Title VII of the Civil Rights Act of 1964
and Affirmative Action

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April 1, 2022
Pacific Coast Labor & Employment Law Conference

I. Introduction

This paper describes the federal law standards that govern the use of race and other protected traits in voluntary affirmative action plans under Title VII of the Civil Rights Act of 1964. In particular, this paper describes the provisions of Title VII that prohibit and otherwise regulate the use of race, sex, and other protected traits in the workplace, regulations about employer affirmative action plans issued by the U.S. Equal Employment Opportunity Commission ("EEOC"), and decisions by the Supreme Court of the United States and other federal courts about the use by employers of race and sex as part of voluntary affirmative action programs.

There are certain conclusions about the use of race and sex that follow from Title VII's text, structure, and history. *First*, Title VII generally prohibits the use of race, sex, and other protected traits in employment. *Second*, Title VII's text expressly permits the use of otherwise protected traits in certain limited circumstances, such as those involving Native Peoples, namely, what Title VII describes as "preferential treatment to Indians." *Third*, Title VII does not require any form of preferential treatment. *Fourth*, the Supreme Court has interpreted Title VII to permit employers to consider race and sex in limited circumstances as part of remedial and voluntary affirmative action plans. In such limited circumstances, employers may temporarily seek to remedy prior discrimination, segregated workforces, or a manifest imbalance in their workforce to attain a more balanced workforce. Employers may not, however, use race, sex, and other protected traits to maintain a balanced workforce, and they may not utilize quotas or engage in racial balancing. *Fifth*, Title VII prohibits race-based action unless an employer has—and can demonstrate—a strong basis in evidence that, had it not acted, it would have been liable under Title VII's disparate-impact prohibitions. *Finally*, the Supreme Court has not decided whether Title VII permits employers to use race, sex, or other protected traits as part of a nonremedial affirmative action or diversity program. Several U.S. Courts of Appeals and district courts have determined that Title VII does not permit an employer with a racially balanced workforce to grant a nonremedial racial preference in order to promote racial diversity.

Because the Supreme Court has not considered whether Title VII permits nonremedial affirmative action plans, this paper also describes the Supreme Court cases involving the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, and the use of race in university admissions programs and by public schools. The Court has recognized that colleges and universities can consider race as part of a nonremedial and "holistic" approach to admissions under certain, narrow circumstances. However, the Court

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has made clear that the Fourteenth Amendment and Title VI prohibit racial balancing and racial quotas, and that any use of race must be limited in time.

Challenges to the admissions processes at Harvard College and the University of North Carolina are pending before the Supreme Court currently, and whatever the Court does with those cases may impact or, at a minimum, inform how both the Supreme Court and other federal courts will treat nonremedial employer diversity programs. The Court will likely issue decisions in the Harvard and North Carolina cases in or around June 2023.

This paper proceeds chronologically. *Part II* of the paper begins with the enactment of Title VII in 1964 and describes the statutory text that regulates affirmative action in employment. *Part III* describes regulations about affirmative action that the EEOC adopted and two seminal Title VII Supreme Court cases about affirmative action. *Part IV* describes federal court decisions that considered Title VII challenges to affirmative action plans after the Supreme Court established the standards that apply to such plans. *Part V* discusses Supreme Court decisions about the use of race in college and university admissions and by public schools and the adoption of the "strong basis in evidence" standard for the use of race by employers.

II. 1964 – Congress Enacts Title VII

Congress passed the Civil Rights Act of 1964 in order to eliminate race and other forms of discrimination in voting, public accommodations, employment, education, and other areas. Title VII of the Civil Rights Act prohibits employment discrimination because of an individual's "race, color, religion, sex, or national origin."[2] It also states that an employer shall not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[3]

Title VII also prohibits the discriminatory use of test scores. Specifically, an employer may not "in connection with the selection or referral of applicants or candidates for employment or promotion, . . . adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin."[4]

Additionally, Title VII has specific language about the "preferential treatment" of workers. Section 703(j) is titled "Preferential treatment not to be granted on account of existing number or percentage imbalance." It provides that no employer is required to "grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group" on account of any workforce imbalance of the number of people employed in that protected class.[5]

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[2] 42 U.S.C. § 2000e-2(a).

[3] *Id.*

[4] 42 U.S.C. § 2000e-2(l).

[5] 42 U.S.C. § 2000e-2(j).

In fact, the only text that expressly *grants* employers the ability to provide preferential treatment, relates only to Native People (described as "Indians" under the Act):

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.[6]

Another provision of Title VII also addresses potential preferential treatment. Section 704(b) prohibits "any notice or advertisement relating to employment . . . indicating any preference. . . or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference . . . or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.[7]

Finally, Section 712 does not "repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans."[8]

III. 1964-1987: Executive Branch Regulations & Supreme Court Cases About Voluntary Affirmative Action

Congress created the EEOC to enforce Title VII, and the EEOC came into existence in 1965. The EEOC had the authority to receive, investigate, and conciliate charges of discrimination, and Title VII vested the EEOC with the authority to issue procedural regulations.[9] It did not—and still does not—have authority to issue substantive regulations. The Attorney General's Title VII litigation authority was limited to filing pattern or practice cases and intervening in cases of public importance.[10] The EEOC gained litigation authority in 1972.[11]

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[6] 42 U.S.C. § 2000e-2(i).

[7] 42 U.S.C. § 2000e-3(b). Title VII also provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor- management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise[.]" 42 U.S.C. § 2000e-2(e). This "bona fide occupational qualification" defense does not extend to race or color discrimination.

[8] 42 U.S.C. § 2000e-11.

[9] 42 U.S.C. §§ 2000e-8(c), 2000e-12(a).

[10] Pub. L. 88-352 § 706(e) ("Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance."); § 707(a) ("Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title . . . the Attorney General may bring a civil action[.]")

[11] Pub. L. 92-261 (Mar. 24, 1972).

The EEOC also issued decisions that adjudicated federal employee claims. In 1973, the EEOC determined that Title VII prohibits racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites. The EEOC reasoned that to hold otherwise would "constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."[12]

Meanwhile, private plaintiffs brought various lawsuits and the federal courts gradually began issuing decisions that adjudicated difficult and then-novel Title VII questions. During the 1970s, the Supreme Court decided several Title VII cases, and two of those addressed questions about the scope of Title VII's race discrimination prohibitions that impact the use by employers of race.

In one case, two white employees, L.N. McDonald and Raymond L. Laird, filed suit under Title VII and other laws after their employer terminated their employment for allegedly misappropriating the employer's property in *McDonald v. Santa Fe Trail Transportation Company.* The plaintiffs claimed that they and an African-American employee, Charles Jackson, "were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze which was part of a shipment Santa Fe was carrying for one of its customers."[13] They alleged that the employer fired them and did not fire Mr. Jackson.

The District Court dismissed the case on the pleadings, and the Court of Appeals affirmed.

The Supreme Court framed the issue as "whether a complaint alleging that white employees charged with misappropriating property from their employer were dismissed from employment, while a black employee similarly charged was not dismissed" states a Title VII claim.[14]

The Court in *McDonald* determined that Title VII did not permit "the illogic in retaining guilty employees of one color while discharging those of another color."[15] Title VII, the Court reasoned, "prohibits All racial discrimination in employment, without exception for any group of particular employees[.]"[16]

The Court explained that its conclusion was consistent with both Title VII's text and its legislative history. Title VII's text, the Court observed, is "not limited to discrimination against members of any particular race."[17] Title VII's legislative history demonstrated that Title VII was

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[12] *McDonald v. Santa Fe Trail Transp. Co*., 427 U.S. 273, 279–80 (1976) (quoting EEOC Decision No. 74-31, 7 Fair Empl. Prac. Cas. 1326, 1328, CCH EEOC Decisions ¶ 6404, p. 4084 (1973)).

[13] *Id.* at 276.

[14] *Id.* at 275–76.

[15] *Id.* at 284.

[16] *Id.* at 283.

[17] *Id.* at 278–79.

intended to "cover white men and white women and all Americans . . . and create an obligation not to discriminate against whites."[18]

The Court concluded that Title VII "prohibits racial discrimination" against anyone of any race "upon the same standards as would be applicable" to anyone of any other race.[19] The Court also noted that the employer "disclaim[ed]" that its actions were "any part of an affirmative action program," and so the Court "emphasize[d]" that it did not "consider here the permissibility of such a program, whether judicially required or otherwise prompted."[20]

Three years later, in 1979, the EEOC issued regulations about "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended,"[21] and in *United Steelworkers of America, AFL-CIO-CLC v. Weber*,[22] the Supreme Court rejected a challenge to an employer's voluntary affirmative action plan.

