

No. 20-1199

---

---

IN THE  
**Supreme Court of the United States**

---

STUDENTS FOR FAIR ADMISSIONS, INC.,

*PETITIONER,*

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

*RESPONDENT.*

---

*On Petition for a Writ of Certiorari to the  
U.S. Court of Appeals for the First Circuit*

---

**BRIEF OF THE LIBERTY JUSTICE CENTER AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

---

Daniel R. Suhr  
*Counsel of Record*  
James J. McQuaid  
LIBERTY JUSTICE CENTER  
190 LaSalle St., Ste. 1500  
Chicago, IL 60603  
(312) 263-7668  
dsuhr@libertyjusticecenter.org

March 31, 2021

---

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

INTEREST OF THE AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT & INTRODUCTION .. 1

ARGUMENT ..... 2

    I.    Harvard was presented with  
          workable race-neutral alternatives  
          to its race-based admissions program..... 2

    II.   The system Harvard defends is at  
          odds with its stated goal of diversity. .... 7

        A. Harvard’s favoritism towards  
           ALDCs is racially unfair and  
           thwarts Harvard’s stated goal of  
           promoting racial and socioeconomic  
           diversity..... 8

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

### Cases

<i>Brown v. Board of Educ.</i> , 347 U.S. 483 (1954) .....	1
<i>Fisher v. Univ. of Tex.</i> , 570 U.S. 297 (2013) .....	3, 7
<i>Grutter v. Bollinger</i> 539 U.S. 306 (2003) .....	2

### Other Authorities

Christina Gough, <i>Share of African Americans in the National Football League in 2019, by role</i> , Statista (Aug. 27, 2020).....	8
Expert Report of Richard D. Kahlenberg, Dkt. 416-1 in No. 1:14-cv-14176-ADB (D.Mass) .....	passim
John Brittain & Eric L. Bloom, “Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions,” in <i>Affirmative Action for the Rich: Legacy Preferences in College Admissions</i> , ed. Richard D. Kahlenberg (Century Foundation Press, 2010).....	9
Rebuttal Report of Richard D. Kahlenberg, Dkt. 416-2 in No. No. 1:14-cv-14176-ADB (D.Mass) .....	6, 7
Richard Lapchick, <i>The 2019 Racial and Gender Report Card: National Basketball Association</i> .....	8

William Fitzimmons, Rakesh Khurana,  
and Michael D. Smith, "Report of the  
Committee to Study Race-Neutral  
Alternatives," April 2018 ..... 3, 7, 10, 11

## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center believes that every American has a right to fair and equal treatment regardless of race, whether in education or other sectors of society.

### SUMMARY OF ARGUMENT & INTRODUCTION

Discriminating between people on the basis of race should be illegal in America. “To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

Yet this is exactly what Harvard has done. Although SFFA’s expert witness propounded multiple race-neutral admissions plans, Harvard continues to maintain

---

<sup>1</sup> Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondent received notice more than 10 days before its filing that Amicus intended to file this brief, and both consented to its filing.

that only its discriminatory system is workable. It is not.

Harvard rejected the proposed race-neutral alternatives for an even more pernicious reason: it wants to maintain a facially race-neutral set of preferences for athletes and children of alumni, donors, and faculty. These preferences, or “tips,” overwhelmingly benefit rich white applicants in contradiction of Harvard’s stated aim of having a diverse student body.

Harvard can, and must, do better. So can all of American higher education.

## ARGUMENT

### **I. Harvard was presented with workable race-neutral alternatives to its race-based admissions program.**

Harvard’s stated intention is diversity: “Harvard tries to create opportunities for interactions between students from different backgrounds and with different experiences to stimulate both academic and non-academic learning.” App. 109 (District Court Findings of Fact). Harvard successfully convinced the First Circuit that its goal was “not simple ethnic diversity” but rather “exposure to widely diverse people, cultures, ideas, and viewpoints.” App 59-60 (Opinion below, quoting *Grutter v. Bollinger*, 539 U.S. 306, 324-45 (2003)).

Harvard convened a committee to determine, as required by *Grutter* and *Fisher*, “whether Harvard Col-

lege’s pursuit of its diversity-related educational objectives still requires it to consider the race and ethnicity of undergraduate applicants . . . or whether Harvard could accomplish those objectives without taking race into account.” William Fitzimmons, Rakesh Khurana, and Michael D. Smith, “Report of the Committee to Study Race-Neutral Alternatives,” April 2018 (“Harvard Report”), CA1.Joint.App’x (JA) 4413-31. After this lawsuit was filed (and at least partly in response to Petitioner’s expert reports, JA 4412), that committee released a report stating that Harvard’s “goal is to admit students . . . who will contribute through their diversity of experiences, backgrounds, and interests to the quality and vitality of life at the College.” *Id.* at 1 (JA 4413).

