No. 20-1199

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PROFESSOR FIONA A. HARRISON IN SUPPORT OF NEITHER PARTY

Alan B. Morrison
(Counsel of Record)
George Washington
University Law School
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

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INTERESTS OF AMICUS[1]

Amicus Fiona A Harrison is the Harold A. Rosen Professor of Physics and Kent and Joyce Kresa Leadership Chair, Division of Physics, Mathematics and Astronomy at California Institute of Technology (Caltech). Dr. Harrison is representing her own views on legacy preferences, and in no way represents the views of Caltech as an institution in this brief. Her personal experience in academia is at Caltech, a highly selective private institution that has never had legacy preferences.

Professor Harrison opposes legacy preferences as unnecessary and discriminatory and believes that the success of Caltech and its students demonstrates that such preferences are unnecessary for any legitimate educational purposes. She is also a strongly supporter of diversity of all kinds, as well as appropriate forms of affirmative action in college admissions. She applauds the increasing ranks of colleges and universities that have abolished preferences for the children of alumni, which include Amherst, Johns Hopkins, and Massachusetts Institute of Technology.[2] It is her position, as a matter of both constitutional law and public policy, that legacy preferences should be abolished generally and in

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[1] No person other than the amicus and her counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. It is filed pursuant to the blanket consents of the parties.

[2] https://www.nytimes.com/2021/10/20/us/amherst-college-legacy-admissions.html.

particular where an institution of higher education like Harvard seeks to defend its racial preferences while still retaining legacy preferences. That is because legacy preferences, such as Harvard's, favor White applicants and those whose parents are, by definition, better educated and more likely to be in the higher income and wealth brackets. As a result, the use of legacy preferences is in direct conflict with Harvard's stated goals of promoting racial and socio-economic diversity.

This brief supports neither party. Harvard has rejected the elimination of its legacy and other preferences. And, as the court of appeals stated, petitioner "does not challenge the admission of this large group of applicants who can and do receive" the legacy and other preferences discussed below. Pet. App. 25. Accordingly, this brief is submitted to fill the void necessary to inform the Court of the impact that the special treatment for this large group of applicants has on the validity of Harvard's admission system.[3]

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[3] The respondent in the University of North Carolina (UNC) case that will be heard with the Harvard case also gives a legacy preference. However, according to the evidence adduced there, that preference has minimal impact on the admission of the vast majority of applicants who apply from in-state. On the other hand, it appears to have considerable impact on the admission of out-of-state applicants, although they are a small percentage of total applicants. In the interest of simplicity, and because the same principles of law would apply to the UNC legacy preference, this brief will discuss only the evidence from the Harvard case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The admission process for Harvard College starts with determinations made in five categories to which numeric ratings are assigned: academic, extracurricular, athletic, school support, and personal, plus a combined overall rating. Pet. App. 17-20. The selection process is quite complicated, but there is no doubt that Harvard takes into account the race of applicants in its efforts to create an entering class that is diverse in many ways, including race and socio-economic background. That latter category is generally understood to include those who have had to overcome significant disadvantages in their paths to college.

It is also undisputed that Harvard has an explicit system of racial preferences that produces what Harvard refers to as "tips," because they provide help that often "tips" the applicant into the admit category. These include race, as well as a category referred to as ALDC which is an abbreviation for recruited athletes, legacy applicants, applicants on the Dean's Interest List, and children of faculty or staff. As the court of appeals noted, although ALDC applicants make up fewer than 5% of applicants, they constitute about 30% of the admitted class annually. Pet. App. 25.

The fundamental problem with the legacy preference is that its operation significantly undermines Harvard's stated goals of seeking a class that is racially and socio-economically diverse. For an institution like Harvard, the inevitable impact of a preference for children of

alumni is, as the record shows, to provide a preference for White applicants who are the children of a decidedly non-diverse alumni base. And because those same applicants are children of alumni, they also undercut Harvard's efforts to recruit students who are the first in their families to attend any college or who are otherwise disadvantaged because their families need to have their children work to contribute to the family earnings while in high school and thus have less time for studying, athletics, and extracurricular activities.

