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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *
STUDENTS FOR FAIR *
ADMISSIONS, INC., *
Plaintiff, *
vs. *
PRESIDENT AND FELLOWS OF *
HARVARD COLLEGE, et al, *
Defendants. *
* * * * *

CIVIL ACTION
No. 14-14176-ADB

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE
STATUS CONFERENCE

A P P E A R A N C E S

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Courtroom No. 17
John J. Moakley Courthouse
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Boston, Massachusetts 02210
July 20, 2016
3:15 p.m.

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CAROL LYNN SCOTT, CSR, RMR
Official Court Reporter
One Courthouse Way, Suite 7204
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P R O C E E D I N G S

1
2 **THE CLERK:** This is civil action 14-14176,
3 *Students for Fair Admissions versus President and Fellows of*
4 *Harvard College, et al.* Will counsel identify themselves
5 for the record.

6 **MR. CONSOVOY:** Good afternoon, Your Honor.
7 Will Consovoy for Students for Fair Admissions along with
8 Patrick Strawbridge, Paul Sanford and Michael Park.

9 **MS. ELLSWORTH:** Good afternoon, Your Honor.
10 Felicia Ellsworth for Harvard, with Seth Waxman and Bill Lee
11 who has newly appeared and two individuals from General
12 Counsel (indicating).

13 **THE COURT:** Mr. Lee, welcome aboard.

14 **MR. LEE:** Thank you, Your Honor.

15 **MR. CREGOR:** Good afternoon, Your Honor. Matt
16 Cregor on behalf of the student intervenor.

17 **THE COURT:** All right. You guys are going to
18 have to help me out here because this jury verdict threw off
19 my whole afternoon so I have read all your letters but I
20 read them when they came in so that three and four are very
21 fresh in my mind. One and two are less fresh in my mind but
22 I have read them so you all are going to have to help me out
23 here.

24 There is an agreed upon discovery schedule;
25 correct?

1 **MR. CONSOVOY:** Correct.

2 **THE COURT:** 11 months?

3 **MR. CONSOVOY:** Yes.

4 **THE COURT:** Harvard thinks they could do it in
5 9. They're willing to give you 11.

6 **MR. CONSOVOY:** We're happy with the 11, Your
7 Honor.

8 **THE COURT:** Okay. I am, since I didn't have
9 time, I would normally parse through this and ratchet you
10 right back to where I think you should be but because I've
11 been sort of just a little bit flat out I'm going to give
12 you the 11 that you agreed to. You can benefit from my
13 schedule the last couple months, so the schedule is fine.

14 And then, I can't -- I know your motion for
15 reconsideration is still pending but I can't get to that
16 today, I'm just not prepared to do it, but I will get to
17 that in the next couple of weeks.

18 And you are looking for much more expansive
19 discovery than Harvard is willing to agree to; correct?

20 **MR. CONSOVOY:** Correct, Your Honor.

21 **THE COURT:** Okay. You want, you're willing to
22 agree to sort of the higher ups and you want more of the
23 individual admissions officers with the third-party people;
24 do I have that generally right?

25 **MR. STRAWBRIDGE:** Yes. To the extent that

1 we're talking about custodians, we think it's certainly
2 important to have some of the high-level admissions officers
3 included. We've identified some selective people outside
4 the Admissions Office who we have reason to believe are
5 going to have relevant information. You know, obviously the
6 parties are pretty far apart on the number of custodians.
7 We've attempted to pare our list once. We've gotten no
8 response from the other side. You know, it may well be that
9 there is a place to meet in the middle here but
10 unfortunately we have been unable to get there without some
11 help from the Court.

12 **THE COURT:** So you want something like four
13 and you were offering something like ten; do I have that
14 right?

15 **MS. ELLSWORTH:** Your Honor, we've offered 11.
16 There are three individuals not in the Admissions Office:
17 The President, the Dean of the College, and the Dean of the
18 Faculty of Arts and Science and then the remaining eight are
19 admissions officers. And it includes the Dean of Admissions
20 and the director as well as several what I would call more
21 like blind (ph.) admissions officers but certainly not every
22 member of the 40 plus member staff. And we haven't produced
23 any documents from any of them yet so I'm not sure how we
24 then know it's insufficient, or excuse me, that SFFA says
25 they know is insufficient but that's what our offer has

1 been.

2 **MR. STRAWBRIDGE:** So a couple, just a couple
3 quick rejoinders from that.

4 We know for a fact that the first read on every
5 application that is done is done by a junior admission
6 officer. All the Admissions Office, they've offered I think
7 what are more fairly characterized as senior admissions
8 officers. Certainly people are much more forthcoming with
9 their colleagues than they are with their supervisors. And
10 at the end of the day these are the people who do the first
11 read on the applications. They have an integral role in it.

12 I'll just note that, you know, among the list of
13 people we want from outside the Admissions Office is the
14 Chief Diversity Officer as well as the Provost for Diversity
15 and Inclusion. It's kind of hard to imagine in this kind of
16 case we wouldn't get them in as custodians.

17 And then the other data point that we offered up
18 which I think is reasonable is given UNC, which actually has
19 a smaller admissions office, there are 70 people in their
20 Admissions Office, there is fewer than that at UNC, we made
21 an opening offer of 24 custodians in the parallel litigation
22 which hasn't progressed beyond that point, but I think that
23 kind of shows a more realistic assessment of what would be
24 typical for a case like this.

25 **MS. ELLSWORTH:** There are 40 admissions

1 officers. There may well be staff members and other people
2 who don't perform reading functions but the number is 40
3 give or take one or two, not 70.

4 We don't think what UNC has or has not offered has
5 any bearing on what should happen in this litigation. And I
6 also, I'm not sure that it's entirely true that none of the
7 folks who we offered do first reads at all. Certainly at
8 prior points in their career they have. I think, you know,
9 when you're talking about ESI searching, what we're talking
10 about is information that might bear on the workings of the
11 office as opposed to individual applicant decisions or
12 applicant information that's not going to be coming up in
13 searching email or other documents. That's files alone or
14 in the database information that's already been produced so
15 I just don't see the need for it.

