

Supreme Court Skeptical in Affirmative Action Cases

No Civil War over oboe players, Chief Roberts reminds Harvard's lawyer

By JOSHUA DUNN

IN THE WAR OVER AFFIRMATIVE ACTION, the counsel for Harvard, Seth Waxman, might have made a fatal admission in his oral argument in *Students for Fair Admissions (SFFA) v. Harvard* on October 31, 2022. Under questioning from Chief Justice John Roberts trying to verify that race was a determinative factor in some admissions cases, Waxman agreed that it was but went on to say that it was similar to a university admitting an oboe player because the school needed someone with an oboe player's skills. Roberts immediately responded that America had not fought a war over oboe players but it had fought one over race, which is why the court has always subjected racial classifications to strict scrutiny. The advocate's admission also pointed to the fact that in a zero-sum game such as college admissions, if one person gets a benefit because of race and another person does not, then there must be some form of racial discrimination occurring. That, it looks like, could be the decisive factor in the court's decision.

Beyond this crucial concession, there seemed to be several other reasons, based on the oral argument in the Harvard case and its companion, *University of North Carolina v. SFFA*, to think that affirmative action might be declared unconstitutional in one or both of these cases. Most important, no one defending either Harvard or UNC at the oral argument—which included Waxman, U.S. Solicitor General Elizabeth Prelogar, North Carolina Solicitor General Ryan Park, and David Hinojosa of the Lawyers' Committee for Civil Rights—could offer a firm deadline for the end of affirmative action. Despite Justice Sandra Day O'Connor's position in her majority opinion in *Grutter v. Bollinger* (2003) that “we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,” none would even

hazard anything resembling an end point. Instead, the position offered was that yes, it will end when, as Prelogar said, schools have reached their “diversity goals.” But no one representing the universities said what those goals should be nor when they could conceivably be met. At least two of the conservative justices, including Brett Kavanaugh and Amy Coney Barrett, sounded like they might have been more sympathetic



Parent activists rally in front of the U.S. Supreme Court against race-based preferences in college admissions. The event took place the day before the court heard oral arguments about the issue.

to letting Harvard and UNC continue their affirmative action programs if they could have given a more concrete deadline. They might at least have been willing to let the programs continue to O'Connor's 25-year deadline in 2028, or maybe somewhat longer if the advocates had provided a precise end date. The failure to do so seems like a tactical error. Even if UNC and Harvard would want them to continue in perpetuity, making that rhetorical concession could allow them to live to fight another day.

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Another option for Harvard and UNC to peel off a couple members of the conservative bloc would have been to convince them that under originalist grounds the 14th Amendment allows for race-conscious policies such as affirmative action. The two attorneys for SFFA, Cameron Norris, who argued against Harvard, and Patrick Strawbridge, who argued against UNC, both contended that the race-conscious policies that had been adopted in the wake of the Civil War and after the passage of the 14th Amendment were remedial and that, under Justice Lewis Powell's controlling opinion in *Bakke v. California*, that was not a compelling justification for the use of race in college admissions. The universities had not really tried to defend the affirmative action programs under consideration on the grounds that they were remedial. Instead, as *Bakke* required, the compelling government purpose had to be diversity. Again, none of the advocates defending Harvard and UNC seemed to offer a persuasive response to this claim, or at least one persuasive enough to satisfy committed originalists such as justices Neil Gorsuch and Clarence Thomas. A lawyer representing UNC did mention Confederate relics and even white supremacist marches on the school's campus and said that universities in states that had not had legal segregation might have weaker or even nonexistent claims to race-conscious admissions, but he was grilled on whether such admissions benefits would apply to an applicant with a single African American great-grandparent.

As well, other conservative justices expressed significant concern that “holistic” admissions programs were, as Gorsuch called them, “subterfuge” for unconstitutional racial quotas. Harvard, he pointed out, had adopted a holistic approach in the 1920s in order to limit the number of Jews in its student body. Kavanaugh even asked whether Harvard had sold Powell “a bill of goods” when it offered and he accepted its holistic method in *Bakke*. Waxman contended that whatever noxious motivations Harvard had in the past, the two situations were completely different. That, again, was unlikely to affect the conservative bloc. Perhaps recognizing that they were making little headway with the court's conservatives, both Waxman and Prelogar floated the idea that if the court disagreed with the lower courts' interpretation of the findings of fact, the justices should remand the cases to be reheard based on clarifying guidance provided by the court.

Finally, and solely related to Harvard, Waxman struggled to respond to questions about the “personal ratings” that Asian American applicants consistently receive from Harvard's admissions department. Each applicant to Harvard is given a personal rating encompassing qualities such as “leadership,” “courage,” “likeability,” “self-confidence,” and “kindness.” Asian Americans

consistently receive worse scores than other ethnic groups based on this personal rating. For instance, 22.2 percent of Asian Americans applicants in Harvard's top academic decile receive a personal rating of 1 or 2, compared to 29.6 percent for whites, 34.21 percent for Hispanics, and 46.97 percent for African Americans. To defend this, Waxman fell back on the ruling by the trial court that this does not in fact count as evidence of racial discrimination. He called it only a slight statistical disparity in an initial “triage,” perhaps related to confidential letters of recommendation. One suspects, though, that if the races were reversed he would not regard this as an innocuous abnormality. While appellate courts generally accede to the findings of fact by trial courts, here one suspects the conservatives will be unpersuaded. Justice Samuel Alito, for instance, pressed Waxman to choose whether the systematically lower scores were evidence that Harvard believes Asian American applicants lack those characteristics or, alternatively, that there is something wrong with Harvard's personal score.

With the usual caveat that predicting outcomes based on oral argument is hazardous and uncertain, it would seem prudent for schools to prepare for an environment where they cannot consider race in admissions. In the case of all public universities and private universities that accept federal funds, the justices appear poised to rule that Title VI of the Civil Rights Act clearly forbids racial discrimination and

that the use of race necessarily requires racial discrimination. Prelogar tried to argue that the use of the word “discrimination” in Title VI was ambiguous, prompting Gorsuch to ask if the court was mistaken in *Bostock v. Clayton County*, an opinion he authored forbidding discrimination based on sexual orientation and gender identity, which held that the meaning of discrimination in Title VII of the same act was not ambiguous. Prelogar's response was that the court was not mistaken but that the same term was in fact ambiguous in one title but not the other. Additionally, the court seems likely to rule that the use of race in admissions violates the Equal Protection Clause of the 14th Amendment, which public universities are also bound by. Going forward, there might be additional questions that universities will have to confront, such as the legality and constitutionality of other mechanisms they use to promote racial diversity, including such things as diversity statements from job applicants. One simply does not get the sense that a majority on this current court is sympathetic to those aims.

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