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The Fall of “Affirmative Action” and Its Implications for Employers

Late last week, the Supreme Court held that the Constitution does not permit universities to consider race as a “plus” factor in admissions. The principal effect of the [decision](#) is to more closely align anti-discrimination protections in academia with those in the workplace — where courts have long permitted “reverse-discrimination” lawsuits against race-conscious hiring practices, subject to affirmative defenses. However, the decision’s broad language and cultural prominence will likely embolden opponents of workplace diversity initiatives.

In a majority opinion authored by the Chief Justice, the Court sharply criticized the practice of “affirmative action” in higher education as inconsistent with the constitutional imperative of equality established in the Fourteenth Amendment’s Equal Protection Clause. Although the Court acknowledged that such programs serve the “commendable goal[]” of achieving the social and educational benefits flowing from greater diversity in education, it held that these objectives were insufficiently compelling to justify outright racial preferences.

In a separate concurrence, Justice Gorsuch emphasized an overlap between the majority’s constitutional analysis and Title VII’s workplace protections, which, in his view, “codify a categorical rule of individual equality, without regard to race.” Several *amicus* briefs, filed by major U.S. corporations, had advanced the view that preserving affirmative action in higher education was important to preserving employers’ ability to recruit the kind of diverse and well-credentialed workforces that many American companies believe are necessary to effectively run their business. While the majority opinion did not address the broader debate over diversity, equity, and inclusion (DEI) initiatives raised by those *amici* and in oral argument, it is likely that critics of such initiatives will seek to take advantage of the Court’s decision to support further challenges to DEI programs.

In responding to the Court’s analysis of racial preferences, corporations and their boards should carefully review both the design and presentation of their existing DEI initiatives to ensure they are well grounded in the company’s business strategy and mission. Although a program that was lawful last week remains lawful today, the decision can be expected to present new challenges and criticism, necessitating careful, deliberate, and well-counseled analysis.

Martin Lipton
John F. Savarese
Noah B. Yavitz

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