

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 15, 2018

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

Pages 1 to 187

9 Defendants.
10

11 TRANSCRIPT OF BENCH TRIAL -- DAY 1
12 BEFORE THE HONORABLE ALLISON D. BURROUGHS
13 UNITED STATES DISTRICT COURT
14 JOHN J. MOAKLEY U.S. COURTHOUSE
15 ONE COURTHOUSE WAY
16 BOSTON, MA 02210
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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 15, 2018.)

THE CLERK: All rise. Court is in session. Please be seated. This is Civil Action 14-14176, Students for Fair Admissions versus President and Fellows of Harvard College.

Will counsel identify yourselves for the record.

MR. MORTARA: Your Honor, Adam Mortara for the Students for Fair Admissions. With me today are Kat Hacker, John Hughes, and Scott McBride. In the back row, Patrick Strawbridge, Meg Fasulo, Krista Perry. Behind them, Mike Connolly, Will Consovoy, and Paul Sanford. And behind them, Tom McCarthy and Mike Park.

THE COURT: I'm not going to remember that. That's a lot. Mr. Consovoy, Mr. Strawbridge, I can't get used to seeing you back there.

Good morning, Mr. Lee.

MR. LEE: Good morning, Your Honor. On behalf of Harvard, you will hear from during the course of the trial Felicia Ellsworth, Danielle Conley, Seth Waxman, and Ara Gershengorn and me. Thank you.

1 THE COURT: I think we're ready to get right to
2 openings. I have a couple of housekeeping matters. The
3 first is, as you've no doubt noticed, we're being besieged by
4 media requests, and one of the things they want are copies of
5 the exhibits. We're wondering if we can leave it to the
6 parties to take responsibility for distributing exhibits to
7 the media in some way.

8 MR. MORTARA: That's no problem from our
9 perspective, Your Honor.

10 MR. LEE: We're fine with that, Your Honor.

11 THE COURT: We don't have the resources to do that.
12 The two amicus parties have proposed a schedule. It seems
13 like Harvard was amenable to it as they didn't want their
14 case interrupted. Is that right?

15 MS. HACKER: That's correct, Your Honor. We're
16 willing to be flexible with the amici and keep them up to
17 date about when we expect our case will close before
18 Harvard's case begins.

19 Right now we told amici that we anticipate that
20 being potentially next Thursday or Friday. Of course as this
21 week goes along, we can update them. But it's just difficult
22 to provide a date certain when that will happen. I think
23 both sides here agree that it will make sense for the amici
24 to go between SFFA's case and Harvard's case.

25 THE COURT: I agree that that makes sense. And I

1 don't want to interrupt the presentation of your case, but I
2 understand they had one person that was only available on one
3 day. So let's just let that go for a bit and we'll see where
4 we end up as we get closer to that one day. Is it the 29th?

5 I have a request for judicial notice on some of the
6 historical stuff. Are you going to respond to that, Mr. Lee?

7 MR. LEE: No, Your Honor. The motion that was
8 filed is something that we negotiated with SFFA.

9 THE COURT: Okay. The last thing is the schedule.
10 I'm just going to go a couple of days ahead. I have a bunch
11 of other things scheduled at 3:00, so at close to 3:00 today
12 when we have a reasonable stopping point, we'll stop there.
13 I usually allow only half an hour and 45 minutes for a lunch.
14 I'm just thinking the cafeteria is going to be crazed today.
15 So I'm thinking of starting with an hour today. If that
16 turns out to be too much, we can shorten it. I don't want
17 anybody to not have time to eat.

18 Tomorrow, as you know, I can only sit until around
19 1:00. And I think I had told you there was another day next
20 week. I forget which day it was, Tuesday or Wednesday. That
21 meeting has been changed to a week after. So I'm planning on
22 going, depending on the rest of my schedule, somewhere
23 between 10:00 to -- somewhere between 3:00 and 4:00 this week
24 with the exception of tomorrow. All right? I'll give you
25 more specifics on that.

1 MR. LEE: Your Honor, what time would you like to
2 start tomorrow?

3 THE COURT: It's hard for me to start before 9:30.
4 If you want the extra half hour, we can do it. Otherwise,
5 the regular start time.

6 MR. LEE: 10:00 is fine with us.

7 THE COURT: I think 10:00 in terms of -- if we
8 start to need extra time, we can begin starting earlier.
9 Give me one second here.

10 MR. MORTARA: Your Honor, may I proceed?

11 THE COURT: Yes, you may.

12 OPENING STATEMENT OF STUDENTS FOR FAIR ADMISSIONS

13 MR. MORTARA: Thank you, Your Honor.

14 The evidence in this trial will show that Harvard
15 College discriminates against Asian-American applicants,
16 specifically those applicants ineligible for Harvard's
17 sizeable preferences for recruited athletes, the children of
18 its alumni, major donors, and its faculty.

19 The evidence will show that senior officials at
20 Harvard, including Dean William Fitzsimmons, have been aware
21 of this discrimination since at least 2013. And in short,
22 Harvard will deny both what its own internal research told it
23 in February 2015 and what common sense should tell us all,
24 that subjectively determining someone's personal qualities
25 from a stack of paper without any guidance, without any

1 warnings about using race, invites racial bias, explicit
2 bias, implicit bias, racial stereotyping, and that here has
3 added up to intentional discrimination in violation of
4 Title VI.

5 This is particularly true in the case of Harvard's
6 admissions process where the very first page of the very
7 first document an admissions officer reads about how to read
8 applications enjoins the admissions officer to focus on race.

9 Most of the evidence we will present in this trial
10 goes to Count I, our claims of anti Asian-American
11 discrimination because on this claim we have the least
12 disagreement with Harvard about the law. Harvard agrees it
13 is against Title VI. It violates Title VI for Harvard to
14 impose an Asian penalty in its admission process. We
15 disagree about the facts.

16 As to the other counts, Your Honor, it's a bit of
17 the converse. The facts are less in dispute. Harvard uses
18 race in its admission process and says its purpose is
19 diversity.

20 By Harvard's own admission, race is determinative
21 in the admission of over half the African-Americans and about
22 the third of the Hispanics on Harvard's campus in the
23 college. That's not our report. That's Harvard's own report
24 on race-neutral alternatives, Plaintiff's Exhibit 316.

25 And as Director McGrath testified and will testify,

1 Harvard runs its preliminary admissions process and then
2 checks the racial numbers from the previous year. If it sees
3 a group that's far behind or significantly behind, an
4 under-represented minority group, it explicitly goes back and
5 re-reviews those applications, balances it out.

6 And of course, as Your Honor observed in the
7 summary judgment ruling, Harvard did not convene or finish a
8 committee or seriously consider race-neutral alternatives
9 until nearly 15 years after the Supreme Court told Harvard it
10 needed to in the *Grutter* decision.

11 Your Honor, the future of affirmative action in
12 college admissions is not on trial here this next couple of
13 weeks. The Supreme Court has held that race can be used in a
14 narrowly tailored way in college admissions. Diversity and
15 its benefits are not on trial here. Students for Fair
16 Admissions supports diversity on campus, and the Supreme
17 Court has held that race can be used in a narrowly tailored
18 way in a college admissions process to unlock the education
19 at benefits of diversity.

20 This trial is about what Harvard has done and is
21 doing to Asian-American applicants and how far Harvard has
22 gone in its zeal to use race in its admissions process.

23 Your Honor, I think you're already very familiar
24 with Harvard's admissions process from the summary judgment
25 briefing. I want to focus on some elements of that process

1 and how important certain features of that process are to
2 admission to Harvard.

3 And the guidance, the written guidance to Harvard's
4 admissions officers about how to review that big stack of
5 paper that they get in the application, is contained in
6 documents like Plaintiff's Exhibit 1. Plaintiff's Exhibit 1
7 is the reading procedures for the class of 2018. They're
8 here on your screen right now, and all the reading procedures
9 will be introduced into evidence, Your Honor.

10 You can see what I told you at the outset. The
11 very first thing that a reader of a Harvard application is
12 enjoined to do is check the race of the applicant and make
13 sure it's been properly transferred from the common
14 application.

15 Now, I know Your Honor knows, you ordered the
16 production of a significant quantity of data about how
17 Harvard applies the written guidance in documents like
18 Plaintiff's Exhibit 1, six years of admissions data from the
19 class years 2014 to 2019. We have about 150,000 applicants.
20 We have about 10,000 offers of admission. You can look at
21 that data and summarize it, and we've done that in Rule 1006
22 summaries of the voluminous evidence Harvard produced from
23 its own admissions decisions.

24 I want to show you one of those summaries now.
25 This is Plaintiff's Exhibit 620. This is a lot of

1 information, Your Honor. I'm not going to talk about all of
2 it today. I want to orient you. This is talking about
3 showing how Harvard uses its ratings. I'm going to talk
4 about some of those ratings.

5 The first thing I want to focus the Court's
6 attention on is this notation down in the corner, so-called
7 baseline data set. As Your Honor knows, we have significant
8 discussions about how to treat the athletes; legacies; dean's
9 list -- that's the list of people that take the attraction of
10 Dean Fitzsimmons, perhaps because he knows the person or
11 because Harvard's development office has asked for that
12 attention; and the children of faculty or staff. They're not
13 included on the data you're seeing on the screen. This is
14 the regular folk, the people with no connection to Harvard,
15 the non-ALDC applicants.

16 You see up here I'm going to focus on the ratings
17 Harvard applies, the first four here. There you see.

18 Now, these ratings are important. They are ratings
19 assigned by Harvard's admissions officers in their subjective
20 judgment, guided by the guidance you saw or are going to see,
21 Plaintiff's Exhibit 1.

22 The overall rating is quite important, but you're
23 not going to hear that much about it. The overall rating is
24 the admissions officer's assessment of the likelihood that
25 the candidate will ultimately be admitted. You won't hear as

1 much about it because Harvard admits that race directly
2 influences the overall rating itself.

3 And once Harvard made that admission, both sides'
4 experts agreed the overall rating could not be used as a
5 variable in an admissions model trying to measure the effect
6 of race. That makes sense.

7 So I'm going to talk first about the academic
8 rating and how important it is to admissions. To do that,
9 I'm going to blow up a portion of Plaintiff's Exhibit 620 so
10 we can all look at it more closely.

11 Here you see the academic rating here, and you're
12 going to start to see some patterns as I go through this. 1s
13 are the best rating and they're the rarest. There's only 600
14 in the six years of data that we have, again for the regular
15 applicants, not the ALDC folks. The admissions rate is very
16 high. 66.18 percent of those candidates were admitted.

17 Then you'll see the lion's share of the admissions
18 are at academic rating 2, 6,000. The admissions rate is
19 lower, about 10 percent.

20 And then you'll an interesting phenomenon. Lions'
21 share here, 2. Then you'll see the steep drop off between 2
22 and 3 and then down to 4. You see, 4 has a lower chance of
23 getting in if you get an academic 3, 2.4 percent admissions
24 rate, and then essentially no chance of getting in if you get
25 a higher rating; that is, a worse rating.

1 This is important. It tells us that the academic
2 rating in getting a 2 or a 1 is very important to admission
3 to Harvard. Since this is such an important rating, we can
4 take a look at the guidance to tell us exactly how admissions
5 officers are directed to assign the academic rating.

6 You can see this here. This is from Plaintiff's
7 Exhibit 1. It's from page 5 over to page 6. This is the
8 guidance for the academic rating. Guideposts, even for
9 academic 1. Evidence of unusual creativity or original
10 scholarship. You see it there. And then down below in 2, 3,
11 and 4, you see score targets for the SAT and the ACT,
12 objective guidance for the assignment of this important
13 rating.

14 Now that we've seen the academics and the academic
15 rating are important to admission to Harvard, we can talk a
16 little bit about how it is that we came to be here today.

17 Well, members of the general public did not have
18 access to Harvard's database that Your Honor ordered
19 produced. What the general public did know was that across
20 America, Asian-American high school students were
21 out-performing their white counterparts on the SAT, on the
22 ACT, on national awards, national merit scholar, all sorts of
23 these types of things.

24 But that wasn't necessarily borne out on Harvard's
25 campus. There were more whites than Asians. But now we have

1 Harvard's database and we can see maybe if the applicant pool
2 explains that.

3 To do that, I want to use an index Harvard uses
4 called the Harvard academic index. That's a score between 60
5 and 240. It's generated for every Harvard applicant for whom
6 Harvard can get the information. It's composed of two-thirds
7 from the SAT or ACT and one-third from the GPA or class rank.
8 We can look at Harvard's own database to summarize the
9 information therein to look at characteristics of the
10 applicant pool.

11 I'm now going to show you Plaintiff's Exhibit 624.
12 This is another Rule 1006 summary of the database. This is
13 not a calculation. This is the data from the database
14 summarized here.

15 What's organized on the left, you see academic
16 index ranges. And on the right, you can see that each one of
17 these ranges, each one of those rows, comprises approximately
18 10 percent of the applicants. They're deciles. And so now
19 we can compare white applicants and Asian-American applicants
20 by reference to these academic deciles.

21 The very first thing you see is that Asian-American
22 applicants are disproportionately present in the top
23 10 percent of Harvard applicants academically. You see that
24 17.92 percent there.

25 You also see that they numerically outnumber white

1 applicants by quite a substantial number in that first decile
2 and again in the second decile.

3 In the third decile, you see that the situation
4 starts to reverse and now there's more white applicants than
5 Asian applicants and the same in the fourth decile.

6 I'll stop there and I'll tell you why. This top
7 40 percent, by academics, of white and Asian applicants to
8 Harvard, again in the regular applicant pool, not ALDC, make
9 up 83 percent of the whites and Asians in the regular
10 applicant pool admitted to Harvard. This is a very important
11 group. It's the most, the lion's share, of the admittees.
12 But on Harvard's campus what we see is something quite a bit
13 different.

14 This is from Plaintiff's Exhibit 319. It's
15 internal Harvard data, but it ends up with things that
16 everybody knew. And what you see here are first the
17 admission rates, Asians being admitted at about half the rate
18 of whites. You see that right there. The percentage of
19 admits. 20 percent of the admits were Asians, 40 percent
20 whites, year in and year out, including years that overlap
21 with the data Your Honor ordered produced.

22 That's of course reflected in the faces on campus,
23 one Asian face for every two whites. That's the result. The
24 public knew that too, which is why the public started to ask
25 questions.

1 And Harvard has answers to those questions. The
2 first answer Harvard gives is admission to Harvard is not all
3 about academics. That is absolutely true, and Students for
4 Fair Admissions is not here to say that Harvard needs to
5 switch to an admissions model that focuses exclusively on
6 academics.

7 The problem with that first answer is
8 Asian-Americans do as well or better than white applicants to
9 Harvard on every single rating that matters to admission to
10 Harvard, including extracurriculars, with the exception of
11 the subjective personal rating I'm going to talk about in a
12 little bit.

13 Asians do better on extracurriculars. That's what
14 the evidence will show. I'll show you that in a little bit,
15 a few minutes.

16 First let's look at how important the
17 extracurricular rating is to Harvard admissions. We'll go
18 back to the blowup of Plaintiff's Exhibit 620, here now
19 showing the extracurricular rating. You see again the same
20 pattern.

21 1s are rare, and the admission rate is quite high,
22 45 percent. All the action is with the 2s. 5,000 admittees
23 here, an admission rate of 15 percent. Then you see again
24 very steep drop off from 2 to 3. And comparing 2 to 4,
25 2.28 percent, 7 times lower chance of getting in if you get

1 an EC rating of 3. This is a very important rating for
2 admission to Harvard.

3 Well, we can check again in Plaintiff's Exhibit 1
4 and see what kind of guidance is given Harvard admissions
5 officers on this important rating. This is again from
6 Plaintiff's Exhibit 1. This is over at page 6,
7 extracurricular.

8 You see some guidance. In extracurricular 1, you
9 see possible national-level achievement or professional
10 experience. In 2, you see examples: class president,
11 newspaper editor, local or regional recognition, and so on.
12 5 and 6, as I think Your Honor probably knows, are special
13 cases for the EC rating: 5 is significant family obligations
14 that prevent participation, and 6 may be something like a
15 physical condition, as you can see on the screen.

16 So the extracurricular rating, also very important
17 to Harvard, also significant objective guideposts and
18 guidance given to its admissions officers on how to apply
19 that important and relevant rating.

20 The athletic rating is a little bit different, Your
21 Honor. We'll blow up Plaintiff's 602 for the athletic rating
22 now, and the very first thing the Court will notice is that
23 there are no 1s. That's because, as I've been telling you,
24 the ALDCs which include the recruited athletes are not
25 included here, and they are the only ones that receive an

1 athletic rating of 1.

2 An athletic rating of 1 is not actually a rating.
3 It's a message that comes from the coach to Harvard
4 admission, saying we would like this person admitted. What
5 the evidence will show is it's not so much a message as it is
6 essentially a command. Recruited athletes are admitted
7 86.6 percent of the time, the evidence will show.

8 I want to talk about the athletic rating for
9 everyone else. They do get athletic ratings. The difference
10 is it's quite unlike what you saw before with academic and
11 extracurricular. See, athletic 2, it's not where the lion's
12 share of that admits are. It's not where the action is, and
13 the admission rate is lower, a little bit lower than academic
14 2, substantially lower than extracurricular 2.

15 But that's not what's important here. What's
16 important is no steep drop off, 3 and 4, and no difference at
17 all between 3 and 4. In fact, the admit rate for 3 and 4 is
18 slightly higher.

19 When you turn to the admissions guidance, the
20 reading procedures, what you'll see is the difference between
21 4 and 3 is someone with an athletic 4 doesn't participate in
22 sports at all, and someone with athletic 3 is on the team.

23 You can take a look at the guidance. You can see
24 it here on the screen, again from Plaintiff's Exhibit 1. You
25 can see is that 4 is little or no interest in athletics, and

1 3 is active participation. The athletic rating is just not
2 very important to admission to Harvard.

3 I want to pause here and talk about why did I
4 mention this. Both experts have included the athletic rating
5 in their models. So for whatever importance it has, it's
6 taken into account by both sides' experts. I've included
7 this because I think Harvard might during the trial focus a
8 little bit and talk a little bit more about how important the
9 athletic rating is in defiance of what its database is
10 telling us.

11 The reason they're going to do that is we've
12 discovered that, for whatever reason, white applicants
13 receive higher athletic ratings than Asian applicants. We're
14 not going to focus too much on that during the trial because
15 the athletic rating isn't very important to admissions. I
16 only note it here in case Harvard makes a big deal out of
17 athletic participation. You just saw the admissions rate for
18 4 and 3 is exactly the same.

19 The personal rating is a different story. The
20 personal rating is crucial to admission to Harvard. And what
21 do I mean by that? Here is Plaintiff's Exhibit 620, enhanced
22 for the personal rating. You see again 1s are the rarest for
23 the personal rating, only 39 for non-ALDC applicants in the
24 six years of data we have.

25 The admission rate is gigantic, 66.67 percent. All

1 the action is with the 2s again, 6,000 of our under 8,000
2 admittees in this group come from the 2s, and they have a
3 21.71 percent chance of getting in, the highest of the
4 ratings you've seen. Look at the drop off from 2 to 3, a
5 14 times lower chance, in Harvard's own database, of getting
6 into Harvard if you get a personal 3 compared to a
7 personal 2. You see it right here. A 1.51 percent chance of
8 getting in if you get a personal 3.

9 And we found zero Harvard admittees from the
10 regular applicant group that got a personal 4 or higher.
11 Given that this is the most important rating that I've shown
12 you, we can all look at now what does Harvard tell its
13 admissions officers about how to assign the personal rating.

14 It's here on page 6, Plaintiff's Exhibit 1. There
15 it is. That's it. That's all. No objective guidance. No
16 instruction or admonition about how to or how not to use race
17 in the assignment of the personal rating. No enjoinder or
18 injunction against applying racial stereotypes or anything of
19 the kind when applying the personal rating. That's it.

20 Harvard's witnesses in this trial will be nearly as
21 vague in their descriptions of what goes into the personal
22 rating as what you're seeing on the screen. Is this person
23 likeable? Are they sensitive? Would they be a good roommate
24 or fit in at Harvard or contribute to the community or do
25 they have grit and integrity?

1 The personal score is dramatically important to
2 admissions to Harvard College. It's a subjective assessment
3 with essentially no guidance about the applicant's
4 likability.

5 The undisputed evidence, Your Honor, will be that
6 Asian-American applicants to Harvard receive substantially
7 lower personal ratings than white applicants. Harvard's own
8 expert, Professor David Card of Berkeley will sit to my left
9 next week or the week after and he will testify that he
10 cannot rule out racial bias as the explanation for why
11 Asian-American students receive substantially lower personal
12 ratings. He'll say that when I talk to him. He will call
13 this gap unexplained.

14 We have an explanation. It's that when no one in
15 the admissions office ever even talks about how to properly
16 use race in admissions and there's definitely no written
17 guidance about how to do so and no one gets any guidance or
18 training about how to use race -- there is not -- and there's
19 no written guidance about how to assign the personal ratings,
20 you have let the wolf of racial bias in through the front
21 door.

22 Our evidence on the personal rating will include
23 the only statistical analysis of Harvard's personal rating
24 from its database performed by either expert. Only Students
25 for Fair Admissions' expert, Professor Peter Arcidiacono,

1 actually modeled the personal rating and showed that race was
2 influencing. Harvard's expert, Professor Card, did not
3 construct his own model.

4 You can also see the influence of race on the
5 personal rating in Harvard's database, just looking at the
6 data. You can see it with your own eyes.

7 I'm going to show you another 1006 summary of the
8 voluminous evidence, not an expert model, not a statistical
9 calculation, just Harvard's own decisions reflected in the
10 data that this Court ordered produced in this case. This is
11 Plaintiff's Exhibit 629. I'm going to mention it a lot.

12 It's again of the regular applicants, the
13 non-ALDCs, Your Honor, but the pattern repeats in another
14 exhibit we have when you include the legacies, dean's list,
15 and children of faculty or staff.

16 You see the academic index ranges on the left.
17 These are the same academic deciles I showed you before.
18 Then you see way on the right, it's that's the first thing I
19 want to talk to you about.

20 What's shown here in each of these cells is the
21 percentage in each academic decile that receives that
22 all-important 2 or 1 on the personal rating. Remember you
23 need that 2 or 1 to be in that big, massive group of 6,000
24 from our just close to 8,000 numbers in the admit database.
25 And this shows you the percentage in each academic decile

1 that got that rating.

2 In the highest academic index, the highest decile
3 is 25.46 percent. I'm pointing that out because it goes
4 steadily down, smoothly down as you go down the academic
5 index ranges. And that's critically important because it
6 shows there's at least an association between performing very
7 well in high school and on your SATs and ACTs and receiving a
8 high personal rating, for whatever reason. That bears out in
9 all the subgroups you're going to see, too.

10 And then I'm sure Your Honor was looking at already
11 the quite remarkable difference between Asian-Americans and
12 whites on the personal rating. In the top academic decile,
13 whites, nearly 30 percent of them get a 1 or a 2 on the
14 personal rating, the all-important personal rating. This is
15 the regular applicants. We're not talking about the ALDCs
16 yet. Asians are down at 22 percent, and that persists.

17 Remember I talked about the top four academic
18 deciles, whites beating Asians in the second by nearly
19 8 percent, in the third by nearly 8 percent, in the fourth.
20 You see it right there all the way down the line.

21 And you can see also some relationships that are
22 interesting. Asian-Americans in the top academic decile,
23 22 percent of them get that all important 1 or 2. You've got
24 to go all the way down to the fifth academic decile to get
25 the same proportion of white applicants to Harvard.

1 That's a pretty stunning difference, and I'm going
2 to hazard a guess that Your Honor noticed another difference.
3 Asian-Americans don't just do more poorly than
4 African-Americans; they do dramatically and shockingly more
5 poorly than African-Americans, sometimes half the proportion
6 of Asians getting personal scores of 1 or 2 compared to the
7 percentage of African-Americans.

8 And I really do not think that Harvard is going to
9 come in here and say that the reason for this is that
10 African-American applicants to Harvard just seem on paper to
11 be more likeable, have greater integrity or sensitivity, or
12 have more grit. I don't think they're going to say that. I
13 don't know what they're going to say. We'll ask.

14 You've also noticed Hispanics do more poorly than
15 African-Americans but wildly better than Asians as well, and
16 they do better than whites.

17 And now perhaps a more plausible explanation for
18 what you're seeing on the screen from Harvard's on database
19 emerges. Harvard admits that it has an affirmative action
20 program in place for under-represented minorities, including
21 African-Americans and Hispanics. Harvard will admit in this
22 trial that the tip, as Harvard calls it, for
23 African-Americans is significantly larger than the tip that
24 Hispanics receive, but they still do receive a tip over
25 whites.

1 And now you see the ordering here, the same
2 ordering in Harvard's admitted affirmative action program,
3 African-Americans receiving a very large boost on the
4 personal rating, Hispanics receiving a boost over whites but
5 not as large as African-Americans.

