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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

CONSOVOY McCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
for the plaintiff
By: William S. Consovoy, Esq.

CONSOVOY McCARTHY PARK PLLC
Ten Post Office Square, 8th Floor
Boston, Massachusetts 02109
for the plaintiff
By: Patrick Strawbridge, Esq.

Courtroom No. 16
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
July 21, 2015
2:00 p.m.

1 APPEARANCES CONTINUED

2
3 BURNS & LEVINSON LLP
4 One Citizens Plaza, Suite 1100
5 Providence, Rhode Island 02903
6 for the plaintiff
7 By: Paul M. Sanford, Esq.

8 WILMER CUTLER PICKERING HALE and DORR LLP
9 1875 Pennsylvania Avenue, NW
10 Washington, D.C. 20006
11 for the des
12 By: Seth P. Waxman, Esq.

13 WILMER CUTLER PICKERING HALE and DORR LLP (Bos)
14 60 State Street
15 Boston, Massachusetts 02109
16 for the defendants
17 By: Felicia H. Ellsworth, Esq.

18 ALSO PRESENT: Ara Gershengorn, Esq., Harvard Office of
19 General Counsel
20
21

22 CAROL LYNN SCOTT, CSR, RMR
23 Official Court Reporter
24 One Courthouse Way, Suite 7204
25 Boston, Massachusetts 02210
(617) 330-1377

P R O C E E D I N G S

1
2 **THE CLERK:** All rise. Court is in session.
3 Please be seated.

4 This is civil action 14-14176, *Students for Fair*
5 *Admissions, Inc. versus President and Fellows of Harvard.*

6 Will counsel identify themselves for the record.

7 **MR. SANFORD:** Good afternoon, Your Honor.
8 Paul Sanford on behalf of the plaintiff Students for Fair
9 Admissions.

10 **MR. STRAWBRIDGE:** Patrick Strawbridge from
11 Consovoy McCarthy Park, also on behalf of Students for Fair
12 Admissions.

13 **MR. CONSOVOY:** Will Consovoy for Students for
14 Fair Admissions, Your Honor.

15 **MS. ELLSWORTH:** Good afternoon, Your Honor.
16 Felicia Ellsworth for Harvard College.

17 **MR. WAXMAN:** Seth Waxman, also for Harvard
18 College.

19 **MS. GERSHENGORN:** Ara Gershengorn, good
20 afternoon, Your Honor, for Harvard College.

21 **THE COURT:** Thank you all. We are in this
22 little courtroom today. I actually kind of like it. It
23 feels a little more intimate to me.

24 So I know we set this up as sort of a routine
25 status to kind of keep this on track. And I want to sort of

1 rule on what I am prepared to rule on today and then have
2 some discussion about sort of what is next.

3 So Harvard has filed a motion to file under seal an
4 unredacted proposed reply memo of law and supporting
5 material in support of the Motion to Stay which I have read
6 and also a Motion for Leave to File a Reply Memorandum in
7 Support of a Motion to Stay which I also have read. Both
8 those motions appear to be unopposed and, in any case, they
9 are both granted.

10 Then I also have sort of two sets of documents
11 here. I have Harvard's Motion to Stay, SFFA's Opposition to
12 the Motion to Stay, now Harvard's reply memo which I guess
13 under the rule you have to refile but I do have a copy in
14 front of me, and then Plaintiff's Motion to Compel
15 Production which I don't believe has been responded to yet;
16 is that right?

17 Okay. So, and on top of that, issues one and two,
18 on top of that, as you all are no doubt aware, I ruled on
19 the motion to intervene and the intervenors have filed a
20 Notice of Appeal in that so I sort of feel like those are
21 the three general topics.

22 I have skimmed Plaintiff's Motion to Compel
23 Production and I am going to put that aside until Harvard
24 has a chance to respond to it.

25 If anybody does have anything they want to say on

1 that today, that is fine but I really haven't thought hard
2 about that motion or spent any time reading it but I have
3 received it.

4 My preliminary question on the issue of the stay --
5 I know there is a lot of appellate specialists back there
6 and I am not one -- do you all have thoughts on whether or
7 not I lose jurisdiction while the motion to intervene is
8 pending, the appeal on the motion to intervene is pending?

9 I have tried to do some research on it and the
10 answer seems very unclear to me. We will do some more on
11 that but I thought rather than spend too much on it, I know
12 you are the biggest, a big appellate specialist crew out
13 there and I thought maybe one of you might know the answer.
14 I actually had lunch with a First Circuit Judge and I said
15 just --

16 (Laughter.)

17 **THE COURT:** -- an interlocutory appeal he is,
18 like, I don't know. So I am going to throw it back out to
19 you guys. Do you have any thoughts on about what happens to
20 my jurisdiction?

21 **MR. CONSOVOY:** This is a guess, Your Honor, so
22 please don't hold me to it. I believe their appeal is under
23 the Collateral Order Doctrine so they have an, that's how
24 they're getting up on appeal, so I believe you still have
25 jurisdiction over the remainder of the case while they are

1 appealing, if that's the question you're asking. But that's
2 based on no research.

3 **THE COURT:** Okay.

4 **MR. WAXMAN:** I'll offer you my tentative
5 off-the-cuff view and you can hold me to it for whatever it
6 is worth.

