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Race-Conscious Admissions and the Race to the Supreme Court

In what is likely only the first step in a trek to the U.S. Supreme Court, on September 30, 2019, Harvard College defeated a challenge to its admissions policy brought in the federal District Court in Massachusetts on behalf of Asian-American applicants. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Civil Action No. 14-cv-14176-ADB, U.S. District Court Judge Allison D. Burroughs found that Harvard's admissions policies did not violate Title VI of the Civil Rights Act or the strict scrutiny standard of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. We will summarize the lengthy court decision in this comparatively short piece. The decision itself outlines extensive factual findings based on written submissions and the testimony from eighteen current and former Harvard employees, four expert witnesses, and eight current or former Harvard college students.

The Admissions Process At Harvard

After extensive evaluation, Harvard adopted an admissions process which included a race-conscious component based on its affirmation of the value of diversity to its educational mission.

The admissions process involves an extensive holistic review of each application. Applicants may, but are not required to, identify their race in their application by checking a box on the application form or mentioning it in their essays. Readers in the admissions department consider an applicant's academic strength and potential based on grades, standardized test scores, letters of recommendation, academic prizes, submitted academic work, and the strength of the applicant's high school. Harvard also considers whether applicants will offer diverse perspectives or are otherwise exceptional in ways that do not lend themselves to quantitative metrics. Race and ethnic factors are two examples of such non-quantifiable factors.

Applicants interview with either a Harvard alumnus or an admissions staff person. Admissions Officers interview a small percentage of applicants, generally those who are recruited athletes, legacies, on the dean's or director's interest list, or children of faculty and staff. The facts at trial showed that Asian American applicants are less likely to be interviewed by admissions officers than white, Hispanic or African American applicants.

Harvard does not make admissions decisions based on a formula, and because its applicants have strong academic credentials the decisions are based on a variety of different factors rather than purely academic measures. Subcommittees within the admissions office review all applications and make recommendations to the full Admissions Committee. Admissions decisions are made by vote of the full committee.

Throughout the process, the admissions office leadership tracks the racial composition of the applicant pool, the students recommended for admission, and the students admitted. They use this information to determine the effectiveness of their efforts to achieve a diverse class. Race has no specified value in the admissions process and is not considered as a negative factor.

The Plaintiffs' Argument That The Process Violates The Law

In this lawsuit the plaintiffs alleged that Harvard's admissions process intentionally discriminated against Asian Americans; used racial balancing; failed to use race as merely a plus factor in admissions; failed to use race to merely fill the last few places in its incoming class; used race where workable race-neutral alternatives existed; and used race as a factor in admissions overall.

Harvard filed a successful motion to dismiss counts IV (failure to use race to merely fill the last few places in its incoming class) and VI (use of race as a factor in admissions overall) of the complaint, and the case proceeded to trial on the remaining counts.

The Court's Conclusions

- Harvard's admissions policies were race-conscious and therefore were held to a "**strict scrutiny**" standard of review requiring a compelling interest to be advanced, coupled with a narrowly tailored means that furthered the compelling interest.
- Harvard proved that its interest in **student-body diversity was substantial and compelling**. The proof presented at trial demonstrated that a diverse student body promoted a more robust academic environment, encouraged learning outside the classroom, and created a richer sense of community. The court found that Harvard made strong efforts to create opportunities for interactions between students of different backgrounds in order to stimulate both academic and non-academic learning, thus demonstrating the importance of diversity to its mission.
- Harvard's means of achieving diversity in its admissions program was sufficiently **narrowly tailored** because, consistent with the U.S. Supreme Court's precedent in affirmative action in admissions cases, Harvard engaged in an individualized and holistic review of each applicant's file and gave serious consideration to all factors that would contribute to student body diversity, including but not limited to an applicant's race.
- Harvard's admissions program **did not unduly burden Asian American** applicants because the plaintiffs were unable to show a statistically significant penalty against Asian American applicants relative to white applicants. In attempting to show an undue burden on Asian American applicants, the plaintiffs presented expert testimony and argued that Asian American applicants tended to score lower than white students on such non-academic factors as personality traits, and were more often described in admissions officers' files as "quiet" or "shy" than white applicants. In rejecting this argument, the court noted non-Asian American applicants who had the same comments regarding their personality traits and that there was no evidence that such comments were at all tied to racial stereotypes or intentional discrimination.
- Harvard **did not engage in "racial balancing"** because it did not use a racial quota in its admissions process nor did it have a either a "target" number for any race or specified level of permissible fluctuation in its admits. Although the court found that Harvard did keep track of the number of minority students likely to enroll during any admissions cycle, it ruled that such a practice was not a violation of Title VI because it was consistent with the fact that there is a relationship between achieving the benefits of diversity and providing a reasonable environment, (i.e.., critical mass), for the student body.

