



2023 CASE Summit for Leaders in Advancement

U.S. Supreme Court Ruling on Affirmative Action: What Now and What Next?

Session Transcript

*Speakers: Vern Granger, Director, Undergraduate Admissions, University of Connecticut, Board Chair, National Association of College Admission Counseling (NACAC); Ishan Bhabha, Partner, Jenner & Block; Alonda Thomas, Chief Communications Officer and Associate Vice President for Marketing and Communications, Jackson State University; Kevin Heaney, Vice President for Development, Princeton University. Question Moderator: Brian Flahaven, Vice President, Strategic Partnerships, CASE*

Brian Flahaven: We also want to get to as many of your questions into the panelists as well, before we get started. We're going to have session evaluations that'll be available afterwards; please do complete evaluations. So, if we get your feedback, we want to make these sections as strong as possible. And also, we do encourage you to ask questions. You'll see this QR code on these two screens. Please use that QR code; it will take you something called our conferences IO site where you can ask questions and vote up questions that you like. We are going to use a lot of democracy because we have a lot of you in this room so the questions that get voted up will try to get to as many of those as possible to get to the QA. But without further ado again thank you for being here, and a huge thanks to Kevin Heaney who's been on the Planning Committee for the summit, is moderating the session, and is vice president for advancement of Princeton. I turn it over to you Kevin and thank you.

Kevin Heaney: All right, thank you Brian. Good morning, everyone. As we all know, on June 29th of this year the US supreme Court issued a ruling at the race conscious admissions programs that both Harvard College and the University of North Carolina Chapel Hill violated the equal protection clause of the 14th Amendment. While it's often foolhardy to try to predict how the court will rule, I think most of us in this room were expecting this decision given the current makeup of the court, given the oral argument that were made, as well as the past decisions and writings of the justices that currently sit on the court like many organizations CASE issued a statement expressing disappointment in the court's ruling but reaffirming the associations commitment to advancing diversity, equity, inclusion, and belonging at Colleges, Universities and Independent Schools. CASE also signed on to an amicus brief submitted by the American Council on Education in support of the respondents many institutions and many of you in this room including my own also issued statements as well on the heels of this decision. Princeton's president Chris Eisgruber expressed opposition to the court's decision calling it unwelcome and disappointing. He added that diversity is fundamental for Princeton's mission and essential to the future of the United States and the world. So, with race conscious afford of action now prohibited by law, colleges and universities will need to use other strategies to preserve and grow the diversity of their communities. For example, institutions could heighten their focus on recruiting students from different socioeconomic backgrounds and geographic areas, or they could design their emissions processes that encourage applicants to share information about their race in ways besides just checking a box. Our panelists today will have much more to say about those strategies I think it's worth noting that not everyone is disappointed by the court's ruling; a recent survey by the Pew Research found that 50% of

Americans disapprove of colleges and universities taking race and ethnicity into account in admissions practices. Many universities will likely see differences of opinions on this topic within their communities especially among their alumni, faculty, and students. Universities and their advancement teams must strike a delicate balance as they seek to communicate to their constituencies on this issue. So, what does this ruling mean for our institutions and our ability to attract a diverse student body? So, what does this ruling mean for our institutions and our ability to attract a diverse student body? And what role should advancement leaders play in helping our institutions respond? I'm very pleased today to be joined by a panel of experts who will help us break down this decision and share their advice on how we should be proceeding. First, we have Ishan Bhabha partner in the law firm of Jenner and Block. Ishan chairs the higher education group for the firm, as well as the DEI Practice Task Force. Next to him is Alonda Thomas, the Chief Communications Officer and the Associate Vice President for marketing communications at Jackson State University. And then we have Vern Granger, Director of Undergraduate Admissions at the University of Connecticut and currently the chair of the National Association of College Admissions Counseling, better known as NACAC. So again, we encourage you to ask questions through the IO app. You can do so by screening the QR code and we will do our best to get to as many questions as we can. So, to kick things off, I'm going to ask Ishan to provide a bit of background on the case that the Supreme Court considered and to explain the ruling to us.

Ishan Bhabha: Happy to do so and thank you all so much for having me. We have represented the Ivy League and a number of other institutions in these cases since our inception, so these cases very near and dear to my heart. And as I'm sure it's been for all of you, it's been a very hectic last couple of weeks for me as I work with my clients to try and figure out what this decision means and what it means for their policies, their procedures, their trainings, and also of course their institutional priorities so for those of you who haven't had time to read the 273 pages of your opinion let me try and give you just a little bit of a sense of what I think the case really holds and why it's important. So obviously in this case the court was asked to consider race conscious admissions programs at Harvard and UNC. This is both of course the consideration of an applicant in a holistic way in which race plays one part of many characteristics the court evaluates, and the schools evaluated. But also processes at the end of the admissions procedure where the schools would look at the entirety of the class and then make so called shaping or lopping decisions, deciding what the overall class makeup would be. So, the challenge said that these procedures, in which race was one factor among many, violated the equal protection clause and Title 6 which obviously applies to private institutions. Now when race is being used as a decisional factor, the standard a school or an organization has to meet is "strict scrutiny", the most forbidding standard in America law. You need to have, number one, a compelling reason as to why you're using race and, number two, the means by which you're using race have to be narrowly tailored. So, applying that standard the court said that the institution's race conscious admissions policies failed. And what the court said in particular was looking at the interests that Harvard and UNC put forward, diversity, creating a pipeline of future leaders, innovation and thought, creating an environment in which certain different perspectives would be forced to collide with each other. The court said those goals, while laudable, are all far too indistinct and far too vague and impossible to evaluate to really form the basis to justify the use of race. So, what are the actual holdings of the case and then I'll just very quickly give a couple of practical takeaways, just some of the advice that I'm giving to my clients as we walk through these issues. So, the holdings are the case: number one is that race for race is sake is out. You cannot consider the race of an applicant as a plus in an admissions factor at all, just like you would not consider the race of an applicant as a negative in an admissions factor. So that's the main holding of the case, but then in

