HRPA HR POLICY ASSOCIATION®

POLICY BRIEF

Title VI, Title VII, and the *Harvard* Supreme Court Case

The U.S. Supreme Court recently decided two cases – *Students for Fair Admissions vs. Harvard* and *Students for Fair Admissions vs. University of North Carolina* – regarding whether colleges and universities may continue to use race as one factor among others in their admissions processes under Title VI of the Civil Rights Act of 1964. **As expected, the Court ruled that colleges and universities can no longer take race into account in admissions decisions, effectively ending affirmative action in higher education.** Although the decision has no direct legal bearing on discrimination and affirmative action in employment, as an indirect result, **courts and other stakeholders may now focus attention on employers' diversity, equity and inclusion (DEI) programs under Title VII of the Civil Rights Act**, which already prohibits the use of race in employment decisions (with very limited exceptions). This document gives a brief background on Title VI and Title VII of the Civil Rights Act, how they differ, and how the *Harvard/UNC* decision impacts both statutes and employer DEI programs.

Affirmative Action Under Title VI – College Admissions

Title VI of the Civil Rights Act of 1964 prohibits organizations or programs receiving federal funding from discriminating against individuals on the basis of race, ethnicity, or national origin. Functionally, within the context of college admissions, this federal law prohibits colleges and universities receiving federal funding from discriminating against applicants on the basis of race, ethnicity, and national origin.

As this law relates to affirmative action – or the use of race, ethnicity, or national origin in admissions decisions in general – the Supreme Court has established, originally in *Regents of the University of California v. Bakke* in 1978, and most recently affirmed in *Fisher v. University of Texas* in 2016, that colleges and universities may use race as one factor among many factors or criteria in making admissions decisions. The Supreme Court has – until *Harvard* – recognized a diverse college campus – *i.e.*, diversity itself – as a sufficiently compelling interest such that colleges and universities may use race as a factor in admissions decisions in furtherance of that interest. Notably, in a similar case decided in 2003 – *Grutter v. Bollinger* – Justice Sandra Day O'Connor noted that she expected that "25 years from now, the use of racial preferences will no longer be necessary to further [that] interest."

Schools may not use simple quotas, and race may only be used as one factor among many in admissions decisions. In practice, schools often use race as a "plus factor" among other "plus factors" (such as geographical location, extracurricular participation, test scores, etc.) that go in favor of an applicant, and compare applicants by the number of "plus factors" each has.

Title VII – Employment

Title VII prohibits employers from discriminating against job applicants or employees on the basis of race, ethnicity, religion, sex, or national origin. Title VII explicitly recognizes two forms of discrimination: intentional discrimination, and disparate impact discrimination. The latter prohibits employers from using employment practices that

while on their face are neutral, have a disproportionately adverse effect on members of a protected class. For example, employers may violate Title VII if they use tests for job applicants that disproportionately screen out female applicants.

As this law relates to affirmative action or employer diversity initiatives generally, Title VII is fundamentally different from Title VI. Unlike Title VI, Title VII generally does not allow race or other protected characteristics to be used in employment decisions, except in very limited circumstances. Courts have never recognized the importance of furthering workplace diversity alone as a basis for using race or other protected characteristics in employment decisions; this is in contrast to Title VI, under which, as mentioned above, the Supreme Court has recognized that the important of furthering campus diversity can be a basis for using race as a factor (among others).

The Supreme Court has established that race can be used as a factor in employment decisions in the following limited circumstances only: to remedy previous discrimination by the employer, or to avoid the discriminatory impact of an otherwise non-discriminatory policy (disparate impact).

At Stake in the Harvard Case for Title VI and Title VII and the Court's Decision

The *Harvard* Supreme Court case involved a challenge to Harvard and UNC's admissions policies, both of which allegedly use race as a factor among others in admissions decisions. Because it dealt with college admissions, the case was governed by Title VI, the Court's decision only affects – legally – that statute. The decision does not touch upon Title VII – legally – whatsoever.

At stake was whether colleges and universities can continue to use race as one factor among many in admissions decisions. The Court ultimately ruled that race may no longer be used under any circumstances in admissions decisions, and effectively rendered affirmative action in college admissions unlawful.

Such an outcome has no immediate direct impact – again, legally speaking – on Title VII and the use of race in employment decisions. Indeed, what was at stake in the *Harvard* case is already prohibited under Title VII. Employers may not use race as a factor whatsoever in employment decisions, except in very limited circumstances as articulated above.

Long-term, however, employer DEI programs could be the next to receive similar legal scrutiny. Already, several interest groups have begun to prepare lawsuits against companies – or have already done so – challenging employers' use of race or gender in employment decisions. For example, in one lawsuit, a pharmaceutical employer's fellowship program designed to address gaps in recruiting, retaining, and promoting diverse talent was challenged as discriminatory against White and Asian-American applicants by a group of Virginia healthcare professionals. Another lawsuit filed against Starbucks alleged that the company's publicly available diversity goals – including "achieving BIPOC representation of at least 30% at all corporate levels" – were unlawfully discriminatory.

In the wake of the Supreme Court's decision in *Harvard*, these lawsuits could proliferate and receive increased media attention, with a final result being the Supreme Court considering a case involving the legality of an employer's DEI program. For example, it is conceivable that a plaintiff could allege that company-wide aspirational diversity goals are being implemented as *de facto* quotas. In the end, the current Court could significantly restrict or outlaw altogether the

current use of certain DEI programs and initiatives. Such a result, however, is likely years away, if it comes to pass at all.

One potential harbinger of how the Supreme Court may view employer DEI programs is its decision in *Groff v. Dejoy*, which was issued at the same time as the *Harvard* case. *Groff* involved how much employers must show to prove that a religious accommodation is unduly burdensome on its business such that the employer refused the accommodation. Traditionally, under Title VII, employers need only show that a religious accommodation request would impose a minimal undue burden in order to reject it. In *Groff*, the Court overruled this precedent and held that employers must now show the request would create a burden substantially increasing costs in order to lawfully reject it. This result could presage a similar narrow view in a case involving employer DEI programs.

More background on the Harvard and North Carolina cases is here and the brief HR Policy Association filed in support can be found here.