The EEOC regulations issued in January 1979 and began by observing that after Congress enacted Title VII in 1964, "many employers, labor organizations, and other persons subject to the Act have altered employment systems to implement the purposes of Title VII by improving employment opportunities for previously excluded groups. Because of what Congress has called the 'complex and pervasive' nature of systemic discrimination against minorities and women, these voluntary efforts often involve significant changes in employment relationships."[23] The Commission also observed that some affirmative action decisions have been "challenged as inconsistent with Title VII, because they took into account race, sex, or national origin" which the EEOC refers to as "so-called 'reverse discrimination.'"[24] The EEOC determined that because the challenged actions by the employers were taken to improve the conditions of "minorities and women" such actions were based on the "principles of title VII."[25]

The EEOC's statement of purpose asserted that employers "should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination" and that "[v]oluntary affirmative action . . . must be encouraged and protected in order to carry out the Congressional intent embodied in title VII."[26]

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[18] *Id.* at 280 (citations and quotations omitted).

[19] *Id.*

[20] *Id.* at 280 n.8.

[21] Adoption of Interpretative Guidelines, 44 Fed. Reg. 4422 (Jan. 19, 1979) (to be codified at 29 C.F.R. § 1608.1).

[22] 443 U.S. 193 (1979).

[23] 44 Fed. Reg. 4422 (citation omitted).

[24] 29 C.F.R. § 1608.1(a).

[25] *Id.*

[26] 29 C.F.R. § 1608.1(c).

The regulations contain detailed instructions about how to establish affirmative action plans and describe circumstances in which voluntary affirmative action is encouraged.[27] The regulations further state that an employer's reliance on the EEOC regulations (meaning, in good faith establishing an affirmative action plan) will entitle the employer to protection from liability under Title VII.[28]

The EEOC's regulations determined that "[e]mployers, labor organizations, or other persons subject to title VII may . . . take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force."[29]

The regulations recognize that the relevant question about whether an affirmative action plan is appropriate focuses on the employer's workforce and practices. For example, the regulations explain "WHEN AN EMPLOYER HAS REASON TO BELIEVE THAT ITS SELECTION PROCEDURES HAVE * * * EXCLUSIONARY EFFECT * * *, IT SHOULD INITIATE AFFIRMATIVE STEPS TO REMEDY THE SITUATION."[30]

The EEOC recognized that the labor pool for "minorities and women" often was "artificially limited" because of historic discrimination.[31] In such circumstances, the EEOC "encouraged" employers to "take affirmative action," which the EEOC said includes:

> (1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;
>
> (2) Extensive and focused recruiting activity;

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[27] 29 C.F.R. §§ 1608.1–1608.12.

[28] 29 C.F.R. § 1608.2 (citing 42 U.S.C. § 2000e-12(b)(1)).

[29] 29 C.F.R. § 1608.3(b).

[30] 29 C.F.R. § 1608.4(c)(1) (quoting the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 38814 (Sept. 13, 1976), reaffirmed and extended, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38290; 38300 (Aug. 25, 1978) (all capital letters in the original)); *see also* 29 C.F.R.§ 1607.17 (policy statement on affirmative action). Congress established the Equal Employment Opportunity Coordinating Council in 1972, *see* 42 U.S.C. § 2000e-14; Pub. L. 92-261, §10 (Mar. 24, 1972); 86 Stat. 111, and "charged [it] with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin." 29 C.F.R. § 1607.17. The Council issued a policy statement in 1976 that explained that "[t]he goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin." 29 C.F.R. § 1607.17(4). The Council's policy statement provided the basis for the EEOC's subsequent affirmative action regulations. 29 C.F.R. § 1608.4(c)(1).

[31] 29 C.F.R. § 1608.3(c).

(3) Elimination of the adverse impact caused by unvalidated selection criteria; [and]

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.[32]

The EEOC's regulations explained that a compliant affirmative action plan or program consisted of three elements: (1) a reasonable self-analysis; (2) a reasonable basis for concluding action is appropriate; and (3) reasonable action.[33]

A self-analysis is used to "determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why."[34]

If such a self-analysis shows a reasonable basis that the employer's practices have the intent or effect of limiting employment opportunities for "previously excluded groups," then the employer could implement an affirmative action program that is "reasonable in relation to the problems disclosed by the self-analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."[35] Such a program or plan may include the "adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded[.]"[36]

Next, on June 27, 1979, the Supreme Court decided *United Steelworkers of America, AFL-CIO-CLC v. Weber*.[37] The Court determined that that Title VII permits employers to utilize temporary affirmative action plans to remedy a racial imbalance among the employer's

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[32] *Id.* (citations omitted).

[33] 29 C.F.R. § 1608.4.

[34] 29 C.F.R. § 1608.4(a).

[35] 29 C.F.R. § 1608.4(b), (c).

[36] 29 C.F.R. § 1608.4(c). The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") also issued regulations about discrimination by federal contractors. The regulations implement Executive Order 11246, which prohibits race, sex, and other forms of employment discrimination by federal contractors. The Equal Opportunity Clause of the regulations states that a contractor will not discriminate against any employee "because of race, color, religion, sex, sexual orientation, gender identity, or national origin." 41 C.F.R. § 60-1.4(a)(1). The OFCCP's regulations also require that contractors "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national orientation." *Id.* Further, contractors will "in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin." 41 C.F.R. § 60-1.4(a)(2).

[37] 443 U.S. 193 (1979).

workforce.[38] The employer and union entered into a collective bargaining agreement that included an affirmative action plan designed to eliminate racial imbalances of the employer's almost-exclusive white workforce. The plan dictated that the employer must hold 50% of the openings in a training program for African American employees.[39] The plan was temporary, and only was to be in place until the number of African American employees was commensurate with the percentage of such individuals in the local labor force (approximately 39% of the local work force, but less than two percent of the employees, were African American).

A white employee who was denied a training position brought suit, alleging the affirmative action plan was discriminatory. Both the District Court and the Fifth Circuit Court of Appeals held that Title VII banned all employment preferences based on race, and found for the white employee.

The Supreme Court reversed. The Court reasoned that although Title VII prohibited all forms of racial discrimination, "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight'" of African Americans "in our economy."[40] According to the Supreme Court, it would be "ironic" if a law passed due to racial injustice forbid "all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[41]

The Supreme Court in *Weber* also relied on Section 703(j) of Title VII (discussed *Supra* in Part II) which provides that nothing within Title VII shall be interpreted to "require" any employer to grant preferential treatment.[42] Because the language does not state that nothing in Title VII shall be interpreted to prohibit preferential treatment, the Court reasoned that "Congress chose not to forbid all voluntary race-conscious affirmative action."[43]

Despite holding that Title VII does not prohibit "all private, voluntary, race-conscious affirmative action plans," the Supreme Court declined to specify in detail the requirements for affirmative action plans. However, the Court held that the following factors were significant as to why the *Weber* plan was permissible:

- The plan did not unnecessarily trammel the interests of non-minority employees;
- The plan did not require the discharge of white workers and their replacement with new African-American hires;

[38] *Id.* at 207–08.

[39] *Id.* at 197.

[40] *Id.* at 202 (citations omitted).

[41] *Id.* at 204.

[42] *Id.* at 205–06.

[43] *Id.*

- The plan did not create an absolute bar to the advancement of white employees; half of those trained in the program would be white;

- The plan was a temporary measure; it was not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance; and

- Preferential treatment would end as soon as the number of African American skilled craftworkers approximated the percentage of African American employees in the local labor force.[44]

Eight years later, in 1987, the Supreme Court reaffirmed its decision that Title VII permits voluntary, remedial affirmative action plans when it decided *Johnson v. Transp. Agency, Santa Clara Cnty.*[45] In *Johnson*, the Santa Clara County Transportation Agency implemented an affirmative action plan that applied to the promotions of employees. "The Agency Plan provide[d] that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant."[46] The plan explained that women were "represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories."[47] The Agency decided to consider sex as a factor in the consideration of employee promotions for "traditionally segregated job classification[s]" because women had been traditionally underrepresented.[48] The Agency made clear that its plan was "intended to achieve a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the agency in all major job classifications where they are underrepresented."[49]

The Agency announced a vacancy for the promotional position of road dispatcher in its Roads Division. Twelve employees applied, including Diane Joyce and Paul Johnson. At the time, the Agency had never employed a woman as a road dispatcher, and the Agency offered the job to Ms. Joyce instead of Mr. Johnson, despite the fact that Mr. Johnson scored a 75 on the interview for the job and Ms. Joyce scored a 73.[50] Mr. Johnson sued the Agency and alleged that it violated Title VII when it denied him the promotion because of his sex.[51]

The district court agreed with Mr. Johnson and determined that the Agency violated Title VII because Ms. Joyce's sex was the "determining factor in her selection."[52] The U.S. Court of

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[44] *Id.* at 208–09.

