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Justices Seek Feds' Input On Harvard Affirmative Action Case

By **Chris Villani**

Law360 (June 14, 2021, 10:18 AM EDT) -- The U.S. Supreme Court on Monday signaled it may take up a landmark challenge to Harvard University's affirmative action admissions policy, inviting the Biden administration to weigh in on whether the school's race-conscious system is legal.



The U.S. Supreme Court on Monday asked the Biden administration to weigh in on Harvard University's affirmative action admissions policy. (AP Photo/Charles Krupa)

The suit, brought by the group Students For Fair Admissions, alleges that the nation's oldest university engages in illegal racial balancing to the detriment of Asian American applicants. **Harvard has defended its policy**, saying it uses race only as a "tip" or "plus factor" in a holistic admissions system designed to achieve diversity and the benefits that flow from it.

The justices now want to know what the federal government thinks after the Trump administration backed SFFA in the lower courts.

"The acting solicitor general is invited to file a brief in this case expressing the views of the United States," Monday's brief order said.

Harvard has already won twice in the lower courts after SFFA sued the Ivy League school in 2014.

The group, led by anti-affirmative action legal strategist Ed Blum, claims Harvard violated Title VI of the Civil Rights Act. SFFA **lost its case** in 2018 after a three-week blockbuster bench trial, a conclusion **the First Circuit upheld** in November 2020.

But legal experts, citing the current makeup of the Supreme Court with the addition of Justice Amy Coney Barrett, have said the Harvard case could present an opportunity for the court's conservative wing to strike down affirmative action in the college admissions process.

"When they ask for the opinion of the solicitor general, who is sometimes called the 10th justice, that is a strong signal the Supreme Court is heavily leaning towards taking the case," said Doron Kalir, a professor of law at Cleveland State University.

The use of race in the admissions process dates back to the Supreme Court's landmark 1978 holding in Regents of the **University of California v. Bakke** , which allowed admissions officials to consider race among several other factors.

A quarter century later, in affirming the University of Michigan Law School's admissions program, Justice Sandra Day O'Connor wrote that racial preferences may no longer be needed by 2028, or 25 years from the 2003 ruling.

Most recently, the high court found in 2016 that the University of Texas' race-sensitive admissions policy survived strict scrutiny, the highest level of judicial review.

Kalir said the addition of Justice Barrett could give the court the four justices needed to decide to take up the case and, if the high court does ultimately grant SFFA's appeal, it would likely do so with an eye towards limiting or eliminating the use of race in higher education.

The Texas case was a 4-3 decision and two of the votes in the majority, Justices Ruth Bader Ginsberg and Anthony Kennedy, are no longer on the court. Chief Justice John Roberts was in the minority in *Fisher v. Texas* and Kalir said he could see the chief justice joining in an opinion that tells colleges "they can consider whatever they want in admissions, but not race."

The position of the federal government is likely different now than it was during the Trump administration. In February, while the case was pending before the First Circuit, the U.S. Department of Justice backed SFFA and hammered Harvard for "overt engineering" in its race-conscious admissions policy.

Under Trump, the DOJ sued Harvard's Ivy League counterpart, Yale, accusing it of discriminating against white and Asian applicants. The federal government dropped the suit just days into the Biden administration, and Blum's SFFA has since filed its own complaint, leaning heavily on the DOJ probe that led to the first suit.

Boston University Law School professor David Rossman said the Biden administration taking the opposite stance is unlikely to sway the justices, who are following "standard procedure" in a politically charged case.

"They are offering the new solicitor general a chance to weigh in, but what's going to influence them is whether they want to use this case to make a statement about what the state of the law is," Rossman said. "There are new justices on the court since the last time they looked at this issue. It may well be that they want to use this case as a vehicle to change what they have said in the past about taking race into account in the admissions process."

Harvard declined to comment. Blum, who led the *Fisher* suits and has guided several cases to the Supreme Court, noted Monday that many legal analysts had speculated that the top court would ask for the solicitor general's take.

"Students for Fair Admissions remains hopeful that, regardless of the views of the solicitor general, the justices will grant to hear our case and end race-based affirmative action in college admissions," Blum told Law360.

Students for Fair Admissions is represented by J. Michael Connolly, William S. Consovoy, Thomas R. McCarthy, Cameron T. Norris and Patrick N. Strawbridge of Consovoy McCarthy PLLC and Adam K. Mortara.

Harvard is represented by Debo P. Adegbile, Brittany Amadi, Rishita Apsani, Andrew S. Dulberg, Felicia H. Ellsworth, Hannah E. Gelbort, William F. Lee, Emma P. Simson, Denise Tsai, Seth P. Waxman and Paul R.Q. Wolfson of WilmerHale and Ara B. Gershengorn of the Harvard University Office of the General Counsel.

The case is *Students for Fair Admissions v. President & Fellows of Harvard*, case number 20-1199, in the Supreme Court of the United States.

--Editing by Alyssa Miller.

Update: This story has been updated with responses from the parties, comments from Doron Kalir and David Rossman, and with additional details and background on the case.

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