6 And then you see what's going on on the left side,
7 Your Honor, and that's the discrimination. That's the use of
8 race Harvard will not admit to, which is Harvard pushing down
9 Asian-Americans on this all-important, subjective,
10 no-guidance personal rating. You see it right here from
11 Harvard's own database.

12 But Harvard has repeatedly tried to tell this Court
13 in briefs, and they will do it again in this trial, that race
14 doesn't influence the personal rating. They will tell you to
15 deny what you're looking at on the screen. They will say
16 race is not involved here.

17 Harvard's trial witnesses, nearly to a man and
18 woman, will try to testify that they don't use race in the
19 personal ratings. Some will do that with more conviction
20 than others, and of course it's the Court's job to judge the
21 credibility of that.

22 One senior admissions officer Christopher Looby,
23 our second trial witness, he'll tell the truth that he's been
24 using race in the personal rating for ten years. And we know
25 from what we're seeing on the screen from the database that

1 Christopher Looby can't be alone.

2 Some group, a sizeable group of Harvard's 40 or so
3 readers of applications, has been using race as a factor in
4 the personal rating. There's no other possible explanation
5 for what you're seeing on the screen in Plaintiff's 629.

6 As to whether Harvard's witnesses are credible on
7 the subject, we'll ask them questions. They'll say there's
8 no correlation between race and the personal rating, in
9 defiance of what you're seeing. They'll say Asian-American
10 applicants are no worse in their personal qualities than
11 others, including whites. And they will be unable to explain
12 what you're seeing on the screen.

13 The truth is, Harvard has known for quite some time
14 that they have a problem with the personal rating and how
15 it's being applied to Asian-American applicants.

16 In December of 2012 when David Brooks of the New
17 York Times gave wide publicity to Ron Unz's critique of
18 Harvard on this subject, the evidence will show a near panic
19 set in at the Harvard admissions office, emails exchanged in
20 the wee hours of the mornings over the holidays.

21 Some of those emails went to the staff of Harvard
22 office of institutional research, including Dr. Erin
23 Driver-Linn, the head of OIR. What is OIR? We can see from
24 Plaintiff's Exhibit 465 what they say they are. Their
25 objective is to offer accurate, timely, and digestible

1 research to, among others, senior university officials like
2 Dean William Fitzsimmons, dean of admissions, that are
3 responsible for mandatory reporting requirements to including
4 the federal government. This is a serious office with a
5 serious mission staffed by serious people.

6 The testimony from Dr. Driver-Linn would be that
7 she would never ever offer senior university officials
8 research that she thought was shoddy or wrong.

9 So what did Dr. Driver-Linn and her colleagues
10 offer Dean Fitzsimmons in February of 2013? Your Honor
11 knows. A statistical analysis of ten years of admissions
12 data that showed what? That Asian-American applicants were
13 better than or equal to white applicants to Harvard on every
14 ranking except the personal score, and that there was a
15 statistically significant Asian penalty in the Harvard
16 admissions office.

17 And here's that report, Plaintiff's Exhibit 9. And
18 as Your Honor knows from before, it's got a mistype on the
19 date. It says February 2012; it's actually February 2013.

20 And on the fifth slide you can see the first thing
21 I discussed. The difference is in average test scores for
22 ratings for white and Asian applicants.

23 First I want to orient you to something on the
24 bottom. This analysis excludes legacies and athletes.
25 There's going to be a lot of discussion of this, Your Honor.

1 I've reserved my time on it. Towards the end, you asked
2 about it at the pretrial hearing. I want to save some to
3 talk about it.

4 But here is Harvard's own internal researchers
5 removing legacies and athletes from the database. As I told
6 you before, Harvard has had an excuse about the
7 disproportionate or underrepresentation of Asians on its
8 campus, that the legacy and athlete preferences explain it,
9 which is why many researches have removed them from the data
10 set. It's why Students for Fair Admissions expert did it.

11 Let's look at what the data shows on the screen.
12 Blow this up, you see in the middle is the zero line. That's
13 where Asian-American and white applicants to Harvard are the
14 same. And you see starting from the top what the public knew
15 that I mentioned, Asian-Americans vastly out performing
16 whites on the SAT 2, over .3 standard deviations. Same on
17 the SAT, both math and verbal.

18 Then you see this alumni rating also outperforming
19 whites. The next four are the same.

20 Then you see the personal rating on which Harvard
21 never gives anybody any training, there's no guidance, no
22 injunction against using race. You saw the written
23 procedures. There's almost nothing written in it. It's
24 about how likeable you are. And somehow, some way, white
25 applicants are deemed to be more likeable.

1 I told you Asian-Americans do better on
2 extracurricular. There it is right there. You can see it.

3 Because they do better on the SATs and they do
4 better in high school, Asian-Americans applicants are doing
5 better on the academic rating. This is the accurate, timely,
6 and digestible research OIR gave Dean Fitzsimmons.

7 What they did next is they created a statistical
8 model. It's called a logistic regression model. And what
9 you do here is you gather variables plausibly related to the
10 admissions process and you use the data that you have. Here
11 OIR was pooling ten years of application data and you try to
12 measure how important those variables are.

13 I have a demonstrative that sort of shows you what
14 you're talking about. You have the admissions data. You
15 know the outcomes. You have the variables, the ratings and
16 such, and now you attempt to use a computer to tell you
17 whether these things are important or not.

18 On the next slide, I have a little picture of what
19 the equation that gets produced results in. You see the
20 ratings there -- academic, extracurricular, and so on -- and
21 you compute these coefficients, the little colored letters.
22 And if they're high and positive, that tells you they're very
23 important to admissions. Negative tells you it's a penalty,
24 it's a minus, penalty. Statistical significance Your Honor
25 is familiar with, and that's what your model spits out.

1 If you're trying to measure race, the impact of
2 race, you can do that, too.

3 So did Dr. Driver-Linn and her colleagues tell Dean
4 Fitzsimmons something about this and what their model had
5 determined? Yes.

6 That's slide 8 of Plaintiff's Exhibit 9. We can
7 blow this up. They expressed their findings in something
8 called odds ratios. Odds ratios are how much more likely are
9 you to get into Harvard if you have this characteristic.

10 And you see the very most important thing in this
11 first model created by Harvard's own researchers, before
12 there was litigation, before there was a website called
13 Harvard Not Fair, before Harvard knew anything about this
14 case or any witness was retained or any expert retained to do
15 an analysis for either side's set of lawyers, Harvard's own
16 internal researchers told Harvard, told Dean Fitzsimmons,
17 that having a high personal rating was the most important
18 thing, a 9x higher chance ever getting in.

19 Also told them there's a big tip for
20 African-Americans. You see it right there, also the legacy
21 tip about the same size.

22 Remember, we looked at the ordering, the hierarchy,
23 if you will, in Harvard's assignment of the personal rating
24 where you can see that African-Americans do better than
25 Hispanics, do better than whites, do better than Asians. I

1 told you Harvard admits to using race in admissions. You see
2 here the same hierarchy, the African-American tip bigger than
3 the Hispanic tip. Right here.

4 Then Harvard's own researchers told Dean
5 Fitzsimmons something else, that there was a statistically
6 significant penalty on Asian-Americans applying to Harvard in
7 February 2013. It's about a 20 percent hit on your
8 admissions chances. That's what they showed him. That's
9 what he knew about.

10 And this was not the only time this information was
11 conveyed to Dean Fitzsimmons. The same analysis was given
12 again and again and again, including with updated and
13 improved models and including in a formal memorandum given to
14 Dean Fitzsimmons in May of 2013.

15 That's Plaintiff's Exhibit 26.

16 This is an email from Erica Bever. She works at
17 OIR, and she is sending this memo to Dean Fitzsimmons,
18 including some others at OIR on the email. Subject is
19 admissions memo. It says, low income admission memo final.
20 You see that? It's the attachment.

21 Now, Your Honor knows, but others may be wondering,
22 why am I talking about a memo describing a recent analysis of
23 low-income admissions in a case about discrimination against
24 Asians? I'll explain.

25 Dean Fitzsimmons did not respond to Plaintiff's

1 Exhibit 9, the February 2013 PowerPoint, by saying our
2 process isn't reducible to a statistical model, I don't like
3 these models, they don't represent what we're doing, they're
4 incomplete or flawed, please never do them again.

5 No. He asked Harvard's own researchers, before
6 there ever was a case here, to do more analysis, more
7 modeling to show that Harvard was giving a tip or a boost to
8 students from underprivileged backgrounds, and he asked for a
9 memo on that.

10 He also asked them to review literature to see if
11 their approach was consistent with what others have done.
12 And Ms. Bever is reporting here that it was.

13 Now there's a curious second paragraph. Harvard's
14 own researchers want to get some other people involved,
15 including Jeff Neal and Christine Heenan.

16 Who are they? They work for Harvard's public
17 relations department. So why is it that Harvard's internal
18 researchers want to tell public relations about this?

19 Well, we can find out in the memo. Here's the memo
20 to Bill Fitzsimmons from Bever, Driver-Linn, and Mark Hansen,
21 all working at OIR. And if you look at the second page of
22 the memo, you see this model. It's a table, logistic
23 regression.

24 The variables are what I told you, SAT or academic
25 rating or whatnot. The coefficients are the numbers, the

1 little colored letters. Positive is a boost and negative is
2 a minus. Your Honor is familiar with what a P value is.

3 The next page we can find out what happened. Here
4 in this model, OIR include the recruited athletes, and they
5 have this enormous positive coefficient. Because as I said,
6 it's less of a rating than it is an instruction. 6.33, that
7 is gigantic. They get in 86 percent of the time.

8 You see for the rest of us, the personal rating is
9 really important, the most important. 2.4. Legacy the same,
10 2.4. Remember that was translating to between a 7 and 10
11 times higher chance of getting in than the previous model.

12 Then you see the same hierarchy. African-Americans
13 getting a big boost. Hispanics less of a boost but still a
14 positive coefficient. The same ordering you saw on
15 Plaintiff's 629 with the personal rating where Harvard denies
16 using race in assigning the personal rating.

17 Then you see what OIR was reporting to Dean
18 Fitzsimmons in an updated improved model. He didn't say I
19 don't want any more models. He got another one. Here it is.

20 A statistically significant Asian penalty, P value
21 of zero. It's right here. Unless there be any doubt as to
22 why OIR was concerned enough to alert public relations or
23 wished to do so, it's right here at the bottom of the memo:
24 "We imagine that sharing any analysis of admission weights
25 will draw attention."

1 And in the lower highlighted section you see what
2 they're worried about attention being drawn to: "Our
3 descriptive analysis and regression models also shows that
4 the tip for legacies and athletes is larger."

5 Harvard's always been somewhat sheepish about the
6 size of these preferences -- and we'll see why in a little
7 bit -- and that there are demographic groups that have
8 negative effects. I'm sure it wasn't lost on Your Honor,
9 even though it was on the screen only briefly, that the only
10 demographic group that has a negative effect in the table is
11 Asians.

12 And this wasn't the last time that Dr. Driver-Linn
13 and her colleagues presented this information. They did it
14 again in October 2013. They did it again in May and July
15 of 2014.

16 Now, Your Honor, you will never see any document,
17 any email, or any contemporaneous objective evidence
18 whatsoever that there was anything shoddy, flawed, or wrong
19 with these OIR analyses all warning Harvard they had a
20 problem, a red warning flag that they at least had a
21 potential problem with discrimination against Asians.

22 What you will see is that Dr. Driver-Linn and her
23 colleagues recognized in their own internal draft of this
24 memo that these findings were "realities."

25 They are realities, and Harvard and Dean

1 Fitzsimmons did nothing you would expect a reasonable
2 employer or university or institution to do, which would be
3 to investigate, deal with the problem, if the analyses were
4 incomplete, to complete them, to acknowledge fault, and
5 commit to doing better. You see it right here.

6 And you'll see nothing from Harvard's documents
7 with all the criticism of this work that you're going to
8 hear. You're going to hear a lot of vague memories that the
9 studies were incomplete or flawed, from Harvard's witnesses.

10 Part of the Court's job is to judge the credibility
11 of that against the objective contemporaneous written record
12 and against the accurate timely and digestible reports OIR
13 generated.

14 You're also going to hear from Harvard that these
15 OIR analyses were so terrible that no one bothered to discuss
16 it further or do any research.

17 Dean Fitzsimmons, for his part, told no one in the
18 chain of command about it. He did not tell his immediate
19 superior, Dean Smith, the dean of the faculty of arts and
20 sciences, about these warning flags. He did not tell
21 President Drew Faust, the president of Harvard, about these
22 warning flags about the treatment of Asians. And he did not
23 tell Marlyn McGrath, the director of admissions that he'd
24 been working with for nearly 30 years, three decades. He
25 didn't tell her.

1 The question we should all ask is what would this
2 have had to have said for Dean Fitzsimmons and Harvard to do
3 anything about it, to take one single further step, to talk
4 to admissions officers about how they're using the personal
5 rating, or how they might be engaging in racial stereotyping,
6 to give them training or written guidance, implicit bias
7 training, anything.

8 Instead, Dean Fitzsimmons and Harvard decided that
9 the system was working as they intended and perhaps had
10 always intended it to work. And that adds up to intentional
11 discrimination in violation of Title VI.

12 The next expert to come along and model Harvard's
13 admissions process is Professor Peter Arcidiacono, Duke's
14 fair admissions expert from Duke University.

15 He took the six years of data that Your Honor
16 ordered produced and that we've been looking at and he did a
17 logistic regression analysis, creating an admissions model
18 similar in kind to the models that had been created before
19 there was ever any litigation by Harvard's own researchers.

20 And just like those prelitigation models created by
21 Harvard itself, Professor Arcidiacono found a substantial
22 penalty on Asian applicants to Harvard not in the ALDC group.
23 He found the Asian penalty results in a 20 percent reduction
24 in the admissions chances of an Asian-American applicant,
25 again about the same size of what you saw in OIR's very first

1 model.

2 And that translates into real numbers, Your Honor.
3 Professor Arcidiacono will tell you that compared to his
4 model without the Asian penalty, there would be at least
5 hundreds more Asian faces on campus in a four-year cohort.

6 And he'll also tell you his model is conservative.
7 If anything, it underestimates the size of the Asian-American
8 penalty.

9 What you will be able to see when experts testify,
10 Your Honor, and you look at particularly Professor Card's
11 yearly models, which he likes, you'll see some patterns in
12 the yearly data. I wanted to point just two of them out for
13 you.

14 One is, and I think in one of Mr. Lee's slides you
15 see this if he uses it, is that the effect of Asian-American
16 ethnicity on admissions, even in Professor Card's model, goes
17 down -- the coefficient goes up a little bit -- in 2017.

18 And what's special about 2017? Class year 2017,
19 most of those students were admitted in the spring of 2013
20 after the Unz article, after David Brooks.

21 After Unz and Brooks shined a flashlight on Harvard
22 admissions, Asian penalty or the effect goes down a little
23 bit.

24 Then you'll see something very interesting, which
25 is that in 2019, when Students for Fair Admissions had sued

1 Harvard in 2014, late 2014, and the admin cycle for the class
2 of 2019 had occurred right after that and this court was
3 going to turn a spotlight on Harvard, the Asian penalty goes
4 down substantially. The effective Asian -- marginal effect
5 of Asians on admissions, the numbers go up, the coefficient
6 gets higher, gets more positive.

7 Why is that? That's because when Harvard knew that
8 somebody was going to be looking into what was going on, they
9 exerted control. They dialed down the Asian penalty.

10 This is powerful evidence, circumstantial evidence
11 of intentional discrimination. They have the control, and
12 they react to this lawsuit by exercising that control. And
13 just like an employer who for ten years does not promote
14 African-Americans on the shop floor and then is sued for
15 civil rights violation and magically promotes three after
16 that, that's not evidence that the employer wasn't
17 discriminating. That's evidence the employer was. So too
18 here, and you'll see it in some of the charts that the
19 experts will show you.

20 In fairness to Harvard, their expert, Professor
21 Card from Berkeley, he has his own model. And the Court's
22 detailed summary judgment ruling outlined some of the many
23 disagreements that Professor Card and Professor Arcidiacono
24 have.

25 But how best to model Harvard admissions? Should

1 we have the ALDCs? Should we do a pooled model versus a
2 yearly model? Oh, I already did pooled; Professor
3 Arcidiacono did pooled. Professor Card prefers a yearly
4 model.

5 Should we include parental occupation? Professor
6 Card really wants to. Professor Arcidiacono says the data
7 quality is not good enough.

8 Should we do certain types of interactions? The
9 list goes on. There are many disagreements. You'll hear
10 about them during the trial.

11 But, Your Honor, you can choose to assume the truth
12 of every single word that Professor Card, Harvard's expert,
13 utters. And as long as you rule in our favor and decide one
14 thing our way: Harvard's own model shows a statistically
15 significant Asian penalty, the model that they went to great
16 lengths to produce, hundreds of pages of expert reports.
17 Their own model shows a statistically Asian penalty.

18 If you agree with us on one thing, what is it? You
19 have to agree with us that what you're saying here on
20 Plaintiff's Exhibit 629 reflects the influence of race on the
21 personal rating. If you believe what every single person
22 listening to me can see right here on this screen that race
23 is influencing the personal rating, the acknowledged use of
24 race and the tip for African-Americans and Hispanics is right
25 there.

1 All you have to believe is that Harvard is using
2 race in a way that it acknowledges it is using race in the
3 ultimate outcomes but denies that they're doing it here with
4 the personal rating. If you believe that, that race has an
5 effect here, then Harvard's own expert will agree that just
6 like the overall ratings got to be pulled out, the personal
7 ratings got to be pulled as because it's influenced by race.

8 What happens to his model if you do that? This is
9 not from Students for Fair Admissions expert report. This is
10 from Harvard's own expert report. A statistically
11 significant Asian penalty if you simply take out the
12 subjective personal rating where no one gets any guidance.

13 And the evidence is going to show Harvard has to be
14 using race. Race has to be influencing it. If you do that,
15 Harvard admits there's an Asian-American penalty and it's
16 statistically significant.

17 And a third of a percent doesn't seem like much,
18 Your Honor, until you realize that the chances of getting
19 into Harvard are about 5 percent. That's actually quite
20 sizeable.

21 Now we can turn to a big disagreement that Your
22 Honor asked about, which is the exclusion of ALDCs from the
23 data analysis. You asked about this at the pretrial hearing.
24 And I didn't understand Your Honor to be asking how did it
25 come to pass that SFFA removed them from the data side.

1 In their analysis, you can see why that's true.
2 OIR did it, others have done it. I thought you were really
3 asking why is it important. I want to try to get into that
4 and show you how it changes the model.

5 To do that, I need to show you some facts about
6 Harvard's admissions of legacies, children of faculty or
7 staff, and those on the dean's list, children of donors, for
8 example, and athletes and the non-ALDC group.

9 And here you see admission rates stratified by
10 academic ratings similar to the blowups of 620 I showed you
11 before. In the left column you see the same numbers I showed
12 you before, for non-ALDC 66, 10 percent, and 2.4 percent.
13 Remember the lion's share of the action is at academic 2.

14 Then you start to see how much better the legacy
15 list does here. They do about 50 percent better. Virtually
16 all of them get in at academic 1. Of course the one athlete
17 in the six years of data we have got in.

18 Then you see something interesting here in
19 academic 2. 10 percent admission chance for the regular folk
20 with no connection to Harvard. A 50 percent admissions
21 chance at academic 2 for the legacy, dean's list, and
22 children of faculty or staff. It's a 5x difference. Again
23 the athletes almost always get in. I told you that; I'll
24 stop saying it.

25 At academic 3, 2.4 percent, really pretty low

1 chances for the regular folk. But if your mom or dad went to
2 Harvard or your grandparent or uncle gave a lot of money to
3 Harvard, then your chances of getting in are seven and a half
4 times higher, 18 percent.

5 Down below at academic 4, almost nobody gets
6 admitted in the regular group. But here we have the legacy,
7 dean's list, and children of faculty or staff, still
8 3.5 percent of them got in.

9 You can also see these relationships. 3.5 percent
10 at academic 4 for the legacy group. That's 2.4 percent at
11 academic 3 for the regular group. A whole academic
12 difference. And the legacy group is a whole academic rating
13 better off. Higher admissions chances. Their admissions
14 chances at academic 3 are almost double what the regular
15 applicants are at academic 2.

16 But that's not what tells you how the model is
17 going to get distorted when you include the ALDCs.

18 Here's how to look at that. You need to look down
19 the columns. I told you have that the academic rating was
20 very important to admissions. You see that here reflected in
21 this drop off and admissions chances as you go from 1 to 2 to
22 3 to 4. There's large numbers, 6, 4, 120.

23 For the legacy, dean's list, and children of
24 faculty or staff, those numbers are quite a bit lower. What
25 that reflects is the academic rating is simply not as

1 important to admissions for this group. It's not as
2 relevant. It's not totally unimportant, but it's not as
3 important.

4 And this effect is most profoundly seen with the
5 athletes, where the numbers and the multipliers get close
6 to 1, reflecting the fact that the academic rating really
7 doesn't matter much at all for the admissions of athletes.
8 As I said, they almost universally get in.

9 So now how does that affect the model? You can see
10 this from the chart I have in front of you, but actually one
11 of Mr. Lee's slides shows it best. The legacy, dean's list,
12 children of faculty or staff, the ALDC group, they are only
13 5 percent of the applicants, Your Honor, but they are a
14 whopping -- I'll use Mr. Lee's slide for this. They are a
15 whopping 29 percent of the admitted students. 5 percent of
16 the applicant pool, 30 percent of the admitted students.

17 So when you include this group for who academics
18 don't matter as much, what your model gets is distorted. It
19 gets a distorted average effect where Harvard is saying
20 academics just aren't that important. It's weighing down the
21 regular applicants.

22 Why are the regular applicants so important to us,
23 Your Honor? I've kind of saved this towards the end. I've
24 shown you have a lot of the baseline data set.

25 98 percent of the Asian applicants to Harvard are

1 in the non-ALDC group. When Harvard chose, its expert chose
2 to include the ALDCs in the dataset, it had the effect of
3 weakening the importance of academics in a distortive way.

4 Academics are very important for the non-ALDC group
5 where most Asians are applying. But if you include the
6 ALDCs, your model spits out kind of an average, a lower
7 number.

8 What does that do? Well, that means that the
9 things that Asian-Americans are much, much better at,
10 academics, are less valued by the model. When an Asian
11 applicant doesn't get in, your model explains it with
12 academics just aren't that important to Harvard in a
13 distortive way, instead of concluding that there's an Asian
14 penalty.

15 You can see that in an analysis of Professor Card's
16 model as well. Because when you remove the personal rating,
17 you get that statistically significant effect, that's Card's
18 yearly model right there. It's in his own report. If you
19 remove the ALDCs, it gets bigger.

20 Here you see that. Take out the personal rating,
21 get the statistically significant effect, and we win. Just
22 believe that race influences the personal rating.

23 Take out the ALDCs, and the effect gets quite a bit
24 larger. That's the point, and that's the answer to Your
25 Honor's question.

1 Now, Your Honor, Harvard has many, many times
2 positioned this case as if we have to prove more than a
3 statistically significant Asian penalty. Harvard has sort of
4 suggested that we need to prove the existence of a 40-person
5 racist conspiracy.

6 We do not. That's not the law. That's not the law
7 in employment discrimination, and it's not the law here. We
8 have shown a statistically significant Asian penalty, and
9 Harvard acknowledges that it uses race in its admissions
10 process. The burden is on Harvard to explain these
11 differences and it will be unable to do so.

12 There's also significant circumstantial evidence,
13 as I've alluded to. The nonresponse. Frankly, the quietude
14 about OIR from Dean Fitzsimmons. That's circumstantial
15 evidence. The 2019 dialing down of the Asian penalty that
16 you'll see, circumstantial evidence.

17 It's not hard to see how Harvard got here, when you
18 look at its laser beam focus on race in its admissions
19 process. And that gets to the rest of the case. I'll spend
20 a very little time this morning talking about it.

21 As you know Harvard, said it has a holistic
22 admissions process harkening back to *Grutter* and *Bakke* and
23 the statements in those cases. Harvard's own brief in the
24 *Bakke* case.

25 The evidence will show and allow the Court to test

1 the proposition whether Harvard is really treating everyone
2 as a whole person instead of as, first and foremost, the
3 member of a racial group. And some of that evidence will be
4 the stunning regularity in the racial balance in Harvard's
5 class. And you've seen this before, Your Honor. It's ten
6 years of admissions data. You see the sort of stability in
7 the numbers.

8 And Harvard doesn't like this. They don't like the
9 rounding. They want to point out the fact that the numbers
10 change plus 10 to 15 percent or minus 10 to 15 percent year
11 to year.

12 Our point is not that Harvard has a quota system
13 down to the last jot and tittle. The point is that Harvard
14 achieves a rough racial balance.

15 And the second point is if Harvard was really
16 treating everyone as a whole person, wouldn't you expect this
17 to move around a little bit more? It's just a commonsense
18 point. I can also see, and the evidence will show, that
19 Harvard is very focused on this racial balance in its class
20 throughout its admissions process.