[45] 480 U.S. 616 (1987).

[46] *Id.* at 620–21.

[47] *Id.* at 621.

[48] *Id.* at 620–21.

[49] *Id.* at 621 (citation and quotations omitted).

[50] *Id.* at 624–26.

[51] *Id.* at 625.

[52] *Id.*

Appeals for the Ninth Circuit reversed the district court, and the Supreme Court affirmed the Ninth Circuit's decision.[53]

On the question of whether the Agency's affirmative action plan was valid, the Court looked to the factors articulated in *Weber*: whether the plan unnecessarily trammeled the interests of non-minorities, whether the plan was a bar to the advancement of non-minority employees, and whether the plan was a temporary measure "not designed to maintain racial balance, but to eliminate a manifest racial imbalance."[54]

One of the central focuses of the *Johnson* Court was whether there was a "manifest imbalance" in the number of women employed in certain jobs compared to the percentage of women in the local labor market.[55] According to the Agency, women were severely underrepresented in a number of positions, due to traditional job segregation. Therefore, the Agency's plan "directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions."[56] The plan stated these goals were not "quotas" but reasonable aspirations given the workforce imbalance. "From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention."[57]

Importantly, the plan "emphasized that the long-term goals were not to be taken as guides for actual hiring decisions."[58] The plan "simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question."[59]

The Court determined that the Agency's plan complied with Title VII. However, the Court cautioned that employment decisions may not be made merely by relying on a statement of imbalance between minority and non-minority or male and female employees, but on a number of factors.[60] The Court emphasized that the "Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees."[61] In addition, the Agency "express[ed]" its "commitment to 'attain' a balanced work

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[53] *Id.* at 620.

[54] *Id.* at 628–630 (citation and quotation omitted).

[55] *Id.* at 631–32.

[56] *Id.* at 635.

[57] *Id.*

[58] *Id.* at 636.

[59] *Id.*

[60] *Id.* at 640–41.

[61] *Id.* at 640.

force," and so "there [was] ample assurance that the Agency [did] not seek to use its Plan to maintain a permanent racial and sexual balance."[62]

IV. 1988-2002: Federal Courts Implement *Weber* & *Johnson*.

The Supreme Court has not considered any Title VII challenge to an affirmative action plan since it decided *Johnson*. The Court has, however, considered challenges to the use of race in other contexts, including government contracting[63] and admissions to colleges and university admissions.[64] Meanwhile, the federal courts of appeals and district courts have decided Title VII challenges to particular affirmative action plans. Generally, the courts determined that the nonremedial use of race by employers and affirmative action plans that involved racial balancing violated Title VII. In addition, in 2009, in *Ricci v. DeStefano* (discussed in greater detail below), the Supreme Court determined that an employer violated Title VII when it discarded the results of a test for promotions based on the employer's claim that it did so because it was concerned that use of the results could have a disparate impact.[65]

In 1996, the U.S. Court of Appeals for the Third Circuit considered a challenge to a nonremedial affirmative action plan. In *Taxman v. Board of Education of the Township of Piscataway*, the court addressed a Title VII claim by Sharon Taxman, a high school teacher.[66]

The case began in May 1989, when the school board of Piscataway High School in New Jersey determined that it would reduce the teaching staff in its Business Department by one teacher. "At that time, two of the teachers in the department were of equal seniority, both having begun their employment with the Board on the same day nine years earlier. One of those teachers was intervenor plaintiff Sharon Taxman, who is White, and the other was Debra Williams, who is Black."[67] The school board determined that Ms. Taxman and Ms. Williams were "equally qualified," and to "break the tie" between the two, the school board "made a discretionary decision to invoke" its affirmative action plan and lay off Ms. Taxman.[68] This approach broke from prior practice when the board had broken a tie between seniority through a "random process."[69] In this case, it chose to discharge Ms. Taxman because she was white and because Ms. Williams was the only minority teacher in her department.

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[62] *Id.*

[63] *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) (deciding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding affirmative action plan for city requiring contractors to subcontract at least 30% of the dollar amount of the contract to "Minority Business Enterprises" was unlawful).

[64] *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

[65] 557 U.S. 557 (2009).

[66] 91 F.3d 1547 (3d Cir. 1996).

[67] *Id.* at 1551.

[68] *Id.*

[69] *Id.*

Ms. Taxman sued and alleged that the board's decision to lay her off violated Title VII's race discrimination prohibitions. The parties stipulated that "that neither the Board's adoption of its affirmative action policy nor its subsequent decision to apply it in choosing between Taxman and Williams was intended to remedy the results of any prior discrimination or identified underrepresentation of Blacks within the Piscataway School District's teacher workforce as a whole."[70]

The United States Department of Justice sued the school board and Ms. Taxman joined the case as a plaintiff-intervenor. The district court granted summary judgment for the United States and Ms. Taxman,[71] and the school board appealed to the Third Circuit.

The Third Circuit affirmed the district court's decision.[72] The court recognized at the outset that Title VII prohibits race discrimination, and that affirmative action plans must meet the factors set forth in *Weber* and *Johnson*. Applying those factors, the Third Circuit held that nonremedial affirmative action policies (i.e., policies with an ultimate goal of "diversity") are unlawful.

Specifically, the Board of Education's affirmative action plan provided that "[i]n all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended."[73] Notably, "[t]he Board's affirmative action policy did not have 'any remedial purpose'; it was not adopted 'with the intention of remedying the results of any prior discrimination or identified underrepresentation of minorities within the Piscataway Public School System.'"[74] In addition, as the court explained, "black teachers were neither 'underrepresented' nor 'underutilized' in the Piscataway School District work force."[75]

The Third Circuit held that under the framework set forth in *Weber* and *Johnson*, the Board of Education's affirmative action policy was unlawful.[76] The court held that "unless an affirmative action has a remedial purpose, it cannot be said to mirror the purposes of [Title VII]" and is thus unlawful under *Weber*.[77] Because the affirmative action plan's purpose was "diversity" as opposed to remedying past discrimination, the court held that the Board violated Title VII when it discharged the plaintiff on the basis of race and "diversity."[78]

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[70] *Id.* at 1563.

[71] *United States v. Bd. of Educ. of Twp. of Piscataway*, 832 F. Supp. 836, 837–38 (D.N.J. 1993).

[72] *Taxman*, 91 F.3d at 1550.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1550–51.

[76] In 2012, the United States District Court of the District of South Carolina similarly held that an employer's decision to use race as a "tiebreaker" violated Title VII as it was not consistent with a valid affirmative action plan. *See Oerman v. G4S Government Solutions, Inc.*, Civ. No. 1:10-1926-TLW-PJG, 2012 WL 3138174, at *7-*8 (D.S.C. July 17, 2012).

[77] *Id.* at 1557.

[78] *Id.* at 1558.

In 1997, the Supreme Court granted the Board's petition for a writ of *certiorari* and agreed to review whether Title VII allows employers to institute affirmative action plans for nonremedial purposes such as fostering diversity.[79] However, before the Supreme Court heard the case, a coalition of civil rights groups funded a settlement offer to Ms. Taxman and the case settled without a decision from the Supreme Court.

V. 2003 to Present: The Supreme Court Considers the Use of Race in College Admissions and Public Schools and Adopts the "Strong Basis in Evidence" Standard for the Use of Race by Employers; Courts and Juries Disavow Remedial Affirmative Action Plans.

