

Nos. 20-1199 & 21-707

In The
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

**On Writs Of Certiorari To The
United States Courts Of Appeals
For The First And Fourth Circuits**

**BRIEF OF AMICUS CURIAE DEFENSE OF
FREEDOM INSTITUTE FOR POLICY STUDIES
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Defense of Freedom Institute for Policy Studies, Inc. (DFI) is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending freedom and opportunity for every American family, student, entrepreneur, and worker, as well as protecting their civil and constitutional rights at school and in the workplace. DFI strongly supports constitutional and statutory prohibitions on school admissions decisions that are based on race-based stereotypes or that arise from adverse or preferential treatment based on race.

The current preferential system used in college admissions conflicts with these legal prohibitions. DFI desires to see that students seeking admission to institutions of higher education enjoy the timeless guarantee that “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). As an authority on education law and policy, DFI has significant experience with the issues presented in this case and a vested interest in its outcome.



¹ Rule 37 Statement: No attorney for any party authored any part of this brief, and no one apart from *amicus curiae* and its counsel made any financial contribution toward the preparation or submission of this brief. All parties have filed blanket consent for *amicus* briefs.

SUMMARY OF ARGUMENT

Almost 45 years ago, this Court looked to Harvard College as “[a]n illuminating example” of “expand[ing] the concept of diversity to include students from disadvantaged economic, racial and ethnic groups.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978). The Court understood that Harvard was “achieving the educational diversity valued by the First Amendment” by recruiting racial minorities who were “thought to exhibit qualities more likely to promote beneficial educational pluralism [through qualities such as] exceptional personal talents, unique work or service experience, leadership potential, * * * a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” *Id.* at 316–17. The admissions program was hailed as a success because it was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” *Id.* at 217.

Yet whatever benefit was supposedly justified through implementing a system of racial discrimination, it has become apparent that Harvard’s system is illuminating only insofar as it sheds light on an illicit and counterproductive process. Its admissions process was not supposed to use racial quotas; it does. Harvard’s admissions system was required to focus only on the individual qualities of the applicants themselves; it does not. And equally important, the admissions process was supposed to foster racial and socioeconomic diversity; it does not.²

² As highlighted in this case, Harvard’s process also directly penalizes Asian-American applicants based on stereotypes about their personalities. Br. for Petitioner at 25–26.

The unfortunate reality is that the license provided to consider race in promoting “diversity” is used as a gerrymander to partially offset the other heavy preferences given in admissions that have nothing to do with applicants’ individual qualities and strengths. Indeed, many students are admitted at Harvard each year based largely on whether their parents went to the university or—more importantly—how much money their family may be expected to contribute to the endowment. The predictable result is *less* diversity among Harvard classes. Even preferences for student athletes turn out to be another way that Harvard becomes more homogenous. The students filling spots in most of the College’s sports come from wealthy families with the opportunity and financial means to participate in upper-class athletics such as rowing, fencing, and equestrian competitions.

Even at the time of *Bakke*, this Court was aware that “institutions of higher learning * * * have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.” 438 U.S. at 404 (Blackmun, J., concurring). These have become known as the “ALDC” preferences: *athletes* ostensibly recruited to play sports for a school, *legacies* (children of alumni), *dean’s interest list* (also known as “development”) applicants intended to generate contributions to the school, and *children* of faculty and staff. ECF 419-143 at 30 (using “ALDC” term in Harvard’s expert witness

rebuttal report). As discussed below, *infra* Part I.A–B, individuals in each of these categories receive a substantial boost (sometimes called a “tip”) in their admissions chances based on factors other than merit.³

Prior to this litigation, it was unknown the extent to which ALDC preferences undermine diversity, whether the race-driven diversity favored by Harvard or a true diversity that takes into account many characteristics of an applicant, such as social class. By overlooking individual characteristics in many instances, the admissions process is anything but “holistic.” Harvard’s eagerness to eschew holistic admissions when it suits certain goals casts great doubt on its claim that its system of racial preferences treats applicants holistically when taking account of race.

The evidence is clear: the “diversity” goal Harvard (and other schools) seeks to achieve via its admissions process is a shallow concept based primarily on race and skin color, not socioeconomic status or other factors representing the actual diversity of America. As a

³ There is often overlap between the ALDC groups. For instance, a marginally competitive athlete might be asked to join a university’s athletic team in order to increase the chances that his or her wealthy parents financially contribute to the school as a result. See, e.g., Daniel Golden, *THE PRICE OF ADMISSION* (2019) at 170 (recounting the recruitment of the son of a best-selling author). Another example of the abuse arising from the preference system is the “Varsity Blues” scandal, which opened the door for applicants to pay coaches to place applicants on athletic recruitment lists—thus obtaining a coveted “admissions bump”—even though there was no expectation that the student would ever compete for the university. *Id.* at 302–27.

result, any appeal by the university now to “broader utopian goals” to be achieved by including race among a school’s sought-after qualities in admissions should be treated skeptically. *Grutter v. Bollinger*, 539 U.S. 306, 374 (2003) (Thomas, J., dissenting in relevant part). Harvard’s admissions program does not satisfy *Bakke*’s justifications for using “race even in [a] modest, limited way.” *Id.* at 387 (Kennedy, J., dissenting).

