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I Can Still Hear You Saying You Would Never Break the Chain: How Higher Education Admissions Policies Put Law Firms at Risk of Losing Corporate Clients

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I CAN STILL HEAR YOU SAYING YOU WOULD NEVER BREAK THE CHAIN: HOW HIGHER EDUCATION ADMISSIONS POLICIES PUT LAW FIRMS AT RISK OF LOSING CORPORATE CLIENTS

*Jolie Abrams**

CONSTITUTIONAL LAW—The rich diversity at higher education institutions and the benefits that flow from that diversity will foster the tolerance, acceptance, and understanding that will ultimately make race-conscious admissions obsolete.

—Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.

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* Jolie Sara Abrams is an Emory Law student graduating in May 2023. She wants to thank *ECGAR* Vol. 9 Editor-in-Chief Anika Prednis for her support and speedy e-mail replies; her Comment advisor, Professor Martin Sybblis, for his excitement about the topic; and her cat, Norbert, for walking across her keyboard to test Word’s auto-save feature.

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I. IF HIGHER EDUCATION INSTITUTIONS ABANDON AFFIRMATIVE-ACTION-BASED POLICIES IN THEIR ADMISSIONS PROGRAMS IN FAVOR OF RACE-NEUTRAL POLICIES, THEY RISK CREATING A PIPELINE THAT DIRECTLY CONFLICTS WITH CORPORATIONS’ DIVERSITY REQUIREMENTS FOR HIRING LAW FIRMS

While law firms attempt to increase their diversity numbers, they still fall short when it comes to achieving their desired level.¹ Often, they have trouble making “meaningful changes” to improve their equity and inclusion.² Moreover, this push to diversify intensifies “tokenism,” which, unfortunately, alienates

¹ Patrick Smith, *Rushing to Meet Client Demands, Law Firms Risk Alienating Diverse Lawyers*, *The American Lawyer* (Dec. 15, 2021, at 05:00 AM) (<https://www.law.com/americanlawyer/2021/12/15/rushing-to-meet-client-demands-law-firms-risk-alienating-diverse-lawyers/?slretum=20220027140858>).

² *Id.*

minority groups.³ One obvious reason that law firms rush their diversification is that corporations who seek to retain them demand diverse lawyers handling their accounts. This forces law firms to demonstrably prioritize diversity on paper over meaningful inclusion, which turns diversity into a meaningless quota.

What corporations fail to realize is that diversity does not start in the law firm. In fact, it does not even start in law schools. Diversity begins with higher education admissions processes. If the population of college graduates is not diverse, then the group of students who are eligible to apply to law school has an even smaller chance of achieving the desired diversity. From there, the group of students who graduate from law school graduate chooses to become practicing lawyers in a private practice law firm are similarly even less diverse. Law firms already have a small pool of applicants from whom they can hire, and the population gets less and less diverse at each fork in the proverbial path to these jobs. Thus, the diversity pipeline's implementation must start with the higher education institutions' admissions. Affirmative action is a component of these higher institutions' admissions policy to enable them to fairly assess prospective students.

There is a long history of juxtaposition between discrimination against minority groups—groups that, historically, would not have access to the opportunity at hand—and unfair advantages for white men.⁴ Therefore, unsurprisingly, affirmative action sits at the heart of many political controversies. Despite its importance, affirmative action does not have one clear-cut definition; rather, its definition depends on the discussion's general field.⁵ Its broad dictionary definition describes affirmative action as “[t]he practice of selecting people for jobs, college spots, and other important posts in part because some of their characteristics are consistent with those of a group that has historically been treated unfairly.”⁶ Essentially, affirmative action is an amalgamation of government-mandated, government-approved, and private programs that use laws, policies, and practices to “end and correct the effects of a specific form of discrimination.”⁷ These programs focus on granting special consideration to minority groups in education and employment. Supporters

³ *Id.*

⁴ Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. OF ECONOMIC PERSPECTIVES, 47 (1964); Jed Rubinfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997).

⁵ THE AMERICAN ASSOCIATION FOR ACCESS, EQUITY, AND DIVERSITY (AAAED), *History of Affirmative Action, Diversity, and Inclusion—What is Affirmative Action?* https://www.aaed.org/aaed/About_Affirmative_Action_Diversity_and_Inclusion.asp.

⁶ *Affirmative Action*, BLACK'S LAW DICTIONARY (5th ed. 2016).

⁷ Walter Feinberg, *Affirmative Action*, THE OXFORD HANDBOOK OF PRACTICAL ETHICS, Sep. 15, 2005.

argue that society needs affirmative action to fend off bias and prejudice against minority groups. Its opponents contend that affirmative action policies create reverse racism and favor one minority group over another. Still, others believe that, while affirmative action was once necessary, it succeeded, so its policy is unnecessary today. Affirmative action really seeks to “tak[e] positive steps to end discrimination, to prevent its recurrence, and to create new opportunities that were previously denied” to minority groups.⁸

Affirmative action uses “good-faith efforts . . . to identify, select, and train potentially qualified minorities” and, thus, emphasizes “targeted goals” that address an institution’s past discrimination.⁹ Its programs “encompass more than outreach and recruitment . . . and include efforts to prevent discrimination by eliminating barriers to equal . . . opportunity.”¹⁰ For example, higher education institutions have admissions policies that seek to increase their populations’ diversity. If higher education institutions abandon affirmative-action-based policies in their admissions programs in favor of race-neutral policies, they risk creating a student body (and, ultimately, a graduating class) that is demographically homogeneous. That necessarily results in a law school applicant pool that does not meet any diversity, inclusion, and equality goals. The inherent pipeline directly conflicts with corporations’ diversity requirements for hiring law firms.

While I would like to say that these affirmative-action-based admissions policies are unnecessary, unfortunately, the discrimination that minority groups continue to face is too great to eliminate. We, as a society, need these policies to ensure that all students have access to the same opportunities. Without these admissions programs, a lack of diversity will flow from undergraduate classes to graduate classes, including law school classes, too, then, law firms. Law firms’ lack of diversity will affect which corporations are willing to hire them because corporate clients demand diversity in the firms they retain.

First, this limited case Comment will address the three cases that provide guidelines to higher education institutions about how they may use race in their admissions processes: *Regents of the University of California v. Allan Bakke*; *Fisher I*; and *Fisher II*. Then, this Comment will discuss an ongoing case, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 980 F.3d 157 (1st Cir. 2020), cert. granted.

⁸ AAAED, https://www.aaed.org/aaed/About_Affirmative_Action_Diversity_and_Inclusion.asp.

⁹ Feinberg (2005); Roland G. Fryer, Jr., and Glenn C. Loury, *Affirmative Action and Its Mythology*, 19 J. OF ECONOMIC PERSPECTIVES 147 (2005).

¹⁰ AAAED, https://www.aaed.org/aaed/About_Affirmative_Action_Diversity_and_Inclusion.asp.

A. *Regents of the University of California v. Allan Bakke: The Supreme Court Held That, Even If Minority Groups Experience Benefits, A University May Not Use Race to Discriminate in Its Admissions Policies under The Fourteenth Amendment’s Equal Protection Clause*

In *Regents of the University of California v. Allan Bakke*, 438 U.S. 265, 265, 98 S. Ct. 2733, 2735–36, 57 L. Ed. 2d 750, the main issue was whether a public university that received federal funds could constitutionally exhibit a preference for racial minorities in its admissions policy. This case is particularly important because the Supreme Court held that universities may not use race to discriminate in their admissions policies under the Fourteenth Amendment’s Equal Protection Clause, even if such consideration would benefit minority groups. The reason this decision was important is that it distinguished a university that considers race as a “plus” in an applicant’s favor from one that makes admissions decisions solely on race. Additionally, the Supreme Court used this case to identify the educational benefits that come from a diverse student body as a compelling governmental interest.

Petitioner had two admissions programs: (1) The regular admissions program (“Regular Admissions”); and (2) The special admissions program (“Special Admissions”).¹¹ Under Regular Admissions, Petitioner automatically rejected candidates with a grade point average (“G.P.A.”) lower than 2.5.¹² A separate committee, of which members of minority groups made up the majority, then operated Special Admissions, which asked candidates whether they wished that the committee would consider them as “economically and/or educationally disadvantaged” and members of a “minority group” (“blacks, Chicanos, Asians, American Indians”).¹³ If the committee found that such an applicant was disadvantaged, the committee would rate the applicant in a manner similar to Regular Admissions without the 2.5 G.P.A. cutoff.¹⁴ Additionally, the Special candidates were not ranked against the candidates of the general admission.¹⁵ Special Admissions admitted no “disadvantaged whites,” though many applied.¹⁶ After his second rejection, Respondent filed their action in state court for mandatory, injunctive, and declaratory relief to compel his admission.¹⁷ He

¹¹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 265, 98 S. Ct. 2733, 2735–36, 57 L. Ed. 2d 750 (1978).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 266.