21 This is Plaintiff 146. It's what's called a
22 one-pager. These are generated routinely throughout the
23 admissions process, largely for Director McGrath and Dean
24 Fitzsimmons. What you'll notice about these one-pagers --
25 I'll point out a couple of things.

1 Number one, race is always on them. It's not that
2 race is the only thing on all of them or it's the only thing
3 on this one, but race is always present. Last year is always
4 being compared to this year. What possible reason is there
5 to do this unless you're trying to match up to last year and
6 not deviate too much from last year, which is the very
7 definition of racial balancing, which the Court has said is
8 per se illegal.

9 Then you'll notice, of course, something that
10 you've seen before is that Harvard likes to separate out the
11 non-legacy, non-athlete students just like Students for Fair
12 Admissions did and OIR did. That's right there on the
13 one-pager.

14 Now, Your Honor, I mentioned earlier that
15 affirmative action in higher education is not on trial here,
16 and diversity is not on trial here. Students for Fair
17 Admissions supports diversity on campus. And our expert,
18 Mr. Rick Kahlenberg, is one the country's foremost supporters
19 of diversity on campus.

20 The problem for Harvard is that race dominates its
21 process. By its own admission, race is determinative in
22 admissions for half the African-Americans and a third of the
23 Hispanics. That's not our report. That's Harvard's report
24 on race-neutral alternatives, Plaintiff's 316. And that's
25 still with the personal rating included.

1 And so we took them at their word. We have said we
2 won't change anything about your admissions system other than
3 what you admit to be the use of race, and we'll generate some
4 alternatives for you. We'll take away what you admit to be
5 doing on race, and we'll generate some alternatives. That's
6 what Mr. Rick Kahlenberg did.

7 Those alternatives required Harvard to do one thing
8 and stop doing another. They had to increase socioeconomic
9 preferences. They had to stop with the legacy and donor
10 children preferences.

11 Harvard steadfastly refuses to even contemplate
12 giving up those preferences, which themselves operate to
13 preserve Harvard as a bastion of privilege. Putting aside
14 the morale valence of those preferences, which I think the
15 amici, some of them will get into. If the choice is between
16 putting young Americans on racial registers or preserving
17 those preferences that almost universally benefit whites,
18 that is no choice at all. Title VI does not contain a
19 Harvard Club exemption.

20 THE COURT: Hold on a second.

21 (Off-record conversation)

22 MR. MORTARA: It says right here, big finish.
23 Right after I said there's no Harvard Club exception for
24 legacy preferences. And I thought you were going to stop me
25 and say really?

1 No big finish. Here we go. In all seriousness,
2 Your Honor, this is a serious matter. I'm sorry to make
3 jokes.

4 Looking back at Plaintiff's 146, you're going to
5 see that Harvard uses these one-pagers. And Harvard's
6 witnesses and its expert will admit Harvard doesn't need to
7 use race as a factor in admissions to enroll a significant
8 number of Asians, and everybody knows they don't need it to
9 enroll a significant number of whites. It's simply not
10 necessary for them to achieve a diverse group of
11 Asian-Americans on campus. They don't need any more whites.

12 The Court might reasonably ask why Harvard needs to
13 distinguish Asian-Americans from whites at all in its
14 process. You see right here, Harvard is not -- is perfectly
15 happy to group together Filipinos and Japanese and Chinese
16 and Indonesians and Vietnamese and Cambodians and Pakistanis
17 and all these groups.

18 Why not just group them in with whites? Why didn't
19 Harvard blind themselves to the difference between whites and
20 Asians after its own researchers pointed out these issues
21 with the personal rating and the existing of the Asian
22 penalty in admissions? Why didn't Harvard do that? Why is
23 Harvard so afraid of such a remedy, which is one that this
24 Court might conceivably and obviously order if there's a
25 finding of liability on our Count I. Just treat Asians and

1 whites the same.

2 The evidence in this trial will provide the answer.
3 Harvard is engaged in and wishes to continue to engage in
4 intentional discrimination against Asian-Americans.

5 Thank you, Your Honor.

6 MR. LEE: May I proceed, Your Honor?

7 THE COURT: Yes.

8 OPENING STATEMENT OF PRESIDENT AND FELLOWS OF HARVARD COLLEGE

9 MR. LEE: May it please the Court. My name is Bill
10 Lee. And together with my colleagues Seth Waxman, Felicia
11 Ellsworth, Danielle Conley, and Ara Gershengorn, and me. I
12 represent Harvard. With us today are Drew Faust, until
13 recently the president of Harvard University; Mike Smith,
14 until recently the dean of Harvard's faculty of arts and
15 sciences; Rakesh Khurana, the dean of Harvard College; Erin
16 Driver-Linn, the dean of education at the Chan School of
17 Public Health; Marlyn McGrath, the Harvard College director
18 of the admissions; and Bill Fitzsimmons, the Harvard College
19 dean of admissions.

20 These are the people, Your Honor, along with many
21 other admissions officers, that you'll hear from that SFFA,
22 the plaintiff, has spent the last hour and the last four
23 years of accusing of intentional discrimination.

24 To be clear, they do not discriminate and did not
25 discriminate against Asian-Americans. Harvard does not

1 discriminate and has not discriminated against
2 Asian-Americans.

3 Now, as Your Honor knows, at the outset of this
4 case, the plaintiff's stated goal, publicly stated and its
5 purpose of the case, was to change the law and eliminate all
6 considerations of race in college admissions. It brought
7 that very claim in this case. Your Honor rejected that claim
8 in this case. As the Court's order recognized, the claim is
9 precluded by an unbroken line of Supreme Court precedent,
10 most recently the second *Fisher* decision.

11 So what is the plaintiff left with? The plaintiff
12 is left instead to claim that an admissions process that was
13 lauded by the Supreme Court in *Bakke* as an illuminating
14 example of a college admissions process and again years later
15 in *Grutter* that is expressly described in a manner in which
16 it's applied today in the appendix to *Bakke* that Justice
17 Powell appended. And it was approved after a more than
18 two-year review by the Department of Education's office of
19 civil rights has somehow been manipulated in some clandestine
20 way by these folks to intentionally discriminate against
21 Asian-American applicants.

22 But, Your Honor, after four years of litigation,
23 the production of tens of thousands of documents, scores of
24 deposition pages, and the production of data of more than
25 200,000 applicants to Harvard over a six-year period, the

1 plaintiff cannot prove that Harvard discriminates against
2 Asian-American applicants.

3 Instead what the evidence will confirm is that, as
4 identified by the Supreme Court as an illuminating example,
5 race is considered as one factor among many in Harvard's
6 admissions process, that when it is considered it is
7 considered flexibly and not mechanically, and it is always
8 used as a plus factor. To be clear, Your Honor, an
9 applicant's race never counts against an applicant in the
10 admissions process.

11 You will not hear differently from SFFA. In fact,
12 you will not hear from a single fact witness from SFFA. The
13 plaintiff concedes that its founder, Mr. Blum, who is in the
14 courtroom today, has nothing relevant to offer to the issues
15 that are before Your Honor now. We couldn't agree more. Not
16 a single one, as Your Honor knows, of the plaintiff's members
17 who were denied admission will appear and testify in that
18 witness box.

19 Instead the plaintiff has resorted into summary
20 judgment briefing and even this morning to invective,
21 accusation, and innuendo based upon -- I think I'll be able
22 to demonstrate to you even this morning misstatements of the
23 record and supposed facts that had been wrenched from
24 context. The plaintiff attacks Harvard and other
25 institutions of higher education that are dedicated to

1 assembling diverse, inclusive, and vibrant communities and
2 educating those who will help an increasingly diverse
3 society.

4 The plaintiff, as you heard, attacks the
5 reputations and motives of Harvard's president, its deans,
6 and dozens of admissions officers and other employees who
7 have dedicated themselves to assembling just that kind of
8 diverse and inclusive class.

9 And the plaintiff has tried to silence the voices
10 of the students who have benefited from these efforts and who
11 can best explain to the Court the benefits of these
12 environments.

13 Now, the vast majority, by my computation, of the
14 opening from the plaintiff today was about statistics and
15 numbers. I think it was almost 80 percent of it. And the
16 plaintiff, for sure, offers an analysis of an economist who
17 has so manipulated the data that it led 16 leading
18 economists, including Janet Yellen, the former chair of the
19 federal reserve, and two noble prize winners to conclude --
20 and I quote here, Your Honor -- his models are, quote, simply
21 not reliable and his findings are, quote, implausible, closed
22 quote.

23 Your Honor will see they are. They are living
24 proof that if you torture the data long enough, it will
25 confess to anything.

1 We are fortunate to have a system that adjudicates
2 controversies based upon real evidence and fact-based inquiry
3 on complete pictures rather than facts taken from context.
4 We're fortunate to have a system that decides cases on a set
5 of principles and the rule of law.

6 Those principles, that evidence, the facts, the
7 truth, Your Honor, will demonstrate unequivocally to Your
8 Honor that there has been no discrimination against
9 Asian-American applicants in the Harvard admissions process.
10 The Harvard admissions process is, as the Supreme Court said,
11 an illuminating example of how far to balance a variety of
12 competing interests.

13 So let me turn to the remaining claims in the case
14 and first address the legal principles which SFFA really
15 didn't address in its opening. I will then turn to the facts
16 and describe what Harvard does, why Harvard does it, and what
17 Harvard does not do.

18 Now, the plaintiff's allegations of intentional
19 discrimination are serious. They are certainly not something
20 humorous. The bar to prove them is high, and the courts have
21 been clear about what the bar is. The plaintiff must prove
22 that Harvard discriminated on the basis of race, that the
23 discrimination was intentional, and the discrimination was a
24 substantial and motivating factor for Harvard's actions.

25 In other words, the plaintiff must have show that a

1 committee comprised of roughly 40 people at any given time is
2 intentionally trying to discriminate against Asian-American
3 applicants because they are Asian-American.

4 Harvard's evidence and the lack of evidence that
5 the plaintiff has been able to muster will show this is
6 simply not true.

7 The plaintiff also claims that Harvard has engaged
8 in racial balancing. To prove this, the plaintiffs must show
9 that Harvard has imposed a quota or otherwise taken steps,
10 and I quote, to assure within its student body some specified
11 percentage of a particular group merely because of race or
12 ethnic origin.

13 It is not enough, Your Honor, to simply show that
14 Harvard pays some attention to the racial and ethnic
15 diversity of its applicants during the admissions process.

16 In fact, the Supreme Court has specifically
17 endorsed the principle that paying some attention to the
18 numbers is permissible. This is from *Grutter* at 336. Were
19 it otherwise, Your Honor, there would be no way for the
20 admissions office and Harvard to know that it was, in fact,
21 assembling a diverse class.

22 Now, the plaintiff next claims that Harvard gives
23 undue weight to race. But again, the Supreme Court has held,
24 and I quote, universities can consider race or ethnicity
25 flexibly as a plus factor in the context of individualized

1 consideration of each and every applicant, again from
2 *Grutter*.

3 In so ruling, Your Honor, the Supreme Court
4 specifically endorsed Harvard's flexible use of race as
5 described in the *Bakke* opinion as a model for how
6 universities can choose to consider race in admissions. As
7 you will hear from Dean Fitzsimmons and several other
8 admissions officers that will testify, that process described
9 in the very appendix to *Bakke* is fundamentally the same
10 process that's used today.

11 It is a system that involves highly individualized
12 holistic review of an applicant's file, gives serious
13 consideration to all the ways an applicant might contribute
14 to a diverse educational environment, and it is a system full
15 of checks and balances, many of which were ignored by SFFA in
16 their opening today, and a system in which no single factor
17 is determinative. It is exactly what the Supreme Court has
18 endorsed.

19 Finally, Your Honor, as you know, the plaintiff
20 alleges that Harvard could achieve its goals without
21 considering race.

22 For many years now, going back decades, Harvard has
23 used and will continue to use multiple initiatives to
24 increase the diversity of its applicant pool and admitted
25 class. You will hear about them. But at this time, Harvard

1 cannot achieve its educational goals without considering
2 race. Either its classes would be radically less diverse or
3 they would suffer in other fundamental ways, including
4 academic excellence. The Supreme Court again has made it
5 clear that universities cannot be forced to choose between
6 diversity and other educational objectives.

7 So let me turn, Your Honor, to what we do because
8 it's important. Each year the Harvard admissions office
9 engages in a comprehensive iterative process with three goals
10 in mind:

11 The first is to admit a class of truly exceptional
12 students. Harvard looks for students who excel in many, many
13 different ways and who will contribute to and benefit from
14 the community and all it has to offer. As you will hear,
15 this does not mean only students who have the highest SAT
16 scores or the highest grade point averages.

17 The second goal, Your Honor, is to admit a class
18 that is diverse in many ways, including racially diverse, so
19 that students live and learn from a range of ideas,
20 perspectives, life experiences, and ways of thinking.

21 The final goal, Your Honor, is to admit a number of
22 students that Harvard has room for. Harvard is a residential
23 college. More than 98 percent of the students live on campus
24 in campus housing. For the class of 2019, there were exactly
25 1,664 or so beds. The admissions office manages the number

1 of offers it extends so that the number of students who
2 actually arrive does not exceed those for whom we have room.

3 To accomplish those goals, the admissions work
4 starts long before any applications are received. Through a
5 variety of initiatives, the office recruits essentially to
6 ensure that as many qualified applicants as possible consider
7 Harvard as an option. For example, since 1971 -- so we're
8 going back now 50 years -- Harvard's had an undergraduate
9 minority recruitment program. You will hear it referred to
10 UMRP. It has sought to identify and encourage high school
11 students of different racial and ethnic backgrounds to apply.
12 This includes Asian-American students and has included
13 Asian-American students.

14 The precise group that the plaintiff claims Harvard
15 is intentionally discriminating against is a group that we
16 are actively recruiting on a daily basis.

17 You will also hear from admissions officers about
18 numerous other recruiting efforts. These officers regularly
19 travel to all 50 states and visit approximately 150 cities.
20 Their purpose is to spread the message that Harvard's doors,
21 like many of its peer colleges and universities, are open to
22 students of all backgrounds and means, and Harvard wants
23 students of all backgrounds and means.

24 These efforts have produced an increasingly large
25 and diverse pool of highly qualified candidates. Harvard

1 currently receives approximately 40,000 applications each
2 year, and it's an incredibly accomplished group of students.

3 For the class of 2019, there were more than 2,700
4 applicants with perfect scores on the verbal section of the
5 SAT, more than 3,400 with perfect scores on the math section,
6 and more than 8,000 applicants with perfect GPAs.

7 But, Your Honor, Harvard has never admitted
8 students on the basis of grades or SAT scores alone and has
9 never defined academic, personal, extracurricular, or any
10 other excellence in that manner. There are simply more
11 academically qualified applicants than there are spots. The
12 ability to succeed academically is necessary to be admitted,
13 but it's not sufficient.

14 Once applications begin arriving, the admissions
15 office begins the difficult task of identifying the
16 approximately 2,000 applications who are offered admission.
17 The suggestion that everything is being done off of that one
18 page that the plaintiff showed you in its opening is at least
19 incorrect.

20 To do its work, the admissions office considers an
21 enormous amount of information provided by the applicants.
22 The material Harvard receives often runs for an application
23 to more than 50 pages, and we will walk you through a couple
24 of the applications so you can see them. You will hear about
25 the parts of the applications in more detail, but they

1 include much more than transcripts and test scores.

2 It includes information about extracurriculars. It
3 includes information about the applicant's high school and
4 the rigor of the program. It includes information about the
5 applicant's parents, their education, their occupation. It
6 includes the applicant's intended major and career
7 aspirations. It includes personal statements and essays.
8 Critically, it includes a guidance counselor recommendation,
9 two teacher recommendations, and an alumni report.

10 And applicants may and often do submit supplemental
11 materials they would like the admissions officer to consider.
12 This includes academic papers, artwork, videos of theatre
13 performances. The admissions officers consider all of these
14 materials in an effort to understand who the applicants are.

15 You will hear it referred to as the whole-person
16 approach, which has been sanctioned by the Supreme Court.
17 Admissions officers pore over the essays, the recommendation
18 letters, interview reports, and other materials to learn what
19 motivates an applicant, what makes an applicant unique, and
20 what the applicant would bring and take away from the Harvard
21 community.

22 Now, because of the wide range of information that
23 applicants submit and that may be submitted on their behalf,
24 it's impossible to list every factor that could contribute to
25 the decision to admit a candidate. But there are several

1 factors that Harvard consistently values. Admissions
2 officers and alumni interviews are expressly told in writing
3 what these factors are and that they should be considered in
4 evaluating a candidate.

5 On the screen now is DX 5 which will be in
6 evidence. These factors are sometimes referred to as tips or
7 pluses. They are listed in a handbook that's provided to all
8 admissions officers and all alumni interviewers.

9 The tips, the pluses, the things that Harvard is
10 looking for are outstanding and unusual intellectual
11 abilities, unusually appealing personal qualities,
12 outstanding capacity for leadership, creative ability,
13 athletic ability, Harvard and Radcliffe parentage, and
14 geographic, ethnic, and economic factors.

15 As you will hear, Your Honor, none of these tips on
16 their own will earn an applicant admission. The purpose of
17 the whole review process is to ensure that no one aspect of
18 any applicant in isolation can alone tip him or her into the
19 admitted pool. Nor, Your Honor, is this an exhaustive list
20 of all the things that may weigh in favor of a particular
21 candidate. But these are some of the factors that Harvard
22 values that are considered by the admissions office and that
23 are set forth in black and white in detail, as Your Honor
24 will see.

25 Now, Your Honor is going to hear about the process

1 in detail because understanding the process puts the lie to
2 much of what SFFA contends. For now, let me outline the
3 process because I think it's important and describes some of
4 the basic contours of a process that involves lots of people
5 considering lots of information over a long period of time.

6 When the application is received, as Your Honor
7 noted in your summary judgment ruling, they are grouped by
8 geographical areas known as the dockets. Within each docket,
9 admissions officers are assigned to specific areas. You will
10 learn that admissions officers are instructed to be advocates
11 for the applicants from their dockets. Their job is to
12 identify and seek out information so they can make the best
13 case on behalf of competitive applicants throughout the
14 process.

15 Now, Your Honor heard a lot about the personal, the
16 four ratings. Let me tell you where in the process they
17 occur and what they actually are.

18 Admissions officers conduct the initial review or
19 the first read of the applications from the high schools.
20 Based upon the initial review of the file before any
21 committee discussion, before my subcommittee discussion,
22 before the file is even complete, often, admissions officers
23 make preliminary assessments of applicants and assign ratings
24 in a number of different categories.

25 There are four ratings referred to as the profile

1 ratings: academic, extracurricular, athletic, and personal.

2 The admissions officers also assign scores based
3 upon teacher and guidance counselor recommendations,
4 information that's coming to the admissions office from
5 outside of Harvard, from the teachers and guidance
6 counselors.

7 There are scores from any interviews for the
8 applicant.

9 And finally, the admissions officers assign each
10 applicant a preliminary overall rating. Some applications
11 are assigned ratings by a second reader. Some a third reader
12 who provide his or her own preliminary assessment and
13 ratings. Applications may also be read, Your Honor, by a
14 member of the faculty.

15 Now, let me pause and say this. The suggestion
16 that the only document at Harvard that discusses these
17 ratings is that one page that SFFA showed you in the opening
18 is simply not true. There is a handbook for interviewers and
19 admissions officers. There are case books with different
20 descriptions of different cases. There are periodic updates
21 that go out from the admissions office. And when a new
22 admissions officer comes in, they are trained, they go over
23 cases, and for their first 50 to 100 files they are read in
24 parallel with a senior admissions officer who can ensure that
25 the person is addressing all issues, including the ratings,

1 in the correct way.

2 Now, contrary to what SFFA has suggested, not a
3 single one of these ratings, not a single one is formulaic.
4 Every single one requires judgment by the admissions office,
5 and every single one involves quantitative and qualitative
6 information to some varying degrees.

7 So let me take the academic rating. Some might
8 assume that the academic rating is a formula based on test
9 scores and GPAs. Your Honor, the academic index that SFFA
10 refers you to is a formulaic determination. It is an index.
11 It's not used in the admissions process. It's not the
12 academic rating. I'm not sure why it was even suggested to
13 you that it is.

14 Instead, the academic rating that's assigned by the
15 reader of a file is something that does take into account
16 grades. It does take into account board scores, but it takes
17 into account whether the applicant has won any awards. It
18 takes into account the strength of the school, the strength
19 of the academic program. It will take into account
20 statements and the recommendations about the student's
21 academic curiosity or capability. And when a Harvard faculty
22 member reads a file, it will include judgments on that basis
23 as well. Nothing in the academic rating is formulaic.

24 The same is true of the extracurricular rating, and
25 the same is true of the personal rating. The personal rating

1 captures a wide variety of things, including characteristics
2 such as leadership, determination, and compassion, the very
3 tips that are expressly described in the handbook. They
4 capture the applicant's potential to contribute not just to
5 their college community but more broadly to society after
6 graduation.

7 Like the other ratings, Your Honor, the personal
8 rating is based in substantial part on information in
9 individual's outside the admissions office giving information
10 to the admissions office. It is teachers; it is guidance
11 counselors; it is recommenders; it is alumni interviewers.

12 Critically, and something not mentioned by SFFA,
13 these ratings are all assigned very early in the process and
14 are very preliminary. And I'm going to come back to this,
15 but Your Honor can see on the screen how the four profile
16 ratings are side by side by side by side.

17 I'd ask Your Honor to keep that in mind, and I'll
18 come back to it.

19 The ratings are intended to help the officers
20 triage among the hundreds and thousands of applications they
21 review, and they serve as rough reminders of the applicant's
22 strength.

23 But, Your Honor, the ratings are assigned before
24 any applicant is discussed by the committee, before any
25 subcommittee meeting occurs. They are assigned before

1 there's been any determination of whether an applicant
2 advances.

3 So what happens next? What actually happens in the
4 process is after these ratings have been assigned, after the
5 individual officers have given it a first read, they actually
6 meet with a group of folks who have read files from the same
7 docket. These meetings take place over several days. They
8 are open. There's an open discussion. There's no one hiding
9 any information from anybody.

10 The application files, all of this information is
11 projected on a screen and available to every member of the
12 committee electronically. Every single member can and does
13 assess for him or herself the strength of an applicant's
14 essay or the strength of the recommendation submitted by a
15 teacher or the strength of a recommendation submitted by a
16 guidance counselor.

17 Then there's a discussion, an open discussion. And
18 after that discussion, a preliminary recommendation as to
19 whether an applicant should be admitted is made. The
20 decisions are tentative. They are recommendations, but
21 they're made collectively. And critically, Your Honor, they
22 can and do change.

23 Your Honor will learn that the ratings assigned
24 that are the focus of SFFA's case do not determine whether an
25 applicant will be tentatively admitted or not. An applicant

1 with lower ratings in all categories can be recommended for
2 admission while an applicant with better ratings, higher
3 ratings might not. It is the collective review and
4 discussion of what the substance of the application is that
5 makes the determination.

6 After the subcommittee meetings are complete, Your
7 Honor, there's another step. The full committee meetings
8 begin.

9 These meetings are attended by 40 members of the
10 admissions committee and span multiple weeks. During these
11 meetings again, the full committee considers all of the
12 applicants who will be recommended for admission and who
13 might not be. To do so, the committee collectively reviews
14 thousands of applications as they work together to put
15 together a class that is diverse in many different respects.

16 Again in the full committee meetings, the
17 applications are projected on a screen. Again in the full
18 committee meetings, every admissions officer has electronic
19 access to the full file.

20 They also have a full list of all the applicants.
21 The admissions can and often do say, well, I know you're not
22 recommending this person, but I'd like us to look at their
23 file. That occurs frequently.

24 At the end of this process, there's a full
25 discussion. There's a full discussion of every single person

1 who will be recommended for admission. The decision is then
2 made in the open meeting among 40 people, each with one
3 vote -- one vote, one person -- and either by consensus or
4 majority vote, the decision is made.

5 It is this decision that results from the process
6 I've just described and the 40-person vote or consensus and
7 not the numerical ratings that determine admission.

8 At every stage of the process, Your Honor, you'll
9 learn that applicants are evaluated as the multidimensional
10 people they are. Harvard doesn't believe that any individual
11 is defined by their grade point average or their SATs. All
12 of the information about an applicant is considered.

13 And for those applicants who have disclosed it,
14 that includes race. To be clear, for Harvard and its
15 students to attain the educational benefits of a diverse
16 student body, Harvard believes that students of certain races
17 or ethnic backgrounds should receive a tip. To be clear, for
18 most applicants, race makes absolutely no difference to the
19 admission decision.

20 There are some applicants who will be denied
21 admission no matter what the race. And for many applicants,
22 they will be admitted no matter what the race. Therefore,
23 however, highly qualified applicants on many, many
24 different -- in many, many different respects who without the
25 tip for race may otherwise not have been admitted.

1 But you will learn there are highly qualified
2 applicants who will not have been admitted, highly qualified
3 in many ways without the tip from being from a certain part
4 of the country, without the tip for being from a modest
5 socioeconomic background, without the tip for being
6 exceptionally creative in an artistic way.