The judgment of the court of appeals should be reversed.

◆

ARGUMENT

Time and again, Harvard has told this Court that its admissions decisions focus solely on what the individual applicants under consideration add to the college experience. See *Bakke*, 438 U.S. at 316–18; JA.386–91.⁴ The evidence here shows otherwise. By basing a significant percentage of its decisions on things such as lineage or projected financial contributions, Harvard’s process is less a “holistic” view of the individual student and more a commentary on the wealth and influence of the student’s parents. This is

⁴ For instance, in its 2003 *amicus* brief in *Grutter v. Bollinger*, Harvard stated that the school “considers an academically qualified student’s race or ethnicity as one among many factors in a carefully designed, competitive admissions process that views each applicant as an individual and weighs the capacity of each to contribute to the class as a whole.” ECF 414-3, at 11 ¶ 51. The College echoed that claim in its 2012 *amicus* brief in *Fisher v. University of Texas at Austin*. *Id.* at 12, ¶ 52.

true even with recruited athletes who are often admitted to compete in sports such as rowing and fencing that are primarily favored by socioeconomic elites. The end result is a significantly decreased number of spots in each freshman class available to genuinely diverse students. There is thus little reason to continue to accept Harvard’s paean to what it calls “diversity”—a goal that is only skin deep.

I. Harvard’s ALDC Preferences Display A Lack Of Focus On The Individual Characteristics Of Students.

The ALDC preferences this Court previously observed have long skewed admissions at elite schools such as Harvard. See generally Golden *supra* (explaining “how America’s ruling class buys its way into elite colleges—and who gets left outside the gates”). The statistical data available from the district court in this case bears this out. See generally Peter Arcidiacono, Josh Kinsler, & Tyler Ransom, *Legacy and Athlete Preferences at Harvard*, IZA Institute of Labor Economics (Sept. 2019) (“Preferences at Harvard”) (analyzing admissions data made available through discovery in this litigation). Students in the ALDC categories are admitted at significantly higher rates than the rest of the applicant pool and are responsible for a whopping 29% of the incoming classes at Harvard. *Id.* at 14. While the school argues that these preferences are necessary for a sense of community, *id.* at 5, the ALDC tips allow almost a third of Harvard’s students to gain admission

based on who their parents are rather than their individual merits.

A. The Preferences Given to Legacies, Dean’s Interest List Students, and the Children of Faculty Have Little to Do with the Attributes of Applicants.

Although “Harvard admits fewer than one in ten undergraduate applicants, turning down more than half of candidates with perfect SAT scores[,] * * * [c]hildren of major donors enjoy far better odds.” Golden *supra* at 29. Those major donors are often Harvard alumni but also include wealthy parents looking to make a financial contribution to the school—in some cases to give their children an edge in admissions. In either case, children of major donors receive a significant boost in the admissions process.

Harvard’s admissions dean William Fitzsimmons has admitted that legacy applicants get “a ‘tip’ in the admissions process,” allegedly because of the special “loyalty and enthusiasm” they bring to the campus. Golden *supra* at 31. The data indicates that the boost is large. Legacy applicants—students with one (or more) parents who attended Harvard—were admitted to the university at a 33.6% rate, which is almost six times higher than the admit rate for those not in the legacy category. Preferences at Harvard *supra* at 14. Moreover, legacy students comprise around 14% of the admitted class—a significant number. *Ibid.*

Importantly, legacy applicants from *wealthy* families benefit the most from the tip. Indeed, it has been shown that “alumni children lose most of their admissions advantage if they apply for financial aid.” *Ibid.* In other words, it is primarily students from wealthy families—applicants who do not qualify for or need scholarship assistance—that get the legacy admissions boost. This fact confirms that the legacy preference has less to do with the qualities of the individual seeking admission (for instance, their alleged loyalty and enthusiasm) and more to do with the ability of that student’s family to contribute to Harvard’s endowment.

