Updates

The U.S. Supreme Court denied certiorari in a much-scrutinized U.S. Court of Appeals for the Fourth Circuit case involving race-neutral school admissions procedures, *Coalition for TJ v. Fairfax County Board*, on February 20, 2024.

A surprise decision, the denial of certiorari in that case may provide important insights into future applications of the landmark college affirmative action decision, *Students for Fair Admissions v. President and Fellows of Harvard College (SFFA)*. Moreover, for employers and supporters of diversity, equity, and inclusion (DEI) programs, this action appears to delay the U.S. Supreme Court weighing in on race-neutral efforts to increase diversity and carries important implications for the continued viability of such programs in the workplace.

As discussed in our prior Update covering the *SFFA* decision, school administrators, corporate DEI officers, and human resources departments have been closely watching the *Coalition for TJ* case to see how the Supreme Court would respond to the race-neutral admissions procedures upheld by the Fourth Circuit. In this Update, we cover the Fourth Circuit decision at issue before the Supreme Court and consider how the denial of certiorari and its associated dissent provide clues for where admissions litigation is headed and how schools and workplaces may continue to ensure diversity.

What Did the Fourth Circuit Hold in *Coalition for TJ*?

Shortly before the Supreme Court struck down the university admissions processes at Harvard and the University of North Carolina (UNC) in the *SFFA* decision, the Fourth Circuit upheld the admissions policies at a top-ranked public school in Fairfax County, Virginia, in *Coalition for TJ v. Fairfax County School Board*. While the cases presented distinctively different facts and policies regarding the consideration of race in admissions, both decisions relied in part on the Equal Protection Clause of the Fourteenth Amendment of the Constitution and garnered significant political, social, and legal attention.

The Fourth Circuit decision arose from changes Fairfax County made for admissions at Thomas Jefferson High School for Science & Technology (TJ). Like admissions to Ivy League universities, admission to TJ is highly competitive and was traditionally based on a stringent entrance examination, standardized test scores, GPA, and previous coursework. Seeking to broaden opportunities for additional students, TJ introduced a new set of admissions guidelines starting in the fall of 2020. Those guidelines broadened the admissions criteria to grant priority to students coming from underrepresented middle schools and included new consideration of students from low-income backgrounds who had engaged in community service or student leadership.

Notably, none of the admissions policies at TJ considered an applicant's race. Nonetheless, the plaintiff in *Coalition for TJ* alleged that the policies amounted to intentional discrimination in violation of the Equal Protection Clause. Plaintiff argued that the policies had led to lower Asian American representation in the affected class. Further, some evidence existed that the Fairfax County School Board had, at least in part, implemented these changes to increase Black and Hispanic enrollment. On February 25, 2022, Judge Claude M. Hilton of the U.S. District Court for the Eastern District of Virginia, applying strict scrutiny, held that the admissions policies at Thomas Jefferson High School were not narrowly tailored to further a compelling interest and thus violated the Equal Protection Clause. The district court judge further noted that "[s]trict scrutiny applies to facially neutral actions 'motivated by a racial purpose or object' in the same manner as when they contain 'express racial classifications.'"

On May 23, 2023, however, the Fourth Circuit reversed and remanded the Eastern District of Virginia opinion. The Fourth Circuit noted that although "the Board may have adopted the challenged admissions policy out of a desire to increase the rates of Black and Hispanic student enrollment at TJ—that is, to improve racial diversity and inclusion by way of race-neutral measures—it was utilizing a practice that the Supreme Court has consistently declined to find constitutionally suspect," namely race-neutral procedures. The Fourth Circuit ruled that, because the plaintiff could not show invidious discrimination in the high school's race-neutral admissions procedures, TJ's admissions procedures were entitled to rational basis review, a far less demanding standard than strict scrutiny review. Under this less demanding standard of review, the procedures were held to be rationally based and serve a compelling interest, warranting continuation of the practice.

Why Does *Coalition for TJ* matter for the *SFFA* decision?

First, the Fourth Circuit decision, looked at in tandem with the *SFFA* decision, shows the extent to which the level of scrutiny applied by courts to an admissions procedure shapes the outcome of the case. Strict scrutiny

asks whether a decision or practice has been narrowly tailored to meet a compelling interest. Courts apply this test to overt racial classifications, which led the Supreme Court to strike down Harvard and UNC's consideration of race as a factor in admissions. The lowest level of judicial scrutiny, rational basis review, instead asks whether a decision or practice is rationally related to a legitimate interest. The district court and Fourth Circuit decisions in *Coalition for TJ* starkly amplify how applications of these tests can lead to such varying results. Like Harvard's practices at issue in *SFFA*, the Fairfax County School Board's admissions procedures did not meet the higher, strict scrutiny standard when it was applied by the district court; but under the lesser, rational basis standard, the Fourth Circuit approved its actions.

Had the Supreme Court taken up *Coalition for TJ*, it would have faced a compelling question of what level of scrutiny should be applied to the use of holistic race-neutral factors for admissions (i.e., attendance at underrepresented school, participation in community service, etc.) where evidence exists that diversity was an underlying goal. Opponents of Fairfax County's practice would likely have welcomed a decision applying strict scrutiny to the holistic factors, as such a decision could further erode schools' desire to fulfill their commitments to diversity and have far-reaching impacts on not only selective high schools, but also selective universities.

