

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3

4 STUDENTS FOR FAIR ADMISSIONS, INC.,

5 Plaintiff,

Civil Action
No. 14-14176-ADB

6 v.

October 18, 2018

7 PRESIDENT AND FELLOWS OF HARVARD
8 COLLEGE, et al.,

Pages 1 to 246

9 Defendants.
10

11 TRANSCRIPT OF BENCH TRIAL - DAY 4
12 BEFORE THE HONORABLE ALLISON D. BURROUGHS
13 UNITED STATES DISTRICT COURT
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15 ONE COURTHOUSE WAY
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on October 18, 2018.)

THE CLERK: All rise. Court is in session. Please be seated.

THE COURT: Couple things. Ms. Hacker, thank you for that, but I didn't get the email until this morning. Some of it's done and some of it's not. We'll have to pick and choose as we go.

To make a long story short, I have a relative in town just for the day. I'd like to try to catch up with them at lunch, so I'm hoping we can have our lunch break from quarter of 1:00 to 1:30. And then we'll go straight through 1:30 to 3:30.

So I don't know how long your cross is, but whenever you want to take a break this morning, that's fine because we'll take a later lunch and we won't have a break in the afternoon, if that's all right with everyone.

You were standing up. Did you have --

MS. HACKER: We were just going to update you on witness order, Your Honor.

1 THE COURT: Okay.

2 MS. HACKER: If it is helpful, we do have a thumb
3 drive with the full transcripts for all those depositions, in
4 case you want to see those for contexts. It also has all of
5 the exhibits referenced in those, if that would be helpful
6 when you're ruling on this objection.

7 THE COURT: I'm happy to take it, but it's just as
8 easy to work out of the notebook. I just have a few
9 questions along the way of things I can't sort out.

10 The first two that you said were Ortiz and Zuluaga.

11 MS. HACKER: And Mr. Zuluaga.

12 THE COURT: I have Ortiz done. Do you want me to
13 go through those now? Do you want me to wait? What's your
14 preference? I don't want to interrupt Mr. Lee.

15 MS. HACKER: We're happy to start with Dean
16 Fitzsimmons this morning and then do the -- Miss Ortiz'
17 rulings right before we read her transcript.

18 THE COURT: What is UMRP?

19 MS. HACKER: Underrepresented minority group at
20 Harvard.

21 MS. ELLSWORTH: Undergraduate minority recruitment
22 program.

23 THE COURT: There's a couple others that I have
24 questions about. It might be easier to do it when we get
25 there. Most of those are done. Then I -- I'm happy to hear

1 you on it, but I am inclined to exclude Zuluaga. I don't
2 know what there is in there that is relevant and not opinion
3 and not very subjective.

4 MS. HACKER: We would like to be heard about it,
5 Your Honor, if I may just very briefly.

6 THE COURT: You want to do it now or after?

7 MS. HACKER: Your Honor's preference. We can get
8 started with Dean Fitzsimmons and do it this afternoon.

9 THE COURT: I don't want to end up in a situation
10 where poor Dean Fitzsimmons has to come back for 10 minutes
11 tomorrow. I'd rather -- if we're going to finish him today,
12 I'd like to finish him. I don't want to use up his time such
13 that he ends up having to come back another day unless he
14 wants to.

15 MR. LEE: Going to need more shirts.

16 THE WITNESS: I got a shirt.

17 THE COURT: When you're ready.

18 MR. LEE: Thank you, Your Honor.

19 THE COURT: One more reminder. I'm sure you know
20 this by now, but you're still under oath.

21 THE WITNESS: Yes, Your Honor.

22 (WILLIAM FITZSIMMONS previously sworn by the Deputy
23 Clerk.)

24 CROSS-EXAMINATION (resumed)

25 BY MR. LEE:

1 **Q.** Dean Fitzsimmons, when we suspended yesterday, we were
2 discussing the process by which the admissions office reviews
3 files and makes decisions. Do you remember that?

4 **A.** I do.

5 **Q.** I'm going to put on the screen now DD 1.17. It's Tab 2
6 of the notebook. It's a demonstrative. You can look at it
7 on the screen or the notebook, whatever is best for you. And
8 I want to move to the next stage of the process.

9 After the initial review of the applications which
10 we discussed yesterday, what is the next step in the review
11 process?

12 **A.** I believe we were talking about the subcommittee
13 meetings.

14 **Q.** What are the subcommittee meetings?

15 **A.** This is what we would call the first pass. And there are
16 about 20 or so subcommittees just dividing pretty much evenly
17 the number of applications geographically. It's meetings
18 that take place, five to seven people, three to five days to
19 do the initial review.

20 **Q.** And what happens at the subcommittee meetings?

21 **A.** Literally what happens is we go through each school
22 individually throughout the whole docket. As we start at
23 each school, we take a look at all the people who applied
24 from the school, and then the advocate makes a decision at
25 that point about which ones he or she will present and put up

1 all the information on the screen.

2 **Q.** Now, are all the applicants from that docket discussed at
3 the meetings?

4 **A.** Not all will be discussed at the meetings. Some, based
5 on at least the initial readings, may not go through a
6 discussion. It's really the ones who at least at that point
7 appear to be legitimate contenders.

8 **Q.** Can other admissions officers in the subcommittee
9 meetings ask to discuss candidates who advocates are not
10 proposing?

11 **A.** Absolutely. That's really the job of the chair, but it's
12 also the job of everybody else on that committee to provide a
13 check and a balance, in a sense, on really the advocate's
14 judgment.

15 **Q.** Now, are you familiar with the concept of a docket
16 binder?

17 **A.** I am.

18 **Q.** What is a docket binder and what is its purpose at the
19 subcommittee meetings?

20 **A.** The docket binder is a paper -- there are two of them,
21 actually. It's a paper copy of literally all of the schools
22 and all of the applicants by school. It supplements the
23 electronic system that we have.

24 **Q.** We're not going to offer it into evidence, but I have
25 this large notebook from one docket.

1 MR. LEE: May I approach the witness, Your Honor?

2 THE COURT: Yes.

3 BY MR. LEE:

4 Q. We're not going to offer it into evidence because of its
5 bulk. Can you just tell Her Honor what is in the docket
6 binder?

7 A. It really is as we go through this docket it gives you
8 information literally about every single candidate on the
9 docket. For example, I can take a look at this particular
10 school and I can see the person's name. I can see background
11 information. I can see the profiles that we've talked about.
12 I can see the test scores and what the person intends to
13 major in. All that sort of information. It's about this
14 much of a page for that person. And that's for every single
15 person from that docket.

16 So that's why it's very easy for the chair to say,
17 okay, well, there happen to be three people, as I'm looking
18 right here quickly at this docket, who applied from this
19 school.

20 But everyone is looking at those three cases, and
21 the area person may have chosen to present one of them. But
22 as that presentation goes on, everyone else may be looking
23 also -- listening, of course, but also looking at the other
24 two to see whether or not perhaps they should have been
25 presented.

1 **Q.** Now, when an application is, in fact, discussed, is there
2 information available to the subcommittee members in addition
3 to the docket binder?

4 **A.** There's a great deal of information. We literally
5 have -- of course it's all electronic. We have every single
6 thing about the applicant available, at least what's come in
7 up to that point.

8 **Q.** And I think you told Mr. Hughes that the information is
9 projected on a screen, correct?

10 **A.** Yes. So all that information you would see literally
11 starting with the common application all the way through the
12 short story that was presented. There are some applications
13 that will have well over 100 pages.

14 **Q.** What is the end product of the subcommittee meetings?

15 **A.** The end product is to come up with what we call initial
16 recommendations. This is way oversimplified, but let's
17 say -- remember we have to go out with about 2,000 admits.

18 So let's say, oversimplification, we'd ask the
19 subcommittee to come in with 100 recommended admits. So
20 they'd come in with 100 recommended admits, we hope, after
21 the five days after going through this.

22 They would have gradations of admits, some that
23 looked stronger than others. They might circle some of those
24 actions, saying that we need this whatever-it-was additional
25 information.

1 They might also have circles around the wait-list,
2 the rejects. We also have holds. We also have a thing
3 called financial aid holds so that we can get more
4 information to determine whether or not this person is, in
5 fact, let's say, very low income.

6 **Q.** Are the decisions final decisions?

7 **A.** Hardly.

8 **Q.** Now, are there applicants who are not recommended for
9 tentative admission after the subcommittee meetings that, in
10 fact, are admitted at the end of the cycle?

11 **A.** Oh, absolutely. All the time.

12 **Q.** Are there applicants who are actually recommended for
13 tentative admission who are ultimately not admitted to the
14 class?

15 **A.** Also all the time.

16 **Q.** Turn to DD 1.18 and let's talk about the next step in the
17 process. Do you have DD 1.18 before you?

18 **A.** Yes. Is this the full committee meeting?

19 **Q.** Yes. Who from your office participates in the full
20 committee meetings?

21 **A.** All 40 or so admission officers.

22 **Q.** Does anyone from outside the office participate in the
23 full committee meetings?

24 **A.** We invite our faculty committee to come in, and based on
25 their schedules, they sometimes are able to be with us as

1 well.

2 **Q.** Have you heard of something called the faculty standing
3 committee?

4 **A.** And that's the faculty standing committee I was referring
5 to.

6 **Q.** The faculty standing committee is made up of tenured
7 members of the faculty?

8 **A.** That's correct.

9 **Q.** How long do these full committee meetings last?

10 **A.** The full committee meetings for regular will go from
11 roughly, say, March 3 to maybe March 20.

12 **Q.** Turn, if you would, to Tab 4 in your notebook.

13 **A.** I have it.

14 **Q.** Do you find DX41?

15 **A.** I do.

16 **Q.** What is it?

17 **A.** It gives you a simplified view of our admissions
18 calendar.

19 MR. LEE: Your Honor, we offer DX41.

20 THE COURT: What tab is it at?

21 MR. LEE: Tab 4, Your Honor.

22 MR. HUGHES: No objection.

23 THE COURT: It's admitted.

24 (Defendant Exhibit No. DX41 admitted.)

25 BY MR. LEE:

1 **Q.** By way of example, for the year 2013 to 2014, when did
2 the full complete meetings take place?

3 **A.** From the 3rd of March. It looks like we had final review
4 on the 19th.

5 **Q.** Had there been an early action admission cycle before the
6 full admission cycle?

7 **A.** There had.

8 **Q.** Is the review process for applications the same for early
9 applications as it is for the regular application cycle?

10 **A.** Yes.

11 **Q.** During 2013 to 2014, how many dockets were discussed at
12 each full committee meeting?

13 **A.** In the full committee, it's typically about two in the
14 full committee, sometimes depending on whether you get ahead
15 of schedule or have a fire drill, for example, something of
16 that sort. But pretty much stay on schedule.

17 **Q.** Are all applicants recommended by the subcommittees or
18 the dockets discussed at the full committee meetings?

19 **A.** Yes. Almost always.

20 But let's say you had someone recommended in
21 subcommittee and then subsequent information comes in
22 indicating that that person wasn't as strong a candidate as
23 we thought, maybe bad midyear grades, perhaps an interview
24 that was below expectations.

25 So you don't necessarily -- we would talk about it,

1 but there would be an explanation for why this person who had
2 been tentatively recommended in subcommittee was not going to
3 be presented. And then the committee could say, well,
4 usually what you'd do is they had a lot of promise. You
5 might end up putting that person on the waiting list and
6 hoping things get better, let's say, with the grades.

7 **Q.** Now, as is true at the subcommittee level, can applicants
8 not recommended by the dockets be discussed?

9 **A.** Yes.

10 **Q.** How long does the full committee, all 40 people plus
11 whoever is there from the faculty standing committee, how
12 long does that group of folks discuss any particular
13 candidate?

14 **A.** It really varies a great deal. If you had someone who
15 was unbelievably strong and you could see that from the
16 reader sheet and a quick perusal and the subcommittee members
17 as well as the chair and the advocate talk about it, now,
18 that could be a relatively short discussion.

19 There are others where you could have a
20 discussion -- I know the math doesn't quite work out, Your
21 Honor, for this, but it does -- you can have a discussion of
22 up to an hour. There's no limit to go through the
23 complexities of the case.

24 And you could also -- perhaps if it took that long,
25 you might at the very end of the subcommittee process talk

1 about -- in the last three days be talking about that
2 candidate again maybe one or two more times. Maybe not for
3 an hour. But the idea is we want the full committee to get
4 to know all the cases in the world here that have a chance of
5 getting in.

6 **Q.** Now, as is true at the subcommittee level, are the
7 applications themselves projected electronically on a screen?

8 **A.** Yes.

9 **Q.** Are the applications in full available electronically to
10 all the admissions committee members?

11 **A.** Yes.

12 **Q.** Does the full committee ever have information that the
13 first readers who we discussed yesterday did not?

14 **A.** It happens all the time because so much late information
15 comes in because the senior year is a time for candidates
16 where lots of things are coming together.

17 **Q.** And for some of these applications, they're filed in
18 November and the full committee's meeting five or six months
19 later?

20 **A.** They can be totally different applications at that point.

21 **Q.** Now, how does a full committee decide to admit, reject,
22 or wait-list an applicant?

23 **A.** It really is a majority vote. I've got a vote, as does
24 everyone else.

25 **Q.** And you take those votes in the open meeting with 40

1 folks there?

2 **A.** Yes.

3 **Q.** Now, you mentioned earlier that you could only admit
4 about 2,000 applicants. Do you recall that yesterday?

5 **A.** I do.

6 **Q.** When you get to the end of the full committee process,
7 are you often over 2,000 in number of tentative admits?

8 **A.** Not often. Always.

9 **Q.** Do you have something called a lop process for when you
10 reach that point?

11 **A.** We do.

12 **Q.** What is the lop process?

13 **A.** It's a process that sometimes takes us as long as three
14 days where we might have just, for example, 100 places left
15 in the class based on what we've done before. And we might
16 have 300 people that we have been looking at actually over a
17 period of time. And so it's getting to know, over a
18 three-day period, all of those people who have a real chance
19 of getting into the class and then voting and comparing each
20 one.

21 **Q.** So when you said a little bit earlier that some
22 applicants could be discussed for a second or third time, is
23 this one of the occasions on which some applicants would be
24 discussed again?

25 **A.** Yes. And they could have been discussed two or three

1 times in subcommittee. Yes, that's how it works.

2 **Q.** I'm sorry. Turn, if you would, to Tab 5. Do you have
3 Tab 5 before you?

4 **A.** I do.

5 **Q.** What is Tab 5?

6 **A.** This is a memo that I sent out on March 14, 2014, about
7 essentially the last three days, the so-called lop session
8 which you referred to.

9 MR. LEE: Your Honor, we offer DX56.

10 MR. HUGHES: No objection.

11 THE COURT: Admitted.

12 (Defendant Exhibit No. DX56 admitted.)

13 BY MR. LEE:

14 **Q.** Let me turn you in the document to the second to the last
15 paragraph. Let me ask you first, are you the author of the
16 document?

17 **A.** I am.

18 **Q.** To whom did you send the document?

19 **A.** To the whole staff.

20 **Q.** And would you read for us the paragraph that begins,
21 "These are only guidelines."

22 **A.** "These are only guidelines. In the end it will be the
23 quality of the case that decides the issue, not whose case it
24 is or on which docket it resides. There is a time and a
25 place for strong advocacy, but we must put this role aside

1 and think simply about getting the best class. For the most
2 part, the class has been chosen and there is no reason to do
3 anything other than keep our perspective and sense of humor
4 as we make the final judgments."

5 **Q.** Is that how you conduct this last stage of admissions
6 process?

7 **A.** That's right.

8 **Q.** Now, if we could go back to slide DD 1.19 in Tab 2.
9 What's the final step in the admissions process that we've
10 been discussing yesterday and today?

11 **A.** Well, after we make -- get through that session, we make
12 our final decisions. And then of course we then let the
13 financial aid office do what they do magically and come up
14 with financial aid awards and then send out the admission and
15 financial aid packet together.

16 **Q.** And you then offer admission to approximately how many
17 people?

18 **A.** About 2,000.

19 **Q.** Now, to give some life to the process, I'm going to take
20 you through an actual application file so we can see how this
21 works. Could you turn to Tab 6?

22 THE COURT: Can I ask a question? Of your
23 admissions, the 40 readers -- let's just take this year, if
24 you remember. How many of those 40 were Asian?

25 THE WITNESS: On the voting committee this year I

1 think around four or five, I would say. On the staff, it's
2 more like eight or ten, I would say.

3 THE COURT: Okay.

4 MR. LEE: Your Honor, what we're going to do is I'm
5 going to offer DX293, which is at Tab 6. It has personal
6 identifying information, obviously. What I'm going to do is
7 take the dean through it and direct Your Honor's attention to
8 pages, ask him to describe what's there in general terms so
9 he's not revealing the information. And we won't put the
10 information on the public screen, but it will be an
11 opportunity to walk through an actual file, if that's all
12 right with Your Honor.

13 THE COURT: This appears to be the one that we
14 spent some time on yesterday.

15 MR. LEE: Yes. A little bit, yes.

16 THE COURT: Does it make sense to put yesterday's
17 exhibit up on the screen so we can have some idea what we're
18 talking about?

19 MR. LEE: That was just a demonstrative. It had
20 the summary sheet on the left and the pullout on the right.

21 THE COURT: Yes.

22 MR. LEE: We can put it back up so people will know
23 what it is, and I'll offer the file. Could someone remind me
24 what the demonstrative number is? Here it is. So this is a
25 file for DD 1.9, Your Honor. On the left would be the

1 summary sheet from the actual file. DX293 is the actual
2 file.

3 THE COURT: Yes.

4 MR. LEE: And we would offer DX293.

5 MR. HUGHES: No objection, Your Honor.

6 THE COURT: Admitted.

7 (Defendant Exhibit No. DX293 admitted.)

8 BY MR. LEE:

9 Q. Now, Dean Fitzsimmons, I want to take you through the
10 file, as I said, to give some life to the process, but I'd
11 like to do it in a way where we're not revealing information
12 about this person individually so we can protect their
13 privacy. Are you with me?

14 A. I'm with you.

15 Q. If you look at DX293, just first, look at the first three
16 pages. Do you have those before you?

17 A. I do.

18 Q. What are those first three pages?

19 A. The first page gives you lots of demographic information
20 and test scores and background information. And then the
21 second and third pages are for comments by the readers.

22 Q. What follows these summary sheets?

23 A. What follows the summary sheets, the first sheets, so on
24 page 2, this is after the first two readers put their
25 profiles in. They then talk about what they think some of

1 the strengths and possible weaknesses of the application are
2 and what some of the issues are, maybe some of the
3 highlights.

4 **Q.** Turn, if you would, then, to the fourth page of the
5 exhibit. Do you have that before you?

6 **A.** Yes.

7 **Q.** What begins at the fourth page?

8 **A.** This is the common application that I mentioned
9 yesterday.

10 **Q.** Again I want to protect the privacy of the individual.
11 In the common application, in general, what is the
12 information that the applicant is providing on the fourth and
13 following pages?

14 **A.** It's all kinds of information about the family, the
15 background, to some extent the financial status. All kinds
16 of things to really help to give a little bit of a sense of
17 who the actual person is.

18 **Q.** Turn, if you would, to page 5, which has the numbers .005
19 in the bottom centered. Do you see that?

20 **A.** Yes.

21 **Q.** Is this still part of the common application?

22 **A.** Yes, it is.

23 **Q.** What information is being provided by the applicant on
24 page 5?

25 **A.** This is all about the family. Families obviously are

1 very important in all kinds of ways for students. It gives
2 you a sense of the -- among other things, the educational
3 background of the family, the profession the family might
4 have, and also information about siblings, which can
5 sometimes be sort of an interesting piece of a person's life.

6 **Q.** One of the pieces of information you mentioned was
7 parental occupation, correct?

8 **A.** That's correct.

9 **Q.** Do you consider parental occupation in the admission
10 among many of these factors?

11 **A.** We do because it can often give you at least a high
12 correlation with the student's life chances.

13 **Q.** Can you give us an example where the parental occupation
14 would illuminate or educate your admissions decision?

15 **A.** It really illuminates almost every case. Let's say you
16 had somebody -- for example, in California we have a fair
17 number of migrant worker families who have kids in the pool
18 and who end up sending their kids to Harvard. So that kind
19 of a piece of information would be very helpful.

20 **Q.** Now, in your experience, is there a benefit to Harvard
21 student body in considering the backgrounds and parental
22 occupations in the admissions decisions?

23 **A.** I think there's a huge benefit. Because I think, again,
24 you bring with you to Harvard your life experience. And your
25 life experience has been shaped often quite profoundly by

1 your parents and your family situation. So you bring, in a
2 sense, a slice of that life with you.

3 For example, let's say you were the son or daughter
4 of a migrant worker. It's one thing to talk about migrant
5 workers and immigration in the abstract, for example. It's
6 another thing to live with someone for four years who has
7 lived that experience.

8 **Q.** Now, turn if you would, to page 6 and 7 of the exhibit.
9 They have the numbers .006 and .007. Do you see those?

10 **A.** Yes. I have it.

11 **Q.** Are these still part of the common application?

12 **A.** Yes.

13 **Q.** Again without specifics, what information is the
14 applicant now providing?

15 **A.** It's information about the high school, or lack
16 thereof -- because we have people who are homeschooled -- a
17 little bit about honors, future plans, which we know can
18 often be tentative, and also a little bit of a sense of what
19 the current year courses are.

20 **Q.** Now, if you turn to pages 8 and 9 of this application --

21 **A.** Yes.

22 **Q.** -- what is on pages 8 and 9?

23 **A.** 0007 is really just about testing, whatever testing a
24 person wants to put in.

25 **Q.** I put you on the wrong page. Pages .008 and .009?

1 **A.** 008 and 9 are the opportunity for the student to tell us
2 about what he or she has done not just in school but out of
3 school. And not just conventional extracurricular activities
4 but work experience: babysitting, which I did myself because
5 I had too much younger siblings and had a neighborhood
6 babysitting system. But whatever that person has done
7 outside of school is of interest to us in addition to what
8 that person might have done academically.

9 **Q.** Did this applicant have actually a substantial number of
10 activities outside the classroom?

11 **A.** Yes.

12 **Q.** Now, turn to the final page of the common application.
13 Do you have that before you?

14 **A.** 0010.

15 **Q.** Do you have that?

16 **A.** I do.

17 **Q.** What is that?

18 **A.** This is the personal essay, and it also is an opportunity
19 for a person to give additional information.

20 **Q.** And is the personal essay an important part of the file
21 when you're considering an admissions decision?

22 **A.** It can be. It's a real opportunity for the student to
23 help define who he or she is.

24 **Q.** Turn to the page that at the bottom center says .12,
25 00.12. Do you see that?

1 **A.** On this page.

2 **Q.** .0012 in the middle.

3 **A.** 0012 in the middle. What am I missing here? I'm sorry.
4 I'm talking about 0012. Okay. It's the Harvard College
5 member page.

6 **Q.** What is the Harvard College member page?

7 **A.** So under the common application, a college can ask
8 additional questions that we think might be helpful in
9 filling out the picture.

10 **Q.** What does Harvard ask applicants to do to help fill out
11 the picture?

12 **A.** We're actually really trying to get a little bit more of
13 a sense of how the person is thinking about college and what
14 we might look for in the application.

15 So for example, for many -- since as long as I've
16 really been in the office, we've encouraged people to send in
17 portfolios or any additional information they might want to
18 send. This is a sign for us to look for it in the
19 electronics.

20 But we're also interested in what kind of thing
21 they want to do academically and also maybe how certain they
22 may be. We're not looking for certainty necessarily because
23 one of the jokes in college admissions is the most popular
24 major is undecided. But nevertheless, there are people who
25 might be, for example, among the best poets in the country or

1 the best mathematicians. So we'd be interested in that.

2 And then we're trying to get a sense of how the
3 student is envisioning spending time in college. So you can
4 look at the activities section. Not surprisingly, just based
5 on the previous page, this woman wants to dance, is her
6 number one extracurricular.

7 But we're also concerned about, I guess, two things
8 under the context. One is we're trying to check ourselves to
9 see whether or not sort of the way we try to reach out to
10 people is effective. So we want to find out how this person
11 ended up in the Harvard applicant pool.

12 So you can see with her she was part of our email
13 and social media campaigns and our letter writing and mailing
14 campaign. She also probably was contacted by one of our
15 student recruiters, it looked like, and maybe one of our
16 alums. We're always glad to see -- we try to make sure we
17 understand, try to check ourselves to make sure that our
18 outreach is as good as can be.

19 **Q.** One of the things you mentioned was intended
20 concentration or major.

21 **A.** Yes.

22 **Q.** Why do you ask for that information?

23 **A.** Because it is important for us to see how well people are
24 thinking about their academic interests but also really to
25 take a look at the record they have compiled.

1 Let's say, for example, one of the things we're
2 always interested in doing is getting more humanists to come
3 to Harvard. Unfortunately, if you look at the College Board
4 reports every year, there seems almost every year there are
5 fewer and fewer students who want to do anything like the
6 humanities in college. And we think we've got a great
7 humanities program, and we teach over 80 languages.

8 So we really want to get these humanists to come
9 here. If they have a track record of accomplishment in the
10 humanities, let's say they had taken Latin and Greek and they
11 were thinking of the classics, that's really a good thing
12 because we think it's really important for people with such
13 serious interests and track records they'll be great
14 educators, we hope. Not just a fellow humanist but of our
15 engineers and our scientists so they'll have a human basis
16 for deciding how to use this powerful technology they're
17 studying.

18 **Q.** Do you also consider information about the applicant's
19 intended career, tentative as it is?

20 **A.** We do, tentative as it is. But sometimes there are
21 people who make a very clear record of interest and
22 demonstrated accomplishment that would lead them to be very
23 successful in one kind of career or another.

24 **Q.** Now, let's look at the additional information that's in
25 this file. Turn, if you would, to the pages 00.17 to 00.20.

1 Do you have that?

2 **A.** I have 17.

3 **Q.** Yeah. All I want you to do right now, I'm going to come
4 back to some of the specifics.

5 What is the document that begins at page 00.17?

6 **A.** This is the secondary school report that usually is
7 filled out by the guidance counselor or the head of the
8 school or something of that sort.

9 **Q.** Turn, if you would, to pages 25 -- 00.25 to 00.30.

10 **A.** Okay. I have it.

11 **Q.** What do you find there?

12 **A.** This is one of the teacher reports. We require that
13 students send two recommendations from teachers.

14 **Q.** Turn, if you would, to the pages .0031 to 32. What do
15 you find?

16 **A.** There we have the interview from the alumnus or alumnae.

17 **Q.** Turn, if you would, back to the first page of this
18 applicant's file.

19 **A.** Right to the reader sheet.

20 **Q.** Right. Now, did the first reader assign ratings that we
21 looked at briefly yesterday?

22 **A.** Yes.

23 **Q.** Was there a second reader?

24 **A.** Yes, there was. The chair of the docket.

25 **Q.** Is there an academic rating?

1 **A.** There is.

2 **Q.** What was the academic rating assigned to this applicant
3 by the first reader?

4 **A.** A 2+ academic.

5 **Q.** What was the academic rating assigned by the docket
6 chair?

7 **A.** A 2, which seems a little low to me. But nevertheless,
8 there it is.

9 **Q.** Now, you told me that page 6 provides information on the
10 applicant's educational background, correct?

11 **A.** That's correct.

12 **Q.** And page 7 provides information on the testing results?

13 **A.** Yes.

14 **Q.** Is that the only information that is considered in
15 setting the academic rating?

16 **A.** Hardly, no.

17 **Q.** Turn, if you would, to page 15 of the application file.

18 **A.** I have it.

19 **Q.** Do you have it before you?

20 **A.** Yes. 15, right.

21 **Q.** What is that?

22 **A.** This is the writing supplement, again something we allow
23 people to do.

24 **Q.** Now, looking at this writing supplement, is there
25 information in the writing supplement from the applicant that

1 would be considered in assigning the academic rating?

2 **A.** Yes.

3 **Q.** What?

4 **A.** I think one the things that comes through, as I read
5 through here quickly, is a tremendous intellectual curiosity
6 and love of learning, which is a huge piece of being a really
7 great academician. Without that, it doesn't work.

8 **Q.** Was there a discussion in her written supplement about
9 her research in a laboratory?

10 **A.** Yes.

11 **Q.** Would that information be useful in setting the academic
12 rating?

13 **A.** Yes, absolutely. Very important.

14 **Q.** Turn, if you would, to pages 17 to 20 of DX93.

15 **A.** 17 to 20?

16 **Q.** Yes.

17 **A.** Okay.

18 **Q.** You told me that that's the school report?

19 **A.** It is.

20 **Q.** Is the school report used in assigning the academic
21 rating?

22 **A.** Yes.

23 **Q.** Why is it important?

24 **A.** Really for some of the same reasons. I think it's to try
25 to get a sense of, based on what was available at the school,

1 for example, academically, did this person take full
2 advantage of the academic opportunities at the school.

3 And the other part of it is -- I don't want to be
4 too simple-minded about it, but did this person do it
5 joyfully? Did this person again have an excitement and a
6 love of learning and an intellectual curiosity? Was this
7 person perhaps someone who might have inspired other students
8 to share that love of learning?

9 **Q.** And what type of information did you get on those issues
10 from this file?

11 **A.** Lots of things. They talk about her being an
12 extraordinary young woman. It talks all about the amazing
13 things she did to try to get into the ballet world at a
14 relatively older age.

15 It's really, in lots of respects, a love letter for
16 a person who has, to me, astonishing range of intellectual
17 and other interests and seems to be able to blend those
18 interests together, which is a really good sign, something
19 you'd want to look for.

20 **Q.** Turn to the pages that have the Bates stamp number 0022
21 through 0023. Do you have those?

22 **A.** I do.

23 **Q.** I forgot to ask you about these. What are those?

24 **A.** If it's 0022 and 23, it's the end of the secondary school
25 report.

1 **Q.** Recommendation from the guidance counselor?

2 **A.** From the guidance counselor, right.

3 **Q.** Turn back to page 1.

4 **A.** Yes.

5 **Q.** What was the extracurricular rating for this applicant?

6 **A.** It was a 1.

7 **Q.** How unusual is it to have an extracurricular rating of 1?

8 **A.** It's quite unusual.

9 **Q.** Is the extracurricular rating of 1 or 2 or 3 or 4 done by
10 some formula?

11 **A.** Not at all.

12 **Q.** Is there information in this file that would tell you why
13 the readers gave her a extracurricular rating of 1?

14 **A.** There is.

15 **Q.** Turn, if you would, to page 8. Do you have that?

16 **A.** Page 8.

17 **Q.** .0008?

18 **A.** Yes, sir.

19 **Q.** In general terms, what's listed on this page?

20 **A.** In general terms, there's really a listing of the
21 activities. And they're pretty impressive. The listing
22 alone wouldn't -- that would suggest that you start to look
23 for the quality.

24 **Q.** I'm going to ask you some specifics, but again trying to
25 protect the applicant's privacy.

1 Did this applicant have a research internship?

2 **A.** Yes.

3 **Q.** Did this applicant perform with a ballet company?

4 **A.** Yes.

5 **Q.** Did she also participate in student government?

6 **A.** She did.

7 **Q.** And did she also have a paid job?

8 **A.** I'm sorry?

9 **Q.** Did she also have a paid job?

10 **A.** Yes.

11 **Q.** Is there information on these pages about how many hours
12 she devoted to each of these activities?

13 **A.** There is.

14 **Q.** Now, is this the only information that you consider when
15 you set the extracurricular rating?

16 **A.** No, not at all.

17 **Q.** Turn to page 42.

18 **A.** 42. Yes, I have it.

19 **Q.** What is this?

