



**Testimony
Before the House Education and the Workforce Committee
Subcommittee on Higher Education and Workforce Development
Hearing on How SCOTUS's Decision on Race-Based Admissions Is Shaping
University Policies**

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Chair Owens, Ranking Member Wilson, and distinguished members of Congress, thank you for the opportunity to present testimony on behalf of the Pacific Legal Foundation on why the *Students for Fair Admissions* decisions represent an important victory for the constitutional and moral principle of equality before the law and about the work that needs to be done to extend and entrench this landmark opinion.

Pacific Legal Foundation is a nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse. We sue the government when it violates Americans' constitutional rights, providing *pro bono* representation to people from all walks of life. We also do extensive work at the federal and state levels on legal policy and strategic research to further our goal of vindicating important constitutional rights and principles.

Individuals should be treated as individuals and not on the basis of their membership in racial groups. The *Students for Fair Admissions* decisions are important because they vindicate that principle. But there is still significant work to be done across all three branches of the federal government to realize the promise of equal protection of the laws as guaranteed by the Fourteenth Amendment. Today, I'll begin by summarizing the Supreme Court's ruling and explaining its importance. Then I'll discuss what future litigation is needed to fulfill the promise of the Fourteenth Amendment, including a discussion of Pacific Legal Foundation cases in this area. Next, I'll address the Education Department's recently issued Frequently Asked Questions document and explain why it does not adequately advise schools how to comply with the Supreme Court's mandate. Finally, I will address some measures that courts or policymakers could take to increase opportunity for all.

- I. The *Students for Fair Admissions* decisions uphold the American principle that individuals should be treated as individuals and not on the basis of their membership in racial groups.

Eliminating race discrimination means eliminating *all* of it, as the Supreme Court recently held in *Students for Fair Admissions*. Under the Constitution and Title VI of the Civil Rights Act of 1964, government and recipients of federal money may not discriminate on the basis of race, color, or national origin.

The Supreme Court first grappled with affirmative action in university admissions in 1978, in *University of California Regents v. Bakke*.¹ At that time, the University of California's medical school maintained a two-track system of admissions, where a specific number of seats were set aside

¹ 438 U.S. 265.

exclusively for students from certain racial and ethnic groups.² In a fractured 4-1-4 opinion, the Court held that this system was illegal.³ But in a concurring opinion necessary to secure a controlling majority, Justice Lewis Powell (writing only for himself) said that the University of California system was only illegal because of its explicit set-asides. He viewed Harvard University's more opaque holistic system of disguised preferences as comporting with the Constitution.

Twenty-five years later in 2003, in *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Supreme Court endorsed and expanded upon Powell's concurrence and held that universities may lawfully discriminate based on race in admissions when such use of race is narrowly tailored to serve a compelling interest in student body diversity.⁴ In theory, *Grutter* carved only a narrow exception to the Constitution and Title VI's general prohibitions on race discrimination. But in practice, many colleges and universities viewed it as *carte blanche* to discriminate unabated, as long as they claimed that the discrimination furthered its interest in diversity.

Grutter's contradictions were apparent almost from the day it was decided. It allowed universities to engage in limited discrimination to promote diversity, but it also prohibited them from using stereotypes to do so. In a paradox for the ages, *Grutter* reconciled broad racial preferences on the grounds they were necessary to ensure that students did not think that all racial and ethnic minorities think alike.

Taking the *Grutter* Court's cue, most universities designed their admissions policies in ways that made little sense if their goal was true multidimensional diversity. For example, most universities use only broad racial classifications and ignore the substantial linguistic, cultural, religious, and other forms of diversity within racial groups. Further, most universities also gave substantially less weight to diversity along non-racial dimensions, such as unusual political or philosophical perspectives or growing up in poverty, than they did to coming from an under-represented racial group. The logical inference is that most universities cared mostly about remedying historical injustice or about racial parity for its own sake instead of diversity—interests that they could not lawfully pursue under Supreme Court precedent.

A decade after *Grutter* and *Gratz*, Abigail Fisher challenged the University of Texas's use of race in admissions. Texas allocated most seats through a program that awarded admission to any student in the top ten percent of her high school graduating class. But the University of Texas did use a holistic admissions process that included race as a factor to decide who received the remaining seats. *Fisher* seemed like a good opportunity to score a victory for the principle of race neutrality of admissions that (because of the Top Ten Percent plan) nonetheless would not have much impact on the University of Texas's racial demographics. While the Supreme Court clarified that reviewing courts should not defer to a university's opinion about whether their program is narrowly tailored, that doctrinal clarification made little practical difference. Most universities continued to use race in admissions.

