

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 22, 2018

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

Pages 1 to 231

9 Defendants.
10

11 TRANSCRIPT OF BENCH TRIAL - DAY 6
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
17
18
19
20
21
22

23 JOAN M. DALY, RMR, CRR
24 Official Court Reporter
25 John J. Moakley U.S. Courthouse
One Courthouse Way, Room 5507
Boston, MA 02210
joanmdaly62@gmail.com

1 APPEARANCES:

2 COUNSEL FOR THE PLAINTIFF:

3
4 ADAM K. MORTARA, ESQUIRE
5 J. SCOTT McBRIDE, ESQUIRE
6 KRISTA J. PERRY, ESQUIRE
7 Bartlit Beck Herman Palenchar & Scott
8 54 West Hubbard Street
9 Suite 300
Chicago, Illinois 60654
312.494.4400
adam.mortara@bartlit-beck.com
scott.mcbride@bartlit-beck.com
krista.perry@bartlit-beck.com

10 JOHN M. HUGHES, ESQUIRE
11 KATHERINE L.I. HACKER, ESQUIRE
12 MEG E. FASULO, ESQUIRE
13 Bartlit Beck Herman Palenchar & Scott
14 1801 Wewatta Street
15 Suite 1200
Denver, Colorado 80202
303.592.3100
john.hughes@bartlit-beck.com
kat.hacker@bartlit-beck.com
meg.fasulo@bartlit-beck.com

16 JOHN MICHAEL CONNOLLY, ESQUIRE
17 THOMAS R. MCCARTHY, ESQUIRE
18 WILLIAM S. CONSOVOY, ESQUIRE
19 Consovoy McCarthy Park PLLC
20 3033 Wilson Boulevard
21 Suite 700
Arlington, Virginia 22201
703.243.9423
mike@consovoymccarthy.com
tom@consovoymccarthy.com
will@consovoymccarthy.com

1 APPEARANCES (cont.):

2 PATRICK STRAWBRIDGE, ESQUIRE
3 Consovoy McCarthy Park PLLC
4 Ten Post Office Square
5 8th Floor, South, PMB #706
6 Boston, Massachusetts 02109
7 617.227.0548
8 patrick@consovoymccarthy.com

9 MICHAEL H. PARK, ESQUIRE
10 Consovoy McCarthy Park PLLC
11 3 Columbus Circle
12 15th Floor
13 New York, New York 10024
14 646.456.4432
15 park@consovoymccarthy.com

16 PAUL M. SANFORD ESQUIRE
17 BENJAMIN C. CALDWELL, ESQUIRE
18 Burns & Levinson LLP
19 One Citizens Plaza
20 Suite 110
21 Providence, Rhode Island 02903
22 401.831.8330
23 psanford@burnslev.com
24 bcaldwell@burnslev.com

25 COUNSEL FOR THE DEFENDANT:

WILLIAM F. LEE, ESQUIRE
FELICIA H. ELLSWORTH, ESQUIRE
ANDREW S. DULBERG, ESQUIRE
ELIZABETH C. MOONEY, ESQUIRE
SARAH R. FRAZIER, ESQUIRE
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109
617.526.6556
william.lee@wilmerhale.com
felicia.ellsworth@wilmerhale.com
andrew.dulberg@wilmerhale.com
elizabeth.mooney@wilmerhale.com
sarah.frazier@wilmerhale.com

1 APPEARANCES (cont.):

2 SETH P. WAXMAN, ESQUIRE
3 DANIELLE CONLEY, ESQUIRE
4 DANIEL WINIK, ESQUIRE
5 BRITTANY AMADI, ESQUIRE
6 PAUL R.Q. WOLFSON, ESQUIRE
7 Wilmer Cutler Pickering Hale and Dorr LLP
8 1875 Pennsylvania Ave, NW
9 Washington, DC 20006
202.663.6006
seth.waxman@wilmerhale.com
danielle.conley@wilmerhale.com
daniel.winik@wilmerhale.com
brittany.amadi@wilmerhale.com
paul.wolfson@wilmerhale.com

10 DEBO P. ADEGBILE, ESQUIRE
11 Wilmer Cutler Pickering Hale and Dorr LLP
12 7 World Trade Center
13 250 Greenwich Street
New York, New York 10007
212.295.6717
debo.adegbile@wilmerhale.com

14 ARA B. GERSHENGORN, ESQUIRE
15 Harvard Office of the General Counsel
16 Smith Campus Center
Suite 980
1350 Massachusetts Avenue
Cambridge, Massachusetts 02138
617.495.8210
ara_gershengorn@harvard.edu

19 COUNSEL FOR AMICI STUDENTS:

20 JON M. GREENBAUM, ESQUIRE
21 BRENDA L. SHUM, ESQUIRE
22 GENEVIEVE BONADIES TORRES, ESQUIRE
23 KRISTEN CLARKE, ESQUIRE
1500 K Street NW, Suite 900
Washington, DC 20005
202.662.8315
jgreenbaum@lawyerscommittee.org
24 bshum@lawyerscommittee.org
gtorres@lawyerscommittee.org
25 kclarke@lawyerscommittee.org

1 APPEARANCES (cont.):

2 LAWRENCE CULLEEN, ESQUIRE
3 EMMA DINAN, ESQUIRE
4 Arnold & Porter LLP
5 555 Twelfth Street, NW
6 Washington, DC 20004
202.942.5477
gina.dean@aporter.com
emma.dinan@aporter.com

7 COUNSEL FOR AMICI ORGANIZATIONS:

8 JENNIFER A. HOLMES, ESQUIRE
9 CARA McCLELLAN, ESQUIRE
10 JIN HEE LEE, ESQUIRE
11 MICHAEL M. TURNAGE YOUNG, ESQUIRE
12 RACHEL N. KLEINMAN, ESQUIRE
13 NAACP Legal Defense and Educational Fund, Inc.
14 700 14th Street NW
15 Suite 600
Washington, DC 20005
jholmes@naacpldf.org
cmcclellan@naacpldf.org
jlee@naacpldf.org
myoung@naacpldf.org
rkleinman@naacpldf.org

16 KENNETH N. THAYER, ESQUIRE
17 KATE R. COOK, ESQUIRE
18 Sugarman Rogers
19 101 Merrimac Street
20 Suite 900
Boston, Massachusetts 02114
617.227.3030
thayer@sugarmanrogers.com
cook@sugarmanrogers.com

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 22, 2018.)

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

THE COURT: Good morning, everyone. Karen just gave me a copy of an email that you all had shared with her. Do you want to discuss that at sidebar?

MR. LEE: Briefly, sure.

THE COURT: Come on up.

[Sidebar redacted.]

THE COURT: Sorry for the slightly late start this morning. As I just noted to the parties at sidebar, and I will reiterate, I am in receipt of their motion to admit P9. The parties tell me it doesn't need to be resolved immediately, so I'll read the motion at lunch and we can take it up thereafter.

Other than that, I think we're ready to get going.

Is Ms. McGrath here?

MR. STRAWBRIDGE: The parties have agreed to call Mr. Kahlenberg out of order.

1 THE COURT: Yes. That's fine. Go ahead then.

2 MR. STRAWBRIDGE: The plaintiffs will call Richard
3 Kahlenberg.

4 THE CLERK: Could you please raise your right hand.

5 (RICHARD KAHLENBERG duly sworn by the Deputy
6 Clerk.)

7 THE CLERK: Thank you. You may be seated. Can you
8 please state your name and spell your last name for the
9 record.

10 THE WITNESS: Yes. My name is Richard Kahlenberg.
11 It's K-A-H-L-E-N-B-E-R-G.

12 THE COURT: When you're ready.

13 EXAMINATION

14 BY MR. STRAWBRIDGE:

15 Q. Good morning, Mr. Kahlenberg. Could you please tell the
16 Court where you live and what you do for a living?

17 A. I live outside of Washington, D.C., and I'm a senior
18 fellow at The Century Foundation.

19 Q. What is The Century Foundation?

20 A. The Century Foundation is a progressive think tank. It
21 was founded in 1919 by Edward Filene, whose basement you may
22 have visited.

23 Q. Some people have perhaps.

24 Let me ask you this, are you appearing here today
25 on behalf of The Century Foundation?

1 **A.** I am not. I am here in my personal capacity.

2 **Q.** And have you been asked to give opinions in this case
3 about the availability of race-neutral alternatives to
4 Harvard College in its admissions process?

5 **A.** I have.

6 **Q.** Before we get to this opinion, let's discuss your
7 qualifications. Can you give the Court a synopsis of your
8 professional background, starting with your college
9 education?

10 **A.** Yes. I attended Harvard College from 1981 to 1985, and I
11 wrote any senior honors thesis on Robert Kennedy's 1968
12 campaign for president, in which he was able to bring
13 together working-class whites, African-Americans, and Latinos
14 by emphasizing kind of the common interests that they have.

15 I then went as a Rotary fellow to the University of
16 Nairobi in Kenya for a year and received a certificate of
17 mass communication. Then I returned to Cambridge for Harvard
18 Law School, attended from 1986 to 1989.

19 **Q.** Did you graduate from Harvard Law School?

20 **A.** I did.

21 **Q.** And did you decide to pursue a career in the noble
22 profession of being a lawyer?

23 **A.** So I did not. During law school, I became more
24 interested in issues of public policy than law per se. And
25 so I came very close to going to Covington & Burling in

1 Washington, D.C., but then decided instead to go work for
2 Senator Charles Robb from Virginia.

3 **Q.** What did you do for Senator Robb?

4 **A.** For Senator Robb, I was a legislative assistant. I
5 worked on a variety of issues from the environment to civil
6 rights. I'd say one of my proudest moments there was having
7 the opportunity to be involved in the 1991 Civil Rights Act,
8 and Senator Robb with a number of other centrists supported
9 that act.

10 **Q.** How long did you work for Senator Robb?

11 **A.** I was with him for four years.

12 **Q.** And then what was the next professional step in your
13 career?

14 **A.** So then I went to teach at George Washington University
15 Law School. I taught constitutional law for a year as a
16 visiting professor.

17 And then I went to a progressive think tank, called
18 the Center For National Policy, that was founded by Ed
19 Muskie, and worked there for about a little over a year.

20 **Q.** And what work did you do at the Center For National
21 Policy?

22 **A.** Well, I was primarily working and writing a book about
23 affirmative action, in which I made the argument that we
24 should shift the basis of preferences in college admissions
25 from race to socioeconomic status.

1 **Q.** Why did you leave the Center For National Policy?

2 **A.** Well, I was ready, quite frankly, to work for an
3 organization that had an endowment. And so I moved to The
4 Century Foundation where I've been for the last 20 years.

5 **Q.** You mentioned that you have written at least one book on
6 the use of race and affirmative action. Have you written
7 other books covering the question of alternatives to race in
8 higher education admissions?

9 **A.** Yes. So I've been involved in editing a number of books
10 on the question of race-neutral alternatives and affirmative
11 action and college admissions generally.

12 So in 2004, I edited a book called "America's
13 Untapped Resource, Low-Income Students in Higher Education,"
14 that included some simulations that Professor Anthony
15 Carnevale did on what would happen if we stopped using race
16 at selective colleges and instead shifted to alternatives.

17 In 2010, I edited a volume called "Rewarding
18 Strivers: Helping Low-Income Students Succeed in College,"
19 and that volume also included discussion of race-neutral
20 alternatives to affirmative action.

21 That same year, I edited a volume called
22 "Affirmative Action For the Rich," which dealt with legacy
23 preferences in college admissions.

24 And then in 2014, I edited a volume called "The
25 Future of Affirmative Action" that included a wide number of

1 scholars, some supportive of affirmative action, others
2 opposed, that was really forward-looking and trying to figure
3 out if there are new paths to diversity.

4 **Q.** In addition to the books that you've discussed, have you
5 written any articles about race-neutral alternatives to
6 college admissions processes?

7 **A.** I have. I've written probably hundreds of articles on
8 the question of affirmative action and race-neutral
9 alternatives for law review journals, for -- I've written
10 book chapters, articles in the more popular press like The
11 New York Times or The Washington Post.

12 **Q.** Have you ever spoken on the topic of race-neutral
13 alternatives at any seminars or conferences?

14 **A.** Yes. On dozens of occasions I've been asked to
15 participate in panel discussions on the future of affirmative
16 action and higher education admissions.

17 **Q.** Have you ever served as a consultant to school systems on
18 questions regarding alternatives to the use of race?

19 **A.** I have. So in addition to writing about higher
20 education, I've written a fair amount about K-12 education
21 and have had the chance to work with a number of school
22 systems. The Chicago Public Schools system,
23 Charlotte-Mecklenburg, Pasadena, New Haven, and others to
24 devise programs that integrate student bodies by
25 socioeconomic status.

1 **Q.** Have you testified in court before as an expert witness?

2 **A.** I have.

3 **Q.** On what occasion?

4 **A.** So I testified in federal court probably around 2008,
5 2009 on the question of whether the Chicago Public Schools
6 should be declared unitary in their desegregation plan and
7 whether it would be feasible in kind of a postracial
8 desegregation era to transition to socioeconomic integration.
9 And so that was of the only other time I testified in federal
10 court.

11 **Q.** Let's discuss the methodology you employed in reaching
12 your opinions in this case. What materials did you review in
13 preparing your opinion?

14 **A.** I reviewed, I'd have to say, thousands of documents that
15 were produced in this case that helped shed light on
16 Harvard's admissions process, what factors are being used
17 today, and what sort of results they're getting.

18 I looked at probably 20 depositions in the case,
19 including some of the central figures. So Dean Fitzsimmons,
20 Dean Khurana, Dean Smith, and others.

21 I was asked to review some of the latest research
22 on race-neutral alternatives. So I did that as well.

23 **Q.** Did you review any of the expert reports that were
24 submitted in this case?

25 **A.** Yes. So I reviewed expert reports on both sides. So

1 Professor Arcidiacono's report for Students For Fair
2 Admission as well as Professor Card and President Simmons'
3 reports on behalf of Harvard.

4 **Q.** Did you have occasion to review any reports from Harvard
5 with respect to its analysis for race-neutral alternatives?

6 **A.** Yes. I reviewed with great interest the committee that I
7 think is referred to as the Smith committee where this was an
8 analysis of Harvard officials on the viability of
9 race-neutral alternatives.

10 **Q.** On that point, did you have the opportunity to review any
11 materials regarding the Ryan committee?

12 **A.** There were just a few documents that I was able to review
13 about the Ryan committee.

14 **Q.** What was the Ryan committee?

15 **A.** So the Ryan committee was a universitywide committee that
16 was created shortly after the website appeared suggesting the
17 plaintiffs were being sought in a potential lawsuit against
18 Harvard. The Ryan committee was charged with looking at
19 race-neutral alternatives.

20 **Q.** Do you remember who was on the Ryan committee?

21 **A.** It was chaired by Professor Jim Ryan and included -- I
22 think it was 28 or 29 individuals from across the university.

23 **Q.** You helped review a slide, prepare a slide on that
24 question?

25 **A.** I have.

