Session 201 | What’s on Trial at Harvard and UNC?
A discussion on Asian Americans, affirmative action, and discrimination

The contentious Harvard trial on race-conscious admissions thrust questions of Asian American identity, racialization, and political alignment into the national spotlight. The trial is over, but questions remain about the fairness of admissions policies, the current climate on college campuses for students of color, including Asian Americans, and the growing divide within the Asian American community about access to higher education.

In this program, you will engage in an interactive admissions simulation to understand how the admissions process works and how race can factor into decision-making. After the simulation, the audience will engage in a dialogue with a panel of experts that include a litigator involved in both cases, a student who testified in the Harvard trial, a former admissions officer, and a social scientist and legal scholar who has filed numerous legal briefs on behalf of the education community in affirmative action cases. Discussion topics will include: (1) the legal, evidentiary, and remedial distinctions between intentional discrimination and the constitutionality of a race-conscious admissions policy; (2) the social science evidence on the impact of race-conscious admissions policies on campus climate; and (3) the politicization of the affirmative action debate in the Asian American community and its implications.

Moderator:
Natasha Quiroga, PREP Director & Senior Counsel, Educational Opportunities Project at the Lawyers’ Committee for Civil Rights Under Law

Speakers:
- Thang Diep, Harvard Class of 2019 (student who testified in the recent Harvard trial)
- Liliana Garces, Associate Professor, Department of Educational Leadership and Policy & Affiliate Faculty, School of Law at University of Texas, Austin
- Nicole Gon Ochi, Former Supervising Attorney – Impact Litigation, Asian Americans Advancing Justice – Los Angeles
- Alyson Tom, Associate Director of College Counseling at Castilleja School and formerly a Senior Assistant Direct of Admissions at Rice University
What’s on Trial at Harvard and UNC?

A DISCUSSION ON ASIAN AMERICANS, AFFIRMATIVE ACTION, AND DISCRIMINATION
Our speakers

Nicole Gon Ochi, J.D.
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Thang Q. Diep
Harvard Class of 2019
Student Amici that testified at Harvard trial
Our goals today

1. To understand how the admissions process works and how race can factor into decision-making.
2. To understand the legal implications of the Harvard decision.
3. To understand the social science evidence on the impact of race conscious admissions policy.
What are the Harvard and UNC admissions cases about?

April 25, 2015
Ed Blum, founder of SFFA

“The goal of these lawsuits is to eliminate the consideration of race and ethnicity.”

October 15, 2018
Adam Mortara, SFFA Trial Counsel

“The future of affirmative action is not on trial...”
The Harvard and UNC cases are about ending affirmative action

Both complaints seek:

(b) A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, from the Court that any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.;

(c) A permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions;

(d) A permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission.

Affirmative Action Fight Shifts to UNC

Some issues are similar to those in Harvard case, but Chapel Hill’s status as public university – and some differing strategies – could affect outcome of the case.

(b) A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, from the Court that any use of race or ethnicity in the educational setting violates the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and federal civil rights statutes 42 U.S.C. §§ 1981 and 1983;

(c) A permanent injunction prohibiting Defendants from using race as a factor in future undergraduate admissions decisions at UNC-Chapel Hill;

(d) A permanent injunction requiring Defendants to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission;
Affirmative Action: A 30-second history

1978 – Bakke
- Diversity rationale
- Quotas are unconstitutional
- Look at Harvard → individual review

2003 – Grutter/Gratz
- Individualized review; no predetermined points (Gratz)
- Race is not the defining feature; it is one of many diversity factors
- Look at Harvard!

2013 – Fisher I
- No deference to the University

2016 – Fisher II
- University must prove that no racial neutral alternatives suffice

Source: Alvin Chang, "Asians are being used to make the case against affirmative action. Again." Vox (Aug. 30, 2018).
Conclusion of Law #1:
Harvard Does Not Engage in Racial Balancing

“[R]acial composition of Harvard’s admitted class has varied in a manner inconsistent with the imposition of a racial quota or racial balancing.” (p. 81)

“Since 1980, the Asian American proportion of the admitted class as increased roughly five-fold....” (p. 82)

“Every applicant competes for every seat.” (p. 113)
Conclusion of Law #2
Harvard Uses Race as a Non-Mechanical Plus Factor

- Race is important, but not a defining feature of the applications.
- Race is an individualized consideration; no mechanical use of race (i.e. points)
- Tip for race has a smaller effect on the probability of admission than ALDC status or profile ratings.
- All admits are qualified – i.e. similar level of academic potential, even though average SAT scores and GPAs may vary.

Race has the least impact of any factor.
Conclusion of Law #3
No Race-Neutral Alternatives Available

Number of Black, Hispanic, and Other Minority Groups:
→ reduced by nearly 50% → lack of critical mass.
Asian Americans: Small increase, but admit rates would increase by less than 1 percent.
Whites would be greatest beneficiaries

David Card, Report, Page 108 (Dkt. 419-33 at 110)
Conclusion of Law #4
Harvard Does Not Intentionally Discriminate

- No evidence of racial animus.
  - No evidence that any admissions decision was negatively affected by Asian American identity.
  - The testimony of admissions officers that there was no discrimination against Asian American applicants was consistent, unambiguous, and convincing.
  - SFFA failed to present a single Asian American who was overtly discriminated against or who was better qualified than an admitted white applicant when considering the full range of factors that Harvard considers.

- Asian Americans fare better than white applicants on extracurricular and academic ratings and worse on personal ratings; these disparities are unexplained, but unintentional and would not be cured by the elimination of race as a consideration in the admissions process.

- Statistical analysis is inconclusive (some data suggests discrimination against certain subsets of Asian American applicants, whereas other data suggests an advantage for other subsets).
A Closer Look at the Personal Rating

Why is there a disparity?

- Race-correlated inputs (such as teacher/ counselor recs)
- Cannot be explained any more than the positive variation in academic/ extracurricular ratings can be explained
- Disparity is small, statistics are a wash, and no corroborating evidence of discrimination

The largest disparity between whites and Asians is athletics.

Yes. A disparity in the personal rating exists.

“In terms of burden, it is likely that eliminating consideration of race would significantly disadvantage at least some Asian American applicants, as evidenced by the testimony of the amici at trial, all of whom viewed their race or ethnicity as a critical aspect of their life experiences and applications to Harvard....Removing considerations of race and ethnicity from Harvard’s admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage and perspective, and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.” (pp. 111-12)
Why Affirmative Action Matters

“Harvard’s admission program passes constitutional muster in that it satisfies the dictates of strict scrutiny. The students who are admitted to Harvard and choose to attend will live and learn surrounded by all sorts of people, with all sorts of experiences, beliefs and talents. They will have the opportunity to know and understand one another beyond race, as whole individuals with unique histories and experiences. It is this, at Harvard and elsewhere that will move us, one day, to the point where we see that race is a fact, but not the defining fact and not the fact that tells us what is important, but we are not there yet. Until we are, race conscious admissions programs that survive strict scrutiny will have an important place in society and help ensure that colleges and universities can offer a diverse atmosphere that fosters learning, improves scholarship, and encourages mutual respect and understanding.” (p. 130)
As selectivity increases, the application review process becomes increasingly complex and nuanced.

Most students admitted

Few students admitted

Not Selective (open enrollment)

Less Selective

Selective

Most Selective
Holistic Review

Many private colleges and some public colleges use a form of holistic review.

**Typical Application Components**

- Application
- High school transcript (curriculum, grades, and/or rank)
- Standardized test scores
- Essay or writing sample
- Extracurricular Activities
- Recommendation letters (teacher, counselor)
- Other (Interview, Portfolio/Audition, etc.)

*Some of the items may not be required.
Holistic Review: Institutional Priorities

- Application decision plan (ED, EA, RD, priority, etc.)
- Athletic recruitment
- College’s relationship with high school
- Demographics (first-gen-to-college, gender, geography, LGBTQ+, multilingual, nationality, political views, race or ethnicity, religion, socioeconomic status, veteran, etc.)
- Demonstrated interest
- Legacy or sibling connection; children of faculty/staff
- Major or area of study
- Money (past or potential donors)
- Unusual talents, recognition, or experiences
- And more!
A Glimpse Into Holistic Review

• Each small group = admission committee at a college

• These applications have already made it through the preliminary review process and are now in the final committee stage.

• Get ready to make admission decisions!
1st Step (5 minutes)

• Read your college’s mission statement.

• Guided by your mission, decide how you will evaluate applicants.
  - What are you looking for?
2nd Step (15 minutes)

- Review and Evaluate the students.

- From these HIGHLY ACADEMICALLY QUALIFIED STUDENTS, select students for the incoming class.
  - Highly Selective: Admit 2
  - Extremely Selective: Admit 1

- NOTE: If a student has not shared something or included it in the essay, assume that it is not important to the student’s profile.
### Who did you admit?

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<th>Institution</th>
<th>Selected Students</th>
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<tr>
<td>1</td>
<td>University of Notre Dame</td>
<td>KM, JM, JL, JM</td>
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<tr>
<td>2</td>
<td>NYU</td>
<td>KM, KM, KM</td>
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<tr>
<td>3</td>
<td>University of Michigan</td>
<td>KL, JK, KL, LM, LM</td>
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<tr>
<td>4</td>
<td>Princeton University</td>
<td>K, K, L, K</td>
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<tr>
<td>5</td>
<td>Swarthmore College</td>
<td>M, K, K</td>
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</table>
Why did you admit/deny these students?

1. How much did race influence your review and evaluation of individual applicants?

2. Did race/racism shape aspects of any of the applicants’ experiences and who they are as students? If so, how?

3. If you were not allowed to consider race in reviewing student profiles, how did that affect your evaluation?
Case Study Limitations – Context

- Full context of the college and knowledge of institutional needs
- Context of the college’s application pool
- High school profile – gives a more complete context of the high school
- Transcript – context of academic history, allows a better understanding of rigor of curriculum (honors, AP, IB, dual credit, etc.), grade trends (steady, upward, downward)
- The entire application would be helpful!
For many students, race and racism affect all these contexts and shape opportunities for individual talents and achievements.
What are Race-Neutral Approaches in Admissions?
Evidence on Race-Neutral Approaches

Outreach

Percent Plans

Socioeconomic Status
Racial Diversity Declines with Race-Neutral Admissions
Race-Neutral Approaches Can Hurt Diversity Efforts and Worsen Inequities
UNITED STATES DISTRICT COURT FOR
THE DISTRICT COURT OF MASSACHUSETTS
BOSTON DIVISION

STUDENTS FOR FAIR ADMISSIONS, INC,

Plaintiff,

v.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE (HARVARD
CORPORATION),

Defendant.

Civil Action No. 1:14-cv-14176-ADB

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No party disputed at trial that race continues to matter in today’s society, racial inequities persist, and racial diversity in higher education produces benefits. In addition to the testimony from Harvard’s witnesses, eight student witnesses—four Student Amici\(^1\) and four Student Organizational Amici\(^2\)—testified to these facts. Strikingly, in a three-week federal trial alleging racial discrimination, SFFA presented no testimony from applicants who claimed to have been discriminated against. The unrebutted accounts of Students’ individual experiences highlight this failure and provide powerful evidence why, under Supreme Court precedent, Harvard must retain the right to consider race in a limited, flexible way. A flexible appreciation of race is indispensable when evaluating college applicants to ensure “institutions are open and available to all segments of American society, including people of all races and ethnicities.” \textit{Grutter v. Bollinger,} 539 U.S. 306, 331-32 (2003). As Students affirmed, this limited use of race is also vital for many Asian American applicants heralding from diverse backgrounds. It also fosters diverse environments which can train our nation’s future leaders “through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’” \textit{Keyishian v. Bd. of Regents,} 385 U.S. 589, 603 (1967) (citation omitted).

\(^1\) Students are a racially and ethnically diverse group that includes prospective students, current students, and alumni of Harvard, all of whom are intimately impacted by Harvard’s race-conscious policies. See Dkt. 440, 440-1. Students vary along numerous dimensions: representing no less than 8 different ethnicities, 8 different class years, and 13 different academic concentrations. \textit{Id.} The four Students who testified at trial were Itzel Vasquez-Rodriguez (class of 2017: identifying as Xicana or Mexican American, and Latina more broadly, SA-3; 10/29 Tr. 9:3-8), Sarah Cole (class of 2016: identifying as Black American, SA-4, 10/29 Tr. 63:6-12), Thang Diep (class of 2019: identifying as Vietnamese American, SA-2, 10/29 Tr. 140:7-8), and Sally Chen (class of 2019: identifying as Chinese American, SA-1, 10/29 Tr. 199:18-23). The trial transcript misspells the first name of Itzel Vasquez-Rodriguez and misspells the last name of Sally Chen. Students have used the correct spelling in this brief.

\(^2\) Student Organizational Amici are student and alumni organizations comprised of current and former Harvard students, who have an institutional interest in ensuring that Harvard College is an inclusive place of learning that provides students with the critically important benefits of diversity. See Dkt. 471. The four Student Organizational Amici who testified at trial were Margaret Chin (class of 1984: identifying as Chinese American 10/29 Tr. 26:10-27:16); Catherine Ho (class of 2021: identifying as Vietnamese American 10/29 Tr. 85:15-86:1); Madison Trice (class of 2021: identifying as African American 10/29 Tr. 166:7-20); Cecilia Nunez (class of 2020: identifying as African American and Mexican American 10/29 Tr. 113:13-114:1).
Harvard’s right to consider race in admissions is firmly established both by the record and well-settled Supreme Court precedent. Students emphasize that SFFA’s two legal theories must be decoupled: SFFA’s claim that Harvard’s race-conscious policy is not narrowly tailored (Counts II, III, and V) is legally and factually distinct from its intentional discrimination claim (Count I).

Section I demonstrates that Harvard’s consideration of race is both necessary and entirely lawful under Supreme Court precedent. Students’ unrebutted testimony confirms that a flexible consideration of race is necessary to perform a truly individualized, holistic assessment for applicants who ascribe importance to their ethno-racial identity. It also remains necessary to fully appreciate the prior achievements and potential contributions of countless applicants whose lives have been shaped by race, including many Asian Americans. As the record here confirms, eliminating race-conscious admissions would have devastating consequences for Harvard’s campus climate. Student testimony establishes that the breadth and depth of racial diversity on Harvard’s campus would markedly decline, thereby exacerbating feelings of racial isolation and reducing educational benefits for all students. Harvard’s consideration of race through holistic, individualized review does not insulate individuals from comparison; it flexibly considers all pertinent elements of diversity, and it ensures race does not become the defining feature of an application. Our Students’ application files vividly illustrate these facts.

SFFA failed to carry its burden of demonstrating that Harvard’s race-conscious policy is unconstitutional. The criticisms that SFFA raised have already been considered, and dismissed, by the U.S. Supreme Court. By challenging practices that have repeatedly been affirmed by the Supreme Court, SFFA reveals its true complaint is not with Harvard’s policies but with the governing precedent itself. This Court should reject SFFA’s efforts to upend settled precedent
which recognizes that universities may consider race “to achieve that diversity which has the potential to enrich everyone’s education.” *Grutter*, 539 U.S. at 315 (citation omitted).

*Section II* of *Students*’ brief demonstrates how SFFA failed to satisfy its burden of proving intentional discrimination because its evidence is both flawed and lacking. SFFA’s statistical analysis places far too much emphasis on academic metrics, which are poor predictors of an applicant’s potential and which are tainted by racial bias. Moreover, SFFA ignores entirely how our *Students*’ application files illustrate that Harvard views Asian American heritage in a positive light. SFFA’s proof is far too weak to sustain its burden.

Finally, *Students* note in *Section III* that, under either legal theory, SFFA would not be entitled to the remedy it seeks—which is unmoored from any bias Asian Americans may face in the admissions system. Since Harvard needs to consider race to achieve its educational mission, any violation of narrow tailoring would merely require Harvard to adjust its practices to comply with constitutional norms; it would not require an outright end to considering race. Similarly, any finding of discriminatory bias would require a remedy which addresses the root cause of the problem and research shows such remedies are race-conscious, not race-blind.

I. Harvard’s race-conscious admissions policy is both necessary and constitutional under well-settled Supreme Court precedent.

For decades, the Supreme Court has recognized that student body diversity is a compelling interest that justifies race-conscious admissions in higher education. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210-11 (2016) (“*Fisher II*”). This interest stems from diversity’s numerous benefits within the academic environment and, more broadly, for our national progress and welfare. As recently as 2016, the Supreme Court reaffirmed that a diverse student body “‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’” *Id.* at 2210 (quoting *Grutter*,
539 U.S. at 330). It also facilitates “enhanced classroom dialogue and the lessening of racial isolation. . . .” Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013) (“Fisher I”). These benefits extend beyond the college campus by contributing to the broader goal of “preparing students for work and citizenship” in our extraordinarily diverse society. Grutter, 539 U.S. at 331. As Justice Powell reflected nearly forty years ago in Regents of University of California v. Bakke, nothing less than “the nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” 438 U.S. 265, 313 (1978) (“Bakke”) (internal quotation and citation omitted).

The framework for evaluating the constitutionality of race-conscious admissions is also well-established. First, a university offers a “reasoned, principled explanation” for its pursuit of the educational benefits of diversity, and that decision is entitled to deference. Fisher II, 136 S. Ct. at 2208 (citation omitted). Next, the university must demonstrate that its consideration of race is narrowly tailored to achieve the benefits of student body diversity. Grutter, 539 U.S. at 333-34.

Narrow tailoring has two basic components. First, the university must engage in individualized review, meaning it “ensure[s] that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.” Fisher I, 570 U.S. at 312 (internal quotation omitted). Second, the university must show that the use of race is “‘necessary’” to achieve the educational benefits of diversity. Id. (quoting Bakke, 438 U.S. at 305).

The record demonstrates that Harvard’s admissions process more than satisfies this standard. As discussed below, the “necessity” of considering race is established by unrefuted
Student testimony, and Harvard’s use of “individualized review” is demonstrated by Students’ application files.

A. Harvard’s flexible appreciation of race is necessary to achieve its educational mission.

Harvard College’s mission “is to educate the citizens and citizen-leaders for our society … through … the transformative power of a liberal arts and sciences education.” DX109.1. Harvard has determined that diversity is central to that objective. Id. According to Harvard, the college’s goal is to “bring a diverse student body together from different backgrounds and experiences” because interactions across difference “catalyze the intellectual, social, and personal transformations that are central to Harvard’s liberal arts and sciences education.” 10/23 Tr. 11:21-23 (Khurana); P302 at 2.

To achieve these educational objectives, Harvard employs a whole-person review process, which considers all available information to identify the students who will contribute to and benefit from the educational experience on campus. 10/17 Tr. 150:9-16; 200:18-214:6 (Fitzsimmons). Harvard’s admissions process is designed to “consider applicants’ accomplishments in context” and also “consider students’ ability to grow and contribute after graduating from Harvard.” Dkt. 619 at ¶ 31. Harvard values diversity of all kinds, including racial diversity. DX5.9-11.

Harvard has articulated three independent reasons why the consideration of race is crucial to its whole person review process and mission: (i) it allows applicants to authentically portray themselves, (ii) it allows the university to more effectively evaluate an applicant’s achievements and contributions, and (iii) it allows the university to develop a depth and breadth of diversity that benefits all students.
A flexible consideration of race is necessary for applicants to authentically portray themselves in whole person review.

Harvard has explained that considering race remains important to honor the experiences of many applicants who feel race is a “defining element” of how they “understand themselves and how they understand the experiences of their lives and what they bring to the Harvard college community.”

See also 11/1 Tr. 254:10-16 (deposition testimony Walsh) (testifying that a student’s race is one part of his or her story that he tries to honor in understanding them as fully as possible in rendering the best decision about their potential admission); DX19.0028 (admission officers should “[h]onor the nuance of both identity and context.”); Brief for Amicus Curiae Harvard University in Support of Respondents at 17, Fisher v. Univ. of Tex. at Austin (2015) (14-891), 2015 WL 6735848 (that “forbidding the consideration of information that a student provides concerning race and ethnicity would . . . demean the worth of the individual applicant.”).

