AFFIRMING AFFIRMATIVE ACTION: WEIGHING THE USE OF RACE IN ADMISSIONS FOR HIGHER EDUCATION

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standards, the minority applicant embodies certain qualities like athletic abilities and unique life experiences that would contribute to fostering a diverse educational environment. In states that implement affirmative action policies, the value of such characteristics would generally be considered in admission decisions, but as affirmative action policies continue to be litigated around the United States, universities around the county are being forced to rethink this decades old practice.

In October and November of 2014, Students for Fair Admissions (SFFA) filed federal lawsuits against Harvard University and University of North Carolina - Chapel Hill (UNC).[1] SFFA claimed, that Harvard and UNC's race-conscious admissions policies unfairly discriminated against Asian Americans while disproportionately favoring African American and Hispanic applicants.[2] On October 8, 2020, the Justice Department, led by Attorney General William Barr, filed a lawsuit against Yale University accusing the Ivy League school of undertaking similar discriminatory actions against Asian Americans.[3]

These lawsuits are each located in separate federal circuits and are likely to continue escalating through the federal court hierarchy. The First Circuit Court of Appeals has affirmed the District Court of Massachusetts's decision that Harvard University's admissions process

circuit courts were to issue a conclusion contrary to the First Circuit, it would set up a circuit split, likely prompting the U.S. Supreme Court to act.

This article analyzes the history of affirmative action and the legal standard universities are required to meet when implementing affirmative action in their admissions processes, culminating in a prediction on how the Supreme Court is likely to rule. Part II focuses on the legislative and judicial history of affirmative action, beginning with its implementation in the 1960s through its development in subsequent decades. This section also discusses the legal standard for affirmative action cases as it has been developed by Supreme Court over the years. Part III focuses on the ongoing lawsuits against Harvard, Yale, and UNC, with particular focus on the Harvard case given that it is the ripest of the three cases for Supreme Court review. Part IV predicts how the Supreme Court is likely to rule on the Harvard case, by applying the legal standard set out in Part II. The article concludes by analyzing the likely impact of such a decision on the use of race in admissions by institutions of higher education.

II. HISTORY OF AFFIRMATIVE ACTION

According to the Stanford Encyclopedia of Philosophy, affirmative action is defined as "positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded."[4] In other words, affirmative action is a steppingstone for historically underrepresented mi

B. Proposition 209

In 1997, California passed Proposition 209 (Prop. 209), banning affirmative action, and modifying the state's Declaration of Rights, to include the following language: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[14] As of 2020, nine states had imposed bans on affirmative action in higher education, with Idaho the most recent sta

affirmed the opinion in *Bakke* certifying that there is a compelling interest in attaining a diverse student body.[37] Thus, the question was whether the school's procedures governing admission were narrowly tailored to achieve that compelling interest.[38] The school considered race as a "plus" factor while still effectively evaluating other individual qualities that could contribute to achieving a diverse educational environment.[39] This was evidenced by statistics revealing that the University of Michigan Law School accepted nonminority applicants with objective standards, like test scores and grades, lower than other rejected nonminority applicants, thus precluding the argument that race was considered an outcome determinative factor in the admissions process.[40] Further, the Court determined that strict scrutiny did not qre iquireÎ ov

alleging that the school's admissions procedures discriminated against non-minorities because the practice of maintaining a racially and ethnically diverse student body amounted to "holding seats" for certain minority groups.[45] The Court agreed, distinguishing *Grantz* from *Grutter* because they were unconvinced that the University of Michigan's policies complied with strict scrutiny.[46] The Court reasoned that the admissions procedures did not provide "individual consideration" and that they led to the admission of nearly every minority applicant.[47] Specifically, the Court held that allocating twenty points (20%) of consideration to "underrepresented minorities" based solely on race or ethnic status, was not a narrowly tailored solution to achieve educational diversity, because such a "decisive" process basically guaranteed admissions to certain applicants while also precluding a detailed assessment of additional qualities that could further the purpose of higher education.[48] The Court developed a hypothetical scenario involving two African American applicants from contrasting socioeconomic backgrounds.[49] In the hypothetical point-

affirmative action must be "precisely tailored to serve a compelling government interest."[52] In *Fisher*, the Court analyzed the University of Texas at Austin's admissions program, which coupled Texas's "Ten Percent Law,"—which provided for students in the top 10% of their high school class in Texas to be granted automatic admission into any public state college—with a race-conscious program seeking to increase overall diversity.[53] The Court in this case instructed the lower court to consider whether race neutral alternatives would achieve the same diversity outcomes when determining whether the university's use of race in admissions was "necessary."[54] Specifically, Justice

disagreeing with the Court's decision to not overrule *Grutter*.[60] Thomas wrote that he did not perceive racial diversity as a compelling interest, and therefore the use of race as a factor in admission procedures should be barred by the Equal Protection Clause.[61] Writing separately, Thomas distinguished educational diversity from the justifications for government sponsored racial discrimination analyzed by the Court in *Korematsu* and *Richmond v. J. A. Croson Co.*[62] Thomas reasoned that whereas the compelling government interests in those cases were based on national security and remedying past discrimination, here, given the

filed in 2014 by a nonprofit organization known as Students for Fair Admission (SFFA).[70] SFFA strongly believes that affirmative action in higher education is unconstitutional and leads to the exclusion of other qualified candidates on the basis of subjective admissions criteria.[71]