While promoting student body diversity may be a compelling interest, “the reviewing court must ultimately be satisfied that *no* workable race-neutral alternatives would produce the educational benefits of diversity.” *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013) (emphasis added). “[S]trict scrutiny imposes on the university the ultimate burden of demonstrating . . . that available, workable race-neutral alternatives do not suffice.” *Id.* In other words, in order to pass constitutional muster, Harvard’s discriminatory plan must be the best of all available plans.

As Petitioner alluded to in its petition, at least one workable race-neutral alternative exists. Petition 43. This statement undersells the Expert Report of Richard D. Kahlenberg, Dkt. 416-1 in No. 1:14-cv-14176-ADB (D. Mass.) (“Expert Report”). The Expert Report was specifically commissioned to examine “whether

Harvard could implement workable race-neutral alternatives that would produce the educational benefits of diversity.” Expert Report at 3.

In fact, Kahlenberg found several race-neutral alternatives. First, Kahlenberg found that increasing socioeconomic preferences would increase both racial and socioeconomic diversity without penalizing applicants based on their race. Expert Report at 17-29. He noted that such a program would benefit “working-class” applicants who are “more likely . . . to live in segregated neighborhoods” – in other words, it would increase the socioeconomic diversity Harvard professes to want. *Id.* at 19.

Second, Kahlenberg proposed that Harvard live up to its 2007 commitment to increase financial aid. *Id.* at 29. Harvard, with its \$40,929,700,000 endowment, could obviously afford to increase financial aid in furtherance of its stated objective of increasing socioeconomic diversity. Ilana Kowarski, *10 Universities With the Biggest Endowments*, U.S. News (Sept. 22, 2020).<sup>2</sup> Increasing financial aid would obviously allow Harvard “to create opportunities for interactions between students from different backgrounds and with different experiences.” App. 109 (District Court Findings of Fact).

Third, Kahlenberg discussed eliminating preferences for athletes, children of donors or faculty members, and the “Z-list,” which *Amicus* will discuss in more detail in Section II of this brief. Expert Report at 31-36.

---

<sup>2</sup> Available at <https://www.usnews.com/education/best-colleges/the-short-list-college/articles/10-universities-with-the-biggest-endowments>.

Fourth, Kahlenberg observed that one of Harvard's own professors published an essay in a book Kahlenberg edited, suggesting that "a university" could achieve a greater degree of diversity by sorting students through a "geographic diversity algorithm" using ZIP codes. Expert Report at 2, 37 (quoting Danielle Allen, "Talent is Everywhere: Using Zip Codes and Merit to Enhance Diversity," in *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas*, ed. Richard D. Kahlenberg (New York: Century Foundation/Lumina Foundation, 2014), pp. 147-48).

Fifth, Kahlenberg suggested that Harvard increase its recruitment efforts, noting that Harvard "exerts far less effort to recruit economically disadvantaged applicants" and "does an especially poor job of recruiting . . . students whose parents do not have a college degree." Expert Report at 39.

Sixth, Kahlenberg noted that "many selective public and private colleges" provide opportunities for high-achieving community college students to transfer, thus promoting socioeconomic diversity. Expert Report at 41. However, Harvard has "lagged" while other colleges have been increasing community college transfers. *Id.*

Finally, Kahlenberg proposed that Harvard end early admissions – as it had once done, citing their inherent unfairness to low-income students. Expert Report at 42. In total, Kahlenberg proposed seven different race neutral alternatives to achieve Harvard's stated goal

of increasing socioeconomic diversity; Harvard rejected them all.

Kahlenberg observed that the sum total of Harvard's token effort to meet its obligation under *Fisher* to consider a workable alternative to its racist admissions system was "a disbanded committee" and the creation of a three-member committee that met only once. Expert Report at 16. Harvard's own experts did not address this failure in their own reports. Rebuttal Expert Report of Richard D. Kahlenberg, Dkt. 416-2 in No. 1:14-cv-14176-ADB (D. Mass) ("Rebuttal Report") at 6. (The Rebuttal Report is dated January 29, 2018; the three-member committee met in March of that year to discuss "race-neutral alternatives . . . including responses to [the] Kahlenberg rebuttal report." JA 4412. That committee produced the Harvard Report in April 2018; some of the Harvard Report's shortcomings will be discussed in Part II of this brief.)