Six years after *Taxman*, the Supreme Court decided *Grutter v. Bollinger*, an Equal Protection Clause and Title VI case about affirmative action programs in law school admissions at the University of Michigan Law School.[80] In *Grutter*, the Law School denied admission to Barbara Grutter, a white female student, consistent with the School's policy of considering "race along with all other factors" in an effort to achieve "diversity" amongst the student body.[81] The Director of Admissions explained that the goal was to ensure that a "critical mass" of minority students would be present in the student body, but that the School did not use quotas.[82]

After an extensive bench trial, the District Court ruled in favor of Ms. Grutter.[83] The court found that the School's use of race as an admissions factor was unlawful, and achieving diversity in the student body was not a "remedy for past discrimination."[84] The Sixth Circuit Court of Appeals, sitting *en banc*, reversed the decision. That court held that establishing diversity was a "compelling state interest" and that the use of a face as a "potential 'plus' factor" was narrowly tailored.[85]

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[79] Ronald Turner, *Grutter, the Diversity Justification, and Workplace Affirmative Action*, 43 Brandeis L.J. 199, 231 (2004). Three years later, in *Schurr v. Resorts Int'l Hotel, Inc*., 196 F.3d 486 (3d Cir. 1999), the Third Circuit extended *Taxman* to a nonremedial affirmative action plan that the defendant, a resort hotel and casino, implemented pursuant to a state agency's regulations. The court explained:

> The plan itself and the regulations which mandate the plan were not based on any finding of historical or then-current discrimination in the casino industry or in the [plaintiff's] technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation. Indeed, the case now before us is an unusual one in that there is no disagreement as to whether [defendant's] plan or the challenged regulations were intended to remedy past or present discrimination. They were not.

Id. at 497–98.

[80] 539 U.S. 306 (2003).

[81] *Id.* at 318.

[82] *Id.* at 318–19.

[83] *Id.* at 321.

[84] *Id.*

[85] *Id.*

The Supreme Court granted Ms. Grutter's petition for a writ of certiorari to decide "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[86] The Court agreed with the Court of Appeals and held that race may be "a 'plus' factor" in higher education admissions decisions so long as there is "truly individualized consideration" that considers race in "a flexible, nonmechanical way."[87]

Like *Johnson*, *Grutter* emphasized that "mechanical, predetermined diversity 'bonuses' based on race or ethnicity" are unlawful, as are quotas.[88] The Court also explained that admissions programs that use race as a factor "must be limited in time" because "racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."[89] The Court further cautioned that "racial balancing . . . is patently unconstitutional."[90]

After *Grutter*, the United States Courts of Appeals for the Third, Fifth, Seventh and Eighth Circuits sustained Title VII challenges to race-conscious diversity programs used by the cities of Milwaukee, Newark, Shreveport, Chicago, and Omaha, as well as at least one major private employer, Xerox Corporation. And, perhaps surprisingly, a number of the courts cited *Grutter* as compelling the conclusion that the challenged diversity programs violated Title VII.[91]

In 2003, in *Frank v. Xerox Corporation*, the U.S. Court of Appeals for the Fifth Circuit considered a challenge to Xerox Corporation's "Balanced Workforce Initiative," an affirmative action program designed to ensure proportional racial and gender representation throughout the company.[92] As a result of the initiative, Xerox determined that the number of African-American employees at its Houston office were over-represented compared to white employees.

Six African-American employees, Carol Frank, Henrietta Williams, Sybil Arterberry, Iris Dubose, Cynthia Walker, and Derrey Horn sued Xerox for alleged Title VII and other violations after Xerox denied them pay increases and other job opportunities. They also alleged that Xerox unlawfully relied on its Balanced Workforce Initiative to reduce the percentage of black employees in Houston. Of the six, four resigned, one was discharged, and another was still working at Xerox

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[86] *Id.* at 322.

[87] *Id.* at 335.

[88] *Id* at 338.

[89] *Id.* at 342.

[90] *Id.* at 330.

[91] *See Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007); *Lomack v. City of Newark*, 463 F.3d 303 (3d Cir. 2006); *Kohlbek v. City of Omaha*, 447 F.3d 552 (8th Cir. 2006); *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006); *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004); *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003).

[92] 347 F.3d at 133.

at the time of the lawsuit.[93] The District Court granted summary judgment in favor of Xerox. It determined that that the six employees failed to establish any discrimination.[94]

The Fifth Circuit reversed in part. The court determined that the existence of the "Balanced Workforce Initiative" was direct evidence of a form or practice of discrimination, because the "existence of an affirmative action plan . . . when combined with evidence that the plan was followed in an employment decision is sufficient to constitute direct evidence of the unlawful discrimination unless the plan is valid."[95] The court found that "Xerox candidly identified explicit racial goals for each job and grade level," and that Xerox determined that "blacks were over-represented and whites were under-represented in almost every job and grade level at the Houston office."[96] The court concluded that "[a] jury looking at these facts could find that Xerox considered race in fashioning its employment policies and that because Plaintiffs were black, their employment opportunities had been limited."[97] As a result, the plan was unlawful and Xerox could be liable for intentional discrimination.[98]

A year later, in 2004, the U.S. Court of Appeals for the Seventh Circuit considered a challenge by white firefighters who claimed that the City of Chicago violated Title VII when it denied them promotions because of their race.[99] The case of *Biondo v. City of Chicago*, addressed whether the Chicago Fire Department could segregate test results based on race in an effort to select a certain percentage of minority firefighters for promotion.

The case began in 1986, when the City developed a lieutenant exam, the results of which were used to promote firefighters and engineers. Of those who took the exam, 29% were African-American or Hispanic, and 12% of the 300 highest scores were in these groups. The City made two lists from the results of the test: one with the results for white candidates and one for African-American and Hispanic candidates. Then the City made 29% of promotions from the minority list.[100]

Peter Biondo and other white firefighters who were denied promotions brought suit under Title VII. They alleged that the use of the lists was discriminatory. Mr. Biondo and several other firefighters received substantial damages awards after two jury trials in the District Court, and the City appealed. The Seventh Circuit determined that the separate lists were discriminatory, and vacated and remanded for reconsideration of the damage awards.

In striking down the City's process, the court stated that the City had made no attempts to claim that its approach was a remedy for past discrimination or a quest for diversity, as the court

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[93] *Id.* at 133–35.

[94] *Id.* at 132.

[95] *Id.* at 137 (citation and quotations omitted).

[96] *Id.*

[97] *Id.*

[98] *Id.* at 137–38.

[99] *Biondo v. City of Chicago*, 382 F.3d 680, 682–83 (7th Cir. 2004).

[100] *Id.*

discussed in *Grutter*. Instead, the City claimed that it was attempting to comply with federal regulations that discourage the use of test scores to make promotion decision. This was not a valid defense, and the court held there was no compelling interest to support the race-based program. The court summarized what happened this way: "After creating racially segregated lists, the Department promoted in rank-order sequence from each list!"[101] This approach, the court said, violated Title VII.

In 2006, in *Dean v. City of Shreveport*, the U.S. Court of Appeals for the Fifth Circuit similarly considered whether a fire department's race-conscious hiring process violated Title VII.[102]

The basis for the lawsuit began in 1977, when the U.S. Department of Justice filed a lawsuit against Shreveport. The Department alleged that the City's fire department had discriminatory hiring practices. The case settled in the form of a consent decree with a plan to end its alleged discriminatory practices and remedy past discrimination. The decree set forth long-term goals that required the fire department have the same proportions of black and women employees compared with the work force, and that the City adopt a "goal of filling at least fifty percent of all firefighter vacancies with qualified black applicants and at least fifteen percent with qualified female applicants."[103] To comply with the decree, the City created a hiring process which gave preference to African-American and female applicants, based on segregation of test scores into lists based on race and gender.[104]

The plaintiffs were Jeffery Todd Dean, an unsuccessful white male firefighter applicant, and eight other unsuccessful white male firefighter applicants. The City rejected their applications from 2000 to 2002 and the City relied on its affirmative action plan to do so.[105] Ultimately, the District Court granted summary judgment for the City and dismissed the plaintiff's claims.

The Fifth Circuit reversed. The court explained that the City must "justify its action with a showing of past discrimination by the governmental unit seeking to use the race-conscious remedy" rather than with general assertions of "past societal discrimination."[106] On this, the court concluded the City had made a successful showing of past discrimination by relying on its past discriminatory hiring practices. However, the court emphasized that in most cases, the failure to "provide statistical data comparing the number of minorities in its work force with the number of minorities qualified to undertake the particular task, rather than the number of minorities in the general population, will prove fatal to an attempt to show past discrimination."[107]

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[101] *Id.* at 685.

[102] 438 F.3d at 448.

[103] *Id.* at 452.

[104] *Id.* at 452–53.

[105] *Id.* at 452.

[106] *Id.* at 454.