20 **A.** This is a rating from our own dance person, Jill Johnson.

21 **Q.** She's a faculty member?

22 **A.** She is.

23 **Q.** And what is she rating?

24 **A.** She's rating the dance and choreography, and she's
25 giving -- beyond the rating, she's giving sort of a

1 description of what it is perhaps we would expect this person
2 to do.

3 And that's a very good thing for us to understand
4 because it means in these activities which she could be
5 perhaps a star in, she'll meet others, she'll inspire others,
6 she'll educate others in these activities.

7 **Q.** Turn back to the first page of the exhibit again to the
8 summary sheet.

9 **A.** Yes.

10 **Q.** Is there a personal rating?

11 **A.** There is a personal rating.

12 **Q.** Now, we looked at that briefly yesterday, correct?

13 **A.** Yes.

14 **Q.** What I'd like to do now is look at some of the
15 information that would have been used or was used in setting
16 the personal rating. Are you with me?

17 **A.** I'm with you.

18 **Q.** Turn to page 10.

19 **A.** Okay. I have it.

20 **Q.** What do you find at page 10?

21 **A.** We have the essay and then we also have the additional
22 information.

23 **Q.** And without disclosing details, what information is the
24 applicant providing to you that helps set the personal
25 rating?

1 MR. HUGHES: Your Honor, I'm going to object to
2 this question. He didn't actually award the personal ratings
3 on this application. It's pure speculation on his part about
4 what the people who actually did consider in awarding those
5 awards. He has no basis to testify what they considered when
6 awarding those awards. He can talk about what's in the
7 application, but I don't see how he can possibly offer
8 reliable testimony on what went into the subjective
9 determination of awarding the personal scores on this
10 application.

11 THE COURT: Well, I think he can say that -- he can
12 say whether or not the personal essays are considered in that
13 score. And he can say generally what the two topics are that
14 she covers in these, right?

15 MR. HUGHES: I think he can say what information is
16 contained in the application. He can't get in the mind of
17 the people who awarded the personal score. Certainly that
18 information was available to them, but he can't say that
19 whoever awarded these scores considered this essay or this
20 factor.

21 THE COURT: No, but he can ask him whether or not
22 the essays are considered in the personal rating. If he says
23 sometimes, he may not know whether it was in this case. But
24 if he says it's the office policy that they always are, and
25 to discuss these two topics, that's fine.

1 So why don't you lay the foundation.

2 MR. LEE: Sure.

3 BY MR. LEE:

4 **Q.** First, Dean Fitzsimmons, was this student admitted to
5 Harvard?

6 **A.** Yes.

7 **Q.** Were you there when her file was reviewed and put on the
8 screen?

9 **A.** I was.

10 **Q.** Were you there when the summary sheet was put on the
11 screen?

12 **A.** Yes.

13 **Q.** Did you have access to every single piece of paper and
14 information we've just been discussing?

15 **A.** Yes.

16 **Q.** You had a chance to look at the personal rating that the
17 first reader had established, correct?

18 **A.** I did.

19 **Q.** Have you evaluated the personal rating -- withdrawn.

20 Turn to page 10. Do you have that before you?

21 **A.** I do.

22 **Q.** Is there any information on page 10 that was relevant to
23 you when you were evaluating the personal qualities of this
24 applicant?

25 **A.** Very much so.

1 **Q.** In general terms, without revealing her personal details,
2 could you tell us the type of information that's on page 10
3 that is useful in evaluating the personal characteristics of
4 a person?

5 **A.** I would say first in terms of extracurricular interest.
6 The way she went about it was very unusual and the way she
7 described her experience with dance was quite unusual.

8 That was reflected in Jill Johnson's report. Jill
9 Johnson is a very tough grader. If you look carefully at
10 that piece, she actually rated her as a 2+ plus, which -- I'm
11 not sure I've ever seen Jill give a 1.

12 It's the combination of her heart and her soul and
13 her intellect that goes into her extracurricular passion.
14 It's dance for its own sake.

15 The other piece on the same page was really all
16 about her father's health challenges. Without getting into
17 the details that could reveal -- that could broach
18 confidentiality, I found this to be incredibly moving. And I
19 would have given her -- based on these two and all the rest
20 of the information in the application, I would have given her
21 a 1 personal.

22 **Q.** Now, is the manner in which she responded to her father's
23 disability something you considered in evaluating her
24 personal qualities?

25 **A.** Yes, very much so.

1 **Q.** Is it something that you can reduce to a number?

2 **A.** Not in a million years.

3 **Q.** Turn, if you would, to pages 22 and 23, which we
4 discussed just a few minutes ago.

5 **A.** Yes.

6 **Q.** Does the secondary school report of this candidate
7 discuss her personal qualities?

8 **A.** Yes.

9 **Q.** And again without reviewing details, what does the school
10 say about the personal qualities of this young woman?

11 **A.** Among other things, they talk about her as being an
12 extraordinary young woman and then give you loads of reasons
13 and examples of why they would make that claim.

14 **Q.** Did they provide any information about how she interacts
15 with others in her community?

16 **A.** Yes. Very much so.

17 **Q.** Would that be important to you in evaluating the personal
18 characteristics of a candidate?

19 **A.** Absolutely.

20 **Q.** I think you told us that she's described as an
21 extraordinary young woman, correct?

22 **A.** That's correct.

23 **Q.** Let me do this so that we're not revealing too much
24 information. Is she also described as gracious, genuine, and
25 caring?

1 **A.** Yes.

2 **Q.** Is that information important to you in evaluating the
3 personal qualities of a candidate?

4 **A.** Yes.

5 **Q.** Now, if you turn to pages 26 and 27, do you have those
6 before you?

7 **A.** I do.

8 **Q.** I think you told me this is one of the teacher
9 recommendations?

10 **A.** It is.

11 **Q.** Turn, if you would, to page 27 to the paragraph that's at
12 the bottom of page 27 and carries over to the top of -- I'm
13 sorry. At the bottom of page 26 and then carries over to the
14 top of 27. Do you see that?

15 **A.** I do.

16 **Q.** And I think we can do this without revealing any
17 confidential information. But if you look at the very last
18 sentence?

19 **A.** Yes.

20 **Q.** It begins, "As this illustrates the nature of all" --
21 redacted -- "activities."

22 Would you read the remainder of the sentence?

23 **A.** Let's see. You're starting where?

24 **Q.** If you start at the top of page 27.

25 **A.** Okay. I'm sorry.

1 **Q.** I want you to begin with "She is."

2 **A.** "She is mature beyond her years. She operates at an
3 exceptional level for a person of any age, and she does so in
4 a number of different fields all at the same time."

5 **Q.** Was that information important to you in evaluating the
6 personal qualities of this candidate?

7 **A.** Yes.

8 **Q.** Staying on page 27, let's see what else her teacher says
9 about her. Do you see the portion in the second page which
10 reads, "She is calm, kind, and quiet, thoughtful and focused,
11 never anxious but always working toward her goals."

12 **A.** I see that.

13 **Q.** Was that also important information to you?

14 **A.** Very much so.

15 **Q.** Turn to page 29 and 30.

16 **A.** I have it.

17 **Q.** Is this another teacher recommendation?

18 **A.** It is.

19 **Q.** We're not going to go through it, but it will be part of
20 the record for Her Honor.

21 But again, is there information on the personal
22 qualities of this individual that would have been relevant to
23 the personal rating but, more importantly, is relevant to
24 whether she's admitted or not?

25 **A.** Absolutely.

1 **Q.** Turn to pages 31 and 32.

2 **A.** I have them.

3 **Q.** I think you told me that's the alumni interview report?

4 **A.** It is.

5 **Q.** Now, was the alumni interview report available at the
6 time that the preliminary ratings were set?

7 **A.** You know, I'm not sure. Quite possibly not so because --
8 because California, I think I mentioned yesterday, four out
9 of the past seven years has been our biggest contributor of
10 students to Harvard. There are lots of people applying. So
11 our alumni interviewers often are -- they have a big backlog
12 and they'll get to the ones we need to get to. It's quite
13 likely it wasn't there when --

14 **Q.** If you turn to page 32 --

15 **A.** Yes.

16 **Q.** -- there is a portion of the interview form called
17 "Personal Qualities." Do you see that?

18 **A.** I do.

19 **Q.** Now, to help complete the picture, do you recall
20 yesterday when I started your cross-examination we were
21 looking at the interview handbook?

22 **A.** Yes.

23 **Q.** And there was a section that described how interviewers
24 should evaluate personal qualities?

25 **A.** Yes.

1 **Q.** If I'm looking at the top of page 22, what is set forth
2 in general terms --

3 **A.** You mean 32?

4 **Q.** 32, you're right. I'm sorry.

5 **A.** This gives you -- and I guess you could look under the
6 other topics as well. For example, under academic, if you go
7 to 31, you can see some of the things even before they get
8 into their write-up that we hope that they will engage in.

9 And then we try to give them a little sense on the
10 extracurriculars.

11 The personal qualities, among other things, we'd
12 like them to give us information or at least their opinions
13 on openness to new ideas and new people, contribution to
14 college life.

15 And a very, very fundamental question that we've
16 talked about before, and with Mr. Hughes as well, is the
17 whole idea of what kind of a roommate will this person be.
18 That's the beginning of the places where people can really
19 make a difference to educating their fellow classmates.

20 And then of course we just ask them to give an
21 overall. They can write as much as they want, by the way,
22 because the electronics now allow them to continue on, as
23 they say, for pages if they want to.

24 **Q.** Now, under the comments this begins, "There is a special
25 maturity about the applicant," correct?

1 **A.** That's correct.

2 **Q.** Is that the kind of information that is important to you
3 in evaluating the personal characteristics and qualities of a
4 candidate?

5 **A.** Yes.

6 **Q.** Is it important to you in deciding whether to admit a
7 candidate or not?

8 **A.** Absolutely.

9 **Q.** Is it capable of quantification?

10 **A.** No. I'm not sure how you do it, but if you use all the
11 different sources and you begin to see how they all meld
12 together, you can get, I think, a good picture of that.

13 **Q.** Now, you mentioned yesterday, but we didn't talk about it
14 much, that the admissions office also assigns a rating to the
15 guidance counselor recommendation?

16 **A.** That's correct.

17 **Q.** And to the teacher recommendations?

18 **A.** That's correct.

19 **Q.** And if you go back to page 1 --

20 **A.** I have it.

21 **Q.** -- of this exhibit?

22 **A.** Yes.

23 **Q.** Do you have those?

24 **A.** I do.

25 **Q.** Now, those are the numbers or the ratings that were

1 assigned by the reader to the guidance counselor
2 recommendation and the teacher recommendations?

3 **A.** That's correct.

4 **Q.** Now, let's turn to page 2 of the application file.

5 **A.** Okay.

6 **Q.** Now, what is at page 2?

7 **A.** This again is a chance for the readers to put any notes
8 down that they think is worth perhaps mentioning in the
9 subcommittee and the full committee. And also we ask them to
10 give a brief overview of what they think is actually going on
11 in the total file.

12 **Q.** What did the first reader say about this candidate?

13 **A.** I am not sure how X has managed to accomplish so much. A
14 product of the blank public schools, she spent her early
15 education in a Spanish immersion program, so she's bilingual.
16 She auditioned for dance but soon discovered a love for
17 ballet and enrolled in the City Ballet of X and fought to
18 continue academics through school.

19 With the city ballet, she had lead paid roles such
20 as Aurora in Sleeping Beauty. She's got a talent for science
21 and research supported by teachers at a local university.
22 For courses that her school did not offer, such as AP
23 chemistry, bio, and environmental studies, she studied the
24 material on her own.

25 It says she studied the material and took the exams

1 on her own, paying for them out of her babysitting money and
2 in the process earned a top grade, which is a 5, in those
3 tests.

4 The principal investigator in the lab where she
5 volunteers wrote that she has "shown a devotion, maturity,
6 and strong assistant in researches uncommon among peers her
7 age." She sounds like she would be a fabulous admission to
8 Harvard.

9 **Q.** Now, when you were telling Mr. Hughes that the admissions
10 process is not just any one factor but a collection of
11 information, is this the type of decision you were talking
12 about?

13 **MR. HUGHES:** Your Honor, I'm going to object to the
14 leading.

15 **THE COURT:** Rephrase the question.

16 **MR. LEE:** I'll rephrase it.

17 **BY MR. LEE:**

18 **Q.** Do you remember Mr. Hughes asking you about different
19 factors in the admissions process?

20 **A.** I do.

21 **Q.** And you responded about the different factors that were
22 considered?

23 **A.** Yes.

24 **Q.** Taking a look at this file, have we discussed the
25 different factors you had in mind when you were answering

1 Mr. Hughes?

2 **A.** Yes. I mean, this is a good example of what we do.

3 **Q.** And she was admitted, correct?

4 **A.** She was admitted.

5 **Q.** Now, I'm going to come to another file in a few minutes,
6 but let me ask you a few questions about the use of race in
7 admissions. You told Mr. Hughes that race can be considered
8 in the admissions process, correct?

9 **A.** That's correct.

10 **Q.** Can race be a tip for some applicants?

11 **A.** It can be.

12 **Q.** And you told us yesterday that can be a plus factor?

13 **A.** It can be.

14 **Q.** What does it mean for race to be a tip or a plus factor
15 in the admissions process?

16 **A.** It simply means for people who are highly qualified and
17 who are, again, in that group of people who really have a
18 chance of getting in, it could be one factor that would lead
19 committee members to vote for that person just in terms of
20 whether or not that person might be a great educator of
21 others over the four years.

22 **Q.** Are applicants of any race or ethnicity subjected to a
23 different admissions process?

24 **A.** No.

25 **Q.** In any of the ratings that we discussed, does indicating,

1 self-identifying yourself as a certain race automatically
2 result in a better rating?

3 **A.** No.

4 **Q.** Are there applicants of all races who are rejected
5 because they're just not academically qualified?

6 **A.** That's correct.

7 **Q.** For those applicants, is race a factor in those
8 decisions?

9 **A.** No.

10 **Q.** At what point in the process could race factor into the
11 decision?

12 **A.** I think when you're in the situation of -- when you're
13 talking about candidates who are very competitive in the
14 subcommittee and then ultimately in the full committee,
15 that's when that kind of thing could come into play. It's
16 one factor among many for people choosing to vote or not.

17 **Q.** Is the fact that an applicant has self-identified their
18 race considered in assigning any of the four profile ratings?

19 **A.** No.

20 **Q.** Is it considered or can it be considered in assigning the
21 preliminary overall rating?

22 **A.** It can be.

23 **Q.** Must it be?

24 **A.** Not necessarily. Lots of people would be -- don't need
25 anything like that, that extra little tip to get in. Many

1 people are -- again in the real world, you're talking about
2 people who are multidimensional across all these dimensions
3 that we've talked about.

4 **Q.** Are there some applicants who will get in no matter what
5 their race or ethnicity is?

6 **A.** Yes. Quite a few.

7 **Q.** How can race be considered in the preliminary overall
8 rating?

9 **A.** If as the -- you're doing your preliminary overall
10 rating, if you think that this might be an additional little
11 element that might be helpful in terms of making a case that
12 this person, as I say, might be an unusual educator of
13 others, the person might decide to factor that into the
14 preliminary overall rating.

15 **Q.** Is an applicant's race ever considered a negative factor?

16 **A.** Never.

17 **Q.** A negative tip?

18 **A.** Never.

19 **Q.** A negative, opposite of a plus, a negative?

20 **A.** Never.

21 **Q.** Turn, if you would, to Tab 7 in your notebook.

22 **A.** Okay.

23 **Q.** Do you find Exhibit 7 A-2 before you?

24 **A.** I do.

25 **Q.** Have you SA-2 before you?

1 **A.** I do.

2 **Q.** Have you seen it before?

3 **A.** Yes.

4 **Q.** Have you reviewed this file before?

5 **A.** Yes.

6 MR. LEE: Your Honor, we offer SA-2 which is one of
7 the exhibits from the amicus students.

8 MR. HUGHES: No objection.

9 THE COURT: Admitted. Can I ask a question? Are
10 we going to see any of the applications from the SFFA
11 representatives?

12 MR. LEE: I don't think so. Not a thing.

13 THE COURT: Okay.

14 MR. LEE: I think the only application files you're
15 going to see are from us.

16 THE COURT: And you're not putting on any of the --

17 MR. LEE: (Witness shakes head negatively.)

18 (Defendant Exhibit No. SA-2 admitted.)

19 BY MR. LEE:

20 **Q.** Do you have SA-2 before you?

21 **A.** I do.

22 **Q.** Is this applicant a current student at Harvard?

23 **A.** Yes.

24 **Q.** Is this applicant one of the students who will testify at
25 this trial?

1 **A.** Yes.

2 **Q.** Turn, if you would, to page 4, which has the Bates stamp
3 number .004.

4 **A.** Yes, I have it.

5 **Q.** Is this the first page of the common application we've
6 discussed?

7 **A.** Yes.

8 **Q.** Does this applicant self-identify his race?

9 **A.** Yes.

10 **Q.** What does he say?

11 **A.** He says Asian and then Vietnam.

12 **Q.** So he has both identified himself as Asian and also as
13 Vietnamese, correct?

14 **A.** Yes.

15 **Q.** Now, for the first four days of this trial we've been
16 referring to Asian-Americans as a category. Do you have that
17 in mind?

18 **A.** I do.

19 **Q.** In the admissions process, are there different groups and
20 subgroups and sub-subgroups within the category of
21 Asian-Americans?

22 **A.** Very much so.

23 **Q.** Are they different?

24 **A.** Very much so.

25 **Q.** Do you consider their differences?

1 **A.** Yes.

2 **Q.** Can you give us just an example of how they're different?

3 **A.** There's a vast difference just within any country in Asia
4 in terms of socioeconomic advantage, for example. The life
5 experiences of someone from Xinjiang province lives in a
6 rural area is vastly different from the experience someone
7 would have in Shanghai, for example.

8 There's astonishing diversity that you can get from
9 even one single country.

10 And in Vietnam, where I've actually been to
11 recruit, there is again a vast difference between what the
12 opportunities in life would be for someone from the rural
13 areas and someone in the cities.

14 **Q.** The applicant here in the admitted student is named
15 Mr. Diep, correct?

16 **A.** Yes.

17 **Q.** And Mr. Diep has publicly disclosed portions of his file,
18 correct?

19 **A.** He has.

20 **Q.** I'm going to ask you some specifics that we can do on the
21 public record, thanks to him. Turn, if you would, to page 5.
22 It has a Bates stamp number .0005.

23 **A.** I'm sorry. Page 5?

24 **Q.** Yes.

25 **A.** Okay. I have it.

1 **Q.** What does this page tell you about Mr. Diep's parents'
2 education?

3 **A.** It tells you that they did not have college education,
4 but they did graduate from high school and secondary school,
5 which I think is a very good achievement. And it also tells
6 you a lot about what they're doing for work now.

7 **Q.** Would Mr. Diep be considered a first-generation Harvard
8 student?

9 **A.** Yes. As I was.

10 **Q.** Turn, if you would, to page 6. What was Mr. Diep's class
11 rank?

12 **A.** Page 6. I'm sorry. He was number one in the class. I
13 don't recall whether there was another person who shared that
14 rank, but he was number one.

15 **Q.** What was his grade point average?

16 **A.** 4.325 out of 4.

17 **Q.** Go to page 7.

18 **A.** Okay.

19 **Q.** What was Mr. Diep's SAT 1 score?

20 **A.** The SAT 1 was a 650.

21 **Q.** 650 for critical reading?

22 **A.** Yes. I'm sorry. Critical reading, which is the old
23 verbal if you're thinking of the way it used to be described.
24 710 in math and 710 in writing, and he had sort of mid
25 600-ish subject tests.

1 **Q.** His total score on the SAT 1 was about 2090, correct?

2 **A.** Sounds about right.

3 **Q.** In the overall applicant pool at Harvard, where does a
4 2090 SAT 1 score fall?

5 **A.** It would be kind of middling in the pool. But I think
6 the way we would look at him is that here's a person who
7 until the fourth grade was in another country and English was
8 not his first language. And he describes in the essay about
9 what he did to learn English.

10 Usually when a person has another language as a
11 first language or, as often is the case in many American
12 homes, usually over 20 percent of American homes have a
13 language other than English somewhere in the home. You will
14 typically find a verbal or a critical reading score probably
15 is not going to reflect whatever his or her real verbal or
16 critical reading score would be.

17 If this person had had a different set of
18 opportunities to grow up with English and so forth, who
19 knows? He may well have had an 800.

20 **Q.** Was Mr. Diep academically qualified to be admitted to
21 Harvard?

22 **A.** Perfectly qualified.

23 **Q.** Turn, if you would, to page 10.

24 **A.** Page 10. Okay.

25 **Q.** What did you find at page 10?

1 **A.** His personal essay.

2 **Q.** And what is the topic of Mr. Diep's personal essay?

3 **A.** It's really all about his adjustment to the United States
4 and especially his language challenges, which is a problem --
5 we have loads of kids who arrive from other countries in our
6 pool and end up at Harvard. His story is a familiar one.

7 **Q.** Does he discuss the challenge with his classmates of
8 being Asian or Vietnamese?

9 **A.** Very much so.

10 **Q.** Turn, if you would, to page 26. Let me ask you this:
11 You reviewed his file as part of the application process,
12 correct?

13 **A.** Yes.

14 **Q.** You were in the room when he was voted to be admitted,
15 correct?

16 **A.** Yes.

17 **Q.** Is this information that we're looking at now important
18 to you in evaluating the personal qualities of this
19 individual?

20 **A.** Yeah. Certainly I think for me and I think anyone who
21 would read it.

22 **Q.** Turn, if you would, to page 26.

23 **A.** Yes.

24 **Q.** Is this the teacher evaluation?

25 **A.** It is.

1 **Q.** Now, since you've been doing most of the talking for
2 three days, I'll read this paragraph. Do you see the second
3 paragraph that begins "As an immigrant?"

4 **A.** I do.

5 **Q.** "As an immigrant, Thang has had to overcome some major
6 obstacles. First, his father is still in Vietnam so Thang
7 has had to deal with the challenge of distance and separation
8 from him. Second, Thang had had to deal with languages. Due
9 to experiences when he was younger, Thang has had to overcome
10 a fear of public speaking. As a child he was made fun of due
11 to his accent. Once he entered high school, Thang challenged
12 himself to overcome this fear, and he has been successful in
13 this struggle. Thang has developed strong voice and he
14 participates consistently with thoughtful comments and
15 questions."

16 Have I read that correctly?

17 **A.** You have.

18 **Q.** Was that information important to you when you were
19 evaluating the personal qualities of this individual?

20 **A.** Absolutely. How could your heart not go out for this
21 person?

22 **Q.** Turn, if, would, to page 29.

23 **A.** Yes.

24 **Q.** What is at page 29?

25 **A.** This is the alumnae/alumni interview.

1 **Q.** And without going into the details, does the interviewer
2 note some of the same challenges and some of the same
3 successes?

4 **A.** Yes.

5 **Q.** And then let me ask you to look at another portion of
6 what the interviewer said. There is a section called
7 "Supporting Comments on Personal Qualities Ratings."

8 Do you see that on page 30?

9 **A.** I do.

10 **Q.** And about halfway down there's a sentence that begins
11 "What was most striking." Do you see that?

12 **A.** Begins where they met?

13 **Q.** No. If you go down seven lines.

14 **A.** Okay.

15 **Q.** In the middle you'll see a sentence that begins "What
16 was."

17 **A.** Yes.

18 **Q.** All right. Would you read that sentence for us.

19 **A.** "What was most striking about Thang was his fun, casual
20 nature but impressive understated maturity."

21 **Q.** Now, go back to the first page and let's look at the
22 ratings that the first reader assigned to this applicant. Do
23 you have the first page before you?

24 **A.** I do.

25 **Q.** What was the preliminary overall rating assigned by the

1 first reader?

2 **A.** It was a 2-.

3 **Q.** What was of the initial academic rating?

4 **A.** 3+.

5 **Q.** What was the initial extracurricular rating?

6 **A.** 2-.

7 **Q.** What was the initial athletic rating?

8 **A.** 4.

9 **Q.** And what was the initial personal rating?

10 **A.** 2-.

11 **Q.** Now, the first reader also made some notes, correct?

12 **A.** Yes.

13 **Q.** And if you turn to the notes, do you see the notes from
14 the first reader? Could you read to us the first two
15 sentences.

16 **A.** It says, "Essay, immigrant Vietnamese identity" --

17 **Q.** I'm sorry. Wrong one. The readers comments.

18 **A.** Oh, yes.

19 Thang is an incredibly hardworking student and very
20 committed to pushing himself academically and personally. He
21 has done a good deal to push his own boundaries and explore
22 new experiences. Support expresses admiration for his
23 intellect, work ethic, and leadership on campus. A very
24 involved first-generation student from a modest background,
25 one to compare with HFAI info --

1 Which is that's the Harvard financial aid
2 initiative, as we call it, to get the precise ranking. In
3 other words, to get the information that might clarify that
4 he might be \$65,000 and under family income so that the
5 family wouldn't have to pay anything, he wouldn't have any
6 loans to pay. It would be obviously a full scholarship.

7 **Q.** Did Mr. Diep's Asian and Vietnamese heritage factor --
8 strike that.

9 Did Mr. Diep's Vietnamese and Asian heritage
10 standing alone factor into any of the four profile ratings?

11 **A.** No. Not alone, no.

12 **Q.** Did his story that resulted from his Asian and Vietnamese
13 heritage factor into the ratings?

14 **A.** Yeah. I think certainly into the overall rating. To me
15 just reading it now, it's a very compelling story.

16 **Q.** Did his application demonstrate to you that he would
17 contribute to the Harvard community?

18 **A.** Very much so.

19 **Q.** You told me that the Asian-American pool or the
20 Asian-American category actually has a lot of subgroups.

21 Are there groups within the Asian-American
22 community that actually receive tips in the admissions
23 process?

24 **A.** I certainly think there are individuals. For example,
25 Hmong applicants, there's actually quite a few from

1 Minnesota, for example. A lot of the more recent immigrants
2 from Southeast Asia have come out of extremely impoverished
3 rural backgrounds, just as an example.

4 There's so much complexity and so much going on
5 that every application is a story in and of itself because
6 it's a person from what is always a complex country, and then
7 coming from a particular part of that country.

8 **Q.** You told us Mr. Diep was Asian-Vietnamese, he was from a
9 modest socioeconomic background, and he was first generation,
10 correct?

11 **A.** That's correct.

12 **Q.** Did any one of those factors guarantee him admission to
13 the Harvard class?

14 **A.** No, not at all.

15 **Q.** What was it that led him to be admitted to the Harvard
16 class?

17 **A.** It really was the combination of things. And I think one
18 of our Asian-American graduates is a woman named Angela
19 Duckworth, and she's done quite a bit of research. She's a
20 person at Penn who -- she's known as the grit lady, I guess.
21 She talks a lot about grit and hard work and how essentially
22 something I think a lot of us believe that about 99 percent
23 of success in life comes through hard work.

24 And this is a person who has truly in every way, if
25 you go all the way through this application, has pushed the

1 boundaries to develop and really consolidate and coordinate
2 all the different opportunities that he's had to put together
3 I think an incredible application.

4 **Q.** I don't think you know, but to keep the family happy, I
5 should tell you that Angela Duckworth is my first cousin. I
6 don't think you knew that.

7 **A.** I did not.

8 **Q.** If I didn't say something, she'd never forgive me.

9 Let's go back to the overall Harvard admissions
10 process. I think you described it as a whole-person process?

11 **A.** Yes.

12 **Q.** Has that process been in place since you joined the
13 office in 1972?

14 **A.** It has, yes.

15 **Q.** Turn, if you would, to Tab 8 in your notebook.

16 **A.** Yes.

17 **Q.** What do you find at Tab 8?

18 **A.** This is the *Bakke* opinion.

19 **Q.** Actually, Tab 8 is it the opinion or is it --

20 **A.** I'm sorry. Is it the friend of the Court brief?

21 **Q.** Yes.

22 **A.** Yes.

23 **Q.** Have you seen it before?

24 **A.** Yes. Not for a while.

25 **Q.** Turn, if you would, to page 47.

1 **A.** All right. I have it.

2 **Q.** At page 47, do you see something called "Appendix" and
3 the title is "Harvard College Admissions Program"?

4 **A.** I see it.

5 MR. LEE: Your Honor, we would offer DX55.

6 MR. HUGHES: No objection, Your Honor.

7 THE COURT: Admitted.

8 (Defendant Exhibit No. DX55 admitted.)

9 BY MR. LEE:

10 **Q.** I want to focus you on the appendix. Do you see that?

11 **A.** I do.

12 **Q.** What does the appendix describe in general?

13 **A.** It really talks about how our admission process had
14 worked for at least 30 years or so.

15 **Q.** Dean Fitzsimmons, were you one of the people who helped
16 put the information together and draft this appendix?

17 **A.** I was. I had been in the office about five or six years.
18 It was a team effort, obviously, but lots of us contributed
19 to the information that was sent in.

20 **Q.** And in fact, was this appendix attached to the *Bakke*
21 opinion itself?

22 **A.** Yes.

23 **Q.** Let's look a little bit about what the appendix to the
24 Supreme Court opinions said. Turn, if you would, to the
25 middle of the first paragraph of the appendix.

1 **A.** Uh-huh.

2 **Q.** Do you see the sentence that begins "The belief"?

3 **A.** Let's see. The belief, yes.

4 **Q.** Could you read that sentence for us, please.

5 **A.** Yes. "The belief has been that if scholarly excellence
6 were the sole or even predominant criterion, Harvard College
7 would lose a great deal of its vitality and intellectual
8 excellence and that the quality of the educational experience
9 offered to all students would suffer."

10 **Q.** Was that true in 1977?

11 **A.** Absolutely.

12 **Q.** Is it still true today?

13 **A.** It is. Not just at Harvard but lots of places.

14 **Q.** And has it been true consistently for the time that
15 you've been the dean?

16 **A.** It has.

17 **Q.** Turn, if you would, to page 48 of this appendix.

18 **A.** Okay.

19 **Q.** Do you see the sentence that begins "The belief"?

20 **A.** I do.

21 **Q.** Would you read that sentence for us?

22 **A.** "The belief that diversity adds an essential ingredient
23 to the educational process has long been a tenet of Harvard
24 College admissions."

25 **Q.** Was that true in 1977?

1 **A.** Yes.

2 **Q.** Is it true today?

3 **A.** It is.

4 **Q.** And has it been true consistently during your time as
5 dean?

6 **A.** Yes.

7 **Q.** Would you read the last sentence on that page?

8 **A.** The last sentence begins, "The quality of the educational
9 experience of all the students in Harvard College depends in
10 part on these differences in the background and outlook that
11 students bring with them."

12 **Q.** Was that true then?

13 **A.** Yes.

14 **Q.** Is it still true today?

15 **A.** Yes.

16 **Q.** And has it been true consistently?

17 **A.** Yes.

18 **Q.** How was race used in the Harvard admissions process at
19 the time that this appendix was submitted to the Supreme
20 Court?

21 **A.** Very much the way we've described, as one factor among
22 many.

23 **Q.** Did you tell the Supreme Court that in the appendix?

24 **A.** We did.

25 **Q.** Has the basic manner in which race is considered in the

1 Harvard admissions process changed?

2 **A.** It has not.

3 MR. LEE: Your Honor, I'm about to move to another
4 topic. I can either go or break, whatever is best for you.

5 THE COURT: As I say, I'm hoping to break for lunch
6 at about quarter of one. I'm happy to take a morning break
7 any time that's a good stopping place for you.