three paragraphs that will be scrutinized, and I would predict litigated over, for years to come. The chief said at the end of the opinion, of course nobody says that a school cannot consider an applicant's race, if the applicant discusses it: it was an inspiration, a form of discrimination, or something else in a response to a question. So what does that mean? So here are my three very high-level takeaways, again over a complicated 270-page opinion. So, number one, I think checkboxes are out. You cannot use race for race's sake, and if you simply have a check box it's very hard to say that you're soliciting anything else than the race itself. Similarly, the chief was very clear, you can't do by essay what you cannot do by check box. So, I'm counseling my clients right now and I can't tell you how many essay questions I have looked at. It really gave me a flashback to the dark days of Junior year in High school. But you cannot consider- you really need to be very careful about what information you solicit. Particularly this year and next year when the litigation environment is very fertile you don't want to go through all the processes of changing your internal process and nonetheless get sued as a result of an essay question soliciting race-based information is out. That's one. #2 race neutral priorities of course can continue to persist. So, there are many things that are correlated with race but are not race whether it's geography social economic status or the light and so I'm working with institutions to say what race neutral priorities have you had, can you still have, can we make sure they're not simply castigated as proxies, but that is permissible. And of course, what we're also doing is looking at the final thing that Chief said, and thinking well what happens when someone writes I guarantee what happened and probably will happen with a lot greater frequency going forward. What happens when someone writes, I'm the president of the Black Students Association in an essay response? How do you deal with that. Well, I would suggest there are tangible real applicable ways to deal with that information. When you look at that as showing leadership, you look at it as showing ability to work with a group of individuals on fast moving social subjects, or a million other things that are not race explicit. But I think and I won't go into detail now, but there are important policies, procedures, training materials you have to get in line, and have to be typed so that when you receive that information you properly process it, but you are nonetheless sued you have a record that shows we were dealing with this information in the correct way and we can talk about specifics more in a minute. The final thing I'll say is, what about everything else? What about all admissions adjacent, all the preadmissions stuff, recruiting outreach pipeline programs and the post admissions stuff yield efforts financial aid scholarships. What happens to all of them? So, two very quick and final points and then I'll let my far more erudite panelists talk about other things. Number one, explicitly that is not in this decision this is a decision about admissions and so while I'm counseling my clients not to underreact and think it's business as usual, I also hate to be the kind of defense lawyer who says overreact, everything is done. It's not. But I think you would be naive not to look at some of the indications in this decision and not think these are the next cases and we should be thinking about it now, so we make the decisions on our own terms as opposed to when you're sued or in litigation. And so, the one concept I'll leave you with is just a general very high 30,000 foot concept to think about as you're evaluating those programs is the notion of zero-sum. The chief was very preoccupied in the admissions decision with the notion of a zero-sum benefit, something that is narrowly, the eligibility is narrow, it's a big benefit and it only goes to some people. I would suggest that that is a good lens. Again, the devil is always in the details, but a good lens by which to view all these other programs is the pipeline program, for example, something that is truly racially exclusive, and does it create a slide which easily gets somebody into an institution. If so, that is much more likely to be attacked, and perhaps successfully so, than something that is actually open to everybody and while it provides a good basis doesn't create this direct slide into admissions and the same on the back end. Yield efforts, if you're

simply getting an extra phone call and saying we'd love you to come and be an African American male in our engineering department, to me that's very, very different than, you know, a specific merit based financial award that only goes to narrow categories. So, there's a lot more to unpack here but that's the general summary of the opinion.

Kevin Heaney: Thanks for getting us going on this topic, and I'm going to turn to Vern now. Vern, I know you've been watching these cases very carefully both in your role at U Conn and also as chair of NACAC. I'm curious what your initial reaction to the court's decision was, and also what's your initial take on the impact this will have on college and university admissions?