In responding to the evidence below that the ALDC tips were not neutral, but in fact made it more difficult for Harvard to meet its goals of increasing diversity and students from disadvantaged backgrounds, this is all that the district court said in rejecting the elimination of non-athletic preferences (Pet. App. 213):

> Eliminating tips for legacies, applicants on the dean's and director's interest lists, and children of faculty or staff would also come at considerable costs, and would adversely affect Harvard's ability to attract top quality faculty and staff and to achieve desired benefits from relationships with its alumni and other individuals who have made significant contributions to Harvard.

Those general statements, unsupported by any studies, are little more than a restatement that Harvard likes its ALDC preferences and wants to keep them. Because the ALDC preferences were not directly challenged in the court of appeals,

there is no other judicial justification for them. Because Harvard is seeking to defend its race-based admission preference, it must satisfy strict scrutiny, *Fisher v University of Texas,* 136 S. Ct. 2198, 2208 (2016). Those general findings by the district court do not meet the required standard. Even if the elimination of the ALDC preferences may not end the need for all racial preferences, that is not a basis to sustain the current system. As long as these preferences stand in the way to achieving greater racial and socio-economic diversity, as they do to a significant degree, they must be eliminated if Harvard is to maintain the remainder of its current system. And this effect is clearly significant: although White students comprise only 40% of the overall entering class, they constitute 67.8% of those admitted through ALDC preferences.

ARGUMENT

THE LEGACY AND OTHER ALDC PREFERENCES FATALLY UNDERMINE HARVARD'S RACIAL ADMISSION PREFERENCE.

As this Court stated in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), "student body diversity is a compelling state interest that can justify the use of race in university admissions." The question is always, as it is here, how the university is using race. The problem for Harvard is that the College

also has a legacy preference that, like the thirteenth stroke of the clock, undermines all that goes before it.

Because race is a factor in the admission process at Harvard, its use is subject to strict scrutiny. *Fisher,* 136 S. Ct. at 2208. Amicus does not question the way in which Harvard uses race alone; her objection is that the effects of the legacy preference are inconsistent with Harvard's stated diversity goals and, as long that preference exists, the otherwise proper racial preference cannot be sustained under a strict scrutiny microscope.

The strongest justifications that Harvard offered at trial for continuing the legacy preferences were from Dean Rakesh Khurana, who discussed one of Harvard's reports examining its admission policies:

> whether an applicant's parents attended Harvard College or Radcliffe College as an undergraduate also helps to cement strong bonds between the university and its alumni. Harvard hopes that its alumni will remain engaged with the college for the rest of their lives, and this consideration [legacy preferences] is one way that it encourages them to do so.

III JA 1788.[4] As further justification, he also noted

[4] Because the parties did not include in their Joint Appendix in this Court, the testimony on which amicus relies in this brief, the JA citations are to the numbered volume and the page in the Joint Appendix in the Court of Appeals.

> a tremendous benefit to the university, especially to the students and what we're trying to accomplish in the college, by the participation of our alumni in new initiatives that we're trying to launch and bringing expertise to help us think through how we might launch them.
>
> As this mentions here, time that our alumni spend in evaluating candidates and applicants for our pool. All of these things matter. It's not just financial donations. *Id.* at 1789.

Former Brown University President Ruth Simmons also testified in support of legacy preferences:

> Our institutions are venerable, I think that's the right word, because they are revered over many, many years by a succession of alumni who come to love our universities and what they provide. It is entirely appropriate for them to believe that it would be wonderful if their children could also enjoy the same benefits that they enjoyed as students.
>
> ...
>
> And so in that regard, we believe that it is appropriate to give a tip to legacies, and that it is in keeping with the tradition that we have as institutions where there is strong identity of alumni with our institutions.

III JA 2787, 2788. These are Harvard's best witnesses to show that legacy preferences meet strict scrutiny. Their testimony can be summarized this way: We like our alumni, they help us, and so we will help them by giving preferential admission to their children. And make no mistake about it, the admission rate for non-legacy and non-athletes is about 4.5%, whereas in 2017 and 2018, legacies were admitted at the rates of 35.4% and 33.3%. I JA 605. Or, viewed from another perspective, "55 percent of legacies who are academic 1s and 2s [the highest rankings] are admitted compared with 15 percent of all other academic 1s and 2s." II JA 843.

In most affirmative action cases, the focus has been on the manner in which a racial preference has been utilized, but here amicus make no such challenge. Instead, amicus contests the legacy exception to the College's admission process which, she argues, is inconsistent with the College's stated goals and therefore undercuts Harvard's rationale for its racial tip.