[107] *Id.* at 456.

In addition to showing past discriminatory practices, the court explained the City needed to show that the effects of past discrimination still existed when the plaintiffs were denied employment: "If the effects of past discrimination no longer existed when Appellants were denied employment, the City no longer had a compelling interest to justify a race-conscious remedy."[108] On this issue, the court remanded, and explained that "the City must properly define a 'qualified applicant.' It must then provide reliable statistical data showing the percentages of blacks in its work force and in its qualified labor pool between 2000 and 2002. "Only when the district court has this information can it properly decide whether a sufficient disparity still existed."[109]

Later in 2006, in *Kohlbek v. City of Omaha*, the U.S. Court of Appeals for the Eighth Circuit considered another challenge to a fire department's affirmative action program.[110] The *Kohlbek* case involved only claims brought under the Fourteenth Amendment's Equal Protection Clause, not Title VII.[111]

In 2000, John Kohlbeck passed a promotion exam for battalion chief and ranked eleventh on the promotion list. Anthony Curtis, an African American candidate, ranked twentieth. After other candidates received promotion, Mr. Kohlbeck was next in line for a promotion. The City of Omaha, however, selected Mr. Curtis for the battalion chief position, in part because the Department had only one other African-American battalion chief at the time. The City also passed over another plaintiff, Michael Pritchard, for a captain position, despite having a higher test score than two other African-American candidates who the City promoted instead. The fire chief testified he would not have promoted out of rank order had the department not had an affirmative action plan.[112]

Mr. Kohlbeck and Mr. Pritchard filed suit and alleged that the City violated Title VII and other laws when it denied their applications for promotion. The District Court granted summary judgment in favor of the City. The court reasoned that the race-conscious affirmative action plan furthered a compelling interest in remedying past discrimination. The Eighth Circuit reversed.

The Eighth Circuit cited and relied upon *Grutter* and explained that a racial classification program is lawful "only if it is a narrowly tailored measure that furthers a compelling governmental interest."[113] It held that the City's plan was not narrowly tailored to remedy "specifically identified" past discrimination and was thus, unlawful.[114] The Court stated that in looking at whether a race-conscious program is narrowly tailored, "we look at factors such as the efficacy of alternative remedies, the flexibility and duration of the race conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties."[115]

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[108] *Id.* at 457.

[109] *Id.* at 458.

[110] 447 F.3d at 552.

[111] *Id.* at 555.

[112] *Id.* at 553–55.

[113] *Id.* at 555.

[114] *Id.*

[115] *Id.* at 555 (citations and quotations omitted).

Further, the court noted, as *Grutter* explained, that the use of racial classifications may be "dangerous" absent compelling interest.[116]

In another 2006 decision, the U.S. Court of Appeals for the Third Circuit considered a challenge to a fire department's affirmative action plan. In *Lomack v. City of Newark*, the Mayor of Newark mandated that all single-race fire departments would be abolished. As a result, "dozens of firefighters were involuntarily transferred to different companies solely on the basis of their race."[117]

The firefighters sued and alleged that the involuntary transfers violated the Fourteenth Amendment's Equal Protection Clause and Title VII. The District Court ruled for the City after a bench trial.[118]

The Court of Appeals reversed. The Court found that the City did not demonstrate that it engaged in past racial discrimination, and thus that it could show no remedial justification for the use of racial classifications to transfer employees. Relying on *Grutter*, the court further explained that nonremedial goals, such as attaining diversity, may justify affirmative action, but only in limited circumstances.[119]

The court explained:

> It is important at the outset to note what this case is not about. This case is not about whether diverse workplaces are desirable. It is not disputed that they are. Neither is this case about a remedy for unlawful past discrimination because, again, it is not disputed that there was no unlawful discrimination in the past. And this case is not about whether the numbers of minority firefighters being hired are satisfying long-range hiring goals. Rather, this case is about whether the City of Newark may employ a race-based transfer and assignment policy when any racial imbalance in the 108 fire companies is not the result of past intentional discrimination by the City. We hold that it may not and, accordingly, will reverse the District Court's entry of judgment for the defendants.[120]

The following year, 2007, the U.S. Court of Appeals for the Seventh Circuit decided another Title VII affirmative action case. In *Alexander v. City of Milwaukee*, 17 white male police officers brought suit and alleged that the City of Milwaukee violated Title VII by denying them promotions based on policies that favored women and minorities. "In special verdicts, the jury found that the City and Chief Jones had discriminated intentionally in favor of women and minority

[116] *Id.* at 556.

[117] *Lomack*, 463 F.3d at 305.

[118] *Id.* at 307.

[119] *Id.* at 308–09.

[120] *Id.* at 305.

candidates in the selection of officers for promotion to captain and that the [Milwaukee Board of Police and Fire] Commissioners had 'personally participate[d]' in the discrimination."[121]

The Chief of Police made promotion decisions based on his own subjective criteria and observations, and a jury found that one of those criteria was the race and gender of the candidate. The City evaluated the Chief on "his ability to foster diversity" in the workforce.[122] The jury found for the plaintiffs, and the City appealed.[123]

The Court of Appeals for the Seventh Circuit affirmed on liability because the general "plan" to increase diversity was not sufficient under Supreme Court precedent on affirmative action plans, including *Grutter*.

Also in 2007, the Supreme Court decided another schools case, *Parents Involved in Community Schools v. Seattle School District No. 1*. In *Parents Involved*, two school districts voluntarily adopted student assignment plans that relied upon race to determine which public schools certain children may attend. "The Seattle school district classifie[d] children as white or nonwhite; the Jefferson County[, Kentucky] school district as black or 'other.' In Seattle, this racial classification [was] used to allocate slots in oversubscribed high schools. In Jefferson County, it [was] used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relie[d] upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole."[124]

Parents of Seattle and Jefferson County students brought suit against their children's respective school districts and challenged the districts' use of race in school assignments. The parents claimed classifications based on race violated the Fourteenth Amendment. The District Courts in each case granted summary judgment for the schools, and the Ninth and Sixth Circuits affirmed.[125]

The Court determined that the two student assignment plans were unlawful because "when race comes into play, it is decisive by itself."[126] The Court reaffirmed *Grutter*'s conclusion that "racial balancing" is "patently unconstitutional."[127]

Consistent with *Weber, Johnson,* and *Grutter*, the Court said that it has permitted "racial classifications" in only two circumstances: (1) when "remedying the effects of past intentional discrimination"; and (2) when "the interest in diversity in higher education" was "not focused on

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[121] *Alexander*, 474 F.3d at 442 (alteration in original).

[122] *Id.* at 440.

[123] *Id.* at 439.

[124] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–10 (2007).

[125] *Id.* at 710–11.

[126] *Id.* at 723.

[127] *Id.*

race alone."[128] The Court said that *Grutter* "relied upon considerations unique to institutions of higher education."[129] The Court described this "unique context" as one of *Grutter*'s "key limitations."[130]

Justice Kennedy wrote a concurring opinion in which he would said he would permit "facially race-neutral means" because they provide a "more nuanced, individual evaluation . . . that might include race as a component."[131] He would also permit some "race-conscious measures" such as "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."[132]

Two years later, in 2009, the Supreme Court considered a Title VII case brought by unsuccessful white and Hispanic firefighter applicants for promotions. In *Ricci v. DeStefano*, the Court held that disregarding test scores in favor of non-minority job candidates for affirmative action purposes violated Title VII.[133]

The *Ricci* case began when the New Haven, Connecticut fire department held examinations for 118 firefighters for promotion. "[T]he examination results showed that white candidates had outperformed minority candidates."[134] Some firefighters threatened to bring a discrimination lawsuit if the City used the results to determine eligibility for promotions. Ultimately, the City "threw out the examinations," and some white and Hispanic firefighters sued and alleged that the City's decision to disregard the results of the examination and deny them promotions violated Title VII.[135] The district court granted summary judgment for the defendants, and the U.S. Court of Appeals for the Second Circuit affirmed.[136]

The Supreme Court reversed and entered judgment for the firefighter plaintiffs.[137] The Court concluded that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[138]

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[128] *Id.* at 721–22.

[129] *Id.* at 724.

[130] *Id.* at 725.

[131] *Id.* at 790 (Kennedy, J., concurring).

[132] *Id.* at 789 (Kennedy, J., concurring).

[133] 557 U.S. 557 (2009).

[134] *Id.* at 562.

[135] *Id.*

[136] *Id.* at 563.