7 I think that's correct, I think that you don't lose
8 jurisdiction. I would be quite surprised if you did because
9 in *Grutter* as I recall there was a denial of a motion to
10 intervene and the case went forward during the pendency of
11 the appeal on the denial of a motion to intervene. And the
12 Sixth Circuit held that intervention, that the intervenors
13 were entitled to participate, they just joined and, you
14 know, I don't know, restarted discovery but augmented
15 discovery. So I think, as far as I know, you can continue.
16 We can all continue to talk here today.

17 **THE COURT:** And I understand that everyone in
18 this room would probably like it to continue in some form or
19 another, just, we will just ignore those people over there.

20 Has any sort of scheduling order been set in that?
21 From the intervenors?

22 **MR. CONSOVOY:** Not to my knowledge. I saw the
23 notice of appeal but I have not seen a scheduling order.

24 **THE COURT:** Okay. So on the one hand we have
25 the intervenors and one can obviously make an argument that

1 we should go forward in the face of the motion to intervene
2 and the appeal and you can also make an argument that given
3 that what they want to do is participate fulsomely in
4 discovery that there are some counterarguments that perhaps
5 it should be stayed.

6 And then on top of that we have Harvard's motion to
7 stay and whatever the *Fisher* overlay is, I do feel like the
8 gravitational forces of the universe are sort of pushing me
9 towards a stay on this. That being said, and this is not
10 meant to be any sort of ruling on the merits because I
11 haven't delved into it deeply enough today, and I am going
12 to give you all an opportunity to argue anything that you
13 want beyond what is in the briefs today but I really don't
14 want to stay the case in its entirety.

15 It appears to me, and, again, I will be interested
16 in your opinions on this, but whichever way *Fisher II* goes,
17 and I am not totally sure why the Supreme Court is rehearing
18 it, I am not sure exactly what their interest is, but it
19 seems unlikely to me that it will completely moot this case.

20 So if there are things that we can do during the
21 pendency of *Fisher* and the pendency of this appeal, I would
22 like to do some of those things, if there are those things
23 that we can identify will need to be done in any case.

24 And I say that understanding that Harvard wants a
25 complete stay and that SFFA wants no stay at all; but I am

1 thinking about sort of a middle ground where we get some of
2 the fundamentals of discovery done and then, so there is not
3 too much replication depending on how *Fisher* works out, how
4 the motion to intervene works out.

5 So, again, I am not going to rule on the motion
6 today. I just got Harvard's brief. I have read SFFA's
7 opposition but not carefully enough. I thought we could use
8 this as sort of a hearing, quasi hearing opportunity on it.

9 Mr. Consovoy, you look like you want to speak. You
10 can go first.

11 **MR. CONSOVOY:** Yes. Obviously our papers, you
12 know, you're right, Your Honor, we definitely would like the
13 whole case to go forward. I think, I hope we can get
14 agreement today on these two basic propositions and I think
15 we will debate the rest.

16 But Count I is a claim of invidious discrimination
17 against Asian Americans. I don't suspect Harvard will leave
18 that issue before the Supreme Court. That has nothing to do
19 with an interest in critical mass or anything like that. It
20 is an old fashioned, you know, under *Yick Wo* and the cases
21 that are over a century old, saying you cannot intentionally
22 discriminate against any racial group in this setting, one.

23 Two, Count II of the Complaint has to do with
24 racial balancing, that you are balancing the class in some
25 of a, you know, a quota system. I hope and suspect that

1 Harvard will also agree that that is, that *Fisher II* will
2 never make that permissible. That has been banned for a
3 long time, decades. Going back to *Bakke*, it was reiterated,
4 that's been a, you know, against the rules in *Grutter* and in
5 *Fisher I* and Texas is not suggesting that they're engaging
6 in racial balancing.

7 Those are the two sort of premier claims and I
8 think they would get most of the discovery done. And I
9 don't think there is any allegation that the Supreme Court's
10 decision no matter what it is doing will shed any more light
11 on that than we have now.

12 **THE COURT:** Mr. Waxman or Ms. Ellsworth, do
13 you want to respond?

14 **MR. WAXMAN:** Well, I think, I take Your
15 Honor's point that it may well be that what the Supreme
16 Court decides in *Fisher II* is anybody's guess, what the
17 Supreme Court will decide in *Fisher II*.

18 As we pointed out in our reply, and I won't
19 reiterate it here, the face of the petition for certiorari
20 and the public statements of Ms. Fisher's lawyers suggest
21 that what the Supreme Court is being asked to do is to
22 substantially affect the way in which the current rules
23 under which race is taken into account. I mean, if all
24 *Fisher II*, if the only complaint in *Fisher II* was that there
25 was a footfall in the application of an agreed upon

1 standard, it's very, very unlikely that the Supreme Court
2 would be taking the case again. That's not what the Supreme
3 Court does. And it's not what it's being asked to do and so
4 we don't really know.

5 And since, I would say that on the issue of whether
6 it would render this lawsuit moot or not, No. one, I think
7 that's not the issue and I'll come back to that; but, No.
8 two, it may, in a sense, that there is no retrospective
9 relief being requested here, this is, they are seeking an
10 injunction to stop Harvard from conducting its holistic
11 admissions process the way that it currently has been doing.