1 **Q.** Does this represent the Ryan committee?

2 **A.** It does.

3 **Q.** Do you know any of the individuals who served on the Ryan
4 committee, based on your professional experience?

5 **A.** Yes. Well, I know Jim Ryan quite well. I met him back
6 in 2001 when he was on a Century Foundation task force on
7 issues of race and class and inequality in K-12 education.

8 And I certainly know Randall Kennedy who is one of
9 the leading thinkers on affirmative action, race-based
10 affirmative action and alternatives at Harvard Law School.

11 I know more by reputation Raj Chetty, who is one of
12 the leading scholars in the country on inequality on higher
13 education on issues of race and class. In fact, in my
14 reports, I cite Professor Chetty.

15 And of course I know of Tommy Amaker, the
16 basketball coach, men's basketball coach at Harvard.

17 **Q.** Were you able to review any report that was prepared by
18 the Ryan committee regarding alternatives to the use of race
19 in the Harvard admissions office?

20 **A.** I was not. That was one of the disappointments in the
21 case.

22 **Q.** Why were you not able to review such a report.

23 **A.** Well, there was no real work product that was shared out
24 of the committee. It's my understanding that it was
25 instituted shortly after the website came up seeking

1 plaintiffs, potential plaintiffs in the case, and then was --
2 had a meeting or two and then disbanded shortly after
3 litigation was filed in this case.

4 **Q.** You mentioned that you were able to eventually review a
5 report prepared by the Smith committee?

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

7 **Q.** When did the Smith committee begin its work?

8 **A.** I believe that was about two and a half years after the
9 Ryan committee disbanded.

10 **Q.** And do you recall when they issued their report?

11 **A.** They issued their report I believe in April 2018.

12 **Q.** And who was on the Smith committee?

13 **A.** This was a much smaller committee. So I can name them.
14 Dean Smith was the chair of the committee. Dean Fitzsimmons
15 was part of the committee as well as Dean Khurana.

16 **Q.** And do you know what role Dean Smith plays at Harvard?

17 **A.** Yes. He's the dean of the faculty of arts and sciences.

18 **Q.** Were you able to review any deposition testimony
19 regarding the work of that particular committee?

20 **A.** I was.

21 **Q.** We'll come back to that committee's report a little bit
22 later.

23 Getting back to your work in preparing your
24 opinion, did you have occasion to review current literature
25 regarding the availability of race-neutral alternatives to

1 colleges?

2 **A.** Yes. So kind of as part of my day job at The Century
3 Foundation, I've tried to keep up with the latest literature
4 on race-neutral alternatives and socioeconomic affirmative
5 action. And for this litigation, I wanted to be sure I was
6 up to speed on the latest literature as well.

7 **Q.** In addition to reviewing the materials produced in this
8 case and that literature, did you do anything else to help
9 inform your opinions that you formed in this case?

10 **A.** Yes. So one of the central activities was to work with
11 Professor Arcidiacono on creating a number of simulations
12 using actual Harvard applicant data to find out what would
13 happen if Harvard were to discontinue using race and instead
14 pursue a number of race-neutral alternatives.

15 **Q.** As you remember forming your opinions in this case, were
16 you able to form an understanding as to the benefits that
17 Harvard is seeking, or at least says that it is seeking, from
18 its use of race in the college admissions process?

19 **A.** Yes.

20 **Q.** What is that understanding?

21 **A.** Well, Harvard argues, and I completely agree, that there
22 are numerous benefits to racial, ethnic, and socioeconomic,
23 geographic diversity in the college experience.

24 Students are not only learning from professors,
25 they're learning every day from one another. And so the

1 conversations in classroom, in dining halls is much more
2 interesting and enriched, the learning is deeper when
3 students who bring different life experiences to the table
4 have a chance to interact.

5 I think, in addition, it's important for our
6 democracy to have people of different backgrounds getting to
7 know one another, reducing levels of intolerance and
8 prejudice. So Harvard articulates those interests I think in
9 a powerful fashion, and I agree with those.

10 **Q.** What is your assessment as to how well Harvard is doing
11 in obtaining the educational benefits of racial diversity
12 today?

13 **A.** I think Harvard is doing a very good job of getting the
14 educational benefits of diversity. Certainly their levels of
15 representation from various groups is impressive.

16 **Q.** What is your view with respect to their obtaining the
17 benefits of other types of diversity?

18 **A.** I think there it's much more of a mixed bag, frankly.
19 The socioeconomic diversity at Harvard, as I outlined in my
20 report, is deeply lacking. Raj Chetty found that there
21 are -- have been 23 times as many rich kids on campus as poor
22 kids. I could cite a lot of statistics on that question.

23 And in terms of geographic diversity, they clearly
24 are heavily weighted towards New England. Other parts of the
25 country are underrepresented.

1 **Q.** Having reviewed the materials you are just described in
2 this case, were you able to form an opinion about whether
3 there were available race-neutral alternatives to Harvard's
4 admissions process that would allow it to achieve the
5 educational benefits of diversity?

6 **A.** I was.

7 **Q.** And what is that opinion?

8 **A.** In my opinion, there are a number of race-neutral
9 alternatives available that would give Harvard the
10 opportunity to achieve the educational benefits of diversity
11 without compromising the excellence of the institution.

12 **Q.** So let's break that down a little bit.

13 When you went about forming your opinion, how did
14 you determine what would constitute an acceptable level of
15 diversity to reach Harvard's goals?

16 **A.** Well, that exercise was a little bit frustrating because
17 I had hoped that particularly the Smith committee would
18 articulate a standard of success. So if you're going to be
19 judging an institution and saying are race-neutral
20 alternatives available, it's good to have a sense of what
21 they are seeking, what level of diversity they would like to
22 achieve in order to get the educational benefits of
23 diversity. And the Smith committee did not articulate a
24 standard.

25 Implicitly, they suggested that some of my

1 simulations were comparable. And so there's some implicit
2 sense of where they think success is, but there wasn't a
3 direct statement of what level of diversity is necessary to
4 achieve the educational benefits of diversity.

5 **Q.** So how did you go about determining for yourself whether
6 or not the alternatives available to Harvard were sufficient?

7 **A.** Right. So in the absence of Harvard's definition, there
8 were a couple of guideposts that I looked to. One is the
9 educational research that was cited by the U.S. Supreme Court
10 in the *Grutter v. Bollinger* case, in which the Supreme Court
11 held based on that research that a law school that was able
12 to achieve African-American and Latino representation at
13 14.5 percent was achieving the benefits of diversity. So
14 that was one guidepost for me.

15 Another was to look at Harvard's historic levels of
16 racial diversity. Going back several decades, Harvard has
17 suggested that diversity is the hallmark of a Harvard
18 education. That was the mantra for many years. I think it's
19 a good one.

20 And during those years, Harvard suggested --
21 Harvard had African-American representation at about 7 or
22 8 percent in the enrolled class. And so that was another
23 benchmark for me of what Harvard had considered a level of
24 success in the past.

25 And I guess my third benchmark was the existing

1 levels of racial diversity at Harvard. I don't think those
2 are necessarily dispositive, but that's another guideline to
3 look to, in the absence of a clearly articulated standard by
4 Harvard itself.

5 **Q.** How did you go about identifying the race-neutral
6 strategies that you considered in determining that there were
7 some available to Harvard as an alternative to its use of
8 race in its admissions process?

9 **A.** So going back to about 1996, a number of states have been
10 the subject of voter initiatives to ban race-based
11 affirmative action. So over the last couple of decades,
12 there's been a fair amount of experience built up on what
13 universities can do when they're not using race to produce
14 the educational benefits of diversity.

15 And over the years, there's essentially a menu of
16 different options that a number of universities have
17 employed. Socioeconomic preferences is one, to start with,
18 that a number of universities have used.

19 **Q.** And have you generally been a supporter of socioeconomic
20 preferences as an alternative to the use of race?

21 **A.** I have.

22 **Q.** How come?

23 **A.** I've been a longtime supporter of this approach, for a
24 couple of reasons. First, as a matter of basic fairness, I
25 think most people believe that if someone has overcome

1 obstacles in life, then it's worth considering that in the
2 application process. And furthermore, that those obstacles
3 are most strongly associated with socioeconomic status. So
4 for example, President Obama has said his own daughters did
5 not deserve a preference in college admissions but that
6 low-income and working-class people of all races do.

7 So I think there is that starting point. If we're
8 trying to create a genuinely fair meritocracy, then we would
9 want to look at obstacles, the economic obstacles that
10 someone has had to overcome.

11 Anthony Carnevale, who I mentioned earlier, at
12 Georgetown, found that the most advantaged student is
13 expected to score 399 points higher on the SAT than the least
14 advantaged student economically. And so the students who
15 have managed to overcome odds and do quite well despite the
16 obstacles I think are truly impressive.

17 A second reason I've supported socioeconomic
18 affirmative action has to do with the benefits of diversity,
19 that an institution is stronger when students are -- some of
20 the students include those who have been born on the
21 so-called wrong side of the tracks and have faced some
22 hardships, and that can educate all the students in an
23 institution.

24 I guess a third reason I'd cite would have to do
25 with the law. For a number of years, the U.S. Supreme Court

1 has made clear that while the goal of racial diversity is
2 compelling, narrow means should be used because there are
3 costs to using race in deciding who gets ahead. There can be
4 increased resentment that results. Stigma can be associated
5 with the beneficiaries of racial preferences.

6 And so the law has long said if you can get the
7 benefits of racial diversity without using race, that's to be
8 the preferred method. And I've advocated socioeconomic
9 preferences for that reason as well.

10 And the final thing I'll say is that I think it is
11 relevant in a democracy to look at where the public is on
12 these questions. And continually, poll after poll after poll
13 has suggested that the vast majority of Americans are
14 uncomfortable or opposed to the idea that race should be a
15 factor in college admissions.

16 And by contrast, large majorities of Americans
17 support the notion of providing a preference to economically
18 disadvantaged students.

19 Maybe perhaps I went on for too long, but that's my
20 sense of why I've been at this for 30 years.

21 **Q.** Besides increased socioeconomic preferences, are there
22 other race-neutral alternatives that are available to a
23 college like Harvard in considering its options as opposed to
24 the use of race in the admissions process?

25 **A.** Yes. So again, highly selective universities who have

1 faced the ban on race have used a number of other
2 alternatives. They have sought to get more geographic
3 diversity as a way of getting the benefits of geographic
4 diversity but also indirectly increasing racial diversity.

5 A number of colleges have increased their
6 recruitment efforts to reach out to more disadvantaged
7 students. Some have looked at community college transfers.
8 A number have tried to kind of pull down the impediments to
9 diversity; that is, the unfair preferences that exist within
10 the current system. So that would be things like legacy
11 preferences. There are a number of universities that have
12 removed that barrier to diversity as well.

13 **Q.** Are there any selective universities that have removed
14 those types of barriers?

15 **A.** Yeah. Some of the world's greatest universities --
16 Oxford; Cambridge; Caltech; UC, Berkeley -- none of them use
17 legacy preferences.

18 **Q.** Before we go any further, let me just ask you this: Do
19 you oppose the use of race in all circumstances by a college
20 or university in its admissions process?

21 **A.** So no, not broadly speaking.

22 **Q.** What is your view as to when the use of race is
23 acceptable to achieve the benefits of diversity?

24 **A.** Well, there are two instances that I would highlight.
25 One is I think it's perfectly acceptable for a university to

1 recruit students in a race-conscious fashion. So I think
2 there's broad support for the idea that an institution which
3 is reaching out to make sure that students of all backgrounds
4 are applying, I think that makes a lot of sense. That's
5 different than at the point of decision-making, but that
6 race-conscious effort is important.

7 The other thing I would mention is that in the
8 instance when a race-neutral alternative does not work, where
9 it does not produce sufficient racial diversity, then I would
10 support the use of race as a last resort.

11 **Q.** Is that an area where you disagree in some respect with
12 Students for Fair Admissions?

13 **A.** Yes. I think that's fair to say.

14 **Q.** Now, in this case, what did you do to try to reach a
15 conclusion as to whether or not there were available
16 race-neutral alternatives that Harvard could, in fact, employ
17 compared to its current admissions process?

18 **A.** Well, as I mentioned earlier, I worked with Professor
19 Arcidiacono, who has the technical skills to run these
20 simulations, to try to -- using Harvard data to estimate what
21 would happen if race-neutral alternatives were adopted.

22 **Q.** Just so we are all clear, are you an economist?

23 **A.** I am not.

24 **Q.** Are you a statistical modeling expert?

25 **A.** By no means.

1 **Q.** So it was necessary for you to rely on the work of others
2 in this particular aspect of your opinion?

3 **A.** That's right. This is something I'd done with Professor
4 Carnevale in the past and now with Professor Arcidiacono.

5 **Q.** And have you prepared a slide that kind of helps explain
6 the understanding of how these models were used to put forth
7 the simulations upon which you relied?

8 **A.** I have.

9 **Q.** And is that the slide that's projected on the screen
10 right now?

11 **A.** Yes.

12 **Q.** So let's go through this step by step.

13 What is your understanding of the first step in the
14 process of creating the models that you ultimately used for
15 your simulations?

16 **A.** Well, the idea of these simulations is to try to
17 replicate as best as possible a university's existing system
18 of admissions. The attempt here is not to tell Harvard what
19 to do, what it should value, but rather to bring together the
20 data as a baseline of what Harvard currently does.

21 **Q.** So what data was used to help construct the models, to
22 your understanding?

23 **A.** Right. So both Professor Card and Professor Arcidiacono
24 looked, had access to six years of data involving 150,000
25 applicants.

1 And I want to be clear, the data set that we were
2 working with in these race-neutral alternatives was what's
3 been termed the expanded data sets. So it including
4 everyone, includes the legacies, includes the athletes. It's
5 the entire population -- domestic population, I should say,
6 that's applying to Harvard.

7 **Q.** In forming your opinions, did you actually end up relying
8 on the models that were used by both of the economists this
9 case?

10 **A.** I was.

11 **Q.** And is it your understanding that they were essentially
12 working with the same data set for purposes of the
13 race-neutral alternatives model?

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

15 **Q.** The models take all this historical data from Harvard.
16 What did they do with it, in your understanding, to generate
17 a model of the admissions process?

18 **A.** So my high-level, non-technical understanding is that
19 they feed in all the factors that now are used in the Harvard
20 admissions process, and they run regressions to see what
21 weights are currently provided to various aspects, various
22 characteristics of the admissions process. So they know
23 who's admitted, they know who's rejected. And so that's what
24 we looked at.

25 We looked at a variety of factors, some of which

1 are listed here. So there are various inputs: the recruited
2 athletes, legacies, race, socioeconomic status, those types
3 of things.

4 **Q.** For purposes of the models that both sides used with
5 respect to the race-neutral alternatives that you reviewed,
6 did that include the overall rating?

7 **A.** No. So the overall rating both sides agreed has a racial
8 preference imbedded into it. So in order to make this a
9 race-neutral alternative, we -- both Professor Card and
10 Professor Arcidiacono took the overall rating out.