[137] *Id.*

[138] *Id.*

The City did not have such a "strong basis in evidence," the Court said, because "the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"[139]

The Court stated that it would not question an employer's "affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made" but "once that process has been established" employers may not invalidate the test on the basis of race.[140] "Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e–2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race."[141]

The Court in *Ricci* explained that an employer must satisfy the "strong basis in evidence" standard for all three prongs of Title VII's disparate impact proof structure.[142] The Court concluded that the City did not satisfy the strong basis in evidence standard and that the firefighter plaintiffs were "entitled to summary judgment on their Title VII claim."[143]

That same year, the U.S. Court of Appeals for the Eighth Circuit decided *Humphries v. Pulaski County Social School District*.[144] In that case, the court considered whether a school's affirmative action plan was "direct evidence" of race discrimination under Title VII.[145]

Dr. Donna Humphries, a white female teacher, applied for almost every elementary school assistant principal position that was available in her District between 2001 and 2005. She was unsuccessful in securing any of the positions to which she applied.[146] Ms. Humphries filed suit in 2007, and she alleged that the District violated Title VII's race discrimination prohibitions, the Fourteenth Amendment's Equal Protection Claus, 42 U.S.C. § 1981, and Arkansas law when it rejected her applications.[147]

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[139] *Id.* at 579 (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006)).

[140] *Id.* at 585.

[141] *Id*.

[142] *Id.* at 585–90. The Court explained that (1) "the City was faced with a prima facie case of disparate-impact liability," (2) the evidence raised "no genuine dispute that the [discarded] examinations were job-related," and (3) respondents "lacked a strong basis in evidence of an equally valid, less discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt." *Id.*

[143] *Id.* at 593.

[144] 580 F.3d 688 (8th Cir. 2009).

[145] *Id.* at 690.

[146] *Id.*

[147] *Id.* at 691 ("The District has a lengthy history of involvement in desegregation litigation. In 1982, the Little Rock School District sued the District, the North Little Rock School District, the State of Arkansas, and the Arkansas State Board of Education, seeking consolidation of the three Pulaski County school districts as a remedy for allegedly unconstitutional efforts to maintain racially segregated schools. This court affirmed the district court's finding that the District acted to perpetuate segregation by, among other things, failing to meet staff hiring goals. In

The School District claimed that its hiring policies were "promulgated in response to court orders requiring the District to desegregate and implement procedures that would make the District attractive to minority students, teachers, and administrators."[148] The School District's hiring plan indicated that it would recruit candidates "to develop a racially diverse pool of applicants."[149] The District also used "biracial committees" to conduct interviews for certain positions, including those for assistant principal.[150] Moreover, the posting for two job applications included the following language: "THE DISTRICT WILL MAKE SPECIAL EFFORTS TO EMPLOY AND ADVANCE WOMEN, BLACKS, AND HANDICAPPED PERSONS."[151] The School District further published a hiring goal of "having at least one minority administrator at each elementary school and attaining a ratio of black administrators in the District in proportion to the ratio of black certified personnel in the District in the preceding year."[152]

The District Court granted the School District's motion for summary judgment, and determined that Dr. Humphries failed to show that the School's affirmative action plan played a role in the decision not to hire her.[153] The Eighth Circuit reversed.[154]

The Court of Appeals explained that there was sufficient evidence for a jury to find that the District violated Title VII. The court explained:

> [E]vidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination. If the employer defends by asserting that it acted pursuant to a valid affirmative action plan, the question then becomes whether the affirmative action plan is valid under Title VII and the Equal Protection Clause.[155]

The court concluded that Dr. Humphries raised a genuine issue of material fact about whether there was a link between the affirmative action policies and the decision not to promote her, due to (1) instructions to the interview committees to follow the affirmative action plan, (2) published hiring goals, including a goal to hire at least one minority administrator at each school, and (3) an unwritten policy of hiring assistant principals who are of a different race than the principal at a particular school.[156] Therefore, the question remained as to whether the affirmative action plan was "remedial" in nature, meaning whether it addressed a "manifest racial imbalance

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response to our decision, the District negotiated a settlement agreement with the other school districts, which we eventually ordered the district court to approve." (citations omitted)).

[148] *Id.*

[149] *Id.*

[150] *Id.* at 693.

[151] *Id.* (capital letters in original).

[152] *Id.*

[153] *Id.*

[154] *Id.* at 690.

[155] *Id.* at 694.

[156] *Id.*

in the workforce" and whether the policies were aimed at "attaining a balance in the workforce."[157] The court explained that a valid affirmative action plan "may not unnecessarily trammel the rights of non-minorities, and it must be intended to attain a balance, not to maintain one."[158] On this issue, the court remanded.[159]

In 2011, the U.S. Court of Appeals for the Second Circuit considered how to reconcile *Weber*, *Johnson,* and *Ricci*. *United States v. Brennan* began in 1996, when the United States brought suit against the New York City Board of Education for alleged Title VII related to civil service exams and hiring practices for custodians, the results of which had a disparate impact on African-American and Hispanic employees.[160]

The parties settled in 1999, and the district court entered a consent decree that provided for the hiring of and a grant of retroactive seniority to 63 minority employees.[161] Three "white male incumbent permanent Custodians" objected to the settlement and moved to intervene: John Brennan, James G. Ahearn, and Kurt Brunkhorst.[162] Overruling the objections, the district court approved the settlement and denied the motion to intervene.[163]

Shortly thereafter, the U.S. Court of Appeals for the Second Circuit vacated the consent decree and remanded.[164] The Second Circuit determined that the district court should have permitted the employees to intervene.[165] Despite the lack of a consent decree, the City voluntarily instituted the disputed parts of the settlement nonetheless.[166]

The three employees intervened and thereafter brought two race discrimination lawsuits against the City.[167] The District Court held that most portions of the policy adopted by the City in the settlement were lawful and did not violate Title VII. Specifically, the district court upheld

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[157] On remand, the matter went to trial, where the District Court held that the validity of the affirmative action policy was a question of law. *See Humphries v. Pulaski County Spec. Sch. Dist.*, 4:06-CV-606-DPM, 2011 WL 1633248, at *1 (E.D. Ark. Apr. 28, 2011). The race-discrimination claim went to the jury, where the jury answered to Interrogatories on the claim: On Interrogatory No. 1, the jury answered "yes" to the question of whether the affirmative action policy was a motivating factor in the District's decision not to promote Dr. Humphries. On the next Interrogatory, the jury answered "yes" to a question that asked "whether the District would have made the same decision apart from race." *Id.* at *2. Thus, the jury found for the District on the race discrimination claim. However, Dr. Humphries "abandoned her Title VII claim," *id.* at *5, and so it is unclear whether the proceedings in the district court after the Eighth Circuit's decision create any inference about Title VII.

[158] *Humphries*, 580 F.3d at 695–96 (citation and quotations omitted).

[159] *Id.* at 697.

[160] 650 F.3d 65, 70 (2d Cir. 2011).

[161] *Id.*

[162] *Id.* at 80.

[163] *Id.* at 80.

[164] *Id.* at 80–81.

[165] *Id*.

[166] *Id.* at 71.

[167] *Id.*

parts of the settlement that provided that all African-American, Hispanic, Asian or female individuals employed as custodians would receive retroactive seniority, regardless of whether they had taken the civil service exams.[168] The employees appealed and claimed that the City's voluntary implementation of the settlement agreement violated Title VII.[169]

The Second Circuit explained that the grants of retroactive seniority were made to remedy a disparate impact, not as part of a forward looking affirmative action plan, and therefore that *Ricci*, not *Johnson* and *Weber*, governed the court's assessment of the claim.[170] The City had to show a "strong basis in evidence" that had if it failed to apply the terms of the settlement agreement (i.e. the grants of retroactive seniority), it would face disparate-impact liability. The court explained:

> We hold that, contrary to the pre-*Ricci* law in this Circuit, *Johnson* and *Weber* do not apply to all race- or gender-conscious employer actions. In light of *Ricci*, the 'manifest imbalance' and 'no unnecessary trammeling' analysis of those cases extends, at most, to circumstances in which an employer has undertaken a race- or gender-conscious affirmative action plan designed to benefit all members of a racial or gender class in a forward-looking manner only. Where, as here, the employer instead provides individualized race- or gender-conscious benefits as a remedy for previous disparate impact, the employer must satisfy the requirements of *Ricci*, not *Johnson* and *Weber*, in order to avoid disparate-treatment liability. Under *Ricci*, the employer must show a strong basis in evidence that, at the time the race- or gender-conscious action was taken, the employer was faced with disparate-impact liability and that the race- or gender-conscious action was necessary to avoid or remedy that liability.[171]

The court explained what *Ricci*'s "strong basis in evidence" standard requires:

> [A] strong basis in evidence of disparate-impact liability is an objectively reasonable basis to fear such liability. It is evaluated at the time an employer takes a race-conscious action. It relies on real evidence, not just subjective fear or speculation. Because it focuses on liability rather than mere litigation, it requires both objectively strong evidence of a *prima facie* case (or perhaps actual proof of a *prima facie case*) of disparate impact, and objectively strong evidence of non-job-relatedness or a less discriminatory alternative.[172]

The court added that an employer that takes "race- or gender-conscious action" must also demonstrate that there is "a strong basis in evidence that the race- or gender-conscious action

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[168] *Id.* at 79.