Further, adding intrigue to the decision, the Court requires the votes of only four justices to grant certiorari, and the *SFFA* decision was recently decided by a 6-3 majority. The denial also came with a sharply worded dissent from Justice Samuel Alito, a less common feature in such denials.

A closer look at the *SFFA* decision may explain, in part, how the Court could have gone from a 6-3 majority in that decision to not having four votes for purposes of granting certiorari in *Coalition for TJ*. Although Chief Justice John Roberts' opinion in *SFFA* did do away with the partial use of express racial classifications in admissions decisions, Chief Justice Roberts also pronounced 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," creating a limited carveout for race to be mentioned by applicants applying to universities.

One way to look at this carveout, when compared to the Fourth Circuit's *Coalition for TJ* decision, is that the Court has already endorsed a more explicit use of race in school admissions than the use of race at issue in *Coalition for TJ*. Under *SFFA*, applicants are allowed to discuss—and school administrators are allowed to consider—their race in university applications in furtherance of explaining how their race has affected their lived experiences. Justices Brett Kavanaugh and Amy Coney Barrett joined Chief Justice Roberts' majority opinion containing that carveout, which likely also has support from the more liberal justices on the Court. The admissions practices at issue in *Coalition for TJ*, in contrast, do not entail explicit reference to individuals' race. Considered as a continuum, the practices at issue in *Coalition for TJ* could be said to involve race less directly than those expressly permitted under *SFFA*. This might explain in part why four justices did not vote in favor of granting certiorari.

Regardless, for now, the Fourth Circuit—which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina—has the last say.

Does the Court's Action Affect Selective Educational Institutions?

Selective educational institutions experienced significant upheaval in the run-up to the *SFFA* decision. While many institutions expected the Supreme Court to overturn Harvard and UNC's use of race in their admissions systems and thereby change their processes, the decision represented a social, political, and legal landmark. Moreover, many states are directly targeting educational institutions' commitments to diversity and DEI programs meant to achieve these goals. Because the Supreme Court did not take up the central question of whether race-neutral steps to increase overall diversity are appropriate under the Constitution and Title VI,

holistic race-neutral actions by educational institutions remain within the current guardrails in the Fourth Circuit. Educational institutions should, however, remain vigilant that their policies and practices do not veer into the use of overt racial proxies, and decision-makers should refrain from race-conscious considerations when overhauling admissions systems or making selection decisions.

Legal Implications of the *SFFA* Decision on Employer-Led DEI Programs

DEI programs are multifaceted and hard to fit into a single bucket. Moreover, the legal risks of DEI programs, like any corporate policy, rise and fall with how company officials—from the CEO to frontline human resource personnel—carry them out in the workplace. At the same time, Title VII has always forbidden consideration of race in employment decisions.

Against this backdrop, three main lines of attack on DEI programs have surfaced since *SFFA*. First, corporate DEI programs have faced a new wave of reverse discrimination claims in which white litigants argue that employers' implementation of corporate DEI programs and diversity-advancing initiatives have resulted in bias in hiring, promotion, and other employment actions.

Second, litigants in some reverse discrimination claims have begun to invoke 42 U.S.C. § 1981. This law broadly forbidding the use of race in contracts has formed the basis of attacks on not only internship programs but also grant programs, including in the closely watched *Fearless Fund* litigation.

Third, there are growing concerns that another upcoming Supreme Court case, *Muldrow v. City of St. Louis*, could, by expanding the definition of an adverse employment action, herald new attacks on some DEI initiatives that have long been viewed as legally permissible. One opinion in *Hamilton v. Dallas County*, a recent U.S. Court of Appeals for the Fifth Circuit decision addressing the same issue, squarely took aim at DEI programs, asserting that various strategies provided by them—such as mentoring and training programs and diverse interview slate requirements—violate Title VII.

How Does the *Coalition for TJ* Decision Affect Employer DEI Programs?

The legal standards governing the issues in *TJ* and those applied to employer DEI programs are technically different. The Constitution's Equal Protection Clause does not apply to private employers, and unlike Title VI, which governs educational institutions, Title VII has always forbidden race-conscious decisions. Nonetheless, these distinctions did not change the desire of opponents of these programs to lump them together and bring new, high-profile cases.

In light of these efforts, employers have been reevaluating all aspects of their DEI. Many of those reevaluations have set priorities on race-neutral tactics while remaining committed to diversity as a core value and business imperative. With the Supreme Court avoiding for now the question of race-neutral admissions procedures, employers deploying race-neutral practices to foster diversity are likely letting out a small sigh of relief. A Supreme Court decision questioning any type of race-neutral actions related to diversity would run the risk of creating another tide of broad attacks.

Still, employers should be mindful of the likelihood of future changes in this fast-moving space. Employers should not only continue reviewing their workplace DEI programs and policies to ensure they do not run afoul of existing requirements under applicable employment anti-discrimination laws, but also seek advice from trusted outside counsel for ongoing guidance. The ongoing activity in the courts on anti-discrimination law indicates that major changes are to be expected.

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