Additionally many of the Student amici that submitted declarations testified to the importance they ascribed to their ethno-racial identity in shaping their experiences, viewpoints, interests, and ambitions for the future. Dkt. 440-1, Exhibit 1.1, ¶¶ 5-7, (Declaration of A.A.); Dkt. 440-1, Exhibit 1.2, ¶ 4 (Declaration of A.Z.); Dkt. 440-1, Exhibit 1.3, ¶ 3 (Declaration of D.L.); Dkt. 440-1, Exhibit 1.4, ¶ 3 (Declaration of J.L.); Dkt. 440-1, Exhibit 1.5, ¶ 6 (Declaration of M.E.); Dkt. 440-1, Exhibit 1.6, ¶¶ 3, 5 (Declaration of Sally Chen); Dkt. 440-1, Exhibit 1.7, ¶¶ 3-7 (Declaration of S.N.); Dkt. 440-1, Exhibit 1.8, ¶¶ 3-5 (Declaration of T.D.); Dkt. 440-1, Exhibit 1.9, ¶¶ 3-4, 7 (Declaration of Sarah Cole); Dkt. 440-1, Exhibit 1.10, ¶ 3, 8 (Declaration of Fadhal Moore); Dkt. 440-1, Exhibit 1.11, ¶¶ 4-6, 10 (Declaration of Itzel Libertad Vasquez-Rodriguez); Dkt. 455-2, ¶¶ 10-12 (Declaration of Aba Sam); Dkt. 455-3, ¶ 10 (Declaration of Cecilia Nunez); Dkt. 455-5, ¶¶ 6-7 (Declaration of Catherine Ho); Dkt. 455-7 ¶¶ 5-8 (Declaration of Melissa Tran); Dkt. 455-8, ¶¶ 7-8, 10-11 (Declaration of Jasmine Parley); Dkt. 455-9, ¶¶ 8-10 (Declaration of Fatima Shahbaz); Dkt. 455-11, ¶¶ 6-7, 10 (Declaration of Jesper Ke); Dkt. 455-12, ¶ 7 (Declaration of Rewan Abdelwahab); Dkt. 517-1, ¶¶ 9 (Declaration of James Mathew); Dkt. 517-4, ¶¶ 12-13 (Declaration of Madison Trice).
race. See 10/29 Tr. 22:16-21 (Vasquez-Rodriguez); 10/29 Tr. 143:4-144:4 (Diep); 10/29 Tr. 80:3-12, 81:15-82:15 (Cole); 10/29 Tr. 172:5-18 (Trice).

For example, Itzel Vasquez-Rodriguez, identifying as Xicana (indigenous Mexican-American) and more broadly Latina, disclosed her ethno-racial identity in her application to Harvard and wrote an entire essay devoted to her “experiences as a young Xicana in Southern California.” 10/29 Tr. 10:22-11:1 (Vasquez-Rodriguez). Ms. Vasquez-Rodriguez explained that she chose to write about her ethno-racial identity because it “was such a core piece of who I am” and “had impacted every decision I had made, every experience that I had had…I felt like it was something important and something of value that I could bring to a school like Harvard.” 10/29 Tr. 12:25-13:6 (Vasquez-Rodriguez).

Thang Diep, who identifies as Vietnamese, also wrote about his ethno-racial identity in his personal essay. 10/29 Tr. 142:22-143:3 (Diep). Mr. Diep discussed how he distanced himself from his Vietnamese identity when he first immigrated to the United States because he was bullied for his limited English proficiency, his accent, and his ethno-racial identity. 10/29 Tr. 140:21-143:3 (Diep); SA-2.0010. He shared how he ultimately re-connected with his Vietnamese identity in high school when his magnet program helped him to embrace it. 10/29 Tr. 140:21-143:3; 145:14-18 (Diep); SA-2.0010. Mr. Diep testified that:

[T]o portray my growth authentically and really show . . . the admission officer who I really am . . . [it was] crucial for me to . . . share this journey of not just learning English, but this journey of rejecting and erasing my own [ethno-racial] identity [that] had become such a huge part of who I was when applying and still who I am now.

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5 Students use the term “Xicana” rather than Chicana based on the spelling preferred by Ms. Vasquez-Rodriguez. Compare Dkt. 440-1 (Declaration of Vasquez-Rodriguez), with 10/29 Tr. 9:3-8 (Vasquez-Rodriguez). Students also use the terms Hispanic, Latina/o, and Latinx interchangeably. Likewise, Students use the terms Black and African American interchangeably.
Mr. Diep concluded: “[I]f I didn’t write about this experience, I don’t know what I would have written about.” 10/29 Tr. 146:5-6 (Diep). Other students shared similar sentiments. See, e.g., 10/29 Tr. 89:14-17 (Ho) (“So if race were to have been removed and I couldn't have talked about that, I don't know what I would have written about because all of my experiences are informed by the fact that I am Vietnamese-American.”); 10/29 Tr. 171:2-19 (Tribe) (“I think that the way that I was bullied was kind of inextricable from my race. . . . I think that also the pride that I have in my culture and my drive for social justice and my drive for encouraging others to love themselves is so deeply connected to my experiences, having been mistreated for my race, that it would have been very difficult to articulate who I am without being able to discuss it.”); 10/29 Tr. 13:15-17 (Vasquez-Rodriguez) (“All of my life's ambitions revolve around communities of color and my ethnoracial identity.”).

Sally Chen, who identifies as Chinese-American, wrote about her ethno-racial identity in her personal statement despite advice from her college counselor that the “Asian immigrant story was overdone,” and that writing about it would hurt her chances for admission. 10/29 Tr. 200:17-23 (Chen). Ms. Chen explained:

Being Chinese-American, being the daughter of Chinese immigrants . . . how I navigated being a translator and advocate. That was so fundamental to my background and my story, my identity, that I don’t think I could have left it out.

10/29 Tr. 201:11-15 (Chen).

Although Sarah Cole, who identifies as African American, did not expressly discuss her race as part of her essay, see SA-4, she identified her race through the common application’s demographic checkboxes. SA-4.13. Ms. Cole was equally adamant that Harvard’s recognition of her race was important:

Race-blind admissions is active erasure. To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race. And because of that, it would
be nearly impossible for me to try to explain my academic journey, to try to explain my triumphs without implicating my race.

10/29 Tr. 83:24-84:5 (Cole).

SFFA never refuted Students’ testimony that sharing their ethno-racial identity was necessary to portray themselves authentically. Nonetheless, SFFA seeks to “prohibit[] Harvard from using race as a factor in future undergraduate admissions decisions” and require “Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission.” Dkt. 1 at 119. Students’ testimony demonstrates this would deprive them of the opportunity to have their full stories—and strengths—considered in college admissions and is inconsistent with the principle of individual dignity enshrined in the Constitution.

ii. The nuanced consideration of race is crucial for admissions officers to holistically and effectively evaluate applicants, especially ethno-racial minority applicants.

When an applicant discloses his or her race—either through demographic boxes, personal statements, or listing leadership positions with cultural affiliations—admissions officers are better equipped to identify those applicants most able to fulfill Harvard’s educational mission. As the Supreme Court recognized in Grutter:

By virtue of our Nation's struggle with racial inequality, such [minority] students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.

Grutter, 539 U.S. at 338. Race is never dispositive, nor is it viewed in isolation, but “in a society . . . in which race unfortunately still matters,” Grutter, 539 U.S. at 333, the knowledge of an applicant’s racial background, alongside various other attributes, may be invaluable to identify who will best “contribute to and benefit from the educational experience on campus.” Dkt. 619 at ¶¶ 29, 58-65.
Traditional admissions criteria systematically undervalue the potential contributions of racial minorities. For example, Ms. Trice, Ms. Cole, and Mr. Diep all observed that teachers were less willing to identify African American students as gifted or offer them advanced coursework. 10/29 Tr. 144:7-11 (Diep); 10/29 Tr. 167:1-15 (Trice); 10/29 Tr. 82:3-10 (Cole). As Students have noted in prior briefs, there is also extensive evidence that standardized tests are infected with racial bias and thereby underestimate the academic potential of Black, Latinx, Native, and other applicants. See Dkt. 509 at 17; Dkt. 517 at 20-22. The ability to consider race allows admissions officers to counterbalance the racial skew in admissions criteria and academic opportunities. For example, knowing that Mr. Diep faced mockery for his Vietnamese accent, SA-2.0010, enables one to appreciate his linguistic achievements more accurately and places his “lower end” SAT score in context. SA-2.0029.

Moreover, the consideration of race is necessary to identify applicants with diverse perspectives who are likely to expose other students to “new ideas, new ways of understanding, and new ways of knowing.” P302.7. As the Court articulated in Grutter, “one’s own, unique experience” of race “is likely to affect an individual’s views” in light of present-day racial inequities. 539 U.S. at 333. Race-conscious individualized review allows Harvard to value the full range of perspectives that can facilitate “enhanced classroom dialogue” on campus. Fisher I, 570 U.S. at 308. Indeed, Ms. Vasquez-Rodriguez testified to how her ethno-racial identity shaped her perspective by allowing her to understand “injustice first-hand at a really young age. . . and that made me want to fight for social justice.” 10/29 Tr. 10:19-21 (Vasquez-Rodriguez).

The “colorblind” system that SFFA seeks would systematically undervalue the achievements and contributions of ethno-racial minority applicants. Purging race from Ms. Vasquez-Rodriguez’s application file would excise, among other items: entire paragraphs of
her personal essay, such as her sharing her “life’s ambition . . . to represent my heritage and inspire my fellow Latinos to embrace our culture” (SA-3.0013); her leadership positions in groups like “Spanish Club” and “Latino Club” (SA-3.0011); references to her “plans on majoring in either Chicano Studies or Economics” (SA-3.0022); her academic distinctions as a “National Hispanic Recognition Program Scholar” and “National Spanish Honors Society member” (SA-3.0011); interviewer notes that she is interested in “a potential career in business with a Latino focus” and how “she learned Spanish from her parents before English and has been increasingly engaged in Latino community and culture. . . .” (SA-3.0005); potentially even her surname “Vasquez-Rodriguez” and much more. Importantly, Ms. Vasquez-Rodriguez testified that reference to race was necessary to share about her aspirations because “[a]ll of my life’s ambitions revolve around communities of color and my ethnoracial identity.” 10/29 Tr. 13:10-13:17 (Vasquez-Rodriguez).

Tellingly, SFFA’s own expert on race-neutral alternatives, Mr. Kahlenberg, conceded that admissions officers should not completely disregard an applicant’s racialized experiences. 10/22 Tr. 71:8-72:7 (Kahlenberg). Mr. Kahlenberg agreed, for example, that colleges should be able to positively consider whether an applicant has overcome racial discrimination. Id. Mr. Kahlenberg acknowledged that the consideration of race is in fact the most efficient method of promoting racial diversity. 10/22 Tr. 82:4-10. Consequently, Harvard’s contextual consideration of race is both essential and the most effective means of pursuing the specific educational benefits associated with racial diversity.

In its post-trial brief, SFFA also suggests that Harvard should eliminate the demographic checkbox for race. Dkt. 620 at ¶ 142. Yet even this would impair Harvard’s ability to view applicants holistically. Ms. Cole’s application provides a case-in-point. In her personal essay,
Ms. Cole discussed how she committed herself to combatting gun violence in Kansas City after a close acquaintance lost his life to gun violence. SA-4.0018. Ms. Cole highlighted her leadership on Kansas City’s Youth Board where she presented recommendations to the mayor to “slow down this losing cycle” in a city with “the second highest homicide rates in the nation.” Id. While she did not explicitly reference her race in her essay, she did mark the checkbox indicating that she is African American. SA-4.0013. Knowing this provides additional context for her advocacy. As Ms. Cole testified, a race-blind admissions system would “not see me simply because . . . there has been no part of my life that has been untouched by race.” 10/29 Tr. 83:24-84:2 (Cole). Consequently, eliminating the demographic checkbox would also have a detrimental impact on Harvard’s evaluation of applications that contain information that is more accurately appreciated when the applicant’s race is disclosed in that way.

iii. **Race-conscious admissions remains necessary for cultivating the fullest depth and breadth of diversity which benefits all students.**

a. **Educational benefits of diversity are essential and flow to all students.**

As noted above, Harvard regards racial diversity as crucial to achieving its educational objectives. 11/1 Tr. 193:1-10 (Faust); 10/23 Tr. 24:13-25:6 (Khurana); 10/24 Tr. 123:22-124:7 (Banks). Student body diversity exposes students to new ideas, perspectives and ways of understanding. DX109.1. “[S]tudent body diversity – including racial diversity – is essential to our pedagogical objectives and institutional mission. It enhances the education of all of our students, it prepares them to assume leadership roles in the increasingly pluralistic society into which they will graduate, and it is fundamental to the effective education of the men and women of Harvard College.” P302.22 (Harvard’s Report of the Committee to Study the Importance of Student Body Diversity). Research confirms that these benefits enhance learning for all students, including non-minority students. Some of these shared benefits include reduced
prejudice; improved cross cultural understanding, comfort, and engagement; enhanced problem-solving and academic abilities; and a developed capacity for teamwork and leadership.

When diverse experiences and perspectives are represented in the classroom, all students benefit. Ms. Cole testified: “I can’t tell you how many times I’ve had professors email me thanking me for the contributions I’ve made in class or classmates stopping me outside of class thanking me for sharing my perspective.” 10/29 Tr. 78:25-79:6 (Cole). And she continued: “[T]he learning would be less if there were fewer black students” at Harvard. 10/29 Tr. 79:6-13 (Cole). Similarly, Ms. Chen testified that, in addition to ethnic studies “recentering and uplifting the experiences and the histories of people of color and students of color who are coming from communities beyond Harvard,” diversity is beneficial for all students. 10/29 Tr. 208:13-209:13 (Chen).

Itzel Libertad Vasquez-Rodriguez confirmed that learning with students from different ethno-racial backgrounds made her a more critical and independent thinker. 10/29 Tr. 17:7-20 (Vasquez-Rodriguez). “I think having had experiences and relationships with people from different ethno-racial groups made me a much better listener, a more empathetic person, someone who is a more critical thinker, and whose [ ] perspective of the world is more broad.” 10/29 Tr. 23:5-11 (Vasquez-Rodriguez). Interactions with other classmates of color who come from different life experiences also benefitted Mr. Diep, who observed that he gained “[n]ew

9 See Chang et al, supra note 7; Luo and Jamieson-Drake, supra note 8, at 67.
perspectives on how to look at different issues” from his classmates at Harvard. 10/29 Tr. 153:2-10 (Diep). Ms. Ho agrees. “[A]s an individual student, we learn from other people, and we learn from listening to their stories, listening to their perspectives. And if their perspectives and stories aren’t present on campus or aren’t as present on campus, who are we supposed to be learning from?” 10/29 Tr. 109:21-25 (Ho).

The personal and social benefits of diversity at Harvard are just as profound. “[E]ducation is not just what you learn in the classroom. I think that Harvard really emphasizes the learning that goes on in dorms and dining halls.” 10/29 Tr. 105:19-25 (Ho). Ms. Ho further testified that living and learning alongside those with different experiences allowed her to see that “there’s so much out there in the world and that you should be a little more nuanced and come from your own perspective.” 10/29 Tr. 107:8-24 (Ho). Ms. Nunez noted that being at a diverse campus has been “really rewarding” and has allowed her to talk about her own identity. 10/29 Tr. 124:25-125:11 (Nunez).

As intended, fostering these interactions helps prepare Harvard’s students to assume leadership roles in an increasingly diverse society. Ms. Trice testified that “the diversity at Harvard has helped me to learn about the different ways that I can be involved and the different causes that I want to devote myself to.” 10/29 Tr. 191:1-12 (Trice). Ms. Vasquez-Rodriguez recognized that ethno-racial diversity at Harvard has been important in her post-graduate work as a legislative aide and California Assembly Fellow, particularly given California’s increasing demographic diversity. 10/29 Tr. 23:5-23 (Vasquez-Rodriguez). “[H]aving had those experiences made me a better policy maker, a better policy thinker and much better equipped for this fellowship.” 10/29 Tr. 23:20-23 (Vasquez-Rodriguez). As an aspiring pediatrician, Mr. Diep recognized that discussions with other students of color provided him with a “tool set to
think about cultural sensitivity and cultural competency.” 10/29 Tr. 153:10-25, 156:12-14 (Diep). Since then, he has reflected on how to design health studies that are inclusive of all communities. 10/29 Tr. 156:1-157:5 (Diep).

Ms. Chen contrasted her experience at Harvard with her high school experience at Lowell, a highly competitive public magnet school in San Francisco with a majority Asian American student body and “very few” Black or Latinx students. She would not describe her high school as racially diverse, as its student demographic “did not really in any way reflect the overall racial diversity of the Bay Area or San Francisco.” 10/29 Tr. 196:7-25 (Chen). She found the lack of diversity “detrimental” to her overall learning experience. 10/29 Tr. 197:4-5 (Chen).

All students benefit from the opportunity to engage with underrepresented minorities outside of the classroom, as well. Many affinity and cultural groups intentionally include the broader Harvard campus in their social and educational activities. Ms. Ho testified that “it’s really important for us [Asian American Women’s Association (AAWA)] as an organization to express that it’s not just for people who identify with the experiences of Asian-American womanhood” and that AAWA is “not [an] exclusive space.” 10/29 Tr. 96:19-97:4 (Ho). Similarly, Ms. Nunez testified that Fuerza hosts “a lot of events that we [publish] out to the larger kind of Harvard community” and are “more tailored to letting other people know about these issues.” 10/29 Tr. 132:15-133:2 (Nunez). Many events combine an educational aspect with more cultural activities and are often attended by a more diverse population that views these as “very welcoming spaces for other students as well.” 10/29 Tr. 135:25-136:25 (Nunez).

b. A critical mass of students of color on campus is necessary to combat racial isolation and hostility.
Racial diversity is also necessary to combat the racial isolation and hostility that Students testified they experienced at Harvard. For example, Ms. Nunez and her friends were called “a bunch of wetbacks” by another student. 10/29 Tr. 129:4-10 (Nunez). Ms. Chen was accused of trespassing in the student lounge by a Harvard staff person. “[I]t made me feel like I didn’t belong there. It made me feel foreign. And it really, I think, triggered a kind of internal critique of myself.” 10/29 Tr. 204:12-205:24 (Chen). Ms. Cole testified that during her freshman year, a classmate published an article on affirmative action in the school newspaper that compared the admission of black students at Harvard to “teaching a blind person how to be a pilot” and recounted her experience of being “cursed at or physically assaulted” for marching through campus asserting that Black lives matter. 10/29 Tr. 72:24-73:24, 82:16-23 (Cole). And Ms. Vasquez-Rodriguez testified that when she entered a classroom, she would “take note mentally of the number of people of color” and in a majority white class she would become “very nervous” and reluctant to speak. “I didn’t want to be seen or stereotyped as someone who [] is just talking about communities of color because that’s where I came from.” 10/29 Tr. 19:5-25 (Vasquez-Rodriguez).

In predominantly white, privileged environments like Harvard, students of color, if there are a sufficient number of them, can find belonging, inclusion, and community by bonding with one another. Professor Margaret Chin explained that when she arrived at Harvard, “I felt like I needed to find people like me to feel comfortable, especially in the very beginning because I was intimidated. I thought I could do well, but I was intimidated, especially in the classroom.” Consequently, she sought other people of color. 10/29 Tr. 34:7-15 (Chin). Similarly, Ms. Vasquez-Rodriguez wanted to attend a campus where there were other people of color like herself “so that I could have a more safe environment . . . and a better [] learning environment.”
10/29 Tr. 16:16-20 (Vasquez-Rodriguez). Ms. Ho testified that having another roommate who is also a first-generation student and whose parents are also immigrants allowed her to process the pressure of being the first in her family to attend college and gender expectations within certain communities. She observed, “I feel the same things, but I just never knew that they were so widespread.” 10/29 Tr. 106:4-24 (Ho).

Harvard acknowledges that this is one of the many benefits of diversity. See 11/1 Tr. 206:3-16 (Faust); 10/23 Tr. 33:25-34:7 (Khurana). Ms. Cole, who originally had no interest in accepting her offer of admission to Harvard, described how visiting the campus and seeing its diversity appealed to her. 10/29 Tr. 70:5-21 (Cole). Sharing a meal and a wide-ranging conversation with other Black students made her think, “I actually can see myself here, and I feel like I could fit in here, and I feel like I could have community here in ways that I just never imagined I could have.” 10/29 Tr. 70:13-21 (Cole). Ms. Vasquez-Rodriguez described how racially and ethnically diverse spaces offered support, facilitated some of her closest friendships, and gave her the confidence and strength necessary to navigate Harvard every day. 10/29 Tr. 20:17-21:4 (Vasquez-Rodriguez). As part of these ethno-racial student or cultural groups, Ms. Vasquez-Rodriguez found a place where she could “finally breathe” and “really be myself.”

10/29 Tr. 20:19-20 (Vasquez-Rodriguez). Ms. Nunez testified that when, as noted above, she and her friends were called “wetbacks” by a fellow student, “we were able to kind of laugh it off and keep going on with our night because we were a large group of students”—but had that not been the case she acknowledged that they may have felt more threatened. 10/29 Tr. 129:11-18 (Nunez).

