit its logic only to college admissions. This led to speculation that, ultimately, race-conscious practices—carried out by businesses not covered by Title VI, but instead falling under Title VII—would also be in jeopardy for using “forbidden classifications,” even if to promote diversity efforts amongst minority races. Again, *Students for Fair Admissions* does not deal with businesses under Title VII, but it is difficult to read the opinion and not walk away believing a race-conscious employment system would not fall as the admissions programs had.

Given the simpler standing and damages concerns for employee-plaintiffs, as compared to denied applicants to a college, there would (and will) be significantly fewer challenges to make the logic of *Students for Fair Admissions* apply to companies—to the extent it doesn’t already. In fact, Justice Gorsuch’s concurring opinion directly connects the Court’s Title VI reasoning to employers under Title VII: “If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it ‘unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.’” 600 U.S. 181 (2023) (Gorsuch, J., concurring) (quoting 42 U.S.C. § 2000e-2(a)(1)).

Indeed, just after the ruling, prominent

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programs. The Court found the universities used methods that seemed disconnected to their (unmeasurable) goals. The Court also did not “take seriously” Harvard’s argument that its benefit to one racial group was not at the expense of others.

After providing this history of Supreme Court cases, Chief Justice Roberts reiterated the Court’s consistent rejection of racial preferences: “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit . . .” When universities do otherwise, they further, the Court said, racial stereotypes that the government is barred from doing under the Constitution. Chief Justice Roberts, relying on *Brown*,

employers—such as major law firms—received letters from elected officials threatening litigation over their Diversity, Equity, and Inclusion programs if they relied on race quotas. Yet, by 2024, an EEOC official was quoted downplaying the connection between *Students for Fair Admissions* and employers’ DEI programs—either disagreeing with Justice Gorsuch’s logic or seeing avenues wherein the programs would avoid race-based outcomes.

But in a January 2024 interview, a different EEOC official publicly rebuked Mark Cuban, regarding his publicly stated use of race as a “plus factor” in his hiring policies. The commissioner stated Cuban was “just fundamentally wrong,” going on to explain: “If any employer, whether private or public, uses race or sex or any other protected characteristic, particularly race or sex, as any factor in their decision-making process for any employment decision then they’ve violated Title VII and an employee that’s been harmed can file a complaint with the EEOC and then if they get a right to sue letter, they can file in federal court.” Federal court is likely where employers can expect to see more and more cases filed if their DEI programs are perceived as creating racial “quotas” or favoring one race over another, rather than pursuing “goals” without discriminating.

Adding to the back-and-forth interpretation of what *Students for Fair Admissions* might mean for employers, thirteen Attorneys General, including California’s Rob Bonta, signed a 2023 letter to employers stating there was no connection: “To be clear, SFFA does not directly address or govern the behavior or the initiatives of private sector businesses.” They went on to write: “Irrespective of [*Students for Fair Admissions*], hiring decisions made on the basis of race are prohibited under Title VII and have been for decades. Of course, consistent with Title VII, private employers can, should—and, in some circumstances, must—identify arbitrary and unnecessary barriers to diversity, equity, and inclusion in the workplace and develop solutions to address those issues.”

If such decisions have been prohibited “for decades,” why then did the case prompt such a flurry of questions over DEI programs? There are several reasons. First, it brought the issue back into the spotlight. Second, there’s been an increased focus on corporate DEI programs, especially in the past decade. Third, there is increased clarity regarding the law’s phrase “on the basis of race”—it prohibits quotas and disfavoring some groups, while still allowing for certain goals. Finally, prior

jurisprudence, despite no statutory language allowing it, seemingly drifted into allowing two questionable things: (1) programs favoring a racial group that had historically been disfavored and (2) a higher barrier to bringing a discrimination claim for a white employee than a minority employee.

Enter this year’s *Ames v. Ohio Department of Youth Services*⁵ decision. The question before the Supreme Court was whether plaintiffs from majority groups have a higher evidentiary burden to bring Title VII claims. Ms. Ames sued, claiming she’d been discriminated against because she was heterosexual—a majority group. Certain appellate courts previously held Title VII claims by those in majority groups could only proceed if the plaintiff showed “background circumstances”—namely, facts that the employer had previously discriminated against members of the majority group. Because Ms. Ames did not provide employer background information, but only the facts of her discrimination claim, the Sixth Circuit upheld the trial court’s dismissal of her case.

The Supreme Court, however, disagreed in a unanimous decision written by Justice Jackson. She wrote *all* plaintiffs are under the same standard for their Title VII cases, regardless of their minority or majority status. While the unanimous opinion does not cite or discuss *Students for Fair Admissions*, its reasoning still informed the *Ames* Court. In fact, the lower court, the cert petition, and the appendix in *Ames* all reference *Students for Fair Admissions*. Thus, for employers who, over the last two years, had been wondering how and when a college-admissions case would impact their employment practices: It seems that time has arrived.

How it impacts employers’ practices, however, is still being played out. Like *Students for Fair Admissions*, *Ames* will likely precipitate increased discrimination claims against employers—given the decreased requirements for majority-group employees to sue. Moreover, Justice Thomas’s concurrence, joined by Justice Gorsuch, would seem to point to the direction the Court majority has been heading since at least *Students for Fair Admissions*, which is looking ever-more skeptically at DEI programs: “a number of this Nation’s largest and most prestigious employers have overtly discriminated against those they deem members of so-called majority groups.” Notably, in the same concurrence, Justice Thomas discusses *Students for Fair Admissions*.

Following the *Ames* decision, the EEOC’s Acting Commissioner issued a statement. It lets employers know exactly how the EEOC is now looking at discrimination cases, including

those flowing from corporate DEI policies that discriminate against majority employees. The statement cautions employers:

- the EEOC had unanimously supported an amicus brief in support of Ms. Ames’s position;
- the EEOC “is committed to dismantling identity politics that have plagued our employment civil rights laws, by dispelling the notion that only the ‘right sort of’ plaintiff is protected by Title VII;” and
- “Thoughtful employers will take note and review their policies to ensure compliance with Title VII.”

The EEOC has certainly read—and twice quotes—Justice Thomas’s concurrence regarding “large” and “prestigious” employers. For such employers in California, there may remain a certain irony. While our state has long been both litigious and employee-friendly, given Attorney General Bonta’s stated position on employers and *Students for Fair Admissions*, it may be that employers face more federal court and administrative claims, rather than state claims—at least for these types of discrimination matters.

Regardless, the takeaway for employers under Title VII is to review all employment practices that consider race, ensuring that they neither favor nor disfavor any racial group.

ENDNOTES

(1) 600 U.S. 181 (2023)

(2) 438 U.S. 265 (1978).

(3) *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

(4) 347 U.S. 483 (1954).

(5) 605 U.S. 303 (2025).



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