Vern Granger: Yes. Thanks for that question, and it is a pleasure being here at this at this conference, but so again I represent not only University of Connecticut in my daytime job, but my other daytime job as a chair, and I think this has obviously been the case - bless you - that we in our field have been focusing on for quite some time. And I think we got an early indication last year with the Dobb's case that this court had no problem in eliminating or disregarding decades of case law. So, we were kind of expecting this decision to be the outcome, and there was a school of thought that that you know it could have been much worse. I mean we know, you know, from our side that this is a very, very tough decision, but it could have been much worse. I mean one of the things that we had feared, was that the ability to be able to consider lived experiences of an applicant and talking about race, how that impacts that, that could have been eliminated. So, there are opportunities and we're trying to, you know, focus on those silver linings as far as the case goes, but, you know, as we've been thinking about this case and thinking about potential outcomes, I mean, there was obviously nervousness amongst myself and our constituent institutions because all we have to do is look at history. We know what happened in California, we know what happened in Michigan when similar type ballot initiatives were passed, and we saw the impacts on the enrollment of underrepresented students of color at the institutions. But more importantly they saw a decrease in the number of applications from those students, and that is something that we are very, very concerned about: the whole self-selecting out of students in in the whole application process. So, it's been something we've been telling our members to be thinking about a lot and continue to think about as they're thinking about what their strategies are. The high-level thing that I think is important that we share and we're very, very forceful on this is that, yes, we're going to follow the law. We're not going to, again, disregard the decision, but we remain steadfast in our commitment to diversity, and I think that's something that all of our institutions need to do. And you heard Kevin talk about the statement from Princeton's President. Our president came out with a statement. I know some others of your leadership came out those statements. So, we're not going to run away from our commitment to diversity. We understand the values of it and the importance of it. We know that students in the public do believe in the overall goals of diversity and we're going to make sure that we are doing those type of things and as far as the impact on our operating in our offices, I mean, the case focused on, and the decision was based on race consideration in the admissions process. Again, there are those similar processes, the scholarships and other things that we know down the line are going to be looked at, but we want this to be an opportunity again to look holistically at the work that we do and make sure that we are trying, we are doing as good a job as possible and eliminating barriers that may be going towards being able to enroll the diverse classes. We should always be taking a look at the work that we're doing, not only on the front end with the recruitment, but also the back end with the yield and again thinking about those strategies and evaluating them and making sure again we are doing everything in our power to eliminate those barriers that may be existing with regards to our ability to enroll these diverse classes.

So again, those are just some of the thoughts that I have. What we are thinking about as our institutions within the NACAC organization. But we're not going to run away from our commitment to diversity, we're going to, again, be out front and amplify our commitment to diversity. Because one of the things we don't want to do, we don't want to see that decrease in applications from students that we know that we saw with those other states that I gave the examples.

Kevin Heaney: Thanks Vern. Alonda, I want to turn to you you're here representing Jackson State one of the largest HBC is in the country. I'm curious what the reaction on your campus was when this decision was announced.

Alonda Thomas: So, as a historically black college and university you know we're looking at this from the other lens. Affirmative action helped us to look at underrepresented communities at our campuses that are usually white students or Hispanic students, and so it was important for us to let those audiences know that we are still are welcoming, test test. So, we were looking at just making sure that the minorities on our campus recognize that we still are going to be a welcoming place for them. That there is still a place for them at our historically black college and university and I'm sure that that's a lot of what some of my sister institutions were doing as well. Additionally, it was important for us to stand with our peer institutions who are PWI's in our state and let them know that we are committed to continuing to work with them on the partnerships that we have. A lot of HPCUS end up being kind of like fears into graduate programs at PWIs. And those are great ways and stronger ways that I think we need to continue to look for in the future. Because when you think about the professional schools that we don't have at Jackson State, like medical schools and pharmacy and law, they're still going to be a need for us to continue to place those students, so we have some programs already in place that help us to build that relationship to help students look at those pathways and those are things that we want to see continue in the future.

Kevin Heaney: Thanks, Alonda. I'm going to stay with you. A decision like this will ripple throughout our various constituencies from our students to our alumni, to our faculty, perspective students, and to donors. How should a chief communications officer at an institution be approaching the aftermath of this decision? And what role should you be playing in the university's response?

Alonda Thomas: How many chief communications are community comms people do we have in the room? I know we have a lot of advancement. Oh just a few. So obviously with this decision and everybody kind of being prepared for it, your comms teams have been very actively involved at the PWIs looking at what's going to change and what that response needs to be. From the statements that I've seen, a lot of them have been very proactive to let their audiences know that they're going to continue to try to diversify their campuses, and that's something that they don't want to lose. I think the next step now that the decision has come down is to work closely with your admissions and recruitment teams of your enrollment management to understand what the process has been and what might need to change in order to be able to continue to be aligned with this decision. And try to be involved in those conversations and decisions because we know that the steps that they're going to take are going to ultimately impact the brand and so you want to make sure that you're, you know, thinking along that thinking along those teams and allowing them to have these conversations proactively with your voice, you know, so you can bring a different perspective to the table. I'd also say that it's important again these audiences making sure that they feel welcome and letting them know that despite this decision that there's still a place for them at your institutions. Well what does that look like? When I go to your website, do I see myself represented there? You know, when I look at your programs, when I get there is

there going to be a place for me to feel included so I can build a little bit of community for myself. Those are the types of decisions and thinking that you want to have at this particular time. As well as from the perspective of thinking ahead for when this next class comes in. Maybe this particular class might not be impacted, it might end up being the next class. But if there is a dip and you have left minorities on your campus, protecting them: campus safety. You know, what are you going to do to ensure that there isn't any backlash about, you know, tension in between different students about whether or not they're here you know for the right reasons or whether they got in for the right reasons. Thinking proactively about what our stance is going to be and how we'll address that is something that communicators need to be thinking about at this time as well.

Kevin Heaney: Vern, what is this decision mean for admissions professionals like yourself? And how will you and your peers adapt, especially in the short term in the next couple of years?