11 **Q.** With respect to both of the models that were used for the
12 race-neutral alternatives modeling, did both models include
13 the personal rating?

14 **A.** They did.

15 **Q.** Why was that?

16 **A.** Well, there's some dispute about whether race is part of
17 the personal rating. But unlike the overall rating, there
18 was not a consensus that race is part of that.

19 **Q.** And so why did you leave the personal rating in your
20 models?

21 **A.** Well, given that there was a dispute over the issue, I
22 took Harvard at its word that race was not part of the
23 personal rating.

24 **Q.** Did the models, as you understand them, both sides also
25 include the other component ratings that Harvard uses in the

1 admissions process?

2 **A.** Yes.

3 **Q.** Did it include other data about the people who are
4 admitted or applied to Harvard?

5 **A.** Yes. This includes all of those ratings other than the
6 overall rating which clearly has a racial preference imbedded
7 in it.

8 **Q.** Once those factors were in the model, what is your
9 understanding of what was done to help advance the simulation
10 process that you ultimately relied upon?

11 **A.** So the point of putting all this data into the model was
12 to find out the weights that the institution currently places
13 on things like the academic rating, legacy status, race,
14 these types of things, so that we'd have a sense of what
15 Harvard's admissions process currently produces.

16 **Q.** And then once you had that information, what was done to
17 help model a race-neutral alternative?

18 **A.** So then the next step was to begin obviously by turning
19 off the racial preference, since we want this to be a
20 race-neutral alternative. And then we would seek to
21 manipulate various of the preferences to see how they
22 would -- see what sort of results they would produce in terms
23 of racial diversity, socioeconomic diversity, geographic
24 diversity, and academic outcomes.

25 **Q.** And once you manipulated the weights, as you said, to

1 test a certain alternative, how would you then go about
2 generating a simulated class?

3 **A.** Right. So then at that point, there was a set of
4 probabilities of student admissions that were generated based
5 on the new models. And then from that, the economists are
6 able to project the likelihood that the class will be of a
7 certain -- you know, this will be the racial makeup of the
8 class, this will be the socioeconomic makeup of the class,
9 the academic strength of the class.

10 **Q.** Okay. And so have you helped prepare some slides that
11 describe some of the simulations upon which you relied for
12 your opinion in this case?

13 **A.** I have.

14 **Q.** Okay. And do those simulations include work that was
15 done by both experts -- both economists in this case?

16 **A.** Yes.

17 **Q.** Does this slide here outline the basic approaches that
18 you relied upon in reaching your opinion?

19 **A.** That's correct.

20 **Q.** Why don't you just explain what we're looking at here.

21 **A.** Okay. So there were many, many simulations that were run
22 in this case. I'm here highlighting four of them, which I'm
23 calling Simulation A, B, C, and D. Three of them are based
24 on Professor Card's model of how the current Harvard
25 admissions system works, and one of them is based on

1 Professor Arcidiacono's model of how the current system
2 works.

3 **Q.** And when you would run these simulations, did you have a
4 focal point as to the comparator was?

5 **A.** Yes. In each case, we want to look at the simulation and
6 compare it to the status quo. We were looking at six years
7 of data, but we in these slides will focus on the class of
8 2019, since that's the most recent set of data we have.

9 **Q.** All right. So can you explain what data is being shown
10 here on the demonstrative with respect to the admitted class
11 of 2019?

12 **A.** Yes. This is again the status quo for the admitted
13 class. And it's describing levels of racial ethnic
14 diversity, the academic characteristics of the class, and the
15 socioeconomic diversity.

16 **Q.** Okay. And starting with the racial and ethnic diversity,
17 what are we looking at here?

18 **A.** Well, you can see that in the class of 2019 there's a
19 vibrant level of racial and ethnic diversity. So that we
20 have white students are a minority in this class with
21 40 percent of the admits.

22 And various other groups have their shares outlined
23 here. So Asian-American admits 24 percent, African-American
24 admits 14 percent, Hispanic and other admits 14 percent.

25 And then we include a bar that combines the

1 African-American, Hispanic, and other admits to total what
2 Harvard refers to as the underrepresented minorities. So
3 these are the non-Asian minorities.

4 **Q.** And what is displayed here with respect to the academic
5 characteristics of the class?

6 THE COURT: That's just bars 3 and 4 added
7 together?

8 THE WITNESS: That's correct.

9 BY MR. STRAWBRIDGE:

10 **Q.** What are we displaying here with respect to the academic
11 characteristics of the class?

12 **A.** So kind of the standard indicators of academic strength
13 or academic preparation that are widely used in the college
14 admissions process include the SAT scores and the high school
15 GPA.

16 In this case, we're looking at SAT scores. Back in
17 2019, there were three parts to the SAT that were all graded,
18 and so it's out of 2400 points. And you can see here that
19 the average SAT is 2244, which is at the 99th percentile of
20 students.

21 **Q.** Let me just clarify for the record so no one thinks we've
22 gone through a time warp.

23 When you "say back in 2019," you're referring to
24 applicants who would have been the graduating class of 2019?

25 **A.** Yes. Right. Right.

1 And then in terms of the high school GPA, it's my
2 understanding Harvard receives different types of GPA scores
3 from different high schools. And so they have a standard way
4 of converting the GPA to a different measure. So 77.0 is the
5 existing high school GPA of admitted students from the class
6 of 2019.

7 **Q.** And what is shown on this demonstrative with respect to
8 the socioeconomic diversity of the class?

9 **A.** So this underlines the mixed bag I was talking about
10 earlier. Harvard has a tag for disadvantaged students in the
11 admissions process. So we used their definition of whether a
12 student was disadvantaged, socioeconomically disadvantaged.
13 And you can see here in the status quo an overwhelming
14 proportion, 82 percent, are advantaged and just 18 percent
15 disadvantaged among the class of 2019 admits.

16 **Q.** Does Harvard have an advantaged tag or just a
17 disadvantaged tag?

18 **A.** They used a disadvantaged tag, and we are interpreting
19 those who are not disadvantaged as advantaged.

20 **Q.** Before we look at some of the simulations you ran, are
21 there simulations that were conducted in this case that you
22 rejected as race-neutral alternatives for Harvard?

23 **A.** Yes.

24 **Q.** Can you describe what those simulations were?

25 **A.** So Professor Card had one simulation in which he provided

1 a very modest socioeconomic preference which resulted in a
2 class where the African-American proportion dropped from
3 14 percent to 6 percent. And I think the evidence suggests
4 that that is not an acceptable level of racial and ethnic
5 diversity, so I rejected that one.

6 There was another simulation that Professor Card
7 embraced -- or not embraced but articulated -- in which the
8 focus would be on taking students from socioeconomically
9 disadvantaged high schools. And that simulation resulted in
10 a fairly dramatic drop in what's called the academic index,
11 the combined measure of SAT and GPA, high school GPA, such
12 that it was below what Harvard athletes currently have. And
13 I thought that was too large a drop in academic preparedness
14 and so rejected that simulation.

15 **Q.** All right. Have you prepared some slides that
16 demonstrate the simulations that you thought were, in fact,
17 workable and available to Harvard?

18 **A.** I have.

19 **Q.** Why don't we look at one of those. Is that what we're
20 seeing on the screen here is what's labeled Simulation A?

21 **A.** It is.

22 **Q.** All right. Can you describe the inputs for Simulation A,
23 starting with what its basis is?

24 THE COURT: Do you have any hard copies on these I
25 can make notes on?

1 MR. STRAWBRIDGE: Yes, I do actually. One moment.
2 May I approach?

3 THE COURT: Yes. Thanks. I'm trying to write it
4 down, but if I can make notes on this, it would be easier.

5 BY MR. STRAWBRIDGE:

6 Q. Okay. So why don't we start at the top. What model is
7 this simulation based upon?

8 A. So this is Professor Arcidiacono's model predicting the
9 current system of admissions.

10 Q. Okay. And so the boxes on this chart explain the
11 adjustments you made to that model?

12 A. That's correct.

13 Q. This may be obvious, but why did you eliminate the racial
14 preference in the model in this simulation?

15 A. That would be kind of the definition of a race-neutral
16 alternative.

17 Q. Okay. What was the next adjustment that was made?

18 A. So the next one was to eliminate the legacy preference.
19 This is a preference which disproportionately benefits white
20 students and affluent students. So in an effort to reduce
21 that impediment to diversity, we eliminated the legacy
22 preference.

23 Q. What is the next adjustment that was made to the model?

24 A. The next was to eliminate the preference for those who
25 appear on the special dean or director's list that Dean

1 Fitzsimmons has. And so we removed that preference as well,
2 given that it disproportionately benefits white and wealthy
3 students.

4 **Q.** Okay. What is the next adjustment that was made?

5 **A.** So Harvard currently has a system by which they
6 preference the children of faculty and staff. Again, the
7 data suggested that those preferences disproportionately
8 benefit white and affluent students, and so we eliminated
9 that preference.

10 **Q.** The next one refers to the athletic preference. What
11 adjustment did you make there with respect to this
12 simulation?

13 **A.** So in that case, we kept the athletic preference. It was
14 my judgment that the athletic preference is basically bred
15 into the culture of higher education in America, and it would
16 be perceived as radical to eliminate that preference. So we
17 kept that preference.

18 Of course, unlike the faculty staff preference, the
19 legacy preference, athletic preference also has to do with
20 the individual merit so someone can work harder to improve
21 their athletic skills. They can't do anything to change
22 their parents or for those other preferences.

23 **Q.** What is the next adjustment that is listed on this model?

24 **A.** Okay. So we provided a larger boost than Harvard
25 currently provides to socioeconomically disadvantaged

1 students. And these are the students who Harvard has
2 identified or tagged in the application process as
3 disadvantaged. And the size of the preference is roughly
4 equal to half of what the athletes are currently given in
5 terms of a preference under the Harvard system.

6 Overlaid on top of that to boost sociogeographic
7 diversity, we relied on some information that Harvard gave us
8 about where students lived and what sort of neighborhoods
9 they lived in. Harvard gave us access to the College Board's
10 materials on neighborhood clusters. So the College Board
11 identifies 33 different types of neighborhoods in the United
12 States. And Harvard didn't give us the ZIP Code data, but
13 they did give us the code for where students line up among
14 these 33 clusters. And so we used that data to take an equal
15 number of the very top students from each of the clusters
16 that the College Board -- these 33 clusters.

17 **Q.** And then the last simulation adjustment here refers to an
18 early-action preference?

19 **A.** That's correct.

20 **Q.** What was the decision there?

21 **A.** So once again, as Harvard's own data suggests, early
22 action is a method of admission that disproportionately
23 benefits wealthy and white students. So they have access to
24 the high school counselors who can advise them that there is
25 a preference to applying early. And so in this simulation,

1 although not in all the simulations, we eliminate the
2 early-action preference.

3 **Q.** Okay. And did you prepare a slide that shows the results
4 of the simulation?

5 THE COURT: When you say that you give
6 socioeconomic status half the weight of an athletic
7 preference, are you talking about percentage? Or you've been
8 able to quantify how much of an advantage an athlete gets?

9 THE WITNESS: Yes. As part of Professor
10 Arcidiacono's model, he is able to estimate the weights
11 currently provided to various preferences. So athletic
12 preference is a substantial one. There's legacy preference,
13 racial preference. And so we're relying on his model which
14 identifies the size of those -- the magnitude of those
15 preferences.

16 THE COURT: Okay.

17 BY MR. STRAWBRIDGE:

18 **Q.** You did, in fact, prepare a slide that shows how this
19 result compares to 2019?

20 **A.** I did.

21 **Q.** Is that what we're seeing on the screen here?

22 **A.** It is.

23 **Q.** Why don't you explain what the results of this simulation
24 were and how they compared to 2019?

25 **A.** Okay. So the blue lines here are the results of the

1 simulation. And to make it easy to compare to the status
2 quo, you can see the dotted lines represent the status quo
3 numbers in these simulations. So we can see that in terms of
4 racial and ethnic diversity, the white applicants get roughly
5 the same share of the class. Asian-Americans do a little bit
6 better, there's a modest drop among African-American
7 students, Hispanic students are roughly flat, and the total
8 of the underrepresented minority students is 24 percent.

9 As I mentioned earlier, the Smith committee, the
10 race-neutral committee, suggested that these numbers are
11 comparable to Harvard's current levels of racial and ethnic
12 diversity.

13 **Q.** Just in your own opinion, I want to talk about the
14 decline in the African-American percentage particularly. How
15 come that does not render, in your view, this simulation
16 unworkable?

17 **A.** Well, I would say a couple of things. First is reference
18 to the Smith committee, which said that these levels of
19 diversity are comparable to existing levels of diversity.

20 In addition, you'll recall that I mentioned earlier
21 Harvard had 7 to 8 percent representation in its enrolled
22 class in the past, and these are numbers that don't fall
23 below that number.

24 In addition, it's important to point out that
25 Harvard did not provide us access with all the information we

1 needed to run simulations that would be completely fair to
2 African-American and Latino students. And in particular, the
3 absence of access to wealth data means that we cannot give,
4 in this model, a preference to those who have low levels of
5 wealth. The reason that's important is that wealth is, in
6 the academic literature, known to be a key predictor of
7 college-going and to life chances more generally. And so it
8 would have been nice to have that information.

9 But in terms of the racial impact, this is
10 particularly important. African-Americans on average have
11 incomes that are 60 to 70 percent of white income levels.
12 But the African-American wealth gap is much, much larger, so
13 that African-Americans on average have 10 percent, just
14 10 percent of the wealth of the median white family.

15 And so the absence of the wealth data in our
16 simulation doesn't tell us what -- it underestimates, in my
17 view, the potential of race-neutral alternatives. Because if
18 you used a wealth variable, it would better capture the
19 history of slavery and segregation in this country, of
20 redlining. Because all of that feeds into wealth, and that
21 helps -- this past discrimination, current discrimination
22 against African-Americans helps explain why the wealth gap is
23 so much larger than the income gap.

24 So the 10 percent figure doesn't represent the full
25 potential that Harvard has to produce higher levels of

1 African-American and Hispanic representation.

2 **Q.** What does the simulation reveal with respect to the
3 academic characteristics of the class under this race-neutral
4 model?

5 **A.** So the academic characteristics remain superb. In the
6 status quo, the SATs are at the 99th percentile. In the
7 simulation, they're at the 98th percentile. High school GPA
8 actually goes up a fraction of a point. So this is a highly
9 prepared, highly academically prepared student body in the
10 simulation.

11 **Q.** And what does the simulation indicate with respect to the
12 effect on socioeconomic diversity?

13 **A.** Obviously socioeconomic diversity expands greatly under
14 this model, perhaps not unexpected, since this is a
15 socioeconomic preference. But you recall that about
16 18 percent of students were tagged as disadvantaged under the
17 status quo, and now that rises to 54 percent disadvantaged,
18 which I think could have a lot of benefits at a place where
19 you have currently 23 times as many rich kids as poor kids.
20 Now there would be a much more vibrant level of socioeconomic
21 diversity and the educational benefits that would flow from
22 that.