16 On the diversity officers point that
17 Mr. Strawbridge raised, again, the Dean of the college, Dean
18 Khurana, has oversight overall of that so what we're, we're
19 offering fairly senior level people but the right and the
20 important people who could speak to Harvard's approach to
21 diversity, the interest in diversity and from an ESI
22 perspective we're going to have the final versions in the
23 relevant we think communications on those topics.

24 **THE COURT:** All right. Well, I'm inclined to
25 give them some of the senior admissions people. I guess I

1 don't fully understand how the process works so I'm not sure
2 how the Chief Diversity Officer and the Provost would have
3 any -- do they have any role in the application process?

4 **MR. STRAWBRIDGE:** I mean, I don't think that
5 we have enough information to say what role they have but
6 they certainly have a role in fostering diversity-inclusive
7 policies on the campus which is really what the admissions
8 process is all about achieving so I think certainly Your
9 Honor is well aware of the fact we have a mismatched claim,
10 that we have some other post admissions relevant data and
11 relevant information in this case. And, you know, we're not
12 asking for everybody who works under that person but we
13 think that at least those two examples are prime people in
14 the case about diversity and inclusion and Harvard's alleged
15 interest thereof.

16 **THE COURT:** I know what you meant, you say
17 Diversity Officer and then the Chief Diversity Officer and
18 that it's easy to sort of throw them in there but, I mean,
19 we are looking at the admissions process, not what happens
20 after the admissions process, at least as of this stage of
21 the game.

22 **MR. STRAWBRIDGE:** Well, I guess I don't think
23 that those two things are necessarily seamless. We don't, I
24 mean, we just, we don't have enough discovery yet to know
25 what extent. It's hard for me to imagine that the Diversity

1 Officer doesn't have any interest in both how applicants get
2 admitted and what the student body looks like and what sort
3 of arrangements are made once they're there. And the
4 point is --

5 **THE COURT:** The arrangements that are made
6 once they're there I'm not concerned about but do the Chief
7 Diversity Officer and the Provost have any role in
8 admissions?

9 **MS. ELLSWORTH:** No, Your Honor, no role in
10 admissions.

11 To the extent Your Honor is inclined to, if you
12 think the more junior admissions officers are relevant, I
13 guess what we would suggest is we think that 11 or
14 thereabouts is a good number for this case given the federal
15 rules on deposition limits, given the deposition limits that
16 are, at least provisionally have been put in place by the
17 Court for this case.

18 So if more junior officers are needed, I guess what
19 I would suggest is Your Honor can set a number from which
20 SFFA can choose who, within reason who these admission
21 officers should be rather than adding to the ones we've
22 already offered.

23 **THE COURT:** I mean, I can go back and look at
24 your letters. Honestly 11 seems skimpy to me in a case of
25 this size and magnitude. On the other hand, 40 seems

1 excessive to me in any case regardless of its size or
2 magnitude so I guess I have two choices. I can go back and
3 parse your letters more carefully than I have which I'm
4 happy to do or I can send you two back to the drawing board
5 or you eight back to the drawing board, however many you
6 are, and come up with another list.

7 I don't want to just pick a number arbitrarily so I
8 don't want to say that you want 10, you want 40, I would
9 rather parse through it a little bit more but I think that
10 the Admissions Office, they should get somebody sort of in
11 each strata so they can sort of figure out what's going on
12 at each level where the selections are being made that are
13 relevant to them.

14 So if you take the higher level people that I'm
15 sure they want, that 11 number doesn't leave very many
16 people actually in the Admissions Office and down in the
17 weeds in the process.

18 **MS. ELLSWORTH:** We can certainly take that
19 guidance in terms of people in each strata and also the
20 guidance that even 11 seems not quite enough. We disagree
21 with that but I understand your position.

22 **THE COURT:** I mean, if I do go back and parse
23 through these and you want me to make these decisions, I'm
24 disinclined to order the Chief Diversity Officer, I'm
25 disinclined to order the Provost and I'm disinclined to

1 include alumni interviewers, sort of the third-parties that,
2 whatever you want to call it, third-party interview types of
3 people but I think they should get a representative sample
4 of what's going on in the Admissions Office and it's hard to
5 think they can do that with 11.

6 **MR. STRAWBRIDGE:** Can I just say a couple
7 things in response?

8 **THE COURT:** Sure.

9 **MR. STRAWBRIDGE:** First of all, I just want to
10 make sure that we're clear. I think what we're talking
11 about here is the custodians. We haven't asked for any
12 third-party alumni interviewers as custodians in this case.
13 There is a separate issue with respect to identifying
14 potential witnesses.

15 But with respect to custodians, the other people
16 that we -- the alumni interviewers (ph.) are people who were
17 actually mentioned in a deposition as the people who
18 interfaced with the Admissions Office when there are
19 requests from alumni or from donors to have certain people
20 admitted. That plays right into both some of the race
21 neutral alternatives available to Harvard and their
22 admissions process directly so I guess I don't agree that
23 those people have no role in the admissions process.

24 We do have evidence we'd be happy to submit in
25 support of that, if you'd like, but, you know, my only

1 concern about going back is we have been trying to negotiate
2 this for a while. We've come down from our initial number.
3 I know that you think our number seems high. It's a civil
4 rights case. We think that the number is appropriate but
5 we've been willing to meet in the middle. We've gotten no
6 movement out of them so I guess I'm a little worried that if
7 we, you know, that it's just going to be, we're just going
8 to be back here in another month and we're not making
9 progress.

10 **THE COURT:** All right. So, I mean, I'm happy
11 to, I mean, now that this trial has resolved itself, I'm
12 happy to take a deeper dive into the letters and just issue
13 an opinion and an order, both on the discovery issue and the
14 motion for reconsideration.

15 **MR. STRAWBRIDGE:** I think we would be fine
16 with that.

17 **THE COURT:** Okay.

18 **MS. ELLSWORTH:** That's fine, Your Honor.

19 **THE COURT:** Okay. That's what I'll do then.
20 Anything else today?

21 **MR. WAXMAN:** Congratulations on finishing your
22 trial.

23 **THE COURT:** Have you been following this
24 trial?

25 **MR. WAXMAN:** Yes.

1 **THE COURT:** Really good, cutting edge kind of
2 and interesting, good lawyering all the way around which
3 made it nice.

4 **MR. CONSOVOY:** A couple more, we have a couple
5 more points, Your Honor.

6 Quickly though, I think we are getting to stuff
7 inside the protective order and I think there may be people
8 in the room who are not covered by that protective order, I
9 just want to be careful about that.

10 **MS. ELLSWORTH:** It's our protective order I
11 think, not yours.

12 **MR. CONSOVOY:** Right, there are people in the
13 courtroom who are not covered by that protective order.

14 **MS. ELLSWORTH:** What order, is it database?
15 (Whereupon, counsel conferred.)

16 **MR. CONSOVOY:** Database, I want to talk a
17 little bit more about matriculating students and the
18 issue --

19 **MS. ELLSWORTH:** So, Your Honor, if we're going
20 to talk about individual database fields, we have designated
21 those as "attorneys' eyes only" under the protective order.
22 We would ask that our folks here from our firm could stay
23 and there are others we'd ask might be excused or we can try
24 and talk at a high level of generality, whichever Your Honor
25 prefers.

1 **THE COURT:** I'm fine either way. I am happy
2 to -- I am not going to clear the courtroom. We can go out
3 back and do this.

4 **MR. CONSOVOY:** I can keep it high level. I
5 just wanted to make sure we -- I didn't want to jeopardize
6 your interests as well.

7 **THE COURT:** Who is here who is not covered by
8 the protective order?

9 (Pause in proceedings.)

10 **THE COURT:** If we need to step out, we can.

11 **MR. CONSOVOY:** Sure. So a couple other
12 points. I take it Your Honor is going to look at the
13 letters and all the issues because you covered only a couple
14 of them.

15 **THE COURT:** Yes.

16 **MR. CONSOVOY:** There are many issues but I
17 just want to, if I could briefly highlight some that we
18 think are more urgent than ours.

19 On the databases, Your Honor --

20 **THE COURT:** Yes.

21 **MR. CONSOVOY:** -we think that the number of
22 years is quite insufficient. When I was here in one of the
23 earlier hearings, I raised a concern that I would be empty
24 handed at the podium in front of an appellate court because
25 we didn't have the record we needed. And I think *Fisher II*

1 bears out my concern that, and I was told I was empty handed
2 there, that three terms of data was insufficient to prove
3 what needed to be proved in *Fisher* and in all candor was
4 held against us.

5 And so I just want to underline that point as Your
6 Honor goes back and reviews those letters that the Supreme
7 Court indicated, there have been eight years of data, it
8 would be inappropriate to have in a case just like this that
9 we're alleging, I just want to make sure we understand what
10 kind of claims, I know it has been a while since we got into
11 the merits of this.

12 We're alleging that Harvard is engaging in racial
13 balancing of the class over a four-year period. You need
14 all four years in that period to prove that claim. We're
15 asking for two full-year periods of data, data that Harvard
16 has, that it can easily produce, that it's not burdensome
17 and that they've already produced two years quite quickly
18 and that it is not privileged.

19 We have also said that we are willing to table any
20 request for application files while we review that data. It
21 is our hope, we understand from, we're trying to listen as
22 well, that the Court is concerned about requiring Harvard to
23 produce application files. We hear that.

24 This is the solution in the short term. If we can
25 get those eight years, we think, and get the fields that we

1 need within them, they have redacted fields that are
2 essential to understanding the process. Harvard can't be in
3 charge of this case deciding what fields are relevant and
4 what fields are not.

5 Our experts have to figure that out for themselves.
6 Things like -- I'm going to try to stay general here. We've
7 identified those fields in our letters. I won't tell you
8 what they are but they are central to determining how
9 applicants are compared head-to-head, how different schools
10 are compared, how different regions in the country are
11 compared.

12 If you review the deposition transcripts which
13 we've highlighted, this is essential to what they do. I
14 think our general frustration in this case has been -- and
15 without getting into the very particular issues -- that we
16 have asked for information that is relevant, that is not
17 covered by any federal or state common law privilege, that
18 is not burdensome to produce or duplicative. Harvard has
19 said no because of a general privacy concern and because
20 they don't think it's important enough for us to get.

21 That's just now how discovery works in a civil
22 rights case.

23 **THE COURT:** Okay. I am going to go back to
24 these letters but just so you understand where I am coming
25 from, I limited discovery significantly while *Fisher* was

1 pending because it wasn't clear to me what would be
2 relevant, how much of your case would be left, how, what
3 they would do in response to *Fisher*. And, you know, *Fisher*
4 came out where it came out. Your case lives on. They can
5 have some reason to be emboldened (ph.) but now we are going
6 to have real discovery, like we are going to get to this and
7 it is going to get done.

8 I am, I remain concerned about the applicant files
9 and if I can balance it out, I will. As I sit here, I am
10 happy to hear you on it. Eight years doesn't sound crazy to
11 me, especially where it limits the applicant files which is
12 what I am really concerned about, but we are going to do
13 sort of fulsome discovery at this point.

14 Now we know what the parameters are. We know what
15 the legal standard is more or less. To the extent it
16 clarified it, it clarified it. And it is going to be a lot
17 less limited than it has been, now that you know what the
18 parameters are and we won't, we're not so much at risk of
19 having to do it and then do it again. So, I mean, it's
20 going to be broader than it's been. And eight years -- I'm
21 happy to hear you on it but eight years doesn't sound crazy
22 to me.

23 **MR. WAXMAN:** Before you rule --

24 **THE COURT:** I'm not ruling today.

25 **MR. WAXMAN:** -- it is a serious misreading of

1 *Fisher* to say three years in any case, and this is a case in
2 which two years has produced 70,000, records of 70,000
3 applicants. If their empirical people, who I am sure have
4 been hard at work on this, have not been able to come up
5 with statistically significant trends that they can talk
6 about out of the sample of 70,000, that's simply because
7 they aren't there.

8 Now, I understand the argument that more years is
9 better and we're talking about data. We're not just talking
10 about data. The two years that we produced, and I believe
11 possibly the year before and the following year, are
12 essentially using, the same data is being collected under the
13 same conventions.

14 As you go back farther and farther, we haven't
15 looked at this except to know that different data was
16 collected using different criteria and there will be
17 significant work to sort of harmonize it so that year
18 after -- year against year can be evaluated.

19 I think it's important to understand this is not a
20 damages case. This is a case asking for prospective
21 injunctive relief. They have some -- we still don't have
22 any meaningful discovery into the standing of this case but
23 they've identified, quote, "members" in the classes for the
24 years in which we've produced. They don't have anybody who
25 has a claim or has made a claim with respect to, you know,

1 all of these prior years. And if the argument is we need a
2 whole admission cycle, that is four years, I think it's
3 important to understand here that there is no dispute that
4 Harvard is assembling classes among an extremely large
5 number of highly qualified applicants class by class. They
6 have two full classes and they can evaluate the extent to
7 which the decisions that are made over an admission cycle
8 reflect intentional discrimination. Even if there were an
9 argument for somehow including a four-year range --

10 **THE COURT:** Let me ask you this:

11 So if they -- one of their claims is that there is
12 an impermissible quota system. And let's just say there is
13 some class of people, I don't care, we can talk about any
14 one you want, Asian Americans or, you know, whoever else,
15 and the percentage of them in those two classes is the same,
16 which I think is what they allege in their Complaint, right?
17 That the percentage is the same year after year?

18 **MR. WAXMAN:** That's what they allege. It's
19 not what they can prove but --

20 **THE COURT:** But how do you prove or disprove
21 that by the statistics of two years?

22 **MR. WAXMAN:** Those numbers are publicly
23 available. They have them just as we have them. Harvard
24 publishes every single year. They don't need a database of
25 hundreds of thousands of other applicant files on a huge

1 number of variables to know what the percentage of Asian
2 Americans, African Americans, Hispanic Americans, Pacific
3 Islanders, White Anglos, Jews have been accepted every year.

4 **THE COURT:** But is it not relevant, I mean, if
5 you have -- and I'm just making it up, I'm Jewish so I'll
6 say that, I'll use Jewish. If you have ten percent Jewish
7 people every year, isn't that relevant to the significance
8 of that number how many Jewish applicants you had? And
9 isn't that what changes year over year?

10 Because if it is ten percent out of the exact same
11 number, that means one thing, but if it's always ten percent
12 and the number of applications fluctuates, does that not
13 mean something else?

14 **MR. WAXMAN:** Sure, if there were wild
15 fluctuations in applications and the same percentage were
16 accepted every year, that would be a data point to argue
17 that what was going on was, in fact, ethnic or racial
18 balancing.

19 **THE COURT:** How are they supposed to know that
20 with only seeing two years?

21 **MR. WAXMAN:** Yeah, I mean, we can do this very
22 simply without transferring hundreds of thousands -- data
23 from hundreds of thousands of files. Simply, we can simply
24 aggregate for them the number of Asian American applicants,
25 the number of Jewish applicants, all the self-reporting data

1 going back eight years if that's the issue.

2 The question is whether we have to turn over for
3 years and years before any plaintiff ever had any claim in
4 this case or any member of a plaintiff had any claims in
5 this case in order to show them that, yes, in, you know, in
6 2012 we had X number of Jewish applicants who self-reported
7 as Jewish and Y number of Jewish matriculants, that can be
8 done. That's not the whole database.

9 I think if there is any argument for more than
10 70,000, the data from 70,000 files, it certainly wouldn't be
11 for more than four years. That's an entire college
12 experience. I don't think there is an argument for more
13 than two years but I don't understand how we immediately
14 devolved to eight years.

15 **MR. CONSOVOY:** The Supreme Court said in
16 *Fisher* eight years was the right number. Your Honor can
17 read the opinion. They weren't guessing. They said we
18 would like to have the last eight years to evaluate the
19 current system. That is direct -- and they said that three
20 years was essentially woefully insufficient.

21 So, I don't need to re-read the opinion for Your
22 Honor but it's there.

23 Second, this kind of argument is exactly what I
24 have been talking about. Harvard has been trying to
25 litigate the merits of the case on the first day of

1 discovery. All we're looking for are databases with
2 information in them that is likely to lead to discoverable
3 evidence.

4 This is a Title VI claim. If this were a Title VII
5 claim for a pattern and practice of racial discrimination,
6 that would similarly be for prospective relief; but, of
7 course, when you're evaluating the pattern and practice you
8 have to look backwards to evaluate what the current policy
9 is. And Your Honor hit it exactly on the head in terms of
10 needing more, it's actually much more than Your Honor said
11 but you said it right. We don't know how many applied.
12 That is conveniently the one field that Harvard doesn't make
13 publicly available. They tell you everything about their
14 applicants but they won't tell you how many from each racial
15 group applied. That has always been interesting to us. But
16 it's the information behind that that's equally important.
17 We don't just have the quota claim. That is one of our
18 claims. It's, you know, one of our main claims but we also
19 have a claim that under Grubb (ph.) race is more than a
20 non-predominant factor in admissions.

21 Now, you have to do a head-to-head -- and Your
22 Honor brought this point up in a previous status conference.
23 Head-to-head comparisons are going to be very important over
24 time. Are people of similar qualifications being treated
25 dissimilarly? We need to know. And I'm not talking about

1 what's actually in the database now. Do people go to the
2 same high schools? They've withheld extracurriculars.
3 They've withheld aspects of a person's application that they
4 deem essential to the admissions decision. So this is, and
5 I'll leave -- I won't belabor it but this is my point:

6 Harvard wants to be in charge of what we get to
7 see. If they haven't, if they don't know what their systems
8 look like over the past year of this stay, then they haven't
9 been looking. How could they not know at this point -- I,
10 mean, Your Honor asked us to all be diligent and be ready --
11 not know how they kept their data and whether it would be
12 easily -- we've been asking for a year. We've been asking
13 for multiple years for a long time now.

14 All we're asking for are databases to avoid getting
15 files. This is a, I think just straightforward. It's eight
16 years, it's two cycles of experience.

17 And the last point is it's not just that it's ten,
18 ten, ten every year. Our claim is that if it bumps up one
19 year, they bump it down the next, right, so that over a
20 four-year period the Jewish number would average out to ten
21 and so you need to see those bumps, right, and you need to
22 see them over multiple cycles.

23 At summary judgment if they want to argue that
24 it's, you know, not good evidence, not strong evidence,
25 that's what summary judgment is for. That's what a trial is

1 for. Discovery goes beyond the bare essential claims and
2 says what's out there. I think this is straightforward.

3 **MR. WAXMAN:** So this is an odd case in that
4 the discovery in this case is, I mean, I understand Your
5 Honor is considering our reconsideration motion but even if
6 it were warranted, it is unbelievably lopsided. We're
7 talking about discovery of an institution that is, A,
8 nonprofit, and, B, imbued with protection of the First
9 Amendment. I mean, other than the *Fisher* case it's hard to
10 recall an opinion that the Supreme Court has in which the
11 Supreme Court has adjudicated what goes on in universities
12 without hearing about the First Amendment and the extent to
13 which the First Amendment protects.

14 Secondly, with respect to the database fields,
15 we're happy to come in and talk with Your Honor about what
16 fields, particularly what fields, what it is that we're not
17 producing, but we are concerned as, Your Honor knows, with
18 the privacy of people who apply to Harvard and who attend
19 Harvard and who did not choose to be part of this lawsuit.
20 And the things that we have, the fields that we haven't
21 produced are fields that we believe would either implicate a
22 FERPA notification but more importantly would permit the
23 identification of a student, a student who had the following
24 extracurriculars and went to this high school.

25 **THE COURT:** So, I mean, we've been around

1 this, we've been around this before, but let me ask you this
2 so I understand.

3 So we get to summary judgment or trial, wherever
4 we're going on this, and they say these few applicants are
5 equal and this one that's selected wasn't. And then you get
6 to that and say no, this guy was captain of his football
7 team. How are they supposed to guard against that if you're
8 not giving them, if you're not giving them information that
9 they need to differentiate?

10 **MR. WAXMAN:** Well, look, obviously we are not
11 going to be -- we are going to be constrained in the same
12 way that they are.

13 If we're talking about applicant, applicant files,
14 I don't know how they're going to be able to say this guy is
15 the same as this guy based on a database record.

16 **THE COURT:** But something like --

17 **MR. WAXMAN:** If all we produce is the data --

18 **THE COURT:** Something like being captain --

19 **MR. WAXMAN:** Excuse me?

20 **THE COURT:** Something like being captain of
21 the football team, let's say that you're like, let's just
22 say that you're an African American captain of the football
23 team in a predominantly white area. That tells you
24 something important about that candidate, it says a lot of
25 important things about that candidate. How are they

1 supposed to know that if you're not kind of giving them what
2 makes that kid unique?

3 **MR. WAXMAN:** There is going to be, I mean,
4 they are getting deposition testimony from -- I mean,
5 they've already deposed the Director of Admissions. They
6 undoubtedly will depose the Dean of Admissions and others
7 within the Admissions Office about how this works and how
8 these individual considerations work.

9 If you're asking about a head-to-head between
10 candidate X and candidate Y, that's an argument which I
11 think requires a disclosure. On those terms you'd have to
12 have an admissions officer say, yeah, I looked at this file
13 and I looked at this file and here's why I think the
14 committee of 40 voted this way in this case and voted this
15 way in another case.

16 We're not talking about -- we're not talking here
17 about the number of electronic, the data -- the size of the
18 database and the fields that are identified. I fully
19 understand, and maybe it would be easier for us to argue
20 about the case if we had, if we didn't have the privacy
21 constraints that we're operating under. But we understand
22 that this is a balance and we have to live by whatever it is
23 that the Court rules just as the other side does.

24 You know, I've heard from Mr. Consovoy a number of
25 times about this is not how discovery works. They made

1 their allegations. They're going to put on their case and
2 we have to defend against it and we can't haul out at trial
3 something that we have refused to produce to them, and Your
4 Honor has upheld, as a way of defending the case.

5 **THE COURT:** If I ordered you to produce the
6 database in a way that, you know, arguably like, like, let's
7 just say that you give a certain zip code, there's only one
8 high school in that zip code and there's only one football
9 captain, if that. Arguably you've put out enough data to
10 figure out who this kid is.

11 If I ordered you to produce a database that have
12 these three pieces of information, does that trigger your
13 FERPA obligations do you think?

14 **MS. ELLSWORTH:** I think we would take the
15 position that a FERPA notice with that combination would
16 require FERPA.

17 **MR. CONSOVOY:** Your Honor, it might implicate
18 that one isolated, it's just a notice. We're not talking
19 about -- it's just a notice that has to go out to comply
20 with FERPA. If Harvard wants to make a privacy argument --

21 **THE COURT:** It is not just a notice. It's not
22 just a notice.

23 **MR. CONSOVOY:** I believe it's just a notice.

24 **THE COURT:** The other person gets an
25 opportunity to object. It's a process.

1 **MR. CONSOVOY:** Sure. UNC sent out notice to
2 all the people. There has been -- nobody has weighed in.
3 If that came up, then we'd actually have, but then we'd
4 actually have a real issue; right? We don't have a real
5 issue right now. We have Harvard saying, remarkably, that
6 extracurriculars are going to be withheld in determining
7 whether their admission decisions are legitimate.

8 The deposition itself, the deposition itself
9 identified all of the characteristics essential to the case.
10 We would prefer to be able to litigate our own case the way
11 we'd like to. We believe the information is relevant to the
12 admission decision. I promise you Harvard will not say
13 contrary to that. It's in the database they've already
14 given us. We just want the field to be not disclosed.

15 We have a protective order in place. It was, Your
16 Honor noted, heavily negotiated. It was negotiated for this
17 purpose, so that the parties could freely produce the data
18 that was necessary to resolve the case. We simply need the
19 data. We cannot litigate our case without it.

20 **MR. WAXMAN:** Well, it's true that the FERPA
21 notice permits objections and there could be litigation
22 about that but the privacy interest here that FERPA is aimed
23 at protecting, and, frankly, it's an institutional concern
24 (ph.) at Harvard is, yes, so everybody now knows that, you
25 know, I could apply to Harvard, I can apply to Yale, I could

1 apply to Stanford, I could apply to Duke, but if I apply to
2 Harvard, you know what? There is information from my file
3 that is likely to be produced or could be produced or has
4 been ordered to be produced in other years that would allow
5 me to be identified. It's a competitive concern for Harvard
6 that the notice goes out that, yes, these personally
7 identifying features in the files will be disclosed. If it
8 weren't for that concern, we would be very happy to produce
9 all of these files insofar as there are data -- these
10 database fields insofar as they bear on determinations.

11 There is no question that the high school that an
12 applicant went to is a factor that the Admissions Office
13 considers in an effort to achieve the broadest form of
14 diversity possible. There is no question about that.

15 The question is where you draw the line in order to
16 protect the privacy of individual people who never wanted to
17 be part of this lawsuit, the vast majority of whom aren't
18 even at Harvard, against the interests in finding out
19 everything possible that might possibly be relevant to what
20 the plaintiffs think they want to show.

21 **THE COURT:** Well, so I don't really buy the
22 idea that this would put Harvard at a competitive
23 disadvantage. I am somewhat concerned about people's --
24 about not so much just generally identifying it, you know,
25 some kid applied to Harvard but more than that, the personal

1 stuff in their application.

2 So, I mean, let's just say, I mean, what is the
3 exact privacy interest sort of implicated here in the
4 database? You get who applied and you get sort of objective
5 data, right, in the database?

6 **MS. ELLSWORTH:** Yes, there are certain -- some
7 of the fields that are in question have the narrative
8 entries so they're going to be, it's going to be descriptive
9 self-entered information about an individual's
10 extracurricular or honors, other biographical type
11 information. There is some other fields at issue that
12 relate to, sort of a rating or something that an Admissions
13 Officer has provided, some of which doesn't relate to the
14 admissions process at all. The extracurriculars, things
15 like that, are taken into account in the admissions
16 decision. Lots of extracurricular information has already
17 been produced in fields we're talking about here that were
18 raised in SFFA's letter, they are the narrative fields that
19 say "captain of X" as opposed to football or however many
20 hours per week were spent on football, just to use that as
21 an example.

22 So it's not that no extracurricular information has
23 been produced and no honors information has been produced.
24 The vast majority of the information that bears on the
25 admissions decision has been produced. It's these fields

1 that have the more narrative descriptions of what somebody
2 did or the role that they played which we think, you know,
3 has poured over into the personally identifiable limit and
4 then we get into just serious privacy concerns.

5 **THE COURT:** I don't think just, I don't think
6 just identifying somebody raises a very high privacy concern
7 but to be able to link somebody's identity with some
8 personal background information seems to me a bigger
9 intrusion.

10 **MR. STRAWBRIDGE:** I just want to remind Your
11 Honor that the protective order in this case already
12 relieves them of any obligation to produce actual names and
13 addresses, anything like that.

14 We also agreed that to the extent the narrative
15 field included that actual information, that they could
16 redact data on a field-by-field basis.

17 **THE COURT:** But what they're saying is that if
18 you put together some of those fields in a small school in a
19 small town in a rural state or whatever, that you could
20 figure out who these people are.

21 **MR. STRAWBRIDGE:** So that's true, although if
22 you recall, the protective order actually has a provision
23 that they insisted on that we agreed to that actually
24 prohibits us from doing that upon, you know, pain of
25 contempt of this Court. We actually agreed that we weren't

1 going to try to do that gumshoe work. We're not trying to
2 identify anybody. We're trying to understand what is the
3 predominant factor in the admissions decision.

4 And I don't understand, if the narrative field says
5 that you're the captain versus just a player, if the
6 narrative field says that you were the leader of your
7 extracurricular club as opposed to just a member, that the
8 narrative field says that you did this or you achieved this
9 accomplishment, how can that not be a factor that is
10 relevant to the admissions decision in trying to weigh as to
11 whether --

12 **THE COURT:** It's clearly relevant to the
13 admissions process and I'm trying to sort out whether the
14 privacy intrusion outweighs the relevance. And what I'm
15 telling you is they have just been able to identify the
16 person sort of doesn't unduly distress me but are there
17 things beyond that that should?

18 **MS. ELLSWORTH:** Well, I guess I'm not sure
19 what it is that would be concerning to Your Honor. There is
20 a whole wealth of information about marital status, parents'
21 marital status, financial, socioeconomic status, whether
22 someone is disadvantaged or eligible for financial aid,
23 things like that that may spill more over into the types of
24 information that is more than just identifying who the
25 person is by very personal facts about themselves or their

1 family or their background.

2 **MR. CONSOVOY:** Disadvantage is at the heart of
3 this case. I mean, again, we filed a Complaint. Harvard
4 answered. In answering they're saying our allegations are
5 plausible. Every -- and it's in our letter, Your Honor.
6 Everything we're asking for is directly tied to an
7 allegation that they answered saying it's plausible.

8 We argue in Count 6, Count 5 and Count 6, that
9 race-neutral alternatives, socioeconomic benefit as a
10 preference instead of race would eliminate the use of race.
11 Harvard is withholding who is socioeconomically
12 disadvantaged. They answered the Complaint. It's relevant.
13 I know how it is not relevant.

14 **MR. WAXMAN:** Our argument is it's not relevant
15 and we think that we've produced fields that actually
16 disclose that. I think, one of the problems we're having
17 here, Your Honor, is we know what the fields are that we
18 produced and they are arguing about names of certain other
19 fields that aren't being produced. I don't want to offer up
20 Your Honor's time or tell you how to run your courtroom but
21 it might be worth simply having, you know, one lawyer from
22 each side come in and walk Your Honor through all of the
23 fields that have been produced for 70,000 files already and
24 understand what it is that we're not withholding and then
25 Your Honor can decide how the line is drawn. I think we've

1 articulated what we think the right balance is and the
2 concern that we have.

3 **THE COURT:** Well, so that's not a bad idea.
4 And just the way that my day unfolded, I am just not as
5 prepared for this conference as I ought to be so why don't
6 we recess this, unless there are other topics that you want
7 to discuss today, I will go through this, get further along
8 on the decision trail and then have somebody in to sort of
9 talk through whatever issues that remain.

10 **MR. CONSOVOY:** That sounds great, Your Honor.
11 I have two really short ones.

12 **THE COURT:** That's fine. I'm not in any
13 hurry.

14 **MR. CONSOVOY:** One is we respect Your Honor's
15 rulings about the, or leanings on the diversity officer but
16 it has raised one, the overall approach did raise one
17 concern. I just want to be heard on that briefly.

18 We do have claims in this case that go to the
19 experience of matriculating students. We have a claim and
20 it's in the Supreme Court's opinion on *Fisher*. *Fisher II*
21 says, In reviewing these programs as to whether they reach
22 strict scrutiny, you have to weigh the benefits of them,
23 which Harvard counts, but also the costs. We have alleged
24 that one of the costs of having these programs is what's
25 called a "mismatch effect." It's in our Complaint.

1 I am not saying we're going to get everything we
2 want on matriculating students. We're asking for a less, it
3 may be different than the custodian issue. Emails, I
4 understand that, although I do think the Chief Diversity
5 Officer would probably -- communications have real insight
6 into the cost and benefits of using race as an admission
7 criteria.

8 But putting that aside, I just don't want the Court
9 to be under the impression that this is just about the
10 applications. We can win this case if we can show that
11 their program isn't meeting their desired needs. I would
12 think it would be relevant to the finder of fact not just
13 what the freshman class looks like but what the senior class
14 looks like. How are these students doing when they get to
15 Harvard? Are they succeeding in the majors they've chosen?
16 Are they failing out? Are they having a positive -- is
17 cross-racial understanding, which is the premise of their
18 program, occurring at Harvard? This was Justice Kennedy's
19 point. This can't be a paper case. This can't be
20 superficial. These are deep, important issues.

21 I understand that there are going to be, that's why
22 they chose to use race in the admissions. That comes with a
23 price. The price is there is going to be some intrusion by
24 the Courts.

25 And I just want to let the Court know that the

1 matriculating students are not part of our case. They're
2 indirectly relevant.

3 **MR. WAXMAN:** Look, the -- I think we will be
4 arguing for however long Your Honor has this case about what
5 *Fisher II* decided. *Fisher II* was very, very clear on the
6 point that it is the university and the university gets
7 great deference in defining what success is and defining
8 what an appropriately diverse class is.

9 And in direct response to the points that my
10 friends here were making in *Fisher*, that if you simply
11 didn't take race into account, you would have, I don't know,
12 smarter students, more academically-prepared students.

13 The Supreme Court said, The University gets to
14 decide this. And this so-called and quite odious mismatched
15 theory I think is over in light of *Fisher II*.

16 Now, Your Honor can decide that at an appropriate
17 time but --

18 **THE COURT:** It may be over given the death of
19 Scalia. That itself might have been but for the death now
20 but --

21 **MR. WAXMAN:** Well, the author, the person who
22 wrote the book on the *Mismatched Theory*, Stuart Taylor, one
23 of the -- a friend of mine and one of the intellectual
24 pro-genders of the plaintiff's case has already published
25 something saying this litigation is over unless the next

1 President gets to support, gets to appoint two presidents
2 with extremely different views. These theories, this is not
3 a one-off case, these theories are gone.

4 Now, I'm not saying that that's how Your Honor
5 should rule in this case; but the notion that a case about
6 race discrimination in admissions requires intrusive
7 discovery about matriculating students and how they're doing
8 so that they can make their own case about Harvard, how
9 Harvard should be defined in success is beyond the pale.

10 **MR. CONSOVOY:** Harvard is making my initial
11 point every time Mr. Waxman stands up. They want to
12 litigate our case for us.

13 We have a claim. The claim has merit. It was
14 answered. Nothing in *Fisher II* forecloses it. If it did,
15 we would have heard from them in their letter to the Court
16 about *Fisher II* that, there is nothing in there that says
17 that. It says we must measure the costs and benefits of
18 these programs.

19 Deference is a summary judgment issue, Your Honor.
20 He makes my point. Harvard wants to say we win summary
21 judgment today so don't give them the information that is
22 relevant to their claim.

23 We're asking for limited information. I would
24 think -- I don't understand how it couldn't be relevant, I
25 am just hypothesizing this, it is not the case. If all

1 minority students were having unsuccessful experiences at
2 Harvard, if they were dropping out of their majors, could
3 anybody say that that's not relevant to Harvard's compelling
4 government interest in the use of race? Of course it's
5 relevant. All we want is the data. There will be plenty of
6 time later in the case -- they agreed to an 11-month
7 discovery for a reason. There will be plenty of time to
8 litigate how far deference goes, how much, what is the line
9 between good faith and bad faith. We are nowhere even near
10 that yet. We have a long way to go here. We just want some
11 basic data.

12 And all we're saying today is matriculating
13 information is relevant to the case. That's it.

14 **MR. WAXMAN:** The fact that we answered the
15 Complaint and denied it doesn't say anything. And --

16 **THE COURT:** I agree.

17 **MR. WAXMAN:** And there may very well be at an
18 appropriate point in time in which we can identify for the
19 Court counts of the Complaint that are no longer viable in
20 light of *Fisher II*.

21 The point here is that the privacy interests of the
22 matriculating students are greatly implicated by this, a
23 case which challenges race discrimination in admissions. We
24 have, we understand that we have two prongs that we have to
25 satisfy to carry our burden. And the first one is to

1 explain what we are looking for in a student class and how
2 we go about getting it.

3 And the second is to demonstrate why there are no
4 appropriate and sufficient, quote, race-neutral alternatives
5 that get us there. We understand that that, it is our
6 burden to -- since we have acknowledged that we engage in
7 race-conscious admissions, we have to prove those two things
8 to the Court. And we will.

9 But inquiries into the records and successes and
10 performances and failures of matriculating students is
11 unbelievably intrusive and quite orthogonal to what the
12 legal theory in this Complaint should be or is.

13 **MR. CONSOVOY:** It should be was, again, my
14 point.

15 **THE COURT:** I get it, I get it.

16 **MR. CONSOVOY:** My only point is if there was a
17 motion to dismiss it would have been filed, which means the
18 allegations are plausible and the discovery rulings as I
19 understand it are tied to whether the information is
20 relevant to a claim that has been entered. That was my only
21 point. And I don't think anybody disagrees that it is.
22 I've said my piece on that.

23 I just want to add, there is an issue we want to
24 raise for Your Honor. It's not before you today. It has to
25 do with Mr. Lee's appearance. He is on the Board of Fellows

1 for Harvard.

2 **THE COURT:** Yes.

3 **MR. CONSOVOY:** It has raised a concern about
4 whether he may or may not be a potential witness in this
5 case. The parties are both in good faith working through
6 this issue right now. We're not putting it before the
7 Court. Everyone has -- we are working to get the
8 information we need to evaluate the question. We hope that
9 it never has to come before the Court but we want to make
10 sure that you're aware of the concern and that the parties
11 are working through it.

12 **THE COURT:** Okay.

13 **MR. LEE:** And, Your Honor, I called
14 Mr. Consovoy the day I entered my appearance to explain to
15 him that I had acted as Senior Fellow but before I entered
16 my appearance I completely recused myself from all of my
17 fiduciary obligations having anything to do with this case.
18 I have actually given them information to prove that to
19 them. And that once I did that and entered my appearance, I
20 am not participating in anything at the corporation level
21 that has to do with the case. They're communicating with
22 Mr. Waxman and Ms. Ellsworth. I'm just here to be one of
23 the foot soldiers at the trial.

24 **MR. CONSOVOY:** I don't want to --

25 **THE COURT:** An impressive foot soldier.

1 (Laughter.)

2 **MR. LEE:** Thank you.

3 **MR. WAXMAN:** We think so.

4 **MR. CONSOVOY:** We respect him. We don't want
5 this to be an issue but I have a duty to my client and our
6 concern goes to things that were done before or earlier than
7 when that switch was made.

8 **THE COURT:** Okay. That's fine. If it comes
9 before me, I will deal with it.

10 You look like you want to speak back there.

11 **MR. CREGOR:** Thank you, Your Honor. Matt
12 Cregor for the student intervenor. Just a quick two
13 matters.

14 First, I'm very happy to be here in the role that
15 you granted us. As intervenor we're monitoring discovery.
16 We ask that if matters come up for which we need
17 clarification that we have the opportunity to seek it.

18 For example, we wondered, Your Honor, if there is
19 some way to be generally informed of discovery such that
20 when the dispositive motion arises we have some sense of
21 what's leading up to it. Just something to raise for you
22 now for consideration later.

23 And then, lastly, we received a great deal of
24 Interest from both current and prospective students at
25 Harvard about this case. As the school year starts we would

1 wish to add some students to our group of Amici. I just
2 wanted to flag it for the Court now.

3 **THE COURT:** I mean, I'll let the parties speak
4 on that but I don't have any issue with you adding or
5 subtracting people as is appropriate.

6 **MR. CONSOVOY:** On that issue, no. On the
7 other we would have concerns.

8 **MS. ELLSWORTH:** No concerns.

9 **THE COURT:** Okay. We will cross that bridge
10 when we get there.

11 **MR. CREGOR:** Thank you very much, Your Honor.

12 **THE COURT:** All right: We'll get working on
13 this. I'm sorry, I've been just a little bit -- I tried
14 that criminal case, it was eight weeks. We tried it from
15 ten to four which has left just literally around the margins
16 so my bad on that but it just ended up being more consuming
17 than I anticipated.

18 **MR. CONSOVOY:** Your Honor, one final
19 technicality. Is the stay lifted? Because there are things
20 we can start doing that we don't have to wait on your --

21 **THE COURT:** Yes, the stay is lifted other than
22 the issues that you raised in here. I mean, it's lifted as
23 to that too. I just don't perceive any progress until I --

24 **MR. CONSOVOY:** We may have additional
25 discovery to propound and things like that.

1 **THE COURT:** That's fine.

2 Okay. All right. Thank you.

3 **VOICES:** Thank you, Your Honor.

4 **THE CLERK:** Court is adjourned.

5

6 (WHEREUPON, the proceedings were recessed at 4:00

7 p.m.)

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C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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DATE: August 3, 2016