Both parties’ experts agree that eliminating race from the admissions process would lead to a precipitous drop in Black and Latinx enrollment, 10/25 Tr. 164:1-25, 165:1-6 (Arcidiacono);
10/31 Tr. 126:21-129:2 (Card), leaving those minority students vulnerable to “feel[ing] isolated or like spokespersons for their race.” See Grutter, 539 U.S. at 318-19. Students from underrepresented backgrounds may feel “that much more alone on campus” should the pool of minority students drop. 10/29 Tr. 138:14-139:2 (Nunez). And, as Ms. Vasquez-Rodriguez testified, a reduction in minority students would have broader adverse impact on the Harvard campus: “I think that there are so few students of color and under-represented minority groups at Harvard as it is that any sort of reduction in any of those groups would be really detrimental to the community at Harvard, both for students of color, but also just for students in general.” 10/29 Tr. 21:5-22:3 (Vasquez-Rodriguez).

Ms. Cole testified that a reduction in Black representation at Harvard “would have a severely adverse impact on Harvard’s racial climate.” 10/29 Tr. 78:12-24 (Cole). She emphasized that because Harvard’s administration consistently failed to adequately support its students of color, students have had to do the work themselves “to create the community that allows us students of color to feel confident and able to thrive on its campus. And if you have fewer students of color on Harvard’s campus, then there’s fewer people to do that work and that work becomes more exhausting.” 10/29 Tr. 78:6-78:24 (Cole). Moreover, a significant drop in either Black or Latinx enrollment undermines the benefits of diversity for all students. As Ms. Cole testified: “[T]here is so much value that black students offer academically. They make classes – the class and learning so much richer . . . There would be less learning if there were fewer black students.” 10/29 Tr. 78:24-79:12 (Cole). As Ms. Trice observed at trial, “I think when you’re interacting with a critical mass of minorities, it’s harder to have stereotypes about them.” 10/29 Tr. 177:6-22 (Trice). In addition to providing support and cover for those subjected to racial hostilities, a critical mass of students of color signals that “discrimination and
microaggressions are not something that the broader community would tolerate.” 10/29 Tr. 177:11-22 (Trice).

c.  **Race-neutral alternatives are insufficient to achieve benefits of diversity.**

SFFA’s expert opined that Harvard could implement a number of race-neutral alternatives through a combination of increasing socioeconomic preferences and eliminating admissions practices that predominantly favor whiter, wealthier applicants. PD27-34; 10/22 Tr. 33:19-47:18 (Kahlenberg). The record shows that eliminating race-conscious admissions may slightly increase the number of Asian American students at Harvard, but white students would be the greatest beneficiaries. 10/31 Tr. 127:24-128:15 (Card). Moreover, with race-neutral alternatives, the number of Blacks on campus would decline by approximately 60%, dropping from 14% to 6%. 10/31 Tr. 127:13-128:15 (Card). SFFA tries to gloss over this impact by noting that the combined share of Hispanics and African Americans would grow from 28% to 29%. Dkt. 620 at ¶ 158. But minorities are not fungible. Increasing the representation of one underrepresented minority group does not neutralize a decline in another. Each group’s representation independently affects the benefits of diversity and the conditions for meaningful participation and cross-racial interaction. Students testified that a significant decline in the African American student population would substantially harm the educational environment for all Students. As Ms. Vasquez-Rodriguez explained, “I think, in particular, like a reduction in the number of black students at Harvard would be really problematic because black student groups on campus tend to be more established. . . . I think that a lot of the power and positive change at Harvard comes from student groups of color . . . . [A] reduction in any of those groups is -- is awful.” 10/29 Tr. 21:17-22:3 (Vasquez-Rodriguez). On this point, Mr. Diep testified that a significant reduction in African Americans “would hurt my education dramatically, not just education in the classroom but also outside the classroom.” 10/29 Tr. 154:16-22 (Diep). The
Student testimony directly refutes SFFA’s claim that an alternative resulting in significantly fewer Black students would work “about as well” as Harvard’s race-conscious admissions policy.

d. Race-neutral alternatives may reduce diversity within each racial group.

SFFA also ignores the fact that reducing the number of underrepresented students on campus threatens diversity within each racial group. Students believe that it is essential to recognize the diversity of experience within each racial and ethnic subgroup. Many have benefitted from the rich range of experiences within ethnoracial groups at Harvard. As Ms. Vasquez-Rodriguez testified, the degree of diversity she experienced at Harvard allowed her to interact with a group of people that she had not known much about before college, which was “mind-opening” in ways that allow her to better identify the “classism, and racism, and colorism within [her] own community.” 10/29 Tr. 17:21-18:10 (Vasquez-Rodriguez). Ms. Nunez states that within racial groups, “there’s a lot more diversity of ethnic background or family experience than I’m used to” at Harvard. 10/29 Tr. 123:11-124:4 (Nunez). Similarly, Ms. Trice testified that because the Black community is not a monolith, it is important for the broader Harvard community to interact with Black students with different experiences whether that is in terms of religion, class, politics or national origin. 10/29 Tr. 179:4-18 (Trice).

Reducing diversity within diversity would harm Asian American students at Harvard, not just other minorities. From Mr. Diep’s perspective, Asian Americans have a fairly strong representation at Harvard when compared to Black or Latinx groups, but not a high level of intragroup diversity. “There are more East Asian students who are Chinese and Korean than Southeast Asian students like Vietnamese, Cambodian, Laotian.” 10/29 Tr. 148:12-14 (Diep). Consequently, he testified that “when you don’t see yourself represented, I think it’s just like a sucky feeling to have,” leaving him feeling “marginalized” and “erased.” 10/29 Tr. 148:19-
149:3 (Diep). Even without a specific intent to exclude or ignore the experiences or contributions of various Asian subgroups, Mr. Diep testified that he “feel[s] erased when I just don’t see myself reflected in the greater Asian community on campus.” 10/29 Tr. 148:17-149:20 (Diep).

The benefits of intraracial diversity are not abstract. Ms. Chen testified that it was “critically changing” for her to meet Asian Americans who are different from her. 10/29 Tr. 209:15-16 (Chen). “[I]t was so important to me to meet and talk to other Asian Americans who are different from me as kind of an impetus for me to learn more, for me to demand an education that would discuss these differences that I would have in these one-on-one encounters.” Id. at 209:20-24 (Chen). Prior to her experience at Harvard, in spite of growing up in San Francisco, Ms. Chen had never met an undocumented Asian American. “Despite the fact that Asian immigrants are the fastest growing immigrant population in the United States, a lot of the public media around immigration and immigration reform is often centered around Latinx communities.” 10/29 Tr. 210:2-5 (Chen). She concluded that it is important to have these different experiences and an Asian American population that is racially, ethnically and socioeconomic diversity “to really dispel these kinds of overarching myths [about] what it means to be Asian American.” 10/29 Tr. 210:11-16 (Chen).

e. Benefits of racial diversity are unique from socioeconomic diversity.

SFFA presumes that implementing a socioeconomic preference can increase both socioeconomic and racial diversity, thereby producing sufficient educational benefits that negate the need for race-conscious admissions. Dkt. 620 at ¶¶ 231-233. But in fact, socioeconomic diversity offers distinct benefits that do not address the specific experiences—positive and
negative—that race plays in shaping personal identity. Moreover, the benefits associated with
greater socioeconomic diversity are not offset by those lost with a reduction in racial diversity.
Both matter, but a myopic focus on socioeconomic status will never cultivate the specific
benefits that may be achieved through the limited consideration of race in admissions. Student
experiences confirm this. Greater socioeconomic diversity in a classroom is helpful but “the
benefits that come from socioeconomic diversity are different than the benefits that come from
having ethnoracial diversity in a classroom.” 10/29 Tr. 22:15-21 (Vasquez-Rodriguez). Because
ethnoracial diversity is “more visibly salient,” Ms. Vasquez-Rodriguez testified, “I didn’t feel
judged or discriminated against because of my socioeconomic status. I felt discriminated against
because of my ethnoracial identity.” 10/29 Tr. 22:16-21 (Vasquez-Rodriguez).

Consequently, even those who share a similar socioeconomic status but different
ethnoracial backgrounds may have a wide range of experiences that shape the perspectives they
bring to the classroom. Based on his experience, Mr. Diep testified that children of different
races are treated differently, even if they share the same low-income status. Growing up, he
observed “a lot of assumptions” related to his Black and Latinx friends as being “dangerous,”
yet “the same assumptions were not made about me.” 10/29 Tr. 143:4-16 (Diep). Without the
burden of these racial stereotypes, Mr. Diep felt free to excel academically. 10/29 Tr. 143:23-
144:4 (Diep). On the other hand, Mr. Diep observed that the Black and Latinx friends who
attended his middle school were not tapped for the same humanities magnet program that he was
referred to in spite of being just “as smart and talented” as him. 10/29 Tr. 144:7-11 (Diep).
Meanwhile, Mr. Diep struggled with feeling like a foreigner. 10/29 Tr. 144:12-19 (Diep). Thus,

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10 As Students have previously noted, research shows that racial diversity contributes to small-group discussion in
ways that enhances reasoning in ways that socioeconomic or geographic diversity may not. See Anthony L. Antonio
a low-income Asian American student like Mr. Diep has a very different lived experience and viewpoint than a low-income African American or Latinx student, even though both are low-income.

Similarly, Ms. Cole’s experiences as “a working-class black person” motivated her to make the sacrifices and hard work of her parents worthwhile and produced “solidarity with lower-income people” and engendered a “strong commitment to fighting for a world where people don’t have to endure the hardships of poverty.” 10/29 Tr. 79:18-80:2 (Cole). Given her family’s history of financial instability, Ms. Cole described the distinction between the challenges associated with socioeconomic status and race. “I can see where there’s like that difference in experience and perspective that comes from being a person of color in addition to experiencing financial instability.” 10/29 Tr. 81:15-19 (Cole). Ms. Cole distinguished the challenges faced by a white working-class father who is laid off and struggling to find work from the additional disadvantages and discrimination her father endured under the same circumstances. 10/29 Tr. 81:15-24 (Cole). Yet even when her family was doing better financially, they encountered racism. “And so regardless of whether we were struggling financially or not, our race has always shaped our experience, and that is a part of what I’m able to offer” or contribute to the learning environment. 10/29 Tr. 81:25-82:15 (Cole).

Ms. Cole recognizes that her experiences as a working-class Black markedly differ from the experiences of a working-class white, Asian or Latino. “The particular prejudices and stigmas and barriers that I face as a black working-class woman are simply different than those other groups.” 10/29 Tr. 80:3-12 (Cole). Consequently, while socioeconomic diversity “makes Harvard’s campus a richer place” it is just one aspect of a student’s identity – like race – that adds benefits to Harvard’s campus. 10/29 Tr. 80:15-81:5 (Cole). In Ms. Cole’s experience, the
benefits associated with the intersection of race and class are unique as “it was the low-income students of color” who found themselves “more impacted by the racial barriers at Harvard” which led them to be among those “most likely to advocate for Harvard to do better by students of color.” 10/29 Tr. 81:6-14 (Cole).

Similarly, Ms. Trice’s experience shows the need to consider race separately from socioeconomic status in admission decisions. “Although I believe there are privileges that come with being upper middle class, I was discriminated against in spite of those.” 10/29 Tr. 172:5-18 (Trice). Her upper middle class status may mask other oppressions or denials that she faced by virtue of her race. “And it mostly just wouldn’t allow me to account for the ways that my [racial] identity has affected me.” 10/29 Tr. 172:9-18 (Trice). It is therefore appropriate for Harvard to cultivate both socioeconomic and racial diversity, in recognition of the unique challenges and benefits that each offers.

f. **Statistical models underestimate the decrease in diversity produced by the elimination of race-conscious admissions.**

SFFA’s statistical models of race-neutral alternatives grossly underestimate the decrease in racial diversity that would ensue if Harvard stopped appreciating the racial background of students in the admissions process. Whenever race-consciousness is supplanted by socioeconomic considerations, both racial and socioeconomic diversity at the most selective universities may decline.\(^{11}\) As *Students* have already noted, the end of affirmative action in Texas and the ban of race-conscious admissions in California reduced the likelihood that

\(^{11}\) See Sean F. Reardon, Rachel Baker & Daniel Kalsik, Race, Income and Enrollment Patterns in Highly Selective Colleges 1982-2004, at 2, Center for Education Policy Analysis, Stanford University (2012).
minority students would request that their SAT scores be sent to in-state public colleges which is highly correlated with where those students might apply.  

Ms. Vasquez-Rodriguez testified: “Honestly I, probably would not have applied to Harvard if they didn’t take race into account... I wanted to go to a school that reflected the diversity of the U.S. population and the world population.” 10/29 Tr. 16:21-17:6 (Vasquez-Rodriguez). Ms. Chen speculated that if race were eliminated from the admissions process, she would not be at Harvard. “I could not see myself being part of an institution that didn’t value me and my experiences when I was fighting so hard to articulate them.” 10/29 Tr. 211:9-22 (Chen). She testified, “I think dismantling the race-conscious admissions policy would really rob students of that critical part of education where you learn from and with people who are different from you and have different experiences with you.” 10/29 Tr. 210:20-23 (Chen). She would anticipate an “overwhelming pressure to buckle under the weight of assimilation” and expressed concern that “those different experiences would very much be pushed to the margins.” 10/29 Tr. 210:20-211:8 (Chen). Ms. Cole testified that if race were not considered in the admissions process and Harvard enrolled fewer students of color, she likely would not have accepted her offer of admission. 10/29 Tr. 70:5-21, 83:17-84:16 (Cole).

B. Harvard engages in an individualized review process that appropriately considers race in a manner that is positive, contextual, and considers all pertinent elements of diversity.

Having established that Harvard’s use of race is “necessary,” strict scrutiny also requires Harvard to show that its “means” of considering race “ensure[s] that each applicant is evaluated as an individual.” Fisher, 570 U.S. at 309 (citation omitted). The Supreme Court has indicated that an “admissions program cannot use a quota system,” but it may consider race or ethnicity

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“as a ‘plus’ in a particular applicant’s file” as long as the applicant is not “insulat[ed] . . . from comparison with all other candidates.” *Grutter*, 539 U.S. at 334 (citations omitted). The process should employ a “highly individualized, holistic review” which flexibly considers “all pertinent elements of diversity . . . although not necessarily according them the same weight.” *Id.* at 309 (citation omitted). Individualized review ensures that an applicant’s race is not the “defining feature of his or her application.” *Id.* at 337.

The record is clear that Harvard’s process exemplifies the hallmarks of individualized review as endorsed by the Supreme Court. Harvard’s admissions officers explained that an applicant’s self-identified race may help contextualize the facts, circumstances, or events which shed light on an applicant’s achievements or contributions. Tr. 10/17 227:3-15 (Fitzsimmons). Additionally, an admissions officer may positively view an applicant’s ethno-racial identity when assigning an overall score if the file suggests the applicant’s distinct viewpoint would enrich campus diversity. Tr. 10/16, 22:18-23:6 (Fitzsimmons). This latter treatment of race was frequently referred to as a “tip” or “per se” consideration of race.

i. **Harvard’s consideration of race does not use race as more than a “plus” factor for Black and Hispanic students.**

SFFA alleges that race is the “predominant factor” in the decision to admit African American and Hispanic students.13 Dkt. 620 at ¶¶ 215-220. Our *Students’* application files are arguably the best direct evidence that SFFA’s assertion lacks merit. The admissions files of Ms. Cole (who identifies as Black) and Ms. Vasquez-Rodriguez (who identifies as Latina) are

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13 Indeed, SFFA’s suggestion that Black and Latinx students are academically underqualified and admitted to Harvard predominantly on the basis of their race is both offensive and directly countered by the experiences of our *Students*, whose impressive academic careers in high-school were followed by their equally impressive performance at Harvard. Ms. Vasquez-Rodriguez graduated from Harvard cum laude with a 3.7 GPA with the highest honors in sociology, a minor in economics, a citation in Spanish and a certificate in Latin American studies and has since been awarded a California Assembly Fellowship. 10/29 Tr. 8:17-23, 22:22-23:4 (Vasquez-Rodriguez). Ms. Cole graduated from Harvard with a 3.6 GPA and received a master’s degree from the Harvard School of Education. She is currently a fifth grade teacher in the District of Columbia. 10/29 Tr. 61:22-62:17 (Cole).
predominantly characterized by commentary about their stellar academic credentials, their recommenders’ effusive comments, their leadership through extracurriculars, and their socioeconomic status.

More specifically, Ms. Cole’s file reflects that admissions officers noted her extraordinary academic achievements including:

- Comments about her “All A[s]”. SA-4.0001. Ms. Cole’s transcript reflects how she earned all As and A+s at Pembroke Hill School, one of the best private college prep schools in Kansas City. SA-4.0006; 10/29 Tr. 65:1-3 (Cole).

- Comments about her “warm school support.” SA-4.0006. Ms. Cole’s Counselor recommendation shared that “Academically, Sarah is virtually unparalleled at our school” and praised her “scholastic prowess” among other accolades. SA-4.0030.

Ms. Cole’s file also contains extensive commentary and notes about her extracurriculars, including:

- Notes underscoring her leadership on the Board of Engage KC. SA-4.0001. In this role, Sarah developed recommendations for Kansas City’s leadership to combat youth violence. 10/29 Tr. 72:1-10. (Cole).

- Notes on her “term-time work” adding up to approximately 7-8 hours a week. SA-4.0001-0002. In addition to earning straight-As, Ms. Cole worked at TJ Maxx during the school year. 10/29Tr. 67:8-10 (Cole).

- Notes on her participation in Debate. SA-4.0001. Ms. Cole was identified as the best Novice Debater in 9th grade and serves as Vice President of the Debate Team in 11th grade. SA-4.0016.

Admissions officers also commented upon her impressive character attributes, including:

- Comments about her “determination, drive, and admirable work ethic.” SA-4.0002.

- Underlines and markups throughout her glowing school recommendation, including the counselor’s comment that Sarah is “one of the most thoughtful, and reflective, adolescents with whom I have ever worked.” SA-4.0030.

Finally, admissions officers appreciated the context of Ms. Cole’s success beyond race, across a wide range of attributes including:
• Comments about her geographic ties through her “love of and devotion to Kansas City.” SA-4.0002.

• Notes about her low socioeconomic status (possible HFAI status). SA-4.0002.

• Notes on her parents’ occupation working at ADT Security and the IRS. SA-4.0001.

Throughout the various comments and markups, admissions readers do not make any comment about her race. Ms. Cole’s file provides powerful evidence that Harvard does not treat race as the defining feature of a minority student’s application, but seriously considers each applicant’s individual qualifications and various diversity attributes. Indeed, it strains credulity to suggest race was the predominant reason Ms. Cole was admitted.

Similarly, Ms. Vasquez-Rodriguez’s file reflects that admissions officers noted her extraordinary academic achievements including:

• Comments on her “strong sets of AP scores.” SA-3.0002. When Ms. Vasquez-Rodriguez applied, Ms. Vasquez-Rodriguez had taken six AP courses and received the highest score on five of tests. 10/29 Tr. 12:1-7 (Vasquez-Rodriguez). By the end of high school, she had completed 10 AP tests. Id.

• Notes underscoring her class rank, her GPA, and how “my goodness Itzel is a hard worker!” SA-3.0001-0002. Ms. Vasquez-Rodriguez graduated from high school with a 4.5 GPA; she was ranked first in her class of about 500 students from grades ten to 12; during the summers, she took community college courses. 10/29 Tr. 12:8-12 (Vasquez-Rodriguez).

The file also includes notes about Ms. Vasquez-Rodriguez’s extensive extracurricular activities including:

• Comments about her being a “2 season runner and 4x © [captain]” who has “earned athletic success.” SA-3.0002.

• Comments about her serving “as E [editor] of a paper, link leader and volunteer.” SA-3.0002.

• Markups to underscore her being a President of the Spanish Club and Secretary of the Latino Club. SA-3.0001.
The admissions officers also commented extensively on Ms. Vasquez-Rodriguez’s demonstrated personal qualities that will enable her to contribute to Harvard and beyond, including:

- Comments about her being “positive, respected, and kind.” SA-3.0002.
- Comments about her being “resilient and determined to succeed.” SA-3.0002.
- Comments about how her GC [guidance counselor] let us know she has an ‘electric personality.’” SA-3.0002.

Finally, there are comments that appreciate the context of Ms. Vasquez-Rodriguez’s success beyond race, across a wide range of attributes including:

- Notes that her “Dad is unemployed, Mom an admin. . . Itzel has lived [between] 2 homes for years.” SA-3.0002.
- Comments that her scores are especially impressive out of her high school “where only 25% [of students] go onto 4[-]year colleges.” SA-3.0002.
- Notes about her low socioeconomic status (fee waiver application and possible HFAI status). SA-3.0002
- Markups to underscore her intended concentration in the Humanities. SA-3.0001.