7 A tip in isolation is never what makes the
8 difference. And the files themselves will show that to Your
9 Honor. Race alone is never the reason that a student is
10 granted admission. And most importantly for the issues
11 remaining with Your Honor, race is never the reason that a
12 student is denied admission.

13 In fact, race by itself does not factor into the
14 four profile ratings. And this is the place where,
15 respectfully, SFFA has engaged in a war of words. The
16 self-identification of race by student is not factored into
17 the four ratings per se or in isolation.

18 But the readers are not blind. If a student is an
19 African-American who grew up in a place or location where he
20 or she suffered substantial discrimination and had to
21 overcome that and took steps to help their community overcome
22 that, that's going to educate the personal rating. That's
23 not race being considered. That is the person and the
24 person's life story which does, in part, depend upon the race
25 being considered.

1 So the mere fact of race self-identified in
2 isolation does not make it into the four ratings. The
3 person's life story, which may or may not relate to the race
4 in the same way that it may or may not relate to gender, it
5 may or he may not relate to modest socioeconomic background
6 are considered in the ratings.

7 Now, a student's race may be considered by the
8 individual admissions officers at any point during the
9 discussion. It's considered one factor among many, and
10 within the context of each individual application.

11 This is what each of the admissions officers, the
12 folks who are really willing to come to take the stand, will
13 tell you. It's exactly what *Grutter* says at page 337.

14 In keeping with the courts's holding in *Grutter*,
15 Harvard has no policy, either de jure or de facto, of
16 automatic acceptance or rejection based upon any single soft
17 variable. Every student admitted to Harvard is qualified on
18 multiple dimensions and different dimensions, Your Honor,
19 including having the intellectual and academic ability to
20 thrive in the community.

21 This was true of the Harvard system at the time of
22 *Bakke*. This was true of the Harvard system at the time of
23 *Grutter*. It is true today. Race is considered. It can tip
24 an applicant who is qualified in multiple different ways into
25 the pool. But the same is true of a variety of other

1 factors, as we say in black and white.

2 Now, as permitted by *Bakke*, Harvard's program
3 treats each applicant as an individual in the admissions
4 process, and an applicant will not be foreclosed from all
5 consideration of a seat simply because of race.

6 At the risk of being redundant, let me just restate
7 this because it's important to the claims that remain before
8 Your Honor.

9 Harvard never considers an applicant's race to be a
10 negative. If it considers race, it's always considered in a
11 positive light. The fact that one applicant is given a plus
12 or a tip doesn't mean that another who is not given that tip
13 is being discriminated against. And if there's one thing
14 that's clear from the Supreme Court cases and the excerpts
15 that I've tried to show you during the opening, it is this:
16 The Harvard process for the last 50 years has been viewed as
17 lawful. That is why the Supreme Court twice pointed to it as
18 illuminating.

19 We are actually not here because Harvard has failed
20 to comply with that unbroken line of Supreme Court precedent.
21 We're here because SFFA would like to change what the law is.

22 So having talked about what we do, let me talk
23 briefly about why we do it. The suggestion this morning that
24 the issue of why we do it is not an issue was at least
25 surprising to me. Why does Harvard -- why do so many

1 colleges and so many universities in the United States
2 consider race as one factor among many in the admissions
3 process?

4 Harvard itself determined long ago that diversity
5 of all kinds was in the best interest of the college and its
6 students. And without considering, as I said, race as one
7 factor, Harvard did not believe it could fully realize the
8 educational benefits of a diverse student body.

9 Harvard's core mission statement, which is on a
10 slide now and will come into evidence, is to educate citizens
11 and citizen leaders to serve society in a variety of ways.

12 You will hear directly from President Faust, Dean
13 Khurana, and the other senior Harvard leaders that Harvard
14 has long regarded diversity in every dimension as essential
15 to its mission.

16 Harvard believes that its students learn as much
17 from each other as they do from their professors. Because
18 they learn -- they live and learn surrounded by classmates
19 who have different backgrounds, different interests,
20 different factions, and who bring different perspectives to
21 the discussions occurring around them every day, our students
22 are able to challenge stereotypes and confront their own
23 assumptions. They are better able to assess their own
24 values. They are in a better position to succeed in our
25 increasingly diverse world.

1 Your Honor, these benefits flow to all students,
2 not just students of color. You will hear directly from some
3 of those students who actually have asked themselves to
4 testify. They are living proof that Harvard has a compelling
5 interest and a diverse student body.

6 I want to be clear on one thing. This commitment
7 to diversity is not a mantra made for this litigation.
8 Justice Powell's opinion in *Bakke* includes an appendix, as I
9 said, specifically describing Harvard's process.

10 On the screen now is a statement from the appendix.
11 The appendix says, "If scholarly excellence were the sole or
12 even predominant criteria for admission, Harvard would lose a
13 great dealing of its vitality and intellectual excellence,
14 and the quality of the educational experience offered to all
15 students would suffer."

16 That was true before *Bakke*; that was true at the
17 time of *Bakke*; it was true at the time of *Grutter*; it is true
18 today. And Harvard has said it in multiple reports that will
19 come into evidence.

20 On the screen now, Your Honor, is an excerpt from
21 the 1996 report by then President Neil Rudenstine, a lengthy
22 report that noted expressly that little, if anything, can
23 substitute for the experience of continued association with
24 others who are different from ourselves and who challenge us
25 even as we challenge them.

1 And in February of 2016, under Dean Khurana's
2 leadership, the faculty of arts and sciences at Harvard
3 unanimously adopted a report issued by a committee to study
4 the importance of student body veracity, a committee that
5 Dean Khurana chaired. The committee embraced and reaffirmed,
6 as the slide suggests, "the university's long-held view that
7 student body diversity, including racial diversity, is
8 essential to our pedagogical objectives and institutional
9 mission."

10 Now, Harvard is not alone in this judgment and for
11 sure Harvard is not alone in making progress. You will hear
12 from Dr. Ruth Simmons. She is the current president of
13 Prairie View A&M University and the former president of Brown
14 and Smith. She has spent her career learning what works and
15 what does not work in higher education. And she will explain
16 diversity, including racial diversity, vastly enhances
17 educational opportunities and better prepares students for
18 the world after graduation.

19 Nothing, she will explain, can substitute from
20 learning that happens from direct personal interactions with
21 people who are different from us.

22 Now that I've discussed what we do and why we do
23 it, let me talk for a few minutes about what we don't do.

24 Before I address the plaintiff's allegations from
25 this century, let me briefly address the subject of Your

1 Honor's judicial notice of inquiry before we started today.
2 These are events from the 1920's.

3 As I said in open court last week, the fact that
4 Harvard restricted the number of Jewish students was not a
5 proud moment in Harvard's history. Not a single Harvard
6 witness will tell you that it was. Instead, they will tell
7 you that they've devoted their careers to making sure that
8 nothing like that ever happens again.

9 As I said in the pretrial conference, that policy
10 occurred 50 years before the *Bakke* decision, 50 years before
11 the Supreme Court said that the Harvard system was an
12 illuminating example.

13 So let's talk about this century and what SFFA has
14 from this century. Each of the Harvard admissions officers
15 who will take the stand will tell you that they take
16 seriously the commitment to evaluate each student fully and
17 fairly, without bias, without prejudice. They don't try to
18 keep personnel out. They try to get people in.

19 Now, as I said, by my calculation, roughly
20 80 percent of the opening was about statistics. To be sure
21 the plaintiff relies upon a complicated statistical analysis
22 of Harvard admissions data in an attempt to prove its claim.
23 But if we take a step back, the fact is that the percent of
24 Asian-American students in a Harvard's admitted class has
25 grown considerably over time.

1 By way of example, from the class of 2006 to the
2 class of 2019, the percentage of Asian-Americans in the
3 admitted class increased from 16.5 percent to almost
4 21 percent, an increase of 25 percent. This representation
5 has continued to increase. Last year, the class of 2022,
6 Asian-Americans were almost 23 percent of the admitted class.

7 Now, there are a variety of factors that contribute
8 to this increase. But I would say respectfully the idea that
9 we got sued by SFFA is the reason that the numbers have gone
10 up simply isn't true. It's an argument only a lawyer could
11 love.

12 These numbers simply do not support the plaintiff's
13 allegations. And when you look at the right set of
14 comprehensive statistics, they don't support the allegations
15 either.

16 Professor David Card, who is also here with us in
17 the gallery today, is a world-renowned economist and
18 recipient of the John Bates Clark Medal, one of the field's
19 most prestigious awards. He will tell you that any model of
20 the Harvard admissions process is imperfect. And it is.

21 The admissions office makes a series of highly
22 individualized decisions each based on the quantitative and
23 qualitative information in the file. And most of that cannot
24 be captured in quantifiable data.

25 Professor Card built a model that approximates

1 Harvard's admissions process as closely as possible.

2 As Your Honor is aware, there are differences in
3 how the experts model the data, but they actually all reduce
4 to one simple question: Which model most accurately reflects
5 what actually happens in the Harvard admissions process?
6 Which one models the real world as opposed to a world that is
7 not consistent with what Harvard does?

8 Professor Card included all applicants in his
9 model. He included athletes, legacies, children of faculty
10 and staff, applicants who have been brought to the attention
11 of the dean or director. He included them, Your Honor,
12 because they are all competing in the same pool to gain
13 admission.

14 He also ran a separate model for each admissions
15 cycle because that's how the process works. When the
16 admissions office makes its decision as to who to admit in
17 any given cycle, it is doing so in the context of who can
18 help make the best class from among that year's applicants.
19 It does not compare those students to students who applied
20 four years ago or those who might apply three or four years
21 from now.

22 Professor Card also included in his analysis all
23 the information that is quantifiable that the admissions
24 office considers. This encompasses a wide variety of data,
25 but it includes the applicant's intended career, his or her

1 parent's occupation, and all the ratings assigned by the
2 admissions officer when the applications are read, not just
3 some of them.

4 When Professor Card modeled Harvard's admissions
5 process considering all the applicants, considering all the
6 quantifiable information that the admissions office itself
7 considers, and considering the information year by year the
8 way that the admissions office does, he found no statistical
9 evidence of discrimination.

10 Critically, Professor Card found that
11 Asian-American ethnicity is never statistically significant
12 in the admissions process. In other words, Your Honor, at
13 the end in a model that considers all the data and all the
14 applicants in the manner in which admissions office does, it
15 is -- the result is not distinguishable from zero.

16 What his model found instead was that over the six
17 years of data that Your Honor had the parties focus upon,
18 Asian-American ethnicity had a positive effect, not
19 statistically significant but a modest positive effect in
20 three years and a modest but statistically significant
21 negative effect in three other years. This would surely be
22 an odd result if we had this massive clandestine scheme to
23 discriminate against Asian-Americans.

24 But Professor Card also found more. He found that
25 there was actually a slightly positive effect in the

1 admissions process for Asian-American women. He found that
2 there was a slightly positive effect for Asian-American
3 applicants from California. Now, these results, too, he will
4 tell you were not statistically significant. But if you're
5 trying to intentionally discriminate against Asian-American
6 applicants, why would it only be males, and why would it only
7 be males from outside of California?

8 Now, the plaintiff's expert did not come to this
9 case without a point of view. He has published papers
10 endorsing the mismatch theory, with which Your Honor may be
11 familiar. But it posits that affirmative action harms
12 minority students by admitting them to schools in which they
13 are unable to succeed. His own published work suggested
14 African-American students for some reason gravitate to easy
15 majors. He came to this case as an opponent of affirmative
16 action, and he then developed a model that would allow him to
17 justify that result.

18 So how did he do that? The way that he did it was
19 not to include all the applicants, not to include all the
20 information, not to do it cycle by cycle.

21 Instead, he kept taking out information. He kept
22 taking out factors and got further and further away from the
23 admissions process. It is the reason the amici describe his
24 results as simply implausible.

25 So what did he do? First he excluded from his

1 analysis whole categories of applicants, including athletes,
2 legacies, children of staff, and students on the dean's and
3 director's list. The plaintiffs have suggested that this is
4 no big deal because these applicants are a small portion of
5 the applicant pool. But as SFFA said in their opening, they
6 are a significant portion of the admitted class.

7 Now, I heard the suggestion today that the academic
8 profile of the legacies is somehow less than the applicant
9 pool itself. That's 100 percent wrong. It's actually
10 better. And the suggestion that somehow giving legacies a
11 tip is an indication that Harvard has dispensed with
12 academics is simply wrong.

13 And the suggestion that the coaches order the
14 admissions office to accept people is simply wrong. Before
15 the recruited athletes can be granted admission, they are all
16 reviewed by the admissions process for their academic,
17 extracurricular, athletic, and personal profiles.

18 Why does SFFA's expert exclude this information?
19 Your Honor, he does so because if you look at each of these
20 categories, the Asian-American applicants in these categories
21 are accepted at higher rates than white applicants. So he
22 takes out a portion of the pool where Asian-Americans, while
23 a very small portion of that pool but an increasing portion
24 as every day passes, are actually admitted at higher rates.

25 Why would you do that? Now, he removed them

1 because having those numbers in doesn't get you to the result
2 he want you to have. He also pooled six years of data rather
3 than going year by year. But the class -- applicants for the
4 class of 2014 do not complete with applicants for the class
5 of 2019.

6 He also excluded from his model parental
7 occupation, intended career, and whether the applicant had an
8 interview with a staff member on campus.

9 Now, that may sound like a random list to Your
10 Honor. It is not. As you will learn, the reason he removed
11 the specific variables is because only by removing them could
12 he reach the results he wanted.

13 And then finally, he came to the personal rating,
14 and he excluded the personal rating from his model. Now, he
15 admits that the personal rating reflects information that is
16 important to the admissions office in evaluating candidates.
17 He admits that it reflects information that comes from
18 teacher recommendations, guidance counselor recommendations,
19 other recommendations, personal statements, and interview
20 reports. He admits that he's unaware of any of the 200,000
21 applicants that he reviewed who was admitted without a
22 personal rating. But he takes them from the model. And he
23 takes them out of his model.

24 Now, the plaintiff has suggested to you that he had
25 to remove them from his model because there was a negative

1 effect for Asian-American ethnicity on the personal rating.
2 But that same model, Your Honor, shows a positive effect for
3 Asian-American ethnicity on the non completely quantitative
4 academic rating, on the non completely quantitative
5 extracurricular rating. A positive effect.

6 So do you remember, Your Honor, when I showed you
7 the summary sheet and I said I would come back to the fact
8 that the four ratings are side by side by side by side?

9 You have a first reader sifting down with a sheet
10 in front of them. They're reviewing the file. To believe
11 SFFA, to credit their allegations, you would have to conclude
12 that a single reader sitting down with a file with that sheet
13 in front of them goes to box one, to the academic rating
14 which is not quantitative, but quantitative and qualitative,
15 and actually gives Asian-Americans a bump up.

16 You then come to the seconds box, which is
17 extracurriculars, which has a substantial portion of the
18 evaluation, not quantifiable, and gives Asians a bump up.

19 And yet the same reader filling out the same form
20 gets to the fourth box and says now I'm going to
21 discriminate, and I'm going to downgrade the same person I
22 just gave the bump up to twice to ensure they're not
23 admitted.

24 Does that make sense? We would suggest it does
25 not.

1 Now, what that leaves SFFA with is a handful of
2 emails and letters among the tens of thousands of documents
3 that Harvard has produced. I am not going to address them
4 now. We will address them during the course of the evidence.

5 Most of them fall in the category like the letter
6 from the 90-year old alum which was racist, inappropriate.
7 There was a response that was polite. Has nothing to do with
8 Harvard's admissions process.

9 Now, this allegation that Harvard's process
10 discriminates against Asian-Americans has been made before,
11 it has been investigated before, and it has been found to be
12 meritless before.

13 In 1988, Your Honor, the Department of Education's
14 Office For Civil Rights responded to the concern that there
15 was possible discrimination against Asian-Americans to
16 selective colleges. Specifically the concern was described,
17 and I quote it here because it is so close to what you're
18 seeing today, "Despite superior academic credentials in terms
19 of high school performance and standardized test results,
20 Asian-Americans have been admitted to selective schools at a
21 lower rate."

22 Both Dean Fitzsimmons and Marlyn McGrath, director
23 of admissions, were there at the time. They will explain
24 that while there have been, for sure, some changes to the
25 admissions process over the last 30 years, the basic

1 system -- the first readers, the docket system, the
2 subcommittees, the full committees, the vote of the 40
3 folks -- is fundamentally the same.

4 The office of civil rights investigated for two
5 years. It reviewed 400 full applications and 2,000
6 application summary sheets. It interviewed ten admissions
7 officers, and it reviewed admissions offices policies. In
8 fact, it set itself up physically in the admissions office.
9 OCR even conducted its own statistical regression analysis on
10 a sample of 110,000 students from Harvard's data.

11 In the end, OCR found that there were some
12 differences in the aggregate statistics between white and
13 Asian-American applicants. When you do averages, you're
14 growing to see some differences. But it recognized that
15 those differences did not reflect discrimination. The
16 conclusion, on the screen now, was that Harvard did not
17 discriminate against Asian-American applicants.

18 Significantly, Your Honor, OCR reached this
19 decision even though its own statistical model found that
20 white applicants on average had higher personal ratings than
21 Asian-American applicants. The very finding or the very
22 proposition that the plaintiff here claims is the linchpin of
23 its case, OCR said we find there to be a difference. There
24 is a difference. Based upon our analysis, it's not evidence
25 of discrimination of any kind.

1 A decade later, an Asian-American individual filed
2 a complaint alleging much the same, that he or she had been
3 discriminated against by Harvard on the basis of their
4 Asian-American ethnicity. OCR investigated again and again
5 confirmed there was no evidence of discrimination.

6 These allegations that SFFA makes today against
7 Harvard have been made before. They've been investigated
8 before. Even though they have been found to be meritless
9 before, Harvard takes those allegations seriously, as you
10 expect we would.

11 So let me give you an example. In the report, OCR
12 recognized in 1990 that Harvard provides admissions tips for
13 athletes and legacies. OCR concluded that those tips
14 explained, in its view, the disparity between whites -- the
15 admission rates between whites and Asian-Americans. OCR also
16 said that those tips were completely proper, that the ability
17 to field competitive athletic teams and the ability to
18 develop a community with Harvard students, faculty, staff,
19 and alumni contributed to a sense of community in ways that
20 are important to the institution, Your Honor, just as it does
21 to other colleges and universities. OCR found that those
22 tips, tips that we use today, were not used to discriminate
23 against Asian-Americans.

24 But nevertheless, following the issuance of the
25 findings, Dean Fitzsimmons periodically reviewed admission

1 rates for non-athletes, non-legacy applicants to confirm that
2 there were not significant differences between white and
3 Asian-American applicants.

4 The suggestion that he just put his head in the
5 sand and assumed an ostrich-like posture as information came
6 his way simply is not true. He asked for this information as
7 the check or balance to ensure that the process that OCR said
8 didn't discriminate against Asian-Americans would not in the
9 future discriminate against Asian-Americans.

10 And as the bar chart on Slide 35 will show you, the
11 data report to him showed that there were no significant
12 differences. Indeed, across the six years of data the
13 experts have studied in this case, not taking all the data
14 that Dean Fitzsimmons has received, but this case, the
15 admission rates for Asian-American applicants who were not
16 legacies or recruited athletes was 5.15 percent.

17 The admission rate for white applicants who were
18 not legacies or recruited athletes was 4.91 percent, a
19 quarter of a point lower.

20 Do I give you the numbers because I think there are
21 some dispositive determination by numbers? No. We give it
22 to Your Honor because it belies the suggestion that Harvard
23 just buried their head in the sand. They could have just
24 said OCR said we don't discriminate, let's move on. Instead
25 they took steps to ensure that for the non-legacy and

1 non-athlete populations they were being treated fairly and
2 squarely.

3 Now, Your Honor, I want to address what I think is
4 the heart of the 20th century information or 21st century
5 information that the plaintiff relies upon. And it's these
6 OIR reports.

7 The plaintiff suggests that there was some internal
8 investigation that found discrimination, and that the dean
9 buried it. There was no finding of discrimination I can show
10 you. I, in fact, can show you that the documents they showed
11 you today and suggested the dean reviewed, he didn't review
12 and there was nothing to bury.

13 Now, this is entirely based upon work from the
14 office of institutional research. It is a universitywide
15 office. It is populated by good folks who are highly
16 qualified. Ms. Driver-Linn then was a director of OIR. You
17 will hear from her and others that the story behind these
18 documents, particularly if you look at all the documents, is
19 not what you heard earlier this morning.

20 You will learn instead that there's been some
21 cherry-picking, and what I'd like to do very quickly is give
22 you a fuller picture of the story.

23 So how does the story develop? In late 2012, Ron
24 Unz, a Harvard alumnus, published an article about what he
25 called corrupt Ivy League admissions, in which he cast

1 aspersions on Harvard and other institutions and alleged
2 admissions policies were discriminating against
3 Asian-Americans.

4 Now, SFFA said this morning that it created a lot
5 of concern. When Your Honor reads the article, it will cause
6 you a lot of concern.

7 Mr. Unz is an equal opportunity critic of racial
8 groups. He criticizes Jews and their intellectual capacity.
9 He criticizes East Asians and their intellectual capacity.
10 He criticized Japanese-Americans and their work ethic. And
11 he is most critical of blacks.

12 The article would get attention from anyone who is
13 in college admissions. It would get attention because it had
14 a provocative thesis: It was disparaging of multiple ethnic
15 groups, and it was based upon a highly suspect analysis.

16 Now, around the same time, Your Honor, at the end
17 of 2012 and 2013, there was another paper published by
18 researchers Caroline Hoxby and Chris Avery.

19 It, too, made a splash in higher education but for
20 a better and different reason. Their thesis was that
21 universities like Harvard and others were not making
22 education accessible to a wide enough range of low-income
23 applicants.

24 It is against this background that OIR began
25 looking at a variety of issues in 2013. Some of this work,

1 to be sure, was in response to Mr. Unz's provocative article.
2 Some addressed low-income students in response to the
3 Hoxby-Avery article and others. And some addressed other
4 topics like early admissions, which Harvard had just
5 reinstituted, and gender balance at our engineering school,
6 which was relatively new.

7 Now, SFFA focused you on P9 -- and I'm going to put
8 it on the screen -- and suggested that this was presented to
9 the dean and he sat on the information.

10 Let me take you through what actually happened.
11 The dean has said he saw some of the information in P9 but
12 never all of it. And let's look at what P9 is.

13 You can see that there's a cover page with no title
14 filled in. You can see that the date is February 14, 2012.
15 It's wrong by a year. When you get to the second and third
16 pages, you'll see that the data is actually flipped. The
17 data for Asian-Americans is under the category of whites, and
18 the data for whites is under the category of Asian-Americans.

19 And when you get to the conclusion page, this is
20 what you will see. When some Harvard witnesses testified
21 that this was preliminary and incomplete, they were not being
22 critical of Ms. Driver-Linn or any of the people working for
23 them. They were just looking at what you're looking at and
24 could see with their four eyes, wrong date, no title, data
25 flipped, no conclusion.

1 Now, let me take you to the next slide into P12.
2 P12 is a presentation that was presented to the dean. It was
3 presented on February 25, 2013. It has, as he said, some at
4 the end, you'll see, data that is the same as P9 but not all
5 of the data. As you can see, this presentation has the
6 correct date. As you will see, it does not have blank pages.
7 As you will see, it does not have data in the wrong columns.
8 And at the end, it does contain some but not all the slides
9 from P9.

10 The first roughly 30 pages of this presentation
11 address issues regarding the return of early action, which
12 Harvard had recently reinstituted. It also examines, as I
13 said, issues of gender balance at the engineering school
14 because Harvard had just recently launched an engineering
15 school.

16 Starting at page 31 of P12, there is a section
17 entitled "Evaluating Factors That Play a Role in Harvard
18 College Admissions."

19 Now, as you will see, OIR itself specifically said
20 at the bottom of the page that the following analysis is
21 preliminary and for discussion.

22 Now, Ms. Driver-Linn will be here herself to
23 explain to you that the models were exploratory, preliminary,
24 and incomplete in the data they modeled. That's why they're
25 described as preliminary.

1 To give you an idea, Your Honor, on Slide 44 is a
2 listing of all the variables that Dr. Card modeled. He
3 admits that these aren't all the variables considered in the
4 process, but he modeled all these variables.

5 On the next slide, Slide 45, here are the variables
6 that were modeled in the OIR analysis. So let me return to
7 the OIR analysis and to P12 and to the pages that Dean
8 Fitzsimmons, in fact, did see.

9 In model 1, which is on the screen right now, OIR
10 considered what would happen to the class if it was admitted
11 only on the basis of academic criteria and found that the
12 class would have more Asian-American students than it does.
13 Now, this model actually used the academic index even though
14 the academic index isn't used in admissions.