23 **Q.** Let's talk about the next simulation that you performed.

24 **A.** Okay.

25 **Q.** Or I should say that you are highlighting with respect to

1 your opinion in this case.

2 **A.** Mm-hmm.

3 **Q.** Can you just describe briefly the basis for Simulation B.

4 **A.** Simulation B is Professor Card's model, and it's also
5 Professor Card's simulation. So this is not something we
6 adjusted in any respect. This is Professor Card's -- his
7 work entirely.

8 **Q.** Why don't we highlight the differences with respect to
9 this simulation performed by Professor Card and the first
10 simulation that you conducted.

11 **A.** Okay. So Professor Card does many of the same things
12 that Professor Arcidiacono and I did. But in addition, I
13 guess to highlight the changes, he takes out the athletic
14 preference, which I considered to be a radical thing to do.
15 And he used a different definition of socioeconomic
16 advantaged.

17 So rather than relying -- let me step back and say
18 the size of the preference was basically the same as the one
19 in Simulation A. So it's half an athlete preference.

20 But he used a different approach to the geographic
21 question, the question what neighborhood students come from.
22 So rather than taking equal numbers from various clusters,
23 College Board clusters, Professor Card looks at the students
24 who -- provides a reference to students would come from
25 disadvantaged neighborhoods, which he defines as those which

1 have a census-tracked income of below \$65,000.

2 And then the other change is Professor Card leaves
3 the early-action preference in place.

4 **Q.** And what were the results of this simulation?

5 **A.** Those results were also positive, in my view.

6 Boy, I'd be worried about that slide.

7 **Q.** There we go. Sorry about that.

8 **A.** So this is Simulation B. Again, this is entirely
9 Professor Card's model and simulation.

10 **Q.** What does the simulation show with respect to racial and
11 ethnic diversity?

12 **A.** Strong levels of racial and ethnic diversity, again
13 termed by the Smith committee to be comparable. 27 percent
14 overall underrepresented minority shares compared to
15 28 percent, so virtually indistinguishable. We had the same
16 results with respect to African-American admits. Even more
17 positive results with respect to Hispanic and other admits.
18 White admits go down, and Asian-American admits go up.

19 **Q.** And what were the academic characteristics reflected in
20 this simulation?

21 **A.** Virtually identical to Simulation A. So again, we're
22 getting very, very well-prepared students, those at the 98th
23 percentile SATs. Grade point average is slightly higher.

24 **Q.** And again with respect to socioeconomic diversity, what
25 were the results of this simulation?

1 **A.** A large jump in the socioeconomic diversity and therefore
2 the educational benefits that go along with that.

3 **Q.** You did a third simulation performed in this case?

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

5 **Q.** That's Simulation C here?

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

7 **Q.** Why don't you explain what the differences were between
8 Simulation C and Simulation B?

9 **A.** Okay. So Simulation C was conducted in conjunction with
10 Professor Arcidiacono but based on Professor Card's model of
11 how the current system works. Unlike the previous -- unlike
12 Simulation B, Simulation C includes the athletic preference.
13 It also makes some minor adjustments to Professor Card's
14 low-income -- low socioeconomic definition.

15 So Professor Card was defining as disadvantaged
16 those who were from -- had various family indicators of
17 disadvantaged, but was also looking at neighborhood.

18 And I asked Professor Arcidiacono to add in a
19 factor that looked at disadvantaged high schools that
20 students attended. There's a large body of research to
21 suggest that attending a high school in which most of your
22 classmates or many of your classmates are low income provides
23 an obstacle to high levels of achievement. And so I adjusted
24 the model in that fashion.

25 We also expanded the definition of disadvantaged

1 neighborhood, and in our case high school, to include
2 additional factors that are included in the educational
3 literature. So we know it's a disadvantage to grow up in a
4 neighborhood where your neighbors are low income on average.
5 It's also a disadvantage to be in neighborhoods where there
6 are low levels of education among those peers in the
7 neighborhood and also where there are high levels of English
8 not spoken as a first language. So we added those
9 characteristics in as well.

10 In addition, I guess the final minor adjustment to
11 mention is that we changed the threshold for what constitutes
12 a disadvantaged neighborhood. Professor Card had used the
13 \$65,000 cutoff, which I thought was too high and instead
14 really wanted to focus on these amazing kids who have
15 overcome disadvantages. So used the bottom third rather than
16 the \$65,000 cutoff.

17 **Q.** Were these adjustments that you made to determine who
18 should get the socioeconomic preference that was applied in
19 this model?

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

21 **Q.** Did you adjust the size of the socioeconomic preference
22 itself?

23 **A.** No.

24 THE COURT: Bottom third of what?

25 THE WITNESS: The bottom third. It's the composite

1 figure that looks at income, education, and the language.
2 Once you put all those in, it's the bottom third of
3 neighborhoods by census tracked in the entire country.

4 BY MR. STRAWBRIDGE:

5 **Q.** Did you equally weight those three factors in order for
6 identifying the bottom third?

7 **A.** Yes. And I was going to say the final change was in this
8 model there's no early-action preference.

9 **Q.** Does this display the results of this simulation?

10 **A.** It does.

11 **Q.** Can you just explain what the results here are with
12 respect to racial and ethnic diversity?

13 **A.** So overall racial and ethnic diversity, the
14 underrepresented proportion, underrepresented minority
15 proportion actually exceeds the status quo. Hispanic numbers
16 rise again without that wealth data we saw some modest drop
17 among the African-American admits. Asian-American admits do
18 quite a bit better. White admits decline under this
19 simulation.

20 **Q.** And what were the academic characteristics of the
21 simulated class in this model?

22 **A.** They remain superb, at the 98th percentile, and SATs and
23 high school GPA at the same level.

24 **Q.** What about socioeconomic diversity?

25 **A.** It's much more socioeconomically diverse than Harvard's

1 current class.

2 **Q.** And there's one more model that we're discussing today
3 that you used in forming your opinions?

4 **A.** Yes.

5 **Q.** That would be Simulation D shown here?

6 **A.** That's correct. This one is a little easier to explain
7 in that the only distinction between C and D is that D
8 includes the early-action preference. We put that one back
9 in.

10 **Q.** So the only difference between C and D is just whether or
11 not there's any preference associated with early action?

12 **A.** That's correct.

13 **Q.** And what were the results of this simulation?

14 **A.** So once again you saw strong results in the
15 underrepresented minority proportions, identical to the
16 current -- the status quo or baseline class. Essentially the
17 same results as we saw in Simulation D with some minor
18 changes in terms of racial and ethnic diversity.

19 **Q.** And specifically what effect did putting early action
20 back into the model have with respect to the racial and
21 ethnic diversity?

22 **A.** It hurt Hispanics a little bit, about one percentage
23 point.

24 **Q.** Academic characteristics under this model?

25 **A.** Academic characteristics remain superb.

1 **Q.** And what about socioeconomic diversity?

2 **A.** There's a great deal of socioeconomic diversity here as
3 well.

4 **Q.** The simulations that we've just been reviewing now, in
5 your view are they feasible to implement at Harvard?

6 **A.** Yes.

7 **Q.** And why do you say that?

8 **A.** Well, Harvard currently has a system of admissions that
9 is holistic and based on various preferences that are
10 weighted in different fashions. So this would essentially
11 replicate that type of system with the major difference being
12 what counts in admissions would shift. So Harvard already
13 has a system of preferences and tips. We would just adjust
14 them.

15 The other thing to point out is the data that are
16 necessary to implement these simulations are all readily
17 available to Harvard. It has access to all the information
18 that we included in these simulations.

19 **Q.** Are there some race-neutral strategies available to
20 Harvard that were not factored into the simulations that we
21 just looked at?

22 **A.** Yes.

23 **Q.** What would you consider those alternatives to be?

24 **A.** So none of these simulations relied on Harvard's doing
25 any better than they currently are with respect to

1 recruitment. So even though Professor Hoxby from Stanford
2 has identified 35,000 high-achieving low-income students of
3 various races as able to do the work at places like Harvard,
4 none of these simulations assume any change whatsoever in
5 recruitment. But that is something that if Harvard were to
6 do a stronger job at they could see even better results.

7 **Q.** Are there other alternatives that Harvard could use with
8 respect to race-neutral strategies that are not factored into
9 the simulations we just looked at?

10 **A.** Yes. So in some instances, universities have used
11 greater reliance on community college students to transfer to
12 a place like Harvard. Princeton, Amherst, other institutions
13 are now seeing community colleges as a source of a rich level
14 of ethnic, racial, and economic diversity and are admitting
15 more transfers from community colleges.

16 And that's -- we don't assume Harvard does any of
17 that in this simulation.

18 **Q.** Was there any other socioeconomic data that was not
19 available for purposes of constructing these simulations?

20 **A.** So I mentioned earlier that wealth was not available, and
21 that's critically important, particularly with respect to
22 African-American shares.

23 But in addition, we didn't have refined data with
24 respect to family income. Harvard has a disadvantaged tag
25 that we used, which is a little bit amorphous. It's

1 basically up to the admissions officer if they have a sense
2 that the individual is economically disadvantaged, they'll
3 tag them as disadvantaged. But that doesn't tell us whether
4 this student is from a family where the parents are
5 struggling at \$15,000 a year up to a much higher level that
6 still would be tagged as disadvantaged. So having that
7 additional data would have allowed us to make a more refined
8 set of judgments.

9 **Q.** Did Harvard respond to the simulations that you relied
10 upon in forming your opinions in this case?

11 **A.** It did.

12 **Q.** How did they respond to them?

13 **A.** Primarily through the Smith committee.

14 **Q.** You mentioned the Smith committee before. This is the
15 committee on race-neutral strategies?

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

17 **Q.** And looking at what's on the screen -- I think you also
18 have a notebook in front of you, if you want to look at a
19 paper version.

20 **A.** Good. This is very fuzzy.

21 **Q.** It should be under Tab 316.

22 **A.** Okay.

23 **Q.** Do you recognize that?

24 **A.** I do.

25 **Q.** What is it?

1 **A.** So this is the Smith committee's report.

2 **Q.** Let's start with what the committee said with respect
3 to --

4 THE COURT: Do I have this notebook?

5 MR. STRAWBRIDGE: I put one up there for you, Your
6 Honor.

7 THE COURT: Deposition designations.

8 MR. STRAWBRIDGE: May I approach?

9 THE COURT: Yes.

10 MR. STRAWBRIDGE: Sorry about that. We're on
11 Tab 316.

12 BY MR. STRAWBRIDGE:

13 **Q.** Mr. Kahlenberg, did the committee respond to this report
14 with respect to the level of racial diversity in your
15 simulations?

16 **A.** They termed the level of racial diversity as comparable.

17 **Q.** If you would, turn to page 14. Is this the language that
18 you were referring to with respect to the committee's
19 response?

20 **A.** Yes.

21 MR. LEE: I object. We're now confusing two
22 things. This is African-American, Hispanic, and others
23 grouped together as opposed to what he just testified to.

24 MR. STRAWBRIDGE: The document will speak for
25 itself. I just wanted to ask Mr. Kahlenberg --

1 MR. LEE: I agree on that.

2 THE COURT: You agree on that?

3 MR. LEE: Yes.

4 THE COURT: Okay.

5 BY MR. STRAWBRIDGE:

6 Q. Is this the language in the report that you were
7 referring to?

8 A. It is.

9 Q. In particular, what is it about what the Smith committee
10 said here that makes you think that -- how did they respond
11 to your level of racial diversity?

12 A. The Smith committee did make mention of racial diversity
13 with respect to an instance when Harvard wouldn't provide any
14 socioeconomic preferences. They said African-American shares
15 would drop to 6 percent and that that was unacceptable to
16 them. And I agree with that.

17 But they made no mention of the drop in
18 African-American percentages from 14 to 10. That wasn't any
19 part of the Smith committee report that I saw.

20 Q. Does this language indicate that, for example -- I direct
21 you to the last sentence here -- that some of the race
22 neutral practices reflected in the simulations could offer a
23 significant degree of racial diversity?

24 A. That's correct.

25 Q. Did you agree with the Smith committee on that point?

1 **A.** Yes.

2 **Q.** What did the Smith committee say with respect to the
3 disadvantages of the simulations that you performed in this
4 case?

5 **A.** Well, they had a couple of concerns. The first had to do
6 with the academic standing of the -- academic preparedness of
7 the class.

8 **Q.** And is that the language that's highlighted on the screen
9 right here?

10 **A.** Yes.

11 **Q.** This concern indicates that "The ultimate combination of
12 race-neutral alternatives that Mr. Kahlenberg deems workable
13 for Harvard would, if adopted, result in a 19 percent drop in
14 the proportion of admitted students with the highest academic
15 ratings." Is that right?

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

17 **Q.** Do you agree with that criticism?

18 **A.** I do not.

19 **Q.** Why not?

20 **A.** Well, to begin with, the objective factors, those that
21 look at SAT scores and GPA, which are kind of the standard in
22 the literature on race-neutral alternatives, remain high.
23 They're at the 98th percentile.

24 In addition, in terms of the -- so when they talk
25 about the proportion of admitted students with the highest

1 academic ratings and they reference the 76 percent to
2 66 percent, you can connect that to the simulations and infer
3 that they're talking about the drops in the numbers of
4 academic 1s and academic 2s combined.

5 And I just didn't find this particularly
6 persuasive. I mean, to begin with there, are very, very few
7 academic 1s under Harvard's system. And so this modest
8 decline in the proportion of academic 1s involves really a
9 handful of students. At the deposition, I noted it was less
10 than 10.

11 So even if we were to adjust the model to make sure
12 they don't lose a single academic 1, it wouldn't change the
13 overall levels of racial, ethnic, and socioeconomic
14 diversity.

15 In terms of the academic 2s -- I'm trying to think
16 about how to say this politely. These are not must-have
17 geniuses under the system. 80 percent of the academic 2s are
18 rejected currently. So that, to me, was unpersuasive.

19 And I guess the other thing I would mention is the
20 students who would replace these academic 1s and 2s
21 presumably would include academic 3s, socioeconomically
22 disadvantaged academic 3s. And it's my understanding there's
23 going to be testimony given from students who received
24 academic 3s and overcame incredible obstacles. And I think
25 Harvard is enriched by having those students and would not

1 see that as a negative in any sense.

2 **Q.** Did the Smith committee have any other critiques of your
3 simulations, at least with respect to its report?

4 **A.** Yes. So another one of their complaints had to do with
5 this concept that sometimes has been called diversity within
6 diversity, where universities will raise the concern that
7 under a socioeconomic preference system, a larger number of
8 the underrepresented minority students will come from
9 economically disadvantaged backgrounds. And for them, that
10 raises a red flag.

11 **Q.** And is this the language you're referring to with respect
12 to that concern?

13 **A.** Yes.

14 **Q.** Okay. This indicates that "Using socioeconomic status as
15 a proxy for race would also, by definition, yield a student
16 body in which many of the nonwhite students would come from
17 modest socioeconomic circumstances. Thus, even if
18 socioeconomic status could be used to increase racial
19 diversity, it would do so at the cost of other forms of
20 diversity, undermining rather than advancing Harvard's
21 diversity-related educational objectives."

