Harvard Victory Pushes Admissions Case Toward a More Conservative Supreme Court

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FULL TEXT

The court’ s rightward tilt under President Trump, whose administration supported efforts to end race-based admissions policies, gives activists a more favorable opening to challenge affirmative action.

A federal appeals court on Thursday ruled that Harvard’ s admissions process did not violate civil rights law, but the victory for the university could be short-lived should the case be taken up by the Supreme Court, whose conservative members have indicated a willingness to reconsider more than four decades of affirmative action.

The decision came in a case that cast an unwelcome light on Harvard’ s once highly secretive admissions decisions despite rulings in its favor, and elevated efforts by conservative activists to challenge the race-based admissions policies that have helped diversify the student bodies of prestigious public and private universities.

The goal of those activists was always to reach the Supreme Court, where an increasingly conservative tilt because of three justices appointed by President Trump has made it appear more likely that they could prevail despite more than 40 years of precedent.

“It is our hope that although we lost in the lower court, ultimately the Supreme Court will take this case and end all considerations of race in college admissions,” said Edward Blum, a conservative activist who is the strategist behind the case.

It takes four of the nine Supreme Court justices to agree to hear a case, and five to overturn previous rulings. The last major Supreme Court case upholding the legality of affirmative action, Fisher v. University of Texas, was decided by a 4-to-3 vote in 2016, and the three dissenting justices are still on the court. (Justice Elena Kagan recused herself from the case, and Antonin Scalia had died and not yet been replaced.)

“They definitely are amenable to revisiting the issue,” said Melissa Murray, a law professor at New York University.

It is a truism that Supreme Court decisions often reflect the mood of society and cultural norms. In one indication of public sentiment, California voters declined this month to overturn a state ban on affirmative action; about 57 percent of voters supported keeping it. A Pew Research Center survey taken in early 2019 found that 73 percent of Americans said race or ethnicity should not be a factor in college admissions.

The Harvard case is among several challenging affirmative action that are expected to go forward in the courts even after the departure of the Trump administration, which has backed efforts to end race-based admissions policies. They include litigation against the University of North Carolina and the University of Texas.

All were filed by Mr. Blum’ s group, Students for Fair Admissions. In the Harvard case, the group sued on behalf of rejected Asian-American students who said the university was violating federal civil rights law.

Harvard said during a 2018 trial that it considered race as one of many factors, and not the determining one, which was allowed under previous Supreme Court rulings. Admissions officers testified that the college would be a much different place if they did not take race into account. They said they had tried alternatives like increasing financial aid and outreach to Black and Latino students, and they did not work as well.

A federal judge, Allison D. Burroughs, found in Harvard’ s favor, and on Thursday the U.S. Court of Appeals for the First Circuit endorsed her ruling, stating in a 104-page decision that Harvard “has already reached, or at least very nearly reached, the maximum returns in increased socioeconomic and racial diversity that can reasonably be achieved through outreach and reducing the cost of a Harvard education.”

Getting into Harvard is challenging for almost anyone. The university admitted 4.6 percent of applicants in 2018, the year the lower-court trial took place. An examination of its inner workings in court exposed how the school gives advantages to many groups of applicants, including recruited athletes, legacies (the children of Harvard graduates), and the children of wealthy donors, prominent people and university employees.

Testimony also revealed that Harvard did value certain personal characteristics in applicants, such as "effervescence, charity, maturity and strength of character."

One reason the Supreme Court might find the Harvard case compelling is that it framed the issue in a new way, pitting the rights of Asian-Americans against other racial groups. The more classic case accuses universities of discriminating against white applicants.

The plaintiffs argued that Harvard systematically discriminated against Asian-American applicants by holding them to a higher standard than other groups. They contended that Harvard's admissions officers used racial stereotypes about studious, shy Asians against them. The case troubled Asian-Americans who had experienced prejudice, though many also said they supported affirmative action.

Harvard countered that its admissions process considered many intangibles, such as the personal stories and special talents of applicants, and could not be reduced to a few variables.

Although various statistical models cited by the plaintiffs showed that Asian-American students had a lower chance of acceptance to Harvard than similarly qualified white students, the margin was negligible, the appeals court said in its ruling. It also rejected the plaintiffs' argument during the trial that Harvard's admissions office had been affected by "implicit bias," or unconscious racial stereotyping.

In public opinion surveys, many Americans favor the broad concept of affirmative action as a remedy for past discrimination. But since a 1978 Supreme Court decision, Regents of the University of California v. Bakke, that has not been the legal rationale. In that case, Justice Lewis Powell enshrined the value of "diversity" as the goal.

Over the years, Supreme Court decisions have outlawed the use of quotas, racial balancing or other numeric targets in admissions. But they have allowed consideration of race as one factor —albeit not the determining one —when considering applicants, in the interest of achieving the educational benefits that come from diversity of thought, background or experience.

Justin Driver, a law professor at Yale, said he did not see the Harvard case as a slam dunk to be heard by the Supreme Court because it raised civil rights law issues rather than constitutional ones. He said it was "improbable" but not impossible that affirmative action would survive the conservative majority.

"Affirmative action has been administered last rites many times, dating back to the court's first substantive decision in this area in 1978," he said, and it has often been Republican appointees, like Justices Powell, Sandra Day O'Connor and Anthony Kennedy, who have rescued it.

The difference, he said, is that the Trump appointees "are movement conservatives and people who came of age in the Federalist Society, and affirmative action is a bogeyman in those circles."

Still, legal experts said it was far from certain how the newest justices, Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett, would rule. Ms. Murray, the N.Y.U. law professor, called Justice Barrett "a blank slate" whose record did not give strong clues, although her mentor, Justice Scalia, was skeptical of affirmative action policies.

Justice Kavanaugh, Ms. Murray said, was known for promoting racial and gender diversity among his court clerks, but she added, "It is unclear how he would view this particular legal question."

And as a textualist, Justice Gorsuch might take literally the federal civil rights law prohibition against discrimination — "even for benign purposes," Ms. Murray said —on the basis of race. But he too, she said, "is a wild card."

Derek W. Black, a constitutional law professor at the University of South Carolina, said it was clear the appeals court understood the national ramifications of the case and the likelihood it could end up before the Supreme Court.

"In an extremely methodical and careful decision," he said, the appeals court had "cut through all the rhetoric of those attacking Harvard's affirmative action plan to find that there is no there there. Harvard, in short, has run its admissions by the book."

In a statement, Harvard welcomed the ruling and said its admissions polices were consistent with Supreme Court

precedent.

“The consideration of race, alongside many other factors, helps us achieve our goal of creating a student body that enriches the education of every student,” Lawrence S. Bacow, Harvard’s president, said in a statement. “Diversity also represents a pathway for excellence for both Harvard and the nation. We will continue to defend these principles and our admissions process all the way to the Supreme Court, if necessary.”

Adam Liptak contributed reporting. Susan C. Beachy contributed research.

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DETAILS

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