12 And in the event that the Supreme Court were to do
13 any one of the things that their cert petition asks the
14 Court to do, including determining that what they call
15 "qualitative diversity" as opposed to "quantitative
16 diversity" is inappropriate, or that the consideration of
17 race should be limited to, quote, the last few spaces in a
18 class, or that race can be taken into account only for
19 reasons that were expressed by the University at the time it
20 began doing so, all of which the Supreme Court is being
21 asked to consider.

22 Harvard, independent of this lawsuit, Harvard would
23 have to reconsider whether or not it can continue to conduct
24 its admissions program the way it has been and has been long
25 since *Bakke* was decided. That would, in fact, render the

1 Complaint in this case moot. Harvard would consider whether
2 it had to change. If it did change, they could bring a
3 claim saying we haven't changed it enough but there is a
4 very real prospect that if the Supreme Court does everything
5 that is being asked of it, the University will have to
6 consider on a going forward basis how it continues to
7 operate.

8 We believe that our program satisfies *Fisher I* and
9 *Grutter*, *Gratz* and *Bakke* but so did the University of Texas
10 and so did the Fifth Circuit. And we think that the
11 University of Texas, in fact, has complied. The Supreme
12 Court has decided to consider the question whether they have
13 and what guidelines ought to apply. And that has bearing I
14 think in two regards, in addition to the fact that it may,
15 in fact, moot the prospective relief challenge here.

16 One is that it is going to inevitably affect the
17 scope and the magnitude of discovery in this case. Now,
18 there is a suggestion that, well, Count I says that we're
19 intentionally discriminating against Asian Americans. Count
20 II says we're engaging in racial balancing.

21 I don't think that the plaintiffs are prepared to
22 dismiss Count III and Count IV and, frankly, all of the
23 discovery in this case, I don't think it can be segregated.
24 We're asking about -- they're asking to examine the same
25 documents, examine the same witnesses, respond to all the

1 same contention interrogatories. We're either going to go
2 forward with the discovery or we're not. And no one can say
3 the extent to which the scope of permissible discovery will
4 be affected.

5 Now, their position is, well, we're not going to
6 ask for any more discovery no matter what *Fisher* decides and
7 that's because, and, you know, we'll get into this when you
8 finally adjudicate the Motion to Compel and see what we are
9 prepared to produce. They're asking for everything. And
10 the notion that there is going to be nothing left more for
11 us to ask for, you just give us everything and then we will
12 decide in light of *Fisher* what subset of that we need.

13 A, it is inappropriate to place on Harvard, a
14 nonprofit institution, discovery that is going to be
15 intrusive, burdensome and enormously expensive. The types
16 of discovery that they're trying to get in this case, and
17 that if we go to the merits of the case they will be, if
18 we -- on some subset of which they would be entitled to once
19 we understand what the constitutional standard is, has
20 enormous student privacy concerns, enterprise concerns for a
21 private educational university and how it goes about making
22 decisions.

23 And I think the balance in evaluating where the
24 balance lies in terms of a stay or not stay, I think it
25 would be a mistake to think that you can segregate discovery

1 as to certain claims of the Complaint and not others. And
2 it also would be a mistake not to consider the fact that the
3 request for a stay here is a consequence of a very
4 considered decision by the leadership, the leadership of
5 SFFA to litigate the issue of the permissible use of race in
6 university admissions in three different courts at the same
7 time. And in light of all the circumstances, not to mention
8 the fact that the First Circuit may, in fact, conclude that
9 the intervenors indeed have a right to participate, and what
10 they want to participate in is discovery, that on balance we
11 think the Court should exercise its discretion and, in fact,
12 stay discovery in this case until the Supreme Court explains
13 what the relevance is.

14 **THE COURT:** So -- I am going to give you
15 another chance to talk, Mr. Consovoy, you can sit -- he was
16 just about to stand. I am just saving the wear and tear on
17 his knees for a second.

18 I am not contemplating segregating discovery by
19 count. And I don't, I didn't actually understand that that
20 is what Mr. Consovoy was asking for. I think what you were
21 saying is that there are two counts that are going to be
22 unaffected and we may as well do discovery since those two
23 counts will survive. But, in any event, if I have
24 misunderstood you, I am not going to segregate discovery by
25 count.

1 And I, you know, I understand that we have the
2 intervenors and we have *Fisher II* and those two things have
3 the capability of changing the landscape significantly over
4 the next few months between the two of them. I have not
5 decided what I am going to do on the motion. I need to look
6 at it much more closely than I have but perhaps in an
7 overabundance of practicality, what I am wondering is if
8 there is, once the intervenors are resolved and once *Fisher*
9 *II* is resolved, I would like to have this case in a position
10 to move expeditiously forward. And I am wondering if there
11 are things that we can do now to position ourselves for
12 that.

13 And I may be naive about this and I may not
14 understand Harvard's admissions process but what I was sort
15 of thinking was that SFFA is going to need to look at some
16 of these applications, look at some of the basic discovery,
17 figure out how they're going to load the information into a
18 computer and how they are going to do whatever analytics
19 they're going to do on it and that maybe it made sense to
20 give them some, you know, smaller sample of applications.
21 They can get their system and their processes in place so
22 that when it does become more clear what they're going to
23 get and what they're not going to get, that they can just
24 load information rather than spend the time trying to figure
25 out how to handle that information.