22 Is that correct?

23 **A.** That's correct.

24 **Q.** Do you find this critique of the simulations compelling?

25 **A.** I don't.

1 **Q.** Why not?

2 MR. LEE: I object to the form of the question. He
3 didn't say he agrees or disagrees. Whether it's compelling
4 or not is --

5 THE COURT: That's fair.

6 MR. STRAWBRIDGE: I'll rephrase, Your Honor.

7 BY MR. STRAWBRIDGE:

8 **Q.** Do you agree with this critique of the simulations?

9 **A.** I do not.

10 **Q.** Why not?

11 **A.** Well, I guess to begin with, when I was talking about why
12 I support socioeconomic preferences in the first place, I
13 think the students who have overcome odds and manage to do
14 quite well despite those obstacles are especially impressive.

15 And so if the underrepresented -- I guess the
16 phrase here is nonwhite students who are admitted under the
17 new system are more likely to be those who have overcome
18 obstacles. I'm even more impressed by those students than
19 those who are more advantaged.

20 Under the current system of admissions, some
21 70 percent of underrepresented minority students fall into
22 the advantaged category. And if the point of having
23 diversity within diversity is to give a sense of -- a genuine
24 sense of the backgrounds of students in a college, then the
25 simulation provides a much better approximation of the real

1 world than does Harvard's current system, which is
2 disproportionately benefiting advantaged nonwhite students.

3 **Q.** Were there other critiques that the Smith committee made
4 of your simulations?

5 **A.** Yes.

6 **Q.** What critiques are you thinking of?

7 **A.** So the third major critique was that this would --
8 admitting more disadvantaged students would put financial
9 pressure on Harvard University.

10 **Q.** Do you agree with that critique?

11 **A.** I do not.

12 **Q.** Why not?

13 **A.** Well, where to start. So to begin with, Harvard
14 University is literally the richest university in the entire
15 country. Its \$37 billion endowment is bigger than the gross
16 domestic product of half the world's countries. They
17 recently raised \$9 billion in a campaign. And in The
18 Chronicle of Higher Education, someone said this was like
19 beating the 4-minute mile.

20 MR. LEE: Your Honor, The Chronicle of Higher
21 Education, the capital campaign is neither in his report or
22 relevant to the issues here.

23 THE COURT: Let's just leave it Harvard is rich.

24 MR. LEE: We'll stipulate.

25 **A.** So that's to begin with. Looking at the enormous

1 resources available to Harvard, I find it unpersuasive. In
2 addition to that, it's not just kind of my view of this
3 issue.

4 There is testimony in the depositions from Dean
5 Fitzsimmons and Dean Donahue on this question of whether
6 Harvard could afford to bring in more socioeconomically
7 disadvantaged students and help provide them financial aid.

8 BY MR. STRAWBRIDGE:

9 Q. And did you rely on that testimony in forming your
10 opinions?

11 A. I did.

12 Q. And is this some of the testimony on this demonstrative
13 here that you relied upon there?

14 A. Yes.

15 Q. And what does this testimony indicate?

16 A. So this is Dean Fitzsimmons, who runs the admissions at
17 Harvard, suggesting in answer to a question about the budget:
18 We are not given a rigid limit on the amount of financial aid
19 that -- essentially says we have to meet.

20 The question is, then: Is there any economic
21 restraint on the number of HFAI students?

22 So HFAI is, as you know, Your Honor, the Harvard
23 financial aid initiative.

24 The answer to that question, is there an economic
25 restraint, is no.

1 **Q.** Did you also rely on the testimony from Sally Donahue?

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

3 **Q.** Who is Ms. Donahue?

4 **A.** Until recently, at least, she was the director of the
5 financial aid department at Harvard University.

6 **Q.** And is this the testimony that you relied upon?

7 **A.** It is.

8 **Q.** And what did Ms. Donahue indicate in the testimony you
9 relied upon in forming your opinion?

10 **A.** She was asked the question, "Would there be any problem
11 if the number of HFAI awards doubled?"

12 And her answer was "No."

13 **Q.** Is this some additional testimony that you relied upon
14 here?

15 **A.** It is.

16 **Q.** And does this inform your view with respect to the
17 alleged concerns about the financial aid impediments to the
18 simulations that you relied upon in this case?

19 **A.** It does. This is further evidence that the question is
20 asked: Is there any restraint on Harvard's ability to
21 increase the number of HFAI? Is it still your testimony that
22 you don't think there's any restraint on Harvard's ability to
23 increase the number of HFAI awards in a given admissions
24 cycle?

25 The answer is clearly yes.

1 MR. STRAWBRIDGE: With that, I pass the witness.

2 MR. LEE: Can we take a morning break and then we
3 can set up and be ready to go? Or we can do whatever Your
4 Honor wants.

5 THE COURT: I'd rather go until noon and take the
6 lunch break, but I'm happy to take as much time as you need
7 to set up.

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

9 THE COURT: When you're ready.

10 EXAMINATION

11 BY MR. LEE:

12 Q. Good morning, Mr. Kahlenberg.

13 A. Good morning.

14 Q. You were retained by SFFA for this case, correct?

15 A. That's correct.

16 Q. Now, you haven't been here during the first week of the
17 trial, so you didn't hear the other witnesses testify,
18 correct?

19 A. So I did read transcripts in the case.

20 Q. My question was were you here.

21 A. I was not here, no.

22 Q. You do know, having read the transcripts, that the only
23 witnesses who have testified have been representatives of
24 Harvard, correct?

25 A. I think that's right.

1 **Q.** So you're the first person that SFFA has called to
2 testify on direct examination on its behalf, correct?

3 **A.** I didn't track carefully, but I don't have reason to
4 disagree with you.

5 **Q.** And you're being compensated by SFFA, correct?

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

7 **Q.** You've been paid by them for over four years now,
8 correct?

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

10 **Q.** And the other -- the only other witness they're going to
11 call on direct is the person, Professor Arcidiacono, that you
12 referred to, correct?

13 **A.** That's correct.

14 **Q.** And he's being paid by SFFA as well, correct?

15 **A.** I assume so. I don't know his financial arrangements,
16 but I assume so.

17 **Q.** You've known Mr. Blum, who is sitting right back here,
18 for some years, correct?

19 **A.** I have known him.

20 **Q.** You've known him for about 15 years, correct?

21 **A.** Let's see. I met him in I think around 2003, so that
22 sounds right.

23 **Q.** So about 15 years, give or take? Fair?

24 **A.** Yes.

25 **Q.** Now, during your direct testimony, you twice used the

1 phrase "searching for plaintiffs," correct?

2 **A.** I may have, yes.

3 **Q.** What you were referring to is Mr. Blum's public statement
4 after the first *Fisher* decision, correct?

5 **A.** I was referring to -- my understanding is there was a
6 website called "Harvard Not Fair" that was asking for people
7 to come forward if they felt as though they'd been poorly
8 treated.

9 **Q.** And Mr. Blum said specifically he was searching for Asian
10 plaintiffs, correct?

11 **A.** I have no idea.

12 **Q.** You don't know one way or another, correct?

13 **A.** No.

14 **Q.** Now, have you spoken to a single member of SFFA?

15 **A.** No.

16 **Q.** Do you know anything about them, a single member of SFFA?

17 **A.** Well, I mean, I know that there are a number of
18 Asian-American applicants who believe that they have been
19 discriminated against, but I haven't met any of them.

20 **Q.** Can you identify one by name?

21 **A.** No.

22 **Q.** Have you read the application file of one?

23 **A.** No.

24 **Q.** Have you spoken to one?

25 **A.** No.

1 **Q.** Have you met one?

2 **A.** No.

3 **Q.** Have you asked to speak to one?

4 **A.** No.

5 **Q.** Have you spoken -- now, you and Mr. Blum have a mutual
6 interest in affirmative action, correct?

7 **A.** I think that's right.

8 **Q.** And you understand that Mr. Blum's interest is to
9 eliminate affirmative action in all programs that consider
10 race, correct?

11 **A.** Well, I haven't -- I think that's probably right.

12 **Q.** Well, if you have any doubt, turn to Tab 4 and you'll
13 find the first page of the web page of SFFA.

14 In the course of your work over the four-year
15 period, have you reviewed SFFA's website?

16 **A.** I've been to the website.

17 **Q.** Good. And you'll see in the second sentence of the first
18 paragraph, "Our mission is to support and participate in
19 litigation that will restore the original principles of our
20 nation's civil rights movement. A student's race and
21 ethnicity should not be factors that either harm or help that
22 student to gain admission to a competitive university."

23 You understand that that's SFFA's mission, correct?

24 **A.** Correct.

25 **Q.** Now, you have been a longtime advocate of using economic

1 status rather than race in college admissions, correct?

2 **A.** So let me respond in this way: Advocate in the sense of
3 supporter, but not advocate in the sense that I have a
4 constituency that I'm representing or that I'm a lawyer who's
5 working on behalf of -- mine is a research basis for the
6 belief.

7 **Q.** Tell me if this is true or not: You have been a longtime
8 advocate of what you think is a fair system of admissions
9 which would take into account class disadvantage rather than
10 race. True or false?

11 **A.** True.

12 **Q.** In fact, you've had that view since the 1980s, correct?

13 **A.** I think that's probably right. That's right.

14 **Q.** You formed that view while you were in college, correct?

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

16 **Q.** And you've held that view since you attended Harvard
17 College, correct?

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

19 **Q.** And as you told Mr. Strawbridge, you have spent a number
20 of years researching and writing about those issues, correct?

21 **A.** That's correct.

22 **Q.** Now, the opinions you just gave to Her Honor is that
23 Harvard could implement workable race-neutral alternatives,
24 correct?

25 **A.** That's correct.

1 **Q.** Now, Mr. Kahlenberg, you've never worked as a college
2 admissions officer, have you?

3 **A.** I have not.

4 **Q.** You've never worked as an admissions officer at a public
5 university, have you?

6 **A.** No.

7 **Q.** You've never worked as an admissions officer at a private
8 university, have you?

9 **A.** No.

10 **Q.** You've never had any involvement with the admissions
11 office or the admissions process at any university or
12 college, correct?

13 **A.** That's correct.

14 **Q.** You have never served in the administration of a college,
15 correct?

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

17 **Q.** You have never served in the administration of a public
18 university, correct?

19 **A.** That's correct.

20 **Q.** You have never served in the administration of a public
21 university, correct?

22 **A.** Correct.

23 **Q.** You have never served in the administration of a private
24 university, correct?

25 **A.** Correct.

1 **Q.** And you've never been retained by a college, public
2 university, or a private university to evaluate race-neutral
3 alternatives for that particular institution, correct?

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

5 **Q.** You've never designed a financial aid program for a
6 college, public university, or private university, correct?

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

8 **Q.** You've never implemented a financial aid program,
9 correct?

10 **A.** Correct.

11 **Q.** You've never designed a college minority recruitment
12 program, correct?

13 **A.** Correct.

14 **Q.** You certainly have never implemented one, correct?

15 **A.** Correct.

16 **Q.** You never designed an early-action program, correct?

17 **A.** Correct.

18 **Q.** You've never implemented one, correct?

19 **A.** That's correct.

20 **Q.** And while you've attended Harvard, you have not worked
21 for Harvard, correct?

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

23 **Q.** You've heard of a concept of an independent expert coming
24 to court. Do you have that concept in mind?

25 **A.** I guess, I do, yeah.

1 **Q.** Now, you're not an expert on Harvard's institutional
2 goals, are you?

3 **A.** Well, I've been able to review the documents in this case
4 that give me a strong sense of what Harvard's institutional
5 goals are.

6 **Q.** So based upon your experience and expertise, which you
7 reviewed with Mr. Strawbridge and you and I just reviewed in
8 part, you were able to review Harvard's institutional goals,
9 correct?

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

11 **Q.** Do you consider yourself to be an expert on Harvard's
12 institutional goals?

13 **A.** I reference Harvard's goals rather than imposing my own.

14 **Q.** Fair enough.

15 And you reference those goals in giving the opinion
16 you just gave to Mr. Strawbridge that Harvard could use
17 race-neutral alternatives to achieve its goals, correct?

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

19 **Q.** Now, you described for Mr. Strawbridge the documents you
20 read, the depositions you read, the exhibits you reviewed,
21 the simulations.

22 Do you recall that?

23 **A.** Yes.

24 **Q.** But, Mr. Kahlenberg, you reached the opinion you just
25 gave the Court before this case was even filed, didn't you?

1 **A.** No.

2 **Q.** Well, Mr. Kahlenberg, isn't it true that you were paid to
3 help SFFA draft the complaint in this very case?

4 **A.** I was paid to give advice on the race-neutral alternative
5 section of the case.

6 **Q.** Mr. Kahlenberg, can you answer my question?

7 Were you paid by the hour to help draft the
8 complaint that was filed against Harvard? Yes or no.

9 **A.** I wouldn't say draft, no.

10 **Q.** Were you paid to consult on the complaint that was filed
11 in this court against Harvard?

12 **A.** Yes.

13 **Q.** And you know that that complaint after you consulted on
14 it was filed, correct?

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

16 **Q.** That complaint that you consulted on was filed in this
17 court, correct?

18 **A.** Yes.

19 **Q.** You were compensated for your work on the complaint,
20 consulting or otherwise, correct?

21 **A.** Correct.

22 **Q.** That complaint was filed on November 17, 2014, correct?

23 **A.** Correct.

24 **Q.** And that very week, you gave an interview to Fox News,
25 didn't you?

1 **A.** So there were some documents sent over. I didn't review
2 that document in particular.

3 **Q.** Well, let me see if I can refresh your recollection.

4 Is it true or is it not that in the very week that
5 the complaint was filed you gave an interview to Fox News?

6 **A.** So is there a document you can refer me to?

7 **Q.** Sure. Turn to Tab 6, and you'll find a November 18,
8 2014, Fox News interview. Let me see if I can refresh your
9 recollection. Turn, if you would -- first, do you see the
10 date November 18, 2014?

11 **A.** I do.

12 **Q.** And you have in mind the complaint was filed November 17,
13 2014?

14 **A.** Okay.

15 **Q.** Now, you and I can agree on this: As of November 18,
16 there hadn't been a single document produced in the case,
17 correct?

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

19 **Q.** There hadn't been a single exhibit produced, correct?

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

21 **Q.** There hadn't been a single witness who testified under
22 oath or otherwise, correct?

23 **A.** That's correct.

24 **Q.** Harvard hadn't even been served with the complaint,
25 correct?

1 **A.** I don't know about that.

2 **Q.** Well, let's see what you said the day after the complaint
3 was filed. Look on the second page.

4 "The plaintiffs present considerable evidence
5 suggesting that Harvard discriminates against Asian-American
6 applicants. Richard Kahlenberg, a consultant for the
7 plaintiffs who studies education policy at The Century
8 Foundation, told foxnews.com."

9 Do you see that?

10 **A.** I do.

