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Extern! Extern! Read All About Them!

Law schools want to place them, law students seek the opportunity, and local government law offices can benefit.



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SUPREME COURT

By: DEANNA SHAHNAMI,
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From the Campus to Main Street: the Broader Impact of *Students for Fair Admissions*

In 2003, former Supreme Court Justice Sandra Day O'Connor wrote a majority opinion preserving affirmative action in college admissions, finding that the University of Michigan Law School's consideration of applicants' race furthered a compelling interest and was narrowly tailored.[1] She envisioned a future where such criteria would be superfluous: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[2]

Justice O'Connor's prophecy would be tested much sooner. On June 29, 2023, the Supreme Court issued its much-anticipated decisions[3] in a duo of cases challenging the consideration of race by college admissions officers at Harvard and the University of North Carolin: *Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard College*[4] and *Students for Fair Admissions, Inc. v. University of North Carolina*[28] (collectively, *Students for Fair Admissions*).

Affirmative Action Eliminated in College Admissions.

In *Students for Fair Admissions*, the Court held that Harvard's and UNC's admissions programs—which considered race as one of many factors in the application process—violate the Equal Protection Clause of the Fourteenth Amendment, which bars racial discrimination by governmental entities.[6] Eliminating affirmative action for college admissions, Chief Justice John Roberts, writing for the majority, explained that UNC and Harvard's race-based admissions programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[7]

The decision does not stop at college admissions. Knowing this, local governments across the United States are reviewing their race-conscious programs, i.e., double-checking their disparity studies for Minority- and Women-Owned Business Enterprise (MWBE) Programs. Cities from St. Petersburg, Florida, to Chicago, Illinois, rely on *City of Richmond v. J.A. Croson Co.,* which held that the city of Richmond failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.[8] In *Croson*, the Court determined that government actors could use racial classifications only if the classifications survived strict scrutiny.[9] In *Students for Fair Admissions*, the court affirmed that "[a]ny exception to the Constitution's demand for equal protection must survive a dauting two-step examination known in our cases as 'strict.'"[10]

Strict Scrutiny, defined.

Strict scrutiny analysis is comprised of two prongs. First, the government must establish its "compelling interest" in remediating race discrimination with a "strong basis in evidence" of the persistence of discrimination.[11] Such evidence may consist of the entity's "passive participation" in a system of racial exclusion.[12] Second, any remedies adopted must be "narrowly tailored to remedy prior discrimination"; the program must be directed at the relevant market and types of discrimination identified.[13]

To satisfy the compelling government interest prong, the Supreme Court has held that the government has a compelling interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."[14] Additionally, the government must present goals that are "sufficiently coherent for purposes of strict scrutiny."[15] To determine whether the government's use of a racial classification is narrowly tailored, the Court examines several factors, including the necessity for the race-based relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties.[16]

Strict Scrutiny Applied to SBA 8(a) Business Development program.

Less than a month after Students for Fair Admissions was issued,—in *Ultima Services Corp. v. U.S. Dep't of Agriculture*.—the U.S. District Court for the Eastern District of Tennessee enjoined the Small Business Administration (SBA) from applying a rebuttable presumption of social disadvantage to individuals of certain racial groups applying to the 8(a) Business Development program.[17] The issue in the case was whether, under the Fifth Amendment of equal protection, Defendants the United States' Department of Agriculture (USDA) and SBA may use a "rebuttable presumption" of social disadvantage for certain minority groups to qualify them for inclusion in a federal program that awards government contracts on a preferred basis to businesses owned by individuals in those minority groups.[18] The court held they cannot.

Plaintiff, Ultima, is a small business that provides administrative and technical support services.[19] Ultima competed for federal services contracts with USDA, earning approximately $37 million since 2015.[20] In 2017, Ultima won four regional Indefinite Delivery Indefinite Quantity (IDIQ) contracts to provide its services to different NRCS offices in four

regions of the country.[21] In 2018, USDA decided not to exercise any more options under all four IDIQ contracts.[22] USDA also declined to exercise any further options on pending task orders under the IDIQ contracts or issue new task orders.[23] To continue providing services to NRCS offices, Defendant USDA, in some instances, awarded sole source contracts with companies participating in the 8(a) Business Development Program (8(a) program) outlined in 13 C.F.R. § 124.1.[24] Ultima was not a participant in the 8(a) program; therefore, USDA could not consider it in awarding those sole source contracts.[25] Ultima experienced a decline in revenue following USDA's decision to set aside contracts for the 8(a) program.[26]