The principle of law under which the Court should examine the exceptions to Harvard's admission criteria as a basis to challenge them is well-established in First Amendment jurisprudence. For example, in *City of Ladue v. Gilleo*, 512 U.S. 43, 47 (1994), a local ordinance prohibited homeowners from placing signs on their property as an effort to keep the neighborhood free of "visual blight and clutter." In setting aside the law, the Court focused on the ten exceptions which

it found to be inconsistent with the alleged aesthetic purposes of the law, and held that, with those exceptions, the ordinance could not be upheld because the exemptions "diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52; accord, *Reed v. Town of Gilbert,* 576 U.S. 155 (2015) (applying strict scrutiny to set aside sign law subjecting signs carrying different messages to different restrictions). Because, as amicus now demonstrates, the legacy exception to the otherwise applicable admission process is inconsistent with two of Harvard's stated goals, that process cannot survive strict scrutiny which Harvard must satisfy to sustain its tip in favor of racial minorities.

The legacy preference directly undermines Harvard's stated goals in its undergraduate admission process in several ways. First, although the record did not contain specific data regarding the races of Harvard's alumni, its Dean of Admissions acknowledged that the legacy pool was less ethnically diverse, but getting better. I JA 595. *See also infra* at 13 (overall racial compositions of all ALDC preferences). Thus, if Harvard simply eliminated this preference, and opened the slots given to legacies to the general pool of applicants, that would lower the percentage of White students to bring it in line with the overall admitted students pool, thereby furthering the stated goal of obtaining greater diversity. As the trial judge noted "if all of your legacies are white and all of

your donors are white, then the larger that pool is, the less diverse your school population becomes in some ways, right?" IV JA 2794-95.

A second admission goal of the College, which amicus strongly supports, is to provide an opportunity for students who had significant disadvantages in their lives before college to enjoy the benefits of a Harvard education and a Harvard degree. Those would include students whose family members did not attend college, which by definition would not include a legacy. Harvard classifies a student as being disadvantaged, and thus entitled to a tip, as one whose parents earn less than $80,000 per year. Children in homes with lower incomes may also have had to work while in high school. If so, that will reduce their ability to participate in athletics and other extracurricular activities, which would lower their objective ratings and put them behind the curve to start. While not all legacy applicants come from families with incomes above $80,000, the vast majority likely do, and so giving a tip to those that do is inconsistent with the goal of seeking more students from disadvantaged backgrounds. Finally, applicants who come from alumni homes, where parental assistance can improve a student's academic performance, and where applicants can afford SAT prep courses and tutoring, receive additional advantages in the admission process generally. Once again, while those benefits do not accrue to all legacy applicants, they are more likely to occur for legacy applicants than to the majority of students seeking admission at Harvard.

The other ALDC preferences raise similar doubts about their consistency with Harvard's stated goals, although the record is less clear on them because petitioner's witness on the issue of legacies, Richard Kahlenberg, did not explore the impact of the other three preferences. Nonetheless, there are reasons to believe that these too raise similar problems of inconsistency with Harvard's stated goals, to varying degrees. As for recruited athletes, amicus notes that athletics are already taken into account for all applicants in the athletic factor. If recruited athletes were limited to football and men's basketball, perhaps a case could be made, at some schools, that the preference assisted in obtaining racial diversity and helping the disadvantaged applicant.

But Harvard's athletic recruitment includes all sports, for both men and women, and for all its teams. The trial record does not include evidence on the breakdown by race of the recruited athletes, but the Court may take judicial notice of the sports listed on the College's website,[5] which include skiing, golf, squash, fencing, crew, sailing, ice hockey, field hockey and lacrosse, none of which is known to attract large numbers of minority, inner-city, or otherwise disadvantaged youth. And because there are so many teams for both genders, the number of recruited athletes is large and therefore likely to have a significant impact on Harvard's efforts to recruit racial minorities and

[5] https://gocrimson.com.

students coming from disadvantaged backgrounds.[6]

The third prong of the ALDC preference is for applicants who are on a special list compiled by the Dean of Admission. This is how the court of appeals described that list:

> The Dean's Interest list is a list of applicants the Dean of Admissions gives special attention to. It primarily includes the children or relatives of donors, and it includes a rating of how important the donor is to Harvard.