11 **Q.** So one day after the complaint's been filed, before
12 anything has happened in the case, you're talking to the
13 media and pronouncing judgment on Harvard, aren't you?

14 **A.** Well, this is based on the -- what I said is "The
15 plaintiffs present considerable evidence," so that would be
16 referencing the complaint.

17 **Q.** So what you were saying there is the complaint says it,
18 but it may or may not be true. Is that what you'd like us to
19 believe?

20 **A.** So I didn't say I have reached an opinion on whether
21 Harvard discriminates against Asian-Americans. I'm just
22 saying the plaintiffs present considerable evidence.

23 **Q.** So there's a complaint that you've consulted on filed
24 against Harvard on November 17, 2014, correct?

25 **A.** Correct.

1 **Q.** SFFA issues a press release, correct?

2 **A.** I imagine there was one.

3 **Q.** And then you speak to Fox News, correct?

4 **A.** Yes.

5 **Q.** And this is what you say, correct?

6 **A.** Yes.

7 **Q.** Before you had seen a single simulation, a single
8 exhibit, a single deposition, a single piece of paper,
9 correct?

10 **A.** Yes. So I didn't say the plaintiffs present considerable
11 evidence and the defendants have no position. I just said
12 the plaintiffs present considerable evidence.

13 **Q.** Well, actually, Mr. Kahlenberg, you went on to say more,
14 and you expressed your opinion on the very race-neutral
15 alternative concept or theories that you've just provided to
16 Her Honor.

17 Turn, if you would, to page 3 in the same
18 interview. Third from the bottom paragraph.

19 "Harvard has as many students in the freshman class
20 from families in the top 1 percent by income nationally as
21 from the bottom 50 percent, he said. It could produce
22 considerable racial and ethnic diversity without resorting to
23 racial preferences."

24 That's what you said to Fox News the day after the
25 complaint was filed, correct?

1 **A.** Correct.

2 **Q.** Then three years later you file your expert report,
3 correct, in this case?

4 **A.** That would be right, three years later.

5 **Q.** And your report says that race-neutral alternatives are
6 workable for Harvard, correct?

7 **A.** Correct.

8 **Q.** Now, I want to be sure I understand what you mean for
9 there to be a race-neutral alternative.

10 Let me ask you to assume that there is a
11 Chinese-American kid who is the son of immigrants growing up
12 in a middle class completely white neighborhood in Lincoln,
13 Nebraska.

14 Do you have that in mind?

15 **A.** Yes.

16 **Q.** That applicant doesn't self-identify their race on the
17 application. Do you have that in mind?

18 **A.** Yes.

19 **Q.** But they provide an essay that describes how even in this
20 middle class neighborhood, being the only Chinese-American in
21 the neighborhood was a challenge, and there was
22 discrimination and there was taunting. And the student then
23 describes all the things that he did to overcome those
24 issues.

25 **A.** MmHm.

1 Q. Can a college admissions officer consider that or not if
2 they're not considering race?

3 A. So my position would be it's fine for a college to
4 consider discrimination as opposed to race.

5 Q. And the fact that the discrimination occurred because of
6 race, it would be fine for them to consider that, correct?

7 A. In my view, yes.

8 Q. Okay. Thank you. Now, I'm going to come to that issue
9 in a little bit.

10 You have been hired in one other litigation to
11 testify, correct?

12 A. I mean, I've been hired in a few other. But yes, I think
13 I know where you're going with this one.

14 Q. You've been hired in at least one, correct?

15 A. Yes.

16 Q. You've been hired in one other case by SFFA, correct?

17 A. That's correct.

18 Q. And you've been hired to testify in a case that it's
19 filed against the University of North Carolina, correct?

20 A. That's correct.

21 Q. Now, Mr. Kahlenberg, there are other people in the
22 academic or think-tank world who study race-neutral
23 alternatives, correct?

24 A. That's correct.

25 Q. Marla Tienda is one, correct?

1 **A.** Marta. Yes.

2 **Q.** John Brittain is another, correct?

3 **A.** Yes.

4 **Q.** Matt, is it Gartner, is another?

5 **A.** Yes.

6 **Q.** None of those folks would have expressed a view on
7 Harvard right after the complaint was filed, correct?

8 **A.** Well, the -- what I said was it can produce --

9 **Q.** Mr. Kahlenberg, I'm not asking what you said.

10 I'm just asking whether any of these other people
11 expressed a view the day after the complaint was filed?

12 **A.** Whether they did, in fact, express a view? I have no
13 idea if they did.

14 **Q.** Those are people who could have come in and given an
15 opinion on race-neutral alternatives, but they're not,
16 correct?

17 **A.** They're not involved in this case, correct.

18 **Q.** Okay. Now, let me go to a slightly different topic. In
19 your opinion, race-neutral alternatives can always achieve
20 racial diversity, correct?

21 **A.** No. There may be instances when it can't. I haven't
22 found a particular situation where race-neutral alternatives
23 would be unworkable, but I don't want to close the door to
24 saying they would always work.

25 **Q.** You anticipated my next question, which is that you

1 cannot think of a single situation where race-neutral
2 alternatives would result in insufficient racial diversity,
3 correct?

4 **A.** So sitting here right now, there could be instances when
5 a university faced a particular applicant pool and for
6 whatever reason wasn't able to overcome that, and maybe that
7 would result in an instance when a race-neutral alternative
8 would be unworkable.

9 **Q.** Let's see what you said in your deposition. It's at
10 Tab 2 of your notebook. Let's turn to page 31, lines 17 to
11 23. Tell me when you're there.

12 **A.** I'm sorry. 17?

13 **Q.** Page 31, lines 17 to 23. Or it's on the screen as well.

14 **A.** Yeah.

15 **Q.** Ms. Ellsworth was asking you some questions. Do you
16 recall that?

17 **A.** Yes.

18 **Q.** "QUESTION: And I asked you earlier whether you would
19 oppose the use of race as a last resort if race-neutral
20 alternatives were unable to achieve the levels of racial
21 diversity that were deemed to be required."

22 And you said you couldn't think of an example where
23 that would come into play.

24 "ANSWER: Right. I can't think of an example."

25 Were you asked that question and did you give that

1 answer?

2 **A.** I did, which is different than saying there would never
3 be an example. I was just saying I couldn't think -- off the
4 top of my head, I couldn't think of an example.

5 **Q.** So the answer was correct at the time you gave it,
6 correct?

7 **A.** Yes.

8 **Q.** And it's true today, correct?

9 **A.** Well, I think -- I'd have to think more about it.

10 **Q.** You understand my chance to question you is today. So I
11 can only ask you my questions today.

12 **A.** Let me answer is this way: I think that there may well
13 be examples of situations where race-neutral alternatives
14 will not produce sufficient levels of racial diversity.

15 So if you're asking me to come up with off the top
16 of my head examples, maybe I'm more deliberative than I
17 should be, but that doesn't mean they don't exist.

18 **Q.** And if those examples existed, then it would be
19 completely appropriate for a university to use race in its
20 admissions process to achieve what that university thinks is
21 the correct level of diversity, correct?

22 **A.** No. I wouldn't leave it up to the university to say -- I
23 mean, if a university said we need 80 percent Latino
24 representation in order to get the educational benefits of
25 diversity, I wouldn't go along with that.

1 **Q.** Well, let's make it more specific.

2 You have described Harvard's racial diversity as --
3 and I have it written down here -- a vibrant level of racial
4 diversity, correct?

5 **A.** That sounds right.

6 **Q.** Harvard has made a decision to have a vibrant level of
7 racial diversity, correct?

8 **A.** Right.

9 **Q.** Harvard's made a decision that in order to have a vibrant
10 level of diversity it considers race as a factor in the
11 admissions process, correct?

12 **A.** Correct.

13 **Q.** Now, you agree that Harvard as an interest in achieving
14 that vibrant level of diversity, correct?

15 **A.** Not the specific level that they have today, but in
16 general, yes, they have an interest in achieving racial
17 diversity.

18 **Q.** Fair enough. I understand what you're saying. So let's
19 set aside the specific level.

20 **A.** Right.

21 **Q.** You agree that Harvard as an interest in having a vibrant
22 level of diversity, correct?

23 **A.** So I guess the word "vibrant" is a little amorphous, but
24 I think it has a compelling interest in getting the
25 educational benefits of a diverse university.

1 **Q.** I'm using "vibrant" only because it was your word, but
2 let's use "compelling."

3 Harvard has a compelling interest in having a
4 diverse community, correct?

5 **A.** Yes.

6 **Q.** Diverse along racial lines, corrects?

7 **A.** Among the many factors, yes.

8 **Q.** Racial, ethnic, religious, political, socioeconomic, it
9 has a compelling interest in being diverse across all of
10 those different factors, correct?

11 **A.** "Compelling" is kind of a term of art in this field. So
12 I'm not sure all of those things -- I think the Supreme Court
13 has spoken to compelling interest in diversity.

14 **Q.** I said it was vibrant because it was your word. I was
15 trying to use "compelling" because it was your word.

16 But to be precise, at least as we focus on race,
17 you agree that Harvard has a compelling interest in having
18 racial diversity on its campus?

19 **A.** There, we will agree, yes.

20 **Q.** Now, and you agree that there are educational benefits to
21 having racial diversity on campus, correct?

22 **A.** Correct.

23 **Q.** And I think you told us it not only matters on campus, it
24 matters in our society, correct?

25 **A.** That's correct.

1 **Q.** It matters, if I have it written down correctly -- if I
2 have your words written down correctly, it matters to our
3 democracy, correct?

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

5 **Q.** Now, you know that Harvard considers race as one factor
6 among many in its admissions process, correct?

7 **A.** I do.

8 **Q.** For some applicants, race is used as a plus factor,
9 correct?

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

11 **Q.** Now, you told Her Honor you have a law degree, correct?

12 **A.** I have a law degree, yes.

13 **Q.** In your report -- you gave us two reports, an opening
14 report and a rebuttal report, correct?

15 **A.** There are actually three.

16 **Q.** Three. I'm sorry. I apologize.

17 In your rebuttal report, you specifically referred
18 to the *Bakke* decision, do you not?

19 **A.** I don't remember specifically, but it sounds right.

20 **Q.** Turn, if you would, to Tab 10 in your notebook, which is
21 your rebuttal report. And I'd like to go to page 14,
22 Footnote 55. This is your rebuttal report, correct?

23 **A.** That's correct.

24 **Q.** I'm putting page 14 on the screen, correct?

25 **A.** Yes.

1 **Q.** You prepared this report, correct?

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

3 **Q.** And note 55 specifically refers to *Bakke*, correct?

4 **A.** Yes.

5 **Q.** Specifically refers to *Bakke* describing the Harvard plan,
6 correct?

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

8 **Q.** And you quote the portion that says in that plan, "The
9 race of an applicant may tip the balance in his favor just as
10 geographic origin or a life spent on a farm may tip the
11 balance in other candidates' cases. A farm boy from Idaho
12 can bring something from Harvard College that a Bostonian
13 cannot offer."

14 That's the quote that you decided to include in
15 your report, correct?

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

17 **Q.** And that's an accurate description of the Harvard's
18 admissions process as described in *Bakke*, correct?

19 **A.** I'm not describing it. It's *Bakke* describing it.

20 **Q.** Right. But you have no reason to disagree with what the
21 Supreme Court said, do you?

22 **A.** No.

23 **Q.** In fact, in *Bakke*, the Harvard admissions process as
24 described here is described as an illuminating example of a
25 constitutionally correct admissions process, correct?

1 **A.** So what the Supreme Court obviously had before it was the
2 Harvard plan, not all the data in this case. But yes, that's
3 what the --

4 **Q.** They called it an illuminating example, correct?

5 **A.** You know, I don't remember that exact quote. They
6 certainly cited it. I remember that.

7 **Q.** Let's see. Since you cited it in your report, could I
8 have the *Bakke* opinion at page 316 -- at page 317. See if I
9 can refresh your memory about what was said about the Harvard
10 program.

11 "An illuminating example is found in the Harvard
12 College program."

13 **A.** I see that.

14 **Q.** "In recent years, Harvard College has expanded the
15 concept of diversity to include students from disadvantaged
16 economic, racial, and ethnic groups. Harvard College now
17 recruits not only Californians or Louisianans but also blacks
18 and Chicanos and other minority students."

19 Do you recall reading that?

20 **A.** I've read *Bakke* many times, so I'm sure I've read that.

21 **Q.** And you've read the appendix to *Bakke*, have you not?

22 **A.** Yes.

23 **Q.** And that describes the Harvard process specifically,
24 correct?

25 **A.** That's correct.

1 **Q.** And you also read *Grutter*, did you not?

2 **A.** I did.

3 **Q.** And you know the Harvard plan again was identified as an
4 example of the way to get things done constitutionally and
5 correctly, correct?

6 **A.** Again with the caveat that they had no idea how the
7 Harvard plan worked in process. But yes, they cited the --

8 **Q.** They had no idea? Have you read the appendix, sir?

9 **A.** Yes.

10 **Q.** How many pages is the appendix to *Bakke*?

11 **A.** I don't know the exact number.

12 **Q.** How much detail is there about the Harvard process?

13 **A.** I guess what I'm trying to describe is the difference
14 between the way Harvard described the process and the reality
15 of -- the degree of racial preference provided, that sort of
16 thing. That's all I'm saying. They didn't have the
17 information that the Court today has.

18 **Q.** And your phrase was what they didn't have was the degree
19 of racial preference, correct, among other things? Is that
20 your testimony?

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

22 **Q.** What you just testified was that they didn't have some
23 information including the degree of racial preference. Were
24 those your words?

25 **A.** The degree of racial preference, they have didn't have

1 information about race-neutral alternatives. There's a lot
2 of things they have --

3 **Q.** Okay. We'll come back to that.

4 Now, you agreed that there is no better way to
5 directly achieve racial integration than using race itself,
6 correct?

7 **A.** By definition.

8 **Q.** Employing race is, by definition, the most efficient
9 method of promoting racial diversity, correct?

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

11 **Q.** Now, as you told Mr. Strawbridge, you have studied the
12 effect much eliminating the consideration of race at some
13 universities, correct?

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

15 **Q.** Specifically you have studied eliminating the use of race
16 at ten public universities, correct?

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

18 **Q.** And you assessed whether those universities were able to
19 achieve the same level of racial diversity after the
20 prohibition on considering race as compared to before.
21 That's a poor question. Let me break it down.

22 You focused on public universities, correct?

23 **A.** That's correct.

24 **Q.** You looked at the degree of their racial diversity
25 before, correct?

1 **A.** Correct.

2 **Q.** And you looked at the degree of racial diversity after
3 they were prohibited from using race, correct?

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

5 **Q.** Three of the universities were unable to replicate the
6 prior levels of racial diversity, according to your study,
7 correct?

8 **A.** That's right. Worked at seven, didn't work at three.

9 **Q.** And I want to focus on the three and your explanation for
10 why it didn't work at three. Now, the three employed
11 race-neutral strategies, didn't they?

12 **A.** They applied some race-neutral strategies, yes.