8 MR. LEE: This would be a good place, and then I
9 can finish up with the dean.

10 THE COURT: 15 minutes, does that work for
11 everyone? Mr. Hughes, 15 minutes?

12 MR. HUGHES: 15 minutes is great, Your Honor.
13 Thank you.

14 THE COURT: Five past, then.

15 MR. LEE: Thank you, Your Honor.

16 (Court recessed at 10:48 a.m.)

17 THE COURT: When you're ready.

18 MR. LEE: Thank you, Your Honor.

19 BY MR. LEE:

20 **Q.** Dean Fitzsimmons, I'd like to move to a different topic,
21 and that is recruiting. Okay?

22 **A.** Yes.

23 **Q.** You discussed some of this with Mr. Hughes, so I'm just
24 going to try to fill in some spots. Okay?

25 **A.** Sure.

1 **Q.** You testified earlier that Harvard has many more
2 applicants than it can admit, correct?

3 **A.** That's correct.

4 **Q.** If that's true, why do you so actively recruit?

5 **A.** Because the reality is most of the best students in the
6 United States hardly have Harvard on their list. Most of the
7 very good students in the United States, in fact, 80 percent
8 or so, will end up at a public college or university.

9 In fact, about 80 percent of students will end up
10 going to college within about 200 miles of their homes. If
11 we hope to get some share of the top students in the country,
12 we need to be out there. We need to be talking with them, to
13 their guidance counselors, and to their families.

14 **Q.** All right. Turn if you would to DD 1.20 in Tab 2. It's
15 demonstrative Number 20.

16 **A.** Tab 2, okay. Yes.

17 **Q.** What is summarized on this page?

18 **A.** These are some of the ways we recruit.

19 **Q.** Again, we've touched on some of these so I'm not going to
20 cover them all. We've talked about the search lists?

21 **A.** We have.

22 **Q.** Can you remind us what joint travel is?

23 **A.** Joint travel is the program where we go to 120 locations
24 every year in the U.S. with Georgetown, Penn, Duke, and
25 Stanford.

1 We do big evening meetings. Sometimes there's 800
2 or 1,000 people, parents, students, and family members, and
3 so on.

4 Then in the morning we do a counselor breakfast.
5 You can have as many as 100 counselors at the breakfast, and
6 essentially presenting our institutions at least as a set of
7 possibilities.

8 It's a very important part of what we do. And we
9 do these presentations and the large presentations in a
10 school auditorium, whatever.

11 Afterwards we talk with individual families after
12 those presentations. And one of the things that -- it is
13 really important, I think, to make contact directly with
14 people on this because -- especially in terms of the
15 financial aid access ability.

16 I remember being in Texas a number of years ago,
17 actually as we were trying to come up with our first
18 iteration for our new financial aid program. And a person --
19 it was in Austin, actually, in Texas, sort of said, gee,
20 Mr. Fitzsimmons, Harvard sounds great, and so on. So do
21 these other colleges tonight. Why should I send my daughter
22 up to the cold north with a bunch of Yankees -- and he was
23 kidding, I think; a bunch of communists -- when I could send
24 my daughter right here to UT Austin in the honors program
25 with music on Sixth Street and Hill Country to the west --

1 and here was the kicker -- for one-third of the cost?

2 So that was the time that we knew we really needed
3 that face-to-face joint travel, that we needed to make a
4 change.

5 So we ended up with the new financial aid program,
6 which means about for really a huge proportion of the United
7 States it's about the same or less expensive for close to
8 90 percent of American families to have their sons or
9 daughters to come to Harvard, even versus the public
10 university in state. So the joint travel is really important
11 for us to get out there.

12 **Q.** Now, why do you meet with the guidance counselors?

13 **A.** Guidance counselors are really the ones who oftentimes
14 will encourage people to apply or not to apply to places,
15 especially out of state.

16 **Q.** Now, there are a number of others listed here. I just
17 want to ask you a couple of questions about each of them.

18 What is alumni outreach?

19 **A.** This is where we ask our 10,000 alumnae/alumni not just
20 to interview but to go to college nights, visit high schools,
21 have events for local students to try to encourage them not
22 just to apply but then after admitted to come to Harvard.

23 **Q.** Now, there is something called the undergraduate minority
24 recruitment program, UMRP. It was mentioned earlier this
25 morning before you took the stand.

1 What is the undergraduate minority recruitment
2 program?

3 **A.** The UMRP is our oldest recruitment program. It was
4 started in the early '70s, really just after I came onto the
5 staff. There are organizations for each -- components for
6 each of the minority groups. So there's an Asian-American
7 organization, there's one for African-Americans, for Latin X,
8 and for Native Americans.

9 **Q.** I think you may have mentioned this. Is there a
10 recruitment program for Asian-Americans?

11 **A.** Yes.

12 **Q.** Her Honor asked you a question yesterday about the search
13 list that you purchased for Asian-Americans. Is that used in
14 the portion of the UMRP that relates to Asian-Americans?

15 **A.** Yes. So not only will these students hear from us
16 perhaps 40 or 50 times electronically and otherwise, but the
17 students themselves will -- in the UMRP will use those lists
18 as a way to sort of go after them electronically, sometimes
19 telephone, all the ways to sort of connect them sort of
20 person-to-person, student-to-student.

21 **Q.** Are the students in UMRP who are helping to recruit
22 Asian-American applicants, do they include Asian-American
23 students?

24 **A.** Yes.

25 **Q.** Now, I want to ask you about the Harvard financial aid

1 initiative which you've already mentioned.

2 Dean Fitzsimmons, do you know how much of the
3 incoming class at Harvard approximately receives financial
4 aid?

5 **A.** About 55 percent right now.

6 **Q.** How much of the incoming class has no parental
7 contribution to tuition --

8 **A.** About 20 percent.

9 **Q.** You need to let me finish. She'll get mad at one of us.

10 **A.** Sorry about that.

11 **Q.** So the question is how much of the incoming class has no
12 parental contribution to tuition, room, or board?

13 **A.** That's about 20 percent.

14 That's the group I mentioned, typically \$65,000 and
15 under. All of our financial aid students, including this
16 group, do not have to take out loans. All they have to do is
17 work 10 or 12 hours a week.

18 And the other thing we do for that group under
19 65,000 is we give them for the first year what we call a
20 start-up grant. So they're given a thousand dollars in
21 August, another thousand dollars in the end of January. And
22 the idea there is they can use that to really purchase some
23 of the things that, frankly, most of the rest of their
24 classmates have been able to purchase through their families.
25 It's really in a sense to level the playing field right away.

1 **Q.** For the portion of the class that is receiving some
2 financial aid, what is the average cost of attending Harvard?

3 **A.** \$12,000. And so that's for the 55 percent of the
4 students who are on undergraduate financial aid. Remember
5 also they do not have to take out loans. Pretty much when
6 you think about it, we call it the 0 to 10 percent plan. So
7 from say, for example, a \$150,000-a-year family income, you
8 pay only \$15,000 to send your son or daughter to Harvard.

9 **Q.** Has the Harvard financial aid program, as you've outlined
10 it, helped Harvard recruit a more diverse and different class
11 of students?

12 **A.** Very much so. It's been 15 years and it's been
13 transformative.

14 **Q.** The last one I want to ask you about is the
15 first-generation program. Do you have that in front of you?

16 **A.** I do.

17 **Q.** What is the first-generation program?

18 **A.** This is a program designed to help recruit those who
19 neither of their parents graduated from a four-year college
20 or university.

21 **Q.** For the incoming class at Harvard, how many students are
22 first generation?

23 **A.** This year about 17 percent of the admits, 16 percent of
24 the matrices.

25 **Q.** I want to go to a slightly different but related topic.

1 You were asked by Mr. Hughes yesterday about the dean's
2 interest list.

3 **A.** Yes.

4 **Q.** I think you mentioned, too, that the list includes people
5 that you meet on your travel, correct?

6 **A.** That would be true.

7 **Q.** Who else is included on the dean's interest list?

8 **A.** For example, if I hear about somebody who -- it may be
9 from any kind of a source, someone who is supposed to be a
10 really good applicant, I'll keep track of that.

11 I'll also keep track of if I hear about people who
12 with have performed unusual service for Harvard, whether it's
13 schools and scholarship committee service or Harvard Club --
14 schools and scholarship are the ones who help us recruit and
15 interview and so on -- Harvard Club activities. But also
16 those who have helped raise money or give money to Harvard.

17 **Q.** So let me ask you a few questions about the list. In any
18 given year, how many names are on the list?

19 **A.** I'm not exactly sure, but I'd say a couple of hundred.

20 **Q.** Does everybody on the list get in?

21 **A.** Hardly.

22 **Q.** Does everybody on the list go through the same process
23 that we've gone through this morning and yesterday afternoon?

24 **A.** Yes.

25 **Q.** Now, you were asked some questions yesterday about some

1 exhibits that dealt with the children of donors. Do you
2 recall that?

3 **A.** I do.

4 **Q.** For any given cycle, how much of the dean's list is
5 significant donors to Harvard?

6 **A.** Significant might be 15 or 20 people, something like
7 that.

8 **Q.** 15 or 20 people in total?

9 **A.** Yeah. You used the word "significant." Yes.

10 **Q.** Of those 15 to 20 people, do some people get in?

11 **A.** Some get in.

12 **Q.** Some not?

13 **A.** Some not. And again, one of the things I'll do, not just
14 with them but some of the others who'd been close to Harvard,
15 is I might try to give them some advance warning. Or if I'm
16 really good and we hear that they might be applying, I
17 might -- if I find out enough about them, try to encourage
18 them not to apply, to be honest.

19 **Q.** Do you recall the three exhibits that Mr. Hughes gave you
20 yesterday about applicants that were admitted?

21 **A.** Yes.

22 **Q.** One was a message from Dean Ellwood?

23 **A.** Pardon?

24 **Q.** One was a message from Dean Ellwood that mentioned --

25 **A.** Yes, yes.

1 **Q.** -- four candidates that he said were highly qualified?

2 **A.** Yes.

3 **Q.** Did they go through the same process as other candidates?

4 **A.** Yes.

5 **Q.** And just to be clear, for each one of the different
6 cycles we're talking about here, the significant donors might
7 be 15 to 20 people out of 40,000?

8 **A.** Yes.

9 **Q.** Has anybody ever suggested to you that considering donors
10 or whether folks have been donors has somehow disadvantaged
11 Asian-Americans?

12 **A.** No.

13 **Q.** Now, what is your purpose for keeping the dean's interest
14 list?

15 **A.** I think like any of us, we're trying to, we hope, get the
16 best people from around the world that we can. And we also
17 are really thinking about the long-term strength of Harvard,
18 both in terms of its ability to generate, for example,
19 cutting-edge research that might save lives or advance
20 knowledge in a variety of ways.

21 The other is really to make sure that the gates of
22 Harvard are open and remain open and we hope even wider for
23 people from modest economic backgrounds. A huge part of my
24 life has been devoted to helping and to worry about making
25 sure there's enough financial aid for all the great students

1 who need it.

2 **Q.** Let me go now to a different topic that Mr. Hughes I
3 think may have mentioned to you. But if he didn't, I
4 apologize.

5 You're familiar with the concept of one-pagers?

6 **A.** One?

7 **Q.** One-pagers.

8 **A.** Yes.

9 **Q.** Turn, if you would, to Tab 10 in your notebook.

10 **A.** Yes.

11 **Q.** Do you find P163?

12 **A.** Yes, I believe. Yes.

13 **Q.** Do you have that?

14 **A.** Tab 10. Yes, I do.

15 **Q.** P163 is something you discussed with Mr. Hughes, and it
16 has several pages, correct?

17 **A.** That's correct.

18 **Q.** I want to be sure that the record is clear on what the
19 one-pager is. Which page of this multipage exhibit is the
20 one-pager?

21 **A.** It would be, I guess, in yours it would be 807, 16807.

22 **Q.** 00016807 is the one-pager, correct?

23 **A.** That's the one-pager.

24 **Q.** Now, I just want to ask you a couple questions.

25 Do you see the categories of information? And

1 perhaps we could ask Mr. Lee to blow up as best he can the
2 categories on the left-hand side of the page.

3 Do you see those?

4 **A.** I do.

5 **Q.** On the one-pagers, what information are you receiving?

6 **A.** This gives us a rough idea of what we've done so far in
7 the process.

8 **Q.** It's broken down by category?

9 **A.** It is.

10 **Q.** And does that include gender?

11 **A.** It does.

12 **Q.** Geography?

13 **A.** Yes.

14 **Q.** Intended major career?

15 **A.** It does.

16 **Q.** If we can move a little further down, lineage?

17 **A.** Yes.

18 **Q.** Financial aid circumstances?

19 **A.** Yes.

20 **Q.** Athletes?

21 **A.** Yes.

22 **Q.** Disadvantaged staff fee waived?

23 **A.** Correct.

24 **Q.** Citizenship?

25 **A.** Yes.

1 **Q.** Race has three methodologies, correct?

2 **A.** That's correct.

3 **Q.** Could you explain to Her Honor why there are three
4 different methodologies listed?

5 **A.** The first one is really just more historical, and we
6 certainly probably don't need it at this point. But I think
7 probably some of the older staff members probably find it
8 useful as some sort of comparison.

9 The two that really are more helpful are the new
10 methodology and then the IPEDS.

11 **Q.** And what is IPEDS?

12 **A.** This is the federal government Integrated Postsecondary
13 Educational Data System, as I understand it.

14 **Q.** Now, do you receive the one-pagers?

15 **A.** Yes.

16 **Q.** And when do you receive them?

17 **A.** At various points in the process.

18 **Q.** What do you do with them?

19 **A.** It gives me a good sense perhaps of -- the real point of
20 the exercise is to make certain we don't come in over 1,660
21 people because that's all the beds we have. So it's a good
22 way for me to look at how the class is developing so that we
23 could know what total number we should probably be thinking
24 about this year.

25 There are lots of factors. We're trying to think

1 about the yield. We even think about current news events,
2 the current state of the economy, almost anything else you
3 can imagine. But this information is pretty helpful because
4 it has patterns that pertain from year to year.

5 **Q.** Would you remind us what's yield?

6 **A.** Yield would be the percentage of the students who we
7 admit who then decide to come to Harvard. We admit about
8 2,000 people, and then about 1,660 will show up.

9 **Q.** And does the yield, in your experience, differ by
10 category for the categories listed on the left-hand side of
11 this one-pager?

12 **A.** Oh, absolutely.

13 **Q.** And why is it important for you to have that yield
14 information by category?

15 **A.** So for example, if you were admitting a lot of engineers
16 this year for whatever set of reasons. And over the past 10
17 years there has been a huge increase in the number of
18 applications and admits from engineers and computer
19 scientists. You would know that they're going to yield at a
20 much lower rate than the rest of the students typically.
21 Again, the competition to so many other great places that do
22 engineering and computer science.

23 So that would give you a confidence that you could
24 admit more total people because you know that a whole bunch
25 of those engineers and computer scientists will end up

1 happily ever after at MIT or Caltech or wherever.

2 **Q.** Now, who gets the one-pagers in addition to you?

3 **A.** I get it and Marlyn McGrath Lewis, the director of
4 admissions; and Sally Donahue, the director of financial aid.
5 Now Jay Kaufman, who is the new director.

6 **Q.** Do you from time to time share information from the
7 one-pagers with the full committee?

8 **A.** I will.

9 **Q.** Do you share the full one-pager with the committees?

10 **A.** No.

11 **Q.** Is there a reason you share information orally but not by
12 giving them the one-pager?

13 **A.** The reason really just goes back to that memo that you
14 had on here about the people in the last few days just
15 focusing on the actual quality of the cases. Nothing to do
16 with numbers, nothing to do with dockets. The whole idea is
17 that you want this to be as far as possible from anything
18 mechanistic or formulaic.

19 **Q.** Do the yield rates at Harvard differ by race?

20 **A.** The yield rates, yes.

21 **Q.** Can you give Her Honor an example or two of how the yield
22 rates differ by race?

23 **A.** Yes. Just as an example, Asian-Americans yield at a very
24 high rate, really the highest rate of any of the ethnic
25 groups.

1 Latin X, or might say -- I'm not sure what they use
2 on this particular one. I guess they say Hispanic-American.
3 That again for a whole bunch of different reasons, part of
4 them geography, those students would tend to yield at a lower
5 rate.

6 **Q.** Now, of the three different categories of race, new
7 methodology, old methodology, IPEDS, which one do you
8 consider the most reliable?

9 **A.** I would consider the new methodology the most reliable.

10 **Q.** Because?

11 **A.** Well, because it allows the student to -- when the
12 students fill out the common application, they can put down
13 the ethnicities with which they identify. So it's really
14 from them and how they identify themselves.

15 It seems to us, too, just based on what we've seen
16 people do once they come to Harvard, for example, did they
17 end up being involved in ethnic organizations of various
18 kinds, of which there are many. Oftentimes it will relate
19 back to what they said on their common app.

20 **Q.** Now, does the one-pager include information about the
21 breakdown or the makeup of a past -- the past year's class?

22 **A.** Yes.

23 **Q.** And why is that information helpful to you in the
24 admissions process?

25 **A.** It's really, I guess, just generally -- remember we've

1 already started the recruiting year for the next year, and
2 we'll be out on the road shortly doing joint travel.

3 One of the things we sort of say -- well, let's
4 say, for example, we were for whatever set of reasons, and it
5 happens, we're having a really bad year let's say in the
6 Mountain States, for example. And there are some states --
7 remember we have no quotas of any kind. Some years there are
8 some states where no one is admitted.

9 So it's good for the staff to have a sense of how
10 well or how badly we're doing as they go back out and to
11 think about whether or not there could be new recruiting
12 approaches. It's a little bit of a report card to us, in a
13 sense of, maybe what's happened this year.

14 We don't have control over a lot of these things.
15 We know that there are different states, including New
16 England, where there are declines in the number of
17 18-year-olds very steadily. There have been and there will
18 be going forward.

19 **Q.** Do you use one-pagers to set a quota on the number of
20 minority applicants?

21 **A.** No.

22 **Q.** Do you use them to set a floor on the number of minority
23 applicants?

24 **A.** No.

25 **Q.** If a one-pager showed you that, to use your example, the

1 number of admitted engineers was significantly lower than a
2 prior year, would you make an effort to increase the number
3 of engineers admitted in that year?

4 **A.** No, no. It has nothing to do with that. That will just
5 tell us we have a little more room or a little less room to
6 admit anybody the committee wants to do as they compare
7 people from around the world.

8 **Q.** Would the same be true if you received a report that said
9 the number of African-Americans who were being admitted was
10 significantly lower than the prior year?

11 **A.** Really the same thing would apply.

12 **Q.** Do you make any effort to match the demographics of a
13 class for one year to the demographics of a class from
14 another year?

15 **A.** Not at all.

16 **Q.** Turn, if you would, to Tab 11 in your notebook.

17 THE COURT: Can I just ask a question? Is the
18 three methodologies on race and ethnicity, is the only
19 difference between those three where the information comes
20 from?

21 THE WITNESS: No. It's a little bit more
22 complicated. The old methodology is was rather arcane. Part
23 of it is the staff would take a look at what the student
24 maybe had said. But also sometimes students even forget to
25 check it, but they may have, for example, when they took the

1 ACT and the SAT, they may have indicated an ethnicity there.
2 So there are ethnicities coming in from a variety of
3 different places.

4 That didn't seem to me to be as effective, say, as
5 what the common app does. Looking just simply at the common
6 app, again you put down exactly what it is. There are a fair
7 number of students in America who have not just two different
8 ethnicities, they might have three or four, which is often you
9 see more often than you would think.

10 On the other hand with IPEDS it's very different.
11 I'll give you an example. So if you check they call it
12 Hispanic on IPEDS, then that's it. You may have checked
13 other boxes or other ethnicities. They don't get recorded.
14 If you check -- if you're not Hispanic but you check two or
15 more ethnicities, then you will be called two or more.

16 So what that means is, for example, the most
17 extreme example would be Native Americans. Usually about 80
18 or 90 percent of Native Americans have at least one other
19 ethnicity. Sometimes they would be Hispanic and Native
20 American. That would not get counted -- they would not get
21 counted as Native American. And if they were checked two or
22 more of the others, that would -- they would not. So
23 essentially under IPEDS, Native Americans almost disappear
24 off the radar scope.

25 And in the real world, we know plenty of people who

1 have checked Native American and other things, which is often
2 the case, and then end up being the head of our Native
3 American recruiting organization or the head of the Native
4 American cultural activities.

5 So the IPEDS would not give you a very good sense
6 at all about what your real diversity was. So that's why we
7 like the new methodology.

8 THE COURT: On the new methodology, how do you
9 account for people that leave that section of the common app
10 blank?

11 THE WITNESS: Blank.

12 THE COURT: So those people aren't accounted for in
13 that section.

14 THE WITNESS: That's correct. They're just blank.
15 It's voluntary.

16 BY MR. LEE:

17 **Q.** I think during the course of your examination by
18 Mr. Hughes, you mentioned from time to time people who were
19 not self-identified. Do you remember that?

20 **A.** That's correct.

21 **Q.** Are those the people that Her Honor is referring to?

22 **A.** That's correct.

23 **Q.** Okay. Now, turn, if you would, to Tab 11. Do you have
24 DX97?

25 **A.** I do.

1 **Q.** What is it?

2 **A.** This is a Harvard Gazette article announcing our new
3 class of current freshmen.

4 **Q.** For the class of 2022?

5 **A.** That's correct.

6 **Q.** Does it report the breakdown of the admitted class?

7 **A.** It does.

8 **Q.** Did admissions provide this information to the Gazette?

9 **A.** Yes.

10 MR. LEE: Your Honor, we offer DX97.

11 MR. HUGHES: No objection.

12 THE COURT: Admitted.

13 (Defendant Exhibit No. DX97 admitted.)

14 BY MR. LEE:

15 **Q.** Turn, if you would, to page 3.

16 **A.** Okay. I have it.

17 **Q.** What was the percentage of the admitted class for the
18 class of 2022 that was African-American?

19 **A.** African-American was 15.5 percent.

20 **Q.** What was the percentage that was Asian-American?

21 **A.** 22.7.

22 **Q.** What was the percentage that was Latino?

23 **A.** 12.2.

24 **Q.** Do these numbers fluctuate from year to year?

25 **A.** They do.

1 **Q.** And have the numbers of Asian-Americans,
2 African-Americans, and Latinos fluctuated from year to year?

3 **A.** They have.

4 **Q.** But during the period of time that you've been the dean,
5 have the numbers and percentages for each of these three
6 categories increased?

7 **A.** Increased, you say?

8 **Q.** Yes.

9 **A.** Generally, yes. Not every year.

10 **Q.** Over time, have they increased significantly?

11 **A.** They have. When I first started in admissions there were
12 almost no Asian-Americans. We were only up to about
13 5 percent by the early '80s, and now it's 22.7 percent.

14 **Q.** Now, let me go to a related but different question.

15 You discussed with Mr. Hughes, I think on the first
16 day of your examination, the importance of diversity and why
17 diversity was one of your goals.

18 Do you remember that?

19 **A.** I do.

20 **Q.** Now, you've been in admissions for 46 years, correct?

21 **A.** Correct.

22 **Q.** Have you been able to see the benefits of diversity in
23 the diverse classes you've admitted on the Harvard campus?

24 **A.** It's a profoundly better place. Just in terms of what
25 the students learn from each other, what the faculty and

1 those of us who work at Harvard learn from the astonishingly
2 diverse classes we have today.

3 Just think of examples, Paula Johnson, one of our
4 great African-American admits from not so long ago, became a
5 great doctor here in Boston, and she's now the president of
6 Wellesley College. I've known her forever.

7 I think of Lisa Quiroz, who was one of our minority
8 recruiters as an undergraduate. She died young,
9 unfortunately, last year in her 50's. But she was the
10 Hispanic Woman of the Year not so long ago.

11 I think of Brenda Wallhood, who was one of our
12 great Native American recruiters, who has gone back and spent
13 her life in the Midwest working on Native American activities
14 and welfare.

15 I guess it's sort of like my daughter, but I was
16 the host family for a woman named Gia Chang, who was one of
17 the first three students admitted after the cultural
18 revolution from China. She and her family spent -- her
19 father spent ten years out in the countryside at hard labor,
20 she spent three years in the countryside at hard labor, and
21 the rest of her family three to five years.

22 Getting to know these people and learning about who
23 they were and what they had experienced in their lives and
24 then being able to watch what they have done, it's changed my
25 life profoundly for the better. And they've changed Harvard

1 and their classmates profoundly for the better.

2 **Q.** Does diversity only benefit minority students?

3 **A.** It benefits everybody. I think I'm not a minority
4 student. It certainly has changed my life.

5 **Q.** Let me talk about race-neutral alternatives very briefly.
6 There are going to be some other witnesses who talk about it
7 in a little bit more detail.

8 But I want to ask you specifically, very quickly
9 yesterday you had mentioned early action and then the
10 decision to reinstitute early action.

11 Do you remember that?

12 **A.** I do.

13 **Q.** Could you explain to Her Honor why you eliminated early
14 action, what you were hoping to achieve, and why you had to
15 say it was an experiment that didn't work?

16 **A.** Well, what we hoped -- one of the problems we see in
17 America right now is there's so much pressure on students.

18 We, in fact, have a paper on our website called
19 "Time Out Or Burn Out For the Next Generation" in which we
20 try to encourage people to think about, for example, taking
21 gap years before coming to college and to Harvard.

22 And that pressure is on all kinds of students. I
23 think one of the dilemmas with early admission is it puts
24 pressure, as part of the general pressure of growing up,
25 pressure across the board. It puts -- I think sometimes

1 people in positions where they begin to make preliminary, I
2 think, decisions about where they want to go to college way
3 before they're ready to do it. Because oftentimes in the
4 senior year, you learn a lot.

5 We've never had binding early decision because we
6 want people to have the whole year. But we have also just
7 thought it kind of truncated -- the whole early process could
8 truncate the senior year, could make the whole senior year
9 less meaningful.

10 So we cannot talk to other colleges because of
11 antitrust issues, you know, if we decide to make any changes.

12 So we just jumped out there and did it on our own,
13 hoping that many of our competitors, frankly, would come with
14 us. Princeton did and the University of Virginia did, but
15 none of our other -- UNC, but none of the others did. That
16 was the backdrop.

17 The other thing is that we were very concerned that
18 because students from poor and modest economic backgrounds
19 often have way less access to college advising. There are
20 plenty of high schools out there now where there are no
21 guidance counselors whatsoever. In the average public high
22 school, it's about 500 to 1. In some states the ratio is 8
23 or 900 to 1 counselee to counselor.

24 So in that world, we felt that people from the
25 other side of the tracks were probably less likely to be able

1 to get into early pools. So it's a bunch of different
2 reasons that really kind of cross all the social classes.

3 **Q.** And at the end when no -- when only Princeton and UVA
4 followed, did you make a decision as to what Harvard needed
5 to do?

6 **A.** Yeah. We started to worry because we did that. Of
7 course one of the things we were concerned about is students
8 who come from less-resourced backgrounds. Ironically, they
9 were frankly being recruited out of our -- into early
10 decision pools and early action pools at other places.

11 So we could begin to see a real problem, and we
12 were probably really going to start losing great kids across
13 the board if we didn't switch back. So reluctantly we did
14 switch back.

15 **Q.** And to be specific to this case, did you see that
16 minority students, highly qualified minority students, were
17 being recruited into the early action pools of other schools?

18 **A.** Absolutely. They're among the most avidly recruited,
19 once -- because we were on the sidelines on early.

20 **Q.** Let's go to a different topic. Turn, if you would, to
21 Tab 12 which is P555, the OCR statement of findings.

22 **A.** Yes.

23 **Q.** Mr. Hughes spent some time with you on this and read
24 certain portions to you. Do you recall that?

25 **A.** Yes.

1 **Q.** So I'd like to just sort of fill in -- this is in
2 evidence, but I want to fill in some of the blanks left by
3 the portions read to you previously.

4 So let's look at the first page and the first
5 paragraph.

6 **A.** Mm-hmm.

7 **Q.** First let's talk about what the concern was that
8 intimated the OCR investigation.

9 Do you see four lines down -- well, we start three
10 lines down.

11 "As articulated in numerous media reports and
12 journal articles, the basic thrust of the concern has been
13 that despite superior academic credentials in terms of high
14 school performance and standardized test scores,
15 Asian-Americans have been admitted to selective schools at a
16 rate lower than white applicants and other minority group
17 applicants."

18 Have I read that correctly?

19 **A.** You have.

20 **Q.** And did you understand that that was the articulated
21 concern that led to the investigation?

22 **A.** Yes, absolutely.

23 **Q.** Turn to page 46, and let's look at the conclusion after
24 the investigation that you described to Mr. Hughes.

25 **A.** I see it.

1 **Q.** All right. So at the end of the entire report, at the
2 end of the portions that Mr. Hughes read to you and some
3 other texts, would you read to us the conclusion of this
4 two-and-a-half-year investigation?

5 **A.** Right at the end. Okay.

6 "As a result of this compliance review, it is OCR's
7 overall conclusion that Harvard did not discriminate against
8 Asian-American applicants to its undergraduate program in
9 violation of Title VI of the Civil Rights Act of 1964 or its
10 implementing Regulation 34 C.F.R. Part 100."

11 **Q.** Is the admissions process that OCR reviewed basically the
12 same admissions process as Harvard uses today?

13 **A.** It is.

14 **Q.** Let's talk about some of the similarities and some of the
15 other portions of the report. Would you turn to page 0006 in
16 P555.

17 **A.** Which tab are we here?

18 **Q.** I'm sorry. Same tab. My apologies. Same tab. So we're
19 still at P555.

20 **A.** Yep.

21 **Q.** And page .0006. Do you have that before you?

22 THE COURT: They're not numbered like that.

23 THE WITNESS: I think you mean page 6.

24 BY MR. LEE:

25 **Q.** I'm sorry. Page 6 at the top. My fault.

1 **A.** I got it.

2 **Q.** I'm going to take you to the second full paragraph. Do
3 you see the sentence that reads, "Applicants are?"

4 **A.** Applicants are. Okay, yes.

5 **Q.** Would you read that sentence for us, please.

6 **A.** "Applicants are chosen on the strength of their
7 credentials, but once they are deemed academically
8 admissible, other strong qualities are added that would
9 potentially contribute to the educational experience at
10 Harvard for all students."

11 **Q.** Was that true in 1990?

12 **A.** Yes.

13 **Q.** Is it true today?

14 **A.** It is.

15 **Q.** Was the docket system in place at the time OCR conducted
16 its investigation?

17 **A.** Yes, it was.

18 **Q.** Was the subcommittee process in place at that time?

19 **A.** Yes.

20 **Q.** Was the full committee process in place at that time?

21 **A.** Yes.

22 **Q.** Were the preliminary and profile ratings in place at that
23 time?

24 **A.** Yes.

25 **Q.** Turn, if you would, to page 6 and look at the final

1 paragraph.

2 **A.** Page 6. Okay, yes. Do you want me to read it?

3 **Q.** Yes. I'd like you to read the sentence that begins -- do
4 you see the sentence that reads, "There are four major
5 criteria on which all candidates are recessed: academic
6 achievement, extracurricular activities, athletics, and
7 personal qualities"?

8 **A.** Yes.

9 **Q.** "Criteria are described as standards against which all
10 applicants are measured."

11 Have I read that correctly?

12 **A.** Yes, you have.

13 **Q.** Would you read us the next sentence from OCR's findings?

14 **A.** "In evaluating a candidate's accomplishments against the
15 criteria, Harvard judgments are primarily based on the set of
16 information listed below. Some items listed are more or less
17 objective while others remain subjective in that they must be
18 measured through individual judgment or discretion.