Comparatively, there are only two notations related to Ms. Vasquez-Rodriguez’s ethno-racial identity, and these comments contextualize the information she shared in her personal essay, noting “she’s connected w/ her heritage after a period of disconnect (see PE [personal essay])” and “PE [personal essay]: Latino heritage.” SA-3.0001-0002. These reader notes and comments reflect how Harvard’s process predominantly considers non-racial factors, how it appreciates non-racial forms of diversity, and how any consideration of race is applied in an individualized context and alongside the consideration of other factors. The extensive commentary affirms that there are no automatic points being awarded based on race. Perhaps most importantly, Ms. Vasquez-Rodriguez’s file reflects how her admission to Harvard is based on her exceptional qualifications and strengths across multiple areas: academics, extracurriculars,
athletics, and impressive character attributes. Her file discredits any claim that race is the “predominant” factor for admitting Hispanic applicants.\(^{14}\)

To be clear, race may have played a limited role in the admissions of Ms. Cole and Ms. Vasquez-Rodriguez, but there is absolutely nothing suspect about a university ascribing value to an applicant’s ability to contribute to campus diversity based, in part, on their race. Indeed, both Ms. Cole’s and Ms. Rodriguez’s applications reflected how they could meaningfully contribute to Harvard’s diversity goals. Specifically, Ms. Vasquez-Rodriguez expressly shared in her personal essay: “I will undoubtedly carry [my Xicana heritage] with me to college.” SA-3.0013.

Ms. Cole’s application also reflected her capacity to dismantle stereotypes, as her guidance counselor shared Ms. Cole’s prior statement:

> I think my most significant contribution to [my high school] community would be providing [students and faculty] with a personal example of an African American who does not come from a financially stable family, but [who] still strives for academic excellence….  [My presence] has helped loosen the stronghold of stereotypes placed on African Americans, at least among my peers here.

SA-4.0030. Indeed, Ms. Vasquez-Rodriguez and Ms. Cole both substantially contributed to Harvard’s diversity goals while in college. For example, Ms. Cole actively led work on a diversity report, served as President of the Black Students Association, guided classmates and administrators to grieve “the deaths of black people at the hands of the police,” and was repeatedly thanked by classmates and professors for sharing her perspective as a Black woman.

\(^{14}\) Furthermore, Harvard’s 2012 casebook also demonstrates that race is not a defining feature in Harvard’s admissions process. The cases in the casebook are actual applicant cases with the applicants’ identifiers removed and are used for training of Harvard admissions personnel. 10/22 Tr. 151:23-152:9 (McGrath). The casebook includes an example of “Peter Duran,” who identified himself as Hispanic in his application and had very good grades and SAT scores. DX2.101-10. Harvard noted his ethnicity as an appealing factor, but ultimately decided not to admit him. 10/22 Tr. 163:14-164:14 (McGrath). As in Grutter, where the Court observed that the Law School frequently accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who were rejected, 539 U.S. at 339, Harvard’s admissions office does not automatically accept or reject candidates based on their race and rejects underrepresented minority applicants who have grades and test scores higher than nonminority applicants who are admitted.
Ms. Vasquez-Rodriguez participated in numerous affinity groups and co-led a cross-cultural, cross-ethnic coalition which successfully established an ethnic studies track at Harvard. 10/29 Tr. 17:3-19:4 (Vasquez-Rodriguez).

Viewed in their entirety, Students’ application files demonstrate that Black and Hispanic students are not receiving an oversized boost based on race, and that any role that race is playing is more than justified based on the tangible contributions such students make to campus.

Moreover, SFFA’s bald assertion that race is a “predominant” factor relies upon inapposite case law and flawed analysis. Dkt. 620 at ¶ 220. SFFA only introduced two admissions files, and neither file demonstrated that race was the defining feature of Harvard’s admissions decision.15 Instead, SFFA proffers two, equally flawed arguments which misinterpret prior case law. First, SFFA draws an analogy between Harvard’s race-conscious policy and programs in Michigan and Georgia that were struck down for automatically awarding a substantial number of points to qualified minority applicants. Dkt. 620 at ¶ 220. SFFA asserts that “[r]ace plays an equally outsized (if not greater) role at Harvard compared to Michigan and Georgia.” Id. To support this assertion, SFFA cites to its analysis of Harvard’s process showing that the marginal effects of race are greatest for highly competitive minority applicants. Dkt. 620 at ¶ 148. But Harvard’s program is readily distinguishable, and clearly defensible.

Unlike the institutions in Michigan and Georgia, Harvard does not award any pre-determined points based on race as it only considers race in an individualized context. Moreover, SFFA is wrong to equate the marginal effect of race with a mechanical point system. The marginal effect of race actually varies depending on the competitiveness of the candidate confirming that Harvard’s process is neither mechanical, nor automatic. Nor does race have an

inappropriately “massive” role as SFFA claims. The data shows that the most competitive candidates experience the greatest marginal effects of race. Rather than suggesting a massive preference, this actually suggests the opposite: race plays little to no role unless the applicant demonstrates an abundance of strengths that are not associated with race. The large marginal effect for the most qualified applicants merely reflects that any desirable trait—whether race, or geography, or socioeconomic status, or artistic ability—can make the ultimate difference in a highly competitive process. Dr. Card’s data analysis likewise confirms race does not play an outsized role: numerous characteristics other than race—including, for example, parental occupation and intended career—explain more about the variation in admissions outcomes than race does. DX715 & DD10.93.16

ii. Harvard’s consideration of race does not unduly harm Asian Americans

SFFA conflates its intentional discrimination claim with its challenge to Harvard’s race-conscious admissions program by inappropriately relying upon Grutter’s recitation that “[n]arrow tailoring . . . requires that a race-conscious admissions program not unduly harm members of any racial group.” Dkt. 620 at ¶ 165 (citing Grutter 539 U.S. at 341). But this language must be placed in its proper context. Grutter clearly stated that the parameters of individualized review—requiring that a university value all pertinent elements of diversity without insulating candidates from review—also ensured a program did not impose undue harm on any racial group. Grutter, 539 U.S. at 341. The Grutter Court explained:

16 SFFA also claims that race is a “predominant” factor because Harvard has stated that eliminating racial considerations will cause the number of Black and Hispanic students to decline dramatically. Dkt. 620 at ¶ 220. But this type of decline merely demonstrates that race plays some role in admissions (as it must for a university to show race-neutral alternatives are not available). It surely does not demonstrate that race unconstitutionally plays a predominant role. Similar facts were presented in Grutter, where the Law School’s expert explained that eliminating the consideration of race would result in a substantial decline in underrepresented minority enrollment: from 14.5% to 4%. Grutter 539 U.S. at 320. The Supreme Court recognized this fact and did not conclude it proved race was the predominant factor in admissions; rather, it upheld the Law School’s holistic, individualized review program as consistent with constitutional principles.
[S]o long as a race-conscious admissions program uses race as a “plus” factor in the context of individualized consideration, a rejected applicant “will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”

Id. at 341 (quoting Bakke, 438 U.S. at 318). While Grutter squarely states that providing a “plus” to minority applicants does not pose an undue burden when paired with individualized review, Dr. Arcidiacono stated that any favorable consideration on the basis of race is “the same thing” as a “white penalty.” 10/25 Tr. 177:13-17 (Arcidiacono). Dr. Arcidiacono would also view a “plus” for an African American or a Hispanic applicant as a relative penalty for an Asian American student. But that is not the law for judging a race-conscious admissions policy as articulated by Grutter. Nor is it the standard for discrimination. Dr. Card succinctly captured the problems with Dr. Arcidiacono’s approach by explaining:

I don’t think it’s appropriate to think of there being discrimination against people who don’t play the cello as well as Yo-Yo Ma just because Yo-Yo Ma is so accomplished in that. And similarly, I don’t think it’s appropriate to think of a positive benefit for an underrepresented group as necessarily representing negative discrimination against others.

10/30 Tr. 80:17-23 (Card). Indeed, the current record reflects that Harvard’s race-conscious admissions program does not unduly burden Asian American students for four primary reasons.

First, Harvard engages in the type of holistic, individualized review which Grutter held prevented any concerns over undue burdens.

Second, race-conscious admissions allows Harvard to positively appreciate the ethno-racial identities of Asian American applicants. Under Harvard’s policy, no applicant is excluded from discussing how race or ethnicity has influenced his or her interests, goals, or experiences. 10/16 Tr. 26:14-27:10 (Fitzsimmons). Students’ testimony and application files reveal that all applicants, including Asian Americans, may have their race considered as a positive factor.
Indeed, both Mr. Diep and Ms. Chen discussed their ethnicities in the application process and both saw that Harvard’s admissions process viewed their ethno-racial identity positively. Reader comments show an appreciation for Mr. Diep’s ethno-racial identity by making a note of his “immigrant Vietnamese identity” and his experience with using “pencils as tools,” a reference to Mr. Diep’s personal essay about overcoming language barriers and racial slurs to excel academically and embrace his identity. SA-2.0002, 0010. In reviewing these experiences tied to race, the admissions officer praised Mr. Diep for being “very committed to pushing himself.” SA-2.0034. These notes reaffirm that Harvard positively views the ethno-racial identities of Asian Americans, and does not reduce them to a monolith, but recognizes their distinct ethnicities and immigration histories. Ms. Chen also referenced her ethno-racial identity throughout her essays and interview for Harvard. Her application file similarly reflects a positive, contextual treatment of Ms. Chen’s ethno-racial identity. The interview report praises Ms. Chen for her academic potential by sharing that, because Ms. Chen is “low-income and with Taiwanese-speaking parents, [Ms. Chen] relates to the plight of outsiders in Ralph Ellison and William Faulkner.” Ms. Chen’s interviewer also praised her personal qualities by noting that her upbringing in a “culturally Chinese home” where she served as a translator reflected positively on her responsibility to take care of others. SA-1.0029-S1.0030

These comments reflect how Harvard only considers race in a manner that is positive and highly contextual. Ms. Chen and Mr. Diep’s files undercut any suggestion that Harvard’s race-conscious policy hurts Asian Americans; instead, the files suggest that some Asian Americans are helped by such a policy. Indeed, this flexible appreciation of race allows Harvard to be sensitive to the diversity among Asian Americans who vary widely in their ethnic, cultural, linguistic, socioeconomic, political and religious backgrounds.
Third, Asian Americans as a community benefit from race-conscious admissions because it fosters the breadth of diversity that positively impacts the learning environment for all students. As Mr. Diep explained, his interactions with classmates from different racial backgrounds are “very beneficial” because “we all have different life experiences. So when I interact with students who are black and Latinx, I gain new perspectives.” 10/29 Tr. 153:6-8. Mr. Diep is not alone. As discussed above in Section I.A.iii.a., the Students of Asian American heritage all confirmed that they benefitted from Harvard’s racial diversity.

Fourth, Harvard’s race-conscious admissions policy has a notably small impact on the percentage of Asian American applicants admitted to Harvard. Because far fewer Black, Latinx, and Native American students apply to elite colleges and universities, as compared to white applicants, the decrease in their admissions due to the elimination of race considerations would not greatly benefit Asian American student applicants. See Goodwin Liu, The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1046 (2002). In fact, according to Harvard’s expert, eliminating all considerations of race would increase the Asian American share of the admitted class by 3 percentage points—from 24% to 27%. This would represent a change in admissions rate of less than 1% for the average Asian American who would only see his or her chances increase from 5.1% to 5.9%. Dkt. 509 at 21-22. Narrow tailoring is especially evident when, as here, the number of impacted seats is notably small. As Fisher II reflected: “The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.” 136 S. Ct. at 2212.
iii. The record shows Harvard is not engaging in racial balancing but merely engaging in practices that have been approved by the Supreme Court.

SFFA alleges Harvard is engaging in racial balancing based on two primary pieces of evidence: (i) Harvard engages in race-conscious recruiting and (ii) Harvard’s leaders periodically review documents known as “one-pagers” which summarize a wide range of characteristics of Harvard’s admitted class, including gender, geography, intended concentration, lineage, recruited athlete status, citizenship, race or ethnicity, and a variety of measures of socioeconomic and financial aid status. Dkt. 620 at ¶ 134-35; Dkt. 620 at ¶ 85-88. With respect to both points, SFFA attacks Harvard for practices that have been confirmed to be valid by prior court decisions. As Harvard’s post-trial brief observes, courts regularly identify the recruitment of minority candidates as permissible and classify it as a “race-neutral” practice. Dkt. 619 at ¶ 280 (citing cases). Harvard’s use of one-pagers has also been validated by the Supreme Court in *Grutter*. There, the Law School similarly consulted “daily reports,” which keep track of the racial and ethnic composition of the class (as well as of residency and gender). The Supreme Court held that consulting such reports did not demonstrate racial balancing since the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports and there was notable variance in the enrollment of underrepresented minorities over the span of five years. *Grutter*, 539 U.S. at 335-36.

This case presents nearly identical facts. Harvard’s admissions officers periodically consult demographic reports and sometimes this information is shared with admissions staff. 10/18 Tr. 77:5-78:10 (Fitzsimmons). Similar to *Grutter*, admissions officers consistently

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17 See also David L. Faigman, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1178-79 (2012) (encouraging judges to track their own statistics in "domains such as bail, probable cause, and preliminary hearings" to help judges identify and correct implicit biases).
affirmed that such information did not change the individualized review process or make them try to admit more students from a particular group. 10/18 Tr. 197:17-20 (Looby); 10/19 Tr. 67:25-68:2 (Bever); 10/23 Tr. 219:9-12 (Yong). As a final parallel to Grutter, there have been meaningful year-to-year variations in the racial composition of Harvard’s admitted and matriculating classes, trends which are inconsistent with racial balancing. DX711, DD10.100-01; 10/31 Tr. 119:9-122:5 (Card). By criticizing Harvard for practices that so closely parallel those approved by Grutter, SFFA reveals that its true complaint is with the governing precedent itself. But SFFA’s claims must be judged by the law as it now stands.

II. SFFA cannot satisfy its burden of proving intentional discrimination.

SFFA’s intentional discrimination claim (Count I) focuses on the treatment of Asian American applicants vis-à-vis white applicants. Dkt. 620 at 58. SFFA is unable to meet its burden of proving Harvard is intentionally treating Asian American applicants differently than white applicants and that this negatively impacts Asian American admissions.

The Supreme Court set forth the basic standard for proving intentional discrimination in Personnel Administrator of Massachusetts v. Feeney:

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. See United Jewish Organizations v. Carey, [430 U.S. 144, 179] (concurring opinion). It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group. 442 U.S. 256, 279 (1979) (footnote omitted). As in most intentional discrimination cases, this case is one where the plaintiff lacks direct evidence of discriminatory intent. In Village of Arlington Heights v. Metropolitan Housing Development Corporation, the Supreme Court set

18 The record shows, for example, a year-over-year increase in the number of Asian American admitted students of up to 19% and a decrease of up to 11%; showing a year-over-year increase in the number of African American admitted students of up to 14% and a decrease of up to 13%; showing a year-over-year increase of white matriculating students of up to 18% and a decrease of up to 9%; showing a year-over-year increase of Hispanic matriculating students of up to 28% and a decrease of up to 20%. DX711; DD10.100-01.
forth a framework for proving discriminatory intent through circumstantial evidence. 429 U.S. 252, 265-68 (1977). “The impact of the official action [and] whether it bears more heavily on one race than another . . . may provide an important starting point.” Id. at 266 (internal quotation and citation omitted). Other relevant factors include: “[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes”; “[d]epartures from the normal procedural sequence”; “[s]ubstantive departures [from the norm] . . .”; and “the legislative or administrative history . . ., especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” Id. at 267-68.

SFFA tries to evade this burden in two ways, neither of which has merit. SFFA begins by trying to import the strict scrutiny standard applicable to race-conscious admissions programs to its claim of intentional discrimination. Dkt. 620 at ¶¶ 159-61. This is incorrect because it inverts the order of operations. SFFA must first prove that Harvard actually does discriminate against Asian American applicants on the basis of race vis-à-vis whites, and only then does the question of a standard of review such as strict scrutiny becomes relevant. See, e.g., Hassan v. City of New York, 804 F.3d 277, 298 (3d Cir. 2015) (“Once a plaintiff demonstrates treatment different from others with whom he or she is similarly situated and that the unequal treatment is the result of intentional discrimination, the adequacy of the reasons for that discrimination are ... separately assessed at equal protection’s second step under the appropriate standard of review,” e.g., strict scrutiny (internal quotation omitted)). Here, Harvard has articulated that its race-conscious admissions policy is intended to materially increase the admissions rates of underrepresented minorities. See, e.g., Bakke, 438 U.S. at 321-24 (Harvard Plan); 10/18 Tr. 65:18-66:2 (Fitzsimmons). Harvard’s open acknowledgment that it may treat underrepresented
minorities differently than other applicants is what invokes strict scrutiny because it racially
classifies these students. See Grutter, 539 U.S. at 318, 326-27. In contrast, Harvard denies that
it systematically treats Asian American applicants differently than white applicants because of
their race. See, e.g., 10/18 Tr. 108:6-109:2 (Fitzsimmons); 10/22 Tr. 175:2-16 (McGrath); Dkt.
619 at 7-8. This makes SFFA’s intentional discrimination claim analytically distinct from its
other claims. As with any other intentional discrimination case, SFFA maintains the burden of
proving that Harvard intentionally discriminates against Asian American applicants vis-a-vis
white applicants.19

Additionally, SFFA tries to sidestep its burden by invoking the “pattern or practice”
theory of discrimination which includes a burden-shifting framework. Dkt. 620 at 167-76.
Mostly modeled on disparate treatment employment cases under Title VII and other statutes, the
“pattern or practice” theory does not change the fact that SFFA carries the burden of persuasion
burden of persuading the trier of fact that the defendant intentionally discriminated against the
plaintiff remains at all times with the plaintiff.”); see also St. Mary’s Honors Ctr. v. Hicks, 509

Nor does the “pattern or practice” theory materially change this Court’s ultimate calculus
in weighing all the evidence to determine whether SFFA has proven intent. By selectively
quoting from several cases, SFFA misleadingly suggests that a statistically significant disparity
proves that a discriminatory policy “exists.” Dkt. 620 at ¶ 173. But the cases cited by SFFA

19 Under SFFA’s theory, any non-Black or non-Hispanic ethnicity could sue Harvard for discriminating against them
vis-à-vis any other non-Black or non-Hispanic ethnicity, obtain the burden-shifting advantages of strict scrutiny,
and—given the difficulties of surviving strict scrutiny—likely succeed. This strange outcome would be consistent
with SFFA’s goals of eliminating all racial considerations from college admissions but inconsistent with the
Supreme Court’s precedent from Bakke to Fisher II.
stand for the proposition that statistics can establish a *prima facie* case of disparate treatment; they do not suggest statistics dispositively prove the ultimate issue of liability. SFFA also implies that its statistical evidence may only be rebutted by statistics. Dkt. 620 at ¶ 176. This effort to underrate the probative value of non-statistical evidence is convenient: after reviewing 480 admissions files, SFFA submitted only two individual files (which it did not substantively discuss in its post-trial brief), no files for any of its standing members, and no individual testimony of racial discrimination. But courts have been clear that nonstatistical evidence and specific counterexamples of discriminatory treatment are highly probative, especially where the statistical evidence is highly disputed. When “experts disagree, . . . the court may need the help of live witnesses to relate their actual experiences.” *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988). Individual victim testimony is useful to bring “cold numbers convincingly to life.” *Id.* at 311 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)). Moreover, “when the statistical evidence does not adequately account for ‘the diverse and specialized qualifications necessary for [the positions in question],’ strong evidence

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20 See, e.g., *Palmer v. Shultz*, 815 F.2d 84, 91 & n.6 (D.C. Cir. 1987) (discussing the type of statistical evidence which will create an inference of discrimination and satisfy plaintiffs’ prima facie case but also acknowledging “[s]tatistics, however, cannot entirely rule out the possibility that chance caused the disparity. Nor can statistics determine, if chance is an unlikely explanation, whether the more probable cause was intentional discrimination or a legitimate nondiscriminatory factor in the selection process.”) (citation omitted); *Karp v. CIGNA Healthcare, Inc.*, 882 F. Supp. 2d 199, 210 (D. Mass. 2012) (“In a pattern and practice disparate treatment case, statistical evidence constitutes the core of a plaintiff’s prima facie case. Within the . . . individual disparate treatment model, however, statistical evidence is only one small part of a substantial web of evidence indicating pretext.”) (emphasis added) (quoting *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 158 & n. 5 (2d Cir. 2001)); *EEOC v. Tex. Roadhouse, Inc.*, 215 F. Supp. 3d 140, 169 (D. Mass. 2016) (“[G]ross statistical disparities . . . alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.’ . . . An important caveat is that statistics are not irrefutable and the context and circumstances determine the evidentiary weight that the statistics provide.”) (internal quotation omitted) (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)).