In contrast to *Fisher*, the two most recent Supreme Court cases on race in admissions—*Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*—challenged *Grutter's* diversity exception directly. The North Carolina case involved a challenge to race preferences in a public university, to which the Constitution applies; the Harvard case involved Title VI, which applies

² 438 U.S. at 273–76.

³ 438 U.S. at 271.

⁴ 539 U.S. 306 (2003).

to any college or university, public or private, that receives federal funding. Instead of trying to chip away at *Grutter*, as *Fisher* attempted, the *Students for Fair Admissions* cases asked the Court to consider whether *Grutter* was correct.

In a 6-3 opinion written by Chief Justice Roberts, the Court held that Harvard and the University of North Carolina had not satisfied strict scrutiny. The Court rejected the universities' asserted interest in the educational benefits of a racially diverse student body and held that the universities' extensive use of race was not narrowly tailored to advance this interest. As the Chief Justice said at that opinion's conclusion: "Each student must be treated as an individual—not on the basis of her race. Many universities have far too long done just the opposite. And in doing so, they have concluded wrongly that the touchstone of an individual's identity is not challenges bested, skills built, lessons learned, but the color of their skin. Our constitutional history does not tolerate that choice."⁵

Nothing in *Students for Fair Admissions* requires universities to use any particular method of selection, as long as the methods that they do choose are not intended to achieve particular racial goals. For example, universities may lawfully use or not use standardized tests, essays, interviews, or auditions to choose their students. Finally, schools may constitutionally pursue diversity along many dimensions, such as socioeconomic status or life experience, as long as they are not discriminating on the basis of race.

II. Universities and Colleges May Not Use Proxy Discrimination to Do Indirectly What They Are Forbidden to Do Directly.

Unfortunately, the early evidence suggests that many universities will try to evade *Students for Fair Admissions* by engaging in proxy discrimination—using non-racial characteristics as proxies for race to achieve racial goals. As racial segregation started to crumble in the South, state and local governments that wanted to preserve its system of race discrimination tried again and again to do indirectly what they could not directly do via proxies for race. The Supreme Court consistently struck down each effort, holding that grandfather clauses,⁶ literacy tests,⁷ and poll taxes⁸ were, despite being facially neutral, in fact prohibited proxy discrimination. "The Supreme Court has repeatedly ruled against racial discrimination by proxy," observes Vanderbilt Law Professor Brian Fitzpatrick in *The Wall Street Journal*. "If the purpose of an apparently race-neutral decision is to cause racial effects, and the decision in fact causes racial effects, then the decision is as illegal as using race itself would be."⁹

Village of Arlington Heights v. Metropolitan Housing Development Corp. is today the leading Supreme Court case setting forth the framework for analyzing proxy discrimination.¹⁰ That case involved claims by a developer that local authorities were using zoning as a tool of proxy discrimination.¹¹ *Arlington Heights* requires courts to look at the "totality of the relevant facts" and to conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" to

⁵ *Students for Fair Admissions v. Harvard*, Nos. 20-1199, 21-707 (June 29, 2023), slip op. at 40.

⁶ *Guinn v. United States*, 238 U.S. 347 (1995); *Lane v. Wilson*, 307 U.S. 268, 269 (1939).

⁷ *Schnell v. Davis*, 336 U.S. 933 (1949).

⁸ *Harper v. Va. State Board of Elections*, 383 U.S. 663 (1996).

⁹ Brian Fitzpatrick, "Racial Preferences Won't Go Easily," *The Wall Street Journal*, May 31, 2023, available at <https://www.wsj.com/articles/racial-preferences-wont-go-easily-thomas-jefferson-harvard-unc-court-bfa302b3>.

¹⁰ 429 U.S. 252 (1977).

¹¹ 429 U.S. at 257–60.

determine if a facially race neutral policy can be “traced to a discriminatory purpose.” Varied facts may be relevant to this analysis, including “the impact of the official action—whether it bears more heavily on one race than another,” “the historical background of the decision,” “the specific sequence of events leading up to the challenged decision,” and “contemporary statements made by members of the decision-making body.”