19 "Examples of objective information are standardized
20 test scores, SATs, grade point average, GPA, and academic
21 distinctions such as National Merit Scholarship. Subjective
22 items may include such information as teacher or counselor
23 recommendations, essays written by the applicant, and the
24 alumni interview."

25 **Q.** Was that true in 1990?

1 **A.** Yes.

2 **Q.** Is it true today?

3 **A.** Yes, it is.

4 **Q.** Is it true with the two application files we reviewed
5 with Her Honor this morning?

6 **A.** Yes.

7 **Q.** Turn, if you would, to page 21. I want to look at some
8 of the portions that Mr. Hughes didn't cover with you that
9 concern the personal rating.

10 **A.** Okay.

11 **Q.** Do you recall Mr. Hughes referred you to some statements
12 and asked you whether you condone stereotyping?

13 **A.** That's correct. Yeah, I remember.

14 **Q.** And you said?

15 **A.** No.

16 **Q.** Let's see what it says about the personal ratings. Are
17 you on page 21?

18 **A.** I am.

19 **Q.** Do you see the sentence that refers to the personal
20 ratings in OCR's finding that begins "With respect"?

21 **A.** Yes.

22 **Q.** Would you read that paragraph for us, please.

23 **A.** "With respect to the personal qualities ratings, most
24 applicants in our sample, both Asian-American and white, were
25 given between 3- and 2+. Overall in the classes of 1991 and

1 1992, from which our file samples were drawn, over 98 percent
2 of the applicants received some form of a 2 or 3. However,
3 between the two groups, 20 percent of Asian-American
4 applicants and 25.5 percent of white applicants received a 2
5 rating in the personal category."

6 **Q.** So to be clear, the second sentence is the sentence that
7 Mr. Hughes addressed with you, correct?

8 **A.** Yes.

9 **Q.** It's preceded by the first sentence that describes the
10 specific findings concerning the classes of 1991 and 1992,
11 correct?

12 **A.** That's correct.

13 **Q.** Now, I'm not going to go back to what I asked you about
14 yesterday when we first looked at OCR briefly.

15 Do you recall what OCR found as to whether these
16 few comments by interviewers before 1988, what effect they
17 had on the personal ratings?

18 **A.** They said they did not have effects on the personal
19 rating.

20 **Q.** So let's look at the next paragraph. Do you have that
21 before you?

22 **A.** I do.

23 **Q.** Now, do you see the portion that reads, "According to the
24 admissions staff who were interviewed, the personal rating is
25 derived from a variety of elements in the applicant's file.

1 It may be based on the essay written by the applicant, the
2 comments of staff or alumni interviewers, teacher
3 recommendations, or any other information in the file which
4 indicates strength of character."

5 Do you see that?

6 **A.** I do.

7 **Q.** Was that true in 1990?

8 **A.** Yes.

9 **Q.** It is true today?

10 **A.** It is.

11 **Q.** Is it true in the two applications we looked at this
12 morning?

13 **A.** Yes.

14 **Q.** Look at the bottom paragraph. Do you see the sentence
15 that begins "Of the 300 files examined?

16 **A.** I do.

17 **Q.** Would you read that sentence and the two sentences that
18 follow for the Court.

19 **A.** Yes. "Of the 300 files examined in this phase of the
20 file review, OCR found only one applicant who received a
21 personal rating poorer than 3- on the summary sheet. The
22 applicant was an Asian-American who was admitted and who
23 ultimately came to Harvard. The fact that the applicant was
24 admitted despite the low personal rating supported Harvard's
25 position that the readers and committees view the entire

1 application as a whole."

2 **Q.** Is it still true that the whole person gets reviewed and
3 the decision is made no matter what the personal rating
4 happens to be?

5 **A.** Yes.

6 **Q.** I want to ask you a couple of questions about a paragraph
7 that Mr. Hughes drew your attention to. It's at the bottom
8 of page 15. Could you get to that page.

9 **A.** Okay. I have it.

10 **Q.** Do you have it before you?

11 **A.** I do.

12 **Q.** And he asked you some questions about the sentence that
13 begins, "Other readers indicated that ethnicity was a factor
14 considered throughout the admissions process" -- "the entire
15 admissions process. They stated that it could be reflected
16 in the four reader rating areas as well as in the POR during
17 the subcommittee and committee meeting discussions."

18 Have I read that correctly?

19 **A.** Yes.

20 **Q.** Now, my notes indicate that Mr. Hughes asked you some
21 questions about whether this applied to the personal rating.

22 Do you recall those questions from him?

23 **A.** I do.

24 **Q.** Is this portion of the OCR report limited to the personal
25 rating?

1 **A.** No. I'm having trouble following. Where did you read
2 from the beginning? Other readers?

3 **Q.** Bottom of the page 15 where it says "Other readers
4 indicated." It's on the screen now.

5 **A.** I see. And then went on to the next page. Sorry.

6 **Q.** Right. Is this portion of the report we're referring to
7 just the personal rating or to all four ratings?

8 **A.** Let me just read it again. So what's your question
9 again?

10 **Q.** I want to draw your attention to the portion that says
11 "They stated that it could be reflected in the four reader
12 rating areas.

13 **A.** The personal rating, yes.

14 **Q.** Are the four reader rating areas the profile ratings?

15 **A.** Yes. But ethnicity is only going to be considered in the
16 overall.

17 **Q.** Great.

18 **A.** If I get the thrust of the question.

19 **Q.** Turn, if you would, to page 45 of this exhibit.

20 **A.** 45. Okay.

21 **Q.** There's a portion that Mr. Hughes covered with you that
22 concerns -- it starts, "Utilizing ten years of quantitative
23 data." Do you see that?

24 **A.** No. But I'll get there.

25 **Q.** Let us highlight for you. It's in the last paragraph.

1 I'm not going to go over it in detail because you and
2 Mr. Hughes spent some time on it.

3 **A.** Right at the bottom.

4 **Q.** This is a person that refers to legacies and athletes,
5 correct?

6 **A.** Yes.

7 **Q.** Now, are you familiar with the acronym NLNA?

8 **A.** I am.

9 **Q.** What does NLNA mean?

10 **A.** Non-legacy non-athlete.

11 **Q.** After of the OCR investigation was concluded, did you
12 begin to track statistics on the NLNA pool?

13 **A.** Yes.

14 **Q.** Have you looked at those statistics periodically since
15 the OCR statement of findings in 1990?

16 **A.** Yes.

17 **Q.** Turn if you would, to Tab 13.

18 **A.** I have it.

19 **Q.** Do you find DX42?

20 **A.** I do.

21 **Q.** What is it?

22 **A.** Let's see. Just a little overall sense. Across a number
23 of years of demographics of various kinds. This particular
24 one is looking at ethnicity.

25 MR. LEE: Your Honor, we offer DX42.

1 MR. HUGHES: No objection, Your Honor.

2 THE COURT: Admitted.

3 (Defendant Exhibit No. DX42 admitted.)

4 BY MR. LEE:

5 Q. Turn to pages 4 to 9.

6 A. 4 to 9, okay.

7 Q. Tell me when you're there.

8 A. I have page 4.

9 Q. If you just flip through pages 4 to 9 --

10 THE COURT: Where are you getting the 4 from?

11 MR. LEE: I'm sorry, Your Honor, .0004 at the
12 bottom center.

13 THE COURT: All right.

14 A. Yes. I have it.

15 BY MR. LEE:

16 Q. Do these pages show the applicants it admits overall and
17 also by NLNA?

18 A. That's correct.

19 Q. Let's look at page 4, and let's look at the class of
20 2001, if we could.

21 A. I'm sorry.

22 Q. 2001. Do you see that?

23 A. Class of 2001. On page 4.

24 Q. Yeah. It's on the screen, if that's easier.

25 THE COURT: Right in the middle.

1 THE WITNESS: Here it is. Okay. Yes.

2 BY MR. LEE:

3 Q. And I'll ask Mr. Lee to highlight the NLNA admit rate for
4 Asian-American applicants to the class of 2001. Do you see
5 that?

6 A. I do.

7 Q. What was that rate?

8 A. That was 10.4 percent.

9 Q. What was the admit rate for NLNA white applicants for
10 2001?

11 A. 10.3 percent.

12 Q. Let's turn to page 6. To make it easier, we'll put it up
13 on the screen.

14 A. That would be great.

15 Q. And let's look at the class of 2008.

16 A. Okay.

17 Q. What was the NLNA admit rate for Asian-Americans that
18 year?

19 A. 8.9 percent.

20 Q. And what was the white NLNA admit rate for that year?

21 A. 8.8.

22 Q. Turn, if you would, to page 7. Again we'll put it on the
23 screen. And I want to look at the class of 2011.

24 A. Okay.

25 Q. What was the NLNA admit late for Asian-Americans in 2011?

1 **A.** 8.1 percent.

2 **Q.** For whites?

3 **A.** Whites, 7 and a half.

4 **Q.** Let's turn to the next page and look at the class of
5 2012. Do you have it before you?

6 **A.** I do.

7 **Q.** What was the NLNA admit rate for Asian-Americans?

8 **A.** 7.2 percent.

9 **Q.** And for whites?

10 **A.** It looks like 7.1 percent.

11 **Q.** Turn, if you would, to the next page and let's look at
12 the class of 2016.

13 What was the Asian-American NLNA admit rate for
14 that year?

15 **A.** 5.3.

16 **Q.** And for whites?

17 **A.** 5.1.

18 **Q.** All right. Now, let's stay on that page and go to the
19 class of 2017. What was the NLNA admit rate for
20 Asian-Americans that year?

21 **A.** 4.9 percent.

22 **Q.** And for whites?

23 **A.** 4.5 percent.

24 **Q.** Now, for each of the years we've looked at, the
25 Asian-American NLNA admit rate was higher than the white NLNA

1 admit rate, correct?

2 **A.** That's correct.

3 **Q.** Now, it's not exactly the same every single year,
4 correct?

5 **A.** That's correct.

6 **Q.** Have you received reports like this after you received
7 the OCR report in the 1990s?

8 **A.** Yes.

9 **Q.** Do you continue to receive them today?

10 **A.** I do.

11 **Q.** And do you review them?

12 **A.** I do.

13 **Q.** Now, has OCR looked into Harvard's admission process
14 after the 1990 compliance review?

15 **A.** They did.

16 **Q.** When?

17 **A.** 2001, again in 2012.

18 **Q.** Let's take 2001. What led to the 2001 inquiry?

19 **A.** There was an individual complaint on the part of an
20 Asian-American applicant.

21 **Q.** Did OCR investigate the claim?

22 **A.** They did.

23 **Q.** Was the claim one of discrimination?

24 **A.** Yes.

25 **Q.** Turn, if you would, to Tab 14.

1 **A.** I'm sorry, Tab --

2 **Q.** -- 14.

3 **A.** We're getting there.

4 **Q.** Tab 14.

5 **A.** Tab 14, yes.

6 **Q.** Do you find DX44?

7 **A.** I do, yep.

8 **Q.** What is it?

9 **A.** It's a letter to President Summers from the Office For
10 Civil Rights.

11 **Q.** And it's dated what?

12 **A.** The date is we received December 14, 2001.

13 MR. LEE: Your Honor, we offer DX44.

14 MR. HUGHES: No objection, Your Honor.

15 THE COURT: Admitted.

16 (Defendant Exhibit No. DX44 admitted.)

17 BY MR. LEE:

18 **Q.** This is approximately ten years after the OCR concluded
19 its review, correct?

20 **A.** That's correct.

21 **Q.** OCR investigated, correct?

22 **A.** They did.

23 **Q.** And what was the conclusion?

24 **A.** That we did not discriminate.

25 **Q.** Now, let me talk a little bit more about the personal

1 rating.

2 Are you aware that SFFA claims that the personal
3 rating is being used to discriminate against Asian-Americans?

4 **A.** I am aware.

5 **Q.** Is that right?

6 **A.** No.

7 **Q.** When we looked at these summary sheets and you told me
8 about the first reader?

9 **A.** Yes.

10 **Q.** When someone is filling out the boxes for the four
11 profile ratings, is it the same person filling out the boxes?

12 **A.** Yes.

13 **Q.** And if it's the second reader, is it the same person
14 filling out the boxes?

15 **A.** That's correct.

16 **Q.** Dean Fitzsimmons, how many applications have you reviewed
17 in your time at the admissions office?

18 **A.** I'm not sure I'd want to count them up, but it's a lot.

19 **Q.** Is it in the thousands?

20 **A.** Many, many, many thousands.

21 **Q.** And for how many applications have you been a member of
22 the 40-person admissions committee?

23 **A.** I've been there the whole time, sitting in those meetings
24 all but about a year and a half since 1972.

25 **Q.** And you've attended virtually all the full committee

1 meetings?

2 **A.** I have attended all of them.

3 **Q.** In those meetings over that long period of time, have you
4 observed racial bias from any members of the committee?

5 **A.** Never.

6 **Q.** Have you observed racial bias by any members of the
7 committee in making decisions?

8 **A.** Never.

9 **Q.** Have you observed any bias or discrimination against
10 Asian-Americans?

11 **A.** Never.

12 **Q.** Based upon your experience in the committee, what are
13 your reasons for your view that Harvard is not using the
14 personal rating to discriminate?

15 **A.** I think it's really, again, a process of having readers
16 look at the evidence in the application and really looking at
17 everything in that application, just the way we did as we
18 went through the process.

19 I think also there are so many checks and balances.
20 Again, you know, when you're filling out an application,
21 filling out a profile let's say at 9:00 at night, you know
22 that eventually that 40 people are going to be looking at
23 your work, you know.

24 So we're always vigilant. Not just every time we
25 read an application but every time we go through applications

1 in committee. So there are so many different checks and
2 balances on this.

3 **Q.** And does the training which you've described provide you
4 some assurance as well?

5 **A.** Yes. The training is certainly -- especially for new
6 staff is very, very important. It is a training period I
7 always say that isn't just simply a matter of months, but
8 it's really kind of a trial period. I would say
9 realistically it takes you about three years before you get
10 fully up to speed. And I think one of the things we --
11 because of the complexity of the job. So we are really
12 always watching each other essentially, and especially some
13 of the newer members of the staff.

14 But we're also going through constant training
15 every year ourselves through our orientation sessions and
16 through various sessions throughout the year.

17 **Q.** And we're going to have Director McGrath tell us about
18 that in more detail.

19 Let me ask you this: Are you aware of the claim
20 that the personal ratings for Asian-American applicants are
21 on average lower than those for white applicants?

22 **A.** I am.

23 **Q.** And have you reviewed yourself data regarding the average
24 personal ratings for Asian-American applicants compared to
25 whites?

1 **A.** I have.

2 **Q.** And what does that data show?

3 **A.** That there is a slight difference, that white applicants
4 have slightly stronger personal ratings than Asian-Americans.
5 Again on average. But the range of course is, even you saw
6 in the OCR report, is quite strong. So there are many, many
7 strong ratings obviously for Asian-Americans as well as
8 whites.

9 **Q.** Now, you described it as a small or slight difference,
10 correct?

11 **A.** I have.

12 **Q.** Could you remind us what information, what external
13 information goes into those ratings?

14 **A.** Well, you've had a little bit of a sense as you went
15 through this morning looking at the two applications.

16 And I think it's much easier to see it that way
17 because every single part of that application gives you yet
18 another set of insights into what this person may be like and
19 what may lead you to make a personal qualities rating of one
20 kind or another.

21 **Q.** And for the information received from these external
22 sources, does Harvard and the admissions office take it as it
23 receives it from the schools, the recommenders, the teachers?

24 **A.** We do.

25 **Q.** Now, how many factors does Harvard use in considering an

1 applicant or applicants for the admissions process?

2 **A.** As many as you can discern. We went through -- we are a
3 little bit like umpires in baseball or the way a court of law
4 works; that is, we're looking at all the evidence. And all
5 we can do is respond to what is in that application. But
6 it's everything that we're looking at.

7 **Q.** Let me return, to conclude, to the plaintiff's
8 allegations.

9 Dean Fitzsimmons, you've been the dean since 1986?

10 **A.** That's correct.

11 **Q.** You understand that SFFA has accused you of intentionally
12 discriminating against Asian-Americans. Do you understand
13 that?

14 **A.** I do.

15 **Q.** Do you take it seriously?

16 **A.** Absolutely.

17 **Q.** Is it true?

18 **A.** No.

19 **Q.** And how do you know?

20 **A.** Again, I think there are so many checks and balances that
21 are involved in the process, and there are so many of us
22 involved. But for all the reasons I said before, I think
23 with all the training that we have in place, I think
24 everything -- we certainly do everything in our power, you
25 know, to treat every applicant completely and fairly.

1 **Q.** Does the admissions office attempt to ensure that it
2 admits the same number of applicants from different racial
3 groups year after year after year?

4 **A.** Not at all.

5 **Q.** Do you attempt to ensure a consistent number of
6 matriculants by racial group year after year after year?

7 **A.** No.

8 **Q.** Have you ever used quotas?

9 **A.** Never.

10 **Q.** Have you ever used floors?

11 **A.** Used --

12 **Q.** -- floors?

13 **A.** No. No.

14 **Q.** Dr. Arcidiacono, the plaintiff's expert, claims that for
15 the classes of 2017 to 2019 you purposefully admitted
16 African-American students at the same level as other domestic
17 applicants.

18 Are you aware of that accusation?

19 **A.** I'm aware of the accusation.

20 **Q.** Is it true?

21 **A.** No, not at all.

22 **Q.** How do you know?

23 **A.** We don't even think in those terms. I think that was the
24 first time I ever saw anybody suggest that somehow you would
25 sort of peg something to some other thing. It just isn't the

1 way we work.

2 **Q.** Dean Fitzsimmons, you entered Harvard College in 1963?

3 **A.** That's correct.

4 **Q.** What was the gender composition of your class?

5 **A.** About 4 to 1.

6 **Q.** 4 men for every woman?

7 **A.** (Witness nods in the affirmative.)

8 **Q.** And what was the ethnic and racial makeup of your class,
9 in general?

10 **A.** There were virtually no students of color.

11 **Q.** Has the diversity both in terms of gender, race, and
12 ethnicity changed under your leadership since 1986?

13 **A.** It has changed dramatically. And again not just under my
14 leadership. But this was a total institutional effort across
15 the board on the part of faculty, administrators, and
16 students and alumni.

17 **Q.** Is Harvard a more diverse community today?

18 **A.** Vastly more diverse.

19 **Q.** In your view, is it a better community today?

20 **A.** It's an infinitely better place.

21 **Q.** Are you proud of your contribution to the diversity of
22 Harvard?

23 **A.** I am proud that Harvard over time, with all the different
24 parts of Harvard, have really opened the gates of Harvard in
25 all kinds of ways to a much wider range of talent in the

1 United States and the world.

2 And people who will bring you excellences and life
3 experiences of all sorts, it is a vastly different
4 institution. It's a work in progress. We always feel we can
5 do better. But we're working hard. There's a lot of talent
6 out there in the country that needs to be encouraged through
7 all the means necessary to get them to all of the
8 institutions of higher education.

9 **Q.** That includes Harvard but also many other colleges and
10 universities, correct?

11 **A.** Absolutely. And I think one of the big things is we're
12 so lucky, a lot of people around the world would say that
13 American colleges and universities are really the gold
14 standard now. And I think one of the great things is you can
15 have choices. You can decide to go to one of the great
16 public universities. You could decide to go to one of the
17 great small colleges. You could go to a place like ours.

18 I think one of the great things is that all these
19 places are vastly improved, say, compared to 1986 so that
20 it's a great time for people to be thinking about going on to
21 higher education.

22 And if we do that, I think we have a much better
23 chance of making sure that America continues to have a
24 leadership role in the world and the generations ahead.

25 **MR. LEE:** Thank you, Dean Fitzsimmons.

1 Nothing further, Your Honor.

2 MR. HUGHES: Your Honor, I will be brief, but I
3 need a minute or two to set up, if that's okay.

4 THE COURT: You don't have to be brief, and you can
5 take as much time as you need to set up, within reason. So
6 go ahead.

7 MR. HUGHES: I appreciate both of those comments.
8 Your Honor?

9 THE COURT: Whenever you're ready.

10 MR. HUGHES: Thank you, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. HUGHES:

13 **Q.** Good afternoon.

14 **A.** Good afternoon, Mr. Hughes.

15 **Q.** I hope to finish here before the lunch hour. I want to
16 turn first to a subject that you talked with both me and
17 Mr. Lee about yesterday, and that was the information that
18 OIR provided to you in 2013.

19 You recall, I'm sure, our lengthy discussion about
20 that, right?

21 **A.** I do.

22 **Q.** And you talked with Mr. Lee yesterday about OIR and your
23 understanding of what was conveyed to you in 2013 by OIR,
24 correct?

25 **A.** That's correct.

1 **Q.** Okay. I just want to make sure a few things are clear.
2 You are reasonably well informed with modern
3 statistical techniques, correct?

4 **A.** I would say reasonably.

5 **Q.** You'd say reasonably?

6 **A.** (Witness nods in the affirmative.)

7 **Q.** In fact, you previously taught statistics at the
8 introductory level, correct?

9 **A.** Yes. About a thousand years ago.

10 **Q.** And you have been part of studies at Harvard using
11 logistic regression, correct?

12 **A.** Yes. Certainly they've been presented over the years by
13 such parts of Harvard as OIR.

14 **Q.** And you are very familiar with the term "logistics
15 regression," correct?

16 **A.** With the term, yes.

17 **Q.** And focusing back on the information that you were
18 provided by OIR in 2013, you certainly understood the
19 information about Asians in the admissions process that OIR
20 provided to you, correct?

21 **A.** Well, the thrust of it, yeah. Remember I taught at Holy
22 Cross, statistics, in the '60s literally, and it was only
23 introductory. I have a decent grasp of it; but beyond that,
24 no.

25 **Q.** Dean Fitzsimmons, I'd like to put up page 431 of your

1 deposition on the screen.

2 MR. LEE: Which page?

3 MR. HUGHES: 431.

4 BY MR. HUGHES:

5 Q. You were asked, line 6:

6 "So did you ignore the information about being
7 Asian in the admissions process?

8 "ANSWER: No.

9 "QUESTION: What did you do with it?

10 "ANSWER: We certainly understood it. The
11 information was received."

12 Did you give that testimony?

13 MR. LEE: I object, Your Honor. This isn't
14 impeachment.

15 THE COURT: I don't think it's strictly
16 inconsistent. It's fine.

17 MR. HUGHES: The question in court, to be clear,
18 was whether he certainly understood the information.

19 THE COURT: He said that he understood it
20 generally, but I think the import of what he's saying is he
21 understood it but he's not an expert.

22 BY MR. HUGHES:

23 Q. Let's move on.

24 You talked with Mr. Lee yesterday briefly about
25 Sparse Country, and the Court had a few questions that I hope

1 the two of us can clear up. I want to go back to Plaintiff's
2 Exhibit 2.

3 MR. HUGHES: I'm going to wait for Her Honor.

4 THE COURT: I got it.

5 BY MR. HUGHES:

6 Q. There was an exchange yesterday where Judge Burroughs
7 asked you about, you see there are high scorers men and high
8 scorers women. Do you see that?

9 A. I do.

10 Q. I'm going to blow this up a little differently. The
11 score ranges there are 1380 to 1600 for men, 1350 to 1600 for
12 women, correct?

13 A. That's correct.

14 Q. You and I reviewed this. There's ethnicity and
15 geographic information in the column to the right of the
16 scores, correct?

17 A. That's correct.

18 Q. You and I reviewed that K is when the applicant doesn't
19 fill in their racial or ethnic information, O is other, W is
20 white, correct?

21 A. Yes. And then all.

22 Q. And "all" means all the states, correct?

23 A. I believe that's true.

24 Q. And so the Asian applicants are not included in these
25 high scorers men and women. They're actually included down

1 below in high scorers Asian men, high scorers Asian females,
2 correct?

3 **A.** That's correct.

4 **Q.** And we can see that's true because if you look over to
5 the column that I'm going to highlight, those are additional
6 applicants, correct?

7 **A.** That's right.

8 **Q.** And then the point that I was making I just want to make
9 sure is clear, with the lower PSAT range for Sparse Country,
10 that includes white applicants, other, and unknown but not
11 Asian applicants for the class years of 2017 and 2018,
12 correct?

13 **A.** That's correct.

14 **Q.** I want to look at one more exhibit related to this, and
15 that is P57. I'll blow this up. And that's an email from
16 Elizabeth Yong to you, January 29, 2014. And before I ask
17 you questions, I'd like to offer it into evidence.

18 THE COURT: Is it Tab 57?

19 MR. HUGHES: I'm sorry, Your Honor.

20 THE COURT: I got it.

21 MR. LEE: No objection, Your Honor.

22 THE COURT: Admitted.

23 (Plaintiff Exhibit No. 57 admitted.)

24 BY MR. HUGHES:

25 **Q.** And I'd like to look at the next page. The last document

1 we were looking at, P2 is for class years '17 and '18. This
2 is for class year 2019, correct?

3 **A.** Yes.

4 **Q.** And here it's a little different. For the high scorers
5 men and women, we've actually got -- it's just one group.
6 It's Asian, unknown, other, and white, correct?

7 **A.** That's correct.

8 **Q.** And we've got the same score range as before, correct?

9 **A.** That is correct.

10 **Q.** And just like before in Sparse Country with the lower
11 score range, you're inviting white applicants, other
12 applicants, and unknown applicants to apply with scores as
13 low as 1310 but Asian applicants are not included in that
14 category, correct?

15 **A.** That appears to be correct.

16 **Q.** And then I want to show you, and then we'll leave this
17 topic, Plaintiff's Exhibit 50, which Mr. Lee showed you and I
18 believe is already admitted into evidence. If we look at the
19 fifth page of that.

20 THE COURT: Not in your book, right? In his book?

21 MR. HUGHES: I think it was in my book. It's not
22 in my book? It's in Mr. Lee's book.

23 MR. LEE: I can get it for you. It's Tab 25 in our
24 notebook.

25 THE COURT: Okay. Got it.

1 BY MR. HUGHES:

2 Q. The last two exhibits we looked at related to searches
3 for the classes of 2017, 2018, and 2019, correct?

4 A. That's correct.

5 Q. This relates to the search for the class of 2016,
6 correct?

7 A. It appears to, yes.

8 Q. We've still got the same -- this time we've got high
9 scorers at the top not differentiated by gender, correct?

10 A. Yes.

11 Q. And we've got the same Sparse Country score range and
12 ethnicities, correct?

13 A. That's correct.

14 Q. All right. And then if we go down -- I think Mr. Lee
15 looked at this with you yesterday. In 2016, there was
16 actually an Asian level 2 category that went down to 1300,
17 correct?

18 A. That's correct.

19 Q. And Harvard evidently made a decision to stop using that
20 category as of the class of 2017, '18, and '19 that we just
21 looked at, correct?

22 A. Yeah. I'm not sure who the Harvard was, to be honest.
23 Because Elizabeth Yong was in charge of our search, and we
24 obviously talked to Elizabeth. But there are sometimes
25 complexities in ordering search materials from the ACT or the

1 SAT, but I don't remember being involved in that decision.
2 It's possible maybe I was. It's also possible that
3 Elizabeth, who also didn't just order our search but she also
4 did our research, may for some reason have made the decision.

5 Q. Okay. But somebody made the decision?

6 A. Precisely, right.

7 Q. So as of 2017, the Asian level 2 no longer appears in
8 search, correct?

9 A. That's what appears to be the case, yes.

10 Q. Now, you talked about the docket. You've got a big
11 docket there in front of you, right?

12 A. Yes, I do.

13 Q. Subcommittee process with Mr. Lee, correct?

14 A. I did.

15 Q. And you actually chair the P docket, correct?

16 A. I do. Currently and really for quite a few years.

17 Q. Okay. The dockets are a big, voluminous documents,
18 correct?

19 A. They are.

20 Q. So I'd like to look at Defendant's Exhibit 50 with you,
21 which is the docket. It's a 1,500-page exhibit which I have
22 a printout of, but we're not going to look at more than a few
23 pages of the P, R, and S dockets. Do you see that?

24 A. I do.

25 Q. If we just flip through --

1 **A.** Is this somewhere in here?

2 **Q.** It is not. I've got it right there for you, if you want
3 the actual full paper binder.

4 **A.** I might, but let's see what we can do to save time.

5 **Q.** As you see on the screen, this is kind of what a docket
6 likes like, right?

7 **A.** That's correct.

8 **Q.** I'm looking at page 3. And this is an entry for the P
9 docket for the Harvard College class of 2018, correct?

10 MR. LEE: Your Honor, could we turn the gallery
11 screen off? These are not redacted.

12 MR. HUGHES: I'm sorry, Mr. Lee. That's fine.

13 THE WITNESS: I think especially because we're in
14 the local area.

15 THE COURT: You turned mine off, too.

16 MR. HUGHES: I took it down. I think we're okay
17 now.

18 THE WITNESS: I think it would be very useful for
19 Your Honor to see it.

20 BY MR. HUGHES:

21 **Q.** You can see it now on the screen, right?

22 **A.** I can see it.

23 **Q.** So here we have the P docket, correct?

24 **A.** That's correct.

25 **Q.** And this is for early action for the Harvard class of

1 2018, correct?

2 **A.** That's true.

3 **Q.** And I see some handwriting on the side. Do you see
4 there's an S? What does S stand for?

5 **A.** This is my hideous handwriting. I put "music" with an
6 exclamation mark because it seemed to be significant. This
7 was the Harvard book winner and the person also plays the
8 saxophone.

9 **Q.** For the P docket, you're the guy that's making the
10 handwritten notes?

11 **A.** Yes. Also remember there's another official docket, too,
12 number 2. Somebody else will do that, but almost always it
13 will be my handwriting in the official number 1, it's called.

14 **Q.** The letters to the side, does A stand for admit?

15 **A.** Yes.

16 **Q.** If you look above, I didn't have it highlighted, but what
17 does S stand for?

18 **A.** That's defer.

19 **Q.** That means you're going to defer them into the regular
20 action?

21 **A.** That's correct.

22 **Q.** I think we may look at a couple of other pages. There's
23 a WL notation. What does that stand for?

24 **A.** Wait list.

25 **Q.** And that means probably not getting admitted?

1 **A.** No, not necessarily. We've had years where we've
2 admitted over 200 off the wait list, the year we returned
3 from not having early action. So it's not at all a dead
4 issue.

5 **Q.** Okay. But it's not as good as a deferral or an admitted,
6 generally speaking?

7 **A.** A defer could end up admitted but they could also end up
8 rejected. I would say on average "wait list" means you're
9 pretty close.

10 **Q.** I want to just take a little side detour here.

11 You testified earlier that the stereotyping
12 comments we saw in the OCR report that Mr. Lee just reviewed
13 with you are abhorrent.

14 Do you agree with that?

15 **A.** Yes.

16 **Q.** I want to look at what those comments were just so we
17 have that stereotypical language was in mind. So I'm going
18 to go back to Exhibit 555, page 24. I'll read it in the
19 record.

20 So here on page 24 of the OCR report, "OCR's
21 concern for the potential stereotyping of Asian-American
22 applicants prompted a review of reader comments for negative
23 characterizations which could have an impact on the
24 admissions decision and ratings.

25 "On its face, reader comments revealed several

1 recurring characterizations attributed to Asian-American
2 applicants. Quite often Asian-American applicants were
3 described as being quiet/shy, science/math oriented, and
4 hard-working. For example, one reader's comment embraced all
5 of these in describing an Asian-American applicant when she
6 wrote, 'applicant seemed like a reserved, hard-working,
7 aspiring woman scientist/doctor.'

