The New York Times

Harvard Does Not Discriminate Against Asian-Americans in Admissions, Judge Rules

NATIONAL REVIEW

DONATE THE CORNER

Judge Applies Minimal Scrutiny So Harvard Can Keep Discriminating

Harvard's [selective] Admissions
40,000 "recent" applicants for <2,000 slots

8,000
perfect GPAs

3,400+
perfect SAT math

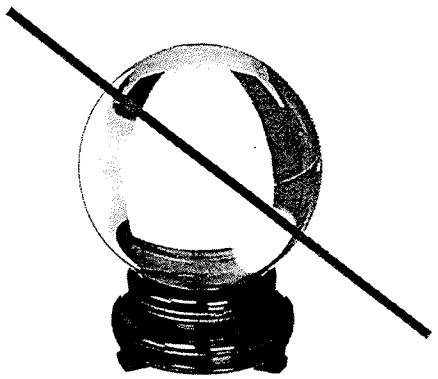
2,700+
perfect SAT verbal

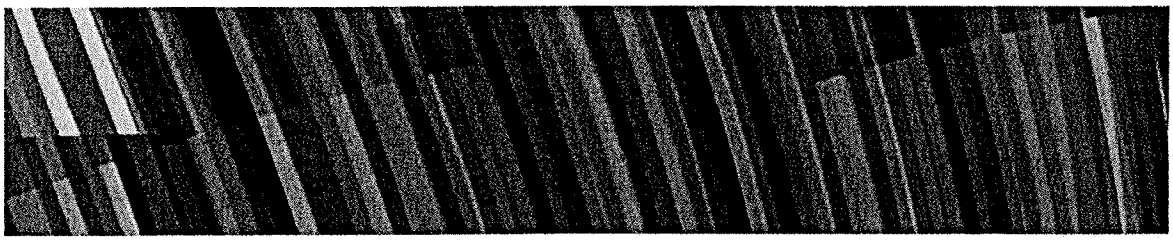
https://www.insidehighered.com/news/2018/06/13/harvard-president-issues-defense-affirmative-action-lawsuit-proceeds

The Plaintiffs' Claims

- ▶ Racial balancing [quotas]
- ▶ Mechanical application of race
- ▶ Failure to pursue alternatives
- ▶ Intentional Discrimination

https://www.acenet.edu/Documents/Harvard-admissions-trial-court-decision_9-30-19.pdf





NACUA NOTES
National Association of College and University Attorneys October 28, 2019 | Vol. 18 No. 1

CRUCIAL CASE SUMMARY

TOPIC:

***Students for Fair Admissions v. President and Fellows of Harvard College:* Major Takeaways from a Federal District Court Opinion Regarding the Consideration of Race in Admissions**

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INTRODUCTION:

On September 30, 2019, the U.S. District Court for Massachusetts rendered a decision in *Students for Fair Admissions v. President and Fellows of Harvard College*[2] in favor of Harvard. SFFA had challenged Harvard's admissions policies and practices as unlawfully discriminatory under Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race and national origin in education.[3] Reaffirming its earlier decision that SFFA had the requisite associational standing to litigate its claims (despite the absence of an individually identified applicant alleging harm[4]), the court addressed and rejected claims that Harvard unlawfully:

- Pursued racial balancing;
- Considered the race of applicants in a mechanical way;
- Failed to pursue viable race-neutral alternatives in lieu of its consideration of race; and
- Engaged in intentional discrimination against Asian American applicants.[5]

The 130-page decision that followed a three-week bench trial is extensive and fact-based, with meticulous attention to a mix of quantitative and qualitative evidence. In its detailed scrutiny of Harvard's admissions policies and practices, the court gave weight to what it determined was

credible testimony of Harvard's fact witnesses. SFFA did not proffer the testimony of any student claiming to have been discriminated against, relying instead on its experts' testimony, reports, and other documents in the record. About 40 pages of the decision are devoted to review and evaluation of competing experts' statistical analyses.

Within a week of the decision, SFFA filed a notice of appeal with the U.S. Court of Appeals for the First Circuit. Therefore, this decision will not be the last word on the policy and practices challenged.