Writing for the majority in *Students for Fair Admissions*, Chief Justice Roberts anticipated schools using proxy discrimination to evade the opinion’s prohibition on race preferential admissions. In response to a hypothetical discussed at oral argument, the majority opinion acknowledges that universities may consider admissions essays about how a student’s race affects her life “so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can bring to the university.”¹² But “despite the dissent’s assertion to the contrary” the majority opinion firmly states that “universities may not simply establish through application essays or other means the regime we hold unlawful today”¹³ and quotes *Cummings v. Missouri*: “What cannot be done directly cannot be done indirectly.”¹⁴

Nonetheless, it appears that many universities will use indirect techniques to avoid compliance with the law. Ten days after the *Students for Fair Admissions* ruling, the American Association of Law Schools held a “Conference on Affirmative Action.”¹⁵ Panelists there discussed how to “protect diversity gains” via “race-conscious, but also race-neutral means” such as “zip code.”¹⁶ Instead of suggesting that law schools stop illegal discrimination, Tim Lynch, vice president and general counsel of the University of Michigan, coached his fellow university officials on how they could bury evidence of illegal activity while continuing to discriminate covertly. He lamented that “courts look into text messages, they look for anything that could be used for discriminatory intent” and that “it’s very difficult for your tenured faculty members sometimes to hold back.”¹⁷ Lynch added “Look at your websites and materials. What do they actually say?” and recommended that universities “Have an undergrad go online” and identify evidence of discrimination to scrub. University presidents at Yale, Columbia, and the State University of New York have issued statements stating that they plan to subvert *Students for Fair Admissions*, and the governors of California, Washington, New Jersey, Massachusetts, and New York have encouraged the universities in their states to flout the law.¹⁸ Even President Biden committed the executive branch to fighting the decision.¹⁹

¹² *Students for Fair Admissions*, slip op. at 8.

¹³ *Id.*, slip op. at 39.

¹⁴ *Id.*, citing 4 Wall. 277, 325 (1867).

¹⁵ Program, Association of American Law Schools, Conference on Affirmative Action (July 10, 2023),

<https://www.aals.org/events/affirmative-action/program>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Amicus Curiae Brief of the Cato Institute, *Coalition for TJ v. Fairfax County School Board*, 10–17, available at

https://www.supremecourt.gov/DocketPDF/23/23-170/280038/20230920161304491_Coalition%20for%20TJ_Final.pdf.

¹⁹ President Joe Biden, Remarks by President Biden on the Supreme Court’s Decision on Affirmative Action (June 29, 2023), transcript available at <https://tinyurl.com/4tacm437>.

If such evasions by universities go unchecked, *Students for Fair Admissions's* guarantees of equal treatment in admissions will ring hollow. Some Pacific Legal Foundation cases illustrate how courts should rule to make sure that such indirect discrimination is rooted out and stopped.

III. The Pacific Legal Foundation's Proxy Discrimination Cases Show How Courts Can Stop Proxy Discrimination and Ensure that All Students Are Treated Equally Regardless of Race.

The Supreme Court never held that *Grutter's* student body diversity exception to the Constitution and Title VI bans on race discrimination applied to K-12 schools. K-12 school districts that wanted to racially balance their schools had to avoid facial race preferences. But that didn't stop them altogether. My employer, the Pacific Legal Foundation, has challenged race preferential admissions schemes by school districts that were not facially discriminatory. Although these cases are at different stages in litigation and have somewhat different facts, all follow the same general factual pattern. First, school administration observes that a competitive school's demographics do not match the district's overall demographics and bewail what they perceive to be the over-representation of Asian American students.²⁰ Second, to change future admitted class demographics, school officials eliminate or de-emphasize traditional measures that predict academic success, such as standardized test scores or grades. New measures that have no apparent relationship to scholastic ability or performance—such as zip code, neighborhood preferences, or middle school choice—are added or receive increased weight because of their likely outcome on demographics. In some cases, there are statements from school officials about the new plan's likely effects on Asian Americans or even statements showing animus against Asian Americans as a group.

This is precisely what Fairfax County did in the summer of 2020, as debates over race relations and equality reached a fever pitch. The Fairfax County School Board revamped admissions procedures at Thomas Jefferson High School (TJ) to bring the elite science and technology magnet's racial demographics closer to Fairfax County's overall racial demographics. The Board dropped the longstanding admissions exam and replaced it with a system that filled most slots at TJ by guaranteeing admission to the top 1.5% at each Fairfax County middle school. Students outside the top 1.5% received an additional boost in admissions if they came from middle schools that are "underrepresented" at TJ. Because Asian American students in Fairfax County disproportionately attend particular high-achieving middle schools, the changes were intended to, and did, significantly lower Asian American representation at TJ.