Most tellingly of all, Kahlenberg used a model produced by one of *Harvard's* expert witnesses (with a few improvements to account for disadvantaged high school students; parental income, education, and English proficiency; neighborhood income; athletic preferences; and a lack of early admissions) to demonstrate that viable race-neutral alternatives exist, and that Harvard is deliberately ignoring them in violation of *Fisher*. Rebuttal Report at 29-32. Kahlenberg's simulation – again, based on Harvard's expert's model, and therefore using data that Harvard had or should have had available – saw white students fall from 40% of admissions to 32%; Asian-American students rise from 24% to 31%; and, perhaps most important for Har-

vard's stated goal of increasing socioeconomic diversity, first-generation college admissions rose from 7% to 25%. Rebuttal Report 33.

Why does Harvard reject all of these proposals? Perhaps because socioeconomic diversity is not Harvard's real goal.

## **II. The system Harvard defends is at odds with its stated goal of diversity.**

To reiterate, Harvard's stated justification for its racial discrimination is that it wants to obtain "a student body that reflects the broadest possible range of backgrounds and experiences." Harvard Report at 1, JA 4413. Harvard maintains that if it eliminated race as a factor in admissions, minority representation in the student body would decrease. *Id.* at 8, JA 4420. To defend its racist practices, Harvard necessarily believes that "no workable race-neutral alternatives would produce the educational benefits of diversity." *Fischer*, 570 U.S. at 312. Harvard's defense in this case revolves around diversity.

Why, then, does Harvard insist on protecting its policy of favoring athletes, legacies, "Dean's list" or "Z-list" applicants, and children of faculty (collectively "ALDCs"), even though its objectives in maintaining ALDC favoritism are directly at odds with its stated objective of student body diversity?

**A. Harvard’s favoritism towards ALDCs is racially unfair and thwarts Harvard’s stated goal of promoting racial and socioeconomic diversity.**

ALDCs are still disfavored if they are Asian-American – or indeed any minority. Between 2014 and 2019, 68% of admitted ALDC applicants were white, while Asian-Americans made up only 12% of that figure, and African-Americans and “Hispanic or Other” represented a paltry 6% each. JA 5926. This program is plainly at odds with Harvard’s stated goals of promoting racial and socioeconomic diversity.

Start with athletes. 86% of athletes are admitted, compared to only 6% of non-athletes. JA 5989. One might expect, depending on the sport in question, an at-least equal share of white and African-American athletic admissions. For example, 58.9% of NFL players in 2019 were African-American. Christina Gough, *Share of African Americans in the National Football League in 2019, by role*, Statista (Aug. 27, 2020).<sup>3</sup> That number was even higher in the NBA, where 74.8% of players were African-American. Richard Lapchick, *The 2019 Racial and Gender Report Card: National Basketball Association* (last visited March 25, 2021).<sup>4</sup> What was the percentage of African-American athletes admitted by Harvard in 2019? 13%. JA 5926. Perhaps Harvard primarily recruits hockey players.<sup>5</sup>

---

<sup>3</sup> Available at <https://www.statista.com/statistics/1154691/nfl-racial-diversity/>.

<sup>4</sup> Available at [tidesport.org/nba](https://tidesport.org/nba).

<sup>5</sup> A separate reason for eliminating athletic preferences is that they are ripe for abuse. While Harvard itself was not implicated, the recent admissions scandal cannot have escaped the Court’s

Legacies, likewise, are overwhelmingly white. As Petitioner’s expert observed, “only 7.6% of legacy admissions in 2002 were underrepresented minorities, compared with 17.8% of all students.” Expert Report at 32, citing John Brittain & Eric L. Bloom, “Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions,” in *Affirmative Action for the Rich: Legacy Preferences in College Admissions*, ed. Richard D. Kahlenberg (Century Foundation Press, 2010), p. 132. Petitioner’s expert also determined that four of the top 10 universities do not employ legacy preferences, suggesting that Harvard could do the same if it was, in fact, committed to socioeconomic diversity. Expert Report at 32.