21 SFFA took extensive discovery in this case, including 24 depositions, and Harvard produced more than 97,000 pages of documents to SFFA, including 480 anonymized application files, along with detailed anonymized database information about more than 200,000 individual applicants. Dkt. 418 at 16; see also 10/25 Tr. 24:21-25 (Arcidiacono). At trial, SFFA only introduced two applicants’ files through Dr. Arcidiacono: P112 and P117. Neither file proves discriminatory intent against Asian Americans or that Harvard failed to satisfy the narrow tailoring standard articulated by the Supreme Court. See 10/26 Tr. 55:10-61:22 (Arcidiacono). SFFA largely acknowledged this—its post-trial brief only makes one reference to P112 and only references it for non-substantive matters. Dkt. 610 at ¶ 17.
of individual instances of discrimination becomes vital to the plaintiff's case.” *Id.* (quoting *Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 69 (D.C. Cir. 1982)).

Contrary to SFFA’s assertions of an Asian American “penalty,” *Students’* application files provide probative proof that Harvard is not intentionally discriminating against Asian Americans. The application files of Ms. Chen and Mr. Diep reflect positive references to their race by admissions officers. SA-1.0029-0030; SA-2.0002. Indeed, the same reader who commented on Mr. Diep’s “Vietnamese identity & pencils as tools” also effusively praised him for “pushing himself academically and personally.” SA-2.0002. Unable to rebut such evidence, SFFA instead suggests that anecdotal examples are “doomed to failure.” Dkt. 620 at ¶ 176. Certainly, it would be of limited probative value if Ms. Chen or Mr. Diep were cherrypicked exceptions to a general rule. But that is not what happened here. Harvard had no role in determining who the members of the *Student Amici* group are and which *Student Amici* would testify.22 Moreover, Ms. Chen and Mr. Diep are not merely “anecdotal examples”—they are among the only direct evidence of how Harvard evaluates Asian American applicants given SFFA’s overreliance on statistics as opposed individual applicants. *C.f. Int’l Bhd. of Teamsters*, 431 U.S. at 337 (proving disparate impact through statistical disparity which was bolstered through testimony of individuals who recounted over 40 specific instances of discrimination).

At best, the statistical evidence SFFA offered at trial goes to the discriminatory *impact* of Harvard’s practices rather than discriminatory *intent*. Statistical disparity is an important factor but rarely sufficient to establish discriminatory intent. *Arlington Heights*, 429 U.S. at 266. In order to prevail in a typical pattern or practice disparate treatment case, plaintiffs must prove that there is a disparity in selection rates (meaning that the selection rate of the group alleging

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22 In fact, *Student Amici* did not have the full admission files of any of the students at the time the trial witness designations were made.
discriminatory treatment is lower than that of the group allegedly receiving preferential treatment) and that the disparity was caused by an unlawful bias against members of the disadvantaged group. *Palmer v. Shultz*, 815 F.2d 84, 90 (D.C. Cir. 1987); *Burgis v. New York City Dep’t. of Sanitation*, 798 F.3d 63, 69 (2d Cir. 2015). But on the issue of selection rates, SFFA’s own expert Dr. Peter Arcidiacano reports that his preferred dataset (which excludes ALDC applicants) shows no statistically significant disparity between white applicant acceptance rates and Asian American applicant acceptance rates. Dkt. 419, Ex. 31 at 35. The difference is two-tenths of one percentage point (4.0% compared to 4.2%). *Id.* Thus, SFFA’s claim fails to meet the traditional statistical analysis test used for Title VII cases.

SFFA tries to get around the lack of statistical disparity in overall selection rates by essentially arguing that Asian American applicants, as a group, are more qualified than students of other races on “objective” criteria. Dkt. 620 at ¶¶ 24-28. SFFA relies on this assumption to argue Asian Americans should have *higher* acceptance rates than white students, rather than a rate that is relatively equal. Dkt. 620 at ¶ 36. SFFA tries to prove this point in two ways: through Dr. Arcidiacono’s descriptive statistics and his regression analysis.

SFFA’s descriptive statistics include a number of charts showing that when students are arranged by academic decile (which is entirely based on standardized test scores and grades), a lower proportion of Asian American applicants receive admissions offers, top overall scores, and top personal scores. PD38 at 16, 18, 21; Dkt. 620 at ¶¶ 24-37. But these descriptive charts do not provide meaningful information because they are predicated on a faulty presumption that academic scores should determine who is worthy of admission. It is wrong to conflate academic scores with merit. As discussed above and in *Students’* prior briefs, such scores are not purely

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23 10/16 Tr. 84:9-13 (Fitzsimmons).
“objective” as SFFA suggests but subject to their own biases that systematically undervalue the potential of African American, Hispanic, and other groups of students with less privilege and educational opportunity (including certain Asian American students). Dkt. 509 at 16-20; see also Dkt. 471 at 16-22; Dkt. 517 20-35. Nor are such academic scores an accurate predictor of college performance. Id. Moreover, it is unsurprising that academic scores alone do not determine admissions because Harvard’s applicant pool is full of academically excellent candidates. DX671.3 & DD10.4; DX672 & DD10.5; 10/30 Tr. 86:25-89:3 (Card). Due to the abundance of academically stellar applicants, applicants distinguish themselves through non-academic factors and by having multiple strengths.24 DX672 & DD10.6, DD10.8; 10/30 Tr. 88:12-89:3, 90:18-93:14 (Card).

It is similarly incorrect to presume there should be a meaningful correlation between applicants’ academic scores and their personal scores. The personal score assesses “what kind of positive difference this person had made to others in her school, outside her school, to her family. . . [how does this person] maximiz[e] the experiences of everyone around her.” 10/17 Tr. 224:23-225:2 (Fitzsimmons). It assesses qualities such as integrity, helpfulness, courage, kindness, reaction to setbacks, concern for others, self-confidence, leadership abilities, and maturity. 10/19 Tr. 228:24-229:17 (McGrath); 10/24 Tr. 117:4-24 (Banks). Logically, the presence of these personal qualities is not dependent on high academic scores; and statistically, there is a negligible relationship between them. 10/31 Tr. 51:12-52:9 (Card). In fact, Students have previously noted that a growing body of research shows that character skills (such as grit and conscientiousness) rival cognition in predicting educational attainment, and such skills do

24 For example, 42 percent of applicants receive high academic ratings (1 or 2), whereas only 24 percent have high extracurricular ratings, only 21 percent have high personal ratings and only 10 percent have high athletic ratings. 10/30 Tr. 87:17-88:6 (Card).
not necessarily move in the same direction as academic factors. Dkt. 509 at 17-18. Our Students provide further proof that academic scores alone do not define merit: Mr. Diep’s ability to “push his own boundaries” and his “infectiously happy personality” could not be captured by his “lower end” SAT scores. SA-2.0002, 0029.

Dr. Arcidiacono’s regression analyses fare no better. Both experts performed multivariate regression to evaluate the role of race in Harvard’s admissions process while holding all other variables constant. 10/25 Tr. 216:22-217:3 (Arcidiacono); 10/30 Tr. 101:15-17 (Card). Importantly, a regression analysis will inaccurately estimate the effect of race if it fails to include an input which impacts admission and correlates with race. 10/25 Tr. 102:23-103:13 (Arcidiacono); 10/30 Tr. 113:1-14 (Card). This problem—also known as omitted variable bias—poses a particular limitation for admission systems such as Harvard’s where there is a substantial amount of relevant information that is not captured by the dataset. 10/25 Tr. 80:13-24 (Arcidiacono); 10/30 Tr. 114:10-23, 123:1-17 (Card). The regressions that Dr. Arcidiacono performed on each rating likely suffer from this issue of omitted variables. The models showed each rating had some correlation with race: Asian Americans received stronger academic and extracurricular ratings than otherwise identical white applicants, while receiving weaker personal ratings. DX688.1& DD10.63; 10/26 Tr. 31:15-18, 33:25-34:3 (Arcidiacono); 10/31 Tr. 45:12-18 (Card). But since there are so many variables missing in the models, these variations may be attributable to a factor outside of the model rather than race. 10/31 Tr. 40:14-43:17 (Card). Dr. Card confirmed the low explanatory power of Dr. Arcidiacono’s regressions of the ratings: the models could only explain 29% of the student-to-student variation in the personal score, 57% of variation in the academic score, and 13% of the variation in the extracurricular score. Id. Consistent with these models’ low explanatory power, Dr. Arcidiacono concluded that factors
outside of the model—not race—explained the positive association between Asian American ethnicity and the academic rating. 10/25 Tr. 102:23-103:25 (Arcidiacono); 10/26 Tr. 35:21-36:8 (Arcidiacono). He reached the same conclusion for the extracurricular rating’s positive association with Asian American ethnicity. Id. But then he concluded that race—not factors outside the model—explained the negative association with Asian American ethnicity. 10/25 Tr. 95:11-96:12 (Arcidiacono). On this basis he removed the personal score entirely from his regression model. 10/25 Tr. 67:3-8, 82:4-9, 84:12-19 (Arcidiacono).

Students acknowledge that bias may manifest itself in different ways. But the fundamental problem with Dr. Arcidiacono’s approach is that it is inconsistent. All three models had relatively low explanatory power and all three showed some variation by race. There is no compelling reason to view the personal score as any more or less influenced by race than any of the other ratings, and thus no reason to treat it differently by removing it but leaving the academic and extracurricular ratings in the model.25 It is the removal of the personal score which allows Dr. Arcidiacono to find a statistically significant negative effect of Asian American ethnicity. Dkt. 620 at 26. Total exclusion of the personal score from the model is not appropriate.26

25 SFFA tries to differentiate the personal rating from the other ratings to show it is influenced by race. First, SFFA argues that race must influence the personal rating because its regression analysis shows the same pattern as the overall score. Dkt. 620 at ¶ 52. SFFA reasons that since the overall score considers race, the personal score must too. Id. But the fact that there is a similar pattern between the personal and overall rating is not suspect on its own. There are many non-racial reasons for why applicants who receive high personal scores would also receive high overall scores given that applicants often have to distinguish themselves through non-academic attributes. 10/31 Tr. 33:16-34:1 (Card). SFFA also argues that the personal score must be influenced by race because it is positively associated with African American and Hispanic ethnicity, but African American and Hispanic applicants have lower “observable” attributes. Dkt. 620 at ¶ 52. SFFA jumps to the conclusion that only race can explain the “discrepancy” between the direction of the personal rating and the direction of “observables.” Id. But this automatic presumption is not warranted. Many of the “observables” that Dr. Arcidiacono measures are academic. PD38.26; see also Dkt. 419, Ex. 35 at 83 n.44. As described previously, academic observables do not necessarily move in the same direction as personal attributes.

26 Students focus on the dispute over the personal score because SFFA has asserted “[t]he key difference between the experts is that Professor Card’s findings depend on including the personal rating in his models.” Dkt. 620 at ¶ 63. On the remaining statistical disputes between the experts, Students observe that their application files lend further support to Dr. Card’s contention that variables such as parent occupation, the athletic score, and an applicant’s intended career should be included in the model because admissions officers consider it. Dkt. 619 at ¶ 121. The admissions officer’s comments about Ms. Vasquez-Rodriguez specifically note her parents’ occupation
First, it seems likely that differences in the personal score are explainable by factors outside the model (rather than race) because the variables in the dataset bear little relevance to the personal score. 10/25 Tr. 23:16-24:12; PD38.26 (variables in model). As explained previously, the dataset’s academic variables are poor measures of personal attributes. The dataset’s non-academic variables also do not have a strong connection to particular character attributes (capturing information such as “docket indicators” and “intended major”). See PD38.26. Moreover, the data cannot capture the very concrete but unquantifiable strengths reflected by an applicant’s essays, non-required recommendations, and the extensive written commentary from teachers and interviewers. 10/30 Tr. 123:1-17 (Card). For example, the model does not account for Ms. Vasquez-Rodriguez expressing in her essay that she “crave[s] success in every aspect of my life because I want to be a role model for my community,” SA-3.0013; or Mr. Diep sharing in his essay about “his drive to chase after my dreams even if it meant facing hardships.” SA-2.0007. Yet, this non-quantitative evidence importantly factors into the personal score.

But perhaps more importantly, removing the personal score from the model altogether is problematic and unnecessary. That is because the personal score captures critical information about applicants’ strengths which is not captured by any other rating, such as their “integrity, helpfulness, . . . reactions to setbacks” and much more. Dkt. 619 at ¶ 46. It reflects important contributions that a student can make to campus and to the world; it also plays a large role in distinguishing candidates. Id; 10/31 Tr. 33:16-34:1 (Card). Instead, it is appropriate to adjust the model by removing the estimated effect of race from all ratings, including the personal

and her athletic success even though she was not a recruited athlete. SA-3.0002. See also SA-2.0005 (interviewer report commenting on Ms. Vasquez-Rodriguez’s career interests); SA-4.0001 (admissions officer’s commentary about Ms. Cole’s participation in tennis and her parents’ work with the IRS and ADT).
Dr. Card made such an adjustment and found there is no statistically significant effect of Asian American ethnicity on admission. DX694; DD10.83; 10/31 Tr. 80:13-81:17 (Card).27

Beyond its statistical analysis, SFFA’s proof of discriminatory intent is weak. Much emphasis is placed on Harvard’s OIR reports. Dkt. 620 at ¶¶ 118-27. It is true that data about racial differences should prompt investigation and reflection. However, these reports did not show anything new. From 1988-1990 the Office for Civil Rights performed a thorough investigation into concerns similar to those raised here: Asian Americans had “superior academic credentials” but their overall admissions rates and personal scores were lower than white applicants. P555.1, 21. The investigation concluded that Harvard was not discriminating against Asian Americans in the personal score or in its admissions process. P555.21-22, 25-26, 43-46. OCR concluded the difference in selection rates between white and Asian Americans could be explained by Harvard’s preferences for legacy students and athletes. P555.31-36. From this, Dean Fitzsimmons understood that the differences observed in the personal score and admissions rates for Asian Americans could be explained by factors other than intentional discrimination. 10/17 Tr. 91:5-18, 10/18 Tr. 130:23-131:5 (Fitzsimmons). Nevertheless, Dean Fitzsimmons did take steps to monitor the admissions rates for bias. Following OCR’s findings, Dean

27 The data does indicate that Asian American applicants may receive, on average, lower personal scores than white applicants. 10/18 Tr. 109:19-110:8 (Fitzsimmons). Students do not summarily conclude that Asian Americans are less strong on non-academic factors. Rather, it may be the case that admissions’ officers have less access to non-academic information about Asian Americans. See id. Consistent with the model minority myth, which both helps and harms Asian Americans, teachers and guidance counselors may unwittingly focus more on the academic qualifications of Asian American applicants and give short shrift to their personal attributes. Moreover, Asian American applicants themselves may avoid discussing the very experiences that would shed light on their personal qualities. Sally Chen testified that a counselor at her predominantly Asian high school told Asian American students that “writing an Asian immigrant story was overdone; that it was not compelling, not interesting, and would ultimately hurt . . . our applications.” 10/29 Tr. 200:18-23 (Chen). Although Ms. Chen disregarded this unsound advice, other students may take it to heart and deprive admissions officers of the very information they need to adequately assess applicants’ personal qualifications. After all, students like Ms. Chen and Mr. Diep who told their immigrant Asian stories authentically received strong personal ratings. SA-1, SA-2.
Fitzsimmons began to review statistics on the admission rates of white and Asian American non-legacy, non-athlete (“NLNA”) applicants, and he continues to do so today to ensure that Asian American applicants are treated fairly in the process. 10/18 Tr. 101:11-16, 105:6-12 (Fitzsimmons). The record shows that in many admissions cycles between 1990 and the present, the admission rate of Asian American NLNA applicants has been higher than that of White NLNA applicants. DX42; 10/18 Tr. 101:19-105:2 (Fitzsimmons). Therefore, the OIR reports, which showed that Asian Americans had lower personal scores and admission rates, did not provide any new information.28 See Dkt. 509 at 16-20; see also Dkt. 471 at 16-22; Dkt. 517 at 20-35.

SFFA’s remaining evidence, and lack thereof, does not prove discriminatory bias. Not only did SFFA fail to produce any live fact witnesses, it produced little from the hundreds of applicant files from which it had access. SFFA notes that a significant number of applications had the notation “standard strong.” But there is no material difference in the term’s application to Asian American versus white applicants. “[A]mongst the students who are labeled as standard strong, the sum of the ratings for Asian-American and white students is essentially the same.” 10/31 Tr. 95:24-96:2 (Card). SFFA also identified two instances where Asian applicants were referred to as “quiet” and “quiet and strong.” 10/18 Tr. 127:16-129:4 (Fitzsimmons). SFFA never links such references to racial discrimination, particularly when some African American, Hispanic, and White applicants are also described as “quiet,” as well as “shy” and “understated.” Dkt. 619 at ¶ 192 (quoting DX50.620, DX50.0975, DX50.1054). To further underscore that “quiet” is not an inherently pejorative term, Students note that the admissions officer reviewing

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28 Students urges Harvard to continue its efforts monitoring for bias. This includes ongoing efforts to monitor for bias in the personal score and it should also include serious reflection about the well-documented racial differences in SAT scores and other academic criteria which systematically disadvantage African American, Latinx, and other underrepresented minority students (including many Asian American subgroups).
Ms. Cole’s application file underlined the counselor’s comment that Ms. Cole (who is African American) possessed leadership “of the quieter, more subtle, variety.” SA-4.0031.

SFFA also never shows how Harvard’s admissions officers are actually implementing a plan to penalize Asian students. SFFA’s primary argument now appears to be that Harvard is acting with an unconscious bias against Asian American students. But SFFA has left this allegation underdeveloped. Surprisingly, it did not bring forth any witness to explain what an unconscious bias is, how it operates, or how the evidence here demonstrates that Harvard is acting with an unconscious bias that favors white applicants to the detriment of Asian American applicants.29

Altogether, SFFA’s intentional discrimination claim fails because it ignores probative evidence offered by our Students’ files, relies on faulty statistics and assumptions, and offers no persuasive evidence that Harvard is intentionally discriminating against Asian American applicants in favor of whites based on their race.

III. The remedy SFFA seeks is unmoored from its legal claims.

As described above, the record is clear that some consideration of race remains “necessary” for Harvard to achieve its educational objectives. Accordingly, well-settled precedent establishes that Harvard is entitled to consider race in admissions so long as certain conditions are met. See, e.g., Fisher II, 136 S. Ct. at 2210-11. Even if SFFA prevailed under either legal theory, it would not compel Harvard to entirely eliminate race-conscious admissions.

29 Perversely, SFFA’s section on “Non-Statistical Evidence Show[ing] that Harvard Discriminates Against Asian Americans” provides an out-of-context quote from Ms. Chen’s high school counselor—not Harvard—that “writing an Asian immigrant story” is “overdone . . . not compelling or interesting.” Dkt. 620 at ¶ 95 (quoting 10/29 Tr. 200:15-23 (Chen)). The effort to associate this statement with Harvard is blatantly misleading and altogether false. In fact, it was Harvard’s race-conscious admissions policy which helped counteract the negative messaging Ms. Chen received. As Ms. Chen shared, “when I wrote about my experiences growing up Chinese-American . . . I was, I think, very much seen and my story was heard . . . I think that it's truly incredible to have been seen and been heard for who I am and valued for it.” 10/29 Tr. 212:1-19 (Chen).
Supreme Court precedent confirms that a narrow tailoring violation would not permanently enjoin Harvard from considering race. In Bakke, the majority of justices struck down U.C. Davis Medical School’s race-conscious practice of reserving a certain number of seats for minority applicants because racial quotas offended the Constitution. 438 U.S. at 319-320. But the majority also held that the lower courts had erred by enjoining the medical school from “ever considering the race of any applicant”. Id. at 320. The Supreme Court reversed this permanent injunction on the grounds that the institution “has a substantial interest [in diversity] that legitimately may be served by a properly devised admissions program involving the competitive consideration of race.” Id. Similarly, in Gratz v. Bollinger, the Supreme Court struck down the University of Michigan’s race-conscious practice of automatically awarding 20-points to certain minority applicants, but notably refrained from permanently enjoining Michigan’s consideration of race. 539 U.S. 244 (2003). Bakke and Gratz illustrate that even if some aspect of Harvard’s race-conscious program offends the Constitution, it would not be prospectively prohibited from considering race given its substantial interest in diversity.