8 "While such descriptions may not seem damaging, OCR
9 was conscious that problem of model minority stereotypes
10 could negatively impact Asian-American applicants as a whole.
11 This concern was also raised when OCR's file review came upon
12 comments such as, 'He's quiet and, of course, wants to be a
13 doctor?'"

14 Do you see that text before you?

15 **A.** I do.

16 **Q.** Some of that stereotypical language associated with
17 Asian-Americans that you say you abhor are quiet/shy, hard
18 workers, reserved, hard-working, quiet. Agree?

19 **A.** Actually earlier today I actually talked about hard
20 working as perhaps one of the best descriptions you could
21 have for anyone.

22 I referenced one of our Asian-Americans alums,
23 Angela Duckworth, and her great book on grit and the
24 importance of hard work in terms of succeeding in any kind of
25 an endeavor.

1 So I would hardly say -- in my own mind at least
2 say that someone who's a hard worker that -- I would consider
3 it to be a huge compliment. But that's just me.

4 **Q.** These are the stereotypical language that you agreed
5 yesterday that you abhorred, correct?

6 **A.** My statement was that I would abhor any stereotypical
7 comments.

8 **Q.** Let's look at Plaintiff's D50, page 56.

9 THE COURT: Are you going to move this into
10 evidence?

11 MR. HUGHES: Sure. I offer D50 into evidence.

12 MR. LEE: Could we have a copy?

13 MR. HUGHES: This was on Harvard's list of
14 documents.

15 MR. LEE: What page?

16 MR. HUGHES: Page 356. I've also got it on the
17 screen. I've also got a motion to move this into evidence.

18 MR. LEE: There's no objection, Your Honor.

19 THE COURT: Admitted.

20 (Defendant Exhibit No. D50 admitted.)

21 BY MR. HUGHES:

22 **Q.** So this is docket P?

23 **A.** Yes.

24 **Q.** I want to look at the bottom that I've got highlighted.
25 This is an applicant that we've got -- what is the ethnicity

1 for this applicant?

2 **A.** That would be Asian and then Chinese.

3 **Q.** What is the course of action that's proposed as wait
4 list, correct?

5 **A.** Yes. At that time.

6 **Q.** And this is your handwriting, correct?

7 **A.** That's correct.

8 **Q.** And you described the applicant. There's only two
9 descriptive words, and they are "very quiet," correct?

10 **A.** That's correct.

11 **Q.** I've got one more.

12 MR. HUGHES: Now, Mr. Lee, I'm on page 186.

13 BY MR. HUGHES:

14 **Q.** Dean Fitzsimmons, can you see the page of the docket that
15 I've got up in front of you?

16 **A.** I can, yes.

17 **Q.** And again, this is your handwriting, correct?

18 **A.** That's correct.

19 **Q.** It's a P docket, correct?

20 **A.** That is correct.

21 **Q.** And what is the ethnicity of the applicant that I have
22 highlighted?

23 **A.** That would be Asian and Chinese.

24 **Q.** And the activity proposed in subcommittee is wait list,
25 correct?

1 **A.** That's correct.

2 **Q.** And you described that applicant as quiet and strong,
3 correct?

4 **A.** I did.

5 MR. HUGHES: No further questions.

6 RE CROSS-EXAMINATION

7 BY MR. LEE:

8 **Q.** Dean Fitzsimmons, have you interviewed white candidates
9 who you described as quiet?

10 **A.** I certainly have.

11 **Q.** African-American candidates you described as quiet?

12 **A.** Yes.

13 **Q.** Hispanic candidates you've described as quiet?

14 **A.** Yes.

15 **Q.** Asian-Americans you've described as quiet?

16 **A.** Yes.

17 **Q.** Is that stereotyping by ethnicity?

18 **A.** No.

19 **Q.** Have you interviewed Asian-American candidates you
20 described as outgoing?

21 **A.** Yes.

22 **Q.** And the document that was just put in front of you is
23 1,592 pages, correct?

24 **A.** That's correct.

25 **Q.** It has handwritten notations by you on a variety of the

1 pages, correct?

2 **A.** That's correct.

3 **Q.** Now, when OCR was referring to stereotyping, it was
4 referring to phrases that were used to characterize someone's
5 ethnicity, correct?

6 **A.** That's correct.

7 **Q.** Is that what you were doing in these 1,592 pages?

8 **A.** No.

9 **Q.** Last couple of questions. You were asked some more
10 questions about OIR.

11 **A.** Yes.

12 **Q.** I think you told us a lot of this started or part of it
13 started with the Unz article?

14 **A.** Yes.

15 **Q.** And as Mr. Hughes said, there was some controversy about
16 Asian-American admits, correct?

17 **A.** That's correct.

18 **Q.** Was there also controversy among the Harvard Jewish
19 community?

20 **A.** Very much so.

21 **Q.** Because?

22 **A.** Because of the Unz article.

23 **Q.** Right. Now, at the end of this six months and all of the
24 different presentation memos you saw, you did see the model
25 you discussed with Her Honor, correct?

1 **A.** Yes.

2 **Q.** Did it tell you anything that was inconsistent with what
3 you had understood before the OCR investigation, after it,
4 right through the date you got those reports?

5 **A.** No. Perfectly consistent with everything we've known.

6 MR. LEE: Thank you, Your Honor.

7 MR. HUGHES: I have nothing further, Your Honor.

8 THE COURT: Dean Fitzsimmons, you are excused.

9 THE WITNESS: Thank you, Your Honor.

10 MR. MORTARA: Your Honor, Adam Mortara. Would you
11 remind me of the time you wanted to take lunch?

12 THE COURT: I was planning on taking lunch from
13 quarter of 1:00 to 1:30.

14 MR. MORTARA: I would suggest we do it right now
15 because I'm going to be right in the middle of my direct
16 examination of Christopher Looby. I would be happy to do it
17 now.

18 THE COURT: I need until 1:30 today. Why don't we
19 do some of these deposition designations at sidebar before we
20 take a break.

21 (The following was held at sidebar. Present are
22 Attorneys Katherine L.I. Hacker, Krista J. Perry, Meg E.
23 Fasulo, Denise W. Tsai, and Felicia H. Ellsworth.)

24 THE COURT: Who do you want to start with? Do you
25 want to start with Ortiz?

1 MS. HACKER: Sure.

2 THE COURT: I think the easiest way is page by
3 page.

4 MS. ELLSWORTH: That's fine.

5 MS. HACKER: Yes.

6 THE COURT: The first one is on page 2. That's
7 overruled.

8 MS. ELLSWORTH: That's withdrawn. Sorry about
9 that.

10 THE COURT: Page 3 is overruled. This one is
11 harder to do. Everything on page 6 comes in. This one I had
12 to stop because I wasn't sure -- the top half of page 7 comes
13 in. So page 7 comes in. Now, on page 8, I couldn't really
14 understand this without an email. I don't really know what
15 it is and all this talk about planning on using it next week.
16 Using it for what? I'm just not sure what this is about.

17 MS. FASULO: Your Honor, Meg Fasulo for SFFA. This
18 is discussing an email chain between Ms. Ortiz and Ms. Bever
19 having to do with the distribution of SAT scores that
20 Ms. Ortiz was planning on using in a presentation to other
21 admission officers.

22 THE COURT: Other admissions officers at Harvard?

23 MS. FASULO: That's correct.

24 THE COURT: That comes in.

25 MS. ELLSWORTH: And I believe the exhibit came in.

1 MS. FASULO: That's correct. The exhibit was
2 unobjected to.

3 THE COURT: Everything on page 8 comes in. So then
4 on page 10, my highlighting at least starts right in the
5 middle of a question. So I'm assuming that --

6 MS. FASULO: That was a mistake. The whole part
7 should be highlighted.

8 THE COURT: You're objecting to the answer? Start
9 on page 9. Is that what's being objected to, that answer
10 that begins at line 18?

11 MS. ELLSWORTH: The one that says, "Were I to
12 guess".

13 THE COURT: That's sustained. That question does
14 not come in. The next question does come in, do you recall.
15 She says I don't recall. That question and answer comes in.
16 And then the next question and answer, the objection is
17 sustained.

18 Page 11, that objection is sustained. So on page
19 12, this kind of lost me again. The answer comes in, I don't
20 recall. The next question, the objection is sustained. I
21 wasn't sure what you're objecting to. The answer comes in,
22 but the question is out.

23 MS. ELLSWORTH: I don't think the answer is the
24 next thing. This is where it's confusing. I'm not sure if
25 we objected to this or not. I think it shouldn't come in

1 because it's speculation.

2 THE COURT: What's in is "Would you have conveyed
3 this information?". That's a legitimate question. She says
4 she doesn't know.

5 MS. ELLSWORTH: It's the question that says what is
6 the type of context that an admissions officer should have
7 taken away --

8 THE COURT: That's sustained.

9 MS. ELLSWORTH: So the answer should not come in
10 either, right?

11 THE COURT: Right. The next objection that says it
12 was help for me. That's overruled. And then -- and that
13 last answer comes in which is on the bottom of page 12.

14 MS. ELLSWORTH: Got it.

15 THE COURT: The next one is -- do you want to talk
16 about Zuluaga here? We can just do the objections here and
17 not hear the argument on who they want to keep out in their
18 entirety.

19 MS. HACKER: I'm happy to do it all right now since
20 Your Honor has time before your lunch.

21 THE COURT: Let me check my phone. Okay. There's
22 this one and another one. One of them is from Stuyvesant and
23 the other is from Thomas Jefferson. What I think on these, I
24 actually looked at Zuluaga and Pedrick. My thinking on it
25 changed a little on it after I went back and did Pedrick.

1 Most of this stuff is not coming in through this witness,
2 right? All the stuff about are Asians different, different
3 socioeconomic backgrounds, are they the same as each other,
4 that's just not coming in.

5 That being said, if you want to put in some
6 information about Thomas Jefferson, how many students they
7 have and what the gender is, what the ethnic breakdown is, I
8 can see letting that in if it's going to be linked up later.
9 It it's not going to be linked up, it's irrelevant.

10 MS. HACKER: Whatever Harvard's position was going
11 into trial over the past few days, what we heard from Dean
12 Fitzsimmons is and this is a quote, "You know, the one thing
13 we do know, for example, and again speculation, and it's a
14 fact that the strength of the teacher recommendations and the
15 counselor recommendations for Whites is somewhat stronger
16 than those for Asian-Americans."

17 Dean Fitzsimmons is saying that the schools who
18 support these students do have a different belief, different
19 ratings for Whites versus Asians. And what we're hearing
20 from these schools is directly relevant to contradict that
21 testimony.

22 THE COURT: What I heard him say is that they're
23 looking at the evaluations and they're seeing that the
24 evaluations for White students are higher than for Asian
25 students. So if you want to prove that up, you have to show

1 me some guidance counselor recommendations, not just this
2 like subjective kind of, oh, no, our recommendations would
3 never show anything like that.

4 MS. HACKER: And we asked for those in discovery,
5 Your Honor, but we were denied --

6 THE COURT: You were offered the opportunity to
7 come back and nobody ever did. If you want to put this in
8 and then you have some other statistical breakdown later
9 about how kids from this high school are treated, that's one
10 thing. But just this thing from the guidance counselor about
11 do we have too many Asians and are Asians different from each
12 other, it's not substantiated by anything.

13 MS. HACKER: We will have data later that shows
14 there is no difference. Whites are not better in school
15 support ratings than Asian-Americans. This testimony
16 confirms that that is what these high school representatives
17 believe. These were 30(b)(6) witnesses on behalf of these
18 high schools.

19 THE COURT: It has to be an actual student. It
20 can't be just general. I don't even know which of these
21 people applied to Harvard. And one of them says -- I think
22 one of them even equivocates -- I think the questions were
23 asked differently. It's like are Asian students
24 well-rounded. It was like more or less, basically, right?
25 It's like saying some are, some aren't which is probably

1 fair. Some whites are -- the questions are asked
2 differently. It doesn't link up to what Harvard is doing.

3 If you want to put in through these people the
4 demographic breakdown of the school, you can have that. So
5 we can go through it and sort of -- but the rest of it just
6 doesn't come in. So do you know the breakdown, how many
7 students, how many boys, how many girls, racial breakdown.
8 So that gets you to the top of page 2.

9 MS. ELLSWORTH: I'm just getting the actual
10 subpoena served to Thomas Jefferson. I think it's also
11 outside the scope of what they were to speak on.

12 THE COURT: I didn't look at the scope. My initial
13 take on this is it was coming out. None of it was coming in.
14 I went back and looked at Pedrick, I thought if you're going
15 to link up those numbers later --

16 MS. ELLSWORTH: This is the Thomas Jefferson
17 30(b) (6) notice. Racial composition of applicants, admitted
18 persons, or enrollees to Harvard; Harvard's use of race in
19 the admissions process; communications to, from or copying
20 Harvard regarding the use of race in the admissions process;
21 alleged discrimination by Harvard against persons of Asian
22 descent from Thomas Jefferson High School for Science &
23 Technology in the college admissions process; and
24 communications concerning SFFA, the plaintiff, and its
25 representatives, including but not limited to Edward Blum or

1 the complaint or this action."

2 This is outside the scope. I don't know that this
3 is actually competent evidence about the racial or ethnic
4 breakdown of Thomas Jefferson high school. The witness
5 wasn't put forward on that.

6 MS. PERRY: Krista Perry for SFFA, Your Honor.

7 THE COURT: Hold on. Let me just look at this.
8 She's right about the scope. Let me what you say about that.

9 MS. PERRY: I was just going to say that the
10 information about the schools themselves goes to the
11 foundation of the witness being a 30(b)(6) witness in the
12 first place. To the extent they would have information about
13 discrimination against Asian-Americans to Harvard, it would
14 be through their experience with their students who apply.

15 THE COURT: I think they are sort of foundational
16 questions on the 30(b)(6).

17 MS. ELLSWORTH: We also requested documents which I
18 don't believe Thomas Jefferson agreed to provide. Again the
19 documents are relating to enrollees to Harvard. They just
20 didn't ask for this in the 30(b)(6) to get the breakdown.
21 I'm not sure these numbers are right.

22 THE COURT: They're much vaguer here than they are
23 in Pedrick.

24 MS. HACKER: To be clear, Your Honor, on the data,
25 there was some discussion going into these depositions of

1 whether or not the schools needed to produce the data because
2 it was data we already had from Harvard. So there was an
3 agreement that the schools didn't need to produce the data
4 separately.

5 MS. ELLSWORTH: The data from Harvard is the data
6 of whoever applied. It's not the actual breakdown of Thomas
7 Jefferson.

8 THE COURT: For example, does the information about
9 the school that Harvard would have on these two schools
10 include the ethnic breakdown of the schools?

11 MS. ELLSWORTH: Not the school. Just the
12 applicants to Harvard.

13 THE COURT: Just the applicants?

14 MS. ELLSWORTH: Right.

15 THE COURT: I think this is so marginal.

16 MS. HACKER: The last thing I'd say on that, Your
17 Honor, given the low bar relevance, we do not plan on
18 spending much time on this. Mr. Zuluaga's transcript is 10
19 minutes and Ms. Pedrick's is 20. Given the low bar
20 relevance, and this directly contradicts what we've heard
21 from Dean Fitzsimmons, we do think it should come in.

22 THE COURT: I know you think it should come in.
23 That's why we're standing here.

24 MS. ELLSWORTH: It's not the timing to which we
25 object.

1 THE COURT: I didn't read anything except what's
2 objected to. You didn't object to everything.

3 MS. ELLSWORTH: We objected to it in its entirety.

4 THE COURT: I didn't read the whole testimony. Or
5 did I? Let me see.

6 MS. ELLSWORTH: The ones we didn't object to
7 related to actually topics of the 30(b)(6). The suggestion
8 that Thomas Jefferson did not have enough black and Latino
9 students. We think the entire designation and the entire
10 deposition is irrelevant.

11 THE COURT: I'm going to exclude the testimony.
12 I'm going to exclude the witness. What's next?

13 MS. HACKER: Was that related to Mr. Zuluaga?

14 THE COURT: Yes. Zuluaga is all the way out.

15 MS. HACKER: Casey Pedrick.

16 THE COURT: I just want to look at the last pages.
17 This is -- what I was going to let in was, and we can discuss
18 this again in light of Zuluaga, everything on page 2,
19 everything on page 3, everything to "the most competitive
20 high school in the country." I was going to let that in and
21 I was going to stop right there. I was going to let in page
22 29 and stop at page 30.

23 MS. ELLSWORTH: Your Honor, we have the same scope
24 objection. The subpoena was identical in terms of didn't ask
25 for the admissions criterion or anything like that or

1 statistics related to applicants to Harvard.

2 THE COURT: Once you're keeping out their
3 subjective impressions of the Asian population, the rest of
4 it just becomes sort of irrelevant. If they were all
5 applying to Harvard and none of them are getting in, that
6 might be relevant. But until you know who is applying and
7 who isn't and what percentage of them getting in, it's just
8 kind of floating out there.

9 MS. PERRY: It seems to me just as an individual
10 student might be an instructive example, an individual
11 guidance counselor's impression and just as Dean
12 Fitzsimmons's general impressions of how the system works.
13 It's important to know whether the guidance counselor ratings
14 are objectively different or whether they're being scored
15 differently.

16 THE COURT: I completely agree that that would be
17 admissible testimony. So if you want to put it in, get a
18 guidance counselor on the stand and say this is the
19 application that I did for a White person and this is the
20 recommendation that I did for an Asian person, and I view
21 them to be equally strong, and they got different ratings,
22 that's a specific -- but this is like generally our Asian
23 students are great. It doesn't get you to what Harvard --
24 You don't even know if all the Asian students she thinks are
25 great, you don't know if any of them applied to Harvard.

1 It's just not limited to their applicant pool in any way.

2 MS. PERRY: Although she does describe her role as
3 a guidance counselor, and presumably she does know which set
4 of students does apply to Harvard.

5 THE COURT: No recommendations were put in front of
6 her, at least from what I have in front of me. So she could
7 look at them and say this is an Asian student that I thought
8 was fantastic and they didn't get in. And this White student
9 that I thought was significantly less qualified did. There's
10 no way to glean any of that from this. So this one's out,
11 too. Who's next?

12 MS. FASULO: Grace Chang.

13 THE COURT: Page 3, the objection is overruled.
14 Page 5, it's sustained. Page 7, they're all sustained. The
15 top one. So page 8 is sustained. The next ones are all
16 overruled on that page. Overruled on page 9 and the top of
17 page 10. On the bottom of page 10, so it's two questions and
18 two answers. The first two answers and the first question
19 come in. The last question, "Why did Dean Simmons ask you to
20 make that call?" is out. Sustained on page 11. Overruled on
21 page 12.

22 MS. ELLSWORTH: Your Honor, just to be clear, the
23 top of page 11 comes out obviously.

24 THE COURT: Yes. The whole thing comes out. Page
25 12, that top part is overruled. The bottom part is

1 overruled. Page 13, overruled. Page 16, it's all overruled.
2 Page 17, it's all overruled. Page 18 overruled. So page 19
3 and 20 and 21, I was once again lost. I can't see what we're
4 talking about. It's a 50-page chart.

5 MS. ELLSWORTH: If I may, Your Honor, a version of
6 the Dean's Interest List, one of which was just introduced
7 into evidence through Dean Fitzsimmons that the witness --

8 THE COURT: Let's see. Chance to review it. Yes.
9 50-page chart. She reviews the document. So this is where
10 she says it's not familiar to her. So I'm not really sure
11 what we're doing here. You mark it. She says she's reviewed
12 it. Right? You want that out where she says she's reviewed
13 it?

14 MS. ELLSWORTH: What page are we on?

15 THE COURT: 19.

16 MS. FASULO: On page 19 we have Exhibit 12 which is
17 actually an email that was sent from Ms. Chang. And then on
18 page 20 starting at page 22, that's a separate exhibit which
19 is the Dean's List.

20 THE COURT: But there's no question about
21 Exhibit 12.

22 MS. ELLSWORTH: Let me just look for it, Your
23 Honor.

24 MS. FASULO: We were just using Ms. Chang as a way
25 to bring Exhibit 12 into evidence.

1 MS. ELLSWORTH: This is a document we've objected
2 to because it contains a lot of hearsay.

3 MS. FASULO: Your Honor, this is not hearsay. This
4 is an email that was written by Grace Chang about her
5 impressions and reactions to an alumni event.

6 THE COURT: Do you have it?

7 MS. FASULO: Yes, I can grab it.

8 THE COURT: While she's getting that, so the next
9 one -- it's marked. You ask her to look at it. Her answer
10 is -- as far as I'm concerned she can look at it. And then
11 she says -- It's not coming in through her, it's not familiar
12 to her.

13 MS. ELLSWORTH: These are our counters. That's why
14 it's not objected to.

15 THE COURT: I see. I guess I don't really get
16 this. If I leave it in, the document's not coming in. If I
17 leave it out, the document's not coming in. Do you want to
18 just have her read that she's shown a document for
19 identification?

20 MS. HACKER: And offer it into evidence, yes, Your
21 Honor.

22 THE COURT: I'm not going to let it come into
23 evidence because she says it's not familiar to her.

24 MS. FASULO: She was familiar enough with the
25 docket to be able to identify that it was a Dean's List.

1 THE COURT: No. "I'd like to mark it as an
2 exhibit. It's a 50-page chart. Witness reviews document."
3 Then what happens? The next thing that I have is you
4 represent that the metadata indicates when it was created.
5 "Have you seen documents in this format before? No. This is
6 not familiar to you? Correct.

7 MS. FASULO: That's fine.

8 THE COURT: So that one is out. Let's just finish
9 the last one, and then we'll go back to the one we just
10 skipped. "Document 16 is an email chain marked for
11 identification. Have you reviewed it? Yes."

12 MS. FASULO: Again Your Honor, this is an email
13 that Grace Chang sent and received. We're just using Grace
14 Chang as a way to get this email in.

15 THE COURT: Are you objecting to that.

16 MS. ELLSWORTH: We are objecting in part. There's
17 a lot of hearsay at the bottom of it.

18 THE COURT: Let me see 16 and 12.

19 MS. FASULO: This is 16 and this is 12. Oh, my
20 gosh. I need better glasses. What are you objecting to,
21 that this is hearsay?

22 MS. ELLSWORTH: It's further down, Your Honor.
23 It's on the third page. Somebody wrote on the message board
24 called College Confidential. It's right there. And there's
25 discussions back and forth.

1 MS. FASULO: Your Honor, these are discussions
2 between Ms. Chang and an alumni interviewer in her role as an
3 alumni interviewer. We're offering this -- that is not
4 hearsay. We're just offering this statement that
5 Ms. Ellsworth has pointed out for its effect on Ms. Chang.

6 THE COURT: I'll let this come in but not for the
7 truth, just that that's what they're responding to.

8 MS. FASULO: Yes.

9 MS. ELLSWORTH: Your Honor, I think the alumni
10 interviewer statements also come in not for the truth.

11 THE COURT: Yes. They'll come in for context on
12 what she's saying. And then this is 12.

13 MS. FASULO: Your Honor, this is an email. The
14 lower email is sent from Grace Chang. She's recounting an
15 event, an alumni event, and all of her impressions of what
16 happened. And then you can see at the top she's forwarded it
17 to another admissions officer.

18 MS. ELLSWORTH: And it's the bottom part, the long
19 part of the email where she recounts various statements from
20 people. It could come in not for the truth.

21 THE COURT: That can come in not for the truth.

22 MS. ELLSWORTH: And then the top part, that's her
23 statement as an employee. That's fine.

24 THE COURT: That should get us through today. I
25 have to go and meet my husband. Who does that leave?

1 MS. HACKER: It leaves us I believe with
2 Ms. Howrigan, Ms. Weaver and Mr. Walsh.

3 THE COURT: Who does it leave? Howrigan.

4 MS. HACKER: Mr. Walsh, Ms. Weaver.

5 MS. FASULO: And Ms. Lopez.

6 MS. ELLSWORTH: Lopez is the only one remaining
7 that we have an objection in full to the witness.

8 THE COURT: I did a bunch of them last night, then
9 got your email this morning and your email this morning and
10 tried to do a bunch more. She's the one I haven't done. So
11 I'll try and do it.

12 (End of sidebar.)

13 (Court recessed at 1:02 p.m.)

14 *** AFTERNOON SESSION ***

15 MR. LEE: Your Honor, Ms. Conley will be presenting
16 the witness for us.

17 THE COURT: Whenever you're ready.

18 MR. MORTARA: Your Honor, Students for Fair
19 Admissions calls Christopher Looby.

20 THE CLERK: Can you please raise your right hand.

21 (CHRISTOPHER LOOBY duly sworn by the Deputy Clerk.)

22 THE CLERK: Thank you. You may be seated. Can you
23 please state your name and spell your last name for the
24 record.

25 THE WITNESS: Sure. My first name is Christopher.

1 My last name is Looby. It's L-O-O-B-Y.

2 MR. MORTARA: Before we begin, Your Honor, I'm told
3 the gallery monitors are off.

4 THE COURT: They're off because there's nothing on,
5 right?

6 DIRECT EXAMINATION

7 BY MR. MORTARA:

8 Q. Good afternoon, Mr. Looby. I'm Adam Mortara. Nice to
9 meet you.

10 A. Nice to meet you.

11 Q. Can you tell the Court about your educational background
12 after high school?

13 A. Sure. I went to Ithaca College where I graduated in
14 1996. And then after that, I received my master's degree in
15 school counseling from Suffolk University.

16 Q. I want to focus our time together, it will be brief, on
17 your work at the Harvard admissions office. How long have
18 you been working there?

19 A. I've been with the admissions office -- financial aid and
20 admissions for about ten years.

21 Q. And when did you start working for the Harvard admissions
22 office exactly?

23 A. Harvard admissions, about eight years ago.

24 Q. What's your title today?

25 A. I'm a senior admissions officer.

1 **Q.** You've been reading applications in accordance with
2 Harvard's admissions procedures for about eight years; is
3 that right?

4 **A.** That's correct.

5 **Q.** And I understand you work on the N docket, which is
6 Connecticut, Rhode Island, and New York; is that right?

7 **A.** That is correct, yes.

8 **Q.** That's Upstate New York, not New York City; is that
9 correct?

10 **A.** That's right.

11 **Q.** And you also work on the D docket, which is Austin and
12 West Texas?

13 **A.** Correct.

14 **Q.** And in particular, in Texas you work on the city of
15 Austin. You know those high schools pretty well?

16 **A.** I do.

17 **Q.** Like Westlake High School, for instance. And you've done
18 that since about a year after you started at admissions
19 and -- financial aid and admissions?

20 **A.** Yes.

21 **Q.** Now, Mr. Looby, you can't recall any way in which Harvard
22 admits students changing over the eight years you've been
23 reading applications, can you?

24 **A.** Can you repeat that, please?

25 **Q.** You can't recall in any way by which the process by which

1 Harvard admits students has changed since you've been reading
2 applications, correct?

3 **A.** That's correct.

4 **Q.** And you personally have read applications the same way
5 for the eight years you've been doing it, right?

6 **A.** That's correct.

7 **Q.** When you were a new reader, when you first started doing
8 it, who read over your shoulder? Who was your second reader?

9 **A.** When I first started, the first 50 actual applications
10 that I read would be parsed out to higher-level admissions
11 folks. So it would be a number of individuals, not one
12 specific person.

13 **Q.** Did Rosemary Green read any of your applications?

14 **A.** She was the chair of D docket, yes, she did.

15 **Q.** Did Sally Harty read any of your applications?

16 **A.** She did. She was the chair of N docket.

17 **Q.** The Rosemary Green was the chair of D docket and she read
18 some of your first 50, correct?

19 **A.** I don't specifically again. It was a number of people in
20 the office.

21 **Q.** But Rosemary Green and Sally Harty would have had some
22 influence in you over how you read applications. Is that
23 fair to say?

24 **A.** That's fair, yes.

25 **Q.** Now I'm going to put on the screen Plaintiff's

1 Exhibit 71, which you also have in front of you, sir. Unlike
2 the last witness, I think we're only going to maybe discuss
3 one document. So that's all you're going to need.

4 MR. MORTARA: And I'm going to offer
5 Plaintiff's 71.

6 MS. CONLEY: No objection, Your Honor.

7 THE COURT: Admitted.

8 (Plaintiff Exhibit No. 71 admitted.)

9 BY MR. MORTARA:

10 Q. Mr. Looby, you see that these are the 2019 reading
11 procedures?

12 THE COURT: Is this the same notebook?

13 MR. MORTARA: It's the same as Plaintiff's
14 Exhibit 1, effectively.

15 THE COURT: It's fine. I just wanted to know if it
16 was in the book. I'll just look on the screen.

17 MR. MORTARA: We're not going to do all that much.

18 BY MR. MORTARA:

19 Q. You were asked about this document in your deposition,
20 right?

21 A. That's correct.

22 Q. Now, this is the only document you recall that discusses
23 how you should consider race in the Harvard admissions
24 process, correct?

25 A. That is not correct.

1 **Q.** Mr. Looby, I'm going to hand you a copy of your
2 deposition.

3 MR. MORTARA: May I approach, Your Honor?

4 THE COURT: Of course.

5 BY MR. MORTARA:

6 **Q.** Mr. Looby, to help you understand, I'm going to orient
7 you to your deposition by turning to page 27 first so you can
8 see what document is being discussed.

9 MR. MORTARA: Your Honor, I'm not going to put this
10 on the screen just yet because this isn't the actual
11 impeachment.

12 BY MR. MORTARA:

13 **Q.** It says Exhibit 1 marked. Do you see that at line 16?

14 **A.** Yes.

15 **Q.** And then you see the next page 28 at lines 2 to 5 it
16 says: Can you describe to me generally what that is, and
17 that's the reading procedures, class of '19.

18 Do you see that?

19 **A.** I do see that, yes.

20 **Q.** And then I want you to turn to page 46 of your
21 deposition, line 7.

22 At line 7 it says, "Do you recall ever reading a
23 document that outlines how you as an admissions officer
24 should use race in the admissions process?

25 "ANSWER: This is the only document that I can

1 recall that discusses how we should consider race."

2 Was that your sworn testimony?

3 **A.** That was, yes.

4 **Q.** But the fact is there isn't actually any discussion in
5 this document about how you should use race in the admissions
6 process, is there?

7 **A.** I see prompts that involve race in this, so I would
8 categorize that as instructions on how to use race.

9 **Q.** Would you please turn to the previous page of your
10 deposition.

11 Do you see at line 5 it says, "Was there any
12 discussion in this document about how you should use race in
13 the admissions process?

14 "ANSWER: Not that I recall, no."

15 Do you see that?

16 **A.** I do.

17 **Q.** That was your sworn testimony?

18 **A.** It was.

19 **Q.** Mr. Looby, there are no written training materials about
20 how to use race in Harvard's admissions process, are there?

21 **A.** I believe there's much more than written instructions
22 with regards to using race in our process.

23 **Q.** Please focus on my question.

24 There are no written training materials about how
25 to use race in Harvard's admissions process, correct?

1 **A.** Again, I view this document as something that discusses
2 race and how to categorize that. So I would say that that is
3 actually not a correct statement.

4 **Q.** Take a look at the document. Please tell me where on the
5 document it tells you how to use race, sir.

6 **A.** In terms of coding the application.

7 **Q.** I'm asking you how race affects whether somebody gets
8 admitted or not. Did you not understand my question before?
9 Let me rephrase it.

10 Are there any written materials that tell Harvard
11 admissions officers, like you, how to use race insofar as it
12 affects somebody's admissions prospects?

13 **A.** Well, there's far more than just race that affects
14 someone's chances of being admitted.

15 MR. MORTARA: Your Honor, I move to strike the
16 answer as nonresponsive.

17 THE COURT: I am not going to strike the answer.
18 The lawyers from Harvard are going to have a chance to go
19 back at you and clarify anything that you feel like it's not
20 clear. So while it's his turn to ask you questions, you
21 should just listen to the question and answer to the best of
22 your ability the question that he's asking.