Vern Granger: Yes, first of all, it's a tough question. No, in all seriousness though, it's something, again, we've been thinking about for a while and you know you made a point about the application and the essay questions and that has been one of the initial reactions that I've heard from a number of institutions: is thinking about the how can we come up with a question that will get at what we're looking at? And, you know, we've also heard from institutions and our institution that UConn is one of those that we are going to be focusing on the current questions that appear on both the Common application and coalition applications. Those are two applications that UConn and many other institutions utilize, and there are some good questions on there. We feel that can get the information that we are looking at. But the reality is that the direct impact on institutions it's only going to be a small handful because they're only a small handful of institutions like UConn and have an admit rate of 50% or below. So, the vast overwhelming majority of institutions will be admitting most of their students who are applying to their institutions, so directly, they're not going to have that impact. Now, we know about somebody who indirect impacts and some of those federal for capital federal programs that many of our institutions participate in and gonna have to figure out what that actually means for our institutions and how the operationalize our work in those. But really, I think this is an opportunity for institutions to really think about what is holistic review, and it's a buzz word that you hear all the time, and you know I bet if I ask, you know, you all in the room what's your definition of holistic review, you probably get different definitions from folks. And so, I think we need to use this as an opportunity to really think about what holistic review means for us. One of the things that- one of the points that was made in the in the decision was about you know the application review and mission, and they're not being that connection. And that's where you got a lot of the gray and it was very, very unfair for some folks. And so I think using this as an opportunity to really connect our application reviews to the missions of our institutions, and again think about how do we communicate what holistic review is to our constituents: to our school counselors, our community based organizations, our parents, students most importantly because that's going to be something that we're going to have to do a better job of really communicating what the holistic review process is. What are the pieces of information that we are considering when we are looking at an application for admissions. We got to rethink how we are training our application readers and again getting them to fully understand what holistic review means to our institutions, and how do we actually practice this. Because again I think that a number of institutions if we say that we utilize all this review, but we have not done as good a job of practicing it and, more importantly, communicating to our groups out there that we have to work with. One of the things again we're just talking about this earlier is you know with that essay, and it's always been something that we and the admissions office value in the application and want to see that because it gives us a lens into the student other than what we see in the academic transcript. But again, it's going to be incumbent on us as institutions to really help students understand what that actually means, because if you think about it,

you know, they're 30-year-olds, 40-year-olds who if I ask you what is your life experience and your background and how does that impact who you are, that you could have difficulty. So, we're going to have to do a better job of helping 17-year-olds, 18-year-olds talk about that and how it actually applies to our application review process. So, I think a lot of the work that we are going to be doing is institutions really focus on process and communication, and I think those are going to be 2 very, very important things for us as institutions moving forward in lieu of these decisions.

Kevin Heaney: So, Vern, I'm going to go off script for a moment. You mentioned essays; so, there's going to it seems to be an increasing importance placed on this essay. There's a lot of support out there helping me 17-year-olds write these essays, not to mention Chat GPT. Any brief thoughts on that?

Vern Granger: You give me some tough stuff. Someone said this is going to be a softball. No, I mean, I think that, you know, Chat GPT is something that we are talking about as institutions and really trying to get a sense of how that's going to impact our application review process. I know a number of institutions, my institution included, you know, are working with our faculty on our campus to, number one, get a better understanding of what it actually is. Because, again, it is so new that there is still a lack of understanding on what it is and, you know, with our understanding our hope is to be able to develop some sort of guidelines, again not going to be required to anything with it, but just guidelines for applicants for counselors to be aware of. And then also, you know, training of our readers to again think about the impact that that has on the application review process.

Kevin Heaney: Thank you. Ishan, I'm going to come back to you. So, in his opinion, on behalf of the court, Chief Justice Robert stated quote, "nothing in this opinion should be construed as prohibiting universities from considering the applicants discussion of how race affected his or her life be it through discrimination inspiration or otherwise" unquote does this open a potential way for applicants to share their racial backgrounds through the application process, and how do you interpret this comment?

Ishan Bhabha: Yeah, no. So, it certainly does. And I think this is an absolute critical part of the opinion. You know, there was obviously the theoretical possibility that the court would have come up with some very extreme ruling almost requiring a redaction of essays. Now that was ridiculous, and frankly from the argument itself I didn't think it was going to go there. But the real question is, you know, what do you do with that language, and I suppose there's some sort of psychological, philosophical analysis about the how the human brain works when you get information and you can use it for one reason, you can't use it for another. You know, I'm not trained in that. And frankly, I'm a much more perhaps boringly so, you know, nuts and bolts, you know, just in the trenches person about how do you operationalize something like that. So, I'd suggest there are three things because I do think that institutions are going to be deluged with information about the race of applicants, that it's not going to be solicited, but it's just going to arrive in the form of essays and personal statements. So here are my three high-level pointers, and I'm only going to send this one more time. The devil really is in the details. And so, it really comes to the specifics of your program, and how your institution works. But here are my three guideposts. Firstly, critical, absolutely critical, is what you are saying publicly about how your admissions procedure works. That is the lowest of low hanging fruit for the SFFA's or the American First Legals or state attorney generals in some states. It is critical that what you say publicly about how your admissions procedure works is not only accurate but is in line with the law. So really scrub that. That's point 1. Point 2, as I said, is what you solicit is your essay question, even from the most skeptical, could it be construed as asking an applicant to identify their race? And so, I had, for example, advise clients recently, in the last couple weeks, if there's some statement about your background or your family heritage, I would take that out this year. You don't need that; it is too risky from my perspective. So, number two is solicit, and number