- Harvard appropriately used **race as a non-mechanical plus factor** (or "tip") because its admissions program was flexible enough to consider all pertinent elements of diversity, and not just race. In addition, the court noted that the "effect of African American and Hispanic racial identity on an applicant's probability of admission has been estimated at a significantly lower magnitude than tips offered to recruited athletes, and is comparable to tips for legacies, applicants on the dean's or director's interest lists, [and] children of faculty or staff…."
- There were **no adequate, workable, and sufficient fully race-neutral alternatives available**. Harvard presented evidence it had studied, and the court considered, a variety of race-neutral alternatives including: elimination of the early admissions program, elimination of legacy preference, elimination of the use of standardized testing, geographic-based quotas, increased admission of transfer students, and revision of Harvard's financial aid and recruiting efforts. These race-neutral alternatives, even if employed together, proved insufficient to achieve the student body diversity necessary to further Harvard's academic goals.
- Harvard **did not intentionally discriminate against Asian American** applicants. The court found no evidence of any racial animus or intentional discrimination in Harvard's admissions process (beyond the fact that the process is race-conscious), and it found no evidence that any particular admissions decision was negatively affected by an applicant's Asian American identity.

What Does This Mean For Race Conscious Programs Now?

The District Court's decision relies on a long line of U.S. Supreme Court precedent, beginning with the *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that case, the Court struck down a quota system employed by the University of California medical school but acknowledged diversity as a compelling state interest that could withstand strict scrutiny. In order to satisfy strict scrutiny, the Court held that a school's approach to admission had to encompass a broad array of qualifications and characteristics of which racial and ethnic origin could be one.

The Supreme Court reaffirmed the constitutionality and clarified the scope of permissible race-conscious admissions practices in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a case that challenged the constitutionality of such a process at the University of Michigan Law School. The Grutter Court found that the University of Michigan law school's admissions process was sufficiently narrowly-tailored because the concept of achieving a "critical mass" of minority students did not require racial balancing nor did it constitute a quota. Rather, "critical mass" was a concept rooted in the educational benefits of diversity, which the court deemed a compelling state interest. The process was found sufficiently individualized and it did not insulate applicants of any racial groups from competition for admission.

Most recently, in *Fisher v. Univ. Of Tex. at Austin*, 136 S. Ct. 2198 (2016), the Court again upheld race-conscious admissions, explaining that strict scrutiny requires colleges and universities to make good faith efforts to consider race-neutral alternatives before employing race-conscious methods.

Although Harvard is not a state institution like the defendants in *Bakke*, *Grutter*, and *Fisher*, Harvard College is a component of Harvard University which receives federal funds and considers race as a factor in its admissions process. Harvard College is therefore subject to the same strict scrutiny standard that the Equal Protection Clause imposes on state actors for the purpose of a Title VI claim.

In finding that Harvard's process passed strict scrutiny, the trial court took great care to develop a detailed factual record, including extensive analysis of testimonial and statistical evidence relating to the plaintiffs' claims. While the court noted that Harvard's process bore all the hallmarks of a narrowly-tailed plan, it went further to determine with specificity, through detailed statistical analysis, that the process did not unduly burden Asian American applicants. The detailed record indicates the District Court's anticipation that its decision will be subject to appeal, quite possibly reaching the U.S. Supreme Court.

What Can My Institution Do To Stay In Compliance?

- Conduct an internal review to identify the educational benefits you seek to foster through student body diversity, informed by research and involving key stakeholders within your institution
- Develop an admissions plan structured to achieve those educational benefits
- Conduct and memorialize appropriate research to determine whether race-neutral strategies will be sufficient to achieve those goals
- If race-neutral strategies prove insufficient, develop a holistic, race-conscious admissions plan that is narrowly-tailored to survive legal scrutiny.

Please contact Monica Barrett, Sarah Luke or any attorney in the Higher Education Practice Group or your primary contact at Bond, if you have questions about this decision or your admissions process.

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