



Federal appeals court upholds Harvard University's use of affirmative action policies

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A federal appeals court Thursday upheld the use of race in college admissions at Harvard University, a major victory for affirmative action policies that could be headed to the Supreme Court.

The appeals court panel ruled 2-0 that Harvard did not violate federal civil rights law by using race and ethnicity as factors in the admissions process. A federal district judge issued the same ruling last fall.

The case against Harvard, the nation's oldest institution of higher learning, was brought in 2014 by opponents of affirmative action using the moniker Students for Fair Admissions, the brainchild of conservative legal strategist Edward Blum. In a twist, the group charged that Harvard discriminated against Asian American students in order to boost African American and Hispanic enrollment.

District Judge Allison Burroughs, who was named to the bench by President Barack Obama in 2014, ruled last year that the affirmative action policy "serves a compelling, permissible and substantial interest, and it is necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity."

The U.S. Court of Appeals for the 1st Circuit – working with two rather than the usual three judges on a panel following the death last month of Judge Juan Torruella – ruled that Burroughs did not err in her analysis of the case.

"Harvard's limited use of race in its admissions process in order to achieve diversity in the period in question is consistent with the requirements of Supreme Court precedent," Judge Sandra Lynch, who was named to the bench by President Bill Clinton, wrote for the panel. She was joined by Chief Judge Jeffrey Howard, named by President George W. Bush

Affirmative action policies have been on opponents' chopping block for decades but have been upheld by a series of Supreme Court decisions dating back to 1978. In 2003, the court opined that in 25 years, racial preferences no longer would be necessary to achieve diversity.

Most recently, the Supreme Court ruled 4-3 in 2016 that "considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."

But that decision was written by Associate Justice Anthony Kennedy, the court's longtime swing vote, who retired in 2018. He was succeeded by the more conservative Associate Justice Brett Kavanaugh, giving opponents of affirmative action hope for a reversal in the future.

Now, Associate Justice Amy Coney Barrett's confirmation has given conservatives a 6-3 majority.

"This ruling isn't surprising in the slightest. The case was always designed to go to the Supreme Court and now it will," said Ilya Shapiro, director of constitutional studies at the libertarian Cato Institute. "It's high time that the justices end the 40-year error of interpreting the Constitution to allow universities that accept public funding to use racial preferences in admissions decisions."

Kristen Clarke, president of the Lawyers' Committee for Civil Rights Under Law, which sided with Harvard in the case, said the ruling shows that "Harvard's race-conscious admissions complies with Supreme Court precedent and is critical for promoting diversity."

Harvard isn't alone in fighting to preserve its use of race in admissions. Trump's Justice Department sued Yale University last month for alleged discrimination against Asian American and white students. And Blum's group is challenging admissions policies at the University of North Carolina at Chapel Hill; a trial in that case began this week.

Blum had sought unsuccessfully over the past decade to end the use of racial preferences at the University of Texas at Austin, which the Supreme Court ultimately upheld in 2016.

In a related matter, California voters this month defeated an initiative that would have ended the state's ban on affirmative action.

In the Harvard case, lawyers for the challengers contended that Asian American applicants were victimized by getting lower "personal ratings" than other racial or ethnic minorities. Those ratings are intended to help create a diverse campus by focusing on characteristics other than academics, extracurricular activities, sports and legacy connections.

The Trump administration's Justice Department began investigating Harvard's admissions policies in 2017, three years after the lawsuit was begun. Last year, it filed a statement of interest in the court case on the side of the challengers.

"No American should be denied admission to school because of their race," Attorney General Jeff Sessions said at the time. "As a recipient of taxpayer dollars, Harvard has a responsibility to conduct its admissions policy without racial discrimination by using meaningful admissions criteria that meet lawful requirements."

The challengers based their case on statistical evidence, rather than bringing Asian American applicants to the stand during a three-week trial in 2018. That omission was seized on by lawyers for Harvard as well as students and student groups supporting affirmative action.

As one of the nation's most venerated universities, Harvard gets more than 40,000 applications annually and enrolls only about 1,650 first-year undergraduate students, or 4%. The school's class of 2023 includes about 25% Asian Americans, 14% African Americans and 12% Hispanics.