On Halloween, the Supreme Court heard oral argument in cases brought by Students for Fair Admissions (SFFA) against Harvard and UNC. These cases seem likely to move the Court closer to requiring colorblindness. How would that impact EPA's ability to pursue environmental justice?

Based on comments of the Justices during the arguments in the Harvard and North Carolina cases, observers believe that the Court will sharply cut back on the use of affirmative action by colleges and universities, possibly eliminating diversity entirely as a basis for those programs. This wouldn't impact EPA directly. EPA isn't a college and doesn't regulate with the goal of increasing diversity. But depending on how far the conservative majority goes in its opinions, a color-blindness mandate would impact EPA.

Under current law, if a regulation refers to race in any way, the government must show that the regulation is narrowly tailored to a compelling government interest. This is a very difficult standard to meet. Apart from diversity in the educational context, the Court has only recognized remedying prior intentional discrimination as a compelling interest. For instance, if EPA adopted a rule giving higher priority to waste sites that impact black communities, EPA would need to show that the owners, operators, or local government of the site were motivated by race in choosing that location or failing to take precautions. This has proved very difficult to do in practice.

The more difficult question is posed by a regulation that does not itself refer to race but is partly based on considerations of race. For example, before issuing a regulation, EPA checks to ensure that it won't have a disparate impact on communities of color. As another example, when determining the risk posed by a substance, EPA relies on studies by epidemiologists, and some of those studies use race as a factor in modeling health impacts in different areas. Are these practices likely to remain legal? There is a paper containing a more detailed legal analysis of these issues, but here's a a boiled-down version for non-lawyers:

There would be a certain logic to striking these practices down. If the conservative majority wants to take color blindness to its logical extreme, it could ban any consideration of race at any point in the regulatory process. The question is whether the conservatives are willing to push the logic of colorblindness that far.

We can't be sure until we see the opinions, but there are strong indications that these forms of race consciousness won't be imperiled by the upcoming decisions. In

previous cases, conservative Justices have referred favorably to race neutral rules that were at least partly intended to increase racial diversity. One example was a University of Texas plan that admitted the top tenth of graduates from every high school. The motivation behind the plan was that by admitting more students from poorer school districts, it would increase minority representation. These race-neutral alternatives also figured in the oral arguments last October, and the Justices again seemed to find them acceptable as an alternative.

When the two most recent affirmative action cases are decided, the fate of race conscious college admissions programs will receive the most attention.  But for those whose interest is in regulation, the most relevant aspect of the opinions may be what the Court says about the use of race-neutral programs to achieve racial justice.