¹⁷ *Id.*

alleged that Special Admissions excluded him based on his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provided that “no person shall[,] on the ground of race or color[,] be excluded from participating in any program receiving federal financial assistance.”¹⁸

The Supreme Court of the United States affirmed the California Supreme Court’s finding that Petitioner should admit Respondent and in invalidating Special Admissions but reversed its holding that Petitioner should not take race into account for future admissions.¹⁹ Justice Powell’s principal opinion was three-fold, and Brennan, White, Marshall, and Blackmun agreed with the first two conclusions. The first was that Title VI proscribed “only those racial classifications that would violate the Equal Protection Clause” if a State or its agencies employed it.²⁰ The second was that any racial and ethnic classifications were “inherently suspect and call[ed] for the most exacting judicial scrutiny.”²¹ They agreed that, while the goal of achieving a diverse student body was sufficiently compelling to justify considering race in admissions decisions, Special Admissions, “which foreclose[d] consideration to persons like [R]espondent,” was unnecessary to this goal and was, therefore, invalid under the Equal Protection Clause.²² The third was that, since Petitioner could not satisfy its burden to prove that, even without Special Admissions, it would have denied Respondent, Petitioner must admit Respondent.²³ Justices Stevens, Rehnquist, and Chief Justice Stewart, whose opinion was that whether race could ever be a factor in admissions decisions was not at issue in this case; that Title VI applied; and that Petitioner excluded Respondent and, thus, violated Title VI, affirmed the Court’s order that Petitioner should admit Respondent.²⁴

This case is difficult because, on one hand, it is easy to say that university admissions programs should be completely fair for everyone and that universities should consider every student with the same standards. However, on the other hand, the students do not have access to the same opportunities, privileges, or experiences. I agree with Justice Blackmun that, while hopefully in the future, universities will not need affirmative action programs, such

¹⁸ *Id.*

¹⁹ *Id.* at 266–67.

²⁰ *Id.* at 267.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

programs are important tools for universities that help combat discrimination's ongoing effects. Thus, these programs are necessary, and it would be difficult for such a program to be race-neutral and still achieve the same diversity goals.

B. Fisher I: The Supreme Court Held that Courts Must Use Strict Scrutiny When It Reviews A University's Race-Based Admissions Process and Cannot Defer How the University Considers Race to Promote Diversity

In *Fisher v. Univ. of Texas at Austin* (“*Fisher I*”), 570 U.S. 297, 297, 133 S. Ct. 2411, 2412, 186 L. Ed. 2d 474, the main issue was whether a court may defer to the way a university considers an applicant's race to promote diversity when the court reviews that university's race-based affirmative action program under the Equal Protection Clause. This case plays off the Court's determination in *Bakke* that the educational benefits that come from a diverse student body are a compelling governmental interest. The Court, here, determined that a university is entitled to deference when it decides that diversity is essential to its educational mission. However, a university is not entitled to deference regarding whether its admissions process is narrowly tailored to achieve its diversity goal. The university must prove that its admissions process is narrowly tailored, and courts must ensure that it considers all applicants as individuals.

University considered race as one of many factors in its undergraduate admissions process.²⁵ University, with its goal of increasing racial minority enrollment, adopted its program after the United States Supreme Court decided *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, which upheld using race as “one of many ‘plus factors’ in an admissions program that considered the overall individual contribution of each candidate,” and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, which held unconstitutional “an admissions program that automatically awarded points to applicants from certain racial minorities.”²⁶ University rejected Petitioner's, who was Caucasian, admission to its 2008 class.²⁷

The Supreme Court held that the Fifth Circuit's decision was incorrect because it did not hold University to strict scrutiny's demanding burden from *Grutter* and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750.²⁸ The Court found that the courts below were correct when they

²⁵ *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 297, 133 S. Ct. 2411, 2412, 186 L. Ed. 2d 474 (2013).

²⁶ *Id.* (citing: *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304; *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257.)

²⁷ *Fisher v. Univ. of Texas at Austin* (“*Fisher I*”), 570 U.S. at 297.

²⁸ *Id.* (citing: *Grutter*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304; *Gratz*, 539 U.S. 244, 123 S.Ct.

found that *Grutter* called for deference to the University, but, once the University established that its goal of diversity was “consistent with strict scrutiny,” the University must prove that the way it attained diversity was “narrowly tailored to its goal.”²⁹ The University had an obligation to demonstrate that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of [their] application,” which the Judiciary must determine.³⁰ Narrow tailoring also required that a reviewing court must verify that it was “necessary” for the university to use race to achieve diversity’s educational benefits.³¹ The reasoning must then ultimately satisfy the reviewing court that no workable race-neutral alternatives would produce the educational benefits of diversity.³²

Instead, the Fifth Circuit held that Petitioner could only challenge whether the University decided to use race as an admissions factor “in good faith.”³³ It presumed that the University acted in good faith and gave Petitioner the burden to rebut that presumption at odds with *Grutter*’s command that all racial classifications imposed by the government “must be analyzed by a reviewing court under strict scrutiny.”³⁴ Strict scrutiny did not permit the Fifth Circuit or the district court to accept the University’s assertion that it used race in a permissible way without examining the process in practice.³⁵ Thus, the Court vacated the Fifth Circuit’s judgment and remanded the case.³⁶

It is important not to take universities at their word that their admissions program is narrow enough to achieve their diversity goals. There must be a way to determine whether a university’s admissions program fulfills its diversity needs. This case provides important qualifications that courts may use to ensure universities do not abuse their freedom to create their own race-based policies.

2411, 156 L.Ed.2d 257.)

²⁹ *Id.*

³⁰ *Id.*

³¹ *Fisher I*, 570 U.S. at 298. (citing: *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 337, 98 S.Ct. 2733, 57 L.Ed.2d 750.)

³² *Id.*

³³ *Fisher I*, 570 U.S. at 298.

³⁴ *Id.* (citing: *Grutter*, 5399 U.S. 306 at 326.)

³⁵ *Fisher I*, 570 U.S. at 298–99.

³⁶ *Fisher I*, 570 U.S. at 298. (citing: *Grutter*, 5399 U.S. 306.)

C. Fisher II: The Supreme Court Held that Courts Must Review University's Race-Based Admissions Process under the Strict Scrutiny Standard

In *Fisher v. University of Texas at Austin* (“*Fisher II*”), 136 S. Ct. 2198, 2202, 195 L. Ed. 2d 511, the main issue is whether courts should review a public university’s decision to consider race in its admissions policy under the strict scrutiny standard. This case is important because it defines strict scrutiny. Under strict scrutiny, racial consideration must be narrowly tailored to achieve diversity. Universities must evaluate each applicant as individuals, not so that their race or ethnicity is their application’s most important quality. The Court held that, if there were a non-race-based approach that would promote the university’s diversity interest in the same way as the university’s race-based method, then the university cannot consider race in its admissions policy.

University used an undergraduate admissions system that had two components: (1) As the State’s Top Ten Percent Law required, it offered admission to any students who graduated from a Texas high school in the top 10% of their class; and (2) It then used applicants’ SAT score and high school academic performance (student’s/applicant’s “Academic Index”) and “a holistic review containing numerous factors, including race” (student’s/applicant’s “Personal Achievement Index”).³⁷ University adopted this process after *Grutter v. Bollinger* and *Gratz v. Bollinger* led it to conclude that its prior race-neutral system did not provide diversity’s educational benefits.³⁸ University denied Petitioner, who was not in her high school class’ top 10%, and she filed suit and alleged that University’s racial consideration violated the Equal Protection Clause and “disadvantaged her and other Caucasian applicants.”³⁹

Fisher I detailed three controlling principles that were relevant when courts assess a public university’s affirmative action program’s constitutionality.⁴⁰

First, a university may not consider race “unless the admissions process can withstand strict scrutiny,” i.e., it must show that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary” to accomplish that purpose.⁴¹ 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

³⁷ *Fisher v. Univ. of Texas at Austin* (“*Fisher II*”), 136 S. Ct. 2198, 2202, 195 L. Ed. 2d 511 (2016).

³⁸ *Id.* (citing: *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304; *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257.)

³⁹ *Fisher II*, 136 S. Ct. 2198 at 2202.

⁴⁰ *Id.* (citing: *Fisher I*.)

⁴¹ *Id.* at 2202–03. (citing: *Fisher I* at 2418.)

deference is proper.”⁴² Third, when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals, the school bears the burden of demonstrating that “available” and “workable” “race-neutral alternatives” do not suffice.⁴³

Thus, the Supreme Court held that the “race-conscious admissions program in use at the time of [P]etitioner’s application [was] lawful under the Equal Protection Clause.”⁴⁴

This case is noteworthy because it stresses that universities should use race-neutral alternatives to achieve their diversity goals if such alternatives are feasible. This reflects the Court’s concern about universities rushing to use race in their admissions processes to solve their diversity problems. It forces the universities to consider other issues outside of race and, possibly, outside their admissions programs entirely, as the problem could lie elsewhere within the universities.