The same limitation applies to SFFA’s intentional discrimination claim: it would not justify a blanket ban on considering race in admissions. Bedrock remedial principles establish that relief “should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests.” United States v. Stokes, 124 F.3d 39, 44 (1st Cir. 1997) (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)). The prevailing consensus among leading social scientists is that countering racial bias requires fostering greater self-awareness and reflection around race, not “blindness” to it in a world where racial inequities are pervasive. See Dkt. 509

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30 SFFA cannot seriously contest that race-conscious measures would be the appropriate way to counter any systemic bias. It offered no witness testimony on countering bias, whether implicit or explicit. SFFA’s post-trial brief selectively quotes from Harvard’s Report on “Pursuing Excellence on a Foundation of Inclusion” to suggest Harvard could engage in practices similar to “blind grading” and “anonymiz[ing] resumes” to counteract bias. Dkt.
at 34-35 (discussing and referencing prevailing research on countering racial bias). As discussed in Students’ prior brief, SFFA’s intentional discrimination claim definitively does not warrant ending race-conscious admissions. Such an injunction would be both factually illogical and legally impermissible. See Dkt. 509 at 34-37.

Dated: January 9, 2019

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620 at ¶ 104. But these selective quotations are taken entirely out of context, and bear limited relevance to a holistic admissions policy. Researchers have concluded that holistic processes such as admissions are ill-suited to race-blind practices. Russell Pearce et al., Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships, 83 Fordham L. Rev. 2407, 2413 (2015) (finding that “overemphasizing individual outcomes without paying attention to the surrounding interactional and institutional processes that produce them” renders holistic evaluations “both incomplete and unjust”); see also Adam R. Pearson et al., The Nature of Contemporary Prejudice, Soc. & Personality Psychol. Compass, no. 3, 2009, at 13 (“[E]fforts to be colorblind can sometimes produce ‘rebound effects,’ causing biases to become activated even more.”); Maja Djikic et al., Reducing Stereotypes Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors, 15 J. Adult. Dev. 106, 110 (2008) (finding that encouraging people to actively think about the characteristics of certain groups of people reduced “stereotype-activated behavior” and, over time, could reduce discriminatory behavior).
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CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on January 9, 2019 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Lawrence Culleen

Lawrence Culleen
[CONDITIONAL] BRIEF OF AMICUS CURIAE ASIAN AMERICANS ADVANCING JUSTICE AND ORGANIZATIONS AND PROFESSORS SUPPORTING HOLISTIC ADMISSIONS POLICIES
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INTERESTS OF AMICI CURIAE

This brief is submitted by several member organizations of Asian Americans Advancing Justice (“Advancing Justice”), including the following nonprofit, nonpartisan organizations: Advancing Justice – Los Angeles, Advancing Justice – Asian Law Caucus, Advancing Justice – AAJC, Advancing Justice – Atlanta, and Advancing Justice – Chicago. Through litigation, direct legal services, policy advocacy, community outreach and education, and organizing, Advancing Justice’s mission is to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders (“AAPIs”) and other underserved communities.

Advancing Justice is joined in this brief by seventy-two civil rights groups, advocacy organizations, bar associations, business associations, academic institutions, student organizations, and other associations and organizations and twenty-one professors, including several based in North Carolina. See Exhibit A. Amici have longstanding histories of serving the interests of Asian Americans, Native Hawaiians, and Pacific Islanders. The undersigned Amici have a substantial interest in this case because they support race-conscious programs designed to improve equal access for all.¹ Amici recognize that AAPIs and other communities of color have fought together against racial discrimination and segregation and for greater equity and justice in this country. Amici

¹ National opinion polls consistently show that a majority of AAPIs are in favor of race-conscious programs. See Karthick Ramakrishnan & Janelle Wong, Survey Roundup: Asian American Attitudes on Affirmative Action, Data Bits (June 18, 2018), http://aapidata.com/blog/asianam-affirmative-action-surveys/.
recognize that AAPIs have obtained greater rights and opportunities in employment, contracting, and education because of historic civil-rights struggles led by other communities of color.\(^2\) Accordingly, Amici respectfully file this brief in opposition to Plaintiff’s Motion for Summary Judgment (Dkt. 158).

**INTRODUCTION**

Asian Americans have become central to the legal and public debate around race-conscious admissions.\(^3\) In moving for summary judgment, Students for Fair Admissions, Inc. (“SFFA”) notes that the University of North Carolina at Chapel Hill “holds Asian Americans to a higher academic standard” than underrepresented minorities,\(^4\) which includes African American, Latino, and Native American applicants.\(^5\)

Amici reject this contention.

First, there is no evidence that UNC holds Asian Americans to a higher academic standard than underrepresented minorities or that Asian Americans are disadvantaged by UNC’s race-conscious holistic admissions policy. Second, eliminating the consideration


\(^4\) Dkt. 159 at 7 & n.2.

\(^5\) Pursuant to a 1981 consent decree between the UNC system and the United States Department of Health, Education, and Welfare, UNC defines underrepresented minorities as racial groups whose percentage enrollment in the UNC undergraduate study body is lower than their percentage within the general population in North Carolina. Dkt. 163-5 at 8.
of race will not address the needs of underrepresented Asian American sub-groups, and no reasonable race-neutral alternatives exist.

Amici support the promise of integrated and equal public education set forth in Brown v. Board of Education\(^6\) and believe that eliminating the consideration of race would be devastating to all communities of color, including AAPIs.

I. UNC’s Nuanced View of Test Scores Does Not Hold Asian Americans to a Higher Academic Standard than Underrepresented Minorities

SFFA asserts that UNC holds Asian Americans to a higher academic standard than underrepresented minorities because UNC considers context when evaluating standardized test scores.\(^7\) Because Asian Americans have higher average test scores than underrepresented minorities, SFFA assumes that this practice disadvantages Asian Americans.\(^8\)

But SFFA’s argument is only as solid as the test scores upon which it is based. In fact, test scores are neither good indicators of academic ability nor race-neutral. The predictive limitations and inherent racial biases of standardized tests are well-documented

\(^6\) 347 U.S. 483 (1954).
\(^7\) See Dkt. 159 at 7 n.2 (citing EX73 207:4-24) (offering testimony by admissions officer regarding consideration of test scores when reading applications); id. at 10 (noting use of SAT scores in recruiting); id at 12 (noting SAT score gap between Asian American admits and African American admits).
\(^8\) Id. at 7 n.2.
by social scientists\textsuperscript{9} and have been acknowledged by the courts.\textsuperscript{10} UNC’s use of test scores as part of a holistic review does not hold Asian Americans to a higher academic standard; it merely levels the playing field for underrepresented minorities who would otherwise be unfairly disadvantaged.

\section{A. Standardized test scores fail to predict academic potential or future success}

Numerous studies show that test scores fail to predict success beyond first-year college grades.\textsuperscript{11} For example, the leading study on U.S. graduation rates found that test scores have no statistically significant effect on college graduation rates—a far better measure of academic success than first-year grades.\textsuperscript{12} Another study of law-school

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\textsuperscript{10} See, e.g., \textit{DeFunis v. Odegaard}, 416 U.S. 312 (1974) (Douglas, J., dissenting) (noting that “there is no clear evidence that the LSAT and GPA provide particularly good evaluators of the intrinsic or enriched ability of an individual to perform as a law student or lawyer”); \textit{Fisher v. Univ. of Tex. at Austin}, 758 F.3d 633, 647 (5th Cir. 2014) (noting the importance of race in UT Austin’s holistic admissions policy because the test score gaps between minority and non-minority applicants would otherwise make holistic admissions “an all-white enterprise”), aff’d, 136 S. Ct. 2198 (2016); \textit{Grutter v. Bollinger}, 288 F.3d 732, 771 (6th Cir. 2002) (Clay, J., concurring) (noting that the record indicated “that LSAT scores are neither race-neutral or gender-neutral criteria for admissions decisions”), aff’d, 539 U.S. 306 (2003).
\end{flushleft}
graduates determined that a combination of LSAT scores and undergraduate GPA failed to predict career success, as measured by income, satisfaction, and service contributions.\(^\text{13}\)

Additionally, some studies have found that SAT test scores’ predictive value is limited even for first-year college grades. For example, analyses of the University of California system have shown that SAT scores explain less than two percent of the variance in first-year grades and are largely redundant of other information provided through the holistic application process.\(^\text{14}\) In short, overreliance on SAT scores to compare and rank similar students incorrectly predicts who will ultimately perform well in college and beyond, particularly for students of color.\(^\text{15}\)

**B. Racial biases cause disparities in test scores for underrepresented minorities independent of socioeconomic disadvantage**

On average, African American, Latino, Native American, and certain AAPI ethnic groups have lower standardized test scores than white students.\(^\text{16}\) Unfortunately, these test scores are disproportionately low due to racial bias.

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score gaps are continuing to grow as our school system re-segregates.\textsuperscript{17} The racial disparities in standardized tests are often attributed to socioeconomic factors because students of color are disproportionately low-income and cannot afford expensive test-preparation courses that inflate scores for wealthier students.\textsuperscript{18} These students are also more likely to be taught by less-skilled or less-experienced teachers,\textsuperscript{19} attend schools in distressed neighborhoods or suburban areas where they are socially isolated,\textsuperscript{20} and be unfairly assigned to lower academic tracks throughout their elementary and high school years,\textsuperscript{21} all of which are factors that contribute to poor test-readiness and lower

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\textsuperscript{17} Geiser, \textit{supra} note 14 at 5–6 (explaining the correlation between growing school segregation in California and the expanding test score gap for black and Latino students).


performance on standardized tests. However, socioeconomic disadvantage does not adequately explain the racial disparities in standardized testing on its own.\textsuperscript{22} Instead, “race has a large, independent, and growing statistical effect on students’ SAT/ACT scores after controlling for other factors. Race matters as much as, if not more than, family income and parents’ education in accounting for test-score difference.”\textsuperscript{23} For example, one factor contributing to the role that race plays in creating the testing gap is “stereotype threat,” which artificially lowers test scores for students of color who internalize messages that they are intellectually inferior.\textsuperscript{24}

The significant effect of race on SAT/ACT scores reflect the inherent racial bias in the development of standardized tests.\textsuperscript{25} According to test expert Jay Rosner:

Each individual SAT question . . . is required to parallel the outcomes of the test overall. So, if high-scoring test-takers—who are more likely to be white (and male, and wealthy)—tend to answer the question correctly in pretesting, it’s a worthy SAT question; if not, it’s thrown out. Race and ethnicity are not considered explicitly, but racially disparate scores drive question selection, which in turn reproduces racially disparate test results in an internally reinforcing cycle.\textsuperscript{26}

\textsuperscript{22} Geiser, \textit{supra} note 14 at 3.
\textsuperscript{23} \textit{Id.}
Because the very process of test construction favors test questions that white test-takers answer correctly more often than black test-takers,\textsuperscript{27} it is dangerous to take standardized test scores at face value without recognizing the racial context of those scores.

At bottom, “[a] combined score of 1000 on the SATs is not always a 1000. When you look at a Striver [a student disadvantaged in the testing process by socioeconomic status, race, or other factors] who gets a 1000, you’re looking at someone who really performs at a 1200.”\textsuperscript{28}

C. UNC considers the context of achievement on standardized tests to provide a fair appraisal of academic potential

According to the \textit{National Standards for Educational and Psychological Testing} developed by the American Educational Research Association, Psychological Association, and National Council on Measurement in Education, disparities between groups in test scores should “trigger heightened scrutiny for possible sources of test bias.”\textsuperscript{29} These standards encourage universities to mitigate the adverse impact of biased tests, which often involves taking race, ethnicity, and socioeconomic status into consideration when evaluating a student’s test scores\textsuperscript{30}—which is precisely what UNC does.

\textsuperscript{27} Id. (noting that out of 276 SAT questions, none favored black test-takers even though such questions were pre-tested).

\textsuperscript{28} Geiser, \textit{supra} note 14 at 6.

\textsuperscript{29} Id.

\textsuperscript{30} Id. at 13.
UNC explicitly recognizes the limitations of standardized test scores.\textsuperscript{31} As a result, admissions officers consider test score gaps for underrepresented minorities, first-generation applicants, and students from lower socioeconomic backgrounds when reading applications.\textsuperscript{32} This accords with industry best practices.

By putting test scores in their proper place, UNC is able to consider a wider, more diverse range of candidates who have other characteristics that are better predictors of college and career success than test scores. Indeed, a growing body of empirical research shows that character skills rival cognition in predicting educational attainment.\textsuperscript{33} For example, a 2007 study found that a lower SAT score is associated with a greater degree of “grit,” which in turn, is associated with a higher GPA at an elite institution.\textsuperscript{34} Another study concluded that conscientiousness and a willingness to work hard matter more than

\textsuperscript{31} See Dkt. 155-4 at 7 (specifying in the Reading Document that results from standardized tests must be “viewed in light of the documented strengths and limitations of these tests”); id. at 9 (stating that “[a]ssessment of disadvantage” must “inform the University’s interpretation of the candidate’s scores on standardized tests and other academic indicators”).

\textsuperscript{32} See Dkt. 167-7 at 20. See Honadle v. Univ. of Vt. & State Agric. Coll., 56 F. Supp. 2d 419, 427–28 (D. Vt. 1999); see also Weser v. Glen, 190 F. Supp. 2d 384, 399–400 (E.D.N.Y.) (holding that where the admissions policy does not seem to subject applicants to different standards, recruiting efforts that seek to be inclusive of certain races do not run afoul of the law), aff’d, 41 F. App’x 521 (2d Cir. 2002).


\textsuperscript{34} Angela L. Duckworth et al., Grit: Perseverance and Passion for Long-Term Goals, 92 J. of Personality & Soc. Psychol. 1087, 1093 (2007).
SAT scores and high school GPA in predicting college GPA.\textsuperscript{35} Thus, UNC’s holistic race-conscious admissions process allows for the recognition of individual applicants’ whole-human dignity and unique qualifications in a way that lifeless numbers could never do.

\textbf{D. UNC’s consideration of context to evaluate standardized test scores does not harm Asian Americans}

UNC’s consideration of context to evaluate standardized test scores does not disadvantage anyone, including Asian Americans, because it merely cures “established inaccuracies in predicting academic performance.”\textsuperscript{36} A higher test score is a poor predictor of a person’s ultimate capacity to be successful at UNC and does not—and should not—entitle anyone to admission at UNC or any other selective university. In fact, UNC explicitly rejects the notion that its goal is “to maximize the average SAT score or the average eventual GPA of the entering class.”\textsuperscript{37} Instead, UNC employs a holistic admissions process that “consider[s] each person as a unique and complex human being” and seeks to enroll “accomplished and capable students who are diverse in all ways.”\textsuperscript{38}

Under UNC’s holistic admissions process, SAT scores by themselves explain less than twelve percent of admissions decisions.\textsuperscript{39} Therefore, the fact that Asian American admits to UNC have SAT scores that are higher than African-American admits\textsuperscript{40} is

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{37}Dkt. 155-4 at 5.
\item \textsuperscript{38}Dkt. 154-4 at 6.
\item \textsuperscript{39}Dkt. 154-22 at 24.
\item \textsuperscript{40}See Dkt. 159 at 12.
\end{enumerate}
\end{footnotesize}
immaterial. Even if UNC did not consider race when evaluating SAT scores, the test score gap would remain, as it did at UC Berkeley and UCLA after Proposition 209 banned the consideration of race in the admissions process.\textsuperscript{41} SFFA’s own expert conceded that Asian Americans have the highest admission rate of any racial group for in-state residents,\textsuperscript{42} which is inconsistent with any suggestion that UNC’s race-conscious admissions process disfavors Asian Americans.\textsuperscript{43}


\textsuperscript{42} See Dkt. 160-1 at 23 (reporting that for in-state applicants, Asian Americans have a 53.56% admission rate, compared to 30.53% for African Americans, 40.96% for Hispanics, and 48.10% for Native Americans). The appropriate inquiry in this case is to examine the way that North Carolina residents are impacted by its admissions policy. For example, UNC’s Code of the Board of Governors caps out-of-state enrollment at no more than eighteen percent. \textit{See also} N.C. Gen. Stat. § 116-1(b) (dictating that UNC is “dedicated to the service of North Carolina and its people”); \textit{Rosenstock v. Bd. of Governors of the Univ. of N.C.}, 423 F. Supp. 1321, 1323 (M.D.N.C. 1976) (“Because the University is a State institution, created for and supported by the bona fide residents of North Carolina, in-state students should be insured a place at the State school insofar as possible.”).

\textsuperscript{43} According to SFFA’s expert, a male, non-first-generation, Asian American applicant with a twenty-five percent chance of admission would more than double if his race were switched to Latino and more than triple if he were African American. Dkt. 159 at 23, 35–36. These statistics are highly misleading because they (1) do not mirror the actual holistic admissions process, (2) overemphasize the role of racially biased criteria like test scores, and (3) focus on a small group of applicants for whom race makes the most difference in admission, thus improperly magnifying the impact of race. Dkt 154-23 ¶¶ 53–61. Most problematic, however, is SFFA’s assumption that an individual’s race can be changed without impacting everything else about their life experiences. A non-first-generation Asian American male is much less likely to be racially profiled, tracked to less rigorous academic classes, subjected to school discipline, and internalize stereotypes that depress academic performance than a non-first-generation African American male. Race permeates every aspect of our lives and is not reducible to an “on/off” switch. Therefore, Arcidiacono’s race-switching analysis is not entitled to any evidentiary weight.
II. Eliminating the Consideration of Race Will Not Address the Needs of Underrepresented Asian Americans and Pacific Islanders

SFFA contends that UNC’s admission system treats Asian Americans as a monolithic block of similar applicants. In fact, it is SFFA’s position that would elide the important distinctions among AAPIs. As Amici well know, AAPIs are a uniquely heterogeneous racial group. Contrary to the popular and insidious misconception that AAPIs are universally successful in the education context, many Southeast Asian, Native Hawaiian, and Pacific Islander subgroups suffer from school segregation, inadequate

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44 See Dkt. 159 at 7 n.2 (“Although Asian Americans comprise numerous ethnicities, UNC views them as an undifferentiated mass of ‘majority’ students.”).
45 Robert T. Teranishi et al., The Data Quality Movement for the Asian American and Pacific Islander Community: An Unresolved Civil Rights Issue, in Race, Equity, and Education: Sixty Years from Brown 139, 142 (2015) (“[D]isaggregated data on the AAPI population reveal a wide range of demographic characteristics that are unlike those of any other racial group in America with regard to their heterogeneity. According to the U.S. Census Bureau, the AAPI racial category consists of forty-eight different ethnic groups that occupy positions along the full range of the socioeconomic spectrum, from the poor and under-privileged, to the affluent and highly skilled.”).
preparation for college, standardized test score gaps, and other barriers to higher education. When AAPIs are viewed as a homogeneous group, the needs of the most underserved AAPIs are obscured.

SFFA misses this important detail. Its proposed remedy of eliminating race from the admissions process would only further disadvantage the most marginalized AAPIs in UNC’s admissions process. The most under-served AAPIs need race-conscious admissions policies and disaggregated data to achieve educational equity for all AAPIs in North Carolina and across the United States.

A. Aggregated data obscures the needs of underrepresented Asian Americans and Pacific Islanders in North Carolina

Asians and Asian Americans do not qualify as underrepresented minorities because they represent eighteen percent of the undergraduate student body at UNC, even though


49 See generally Asian American, Native Hawaiian, Pacific Islander Report, supra note 47.

50 See generally id.

Asians only represent 3.1% of the population in North Carolina. However, this aggregated data very likely obscures underrepresentation of particular AAPI subgroups.

AAPI communities in North Carolina are extremely diverse. The largest AAPI ethnic group is the Asian Indian community, followed by the Chinese, Vietnamese, and Filipino communities. North Carolina is also home to significant ethnic minority communities from Southeast Asia, such as the Montagnard community from Vietnam and the Hmong community, many of whom settled in North Carolina as refugees. As of the last census, more than 6,600 Native Hawaiians and Pacific Islanders lived in North Carolina. The most commonly spoken Asian languages in North Carolina are Chinese (including Mandarin, Cantonese, and other varieties of Chinese language), Vietnamese, and Arabic. Thirty percent of Asian Americans in North Carolina report speaking English less than “very well,” with some subgroups reporting much lower levels of English proficiency, such as the Vietnamese community, fifty percent of whom report speaking

54 Id. at 10–11.
56 Institute for Southern Studies et al., supra note 53, at 11.
English less than “very well.”  

AAPIs in the state also practice a range of religions including Buddhism, Hinduism, Islam, Sikhism, and Christianity.

These diverse AAPI communities in North Carolina experience varying economic and educational barriers. For example, according to the 2011–2015 American Community Survey, Hmong, Korean, Pakistani, and Cambodian Americans had a higher rate of poverty than an average of 13.5% for Asian Americans overall, with Pakistani Americans experiencing a 27% rate of poverty. Additionally, only between 58 and 75% of Cambodian, Laotian, Vietnamese, and Hmong Americans in North Carolina have a high school diploma, compared to over 85% of North Carolinians overall who have a high school diploma. Only about 7.8% of Cambodian Americans, 14.3% of Hmong Americans, 9.2% of Laotian Americans, and 18% of Vietnamese Americans have a bachelor’s degree or higher in North Carolina, compared to 28.4% for the state overall.

