City and County of San Francisco

Impact of *Harvard* Case on Business Opportunity Programs

Colette Holt

3 August 2023

COLETTE HOLT & ASSOCIATES

Students for Fair Admissions v. Harvard and University of NC

- Majority decision by Roberts
  - SFFA has standing to sue
  - Race-based state action must be “rare”
  - Admission programs must meet the strict scrutiny test, may never use race as a stereotype or negative, and must end
  - Only two SCOTUS-recognized compelling interests
    - Remediating specific, identified instances of past discrimination that violated the Constitution or statute
    - Avoiding imminent and serious risks to human safety in prisons, such as a race riot

COLETTE HOLT & ASSOCIATES

Students for Fair Admissions v. Harvard and University of NC

- Admissions programs are not ”sufficiently measurable to permit judicial review”
  - Training future leaders, diversity of viewpoints and experiences, are not sufficiently coherent to meet strict scrutiny
  - Impossible to measure or to know when they have been achieved
  - No meaningful connection between the means and the goals
    - Categories are overbroad (Asian rather than South Asian or East Asian); arbitrary or undefined (Hispanic); or underinclusive (Middle Eastern/North African)

Students for Fair Admissions v. Harvard and University of NC

- Race may never be used as a "negative" factor
  - College admissions are zero sum
- Race may not operate as a stereotype
  - Program "engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," contrary to the "core purpose" of the Equal Protection Clause
  - Government actors cannot "intentionally allocate preference to those who may have little in common with one another but the color of their skin," causing "continued hurt and injury"

Students for Fair Admissions v. Harvard and University of NC

- Programs must have an end point
  - "Racial balancing is patently unconstitutional"
    - "Government must treat citizens as individuals not simply components of a racial, religious, sexual or national class"
  - Periodic review isn't sufficient
    - Race cannot be relevant indefinitely
- Colleges may consider how race has affected an applicant's life
- Footnote 4: military academies have "potentially distinct interests" so not bound by opinion

COLETTE HOLT & ASSOCIATES

What Should Agencies Do?

- Conduct a serious and thorough program assessment, regardless of funding source
- Enhance Title VI procedures
- Get your documents in order
- Educate D/M/WBEs about the changing legal landscape and prepare them for the open market
- Collect data
- Develop unremediated markets data

What Should Agencies Do?

- Develop M/WBE availability estimates to benchmark and comply with Title VI
- Critically examine your contract policies and practices
  - Pay on time
- Measure outcomes
- Stealth race-conscious programs?
- Greatly increase technical assistance, supportive services and capacity building initiatives
  - SFMTA and LAX are good models

What Should Community Members Do?

- Educate yourselves and stay abreast of legal developments
  - US Department of Commerce MBDA program stuck down
  - SBA 8(a) program program enjoined
  - Attacks on the USDOT DBE program
- Prepare for fully unremediated markets
- Focus on prime contract opportunities
- Organize to keep pressure on agencies and prime sector firms

COLETTE HOLT & ASSOCIATES

16 Carriage Hills • San Antonio, Texas 78257

433 West Briar Place #11C • Chicago, Illinois 60657

773.255.6844 • colette.holt@mwbelaw.com

www.mwbelaw.com • Twitter: @mwbelaw