II. *STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT & FELLOWS OF HARVARD COLL.*: APPELLEE DID NOT DISCRIMINATE AGAINST ASIAN-AMERICAN STUDENTS BECAUSE: (1) IT MET STRICT SCRUTINY’S REQUIREMENTS; (2) IT DID NOT ENGAGE IN IMPERMISSIBLE RACIAL BALANCING; AND (3) IT ADEQUATELY CONSIDERED RACE-NEUTRAL ALTERNATIVES BEFORE IT ADOPTED ITS RACE-CONSCIOUS ADMISSIONS POLICY

More recently, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 980 F.3d 157, the Court considered whether Appellee’s race-conscious undergraduate admissions process violated Title VI of the Civil Rights Act of 1964.

Appellant, Students for Fair Admissions, (“SFFA”) brought suit on November 17, 2014, against Appellee, Harvard University, and alleged that Appellee discriminated against Asian-American applicants in the undergraduate admissions process and, thus, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq (“Title VI”).⁴⁵ Appellee acknowledged that its

⁴² *Id.* at 2203. (citing: *Fisher I* at 2419.)

⁴³ *Fisher II.* at 2203. (citing: *Fisher I* at 2420.)

⁴⁴ *Fisher II*, 136 S. Ct. 2198 at 2202.

⁴⁵ The Supreme Court of the United States granted a petition for writ of certiorari submitted by the Plaintiff/Petitioner. The case is *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126, 131 (D. Mass. 2019), *aff’d sub nom, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. granted, (U.S. Jan. 24, 2022) (No.

undergraduate admissions process considered race as “one factor among many,” but claimed that it used race consistently with applicable law.⁴⁶

A. Procedural History

The District Court considered two main issues: (1) Whether Appellant had standing to sue Appellee for allegedly discriminating against Asian-American applicants; and (2) Whether Appellee’s admissions process violated Title VI of the Civil Rights Act. The court held that Appellant had standing to sue Appellee for three reasons: (i) Its members would have standing on their own; (ii) Litigation was relevant to its purpose; and (iii) The injunctive relief it sought did not require its members’ participation. The District Court held that Appellee’s admissions program did not violate Title VI of the Civil Rights Act. The District Court determined that Appellee’s admissions process served a compelling and substantial interest (the educational benefits that flow from diversity) and was narrowly tailored to achieve Appellee’s diversity goals.

Appellant’s initial complaint alleged that Appellee: (1) Intentionally discriminated against Asian-Americans and violated Title VI (“Count I”); (2) Used racial balancing (“Count II”); (3) Failed to use race merely as a “plus” factor in admissions decisions (“Count III”); (4) Failed to use race merely to fill the last “few places” in the incoming freshman class (“Count IV”); (5) Used race where there were available and workable race-neutral alternatives (“Count V”); and (6) Used race as a factor in admissions (“Count VI”).⁴⁷ Appellant sought declaratory judgment, injunctive relief, attorneys’ fees, and costs.⁴⁸ Appellee filed its answer on February 18, 2015, and denied any liability.⁴⁹

On September 23, 2016, Appellee moved: (1) To dismiss the lawsuit for lack of standing; and (2) For judgment on the pleadings as to Counts IV and VI.⁵⁰ On June 2, 2017, the District Court found that Appellant had the requisite standing to pursue this litigation because it was an organization whose membership included Asian-Americans who applied to Harvard, were denied admission, and were prepared to apply and transfer to Harvard.⁵¹ The District Court also granted Appellee’s motion for judgment on the pleadings and dismissed Counts IV and VI (that Appellee did not use race only to fill the last few places in the incoming

20-1199).

⁴⁶ *Id.* at 131–32.

⁴⁷ *Id.* at 132.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

freshman class and that Appellee used race as a factor in admissions).⁵² After discovery, on June 15, 2018, the Parties filed cross-motions for summary judgment on the four remaining counts, which the District Court denied on September 28, 2018.⁵³ The case proceeded to trial on Counts I (intentional discrimination), II (racial balancing), III (failure to use race merely as a “plus” factor), and V (race-neutral alternatives).⁵⁴

B. Findings of Fact

The court found that Appellee did its best to create an environment where students from all walks of life could interact to foster a more robust learning environment. Appellee specifically focused on reaching low-income applicants whose scores could not adequately reflect their potential and intelligence. The admissions officers made judgments about each applicant as a person and as a student and evaluated them individually and accordingly with their circumstances so that their decisions reflected each applicant’s potential. The Admissions Officers’ testimony proved that Appellee did not want its Admissions Officers to consider race when they assigned profile ratings. While there were inconsistencies in Appellee’s search criteria for students, the District Court could not link them with any advantage or disadvantage to any racial groups, nor could the District Court definitively state that they were accidental or intentional. Additionally, statistical evidence proved that Appellee did not impose diversity quotas and that there were no race-neutral alternatives that would allow Appellee to adequately achieve its desired level of diversity.

Appellee’s goal was to admit the best freshman class, which did not mean merely considering applicants with the strongest academic qualifications. Appellee had the right to consider race, even if the applicants chose not to write about how their race played a role in their lives.

Ultimately, the District Court found that the Admissions Officers held no bias against Asian-American applicants and found that there was no individual applicant against whom the Admissions Officers discriminated or intentionally stereotyped.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

1. Appellee's Interest in Diversity

There is no question that diversity, including racial diversity, is an important aspect of education.⁵⁵ The evidence made it clear that a “heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community . . . [and] [t]he benefits of a diverse student body are also likely to be reflected by the accomplishments of graduates and improved faculty scholarship following exposure to varying perspectives.”⁵⁶

Appellee's mission is “‘to educate the citizens and citizen-leaders for our society’ and it seeks to accomplish this ‘through . . . the transformative power of a liberal arts and sciences education.’”⁵⁷ Appellee claimed that it valued and pursued “many kinds of diversity within its classes, including different academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities.”⁵⁸ Appellee's admissions officers, faculty, students, and alumni who testified at trial all echoed Appellee's interest in diversity and diversity's importance in education.⁵⁹ Appellee, consistent with its views of diversity's benefits both in and outside the classroom, tried to “create opportunities for interactions between students from different backgrounds and with different experiences to stimulate both academic and non-academic learning.”⁶⁰ Appellant did not contest diversity's importance in education but argued that Appellee's “emphasis on racial diversity is too narrow and that the

⁵⁵ *Id.* at 133. (citing: *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), *supplemented sub nom, Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).)

⁵⁶ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 133.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 133–34. (Appellee gave, as examples, student living assignments, the available extracurricular opportunities, and the athletic programs all of which Appellee “intended to promote a sense of community and encourage exposure to diverse individuals and viewpoints.” Similarly, Appellee evaluated and affirmed its interest in diversity on multiple occasions and gave, as an example, that, in 2015, Appellee established the Committee to Study the Importance of Student Body Diversity, which Dean Rakesh Khurana (the “Khurana Committee”). The Khurana Committee “reached the credible and well-reasoned conclusion that the benefits of diversity at Harvard are ‘real and profound.’ The Khurana Committee endorsed Appellee's efforts to “enroll a diverse student body to ‘enhance[] the education of [its] students of all races and backgrounds [to] prepare[] them to assume leadership roles in the increasingly pluralistic society into which they will graduate,’ achieve the ‘benefits that flow from [its] students’ exposure to people of different backgrounds, races, and life experiences’ by teaching students to engage across differences through immersion curriculum and the range of scholarly interests.” The Khurana Committee “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.”)

full benefits of diversity can be better achieved by placing more emphasis on economic diversity.”⁶¹

2. *The Admissions Process*

Several admissions officers testified that reviewing application files is a “time-consuming, whole-person review process” in which they evaluate every applicant as a unique individual.⁶² The admissions officers “attempt to make collective judgments about each applicant’s personality, intellectual curiosity, character, intelligence, perspective, and skillset” and “evaluate each applicant’s accomplishments in the context of [their] personal and socioeconomic circumstances” to make admissions decisions “based on a more complete understanding of an applicant’s potential than can be achieved by relying solely on objective criteria.”⁶³

a. Admissions Office’s Efforts to Obtain a Diverse Applicant Pool

Appellee’s Office of Admissions and Financial Aid (the “Admissions Office”) decides which students Appellee accepts, rejects, or waitlists.⁶⁴ This is a difficult task because the applicant pool is both large and filled to the brim with talent.⁶⁵ Thus, while academic excellence is necessary, it is not alone sufficient to gain admission, and the Admissions Office must attract applicants who are exceptional in ways outside standardized test scores and high school grades.⁶⁶ Appellee has extensive and multifaceted outreach efforts that it undertakes to attract these exceptionally strong and diverse applicant pools.⁶⁷ Appellee also places a particular emphasis on communicating with potential low-income minority applicants “whose academic potential might not be fully reflected in their scores.”⁶⁸ Despite these efforts, however, “African American

⁶¹ *Id.* at 133.

⁶² *Id.* at 136.

⁶³ *Id.*

⁶⁴ *Id.* at 134.

⁶⁵ *Id.* (Appellee gave, as an example, that there were around 35,000 applicants for admission to the class of 2019. Among these applicants, approximately 2,700 had a perfect verbal SAT score; 3,400 had a perfect math SAT score; and over 8,000 had perfect GPAs. Appellee’s target class size is roughly 1,600 students, and admitted around 2,000 applicants, based on an expectation that approximately 80% of those admitted applicants will enroll. Given its target class size and outstanding applicant pool, Appellee cannot extend offers to every applicant with a perfect GPA without also expanding its class size by 400%; rejecting every applicant with an imperfect GPA; and eliminating students’ athletic, extracurricular, or other academic achievements, or life experiences.)

⁶⁶ *Id.* at 135.

⁶⁷ *Id.*

⁶⁸ *Id.* (Specifically, Appellee recruits minority students, including Asian Americans, through its Undergraduate Minority Recruitment Program (“UMRP”), which writes letters, makes calls, and sends current

and Hispanic applicants remain a relatively modest portion” of the applicant pool, “together accounting for only about 20% of domestic applicants.”⁶⁹ In contrast, “Asian-American . . . students have accounted for approximately 22% of the total applicants.”⁷⁰

b. The Application

Applicants may, but need not, identify their race in their application, either in their personal statement and/or essays or they may check a box on the application form for one or more “preset racial groups.”⁷¹ If the applicants disclose their racial identities, Appellee may take race into account, “regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are.”⁷²

i. Alumni and Staff Interviews

Alumni interviewers completed an evaluation form on which they assigned numerical ratings for applicants in academic, personal, and overall categories that aligned with Appellee’s admissions officers’ rating categories.⁷³ Beyond this, alumni interviewers wrote comments that explained their ratings, which then went into the applicant’s file.⁷⁴ Although the Interviewer Handbook contained a section on “distinguishing excellences[,] including ‘ethnic . . . factors,’” Appellee did not coach alumni interviewers to “boost the ratings they assign to applicants based on race or ethnicity.”⁷⁵ However, Appellee did instruct them that they should “[b]e aware of, and suspect, [their] own biases,” and that awareness of one’s biases [was] important because ‘no one can really be “objective” in attempting to evaluate another person.’”⁷⁶ Appellee’s admissions staff was a diverse group that included Asian Americans.⁷⁷

undergraduates to their hometowns to speak with prospective applicants. Appellee also targets low-income and first-generation college students regardless of racial identity through a recruiting program that operates in conjunction with the Harvard Financial Aid Initiative (“HFAI”). Through the HFAI recruitment program, Appellee “employs students who return to their hometowns and visit high schools to talk about the affordability of Harvard and other colleges with need-blind admissions programs.”)

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 137. (Some of the options include American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or White.)

⁷² *Id.*

⁷³ *Id.* at 137.

⁷⁴ *Id.* at 138.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (“Several admissions officers testified at trial and forcefully denied the suggestion that racial animus

Appellee awarded a small percentage of applicants an interview with an Admissions Office staff member.⁷⁸ Students who received staff interviews were mostly among the strongest applicants and Appellee accepted those students at a “comparatively high rate.”⁷⁹

ii. Application Review Process

The Admissions Office decided which applicants to admit, reject, or waitlist.⁸⁰ The Admissions Office did not provide new admissions officers with and written guidance about how they should consider race in the admissions process at this time.⁸¹ A “first reader” initially reviewed the applications and assigned the applicant a rating based on regularly-updated reading procedures.⁸² First readers, and all subsequent readers, assigned an overall rating that included four profile ratings⁸³ and at least three school support ratings^{84,85} The ratings typically ranged from 1 to 4, with 1 as the strongest rating.⁸⁶

or conscious prejudice against Asian Americans infect Harvard’s admissions process.”)

⁷⁸ *Id.* (“Although some staff interviews are offered on a first come, first served basis, many applicants secure staff interviews because they are well-connected or particularly attractive candidates, or because they are from a part of the country where an alumni interview may be unavailable.”)

⁷⁹ *Id.* (“Asian American applicants are less likely to have a staff interview than white, African American, or Hispanic applicants. [PX619]. Among applicants who receive a staff interview, 59% of African Americans, 48% of Hispanics, 53% of whites and 44% of Asian Americans are admitted. [*Id.*]. The lower admission rate for staff-interviewed Asian Americans is driven primarily by the fact that Asian American applicants are less likely than African American and Hispanic applicants, and far less likely than white applicants, to be recruited Athletes, Legacies, on the Dean’s or Director’s interest list, or Children of faculty and staff (“ALDCs”), all of whom are advantaged in Harvard’s admissions process.”)

⁸⁰ *Id.*

⁸¹ *Id.* at 139. (“Although[,] [Appellee] amended its admissions reading procedures in 2018 for the class of 2023 to explicitly instruct admissions officers 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 “[t]he consideration of race or ethnicity may be considered only as one factor among many.”)

⁸² *Id.* at 140. (“Except for the recent changes to the reading procedures to provide more explicit guidance on the use of race, the substantive guidance on rating applicants has remained largely the same in recent years . . . Each of the profile ratings assigned by the first reader and any subsequent readers are preliminary and used as a starting point for any later consideration of the applicant by a docket subcommittee or the full Admissions Committee.”)

⁸³ *Id.* (These four profile ratings included: (1) Academic; (2) Extracurricular; (3) Athletic; and (4) Personal.)

⁸⁴ *Id.* (These three ratings reflected each recommendation letter’s strength that teachers and guidance counselors submitted on the applicant’s behalf.)

⁸⁵ *Id.*

⁸⁶ *Id.* (“Ratings of 5 and 6 are also available and indicate either weakness or special circumstances, for example where family responsibilities prevent the applicant from participating in extracurricular activities. Admissions officers may also use “+” (stronger) and “-” (weaker) signs to fine tune a rating, with a rating of 2+ being stronger than a rating of 2, which is stronger than a rating of 2-.”)

Appellee also considers whether applicants will “offer a diverse perspective or are exceptional in ways that do not lend themselves to quantifiable metrics.”⁸⁷ Appellee may give applicants a “tip” for “‘distinguishing excellences,’ such as capacity for leadership, creative ability, and geographic, economic, and racial or ethnic factors.”⁸⁸

In making admissions decisions, Appellee’s goal was to admit the best freshman class, not merely a class with the strongest applicants based solely on academic qualifications.⁸⁹

iii. Appellee’s Use of Race in Admissions

Throughout the admissions process, the Admissions Office leadership tracks the “racial composition” for the general applicant pool, the students recommended for admission, and the admitted students.⁹⁰ This composition helps the Admissions Office see how well its efforts to achieve a diverse class work and helps Appellee forecast its “overall yield rate” because different racial groups historically accept Appellee’s offers at different rates.⁹¹ Appellee uses this composition to determine how many students it should admit overall to avoid either under or overfilling its class.⁹²

The Admissions Officers also use race to evaluate applicants and assign an overall rating, however, while race may be a “tip,” or “plus,” factor for admissions decisions, it is “only one factor among many used to evaluate an applicant.”⁹³ “Race is only intentionally considered as a positive attribute.”⁹⁴

⁸⁷ *Id.* at 142.

⁸⁸ *Id.*

⁸⁹ *Id.* at 144. (“To summarize the use of race in the admissions process, 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. Admissions officers are not supposed to, and do not intentionally, consider race in assigning ratings other than the overall rating.”)

⁹⁰ *Id.* at 146.

⁹¹ *Id.* (For example, the composition can show whether Appellee sees an increase in applications from students with backgrounds that on which it placed a special recruiting emphasis, and whether Appellee admitted minority students in numbers that will likely lead to a racially diverse class. Also, admitted Asian-American students usually matriculate at a higher rate than white students, while admitted Hispanic, African American, Native American, and multi-racial applicants matriculate at a lower rate.)

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Admissions Officers “are not supposed to, and do not intentionally,” consider a student’s race, however, Appellee’s application reading procedures “did not instruct readers not to consider race in assigning those ratings until 2018, when [it] amended the reading procedures for the class of 2023 to provide more explicit guidance on the appropriate use and non-use of race.”⁹⁵

3. *Non-Statistical Evidence of Discrimination*

While there were inconsistencies in Appellee’s search criteria, the District Court could not link them to any advantage or disadvantage to any racial minority group. The District Court also could not say with certainty whether these inconsistencies were intentional or accidental. However, the District Court concluded that Appellee specified to its Admissions Officers that they should not consider race when they assigned personal ratings to the applicants.

Ultimately, the District Court found that there was no bias against Asian-American applicants and found that the Admissions Officers did not discriminate or intentionally stereotype any individual Asian-American applicant

a. *Sparse Country*

Appellant offers a different side to Appellee’s admissions process. Appellee uses a search list based on a potential applicant’s ACT, SAT, or PSAT test scores that helps Appellee market itself to diverse students, but the necessary scores a student must achieve to make the search list varies by gender, GPA, geography, and race.⁹⁶ Appellant also puts forth other anomalies in the search list selection criteria.⁹⁷

While Appellant agreed that the list was a marketing tool, it wanted the District Court to consider this “sparse country” disparity between the required scores for Asian-American and white students to make the list is evidence that

⁹⁵ *Id.*

⁹⁶ *Id.* at 153. (For example, to make Appellee’s class of 2018 search list, “a white male high school student from outside “sparse country” needs an SAT score of 1380, while black, Chicano, Hispanic, Native American, and Puerto Rican students needed only an 1100.)

⁹⁷ *Id.* at 153. (“For example, assuming an applicant reported a sufficiently high GPA, for the class of 2018, Harvard lowered the SAT score required to make the search list to 1310 for students from ‘sparse country’ who identified their race as white, other, or unidentified while not simultaneously lowering the required score for Asian American students from the same states to the same level. Consequently, Asian-American students from the same states needed to score 1350 or 1380, depending on their gender, to make the search list. Some Asian-American students, therefore, did not make the search list, when white students from the same area who had similar grades and SAT scores *d/d.*”)

Appellee intentionally imposes more selective admissions criteria on Asian-American students to artificially suppress Asian-American representation.⁹⁸

Overall, the District Court decided that the “inconsistencies in the search criteria do not seem to be linked to efforts to advantage or disadvantage any particular racial group, and it was unclear from the testimony at trial whether these variations were accidental or intentional.”⁹⁹

b. The OCR Report

Appellant also pointed out that this case was not the first time Appellee’s discrimination against Asian-American students in its admissions process came to light.¹⁰⁰ Appellant’s argument is that “repeated instances of smoke should heighten concerns about a fire.”¹⁰¹

In the late 1980s, Appellee faced similar allegations that the United States Department of Justice Office of Civil Rights (“OCR”) put together a report (the “OCR Report”) that “reached an overall conclusion that Harvard did not discriminate against Asian-American applicants to its undergraduate program in violation of Title VI of the Civil Rights Act.”¹⁰²

Appellee did not hold a meeting with its admissions officers or otherwise require that its admissions officers modify their evaluation practices to avoid stereotyping after the OCR Report found that Appellee did not discriminate against Asian-American students, despite some unfavorable specific findings.¹⁰³

⁹⁸ *Id.* at 154. (However, notably, in the years that Appellee did not lower the “sparse country” SAT search list score for Asian-American students in proportion with the lower requirement for white students, it selected Asian-American students based on lower ACT scores than similarly situated white students from “more urban areas.”)

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 155. (These “unfavorable specific findings” were “broadly consistent with stereotypes” and noted that, “In addition to examining the ethnic reader’s comments, OCR’s concern for the potential stereotyping of Asian-American applicants prompted a review of reader comments for negative characterizations, which could have an impact on the admissions decision and ratings. On its face, reader comments revealed several recurring characterizations attributed to Asian-American applicants. Quite often, Asian-American applicants were described as being quiet/shy, science/math oriented, and hard workers . . . While such descriptions may not seem damaging, OCR was conscious that problems of ‘model minority’ stereotypes could negatively impact Asian-American applicants as a whole. This concern was also raised when OCR’s file review came upon comments . . . suggesting that most or all Asian-American applicants ‘want to be a doctor . . .’ OCR noted that, in a number of cases, Asian-American applicants were described as ‘quiet, shy, reserved, self-contained, soft spoken’ and that these characteristics were underlined for added emphasis by the reader. While white applicants were similarly described, OCR found such descriptions ascribed to Asian-American applicants more frequently . . . OCR

Conversely, the District Court, based on the Admissions Officers' testimony, concluded that Appellee made it clear to its Admissions Officers more recently that they should not use race to assign profile ratings.¹⁰⁴

c. More Recent Allegations of Stereotyping and Bias

Appellant also brought up more recent examples where admissions officers referred to Asian-American applicants as “‘quiet,’ ‘hard worker,’ ‘bright,’ but ‘bland,’ ‘flat,’ or ‘not exciting.’”¹⁰⁵ The Admissions Officers toe the line of improper racial consideration because, while Appellee instructs them to consider race in the admissions process without stepping into unlawful discrimination.¹⁰⁶ It is true that Asian-American applicants “face both positive and negative stereotypes,” and that Asian-American applicants have “significantly higher median incomes” and are “more likely to hold science, technology, engineering, and mathematics occupations than the United States population more broadly.”¹⁰⁷ Therefore, “the Court is sensitive to the challenge of differentiating among discriminatory comments that evidence actual stereotyping, animus, or racism and comments about a particular applicant that may incidentally reference a stereotypical characteristic” when Admissions Officers review applications.¹⁰⁸

Appellant did not show that any applicant received these descriptors due to their race or that there was any systemic reliance on racial stereotypes.¹⁰⁹ Without a clear and distinct pattern that the Admissions Officers used stereotypes, the District Court accepted that the Asian-American applicants received these descriptors because they were “truthful and accurate rather than reflective of impermissible stereotyping.”¹¹⁰ The District Court ultimately found that comments on application files and Admissions Office correspondence

recognized that reader comments were also sometimes echoes of other reviewers' commentaries related to the applicant. OCR also noted a few cases in which the readers referred to an applicant as ‘a classic V.N. [Vietnamese] bootstrap case’ or ‘a classic BC/NC [blue collar/non-college background] Asian-American from the inner-city.’ While it was clear from the context of the statement that the readers were not criticizing the applicants, and that there was no negative intention, the comments do suggest a tendency to stereotype by calling the applicants ‘classic.’”

¹⁰⁴ *Id.* at 155–56.

¹⁰⁵ *Id.* at 156.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 156–57.

¹⁰⁹ *Id.* at 157. (The District Court noted that the “notes to the effect that several Asian-American applicants were ‘quiet’ or ‘flat’ also include[d] notes for white, African American, and Hispanic applicants who were also described as ‘quiet,’ ‘shy,’ or ‘understated.’”)

¹¹⁰ *Id.*

“[did] not suggest any pervasive bias against Asian-Americans among [Appellee’s] admissions officers or its admissions leadership,” and that “[there was no] individual applicant whom [the Court] can determine was discriminated against or intentionally stereotyped by an admissions officer.”¹¹¹

4. *Statistical Analysis*

The District Court held that Appellee did not have any “racial quotas” and did not “attempt[] to achieve classes with any specified racial composition.”¹¹² The District Court determined that Appellee evaluated its class’ “racial composition” and provided tips to applicants “to help it achieve a diverse class,” and that those tips were “necessary to achieve a diverse class[,] given the relative paucity of minority applicants that would be admitted without such a tip.”¹¹³ Additionally, Appellee “track[ed] and consider[ed]” diversity’s “various indicators . . ., including race,” in its admissions process, its admitted classes’ “racial composition[s]” “varied in a manner inconsistent with the imposition of a racial quota or racial balancing.”¹¹⁴

The District Court found that the statistical evidence showed Appellee did not impose racial quotas or that it otherwise engaged in impermissible racial balancing.¹¹⁵

5. *Race Neutral Alternatives*

Under the Supreme Court’s strict scrutiny rubric, universities can consider race in admissions to achieve diversity only if there are no other “workable race-neutral alternative[s]” that ensure a “sufficiently diverse class.”¹¹⁶ A race-neutral alternative is “workable” only if it allows universities to achieve the benefits “that it derives from its current degree of diversity within a given class year,

¹¹¹ *Id.* at 158.

¹¹² *Id.* at 176.

¹¹³ *Id.* (In trying to assure a diverse class, the admissions officers considered various “qualitative and numerical indicators of diversity,” which included the admitted-students group’s racial composition.)

¹¹⁴ *Id.* (“The demographic makeup of [Appellee’s] classes from 1980 through 2019 show significant changes to the composition of each class, and there has been more year-to-year variation in admitted Asian American applicants than year-to-year variation in the number of applicants. From 1980 to 2019, Asian Americans went from 4.1% of applicants and 3.4% of admitted students to 21.2% of applicants and 20.6% of admitted students. Since 1980, the Asian American proportion of the admitted class has increased roughly five-fold, and since 1990 the Asian American proportion of the admitted class has increased roughly twofold. [Appellant] did not offer expert testimony on racial balancing and instead asserts that the claim can be resolved without any expert analysis.”)

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 177

while also being practical, affordable, and not requiring a material decline in academic quality or any other [valued] measures of excellence.”¹¹⁷

Appellee’s race-conscious admissions policy had a significant impact on its classes’ racial diversity.¹¹⁸ While this policy particularly benefitted “African American and Hispanic applicants,” it overall “result[ed] in fewer Asian-American and white students being admitted,” however, it could improve some Asian-American applicants’ admissions chance if they “connect[ed] their racial identities with particularly compelling narratives.”¹¹⁹ Without other adjustments, if Appellee eliminated its racial consideration, “the African American representation . . . [would] decline from approximately 14% to 6% . . . and Hispanic representation to decline from 14% to 9%.”¹²⁰

The District Court noted that Appellee’s admissions policy did not result in under-qualified students’ admission “in the name of diversity;” rather, the tip for race “impact[ed] who among the highly-qualified students in the applicant pool will be selected for admission to a class that is too small to accommodate more than a small percentage of those qualified for admission.”¹²¹

Both parties’ experts examined many race-neutral alternatives and whether they, “alone or in combination,” could “conceivably limit the decline in racial diversity.”¹²² These alternatives included: (1) Eliminating early action; (2) Eliminating tips for ALDC applicants; (3) Expanding recruiting and financial aid; (4) Admitting more transfer students; and (5) Eliminating standardized testing.¹²³

Thus, Appellee demonstrated that no approach, “individually or in combination,” would “allow it to reach the level of racial diversity that it

¹¹⁷ *Id.* at 178

¹¹⁸ *Id.*

¹¹⁹ *Id.* (Although Appellee always considered race “in conjunction with other factors and metrics,” it was a “determinative tip” for approximately 45% of all admitted African American and Hispanic applicants. “At least 10% of Harvard’s admitted class, including more than one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard’s race-conscious admissions process.”)

¹²⁰ *Id.* (“Over the course of four years, the number of African American and Hispanic students at Harvard would fall by nearly 1,000 students.”)

¹²¹ *Id.* (“Therefore, removing attention to race, without a workable race-neutral alternative, would cause a sharp decline in the percentage of African American and Hispanic students at Harvard without resulting in a particularly significant increase in the overall academic strength of the class.”)

¹²² *Id.* at 179.

¹²³ *Id.*

believe[d] necessary to achieve its educational mission without significant consequences to the strength of its admitted class.”¹²⁴

C. *Conclusions of Law*

The Appellate Court had five followings specific to this case:

First, there was no evidence, neither during the trial nor after the Court reviewed all exhibits and written submissions, either of “any racial animus whatsoever” or that Appellee intentionally discriminated against applicants beyond a race-conscious admissions policy.¹²⁵ Additionally, there was no evidence that the “Asian American identity” negatively affected any admissions decision.¹²⁶

Second, race-conscious admissions program allowed Appellee to achieve “a level of robust diversity” that would otherwise be impossible.¹²⁷

Third, the Court believed that Asian Americans were “not inherently less personable than any demographic group,” however, it did believe that Asian Americans were “not more intelligent or more gifted in extracurricular pursuits than any other group.”¹²⁸

Fourth, there was a statistical difference in the personal ratings “with white applicants faring better than Asian American applicants,” while Asian Americans did better on the extracurricular and academic ratings.¹²⁹ While

¹²⁴ *Id.*

¹²⁵ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 201–02.

¹²⁶ *Id.* at 202. (See, *Supra* n. 62. (The Court noted that, under the Title VI standard applicable outside the higher admissions context, Count I would fail because Appellant did not show, by a preponderance of the evidence, that: (1) Appellee used race to discriminate against applicants; (2) The discrimination was intentional; and (3) The discrimination was a substantial or motivating factor for admissions decisions. (citing: *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 43 (1st Cir. 2004). (citing: *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (“The requirement for a ‘substantial or motivating factor’ requires evidence of racial animus,” which was not present in this case.)) Further, under *Goodman*’s standard, the Court would enter judgment for Appellee because it showed that it employed its admissions program to promote diversity, which was not an invidious discriminatory purpose. Appellee made admissions decisions only after a “careful process that consider[ed] and appreciat[ed] the diversity that applicants from diverse racial backgrounds, including Asian Americans, provid[ed].” Appellee’s only intentional consideration of race viewed increased diversity as a positive attribute to its admitted class, which it achieved “by considering an individual’s race through an individualized holistic evaluation” the way the Supreme Court envisioned. Further, this Court was confident that “some external race-correlated factors and perhaps some slight implicit biases among some admissions officers that, while regrettable, cannot be completely eliminated in a process that must rely on judgments about individuals” resulted in the identified statistical disparities in personal ratings and admissions probabilities.))

¹²⁷ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 202.

¹²⁸ *Id.*

¹²⁹ *Id.* (These three ratings “incorporated subjective and objective elements.”)

implicit biases could affect Appellee's ratings, they were unintentional to the extent that race caused the disparities, and a judicial dictate that Appellee must abandon racial considerations in its admissions process would not cure them.¹³⁰

Fifth, Appellee's admissions program was "conceptually narrowly tailored to meet its interest in diversity."¹³¹ In practice, it "did not seem to unduly burden Asian Americans[,] despite the fact that some percentage of Asian American applicants . . . received lower personal ratings than white applicants who seem similarly situated."¹³² Race-conscious admissions programs "will always penalize to some extent" the groups that the process did not advantage, but the compelling interest in diversity and all benefits from a diverse population justified this penalty.¹³³ Here, "any relative burden on Asian Americans (and it is [unclear] that there is a disproportionate burden)" was not enough to warrant a finding that Appellee's admissions process did not survive strict scrutiny or that Appellee must forgo diversity to favor solely quantifiable metrics.¹³⁴

1. Overview

The Appellate Court first affirmed that Appellant had standing and found that Appellee met its burden and showed that its admissions process complied with the Supreme Court's principles.¹³⁵ The Appellate Court concluded that it should issue judgment for Appellee on the remaining claims (Count I: Intentional discrimination; Count II: Impermissible racial balancing; Count III: Failure to use race merely as a "plus factor;" Count V: The availability of race-neutral alternatives).¹³⁶ The Appellate Court relied on the Supreme Court's guidance in *Fisher v. Univ. of Texas at Austin*.¹³⁷ In *Fisher*, the Supreme Court stated three controlling principles discussed above that reflected the sum of its holdings in cases about higher education admissions and guided Title VI's application in this case.¹³⁸

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* ("The reason for these lower scores is unclear, but they are not the result of intentional discrimination. They might be the result of qualitative factors that are harder to quantify, such as teacher and guidance counselor recommendations, or they may reflect some implicit biases.")

¹³³ *Id.* at 202–03.

¹³⁴ *Id.* at 203.

¹³⁵ *Id.* at 183.

¹³⁶ *Id.*

¹³⁷ *Id.* at 184. (citing: *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 195 L. Ed. 2d 511 (2016)).

¹³⁸ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 188–89.

The Supreme Court consistently used strict scrutiny when it reviewed school admissions programs that considered race.¹³⁹ When the Court says that a school admissions program is subject to strict scrutiny, it means that the admissions program is subject to strict scrutiny, not just the admissions decisions that “involve the students that it seeks to advantage.”¹⁴⁰

Appellee argued that the court should apply a “facially neutral policy.”¹⁴¹ Analytically, a facially neutral policy that “has a disparate impact by race” is different from a policy that “admittedly considers race.”¹⁴² “In reviewing a uniformly applied facially neutral policy, ‘[d]etermining whether invidious discriminatory purpose was a motivating factor [in its adoption] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’”¹⁴³ Policies that do not “explicitly consider” race are facially neutral and violate the Equal Protection Clause “based on statistical evidence only where they form a clear pattern, unexplainable on grounds other than race.”¹⁴⁴ A policy that relies on race at least in part is subject to strict scrutiny, regardless of impact.¹⁴⁵

Appellee believed that its admissions program was “facially neutral” and that the court should use a “less demanding” standard than strict scrutiny to evaluate it.¹⁴⁶ Appellee claimed that its admissions program was “facially neutral” because it did not “explicitly prioritize” any racial group over another and it allowed the admissions officers to evaluate every student’s racial and ethnic identity “in the context of [their] background and circumstances.”¹⁴⁷ The Appellate Court decided, however, that Appellee’s admissions process was not “facially neutral” from a Title VI perspective because the admissions officers gave African American and Hispanic applicants tips, but was unlikely to give

¹³⁹ *Id.* at 190.

¹⁴⁰ *Id.* at 190 n. 56.

¹⁴¹ *Id.* at 189.

¹⁴² *Id.* at 189 n.55.

¹⁴³ *Id.* (citing: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 193 (D. Mass. 2018) (quoting: *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 83 (1st Cir. 2004)).

¹⁴⁴ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 189 n.55 (citing: *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (finding unconstitutional the administration of a facially neutral policy for licensing laundries where permits had been denied to 200 Chinese applicants but granted to all but one of 80-odd others permit applicants who were not Chinese); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (finding unconstitutional the administration of a facially neutral policy for licensing laundries where permits had been denied to 200 Chinese applicants but granted to all but one of 80-odd others permit applicants who were not Chinese)).

¹⁴⁵ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 189 n.55.

¹⁴⁶ *Id.* at 190 n.56.