In private text chats as revealed in discovery, some of Fairfax County's twelve Board members candidly admitted that the process targeted Asian students. Stella Pekarsky and Abrar Omeish agreed "there has been an anti [A]sian feel underlying some of this, hate to say it lol" and that Asian students were "discriminated against in this process." They observed that the district's superintendent had "made it obvious" with "racist" and "demeaning" comments and that he came "right out of the gate

²⁰ Although these cases' more vituperative critics have sometimes bemoaned the "white privilege" of plaintiffs suing their magnet schools, in many places Asian American students have been the group that has lost the most magnet school seats due to racially discriminatory admissions changes. At Thomas Jefferson High School in Alexandria, Virginia, for example, whites actually gained a small number of seats after the discriminatory changes were implemented, while Asian American numbers dropped significantly (from 73% of the admitted class to 54% of the admitted class.)

blaming” Asian American students and parents. They reasoned that the proposals would “whiten our schools and kick ou[t] Asians” and said “Asians hate us.”²¹

The Coalition for TJ, a grassroots group of parents and alumni, sued in federal court, claiming that the revamped policy violated students’ constitutional rights to equal protection. The Coalition won on cross-motions for summary judgment in district court, but that ruling was reversed on appeal by a divided panel in the Fourth Circuit. In dissent, Judge Allison Rushing chided the majority for “refus[ing] to look past the policy’s neutral varnish.” She would have held that “undisputed evidence shows that the Board successfully engineered the policy to reduce Asian enrollment at TJ—while increasing enrollment of every other racial group—consistent with the Board’s discriminatory purpose.”²² The Coalition’s petition for a writ of certiorari is currently pending in the Supreme Court.²³

Just across the Potomac River, Montgomery County, Maryland, similarly redesigned its admissions processes to change the demographics of its magnet middle schools.²⁴ First, Montgomery County adopted “socioeconomic norming,” in which a student’s standardized test score was normed according to the socioeconomic status of her elementary school. Second, it adopted a policy that put students with a group of “academic peers” in their home middle schools at a disadvantage when applying for magnet programs. Because Asian American students are concentrated in particular Montgomery County middle schools, these combined policies were intended to lower Asian American representation in magnet school programs. That case is on appeal to the Fourth Circuit.

In Boston, exam scores traditionally determined admission to the famous Boston Latin School. But in 2019, the school board adopted a plan that allocated 20% of magnet seats based on grade point average and the rest based on zip codes. Boston’s school board did not attempt to disguise its racial motivations. One working group member said that the admissions changes were meant to address “historic racial inequities,” and the School Committee’s chair was caught on a live microphone mocking Chinese American surnames. Because Asian American and white students in Boston tend to live in certain zip codes, the new system meant that students from these groups went from receiving 61% of the seats available in magnet programs to just over half of them. This case is pending appeal in the First Circuit.

New York City is home to some of the best-known competitive admission high schools in the country, including Stuyvesant High School, the alma mater of four Nobel Prize winners. Until recently, Stuyvesant and other New York City magnets made most admissions decisions based on Specialized Admissions High School test scores. Students from low-income backgrounds could qualify for magnet attendance through the Discovery program, which set aside a limited number of seats for students from low income families who scored just below the cutoff. Starting in 2020, however, then-Mayor DeBlasio limited the Discovery program to students from middle schools with a 60% or higher poverty rate. Because Asian Americans in New York City tend to cluster in middle schools with a lower than 60% poverty rate, this change decreased the numbers of seats available to them in New York City’s magnet schools. The adverse effect on Asian Americans students was not coincidental; then-New York City Schools chancellor Richard Carranza observed in a television interview, “I just don’t buy the narrative

²¹ *Coalition for TJ v. Fairfax County School Board*, 86 F.4th 864, 892 (4th Cir. 2023) (Rushing, J., dissenting).

²² *Id.*

²³ The petition is available here: <https://pacificlegal.org/wp-content/uploads/2023/08/2023-08-21-Coalition-for-TJ-Cert-Petition.pdf>.

²⁴ *Association for Education Fairness v. Montgomery Cnty. Bd. of Ed.*, 560 F. Supp. 3d 929 (D. Md. 2021).

that any one group owns admissions to these schools.”²⁵ Pacific Legal Foundation’s suit challenging these policies is pending in the Second Circuit.

These stories of school districts engaged in sneaky discrimination, coupled with the early media reports about universities thinking of engaging in sneaky discrimination, suggest that attempts to evade *Students for Fair Admissions* will be rampant. The Supreme Court should fulfill the promise made in *Students for Fair Admissions* and hold that such proxy discrimination is unconstitutional and violates Title VI of the Civil Rights Act of 1964.

