Appeals Court upholds Harvard's discrimination against Asian-Americans as justified by diversity goals

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This case likely will be accepted for review by the Supreme Court, and in my prediction, will finally end racial discrimination in admissions in the name of diversity.

Harvard discriminates in admissions, that is beyond doubt. So do many other elite colleges and universities.

That's illegal, right? Kinda, sorta, but not if you discriminate against certain groups to benefit other groups and couch it in Supreme-Court-approved verbiage about wanting to provide a diverse educational environment.

As we explained in an **earlier post**:

Harvard is far from alone. Study after study have shown that Asian students need to outperform other students, particularly other non-white minorities, on standardized tests and grades in order to obtain admission.

This is achieved through the use of "soft" factors in admissions decisions similar to those used to cap Jewish enrollment starting in the 1920s. Harvard pioneered the way in limiting Jewish enrollment much as it has pioneered the way in capping Asian enrollment.

The use of these soft factors has been boosted by U.S. Supreme Court **decisions**upholding discrimination in the service of diversity. The argument is that diversity adds to the educational experience, so some discrimination to achieve that supposed educational end is permitted, as long as it's not too blatant….

In the past 30 or so years, Asian students have been sacrificed by elite universities at this altar of diversity, and the US Supreme Court has sanctioned this racial discrimination. Shameful.

At Harvard, a group called Students for Fair Admissions, Inc. ("SFFA"), sued for discrimination against Asian Americans.

We covered the lawsuit since it's inception in 2015, through the trial court decision favoring Harvard, and onto the appeal in which the Trump administration supported the Asian American students:

The First Circuit Court of Appeals just issued an **Opinion** by a two-judge panel affirming the District Court ruling in favor of Harvard. (A third judge, Juan Torruella, heard oral argument and participated in deliberations, but **died** on October 28, 2020, before the Opinion was issued). The

104-page Opinion catalogs the extensive infrastructure Harvard has developed to justify discrimination as part of a diversity goal — it's truly mind-boggling.

Once again, the discriminatory effect on Asian-American students was not disputed, but the motive and method were deemed lawful:

SFFA asserts that Harvard fails to meet the Supreme Court's standards for the use of race in admissions which are asserted to be justified by diversity in these ways: (1) it engages in racial balancing of its undergraduate class; (2) it impermissibly uses race as more than a "plus" factor in admissions decisions; (3) it considers race in its process despite the existence of workable race-neutral alternatives; and (4) it intentionally discriminates against Asian American applicants to Harvard College. SFFA seeks a declaratory judgment, injunctive relief, attorneys' fees, and costs. The district court denied Harvard's motion to dismiss SFFA's suit for lack of Article III standing. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. ("SFFA I"), 261 F. Supp. 3d 99, 111 (D. Mass. 2017).

After a fifteen-day bench trial at which thirty witnesses testified, the district court issued a 130-page opinion with findings of fact and conclusions of law. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. ("SFFA II"), 397 F. Supp. 3d 126, 132 (D. Mass. 2019). It made numerous factual findings, including as to competing expert witness testimony and credibility determinations about the testimony of witnesses. See id. at 158-83. The district court found that Harvard had met its burden of showing its admissions process did not violate Title VI. See id. at 197, 199, 201, 204. It entered judgment for Harvard on all counts. See id.

After careful review of the record, we hold that SFFA has associational standing to bring its claims and that under governing Supreme Court law Harvard's race-conscious admissions program does not violate Title VI.2

There was no doubt that Harvard takes race into consideration in admissions:

Harvard's use of tips that take race into account is the focus of many of SFFA's claims. We consider how and when Harvard claims to consider race. It admits that race can be considered during Harvard's "first read" of application materials only when assigning an applicant's overall rating. It also admits that an applicant's race can be considered in both subcommittee and full committee meetings. Harvard denies that race is considered in assigning an applicant's personal rating during the "first read." We describe the background against which Harvard's tip taking race into account is used. Admissions officers are provided, from time to time, with summaries containing demographic information.

These "one-pagers" provide a snapshot of various demographic characteristics of Harvard's applicant pool and admitted class and compares them to the previous year. In addition to race, these sheets summarize the applicant pool on a variety of other dimensions (e.g., gender, geographic region, intended concentration, legacy status, whether a student applied for financial aid, etc.). Information from this sheet is periodically shared with the full admissions committee, and the committee uses this information in part to ensure that there is not a dramatic drop-off in applicants with certain characteristics — including race — from year to year. Harvard keeps abreast of the racial makeup of its admitted class in part because doing so is necessary to forecast yield rates. The yield rate is the percent of admitted applicants who accept an offer of

admission.13 Empirically, Asian American and white students accept offers of admission at higher rates than African American, Hispanic, Native American, and multiracial applicants.

The effect of using this race-oriented admission was dramatic:

A race-conscious admissions program is not narrowly tailored if a university uses it despite workable race-neutral alternatives. See Fisher I, 570 U.S. at 312. The district court found that eliminating race as a factor in admissions, without taking any remedial measures, would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%. SFFA II, 397 F. Supp. 3d at 178. It found that at least 10% of Harvard's class would not be admitted if Harvard did not consider race and that race is a determinative tip for approximately 45% of all admitted African American and Hispanic students. Id.

But the Court held that Harvard had a lawful motive of diversity:

Harvard has identified specific, measurable goals it seeks to achieve by considering race in admissions. These goals are more precise and open to judicial scrutiny than the ones articulated by the University of Texas and approved by the Fisher II majority….

These goals make clear that Harvard's interest in diversity "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," but "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Parents Involved, 551 U.S. at 722 (quoting Grutter, 539 U.S. at 324-25). Race is one piece of Harvard's interest in diversity. It is "considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" Id. at 723 (quoting Grutter, 539 U.S. at 330). …

Harvard has sufficiently met the requirements of Fisher I, Fisher II, and earlier cases to show the specific goals it achieves from diversity and that its interest is compelling….

… there is nothing in Fisher II suggesting that a university can only consider race once or that only a single use of race is a necessary component of a narrowly tailored policy. The Court made clear that as long as race is "considered in conjunction with other aspects of an applicant's background" and is "but a 'factor of a factor of a factor' in the holistic-review calculus," it will not be considered impermissibly mechanical. Fisher II, 136 S. Ct. at 2207. Harvard has shown that its holistic consideration of race is not impermissibly extensive.

The Court found that there was only a correlation of the use of soft factors resulting in diminished Asian admission, but not a causal relationship:

There is a clear and important distinction between race <u>being correlated with</u> the personal rating and race <u>influencing</u> the personal rating. Race <u>correlating</u> with the personal rating means that there is a statistical relationship between race and the personal rating. Race influencing the personal rating means that this statistical relationship is causal. It means that Harvard assigns applicants higher or lower personal scores <u>because of</u> their race. The distinction between correlation and influence is very important. [Underscoring in original.]

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I agree with this comment on the decision by **<u>Ilya Shapiro</u>** of the Cato Institute:

This ruling isn't surprising in the slightest. The case was always designed to go to the Supreme Court and now it will, though not in time to be heard this term. When even Californians vote overwhelmingly to maintain that state's prohibition on the use of race in public employment, contracting, and education, it's high time that the justices end the 40-year error of interpreting the Constitution to allow universities that accept public funding to use racial preferences in admissions decisions. Evaluating applicants based on the color of their skin—even as one of many factors—is repugnant to the constitutional precept of equal treatment under the law.