Relatedly, Harvard—like other elite universities—maintains what is known as the Dean’s Interest List (also known as a “development” list) for potential donors to the university who did not attend the college but who have children interested in admission. As seen at the trial here, students whose parents may have the ability to financially contribute meaningfully to the university also receive a substantial admissions boost. Preferences at Harvard *supra* at 14. Indeed, the Dean’s Interest List applicants have an approximately 43% admission rate and comprise almost 10% of the admitted students. *Ibid.*⁵

The advantage for students who come from wealthy families—especially legacy applicants—is further seen

⁵ Both legacies and students from donor families also enjoy a “marked preference in the transfer process” should the students enroll first at another college and then apply to transfer to Harvard. Golden *supra* at 44.

in a special deferred admissions policy at Harvard: the “Z-list.” This policy allows a group of “well-connected but often academically borderline applicants [to be] accepted on condition they defer enrollment until the following fall—when they occupy slots that could otherwise be given to outstanding but unhooked applicants” in the following year’s class. Golden *supra* at 40–42. For example, this might include a student whose SAT scores were 200 points below the Harvard average, and whose grades were below the average for her high school, but whose family contributed over \$1 million to the school. *Ibid.* As Harvard admits, the Z-list exists to help students with “*significant connections* to the University.” JA.1323 (emphasis added).

Given all this, it should come as no surprise that “Harvard College has almost as many students from the nation’s top 0.1 percent highest-income families as from the bottom 20 percent. More than *half* of Harvard students come from the top 10 percent of the income distribution, and the vast majority—more than two-thirds—come from families in the top 20 percent.” Marina N. Blotnikova, *Harvard’s Economic Diversity Problem*, HARVARD MAGAZINE, Jan. 19, 2017, <https://www.harvardmagazine.com/2017/01/low-income-students-harvard>.

Finally, the preference category for children of faculty and staff is another significant source of admissions based on lineage rather than merit. See Golden *supra* at 189–90. Students in this cohort are admitted at an almost 47% rate and comprise over 1% of the admitted class. Preferences at Harvard *supra* at 14.

Though not as large as the other categories, this preference still allows for the admission of approximately 100 students each year who would otherwise not receive acceptance at Harvard.

An examination of the data here confirms the admissions boost given to the LDC preferences—a boost that comes through the ratings received by those applicants “in the non-academic dimensions that Harvard values.” *Id.* at 18. Unsurprisingly, disadvantaged students are underrepresented in the LDC groups. *Id.* at 17. The use of legacy, Dean’s interest, and faculty/staff child preferences is tied to family wealth, an attribute outside the allegedly “holistic” review of individual qualities touted by the university.

B. Athletes Are Also Recruited by Harvard for Reasons Other than Their Individual Characteristics.

The athletes recruited by Harvard likewise evidence a preference for the status of students’ parents more than the abilities of the individual students themselves. Moreover, these recruits are essentially guaranteed admission regardless of their academic qualifications. The result is more students matriculating to Harvard based on something other than their own merit. Such admissions decisions do not comport with the holistic process mandated by this Court.

Regarding athletics, the discovery in this case is damaging to Harvard’s case. Athletes recruited to play for one of Harvard’s sports teams have an admission

rate of 86%—over 14 times greater than those not recruited. Preferences at Harvard *supra* at 14. The boost gained from being a recruited athlete is especially revealing when observed through the lens of the 1–5 evaluation system of academic qualifications (with 1 being best, and 5 worst) used by Harvard for admissions decisions. Students in the top two brackets academically are virtually guaranteed admission if they are an athlete, while those in tiers 3 and 4 are still accepted 87% and 80% of the time, respectively. *Id.* at 41. Astonishingly, 50% of the athletes who are ranked in the lowest academic group are still admitted. *Ibid.* By contrast, Harvard accepts no other students who are given a rating of 5 in the academic category. *Ibid.*

This admissions boost is not trivial. Although the recruited athletes are less than 1% of the applicant pool, they comprise over 10% of the admitted class. *Id.* at 14. That is because Harvard offers 42 Division I intercollegiate sports teams—the most of any university in the country. *Id.* at 4 n.6. The school boasts more sports teams than the even the largest public universities. *Ibid.* Harvard’s varsity teams include men’s and women’s fencing, rowing, skiing, and sailing. Harvard University—Official Athletics Website, www.gocrimson.com.⁶

⁶ “[T]he typical Ivy League school fields teams in at least thirty sports—double the collegiate average. Also, because they don’t offer athletic scholarships, Ivy League schools often recruit more players than they need to fill rosters * * * .” Golden *supra* at 157.

At first blush, one might suppose that while the admission of academically unqualified athletes might be bad for those students once enrolled, at least Harvard is taking into consideration the individual qualities of the students seeking admission in these instances. That is not the case. In reality, the athletes are often recruited based on parental means.

This takes place because of the proliferation of upper-class sports—such as sailing, squash, and skiing—to which most families do not have access. The result is that students are recruited (and thus given a bump in the admissions process) because they happen to be affluent enough to go to a school that participates in those sports in high school or come from wealthy families who can afford private sailing or skiing lessons and competitions. As Dean Fitzsimmons has recognized, “[a]thletics is a major area where the playing field is tilting as we speak.” Golden *supra* at 153. Monetary concerns in athletics “[work] against kids from the bottom half and bottom quarter of the income range. * * * People who are middle class and above now have a much bigger edge when it comes not just to academic opportunity but athletic and extracurricular opportunities.” *Id.* at 153–54.