15 Models 2, 3, and 4, as Your Honor moves from left
16 to right, adds additional factors at each step.

17 THE COURT: Can you blow up that a little bit? I
18 can't see it.

19 MR. LEE: Is that better, Your Honor?

20 THE COURT: Yes. Much better. Thank you.

21 MR. LEE: If you move from left to right, you'll
22 see that as you add in additional factors, legacies,
23 athletes, personal qualities, and demographics, the makeup
24 you have of the class changes, and you actually get very
25 close to what the class looks like.

1 When the dean and others saw this analysis at a
2 high level, even in a preliminary analysis it told them what
3 they knew already, which is if Harvard admitted just on
4 quantitative academic indications, the class would be more
5 Asian-American. It would. But if you added more and more
6 factors in, you get closer and closer to the actual class.

7 Now, I think I heard SFFA saying that Dean
8 Fitzsimmons should have sounded an alarm in response to
9 something that basically confirmed what he knew already.

10 There was no reason for alarm for several reasons.
11 First, he's been in the trenches. He's been at these
12 meetings. He's been there when the 40 people have voted. He
13 knows what the models show. If they just went by test scores
14 and grades, the composition of the class would be different.
15 But that's not the class that they want.

16 And the dean, he will tell you, continued to do
17 what he had done before this, after this, to ensure that
18 there was no prejudice or bias working against anybody in the
19 process.

20 Now, he also asked, after this, OIR to do some
21 additional research regarding the tip for students from
22 low-income families. He wanted to know whether they were
23 getting a plus in response to the Hoxby-Avery letter. On the
24 screen now is PX29. He specifically asked for this
25 information and he specifically asked for that information

1 for Asian-Americans. And he got a response: Low income
2 Asian-Americans, like other ethnicities, were getting a tip.

3 And, in fact, Your Honor will see that the tip
4 received by Asian-Americans was as high as or equal to the
5 highest tips that were being given. If the dean was involved
6 in that nefarious plan to bury OIR and discriminate against
7 Asian-Americans, why would he be concerned in ensuring and
8 confirming that low-income Asian-Americans were getting a tip
9 and a benefit in the process?

10 Before I briefly return to the other claims -- and
11 it will be briefly -- let me say this: To believe there is
12 intentional discrimination, SFFA would have you conclude that
13 a process involves multiple readers, multiple subcommittee
14 meetings, multiple committee meetings, and a decision by
15 40 folks year after year after year has been somehow used to
16 intentionally discriminate against a group of folks,
17 Asian-Americans, on the basis of their race.

18 You would have to conclude that to carry out this
19 scheme the readers assigned to the academic and
20 extracurricular ratings -- ratings that I said are
21 quantitative and qualitative -- are giving Asian-Americans
22 better scores but then moving to the last box and saying now
23 I'm going to discriminate and I'm going to lower the score in
24 the last box.

25 You would have to conclude that the admissions

1 office did not discriminate against Asian-Americans who are
2 legacies, athletes, children of faculty, children of staff,
3 on the dean's list or Asian-American women or Asian-Americans
4 from California but that Harvard is somehow intentionally
5 discriminating against all the Asian-Americans, all other
6 Asian-Americans.

7 And you would have to conclude that the admissions
8 office managed to execute this, what I would say is a
9 nonsensical scheme, without leaving behind an email, a
10 document, a single presentation that would indicate that this
11 is what they're trying to do.

12 Now, briefly on the other claims, one of the claims
13 is that Harvard uses race as more than a plus factor with
14 greater weight than is permissible.

15 As Dr. Card will tell you looking across the full
16 applicant pool, there are many factors that explain
17 admissions decisions better than the applicant's race.

18 There on the screen now in Slide 48 it includes
19 everything, and it's commonsensical. The teacher
20 recommendations, the guidance counselor recommendations, the
21 information about the student's high school and its program,
22 even the applicant's intended career, actually tells you more
23 about whether a student will get admitted than race.

24 Now, SFFA says, and it is true, Your Honor, that
25 for certain African-American and Hispanic applicants, those

1 whose files demonstrate real strength in multiple dimensions,
2 the tip for race can mean a great deal.

3 But in this pool of applicants who are otherwise on
4 the bubble, as you'll hear, the presence of any one factor
5 could tip the balance in. For some it's race, and that's
6 permissible.

7 Now, SFFA also suggested that Harvard engages in
8 racial balancing. You will hear there are no quotas; I think
9 they conceded that this morning. You will hear that there
10 are no formulas; I think they conceded that this morning. In
11 fact, you'll see, I think, I hope, that the process is as
12 I've described and results in substantial variation in the
13 composition of the admitted class.

14 So on the screen now is Slide 49, which has
15 Asian-American, African-American, and Hispanic admission
16 rates over years. You can see an increase for all three but
17 wide variations year by year by year.

18 Now, the plaintiffs suggests this is somehow racial
19 balancing. I think the chart speaks for itself.

20 And the one-pagers that SFFA described to you are
21 somehow what's being used to racially balance. As Your Honor
22 said in your summary judgment ruling, the one-pagers, if I go
23 to the next slide, have a host of information: gender,
24 geography, legacy status, financial aid, disadvantaged
25 status, intended concentration, and yes, race.

1 They are not provided to all the admissions
2 officers, just to the dean and the director of admissions.
3 It is used for two reasons: to help manage the yield, to
4 ensure that the number of kids who are admitted are folks for
5 whom we have beds. And it is to see how the class is shaping
6 up in terms of diversity across all of these different
7 dimensions.

8 And that is precisely what *Bakke* in the appendix
9 blessed. Some attention to the numbers so that you could
10 understand whether you're achieving the benefits of a diverse
11 class.

12 Race-neutral alternatives. Harvard has taken
13 seriously its obligation to evaluate in good faith whether
14 there are other ways to achieve meaningful racial diversity.
15 Long before *Grutter* says or made the phrase "racial neutral
16 alternatives" as popular it's it might be today, Harvard
17 actually, you will learn, was aggressively pursuing many of
18 these things. I talked about the minority recruitment
19 program. You'll learn about Harvard's effort to have early
20 action and the decision that it had been not the right
21 decision.

22 You will also learn about one of the most ambitious
23 financial aid programs to help increase diversity. Today
24 over half the students at Harvard are on financial aid.
25 20 percent of the class has no parental contribution. And

1 for that portion of the class receiving some financial aid,
2 the average cost of attending Harvard all in -- tuition,
3 room, and board -- each year is \$12,000. That is our effort
4 at a race-neutral alternative to increase diversity. And
5 16 percent of the incoming class is first generation in their
6 family to go to college.

7 Harvard will continue to pursue these alternatives,
8 but it also has evaluated the question of whether race needed
9 to be considered at this time. It took up the charge in
10 2017. Dean Smith, Dean Khurana, and Dean Fitzsimmons, each
11 of who will testify, will tell you that they met on multiple
12 occasions. They will tell you that they reviewed literature.
13 They will tell you that they reviewed the expert reports of
14 the plaintiff's expert and Dr. Card's. And they came to the
15 conclusion that at this moment in time Harvard still needed
16 to consider race.

17 Now, SFFA claims that somehow the fact that lawyers
18 were involved in this process makes the process a sham or in
19 less than good faith.

20 Your Honor, this concept of pursuing race-neutral
21 alternatives comes from a Supreme Court decision. It comes
22 from a legal decision. How you comply with that is something
23 that lawyers are going to be involved in, unless it's done
24 poorly.

25 Let me end, Your Honor. 42 years ago I walked into

1 a courtroom at Post Office Square, my first time in the
2 United States District Court for the District of
3 Massachusetts. I remember it as if it were yesterday. With
4 the exception of the courtroom deputy, every single person in
5 the room was male. With the exception of me, every person in
6 the room was a white male. Even the gallery, which like
7 today had interest from the press, looked the same.

8 I'd ask Your Honor just to look around the
9 courtroom today. It could not look more different. The
10 demographics of those sitting in the courtroom today and
11 enormous progress we have made in becoming a diverse and more
12 inclusive legal system in society are manifest.

13 Many institutions, many people have contributed and
14 worked tirelessly to make this happen. Among them are our
15 colleges and universities. Those colleges and universities,
16 including Harvard but not Harvard on its own or not Harvard
17 in a way that is different from so many other colleges and
18 universities, have realized the benefits, the very real
19 benefits to our students, to our communities, and ultimately
20 to society that come from a diverse community.

21 Those colleges and universities recognize that
22 fostering diversity and broad inclusion in higher education
23 through tested and constitutionally approved measures like
24 the Harvard system have been an engine, not the only engine,
25 but an engine for democracy itself. The result is what you

1 see in the courtroom behind me and in front of me.

2 This progress was a result of concerted efforts by
3 lots of folks to do the right thing. For Harvard, it meant
4 implementing and adhering to the very admissions program the
5 Supreme Court has twice blessed. For Harvard, it meant an
6 admissions process that considers not just what students have
7 done, for admission to any college is not a reward for what
8 you have done but, more importantly, what they'll bring to
9 their peers and their communities and the world beyond.

10 This progress, Your Honor, is not the result of
11 intentional discrimination. This progress is not the result
12 of racial balancing. It is not the result of using race as
13 more than a tip.

14 The progress we have made in considering race as
15 one of many factors is what has led us to the more diverse,
16 more inclusive, and more robust society that we have today.
17 We have made much progress, but there remains, as the
18 students will tell you, much left to be done.

19 This, of all times -- this of all times is not the
20 time to go backwards. This is the time to build upon the
21 progress we have made and carry ourselves further.

22 Thank you, Your Honor.

23 THE COURT: If it's all right with everyone, I
24 would like to go on to the two remaining openings before we
25 break for lunch? Can everyone manage or do we need a break?

1 MR. LEE: It's fine for us, Your Honor.

2 MR. MORTARA: It's great, Your Honor.

3 THE COURT: I'm Mostly concerned with my court
4 reporter, and she says she's good to go, so I'd like to go
5 forward.

6 Are both amici groups going to open orally?

7 MS. TORRES: Yes.

8 THE COURT: When you're ready.

9 MS. TORRES: I have some slides, and I do have a
10 copy.

11 OPENING STATEMENT FOR AMICI STUDENTS

12 MS. TORRES: May it please the Court. My name is
13 Genevieve Bonadies Torres, and I represent the student amici
14 in this case who are a diverse group of current and
15 prospective Harvard students and recent graduates who stand
16 together to defend Harvard's right to appreciate race and
17 racial diversity in admissions. Our students appreciate the
18 opportunity to share how this policy has intimately impacted
19 their lives.

20 As this Court is well aware, plaintiffs bring two
21 separate claims. Students are here to defend one and show
22 the other is disconnected.

23 The first challenges Harvard's race-conscious
24 admissions policy, which values racial and ethnic diversity.
25 The second claims that Harvard intentionally discriminates

1 against Asian-Americans by giving white applicants an
2 admissions advantage. The plaintiff's evidence may blend
3 these claims together, but they must be distinguished.

4 The first involves race-conscious holistic review,
5 which the Supreme Court has repeatedly upheld because the
6 benefits of diversity are both constitutional and profound.

7 The second involves a white admissions advantage
8 which, if found, does not justify a blanket ban on valuing
9 race in admissions.

10 I will mainly focus on the first claim, which asks
11 whether Harvard when engaging in whole-person review may
12 appreciate an applicant's race. The answer is yes. Our
13 students humanize the reasons why, and there are three.

14 First, race and racial diversity matter in
15 present-day America, on Harvard's campus, and in admissions.
16 Ethnoracial identity also matters for many Asian-American
17 applicants who vary widely in their cultural backgrounds.

18 Take Thang. 2060 out of 2400, that was Thang's
19 total SAT score, a high score that is surely impressive at
20 most schools but not at Harvard.

21 Indeed, Thane's admission file notes that his SAT
22 scores were at the lower end of the Harvard average. But the
23 file will also show that Harvard did not reduce Thang to a
24 number. There is not just a raw academic score but comments
25 about his intellectual curiosity. Not just a raw score for

1 extracurriculars, but comments about his genuine commitment
2 to social impact and the arts. Not just a raw personal score
3 but comments about his infectious happy personality.

4 And on top of all this, there will be information
5 about Thane's socioeconomic status, his parents' occupation,
6 his intended concentration, and much more. And in this
7 multitude of contextual information is Thane's ethnicity.
8 It's listed once, but it shines through in his essay, his
9 interview, and his recommendation.

10 Notes from one of the readers states, Immigrant,
11 Vietnamese identity, pencils as tools.

12 This comment is a reference to Thang's essay where
13 he shared about how his family emigrated from Vietnam in
14 2006, how he struggled with English, how he was ridiculed,
15 how he was called racial slurs. For a year he put a pencil
16 between his teeth and read hundreds of books out loud to
17 improve his pronunciation.

18 And he shared all of this with Harvard, and Harvard
19 listened. This note, though short, Vietnamese identity and
20 pencils as tools, reflects how Harvard's whole-person review
21 process appreciates how ethnicity can shape our prior
22 achievements and future potential. Indeed, Thang's 2060 SAT
23 score takes on a different hue after realizing that he faced
24 racial slurs and struggled with English.

25 His contribution to discussions on Harvard's campus

1 takes on new light once you know that he can weigh in on
2 race-based hurdles faced by many immigrant communities.

3 Thang is not alone in having his ethnoracial
4 identity play some role in his experiences and contributions.

5 You'll also hear from Itzel Vasquez-Rodriguez,
6 class of 2017. Itzel will share that her application
7 highlighted her strength as a Latina growing up in California
8 and how her extracurriculars included Spanish club, Latino
9 club, and volunteer work on behalf of native and Latino
10 youth.

11 The Supreme Court itself has observed that race
12 remains relevant in evaluating applicants since it remains
13 relevant in our society. As the Court observed in *Grutter*,
14 which involves Michigan law school, by virtue of our nation's
15 struggle with racial inequality, underrepresented minority
16 students are both likely to have experiences of particular
17 importance to the law school's mission and less likely to be
18 admitted in meaningful numbers on criteria that ignore those
19 experiences.

20 Harvard's race-conscious policy recognizes these
21 experiences, and its flexible policy applies to all racial
22 groups, including many Asian-Americans.

23 As you'll hear from our student Sally Chen, she was
24 pleased -- Sally Chen. She was pleased that when she
25 reviewed her admissions file she saw praise for her academic

1 interests which drew from her Chinese heritage.

2 Now, just as race continues to matter, so does
3 racial diversity. As you'll hear from Itzel, racial
4 diversity on campus eased her sense of isolation. And as
5 you'll hear from Sarah Cole, other students of color were her
6 saving grace when correcting biases felt exhausting and gave
7 her the support to share her voice and perspective.

8 You will hear from all of our students how the
9 racial diversity on campus resulted in better discussions and
10 learning. And two aspects of this diversity make it
11 particularly rewarding: First, by seeking diversity across
12 all dimensions, Harvard cultivates diversity within each
13 racial group, interracial diversity. And this breaks down
14 stereotypes.

15 Second, the benefits students derive from
16 ethnoracial diversity is distinct from that of socioeconomic
17 diversity.

18 As you will hear from Itzel, she felt isolated in
19 classrooms because of the color of her skin, her name, and
20 her features. Race is visually salient and culturally
21 distinct. The lawfulness of Harvard's race-conscious
22 admissions policy will be based on these sound facts.

23 And plaintiff's evidence cannot disturb these
24 justifications. Plaintiff's attack primarily relies on their
25 expert, Dr. Arcidiacono. Their expert concludes that black

1 and Hispanic applicants receive an unfair advantage in the
2 admissions process.

3 There are many problems with their expert's
4 analysis, but one stands out. He fixates on academic scores
5 which are primarily determined by grades and test scores.

6 This brings us to the second problem with
7 plaintiff's evidence. Merit is more than a number. First,
8 equating merit with academics overlooks every other strength
9 of an applicant.

10 But second, it ignores that those receiving an
11 average academic score, what plaintiff's counsel called a 3,
12 rather than a 1 or 2, are still academically exceptional.
13 This is because Harvard's applicants pool is a highly
14 competitive one, full of high academic credentials.
15 Admitting students with more average academic scores is not
16 unfair when the evidence will show that such students are
17 more than academically qualified and their other strengths
18 make them stand out.

19 Take Sarah Kohl. Sarah earned a scholarship to one
20 of the best college prep schools in Kansas City, where she
21 earned straight A's with several A pluses. Her school letter
22 said that academically Sarah stood out and was virtually
23 unparalleled. With all of those stellar credentials, Sarah
24 earned a 3 plus for her academic score, what plaintiffs would
25 call a not cutting edge score, not a 1 or a 2.

1 A narrow focus on academics also overlooks Sarah's
2 other strengths, such as the fact that she worked part-time
3 while maintaining her grades or the fact that she served on
4 Kansas City's Engage KC Leadership Board. Kansas City, which
5 had the second highest homicide rate in the nation where she
6 focused her efforts on combatting gun violence because a
7 close acquaintance was murdered, where she presented six
8 recommendations to the Kansas City mayor on how to combat gun
9 violence, and she shared about these things in her
10 application.

11 Now, this is a compelling application on its own.
12 But knowing that Sarah is an African-American woman adds
13 texture. She was combatting violence in a city notorious for
14 its own violence against the African-American community.

15 This brings me to the third problem with
16 plaintiff's evidence, the impacts of eliminating race in
17 admissions. Harvard expert calculated this impact on the
18 admitted class, and it's captured through this graph.

19 Three things jump out. First, white students will
20 benefit the most from removing the consideration of race, not
21 Asian-Americans.

22 Second, eliminating the consideration of race will
23 have a drastic negative impact on the number of
24 African-American, Hispanic, and other minority students
25 admitted to Harvard's campus. In terms of their numbers,

1 they will be cut by 50 percent about.

2 Third, the proportion of Asian-Americans changes
3 slightly from 24 to 27 percent. But importantly, this has a
4 minimal impact on the likelihood of admission for
5 Asian-American applicants. And it's shown in the data.
6 While the number admitted does rise slightly, the number of
7 Asian-Americans applying is still over 7,800. As such, the
8 actual admissions rate hardly changes at all, only moving
9 1 percentage point from 5.1 to 5.8 percent, less than
10 1 percentage point.

11 And recall there's a substantial impact on the
12 number of black, Hispanic, and other ethnoracial minorities
13 on Harvard's campus. This is a reduction among the students
14 who already feel a heightened sense of isolation, who also
15 lead many of the efforts which improve the campus racial
16 climate for all students of color.

17 Plaintiffs will claim that race-neutral
18 alternatives can achieve the same levels of diversity.
19 Students' testimony will focus on two reasons that this has
20 problems. And it's not on the slide.

21 But the first reason is that our student Itzel will
22 testify that it was important to her that Harvard valued race
23 and racial diversity on campus. And she may not have applied
24 if that were not the case. The admissions pool may actually
25 change if Harvard no longer considered race.

1 Second, the parties' experts have put forth several
2 race-neutral alternatives. There are primarily three in
3 play. But under all three, there is a reduction of
4 approximately 30 percent of the number of African-American
5 students on campus. Again, a group that already feels
6 racially isolated.

7 Now, I'll turn very briefly to plaintiff's second
8 claim of a white admissions advantage. Again, students are
9 here to show that it's disconnected from a policy that
10 appreciates ethnoracial identity and promotes diversity.
11 This disconnect is shown by the fact that banning
12 race-conscious admissions predominantly benefits white
13 students.

14 But this disconnect is also shown by the data which
15 suggests that any white admissions advantage is due to
16 Harvard's preferences for ALDC applicants, athletes, legacy
17 applicants, those on the dean or director's list, and
18 children of faculty or staff. These preferences, as we saw,
19 are substantial. And two pieces of evidence suggest it is
20 these preferences, not race-conscious admissions which
21 explain the white admissions advantage.

22 Now, first, I don't have a slide for this, but it's
23 in the reports that we've heard about several times.
24 Harvard's own internal report notes athletes and legacies
25 explain the difference in raw admit rates for Asian-American

1 and white applicants. You'll see that come out during the
2 trial.

3 And then second, the raw numbers. A table in
4 plaintiff's expert report provides the following breakdown of
5 admitted students over six years. It shows the total admits
6 broken down by race. It also shows the total admits
7 receiving special ALDC preferences by race.

8 It's immediately apparent that the number of white
9 students receiving these preferences dwarfs those of all
10 other racial groups.

11 Adding them up makes it even clearer. A totaling
12 of 2,678 white admittees are associated with ALDC
13 preferences. To put this in perspective, that's roughly
14 equal to all the Asian-American applicants admitted and
15 roughly equal to all the Hispanic and black students admitted
16 combined.

17 Numerically any disadvantage Harvard faces is more
18 likely attributable to these ALDC preferences and
19 race-conscious admissions. As such, any remedy that
20 addresses a white admissions advantage would not involve
21 banning race-conscious admissions but addressing the actual
22 underlying issue.

23 Now, we all know that this case has national
24 significance, but it also has personal significance to our
25 students and the countless other prospective, current, and

1 other former students of Harvard and beyond. Race
2 consciousness is critical for campus diversity, and it's
3 critical for viewing the whole person.

4 Our student Sarah Kohl will perhaps state it best.
5 To not see my race is to not see me at all.

6 Thank you.

7 Good morning, Your Honor. I have the unenviable
8 position of standing between everyone and lunch, so I will
9 try to be brief.

10 THE COURT: I'm not that hungry.

11 OPENING STATEMENT OF AMICI ORGANIZATIONS

12 MS. HOLMES: My name is Jennifer Holmes from the
13 NAACP Legal Defense and Educational Fund. We represent 2,500
14 Harvard student and alumni organizations that joined this
15 lawsuit as amici in support of Harvard's ability to consider
16 race as one of many factors in its holistic admissions
17 process.

18 Collectively, these organizations represent
19 thousands of Harvard students and alumni. They are black,
20 white, Latino, Native American, and Asian-American. In fact,
21 ten of the organizations that we represent are Asian or
22 Asian-American affinity groups. Our clients are the children
23 of immigrants, those who can trace their lineage back to
24 antebellum slavery and before, and those whose ancestors were
25 indigenous to this country. Many of them were the first in

1 their families to attend Harvard, and some of them were the
2 first in their family to attend any college at all.

3 They are doctors, public servants, professors,
4 entrepreneurs, and many are students still figuring out what
5 the future holds for them and just trying to make it through
6 this semester of organic chemistry.

7 The 25 organizations that we represent are
8 emblematic of Harvard's diversity and play a crucial role in
9 helping Harvard realize the benefits of that diversity. They
10 join this case because their racial identities matter both to
11 who they are and how they shape Harvard.

12 SFFA ignores this reality. As Harvard's counsel
13 mentioned, SFFA's stated goal in this case was to change the
14 law and make race-conscious admissions illegal. That claim
15 was dismissed.

16 But in its summary judgment papers, SFFA continued
17 to argue that Harvard should no longer be permitted to
18 consider race. So when Your Honor hears that affirmative
19 action is not on trial and that diversity is not on trial,
20 the Court need only review the record in this case and SFFA's
21 ultimate goal in this lawsuit.

22 SFFA wants Harvard to create an admissions system
23 where we can't acknowledge racial identity, where race gets
24 redacted, erased, and ignored, applicants can't talk about it
25 or reveal it, and Harvard can't consider it.

1 But allowing universities to consider race in
2 admissions as one of many factors is a necessary part of
3 achieving the constitutional goal of pursuing the educational
4 benefits of diversity.

5 As the Supreme Court recognized in *Fisher*, a
6 diverse student body promotes enhanced classroom dialogue and
7 the lessening of racial isolation and stereotypes. Diverse
8 learning environments improve critical thinking skills and
9 prepare students for careers in an increasingly global work
10 force.

11 We also can't forget that race affects the
12 opportunities that students receive even before they apply to
13 college with bias and structural barriers imbedded in school
14 discipline, standardized tests, and whether a student is
15 selected for advanced courses or even the cheerleading team.

16 An admissions process that considers race, along
17 with academics, extracurriculars, civic engagement, career
18 goals, socioeconomic economic status, parental occupation,
19 geography, and many other factors allows for a truly
20 individualized and equitable assessment of students that
21 examines the whole person.

22 You will hear testimony from three Harvard students
23 and one alumni whose life experiences offer real-world
24 examples of the concepts I just described. They are
25 Catherine Ho, a Vietnamese-American student; Madison Trice, a

1 black student; Cecelia Nunez, a Latina and African-American
2 student; and Margaret Chen, a Chinese-American alumna.

3 If you take nothing else from their testimony, know
4 that these witnesses are the ones who have firsthand
5 experience with student life at Harvard. They have spent
6 many days learning at Harvard and contributing their talents
7 to its campus. They're the ones collaborating in the
8 library, at the laboratory, at the late-night study sessions,
9 or sometimes feeling excluded from those spaces because even
10 at Harvard real inclusion is still a work in progress.

11 Our witnesses' voices and perspectives and stories
12 cannot be accounted for in statistical modeling. And unlike
13 any of the witnesses that SFFA or Harvard will put on, these
14 witnesses will offer a window into the student experience,
15 including going through the application process and learning
16 in the diverse environment that Harvard strives to cultivate.

17 You will hear a few common themes from our
18 witnesses. They will share personal stories about how their
19 racial and ethnic identities figured prominently into their
20 experiences growing up and continue to shape their experience
21 at Harvard. Race is just not something they can separate
22 from who they are. And being unable to share that with a
23 college admissions officer would place students like them at
24 a significant disadvantage.