At trial, Dean Fitzsimmons admitted that Harvard gives a “tip” in its admissions scoring process to children of alumni because alumni perform recruitment tasks for Harvard, “promote Harvard across the country,” and “give money and raise money for Harvard.” JA 920. (Kahlenberg argues that “the existence of legacy preferences does not increase alumni donations to an institution,” Expert Report at 32.) Likewise, Harvard also “give[s] a tip to children of Harvard faculty

---

notice. The rich and famous paid more than \$25 million in total bribe money to place their children in prestigious universities’ athletic admissions program. Aaron Feis and Lia Eustachewich, *Felicity Huffman, Lori Loughlin busted in college admissions cheating scandal*, New York Post, March 12, 2019, 10:54 AM, <https://nypost.com/2019/03/12/lori-loughlin-felicity-huffman-busted-in-college-admissions-cheating-scandal/>.

and staff.” JA 921. It does this in order “to attract faculty to Harvard.” JA 922. And it also gives a “tip” to athletes because “having all of our students gather together . . . for athletic contests builds a spirit of community.” JA 915. These “tips” matter; legacy applicants have a 33.6% admit rate compared to 5.9% of non-legacy applicants, and children of faculty or staff have a 46.7% admit rate compared to a 6.6% admit rate for applicants who are not children of faculty or staff. JA 5989. And Dean Fitzsimmons admitted that “[t]here are some [athletes and legacies] who needed a tip to get in.” JA 916.

So it should come as no surprise that Kahlenberg proposed removing ALDC “tips” in his expert report as a means of achieving a greater degree of racial and socioeconomic diversity and, incidentally, a more race-neutral admissions rubric. Expert Report 31-36. For example, if Harvard stopped showing favoritism to children of “the wealthiest donors, those giving \$1 million or more,” Harvard’s student body would obviously become more socioeconomically diverse. Expert Report at 34.

Kahlenberg also proposed eliminating the “Z-list,” a method by which Harvard admits mediocre students (those whose “academic records on average fall about as close to rejected students as they do to admitted students”) on the condition that they take a gap year before entering Harvard. *Id.* at 34, 36.

The Harvard Report euphemistically states that the Z-list “allows Harvard to admit excellent students who would benefit from the experiences gained in a gap year.” Harvard Report at 17 (JA 4429). But then the

Report immediately goes on to admit that, yes, some Z-list students “also have significant connections to the University.” *Id.* Harvard nevertheless presents this as a good thing. Favoring well-connected applicants at the expense of underserved communities “helps to cement strong bonds between the university and its alumni.” *Id.* at 16 (JA 4428). Admirable, but such a goal is not a sufficiently important reason to discriminate on account of race. And while the Committee self-servingly states that “children of Harvard alumni tend to be very strong applicants,” *Id.* at 17 (JA 4429), that only begs the question of why “very strong applicants” need an extra advantage.

Likewise, Ruth Simmons, President of Prairie View A&M University in Texas and an expert witness for Harvard (JA 2757-58), said at trial that Harvard would “never” admit a child of an alumnus or donor “if they are not qualified on the same basis as other students,” JA 2788:2-4, 22-3, begging the question of why they get “tips” in the first place. Her further testimony may answer that question: “when individuals who are prominent, . . . who have all manner of things that they can do to assist the university, might have children apply,” it would not be “problematic to admit those students” “if it is possible that their children are highly able and . . . their parents could make a difference for the institution.” JA 2789. This is somehow different from “admit[ting] a student because their family promises a contribution,” which would be a “completely inappropriate” “quid pro quo.” JA 2788. Semantics aside, Harvard’s interest in maintaining these sorts of perks for wealthy, well-connected (and usually white) students is at odds with its stated intention of having a diverse student body.

Harvard is, on the one hand, hiding behind its “diversity” goal to discriminate against Asian-Americans, and on the other, completely ignoring that goal to avail itself of wealthy parents’ largesse (to the detriment of *all* minorities). This hypocrisy should not stand.

### CONCLUSION

Harvard’s actions speak louder than its words. Its race-weighting admissions system impermissibly discriminates against Asian-Americans, while its allegedly race-neutral admissions track unfairly benefits the richest white applicants. Harvard knows this, and yet refuses to modify its racist admissions system as required by *Fisher*.

This Court should adopt a clear, bright-line rule: no educational institution may consider an applicant’s race in determining whether to admit that applicant.

Respectfully submitted,

Daniel R. Suhr  
*Counsel of Record*  
James J. McQuaid  
LIBERTY JUSTICE CENTER  
190 LaSalle St.  
Suite 1500  
Chicago, IL 60603  
(312) 263-7668  
dsuhr@libertyjusticecenter.org

March 31, 2021