IV. The Department of Education’s Frequently Asked Questions Document About *Students for Fair Admissions* Was a Missed Opportunity to Clarify Universities’ Obligations.

The Department of Education’s Office for Civil Rights and the Civil Rights Division of the Department of Justice (among other federal civil rights agencies) are charged with enforcing the civil rights laws that prohibit race, color, or national origin discrimination by recipients of government funds. The Department of Education has indicated that it is not going to fulfill its mission and ensure that all students benefit from the guarantee of equal protection enshrined in *Students for Fair Admissions*. Some of its “Questions and Answers Regarding the Supreme Court’s Decision in *Students for Fair Admissions, Inc. v. Harvard College and the University of North Carolina*” merely reiterates or paraphrases core passages of the Court’s lengthy opinions and is noncontroversial. But the Department largely ignores the looming problem of universities engaging in proxy discrimination. Instead of reaffirming Chief Justice Roberts’s statements against indirect discrimination, it largely ducks the issue and may give devious colleges and universities the mistaken impression that whatever they want to do is fine as long as they are not too open about it. The problem is that the Constitution and Title VI command otherwise. Continued congressional oversight is necessary to make sure that the Department is fulfilling its legal obligations.

V. By Enforcing Other Constitutional Rights, Courts and Policymakers Can Remove Barriers to Opportunity and Clear New Paths to Success for All.

Although some of *Student of Fair Admissions*’s more outspoken critics have wailed that these decisions will take away valuable academic or professional opportunities from talented but poor racial and ethnic minority students, many other and better strategies are open to improve opportunity for all. As Justice Thomas discusses in his concurring opinion, because many colleges and universities have open admission, race preferential admissions do not affect the overall number of minority students who can receive college degrees. They merely shift students around in the academic hierarchy, nudging some students to higher-ranked schools than they might have attended otherwise. It is far from clear that students who attend schools where they receive large preferences are actually better off academically or professionally as a result; as discussed in Justice Thomas’s concurrence, the research into academic mismatch suggests that many students are better off attending colleges, graduate or professional programs where their credentials are closer to those of the median student. When students are admitted to universities based on their individual skills, talents, and interests—not race or ethnicity—they’re more likely to find the right fit.

²⁵ Mayor wants to diversify specialty high schools, Fox5 New York, (June 4, 2018) <https://www.fox5ny.com/news/mayor-wants-to-diversify-specialty-high-schools>.

Reasonable minds can and do differ on what educational, family, workplace and housing policies best set up all children and young adults for academic and professional success. At the Pacific Legal Foundation, we have focused our litigation and policy efforts in three areas. First, the courts should vindicate the constitutional right to earn a living. We have brought suit on this basis on behalf of Ursula Newell-Davis, who tried to open a respite care facility for special needs children but was blocked from doing so by a Louisiana law that gives competitors a veto over her plans. A petition for writ of certiorari has been filed in the Supreme Court.²⁶ Second, courts and policymakers can protect the right of parents to choose the best school for their children. Today, children from poor backgrounds tend to benefit the most from school choice programs.²⁷ Third, courts and policymakers should take a fresh look at housing policies that wrongfully deprive individuals of property rights, including rent control laws that reduce the supply of housing and zoning laws that prevent new housing from being built.²⁸

VI. Conclusion:

Students applying to competitive high schools, colleges, universities, and other selective academic programs should be treated on the basis of their character and accomplishments and not on the basis of their race or color. The Supreme Court's opinions in the *Students for Fair Admissions* cases are a ringing endorsement of this moral and constitutional principle and deserve to be celebrated accordingly. But the struggle does not end there. Many educational institutions will probably try to find indirect ways of discrimination so that they can keep getting the same demographic results they did under more direct discrimination. We as Americans should not tolerate this evasion, and these institutions should be held to account.

Respectfully submitted,

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²⁶ The petition is available at <https://pacificlegal.org/wp-content/uploads/2021/01/06.12.23-Ursula-Newell-Davis-et-al.-v.-Courtney-N.-Phillips-et-al.-PLF-Petition-for-Writ-of-Certiorari.pdf>.

²⁷ Patrick J. Wolf, Programs Benefit Disadvantaged Students, EducationNext, Spring 2018, Vol. 18, No. 2, <https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice/>.

²⁸ For a fuller description of PLF's work in this area, please see Amicus Curiae Brief of Pacific Legal Foundation, *Students for Fair Admissions v. Harvard*, available at https://www.supremecourt.gov/DocketPDF/20/20-1199/222643/20220505160636226_20-1199%20AC%20brief%20final2.pdf.