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The Supreme Court Tactic That Aims to Kill Affirmative Action

A group suing Harvard and the University of North Carolina at Chapel Hill has asked the court to hear the two cases together, hoping for a ruling that would apply across higher education.

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The plaintiffs who filed lawsuits accusing Harvard and the University of North Carolina at Chapel Hill of racial discrimination in their admissions policies are asking the Supreme Court to hear both cases together, potentially increasing the chances that the justices will issue a sweeping ruling that strikes down affirmative action across higher education.

A group known as Students for Fair Admissions sued both schools on the same day in 2014. Its targeting of both a private and a public university was part of a long-term legal strategy that seeks to overturn a practice that the Supreme Court has upheld in some fashion for more than four decades, as colleges have worked to admit a more racially diverse student body.

The Harvard case has already been heard by a federal appeals court, while the North Carolina case has only reached the district level — with rulings against the plaintiffs in both. But Students for Fair Admissions argues in a petition filed to the Supreme Court on Thursday that the justices regularly fast-track cases where similar issues are already pending before them and should hear the two suits together.

That is what happened almost two decades ago in a ruling that affirmed the very precedent that Students for Fair Admissions seeks to overturn. The court decided to hear two affirmative action challenges at the University of Michigan — one at the law school and one at the undergraduate level — at the same time, bypassing the appeals court in the undergraduate case.

In 2003, those cases, known as Grutter v. Bollinger and Gratz v. Bollinger, resulted in decisions striking down the college's system for admitting a more racially diverse student

body as too mechanical, but affirming the law school's consideration of race in admissions, allowing affirmative action to continue.

The Supreme Court has tilted more conservative in recent years with the addition of three justices nominated by former President Donald J. Trump. They are considered potentially receptive to arguments against race-conscious admissions practices, emboldening opponents of affirmative action.

But the court has put off a decision on whether to accept the Harvard case until it hears from the Biden administration, whose brief is expected soon. If the justices take the Harvard case, it would make sense for them to consider the North Carolina lawsuit at the same time, some legal experts said — especially as there might be greater public interest in the use of affirmative action at a taxpayer-supported institution.

"It's possible that the court would feel more comfortable with a case involving a public university," said Justin Driver, a Yale law professor and expert in constitutional law, adding, "I think this can be seen as trying to force the hand of the Supreme Court to issue a decision invalidating affirmative action sooner rather than later."

Ilya Shapiro, a constitutional law expert at the Cato Institute, threw some cold water on the strategy. He said he did not believe it would make any difference whether North Carolina was added to the Harvard case because the court was unlikely to treat public universities differently from private ones that accept federal funds. But he said that if he were in the plaintiffs' position, he would probably pursue the same maneuver to remind the court that if it did not review Harvard's policy, there was another case coming behind.
The strategy of filing against both North Carolina and Harvard was orchestrated by Edward Blum, a financial adviser who founded Students for Fair Admissions. He has spearheaded more than two dozen lawsuits challenging affirmative action practices and voting rights laws, including a case against the University of Texas at Austin that led to the Supreme Court's most recent decision supporting race-conscious admissions policies in 2016.

The plaintiffs accused Harvard of using a subjective personal metric to discriminate against high-performing Asian Americans and to create an unspoken ceiling for them in admissions. The argument in North Carolina was more conventional, contending that the university discriminated against white and Asian applicants by giving preferences to Black, Hispanic and Native American applicants. The universities denied those accusations and defended their admissions practices.

The two-pronged attack faltered when the North Carolina case fell behind the Harvard case by about two years. A federal judge ruled for Harvard in 2019, and the appeals court

affirmed that ruling in 2020, while a judge did not rule in the North Carolina case until last month — also in favor of the university.

If the justices choose to hear both cases, the court could rule in a narrow way, either upholding the admissions systems at one or the other university or both, or asking for specific fixes, which would have little relevance to higher education as a whole. Or it could rule more broadly, taking on the bigger topic of race-conscious admissions in a decision that would apply across the land.

Harvard declined to comment on the plaintiffs' petition to the Supreme Court. The University of North Carolina did not immediately respond to a request for comment.

Apart from clearly linked companion cases, such as the University of Michigan lawsuits that led to the 2003 affirmative action decisions, the Supreme Court usually does not hear cases before an appellate decision unless they involve exceptional or urgent matters, like the Texas abortion challenges argued recently.

Such immediate review, leapfrogging an appeals court, is called "certiorari before judgment," and is typically used in cases involving national crises, like President Richard M. Nixon's refusal to turn over tape recordings to a special prosecutor.