25 Second, cultural organizations played a meaningful

1 role in enhancing their college and alumni experiences. The
2 educational benefits of a school like Harvard are not just
3 found in the classroom. These organizations serve as support
4 systems, hubs of civic and intellectual engagement, inclusive
5 social spaces, and voices that challenge the Harvard
6 administration when it needs to do better.

7 They rely on a diverse student body for their
8 membership. And if the number of students of color on campus
9 declined, some of these organizations would cease to exist or
10 would operate at a diminished capacity.

11 Catherine Ho will testify about how her identity as
12 a Vietnamese-American was front and center in her admissions
13 application. Ms. Ho's parents were refugees who were
14 resettled in the U.S. during the Vietnam War. In her
15 personal essay, Ms. Ho wrote about the idea that the
16 Vietnamese language has no past tense, so everything is
17 expressed in the present tense. She explored the concept
18 that this structural aspect of the language helped her
19 parents not to dwell on hardships of the past but to focus on
20 pursuing a better life in the present, which for Ms. Ho
21 included extensive volunteer work at the same refugee
22 organization that helped her mother years before she was
23 born.

24 SFFA claims that Asian-American applicants are
25 primarily a collection of strong SAT scores and academic

1 credentials. Although Ms. Ho's scores were impressive, SFFA
2 couldn't be more wrong that those scores represented the sum
3 total of her life by the end of high school. If SFFA
4 prevails in this case, students like Ms. Ho will be forced to
5 erase the formative experiences that shaped their lives when
6 they apply to college. Applicants of color, in particular,
7 will be at a disadvantage because they will not be able to
8 share compelling stories of adversity or identity that relate
9 to race.

10 And Harvard, whose mission is to educate the
11 citizen leaders of tomorrow, will be forced to adopt a
12 definition of "merit" that is blind to the people behind the
13 numbers.

14 Although Harvard now strives to create a class of
15 high achieving students of diverse racial, geographic, and
16 socioeconomic backgrounds, that was not always the case.
17 Until the late 1970s, Harvard was a bastion of the white,
18 privileged, and male.

19 This has changed, to a large degree. But as
20 Harvard's expert will testify, the remedies sought by SFFA
21 threatens to slash the number of students of color on campus
22 and turn back the clock to a time when the halls of Harvard
23 were predominantly white and difference was not welcome or
24 celebrated.

25 Our witness Madison Trice will testify about her

1 experience in an educational environment -- in a similar
2 educational environment as one of the few black students at a
3 predominantly white high school. Despite excellent grades,
4 she faced classmates who doubted her abilities and her
5 intellect and teachers who steered her away from gifted and
6 talented courses until her parents intervened.

7 She felt isolated in the classroom, treated as an
8 other, an anomaly, and a curiosity because of her skin tone
9 and her hair. Seeing new black students enter the high
10 school in lower grades each year was a bittersweet experience
11 for Ms. Trice. She was happy to see more representation but
12 feared that their experience, like her own, would be painful,
13 marked by isolation and tokenism, and carrying the burden of
14 being a symbol and a spokesperson of their race.

15 Ms. Trice will testify that when she came to
16 Harvard in 2017, discovering a school more significant than
17 her high school was a revelation. Through her involvement in
18 the Association of Black Harvard Women and the Black Students
19 Association, Ms. Trice found a rich, supportive network of
20 black students. She now helps organize events that encourage
21 campus engagement with issues that affect communities of
22 color and provide a social and intellectual hub for students
23 from all backgrounds.

24 For example, the black students union -- Black
25 Students Association hosted a panel on police brutality after

1 a black student was assaulted by the police.

2 Ms. Trice, like other Harvard students, can also
3 take advantage of a range of events put on by other
4 organizations such as "walk tails" or a women of color
5 cocktail and discussion night hosted by the Asian-American
6 women's association. Or the Harvard Pow Wow, hosted annually
7 by the Native Americans of Harvard College. Or Brown Sugar,
8 a massive dance party hosted Fuerza Latina and other cultural
9 groups and one of the few parties where you will hear Spanish
10 music on campus.

11 Ms. Trice will testify that when new black faces
12 arrive at Harvard each year on move-in day, she no longer
13 feels bittersweet but instead is joyful about the diverse,
14 vibrant community that awaits them.

15 SFFA's goal of eliminating race-conscious
16 admissions threatens this community and the organizations
17 that help it thrive.

18 So far I've painted a rosy picture of Harvard, but
19 you will hear testimony that Harvard is not perfect. The
20 organizations we represent often challenge the Harvard
21 administration to support and include students of color.
22 Margaret Chen has spent decades advocating for
23 Asian-Americans at Harvard, first as a student and minority
24 recruiter, then as an alumni interviewer, and now as an
25 active member of various alumni organizations.

1 Experiencing firsthand the transformative impact of
2 Harvard's diverse environment on her own life and career,
3 Ms. Chen has pushed the administration to hire more
4 Asian-American professors and admissions officers, to offer
5 an ethnic studies program, and to increase training on
6 cultural bias and stereotypes.

7 She knows from personal experience that advocating
8 for Asian-Americans does not mean wiping away race altogether
9 or, as SFFA suggests, lumping Asian-Americans in with white
10 students, as if their unique life experiences have no value.

11 You will hear that even as diversity has grown on
12 campus, some students still face racial isolation or episodes
13 of racial insensitivity.

14 The organizations we represent play an important
15 role in supporting students who face these challenges,
16 especially when Harvard's own support system falls short.

17 Cecelia Nunez will testify about how she has been
18 called racial slurs on campus when just trying to enjoy a
19 night out with friends. Her organization, Fuerza Latina,
20 conducts mental health check-ins with its members and
21 successfully lobbied the administration to hire more mental
22 health counselors with experience on issues of race and in
23 particular Latino identity to better serve students on
24 campus.

25 Harvard has made great strides over the years, but

1 there's still a pressing need for more diversity and
2 inclusion. Being able to consider race as part of a holistic
3 admissions process is necessary for Harvard to continue to
4 pursue these goals. Eliminating race altogether would make
5 the existing challenges faced by Harvard students of color
6 far worse.

7 SFFA wants you to believe that none of these
8 experiences matter and there's no value in Harvard's
9 consideration of race. They want you to believe that Harvard
10 should ignore race and that applicants should erase their
11 racial identity when they present themselves for admission.
12 But a colorblind approach to college admissions means that
13 you close your eyes to the realities of racial inequities. A
14 colorblind approach means that you close your eyes to the
15 full, lived experience of each applicant. A colorblind
16 approach means that you close your eyes to the value of a
17 campus where students of different backgrounds learn
18 alongside each other, challenge each other, overcome
19 stereotypes, and shape the campus into a place that is
20 increasingly inclusive and intellectually stimulating.

21 The diversity on Harvard's campus is a foundational
22 part of the student experience, and the organizations we
23 represent are the engines that bring that diversity to life.

24 Creating supportive networks is fostering outreach
25 and exchange and holding Harvard accountable on issues that

1 affect communities of color. The law recognizes Harvard's
2 right to foster that kind of campus, and our witnesses will
3 make clear why it is imperative that Harvard continue to do
4 so.

5 Thank you.

6 THE COURT: All right. Thanks very much, everyone.
7 We'll recess for lunch and be back at ten of 2:00.

8 THE CLERK: Court is adjourned.

9 (Court recessed at 12:50 p.m.)

10 *** AFTERNOON SESSION ***

11 THE COURT: Do you want to call your witness?

12 MR. MORTARA: SFFA calls Dean William Fitzsimmons.

13 THE CLERK: Can you please raise your right hand.

14 (WILLIAM FITZSIMMONS duly sworn by the Deputy
15 Clerk.)

16 MR. HUGHES: Your Honor, before I get started with
17 the witness, I've got a binder of the exhibits that we may
18 get to with him during his examination. Would you like a
19 copy of that binder or would you prefer just to follow along
20 on the screen?

21 THE COURT: I'll take a binder. I'm going to
22 confess to still using a paper calendar too. I like paper.

23 DIRECT EXAMINATION

24 BY MR. HUGHES:

25 Q. Good afternoon, Dean Fitzsimmons?

1 **A.** Good afternoon.

2 **Q.** We haven't met yet. My name is John Hughes. I'll be
3 examining you today. Nice to meet you.

4 **A.** Good to meet you.

5 **Q.** I'd like to start with some background about your
6 experience in the Harvard admissions office. You began
7 working in the Harvard admissions and financial office in
8 1972, correct?

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

10 **Q.** What were your job title? What were your
11 responsibilities at that time?

12 **A.** It was a long time ago, but I think it was assistant
13 director of admissions.

14 **Q.** I understand you did that job for two or three years, and
15 then you shifted to some different responsibilities within
16 Harvard, with the Harvard fund for about a year and a half;
17 is that right?

18 **A.** That's not quite the sequence, no. I then became
19 director of admissions. That other position you mentioned
20 didn't occur until about the mid '80s.

21 **Q.** You were with the Harvard fund for about a year and a
22 half, correct?

23 **A.** Yes.

24 **Q.** What did you do when you were working for the Harvard
25 fund?

1 **A.** It was a job that was mostly designed to raise gifts for
2 financial aid. It's annual gifts, small gifts, to try to
3 inspire classmates mostly through reunions to make gifts that
4 we thought were critically important to us.

5 **Q.** And after you finished working for the Harvard fund, what
6 was your next position with Harvard?

7 **A.** It was dean of admission and financial aid.

8 **Q.** And that's a position that you've held ever since,
9 correct?

10 **A.** That's correct.

11 **Q.** And you got that position, to be clear, in 1986, right?

12 **A.** That's right.

13 **Q.** So for the last 32 years, you've been the person in
14 charge of Harvard's admissions office, correct?

15 **A.** That's correct.

16 **Q.** And you have a number of folks that report and work with
17 you in the admissions office, right?

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

19 **Q.** One of those is Director McGrath, right?

20 **A.** Yes.

21 **Q.** How long has Director McGrath worked with you in the
22 admissions office?

23 **A.** She came on board very shortly after I became dean. I
24 would say maybe within the year perhaps.

25 **Q.** So you've been working with her at least approximately

1 30 years?

2 **A.** Yes.

3 **Q.** And how many people do you have in the admissions office
4 that are reading applications to Harvard?

5 **A.** About 40 people.

6 **Q.** Does that include you?

7 **A.** Yes.

8 **Q.** So all of you read applications and participate in the
9 admissions process that we've heard described this morning,
10 correct?

11 **A.** Yes.

12 **Q.** You were here this morning for the opening statements,
13 right?

14 **A.** I was.

15 **Q.** And would you agree that you are ultimately responsible
16 for the way the Harvard admissions process is administered?

17 **A.** I'm not sure I would say that. It really is a team
18 effort. I have one of the 40 votes, but it's really the
19 responsibility of everyone.

20 **Q.** You agree that you lead the admissions office, correct?

21 **A.** Yes.

22 **Q.** Do you agree that you have a responsibility to make sure
23 that the admissions process is fair?

24 **A.** Yes. I'm one of, as I said, really 40 people and more.

25 **Q.** Do you agree that you have a responsibility to make sure

1 that each applicant that is applying to Harvard is treated
2 fairly?

3 **A.** That is certainly one of my responsibilities but also the
4 responsibility of everyone on the committee.

5 **Q.** Something that you would expect everybody in the
6 admissions office to do as the leader of the office, correct?

7 **A.** That's correct.

8 **Q.** Now I'd like to shift gears a little bit and talk about
9 the Harvard admissions process, about the part that we only
10 heard a little bit about this morning. And that's the
11 beginning of the cycle, recruitment. You heard Mr. Lee talk
12 about recruitment, right?

13 **A.** I did.

14 **Q.** And recruiting prospective students is a very important
15 part of the work done by you and your colleagues in the
16 admissions office, correct?

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

18 **Q.** I'd like to look at some things that the admissions
19 office has said about recruiting. I'm going to show you on
20 the screen Plaintiff's Exhibit 83.

21 Before I do that, Dean Fitzsimmons, I'm going to
22 let you know I put a binder in front of you that has numbered
23 tabs which each of the exhibits that we may discuss in our
24 time together over the course of the next couple of days -- I
25 can't promise we'll get to all of those, but if you ever want

1 to see a paper copy, see more context, please do so. It will
2 be right in front of you.

3 **A.** But it's going to be on the screen.

4 **Q.** It will be on the screen. Hopefully we can follow along
5 on the screen. I'm going to show you Plaintiff's Exhibit 88.

6 MR. LEE: Can I have a hard copy?

7 BY MR. HUGHES:

8 **Q.** I've got on the screen, Dean Fitzsimmons, the third page
9 of Plaintiff's Exhibit 88. Do you recognize this as a
10 document from your admissions office?

11 **A.** I do.

12 **Q.** What this document is, it's the interviewer handbook,
13 correct?

14 **A.** That's correct.

15 **Q.** And the interviewer handbook is something that you supply
16 to your alumni interviewers, correct?

17 **A.** Among other things, correct.

18 **Q.** Is it also supplied to the folks working in the
19 admissions office?

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

21 **Q.** And the information that's contained in here is an
22 accurate description of how the admissions process at Harvard
23 works, correct?

24 **A.** Yes. It's kind of a thumbnail sketch, as it were, but
25 it's an overview.

1 **Q.** Alumni interviewers are important to the process because
2 virtually every applicant to Harvard interviews with an
3 alumni of Harvard who lives in their geographic area,
4 correct?

5 **A.** The majority do.

6 **Q.** So now I want to see what the alumni interview handbook,
7 Plaintiff's Exhibit 88, has to say about recruitment. So I'm
8 going to turn to page 15.

9 MR. LEE: Your Honor, I have no objection. But I
10 think before we start asking witnesses about exhibits, we
11 ought to offer them.

12 THE COURT: Do you have exhibits that are agreed
13 upon or are you going to admit each one as we go?

14 MR. LEE: We're admitting them as we go.

15 MR. MORTARA: That's fine. I thought we might wait
16 for a break and do a bunch at the same time.

17 But Your Honor, I offer Plaintiff's Exhibit 88.

18 MR. LEE: No objection, Your Honor.

19 THE COURT: Admitted.

20 (Plaintiff Exhibit No. 88 admitted.)

21 BY MR. HUGHES:

22 **Q.** Dean Fitzsimmons, I'm going to blow up a part that I want
23 to take a look at with you together. These screens are a
24 little small. I want to make sure you can see what's on the
25 screen in front of you.

1 **A.** I can.

2 **Q.** This is the part of the alumni interviewer handbook that
3 has to do with recruiting prospective students, correct?

4 **A.** That's correct.

5 **Q.** And it starts by saying, "Many people often ask why,
6 given the thousands of applications Harvard receives every
7 year, we must invest such time, effort, and resources to
8 recruit talented students. Vigorous recruitment, however,
9 has been instrumental to our success."

10 Do you see that?

11 **A.** I do.

12 **Q.** Do you agree with that statement?

13 **A.** I do.

14 **Q.** And then down below you see I've got some additional
15 language highlighted that says, "Active recruitment helps
16 sustain the critical opportunity to 'consciously shape the
17 makeup of our student body' as colleges compete intensely for
18 the best students."

19 Do you see that?

20 **A.** I do.

21 **Q.** Do you agree with that statement?

22 **A.** I do.

23 **Q.** So recruiting is part of how Harvard consciously shapes
24 the makeup of Harvard's student body, right?

25 **A.** It's certainly one of the most important beginnings.

1 **Q.** Now I've just highlighted the next paragraph down below
2 what we've just looked at. I want to read this into the
3 record and ask you a few questions about it.

4 "Direct mail. Virtually all college-bound students
5 take the PSAT by their junior year. High school juniors and
6 seniors also take SATs and the ACT which survey students
7 about their academic experiences and interests. With
8 students' permission, the College Board and the American
9 College Testing company sell colleges this information.
10 Harvard has identified accomplished students with these
11 searches for many years. We send letters and view books to
12 searched students, and we share student lists with schools
13 committee chairs to craft recruitment plans and to identify
14 students to invite to local presentations. Our research
15 shows that students who qualify for this search are about
16 twice as likely to be admitted as other applicants."

17 Do you see that?

18 **A.** I do.

19 **Q.** Does that accurately describe how Harvard uses the
20 information that it purchases from the College Board?

21 **A.** It's a partial explanation.

22 **Q.** To make sure we unpack what's happening here, Harvard
23 gets information from the College Board, which administers
24 the PSAT, about certain students, correct?

25 **A.** Yes.

1 **Q.** Based on things like SAT scores, SAT scores, PSAT scores,
2 geography, and race or ethnicity, correct?

3 **A.** Yes.

4 **Q.** And then what Harvard does with that information is it
5 generates a list of students to invite to apply to Harvard,
6 correct?

7 **A.** Yes. It's one of the ways we recruit.

8 **Q.** It not only uses those names to create the mailing list,
9 so to speak, those searched student lists are provided to
10 underrepresented minority recruitment programs, correct?

11 **A.** That's true.

12 **Q.** And they're used when you go out on the road. You go all
13 over the country every fall meeting prospective students,
14 right?

15 **A.** Yes.

16 **Q.** One of the ways the list is used to identify people to
17 invite to come to meet with you and your staff when you go
18 out on the road, correct?

19 **A.** Yes. It's what we call a good start.

20 **Q.** And you also supply the list to the schools committee,
21 correct?

22 **A.** We do.

23 **Q.** Tell us what that is.

24 **A.** The schools committee. There are about 10,000 alumnae
25 and alumni around the country and around the world who help

1 us recruit, first of all, which is what we're talking about
2 here. But then they will interview all of the local
3 candidates in their local areas. Then afterwards they have
4 another job. When the students are admitted, we also ask
5 them to do everything they can to encourage the students to
6 come to Harvard.

7 **Q.** So getting back to our -- thank you for that.

8 But getting back to our search list, the last
9 sentence I have highlighted here says, "Our research shows
10 that students who qualify for this search are about twice as
11 likely to be admitted as other applicants."

12 That's a true statement, right?

13 **A.** I believe it was at the time, yes.

14 **Q.** And whether or not a student is searched is actually
15 something the admissions office keeps track of during the
16 admissions cycle, correct?

17 **A.** We do.

18 **Q.** Getting on the list is a good thing if you're a high
19 school student who wants to go to Harvard, correct?

20 **A.** The fact that you are on the searched list would not make
21 a difference in terms of the decision the committee might
22 make, but it's a good thing for us to know in terms of
23 whether or not our outreach through the search program is
24 helpful.

25 **Q.** Now I'd like to look at an example of the letter that you

1 send to searched students, and that's going to be Plaintiff's
2 Exhibit 55.

3 MR. HUGHES: Before I get started, Your Honor, I'd
4 like to offer Plaintiff's Exhibit 55.

5 MR. LEE: No objection, Your Honor.

6 THE COURT: Admitted.

7 (Plaintiff Exhibit No. 55 admitted.)

8 BY MR. HUGHES:

9 Q. So, Dean Fitzsimmons, I've got again blown up on the
10 screen. Will you just let me know if at any time you can't
11 see what's on the screen in front of you? Otherwise I'll
12 just assume that you can.

13 A. I will.

14 Q. So I've got on the screen the first page of Plaintiff's
15 Exhibit 55. You're one of the people this email is addressed
16 to, correct?

17 A. Yes.

18 Q. It's for fall 2013. You can see that down below in
19 attachments, correct?

20 A. Yes.

21 Q. And one of the attachments is the search letter, correct?

22 A. That's correct.

23 Q. And the search letter is the way the admissions office
24 refers to this letter that goes out to the names that you get
25 from the College Board and the ACT, correct?

1 **A.** Yes. It's the first communication of many.

2 **Q.** Based on your mailing list, you communicate more than one
3 time with these potential applicants?

4 **A.** That's true.

5 **Q.** Now I'd like to show you -- I'm on page 2 now of
6 Exhibit 55. I'll blow up -- part of what you tell students
7 in the letter is that "Your strong grades and standardized
8 test scores indicate to us, to Harvard, that Harvard and
9 other selective institutions may be possibilities for you."

10 That's part of what you communicate in the letter,
11 correct?

12 **A.** That's right.

13 **Q.** And whether a high school student receives this letter
14 depends on whether they're on your list, right?

15 **A.** That's right.

16 **Q.** Now, Dean Fitzsimmons, I'd like to show you Plaintiff's
17 Exhibit 2.

18 MR. HUGHES: Before we proceed, I'd like to offer
19 Plaintiff's Exhibit 2 into evidence.

20 MR. LEE: Can we at least have the foundation as to
21 whether he's seen it? Otherwise no objection.

22 BY MR. HUGHES:

23 **Q.** Dean Fitzsimmons, you've seen this document before. We
24 showed it to you in your deposition, right?

25 **A.** Yes. I think I recall it.

1 MR. LEE: No objection, Your Honor.

2 THE COURT: Admitted.

3 (Plaintiff Exhibit No. 2 admitted.)

4 BY MR. HUGHES:

5 Q. What I'd like to focus on -- and I'll blow this up at the
6 top here. PSAT is the basis for -- let me back up.

7 What this document, this Plaintiff's Exhibit 2,
8 shows searches that are done in 2013 for the class of 2018,
9 correct?

10 A. That's correct.

11 Q. It has data that about searches that occur in 2018, and
12 it also has information about the preceding class year, 2017,
13 correct?

14 A. Where would that be? I'm sorry. Oh, I see. Yes. Yes.

15 Q. Agreed?

16 A. Agreed.

17 Q. The PSAT is the source of, in 2017, 92,510 letters,
18 correct?

19 A. That's correct.

20 Q. And in 2018, 95,119, correct?

21 A. That's correct.

22 Q. Let me show you the rest of the document. That is the
23 majority of the total of the letters sent. I've got the
24 totals here at the bottom, correct?

25 A. They sound right.

1 **Q.** The PSAT is the primary source of names for the list,
2 correct?

3 **A.** Yes.

4 **Q.** Okay. So now I want to go back up and look at what we
5 have for the PSAT.

6 So in the left-hand column we have, it says PSAT
7 and we've got some different categories of people in that
8 column, correct?

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

10 **Q.** I want to start with the first two, "High Scores Men" and
11 "High Scores Women." Do you see that?

12 **A.** I do.

13 **Q.** And up at the top of the -- in the second column we've
14 got an SAT score range. Do you see that?

15 **A.** I do.

16 **Q.** For men, that's 1380 to 1600, correct?

17 **A.** Correct.

18 **Q.** And for women, that's 1350 to 1600, direct?

19 **A.** Correct.

20 **Q.** These are some of the people that will be getting the
21 search letter we just looked at, right?

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

23 **Q.** And the next column, that column is entitled
24 "ETH/States." Do you see that?

25 **A.** I do.

1 **Q.** ETH stands for ethnicity, correct?

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

3 **Q.** And "States" stands for geographic states, correct?

4 **A.** Correct.

5 **Q.** And the ethnicity for high scores, men and women, is KOW.
6 Do you see those codes there?

7 **A.** Yes.

8 **Q.** W stands for white, correct?

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

10 **Q.** O stands for other, correct?

11 **A.** Probably. Because these things change. Probably.

12 **Q.** And K stands for unknown when you don't fill it out?

13 **A.** I think it's essentially everyone, when all is said and
14 done.

15 **Q.** I'm sorry?

16 **A.** I think it would be everyone, it sounds like. In other
17 words -- I'm not 100 percent sure, but just looking at this,
18 it would be all high scores no matter, of all states and all
19 ethnicities.

20 **Q.** Let's look down the test data. Let me ask you this.

21 Who is Elizabeth Young?

22 **A.** She used to be our data person and computer interface
23 person and research person.

24 **Q.** She'd be very familiar with this date, correct?

25 **A.** Yes.

1 **Q.** And she testified that K is unknown. It's when somebody
2 doesn't fill it out on the common app. You'd have no reason
3 to dispute that, right?

4 **A.** I would take her word for it.

5 **Q.** If she testified that O means "other" on the common app,
6 you'd take her word for it, too, correct?

7 **A.** I would.

8 **Q.** Just to kind of clear things up, you said it might be
9 referring to everyone. Here we have down here -- we'll come
10 back to sparse country in a minute, but we've got these
11 categories down here which are high scores Asian men, high
12 scores Asian women, females, right?

13 **A.** Yes.

14 **Q.** And those are additional people who are getting letters,
15 correct?

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

17 **Q.** They're not included in that KOW category, correct?

18 **A.** It's the same range, but that would be technically
19 correct.

20 **Q.** They're different people, right?

21 **A.** Yeah.

22 **Q.** It's the same SAT range, correct?

23 **A.** Yes.

24 **Q.** And if we go down here to BCHNP. That's -- BCHNP stands
25 for black, Chicano, Hispanic, Native American, and Puerto

1 Rican, correct?

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

3 **Q.** All of the states, United States and Puerto Rico, those
4 applicants are invited to apply if they have an SAT score of
5 1100 up to 1600, correct?

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

7 **Q.** So in Harvard's view, a student in this BCHNP category
8 with the PSAT of 1100 could be admitted and succeed at
9 Harvard, correct?