three: when you actually get the information what do you do with it well here I would suggest it really comes down to training your admissions officers need to have. And as institutions you need to be able to show a deck that was given to them or a document that explains when somebody says, "I walked in the last three years in a Hispanic community center because my parents are from Latin America" for example "and I feel a great affinity". How do you deal with that information? Well, you look at it from the race neutral factors working within a community commitment to an organization for a long time, determination, grit, overcoming adversity, leadership, things that I would suggest have always probably been things that your institution has looked for in applicant, and will continue to be. But again, as a defense lawyer for institutions of higher education, I think about what is the record, not what's in the mind of the admissions person. You know, I don't even know how to analyze that properly. What is on paper, what does the training say and the evaluation document? When someone in admissions is looking at an essay, and they are evaluating that application based on that, I say what actually is on the paper: is there a box that says leadership attributes, and do they write something in that, and what do they write? That's stuff that can be trained. I think it's concrete and I think it creates the record so also your admissions offices - and we can talk about things like legacies and financial aid as well - but they're not working on eggshells and they're not worried every single day, am I about to get sued because of something I'm doing. But it comes out to training, and I think it's the tangible documents that are created, rather than worrying in a more sort of 30 foot level about what's going on in someone's mind.

Kevin Heaney: All right I'm going to turn to two topics now that I think will overlap with our work in advancement, especially for many of us in this room. The first topic being legacy admissions policies and I think we all know that a recent complaint has been filed with the US Department of Education against Harvard College's use of legacy admissions. So, I'm going to ask the entire panel or anyone on the panel who wishes to respond. In addition to this lawsuit there's also been a lot of rolling on Capitol Hill about legislation that would prohibit the use of legacy admissions. I wonder if you could tell us what the current state of legacy admissions policies is and how you would advise institutions who currently have such policies. Vern, you want to take the first stab.

Vern Granger: Yeah. Legacy is something that has been a conversation. It's been a conversation for a number of years for our institutions, and it's a mixed bag. There are some institutions that still utilize legacy as a part of their application review and there are some institutions that have moved away from it. I think we all see that, as you said Kevin, that is going to be the next item of the application review piece that is going to be discussed and litigated and we're already starting to see some states move forward with initiatives, ballad initiative, excuse me, on legislation to prohibit legacy in the admission process. So again, it's something that I think that is out there. It's going to get more attention over the next few years, and it's just something again that we are watching as a part of what are the other impacts that are going to be out there for the application review that our institutions are utilizing.

Alonda Thomas: We don't have a lot of legacy at historically black colleges and universities. They're just thinking holistically for other institutions. Obviously, you got to weigh the pros and the cons when it comes to making a decision like this like. We had mentioned with the letters there are some of your audience that are going to be on the opposite side of where you think your institution should take a stance, and I've heard from some of my colleagues about how they've gotten some angry emails about the public position that the institute had taken. So, when it comes to legacy, how much does that play into the makeup of your classes at that particular institution. Is most of that legacy just generational in terms of, you know, "my father's, father's, father went to this institution, and I want to as well" or is it tied to "I'm going to make a donation so that when my child is ready to come to this institution, you know, we'll have a leg up" and that kind of thing. Those are factors that need to be considered. And

could you survive without that legacy if those donations dry up? I think for most of these institutions they can survive after that and that's why you're seeing the MIT's and the Cal Tech's and the Johns Hopkins taking a step away from it. Because it creates another type of imbalance in terms of another box that somebody gets to check, and typically those are people who are more wealthy. Which again is going to impact how many of these underserved communities that you're going to be able to assist.

Kevin Heaney: I'm going to interject here for a moment, because, we're starting to see, especially at Princeton, we're starting to see that legacy doesn't just mean white applicants, right. So, we're starting to see a generation of up-and-coming alumni of color, donors of color in more significant numbers for children the applicant. So, it's gonna cut both ways.

Ishan Bhabha: You know, I think that's a very, it's a very important point and I think this actually goes to a legal matter. The only thing that surprised about this decision is that, I thought, based on the tenor of the oral argument, that the court was going to say, look I think that the diversity rationale pipeline all of that is absolutely fine, but what the institutions are doing is not narrowly tailored. Because if you heard during the argument there was all this discussion of some sort of mystical oboe player from Iowa, or the legacy, or the squash player. Why was the court asking those questions? It was asking them because they were trying to say, look you say you really care about diversity of the student body, but you have all these other preferences that actually, you know, have a high level of generality. And Obviously I'm speaking in generalities, notwithstanding Kevin's point about diversity amongst legacies, but generally select for upper middle class white kids. So, you're doing all these policy preferences, and then you turn around and say, "Oh our class is not racially divorced enough so now we have to overcorrect". The only thing about the decision that surprised me is it didn't really decide on that basis. Instead, it said, the principles your spousing – diversity, pipeline, all of that - is just not substantial. So, we don't care what you're doing we the principles themselves aren't enough. So, number 1, what I would say is from a legal matter, you have the authority, I think, to make this decision: you want to get rid of legacy or you want to keep legacy. I think as a legal matter, the decision doesn't move the needle on that. That's 1. Number 2, and you'll really forgive me for being a legal nerd here, though, I guess I am. You know, it's interesting. If you see the Harvard case, it's not a case filed in federal court. And that's because you cannot bring a disparate impact claim, i.e., saying that the policy is facially racially neutral, but it has impact. You can't bring that in federal court. So, for your institutions, what does that mean practically? It means that the SFA's of the world are less likely to bring a claim like this and it really has to be in an administrative agency which just lowers the kind of damages and the public perception and all that. The third thing I'd say is, I am very conscious of and frankly very defensive about attempts by the state, by federal government, or anybody else to tell you what your admissions procedures have to be. I see that as a very, very slippery slope, and it may be legacy today and who knows what it's going to be in the future, including ideological litmus tests and all sorts of other things. And so, I think that institutions would be very well served to draw a line, and you have a powerful 1st Amendment academic freedom rights, maybe the question of whether public institutions do is highly litigated, but we can talk about that over a drink later. You have the academic freedom rights to set your own admissions criteria, and so I think the question of legacy is really one that should be driven by institutional priorities, financial considerations, it is not a question implicated by the legal decision here. Nor, in my estimation, should it be.

