

United States Senate

Washington, DC 20510

February 23, 2022

The Honorable Merrick Garland
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Attorney General Garland:

We write to express our concern and request information regarding the Department of Justice’s decision to provide a waiver from certain ethics requirements for Solicitor General Elizabeth Prelogar, allowing her to participate in a case pending before the Supreme Court of the United States in which Ms. Prelogar’s alma mater and former employer, Harvard College, is a party. The Biden Administration previously touted its intent to establish a stringent ethics regime within the Executive Branch and tighten the ethics pledge for executive branch employees through Executive Order (“EO”) 13989.¹ In relevant part, EO 13989 bars appointees entering government from participating in any matter involving specific parties that are directly or substantially related to previous employers and clients for two years.²

As you know, Ms. Prelogar joined the Department of Justice (“DOJ”) on January 20, 2021, and assumed the role of Acting Solicitor General. Ms. Prelogar was later nominated by President Biden to serve as Solicitor General on August 11, 2021, and confirmed to this position by the United States Senate on October 28, 2021. Only three weeks after becoming Solicitor General, on November 18, 2021, Ms. Prelogar was granted an ethics waiver by Assistant Attorney General for Administration and Designated Agency Ethics Official Lee J. Lofthus (“AAG Lofthus”), allowing her to participate in a case pending before the Supreme Court—*Students for Fair Admissions Inc. v. President & Fellows of Harvard College*.³ Days before this waiver was granted, on November 4, 2021, Harvard published a flattering article related to Prelogar’s confirmation that touted how she would “carry on a Harvard Law School legacy.”⁴ This puff piece appears to have been written while Ms. Prelogar was awaiting word from DOJ in response to her conflict-of-interest waiver request. The timeline of these events gives rise to serious concerns about the appearance of impropriety and calls into question DOJ’s impartiality in not only this case but other cases as well.

This pending case, *Students for Fair Admissions*, is poised to have a potentially transformative impact on the ability of universities to factor an applicant’s race into admissions decisions. The

¹ Ethics Commitments by Executive Branch Personnel, 86 Fed. Reg. 7029-7035 (Jan. 25, 2021).

² *Id.* at 7029.

³ Memorandum for the Solicitor General from Lee J. Lofthus providing a Limited Waiver of Executive Order 13989 allowing her to participate in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* (Nov. 18, 2021), <https://www.justice.gov/jmd/page/file/1449406/download>.

⁴ *As Solicitor General, Elizabeth Prelogar ‘08 Carries on a Harvard Law School Legacy*, HARVARD L. TODAY (Nov. 4, 2021), <https://today.law.harvard.edu/elizabeth-prelogar-08-confirmed-as-48th-solicitor-general-of-the-united-states/>.

government's brief in that case, which calls upon the Court to deny certiorari, was submitted approximately one month after Ms. Prelogar's waiver was issued. Notably, Ms. Prelogar is the first signatory listed on the brief.

Solicitor General Prelogar has a long-standing history with the defendant in *Students for Fair Admission*, Harvard College. She attended law school at Harvard.⁵ After law school, Ms. Prelogar consulted for Harvard College for nearly a decade—between 2011 and 2020.⁶ Additionally, she taught a course at Harvard Law during the fall of 2020.⁷ Ms. Prelogar's public financial disclosures reveal she was paid \$10,500 in 2019 and 2020 for these services.⁸

Despite these obvious conflicts, Ms. Prelogar sought an ethics waiver rather than simply recusing herself from the case. The reasoning provided to justify the waiver ultimately granted to Ms. Prelogar is vague, arbitrary, and broad enough to encompass nearly any conflict. Specifically, there is some suggestion that her involvement is crucial to serving the public interest because: (1) the case is of high importance and could result in the creation of a new precedent; (2) her title is "itself a qualification no other person possesses;" and (3) she has considerable Supreme Court litigation experience.⁹ All three of these justifications, however, are likely to hold true for anyone who serves as Solicitor General, regardless of the case at issue. Indeed, cases that are argued before the Supreme Court are, by definition, cases of high importance and have the potential to create new precedent. Similarly, Ms. Prelogar's title and prior work experience are no more a factor in the *Students for Fair Admissions* case than they would be in any other case handled by the Office of the Solicitor General.