1 I may be completely off base about that but that is
2 what I was sort of thinking, just some way to get processes
3 in place so when all these issues resolve themselves we can
4 move forward without wasting any more time.

5 It was your turn, go ahead.

6 **MR. CONSOVOY:** Direct, responding to your
7 question directly, we would have to talk to our experts but
8 I suspect our processes are ready to go. We are waiting on
9 some discovery. We haven't had any yet. This case has been
10 pending for a long time now. To have no documents produced
11 is I would confess frustrating.

12 I think some of the concerns we raised at the
13 initial scheduling conference have borne out, how long it
14 took to get a protective order in place, how long it took to
15 negotiate electronic discovery.

16 We represent something like over 16,000 students
17 now. 64 Asian-American organizations filed a Complaint with
18 the Department of Education. That Complaint was dismissed
19 because the Department of Education told them that this case
20 is proceeding so, therefore, they will not review their
21 Complaint.

22 And now Harvard comes here to say stop this case
23 from proceeding, now that the Complaint is dismissed, and
24 then I gather Harvard is going to tell the Supreme Court
25 please don't do anything to change what the University of

1 Texas did but if you do, to Your Honor, please look at
2 footnote one of our stay paper where we say even if we lose
3 terribly in *Fisher II*, we're going to argue that it really
4 has an affect on us because we're a private institution
5 that's governed by Title VI and not by the Fourteenth
6 Amendment. So if there is a concern of litigation strategy
7 here, I think it's Harvard's and not ours.

8 Second, I wrote the *Fisher* petition. I would
9 direct Your Honor to -- I think it really solves these
10 issues more than we can debating it -- the brief in
11 opposition submitted by the University of Texas. They said
12 everything that Mr. Waxman said. Well, surely --

13 **THE COURT:** Probably not as well.

14 (Laughter.)

15 **MR. CONSOVOY:** Well, no one could. But it is
16 a footfall case. They're just asking for review. And,
17 look, they have this Harvard case going. If you really want
18 to get to the big issues, wait for that one.

19 In response we said no, you're right, you're right,
20 this is about correcting error from the Fifth Circuit and
21 you don't normally do that but this was a pretty big error
22 and this is a pretty big case.

23 And, two, this is a big issue irrespective of what
24 happened with the larger issues. This case is about whether
25 strict scrutiny was correctly applied. I think if you read

1 those papers you will see that almost everything Mr. Waxman
2 said about *Fisher* actually is inaccurate, that we're not
3 challenging them to limit them to *Bakke* there. We're saying
4 that their arguments don't stand up to their own reasons.
5 And I won't go on about it more than that.

6 I agree with Your Honor that segregating discovery
7 is going to be difficult here. I think my point was, and I
8 think you definitely grasped it, was -- and I didn't hear
9 Mr. Waxman say differently -- Counts I and II are against
10 the law now and they will be against the law after *Fisher*.
11 They are the lead count in the Complaint. They will be
12 unaffected by the case.

13 Harvard bears the burden of saying why a stay will
14 do something here. And their argument seems to be we might
15 lose *Fisher* so badly that we might abandon the whole thing.
16 That's an unusual reason for someone to grant a stay, to
17 seek a stay, particularly when they say that if we lose,
18 we're going to argue that *Fisher* had no application to us.

19 I really do think the case should go forward. It
20 will eliminate the concern about destruction of evidence,
21 witnesses, God forbid, passing away or moving out of the
22 jurisdiction. We will add another admission cycle to this
23 process. Every year 37,000 more students go through this
24 process.

25 The reason why this case is a big deal is because

1 this is a major Civil Rights action and there is an interest
2 in justice in cases like that going forward. It would take
3 a really big reason on Harvard's part to stay it. And I
4 understand there are convenience issues. And I agree, you
5 know, could *Fisher* dictate certain changes to the legal
6 standard of summary judgment briefing, maybe, but we're
7 going to be done with discovery before we ever get to that.
8 There really, there just really isn't a basis for a stay.

9 And my last point is on the intervenors. They
10 haven't sought a stay of the discovery pending appeal yet.
11 They could. I think that would be something everyone would
12 want to look at if they did. And if I recall their papers,
13 they were mostly interested in expert discovery. Their
14 appeal will likely be resolved well in advance of expert
15 discovery. They certainly haven't suggested they're going
16 to be producing facts. And they certainly have said to us I
17 believe in their papers, I apologize if I'm wrong, if it was
18 in an email exchange, but that they would likely let Harvard
19 take the lead on propounding discovery on us. They're not
20 going to add fact discovery. So, if anything, we could
21 think about this when we get to expert discovery and see
22 where the intervenors are but I wouldn't let the tail wag
23 the dog on a stay here. This is a big, big deal.

24 **THE COURT:** So, again, I haven't read the
25 papers thoroughly enough, especially since I just got some

1 of them today, to rule on this; but is there a smaller
2 subset of information that were I inclined to give some sort
3 of limited stay in this, is there some smaller subset of
4 information that would, "satisfy you" would be an
5 overstatement but that would help advance the case?