This NACUANOTE will briefly provide an overview of the U.S. Supreme Court decisions governing the consideration of race in admissions to advance diversity interests associated with student diversity, discuss the facts and findings of the *Harvard* decision, and offer key takeaways from the decision along with issues to watch moving forward.

DISCUSSION:

I. Legal Background

Five U.S. Supreme Court decisions spanning nearly four decades set the stage for the decision in this case. In 1978, Justice Powell issued a singular "compromise" opinion in *Regents of the University of California v. Bakke*[6], recognizing conceptually that the educational benefits of diversity could justify the limited consideration of race in admissions. A quarter century later, in companion cases *Grutter v. Bollinger*[7] and *Gratz v. Bollinger*[8], the Court expanded on that concept by establishing a governing analytical framework to guide federal court reviews of discrimination claims in admissions and distinguishing between (favored) individualized holistic review that involved considerations of race among many factors and (disfavored) mechanical consideration of race in admissions. Building on those foundations, the Court in *Fisher v. University of Texas at Austin*[9] and *Fisher v. University of Texas at Austin*[10], expanded on Court precedent with a focus on the requirement of evidence to establish the necessity of any consideration of race in admissions (*Fisher I*), and the kind and quality of evidence sufficient to comply with federal non-discrimination law (*Fisher II*).

The Court in *Grutter* affirmed a process at University of Michigan's law school, similar to Harvard's in the present case, where racial composition of the class was tracked throughout and decision-makers were aware of the race of individuals, but where application reviewers assessed applicants holistically at every step and, in that context, considered race only as one of many factors. In *Fisher I* and *II*, the Court applied relevant precedents to a somewhat different admission process, where the consideration of race applied only to about twenty-five percent of those offered admission, the proportion of the incoming class that had not already been offered admission to UT through the ostensibly neutral – and unchallenged – Texas Top Ten Percent Plan. When conducting holistic review for a quarter of its admittees, UT considered race as one of a number of factors in personal ratings, but only as "a factor, of a factor, of a factor." UT did not track the racial composition of the class, and its ultimate decision-makers were unaware of the race of individuals.

This decision also has been rendered in the context of other federal litigation and OCR investigations of relevance. On the day this decision was rendered, a federal district court in North Carolina denied summary judgment motions of all parties in *Students for Fair Admissions v. University of North Carolina*[11], where the plaintiff claims (and UNC denies) that UNC failed

to articulate diversity goals and objectives with sufficient clarity and precision, unlawfully considered race in admissions, and failed to pursue viable race neutral alternatives. Other cases and OCR investigations that are pending throughout the county involve similar claims associated with financial aid and scholarship programs, law review selection, enrichment programs, and more. Many also include claims of sex discrimination under Title IX.[12]

II. The District Court's Decision[13]

A. Facts

Approximately 35,000 applicants sought admission to Harvard for fall 2019; about 2000 were admitted, and 1600 enrolled. While academic excellence was required, Harvard sought students who would contribute to a "transformative...liberal arts education"[14] and were "exceptional across multiple dimensions"—well beyond "just standardized test scores or high school grades."[15]

Harvard's admission process involved "an overall rating" based on "first reader" academic, extracurricular, and personal ratings of applicants, as well as high school support ratings.[16] (Additional readers also could assign ratings.) Subcommittees then made recommendations, and a 40-member committee ultimately made final admissions decisions.