Pet. App 25, n. 14. It seems likely that almost all of those in this preference category are also part of the legacy group, are unlikely to be minorities, and are almost certain not to have annual family incomes below $80,000. Thus, even more than the legacy preference, this one directly undermines Harvard's stated goals of having greater racial diversity and admitting more disadvantaged students.

The final ALDC preference is for children of faculty and staff. The record contains no evidence on the racial composition or size of this group, but

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[6] Although petitioner brought this case on behalf of Asian-American students who claimed that they were subjected to unconstitutional discrimination, it did not seek to eliminate these ALDC preferences, including the one for athletic recruits, which may well disadvantage the group that petitioner represents. *See* IV JA 2193 ("Asian-Americans are especially underrepresented in athletics').

at least as to faculty, it is quite unlikely that these applicants will come from a disadvantaged background, as Harvard defines that term.

There is no breakdown of the racial compositions of each of the component preferences, but the court of appeals did set forth a comparison of the racial composition of admitted ALDC applicants and the admission by race of all other applicants (Pet. App. 25-26): [7]

	Overall Percentage	ALDC Percentage
White	40.3%	67.8%
Asian American	28.3%	11.4%
African American	11.0%	6.0%
Hispanic	12.6%	5.6%

There also can be no question that the impact overall of the ALDC preference is very significant, although the breakdown within its components was not determined, perhaps because of some overlap among the four categories. But it is clear, as the court of appeals concluded, that ALDC applicants "have a significantly higher chance of being admitted than non-ALDC

[7] The totals for both groups are closer to ninety than 100%. Amicus is not aware of the basis for that difference, but because a remand will be necessary, any discrepancy is of no significance.

applicants." Pet. App. 25. That conclusion was based on the finding in the record that, while only 5% of all applicants have an ALDC preference, they comprise 30% of those admitted. *Id.* Of course, many ALDC admittees might have been admitted without the preference, but there can be no doubt that these preferences have a significant impact on the composition of the entering class. And given the racial disparities between ALDC applicants and all others, the ALDC preferences almost certainly have the effect of creating a "whiter" and less disadvantaged group of admitted students than would be the case if these ALDC preferences were eliminated. While ending ALDC preferences alone may not assure that Harvard will achieve the levels of racial and socio-economic diversity that it desires, it will come much closer by removing preferences that make it more difficult for Harvard to achieve its stated goals.

Amicus recognizes that not all departures from a general admission process that includes some racial preferences are fatal to that process. For example, in *Fisher,* a large percentage of the entering class at the University of Texas [75%] was admitted solely because they were in the top 10% of their Texas high school graduating class, but the Court never suggested that was a flaw in the system. That is because the 10% rule probably increased the number of minorities in the entering class, and it surely did not, as the ALDC preferences do at Harvard, increase the number of White admittees and thereby make it more difficult for Harvard to achieve a class that has greater racial and socio-economic diversity.

To be sure, in theory, Harvard might be able to sustain its legacy and other preferences if it can satisfy strict scrutiny. *Fisher, supra.* Amicus doubts that Harvard could make that showing, and it surely has not made it to date. However, because petitioner's focus in its challenge to Harvard's admission process was not primarily on the basis that amicus has done here, Harvard should be given the opportunity to meet the requirements of strict scrutiny on remand. If that remand is ordered, the district court should also consider allowing persons who oppose the ALDC preferences, but otherwise do not support the thrust of petitioner's complaint, to intervene with respect to the ALDC preference issues.

Amicus has one final point in connection with her proposed remedy of eliminating legacy and other ALDC preferences.. That remedy does not require a court to speculate on whether or how an untested set of additional procedures would affect the Harvard's admission system. The numbers above make it very clear that, if the ALDC preferences were eliminated, Harvard's goals of increasing racial diversity and adding more disadvantaged students to the entering class would be furthered, even if not totally achieved. Of course, Harvard would have the choice of keeping the ALDC preferences, but not if it wished to keep its racial preferences.

CONCLUSION

For the foregoing reasons, although the Court would be justified in striking down Harvard's admission system because of the ALDC preferences, neither lower court focused on that issue alone. Moreover, it is possible, although doubtful, that Harvard might offer some more substantial justifications on that question if there were a remand for that limited purpose. Accordingly, amicus urges the Court to vacate the judgment below and remand the Harvard case for further proceedings with respect to the ALDC issues.

Respectfully Submitted,

Alan B. Morrison
(Counsel of Record)
George Washington University Law School
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

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