Although disaggregated admissions data for North Carolina is not available, studies from other regions have found substantial disparities in representation in admissions as

57 Id. at 15.
58 Id. at 11.
60 U.S. Census Bureau, American Community Survey, Table B17001: Poverty Status in the Past 12 Months by Sex by Age, 2011–2015.
62 U.S. Census Bureau, American Community Survey, Table S1501, Educational Attainment, 2011–2015.
63 U.S. Census Bureau, American Community Survey, supra note 61.
64 U.S. Census Bureau, American Community Survey, supra note 62.
well. For example, a 2015 study of California’s AAPI population revealed
underrepresentation of Filipinos, Native Hawaiians, Samoans, Guamanians, and Fijians in
the University of California system compared to their percentage of California’s AAPI
population.65 A 2013 study of UCLA admission rates found that some AAPI sub-groups,
such as Hmong, Bangladeshi, Filipino, Thai, Cambodian, Indonesian, and Pakistani, have
significantly lower admit rates than the average for all AAPIs.66 The same study similarly
showed significant disparities in the representation of AAPI sub-groups at UC Berkeley
relative to their proportional representation in the state. For example, Southeast Asians
(Laotians, Cambodians, Hmong, and Vietnamese), Filipinos, Pacific Islanders (Samoans,
Guamanians, Tongans, and Native Hawaiians) are all underrepresented in UC Berkeley’s
applicant pool.67

B. Eliminating the consideration of race will disadvantage the most
marginalized Asian American and Pacific Islander applicants

SFFA tries to paint Asian Americans as victims of UNC’s race-conscious
admissions policy, but its requested remedy of eliminating race completely from the
admissions process—to make it impossible to discern the race or ethnicity of any
applicant68—will be extraordinarily detrimental for AAPIs, particularly the most
marginalized AAPIs in North Carolina. Eliminating the consideration of race would not
make UNC’s admissions process race-neutral; it would only serve to reinforce racial

66 See Teranishi et al., supra note 16, at 17.
67 Id. at 16.
68 Dkt. 1 at 64.
segregation and widen the existing racial disparities in educational opportunity for students of color, including many AAPIs.

Nor would a strictly class-conscious admissions system be an adequate alternative, because class is not a sufficient proxy for race to understand “each person as a unique and complex human being”\(^{69}\) or to achieve comparable levels of racial diversity.\(^{70}\) SFFA’s proposal—“a multi-faceted socioeconomic preference”\(^{71}\)—would reduce Asian American representation at UNC, increase racial disparities, and result in a more racially hostile campus for all students of color, including AAPIs. Against the backdrop of biased test scores and unequal distribution of prior educational opportunities, this alternative is neither race-neutral nor workable.

First, UNC cannot possibly accomplish its goal “to understand [each] candidate individually, comprehensively, and holistically,” without the consideration of race. Race is a unique and inextricable aspect of a person’s identity for which there is no substitute. As one student testified in *SFFA v. Harvard*:

\(^{69}\) See Dkt. 154-4 ¶ 14.

\(^{70}\) Although inquiry in this area has relied upon different methodologies and samples, the results are the same—specifically, class-based admissions policies cannot substitute for race-based ones when it comes to ensuring racial diversity. See generally William C. Kidder, *How Workable Are Class-Based and Race Neutral Alternatives at Leading American Universities?*, 64 UCLA L. Rev. 100 (2016), https://www.uclalawreview.org/wp-content/uploads/2016/06/Kidder-D64-update.pdf. In his analysis, William Kidder concludes: “The weight of social science research . . . supports the conclusion that socioeconomic status is not an effective alternative to race-conscious measures with respect to undergraduate diversity at selective colleges and universities in the United States.” *Id.* at 131.

\(^{71}\) Dkt. 159 at 39.
Race-blind admissions is active erasure. To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race. And because of that, it would be nearly impossible for me to try to explain my academic journey to try to explain my triumphs without implicating my race.\(^{72}\)

The same is true for Asian American students, like Sally Chen, a Chinese-American Harvard student who testified, “Being Chinese-American, being the daughter of Chinese immigrants . . . [and] how I navigated being a translator and advocate. That was so fundamental to my background and my story, my identity, that I don’t think I could have left it out.”\(^{73}\) Thang Diep, a Harvard senior who immigrated to the United States from Vietnam when he was eight years old wrote his college essay about rejecting his Vietnamese identity after being bullied as a child and then learning to embrace his ethnic identity as he began to understand institutionalized racism in high school. He testified: “[T]o portray my growth authentically and really show . . . the admission officer [who] I really am . . . [was] crucial for me to . . . share this journey of not just learning English, but this journey of rejecting and erasing my own identity [that is] . . . such a huge part of who I was when applying and still who I am now.”\(^{74}\)


\(^{73}\) \textit{Id.} at 13.

\(^{74}\) \textit{Id.} at 12.
Second, the educational benefits of diversity cannot be achieved when socioeconomic diversity is substituted for racial diversity.⁷⁵ Models that rely exclusively on class-based affirmative action perform poorly in terms of ensuring racial diversity, such that “even relatively aggressive [socioeconomic status]-based affirmative action policies do not mimic the effects of race-based policies on racial diversity.”⁷⁶ This is evident in SFFA’s preferred model, which reduces Asian American representation in favor of greater white representation in SFFA’s simulation.⁷⁷ This is not an adequate alternative because it fails to “promote [the university’s] interest in the educational benefits of diversity” as effectively as UNC’s current race-conscious admissions policy.⁷⁸ In fact, a 2015 study of multiple colleges revealed that an admissions scheme that gives significant weight to both race and class—as UNC’s policy does—results in more class diversity than one that relies on class alone. The authors write that, “In tandem, race and [socioeconomic status]-based policies seem to improve both race and [socioeconomic] diversity beyond what is achieved using either plan in isolation.” Although these results are perhaps initially surprising, they underscore the fact that students cannot be reduced to simply race or class. Considering both in relation to one another most closely resembles the actual lived experience of students and better informs their likely enrollment decisions.

⁷⁵ See generally Julie Park, Is Class-Based Affirmative Action the Answer, in Race on Campus: Debunking Myths with Data 49, 49–70 (2018).
⁷⁷ Dkt. 159 at 39–40.
⁷⁸ Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016).
Third, some race-neutral alternatives—like those proposed by SFFA—rely on standardized tests, such as the SAT and ACT, which are known to be racially biased. As discussed in detail above, while standardized admissions tests may appear race-neutral on their face, they are not. For reasons related to sampling, testing, and design, standardized tests “guarantee[] the lower performance of African Americans and Chicanos on the SAT.”79 Therefore, racial disparities in admissions at UNC would increase if UNC did not consider race. Although AAPIs tend to have high test scores in the aggregate, there are tremendous disparities in SAT scores among AAPI sub-groups. For example, a 2013 study of SAT scores in Asian ethnic enclaves showed that test-takers in Chinese ethnic enclaves scored an average of 1656, whereas Hmong and Filipino enclaves averaged 1174 and 1208, respectively.80 In Alhambra, California, a city that is predominantly Chinese, about seventy percent of test takers scored more than 1500 on their SAT; in contrast, in a predominantly Hmong ethnic enclave in Sacramento and a predominantly Filipino ethnic enclave in Daly City, only 7.6% and 12.8% of test-takers respectively achieved the same results.81 Under SFFA’s race-blind models, the most marginalized AAPIs will experience even more structural barriers to admission while also losing the tools to demonstrate their unique contributions to diversity.82

79 Kidder & Rosner, supra note 25, at 156.
80 Teranishi et al., supra note 16, at 18.
81 Id.
Fourth, numerous studies have documented the negative impact on campus climate when a race-conscious admissions policy is eliminated. AAPIs are not immune from these impacts. A recent empirical study reported that AAPI students experienced direct racial hostility in the forms of racial bullying, racial slurs, and racial profiling, as well as indirect intimidation as a result of witnessing racist acts directed towards other students of color. Studies show that colleges and universities that reach the highest levels of diversity have fewer incidents of racial hostility. AAPI students also reported experiencing pressure to segregate from or assimilate to the dominant White culture, feeling silenced in

explains that Harvard’s consideration of race allowed her to “break through the model minority myth” and “present [her]self as a whole person—beyond stereotypes—in a way that flat numbers could not”); Young Jean Lee, I’m Asian-American. Affirmative Action Worked for Me, N.Y. Times (Feb. 9, 2019) https://www.nytimes.com/2019/02/09/opinion/sunday/im-asian-american-affirmative-action-worked-for-me.html (recounting the story of Broadway’s first Asian American woman playwright, who attributes her college admission to the English department’s recognition of the diversity she would bring to the department, notwithstanding her low SAT scores).

83 See, e.g., Kidder, supra note 41, at 56–70.
85 See, e.g., id. at 557–58 (discussing how a hate crime against a Black student and incidents involving other Asian American students made one student feel that “[i]t’s pretty scary to be a minority around here sometimes”).
academic exchanges and campus spaces, and suffering from stereotyping as a perpetual foreigner or model minority. These experiences are exacerbated when universities do not consider and value race.

In sum, SFFA’s effort to dismantle UNC’s race-conscious admissions program would destroy racial diversity and exacerbate the disadvantages that the most underserved AAPIs already face in the admissions process. A more nuanced approach to AAPI prospective students, which uses disaggregated data in tandem with UNC’s existing race-conscious admissions policy is the best path to serving the diverse AAPIs in North Carolina.

CONCLUSION

Amici reject SFFA’s efforts to dismantle UNC’s race-conscious admissions program, which has increased educational opportunities for diverse North Carolinians, including Asian Americans. UNC appropriately considers context—including the racial biases inherent in standardized test scores—when evaluating applicants. This does not give an unfair preference to underrepresented minorities. Rather, UNC’s race-conscious admissions process is only a small effort to level a playing field that is still stacked against underrepresented minorities. Moreover, neither race nor test scores predominate in UNC’s holistic admissions process. Amici also reject SFFA’s class-based alternatives to the consideration of race, which will undermine UNC’s holistic admissions process, reduce racial diversity, and harm campus climate for everyone, including AAPIs. Amici recognize that these alternatives will harm, rather than benefit the most underrepresented AAPI
subgroups in North Carolina and refuse to be used as a weapon to limit opportunities for their African American, Latino, and Native American brothers and sisters.

This the 4th day of March, 2019.

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STATEMENT PURSUANT TO L.R. 7.5(D)

Amicus Asian Americans Advance Justice represents that (1) no party’s counsel authored the brief in whole or in part, (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief, and (3) no person—other than amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

This the 4th day of March, 2019.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg
CERTIFICATE OF WORD COUNT

This is to certify that the foregoing brief contains fewer than 6,250 words, after excluding the caption, signature lines, and certificate of service. Therefore, the foregoing brief complies with the length limitations set by Local Rule 7.3(d). The basis for this certification is the word count feature of the word processing software used to prepare this brief.

This the 4th day of March, 2019.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg
Exhibit A: Full List of Amici Curiae Joining Asian Americans Advancing Justice

Organizations

1. 18MillionRising.org

18MillionRising.org (18MR.org) brings Asian American communities together online and offline to reimagine Asian American identity with nuance, specificity, and power. It is using this Asian American identity as the foundation to build a more just and creative world where Asian American experiences are affirmed, their leadership is valued, and all of them have the opportunity to thrive. Using technology and popular culture, 18MR.org develops new ways for Asian Americans and allies to collaborate, create new ways of being, and transform the world around them. 18MR.org utilizes digital-first advocacy tactics to elevate the voices of and mobilize its over 120,000 members to take action on issues that matter to them. 18MR.org creates meeting places online where young Asian Americans can deliberate together about what it means to be Asian American in the 21st century.

2. AAPIs for Civic Empowerment Education Fund

AAPIs for Civic Empowerment Education Fund is a network of grassroots AAPI organizations working to advance policies, campaigns, and issues that support low-income Asian American and Pacific Islanders (AAPIs). AAPIs for Civil Empowerment EF believes that increased civic participation amongst AAPIs is critical to ensure political representation and achieve genuine democracy. AAPIs for Civil Empowerment EF believes that race-conscious policies are critical to underserved and underrepresented AAPI communities.

3. After Bruce

After Bruce is a PR and marketing firm committed to the advancement of AAPI and other underrepresented communities in the media landscape. After Bruce believes in the power of independent filmmakers, community-minded organizations, and socially conscious businesses to elevate voices, influence audiences, and impact the most pressing issues AAPIs face.

4. American Citizens for Justice

American Citizens for Justice is a 501(c)(3) civil rights advocacy organization dedicated to protecting the civil rights interests for Asian Americans among all Americans.
5. American Muslim Voice Foundation

The mission of American Muslim Voice Foundation is to foster friendships among all Americans by bridging cultural and religious gaps. The organization works towards protecting and preserving civil liberties and constitutional rights for all.

6. Asian Pacific Islander Americans for Civic Empowerment (APACE)

Asian Pacific Islander Americans for Civic Empowerment (APACE) in Washington strives to increase access and participation in electoral and civic affairs by registering, educating, and protecting APIA voters. APACE stands in unequivocal support of affirmative action in Washington state and across the nation.

7. API Equality – Northern California

API Equality - Northern California works to build LGBTQ API power through training and developing new leaders, establishing intergenerational connections, and documenting and disseminating our histories. APIENC is committed to racial justice and solidarity with all people of color.

8. Arab American Action Network

The Arab American Action Network (AAAN) strives to strengthen the Arab community in the Chicago area by building its capacity to be an active agent for positive social change. As a grassroots nonprofit, AAAN’s strategies include community organizing, advocacy, education, providing social services, leadership development, cultural outreach, and forging productive relationships with other communities. AAAN’s vision is for a strong Arab American community whose members have the power to make decisions about actions and policies that affect their lives, and access to a range of social, political, cultural, and economic opportunities in a context of equity and social justice.

9. Arizona Asian & Pacific Islander American VoteTable

Arizona Asian & Pacific Islander American VoteTable works to advance justice, fairness, and equal opportunity for all Americans through voting advocacy.

10. Asian & Latino Solidarity Alliance of Central Virginia

The Asian & Latino Solidarity Alliance of Central Virginia is a non-profit, non-partisan organization based in Central Virginia whose mission is to advance common objectives impacting the Asian and Latino communities. The alliance strives for equitable representation, visibility, and access to economic and social programs that enrich their lives. The alliance acts as the connective tissue between the various community groups within the Central Virginia multicultural community. The alliance engages in partnerships
with community, faith-based, local government, and business groups to amplifier their voices; connect and support their work; and empower and engage current and future leaders.

**11. Asian American Legal Defense and Education Fund**

The Asian American Legal Defense and Education Fund (“AALDEF”), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF protects the rights of Asian Americans and supports educational equity in higher education. AALDEF has an interest in this litigation because its work with community-based youth advocates across the country has revealed that Asian American students benefit from individualized race-conscious admissions policies as well as from diverse educational settings. AALDEF opposes any cap, quota, or negative action against Asian Americans. However, AALDEF believes that narrowly tailored, individualized admissions programs strongly benefit the Asian American community. AALDEF has filed amicus curiae briefs in several higher education affirmative action cases including *Fisher I & Fisher II*.

**12. Asian American Political Alliance (AAPA), University of California, Berkeley**

AAPA stands in solidarity with all oppressed peoples nationally and internationally fighting for self-determination in their communities and respective countries. AAPA rejects racist attempts to divide Asian Americans and Third World peoples from their common struggle for real equality.

**13. Asian Community Development Council (ACDC)**

The mission of the Asian Community Development Council (ACDC) is to improve the general well-being and education of the Asian, Pacific Islander and other ethnic communities in Nevada. ACDC’s goal is to educate, connect, and empower our youth.

**14. Asian Counseling and Referral Service**

ACRS promotes social justice and the well-being and empowerment of Asian Americans and Pacific Islanders and other underserved communities—including immigrants, refugees, and American-born—by developing, providing, and advocating for innovative, effective, and efficient community-based multilingual and multicultural services.
15. **Asian Law Alliance**

The Asian Law Alliance, founded in 1977, is a non-profit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California.

16. **Asian Pacific American Bar Association of Los Angeles County**

The Asian Pacific American Bar Association of Los Angeles County, formed in 1998, advocates on issues that impact the AAPI community and is committed to civil rights, racial justice, and equal opportunity. APABA-LA opposes initiatives designed to deprive immigrants, people of color, and other minorities of their civil rights, and advocates for equal treatment and opportunity in education for AAPIs and all people of color.

17. **Asian Pacific American Labor Alliance (APALA), AFL-CIO**

Founded in 1992, the Asian Pacific American Labor Alliance (APALA), AFL-CIO, is the first and only national organization of Asian American and Pacific Islander (AAPI) workers and allies. APALA works to advance worker, immigrant and civil rights. APALA is committed to defending race-conscious admission because 76% of Asian Americans support policies that increase educational opportunities for women and minorities. These policies are crucial for AAPI workers to gain access to educational opportunities for their youth.

18. **Asian Pacific Policy and Planning Council**

As a coalition of forty community-based organizations serving the 1.5 million Asian Pacific Islanders in the greater Los Angeles area, Asian Pacific Policy and Planning Council (A3PCON) strongly supports race conscious holistic admissions policies that seek to provide equitable access to higher education for millions of students of color. Since 1976, A3PCON and our member organizations have worked to combat systemic racism against all communities of color. A3PCON joins this brief to reflect its long-standing commitment to social justice.

19. **Asian/Pacific Islander Law Students Association at University of California, Los Angeles School of Law**

APILSA serves as a valuable resource for law students to succeed academically, socially, politically, and professionally. APILSA coordinates numerous events and activities that educate and inform members about current Asian Pacific Islander issues, and prepare members to manage such issues in both academic and professional legal settings. APILSA also provides a common forum for expressing members’ needs and concerns as Asian Pacific Islander law students. APILSA strives to develop innovative programs that
lend academic and peer support, and aspire to continue the organization's long-standing success.

20. **Association for Asian American Yale Alumni (AAAYA)**

   The Association of Asian American Yale Alumni is a volunteer-run, membership based, 501(c)3 nonprofit organization that provides a vehicle for Yale University alumni to promote the civic participation, leadership and service of Asian Americans and Asians at Yale and in the broader society.

21. **Baltimore Asian Resistance in Solidarity**

   Baltimore Asian Resistance in Solidarity (BARS) brings together Asians and Pacific Islanders of all backgrounds in Baltimore for learning, mutual support, and radical organizing. BARS is organized against all oppressive systems, including racism and anti-blackness, in solidarity with all peoples of color. As BARS amplifies the voices of API people, it does so in harmony with all marginalized peoples because their liberation is tied together.

22. **Berkeley Law Asian Pacific American Law Students Association (APALSA)**

   The Asian Pacific American Law Students Association (APALSA) is dedicated to the empowerment of Asian American and Pacific Islander law students and strives to meet the political, cultural, social, academic, and career needs of Berkeley law students interested in Asian Pacific Islander issues. In addition, the group’s mission includes recruitment of under-represented students, particularly Southeast Asian and Filipino students.

23. **Chinese American Citizens Alliance (C.A.C.A.), Los Angeles Chapter**

   One of the main purposes and objectives of C.A.C.A., the nation's oldest, continuous civil rights and advocacy organization for citizens of Chinese ancestry is to assure the education of our youth and community. C.A.C.A. understands the distinction between race-bias and race-conscious admission practices.

24. **Chinese American Progressive Action**

   CAPA shares with Chinese Americans and the broader U.S. public how progressive, forward-looking policies benefit our communities. CAPA believes in justice, fairness, and an inclusive economy that provides opportunity for all Americans. CAPA lifts up Chinese American voices on the important issues that affect our country’s future and encourages Chinese Americans to take political action, lead its communities, and build coalitions to ensure a strong and diverse America. As such, CAPA opposes this lawsuit which threatens racial integration at UNC.
25. Chinese for Affirmative Action (CAA)

Chinese for Affirmative Action (CAA) is a 50-year old community-based organization dedicated to defending the civil rights of Chinese Americans and advancing multiracial democracy in the United States. CAA engages in direct services, leadership development, civic engagement, policy advocacy, strategic communications, and movement building on a range of social justice issues. These issues include immigrant rights, education equity, affirmative action, language diversity, economic opportunity, and community safety and justice.

26. Chinese Progressive Association

The Chinese Progressive Association (San Francisco, CA) was founded in 1972 and educates, organizes and empowers the low income and working class immigrant Chinese community in San Francisco to build collective power with other oppressed communities to demand better living and working conditions and justice for all people. Racial justice is a key value and part of its work for the past 46 years, and Chinese Progressive Association understands how critical racial justice, equity, and diversity are if its communities are to be healthy and thrive.