Kevin Heaney: Alright, one more time before we open it up for questions, so the other area where I think this will obviously overlap with advancement is how this court's decision may indicate race-based scholarships and financially going forward. And I wonder if the panel has any thoughts on that?

Alonda Thomas: Well, I think race-based scholarships probably is going to be one of those areas that does need to have a conversation. It seems like it's going to be an easy area to litigate against if you're having particular scholarships that are specific to an ethnicity or even to a gender. I just had a quick conversation with one of my former colleagues at institution I used to work for, and they were already looking at the language for those scholarships that helped them to get certain you know type of students, even if the even if that was the intentions of the donor. You know, it's one thing with a federal scholarship, you know, I can understand that clearly, but, you know, you have certain donors that have certain things they're interested in getting to and they're going to stop doing anything that's race specific and gender specific.

Ishan Bhabha: So, I would say all this, not all race-based scholarships are equal, and it really depends on the details. And so, I think that pool-and-match-like programs to me are quite a different risk profile than a specific merit based targeted scholarship that is only available to a particular group of individuals based on a racial classification. So, I think that is to some extent the way you need to look at the scholarships. The other thing I would say is you know the federal government is clearly at some point to give new indication of the existing guidance, I'm sure you're away it's decades old and rests very heavily on the admissions framework which is now completely offended by this decision. The final thing I would say is it's also, I think, really important, when you look at things from a legal perspective, to also just think sort of practically one step back, how big a risk is this to the institution? So, by that I mean you may have large programs that have race based scholarships whether thousands of applicants hundreds of applicants, that's likely to attract a lot of attention. If you have some particular scholarship for, you know, "medieval literary criticism and history" the group of applicants is so much smaller. Practically speaking you may just think, look is this a legal risk? Sure, I mean everything in the 21st century is a legal risk, but in reality, it's much less likely to be challenged. And so, I think that's it's important to be flexible as you think about these things, but certainly merit based racial exclusive scholarships is it in this opinion? No. Do I think in the future that's likely to be challenged? Absolutely.

Kevin Heaney: Vern, any other additional thoughts? OK so Brian'll turn to questions from the audience.

Brian Flahaven: Yep, let me see if I can find a microphone that's working here. Is that one working? OK great. So, you answered a number of questions, particularly the legacy admissions and the financial aid questions and scholarship questions. So, if there are other implications or questions around that or follow ups that you want to ask please put them in the conferences IO app, and of course remember can use the QR code to get to it. There is also as a way to look at the questions that have been asked and vote questions up if there are particular questions that you think you'd like to see asked. But going from the top, the first question we had: Is ZIP code recruitment allowable?

Alonda Thomas: I believe that for places they had to do away with affirmative action previously, like California, they have done some type of looking at targeting in that particular way. Going to a particular area, particular county, maybe not necessarily particular high school, in order to make sure that you're engaging with the types of audiences that you want to join your institution.

Vern Granger: Yeah, we've been advised that that is permissible. So, what you're seeing is a number of institutions that are looking to increase their outreach efforts based on the geography of an applicant. And so, you know, the guidance that we've been given by our council at NACAC as well as the general counsel that UConn, is that that is permissible. And we're going to be thinking about our current strategies around that and see if there's any other opportunities to expand on those opportunities.

Ishan Bhabha: So, I agree with all of that but let me just make two points here. The first one is that, and I'm not just trying to increase the work of lawyers even though I suppose theoretically that is what I'm supposed to be doing every day, it is critical that you have your in-house counsel and outside counsel involved in these discussions. Because these questions about which race neutral priorities to use, which not to use, what the outcome will be from using those. And that is absolutely you know the most smokiest of smoking guns for the SFFA's of the world, who are going to want to claim that you picked a whole bunch of facially race neutral things to actually just replicate race, right. So, number one, those discussions should not be taking place without lawyers, really recognizing how institutionally critical those are. That's 1. Number two, I agree. I think as a general matter, particularly if you've used ZIP codes in the past because you want to have geographic diversity, I think that's absolutely fine. But be self-critical. If you're an institution based in New York and you say, look you want to really increase the service we do to the community around us including from Harlem, from the Bronx, or Queens, or you name it, or even maybe New York state. I think that is very defensible. If you say we want to do all of that and, by the way, we also want to increase recruitment from the Texas-Mexico border, suddenly that looks a lot more contrived. Why would you have that Southern geographic priority, especially the year after SFFA. And so, for all the race neutral categories, I think number one recognize how sensitive those discussions are and actually protect them, and number two just keep yourselves honest. You ask to identifying institutional priority behind this: what is it and why is it race neutral. But I agree as a general matter that is OKAY.