SFFA's complaint alleged that Harvard's race-conscious admissions procedures discriminated against Asian Americans by using subjective standards like "personality" that favored other minority groups such as African Americans and Hispanics in violation of Title VI of the Civil Rights Act of 1964.[72] The District Court ruled in Harvard's favor, finding that Harvard's admissions procedures showed no evidence of unconstitutional racial quotas, that there was no statistical support to indicate that racial balancing had occurred, and that the annual variations in Harvard's minority class compositions were statistically insignificant—likely stemming from the natural

for Hispanics.[76] Therefore, Harvard's admissions guidelines were narrowly tailored to achieve the benefits of a diverse student body.[77]

SFFA immediately appealed to the First Circuit, who rendered their decision on November 12, 2020.[78] The First Circuit upheld the lower court's decision, finding no evidence that Harvard's use of race in admissions equated to racial balancing.[79] The court stated "[t]he fact that Harvard's admitted share of applicants by race varies relatively

step of the admissions process, an argument ed.[83] The court also agreed that Harvard had s diversity goals through race neutral policies did not succeed.[84] Specifically, it o eliminate Early Action from 2012 to 2015 rts to increase financial aid, which led to Hispanic and African American applicants, ost qualified of those applicants chose to offered early admission or early decision.[85]

jected petitioner's argument that Harvard's nst Asian Americans or that an applicant's ced by race.[86] Instead, they found that while ween race and personal rating, there was no tistical analysis accounting for the personal average marginal effect on admission n other words, under the school's current plicants had an 0.08% less chance of being an a similarly situated white student.[89]

complaint alleges that Yale's use of race as a factor in admissions unfairly discriminates against white and Asian American applicants in violation of Title VI of the Civil Rights Act of 1964.[104] Interestingly, however, this case could also be the easiest of the three ongoing lawsuits against affirmative action to be dismissed. Whereas the Trump administration has actively opposed the use of race as a factor in admissions, supporting SFFA in their cases against Harvard and UNC, the Biden administration is less likely to continue such policy.[105]

Although the SFFA did not file the original lawsuit against Yale, they have been far from silent on the issue. On October 27, 2020, SFFA filed a Motion to Intervene in the case, alleging that they are entitled to intervention because some of their members had been rejected by Yale, and that other members were planning to apply.[106] If the District Court grants SFFA's motion, then SFFA would have the right to continue the lawsuit despite the potential absence of the DOJ.[107] SFFA President, Edward Blum, has already revealed his intention to continue the litigation, stating "SFFA brings a unique perspective and standing to the challenge to Yale's admissions practices that is not fully articulated in the DOJ complaint."[108] As such, if SFFA's Motion to Intervene is granted, the case will likely proceed to trial in the District Court of Connecticut.[109]

IV. WHY SCOTUS SHOULD UPHOLD HARVARD'S AFFIRMATIVE ACTION ADMISSIONS PROGRAM

Assuming the Supreme Court grants certiorari, the first affirmative action case on the docket will be the one against Harvard, given that it is the most advanced stage of the three, having recently been decided by the First Circuit.[111] The Court could decide the case in one of three ways: (1) uphold the First Circuit's decision that Harvard's use of race was narrowly tailored in achieving a diverse educational environment; (2) reverse the First Circuit and find that Harvard's admissions program was not narrowly tailored toward achieving a diverse educational environment and that its use of race was decisive; or (3) reverse *Grutter*

contrasted Harvard's admissions program from *Gratz* in that Harvard did not use a point based system.[117] Further, there was a lack of evidence supporting petitioner's argument that race was given disproportional consideration in admissions compared to other qualities.[118] Indeed, SFFA's expert analysis revealed that a significant number of Hispanic and African American applicants who excelled in objective categories like test scores and GPA were also rejected, likely due to other factors unrelated to race or ethnicity.[119]

Harvard also carefully considered all workable race neutral alternatives and found they would not meaningfully add to the overall diversity objectives they were seeking.[120] Further, such race neutral alternatives would have impaired enrollment opportunities for applicants with other diverse qualities like athletic skill, extracurricular activities, and applicants with varied life experiences.[121]

Finally, the First Circuit analyzed statistical models to determine whether Harvard's numerical ratings, including an applicant's personal ratings, were influenced by race.[122] The lower court was convinced that while there was a correlation between race and an applicant's personal rating, such correlation did not necessarily imply causation between the two factors.[123] In addition, both the District Court and First Circuit cited Harvard's statistical model incorporating non-quantifiable personal ratings for evaluating applicants in finding no implicit bias on Harvard's part, determining the overall marginal impact on Asian American admissions to be "statistically insignificant."[124]

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C. Reverse Grutter and Prohibit the Use of Affirmative Action in Higher Education

The final route the Supreme Court could take, would be to reverse *Grutter* and determine there is no compelling interest in fostering a diverse educational environment in higher education.[130] At the time *Grutter* was decided, Justice O'Connor wrote "We expect that 25 years from now, the use of racial preferences will no longer be necessary to

have repercussions on admissions policies in universities all around the country, requiring them to reconstruct their admissions programs to be either completely or slightly more race neutral. In addition, it could also impact minority enrollment rates in certain universities, as occurred with Berkeley and UC following Prop. 209. Although the Supreme Court should find that that Harvard's admissions policies are narrowly tailored to achieving educational diversity, universities should be prepared for an alternative scenario. One in which the Court overturns *Grutter* and determines that educational diversity is no longer a compelling interest. Amid the Supreme Court deliberation, admissions seasons will be hectic.