27. Claremont South Asian Student Association

Claremont South Asian Student Association (SASA) is an organization for South Asian identifying students at the Claremont Colleges. SASA strives to be a space that is inclusive of all of its members, especially those from historically marginalized South Asian identities. As an organization, it wants to pursue advocacy around issues that directly affect South Asian communities both in the United States and in South Asia. In building a community that is inclusive of all South Asians, it strongly support race-conscious admissions.

28. Coalition for a Diverse Harvard

Coalition for a Diverse Harvard ("Diverse Harvard") is a group of over 1,100 Harvard students and alumni of diverse racial and ethnic backgrounds, including approximately 250 Asian American members. Diverse Harvard was launched in 2016 by Harvard and Radcliffe alumni to take a stand against an anti-affirmative action slate of candidates for Harvard's Board of Overseers, the University's second-highest governing body. Diverse Harvard's mission is to fight for diversity, equity, and inclusion at our own University and in higher education at large. Diverse Harvard believes that assembling a diverse student body and creating an environment where all students can thrive is central to the mission of higher education: developing successful citizens and leaders in a diverse nation and world.
29. Coalition for Asian American Children and Families (CACF)

CACF advocates for equity and opportunity for marginalized Asian Pacific American (APA) children and families. CACF is building a community too powerful to ignore by: Using and sharing information that counters the model minority myth and sheds light on community needs, activating APA youth and community members as “social justice” leaders, and mobilizing a coalition of partners to fight for systems and policy change. CACF’s vision is for all children and families, including Asian Pacific Americans, in New York City to be safe, healthy, and able to reach their full potential in life.

30. Council on American-Islamic Relations, California

The Council on American-Islamic Relations, California (CAIR-CA) is one of the largest American Muslim civil rights and advocacy organizations. CAIR-CA’s mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, and empower American Muslims. Through its four offices, CAIR-CA serves California’s estimated one million American Muslims by providing direct legal services to victims of discrimination, working with the media, facilitating community education, and engaging in policy advocacy to advance civil rights and civic engagement. CAIR-CA serves individuals from mostly Arab, Middle Eastern, Muslim and South Asian (AMEMSA) communities.

31. Duke Asian American Studies Program

Duke University’s Asian American Studies Program (AASP) offers interdisciplinary perspectives on the historical and current-day status of Asian Americans and Pacific Islanders in its society. AASP is committed to supporting the University of North Carolina’s race-conscious holistic admissions policies.

32. Duke Asian Students Association

Duke Asian Students Association (DASA) stands in support of the affirmative action policies at UNC Chapel Hill. DASA refuses to see Asian/American students be exploited and complicit as a wedge against important equity practices, under the guise of "fair admissions," especially at a university with whom the organization’s members share many strong ties. DASA refuses to see the hard work of progressive activists, which indeed includes Asian activists and supporters at an earlier point in history, be dismantled in the fight against affirmative action today.

33. East Coast Asian American Student Union

The East Coast Asian American Student Union (ECAASU) is a non-profit organization that serves to inspire, educate, and empower those interested in Asian
American and Pacific Islander issues. ECAASU was originally founded after the Bakke decision in 1978, in recognition of the need to build an advocacy network that fosters mutual support and solidarity. ECAASU fights for justice and equal opportunities for all marginalized communities. Its members are veterans of the Third World Liberation Front student strike at UC Berkeley in 1969. For the past 50 years ECAASU has been standing up and fighting for justice and equity for students of color. The organization is proud to join this amicus brief and AAAJ and others in this important fight.

34. Empowering Pacific Islander Communities

Empowering Pacific Islander Communities (EPIC), a non-profit organization based in Los Angeles, strives for the empowerment of Pacific Islander communities. The persistence of institutional discrimination in higher education presents a significant barrier to Native Hawaiians and Pacific Islanders. EPIC’s mission is to mobilize Pacific Islander communities to foster opportunities for achieving social justice through advocacy, research, and development.

35. GAPIMNY—Empowering Queer & Trans Asian Pacific Islanders

GAPIMNY—Empowering Queer & Trans Asian Pacific Islanders (GAPIMNY) is an all-volunteer, membership-based community organization that empowers queer and transgender Asian Pacific Islander people in the greater New York metropolitan area. GAPIMNY is committed to advancing racial justice and LGBTQ rights for intersectionally marginalized communities, and supports affirmative action as a policy that equalizes opportunity.

36. Harvard Asian American Women's Association

The Asian American Women’s Association (AAWA) was created in 2005 as an inclusive, welcoming space for those on campus who identify with the experiences of Asian American women, including those who identify as gender non-conforming. AAWA’s mission is to be a space where students can learn from and consequently empower each other. AAWA’s founding members felt that Harvard students needed a community that was non-competitive and open to understanding each other’s experience; as such, membership to AAWA is open to anyone without membership fees or requirements. AAWA has been cultivated so that students do not feel as though they must conform to or abide by any expectations to be included. Because AAWA values every lived experience as inherently valid and valuable, it has been committed to diversity and supporting fellow students from the very beginning of its existence. AAWA has and always will endeavor to foster a sense of belonging for people of very different backgrounds. AAWA also realizes that communities of color are stronger when they are united. AAWA therefore refuses to be used as a racial wedge and political tool by those who do not have its community’s interests at heart. AAWA believes that the proposed end of race-inclusive
admissions policies is tantamount to the erasure of the racial inequality in education systems and society at large. Although AAWA serves primarily Harvard students, it also realizes that the fight for educational justice and greater educational accessibility cannot be confined to our campus. Therefore, it stands in solidarity with communities of color and students throughout the country.

37. Harvard Vietnamese Association

Harvard Vietnamese Association (HVA) is a cultural organization that aims to foster a sense of community for Vietnamese-identifying students on campus. HVA is committed to diversity and inclusion at Harvard and recently signed on to be part of an amicus brief for the *SFFA v. Harvard* lawsuit. As a group representing students who are often erased in conversations around Asian American issues, HVA hopes to bring the experiences of Vietnamese students to the table.

38. Jakara Movement

The Jakara Movement is the largest Sikh youth organizing community benefit organization in the nation and our membership includes a large Asian American population. It believes race-conscious holistic admissions policies play an important role in building an American civic life that is open and representative of its diverse communities and populations.

39. Japanese American Citizens League

The Japanese American Citizens League is the nation's largest and oldest Asian American civil rights organization whose mission is to secure and safeguard the civil and human rights of Asian and Pacific Islander Americans and all communities who are affected by injustice and bigotry. The leaders and members of the JACL also work to promote and preserve the heritage and legacy of the Japanese American community.

40. Lambda Phi Epsilon at North Carolina State University

Lambda Phi Epsilon at North Carolina State University is an Asian-Interest fraternity that strives to help each brother achieve their fullest potential. We believe that personal development cannot be complete without social justice and civil rights. Asian Americans bring new perspectives to the Greek system through involvement in our communities, and we encourage our brothers to be catalysts for change. We believe that race-conscious admissions benefits our brothers and support UNC's admissions policies.

41. MinKwon Center for Community Action

The mission of MinKwon Center for Community Action is to empower the Korean American community and work with the broader Asian American and immigrant
communities to achieve social and economic justice for all. The center believes that being blind to race, especially in the context of admissions and access, is to be blind to the unique and structural problems that continue to exist for different racial groups.

42. Muslim Student Association West (MSA West)

Muslim Student Association West (MSA West) is a grassroots organization comprised of Muslim Student Associations (MSAs) representing campuses across the West Coast of the United States. MSA West is a cohesive coalition of Muslim students united for the sake of Allah (God) who aim to embody the concepts of unity, strength, and activism.

43. National Asian Pacific American Families Against Substance Abuse (NAPAFASA)

NAPAFASA is the nation’s sole advocacy organization focused on the behavioral health needs of Asian Americans, Native Hawaiians, and Pacific Islanders. NAPAFASA supports the continuing usage of race-conscious admissions policies for higher education. In its work with local communities, students of Southeast Asian and Pacific Islander descent are at significantly higher risk for substance use disorders and related addictions (as well as those of African and Latino descent). Universities and colleges can make better decisions in their holistic admissions procedures with this limited additional information. NAPAFASA therefore joins as an amicus in support of UNC’s race-conscious admissions policy.

44. National Asian Pacific American Women’s Forum

The National Asian Pacific American Women’s Forum (NAPAWF) is the only national, multi-issue Asian American and Pacific Islander (AAPI) women’s organization in the country. NAPAWF’s mission is to build the collective power of all AAPI women and girls to gain full agency over their lives, families, and communities. NAPAWF’s work is centered in a reproductive justice framework that acknowledges the diversity within their community and ensures that different aspects of their identity—such as ethnicity, immigration status, education, sexual orientation, gender identity, and access to healthcare—are considered in tandem when addressing their social, economic, and health needs.

45. National Council of Asian Pacific Americans (NCAPA)

National Council of Asian Pacific Americans (NCAPA) is a national coalition of 33 Asian American and Pacific Islander (AAPI) organizations striving for equity and justice by organizing their diverse strengths to influence policy and shape public narratives. Their coalition members work together on policy issues that are deeply tied to their communities,
ranging from civil rights, education, health, housing & economic justice and immigration. They recognize that race-conscious holistic admissions policy is essential to creating a more racially diverse and equitable learning environment. The coalition believes that this attempt to dismantle such policy is an attempt to drive a wedge between AAPIs and other minority and underserved communities. In fact, the coalition believes that the community has directly benefited from efforts to increase racial diversity in higher education. The coalition further believes that educational attainment and socioeconomic data on Southeast Asian, Native Hawaiian and Pacific Islander communities clearly illustrate the need for the continuation of race-conscious holistic admissions policies for many within their communities.

46. National Queer Asian Pacific Islander Alliance (NQAPIA)

The National Queer Asian Pacific Islander Alliance is a federation of lesbian, gay, bisexual, and transgender (LGBT) Asian American, South Asian, Southeast Asian, and Pacific Islander (API) organizations. NQAPIA builds the capacity of local LGBT API groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaborations, and challenges anti-LGBT bias and racism.

47. National Tongan American Society (NTAS)

The National Tongan American Society was created in 1994 providing assistance with immigration and translation services. It is the oldest nonprofit organization of its kind in Utah. Today, NTAS works in various sectors, including immigration, healthcare and public benefits, education, wellness, and voter engagement, to support and advocate for civil rights, equity, and social justice.

48. New Mexico Asian Family Center

New Mexico Asian Family Center is the only nonprofit, nonpartisan organization that provides culturally-specific and linguistically-appropriate services to the Pan-Asian population in the state of New Mexico. Its programs and services include survivor-centered, trauma-informed case management, counseling, and legal support for survivors of gender-based violence, as well as multigenerational family programming, cross-racial collaboration building, and early childhood education initiatives. It is heavily invested in nonpartisan civic engagement and policy change in order to work towards a more culturally accessible and equitable New Mexico.

49. North Carolina Asian Americans Together

North Carolina Asian Americans Together (NCAAT) is a nonpartisan, nonprofit organization committed to supporting equity and justice for all by fostering community
among Asian American Pacific Islanders (AAPIs) and allies in North Carolina through civic engagement, leadership development, grassroots mobilization, and political participation. NCAAT’s work is guided by principles and strategies including increasing visibility of the rapidly growing AAPI population in North Carolina by adding voices to the public discourse, working within an intersectional framework for racial justice and civil rights, and creating structural change, as well as greater justice within current systems.

50. North Carolina State University Asian Students in Alliance

The Asian Students in Alliance (ASIA) is a council overseeing 14 Asian-interest organizations at North Carolina State University. ASIA consistently collaborates with Asian American student groups at University of North Carolina - Chapel Hill to bring more visibility to Asian American identities. Therefore, ASIA firmly believes that it should support UNC in this case with the resources available at its campus.

51. OCA - Asian Pacific American Advocates

OCA - Asian Pacific American Advocates is dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders. OCA supports holistic admissions practices (inclusive of race, ethnicity, and sex) and seeks to prevent the dismantling of Affirmative Action in higher education admissions.

52. OCA Greater Phoenix

As an Asian Pacific American civil rights organization, OCA Greater Phoenix has always advocated for, and will continue to advocate for, equity in the education system. OCA Greater Phoenix believes that affirmative action policies in higher education are the cornerstone of socioeconomic justice and progress for the underrepresented communities that the organization’s members are a part of and strive to serve.

53. Pacific Islander Health Partnership

Pacific Islander Health Partnership’s (PIHP’s) mission is to improve the health of Native Hawaiians and Pacific Islanders (NHPIs) by engaging communities, researchers, and policymakers. The organization educates Pacific Island communities about chronic illnesses, promotes research that sheds light on Pacific Islander health disparities, and advocates for policies that ensure NHPI communities receive resources that address the root causes of health disparities. PIHP is participating in this amicus brief because race-conscious admissions policies are necessary to address the historical underrepresentation of NHPIs in higher education institutions and in healthcare professions. PIHP believes that education achievement level has a profound impact on community health by improving the ability to navigate health care systems, increasing access to resources, and enhancing the health characteristics of community environments.
54. Pilipino American Law Society at Berkeley Law

Pilipino American Law Society (PALS) is a student-led group that strives to address the needs of law students of Filipino decent through mentorship, career advising, and social activities. Born of the common experiences and challenges of students from Filipino-American backgrounds, PALS is a community that fosters inclusiveness, well-being, and academic achievement throughout students’ time at Berkeley Law.

55. Pilipino Workers Center of Southern California

Pilipino Workers Center (PWC) was formed in 1997 to promote safe working conditions, living wages, decent living conditions, access to quality healthcare, and basic human dignity. PWC advocates in the areas of employment, immigration, healthcare, housing, and youth empowerment. PWC believes in creating a level playing field for marginalized communities.

56. Reappropriate

Reappropriate is the web’s longest-running and one of its most widely-read AAPI race and feminism blogs.

57. South Asian Americans Leading Together (SAALT)

SAALT is a national, nonpartisan, non-profit organization that fights for racial justice and advocates for the civil rights of all South Asians in the United States. The organization’s ultimate vision is dignity and inclusion for all.

58. South Asian Law Students Association at the University of Michigan Law School

SALSA seeks to foster a cohesive South Asian community at Michigan Law School whose members will go on to become active members in the South Asian community at large. SALSA aims to encourage the South Asian community at the Law School, as well as the larger law student body and other organizations around campus, to engage in legal and social issues important to South Asia and the South Asian diaspora.

59. Southeast Asia Resource Action Center (SEARAC)

SEARAC is a national civil rights organization that seeks to empower Cambodian, Laotian, and Vietnamese American communities to create a socially just and equitable society. As representatives of the largest refugee community ever resettled in the United States, SEARAC stands together with other refugee communities, communities of color, and social justice movements in pursuit of social equity. SEARAC’s National Equity
Agenda includes education policy priorities focused on college access, affordability, and completion, such as support for race-conscious college admissions policies that look beyond test scores to assess a student’s capacity to thrive in college. SEARAC was also a signer of the Asian American Legal Defense and Education Fund’s amici brief in support of Harvard’s race-conscious admissions policies in 2018.

60. Task Force on Asian and Pacific American Studies at Harvard College (TAPAS)

TAPAS was founded in 2016 as a student organization dedicated to establishing a robust ethnic studies curriculum at Harvard. To date, TAPAS’ central mission remains the same, although the organization has also begun to address other issues relating to Asian American advocacy. Over the past couple of years, TAPAS has coordinated meetings with key administrators at Harvard, organized a rally for ethnic studies, and planned events related to ethnic studies for students on campus. In 2017, TAPAS released a petition to the Harvard administration that garnered thousands of signatures from students, student groups, and faculty members.

61. Third World Liberation Front (TWLF), University of California, Berkeley

TWLF is in solidarity with all oppressed peoples nationally and internationally fighting for self-determination in their communities and respective countries. TWLF rejects racist attempts to divide Asian Americans and Third World peoples from their common struggle for real equality.

62. Third World Liberation Front ‘69 Ad Hoc Committee

TWLF ‘69 Ad Hoc Committee is composed of veterans of the Third World Liberation Front (TWLF) student strike at UC Berkeley in 1969. For the past 50 years, the Committee has been standing up and fighting for justice and equity for students of color. The Committee is proud to join this amicus brief and AAAJ and others in this important fight.

63. U.S. Palestinian Community Network (USPCN)

The U.S. Palestinian Community Network (USPCN) is a Palestinian community-based organization, founded in 2006 to revitalize grass-roots organizing in the Palestinian community in the U.S. The organization’s members and leaders believe that affirmative action in college and university admissions policies must be upheld. Institutional and structural racism have devastated communities of color in this country for centuries, and it is only through equitable policies in government and the private sector that all people in America—not just the privileged—can live productive and fruitful lives.
64. University of California, Los Angeles South Asian Law Students Association

UCLA SALSA is dedicated to providing a forum for South Asian law students to exchange thoughts and ideas, develop a community support and referral network, and address the needs of the larger South Asian community—particularly its most marginalized members.

65. University of North Carolina alpha Kappa Delta Phi

The Associate chapter of the alpha Kappa Delta Phi International Sorority at UNC fosters the making of successful leaders by assisting and challenging its members to reach their maximum potential. The organization strives to maintain the highest levels of integrity and innovation in the promotion of sisterhood, philanthropy, scholastic excellence, and Asian-Awareness in the community while creating lifelong relationships. As an Asian-interest sorority, the chapter would like to stand in support of and solidarity with UNC and the AAPI organizations spearheading this case in defending UNC’s holistic race-conscious application process.

66. University of North Carolina Asian American Law Students Association

Asian American Law Students Association (AALSA) is a diversity student organization at UNC School of Law. The mission of AALSA is to promote diversity and to serve Asian Pacific American students’ interests at the school of law. By holding diversity events and offering legal services to the Asian Pacific American community, AALSA has been dedicated to ensuring that minority students’ voices are heard and promoting a more inclusive studying environment at the school of law.

67. University of North Carolina - Chapel Hill Asian American Students Association

UNC-CH Asian American Students Association is dedicated to advancing the needs and interests of UNC’s Asian/Asian American population. The association stands in solidarity with other student groups of color in supporting race-conscious admissions practices at UNC-CH and everywhere.

68. University of North Carolina - Chapel Hill Campus Y Executive Board

The Campus Y, UNC’s Hub for Social Justice and Social Innovation, is the university’s oldest and largest student-run organization. Founded in 1860, the Campus Y’s mission centers on engaging students, the UNC campus, and communities in the pursuit of social justice. The organization’s work ranges from criminal justice advocacy to environmental organizing to youth programming and more.
69. Union of North American Vietnamese Student Associations

Union of North American Vietnamese Student Associations is a non-profit, community based organization dedicated to cultivating the next generation of leaders who will serve as advocates for the Vietnamese community. UNAVSA educates and mobilizes student and young Vietnamese North Americans on economic, political, and social issues affecting the Vietnamese diaspora.

70. University of Michigan, Asian Pacific American Law Students Association

The Asian Pacific American Law Students Association (APALSA) is an organization of law students dedicated to advocating for the Asian Pacific American community at Michigan Law, providing academic and professional resources for its members and creating a social and professional network to connect students and alumni. APALSA sees the recent lawsuits by those opposed to holistic race-conscious admissions and the use of Asian Pacific Americans as a wedge in that agenda as an affront to the Asian Pacific American community and APALSA’s commitment to seeking racial justice. The organization has worked to educate its members and their communities to dispel the misinformation spread by the lawsuits and is unwavering in its support of efforts in opposition to these divisive acts.

71. University of Pennsylvania Asian Pacific Student Coalition

The purpose of APSC is to voice and support the common interests and concerns of the Asian Pacific Islander community, to provide a forum for discussion, action, and exploration of issues of concern to students, and to present and to celebrate the richness of the diverse Asian Pacific cultures and backgrounds to the University community and beyond. Within the Asian Pacific Islander community, APSC works to strengthen the relationships among its 22 constituent groups by planning cultural and social events that build a sense of unity around the idea of the Pan-Asian experience. Outside of the Asian Pacific Islander community, APSC serves as the voice of 20% of the undergraduate student body by acting as the representative of the Asian Pacific Islander community in meetings with faculty, administration, student groups, and media. APSC supports this amicus brief because the organization strives to uplift the voices and lived experiences of all minority students and will not condone the utilization of Asian Americans as a wedge between other communities of color in this, or any other, instance.

72. Vietnamese American Bar Association of Southern California

The Vietnamese American Bar Association of Southern California is an association of attorneys, judges, law professors, and law students, providing a network for its members and affiliates with practice settings ranging from solo practices to large firms, corporations,
legal services organizations, non-profit organizations, law schools, and governmental agencies.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been filed electronically with the Clerk of Court using the CM/ECF system, which will send notification to counsel

This the 4th day of March, 2019.

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg