



**Hearing Argument of LDF Assistant Counsel Jennifer A. Holmes
on behalf of Amici 25 Harvard Student and Alumni Organizations**

SFFA v. Harvard, 1:14-cv-14176-ADB

February 13, 2019

Good afternoon Your Honor, counsel. My name is Jennifer Holmes from the NAACP Legal Defense Fund and I represent 25 Harvard student and alumni groups as amici. These organizations represent thousands of Asian American, Black, white, Latinx, and Native students and alumni who support Harvard's ongoing consideration of race, as one of many factors, in its holistic admissions process. Your honor heard from a few of these members who testified during trial as well as witnesses from the student amici. By contrast, no student testified in support of SFFA's claims. The Court has our proposed findings of fact and conclusions of law, but I would like to highlight three crucial points in a case that has become largely dominated by the battle of statistics.

1. The first is to give a concrete picture of what is meant by the educational benefits of diversity, in other words, what would be lost should Harvard no longer be able to cultivate this diversity.
2. The second is to expose the fallacy of race-neutral alternatives. They have been studied, attempted, and simulated, and the evidence in the record shows that there are no workable alternatives through which Harvard can generate sufficient educational benefits of diversity compared to the limited consideration of race in admissions.
3. Finally, SFFA's push for race-blind admissions disproportionately harms applicants and students of color, including Asian Americans.

I. Educational Benefits of diversity

One goal of the organizations I represent is to make concrete what a diverse student body looks like—and I'm focusing here on racial and ethnic diversity although it is true that other types of diversity are also important. Our witnesses demonstrated how a learning in a diverse student environment shaped their educational experiences.

Their firsthand experiences offer real world examples of the concepts described by Dr. Ruth Simmons, an educator with decades of experience in college pedagogy and administration: that encountering difference deepens students' learning, influences their



academic and career paths, and breaks down stereotypes to prepare them for a future in a pluralistic and diverse society.

To highlight a few examples from the record—

A racially diverse student body enhances academic study:

- As Thang Diep recalled, hearing from a Black student in his public health class help open his eyes to how medical studies can be racially biased, informing his plans to be a pediatrician.
- Or take Cecilia Nuñez, whose experience before Harvard was primarily with Mexican-Americans in her community, came to Harvard and discovered Latinx students from a range of ethnic backgrounds, and was inspired to focus on Latin American studies to explore the full breadth of this diaspora.

Harvard as an institution depends on a diverse student body to become a school that is more responsive to the needs of its students:

- For example, Harvard administrators reached out to Sarah Cole, the President of the Black Students Association, during a period of police shootings of unarmed Black men, for help in communicating with the student body about this sensitive issue.

Diversity on campus fosters feelings of representation, recognition, and solidarity:

- Madison Trice spent years being the only Black student in her high school honors classes, but was elated to arrive at Harvard and be welcomed into an organization that celebrates Black Harvard women in all their multidimensional identities.

Diversity allows for coalition building and coming together to tackle difficult topics:

- a group of Asian American students started a coalition of multiple student groups of color to push the Harvard administration to establish an ethnic studies track and program.

And diversity promotes moments of interpersonal revelation:

- Through late night conversations with her Black roommate after an incident of police brutality against a Black student took place just steps from campus, Catherine Ho learned about the emotional toll the episode had taken on the Black student community.



This is what the Supreme Court meant when it said in *Bakke*, “The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.” Justice Powell continued, “[I]t is not too much to say that the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”

Without a diverse student body, the conversations, educational epiphanies, moments of solidarity, challenges to prior assumptions, or feelings of finally belonging cannot happen. These educational experiences cannot be taught in the classroom. Indeed, much of the work of translating diversity into these benefits is shouldered by out client organizations, which bring people together across racial lines for socializing, educational events, dialogue, and activism. Even though they can’t be quantified, the evidence shows that these benefits are more than abstract concepts, and have real lasting effect on students’ educational experiences and future potential. And we should tread carefully when we consider dismantling an admissions system that has made them possible.

II. Fallacy of Race-Neutral Alternatives

Turning to race-neutral alternatives, I will start by pointing out that on the stand, Mr. Kahlenberg agreed to the eminently simple concept that the best and most efficient method of promoting racial diversity in a student body is to consider race in admissions.

The evidence in the record takes this further, demonstrating that it is a fallacy that race-neutral alternatives are enough to produce a sufficiently diverse class to foster the educational benefits of diversity.

First, Harvard already employs numerous race-neutral alternatives such as an immense and targeted recruitment apparatus, one of the most generous financial aid programs in the country, strong consideration of low-income or disadvantaged status in admissions, and extensive resources put toward convincing admitted students to matriculate.

Even if these practices remained in place, according to Dr. Arcidiacono, if Harvard eliminated the consideration of race in admissions, the number of Black and Latinx admitted students would fall by nearly 1,100 across all four years. That is roughly half.



Mr. Kahlenberg agreed this would be unacceptable, but his own proposals of race-neutral alternatives do not fare much better. In each of his four main simulations, the share of admitted Black students would drop by nearly one third. And we must remember that this is the percentage of admitted students, so the actual share of Black student enrollment would be even lower, in the single digit percentages, especially given that Black students yield at a lower rate.

SFFA repeatedly characterizes this reduction as “slight.” And shockingly, SFFA touts this marginalization of Harvard’s Black student community as an *increase* in diversity claiming that there will be increases to the Latinx or Asian American share of admits. Our clients would support this increase but not at the cost of losing one third of their Black classmates.

