Harvard College's Affirmative Action Admissions Plan Upheld in Recent Decision: Key Takeaways for Colleges & Universities

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EXECUTIVE SUMMARY

On September 30, 2019, the District Court for the District of Massachusetts issued its long-awaited opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, __ F. Supp. 3d. __, 2019 WL 4786210, No. 14-cv.14176-ADB (D. Mass. Sept. 30, 2019), upholding the race-conscious admissions program used by Harvard College against a challenge brought by Students for Fair Admissions (SFFA) which alleged that Asian American students were discriminated against by Harvard on account of their race.

The district court's 130-page opinion carefully and thoughtfully reviews the voluminous evidence presented by the parties over three weeks of trial and concludes that while "not perfect," Harvard's admissions program meets the strict scrutiny standard articulated by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), as refined and more recently applied in *Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*) and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*).

Central to the court's decision, and therefore, among the most important takeaways from this opinion are:

- The depth and breadth of evidence Harvard was able to marshal to support its race-conscious admissions program.
- The consistent testimony Harvard put forward from its admissions officers and others evidencing a lack of intentional discrimination based on race in the admissions process.
- SFFA's failure to present a single Asian American applicant who alleged actual harm from Harvard's admissions program.
- Expert statistical analysis, while important, was insufficient by itself, to show an over-reliance on race by Harvard.

Colleges and universities that employ race-conscious admissions programs should pay close attention to the evidence garnered by Harvard in supporting its program and consider whether they would be in a position to put forward similar evidence should their own admissions programs be challenged. In combination with the ongoing *Varsity Blues* investigation, all colleges and universities should consider a review of their admissions programs to ensure that all "preferences" or special considerations for particular groups of applicants are well thought out and defensible based on the institution's particular mission, and that personnel responsible for admissions are well trained.

It is also important to know that the district court's opinion is certainly not the last word in this matter. SFFA filed a notice of appeal on October 4, 2019, meaning that the United States Court of Appeals for the First Circuit will hear the case and issue an opinion, perhaps in late 2020. Also, SFFA has a suit pending against the University of North Carolina Chapel Hill, *Students for Fair Admissions v. University of North Carolina*, No. 1:14CV954 (M.D.N.C.), in which cross motions for summary judgment were denied on September 30, 2019, meaning that absent a settlement (which seems unlikely) that case will soon be set for trial.

DISTRICT COURT'S DECISION

In 2014, SFFA brought suit against Harvard alleging that its admissions program intentionally discriminated against Asian American students. SFFA's complaint alleged that Harvard violated Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, by, among other things, operating a quota system for Asian American students. SFFA supported its allegations with data showing that the average standardized test scores for admitted Asian American students were higher than for any other racial or ethnic group at Harvard. By the time of trial, four claims remained against Harvard, specifically, that Harvard:

- Engaged in intentional discrimination.
- Used racial balancing.
- Failed to use race as merely a "plus" factor.
- Used race where there were available and workable race-neutral alternatives.

Findings of Fact

The district court found that the evidence at trial was "clear" on the benefits of a diverse student body at Harvard, concluding that at Harvard diversity provides "a more robust academic environment with a greater depth and breadth of learning," which "encourages learning outside the classroom, and creates a richer sense of community." Slip Op at 7. Harvard demonstrated its interest in diversity through the establishment of the Committee to Study the Importance of Student Body Diversity in 2015, which was chaired by the Dean of Harvard College. This Committee, known as the Khurana Committee, "reached the credible and well-reasoned conclusion that the benefits of diversity at Harvard are 'real and profound.'" *Id.* at 8. The Khurana Committee, in its own words, "emphatically embrace[d] and reaffirm[ed] the University's long-held view that student body diversity—including racial diversity—is essential to [its] pedagogical objectives and institutional mission." *Id.* The Faculty of Arts and Sciences at Harvard voted to adopt the report in 2016. *Id.* at 40. Indeed, SFFA did not dispute the importance of diversity in education, but instead "argue[d] that Harvard's emphasis on racial diversity is too narrow." *Id.* at 7.