6 **MR. CONSOVOY:** So I think if you look at the
7 Motion to Compel, the sample of application files are a
8 major centerpiece and will take a large part of our work. I
9 think the names, and I don't want to prejudice Your Honor's
10 review of the papers, but Harvard has said we've asked for
11 the names of alumni interviewers who they concede are third
12 parties in this case and who we would like to investigate,
13 interview some and maybe depose some but, you know,
14 third-party discovery which would have no real burden on
15 Harvard, you know. They won't even give us the names.

16 So I would say could we at least, and maybe if Your
17 Honor, you know, over opposition grants a partial stay, we
18 could perhaps submit something in writing that could more
19 clearly detail the kinds of things that would be helpful but
20 getting files would be a huge step forward. Getting the
21 names of the alumni interviewers would be a second huge step
22 forward. And getting just basic materials that we can start
23 reviewing, the training materials, the instructions for
24 readers, their policies on affirmative action and why they
25 use it, stuff that they have and, you know, we're six months

1 in and, yeah, discovery, you know, of some custodians in the
2 Admissions Office, just the basics. As you put it, sort of
3 the ground floor of building the case. I mean, at a minimum
4 we would ask for that; but, again, I don't want, you know,
5 we would oppose any stay of course.

6 **THE COURT:** I understand.

7 Mr. Waxman, in terms of -- I take the application
8 files and put them in a separate category. And I think
9 there is going to need to be a more fulsome discussion about
10 those applications and how many they get. They have, you
11 have asked for an enormous number of things and I take it it
12 is going to be a lot of work for Harvard to redact those
13 sufficiently to give those to you.

14 But he might be making a reasonable proposal which
15 is that we start with some things that don't really infringe
16 on student privacy like the alumni interviewers and the
17 training manuals and all that sort of thing.

18 What is your view on starting with those things?

19 **MR. WAXMAN:** I am hesitating only because I am
20 wondering whether my partner Ms. Ellsworth should speak
21 because she's been negotiating the discovery issues. On the
22 other hand -- I'm always reluctant to pass up the
23 opportunity to stand up but --

24 (Laughter.)

25 **THE COURT:** Well, that being said, I am always

1 delighted to have a woman stand up and speak in here. It
2 doesn't happen that often.

3 (Laughter.)

4 **MR. WAXMAN:** Well, that's easy.

5 **MS. ELLSWORTH:** With that said. So in terms
6 of what Mr. Consovoy has outlined as the kind of limited
7 baseline of discovery, I mean, I think as Your Honor has
8 recognized, there is some disagreement here about what that,
9 where that baseline should begin and end.

10 Certainly things like policies and training manuals
11 we could consider. I don't hear Mr. Consovoy asking for the
12 files right now which is, of course, you know, both the
13 subject of a dispute here as well as one of the major
14 privacy interests.

15 We also have -- and this will be in our opposition
16 motion -- we have agreed to provide to SFFA the admissions
17 database and that contains we think, and, again, you will
18 see this in our papers, but we think most, if not all, of
19 what they purport to need from this huge number of files
20 that they're requesting so, you know, there is sort of
21 information that we see in the sense of the fields that are
22 available in the database that we consider being, producing
23 now and in the event of a limited stay, depending on how
24 Your Honor rules on this.

25 There are sort of, I think there is a way that we

1 could make some progress without handling and grappling with
2 some of these privacy issues that are so important to
3 Harvard and also have, you know, major implications for our
4 students and applicants and also the need for other
5 considerations.

6 I would like to just make a quick point on the
7 status of discovery that Mr. Consovoy has raised. It
8 certainly is not the case that discovery is not ongoing.
9 It's true that documents have not yet been produced but
10 there have been RP's and interrogatories propounded and
11 responded to on time by Harvard. They noticed the
12 deposition of Director McGrath who is the Director of
13 Admissions and that deposition is scheduled right around the
14 date that was requested. It went forward. There was no
15 objection so it is not, it is not the case that discovery is
16 not going forward. It is the case the documents have not
17 yet been produced but we certainly are collecting and will
18 be prepared to produce those expeditiously in the event that
19 Your Honor does order us to go forward.

20 But in terms of how we might limit the discovery, I
21 think we could conceivably come to a baseline but I do think
22 that what Mr. Consovoy was describing is closer to what we
23 would consider the scope of appropriate discovery for the
24 entire case would be as opposed to the more limited scope
25 that I understand Your Honor to be suggesting.

1 You know, conceivably we could meet and confer with
2 SFFA and come up with a proposal or at least competing
3 proposals for how, what a limited stay might look like and
4 what the parties would be willing to agree to. We certainly
5 haven't thought precisely what we would be willing to
6 propose at this point but we're happy to do that quickly if
7 Your Honor would like.

8 **THE COURT:** All right. Well, let me do this.
9 I, as I say, I am worried about the -- I am not worried
10 about but we have the intervenors going to the Appellate
11 Court. We have *Fisher II* out there.

12 That being said, I am very reluctant to stay the
13 whole thing. I will read the briefs more carefully. I am
14 talking about philosophically reluctant to stay the whole
15 thing. I am sort of unencumbered by, you know, really a
16 depth understanding of the law. And I will go back and read
17 your briefs on that but I am not going to get to this, I
18 have some teaching obligations for the rest of this week and
19 won't be back in the office until next week.