23 BY MR. MORTARA:

24 **Q.** Insofar as it affects whether someone is admitted or not,
25 there are no written training materials telling admissions

1 officers how to use race in the process, correct?

2 **A.** I'm not sure.

3 **Q.** Is there any written guidance in Plaintiff's Exhibit 71
4 on how to use race as to whether someone is admitted or not
5 in Harvard's admission process?

6 **A.** I think all of the information in this document is
7 related to who exactly has the potential to be admitted.

8 **Q.** Mr. Looby, please focus on my question. I'm only asking
9 about the use of race as it pertains to whether someone is
10 admitted or not.

11 Can you just tell me whether there's anything in
12 Plaintiff's Exhibit 71 that tells you how to use race in
13 making that decision?

14 **A.** Again, I see this as all information tied to how we make
15 these decisions.

16 **Q.** Mr. Looby, please identify where in Exhibit 71 it tells
17 you how to you use race to decide whether to admit somebody.

18 MS. CONLEY: Objection. Asked and answered.

19 THE COURT: Well, it has been asked. I don't think
20 it's exactly been answered. I'll give him another shot at
21 it.

22 BY MR. MORTARA:

23 **Q.** Just page through it as long as you need to, sir. Find
24 where it tells you how you to use race in deciding whether to
25 admit somebody.

1 **A.** Again, race is not something that is solely responsible
2 for admitting anyone.

3 **Q.** I understand that, Mr. Looby. My question is, is there
4 any written guidance given to Harvard admissions officers
5 instructing them how to use race in making their admissions
6 decisions?

7 **A.** Again, I think this is a solid guideline that helps us
8 make these decisions. I don't see anything specific that
9 points to this is how you should use it when admitting a
10 student.

11 **Q.** Now let's break that down a little bit.

12 That means there's no written guidance on how to
13 use race in the ratings Harvard assigns, including the
14 overall rating, which appears at the top of page 5 of this
15 document. No written guidance on how to use race in
16 assigning that rating, correct?

17 **A.** We don't use -- that's correct. I strike that.

18 **Q.** No written guidance on how to use race in the academic
19 rating, correct?

20 **A.** We don't use race when we're assigning academic.

21 **Q.** Mr. Looby, does it say anything about using race one way
22 or the other on Plaintiff's Exhibit 71 when it's talking
23 about the academic rating?

24 **A.** No, it does not.

25 **Q.** No written guidance about whether to use race one way or

1 the other on the extracurricular rating, correct?

2 **A.** That is correct.

3 **Q.** No written guidance on whether to use race one way or the
4 other whether it comes to the athletic rating, correct?

5 **A.** That is correct.

6 **Q.** No written guidance when it comes to how to use race one
7 way or the other when it comes to the personal rating,
8 correct?

9 **A.** That is correct.

10 **Q.** And the same for school support. No written guidance one
11 way or the other being on how to use race with the school
12 support, correct?

13 **A.** That is correct.

14 **Q.** Do you think one priority of your work in admissions is
15 to make sure that everyone is getting a fair shake?

16 **A.** I do, yes.

17 **Q.** And making sure that everyone is treated fairly requires
18 making sure as much as is possible that the reading guidance
19 and the written instructions you're given are applied in a
20 consistent way. Is that fair?

21 **A.** Absolutely, yes.

22 **Q.** And that's why you have the reading procedures. So if we
23 go back to academics, there's some guidance here to make sure
24 that the ratings are applied in a consistent way, right?

25 **A.** That's correct.

1 **Q.** Now, you've worked in a few other professional
2 environments, right?

3 **A.** I have, yes.

4 **Q.** You worked at ESPN?

5 **A.** I did.

6 **Q.** And you worked at Major League Baseball?

7 **A.** I did.

8 **Q.** Did you have training at those jobs?

9 **A.** I did.

10 **Q.** Do you remember some of your training from those jobs?

11 **A.** Vaguely.

12 **Q.** Do you remember some of the important topics that were
13 discussed in those trainings or in the written materials you
14 received?

15 **A.** Vaguely.

16 **Q.** You don't need to get into specifics, although we might
17 all want to know about what you get trained in when you work
18 at Major League Baseball, but do you remember what was
19 important to Major League Baseball with respect to your job
20 there?

21 **A.** I do.

22 **Q.** Was there written guidance on company procedures?

23 **A.** Yes.

24 **Q.** Now, when you started reading applications, did you think
25 it was strange that there was no written guidance on how to

1 use race in the consideration of whether to admit a Harvard
2 applicant?

3 **A.** I did not.

4 **Q.** I mean, you saw the written guidance here for academic.
5 We saw written guidance for extracurricular and for athletic.
6 You saw all those, right?

7 **A.** I did.

8 **Q.** You didn't think it was odd that there was no written
9 guidance on how to use race?

10 **A.** Not at the time, no.

11 **Q.** You understand race can be a sensitive issue in America,
12 right?

13 **A.** I sure do, yes.

14 **Q.** You understand that it's a sensitive issue when you're
15 dealing with college admissions, right?

16 **A.** I do, yes.

17 **Q.** And I don't know whether you do or not, but do you have
18 some idea that there's considerable legal boundaries on what
19 can be done with the use of race in college admissions?

20 **A.** I do, yes.

21 **Q.** Did you have those understandings when you started
22 reading applications?

23 **A.** I believe I did, yes.

24 **Q.** And you didn't think it was odd that there was nothing in
25 writing that was given to you about how to use race in

1 deciding whether to admit someone?

2 **A.** I didn't think it was odd because, while it wasn't
3 written, it was certainly a topic that was discussed at great
4 length in person.

5 **Q.** Mr. Looby, you've been reading applications for eight
6 years, right?

7 **A.** That's right.

8 **Q.** And in those eight years, you can't even remember anyone
9 ever teaching you how to use race in the admissions process
10 when you were making your admissions decisions; isn't that
11 right?

12 **A.** That is not right.

13 **Q.** Please turn to your deposition at page 46, sir. At the
14 bottom at line 123 there's a question. Do you see that?

15 **A.** I do.

16 **Q.** "Did anyone ever teach you how to use race in the
17 admissions process when you were making your admissions
18 decisions?

19 "ANSWER: I don't recall."

20 Was that your sworn testimony a year ago?

21 **A.** It was, yes.

22 **Q.** Now, Mr. Looby, I want to stop here and talk about the
23 time that's passed since you gave your sworn deposition in
24 this case.

25 **A.** Mm-hmm.

1 **Q.** You gave your sworn deposition in, what, about June 2017?

2 **A.** That's correct.

3 **Q.** That was taken by my friend Mr. Connolly over here?

4 **A.** Correct.

5 **Q.** About a month later -- let's back up. That was on page
6 46 and 47 of your deposition, right?

7 **A.** Correct.

8 **Q.** And how many pages of your deposition do you have in
9 front of you? About 226 of your testimony?

10 **A.** That's correct.

11 **Q.** And how long did your deposition last, sir?

12 **A.** Quite a long time.

13 **Q.** So in the first 46 pages, you told my friend Mr. Connolly
14 that you couldn't remember anyone ever teaching you how to
15 use race in the admissions process, correct?

16 **A.** That's what it says here.

17 **Q.** And then you sat there for hours and gave more testimony,
18 correct?

19 **A.** That's correct.

20 **Q.** There were breaks, correct?

21 **A.** That's correct.

22 **Q.** You could have come back and told Mr. Connolly you'd
23 spoken in error and you'd remembered something, correct?

24 **A.** That's correct.

25 **Q.** And then you filled out what's called an errata sheet.

1 Do you know what that is, sir?

2 **A.** I believe I do.

3 **Q.** I'm going to hand you a copy.

4 MR. MORTARA: Your Honor, may I approach?

5 THE COURT: You may.

6 BY MR. MORTARA:

7 **Q.** I'm going to put it up on the screen. Is that your
8 signature on this errata sheet, which is August 9, 2017?

9 **A.** Yes, it is.

10 **Q.** And in fact, you made some changes to your deposition
11 testimony, didn't you?

12 **A.** I did, yes.

13 **Q.** So a month later, you carefully read your deposition and
14 you made changes where you even needed to clarify your
15 testimony, right?

16 **A.** Correct.

17 **Q.** And you did not clarify your testimony that you couldn't
18 remember anyone teaching you how to use race in Harvard's
19 admissions process, did you?

20 **A.** I did not, no.

21 **Q.** And here we are, it's about 14 months later, correct?

22 **A.** Correct.

23 **Q.** Did you reach out to Mr. Connolly or anybody and tell
24 them that you had new testimony or wanted to change your
25 testimony? Did you do that?

1 **A.** No, I did not.

2 **Q.** Okay, Mr. Looby, let's get back on track. I want to talk
3 to you about the dockets you read in and what you see when
4 you read applications.

5 Now, we pulled the numbers from the Austin docket,
6 but you're the one who really knows. I'm just going to ask
7 you about your experience. Okay?

8 Is the Austin docket quite racially diverse?

9 **A.** Yes.

10 **Q.** There are a lot of Asian-American applicants in the
11 Austin docket, aren't there?

12 **A.** I believe there are. I think there's a number of
13 different types of folks applying from that docket.

14 **Q.** I'm going to go through -- fair number, there's a fair
15 number, sizeable percentage of Asian-American applicants in
16 the Austin docket, correct?

17 **A.** Correct.

18 **Q.** Would you agree with me it's about 30 percent?

19 **A.** I don't know.

20 **Q.** Does it sound good to say it's more than 10 percent?

21 **A.** That's fair.

22 **Q.** And there's a fair number of African-American applicants,
23 too, right?

24 **A.** Yes.

25 **Q.** And of course a large number of Hispanic applicants,

1 being Texas, correct?

2 **A.** Yes.

3 **Q.** And there's a lot of white applicants, too, actually.
4 It's kind of a mix, isn't it?

5 **A.** It is, yes.

6 **Q.** And how long have you been reading the Austin docket,
7 again?

8 **A.** I believe seven years.

9 **Q.** And you've reviewed a lot of applications from the Austin
10 docket from Asian-American students, correct?

11 **A.** The Texas docket, yes, I have.

12 **Q.** Hundreds? Thousands?

13 **A.** Probably thousands.

14 **Q.** Thousands of applications from Asian-Americans?

15 **A.** Over a thousand, I should say.

16 **Q.** Over a thousand applications from Asian-American students
17 from the Austin docket. Have you seen Asian-American
18 applications from the D docket, from Austin, where the
19 applicant has perfect or near-perfect SAT or ACT scores?

20 **A.** I've seen a number of students in general that fit that
21 criteria.

22 **Q.** From say Westwood High School. Have you seen a lot of
23 Asian-American applicants with perfect or near-perfect ACT or
24 SAT scores?

25 **A.** Again, I've seen a number of students that present those

1 credentials.

2 **Q.** I'll get there. I understand that not all the students
3 can be admitted. I get where you're going. I'm just asking
4 you have you seen a fair number of Asian-American
5 applications with near-perfect or perfect ACT and SAT scores?

6 **A.** I believe I've seen quite a few, yes.

7 **Q.** And sometimes those applicants get wait-listed or
8 rejected because they lack what you call distinguishing
9 excellence, right?

10 **A.** Just like other applicants, yes.

11 **Q.** Would you say in your experience on the D docket that
12 there are more Asian-American applications with near-perfect
13 or perfect SAT or ACT scores than there are white applicants
14 with those kind of marks?

15 **A.** I can't say for certain, no.

16 **Q.** Would you say that there are more Asian-American
17 applicants with perfect or near-perfect SAT or ACT scores
18 than there are African-Americans with those kind of marks?

19 **A.** I couldn't say that as well. I couldn't say that either.

20 **Q.** I want to talk to you about something I saw in the reader
21 guidance, and it's over at page 12. Are you there, sir?

22 **A.** Yes.

23 **Q.** It's something about prose comments. It says, "When
24 making prose comments, first readers" --

25 That's you, right?

1 **A.** That is, yes.

2 **Q.** -- "should note the important academic and
3 extracurricular accomplishments that are particularly
4 pertinent to the case. It is also helpful to reference
5 teacher reports or other items that may be crucial to our
6 evaluation. In addition to numerical ratings, readers should
7 try to summarize the strengths and weaknesses of the folder
8 in brief paragraphs or comments. Avoid slang and jargon and
9 remember," all caps, "your comments may be open to public
10 view at a later time."

11 Do you see that?

12 **A.** I do, yes.

13 **Q.** How do you take that instruction? What do you think it
14 means?

15 **A.** Just be careful with what you write.

16 **Q.** Because somebody might look at it later, right?

17 **A.** Someone may look at it later.

18 **Q.** Now let's talk -- even though there aren't any written
19 instructions about how you use race, you usually discover the
20 race of a student from a data point or box on the
21 application, correct?

22 **A.** If self-identified, yes.

23 **Q.** And if race is provided to you on the application, that
24 means you will include it in your decision-making, correct?

25 **A.** Just like with everything else in that application, it's

1 something we consider.

2 **Q.** Now, you see applications where you know the student's
3 race, but the student's race wasn't discussed anywhere else
4 on the application, correct?

5 **A.** That could be the case.

6 **Q.** And in those situations, you take the student's race into
7 account when making your admission decision by what you call
8 thinking of the whole person, correct?

9 **A.** We review the whole person, that's correct.

10 **Q.** You would take the student's race into account even
11 though the only place the student put race on their
12 application was the box check on the common application,
13 correct?

14 **A.** Again, we take everything that's included in the
15 application. If that's included, it would be something that
16 we would consider, absolutely.

17 **Q.** I want to make sure we got the record clear. A student
18 applies to Harvard. They check the box. They say I am
19 Asian-American. They don't write anything about their race
20 or ethnicity anywhere else on their application.

21 You, Christopher Looby, will take that into account
22 in making your admissions ratings and decisions, correct?

23 **A.** Not specifically. We take socioeconomic status, the
24 family's socioeconomic status into consideration. We would
25 take the school support into consideration. We would take

1 their extracurriculars into consideration. I mean, it's one
2 of many factors that we would consider.

3 **Q.** And you take their race into consideration as well,
4 correct?

5 **A.** If provided, it might be something that we might
6 consider.

7 **Q.** If provided by checking the box on the common
8 application, correct?

9 **A.** It may be something that we consider.

10 **Q.** Correct? Yes?

11 **A.** It may be something that we consider.

12 **Q.** If a student checks the box on the common application and
13 indicates their race, you will take that into account no
14 matter what the rest of the application says, correct?

15 MS. CONLEY: Your Honor, asked and answered.

16 THE COURT: I'll let him have it.

17 MR. MORTARA: Could you read it back, Ms. Daly.

18 (The reporter read back as requested.)

19 THE WITNESS: That's not the case.

20 BY MR. MORTARA:

21 **Q.** Tell me about all the times you have not taken race into
22 account when the student checked the box on the application.

23 **A.** There may be other factors involved when deciding the
24 outcome of that particular application.

25 **Q.** I thought you understood Harvard's admissions process to

1 be about the whole person; is that correct?

2 **A.** That is.

3 **Q.** And somebody's race is part of the whole person, correct?

4 **A.** That's correct.

5 **Q.** And you take that into account when somebody provides
6 that information, correct?

7 **A.** It may not be a component that is what is driving us to
8 make a certain decision.

9 **Q.** I'm not asking you why you make your decisions. I'm
10 asking you what you take into account in making them.

11 You take an applicant's race into account when that
12 information is provided, correct?

13 **A.** Again, we may. We may. It's not a yes-or-no answer.

14 **Q.** Do you sometimes decide not to take an applicant's race
15 into account?

16 **A.** No. Sometimes it's not a factor that again is driving
17 the decision. So it's not --

18 **Q.** I'm not asking you about factors that drive the decision.
19 I'm asking you about things you think about or take into
20 account of. You may take them into account and reject them.
21 You may take them into account and admit them.

22 Do you take applicant's race into account when they
23 provide it to Harvard?

24 **A.** It depends on the individual.

25 **Q.** Now, you told us a little while ago -- withdrawn.

1 You learned -- the first place you learned that
2 race was a factor for you to consider in admissions was
3 actually the first page of the reading guidance we're looking
4 at, Plaintiff's 71. Isn't that correct?

5 **A.** I don't recall if that's the first place that I learned
6 it.

7 **Q.** Well, how did you learn that race is one of the many
8 factors you should use in the admissions process?

9 **A.** It could have been a discussion prior to reading this
10 guideline.

11 **Q.** Please turn to page 47 of your deposition, line 18.

12 "QUESTION: Yes, but there's no discussion here
13 about how you should use race when reviewing an application.
14 So how did you learn that race is one of many factors that
15 you should use in the admissions process?

16 "ANSWER: It's on the first page here. It's one of
17 the components of the reading procedures."

18 Was that your sworn testimony?

19 **A.** It was, yes.

20 **Q.** 14 months ago, correct?

21 **A.** That's correct.

22 **Q.** To Mr. Connolly, my friend?

23 **A.** That's right.

24 **Q.** And a month later you had an errata sheet and didn't
25 change that either.

1 **A.** Correct.

2 **Q.** And 14 months later we're here, correct?

3 **A.** Correct. If I could say one thing. What you asked me
4 was what was the first thing that you learned about that.
5 I'm saying here that it was on the first page. I didn't say
6 anywhere that it was the first thing that I learned about how
7 race should be used.

8 **Q.** The record will be clear about what I asked, sir, so we
9 can go back and look at it. If I confused you, then I'm
10 deeply sorry.

11 Now I want to talk about the eight years you've
12 been there reading applications. You've been there for eight
13 years reading applications, and you have can't even remember
14 anyone teaching you to use race in the admissions process.
15 We talked about that, right?

16 **A.** I don't view it that way.

17 **Q.** You don't know if other admissions officers use race the
18 way you do, do you?

19 **A.** I do know that others use race the way that I do.

20 **Q.** Please turn to page 49 of your deposition, sir.

21 Line 6, "Do you know if this is how other
22 admissions officers use race in the admissions process?

23 "ANSWER: I don't know."

24 That was your testimony 14 months ago to
25 Mr. Connolly, my friend, correct?

1 **A.** That's correct.

2 **Q.** And a month later you did an errata sheet, a sworn errata
3 sheet. You didn't change this either, did you?

4 **A.** No, I did not.

5 **Q.** And 14 months go by and you don't tell anybody you're
6 going to change your testimony, do you?

7 **A.** That's correct.

8 **Q.** Now I need to stop again. You spent 15 hours preparing
9 for your deposition with Harvard's lawyers; isn't that right?

10 **A.** Approximately.

11 **Q.** Do you want me to the refresh your recollection with your
12 deposition? Please look at page 6, lines 21 to 23. I'll
13 leave it off the screen.

14 You spent 15 hours with Harvard's lawyers getting
15 ready for your deposition 14 months ago, correct?

16 **A.** Yeah. Approximately.

17 **Q.** And then you spent some hours reviewing your transcript
18 for the errata sheet we talked about several times. How many
19 do you think that was?

20 **A.** I don't know.

21 **Q.** Two?

22 **A.** Approximately.

23 **Q.** Let's call that two. How many days were you meeting with
24 Harvard's lawyers to get ready for your testimony in court
25 today?

1 **A.** A number.

2 **Q.** How many?

3 **A.** Eight, ten.

4 **Q.** Eight or ten days with Harvard's lawyers. How many hours
5 a day?

6 **A.** It's varied tremendously. It hasn't been a consistent
7 number.

8 **Q.** Let's go through as best as you can recollect, sir. I
9 want to get for the record how many hours you spent with
10 Harvard's lawyers getting ready to testify here for about
11 30 minutes today.

12 How many hours on the first day?

13 **A.** I don't recall.

14 **Q.** You don't have any recollection of how many hours you
15 spent? And who were the lawyers there?

16 **A.** The lawyers were represented over at this table here.

17 **Q.** Who are you identifying?

18 **A.** Danielle, Denise. I believe there were others back at
19 the law firm.

20 **Q.** How many lawyers did you meet with on the first day when
21 you can't remember how long you met with them?

22 **A.** I really don't recall.

23 **Q.** Was it more than two or three?

24 **A.** I believe so, yes.

25 **Q.** So you met with more than two or three lawyers for some

1 undetermined number of hours on one day. Same for the next
2 day. Do you remember how many hours that was?

3 **A.** I don't know.

4 **Q.** Did you meet yesterday with lawyers?

5 **A.** I did.

6 **Q.** How many lawyers did you meet with yesterday?

7 **A.** I believe three or four.

8 **Q.** For how many hours yesterday did you meet with lawyers?

9 **A.** About three, I believe.

10 **Q.** Was that about the same amount of time you met with them
11 on the previous days?

12 **A.** No. I believe previous days was a bit longer.

13 **Q.** So let's call it conservatively three hours a day for
14 conservatively eight days. By my count, that's 24 hours. So
15 you've now spent over 40 hours thinking about your testimony
16 in this case; is that right?

17 **A.** Yes. Well, I would say just thinking about this
18 testimony far more than 40 hours.

19 **Q.** And you spent 39 hours with Harvard's lawyers, correct?

20 **A.** Yep.

21 **Q.** And you spent at least, probably more than 24 hours with
22 groups of Harvard's lawyers before you came in here and
23 changed about five or six different items in your deposition
24 testimony we've already been through. Isn't that right?

25 **A.** I don't believe I've changed on all of these answers.

1 **Q.** Do you disagree that you answered things like "I don't
2 know" in your deposition and you're coming in here and you're
3 saying now you do know?

4 **A.** I believe I did not know at that time, yes.

5 **Q.** And between then and now, you spent 24 hours at least in
6 rooms with Harvard -- multiple lawyers from Harvard getting
7 ready to tell the truth under oath here, correct?

8 **A.** I have told the truth in my deposition as well.

9 **Q.** I want to talk to you about things related to the
10 personal rating, but first I want to talk about the other
11 ratings.

12 Do you see on Plaintiff's Exhibit 71 overall,
13 academic, extracurricular, athletic, personal? Do you see
14 all that? And then there's school support. You know those
15 ratings?

16 **A.** I do.

17 **Q.** And you would give every student who had completed an
18 application a score in one of those six categories, correct?

19 **A.** I would, yes.

20 **Q.** And when we talked to you before under oath, you told us
21 that you didn't know any other document that would describe
22 how an admissions officer would score candidates in these
23 categories, did you?

24 **A.** I believe I did.

25 **Q.** The description in each of these categories aligns with

1 how you would rate an applicant, correct?

2 **A.** Provides a solid framework, yes.

3 **Q.** It aligns with how you would rate an applicant in each of
4 these categories, correct?

5 **A.** It could.

6 **Q.** You'd say generally speaking it does, right?

7 **A.** It could.

8 **Q.** Mr. Looby, please turn to your deposition, page 39.

9 "QUESTION: And after reviewing these pages, does
10 the description in each of these categories align with how
11 you would rate an applicant for each of these categories?"

12 Then your lawyer objected.

13 "ANSWER: Generally speaking, yes."

14 Did you see that?

15 **A.** I do.

16 **Q.** Did you read your deposition before you came here today,
17 sir?

18 **A.** I did.

19 **Q.** How many times?

20 **A.** I believe I read it when I signed this piece of paper.

21 **Q.** That was 14 months ago or about, right?

22 **A.** Yes.

23 **Q.** Did you read it in the last couple of weeks?

24 **A.** I did, yes.

25 **Q.** Did you discover that there were things that were wrong

1 in it?

2 **A.** No.

3 **Q.** Mr. Looby, now let's talk about the scores again, and I
4 want to ask you when you assign a score in any of these
5 categories, you take race into account, don't you?

6 **A.** If we were to take race into account when ranking any of
7 these, it may very well be the overall.

8 **Q.** Please turn to your deposition, same page, 39, sir.

9 "QUESTION: When you would score students in these
10 categories, would you take a student's race into account when
11 assigning him a score in any of these categories?"

12 And your lawyer objected.

13 "ANSWER: It's one of my factors that I consider.

14 "QUESTION: For every category?

15 "ANSWER: I'm looking at the applicant as a whole.

16 Race is one of the factors you consider --
17 withdrawn.

18 That was your sworn testimony, sir, wasn't it?

19 **A.** It was indeed, yes.

20 **Q.** And race is one of the factors you consider when
21 assigning an applicant a score in any of the categories,
22 correct?

23 **A.** That would be, again, the overall.

24 **Q.** Sir, it doesn't say "overall" on your deposition, does
25 it? It says any of these categories. That's what it says,

1 right?

2 **A.** It does not say that exactly. It says when you would
3 score students in these categories.

4 **Q.** Keep reading the question, sir.

5 **A.** Would you take a student's race into account when
6 assigning him a score in any of these categories?

7 **Q.** "ANSWER: It's one of my factors that I consider."

8 When you were reading your deposition, did you
9 discover that you maybe testified in error and wanted to say
10 it was the overall score?

11 **A.** No. I answered the question as I heard it. That's not
12 what I was trying to convey.

13 **Q.** You misheard the question but then you read it and you
14 did the errata sheet. You didn't clarify your answer to this
15 question, did you?

16 **A.** I answered the question as I heard it.

17 **Q.** Sir, when you did your errata sheet, you weren't
18 listening to the deposition on an audio tape, were you?

19 **A.** No, I was not.

20 **Q.** You were reading it just like we're reading it right here
21 in court. And you didn't fix it, did you?

22 **A.** I did not, no.

23 **Q.** You didn't tell my friend Mr. Connolly that you were
24 going to change your testimony, did you, or that you misheard
25 the question, did you?

1 **A.** I thought I understood the question. What I was trying
2 to convey is that race is one factor of many when trying to
3 assess the applicant as a whole. If you're trying to say
4 that I use race when assigning any of the four components of
5 the profile, that would not be accurate.

6 **Q.** We'll come back to that, sir.

7 Now I want to talk about the personal rating. And
8 what I'm hoping to do is not have to use your deposition
9 while I just ask you some simple questions that go into it.

10 MS. CONLEY: Objection, Your Honor. Argumentative.

11 THE COURT: Ask a question.

12 MR. MORTARA: Ms. Daly and I have organized a
13 procedure. She's going to come over there by the flip chart,
14 and I'm going to draw on it a few things. I'm going to take
15 my outline and your deposition, and I have Ms. Daly's
16 permission to ask questions from over there, if I have the
17 Court's.

18 THE COURT: Is there a microphone over there or are
19 you going with him?

20 THE REPORTER: I'm going with him because there's
21 no microphone there.

22 BY MR. MORTARA:

23 **Q.** So let's talk about the personal rating, Mr. Looby. Are
24 you ready?

25 **A.** Yes.

1 **Q.** I understand when you assign a personal rating, you're
2 looking at who that person is, correct?

3 **A.** Correct.

4 **Q.** So I'm going to make a title here, "Personal Rating."
5 And the first thing I'm going to write is who that person is.
6 And by that, you mean what a person brings to the community,
7 right?

8 **A.** Could be.

9 **Q.** Positive contributions that you're looking for include an
10 ability to work well with others and create meaningful
11 relationships with peers, right?

12 **A.** Yes.

13 **Q.** And I'm writing those on the flip chart. I'll write
14 "meaningful relationships" and "work well with others."

15 And I'm running out of room. Look at that.

16 You're looking for where others like to be around
17 him or her. You'd say that?

18 **A.** I would, yes.

19 **Q.** Can we call that likability?

20 **A.** Sure.

21 **Q.** And you'd call that a positive personality, wouldn't you,
22 positive personality characteristics?

23 **A.** All of those?

24 **Q.** No. Just generally. You're looking for a positive
25 personality or like ability?

1 **A.** Could be.

2 **Q.** And I put that up there, too.

3 MR. MORTARA: Ms. Daly, we can go back.

4 BY MR. MORTARA:

5 **Q.** Is race a part of who someone is or who the that person
6 is?

7 **A.** I don't think so necessarily, no.

8 **Q.** Race is not a part about who someone is, huh?

9 **A.** A person's race could inform us of characteristics that
10 tell us a bit about their personality.

11 **Q.** And someone's race could also tell you something about
12 what they're going to bring to the Harvard community, right?

13 **A.** Not necessarily.

14 **Q.** It doesn't tell you what they might bring to the Harvard
15 community at all? Why is Harvard using race in admissions
16 exactly? I'll withdraw the question.

17 Why is Harvard using race in the college admissions
18 process?

19 **A.** Could you repeat that, please?

20 **Q.** Yeah. Why is Harvard College using race as part of its
21 college admissions process?

22 **A.** Again, I think it goes back to the whole-person review.
23 It allows us to get a good understanding of the applicant as
24 a whole.

25 **Q.** And what is Harvard trying to get for itself from that?

1 Trying to make a good and diverse community maybe?

2 **A.** Absolutely, yes.

3 **Q.** So does somebody's race tell you a little bit about what
4 they're going to bring to the community?

5 **A.** I think it depends on the individual.

6 **Q.** But it can, right?

7 **A.** It could.

8 **Q.** And you take a student's race into account when assessing
9 his or her personal qualities as one factor to consider.
10 Isn't that right, Mr. Looby?

11 **A.** That is not right.

12 **Q.** Please turn to your deposition again, sir, at page 51.
13 We're going to go to line 12 this time.

14 "QUESTION: Would you take a student's race into
15 account when assessing his or her personal qualities?

16 "Just like with the academic rating, it's one
17 factor of my consider."

18 That was your sworn testimony, right?

19 **A.** Correct.

20 **Q.** 15 hours with Harvard's lawyers before you gave it,
21 right?

22 **A.** Correct.

23 **Q.** A month went by afterwards, you spent at least two hours
24 reading this, signed a sworn errata, didn't change it.
25 Right?

1 **A.** That's correct.

2 **Q.** Since then in getting being ready for trial you spent at
3 least 24 hours with three or four, maybe even five, Harvard
4 lawyers getting ready to come in here and testify when I
5 asked you questions, right?

6 **A.** That's correct.

7 MR. MORTARA: No more questions, Your Honor.

8 Your Honor, we're going to mark the demonstrative
9 Plaintiff's Demonstrative Exhibit 21. We'll sticker it and
10 send you a picture. It looks horrible.

11 THE COURT: What did you say was the number?

12 MR. MORTARA: Plaintiff's 21.

13 MS. CONLEY: Your Honor, can we take that down?

14 THE COURT: Sure.

15 CROSS-EXAMINATION

16 BY MS. CONLEY:

17 **Q.** Good afternoon, Mr. Looby.

18 **A.** Good afternoon.

19 **Q.** Mr. Looby, do you consider this a serious case?

20 **A.** Very serious.

21 **Q.** And do you consider these to be serious issues?

22 **A.** Absolutely I do.

23 **Q.** And you're taking your testimony today seriously,
24 correct?

25 **A.** I sure am, yes.

1 **Q.** Now, Mr. Mortara walked you through various ratings that
2 an admissions officers assigns when evaluating an application
3 for admission and asked you if you consider assigning those
4 ratings. Do you recall that?

5 **A.** Yes.

6 **Q.** Mr. Looby, do you consider race when assigning an
7 applicant a personal rating?

8 **A.** No.

9 **Q.** Do you consider race when assigning an applicant an
10 academic rating?

11 **A.** No, I do not.

12 **Q.** Do you consider race when assigning an applicant an
13 extracurricular rating?

14 **A.** No, I do not.

15 **Q.** Do you consider race when assigning an applicant an
16 athletic rating?

17 **A.** No, I do not.

18 **Q.** Do you recall when Mr. Mortara showed you your deposition
19 testimony regarding whether you take race into account when
20 assessing an applicant's personal qualities?

21 **A.** I do, yes.