In addition, non-academic factors "especially beneficial to the Harvard community" that could result in "large tips" in admission included: recruited athletes, legacies, applicants on the dean's list, and children of faculty and staff ("ALDCs").[17] Tips also were assigned to applicants who "offer a diverse perspective or are exceptional in ways that do not lend themselves to quantifiable metrics," i.e., "distinguishing excellences" that could include race and ethnicity, as well as creativity, leadership, geography, and economics.[18] Only in the context of a whole file "overall rating" could race or ethnicity be "a tip or plus factor."[19] Race was "only ever one factor among many used to evaluate an applicant,"[20] and it was never viewed as a "negative attribute."[21]

Harvard's admissions staff tracked the racial and other composition of the applicant pool through "one-pagers" that provided a "snapshot of the projected class and compared it to the prior year," including statistics on applications and application rates by racial or ethnic group (among other factors).[22] The aim of this tracking was to provide "some perspective on whether [Harvard] was admitting a diverse class" and to help "better forecast its overall yield rate."[23]

B. The Court's Ruling

The District Court ruled on four of SFFA's claims, with the following conclusions:

1. Harvard did not engage in racial balancing.

The court found that Harvard treated applicants as individuals, with "every applicant compet[ing] for every seat," through a process of individualized holistic review that continued at every stage of the process, despite Harvard's consideration of "one pagers" that tracked race and ethnicity (among other information) during the process. In affirming the use of the "one pagers," the court stated: "Although a university could run afoul of Title VI's prohibition on quotas even where it stopped short of defining a specific percentage and instead allowed some fluctuation around a

particular number...Harvard's admission policy ha[d] no such target number or specified level of permissible fluctuation." Also, there was "considerable variation" in the percentage of Asian American students admitted from year to year. For these reasons, the court concluded that Harvard's awareness of numbers (with no target numbers "firmly in mind") was, in fact, necessary "to remain compliant" with strict scrutiny standards, "including monitoring...the availability of race-neutral alternatives."[24]

2. Harvard considered race as a non-mechanical plus factor.

While Harvard's consideration of race was an important factor in the admission of many black and Hispanic students, the court concluded that race was part of an "individualized consideration" and was "never... the 'defining feature' of applications."[25] With respect to expert estimates of the "average magnitude of Harvard's race-related tips,"[26] the court concluded: (a) The magnitude of a tip for any applicant could not be "precisely determined" because the consideration of race was "contextual" as part of the "holistic evaluation of each applicant,"[27] *and* (b) The estimated magnitude was "comparable" in "size and effect" to the tips upheld by the Supreme Court in *Grutter* (less % effect) and in *Fisher II* (about the same % effect).[28] The court also recognized that the magnitude of the race tips was "modest," particularly compared to tips for ALDCs.[29]

The court also found that "[e]very student Harvard admits is academically prepared for the educational challenges offered at Harvard....[M]ost Harvard students from every racial group have a roughly similar level of academic potential, although the average SAT scores and high school grades of admitted applicants from each racial group differ significantly."[30]

3. There were no adequate race-neutral alternatives.

The court examined the viability of various neutral alternatives proposed by SFFA, considering their benefits and costs, as well as Harvard's standards and diversity-related goals. In light of Harvard's existing race-neutral efforts (outreach, recruitment, and more), and because the court found that they would have no meaningful impact on diversity, except to significantly reduce the admission of black and Hispanic students, and/or to diminish Harvard's excellence and student experience, the court rejected the following alternatives:[31]

- Eliminating early action decisions in admissions (which was tried for three years, with adverse racial diversity outcomes in a competitive recruitment context);[32]
- Eliminating tips in favor of recruited athletes, legacies, applicants on the dean's or director's interest list, and children of faculty and staff (which would diminish athletic and faculty competitiveness, alumni and donor relations, and associated student experience);[33]
- Augmenting recruitment and financial aid (noting that existing robust programs already "very nearly" achieved "maximum returns in increased socioeconomic and racial diversity");[34]
- Admitting more transfer students (a group reflected as "on average, less diverse and less qualified," and for whom Harvard lacked sufficient campus housing);[35]
- Eliminating consideration of standardized test scores (which would reduce "academic qualifications...at least as measured by the criteria Harvard presently uses");[36]
- Pursuing place-based quotas ("Harvard is far too selective and high schools are far too numerous [for this] to be "even close to viable," and such percentage plans are of "questionable legality");[37] and

- Providing a "more significant tip for economically disadvantaged students (which would "sacrifice the academic strength of its class").[38]

Carrying forward a point from *Grutter,* the court observed that Harvard was not obligated to sacrifice its character of academic excellence in assessing the viability of race-neutral alternatives.[39]

4. Harvard didn't intentionally discriminate.

Addressing SFFA's claim that Harvard should admit Asian American applicants at a "higher rate than" white applicants,[40] the court found that there was "no evidence of any racial animus whatsoever;" no "evidence that any particular admissions decision was negatively affected by Asian American identity;" and no evidence of prohibited intentional discrimination under court precedent. The court found no pattern ... of stereotyping of any kind.[41] It found the testimony of admissions officers to be "consistent, unambiguous, and convincing" that there was no discrimination against Asian American applicants in the admissions process, including with respect to personal ratings.[42] Moreover, SFFA failed to produce a "single Asian American applicant who was overtly discriminated against or who was better qualified than an admitted white applicant...."[43]

The court found competing statistical models and expert opinions related to this claim "inconclusive," while recognizing that statistics alone address the "what" but not the "why" and don't tell the whole story. The court observed that any bias in personal ratings, which contributed to "slight" statistical differences in personal ratings of white and Asian applicants, could have come, in part, from the strength or wording of the applicants' high school recommendations—which neither the court nor Harvard could control.

C. Major Takeaways and Issues to Watch

- **The court's decision follows four decades of admissions precedent** affirming that the educational benefits of diversity to all students are "compelling" enough to support limited consideration of race and ethnicity in admissions upon a showing of "narrowly tailored" policy design and implementation. Amplifying long-recognized educational benefits associated with student diversity, the court recognized Harvard's authentic institution-specific interests: student diversity's impact on faculty perspectives, curriculum, and research; and "immersion in a diverse community" as a method of teaching students to "engage across differences."[44]

- **The court's decision illustrates the fact-intensive, institution-specific investments in policy design and implementation needed to satisfy strict scrutiny standards over time** (i.e., specific desirable educational outcomes sought and whether, why, and how race and ethnicity of individuals are considered). Although Harvard's policies and practices were highly context-specific, underlying requirements and issues that surfaced in the court's decision merit attention more broadly. This is particularly true regarding longstanding operational and evidentiary elements (e.g., the establishment of and action by committees addressing key issues like race-neutral alternatives) that are critical regarding any postsecondary institution's race-conscious policy development and implementation.

The court also "emphatically repeat[ed] what the Supreme Court said in *Fisher II*,"—that Harvard must "continue to use [its valuable] data to scrutinize the fairness of its admissions program" and to make "refinement[s]" in light of changing conditions.[45]

- **The decision depended substantially on the careful design and authenticity of Harvard's individualized holistic review policy—and its fidelity to policy aims in practice.** While recognizing on several occasions that Harvard's admissions process was not perfect, the court pointed to key features of the policy and its effects to conclude that the policy satisfied strict scrutiny standards. The court observed that applicants of *all* races received individualized, whole file review and race was flexibly considered in that context. The court also observed: "[i]t is vital that...racial minorities be able to discuss their racial identities in their applications[, recognizing that] race can profoundly influence applicants' sense of self and outward perspective [and applicants have] the right to advocate the value of their unique background, heritage, and perspective...."[46] The court further recognized that a new written policy in 2018 asserting that race was to be considered only in assigning the "overall rating" of candidates (and specifically not in profile ratings) was followed in practice "in more recent years"—a conclusion based on the "uniform" testimony by admissions officials that they had adhered to that policy prior to its issuance.

- **The court's extensive analysis of plaintiff's proposed race-neutral alternatives corresponds to the Supreme Court's analysis of *Fisher II*, which involved an assessment of all relevant *enrollment policies*, while marking consideration of a broader array of neutral alternatives.** The court's review of the parties' evidence about the viability of race-neutral alternatives to Harvard's consideration of race in admissions reflects the most extensive treatment of the issue by any federal court on record. That analysis follows the Supreme Court's consideration of race-neutral efforts undertaken by the University of Texas in *Fisher II*, where UT's extensive investments in and expansion of outreach, recruitment, and aid efforts helped shape the Court's decision about its challenged admissions policy in favor of the university. With a corresponding baseline established in this case, the district court fully analyzed each of the proffered approaches pressed by SFFA, ultimately rejecting SFFA's proposals due to their adverse effect on other mission-related interests and/or lack of feasibility (including cost). Coupled with similar claims in the pending *SFFA v. UNC* litigation, this area of focus can be expected to generate more attention in cases to come.

CONCLUSION:

If the record before the federal district court tells us anything, it is that careful attention to details regarding institution-specific facts and evidence is essential for success under a federal strict scrutiny review—and that the scope of that required evidence is multi-faceted and must be tied to factors like the following:

- mission-related goals and objectives associated with the benefits of student diversity;
- the necessity of any consideration of race in admissions (as a matter of process and substantive decision-making over time);
- the careful policy design and integration of race as an element of individualized holistic review that involves the intersection of many admissions factors of importance to an institution; and

- periodic review and data-informed evaluation of policies and practices over time that document judgments that address issues presented under prevailing non-discrimination standards.

Institutions are well advised, on an ongoing basis, to systematically collect, document, and evaluate evidence as a basis for any race-conscious enrollment program design and practice, as well as to evaluate and document impacts from race-neutral strategies, when utilized.

END NOTES:

[1] Mr. Coleman is a managing partner of EducationCounsel; he served as Deputy Assistant Secretary for Civil Rights in the U.S. Department of Education during the Clinton Administration. Ms. Keith is a partner at EducationCounsel; she served as Vice President, General Counsel and University Secretary at the University of Florida and Senior Counsel at Massachusetts Institute of Technology. EducationCounsel is an affiliate of Nelson Mullins Riley & Scarborough, LLP. The authors are grateful for the insights of Alexandra Schimmer, General Counsel of Denison University, whose insights helped inform the development of this resource.

[2] *Students for Fair Admissions v. Harvard Corp.*, No. 14-cv-14176 (D. Mass. Sept. 30, 2019).

[3] The court applied legal principles that the U.S. Supreme Court had applied previously to public institutions under the Equal Protection Clause of the Constitution's Fourteenth Amendment. Those principles extend through Title VI to federally funded public and private institutions alike, in line with federal precedent. *See generally* Jamie Lewis Keith, "Reaping What We Sow: How to Realize the Educational Benefits of a Diverse and Inclusive Student Body" (NACUA April 2019 CLE Workshop); Jamie Lewis Keith, "Pursuit of Student Body Diversity is Doable, But Do It Right!" (NACUA April 2019 CLE Workshop).

[4] The plaintiff in this case, Students for Fair Admission, never identified or named any injured individual Asian American applicant. That omission appeared to shape the court's conclusions on several points outlined below.

[5] The court earlier dismissed two of SFFA's original six claims—that Harvard did not use race "only to fill the last few places" and that any "use of race as a factor in admissions" was unlawful. *Students for Fair Admissions*, No. 14-cv-14176, at 5.

[6] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[7] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[8] *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[9] *Fisher v. University of Texas at Austin*, 570 U.S. —, 133 S.Ct. 2411 (2013) (*Fisher I*).

[10] *Fisher v. University of Texas at Austin*, 579 U.S.—, 135 S.Ct. 2198 (2016) (*Fisher II*).

[11] *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14CV954 (M.D. N.C. Sept. 30, 2019).

[12] Institutions that are prohibited by state law or regulation from considering race in admissions should not be affected by the Harvard litigation.

[13] Segments of this analysis are derived, with permission, from "Takeaways from the District Court Decision in *Students for Fair Admissions v. Harvard*: A Preliminary Analysis" published on October 4, 2019 by the College Board's Access and Diversity Collaborative. For more information, you may visit https://professionals.collegeboard.org/higher-ed/access-and-diversity-collaborative.

[14] *Students for Fair Admissions*, No. 14-cv-14176, at 7.

[15] *Id.* at 9. The court recognized that "Harvard cannot admit every applicant with exceptional academic credentials," where among its applicant pool, 8000 applicants had perfect GPAs, 2700 applicants had perfect verbal SAT scores, and 3400 applicants had perfect math SAT scores. *Id.*

[16] *Id.* at 18.