Alonda Thomas: If I could just add. I think it's only going to be important if you had a strategy that's been working for you, and you've been able to get a population of students. You might want to lean into those students, and looking at, you know, where they came from. You got, you know, a superstar from a particular high school: are we also recruiting at that school all the time? You know, let's make sure that we don't lose those lines that have been working for us just because of the experience.

Brian Flahaven: So, we've got another question. Ishan, you said that obviously the check box for race is out because of the ruling. But also, one audience member said, "it's my understanding that the federal government will still require institutions to report enrollment by race and ethnicity; is that true? And, if so, do you that race and ethnicity speak be asked after the admissions process for all students?"

Ishan Bhabha: Yeah, so as to whether it's still true or not, you know my history of predicting what's going to happen at the federal government level in almost any area has not been great. So right now, it is definitely true that that's the case, and obviously some institutions also need those things for accreditation bodies as well, including at the state level. So, here's what I would say on that. I think it is fine to- once your students are admitted, you're no longer in the decisional process, and so I think gathering race-based information at that stage is fine. There are situations in which, because you are using the common app- at least as of yesterday, the common app said it's still going to have the check boxes. Just institutions can decide, you know, whether or not to receive that information or how to receive that information. I think that's more sort of a technical logical issue. Ideally for me in the best world, you would get everything but the race information, and once you've made the admissions decisions, then you would inject that additional information into your system. If that's not possible then you need to have a very, very clear fire wall between admissions information and race-based information. And you should have a written policy that makes very clear, if you have a challenge, that this is our policy, and that nobody in admissions is getting access. And if I could just say one more thing and answer a question that wasn't asked but I think it's connected to this. One of the ways in which the admissions adjacent staff can bleed into the admissions staff might be actually just very mundane. So, you have for example, if you slate for example, or use one of these other database programs you might

have all the admissions information about an applicant on one sheet of your database and on the next street you might have all the reach outs from the institution to those applicants. And if those reach out because these applicants were identified as being part of a racial minority group or they were connected through some affinity group, even if the admissions office had never clicked over to that second sheet, they will nonetheless have at their disposal, one click away very strong evidence of the race of the applicant. It's at that level of granularity I think you need to be thinking, because then once you have really looked at your systems you can free your admissions officers to do their work and you can focus on recruiting and yielding, you know, racially diverse applicants. But it's the intersection of the two I think you need to be thoughtful.

Vern Granger: If I can add, just at the granular level at the admissions practitioners. So, what I'm hearing from our members is that on the front end of the application the overall majority are going to be collecting that information on the application. But while we talk about what we are also going to be doing is working with the common application and the coalition, and he mentioned slate. For those of you not familiar, slate is a CRM at many admissions offices used for processes like their application review. Working with all of those groups, they have provided institutions with the ability to suppress that information. So, to the point that Ishan made, the institution will have the ability to suppress that information so that readers and admissions staff are not going to be able to have that information viewable or accessible when they're reviewing that application for admission. So, from a operational standpoint those are the things that we're doing of moving forward on the application read piece. And again, making sure that that information is suppressed when we're actually reading that information to, again, protect our readers and protect the university's picture.

Brian Flahaven: All right, we have another question. It's: what do you recommend we do Today - and today is capitalized - with our existing donor funded scholarships that have race criteria, or do we wait? I'm assuming they mean after lunch by the way which is after this.

Alonda Thomas: I think that now is the time to have those internal conversations to make a decision on that, looking at how much of that pot is those particular scholarships, and who are they attached to, and can I go back to those donors and talk to them and explain to them what's going on with this new decision, and, you know, figuring out whether or not just saying "preferred" will work for them. Instead of it being, you know, mandatory that the person has a particular race involved. I think if you go to preferred so that there's the option for other races and ethnicities to also be considered at least that's a step in the right direction.

Vern Granger: Yeah, I mean my hope is that these conversations are not being talked about today, they were starting to talk being talked about months from now. Because, again, the reality is that this is something that we all saw coming. That it was it was going to happen and, as was mentioned earlier, hoping that those conversations are taking place with your general counsel at your institutions to make sure again that they're meeting your goals that you're looking to do, and that you are also in compliance with the decision. So that's what I would encourage is that you had those conversations earlier. But if you were just starting those conversations now, again the point making sure you're having those in consultation with your general counsel, with your enrollment offices, that your institution, again because want to make sure that everyone is on the same page as far as how you were going to be moving forward with these important decisions.

Ishan Bhabha: You know, I agree with everything that was just said. I guess as I think about it, and again, the devil really is going to be in the details on the way these things are structured, but here are the three

things I would think about as you look at those race culture scholarships. Number one, what is the actual eligibility criteria as it's written right now? And is there a way, as I want to say, to modify that? So, I also do a lot of work in the corporate sphere with DEI programs at big corporations, and sometimes you can change a racially exclusive program for something that, for example, is now eligible to anybody who has supported the advancement of Black and Hispanic, you know, students or business leaders or what have you. That's a sort of small wording change that only a lawyer could really love, but has an enormous thing that comes to the legal vulnerability. So, one is eligibility. Number two is the benefit. How big is this benefit? Is this a massive thing that somebody is going to be very upset about if they are denied, or practically speaking is this a relatively small add-on benefit. And then number three, are there other avenues for somebody, if it is indeed racially exclusive. Which I think is a red flag to be clear, a very big red flag. But if it is racially exclusive could somebody who is not eligible for that get the funding, get the money, get the support somewhere else, either formally because it's pull-and-match or practically because there are other funding opportunities out there. And I think those are the three ways I would look at the race conscious scholarships, and I would try to assess them. And that way you can do a risk analysis, and you can pick your highest risk ones to begin with. Because you have an enormous amount on your plate already, and you can't look at every single source of funding you have. I would analyze it like that, pick your biggest ones, and those are the ones I'd focus on first.