20 So why don't you all take, say, a week and see if
21 you can -- if I do come to the conclusion that some sort of
22 limited stay is appropriate, understanding that I would like
23 to in some way keep this going but without unnecessarily
24 risking the duplication that may come as a result of the
25 motion to intervene or *Fisher*, if you could come up with a

1 joint or competing proposals that if I choose the middle
2 ground, I can get that into an order and get you guys back
3 to work on this.

4 And if you can't, that is fine. If you just want
5 me -- if you decide not to avail yourselves of the
6 opportunity and you just want me to rule on the motion in
7 its current form, I am happy to do that too. But if there
8 are things that can be accomplished during this period, I
9 would really like to try and get some of that done.

10 **MR. SANFORD:** If I may, Your Honor?

11 **THE COURT:** Absolutely.

12 **MR. SANFORD:** I understand the Court's
13 reluctance to allow the case to go forward as a whole but I
14 would suggest, Your Honor, that I cannot conceive of a
15 partial stay in this case that would make any practical
16 impact on discovery when I think it's virtually conceded by
17 Harvard that Counts I and II will go forward on invidious
18 discrimination against Asian Americans and Count II will go
19 forward on racial balancing.

20 The only standard we need to meet support for
21 discovery for those two counts is likelihood to lead to the
22 discovery of admissible evidence period. It's a very simple
23 standard for us to meet.

24 Those two counts alone, separate and apart from
25 *Fisher II* and the intervenors who have taken an appeal, will

1 allow us to conduct the discovery that we have sought to
2 conduct so far in this case. Unfortunately while there is
3 some good news on discovery, as Ms. Ellsworth pointed out,
4 which is we have taken the deposition of Ms. McGrath, the
5 parties have exchanged some interrogatory answers and some
6 document production responses, the reality is we are now
7 three months removed from the initial scheduling conference
8 in this case. The only documents Harvard has produced
9 during that three-month period are about 7 to 9 pages of
10 documents from the Admissions Office which Your Honor
11 suggested they give to me because I would be entitled to
12 know the names of the Admissions Office personnel, their job
13 duties and their responsibilities.

14 In addition to those few pages which it took three
15 weeks to receive we have also received some information on
16 geographic areas or dockets for their alumni interviewers
17 but that's it.

18 So the rate of production in this case so far from
19 Harvard is equal to roughly one page per month for each
20 month that this case has been pending. And now they come
21 before the Court seeking a stay of the entire action based
22 on *Fisher II* which when you get into *Fisher II* briefing and
23 decision, you will see it really is the U.S. Supreme Court
24 saying the Fifth Circuit apparently did not apply the
25 standard which the Supreme Court had instructed them to

1 apply.

2 The discovery in this case is going to be broad
3 sweeping. Now, Harvard came to you at the initial status
4 conference and tried to portray this as plaintiff had the
5 temerity to request copies of 145,000 application files.
6 That was not the case. Plaintiff has never formally
7 requested copies of every application file over the
8 four-year period. In fact, what we had done was provide to
9 Harvard a random sampling proposal of application files
10 segregated by race for each of the four primary racial
11 categories which constitute a minimum of 10 percent of the
12 student body at Harvard. We requested four percent of the
13 applications --

14 **THE COURT:** The number is still huge. I am
15 looking for it but it is --

16 **MR. SANFORD:** It is 6400 files over a
17 four-year admission cycle to root out invidious
18 discrimination. It is a statistically significant sampling
19 which is exactly what Harvard had offered to provide in the
20 Joint Statement filed with this Court in writing prior to
21 the initial scheduling conference that we had on April 30th.

22 Now what Harvard is doing, as we have pointed out
23 in our motion -- I'm not trying to argue the motion on its
24 merits -- is they would like to offer us one-tenth of one
25 percent which is 160 files, 80 of which they cherrypick and

1 then say we can take the others. That is what we've been
2 facing in discovery. They have not produced a single
3 document in response to a document production request served
4 months ago.

5 And it is unfortunate but I had pointed out to the
6 Court at the initial scheduling conference my concerns that
7 we might very well experience not only these types of delays
8 but calculated decisions not to produce enough admissions
9 files so they could attack any expert witness on the basis
10 that it was not a statistically significant sample.

11 So at this stage, given the breadth of the two, the
12 first two counts of the Complaint, I don't see any way that
13 we could possibly fashion a partial stay with Harvard
14 because the breadth of discovery is so broad and the
15 discovery is so straightforward in our request with the four
16 percent of the application files.

17 So with that, Your Honor, I would suggest we will
18 meet, we will confer with Harvard to see if it is possible;
19 but given the track record of what we've seen in
20 negotiations so far, it took us over a month after the
21 initial scheduling conference to agree on a protective
22 order. Now we see Harvard wants to use the protective order
23 as a shield and be over-inclusive on what they designate as
24 confidential when in reality a simple Google Internet search
25 will yield the same information, either from the *Harvard*

1 *Gazette, the Harvard Crimson, the New York Times, or the*
2 *Boston Globe.*

3 So they've been extremely reluctant to produce
4 anything in this case yet publicly available the information
5 is out there.

6 So if we were to issue some kind of a partial stay
7 of discovery, we'd want to seek to limit the perimeters of
8 discovery, we wouldn't get a single document out of Harvard,
9 which is really where we are at this point in response to
10 our document production request.

11 So I would simply urge the Court please to take
12 that into consideration when trying to fashion, if the Court
13 is so inclined, some kind of a partial stay. The discovery
14 in this case is very broad sweeping. And I would also
15 submit that sampling four percent of the application files
16 is a very narrow directly-targeted approach that included
17 random sampling supported by an expert's affidavit and that
18 is now going to open the door for Harvard to come back and
19 reiterate what I had said at the initial scheduling
20 conference which is they will try to claim there was enough
21 of, you know, further confidentiality.

22 Thank you, Your Honor.

23 **MS. ELLSWORTH:** May I respond briefly?

24 **THE COURT:** Yes.

25 **MS. ELLSWORTH:** Thank you.

1 So I would just like to, I take on the suggestion
2 that Harvard has been dragging its feet here. As I said,
3 there has been a lot of discovery that has happened.
4 Document productions will be ready to begin, you know, in
5 the event that the Court doesn't stay all document
6 production. It's not that we've been sitting around waiting
7 for the Court to grant *Fisher II* in the hopes that we would
8 never have to produce any documents. At the same time the
9 documents that are being requested here, it's been referred
10 to as broad sweeping and with great breadth. It is we think
11 for overbroad, the requests that have been made, and
12 particularly I would add, as Your Honor has commented, the
13 number of applicant files, the 6400 is in the document
14 requests proposed by plaintiff, simply a preliminary sample
15 to lead to a much larger number which Your Honor had, at the
16 initial scheduling conference had indicated a lack of
17 interest in providing. And certainly Harvard does not agree
18 that that is necessary or appropriate, from a pure burden
19 standpoint, and also, of course, because of the very serious
20 privacy concerns.

21 We are here without any documents to produce in
22 part because Harvard in its responses which were filed well
23 over a month ago made a proposal. We proposed 160 files, 80
24 that Harvard could choose and 80 that SFFA would be in a
25 position to choose. That was our proposal for the files.

1 Instead of engaging in that proposal SFFA has filed
2 a Motion to Compel. Now, that is their right and we will
3 respond in due course but that has put the brakes on any
4 ability to talk about any possible changes to that number.
5 And, again, we will respond with our own argument as to why
6 we think that number is appropriate and why we think that
7 the plaintiff will be able to do everything that its expert
8 contends that they need to do with the information that
9 Harvard has already agreed to produce.

10 Our response --

11 **THE COURT:** Hold on a second.

12 Mr. Sanford, what are you thinking you are going to
13 get out of the actual application files that you are not
14 going to get out of the database they're offering to
15 provide?

16 **MR. SANFORD:** Mr. Consovoy could address that
17 directly, Your Honor, if he may?

18 **MR. CONSOVOY:** So the files are the heart of
19 the case. And I think you'll see from our papers the answer
20 to your question, Your Honor, that if you deny a
21 statistically significant sample of files, what you're
22 denying is the right to bring expert testimony. That's
23 essentially what the ruling is. Because what the experts
24 are going to do, Harvard -- I'm going to speak in
25 generalities here because we're under a protective order and

1 there are things in the deposition that I can't get to in
2 open court but Harvard claims that it's a holistic system.
3 I think you heard Mr. Waxman say the word "holistic" more
4 times than I can count. Certainly in their papers more
5 times than any of us can count.

6 And the point of that, the point of their argument
7 is that you can look at the numbers but the numbers don't
8 tell you what is actually going on overall with the choice
9 of applicants, that everyone is looked at as a whole person,
10 that it's not just the numbers, that race is a contextual
11 factor and that there is an evaluation that goes on. That's
12 why they have training materials. If it was just the
13 numbers that got someone into Harvard, they wouldn't have
14 readers and they wouldn't have reader training materials
15 because they're trained to read these applications as a
16 whole.

17 The fundamental question here is do the scores add
18 up to their reasons which is sort of the classic civil
19 rights question, right. So if Walmart has, Walmart says we
20 don't deny women promotions, right, because they're women,
21 they actually just didn't do as well in their interviews.
22 And they have interview notes, right. That is a routine
23 expert analysis to examine the files, right, and to see
24 whether the notes actually add up to a neutral examination
25 what they're saying.

1 What we have here are essays. We have
2 recommendations. We have review notes. We have all the key
3 underlying material that leads to the question of what is
4 going on here.

5 Now, if Harvard wants to, and we don't want this,
6 if Harvard wants to say we'll give you the numbers and we'll
7 rise or fall with the numbers, again, we oppose, we think
8 that's not the appropriate way for the Court to build the
9 kind of record that ultimately the Appellate Courts are
10 going to ask me and Mr. Waxman at a podium about. And we
11 won't have answers if we don't have the materials.

12 **THE COURT:** I am not suggesting you're not
13 going to get some or all of the applications. I am
14 wondering if there is some place we can start, in light of
15 the interveners and *Fisher II* --

16 **MR. CONSOVOY:** Sure.

17 **THE COURT:** -- where we can get, start getting
18 to the heart of what you are looking for. I am not
19 suggesting you are not going to get the applications.

20 **MR. CONSOVOY:** Oh, right.