22 **Q.** Let's take a quick look at that deposition testimony,
23 page 51, lines 12 through 17. You were asked whether you
24 would take a student's race into account when assessing his
25 or her personal qualities.

1 And your answer was, "Just like with the academic
2 rating, it's one factor of many I consider."

3 Is that right?

4 **A.** That's correct.

5 **Q.** And you told Mr. Mortara that your testimony at your
6 deposition was -- you answered in a way that you understood
7 the question?

8 MR. MORTARA: Your Honor, I object. That wasn't
9 the question I was reading when he said that. That was the
10 other question about all the ratings when he said he misheard
11 me any of the factors. Not even the same question. I
12 object.

13 THE COURT: I'm going to overrule it because "I
14 don't like it" is not the same thing as a legitimate
15 objection. You have to give me a rule on an objection.
16 There's no rule that prohibits what she just did. I will
17 listen to the evidence. I got it.

18 BY MS. CONLEY:

19 **Q.** What did you mean when you told Mr. Mortara that that's
20 how you understood the question?

21 **A.** Again, what I was trying to convey is how I used race as
22 one factor of many within the application when assessing an
23 applicant's overall rating.

24 **Q.** Stepping back for a minute, when you were deposed in this
25 case 14 months ago, was in a your first deposition?

1 **A.** Yes.

2 **Q.** And were you nervous?

3 **A.** Extremely nervous, yes.

4 **Q.** Now, Mr. Looby, at the time that you were deposed
5 14 months ago, did you, as an admissions officer, consider
6 race when assigning an applicant a personal rating?

7 **A.** No.

8 **Q.** And sitting here today as an admissions officer, do you
9 consider race whether assigning an applicant a personal
10 rating?

11 **A.** No.

12 **Q.** Mr. Looby, what is the preliminary overall rating?

13 **A.** The preliminary overall rating would be a rating that is
14 assigned by an admissions officer, and that would be an
15 indication of how that officer views the strength of that
16 particular application relative to the applicant pool.

17 **Q.** And would you consider an applicant's race when assigning
18 an applicant a preliminary overall rating?

19 **A.** We certainly could.

20 **Q.** Under what circumstances might you consider an
21 applicant's race when assigning the POR or preliminary
22 overall rating?

23 **A.** So at that point we'd be looking at, you know, many, many
24 very qualified applicants. And it may be that for a
25 particular applicant it ultimately winds up being a tip that

1 pushes him or her into the admitted applicant pool.

2 **Q.** Now, Mr. Mortara also showed you P71, which were the
3 reading procedures from the class of 2019. Do you recall
4 that?

5 **A.** I do, yes.

6 **Q.** And he asked you whether there was any written guidance
7 with respect to the use of race in that particular document;
8 is that right?

9 **A.** That's correct.

10 **Q.** Mr. Looby, let me just back up and ask you, as an
11 admissions officer, have you received training on how to use
12 race in the admissions process?

13 **A.** I absolutely have, yes.

14 **Q.** And can you describe to Your Honor what training you've
15 received with respect to how to use race in the admissions
16 process?

17 **A.** Sure. So as mentioned earlier, when I first began
18 working as an admissions officer, I worked with a number of
19 colleagues also beginning.

20 And we would meet as a small committee and go over
21 the reading instructions. We'd go over how to read a
22 particular file. We would go over how the committee process
23 works.

24 And at that point, once the application is cleared,
25 they became actual applications. We would then read those,

1 we would rate those, and they would be passed along randomly
2 to upper-level admissions folks who would then circle back
3 and talk to us about things we may have -- things we could
4 have added, different things we could have looked at, weighed
5 more heavily.

6 Outside of that, we've also received training
7 through some colleagues. We have also been addressed by a
8 member of the office of general counsel to talk about issues
9 related to higher ed and race, and I've also attended
10 professional development seminars.

11 I think it's important to know, too, that I work
12 with a number of folks who have spent decades upon decades in
13 higher ed in admissions offices. The person next to me in
14 the office has been doing this at Harvard for 40-plus years.
15 My N docket chair, Sally Harty, she's been doing this for
16 over 30 years. And the docket chair, the D docket chair was
17 the longtime former admissions director at Brown.

18 So these are -- it's a constant education. It
19 continues to be a constant education.

20 **Q.** Mr. Looby, Mr. Mortara pointed you to one piece of your
21 deposition testimony about whether you recalled, whether you
22 were taught about the use of race.

23 Do you recall when he did that?

24 **A.** I do.

25 **Q.** Okay. I want to take a look at a piece of your

1 deposition testimony that he didn't show you regarding this
2 same topic. Can you take a look at page 48.

3 MR. MORTARA: Objection, Your Honor. She can ask a
4 question. She can't lead the witness with his own
5 deposition. She can ask a question. There was no
6 completeness objection when I impeached him. Just to be
7 clear, my objection is one cannot lead a witness with his own
8 deposition.

9 THE COURT: Yes. I understand. I think she's just
10 trying to orient him. Is this meant to be his direct and his
11 cross? Is he on your list as well? What are we doing here?

12 MR. MORTARA: Your Honor, we have an agreement that
13 witnesses will only be called once, so she can go outside the
14 scope.

15 THE COURT: So you're not making a scope objection.

16 MR. MORTARA: No.

17 THE COURT: I think she's just trying to orient
18 him. But don't lead.

19 MR. MORTARA: My objection is leading.

20 THE COURT: Yes.

21 BY MS. CONLEY:

22 Q. Do you recall testifying at your deposition other times
23 when -- excuse me. Withdrawn.

24 Do you recall testifying at your deposition whether
25 you had ever learned about how to use race in the admissions

1 process?

2 **A.** I do.

3 **Q.** Do you recall Mr. Mortara showing you a piece of your
4 deposition with respect to whether you had ever learned about
5 the use of race in the admissions process?

6 **A.** I do.

7 **Q.** And did he show you all of your deposition testimony
8 related to that topic?

9 **A.** I don't believe that he did.

10 **Q.** Okay. Can you turn to page 48 of your deposition
11 testimony.

12 MR. MORTARA: Your Honor, objection sustained.
13 Leading. If counsel obviously wanted to read more of the
14 deposition when I impeached him, the objection is
15 completeness. Now this is leading with his former testimony.
16 I'm actually happy for the Court to take a look at it but not
17 during the exam, showing the guy his deposition and then
18 saying --

19 THE COURT: You're trying to make the point that he
20 was testifying inconsistently --

21 MS. CONLEY: Exactly.

22 THE COURT: -- here with what he said in his
23 deposition.

24 So I think that entitles her to go back and show
25 portions of the deposition that were consistent in response

1 to your --

2 MR. MORTARA: I understand your ruling, Your Honor.
3 However, what I would say is why not just ask the question
4 and get the answer.

5 THE COURT: Hypothetically speaking, right? We
6 have his answer here today. You're saying his answer here
7 today is different than his answer yesterday. She's trying
8 to show that the answer yesterday was also consistent with
9 what he said today. That's fair game.

10 MR. MORTARA: Again to be clear, I'm going to stand
11 up in a few seconds again and say the question isn't the
12 same.

13 THE COURT: Okay.

14 BY MS. CONLEY:

15 **Q.** Mr. Looby, can you turn to page 48 of your deposition
16 testimony. At line 16 you were asked, "Can you recall from
17 your time at Harvard anyone ever telling you that race is one
18 factor among many that you should use in the admissions
19 process?"

20 And what was your answer?

21 **A.** "I believe so."

22 MR. MORTARA: Your Honor, and again my objection is
23 my question was about learning how to use race, and this was
24 about -- and I'll be argumentative for one moment longer,
25 Your Honor.

1 This is about Harvard's pablum about race being one
2 factor in admissions. This is not the testimony about how he
3 learned how to use race, which is what I examined him about.

4 THE COURT: Someone telling him that race is a
5 factor is part of telling him how to use race.

6 MR. MORTARA: We'll respectfully disagree on that.

7 THE COURT: Okay. That's fine.

8 BY MS. CONLEY:

9 **Q.** So, Mr. Looby, with respect to the training that you
10 received, that you were just discussing, did you specifically
11 receive feedback on how to evaluate applications?

12 **A.** Yes.

13 **Q.** And in the process of receiving that feedback on how to
14 evaluate applications, did you receive feedback on how to
15 consider race when evaluating applications?

16 **A.** Yes.

17 **Q.** Just stepping back for a minute, Mr. Looby, I just want
18 to talk to you a little bit about your background and how you
19 came to Harvard College. You have mentioned that you
20 graduated from college in 1996, right?

21 **A.** That's correct.

22 **Q.** What did you do after you graduated?

23 **A.** I worked at ESPN in Bristol, Connecticut.

24 **Q.** After ESPN, what did you do next?

25 **A.** I worked for Major League Baseball.

1 **Q.** How long were you at Major League Baseball?

2 **A.** I was at Major League Baseball for about eight years.

3 **Q.** What did you do after you left Major League Baseball?

4 **A.** I left Major League Baseball on a Friday and the
5 following Monday was employed by Boston Public Schools as a
6 paraprofessional.

7 **Q.** What led to your decision to leave Major League Baseball
8 and join Boston Public Schools?

9 **A.** So there were a number of factors involved. I felt as
10 though my career in the professional sports entertainment
11 industry, I felt as though the time had come for me to pursue
12 other endeavors.

13 I think a big factor was my now wife. She and I
14 had been dating for two years. She was living here in Boston
15 and I was working in Manhattan. So I had talked to a number
16 of people. I have talked to family members, you know, began
17 to start considering education.

18 And then I had a powerful event happen where -- you
19 know, go back years earlier. I was a tennis instructor at a
20 summer club and became close with a number of the students I
21 was teaching, family members, and so on. There was one
22 family in particular where I was drawn to them because the
23 two boys reminded me a lot of my brother and myself.

24 So fast-forward again. Now my time is at Major
25 League Baseball, and I receive a call from my mother who is a

1 teacher in my hometown. And she said that the younger son
2 had been tragically killed in a car accident, which certainly
3 shook me. So I went home and I went to the wake. And it was
4 at the wake that I learned he was in line to become the
5 captain of my high school tennis team, which I also was. His
6 first job was my first job at a local tennis club. And I
7 also learned that, you know, I had a profound impact on this
8 young man.

9 And for me to hear that, you know, thinking back to
10 when I was a college kid teaching tennis and just enjoying
11 the summer, I didn't think I was having an impact on anyone's
12 life. And I felt as though maybe my calling was to work in
13 an industry helping others. And I felt like education was
14 the right path.

15 **Q.** And so you mentioned you started with Boston Public
16 Schools as paraprofessional?

17 **A.** That's correct.

18 **Q.** What is a paraprofessional?

19 **A.** I was hired to work as a-one-to one aide with a student
20 in one of the Boston Public Schools.

21 **Q.** When you were working with this particular student, what
22 sort of services were you providing?

23 **A.** This student was involved in a gang-related incident and
24 was left paralyzed on one side of his body, so he was not
25 able to write. So I was essentially his scribe. I went to

1 all of his classes with him. I would help him with his
2 homework. I would call him at night and help him with his
3 homework, help him take his exams, and so on.

4 **Q.** And were you doing anything else at the time that you
5 were working with the Boston Public Schools system?

6 **A.** I was enrolled in Suffolk University's school counseling
7 graduate program.

8 **Q.** And what type of coursework were you taking in that
9 counseling program?

10 **A.** Primarily psychology courses along with adolescent
11 development courses.

12 **Q.** At some point you left Boston Public Schools?

13 **A.** I did, yes.

14 **Q.** What did you do next?

15 **A.** I was hired by Harvard to work in the financial aid
16 office.

17 **Q.** And when was that?

18 **A.** That was 2008, the summer of 2008, I believe.

19 **Q.** And, Mr. Looby, what led you to join the Harvard
20 admissions office?

21 **A.** Again, there were a number of things in play there. I
22 felt as though having just moved to Boston and working in a
23 completely new industry, finances were certainly tough. I
24 also, more importantly, felt as though this could lead to a
25 career that directly tied into my college counseling or my

1 school counseling coursework. So I felt as though the move
2 made sense on a number of levels.

3 **Q.** And do you like what you do in the admissions office at
4 Harvard?

5 **A.** Very much so, I do.

6 **Q.** What do you like about it?

7 **A.** I feel like I make an impact or I help make an impact on
8 people's lives. You know, our students, I feel as though it
9 extends beyond just the individuals. I feel as though -- you
10 know, in many cases I hear how it impacts direct family
11 members. And on a larger scale, I've heard how a student
12 being accepted to Harvard College, it impacts a community.

13 I've got great stories that I enjoy telling people,
14 you know. Certainly my time at Major League Baseball I could
15 sit down and tell you stories about conversations I've had
16 with Hall of Famers, you know, like just amazing people.

17 But nothing, nothing comes close to calling a
18 student and telling him or her that not only are they -- have
19 they been accepted to Harvard College but perhaps they're not
20 paying anything for their freshman year because of their
21 financial situation.

22 **Q.** Earlier you mentioned that you've worked as an admissions
23 officer for about eight years. Is that right?

24 **A.** That's correct, yes.

25 **Q.** And in those eight years, approximately how many

1 subcommittee meetings did you attend?

2 **A.** Probably close to 100.

3 **Q.** And in that same eight-year period, how many full
4 committee meetings did you attend?

5 **A.** Probably close to 50.

6 **Q.** And in that time period, how many times have you seen an
7 admissions officer show bias against an applicant because of
8 the applicant's race?

9 **A.** Never.

10 **Q.** Mr. Looby, when you're determining whether to admit an
11 applicant, is race ever used as a negative factor?

12 **A.** No.

13 **Q.** And in your eight years in the admissions office, have
14 you ever seen any of your colleagues treat an applicant's
15 race as a negative factor?

16 **A.** No.

17 **Q.** Mr. Looby, have you ever been instructed to admit a
18 target number of any particular racial or ethnic group in the
19 admissions process?

20 **A.** Absolutely not. We don't work with targets.

21 **Q.** And, Mr. Looby, have you ever discriminated against an
22 applicant because of his or her race?

23 **A.** Certainly not, no.

24 MS. CONLEY: No further questions.

25 THE COURT: Redirect?

1 MR. MORTARA: No redirect, Your Honor.

2 THE COURT: You're excused, Mr. Looby.

3 Your next witness?

4 MR. McBRIDE: Your Honor, Scott McBride for
5 Students for Fair Admissions. Our next witness is Erica
6 Bever. May we have a moment to set up?

7 THE COURT: Yes, of course.

8 MR. McBRIDE: Your Honor, I have a binder of
9 exhibits that I can hand up to you and opposing counsel and
10 for the witness.

11 THE CLERK: Can you please stand and raise your
12 right hand.

13 (ERICA BEVER duly sworn by the Deputy Clerk.)

14 THE CLERK: Can you please state your name and
15 spell your last name for the record.

16 THE WITNESS: It's Erica Bever. B as in boy, E, V
17 as in Victor, E-R.

18 MR. McBRIDE: Your Honor, may I approach the
19 witness?

20 THE COURT: Yes, of course.

21 MR. McBRIDE: Your Honor, we have a number of
22 exhibits for which there are no objections. In the interest
23 of efficiency, if I can just go through and read them and get
24 confirmation from counsel and get them admitted into evidence
25 to streamline the examination, if that's acceptable to you.

1 THE COURT: It's fine with me if it's fine with
2 them.

3 MS. ELLSWORTH: Your Honor, I'd prefer to do them
4 when they come up. I don't know if they're all going to come
5 up in the examination or not.

6 DIRECT EXAMINATION

7 BY MR. McBRIDE:

8 **Q.** Good afternoon, Ms. Bever. How are you?

9 **A.** I'm fine, thank you.

10 **Q.** I'm Scott. I'd like you to look at first Plaintiff's
11 Exhibit 43, if you could, please. Let me know when you've
12 found it.

13 **A.** I'm there.

14 **Q.** Is Plaintiff's Exhibit 43 an August 28, 2014, email with
15 attachments from you to Lucerito Ortiz?

16 **A.** It is.

17 MR. McBRIDE: I'd like to admit this into evidence.

18 MS. ELLSWORTH: No objection.

19 THE COURT: Admitted.

20 (Plaintiff Exhibit No. 43 admitted.)

21 BY MR. MORTARA:

22 **Q.** Could you turn to Plaintiff's Exhibit 44, please.

23 Plaintiff's Exhibit 44, this is an August 2, 2014, email with
24 attachments, from you to Lucerito Ortiz as well?

25 MR. McBRIDE: Your Honor, I'd like to move

1 Plaintiff's 44 into evidence.

2 MS. ELLSWORTH: No objection.

3 THE COURT: Admitted.

4 (Plaintiff Exhibit No. 44 admitted.)

5 BY MR. MORTARA:

6 Q. Thank you. That was just a little bit of housekeeping,
7 Ms. Bever.

8 Where do you work currently?

9 A. I currently work in the Harvard College office of
10 admissions and financial aid.

11 Q. What's your position there?

12 A. I'm the director of research for admissions and financial
13 aid and a senior admissions officer.

14 Q. You've been working there for how long in the admissions
15 office?

16 A. I've been there for about four years.

17 Q. Prior to going there four years ago, where did you work?

18 A. I worked in the Harvard University office of
19 institutional research.

20 Q. OIR?

21 A. Correct.

22 Q. When did you start in OIR?

23 A. In July of 2007.

24 Q. And if you had been working in the admissions office for
25 about four years, is it correct that you left OIR sometime in

1 the summer of 2014?

2 **A.** That's correct.

3 **Q.** Which means you spent seven years in OIR?

4 **A.** Yes.

5 **Q.** How many admission cycles, then, have you done since you
6 joined the office?

7 **A.** I'm about to begin my fourth.

8 **Q.** Begin your fourth. So you've completed three admission
9 cycles?

10 **A.** Yes.

11 **Q.** I noticed that your counsel had identified a number of
12 application files as exhibits to your examination today. So
13 I wanted to talk to you first briefly about your experience
14 as an admissions officer over the last four years.

15 Is it correct that as a new admissions officer one
16 of the ways you are trained is that you have someone who is
17 rereading the first 50 to 100 files that you are reading as
18 part of your work?

19 **A.** Yes. During my initial period there were -- the first 50
20 of my applications were reread by a second reader. But of
21 course, all the applications I pass to a chair of any
22 subcommittee I served on were also read by that chair and
23 provided feedback that way.

24 **Q.** Who provided you the second reading on the first 50 files
25 that were part of your training?

1 **A.** I believe it was various colleagues who are senior on the
2 admissions committee in tenure to me.

3 **Q.** Do you remember anyone specifically?

4 **A.** It certainly would have been people like Grace Chang. It
5 could have been other colleagues who'd been on the committee
6 longer.

7 **Q.** In a given admissions cycle, about how many admission
8 applications or application files do you read?

9 **A.** Currently I read about 500 a year.

10 **Q.** Has that been true for the first three years or the first
11 three cycles that you did?

12 **A.** In my first year on the admissions committee, I served on
13 two subcommittees, and I read over a thousand that year and
14 after that have read about 500.

15 **Q.** Why the reduction in the number?

16 **A.** To balance out my own workload.

17 **Q.** And when you go into the subcommittee and the committee
18 stages, which we've heard about from other witnesses, about
19 how many files do you then have to review and examine as part
20 of that work?

21 **A.** Generally we review all of them in preparation for
22 subcommittee. Sometimes that's a cursory glance to see what
23 new information has come in. Sometimes it's a more thorough
24 reread to prep for presentation in subcommittee.

25 **Q.** When you're in subcommittee and committee, do you review

1 the application files of other examiner or other readers who
2 are bringing those files to subcommittee?

3 **A.** Yes.

4 **Q.** So about how many files -- other than the 1,000 or 500
5 that are part of your group of files, how many of those other
6 files do you then read and review for the subcommittee and
7 the committee process each year?

8 **A.** Well, again, I couldn't really estimate how many are
9 discussed in subcommittee and full committee. But every one
10 that's presented. We're essentially seeing the full file as
11 we are reviewing them.

12 **Q.** Now, we've heard there are a number of different ratings
13 that admissions officers like you assign when reviewing an
14 application. You're familiar with those ratings?

15 **A.** I am.

16 **Q.** So for example, the profile ratings, as I understand it,
17 are the academic, the extracurricular, the athletic, the
18 overall, and a personal rating, right?

19 **A.** Yes.

20 **Q.** And you as the reader, you assign those scores in the
21 applicant's files?

22 **A.** I assign the first reader ratings, yes.

23 **Q.** And if a second reader reads the file, the ratings are
24 made by that second reader?

25 **A.** That's correct.

1 **Q.** And it's true the personal rating is the rating by which
2 you assess an applicant's personal qualities and character?

3 **A.** Yes.

4 **Q.** There are also some school support ratings, as I
5 understand it, from teachers and guidance counselors?

6 **A.** Correct.

7 **Q.** And you as the reader, you also assign those teacher and
8 counselor ratings to the applicant's files?

9 **A.** Yes. I read their letters and I assign a rating based on
10 the review given in those letters.

11 **Q.** So it's correct, then, that the teacher and guidance
12 counselor, the so-called school support ratings, you assign
13 those based on your reading of the text of the teacher
14 recommendation and the counselor letter?

15 **A.** Yes. And the forms that they submit that go along with
16 those letters.

17 **Q.** I'm sorry. What?

18 **A.** There are forms that come with their letters that often
19 provide some rating information as well from the teachers and
20 guidance counselors.

21 **Q.** And you rely on that from the teachers in forming the
22 rating that you give in the school support measures?

23 **A.** Exactly.

24 **Q.** Did you receive any instruction about whether or not race
25 should ever be incorporated into the personal score when you

1 were trained as an admissions officer?

2 **A.** No, I didn't receive specific instruction about putting
3 race into the personal rating.

4 **Q.** Did you receive any instruction about whether or not race
5 should ever be incorporated into the personal score when you
6 were trained as an admissions officer?

7 **A.** No. There was a lot of feedback about how the personal
8 rating should be used but not specifically about race per se.

9 **Q.** However, you do look at race as one of many factors in
10 evaluating an application, right?

11 **A.** That is correct.

12 **Q.** And as part of your process, what you say is that if a
13 student indicates race somewhere on the application, you
14 would note that as you would note their birthday, gender,
15 where they're from, what their high school is, and what the
16 grades are, right?

17 **A.** Certainly I would know all that information as I was
18 evaluating their application.

19 **Q.** And you would note that along with race?

20 **A.** I would make note of it, yes.

21 **Q.** And you can't ever recall factoring in a student's race
22 when you assign them an overall rating, right?

23 **A.** The overall rating, as I see it, is the strength of the
24 application has a whole. Certainly if their race played a
25 role in how strong I viewed that application, then the

1 overall rating might reflect something about their race in
2 the strength of their case.

3 MR. McBRIDE: Your Honor, may I approach?

4 THE COURT: Sure.

5 BY MR. McBRIDE:

6 Q. Ms. Bever, I'm going to hand you a copy of your
7 deposition. Do you remember your deposition on -- I believe
8 it was in July 13 of 2017.

9 A. I do.

10 Q. And do you remember before you began the deposition you
11 raised your right hand, like you did here, and swore to tell
12 the truth?

13 A. I did.

14 Q. And you gave truthful testimony at your deposition?

15 A. Yes.

16 Q. Could you please turn to page 301. I put that up on the
17 screen. I'd like to look at lines 22 to 25.

18 Do you recall at your July 13, 2017, deposition you
19 were asked the question:

20 "Do you -- can you recall ever factoring in a
21 student's race when you assigned them an overall rating?

22 "ANSWER: I cannot."

23 Do you recall being asked that question and giving
24 that answer?

25 A. Yes.

1 **Q.** You also, you can't say how race would weigh on your
2 ultimate decision as to whether or not to recommend
3 admission, right?

4 **A.** Again, race might play a role in how strongly I feel the
5 applicant will compare to others in the application pool.

6 **Q.** Well, how would it weigh on your ultimate decision as to
7 whether or not to recommend admission?

8 **A.** I cannot say per se how it would impact my decision.
9 Race plays a role among many factors in how strongly I might
10 view a case, a particular applicant's case.

11 **Q.** Do you think race is more or less relevant than the
12 applicant's birthday?

13 **A.** It's just different.

14 **Q.** Can you say whether it's more or less relevant than the
15 applicant's birthday?

16 **A.** Race is one of many factors. Perhaps their birthday
17 played a role in their case, and that would be important for
18 a particular applicant. Race can play a different role in a
19 different applicant's case.

20 **Q.** Could you turn to page 303, please?

21 **A.** 300 and what?

22 **Q.** 303. And look at lines 9 through 12. Do you recall at
23 your deposition being asked --

24 MS. ELLSWORTH: Your Honor, I object. This is not
25 impeachment.

1 MR. McBRIDE: Your Honor, I asked the question and
2 she did not say I don't know because it might be important.

3 THE COURT: I don't think it's directly
4 contradicting, but I don't see any harm in the question
5 either.

6 BY MR. McBRIDE:

7 **Q.** Were you asked the question, "Do you think it's more or
8 less relevant than the birthday?"

9 Ms. Ellsworth objected.

10 "ANSWER: I don't know."

11 Were you asked that question and did you give that
12 answer?

13 **A.** Yes.

14 **Q.** You don't believe you've ever counted a student's race as
15 a negative in their application, do you?

16 **A.** No, I do not.

17 **Q.** But you don't know whether you ever counted race as
18 positive in their application, do you?

19 **A.** I can recall cases where a student's race played a role
20 in how I viewed their application and how strongly I viewed
21 their application.

22 **Q.** Have you ever counted race as a positive?

23 **A.** Again, it's one factor among many. I don't think of it
24 that way.

25 **Q.** Could you please turn to 302 for me of your deposition,

1 looking at lines 21 to 24.

2 "QUESTION: Have you ever counted it as a positive?

3 "ANSWER: I do not know."

4 Were you asked that question and did you give that
5 answer in your sworn testimony?

6 MS. ELLSWORTH: Your Honor, I'll lodge the same
7 objection. I don't think this is proper impeachment.

8 THE COURT: I understand the objection. In front
9 of a jury, I may make a different ruling. But I'm making the
10 decisions, and I don't see any harm to the question. I heard
11 the first question and I see the question in the deposition.
12 I don't think they're strictly contradictory, but they are
13 different, and I'll let him have it.

14 MS. ELLSWORTH: Thank you, Your Honor.

15 MR. McBRIDE: Thank you, Your Honor.

16 BY MR. McBRIDE:

17 **Q.** Is it possible for you to say whether in all your time
18 reading files race has ever made a difference in whether
19 someone got admitted or not?

20 **A.** I couldn't say.

21 **Q.** I'm sorry?

22 **A.** I couldn't say.

23 **Q.** I want to turn to your time at the office of
24 institutional research, OIR, if I could, please. And I want
25 to look at Plaintiff's Exhibit 465.

1 MR. McBRIDE: Your Honor, I offer Plaintiff's
2 Exhibit 465 into evidence.

3 MS. ELLSWORTH: No objection.

4 THE COURT: Admitted.

5 (Plaintiff Exhibit No. 465 admitted.)

6 BY MR. McBRIDE:

7 Q. You see at the top this is the website for OIR. Do you
8 recognize that?

9 A. Yes.

10 Q. And you see at the top the objectives of OIR is to offer
11 accurate, timely, and digestible research, tailored to
12 diverse audiences, with the goal of promoting informed
13 decision-making and furthering the core missions of the
14 university."

15 A. Yes.

16 Q. That's the standard you followed when you worked at OIR?

17 A. I believe this is the same objective statement we had
18 when I was in the office.

19 Q. And is that the standard that you followed at OIR to
20 offer accurate, timely, and digestible research?

21 A. Yes.

22 Q. And you tried to do a good job, the best job you were
23 able to do when you were at OIR?

24 A. I did.

25 Q. And it was your practice to prepare complete assessments

1 on questions that you looked into, right?

2 **A.** Most often.

3 **Q.** Did you ever not try to do that?

4 **A.** Occasionally we had meetings that were preliminary in
5 nature, and we would try and ask for more information in the
6 middle of a process or project.

7 **Q.** Was it your habit when you worked at OIR to prepare
8 incomplete assessments on the questions you were asked to
9 look into?

10 **A.** Again, projects took many months, sometimes years. So we
11 would have checked in periodically.

12 **Q.** Could you please turn to page 131 of your deposition,
13 lines 12 to 16.

14 "QUESTION: Did you -- was it your habit when you
15 worked at OIR to prepare incomplete assessments on questions
16 you were asked to look into?"

17 There was an objection.

18 "ANSWER: No."

19 Were you asked that question and did you give that
20 answer at your deposition?

21 **A.** Yes.

22 **Q.** It was your practice to provide reliable work product to
23 your Harvard decision-makers, right?

24 **A.** Yes.

25 **Q.** So I want to look at some of the work from when you were

1 at OIR. Turn to Plaintiff's Exhibit 12, which I believe is
2 already in evidence, Your Honor.

3 This is an OIR report from February of 2013; is
4 that right?

5 **A.** It is a presentation that appears to be from
6 February 2013.

7 **Q.** And if you turn to the third page, you see that one of
8 the questions in this presentation was under the heading
9 "Access" on a page titled "Recent Admissions and Financial
10 Aid Questions Raised Was 'Does the Admissions Process
11 Disadvantage Asians?'"

12 Do you see that?

13 **A.** I do.

14 **Q.** I don't want to go through this whole deck, but I would
15 like to orient you. If you could, turn to Slide 31. You see
16 it's a section on evaluating factors that play a role in
17 Harvard College admission?

18 **A.** I see that.

19 **Q.** It goes on for about six or seven slides through to
20 around -- I think this section ends on Slide 38. Do you see
21 that?

22 **A.** Yes.

23 **Q.** And Slide 32 has, as you see on the screen under the
24 methods, it has the goal, the strategy, and the notes. Do
25 you see that?

1 **A.** Yes.

2 **Q.** And in summary, what's being described here is creating
3 some logistic regression models that OIR had created?

4 **A.** Yes, I believe so.

5 **Q.** And at the bottom, it does note here in the notes
6 section, "The following analysis is preliminary and for
7 discussion." Do you see that?

8 **A.** I do.

9 **Q.** And this caveat, that was something that was applied to
10 reports that you would do at OIR generally, wasn't it?

11 **A.** Again, there were things that were preliminary and often
12 for discussion, yes.

13 **Q.** And it was something that was applied to reports that you
14 would do at OIR generally, right?

15 **A.** Again, I think we tried to apply that label when things
16 were preliminary and for discussion.

17 **Q.** I'd like to turn to your deposition again, if you would,
18 please. If you could go to page 114. I'll just read this
19 one.

20 On page 114 at around line 17, it says, "Okay. The
21 next bullet point says, 'The following analysis is
22 preliminary and for discussion.' Did I read that correctly?

23 "You did," is the answer.

24 "QUESTION: Is that -- do you remember -- do you
25 remember that -- do you remember that caveat being applied to

1 reports that you would do at OIR generally?"

2 Next page.

3 "ANSWER: Yes."

4 Were you asked that question and did you give that
5 answer?

6 **A.** Yes.

7 **Q.** You included that caveat because almost everything you
8 did at OIR was up for discussion and review, right?

9 **A.** Many things, yes.

10 **Q.** Almost everything was, right?

11 **A.** Certainly everything was up for discussion, yes.

12 **Q.** And review?

13 **A.** Yes.

14 **Q.** So over the next few slides here in Plaintiff's
15 Exhibit 12, you agree this is presenting the results of the
16 modeling of Harvard's admissions process that was done?

17 **A.** I agree that it's presenting models of the admission
18 rate.

19 **Q.** And you see on Slide 35 it has some showing of how
20 projected admit rates in the model would change as you add
21 more factors. Do you agree?

22 **A.** Yes. For the few factors that was included in this
23 model.