[169] *Id.* at 71.

[170] *Id.* at 71–72.

[171] *Id.* at 72.

[172] *Id.* at 113.

taken by the employer is *necessary* to avoid disparate-impact liability."[173] In addition, the court explained:

> [T]he strong-basis-in-evidence standard of *Ricci* applies not only to the question of disparate-impact liability, but also to the further question of whether the employer's race- or gender-conscious action is necessary to remedy that disparate impact. Here too, the employer's belief that its action is necessary to remedy disparate impact . . . *i.e.*, that the beneficiaries of the action were victims of disparate impact and the action puts them roughly where they would have been in the absence of discrimination, must be objectively reasonable[.][174]

The court also explained that an employer must satisfy the "strong–basis-in-evidence" standard for Title VII's disparate impact elements: an employer must "show, for each disputed employment practice, a strong basis in evidence either that the practice was not job-related or that there was a less discriminatory alternative to that practice."[175] Said another way, "[o]nce an employer has a strong basis in evidence that it faces disparate-impact liability, the employer must also undertake a recreation of the past that is supported by a strong basis in evidence."[176]

The Second Circuit vacated the district court's decision and remanded the case for further proceedings consistent with the *Ricci* framework.[177] The court instructed the district court to proceed as follows: the district court should "take up the difficult task of determining whether the 'hypothetical nondiscriminatory past' that the City Defendants attempted to recreate, when they implemented the settlement agreement, was supported by a strong basis in evidence."[178]

In 2013, the D.C. Circuit considered a Title VII challenge that required the court to decide whether to apply the *Weber-Johnson* or *Ricci* proof structures.

In *Shea v. Kerry*, William Shea, a white Foreign Service Officer for the U.S. State Department, sued the State Department for alleged violations of Title VII.[179] Mr. Shea claimed that the Department hired him at a lower pay grade due to the Department's affirmative action plan, which provided for preferential treatment for minority applicants who entered service through a special program.[180] The State Department had instituted the Affirmative Action Plan pursuant to Congress enacting the Foreign Relations Authorization Act, which required the

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[173] *Id.* at 114.

[174] *Id.*

[175] *Id.* at 127.

[176] *Id.* at 130.

[177] *Id.* at 131.

[178] *Id.* at 134.

[179] 796 F.3d 42 (D.C. Cir. 2015).

[180] *Id.* at 49.

Foreign Service to become "truly representative" of the American people and to address the issues of disproportional representation of minority and women employees.[181]

The district court applied *Weber* and *Johnson* and granted summary judgment in favor of the State Department.[182] The district court determined that the Department acted pursuant to a lawful affirmative action plan.

Mr. Shea appealed. The D.C. Circuit affirmed and explained:

> [I]n *Ricci*, the Court's "analysis beg[an] with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense." . . . The inquiry prescribed by *Johnson* and *Weber*, by contrast, pertains to assessing whether there is a violation of Title VII's disparate-treatment prohibition in the first place, the same question we address here.[183]

The court added that the employers in *Weber* and *Johnson* "did not modify the outcomes of personnel processes for the asserted purpose of avoiding disparate-impact liability under Title VII."[184] In addition, the *Weber-Johnson* framework applies when an employer acts to "expand job opportunities for minorities and women and to eliminate traditional patterns of racial segregation."[185] "*Ricci* does not purport to reach the Department's actions in pursuit of those purposes," the Court concluded. "*Weber* and *Johnson* therefore still control."[186]

The State Department's actions accordingly fit into the *Weber-Johnson* proof structure. The court applied the *Weber-Johnson* framework and concluded that: (1) the Department adequately grounded its Affirmative Action Plan "in evidence of a manifest imbalance in a traditionally segregated job category[;]" and (2) the plan did not "unnecessarily trammel[] the rights of white applicants."[187]

The D.C. Circuit agreed that Mr. Shea established a *prima facie* case of discrimination. Next, the court considered whether the Department established that it acted "pursuant to a valid affirmative action plan."[188] To be valid, the court explained, the affirmative action plan must

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[181] *Id.* at 47 (citing Pub. L. No. 100-204 § 183(b)(2) ("The Secretary of State and the head of each of the other agencies utilizing the Foreign Service personnel system — . . . shall ensure that those plans effectively address the need to promote increased numbers of qualified women and members of minority groups into the senior levels of the Foreign Service.")).

[182] *Id.* at 46.

[183] *Id.* at 55.

[184] *Id.*

[185] *Id.* (citations and quotations omitted).

[186] *Id.*

[187] *Id.* at 58, 61.

[188] *Id.* at 57.

remedy a "manifest imbalance" in a "traditionally segregated job categor[y]" and "refrain[] from unnecessarily trammel[ing] the rights of [white] employees."[189]

One way an employer can satisfy the "manifest imbalance" standard, the court said, was by "showing of statistical disparities between the racial makeup of the employer's workforce and that of a 'comparator population.'"[190] The State Department had statistics of this kind – that is, "overwhelming" "substantial imbalances" – that supported its decision to implement an affirmative action plan.[191] Said another way, "evidence identified by the Department would permit the conclusion that there had been a past practice of discrimination with continuing effects through the [period that Mr. Shea applied]. We therefore agree with the district court that the Department made an adequate evidentiary proffer that the [affirmative action] Plan served to remedy the lingering effects of State's past discrimination."[192]

Next, the court turned to whether the State Department's plan unnecessarily trammeled the "rights of non-beneficiaries" like and including Mr. Shea.[193] This standard requires a consideration of many factors, the court said, and it was significant that the State Department's plan was designed to "attain more proportional representation, not to maintain it in perpetuity," lasted for only a brief period of time, and then "ceased to operate" and "has not been replaced."[194] The plan also did not create an "absolute bar" to non-beneficiaries, and the evidence demonstrated that "white candidates could—and did—gain promotion to mid-level positions from the Foreign Service entry-level ranks."[195] The plan also had only a "modest effect on the hiring process."[196]

For these reasons, the court affirmed summary judgment for the State Department.[197]

More recently, in 2013 and 2016, the Supreme Court decided two cases related to the University of Texas at Austin's race-conscious admission process.[198] Abigail Fisher, a white female, was rejected for admission in 2008. She sued the University and alleged that the University violated the Fourteenth Amendment's Equal Protection Clause when it denied her application for

[189] *Id.* (first, third, and fourth alterations in original) (citations omitted).

[190] *Id.*

[191] *Id.* at 58–59.

[192] *Id.* at 60 (citation and quotation omitted).

[193] *Id.* at 61.

[194] *Id.*

[195] *Id.* at 62.

[196] *Id.* at 64.

[197] *Id.* at 65.

[198] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

admission due to her race.[199] The District Court granted summary judgment in favor of the University, and the Fifth Circuit affirmed.[200]

The University admitted about 75 percent of its class through its Top Ten Percent Plan, which the Court explained actually meant that "a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category."[201] Ms. Fisher did not challenge the Ten Percent Plan. Instead, her claim challenged the University's process for decisions about the remaining 25 percent of its class. Under that process, the University considered race as a subfactor of one of two indices it used to evaluate applicants.[202]

The University used an Academic Index and a Personal Achievement Index to make decisions about applications. The Academic Index was "calculated by combining an applicant's SAT score and academic performance in high school."[203] The Academic Index did not consider race as a factor.

