

United States Court of Appeals For the First Circuit

No. 19-2005

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff, Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Allison D. Burroughs, U.S. District Judge]

Before

Howard, Chief Judge
and Lynch, Circuit Judge.*

William S. Consovoy, with whom Thomas R. McCarthy, J. Michael Connolly, Cameron T. Norris, Patrick Strawbridge, Consovoy McCarthy PLLC, Adam K. Mortara, John M. Hughes, and Bartlit Beck LLP were on brief, for appellant Students for Fair Admissions, Inc.

Eric S. Dreiband, Assistant Attorney General, with whom Elliot M. Davis, Acting Principal Deputy Assistant Attorney General, Thomas E. Chandler, and Matthew J. Donnelly were on brief, for the United States, amicus curiae.

Gordon M. Fauth, Jr., Litigation Law Group, Lee C. Cheng, and

* Judge Torruella heard oral argument in this matter and participated in the *semble*, but he did not participate in the issuance of the panel's decision. The remaining two panelists therefore issued the opinion pursuant to 28 U.S.C. § 46(d).

Asian American Legal Foundation on brief for the Asian American Coalition for Education and the Asian American Legal Foundation, amici curiae.

Wencong Fa, Joshua P. Thompson, and Pacific Legal Foundation on brief for Pacific Legal Foundation, Reason Foundation, Center for Equal Opportunity, Individual Rights Foundation, and the Chinese American Citizens Alliance - Greater New York, amici curiae.

Randall B. Clark, C. Boyden Gray, Adam R.F. Gustafson, James R. Conde, T. Elliot Gaiser, and Boyden Gray & Associates on brief for Economists Michael Keane, Hanming Fang, Christopher Flinn, Stefan Hoderlein, Yingyao Hu, Joseph Kaboski, Glenn Loury, Thomas Mroz, John Rust, and Matthew Shum, amici curiae.

Jun Xiao, Yong Li, Xiaoying Yu, and Haiying Li, on brief pro se.

Timothy J. Perry, Perry Krumsiek, LLP, T. Russell Nobile, Robert D. Popper, and Judicial Watch, Inc. on brief for Judicial Watch, Inc., amicus curiae.

Cody J. Wisniewski on brief for Mountain States Legal Foundation, amicus curiae.

Dwight Duncan and Dennis J. Saffran on brief for National Association of Scholars, amicus curiae.

Seth P. Waxman, with whom Paul R.Q. Wolfson, Danielle Y. Conley, Brittany Blueitt Amadi, William F. Lee, Felicia H. Ellsworth, Andrew S. Dulberg, Debo P. Adegbile, Michelle Liszt Sandals, Greg Schmidt, Emma Simson, Alex Hemmer, Wilmer Cutler Pickering Hale and Dorr LLP, Ara B. Gershengorn, and Harvard University, Office of the General Counsel were on brief, for appellee President and Fellows of Harvard College.

David Hinojosa, with whom Jon M. Greenbaum, Genevieve Bonadies Torres, Lawyers' Committee for Civil Rights Under Law, Lawrence E. Cullen, Elisabeth S. Theodore, Nancy L. Perkins, Janine M. Lopez, Emma Dinan, Camille Heyboer, Arnold & Porter Kaye Scholer LLP, Niyati Shah, Marita Etcubanez, Eri Andriola, Asian Americans Advancing Justice, Oren M. Sellstrom, and Lawyers for Civil Rights were on brief, for Students, Alumni, and Prospective Students of Harvard College, amici curiae.

Jin Hee Lee, with whom Sherrilyn Ifill, Janai Nelson, Samuel Spital, Rachel Kleinman, Cara McClellan, Michael N. Turnage Young, Jennifer A. Holmes, NAACP Legal Defense and Educational Fund, Inc., Kate R. Cook, Kenneth N. Thayer, and Sugarman, Rogers, Barshak & Cohen, P.C. were on brief, for Coalition for a Diverse Harvard, Association of Black Harvard Women, First Generation Harvard Alumni, Fuerza Latina of Harvard, Harvard Asian American Alumni Alliance, Harvard Asian American Brotherhood, Harvard Black Alumni Society, Harvard Islamic Society, Harvard Japan Society, Harvard Korean Association, Harvard Latino Alumni Alliance,

Harvard Minority Association of Pre-Medical Students, Harvard Phillips Brooks House Association, Harvard Progressive Jewish Alumni, Harvard South Asian Association, Harvard University Muslim Alumni, Harvard Vietnamese Association, Harvard-Radcliffe Asian American Association, Harvard-Radcliffe Asian American Women's Association, Harvard-Radcliffe Black Students Association, Harvard-Radcliffe Chinese Students Association, Kuumba Singers of Harvard College, Native American Alumni of Harvard University, Native Americans at Harvard College, Task Force for Asian American Progressive Advocacy and Studies, and 21 Colorful Crimson, amici curiae.

Jessica L. Ellsworth, Stephanie J. Gold, Jo-Ann Tamila Sagar, Hogan Lovells US LLP, Peter McDonough, and American Council on Education on brief for American Council on Education and 40 Other Higher Education Organizations, amici curiae.

Samuel P. Groner, Harrison D. Polans, Fried, Frank, Harris, Shriver & Jacobson, LLP, Steven M. Freeman, and Amy Feinman on brief for Anti-Defamation League, amicus curiae.

Madeleine K. Rodriguez, Dean Richlin, Hemmie Chang, Sarah Burg, Rachel Hutchinson, Jacqueline Chávez, Foley Hoag LLP, Kenneth Kimerling, and Asian American Legal Defense and Education Fund on brief for Asian American Legal Defense and Education Fund and Other Asian American Education and Youth-Serving Organizations and Higher Education Faculty.

Jaime A. Santos, Sabrina M. Rose-Smith, William Evans, and Goodwin Procter LLP, on brief for the National Association of Basketball Coaches, Women's Basketball Coaches Association, Geno Auriemma, James A. Boeheim, John Chaney, Tom Izzo, Michael W. Krzyzewski, Joanne P. McCallie, Nolan Richardson, Bill Self, Sue Semrau, Orlando Smith, Tara Vanderveer, Roy Williams, Jay Wright, and 326 Additional Current or Former College Head Coaches, amici curiae.

Matthew S. Hellman, Ishan K. Bhabha, and Jenner & Block LLP, on brief for Brown University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, Massachusetts Institute of Technology, Princeton University, Stanford University, University of Chicago, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University, amici curiae.

Maura Healey, Attorney General of Massachusetts, Elizabeth N. Dewar, State Solicitor, Ann E. Lynch, Assistant Attorney General of Massachusetts, David Ureña, Assistant Attorney General of Massachusetts, Xavier Becerra, Attorney General of California, Philip J. Weiser, Attorney General of Colorado, Kathleen Jennings, Attorney General of Delaware, Karl A. Racine, Attorney General for the District of Columbia, Clare E. Connors, Attorney General of Hawai'i, Kwame Raoul, Attorney General of Illinois, Aaron M. Frey,

Attorney General of Maine, Brian E. Frosh, Attorney General of Maryland, Keith Ellison, Attorney General of Minnesota, Aaron D. Ford, Attorney General of Nevada, Hector Balderas, Attorney General of New Mexico, Letitia James, Attorney General of New York, Josh Shapiro, Attorney General of Pennsylvania, Peter Neronha, Attorney General of Rhode Island, and Mark R. Herring, Attorney General of Virginia, on brief for Massachusetts, California, Colorado, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Mexico, New York, Pennsylvania, Rhode Island, and Virginia, amici curiae.

Derek T. Ho, Bradley E. Oppenheimer, Minsuk Han, Joseph L. Wenner, and Kellogg, Hansen, Todd, Figel & Frederick P.L.L.C. on brief for Professors of Economics, amicus curiae.

Sarah E. Harrington and Goldstein & Russell, P.C. on brief for 678 Social Scientists and Scholars on College Access, Asian American Studies, and Race, amici curiae.

Anton Metlitsky, Patrick D. McKegney, Apalla U. Chopra, Bradley N. Garcia, Anna O. Mohan, and O'Melveny & Myers LLP on brief for Walter Dellinger, amicus curiae.

Mark S. Davies, Thomas M. Bondy, Katherine M. Kopp, Sheila A. Baynes, Sarah H. Sloan, E. Joshua Rosenkranz, Darren S. Teshima, and Orrick, Herrington & Sutcliffe LLP on brief for Amgen Inc., Apple Inc., Applied Materials, Inc., Cisco Systems, Inc., Cummins Inc., General Electric Company, Gilead Sciences, Inc., GlaxoSmithKline LLC, Intel Corporation, Micron Technology, Inc., Microsoft Corporation, Twitter, Inc., and ViiV Healthcare Company, amici curiae.

Keffe B. Clemons on brief for Verizon Services Corp., amicus curiae.

November 12, 2020

LYNCH, Circuit Judge. Students for Fair Admissions, Inc. ("SFFA") brought suit on November 17, 2014, against the President and Fellows of Harvard College and the Board of Overseers (collectively, "Harvard"). The suit alleged that Harvard College's admittedly race-conscious undergraduate admissions process violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. ("Title VI") by discriminating against Asian American applicants in favor of white applicants.

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

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