24 **Q.** And to be clear, your only memory of this section of
25 slides is of Mark Hansen sitting in your office and showing

1 you these slides?

2 **A.** I remember a couple of these slides from a meeting with
3 Mark Hansen. This is not one of the slides I recall.

4 **Q.** And you have no recollection of any critique you had of
5 the slides that Mark showed you?

6 **A.** That is correct.

7 **Q.** And you don't have a memory of any concerns you had about
8 mistakes in the slides?

9 **A.** That is correct.

10 **Q.** But Mark Hansen, he worked for you at OIR at that time,
11 right?

12 **A.** He did.

13 **Q.** And in your experience, he did quality work?

14 **A.** He did.

15 **Q.** And you were responsible for his performance evaluations,
16 right?

17 **A.** I was.

18 **Q.** And you don't remember ever giving him a negative
19 performance evaluation?

20 **A.** That's true.

21 **Q.** But you do remember giving him positive performance
22 evaluations when he worked for you?

23 **A.** Yes.

24 **Q.** And you thought highly enough of Mr. Hansen's work in
25 Plaintiff's Exhibit 12 to pass it along to others?

1 **A.** That may be the case, yes.

2 **Q.** I'd like to look at some of the times that you passed
3 Mr. Hansen's work along to others while you were at OIR. If
4 you could, turn to Plaintiff's Exhibit 15.

5 MR. McBRIDE: I'd like to move Plaintiff's
6 Exhibit 15 into evidence.

7 MS. ELLSWORTH: No objection.

8 THE COURT: Admitted.

9 (Plaintiff Exhibit No. 15 admitted.)

10 BY MR. McBRIDE:

11 **Q.** So Plaintiff's Exhibit 15, this is an email from you to
12 Mark Hansen and Erin Driver-Linn on February 20, 2013; is
13 that right?

14 **A.** That's correct.

15 **Q.** I understand she's Ms. Driver-Linn, not Dr. Driver-Linn.
16 Is that correct?

17 **A.** I always referred to her as Erin.

18 **Q.** Okay. I won't do that. Ms. Driver-Linn, was she your
19 boss at this time?

20 **A.** She was.

21 **Q.** And Mark, as we already established, he worked for you or
22 Mr. Hansen worked for you?

23 **A.** Yes.

24 **Q.** If you look at the first two sentences, you say, "Hi,
25 Mark and Erin. Attached is my shot at pulling together much

1 of the work related to admissions. Since I'm still not sure
2 what Fitz and Sally have seen, I'd welcome your thoughts on
3 what we should add (especially related to the Unz article)."

4 Do you see that?

5 **A.** I do.

6 **Q.** "Fitz," is that the shorthand you'd use for Dean
7 Fitzsimmons?

8 **A.** Yes.

9 **Q.** And who is Sally?

10 **A.** In this case I'm probably referring to Sally Donahue who
11 was our director of financial aid.

12 **Q.** It mentions the Unz article. During your time at OIR,
13 you were familiar with that article?

14 **A.** A little bit.

15 **Q.** And you recall it came up in late fall, early winter of
16 2012-2013?

17 **A.** I believe that's correct.

18 **Q.** And you understand you were out of the office on leave
19 for part of that, for maternity leave?

20 **A.** That's correct.

21 **Q.** But you were aware that the Unz article made assertions
22 about the way Harvard treated Asian-Americans in the
23 admissions process?

24 **A.** Yes.

25 **Q.** And specifically that it alleged Harvard discriminated

1 against Asian-Americans in the admissions process?

2 **A.** Yes.

3 **Q.** And you recall that when David Brooks wrote about that in
4 the New York Times, it caused a bit of a stir at Harvard
5 among the decision-makers above you?

6 **A.** I was on leave during that period. I wasn't really aware
7 of what discussions were happening during that time.

8 **Q.** Now, if you see here, there are a series of attachments.
9 I think there are two attachments here in Excel and a
10 PowerPoint?

11 **A.** Yes.

12 **Q.** I notice that in each of them they have a name. For
13 example, admissions_20120220_EB.pptx.

14 Do you see that?

15 **A.** Yes.

16 **Q.** And does this reflect a naming convention you used for
17 documents that you prepared?

18 **A.** Yes. It's how we dealt with version control.

19 **Q.** By version control, then you include this reverse date
20 notation?

21 **A.** Correct.

22 **Q.** And you would also include your initials, EB?

23 **A.** Yes.

24 **Q.** And that would reflect that you had had a hand in
25 preparing for editing that version of the document?

1 **A.** Either I created it or edited it.

2 **Q.** And would you agree that this date here appears to be --
3 the thing I always do, which is for the first two months of a
4 year I use the wrong year when I label a document.

5 So this from 2013 is actually from 220 -- 2013
6 where it says 2012?

7 **A.** That's possible, but I don't recall.

8 **Q.** And if you look at the document that's attached, we page
9 forward, here's the Excel sheet for the first few pages. And
10 then it begins here on what is it about the ninth page of the
11 document, even though it says Slide 1.

12 Do you see we're starting a PowerPoint?

13 **A.** Yes.

14 **Q.** And take a moment, but would you agree that this is a
15 version, close version of the PowerPoint that we had just
16 looked at at Plaintiff's Exhibit 12?

17 **A.** It appears to be a version. I don't recall everything
18 that was in that document.

19 **Q.** You have both exhibits there. So please take your time.
20 I would like to make sure that we're clear for the record
21 that what you are forwarding to your boss, Erin Driver-Linn,
22 is a version of the PowerPoint we just looked at at
23 Plaintiff's Exhibit 12.

24 **A.** We can agree to that.

25 **Q.** Specifically if you look at the third slide here in this

1 Plaintiff's Exhibit 15, you'll note that it is, in fact,
2 asking not exactly the same but a very similar question as
3 what we saw in the previous one. I think the last one said
4 does it disadvantage Asians. Here the question is, is there
5 bias against Asians in college admissions?

6 Do you see that?

7 **A.** I see that.

8 **Q.** And then if you look on, you'll see starting at around
9 Slide 30 and 31, we have the same series of seven or eight
10 slides that we saw earlier in Plaintiff's Exhibit 12
11 reflecting a logistic regression model?

12 **A.** Yes.

13 **Q.** And what you were pulling together for your boss relating
14 to admissions was the OIR PowerPoint that include Mark
15 Hansen's slides with the logistic regression modeling the
16 effect of certain factors on admit rates at Harvard, right?

17 **A.** Yes. I was pulling together a number of slides that
18 included Mark's analysis.

19 **Q.** The same slide deck basically as P12?

20 **A.** This one appears a little bit rougher. There are notes
21 on it.

22 **Q.** I understand that other than what's written in the email,
23 you say that you don't actually have a recollection of the
24 discussions that the email refers to. Is that right?

25 **A.** That's correct.

1 **Q.** But we can agree that at least with respect to what you
2 wrote in your email to Ms. Driver-Linn, you did not criticize
3 the work of Mark Hansen that you pulled together for her. Is
4 that right?

5 **A.** This email does not include any criticism. That's
6 correct.

7 **Q.** You did not tell her, for example, in this email that the
8 work Mark had done in those slides was somehow unreliable or
9 incomplete?

10 **A.** That's correct.

11 **Q.** I'm sorry. Did I interrupt you? I apologize.

12 **A.** I was just saying the email does not say that.

13 **Q.** And you did not tell her in your email that this
14 reflected anything other than the complete and reliable work
15 that you normally did when you were at OIR, did you?

16 **A.** All it says is that I pulled together much of our work.
17 It doesn't even say it's complete.

18 **Q.** And it definitely doesn't say it's incomplete or
19 unreliable or don't rely on this, right?

20 **A.** That's correct. It does not say that.

21 **Q.** So I'd like to move forward in time. If you could look
22 at Plaintiff's Exhibit 25 for me, please.

23 MR. McBRIDE: I'd like to offer Plaintiff's
24 Exhibit 25 into evidence.

25 MS. ELLSWORTH: No objection.

1 THE COURT: Admitted.

2 (Plaintiff Exhibit No. 25 admitted.)

3 BY MR. McBRIDE:

4 Q. So Plaintiff's Exhibit 25, is this an April 30 email from
5 you, again to Ms. Driver-Linn, copying Mark Hansen?

6 A. It is.

7 Q. And again, this is another instance where you have sent
8 around OIR analysis that relates to race and admissions,
9 right?

10 A. I believe this memo was intended to address the issue of
11 economics, socioeconomic status in admissions.

12 Q. We'll take a look at what you've got here in this email
13 in a second.

14 What you wrote is, "Hi, Erin. Mark and I have
15 updated the memo and exhibits based on your comments,
16 including adding the new exhibit. Please let us know if you
17 would suggest additional changes."

18 Do you see that?

19 A. I do.

20 Q. Again, all the files here have your naming convention
21 with EB in your name?

22 A. The first file does. The second does not.

23 Q. Correct. I see that. So the analysis memo, that has
24 your initials in the file name?

25 A. Yes.

1 **Q.** Now, if we go to the next page, this is the first page of
2 the memo that you referenced. And this is a draft memo from
3 you, Ms. Driver-Linn, and Mr. Hansen to Dean Fitzsimmons,
4 right?

5 **A.** That's what it appears, yes.

6 **Q.** And it has as the subject line, "Harvard College
7 admissions and low-income students."

8 Do you see that?

9 **A.** Yes.

10 **Q.** I don't want to go through this in excruciating detail.
11 We've seen versions of this previously.

12 But would you agree that this memo reflects the
13 results of some logistic regressions that OIR ran for Dean
14 Fitzsimmons relating to admissions and low-income status?

15 **A.** Yes, that's correct.

16 **Q.** And if you look on the last -- I'm sorry -- on the next
17 page, which is the third page of the document altogether, I
18 just want to look at the bottom paragraph there.

19 You wrote in this memo that you were sending to
20 your boss at this time, this draft, "To get a sense of the
21 size of the admissions advantage conferred to low-income
22 applicants relative to other groups of applicants, the
23 so-called thumb on the scale, we include low-income status in
24 a second logistic regression model. The table below is
25 sorted based on the effect size of each of the variables

1 included in the model. The variables with the largest
2 effects on the probability of admission are athletic rating,
3 personal rating, and legacy status. Compared to athletes and
4 legacies, the size of the advantage for low-income students
5 is relatively small."

6 Do you see that?

7 **A.** I do.

8 **Q.** And the table with the results that the memo is
9 describing here, those are on the next page; is that right?

10 **A.** Yes.

11 **Q.** And on the next page this table is a table titled
12 "Logistic Regression Predicting Admission."

13 Do you see that?

14 **A.** I do.

15 **Q.** And it's a table with variables along the left,
16 coefficient estimates in the middle, and P values on the
17 right?

18 **A.** Yes.

19 **Q.** And the coefficient, that reflects the probability of a
20 particular outcome, right?

21 **A.** It reflects the correlation between that variable and the
22 outcome of interest.

23 **Q.** And by "correlation," you mean how it affects the
24 probability of that outcome occurring?

25 **A.** Yes.

1 **Q.** And a positive -- and the outcome here is probability of
2 admission, to be complete?

3 **A.** I believe so, yes.

4 **Q.** And a positive coefficient means there is a positive
5 relationship between that variable and admissions outcomes?

6 **A.** Yes.

7 **Q.** In other words, "positive" means makes it more likely
8 you'll be admitted --

9 **A.** Yes.

10 **Q.** -- according to the model?

11 **A.** According to this model with a limited set of variables,
12 yes.

13 **Q.** And a negative coefficient means there is a negative
14 relationship between that variable and the possibility of
15 admissions, right?

16 **A.** Between that particular variable, yes.

17 **Q.** And if you go down the chart, we see what the memo is
18 describing, that the biggest effect is athletic rating 1
19 because it has the highest positive coefficient?

20 **A.** Yes. The biggest effect in this model.

21 **Q.** And the next biggest effect shown in this model is
22 personal rating of 1 or 2?

23 **A.** Yes.

24 **Q.** And then legacy?

25 **A.** Yes.

1 **Q.** And so on. And if you go down the columns, what we see
2 here is that near the very bottom we see Asian, and Asian has
3 a negative coefficient, right?

4 **A.** It does.

5 **Q.** And the negative coefficient here means that the model
6 says that being an Asian-American applicant has a negative
7 effect on your probability of admission, according to this
8 model?

9 **A.** According to this model with limited set of variables, it
10 says that being Asian in this model is negatively correlated
11 with the admission rate.

12 **Q.** And P value, that represents statistical significance,
13 right?

14 **A.** It does.

15 **Q.** The P value of zero, that means it is statistically
16 significant?

17 **A.** That's correct.

18 **Q.** And we see that for everything all the way down through
19 Asian until the very last two variables, all of those values
20 the model finds to be statistically significant?

21 **A.** Yes.

22 **Q.** Now, in fairness to you, I'm going to turn back to the
23 previous page. Because you do in this draft memo that you're
24 sending to your boss, Ms. Driver-Linn, you reflect on some
25 limitations that the model has.

1 And you state, "This approach has several
2 limitations. We picked a small set of variables that would
3 factor in admissions decisions. The selection of a wider set
4 of variables might result in a better fitting model, one that
5 accounts for more of the variation in individual applicants
6 and their potentially unique contributions to the entering
7 class. For example, the model does not capture exceptional
8 talent in art or music explicitly, although ratings may
9 capture some aspects of these attributes. In addition, our
10 model is limited to main effects, not examining interactions
11 between variables. Our analysis should not be considered
12 exhaustive."

13 Do you see that?

14 **A.** I do.

15 **Q.** However, you'll note that if you continue down, the next
16 thing you say is, "In spite of these limitations, the
17 logistic regression model results are consistent with the
18 descriptive analysis described above and shown in Exhibits 1
19 and 2," right?

20 **A.** Yes.

21 **Q.** To be fair, you understood that there was more data on
22 additional variables available in Harvard's database, right?

23 **A.** I think I was aware that there was more data available,
24 yes. But I had no understanding of the admissions process at
25 the time.

1 **Q.** I apologize. You were in OIR at that time. You hadn't
2 yet become a reader?

3 **A.** That's correct.

4 **Q.** But you understood you could go to Elizabeth Yong, who
5 managed the database, and you could secure more data on more
6 variable if you wanted it, right?

7 **A.** I don't specifically recall that, but that may be the
8 case.

9 **Q.** And generally when you had wanted to get more data on a
10 process, you went to Elizabeth Yong to get it, correct?

11 **A.** I think that's correct, yes.

12 **Q.** You could also have expanded the model to include
13 interaction between variables, as you noted here, right?

14 **A.** Yes.

15 **Q.** Like interacting race and disadvantaged status?

16 **A.** Yes.

17 **Q.** You don't remember anyone at the time of this memo
18 raising concerns about the way a logistic regression was
19 being used here, do you?

20 **A.** I don't recall any discussions about that memo.

21 **Q.** Which means you don't -- no one raised any concerns about
22 the use of a regression, that you recall?

23 **A.** I don't recall any discussions about this memo.

24 **Q.** And you don't recall anyone critiquing the analysis that
25 was employed here generally?

1 **A.** Yes. I don't recall discussing it.

2 **Q.** But ultimately you did finalize this memo and you sent it
3 on to Dean Fitzsimmons, right?

4 **A.** I believe we sent a version, yes.

5 **Q.** Hopefully a final version?

6 **A.** I think it was final.

7 **Q.** But first before we do that, I wanted to look at just one
8 more draft of this memo here.

9 MR. McBRIDE: I'm going to put Plaintiff's
10 Exhibit 23 up on the screen and offer it into evidence.

11 MS. ELLSWORTH: No objection.

12 THE COURT: It's admitted.

13 (Plaintiff Exhibit No. 23 admitted.)

14 BY MR. McBRIDE:

15 **Q.** If you take a look at what is in your binder, it's
16 Plaintiff's Exhibit 23 as well as here on the screen. I just
17 want to establish first this is a markup redline draft of the
18 same memo we looked at before.

19 **A.** Yeah. It appears to have track changes.

20 **Q.** I'll represent to you that the metadata for this shows
21 that it's titled "analysis memo_20130426_EB."

22 If you would accept that representation, you'd
23 agree that this is from April 26 of 2013?

24 **A.** Yes.

25 **Q.** And that would be a few days before the April 30 memo we

1 just saw?

2 **A.** Yes.

3 **Q.** I want to focus on the last page of this memo. If you
4 look at the last page, first just confirm that this earlier
5 memo here, it has the same chart of coefficients, albeit at
6 the very end of the memo?

7 **A.** I think it does, yeah.

8 **Q.** And if we look up at the top, there's a final paragraph
9 here. I just want to highlight some of the text here while
10 we read it.

11 So what you write here in this draft from before
12 April 30, the April 26 draft, it says, "While we find that
13 low-income students clearly receive a tip in the admissions
14 process, our model also shows that the tip for legacy
15 athletes, etc., is larger.

16 "On the flip side, we see a negative effect of
17 being Asian. These realities have also received intense
18 scrutiny from critics like Bowen or more recently Unz, as we
19 have discussed at length. To draw attention to the positive
20 benefit that low-income students receive may also draw
21 attention to the more controversial findings around Asians or
22 the expected results around legacies and athletes."

23 Do you see how you wrote that in that draft?

24 **A.** I see that that's written here. I don't recall writing
25 it.

1 **Q.** I want to look at the final version of the memo that you
2 then sent to Dean Fitzsimmons. So if you could, turn to
3 Plaintiff's Exhibit 26. I believe 26 is in evidence.

4 So this is an email from you to Dean Fitzsimmons on
5 May 1, the day after the first memo draft that we looked at.
6 Is that true?

7 **A.** Yes.

8 **Q.** And you copy his assistant as well as Ms. Driver-Linn and
9 Mr. Hansen?

10 **A.** Yes.

11 **Q.** And you say, "Dear Fitz. Attached is a memo describing
12 our recent analysis of low-income admissions. In the memo we
13 describe our approach and results. At your suggestion, we
14 reviewed a small sample of literature to put this in context
15 and realized our approach was consistent with what others
16 have done. We'd appreciate any comments or suggestions you
17 have."

18 Do you see how you wrote that?

19 **A.** Yes.

20 **Q.** And if you take a look, you would agree that if we page
21 through the rest of the memo that it is very similar to both
22 of the drafts that we saw before, more closely related to the
23 April 30 draft obviously. Would you agree?

24 **A.** Yes.

25 **Q.** And it has the same chart of coefficients for Dean

1 Fitzsimmons that we saw before?

2 **A.** Yes.

3 **Q.** And other than the email that sent this memo, you don't
4 recall discussing the memo or its findings with Dean
5 Fitzsimmons, do you?

6 **A.** That's correct, I do not.

7 **Q.** You don't remember any discussions with Dean Fitzsimmons
8 about the findings in the memo about the effect of being
9 Asian-American, right?

10 **A.** I don't recall discussing this memo with Dean
11 Fitzsimmons.

12 **Q.** And you say that you actually don't remember much about
13 the specific analysis that was done in this memo; is that
14 right?

15 **A.** I don't really remember the analysis of this work, but
16 I'd be happy to comment on it today.

17 **Q.** I'm sure your lawyers will be happy to ask you.

18 But I'm going to ask you instead that you don't
19 remember the analysis about the extent to which the
20 admissions process fell negatively on Asian-Americans, right?

21 **A.** I don't remember any discussion about this analysis.

22 **Q.** This wasn't the last time, though, that you were sending
23 Dean Fitzsimmons OIR analysis on race, low income, and
24 admissions probabilities, though, was it?

25 **A.** I don't recall.

1 **Q.** Would you turn to Plaintiff's Exhibit 29.

2 MR. McBRIDE: Your Honor, if I may just check in.
3 I can't remember how long you said we were going, if we were
4 going until 4:00 or 3:30.

5 THE COURT: I have another hearing at 3:30.

6 MR. McBRIDE: This is a new document. I don't know
7 if you'd -- --

8 THE COURT: I'd like us to use the time.

9 MR. McBRIDE: I'll keep going.

10 BY MR. McBRIDE:

11 **Q.** Plaintiff's Exhibit 29 is in evidence. This is an email
12 that you sent to Dean Fitzsimmons on Monday, June 3?

13 **A.** Yes.

14 **Q.** And this is about a month after the low-income admissions
15 and admissions memo we just saw?

16 **A.** Yes.

17 **Q.** And what you say -- you say, "Hi, Fitz. This note is a
18 follow-up from our last conversation on income and admissions
19 with Jeff Neal. We've put together several exhibits that
20 examine the interaction between race and low-income status."

21 Do you see that?

22 **A.** I do.

23 **Q.** And you don't recall what the last conversation is that
24 this is referring to?

25 **A.** I don't.

1 **Q.** And it notes an attachment here at the bottom, an
2 attachment in the form of a download file titled
3 "Demographics & Income_20130603."

4 Do you see that?

5 **A.** I do.

6 **Q.** I want to look at the attachment which you'll find just
7 before this at Plaintiff's Exhibit 28, if you would, please.
8 And that is, I believe, in evidence.

9 Do you see Exhibit 28?

10 **A.** Yes. I am at 28.

11 **Q.** And if you will page through this for me, please, you'll
12 see that around Slides 7 and 8, what you've provided to Dean
13 Fitzsimmons are additional tables of results from logistic
14 regression models that you did on modeling the predicted
15 probability of admissions, in this case for the classes of
16 2009 to 2016.

17 Do you see that?

18 **A.** I do.

19 **Q.** And if we can look at both of those, both Slide 7, there
20 we see again the coefficient for Asian is negative,
21 reflecting a negative correlation to the probability of
22 admission?

23 **A.** The coefficient for Asian is negative. The coefficient
24 for being Asian and low income is positive.

25 **Q.** The way you work with those, as you know, is that if you

1 want to find out what that means for the overall coefficient
2 for a low-income Asian applicant is you add those two
3 together?

4 **A.** That's correct.

5 **Q.** So if you were to do that in this instance, what you
6 would find -- Asian and low income, that's an interaction
7 term, to be correct?

8 **A.** Yes.

9 **Q.** And what you do is if you want to ask the question, What
10 is the coefficient for a low-income Asian applicant? is that
11 you take .282 positive and you add it to the overall
12 coefficient for Asian of negative .429, right?

13 **A.** And then you add the coefficient for it being low income,
14 which is .899.

15 **Q.** Your testimony is that in order to determine what a
16 low-income Asian applicant is that you add all three
17 variables?

18 **A.** I think that's correct. I'd have to check.

19 **Q.** I agree that I think you should go back and check that.

20 For now, we'll leave that for the experts to
21 resolve later --

22 **A.** Okay.

23 **Q.** -- since you're not sure.

24 But we can agree on one thing, that this purely
25 Asian coefficient here is negative .429?

1 **A.** Yes.

2 **Q.** And it's more negative than what we saw before?

3 **A.** Controlling for a few other things, yes.

4 **Q.** Yes. So adding more controls has made this Asian
5 coefficient more negative?

6 **A.** In this particular model.

7 **Q.** In this particular model, right.

8 And regardless of our disagreement or uncertainty
9 about how exactly you put these numbers together to get to a
10 low-income Asian applicant, you'd agree this number here
11 reflects now a non low-income Asian applicant?

12 **A.** Relative to whatever the omitted group is, yes.

13 **Q.** And for a non-low-income Asian applicant, this model is
14 showing an even more negative correlation with admission?

15 **A.** In this particular model, yes.

16 **Q.** And you'd agree that when we look at the number of Asians
17 who are not in the low-income category, it's over 80 percent
18 of the applicants, right?

19 **A.** Over 80 percent of Asian applicants? I'd have to check.

20 **Q.** We'll go back because I believe you helpfully provided us
21 some information in this draft. This is back on Slide 4.

22 This is a slide which I've conveniently blocked the
23 title so you can't see it. "Percent of Applicants With
24 Incomes Less Than 60,000 by Race/Ethnicity."

25 Do you see that?

1 **A.** Yes.

2 **Q.** What it shows here is that for the Asian-American
3 applicants it is 18 percent, right?

4 **A.** Yes.

5 **Q.** And so that means that 82 percent of Asian-American
6 applicants are in the non-low-income category associated with
7 the negative .4-something coefficient in the model?

8 **A.** During this time period, yes.

9 **Q.** And if we look on page 8, just to wrap things up, here
10 you have what you've done on this page 8 is you've actually
11 done additional interactions not just between Asian and low
12 income, but you've interacted all races and ethnicities with
13 low income and now provided resulting coefficients?

14 **A.** Yes.

15 **Q.** And in fact, what you find here is that for
16 non-low-income Asians, this model shows a negative
17 correlation with admissions in a coefficient of the form
18 negative .418.

19 Do you see that.

20 **A.** Yes.

21 **Q.** And you say that you don't recall why you would be
22 sending this to Dean Fitzsimmons at the time?

23 **A.** I don't recall having a conversation in between sending
24 the initial memo and sending this document.

25 **Q.** And you don't recall any discussions about the

1 information in this chart in June of 2013 or at any point
2 thereafter, right?

3 **A.** I do not.

4 **Q.** But as was your practice when at OIR, you would only have
5 sent him analysis that you believed to be accurate and
6 reliable, right?

7 **A.** Yes.

8 **Q.** I want to move forward now from June of 2013 to October
9 of 2013. I'm going to move to a new exhibit. This is
10 Plaintiff's Exhibit 35.

11 MR. McBRIDE: And I'd like to move that into
12 evidence, please.

13 MS. ELLSWORTH: I'm sorry. Mr. Lee was distracting
14 me. No objection.

15 THE COURT: Admitted.

16 (Plaintiff Exhibit No. 35 admitted.)

17 THE COURT: She threw you right under the bus. Not
18 even a moment of hesitation.

19 MR. LEE: I'm not saying anything any longer.

20 MS. ELLSWORTH: It's not going to be the last time.

21 BY MR. McBRIDE:

22 **Q.** Ms. Bever, Plaintiff's Exhibit 35 is an email from
23 Monday, October 7, from you to Ms. Driver-Linn?

24 **A.** Yes.

25 **Q.** And you're attaching something that is also, on the

1 subject line, called "Admissions Simulation 20130114_MH"?

2 **A.** Yes.

3 **Q.** What you say in your email is, "Hi, Erin. So Mark did
4 quite a bit of work, and his slides attached here essentially
5 answer the questions posed. Although we could do a bit more
6 using socioeconomic status and ZIP Code, which were mentioned
7 of interest, I won't have time to get to that before
8 tomorrow. So we might just bring these slides."

9 Do you see that?

10 **A.** I do.

11 **Q.** The MH and Mark, that both refers to Mark Hansen here?

12 **A.** I assume so, yes.

13 **Q.** When you say the work, you're referring to the attachment
14 with his initials in it?

15 **A.** I imagine so.

16 **Q.** And if you look at the attachment, we'll see again there
17 are some very familiar slides here, some of the slides we've
18 seen going all the way back to February 2013?

19 **A.** Yes. This seems to be a draft.

20 **Q.** You agree this is another draft of the logistic
21 regression model that we first began our discussion with in
22 the February 2013 time period?

23 **A.** Yes.

24 **Q.** Your email doesn't offer any criticism of the quite a bit
25 of work that Mark did, does it?

1 **A.** It does not.

2 **Q.** Your email doesn't say that Mark's answer to the
3 questions posed are somehow flawed or unreliable, does it?

4 **A.** It does, but it says we could do some more.

5 **Q.** It says you could do more, but it doesn't say what you've
6 done is flawed or unreliable, does it?

7 **A.** No.

8 **Q.** In fact, you're saying we might just bring these slides,
9 right?

10 **A.** Yes.

11 **Q.** You don't bring slides to someone else out of OIR unless
12 they are reliable and digestible and accurate, right?

13 **A.** That would be true, although we bring preliminary work to
14 discuss with someone to get their feedback and thoughts.

15 **Q.** Of course. As you said, all OIR work is preliminary and
16 up for discussion, right?

17 **A.** Yes.

18 **Q.** And on your website, I'm assuming that you are accounting
19 for that when you say we provide accurate, reliable, and
20 digestible research, right?

21 **A.** Yes.

22 **Q.** Now, you say that you don't remember where you were
23 bringing these slides to or who you were meeting with,
24 though, do you?

25 **A.** I don't.

1 **Q.** Look at Plaintiff's Exhibit 36, if you would, please.

2 MR. McBRIDE: Offer that into evidence.

3 MS. ELLSWORTH: No objection.

4 THE COURT: Admitted.

5 (Plaintiff Exhibit No. 36 admitted.)

6 BY MR. McBRIDE:

7 **Q.** Plaintiff's Exhibit 36 is a meeting invite out of
8 Microsoft Outlook, for Tuesday, October 8. Do you see that?

9 **A.** Yes.

10 **Q.** That's the next day. That's the tomorrow from your
11 email, so to speak?

12 **A.** Yes.

13 **Q.** And it is a meeting organized by Robert Iuliano. That's
14 the general counsel of Harvard?

15 **A.** Yes.

16 **Q.** And you were one of the required attendees at this
17 meeting?

18 **A.** I think that's the default in Outlook, but yes.

19 **Q.** And the subject of the meeting was *Fisher v. University*
20 *of Texas*, Discussion Number 2. Do you see that?

21 **A.** Yes.

22 **Q.** And you're familiar with the *Fisher* decision?

23 **A.** Yes.

24 **Q.** You know that was an important Supreme Court decision on
25 affirmative action in this general time period?

1 **A.** Yes.

2 **Q.** And the other people you see here who were required
3 attendees, what departments do they represent?

4 **A.** The admissions office, institutional research, financial
5 aid, our office of general counsel, Harvard College IR.

6 **Q.** So you have people from the OGC, OIR, admissions,
7 financial aid, and Harvard IR meeting to talk about
8 affirmative action on the day after you forwarded around
9 slides that you say essentially answered some kind of
10 questions posed. Is that right?

11 **A.** I don't know what we discussed at this meeting. I don't
12 remember it.

13 **Q.** And isn't it possible that the event that you refer in
14 your meeting to happening tomorrow was the *Fisher* meeting?

15 **A.** It could have been.

16 **Q.** And isn't it possible that the questions essentially
17 answered by Mark Hansen's admissions models were questions
18 about the effect of Harvard's use of race in admissions?

19 **A.** I don't think that's what necessarily that analysis
20 answers, but it could have been something we might have
21 wanted to discuss at this meeting.

22 **Q.** And isn't it possible that in your October 7 email to
23 your boss you were proposing bringing the slides modeling the
24 effect of race in Harvard's admissions process to the *Fisher*
25 meeting the next day?

1 **A.** It is possible that's what that email was suggesting,
2 that I would bring those slides.

3 MR. McBRIDE: Your Honor, we're ready to move on to
4 a new document, a new exhibit, and I've hit 3:30 pretty
5 closely.

6 THE COURT: Yes, you have.

7 We can recess for the day. We can start tomorrow
8 at 9:30, if you want, or we can go back to 10:00. I think I
9 can go to 4:00 tomorrow, right, Karen?

10 THE CLERK: Yes.

11 THE COURT: I'm happy to go to 4:00 unless any of
12 you people have to travel, in which case I'm willing to
13 recess whatever works for you all.

14 MR. MORTARA: Depending on how long they're going
15 to be, I think we can get all four of our witnesses on and
16 off tomorrow, if we start at 9:30 and go to 4:00.

17 THE COURT: That's a long day, but if that schedule
18 works for everyone, I'm happy to do it. Any objections?

19 MR. LEE: No.

20 MR. MORTARA: No.

21 THE COURT: So we'll see everyone tomorrow at 9:30
22 tomorrow.

23 (Court recessed at 3:32 p.m.)
24
25

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Joan M. Daly

October 18, 2018

Joan M. Daly, RMR, CRR
Official Court Reporter

Date

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