21 **THE COURT:** I would hate to have you up in
22 front of that podium being embarrassed that I have created
23 a --

24 (Laughter.)

25 **MR. CONSOVOY:** And so, you know, ultimately, I

1 think, in response to our motion we would like to hear from
2 Harvard. Harvard said to the Court please don't make us
3 give over all of the files. We'll give a statistically
4 significant sample. We went back to our expert and said,
5 okay, that is a somewhat reasonable request. Can you work
6 with that, right? And the expert said yes, we can.

7 Let us tell you, given the volume of applications,
8 it's not our fault that Harvard gets 37,000 applications a
9 year. The experts have to tell us from an, I won't say
10 "scientific" but, you know, from a matter of expertise how
11 many they need to draw reliable statistical conclusions from
12 that. And this is what they're telling us.

13 Now, if Harvard had an expert who can say that
14 experts can draw reliable statistical conclusions about a
15 37,000-person process based on non-randomly selected, not
16 stratified by race, 160 files, I would like to hear from
17 that expert and then I think we could have a realistic
18 conversation about their position and our position.

19 Right now their position is, well, we said
20 statistically significant but we meant representative but
21 not really representative because we want to cherrypick half
22 of them so really what we're saying is you get nothing.

23 **THE COURT:** Okay. So let's do this --
24 Mr. Waxman, do you want to say something?

25 **MR. WAXMAN:** I mean, since -- I think I've

1 listened quite long enough to opposing counsel's
2 characterizations of what I had said and what we've done.

3 They have filed a Motion to Compel attaching an
4 expert's declaration in due course, on time, as we have
5 filed -- as we have responded to every single discovery
6 request in this case, we will respond with our own
7 explanation for what we think is or isn't appropriate in the
8 event that this type of discovery is permitted to go
9 forward.

10 I do want to say that this very discussion, which
11 is a small, small, small subset of the kinds of disputes
12 that will come up if and when discovery does go forward full
13 steam just underscores how important -- how pointless it is
14 to have the discussion about what is or isn't relevant or
15 what may or may not be necessary, either for them to
16 discover or for us to produce in order to prove our case
17 under whatever the standard is that the Supreme Court
18 explicates until we have that standard but Your Honor was, I
19 thought, clear that we weren't going to have an argument on
20 the Motion to Compel since our time to respond hasn't
21 occurred yet and we haven't responded.

22 And I just want to hesitate to say, if Your Honor
23 wants to hear argument about this, you know, whether 6400 is
24 right or what is representative or what our database, if and
25 when discovery proceeds, will show in advance of us filing

1 our response, I can do it.

2 **THE COURT:** No, I am not going to put you in
3 that position. That is not fair. That is not what I want
4 to do today.

5 All right. So the Motion to Compel we'll keep
6 under, we will hold aside until Harvard has an opportunity
7 to respond. I think it is an important motion, we are going
8 to take our time with it and look at it thoroughly.

9 That being said, if you have other motions on the
10 protective order and things that can be resolved quickly,
11 shoot them over and we will do it, okay. I don't want this
12 hung up on those sorts of motions. This one is more
13 substantive. We are going to take some time with it. But,
14 you know, the protective orders, just shoot them over and if
15 there is -- I don't have any reason to believe that they are
16 withholding information inappropriately; but if they are, we
17 will deal with it quickly. It is not going to be that
18 public information is going to be held aside under a
19 confidentiality order or a protective order.

20 In terms of the Motion to Stay, we will review it
21 on the merits and rule on it in due course. If anyone -- I
22 won't do anything with it for the next week and if anybody
23 wants to take that week to sort of file something jointly or
24 separately and that document will be something to the effect
25 of if you are inclined to grant the partial stay, this is

1 what we propose. I will not take it to mean that anyone is
2 actually agreeing to a partial stay but if you could give me
3 some broad outlines and, again, unencumbered by too much
4 thought (ph.), my proclivity is if we can find things that
5 we can go forward on without, sort of under the *Fisher* cloud
6 and the intervenor's cloud without prejudicing anybody too
7 much and keeping the case moving, that is what I am
8 philosophically interested in doing.

9 Now, I may read your briefs and they may completely
10 change my mind; but in the interim if you want to submit
11 something that says if there is going to be a partial stay,
12 this is what we would like or we can live with or however
13 you want to phrase it, why don't you take a week to do that
14 and I won't rule on the motion on that.

15 Now, we did set another status three months out
16 for, I am actually sort of, I mean -- so if the case is
17 stayed, we won't need to meet. And if we are to a point
18 where a ruling on the Motion to Compel, I assume you are
19 going to need another hearing on that so why don't we not
20 set another hearing for three months forward on the
21 assumption that we will be here in the interim on one of
22 these motions anyway. Okay? Is that all right with
23 everyone?

24 **MR. CONSOVOY:** Yes, Your Honor.

25 **MR. WAXMAN:** Yes, Your Honor.

1 **THE COURT:** Anything else I can help you with
2 today or is that it?

3 Okay. The case is recessed then. Thank you.

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

5

6 (WHEREUPON, the proceedings were recessed at 2:45
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

CAROL LYNN SCOTT
Official Court Reporter
John J. Moakley Courthouse
1 Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377

DATE: July 30, 2015