13 **Q.** Now, the three were University of California at Berkeley,
14 correct?

15 **A.** Correct.

16 **Q.** University of California at Los Angeles, correct?

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

18 **Q.** And the University of Michigan, correct?

19 **A.** That's correct.

20 **Q.** And when you published this article that you mentioned to
21 Mr. Strawbridge, you concluded that these three universities
22 had what you coined a special disadvantage, correct?

23 **A.** Is there a document you can refer me to?

24 **Q.** Pardon?

25 **A.** Is there a document you can refer me to?

1 **Q.** Sure. Look at your report, which is Tab 1 in the
2 notebook before you, at page 8, note 19. Do you have it
3 before you?

4 **A.** I do.

5 **Q.** Now, again to be clear for the record, this is your
6 expert report, your opening report, correct? These are your
7 words, correct?

8 **A.** Yes. I wasn't doubting you. I was just wanting to have
9 the context.

10 **Q.** Look, it's perfectly fair if you want to go to a specific
11 document. You tell me and we'll be sure that you're there.

12 **A.** Okay.

13 **Q.** We're now at the document, correct?

14 **A.** Yes.

15 **Q.** What you said is, "UC Berkeley, UCLA, and University of
16 Michigan have also faced a special disadvantage in recruiting
17 minority students because they have a national pool of
18 applicants and restrictions on using race that were imposed
19 by a state referendum rather than federal court. As a
20 result, out-of-state competitors could continue to use racial
21 preference."

22 Do you see that?

23 **A.** Yes.

24 **Q.** Now, you would agree that Harvard has a national pool of
25 applicants, correct?

1 **A.** Correct.

2 **Q.** And you also agree if Harvard stopped considering race as
3 a factor in its admissions process, the portion of
4 African-American students on campus would decrease, correct?

5 **A.** I think it depends on what race-neutral alternatives are
6 put in place.

7 **Q.** In all of your simulations, the number of
8 African-American -- the percentage of African-American
9 students decreased by at least 4 percent, from at least 14 to
10 10 percent, correct?

11 **A.** So yes. But as I explained, that's because we didn't
12 have access to the wealth data. So I don't see those as the
13 final word.

14 **Q.** Let me ask you about the wealth data, while we're there.

15 You were describing to Her Honor your
16 characterization of people as disadvantaged or not
17 disadvantaged, correct?

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

19 **Q.** And in the class of 2019, you suggested that I think
20 18 percent of that class was disadvantaged and 82 percent was
21 not, correct?

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

23 **Q.** You know that 50 percent of the class receives financial
24 aid, correct?

25 **A.** Right. You can receive financial aid and be fairly well

1 off.

2 **Q.** Right. But they're receiving financial aid, correct?

3 **A.** Yes.

4 **Q.** You know that the average cost of attending Harvard for
5 that 50 percent is about \$12,000 a year, correct?

6 **A.** That sounds familiar to me.

7 **Q.** You know that 20 percent of the class is paying has no
8 parental contribution, correct?

9 **A.** You're asking me specific percentages. That sounds about
10 right, but I like to be more cautious than just -- I'll leave
11 it at that. That sounds about right.

12 **Q.** Do you know?

13 **A.** I feel like I read something recently, maybe in an email
14 from you, suggesting that there had been an advance in the
15 number of students who are below that 65,000.

16 **Q.** I hope if the email was from me that it was accurate.
17 But wherever you got the information.

18 And you know that for those students there's no
19 parental contribution and they're not required to take any
20 loans, correct?

21 **A.** Correct.

22 **Q.** Now, Harvard uses a variety of what you've described as
23 race-neutral alternatives already, correct?

24 **A.** So it uses some, not others. So obviously the legacy
25 preference is still there. The dean's, director's list is

1 still there. It does provide, as you just said, financial
2 aid, which is a positive. But there's a whole lot more they
3 could do.

4 **Q.** So I want to talk to you about some of the things that
5 Harvard does. And then we'll come back probably after lunch
6 and talk about what you say Harvard doesn't do.

7 **A.** Okay.

8 **Q.** You say Harvard could increase recruitment of
9 economically disadvantaged students, correct?

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

11 **Q.** You say Harvard could expand its financial aid program,
12 correct?

13 **A.** That's correct.

14 **Q.** You say that Harvard could increase the tip it gives to
15 socioeconomically disadvantaged applicants, correct?

16 **A.** So I doubt I used the word "tip," but yes, they could
17 increase the preference.

18 **Q.** Do you know if Harvard gives a preference to economically
19 disadvantaged Asian-Americans?

20 **A.** Yes.

21 **Q.** They do, don't they?

22 **A.** Yes.

23 **Q.** And how does that compare to the -- how does that compare
24 to the tip that is given to any other racial or ethnic
25 group -- low-income, racial, or ethnic group across the

1 Harvard applicant pool?

2 **A.** You're saying within the tip given or preference given to
3 low income, what's the comparison between the Asian tip and
4 the African-American tip, say?

5 **Q.** Let's break it down.

6 **A.** Yeah.

7 **Q.** So let's just focus first on Asian-Americans. You agree
8 with me that Asian-Americans, low-income Asian-Americans
9 receive a tip in the Harvard process, correct?

10 **A.** So I think that's right. What I know is that the
11 African-American disadvantaged students don't receive a tip,
12 according to Professor Arcidiacono's data. So I'm inferring
13 that the Asian-American -- someone's getting the low-income
14 tip, but I should probably be less definitive than I'm
15 answering.

16 **Q.** You're not sure, correct? Is that fair?

17 **A.** I would say I'm pretty confident that Asian-American
18 low-income students get a tip, but I don't want to say it
19 definitively.

20 **Q.** Okay. Fair enough. Now, you would agree with this:
21 Under Dean Fitzsimmons's leadership, Harvard has made a
22 concerted effort to bring in low-income students, correct?

23 **A.** Correct.

24 **Q.** And, in fact, you gave -- you've given interviews in
25 which you've publicly complimented Dean Fitzsimmons for his

1 efforts to bring in or open the doors to low-income students,
2 correct?

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

4 **Q.** And in fact, you did it as far back as February 2013. If
5 you'd like to look at Tab 14 of your notebook. Do you find
6 an article from the Harvard Political Review?

7 **A.** I do.

8 **Q.** And this is February of 2013, correct?

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

10 **Q.** It's before SFFA filed its complaint, correct?

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

12 **Q.** It's before your Fox News interview, correct, by year?

13 **A.** Yes.

14 **Q.** And what you say, if you turn to the second page, is the
15 following: "Kahlenberg, himself a graduate of both Harvard
16 College and Harvard Law School, thinks that the contemporary
17 Harvard College model of admissions offers a blueprint for
18 the future of affirmative action. He says, 'Under the
19 leadership of Larry Summers and Bill Fitzsimmons in the
20 admissions office, Harvard has made a concerted effort to
21 bring in low-income students of all races along with students
22 of color. And in my mind, that's a big step forward in
23 making affirmative action more inclusive of socioeconomic
24 status.' "

25 That's what you said a year before the complaint

1 was filed, correct?

2 **A.** Yes. And I would say it today, too.

3 **Q.** Yeah. And in fact, four years before the complaint was
4 filed, you gave an interview where you talked about how Dean
5 Fitzsimmons had been working doggedly to open up Harvard to
6 different racial and ethnic groups, correct?

7 **A.** Correct.

8 **Q.** And let me show you your interview. And my question is
9 going to be: Do you stand by your interview today?

10 **A.** Okay.

11 (Interview played.)

12 BY MR. LEE:

13 **Q.** That's what you said in 2010, correct?

14 **A.** Yes.

15 **Q.** You stand by it today, don't you?

16 **A.** Definitely.

17 **Q.** And you said it again in 2013, as we just said, correct?

18 **A.** Yes.

19 **Q.** And you stand by that again, correct?

20 **A.** Correct.

21 **Q.** Now, one of the race-neutral alternatives you identified
22 is increasing recruitment, correct?

23 **A.** I'm sorry. Increasing?

24 **Q.** One of the race-neutral alternatives you have identified
25 was increasing recruitment, correct?

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

2 **Q.** If you can't hear me, Mr. Kahlenberg, let me know. I'm
3 wandering away from the microphone.

4 **A.** Okay.

5 **Q.** Now, Harvard already has a number of programs to recruit
6 students from different backgrounds, correct?

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

8 **Q.** One of them is the undergraduate minority recruitment
9 program, correct?

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

11 **Q.** Now, when you prepared your reports in this case, you did
12 not know when the UMRP was first instituted, correct?

13 **A.** I wouldn't say that. I've reviewed various documents
14 about what Harvard is doing today. At the deposition I
15 couldn't remember off the top of my head the year it was
16 founded, but that's different than saying I had no general
17 knowledge of when it was founded.

18 **Q.** Well, what you said at your deposition was the following,
19 at page 69, lines 14 to 16.

20 "Do you know when the undergraduate recruitment
21 minority program first began?

22 "ANSWER: I don't."

23 **A.** Right. Which is a -- it's basically like a memory test.
24 At that time, I didn't remember the year.

25 **Q.** You didn't remember the year. You also didn't remember

1 what minority groups were included within the program,
2 correct?

3 **A.** If you're saying so, I'm guessing there's something in
4 there, yes.

5 **Q.** Yes. And you didn't even know that Asian-Americans were
6 actually part of the undergraduate minority recruitment
7 program, correct?

8 **A.** I'd have to look at the transcript, but I'm guessing if
9 you're asking that, that's probably true.

10 **Q.** It is. You didn't know how many people UMRP employed,
11 correct?

12 **A.** Right. So as I sat at my deposition, I had an
13 opportunity to review a lot of documents, thousands of pages
14 of documents. I may not recall certain specific items. What
15 I focused on was the fact that the proportion of applicants
16 from, say, first-generation family, first-generation college
17 families was strikingly low.

18 So I was focused more on the results than spending
19 time kind of trying to recall the various programs that
20 Harvard talks about. It's in a number of documents. It's in
21 the Smith committee and others. But I did not on that
22 occasion recall the various aspects of that program.

23 **Q.** Have you finished your answer?

24 **A.** I have.

25 **Q.** So I'd like to go back to where I started. One of the

1 things you claim is that Harvard could do a better job of
2 recruiting minority candidates, correct?

3 **A.** Correct.

4 **Q.** You know that it has a program to recruit minority
5 candidates, correct?

6 **A.** Correct.

7 **Q.** In order to determine whether Harvard could do a better
8 job, it would be a good thing to know how that program works,
9 correct?

10 **A.** Yes and no. I think you can look at the results and
11 say -- if you're looking at the bottom line of what happens
12 at a place like Harvard, even if they have a program that's
13 doing a lot of good and interesting things, they could
14 probably do more. So I don't think you need to know all the
15 details to make a judgment on whether they could do better.

16 **Q.** And the truth of the matter is under the undergraduate
17 minority recruitment program, you knew none of the details,
18 correct?

19 **A.** I wouldn't say none of the details.

20 **Q.** Almost none. You didn't know when it started, you didn't
21 know what ethnic groups or racial groups were recruited, you
22 didn't know who staffed the recruitment, you didn't know
23 whether students were involved, and you didn't know what the
24 results of that program were, correct?

25 **A.** I'd have to look back at the deposition on the specifics

1 of that.

2 **Q.** As you sit here today, which is my one chance to ask you
3 questions --

4 **A.** Yes.

5 **Q.** -- you can't tell us today, can you?

6 **A.** About the undergraduate minority recruitment program?

7 **Q.** Right. You can't answer any of the questions I just
8 asked about when it started, what ethnic groups are
9 recruited, who does the recruiting, when they do the
10 recruiting?

11 **A.** I can answer them.

12 **Q.** You can't as you sit here today?

13 **A.** I can answer some of those.

14 **Q.** When did it start?

15 **A.** It started early in the early 1970s.

16 **Q.** You've learned that since your deposition?

17 **A.** Yes.

18 **Q.** Now the important question.

19 **A.** I'm sorry. I didn't answer that correctly.

20 I learned that surely when I was reviewing the
21 documents. When I was in a deposition, I didn't recall the
22 date. So I would say I refreshed my memory.

23 **Q.** Fair enough. Are Asian-Americans one of the ethnic or
24 racial minority groups that are recruited as part of the
25 undergraduate minority recruitment program?

1 **A.** Yes.

2 **Q.** And that recruitment program for Asian-Americans has been
3 quite successful over a number of years, correct?

4 **A.** I mean, I'd have to look at more data on that question.

5 **Q.** Fair enough.

6 MR. LEE: Your Honor, I think it's noon, and it
7 would be a good place to stop.

8 THE COURT: That's fine. Quarter of 1:00. See
9 everyone back.

10 (Court recessed at 12:00 p.m.)

11 *** AFTERNOON SESSION ***

12 BY MR. LEE:

13 **Q.** Good afternoon, Mr. Kahlenberg.

14 **A.** Good afternoon.

15 **Q.** I want to return to discussing some of the race-neutral
16 alternatives you discussed during your direct examination.
17 Okay?

18 **A.** Yes.

19 **Q.** One that you mentioned was the suggestion that Harvard
20 could increase financial aid, correct?

21 **A.** Correct.

22 **Q.** I've asked you a couple of questions about the financial
23 aid program. I just want to ask you a few more. Okay?

24 **A.** Yes.

25 **Q.** You did not undertake an independent evaluation of

1 whether Harvard could increase its financial aid, correct?

2 **A.** Correct.

3 **Q.** You do know that beginning with the class of 2008,
4 students from families earning up to \$40,000 were asked for
5 zero parental contribution, correct?

6 **A.** Correct.

7 **Q.** And zero parental contribution means, as you and I
8 discussed before, the parents or family contribute nothing to
9 tuition, room, and board, correct?

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

11 **Q.** Now beginning with the class of 2010, Harvard increased
12 the threshold for zero parental contribution to \$60,000,
13 correct?

14 **A.** Correct.

15 **Q.** And beginning with the class of 2016, Harvard increased
16 the threshold to \$65,000, correct?

17 **A.** Correct.

18 **Q.** Now, I'd like to focus you on that instance when Harvard
19 increased the cutoff for zero parental contribution to
20 \$635,000. Do you have that in mind?

21 **A.** Yes.

22 **Q.** It's true, is it not, Mr. Kahlenberg, that when Harvard
23 made that increase, the share of applicants who identified as
24 African-American, Hispanic, or other did not increase,
25 correct?

1 **A.** So when we're going from --

2 **Q.** When Harvard made the increase for the class of 2016, the
3 share of applicants who identified as African-American,
4 Hispanic, and other did not increase, correct?

5 **A.** I think that's right.

6 **Q.** Okay. Now I'd like to move to a slightly different topic
7 but still related to financial aid. Okay?

8 You're familiar with something called The New York
9 Times college index?

10 **A.** I am.

11 **Q.** In fact, you quote The New York Times college index in
12 your reports, correct?

13 **A.** Right.

14 **Q.** And you have relied upon them for your opinions in this
15 case, correct?

16 **A.** Correct.