The real dispute at trial was not about the educational benefits of diverse student enrollments (that is, Harvard's compelling interest in the use of race), but rather about how Harvard used race in its admissions process (that is, whether Harvard's use of race was narrowly tailored). The district court summed up Harvard's use of race in the admissions process as follows:

> Harvard does not have a quota for students from any racial group, but it tracks how each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity that will provide its students with the richest possible experience. It monitors the racial distribution of admitted students in part to ensure that it is admitting a racially diverse class that will not be overenrolled based on historic matriculation rates which vary by racial group. Although racial identity may be considered by admissions officers when they are assigning an applicant's overall rating, including when an applicant discloses their race but does not otherwise discuss it in their application, race has no specified value in the admissions process and is never viewed as a negative attribute.

Slip Op. at 30. In providing this summary of Harvard's use of race at the relative start of its factual findings, the district court largely tipped its hand as to the legal outcome of the case.

In addition to the work of the Khurana Committee, Harvard also presented as evidence the work of another largely faculty committee, the Committee to Study Race Neutral Alternatives in Harvard College Admissions which was chaired by Michael Smith, Dean of the Faculty of Arts and Sciences at Harvard. This Committee became known as the Smith Committee. The Smith Committee met seven times and worked with the attorneys who were representing Harvard in the case and issued a report that was drafted by the attorneys, based on expert analysis from the case. The Smith Committee "concluded that no workable race-neutral admissions practices could, at that time, promote Harvard's diversity-related educational objectives while also maintaining the standards of excellence that Harvard seeks in its student body through its whole-person, race-conscious admissions program." Slip Op. at 41. It recommended that Harvard review these findings in five years. *Id.*

In addition to findings from these faculty committees, Harvard provided testimony from several admissions officers and the district court found these witnesses to be credible, Slip Op. at 11, including

when they testified that they had never witnessed any discrimination against Asian Americans within the admissions process. *Id.* at 17. The district court noted that admissions officers receive annual training from Harvard's general counsel on the permissible use of race in the admissions process. *Id.* And as of 2018, the admissions office provided admissions officers with written guidance stating that they "should not take an applicant's race or ethnicity into account in making any of the ratings other than the Overall rating" and that for the overall rating "the consideration of race or ethnicity may be considered only as one factor among many." *Id.* The court noted that "Harvard perhaps should have instituted an explicit written policy stating which ratings could take race into account before 2018, but that error has now been remedied." *Id.* at 45.

In support of its discrimination claims, SFFA focused on an internal report that had been prepared by Harvard in response to a 2014 magazine article. The magazine article had suggested that Harvard used a quota for Asian American students. In response, a Harvard Dean had asked Harvard's Office of Institutional Research (OIR) to evaluate that claim, including by the use of existing statistical evidence. OIR prepared some "rough" regression models that could be viewed as reflecting that Asian Americans admitted to Harvard had higher academic metrics than other racial groups and that absent any consideration of race, many more Asian Americans would be admitted to Harvard. Slip. Op. at 34. SFFA attempted to argue at trial that Harvard's failure to take action based on this report showed that it was intentionally discriminating against Asian Americans in the admissions process. But the district court instead concluded that the OIR report was much less comprehensive than the expert analyses that were provided by both sides in the trial and that Harvard administrators' conclusions that the OIR report was preliminary and flawed and therefore did not merit follow up, was only "weak" evidence of bias against Asian Americans. *Id.* at 35, 38

In contrast to the OIR report, the district court examined in considerable detail the statistical and econometric models presented by the parties through expert witnesses noting it was "perhaps the most important evidence in reaching a resolution of this case, given SFFA's heavy reliance on the data to make out its claims." *Id.* at 50. Harvard's statistical expert was Professor David Card, from the University of California at Berkeley, while SFFA relied on Professor Peter Arcidiacono from Duke University. The court found both experts to be very well-qualified. *Id.* The experts based their analyses on data produced by Harvard in the litigation, including "applicant-by-applicant admissions data for more than 150,000 domestic applicants" to Harvard's classes over five years and aggregate information for 17 years' worth of classes. *Id.* at 51-52.