10 **A.** Just simply -- that isn't technically correct. It would
11 simply be these are people who we hope would consider
12 Harvard, in looking at that range.

13 **Q.** And you tell them in the letter that you send them that
14 their SAT scores indicate that they could be a good candidate
15 to apply to Harvard, right?

16 **A.** That's right. That they could be.

17 **Q.** And Harvard does not invite white or Asian students to
18 apply unless they have a 1350 for women or a 1380 for men,
19 correct?

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

21 **Q.** Even though you agree that an Asian student with an 1100,
22 depending on the individual case, could be successful at
23 Harvard, correct?

24 **A.** It's possible that any student could be.

25 **Q.** And of course you must admit that Asian-American

1 applicants are treated very differently than all other
2 minority applicants in terms of receiving an invitation to
3 apply to Harvard based on information provided by the College
4 Board, correct?

5 **A.** Again, it is really exactly the same parameters as was
6 the case for white students.

7 **Q.** My question is the Asian-American applicants were treated
8 very differently in terms of getting the letter based on the
9 information from the College Board than other minority
10 potential applicants, correct?

11 **A.** Again, there's a slightly lower range for the other
12 minorities.

13 **Q.** So you would describe an 1100 on the PSAT as slightly
14 lower than 1350?

15 **A.** Yes.

16 **Q.** And slightly lower than 1380?

17 **A.** Yes.

18 **Q.** And the last time we asked you questions under oath, you
19 had no explanation for why Asian applicants who score 1100
20 and above are not being reached out to through this
21 particular recruiting method, correct?

22 **A.** It's simply with all of the outreach that we do for all
23 these categories, what we're trying to do, for example, with
24 the minority students who are not Asian is to get a sense of
25 to what extent economic background might make a difference in

1 their ability to score at higher levels on the SAT or the
2 PSAT. So it really comes down to the rather stark economic
3 differences and opportunities that are available for the
4 BCHNP.

5 **Q.** Dean Fitzsimmons, I'd like you to pick up your transcript
6 of your deposition that's in the coil-bound binder to your
7 right, on the far right of the desk. If you could open that
8 to page 73, please. If you could look at page 73, line 13.
9 Do you see that?

10 **A.** Yes, page 73.

11 **Q.** Line 13. Are you there?

12 **A.** Yes.

13 **Q.** "QUESTION: So my question is, why aren't Asian males who
14 score 1100 to 1370 being reached out to through this
15 particular search method?

16 "ANSWER: I don't have a precise answer.

17 "QUESTION: Do you have any answer?

18 "ANSWER: No."

19 Were you asked those questions? Did you give that
20 testimony?

21 **A.** If this says I did, I did. But again, I think it would
22 come down, at least in my mind, to having a precise answer.

23 **Q.** So when you're sending letters out to the people that are
24 on the list that you generate from the College Board, you
25 have three pieces of information: the score, geography,

1 race/ethnicity, correct?

2 **A.** There are some additional.

3 **Q.** Those are the ways the data is getting sorted here,
4 correct?

5 **A.** There's also self-reported grades.

6 **Q.** So you've got grades, SAT score, geography,
7 race/ethnicity, correct?

8 **A.** Yes.

9 **Q.** You don't have the information you need to do a
10 whole-person review, correct?

11 **A.** I'm sorry. Could you repeat that question?

12 **Q.** When you're sending these letters out, you don't have the
13 information that you need to do the kind of holistic review
14 that you say you do once these people apply, correct?

15 **A.** Certainly not. Just one of the most basic set of
16 components.

17 **Q.** Is the reason Harvard makes substantial racial
18 categorical distinctions in terms of who's getting invited to
19 apply based on this list, is that part of how Harvard
20 consciously shapes its student body?

21 **A.** No. It's simply trying to reach out to people from all
22 backgrounds, and especially those who have experienced
23 disproportionate effects of economic disadvantage.

24 **Q.** Do you remember the interview or handbook and the
25 language that we read that you agreed was accurate that said

1 recruitment is part of how Harvard consciously shapes its
2 student body? You remember that, right?

3 **A.** Yes.

4 **Q.** And are you saying that this is somehow an exception to
5 that, that the way you've sliced and diced the data here for
6 in terms of who gets an invitation to apply to Harvard is
7 somehow not part of how Harvard is consciously shaping its
8 student body?

9 **A.** No. It's certainly one of the things we do to recruit.

10 **Q.** And one of the things that you do to recruit to
11 consciously shape your student body is to differentiate who
12 you invite based on race or ethnicity, correct?

13 **A.** You're technically correct.

14 **Q.** Now I want to focus on the last category here, Sparse
15 Country, near and dear to my heart because that's where I'm
16 from.

17 **A.** Which state?

18 **Q.** Montana, a great state.

19 Dean Fitzsimmons, we look at Sparse Country. In
20 Sparse Country you get invited to apply if you get a score
21 between a 1310 and a 1370, correct?

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

23 **Q.** And the people who are invited to apply from Sparse
24 Country are the unknown, other, and white, correct?

25 **A.** Yes.

1 Q. Asians are not included in that list, correct?

2 A. Not in that particular list.

3 Q. Okay. And the score, again, is 1310 to 1370, correct?

4 A. That's right.

5 Q. Now, I want to see if you would help me build a map of
6 Sparse Country. You'll probably need to turn to the actual
7 paper Exhibit 2 because I'm going to switch it off of the
8 screen. Let me know when you're there.

9 A. It's P2?

10 Q. Yes.

11 A. Okay. I have it.

12 Q. I'm going to show you a map that your lawyers I think
13 plan to use with you in your examination. I want to see if
14 we can use it in mine. I've got that up on the screen. It's
15 a map of the United States divided up by docket, correct?

16 A. That is correct.

17 Q. The we'll take a little detour here.

18 Dockets are the way you kind of break down the
19 applicant pool in terms of your process in the admissions
20 office, correct?

21 A. It's a beginning of the committee process.

22 Q. And the geographic breakdown, right?

23 A. More or less.

24 Q. So now if you've got P2 in front of you, I want to walk
25 through the states and we'll mark them here on your map.

1 Okay?

2 So the first one is AL. That's Alabama, right?

3 **A.** That is correct.

4 **Q.** And I've got an X on Alabama on the screen, correct?

5 **A.** Very good. Yes.

6 **Q.** The second one is Alaska, correct?

7 **A.** Yes.

8 **Q.** And now we've got an X on Alaska, correct?

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

10 **Q.** And we've got Arizona, and I've got that correct on the
11 screen, right?

12 **A.** Yes.

13 **Q.** Arkansas?

14 **A.** Yes.

15 **Q.** Idaho?

16 **A.** Yes.

17 **Q.** Louisiana?

18 **A.** Yes.

19 **Q.** Maine?

20 **A.** Yes.

21 **Q.** Mississippi?

22 **A.** Yes.

23 **Q.** Montana?

24 **A.** Yes.

25 **Q.** Nebraska?

- 1 **A.** Yes.
- 2 **Q.** Nevada?
- 3 **A.** Yes.
- 4 **Q.** New Hampshire?
- 5 **A.** Yes.
- 6 **Q.** New Mexico?
- 7 **A.** Yes.
- 8 **Q.** North Dakota?
- 9 **A.** Yes.
- 10 **Q.** Oklahoma?
- 11 **A.** Yes.
- 12 **Q.** South Dakota?
- 13 **A.** Yes.
- 14 **Q.** Utah?
- 15 **A.** Correct.
- 16 **Q.** Did I get that right?
- 17 **A.** Yes.
- 18 **Q.** Vermont?
- 19 **A.** Yes.
- 20 **Q.** Kind of crowded up there.
- 21 West Virginia?
- 22 **A.** Yes.
- 23 **Q.** And Wyoming, right?
- 24 **A.** Yes.
- 25 **Q.** Okay. 20 states, right?

1 **A.** Correct.

2 **Q.** And there's some pretty big population centers in some of
3 these states, like Las Vegas and Phoenix, New Orleans,
4 Oklahoma City, all metropolitan areas with significant
5 populations, correct?

6 **A.** There are certainly some large metropolitan areas within
7 those states.

8 **Q.** And turning back to Exhibit 2, which I'll put back on the
9 screen so everybody can see it, you invite -- so all of the
10 BCHNP candidates are invited to apply in Sparse Country.
11 Because every single state, anybody in that category that
12 gets 1100 or above gets invited to apply out of the black,
13 Chicano, Hispanic, Native American or Puerto Rican category,
14 they get invited to apply in those states, correct?

15 **A.** That would be correct.

16 **Q.** The only distinctions you have for Sparse Country are
17 white, other, and unknown. No Asians. We've already agreed
18 on that, correct?

19 **A.** Yes. Obviously they're included in the other searches.

20 **Q.** My question to you is, what is Harvard's explanation for
21 why in Sparse Country in 20 states, states that some of them
22 have big population centers, a white applicant with a 1310 is
23 invited to apply to Harvard, but an Asian male who lives in
24 any of those states with a 1370 is not? What are all the
25 reasons Harvard does that?

1 **A.** Again, we're looking for candidates from all different
2 kinds of backgrounds. In the Sparse Country states, there
3 are -- certainly there are some cities, but there are lots of
4 very rural areas. Again, we're trying to apply the same
5 standards for the different kinds of searches that we have.

6 **Q.** You're not suggesting that there aren't significant
7 Asian-American populations in Sparse Country, are you?

8 **A.** There are certainly some Asian-American populations in
9 Sparse Country.

10 **Q.** And what you're doing is -- you could have kids in Las
11 Vegas where there's a significant Asian-American population
12 at the same school, white kid, 1310, gets a letter that says
13 his scores qualify him to apply to Harvard. Asian kid
14 sitting next to him in class gets a 1370, they're comparing
15 notes. The Asian boy does not get invited to apply. The
16 white student does.

17 What is the possible explanation for that?

18 **A.** Well, again, we're looking for a diverse student
19 population, for all the reasons that was discussed in the
20 opening statement this morning. And we simply want to make
21 sure in those schools that we send encouraging messages to
22 people along our normal search parameters.

23 **Q.** Is part of how you achieve the diversity that Mr. Lee
24 discussed this morning is to put a thumb on the scale for
25 white students who you invite to apply from Sparse Country?

1 **A.** The fact that a person applied from Sparse Country might
2 be one of, again, many, many factors that could possibly go
3 into a decision. But there are people who, let's say, for
4 example, have only lived in the Sparse Country state for a
5 year or two. Let's say that can happen. And then on the
6 other hand there are people who have lived there for their
7 entire lives under very different settings.

8 So what we're trying to make sure we do, in an
9 even-handed way, is to reach out to what lots of people would
10 say is the heartland of America. And many of these states
11 that you have on your map are states where Harvard is not on
12 anyone's radar scope at all.

13 And one of the things we love to do is to get
14 students from any background, really, from those states who
15 could bring something special to Harvard that would help
16 educate fellow classmates.

17 One of my roommates was from Mitchell, South
18 Dakota, home of, you probably know, the Corn Palace, which
19 you may not know. But he was an amazing person. And the
20 thing that he brought to me and to everybody in our dorm was
21 a tremendous appreciation for what was happening in a state
22 where we get very few people. So he was a great ambassador.

23 We also of course will visit all of these states
24 every year. So we do everything we can to reach out to a
25 much broader range of people than certainly was the case at

1 Harvard when I was an undergraduate.

2 **Q.** I want to just try to focus on what we've got before us.
3 And that is in Sparse Country if you're an Asian male, you've
4 got to score 1380 to get an invitation from Harvard, correct?

5 **A.** Yes. And we would hope that that student would apply.

6 **Q.** In Sparse Country if you're white, either gender, you are
7 get invited to apply at 1310, correct?

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

9 **Q.** And all the stuff you just told me about some people have
10 lived there longer and some people just arrived one or two
11 years ago, you have no idea who that applies to at the time
12 that you're sending out these letters, correct?

13 **A.** That's correct.

14 **Q.** You don't know whether the recipient of the letter is
15 going to be like your roommate from South Dakota. You have
16 none of that kind of information when you send out the
17 letter, correct?

18 **A.** That's true. But people talk among themselves. So there
19 are times when a search letter will go out to someone, say,
20 with a lower search parameter. People start talking. People
21 start considering whether or not they might consider Harvard.
22 And that's one of the ways Harvard has changed, why it's
23 changed so dramatically in terms of its geographic
24 distribution over the past 35 or 40 years.

25 **Q.** So I get it. So when you have send a letter out to

1 somebody to recruit them, part of what you're doing is
2 sending a message, you said, with a lower search parameter.
3 They might start talking and get other people interested in
4 Harvard. Is that the gist of what you just said?

5 **A.** Yes. And that's exactly what has happened over the
6 years.

7 **Q.** And is the flip side of that message to the Asian student
8 from Sparse Country with a 1370 whose white pals tell him
9 they got invited to apply at 1310 and he didn't, what's the
10 message that student is supposed to receive?

11 **A.** I guess the general message would be, say within a high
12 school class and sometimes -- you're from Montana, and I know
13 there are large high schools in Montana, and there are some
14 very, very small high schools in Montana.

15 But the idea is to try to break the cycle, to try
16 to get people from a much broader array of states and
17 backgrounds to think about Harvard. So the idea at least is
18 to get Harvard on the map, just given the fact, remember,
19 that most students will end up going to college within about
20 one hour's drive of their home.

21 **Q.** Between the Asian student in Sparse Country with 1370 who
22 doesn't get the letter and the white student with the 1310
23 who does, the only difference between those two students, the
24 only different information that you have when you decide
25 whether or not to send that letter is race. Correct?

1 **A.** In terms of that letter, yes.

2 **Q.** And that's race discrimination, plain and simple, isn't
3 it, Dean Fitzsimmons?

4 **A.** It's reaching out to people who might be good applicants
5 for Harvard and hoping that these applicants will again talk
6 to their friends and think about whether or not Harvard could
7 be an option.

8 **Q.** Respectfully, sir, you're not answering my question.

9 The only different information you have between the
10 white applicant who you invite to apply with the 1370 and the
11 Asian --

12 MR. HUGHES: May I finish my question before you
13 object? I'll try again.

14 BY MR. HUGHES:

15 **Q.** My question is, the only reason that Harvard doesn't
16 invite the Asian student with the 1310 from Sparse Country
17 and does invite the white student with the 1310 is race?

18 MR. LEE: Asked and answered twice before.
19 Identically.

20 THE COURT: I'll let him answer it this time. It
21 has been asked and answered. You might want to move it
22 along.

23 THE WITNESS: On the search parameter, that very
24 small number of points is the difference.

25 BY MR. HUGHES:

1 **Q.** And that's race discrimination, plain and simple, isn't
2 it, Dean Fitzsimmons?

3 **A.** It is not.

4 **Q.** And is the decision to invite white students with lower
5 scores than Asian students from Sparse Country part of how
6 Harvard consciously shapes the makeup of its class?

7 **A.** We're simply trying to reach out to people from all over
8 the nation.

9 **Q.** I'm going to change topics now, talk about how athletes
10 and legacies are treated in the admissions process, okay?

11 **A.** Sure.

12 **Q.** To establish some common ground, I think you will agree
13 that, as a whole, the legacy applicant pool is on average
14 less ethnically diverse than the non-legacy applicant pool,
15 correct?

16 **A.** At the moment it is, but it's fast changing.

17 **Q.** But at the moment that holds true, right?

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

19 **Q.** Okay. And Harvard is very competitive. Most of your
20 applicants are turned away, correct?

21 **A.** Unfortunately, yes.

22 **Q.** And I'd like to talk to you about the admission rates,
23 the likelihood of admission to Harvard. That's something
24 that you and your colleagues in the Harvard admissions office
25 keep track of, correct?

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

2 **Q.** And I'd like to take a look at Plaintiff's Exhibit 163.

3 **A.** Will it be up on the screen, too?

4 **Q.** It should be.

5 **A.** I have 163.

6 MR. MORTARA: Before we get started, I'd like to
7 offer P163.

8 MR. LEE: No objection, Your Honor.

9 THE COURT: Admitted.

10 (Plaintiff Exhibit No. 163 admitted.)

11 BY MR. HUGHES:

12 **Q.** Do you see that, Dean Fitzsimmons?

13 **A.** This is the Sunday, March 2?

14 **Q.** Yes, sir.

15 **A.** Yes, I do.

16 **Q.** And you're getting at the bottom here an email from
17 Elizabeth Young, attaching certain statistics for a meeting I
18 guess on March 3, correct?

19 **A.** It sounds that way, yes.

20 **Q.** And at what point in the admissions process is early
21 March?

22 **A.** This is probably just as we were going into full
23 committees, and that's when the actual decisions are made.

24 **Q.** And so let's look at the fifth page of this document, the
25 fourth page of the document. I've got it blown up on the

1 screen, Dean Fitzsimmons. Do you see that in front of you?

2 **A.** I do.

3 **Q.** What we've got here, harkening back to the first page of
4 the email, we're in 2013. We're selecting the class of 2018,
5 correct?

6 **A.** Yes.

7 **Q.** And what we've got on the right-hand side of the screen
8 is information related to the class of 2018, correct?

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

10 **Q.** And on the left-hand side of the screen we've got
11 information related to 2017, correct?

12 **A.** That's correct.

13 **Q.** And you've got information that relates in both years
14 both to the overall applicant pool, correct?

15 **A.** Yes.

16 **Q.** And you've also got information that relates to the NLNA
17 portion of the applicant pool, correct?

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

19 **Q.** NLNA is non-legacy, non-athlete, correct?

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

21 **Q.** Why does Harvard, Harvard admissions office, separate out
22 the applicant pool by NLNA?

23 **A.** It's really a safeguard, in a sense, to make sure we're
24 going along the way Susie Chow and I stated before the OCR
25 investigation where we said that the difference between the

1 admission rate of whites and Asian-Americans had to do with
2 essentially lineage and athletics.

3 And then it actually relates back to the OCR report
4 itself, which found that we did not discriminate against
5 Asian-Americans. But it is a -- it's a thing that we have
6 done ever since then to provide another safeguard, another
7 check and balance on this, another way of trying to make sure
8 that we're being even-handed with Asian-Americans and white
9 students.

10 **Q.** So that the safeguard or check that the Harvard
11 admissions office does to ensure that there is not
12 discrimination against Asian-American applicants is to take
13 the athletes and the legacies out of the pool and look at the
14 portion of the pool that remains?

15 **A.** No. It's not the safeguard. There are many, many
16 safeguards. It's one of the things that we did even prior,
17 just to sort of let the public know prior to the OCR
18 investigation.

19 But then after the finding, we just wanted to make
20 sure we continued to take a look at this as one way of many
21 where we would make sure that we're treating every applicant
22 in a fair and even-handed way.

23 **Q.** And do you still do that today?

24 **A.** Yes.

25 **Q.** So a safeguard, one of many, you say, that Harvard

1 admissions office employs to check to make sure there's not
2 discrimination against Asian-American applicants is to take
3 the legacies and the athletes out of the applicant pool and
4 then analyze the remaining applicant pool, correct?

5 **A.** Yes. It's a very quick and simple thing to look at, but
6 it's one -- remember there are -- Professor Card identified
7 200 variables of factors in admission. Certainly grades and
8 scores are factors, as we know from this morning. And also,
9 though, it's also true that alumnae/alumni sons and daughters
10 and athletics are also factors, one of many factors in the
11 admissions process.

12 **Q.** So let's look at some admissions rates together. I've
13 got them highlighted at the top.

14 So the admission rate if you're not a legacy or not
15 an applicant in these class years is about 4 1/2 percent,
16 correct?

17 **A.** That would be correct. In a very rough kind of way.

18 **Q.** That sounds right to you, right?

19 **A.** Yes.

20 **Q.** And then if you add the legacies and applicants back into
21 the pool because they're admitted at such a higher rate, the
22 overall admit rate jumps up to 5 .7 in 2018 and 5.8 in 2017,
23 correct?

24 **A.** Overall, yes.

25 **Q.** And I'd like to look at one other thing on here. This is

1 something you referred to in the admissions office as a
2 one-pager, correct?

3 **A.** That's part of it, yes.

4 **Q.** Although sometimes the one-pagers are more than one page,
5 correct?

6 **A.** Occasionally. They're usually one page.

7 **Q.** So this one that we're looking at has information all the
8 way up and down. The information that's being compared
9 between the class of 2017 and the class of 2018 is the racial
10 or ethnic makeup of the class, correct?

11 **A.** That would be correct.

12 **Q.** And sometimes, to be fair, Dean Fitzsimmons, there are
13 one-pagers with other information like geography and so
14 forth, correct?

15 **A.** Yes. It could be occasionally.

16 **Q.** I'll show you that in a minute. Focusing on this page 4
17 of Plaintiff's Exhibit 63, why does the admissions office
18 compare the racial or ethnic makeup of the current year's
19 class to the racial or ethnic makeup of the preceding year's
20 class?

21 MR. LEE: Your Honor, if I could. This is just to
22 make the record clear. The second page of this exhibit is
23 the actual one-pager.

24 MR. HUGHES: We're going to look at that in a
25 moment.

1 MR. LEE: Which is part of the confusion. The
2 fourth page is something different. I think if we're going
3 to refer to the one-pager, we'll should refer to the
4 one-pager.

5 MR. HUGHES: Mr. Lee, I asked him if it was the
6 one-pager. He told me it was.

7 THE WITNESS: I'm sorry. I did not. I said that's
8 part of the one-pager. The one-pager is usually is one page.
9 And usually at the bottom it has the thing that you had
10 selected out for page 4. What you just showed with all the
11 information, that's the one-pager.

12 BY MR. HUGHES:

13 **Q.** There's no doubt that the Harvard admissions office
14 created page 4, correct?

15 **A.** As part of the one-pager.

16 **Q.** And now let's look at the other part of the one-pager.
17 I'll ask my question again.

18 Here at the bottom, like you were just telling us,
19 Dean Fitzsimmons, there is information at the bottom of the
20 one-pager comparing the racial or ethnic makeup of the
21 current class that you're working to admit to the prior
22 year's admitted class, correct?

23 **A.** That's correct.

24 **Q.** And the question is why does the Harvard admissions
25 office, when it's trying to decide who to admit to Harvard,

1 compare the racial makeup of the prospective admitted class
2 to the admitted class of the prior year?

3 **A.** There are a couple of reasons. One is, remember, I think
4 you said it was March 3 or something like that. We've
5 already started the recruiting for the next year. And we'll
6 be going out on the road. We actually visit about 60-70
7 cities in the spring or locations in the spring and then 60
8 or 70 more in the fall.

9 But one thing you can do is just simply to give you
10 have a rough idea perhaps of how far effective your
11 recruiting has been this year versus last year. Keeping in
12 mind that in America usually there isn't a huge change from
13 one year to the next in of the talent pool, as it were, in
14 America. So one year will be more like the next one but can
15 often be very different, say, from five years ago or five
16 years into the future.

17 But the other thing, the other reason you do this
18 is that we have to be really, really careful that we do not
19 come in with too many students. We try to shoot for about
20 1,660 every year.

21 And we are -- as Mr. Lee said this morning, we're
22 at 98 percent residential. All the first-year students
23 actually have to live in the dorms, so we cannot be
24 overcrowded.

25 So this information is actually very useful to --

1 for us to try to prevent being overcrowded. Because, for
2 example, if you went through the whole one-pager, there are
3 expected differential yields by -- on the part of really a
4 lot of different kinds of people.

5 For example, your Sparse Country often has a
6 relatively lower yield than some other parts. So in other
7 words, what we're trying to do is to -- at that point, we
8 probably have until about March 20 to try to make some final
9 decisions before we let people know around April 1 what's
10 going to happen.

11 But if you found yourself, for example, with lots
12 of engineers admitted, that -- we know that historically
13 engineers will yield a considerably lower rate than most
14 other students. So that would give us -- in other words,
15 they're less likely to choose Harvard if admitted. So that
16 would give us at least a little bit more room, knowing that a
17 whole bunch of them probably won't come to, once we're trying
18 to figure out that last number around March 20, that we would
19 be able to perhaps admit a few more people generally.

20 **Q.** Are yield rates something that can factor into admission
21 to Harvard?

22 **A.** Just in terms of the number of admissions that we send
23 out on April 1. If we miscalculate, which we did one year
24 since the '70s, it can create a really big set of problems.

25 **Q.** Are there differences in yield rates amongst different

1 races or ethnicities?

2 **A.** Yes.

3 **Q.** Do you keep track of that?

4 **A.** Generally speaking. Quite a bit of variation from year
5 to year. It's kind of unpredictable, but in general terms,
6 yes.

7 **Q.** And is that something you take into account when making
8 certain admissions decisions to Harvard?

9 **A.** Not any particular decisions, but it's just in terms of
10 the number you would feel confident about sending out so that
11 you would not be overcrowded. The best thing for us is --
12 obviously we cannot be overcrowded. There's no place to put
13 people. So the other thing we typically would then be able
14 to take perhaps 50 or 100 people off the waiting list.

15 **Q.** All right. Let's get back to our admission rate
16 discussion. I'm going to try to blow up part of this page.
17 Can you see that, Dean Fitzsimmons?

