THE HARVARD ADMISSIONS CASE
REACTIONS TO THE JUDGE'S RULING

IT IS ORDERED AND ADJUDGED: Judgment for the Defendant President and Fellows of Harvard College (Harvard Corporation)—U.S. District Judge Alison D. Burroughs (September 30, 2019)

Students for Fair Admissions, Inc. v. Harvard is a federal lawsuit that was filed in the U.S. District Court for the District of Massachusetts challenging Harvard University's "holistic" admissions process and its consideration of race and ethnicity when reviewing applications for undergraduate admission. Following lengthy discovery, a three-week non-jury trial during the fall 2018, and post-trial submissions by the lawyers in early 2019, U.S. District Judge Allison D. Burroughs ruled for Harvard on September 30, 2019. Judge Burroughs' decision is explained in 130 pages of factual findings and legal conclusions.

A little more than three years ago, the U.S. Supreme Court reaffirmed for the fourth time in four decades that the educational benefits of a diverse student body constitute a compelling governmental interest that can justify the narrowly tailored consideration of race as one factor in a holistic admissions process. There is little doubt that Edward Blum, the president of Students for Fair Admissions, Inc. (SFFA) and the driving force behind the Harvard lawsuit, hopes that the Supreme Court ultimately will use this case to make it five times in five decades, but with a different outcome. Thus, Judge Burroughs' ruling may prove to be the first step in a new march to the Supreme Court and a fresh reexamination of the autonomy of our country's colleges and universities and their ability to construct diverse and inclusive campuses.

In this issue brief, ACE Vice President and General Counsel Peter G. McDonough poses some top-of-mind questions to knowledgeable, thoughtful participants in the student body diversity journey through the decades: Jessica L. Ellsworth, partner in the international law firm Hogan Lovells US LLP; Jonathan R. Alger, president of James Madison University; Theodore M. Shaw, the Julius L. Chambers Distinguished Professor of Law and director for the Center for Civil Rights at the University of North Carolina; and Martin Michaelson, senior counsel at Hogan Lovells.

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DISCLAIMER: This issue brief does not constitute legal advice. It incorporates and reflects high-level observations based on non-exhaustive research and does not analyze any specific factual scenarios taking into account potentially relevant details. Institutions should examine issues addressed here based on the context and facts of each situation, institutional policies, geographical and political context, and on their own counsel's interpretation of relevant law. This is a fluid environment and topic, including the potential for changes in current law or current enforcement practices.

Peter: Jess, we understand the complaint alleged that Harvard discriminates against Asian-American applicants in its admissions processes. But it seems like the trial and the judge's decision were about a lot more than that. What was the judge being asked to consider here, and what did she do?

Jess: Harvard, like many colleges and universities, views diversity of all sorts, including racial diversity, as an important aspect of education. At trial, the plaintiff didn't dispute the importance of diversity in education, and Judge Burroughs agreed that the evidence showed a heterogeneous student body promotes a more robust academic environment. The decision, like the trial, carefully parsed the record to determine whether Harvard's approach to the admissions process—which uses race as one of many factors—was "narrowly tailored" to further the compelling interest in a diverse student body.

Applying decades of Supreme Court precedent, from *Bakke* in 1978 to *Fisher II* in 2016, the court methodically walked through how Harvard reviews application files, testimony from admissions officers, statistical analyses done by both sides, and race-neutral alternatives. Judge Burroughs found that Harvard does not engage in racial balancing, it does not use race in a mechanical manner, and no adequate, workable, and sufficient fully race-neutral alternatives are available. The court's ultimate conclusion was that "Harvard's admissions program has been designed and implemented in a manner that allows every application to be reviewed in a holistic manner consistent with the guidance set forth by the Supreme Court."

Peter: Ted, the phrase "affirmative action" appears in Judge Burroughs' opinion five times, and four of them are in quotes from earlier court decisions. She uses the word "diversity" over 130 times. Was this trial about affirmative action or was it about diversity? Or both?

Ted: In the first instance, this case was about diversity. Ever since the Supreme Court's 1978 decision in the *Bakke* case, the legal issues relating to underrepresented minorities, historically discriminated groups, and admission to selective higher educational institutions have focused on the interests of colleges and universities in enrolling diverse classes of students, not on affirmative action. That is intentional. Justice Lewis Powell's *Bakke* opinion, which established the legal framework that the Supreme Court has continued to reaffirm and further develop and which Judge Burroughs applied in the Harvard case, bridged two groups of his colleagues on the Supreme Court at that time. The more conservative group would have banned any consideration of race in admissions in almost all circumstances. The more liberal justices would have allowed "affirmative action"—the consideration of race to open educational opportunity to individuals from groups that had been historically discriminated against. Justice Powell's middle ground approach focused on the educational benefits of diversity and on the practical reality that some consideration of race in the admissions process would likely be necessary to build a student body that is sufficiently diverse to realize those educational benefits.

Thus, although the efforts to admit minority students began in the 1960's with the objective of remedying a long history of discrimination against African Americans and other people of color, the Supreme Court majority in *Bakke* abandoned that remedial rationale that had been the original impetus for integrating higher education. From *Bakke* to *Gratz v. University of Michigan* and *Grutter v. University of Michigan* to *Fisher v. University of Texas I* and *II*, and now here in *SFFA v. Harvard*, the only legally sustainable justifications for consideration of race in admissions have been on grounds of diversity, not affirmative action.

Having said that, one can point to the legal discourse among the justices and judges who have considered and decided these cases, as well as among the lawyers, and identify ways in which the remedial justification that originally undergirded affirmative action remains part of the discourse in diversity battles in the courts and elsewhere.

Peter: Jon, you played a crucial role in the University of Michigan's defense of its admissions processes when you were there as legal counsel during the Supreme Court's consideration of *Grutter* and *Gratz*. You forcefully pressed for the Court's embrace of "the educational benefits of a diverse student body." Now, in your eighth year as a college president, what are your thoughts about this? Are they real? Are they important?

Jon: In the line of precedents that include this newest Harvard decision as well as the University of Michigan cases, the institutions defended their admissions policies on grounds that were directly related to, and reflective of, their educational mission. Having been a university president for a number of years now, I firmly believe that student body diversity has profound educational benefits for all students—majority and minority alike. I have seen and experienced those benefits first as a student at Swarthmore College and Harvard Law School, and subsequently through my own teaching at Michigan, Rutgers, and James Madison University in courses on varied topics in law, policy, and leadership.

As an educator, I am convinced that there is no substitute for face-to-face interaction, both in and outside the classroom, among students of different backgrounds as a way to break down stereotypes and foster increased understanding. This educational theory has been backed up with research and experience over the years at many institutions and is a reminder that our colleges and universities are learning *communities* rather than just groups of isolated individuals. In a learning community, everyone has an active role to play: we all have a lot to contribute and a lot to learn from others.

More and more, educational institutions are turning to high-impact, active learning practices such as team-work, debate, and problem-solving that embrace all of the attributes that students bring to the environment. This is where and how deep learning takes place. Furthermore, this is the kind of learning that prepares students to live and work in a diverse democracy and global economy. That is why employers now say that the ability to live, learn and work with individuals from different backgrounds is a critical skill set in the twenty-first century.

Peter: Marty, you've been deeply involved in these issues for universities since your days as in-house counsel at Harvard in the 1980's, and you represented ACE on amicus briefs in the Michigan and Texas cases. Where does this decision fit in that historical context?

Marty: Perhaps it was inevitable—and in any event it seems symmetrical—that eventually a trial court would subject to microscopic evidentiary review the validity of Justice Powell's 1978 endorsement in *Bakke* of the Harvard College admissions system. No court before has so meticulously examined race-conscious admissions as practiced. Students of this area of law will find enlightening the oral argument to the Supreme Court in *Bakke*, which was taped and is publicly available. Particularly striking was Archibald Cox's presentation. Back then, even the most sophisticated lawyers and Supreme Court justices had not plumbed the matter, or under-stood it, as thoroughly as did Judge Burroughs. Her 130-page analysis is penetrating, long on facts, and short on rhetoric. She anticipates and answers potential disagreements. Justice Powell is vindicated.

Peter: Jon, is the "Harvard Model" replicable elsewhere? What are the challenges or limitations for a college in that regard?

Jon: One of the lessons learned throughout this line of cases is that each institution and educational program has its own unique history and circumstances. Harvard, for example, is an extremely selective institution that recruits students nationally and internationally for its undergraduate and graduate programs. For its under-graduate college, Judge Burroughs' decision noted that Harvard's admissions officers review approximately

35,000 students a year—a number that continues to grow. As the record demonstrates in this case, race is just one of many factors that Harvard considers in putting together a student body that represents the rich, multi-faceted complexity of our nation and our world.

Harvard's holistic, individualized review of applicants is labor-intensive and is as much an art as it is a science. This model requires sufficient staff resources to take the time and effort to look at each file carefully. In such cases, admissions officers are looking not just at an individual's past accomplishments in a vacuum, but also at potential for future contributions—contributions to both the educational program and to society. This kind of review necessitates a certain amount of experienced human judgment; it cannot be replicated by computers, and it cannot be captured by simple metrics such as grade-point averages and standardized test scores.

In order to meet the standards set forth by the courts for the consideration of race as one of many factors in admissions, institutions must do the hard work of studying their own unique histories, circumstances, and applicant pools on an ongoing basis. As Judge Burroughs acknowledged in her opinion, that analysis includes a serious review of whether and to what extent "race-neutral" alternatives would be workable. In virtually all instances, institutions will employ a variety of strategies simultaneously involving outreach, recruitment, admissions, and financial aid to seek and enroll a diverse student body—knowing that no one approach will be a panacea.

Wisely, however, Judge Burroughs also made clear that perfection is not the standard for a race-conscious admissions program. Admissions policies are always a work in progress and are tweaked every year as institutions benefit from a continuing review of demographic trends, best practices, and the impact of their past and current efforts.

Peter: Jess, you co-authored an *amicus brief* for ACE and other higher education associations before the trial commenced. Harvard won, and SFFA now has appealed to the U.S. Court of Appeals. It surely will be awhile before that court rules, and it will be even longer if the Supreme Court chooses to hear the case. In the meantime, what are the headlines—three or four takeaways—from Judge Burroughs' decision for campus leaders and admissions officers?

Jess: There are lots of takeaways in any decision that spans 130 pages, but here are the ones that stand out to me.

1. The most obvious takeaway is that any institution that chooses to consider race and ethnicity in its admissions process should carefully review its procedures in light of the legal standard that the Supreme Court set out in 2016 in its *Fisher II* ruling. The court here relied "principally" on that decision.

2. A second takeaway is to ensure that an institution's admissions staff is trained in using race in a"flexible, nonmechanical way" such that it doesn't overwhelm individualized consideration of every applicant, as the Supreme Court emphasized in *Grutter*.

3. Third, to meet strict scrutiny, institutions must give careful thought to race-neutral alternatives and the impact that such alternatives would likely have on racial diversity. The evidence that Harvard presented at trial demonstrated that it had done so and that no workable and available race-neutral alternative would allow Harvard to achieve a diverse student body while still maintaining its standards for academic excellence.

4. Lastly, institutions should be able to articulate a "reasoned, principled explanation" for their academic decisions, consistent with *Fisher I*. Doing so puts them in a much better position to defend the reason for their actions.

Peter: Ted, what does your crystal ball tell you about the likelihood that this case will ultimately be considered by the Supreme Court, joining the continuum of *Bakke* through *Fisher II*, and how we should think about that now?

Ted: As a rising third-year law student, I was in the Supreme Court on the day *Bakke* was decided. I left the Court devastated on that day, because, as I have said ever since, for African Americans *Bakke* was a loss. Yet for over four decades now, much of my life has been spent defending and preserving *Bakke*. I played a key role in the University of Michigan law school's efforts to design its admissions program to be *Bakke*-compliant, and I have been involved in one way or another in many, if not most of the affirmative action/diversity admissions cases. Forty years of precedent on a given issue is a lot of precedent. Yet, this Supreme Court is more conservative than any of its predecessors in more than 40 years.

I have often said that predicting whether the Supreme Court will take a particular case is a fool's errand. But there is a good chance the Supreme Court will review this matter. Keep in mind that there is another case brought by SFFA challenging diversity efforts in college admissions at the University of North Carolina. While still awaiting trial in the federal district court, it, too, could be a vehicle for reconsideration of the *Bakke-Fisher II* precedent. That may factor in the Supreme Court's consideration of whether to take up the Harvard case for review after it is considered by the U.S. Court of Appeals for the First Circuit.

The court has changed since *Fisher II* was decided three years ago. Justice Kennedy, whose vote was decisive on diversity and other civil rights and race issues, is gone. Whether it will feel constrained to follow now well-established precedent and choose not to revisit this area again in the near future is anyone's guess. The tension between precedent and shifting ideological majorities on the Supreme Court certainly heightens the chances of review.

But for now at least, it is important to keep in mind that, as law, the *Bakke* diversity rationale has been repeatedly embraced and reaffirmed over the years. On that basis, colleges and universities should not abandon their embrace of diversity in anticipation of a change in law. As I say, 40 years is a lot of precedent.

Peter: Marty, do aspects of Judge Burroughs' decision offer early signals about how this case may be treated on appeal in the U.S. Court of Appeals for the First Circuit and then, perhaps, in the Supreme Court?

Marty: The plaintiffs have their work cut out for them in the U.S. Court of Appeals. The case that was tried before Judge Burroughs does not center on whether there is a compelling interest in student diversity—it centers on whether Harvard's system acquits that interest in a narrow, punctilious way, and whether there is a viable race-neutral alternative. Judge Burroughs cites powerful evidence on each of those points, drawing on a massive record and extensive statistical analyses.

The opinion appears fair minded, is extraordinarily thorough, and is devoid of exaggeration. The court did not find Harvard's system perfect but recognized that the law does not require perfection. The plaintiffs will have to attempt factual rebuttal in the appellate context, which tends to be difficult. Judge Burroughs' opinion shows that Harvard was extraordinarily careful and rigorously complied with guidance from the Supreme Court's Michigan and Texas decisions in how it structured and administered admissions. Harvard has a very strong case. We must never, however, underestimate the ingenuity of the United States Supreme Court.