¹⁴⁷ *Id.*

those same race-based tips to white and Asian-American applicants.¹⁴⁸ “In the case of a facially neutral policy, “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”¹⁴⁹ If the court here applied that standard, it would easily find for Appellee on Appellant’s claim of intentional discrimination because Appellant did not show any discriminatory intent or purpose.¹⁵⁰

Appellee’s admissions process, therefore, was not “facially neutral” because, even though Appellee’s admissions procedures did not “explicitly preference particular racial groups,” Appellee used its applicants’ races to “[pursue] its interest in diversity,” and it allowed its admissions officers to consider an applicant’s race when the officer made an admissions decision, “even when the applicant has not discussed their racial or ethnic identity in their application.”¹⁵¹ Appellee’s “acknowledged consideration of race” differs from a facially neutral policy because a facially neutral policy requires that plaintiffs “prove racial discrimination.”¹⁵² Here, Appellee admitted that it used race, so the issue became “whether it is permissible given the justification and the means used to achieve the sought-after diversity—in other words, whether [Appellee’s] use of race survives strict scrutiny.”¹⁵³

2. Appellee’s Admissions Program and Strict Scrutiny

Appellee’s admissions program passed strict scrutiny because its interest in diversity was substantial and compelling, and its goals were sufficiently measurable and permitted their adopted policies’ scrutiny. Additionally, Appellee used its admissions program to review each applicant holistically and consistently with the Supreme Court’s guidelines. Even though its admissions

¹⁴⁸ *Id.* (citing: *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (“In this circumstance, the standard for facially neutral policies could arguably be applied in evaluating any disparate outcomes as between whites and Asian Americans, keeping in mind that the purpose of strict scrutiny is to ferret out inappropriate racial classifications, and given that there is no suggestion of a racially motivated classification involving whites and Asian Americans.”); *Grutter v. Bollinger*, 539 U.S. 306, 323, 123 S. Ct. 2325, 2336, 156 L. Ed. 2d 304 (2003) (“We apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool.” (quotation marks omitted and modifying punctuation omitted))).

¹⁴⁹ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 190 n.56. (quoting: *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 55, 50 L.Ed.2d 450 (1977).)

¹⁵⁰ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 190 n.56.

¹⁵¹ *Id.* at 189–90.

¹⁵² *Id.* at 190. (citing: *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977) (plaintiffs “failed to carry their burden of proving that discriminatory purpose was a motivating factor” for a rezoning decision that did not explicitly rely on race.)).

¹⁵³ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 190.

policies were, perhaps, imperfect, the District Court concluded that the disparities did not come from any conscious racial prejudice.

a. Compelling Interest

In *Regents of Univ. of California v. Bakke*, the Court found that student body diversity and the educational benefits that come from a diverse student body was a compelling interest that could justify race's consideration in the admissions process: "As the interest of diversity is compelling in the context of a university's admissions program [the remaining question is] whether the program's racial classification is necessary to promote this interest."¹⁵⁴ Justice Powell explained that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."¹⁵⁵ Additionally, in *Grutter v. Bollinger*, the Court reaffirmed that "student body diversity is a compelling state interest that can justify the use of race in university admissions."¹⁵⁶ In *Fisher v. Univ. of Texas at Austin*, a university's goals should include: "enhance[ing] the education of [its] students of all races and background [to] prepare them to assume leadership roles in the increasingly pluralistic society into which they will graduate," achieving the "benefits that flow from [its] students' exposure to people of different background, races, and life experiences" by teaching them to engage across differences through immersion in a diverse community, and "broaden[ing] the perspectives of teachers[, and] thus tend[ing] to expand the reach of the curriculum and the range of scholarly interests of [its] faculty."¹⁵⁷

In the current case, Appellee's interest in student body diversity was "substantial and compelling;" its goals were not "elusory or amorphous," but were, instead, "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."¹⁵⁸ According to the Court, Appellee's goals were like those that the Supreme Court found concrete and precise" in *Fisher v. Univ. of*

¹⁵⁴ *Id.* at 191 (citing: *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 314, 98 S.Ct. 2733, 2761, 57 L. Ed. 2d 750 (1978)).

¹⁵⁵ *Id.* (citing: *Bakke*, 438 U.S. at 315, 98 S.Ct. 2733.)

¹⁵⁶ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 191 (citing: *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 2337, 156 L. Ed. 2d 304 (2003); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309, 133 S. Ct. 2411, 2418, 186 L. Ed. 2d 474 (2013) (reiterating that prior cases had found that "obtaining the educational benefits of student body diversity is a compelling state interest" (citation and internal quotation marks omitted)).

¹⁵⁷ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 191 (citing: *Fisher I*, 570 U.S. at 2211).

¹⁵⁸ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (citing: *Fisher II*, 136 S. Ct. 2198, 2211, 195 L. Ed. 2d 511 (2016)).

Texas at Austin, and the Appellate Court in this case found that Appellee needed racial categorizations to achieve those goals.¹⁵⁹ Appellee's racial diversity, the Court found, "would likely decline so precipitously that [Appellee] would be unable to offer students the diverse environment that it reasonable [found] necessary to its mission" without such racial categorizations.¹⁶⁰

b. Narrowly Tailored

Even where racial distinctions are permissible to further a compelling state interest, a university is still "constrained in how it may pursue that end: 'The means chosen to accomplish the [university's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'"¹⁶¹ Therefore, to satisfy strict scrutiny, "a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that 'encompasses a ... broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'"¹⁶² "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."¹⁶³

To be narrowly tailored, a race-conscious admissions program cannot use a quota system,¹⁶⁴ but instead must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.¹⁶⁵ In other words, an admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.¹⁶⁶ Thus,

¹⁵⁹ *Id.*

¹⁶⁰ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192.

¹⁶¹ *Id.* (citing: *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S. Ct. 1894, 135 L.Ed.2d 260 (1996) (quoting: *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986))).

¹⁶² *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (citing: *Fisher I*, 570 U.S. at 4211 (quoting: *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 315, 98 S.Ct. 2733, 2761, 57 L. Ed. 2d 750 (1978))).

¹⁶³ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (quoting: *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 2337, 156 L. Ed. 2d 304 (2003)) (citing: *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) ("The purpose of strict scrutiny is to ensure that 'the means chosen 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'")).

¹⁶⁴ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (quoting: *Grutter*, 539 U.S. at 334.).

¹⁶⁵ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (quoting: *Fisher I*, 570 U.S. at 309 (quoting: *Grutter*, 539 U.S. at 337.)).

¹⁶⁶ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (quoting: *Grutter*, 539 U.S. at 334 (quoting: *Bakke*, 438 U.S. at 317)).

individualized consideration in the context of a race-conscious admissions program is paramount.¹⁶⁷

The Court in this case found that Appellee’s admission’s program “[bore] the hallmarks of a narrowly tailored plan’ in that it used ‘race . . . in a flexible, nonmechanical way’ and considered ‘as a “plus” factor in the context of individualized consideration of each and every applicant.’”¹⁶⁸ Like the law school in *Grutter*, Appellee: “‘engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment,’ ‘this individualized consideration [is afforded] to applicants of all races,’ and its ‘race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.’”¹⁶⁹

This case’s allegations, though, required more analysis because, while Appellee proved that its admissions policy “must consider race to serve its substantial and compelling interest,” there still must be a “‘further judicial determination that the admissions process meets strict scrutiny in its implementation.’”¹⁷⁰ Thus, “narrow tailoring further requires ‘that a race-conscious admissions program not unduly harm members of any racial group’¹⁷¹“ due to “‘the ‘serious problems of justice’¹⁷²“ associated with narrow tailoring.¹⁷³

The last issue was whether Appellee’s admissions program unduly burdened Asian American applicants.¹⁷⁴ There was no statistically significant difference between Asian American and white applicants’ possible admission, which suggested that Appellee’s race-conscious admissions policy did not place an

¹⁶⁷ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 192 (citing: *Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 318 (“identifying the ‘denial . . . of th[e] right to individualized consideration’ as the ‘principal evil’ of the medical school’s admission’s program.”)).

¹⁶⁸ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 193 (citing: *Grutter*, 539 U.S. at 334).

¹⁶⁹ *Id.* (quoting: *supra* at 337–38).

¹⁷⁰ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 193 n.58 (citing: *Fisher I*, 570 U.S. at 311, 312–13 (“strict scrutiny affords a plaintiff ‘cross analysis to the evident of how the [admission] process works in practice.”)).

¹⁷¹ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 193 (quoting: *Grutter*, 539 U.S. at 341) (citing: *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 630, 110 S. Ct. 2997, 3043, 111 L. Ed. 2d 445 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (O’Connor, J., dissenting) (a race-conscious admissions program must not “unduly burden individuals who are not members of the favored racial and ethnic groups”)).

¹⁷² *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 193 (quoting: *Bakke*, 438 U.S. at 298).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

undue burden on its Asian American applicants.¹⁷⁵ However, other analysis implied that Asian American applicants were at a disadvantage as compared with white applicants, so this case's questions became: (1) Why did Asian American applicants score lower on the personal rating; (2) Did that lower score unfairly affect their admission chances; and (3) If the lower score did unfairly affect their chances, was that a burden on them when measured against Appellee's compelling interest in diversity?¹⁷⁶ There was the possibility that the group of Asian Americans that applied did not possess Appellee's preferred personal qualities at the same rate that the white applicants did and that the white applicants had weaker academics than the Asian American applicants.¹⁷⁷ There was little to no evidentiary support for this theory, but it "would result in a finding of no undue burden and a narrowly tailored process that satisfied strict scrutiny."¹⁷⁸ Alternatively, there was the possibility that overt discrimination and implicit bias disadvantaged Asian American applicants.¹⁷⁹

The Court saw no evidence of discrimination in the personal ratings other than "the slight numerical disparity itself," which the Court believed was minor and that several other factors, such as race-correlated inputs to the rating (i.e., recommendation letters), could partially explain.¹⁸⁰ "Just as the Court cannot explain the variations in the academic and extracurricular ratings, it cannot definitively explain the difference in the personal ratings," but the Court found that "the disparity was small and reflect[ed] neither intentional discrimination against Asian-American applicants nor a process that was insufficiently tailored to avoid the potential for unintended discrimination."¹⁸¹ Even if there were

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* ("In other words, [if we assume that] Asian American and white applicants have the same academic and extracurricular potential and the same quality of personal attributes as demographic groups, it could be that asymmetric portions of each of these groups apply to Harvard. This would explain why Asian American applicants . . . did better than white applicants on the academic and extracurricular ratings and why white applicants . . . did better on the personal rating[,] despite the likelihood that Asian Americans are not inherently more intelligent and white applicants are not inherently more personable.").