In other words, the ethics waiver granted to Ms. Prelogar was not "granted in the narrowest [of] circumstances when necessary and in the public's interest"¹⁰ as the Biden Administration purports to require of its appointees, but, instead, amounts to a blank check. The shaky reasoning underlying the grant of Ms. Prelogar's waiver not only undermines the foundational purposes of this Administration's ethics regime but also serves to erode the public trust in the integrity of its public servants and institutions.

Further inquiry into both the specific reasoning supporting the grant of Ms. Prelogar's ethics waiver and the timing of its issuance is warranted. Please provide a response below for each question, rather than a narrative response.

1. When did Ms. Prelogar first submit her application for an ethics waiver seeking the ability to participate in the *Students for Fair Admissions Inc. v. President & Fellows of Harvard*

⁵ Meet the Solicitor General, <https://www.justice.gov/osg/staff-profile/meet-solicitor-general>.

⁶ Executive Branch Personnel Public Financial Disclosure Report for Elizabeth B. Prelogar (Feb. 11, 2021), [https://fingfx.thomsonreuters.com/gfx/legaldocs/zdvxonengpx/Prelogar%20Elizabeth%20NE%202021%20pdf%20\(1\).pdf](https://fingfx.thomsonreuters.com/gfx/legaldocs/zdvxonengpx/Prelogar%20Elizabeth%20NE%202021%20pdf%20(1).pdf)

⁷ *Id.*

⁸ *Id.*

⁹ Memorandum for the Solicitor General from Lee J. Lofthus providing a Limited Waiver of Executive Order 13989 allowing her to participate in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* (Nov. 18, 2021), <https://www.justice.gov/jmd/page/file/1449406/download>.

¹⁰ Ethics Pledge Waivers Released by the White House, <https://www.whitehouse.gov/disclosures/ethics-pledge-waivers/>.

College case? Please provide a copy of Ms. Prelogar's application for an ethics waiver with your response to this letter.

2. The approved ethics waiver for Ms. Prelogar suggests that her experience as a lecturer at Harvard College is the conflict relevant to the former-employer recusal requirement. However, according to Ms. Prelogar's financial disclosures, she also worked in an unspecified capacity as a consultant for Harvard College for nearly a decade. Was the long-standing consulting relationship considered by DOJ and AAG Lofthus during the ethics waiver process? Please describe in detail the facts that DOJ is aware of surrounding Ms. Prelogar's consulting work performed for Harvard College.
3. Did Ms. Prelogar's work for Harvard, in any capacity, ever involve working on student admissions, admissions policies, or legal issues involving admissions at Harvard College?
4. Please describe the specific reasons why DOJ believes that Ms. Prelogar's involvement in the *Students for Fair Admissions* case was crucial, so as to "outweigh the concern that a reasonable person may question the Department's integrity"?
5. In relation to the November 4, 2021, Harvard Law Today article about Ms. Prelogar's confirmation as Solicitor General, did anyone at DOJ, including within the Office of Public Affairs (OPA) have advance knowledge that this article was going to be published?
 - a. Did anyone at DOJ use taxpayer-funded resources to support the publication of this article prior to its publication or to distribute or promote this article after its publication?
 - b. Did Ms. Prelogar have advance knowledge that this article was going to be published? If so, what did she know and when did she know it?
6. On what date did Ms. Prelogar begin participating in preparations of any kind in connection with the *Students for Fair Admissions* case? Was such preparation prior to the issuance of the limited ethics waiver on November 18, 2021?
7. On what day did the DOJ begin preparations on the amicus brief it submitted to the Court? How long did it take from start to finish to complete the amicus brief? Was Ms. Prelogar involved in preparations for the amicus brief before the issuance of the limited ethics waiver? If so, at what level?
8. The language in the analysis section of the DOJ's ethics waiver seems to suggest that the high profile and important nature of this case cuts in favor of involving Ms. Prelogar. Why is that the case? In other words, why would the DOJ dispense with safeguards to protect the integrity and ethics of the Department in high-profile and important cases?
 - a. Does the DOJ only retain ethical safeguards in cases of medium or low importance?

- b. Does dispensing with ethical safeguards in important cases undercut the concept of having such safeguards at all?

Thank you for your attention to this pressing matter.

Sincerely,



Ted Cruz
Member, Senate Judiciary Committee



Mike Lee
Member, Senate Judiciary Committee



Marsha Blackburn
Member, Senate Judiciary Committee