[17] *Id.* at 15, n. 15. ALDCs were admitted at substantially higher rates than all other applicants.

[18] *Id.* at 21-22.

[19] The personal rating associated with interviews included many qualities, but the court found that it did not include race. Most applicants received alumni interviews in which personal ratings were assigned, but unlike admissions staff, alumni did not have access to applicants' complete files. *Id.* at 13-14. The court accepted testimony that Harvard did not use race in assigning personal ratings. While Harvard reflected that policy in writing only during the trial in 2018, the court found that "procedures for [prior] classes...d[id] not differ in material respects," based on the "uniform" testimony of admissions officers about this practice "in more recent years." *Id.* at 20-21, n. 20, 29-30.

[20] *Id.* at 29.

[21] *Id.* at 30.

[22] *Id.* at 27.

[23] *Id.* at 29.

[24] *See also Grutter v. Bollinger,* 539 U.S. 306, 336 (2003) ("'Some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."). *But see id.* at 392 (Kennedy, J., dissenting) (daily reports tracking applicants' race and ethnicity designed to inform judgments about the compositional diversity of the incoming class provided insufficient safeguards in late stages of the decision-making process that would assure individualized applicant review without race serving as the predominant factor in the decision).

[25] *Id.* at 117

[26] *Id.*

[27] *Id*; *see also Fisher v. University of Texas at Austin* (*Fisher II*), 579 U.S. —, 135 S.Ct. 2198 (2016).

[28] *Students for Fair Admissions*, 14-cv-14176, at 117-18.

[29] *Id.* at 119. Tips for ALDCs were greater than tips for racial identity. *Id.* at 118-19. The court also recognized that tips for ALDCs, "like so many facets of...American life, disproportionately benefit individuals in the majority and more affluent group." *Id.* at 84, n. 52. That comparison was not determinative but informed the court's conclusion that race was not unduly weighed.

[30] *Id.* at 119. The court concluded separately that standardized tests were "imperfect measures" that could be a "useful metric" when considered with other background factors associated with an applicant. *Id.* at 88-89.

[31] *Id.* at 120-21.

[32] *Id.* at 85.

[33] *Id.* at 86.

[34] *Id.* at 87.

[35] *Id.* at 88.

[36] *Id.*

[37] *Id.* at 89, 121-22 The question of whether ostensibly neutral strategies are, in fact, neutral in legal terms is a highly fact-based determination, and it is one on which U.S. Supreme Court Justices have focused with respect to percentage plans. *See, e.g., Fisher v. Univ. of Texas at* Austin, 579 U.S. __, 135 S.Ct. 2198 (2016) (*Fisher II*) (The Texas Top Ten Percent Plan "cannot be understood apart from its basic purpose, which is to boost minority enrollment.) *See generally* Coleman, Keith, and Webb, *The Playbook:* Understanding the Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals (College Board and EducationCounsel, 2d ed., 2019) [in press] (cutlining relevant federal legal rules, social science research, and illustrative models associated with numerous "plays" of neutral strategies and criteria that should be considered as part of any assessment of compliance with strict scrutiny requirements).

[38] *Students for Fair Admissions*, 14-cv-14176 at 122.

[39] *Id.*

[40] *Id.* at 123. According to the court, SFFA did not claim that Harvard was excluding Asian Americans. *Id.*

[41] *Id.* at 47.

[42] *Id.* at 125-26. Given that Asian Americans account for 6% of the population in America but comprised nearly a quarter of Harvard's class, the court found it "reasonable for Harvard to determine that students from other minority backgrounds are more likely to offer perspectives that are less abundant in its classes and to therefore primarily offer race-based tips to those students." *Id.* at 126.

[43] *Id.*

[44] *Id.* at 106-07. Harvard's diversity interests were expressed in institutional mission statements; faculty, student, alumni, and admissions staff testimony; and more.

[45] *Id.* at 128 (quoting *Fisher II*).

[46] *Id.* at 111.

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