In some respects, the court credited the analysis of SFFA's expert, but for the most part, the court credited the analysis performed by Harvard's expert, Professor Card. Slip Op. at 75.Also, the court noted that while "logistic regression models are seemingly the best available econometric tool, they cannot capture all of the factors that Harvard considers and can, therefore, account for only part of the variation in admissions decisions, or other modeled outcomes." *Id.* at 63. Along those lines, even while the court found, consistent with SFFA's expert's conclusion that "the data demonstrates a statistically significant and negative relationship between Asian American identity and the personal rating assigned by Harvard admissions officers," it discounted that finding in part because "Harvard's witnesses credibly testified that they did not use race in assigning personal ratings . . . and did not observe any improper discrimination in the admissions process." *Id.* at 69. According to the testimony at trial, the "personal" rating component used by Harvard admissions officers assessed qualities including "integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity or grit."

The court also noted the possibility that Asian American applicants to Harvard could have been affected by bias that occurred in their high schools, stating "[i]t is possible that Asian American applicants to Harvard are being disadvantaged by biases in their high schools that affect their college applications. Admissions officers have no easy mechanism to measure or correct for these biases, except to carefully review individual applicants in a holistic way and to recognize and consider

applicants' accounts of how their racial identities have shaped their pre-college experiences." *Id.* at 70 n. 48.

The court also considered the evidence presented by Harvard showing that it had considered race-neutral alternatives and found that Harvard, through the Smith Committee and expert testimony, "convincingly establish[ed] that no workable race-neutral alternatives will currently permit Harvard to achieve the level of racial diversity it has credibly found necessary for its education mission." Slip Op at 83. Among the race-neutral alternatives considered by Harvard were the following:

- Eliminating early action admissions.
- Eliminating "tips" or preferences for athletes, and children of alumni and staff.
- Eliminating consideration of standardized test scores.
- Expanding recruiting and partnership efforts.
- Expanding preferences for economically disadvantaged students.

Id. at 85. The court also rejected the race-neutral plan proffered by SFFA's expert, Richard Kahlenberg, which combined several of the race-neutral alternatives with the elimination of preferences for athletes, children of alumni and children of faculty and staff to assertedly achieve the same levels of racial diversity Harvard currently enjoys. The court found that Kahlenberg's models would come at a "cost" to Harvard of significant (53 to 71 points) declines in average SAT scores, and moreover, would not result in the same representation of African American students at Harvard. *Id.* at 91.

Conclusions of Law

Given the court's findings of fact, the court's conclusions of law were no surprise. After a discussion of Supreme Court case law starting with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the court summarized three "controlling principles" from *Fisher II* as follows:

> First . . . Strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose.
>
> Second . . . The decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper. A university cannot impose a fixed quota or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin. Once, however, a university gives a reasoned, principled explanation for its decision, deference must be given to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.
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> Third . . . No deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. . . . Though narrow tailoring does not require exhaustion of every conceivable race-neutral alternative . . . it does impose on the university the ultimate burden of demonstrating that race-neutral alternatives that are both available and workable do not suffice.

Slip Op. at 101, quoting *Fisher II*, 136 S. Ct. at 2208 (citations and modifying punctuation omitted by district court).

The court noted that Title VI of the Civil Rights Act, which applies to Harvard due to its receipt of federal funds, adopts the tests encompassed by the Equal Protection Clause of the Fourteenth

Amendment for determining claims of intentional discrimination. Slip Op. at 103. The court rejected Harvard's argument that its admissions policy was facially neutral because it did not prefer one race over another, finding that a policy that considers race must be subject to strict scrutiny.

The court then concluded, based on its findings of fact, that Harvard had shown that its "interest in student body diversity is substantial and compelling." Slip Op. at 106. It found that Harvard's goals had similar precision to those found "concrete and precise" by the Supreme Court in *Fisher II*. *Id*. at 107 (citing *Fisher II*, 136 S. Ct. at 221).