Brian Flahaven: Let's do a really quick last question. One thing is, there was another question that was around the Missouri Attorney General's statement which I think got to student financial aid and scholarships at a much more clear way. I think we touched that earlier. I think that's an area where there is certainly going to be a lot of potential legal risk down the line. But there was a question about, obviously institutions get a lot of funds from the federal government, and particular types of institutions, specifically somebody asked about Hispanic serving institutions, and whether there's any implications for institutions in the funding they get from the federal government?

Ishan Bhabha: So yeah, well I mean I can give a shot at this. This is a very difficult question and it's one that you know higher-ed is facing. Frankly, government contract schools facing exactly the same issue, so we're dealing with in that context too. The short answer is the federal government's going to have to take a position, whether it likes it or not, pretty soon on these kinds of grants, because it's putting institutions in an untenable place where the conditions for a lot of grants or specific funding are "to recruit, to enroll diverse graduate student body, diverse undergraduate student body" so you have that. In very same time, you have Title 6 for private institutions and obviously the equal protection clause. Republicans are saying that's precisely the kind of distinctions you can't draw. So, the Department of Education is going to have to take a stand on that. That's point one. Point two, I think that it is a situation again where really close looking at the eligibility, the terms of grant proposals, the terms of existing grants is really beneficial. I have done this with some of my clients already. I have a client that gets all NIH funding for some of its medical schools. And as we looked at this huge pot of money that came from the NIH, it actually turned out with more than the client thought when we really got into the line-by-line analysis, actually was not racially exclusive. They had certain preferences or certain suggestions, but we could actually make it straight faced argument that we are not making race based, or exclusively race based, determinations for this money. There were other parts that were, and then we said, OKAY we need to go talk to the program officer from this agency that's giving you the grant and figuring out what their role is going to be on this. Because we don't want to refuse the money and they don't want us to refuse the money, and particularly if you're talking about multi-year programs, you have, you know, basic research you can't just turn off. You lose potentially decades of work. So, then you get to engage with the federal government on this. But I think it's difficult and look, it really will come down to the specifics. It won't surprise you to know there's a whole body of case law that exists to analyze situations when two

different federal government directions are in conflict. There are case laws that you can look at, it's not directly on point because obviously this decision really came out ten days ago, but it is a good guidance of how to go about the analysis. And I think it's another situation where a practical approach to, look, where are really big pots of money that we need to be worrying about, plus and then the small stuff which may also attract less attention you'll worry about that later.

Kevin Heaney: All right, one final question for our panel, but before we do, I just want to ask you to join me in thanking this remarkable group. I've also been asked to make a brief public service announcement: so, CASE will continue to provide resources and tools on its affirmative action page that you can find out on the CASE website. If you're not a member of CASE, you can become one at the marketplace, and we encourage you to do so. Finally, please do take a moment to fill out the session evaluation. So, I don't want to end the session on a negative note, and I'm wondering if the panelists have any thoughts on how this decision could be an opportunity in addition to being a challenge.

Vern Granger: I mean I made this point earlier. I think that this provides us and institutions with the opportunity to really be able to articulate why diversity is important, number one. And we need to do that every form possible, and we need to eliminate all barriers that exist in achieving that diversity number one. But I also think it provides an opportunity to be much clearer with all our dividend constituents about what app policy review is, and there is so much confusion about what it is, what it isn't all of those things. I think we can do a lot as institutions, and we can do a better job as admissions offices in being much more transparent about what our processes are. And I think that's going to go a long way in helping to reduce some of the anxiety that our students feel overall about the application process, but specifically how we are looking at applications. So, I think it gives us an opportunity to really be able to focus on process our processes and being much more transparent about the work that we do.

Alonda Thomas: I feel this is a great opportunity, if you're not already having the relationships with your comms offices, to develop those relationships. This is not something that you have to work on alone. It's definitely a time to look across the campus and bring in those stakeholders who, maybe only think of us as the team to promote stuff but now it's time for us to be a part of the actual strategy here, because there's a lot of professional advice that we can give you to help give you guidance so you're not alone.

Ishan Bhabha: You know, what I would say is that I think that the other side of these issues are the rest of private plaintiff litigation groups like SFA, or state attorney's general, or, in some context, the federal government as well. You know, they thrive on the 30,000-foot fear mongering. It's very easy to say well everything is different now; you've got no legitimacy, and they basically will send letters, including like the Missouri Attorney General. But actually, I think when you roll up your sleeves and you get into the nuances of the details of your admissions programs, there is still, as it should always be, thank goodness in America, a real roll in the 1st Amendment Academic Freedom Priorities of institutions. And I work with my clients, there is always an ability to continue to shape your student body classes. But it takes hard work, and I think the other side is banking on the notion that admissions officers and educational leaders more broadly will throw up their hands given all the other priorities. And if you don't do that, I think there is real opportunity here to continue to shape what it would be like.

Kevin Heaney: Thank you, all. Thank you for attending, and please enjoy the rest of the summit.