In SFFA’s view apparently, diversity means people of color are fungible. You don’t need a robust mix of people from different backgrounds. You don’t care about diversity within each racial group. You can squeeze out a third of the Black community and pat yourself on the back for increasing diversity.

Thankfully, under *Fisher*, Harvard, and not SFFA, has a First Amendment right to define its educational mission and pursue the type of robust diversity that supports that vision.

But SFFA’s ultimate failure is that it does not go past the numbers to consider the effect on actual students. SFFA and Mr. Kahlenberg offer no evidence about how the loss of one-third of Black admits would affect the educational benefits of diversity at Harvard. Mr. Kahlenberg did not speak to any students, faculty, or educational experts about this, and SFFA presented no evidence on the issue. In its brief, SFFA simply scoffed at the idea that there could be a negative effect, calling it “not credible.”

But the unrebutted evidence at trial shows otherwise. Amici witnesses described their participation in or engagement with the Black student community and the detrimental effects a significant reduction in this community would have on their Harvard experience. These effects include:

- Fewer opportunities for meaningful interactions that break down stereotypes
- More isolation of Black students and feelings of tokenism in the classroom
- A potential increase in racial hostility
- Less diversity within the Black community because a smaller community will likely be less multidimensional and intersectional and cannot represent the full range of Black experience.
- Fewer Black students to help recruit and welcome prospective students



- Less capacity of cultural organizations to promote dialogue and education that helps expose students to people of different backgrounds and issues faced by different communities
- On this last point, many Black student organizations (such as our clients, the Black Students Association and the Kuumba singers) are some of the more established organizations on campus, with decades of leadership at Harvard. They have served as models and paved the way for a proliferation of other cultural organizations. For these organizations to lose members and capacity would have effects that reach beyond the Black community but would affect the entire network of cultural organizations and Harvard's relationship with its students of color.

Harvard still has progress to make to become a more inclusive place: there are still classes and spaces that feel overwhelmingly white, Harvard still lacks an ethnic studies program, there are still incidents of racial hostility, and many complained about the school's inadequate response to police brutality. A significant reduction in the Black student community is antithetical to making progress on these issues.

And thus, Your Honor should reject SFFA's claims that it has identified race-neutral alternatives that work "about as well" as the consideration of race because there is no evidence these alternatives can foster diversity sufficient to reap its educational benefits.

III. Disadvantage to Applicants of Color

Finally, at every step of this case, SFFA has pursued its claim in ways that disadvantage students of color.

First, SFFA's intentional discrimination claim relies heavily on comparing applicants on academic measures of grades and test scores. But Harvard has never claimed that these are the most important metrics in its admissions determinations, especially when distinguishing between highly competitive applicants. One reason is because Harvard recognizes the realities of our K-12 education system, in which Black and Latinx students disproportionately face barriers to educational opportunity that may limit the degree to which grades and test scores reflect their full academic potential.

And yet, SFFA over emphasizes grades and test scores in its analysis, constantly comparing applicants by academic index, even though but Harvard does not even consider the academic index in its admissions.



You have heard from student witnesses of many races and they are all highly qualified, with stellar academic and non-academic credentials. Hearing their pre-Harvard accomplishments, scores, and resumes, it is clear that to the extent race was considered in their admission, it was simply a plus factor that helped add context to their story, the cherry on top of a great application.

But SFFA's focus on academic measures, devalues the non-academic strengths of their applications, which can sometimes be the credentials that allow Black and Latinx applicants to show their full potential.

Second, race-conscious admissions allow Harvard to consider the full lived experiences of applicants of color, whose experiences may often be illuminated by their racial or ethnic identity. If Harvard no longer considered race in admissions, it could signal to these applicants that the school doesn't value these experiences or might not even consider compelling stories of adversity or identity or immigrant background that are inextricably tied to race. This would hurt Asian American applicants as much as other applicants of color.

Finally, under all the expert analysis in this case (Dr. Card, Dr. Arcidiacono, and Mr. Kahlenberg) if you remove the consideration of race, almost any way you slice the data, the groups that suffer in the admissions process are primarily Black and/or Latinx applicants. SFFA's claim is premised on alleged discrimination against Asian American applicants compared to white applicants, yet white applicants do not bear the brunt of the burden of the proposed alternatives or remedies. Indeed, in some analyses, white applicants are the primary beneficiaries.

It is hard to believe that SFFA has pursued this case in order to turn away the wolf of racial bias when SFFA's claims, analyses, and remedies seem so slanted against students of color.

CONCLUSION

On a final note, since its inception, my organization, LDF, as well as the 25 organizations we represent, has been committed to racial equality. We unequivocally denounce discrimination against any group.

We are also well aware of the burden civil rights plaintiffs shoulder in bringing intentional discrimination cases under Title VI. SFFA bears that burden in this case, but it has attempted to evade its obligation by twisting the law to argue that the burden should



shift onto Harvard to disprove discrimination simply because Harvard has a race-conscious admissions policy, even though that policy been approved by Supreme Court precedent.

SFFA's legal gymnastics are revealing. Because this case is not really about intentional discrimination. It is an attack on Harvard's ability to provide a racially inclusive and diverse educational environment from which all students benefit. The subtext of SFFA's argument is that *any* race-conscious admissions policy is tantamount to discrimination. But that premise is not borne out by the evidence in this case and conflicts with Supreme Court precedent. And it is deeply ironic that under the guise of Title VI of the Civil Rights Act of 1964, SFFA would attempt to ban a civil rights policy that is intended to advance equity in higher education without which Harvard would be a much whiter, more closed institution.