In some cases, then, student-athletes are purposefully recruited by schools like Harvard as simply another form of the Dean’s Interest List. *Id.* at 170 (“Children of wealthy alumni and donors sometimes are given slots on teams even if they’re out of their league athletically, in the hope that their parents will renovate a locker room or a sprinkler system.”). In

other cases, those students may just happen to benefit from the university offering upper-class sports because the students come from families who could afford to participate them. Either way, the athletic preferences perpetuate a system that is rewarding students for the family into which they were born rather than their individual merits.

In sum, Harvard's use of admissions preferences for upper-class sports provides another access point for wealthy families able to use "token[s] of social status" as "a credential for a college education." *Id.* at 151. Thus "athletic preference, like legacy and development, favors the wealthy, the white, and the well-connected." *Id.* at 154. It does not provide increased diversity based on a holistic view of an individual applicant's qualities and merits.

II. Harvard's Focus On ALDC Preferences Undermines True Diversity.

Harvard has long touted that its "holistic" admissions process "opens doors for less advantaged applicants." Preferences at Harvard *supra* at 4. Unfortunately, this is only the case if students are considered "less advantaged" merely by virtue of their race. *Ibid.* That is because Harvard's use of the ALDC preferences decreases true diversity on campus.

It is no secret that the ALDC preferences primarily benefit white students. Over 43% of the white students admitted to Harvard come from those preferences. *Id.* at 34. At the same time, only 15% of

admitted African American students come from the ALDC list. *Id.* at 42. While there were no non-ALDC white, Hispanic, or Asian-American applicants admitted who were at the bottom of Harvard's academic rating scale, white LDC applicants in that range were admitted at a rate of 6.35%. Preferences at Harvard *supra* at 32. That is higher than the admission rate of 5.46% for all white, non-ALDC preference applicants. *Ibid.* To put it another way, researchers have determined that only one quarter of the white ALDC admits would have been admitted if they had been treated as white non-ALDC applicants. *Id.* at 5.

Not only is racial diversity absent from the LDC preferences, even athletic recruits are predominantly from the same types of backgrounds as the LDC preferences. "Currying favor with alumni and donors, elite colleges that profess to aspire to racial and socioeconomic diversity lower the bar for athletes in sports that are segregated by both race (white) and class (upper)." Golden *supra* at 154.

"Contrary to the stereotype, varsity athletes at elite colleges are more homogenous, both racially and socioeconomically, than the student bodies as a whole." *Ibid.* For example, men's golf is almost 88% white, men's and women's lacrosse 91% white, women's horseback riding 93% white, and men's and women's skiing both around 90% white. *Ibid.* These numbers are not offset by the larger (and more "diverse") team sports because those sports also recruit students from wealthy families to round out teams. See, e.g., *id.* at 171 ("Basketball coaches—a predominately white

group—sometimes use the last few seats on the bench as patronage plums for the children of donors, ex-players, and others with connections.”). Only 11% of Harvard’s admitted athletes are African-American. JA.1176.

And “due in part to the nature of the sports that Harvard offers, recruited athletes alone make up over 16% of white admits.” Preferences at Harvard *supra* at 34. At the same time, only 6% of those athletes come from the poorest quarter of American families, whereas 12% of the admits at Ivy League universities come from that demographic. Golden *supra* at 155.

In short, “for each special applicant group under the ALDC umbrella, applicants and admits are disproportionately white and come from higher income households.” Preferences at Harvard *supra* at 4. Notably, even Harvard’s use of racial preferences falls short of introducing socioeconomic diversity. See *Most Black Students at Harvard are from High-Income Families*, The Journal of Blacks in Higher Education, 2006 (recognizing that “[i]f Harvard has set the pattern for others, it appears likely that most blacks currently enrolled at our elite institutions of higher education come from middle- or high-income families”). This fact has also been observed by Professor Henry Louis Gates Jr., director of the Hutchins Center for African and African-American Research at Harvard. *Ibid.* As a result, use of those preferences undermines the university’s claim that racial

preferences are needed as part of a “holistic” admissions review process that examines individual cases.

* * *

As Petitioners have shown, Harvard could achieve true diversity without resorting to discrimination by simply eliminating its ALDC preferences. Br. for Petitioner at 32–35; 80–83. But by failing to use a holistic admissions process that examines the individual merits of each applicant—and instead granting admissions based on the wealth, political clout, or celebrity status of the applicants’ parents—Harvard’s use of racial preferences is suspect and should be struck down.



CONCLUSION

The judgment of the court of appeals should be reversed.

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MAY 2022