The Tennessee court acknowledged that *Students for Fair Admissions* concerned college admissions programs, but stated that the reasoning in that case is not limited to academic admissions.[27]

Applying strict scrutiny, the Tennessee court found that defendants' rebuttable presumption of social disadvantage must (1) satisfy a compelling interest and (2) be narrowly tailored to promote that compelling interest. To satisfy the compelling-interest prong, the government must both identify a compelling interest and provide evidentiary support concerning the need for the proposed remedial action.[28] To determine whether the government's use of a racial classification is narrowly tailored, the Court examines several factors, see *supra* note 13.

The court said examples provided by the defendants did not show that the federal government allowed discrimination to occur in the industries relevant to Ultima. Going further, the court found that the defendants had not examined whether any racial group is underrepresented in a particular industry relevant to a specific contract in the 8(a) program.[29] This approach is more rigorous than the industry within a market area analysis presented in *Croson*.[30] Accordingly, the court determined that defendants failed to show a compelling interest justifying their use of the rebuttable presumption as applied to Ultima. The court went on to say that even if defendants could establish a compelling interest, the rebuttable presumption of social disadvantage is not narrowly tailored to serve the asserted interest.[31] The court also noted the Supreme Court's instruction to examine whether (1) the governmental entity considered race-neutral alternatives prior to adopting a program that uses racial classifications; (2) the program does not presume discrimination against certain minority groups; and (3) if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified.[32] The court did not find any relevant evidence specific enough to Ultima's contracts under these considerations.

Immediate Action by SBA.

On the heels of the Tennessee court decision, the U.S. Small Business Administration (SBA) updated its website to reflect Ultima and a new environment for all 8(a) participants: the "SBA has temporarily suspended new 8(a) application submissions to comply with the Court's decision."[33] To comply with the Court's order, SBA is requiring that all 8(a) participants whose program eligibility is based upon one or more individuals who relied upon the presumption of social disadvantage to establish their individual social disadvantage must complete a social disadvantage narrative.[34] Under the Small Business Act, Congress explained that "economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[35]

To receive new 8(a) contracts, an individually owned 8(a) participant that previously relied on the presumption of social disadvantage to support its eligibility will need to submit information to SBA, through the Certify.sba.gov system, that will allow SBA to determine whether the individual upon whom eligibility is based has established personal social disadvantage.[36]

What to Consider and What to Look Forward to.

Here are some of the takeaways from the *Ultima* decision: (1) Ultima only challenged the SBA's use of the rebuttable presumption of social disadvantage for the 8(a) program, not the entire 8(a) program itself; (2) to comply with the *Ultima* court's decision, SBA responded accordingly and updated it website, interim guidance, and temporarily suspended new 8(a) application submissions; and (3) the decision will likely open the door to future challenges to SBA's authority, the 8(a) program itself, and other race-based programs that are outside of the 8(a) program.

That issue is already being tested in a Houston case. *Landscape Consultants of Texas, Inc. v. City of Houston,* (S.D. Tex. Sept. 19, 2023). The City has adopted a policy to "stimulate the growth of local minority, women, and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting."[37] The plaintiff, a contractor providing more than $1.3 million annually in landscaping services to Houston, argues that it should not have to subcontract eleven percent of its revenue from the City to minority-owned business enterprises: "Although most of Landscape Consultants' and Metropolitan's employees are racial minorities, the owners are not. These businesses are thus placed at a disadvantage just because their owners are not from a preferred race. Picking winners and losers based on race violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution."[38]

One area of concern for local governments will be their use of disparity studies in supporting minority-owned, women-owned, and small business enterprises (MWSBEs). An example is Chicago.

The City of Chicago's latest disparity study for construction contracts was in 2021. Following Croson, which states that a state or local government may only remedy discrimination within its own contracting market area, the Chicago study has "long established economic principles to empirically establish the City's geographic and product market area to ensure that any program based on the study satisfies strict scrutiny."[39]

One thing for local governments to think about, for race-based initiatives or policies, is the Ultima court's meaning of specific contract.[40] How will evidence before the contract is awarded differ from evidence gathered at trial? How specific does the evidence have to be to survive strict scrutiny? Croson is dicta for many jurisdictions, but only time will tell if Ultima will make its way to the Supreme Court to solve the plurality opinions that govern the topic.[41] ML

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