The court further concluded that Harvard had shown that its use of race was narrowly tailored to its compelling interest. The court noted that "individualized consideration in the context of a race-conscious admissions program is paramount." Slip Op. at 108 (citing *Grutter*, 539 U.S. at 334) (additional citations omitted). The court found that Harvard used race in a "flexible, nonmechanical way" such that it was only a "'plus' factor in the context of individualized consideration of each and every applicant." Slip Op. at 108 (quoting *Grutter*, 539 U.S. at 334).

Additionally, the court went a step further and considered whether "Harvard's admissions program unduly burdens Asian American applicants." Slip Op. at 109. The court found that while its preferred expert analysis had found that Asian Americans had a statistically smaller chance of acceptance than similarly situated to white students, this difference was not statistically significant. *Id*. Also, the court was unable to identify "any individual applicant whose admissions decision was affected" and found that Asian Americans were not burdened significantly more than white applicants by Harvard's race-conscious policies. *Id*. at 111. Moreover, the court found it "likely" that eliminating the consideration of race would "significantly disadvantage at least some Asian American applicants" who had testified as *amici* at trial and had explained that their race or ethnicity was a critical aspect of their life experiences and application to Harvard. *Id*.

In conclusion, the court noted:

> Notwithstanding the fact that Harvard's admissions program survives strict scrutiny, it is not perfect. The process would likely benefit from conducting implicit bias trainings for admissions officers, maintaining clear guidelines on the use of race in the admissions process, which were developed during this litigation, and monitoring and making admissions officers aware of any significant race-related statistical disparities in the rating process. That being said, the Court will not dismantle a very fine admissions program that passes constitutional muster, solely because it could do better. There is always the specter of perfection, but strict scrutiny does not require it and a few identified imperfections, after years of litigating and sifting through applications and metrics, do not alone require a finding that Harvard's admission program is not narrowly tailored.

Slip Op. at 127-28.

ANALYSIS

As noted above, Harvard prevailed in the district court only after marshaling an extensive factual and expert record supporting its race-conscious admissions policy. Such a record, which includes work by faculty committees, cannot be developed only after litigation is brought, but must be developed beforehand, as an institution defines its policy, states as a matter of its educational mission why it seeks the benefits of a racially diverse student body, and then supports with data why race-neutral means will not suffice for that institution to meet its educational goals. Harvard, furthermore, was required to produce in the litigation voluminous admissions data, including files on individual applicants. Harvard also benefitted in this case from the fact that SFFA was unable to come forward with any

particular student who alleged, no less proved, harm based on the application of Harvard's race-conscious policy.

Accordingly, institutions that seek to use race as one factor in a holistic admissions process should consider the record that they would be able to put forward should their program be challenged. Also, strict scrutiny requires periodic review of programs to ensure that race continues to be necessary to be used as a factor, so this is not an area that can be "done" once and left alone. The Harvard court furthermore emphasized the importance of training of admissions personnel and attention to internal statistical evidence an institution may have at hand that may show that race has become more than a "plus" factor.

Finally, this is not the last word on the Harvard case. As noted above, the Court of Appeals for the First Circuit Court will issue a decision on this case, likely in late 2020. Meanwhile, absent some sort of resolution, the University of North Carolina and SFFA should be trying their case in the Middle District of North Carolina sometime in the coming year. And the United States Supreme Court has shown a high degree of interest in affirmative action cases in higher education since the *Grutter* and *Gratz* cases. The next time it accepts such a case for review, whether it is the Harvard case, the North Carolina case, or some other case, the Supreme Court will have a different set of Justices than that which decided *Fisher I* and *Fisher II*, and most importantly, will be missing Justice Anthony Kennedy the author of *Fisher II,* who has since been replaced by Justice Brett Kavanaugh. Accordingly, this is an area that continues to develop and needs to be watched carefully.

Although every college and university has its unique circumstances and challenges around the admissions process, the issues brought forward in this case present themselves in many higher education institutions. If you have questions or need assistance with reviewing student admissions plans, especially race-conscious ones, do not hesitate to contact Audrey Anderson.

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