Initially, the Personal Achievement Index "was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other 'special characteristics' that might give the admissions committee insight into a student's background."[204] After the Supreme Court decided *Grutter*, the University added race as a "subfactor" to the Personal Achievement Index.[205]

Both the Academic Index and Personal Achievement Index generated numerical scores, and after decisions about the Top Ten Percent Plan, the remaining "portion of the class [was] admitted based on a combination of their [Academic Index] and [Personal Achievement Index] scores."[206] Admissions officers set a "cutoff" score of the two indices, and then "admit[ted] all of the applicants who [were] above that cutoff point."[207]

In 2013, in *Fisher I*, the Supreme Court held that the Fifth Circuit did not apply the correct strict scrutiny standard to Ms. Fisher's claim and thus remanded.[208] The Court explained that racial classifications must be narrowly tailored to further a compelling interest.[209] Achieving diversity may be a compelling interest, the Court explained, but the University "must prove that the means

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[199] *Fisher*, 570 U.S. at 300–03.

[200] *Id.* at 303.

[201] *Fisher*, 136 S. Ct. at 2206.

[202] *Id.*

[203] *Id.* at 2204.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 2206.

[207] *Id.* at 2207.

[208] *Fisher*, 570 U.S. at 303.

[209] *Id.* at 314–15.

chosen . . . to attain diversity are narrowly tailored to that goal."[210] Further, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[211]

After the Court remanded, the Court of Appeals re-analyzed the University's admission program, and again affirmed summary judgment for the school. Ms. Fisher appealed to the Supreme Court, and the Court granted her second petition for a writ of certiorari.

In *Fisher II*, the Court rejected Ms. Fisher's claim. The Court explained that the University had shown a compelling interest in its admissions program—mainly, the educational benefits flowing from diversity—and that the University's goal was set forth in concrete and precise terms. In addition, the plan was narrowly tailored to achieving the University's goals, by showing the lack of other available means of achieving its diversity goals. The Court also determined that the University used race only minimally: "race is but a 'factor of a factor of a factor' in the holistic-review calculus."[212]

Currently pending before the Supreme Court is *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[213] A group of students filed suit in 2014 alleging that Harvard discriminates against Asian-American applicants in its undergraduate admissions. In 2019, the District Court granted judgment for Harvard after a bench trial, and the U.S. Court of Appeals for the First Circuit affirmed in December 2020.[214] The Court held that Harvard did not unduly discriminate against Asian-Americans and its admission process was constitutional.[215]

On February 25, 2021, the plaintiffs, Students for Fair Admission, filed a petition for a writ of certiorari with the Supreme Court. Their petition asks the Court to decide the following two questions:

> 1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?
>
> 2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-

[210] *Id.* at 311.

[211] *Id.* at 312.

[212] *Fisher*, 136 S. Ct. at 2207.

[213] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020).

[214] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 397 F.Supp.3d 126 (D. Mass. 2019); *Students for Fair Admissions*, 980 F.3d 157.

[215] *Students for Fair Admissions*, 980 F.3d at 164.

> American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?[216]

On January 24, 2022, the Supreme granted the plaintiff's petition for a writ of certiorari, and will likely hear the case during the Court's 2022-23 term. The Court consolidated the case with *Students for Fair Admissions for University of North Carolina*.[217]

In the North Carolina case, the plaintiffs ask the Court to "recognize that, for public schools, the Fourteenth Amendment's guarantee of racial neutrality" forbids the use of race in admission.[218] The plaintiff contends as follows:

> UNC considers an applicant's race at "'every stage"' of the review process. In reviewing applications, admissions officers focus intently (and sometimes crudely) on an applicant's race, as revealed by online chats among admissions officers.
>
> • "I just opened a brown girl who's an 810 [SAT]."
>
> • "If its brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."
>
> • "Still yes, give these brown babies a shot at these merit $ $."
>
> • "I am reading an Am[erican] Ind[ian]"
>
> • "[W]ith these [under-represented minority] kids, I'm trying to at least give them the chance to compete even if the [extracurriculars] and essays are just average."
>
> • "I don't think I can admit or defer this brown girl."
>
> • "perfect 2400 SAT All 5 on AP one B in 11th" "Brown?!"
>
> "Heck no. Asian."
>
> "Of course. Still impressive."
>
> • "I just read a bl[ac]k girl who is an MC and Park nominee."
>
> [S]ee also Pl's Ex. 74 ("Stellar academics for a Native Amer/African Amer kid."); Pl's Ex. 75 ("I'm going through this trouble because this is a bi-racial (black/white) male."). In the ultimate decision, a student's race is often the "determinative" factor in whether the student is admitted or denied.[219]

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[216] Petition for Writ of Certorari at i, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, ___ U.S. ___ (2021) (No. 20-1199).

[217] Order Granting Petition for Certiorari and Consolidating Cases, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* 142 S.Ct. 895 (2022).

[218] *Students for Fair Admissions, Inc. v. University of North Carolina,* 2021 WL 5343495 (U.S.) (Petition For Writ of Certiorari), at *2.

[219] *Id.* at *5-*6 (citations omitted).

The *Fair Admissions* cases do not involve any Title VII claims. However, the Court's decision or decisions may impact how federal courts consider Title VII challenges to affirmative action and other race- and sex-conscious decisions in employment.

Outside of the school context, at least one recent court held, and one jury found, that non-remedial policies that permit racial discrimination for the purposes of diversity are unlawful.

In September 2021, in *United States v. City of Cincinnati*, a district court considered a motion to modify a consent decree for the City of Cincinnati and the Cincinnati Police Department, which contained race-based hiring goals and had been in place for 40 years.[220] The consent decree was enacted following complaints that African American applicants were disadvantaged when applying for positions with the Police Department.[221] The United States approached the city about modifying the consent decree in recent years given the composition of the Department's workforce, but the parties could not reach agreement.[222]

The District Court recognized that not only had Supreme Court case law on affirmative action developed further since 1981, but the interests underlying the consent decree may no longer exist at present-day: "[a]lthough remedying past discrimination may have constituted a compelling interest at the time the Consent Decree was entered in 1981, the question is whether 40 years later the remedial race-based hiring and promotional goals actually serve to remedy that past discrimination at this point in time."[223]

Examining the racial makeup of the Department, the court explained that the consent decree was successful in remedying past discrimination, but there was no longer served a remedial purpose. Relying on *Johnson*, the court held "[t]he race-conscious goals have remained in effect for 40 years and at this time are improperly utilized to maintain diversity."[224] The court concluded that racial-hiring goals must be removed from the consent decree, as they no longer served a compelling interest.[225] The City's appeal is currently pending before the U.S. Court of Appeals for the Sixth Circuit.

Next, in October 2021, a jury awarded $10 million dollars in punitive damages to Plaintiff David Duvall, a white male, who brought suit against Novant Health for discrimination based on his race and sex in violation of Title VII.[226] Mr. Duvall was the Senior Vice President of Marketing and Communications for Novant, and he alleged that Novant Health discharged him in 2018 for the "purpose of replacing him with two persons, one of a different gender and the other of a

[220] 1:80-CV-369, 2021 WL 4193211, at *1 (S.D. Ohio Sept. 15, 2021).

[221] *Id.*

[222] *Id.*

[223] *Id.* at *5.

[224] *Id.* at *6.

[225] *Id.* at *7.

[226] *Duvall v. Novant Health, Inc.*, No. 3:19 CV000624, Jury Verdict Form, Dkt. No. 99 (W.D.N.C. Oct. 26, 2021); *Id.*, Plaintiff's Response to Rule 50(b) Motion, Dkt. No. 145 (W.D.N.C. February 18, 2022).

different gender and race" for the "purpose of improving diversity."[227] Mr. Duvall claimed that his termination violated Title VII, and the jury found in his favor on his race discrimination claim.

Specifically, Mr. Duvall claimed that he "had performed at a high level," but was discharged due to a "heavily documented diversity and inclusion initiative with an expressed timeline to remake the workforce to reflect the community and 'embed' a culture of 'D&I' at Novant between late 2016 and 2019."[228] After his discharge, he was replaced with a white female and an African-American female.[229] According to Mr. Duvall, evidence at trial showed that the Senior Vice President for Diversity and Inclusion implemented a three-phase strategic plan with "the express goal of increasing diversity at the executive and senior levels."[230] Mr. Duvall also claimed that the evidence showed that he was "let go as part of the replacement of several executives….to get a new 'point of view.'"[231] Post-trial briefing for the case is currently pending before the district court.

[227] *Id*., Complaint, Dkt. No. 1.

[228] *Id.* at Dkt. No. 145 at 3.

[229] *Id.* at 3.

[230] *Id.* at 4.

[231] *Id.* at 9.