18 **A.** I do.

19 **Q.** We're still on page 2. Here we have the overall admit
20 rate at the top of page 2, Dean Fitzsimmons?

21 **A.** Yes.

22 **Q.** 5.8 and 5.7. Do you see that?

23 **A.** I do.

24 **Q.** Down below, the Harvard admission office keeps track of
25 the admit rates for a category called "Lineage." Do you see

1 that?

2 **A.** I do.

3 **Q.** What does that category refer to?

4 **A.** That refers to applicants where either the mother or
5 father or both went to Harvard College.

6 **Q.** And the admission rate for legacy candidates in 2017 was
7 35.4 and in 2018 was 33.3, correct?

8 **A.** Yes. Except I think, again, 2018 I believe was still a
9 work in progress.

10 **Q.** 2018 was --

11 **A.** Right.

12 **Q.** We looked before on page 4 that the non-legacy,
13 non-athlete admission rate was about 4 1/2 percent, correct?

14 **A.** Yes.

15 **Q.** So a legacy candidate is many, many, many times more
16 likely to get into Harvard than a non-legacy, non-athlete,
17 correct?

18 **A.** That would be true for many reasons.

19 **Q.** If we look down at athletes, 1 athletes, those are
20 athletes that receive an athletic rating of 1, correct?

21 **A.** That's correct.

22 **Q.** And again, that is a result of a request from a coach who
23 is trying to recruit an athlete to come to Harvard
24 communicates that request to the admissions office, correct?

25 **A.** That would be a person the coach has rated as an athlete

1 desired for his or her team.

2 **Q.** And the admission rate for 1 athletes is even higher than
3 legacies, 76.6 for the class of 2017, correct?

4 **A.** That's correct.

5 **Q.** The number is close for 2018 as well?

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

7 **Q.** So what that means is that athletes are many, many, many
8 times more likely to get in than the non-legacy, non-athletes
9 who are admitted at 4.5 percent, correct?

10 **A.** That would be correct.

11 **Q.** Now, you talked to me a minute ago and said that Harvard
12 started carving out the non-legacy, non-athlete rating as a
13 result of -- or in connection with OCR's investigation of
14 claims of Asian-American discrimination in the late 1980s?

15 **A.** Well, it was really prior to that because there had been
16 much speculation in the press and from our students, is it,
17 you know, why the admission rate was different. So that's
18 why Susie and I just sat down and did, again, a very simple
19 calculation. But I think it was somewhat illuminating
20 because it certainly was something that was noted by OCR as
21 it conducted its investigation and in doing so found that we
22 had not discriminated against Asian-Americans.

23 **Q.** I'd like to talk with you a little bit more about that
24 OCR investigation. Dean Fitzsimmons, you were the dean when
25 that investigation occurred in the late '80s, correct?

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

2 **Q.** It ultimately culminated in a statement of findings in
3 1990, right?

4 **A.** That's correct.

5 **Q.** And before OCR issued that statement of findings, it
6 conducted a comprehensive investigation. We heard Mr. Lee
7 tell us this morning they actually set up shop in your
8 office, right?

9 **A.** Among other things. They did quite a few things. They
10 interviewed ten of us. They did their own regressions with
11 lots of data. They looked at 400 applications. They looked
12 at 200 summary sheets or reader sheets. So it was a very,
13 very comprehensive investigation.

14 **Q.** And I know that -- and Mr. Habeno was the gentleman at
15 OCR who was in charge of that investigation, correct?

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

17 **Q.** You ultimately became friends with Mr. Habeno, correct?

18 **A.** We have over the years.

19 **Q.** Eaten at Ruth's Chris together, right?

20 **A.** Yes. Once, as I recall.

21 **Q.** Exchanging jokes over email, correct?

22 **A.** That, I wouldn't say at all.

23 **Q.** Okay. We'll get to that tomorrow.

24 **A.** We'll get to that, I'm sure.

25 **Q.** I assumed that even through you developed a friendly

1 relationship with Mr. Habeno that you and everyone in the
2 admissions office was professional and forthright with
3 Mr. Habeno during the OCR investigation.

4 **A.** Yes. And with all his colleagues, both here in Boston
5 and in Washington.

6 **Q.** And I think you already told me you thought that
7 investigation was comprehensive and thorough, correct?

8 **A.** I do.

9 **Q.** And your admissions officers and you all told the truth
10 when you talked to the OCR folks, correct?

11 **A.** Yes.

12 **Q.** And you believe OCR used a reliable approach and
13 methodology to investigate the claims that Harvard was
14 discriminating against Asian-Americans, correct?

15 **A.** It certainly was comprehensive.

16 **Q.** And reliable. Mr. Lee relied on it this morning, right?

17 **A.** Yes. And we've relied on its base, especially given its
18 correlation to the *Bakke* decision and then ultimately to
19 *Grutter* and others.

20 **Q.** And you don't have any criticisms of OCR's approach.
21 You're comfortable with the statement of findings, correct?

22 **A.** Yes.

23 **Q.** So now I'd like to look at some portions of the statement
24 of findings with you, which is Plaintiff's Exhibit 555.

25 **MR. HUGHES:** Before I do, I'd like to offer that

1 into evidence.

2 MR. LEE: No objection.

3 THE COURT: Admitted.

4 (Plaintiff Exhibit No. 555 admitted.)

5 BY MR. HUGHES:

6 Q. I've got it on the screen here, Dean Fitzsimmons.

7 A. Are you going to highlight?

8 Q. I will do my best. You're familiar with this document
9 and you've reviewed it before, right?

10 A. I have.

11 Q. I'd like to turn to page 2. And here we've got -- I'll
12 just read it.

13 In January of 1988, Harvard, through the dean of
14 admissions and financial aid, issued a statement on
15 Asian-American admissions at Harvard-Radcliffe which in part
16 responded to concerns raised about underrepresentation of
17 Asian-Americans at Harvard and rumors of quotas.

18 Do you see that?

19 A. Yes. Susie and I put that together.

20 Q. You remember issuing that statement, correct?

21 A. I do.

22 Q. You've got the statement block quoted below, correct?

23 A. It looks like it, yes.

24 Q. I'll read what the OCR said in the block quote.

25 "The difference in admission rates for Asians and

1 whites, about 3.7 percent, 13.3 versus 17.0 over a 10-year
2 period including the classes of 1982 through 1991, was
3 explained as follows."

4 And then we've got the block quote. The block
5 quote says, "While Asian-Americans are slightly stronger than
6 white candidates on academic criteria, they're slightly less
7 strong on extracurricular criteria. In addition, there are
8 very few Asian-Americans in our applicant pool who are alumni
9 children or prospective varsity athletes. When all these
10 factors are taken into account, the difference in admission
11 rates for the two groups disappears."

12 Do you see that?

13 **A.** I do.

14 **Q.** And that's what you told OCR back in the late 1980s,
15 correct?

16 **A.** That's certainly what our data told us.

17 **Q.** In fact, we can look at this tomorrow. It's no longer
18 true that Asian-Americans are slightly less strong on
19 extracurriculars, correct?

20 **A.** Yes. In fact, our readers rate them stronger than whites
21 on extracurriculars.

22 **Q.** Just to make sure the record is clear --

23 **A.** Yes. Based on the evidence that we see in the
24 applications.

25 **Q.** Currently the Asian-Americans have scored better on

1 extracurricular criteria than white applicants to Harvard,
2 correct?

3 **A.** Yes. That's certainly what our staff believes when it
4 goes through all the applications one at a time and then
5 assigns a strong extracurricular rating, slightly stronger
6 for Asian-Americans and whites.

7 **Q.** I think you've already told me that OCR performed a
8 statistical analysis as part of its work here, correct?

9 **A.** Yes.

10 **Q.** I'd like to look at some of that with you. I'm going to
11 turn to page 33.

12 THE COURT: Mr. Hughes, I see you looking at your
13 watch. I pushed everything later. We can go until 3:30, if
14 that's all right with you. I don't want to surprise you. We
15 can go until 3:30.

16 MR. HUGHES: I think I'm going to hit a logical
17 breaking point between 3:15 and 3:30.

18 THE COURT: That's fine.

19 MR. HUGHES: Thank you very much, Your Honor.

20 BY MR. HUGHES:

21 **Q.** Dean Fitzsimmons, I've got on the page here the narrative
22 that OCR put together relating to some of its statistical
23 analysis. Do you see that?

24 **A.** I do. You've highlighted a number of things.

25 **Q.** OCR says, "Our first task was to determine whether the

1 Asian-American and white applicant pools were similarly
2 qualified. If the white applicants were, on average,
3 superior to Asian-American applicants, then it is reasonable
4 to expect that whites would be admitted at a higher rate."

5 Do you see that?

6 **A.** I do.

7 **Q.** Then we've got a table and the OCR says, "As shown in
8 Table 5 below, while the two groups were found to be
9 significantly different on many of the variables, they appear
10 overall to be comparably qualified when viewing their means."

11 Do you see that?

12 **A.** I do.

13 **Q.** And then we've got some comparisons between Asian and
14 white applicants in Table 5. Do you see that?

15 **A.** I do.

16 **Q.** So one of them is academic rating. Do you see that?

17 **A.** I do.

18 **Q.** For that variable, Asian-Americans scored higher,
19 correct?

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

21 **Q.** The athletic rating, white higher, correct?

22 **A.** Yes.

23 **Q.** And personal rating, which was the discussion discussed
24 at length this morning, at least at this time whites were
25 getting higher personal scores than Asian applicants,

1 correct?

2 **A.** Yeah. Again, it's pretty slight. Yes. The one before
3 it was not significant statistically.

4 **Q.** That was on extracurricular?

5 **A.** Right.

6 **Q.** The white applicants were being awarded higher personal
7 scores than Asian-American applicants at this time, correct?

8 **A.** Yes. By a very small margin.

9 **Q.** And the other area where white applicants were performing
10 better was on the SAT verbal, correct?

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

12 **Q.** And that was true maybe back in 1990, but that's not true
13 today, correct?

14 **A.** I would have to look at it, but I believe that could be
15 correct.

16 **Q.** And it's also the case that Asian-American applicants to
17 Harvard score better on the SAT writing test than white
18 applicants, at least today, correct?

19 **A.** We actually no longer use the writing, actually.

20 **Q.** For the time period that you did, in recent times the
21 Asian-American applicants were doing better?

22 **A.** That, I did not know that. But we found the test to be
23 quite unreliable, so we actually dropped it this past year.

24 **Q.** Now, you wouldn't have any reason to dispute your own
25 internal admissions data that showed what I just said to be

1 true. It just doesn't come to mind, correct?

2 **A.** Excuse me. Table 5's data?

3 **Q.** Your own recent data from the Harvard admissions office
4 showing Asian-Americans applicants scored better on the SAT
5 writing. You don't have any reason to --

6 **A.** I don't have any data at all on it.

7 **Q.** So now, I think you also mentioned that OCR ran a
8 statistical or regression analysis. You're familiar with
9 that, correct?

10 **A.** I am.

11 **Q.** Let's look at what they had to say about that. It's on
12 page 34.

13 OCR says, "We then employed logistic regression to
14 try to identify which of the ten admissions variables could
15 account for the admit rate disparity. Through this
16 technique, we identified six variables which appeared to
17 negatively impact Asian-Americans; that is, those variables
18 on which Asian-Americans received less benefit in the
19 admit/reject decision than white applicants with similar
20 scores. These were three of the reader ratings: academic,
21 extracurricular, and personal, along with the counselor and
22 alumni ratings and SAT math.

23 "Since Harvard asserted that the preference given
24 to legacy and recruited athlete applicants explained the
25 admit rate disparity, we next reran the logistic regressions

1 without these two groups. When recruited athletes and
2 legacies were removed from the analysis, all of these race
3 effects disappeared with the exception that one variable, the
4 reader academic rating, continued to have a small adverse
5 effect on Asian-Americans."

6 Do you see that?

7 **A.** I see that.

8 **Q.** Back in 1990, Harvard was asserting that legacy and
9 athlete preferences explained the difference in admit rates
10 between White and Asian applicants. And based on that
11 explanation, OCR removed the legacy and athlete applicants
12 from their regression analysis, correct?

13 **A.** I see that.

14 **Q.** And again, you don't have any criticism with what OCR did
15 here, correct?

16 **A.** That's correct. The only thing I would just say -- and
17 maybe I'm misunderstanding your question. I think when Susie
18 and I did our little NLNA, I'm not sure which data we
19 actually used. It might have been one year. It might have
20 been five years. I don't know. Their data was -- I think it
21 was ten years, I think. So they're not directly comparable,
22 I would say.

23 **Q.** Right. But what OCR did, which Harvard has relied on, is
24 when OCR was analyzing claims of discrimination against
25 Asian-Americans and running a logistic regression model, it

1 decided to take out the legacies and the athletes from its
2 logistic regression model data set, correct?

3 **A.** It did. That's what they say, yes.

4 **Q.** You understand both the experts in this case have run
5 logistic regression models, correct?

6 **A.** Yes. As I understand it.

7 **Q.** I want to look at a more recent document between Harvard
8 and OCR. Before I do, let's just ask you a few questions.

9 You work with, from time to time, Harvard's office
10 of general counsel, correct?

11 **A.** Yes.

12 **Q.** And when you communicate with Harvard's office of general
13 counsel about what's going on in the admissions office,
14 you're careful to be truthful and accurate, correct?

15 **A.** Yes.

16 **Q.** And you expect, I'm sure, that when Harvard's office of
17 general counsel communicates with your regulators like the
18 Department of Education Office of Civil Rights, that it
19 provides accurate information, correct?

20 **A.** That sounds fair.

21 **Q.** So now I want to jump forward in time to see what Harvard
22 has to say in more recent times about whether athletes and
23 legacies should be removed from the data set when analyzing
24 claims of discrimination against Asian-Americans.

25 I'm going to show Plaintiff's Exhibit 509.

1 **A.** Will you be putting this on the screen?

2 **Q.** Yes, sir. I was just providing a copy to Mr. Lee.

3 MR. LEE: Thank you.

4 MR. HUGHES: So what we have here -- before I do,
5 I'd like to offer this into evidence, Plaintiff's
6 Exhibit 509.

7 MR. LEE: No objection, Your Honor.

8 THE COURT: Admitted.

9 (Plaintiff Exhibit No. 509 admitted.)

10 BY MR. HUGHES:

11 **Q.** Mr. Lee, this is a February 2, 2012, letter, correct?

12 MR. LEE: I think you mean Mr. Fitzsimmons, not
13 Mr. Lee. I can't testify.

14 MR. HUGHES: You and I both.

15 BY MR. HUGHES:

16 **Q.** Dean Fitzsimmons, this is a February 2, 2012, letter from
17 the Harvard office of the general counsel, correct?

18 **A.** It appears to be.

19 **Q.** And it's to Ms. Nicole Merhill at the Office of Civil
20 Rights for the Department of Education, correct?

21 **A.** Yes.

22 **Q.** Turning to page 11, the last page of the document, you
23 were copied at least on this document, correct?

24 **A.** Yes.

25 **Q.** If we go back to the first page, I think that this -- I

1 think Mr. Lee talked about this this morning, this letter
2 related to an individual claim of discrimination against
3 Asian-American students, correct?

4 **A.** Yes, I believe so.

5 **Q.** So now I want to see what Harvard told OCR in 2012,
6 turning to page 7.

7 So Harvard tells OCR, "Enclosed as attachment 8 is
8 a chart labeled "Class of 2015-NLNA Overall." Again limited
9 as described above to data for self-identified
10 Asian-Americans and white Americans, this chart shows the
11 applicant numbers and admissions rates for non-legacy and
12 non-athlete candidates, in other words; for those applicants
13 who would not be eligible for a tip either because one of
14 their parents went to Harvard or Radcliffe or because of
15 their exceptional athletic ability. These data show that,
16 consistent with OCR's previous findings about Harvard's
17 admissions practices, once applicant data is limited to
18 non-legacy/non-athlete candidates, the admit rates between
19 Asian-Americans and white Americans are far closer."

20 Do you see that?

21 **A.** I do.

22 **Q.** So what we have here is the Harvard office of general
23 counsel in 2012, concerning a claim of Asian-American
24 discrimination, telling the government to remove the
25 legacy/athletes from the data, correct?

1 **A.** That's what it says.

2 **Q.** So now I want to make sure we're on the same page about
3 this athlete and legacy issue.

4 1990, OCR, at Harvard's invitation, removes the
5 athletes and legacies from their logistic regression model.
6 We just looked at that, right?

7 **A.** As one of many things they did in the very comprehensive
8 investigation.

9 **Q.** And then in 2012, much more recent times, we have the
10 Harvard office of general counsel telling the government that
11 when they're analyzing claims of discrimination against
12 Asian-Americans, the way to do that is by removing athletes
13 and legacies from the data set, correct?

14 **A.** I don't think I would read it that way.

15 I guess what I would need to know is the context of
16 who this applicant was and what this person was like relative
17 to other applicants.

18 Certainly in our real admissions process, certainly
19 legacy and athletic expertise, certainly some of the many
20 tips that could perhaps get somebody admitted. But I'd have
21 to see exactly how they were applying this to this particular
22 case. I would need to see literally what this complainant's
23 application was all about before I would try to figure out
24 exactly how this description was applied.

25 **Q.** We can get into those details, if you'd like to, in a

1 minute.

2 But what I'm just focusing on here is, here we have
3 the office of general counsel enclosing attachment 8, which
4 is a chart like the charts we've looked at, 2015-NLNA
5 Overall, and then telling the government that the data shows
6 that consistent with OCR's previous findings about Harvard's
7 admissions practices, once applicant data is limited to
8 non-legacy/non-athlete candidates, the admit rates between
9 Asian-Americans and white Americans are far closer.

10 Harvard is still taking the same position it took
11 in 1990 here in this letter, correct?

12 **A.** Yes. And I think if I understand it correctly, following
13 OCR's guidelines.

14 **Q.** OCR took the athletes and legacies out in 1990. Harvard
15 is still encouraging OCR to take them out in 2012. That's
16 what this document says, correct?

17 **A.** I'm not quite sure it says that. I just think that -- it
18 was certainly one thing that OCR looked at is one way of all
19 the different things they did, reading all those
20 applications, reading all the reader sheets, all the other
21 things they did.

22 And another thing they did, I suppose, was take a
23 look at what Susie and I had postulated, just a very simple
24 way to look at it. And this is another one way to try to get
25 to the truth. But I'd have to see what this person looked

1 like.

2 **Q.** And Harvard is still taking the position that one way to
3 look at potential discrimination against Asian-American
4 athletes is to take out the athletes and legacies from the
5 data set. That's what it says right here on the screen. One
6 way?

7 **A.** It's one way to look at, depending on the issue that
8 you're dealing with.

9 **Q.** I want to fast-forward to even more recent times.

10 You're aware that Harvard has sent out emails to
11 its alumni updating them on this very case, correct?

12 **A.** There have been emails sent out, I know, by Harvard.

13 **Q.** In fact, you sent one out over the weekend, right?

14 **A.** Our office did.

15 **Q.** Under your name?

16 **A.** I believe that's right. To our interviewers.

17 **Q.** And that encouraged the people receiving that email to
18 look at the portion of Harvard's website that provides
19 Harvard's -- information by Harvard about this case, correct?

20 **A.** Yes. We have referred people who are interested in the
21 case to our website.

22 **Q.** And I'd like to take a look at that. This is Plaintiff's
23 Exhibit 467.

24 MR. HUGHES: I'd like to offer that.

25 MR. LEE: I can't read it. Sorry. Old eyes won't

1 do it. No objection, Your Honor.

2 THE COURT: Admitted.

3 (Plaintiff Exhibit No. 467 admitted.)

4 BY MR. HUGHES:

5 Q. You can see up at the top here, Dean Fitzsimmons, this is
6 part of Harvard's website that relates to the Harvard
7 admissions lawsuit, correct?

8 A. That's correct.

9 Q. And I'm going to turn to page 3 of that.

10 A. I guess the date is 8/21, I think, as I see it.

11 Q. This is likely the date that we printed it out to make it
12 an exhibit.

13 A. Okay.

14 Q. I'll represent to you it's still the same. I'd like to
15 look at page 3 of Plaintiff's Exhibit 467. Do you see that?

16 A. I do.

17 Q. And what Harvard says today on its website, it's entitled
18 "A Faulty Statistical Model."

19 "Mr. Blum's case hinges on a statistical model that
20 deliberately ignores essential factors such as personal essay
21 or teacher recommendations, and omits entire swaths of the
22 applicant pool (such as recruited athletes or applicants
23 whose parents attended Harvard) to achieve a deliberate and
24 pre-assumed outcome."

25 Do you see that?

1 **A.** I see that.

2 **Q.** You understand that our expert, like your expert, ran a
3 logistic regression model, correct?

4 **A.** That's correct.

5 **Q.** And in 1990, Harvard and OCR's position was that the
6 right way to run a logistic regression model was to remove
7 athletes and legacies from the data set, correct?

8 **A.** I am not sure that's correct. I think we certainly were
9 in no position to tell OCR how to conduct its own
10 investigation in any way. Because both the Boston office and
11 the Washington office did look at all kinds of different
12 factors. So we certainly had no leverage at all to tell them
13 how to conduct their own logistical statistical procedures.
14 They happened to do the NLNA, but that's one of many, many
15 things they did.

16 **Q.** I've got the portion of Plaintiff's Exhibit 555, the
17 statement of findings from OCR, page 34, back on the screen.

18 Do you see that?

19 **A.** Yes, I do.

20 **Q.** This is the paragraph we looked at a moment ago, talking
21 about the logistic regression model run by OCR. Correct?

22 **A.** Yes.

23 **Q.** And it says -- do you see where I've got it
24 underlined? -- "Since Harvard asserted that the preference
25 given to legacy and recruited athlete applicants explained

1 the admit rate disparity, we next reran the logistic
2 regressions without these two groups."

3 You see that, correct?

4 **A.** I do. They obviously made their own decision on that,
5 but they certainly decided to do it.

6 **Q.** You've already told me you guys had no problem with OCR's
7 methodology and are relying on it in court today. Mr. Lee's
8 opening, correct?

9 **A.** Yes. But you have to understand I am no statistical
10 expert. So I would certainly refer to Professor Card for any
11 statistical expertise.

12 **Q.** And we saw that in 2012 the Harvard OGC office is still
13 talking about removing athletes and legacies from the data,
14 correct?

15 **A.** It certainly was there, yes.

16 **Q.** What you told all your alumni on the website is when our
17 expert did the same thing that OCR did, which was to remove
18 athletes and legacies in a logistic model regression set,
19 that that was fatally flawed.

20 That's what it says on your website.

21 **MR. LEE:** I object. Particularly with this on the
22 screen. This actually says the analysis was run twice, and
23 once with legacies in and once without. The foundation for
24 all these questions is just inconsistent with the document,
25 Your Honor.

1 MR. HUGHES: I think he can answer the question.

2 MR. LEE: That's up to Her Honor, I think.

3 THE COURT: I actually get to decide that.

4 He makes a good point about the foundation. So why
5 don't you rephrase the question and try it again.

6 BY MR. HUGHES:

7 Q. You understand that OCR ran a logistic regression model,
8 correct?

9 A. Yes.

10 Q. You understand they ran it two times. They ran it once
11 with the legacies and athletes and once without them,
12 correct?

13 A. Yes. But I know they also did quite a few other things.
14 Again I don't know, since I obviously wasn't on their team,
15 exactly what they did over that two and a half period of
16 time. They may have done many, many different things with
17 the data.

18 Q. One thing we know for sure that they did was run their
19 logistic regression model without the legacies and athletes.
20 That's what we can see right here, correct?

21 A. Yes, we can see that.

22 Q. We also know for sure that in 2012 the Harvard office of
23 general counsel told OCR again that one way to look at claims
24 of Asian-American discrimination is to take the legacies and
25 athletes out of the data set. That's what we looked at in

1 P509, correct?

2 **A.** It's one way. But you really have to look at it
3 comprehensively, I think in the way Professor Card did.

4 **Q.** What you're saying, what Harvard is saying on its website
5 today -- I'll put it back up on the screen -- is that
6 omitting recruited athletes and legacies is not the way to
7 go. That's what Harvard says today, correct?

8 **A.** Yes. And I would agree with that.

9 MR. HUGHES: Your Honor, I think I'm actually at a
10 really good transition point, if that's okay with you.

11 THE COURT: It's fine. I usually like to go right
12 up to the end of the day. But I did mislead you today and
13 tell you that we'd be done by 3:00 and then I baked in a
14 little bit of extra time.

15 We can recess for the day today. We'll start again
16 at 10:00 tomorrow. I have another meeting at about 1:30, so
17 maybe we can go to like 1:15 or so. We'll take a 15-minute
18 break in the morning, if that helps you for planning
19 purposes. But other than that, we'll go straight through.

20 Thanks, everyone. Case is recessed.

21 (Court recessed at 3:16 p.m.)

22

23

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 15, 2018

Joan M. Daly, RMR, CRR
Official Court Reporter

Date

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