¹⁷⁸ *Id.* at 194. E.g., *Id.* at n. 59 ("There may be little evidentiary support for this hypothesis because it was not in the interest of either party to develop this scenario. SFFA was wedded to the idea that the Asian American applicants were superior in two profiles and discriminated against on a third, while Harvard was unwilling to overtly argue that Asian American applicants were actually weaker in personal criteria, notwithstanding their stronger average academic performance and Harvard's acknowledgment that Asian American applicants tend to be stronger in their extracurricular pursuits. The Court does not think, however, that demonstrable, disproportionate strength of a racial group in one area necessarily implies that the same racial group should be strong in all areas. If one assumes that raw talent and race are unrelated, it would be unsurprising to find that applicants that excel in one area, tend to be somewhat weaker in other areas.").

¹⁷⁹ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 194.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

“unwarranted disparity in the personal ratings,” the Court could not identify a situation where the personal ratings affected an individual applicant.¹⁸² Thus, the Court found that the personal ratings did not burden Asian-American applicants more than they did white applicants.¹⁸³ Further, the Court found no evidence of “any discriminatory animus or conscious prejudice” and that it could interpret that certain statistics suggested that Appellee’s admissions process “unintentionally favored some subsets of Asian-Americans.”¹⁸⁴

In terms of burden, the Court found that it would likely disadvantage at least some Asian-American applicants if Appellee eliminated race’s consideration because the “*amicus*” testified that they “viewed their race or ethnicity as a critical aspect of their life experiences and applications.”¹⁸⁵ Thus, the Court decided it was vital that Asian-Americans and other racial minorities could discuss their racial identities in their applications— “[a]s the Court has seen and heard, race can profoundly influence applicants’ sense of self and outward perspective.”¹⁸⁶ If Appellee removed racial and ethnic considerations from the admissions process entirely, Appellee would not only simultaneously deprive applicants, including Asian-American applicants, “of their right to advocate the value of their unique background, heritage, and perspective,” but also “deprive [itself] of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.”¹⁸⁷ Further, the Court stated that Appellant did not present any evidence that reflected any discriminatory animus, or an Asian-American applicant who Appellant could show that Appellee would have admitted were it not for the personal ratings unfairly deflating their application.¹⁸⁸

Thus, the Court concluded that Appellee designed and implemented its admissions program in a way that allowed it to review every application in a holistic manner that was consistent with the Supreme Court’s guidance.¹⁸⁹

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (“The most likely causes of these statistical findings, however, is random variation in the admissions process or omitted variable biases, not selective discrimination that favored some Asian Americans and disfavored others.”)

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 194–95.

¹⁸⁷ *Id.* at 195.

¹⁸⁸ *Id.* (“There thus remains the distinct possibility that a review of the available applications did not turn up a rejected Asian American applicant who was clearly more qualified than the white applicants who were admitted, or an applicant who received an obviously unjustified personal rating. This would strongly suggest that Asian American applicants were not discriminated against relative to white applicants and were therefore not unduly burdened by Harvard’s admissions program.”)

¹⁸⁹ *Id.*

Moreover, the Court concluded that, even though Appellee's admissions process was, perhaps, imperfect, "the statistical disparities between applicants from different racial groups on which [Appellant]'s case rests [were] not the result of any racial animus or conscious prejudice."¹⁹⁰ The Court found that Appellee's admissions program was narrowly tailored to achieve a diverse class and the benefits that flowed from such a class.¹⁹¹

3. Summary

Even though Appellee's admissions program survived strict scrutiny, it was not perfect and would likely benefit from implicit bias training for admissions officers; clear guidelines on how to use race in the admissions process; and a note to admissions officers about the significant race-related statistical disparities in the rating process.¹⁹²

Further, the Court repeated what the Supreme Court said in *Fisher II*:

The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.¹⁹³

The Court did not intend, however, to require that Appellee have a system that is "overly data driven."¹⁹⁴ If Appellee used statistics to ensure that profile ratings', or any other measure's, distribution was exact, even among various groups, could run afoul of quotas' prohibition.¹⁹⁵ More importantly, it might defeat a comprehensive, holistic review process that would allow applicants'

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 204. ("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 [Appellee's] admissions program is not narrowly tailored.")

¹⁹³ *Id.* (quoting: *Fisher II* at 2213–15.)

¹⁹⁴ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 204.

¹⁹⁵ *Id.*

admission with potentially non-quantifiable virtues.¹⁹⁶ However, now that Universities understand how statistical analyses could reveal “otherwise imperceptible statistical anomalies,” they should use these statistics “as a check on the process and as a way to recognize when implicit bias might be affecting outcomes.”¹⁹⁷

The Supreme Court always intended that affirmative action programs would have limited durations.¹⁹⁸ For example, the Supreme Court articulated its expectation that it would be unnecessary to use racial preferences to achieve a diverse student body in twenty-five years.¹⁹⁹ However, as entrenched racism’s and unequal opportunity’s effects remained obvious, it was imperative that higher education institutions that used racial preferences to achieve a diverse learning environment “ensure, through data and experience, that ‘race plays no greater role than is necessary to meet its compelling interest’ in diversity and to keep in mind that ‘racial classifications may sometimes fail to capture diversity in all of its dimensions.’”²⁰⁰

Here, the Court determined that ensuring Appellee’s diversity relied, at least in part, on race-conscious admissions.²⁰¹ Appellee’s admission program passed constitutional muster because it satisfied strict scrutiny’s requirements.²⁰² The students Appellee admitted and who chose to attend it lived and learned “surrounded by all sorts of people, with all sorts of experiences, beliefs, and talents.”²⁰³ This gave them the opportunity to know and understand each other beyond race, “as whole individuals with unique histories and experiences.”²⁰⁴ “It is this, at [higher education institutions,] that will move us, one day, to the point where we see that race is a fact, but not the defining fact that tells us what is important, but we are not there yet.”²⁰⁵

Until then, race-conscious admissions programs that survive strict scrutiny have an important place in society and help ensure that higher education institutions offer a diverse atmosphere that fosters learning, improves scholarship, and encourages mutual respect and understanding.²⁰⁶

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (citing: *Grutter v. Bollinger*, 539 U.S. 306, 342, 123 S. Ct. 2325, 2346, 156 L. Ed. 2d 304 (2003).)

²⁰⁰ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 205. (quoting: *Fisher II* at 2210.)

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 205–06.

CONCLUSION

The Supreme Court granted certiorari to *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 133., on January 24, 2022. With the new change in Justices, it is impossible to determine the case's outcome. Whatever the Supreme Court decides will directly affect the pipeline by which diversity leaks into law firms. Should it do away with affirmative action-based admissions policies in higher education institutions, the pool of graduates' diversity will likely decline, which will affect incoming and graduating law school classes, which decreases the amount of diversity law firms can achieve.

Race-conscious admissions policies' elimination will indirectly affect which law firms corporations choose to hire. Since corporations use diversity as a determining factor when retaining law firms, this diversity decrease will limit which firms they can hire because there will be fewer firms that meet their requirements. "The rich diversity at higher education institutions and the benefits that flow from that diversity will foster the tolerance, acceptance, and understanding that will ultimately make race-conscious admissions obsolete," and these effects will continue through to law firms and help them meet their corporate clients' diversity requirements.²⁰⁷

Today's large corporate clients demand that the lawyers who work on their matters be diverse. To meet these demands, law firms must first hire qualified and diverse attorneys (or prospective attorneys awaiting passage of their bar admission examination). There must be a sufficient available pool of candidates that satisfy diversity standards. The starting point for assuring a diverse pool, however, cannot be at the law firm or law school level—it must be at the higher education institution level using affirmative action as the basis for the admissions process.

If corporations really have concerns about their law firms' diversity, then one solution to this problem would be corporations funneling money to protect higher education institutions' race-conscious admissions policies or donating money to help their local institutions' recruitment efforts or to create scholarships or incentives specifically for minority students. Corporations' pressuring law firms to be diverse seems, on its face, a reasonable request. However, law firms have no control over their applicant pool's diverse make-up. Thus, corporations must go straight to the source if they intend to make such demands of law firms. Corporate clients must do their part to ensure that the next

²⁰⁷ *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 205.

generation of lawyers is more diverse than the one before. Otherwise, they must realize that their standards are detrimental to meaningful diversity.