17 **Q.** The New York Times, that index is a ranking of colleges
18 that are doing the most for low-income students, according to
19 that ranking, correct?

20 **A.** That's right.

21 **Q.** And it's relevant whether one of the institutions is top
22 ranked for social mobility, correct?

23 **A.** Yeah. I cited it in my report.

24 **Q.** And one of the important things is whether an institution
25 is helping with what you've described as social mobility,

1 correct?

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

3 **Q.** Now, you would agree with me that Harvard has done pretty
4 well in the College Access Index, correct?

5 **A.** It's ranked fairly high.

6 **Q.** Turn if you would, to Tab 17 in the notebook that you
7 have.

8 **A.** Okay.

9 **Q.** Will do you have that before you?

10 **A.** Yes.

11 **Q.** Do you find DX119?

12 **A.** Yes.

13 **Q.** This is the College Access Index for 2017?

14 **A.** Yes.

15 MR. LEE: Your Honor, we'd offer DX119.

16 MR. STRAWBRIDGE: No objection, Your Honor.

17 THE COURT: Admitted.

18 (Defendant Exhibit No. DX119 admitted.)

19 BY MR. LEE:

20 **Q.** Turn, if you would, Mr. Kahlenberg, to the page at the
21 bottom middle. You'll see it's .0001 to start. I'd like to
22 take you to the one that's .0008.

23 **A.** Right.

24 **Q.** Do you have that before you?

25 **A.** I do.

1 **Q.** And just so the Court is clear, in DX119, the highest
2 ranked university, which is UC Irvine, is at the bottom,
3 correct?

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

5 **Q.** And then as you move up the page, you go 1, 2, 3, 4, and
6 so on, correct?

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

8 **Q.** Now, among private institutions -- sorry. Withdrawn.

9 Within all institutions, Harvard ranked Number 10,
10 correct?

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

12 **Q.** And only a couple of private universities, Pomona and
13 Amherst, ranked higher, correct?

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

15 **Q.** And among the top ten schools on this list, Harvard cost
16 the least amount for middle-income students to attend,
17 correct?

18 **A.** I'm not sure which line you're looking at.

19 **Q.** So we're at -- you're on that page, correct?

20 **A.** Yes. The 5K?

21 **Q.** We'll see if we can blow it up a little bit. And you see
22 in the third column from the left after the name of the
23 university?

24 **A.** Right. That price middle income we're talking about?

25 **Q.** Right.

1 **A.** Yes.

2 **Q.** Okay. Let me go to another one of your race-neutral
3 alternatives. You suggested that Harvard could increase
4 diversity by ending its early admission program, correct?

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

6 **Q.** In fact, Harvard did end its early-action program for a
7 period of several years, correct?

8 **A.** Right. For precisely the reasons I talked about.

9 **Q.** Right. They stopped doing it for a while, correct?

10 **A.** Right. To open access to low-income and minority
11 students.

12 **Q.** And that was one of the purposes was to see if it would
13 open access, correct?

14 **A.** Correct.

15 **Q.** And to see if other universities and colleges would
16 follow, correct?

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

18 **Q.** It made the decision in 2006, correct?

19 **A.** That's right.

20 **Q.** It re-instituted early action in 2011, correct?

21 **A.** That sounds right.

22 **Q.** And Harvard is early action rather than early decision,
23 correct?

24 **A.** That's correct.

25 **Q.** If you get into Harvard on early action, you can still

1 apply anywhere else you would like, correct?

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

3 **Q.** Now, during the period before early action was -- strike
4 that.

5 During the period after early action was ended or
6 suspended, the yield rate for African-American, Hispanic, and
7 other applicants at Harvard actually declined, correct?

8 **A.** I think it declined for everyone, maybe except Asians,
9 yeah.

10 **Q.** And it declined, in part, because Harvard was losing
11 African-Americans, Hispanics, and other applicants to
12 universities that had early decision or early action,
13 correct?

14 **A.** It was losing, yeah, losing out among various racial
15 groups including the ones you're describing.

16 **Q.** Because other universities that had early action, early
17 decision were basically accepting those students before
18 Harvard had a chance to do so, correct?

19 **A.** Right. Harvard had kind of unilaterally disarmed.

20 **Q.** I think you said "unilaterally disarmed"?

21 **A.** Yes.

22 **Q.** And Princeton and University of Virginia followed but no
23 one else did, correct?

24 **A.** Correct.

25 **Q.** Turn, if you would, to Tab 18 in your binder.

1 **A.** Okay. I'm there.

2 **Q.** Do you have P288?

3 **A.** Yes.

4 **Q.** Now, this is a document that you relied upon in
5 formulating your opinions, correct?

6 **A.** That's right.

7 MR. LEE: We offer P288.

8 MR. STRAWBRIDGE: No objection.

9 THE COURT: Admitted.

10 (Plaintiff Exhibit No. P288 admitted.)

11 BY MR. LEE:

12 **Q.** Do you have it before you, Mr. Kahlenberg?

13 **A.** I do.

14 **Q.** Would you turn to page, the bottom right-hand corner, is
15 77586, and we'll put it on the screen for you. It's a little
16 hard to read. The hard copy may help you.

17 But to orient us, there are two charts on this
18 page, correct?

19 **A.** Yes.

20 **Q.** Both show yield rates for 2003 to 2007, correct?

21 **A.** Yes.

22 **Q.** That was before Harvard suspended early action, correct?

23 **A.** Right.

24 **Q.** They also show yield rates for 2008 to 2010, correct?

25 **A.** Correct.

1 **Q.** And that was after Harvard suspended early action,
2 correct?

3 **A.** Correct.

4 **Q.** So we have a before-and-after comparison, correct?

5 **A.** That's right.

6 **Q.** On the left it shows results for what is described as
7 students with high academic and extracurricular ratings. Do
8 you see that?

9 **A.** I do.

10 **Q.** Is that a yes?

11 **A.** Yes.

12 **Q.** You have to give a yes for the transcript. Are?

13 **A.** Yes.

14 **Q.** Do you see the key to the right of that chart that says
15 black students are identified with a square?

16 **A.** Yes.

17 **Q.** The yield rate for African-American students with high
18 academic and extracurricular ratings declined after early
19 action was suspended, correct?

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

21 **Q.** It went from 65 percent to close to 50 percent, correct?

22 **A.** Yeah. Yes.

23 **Q.** Now, you agree that Harvard ended early action but
24 restored it based upon concerns that the yield rate for
25 students of color was declining, correct?

1 **A.** Well, when I remember reviewing the document, there was
2 concern about losing out from the top feeder schools. And
3 there was mention of students -- African-American, Latino
4 students, but those were not the only students who we were
5 seeing decline.

6 **Q.** Would you agree with this statement or not: Harvard
7 reinstated early admissions because it was concerned that its
8 yield rate, those accepting their offer of admissions, had
9 declined. True or not true?

10 **A.** True.

11 **Q.** Would you agree with this statement: Of particular
12 interest, given the rationale for limiting early action, the
13 admissions office was becoming increasingly concerned that
14 not having an early admissions option was causing Harvard to
15 lose some of the most academically talented and prepared
16 low-income and underrepresented minority students.

17 Agree or disagree?

18 **A.** I'm not sure I totally agree.

19 **Q.** All right. Turn, if you would, to the page that is 77565
20 in P288. Again, this is the Harvard document that you rely
21 upon, correct?

22 **A.** Right.

23 **Q.** What it says in the second full paragraph is, "Of
24 particular interest, given the rationale for eliminating
25 early action, our admissions office is becoming increasingly

1 concerned that not having an early admission option is
2 causing us to lose some of the most academically talented and
3 prepared low-income and underrepresented minority students."

4 Have I read that correctly?

5 **A.** Yes. Maybe I should clarify my answer.

6 When I was hesitating, what I meant is clearly
7 early admissions hurts low-income and underrepresented
8 minority students. So I'm not questioning that Harvard said
9 this.

10 I guess I'm questioning whether, in fact, the net
11 result is a program which is going to hurt -- a change which
12 will hurt low-income and minority students. Net. It's more
13 complicated than just the yield.

14 **Q.** Sure enough. Let's see if I can uncomplicate it a little
15 bit.

16 We can agree that he eliminating early action was
17 one of your race-neutral alternatives, correct?

18 **A.** Yeah. It's one. In two of the simulations, we have
19 early action in there kind of precisely for this reason, that
20 there is an issue of yield when Harvard University
21 unilaterally disarms. Other simulations, we do call for
22 eliminating early action. We've got both sides in there.

23 **Q.** You have both suggestions, correct?

24 **A.** Yes. Right.

25 **Q.** So we can agree that one of your suggestions in some of

1 the simulations is to eliminate early action, correct?

2 **A.** Yes.

3 **Q.** Harvard, in fact, eliminated early action, correct?

4 **A.** Correct.

5 **Q.** It generated some statistical data on the consequence of
6 that in a document that you reviewed and relied upon,
7 correct?

8 **A.** Correct.

9 **Q.** And it came to a conclusion, including the conclusion
10 that's on the screen as we speak, correct?

11 **A.** Correct.

12 **Q.** And it made the institutional decision to reinstitute
13 early action, correct?

14 **A.** Correct.

15 **Q.** Now, another race-neutral alternative that you suggest in
16 your report is something that you described as place-based
17 preferences, correct?

18 **A.** Right.

19 **Q.** For the Court, a place-based reference is something
20 that's based upon geography, correct?

21 **A.** Correct.

22 **Q.** Now, you agree that Harvard already considers geography
23 in its admissions process, correct?

24 **A.** It's one of the factors.

25 **Q.** And, in fact, you know from having reviewed the Harvard

1 documents that there's a tip for geographic location for some
2 applicants, correct?

3 **A.** So Harvard says there's a tip. It didn't register on
4 our -- well, I'll let Professor Arcidiacono take on that.
5 Let me leave that.

6 **Q.** Now, one of the approaches you discuss in your report is
7 admitting the highest performing applicants within specific
8 ZIP codes, correct?

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

10 **Q.** Just give me a chance to switch here. And I want you to
11 keep in mind, that place-based alternative of using ZIP
12 codes.

13 **A.** Yes.

14 **Q.** There are more than 33,000 ZIP codes in America, correct?

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

16 **Q.** Harvard admits 2,000 students a year, correct?

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

18 **Q.** It has 1,660 or so beds, correct?

19 **A.** That's correct.

20 **Q.** You agree with me, just doing the simple math, Harvard
21 could not admit the top student from every ZIP Code in
22 America without increasing its student body by a factor of 15
23 times, right?

24 **A.** Absolutely, correct.

25 **Q.** So you're not suggesting that that would work for

1 Harvard, correct?

2 **A.** Correct.

3 **Q.** Now, you also suggested a race-neutral alternative which
4 is to enroll a percentage of students from a variety of high
5 schools, correct?

6 **A.** Correct.

7 **Q.** Now, there are literally tens of thousands of high
8 schools in America, correct?

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

10 **Q.** Harvard could not enroll the top student from every high
11 school in America, correct?

12 **A.** That's correct. They don't all apply, but even if --
13 yeah. I agree with the basic point.

14 **Q.** How many different high schools are represented in the
15 40,000 applicants that Harvard gets every year?

16 **A.** Well, I remember reading in the data that something like
17 80 percent of high schools send no applications. So working
18 back from that, it must be some 20 percent of the high
19 schools.

20 **Q.** And so how many is that in absolute terms?

21 **A.** I'm forgetting the first number you said, how many high
22 schools.

23 **Q.** Could we agree that even with that math Harvard could not
24 accept the top student for every one of those?

25 **A.** No. I'm not asking for that, right.

1 **Q.** So one thing you do suggest is that Harvard adopt a
2 policy based upon College Board neighborhood clusters,
3 correct?

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

5 **Q.** And you mentioned College Board neighborhood clusters
6 briefly to Mr. Strawbridge this morning, correct?

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

8 **Q.** In fact, using College Board clusters is your preferred
9 model, correct?

10 **A.** I have four preferred models, but yes.

11 **Q.** It's one of them?

12 **A.** It's one of the four.

13 **Q.** So let's talk about what a College Board cluster is. A
14 College Board cluster is a combination of neighborhoods,
15 correct?

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

17 **Q.** There are 33 clusters in the United States, correct?

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

19 **Q.** They are not geographically contiguous, correct?

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

21 **Q.** One cluster can have neighborhoods from all over the
22 United States of America, correct?

23 **A.** That's correct.

24 **Q.** Your suggested race-neutral alternative is to admit an
25 equal number of students from each of the 33 College Board

1 clusters, correct?

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

3 **Q.** So under your proposal, Harvard will admit roughly 50
4 students from each cluster each year, correct?

5 **A.** That's right. I think a little more than 50, right.

6 **Q.** So let's talk about how these clusters are identified.
7 The fact of the matter is that the College Board uses race as
8 a factor in identifying these clusters, correct?

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

10 **Q.** Each cluster actually represents a group of students with
11 similar demographic attributes, correct?

12 **A.** That's correct.

13 **Q.** And, in fact, race is often the most dominant factor in
14 defining the clusters, correct?

15 **A.** Right. I mean, I think the point is that you have white
16 people living in the predominantly African-American clusters.
17 It's not race per se, but race is part of how they define the
18 clusters.

19 **Q.** Let's see how -- in many of them, race is the dominant
20 way they define the clusters, isn't it?

21 **A.** I have reviewed those data, and race can be an important
22 factor.

23 **Q.** To be clear, let's turn to Tab 19, which is DX139. Do
24 you recognize this?

25 **A.** I do.

1 **Q.** Are these the College Board clusters?

2 **A.** They are.

3 MR. LEE: Your Honor, we offer DX139.

4 MR. STRAWBRIDGE: No objection.

5 THE COURT: Admitted.

6 (Defendant Exhibit No. DX139 admitted.)

7 BY MR. LEE:

8 **Q.** Now, if I turn you in DX139 to the page on the bottom
9 that is .0013. Let's just take an example. Do you see
10 neighborhood cluster 71?

11 **A.** I do.

12 **Q.** That is just one example of the 33, correct?

13 **A.** That's right.

14 **Q.** And what the College Board does is it takes a series of
15 cities, towns, places across the country and cluster them,
16 and it's described as primarily African-American, black inner
17 city, correct?

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

19 **Q.** And if we were to continue through the College Board
20 clusters, we would find predominantly Hispanic clusters,
21 correct?

22 **A.** Correct.

23 **Q.** Predominantly Asian clusters, correct?

24 **A.** Offhand I don't remember that one, but I don't doubt you.

25 **Q.** Turn to page .0006.

1 **A.** It looks like it's large as opposed to predominant.

2 **Q.** It's large, is it not?

3 **A.** Yes.

4 **Q.** It's phrased as largely Asian, correct? Just so we're
5 all clear, these dots that are on the map of the United
6 States below is an indication of the geographies within these
7 clusters, correct?

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

9 **Q.** So we have these 33 clusters that are defined, at least
10 in part, on the basis of race, correct?

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

12 **Q.** That are described, in part, on the basis of race,
13 correct?

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

15 **Q.** And your suggestion is that it's a race-neutral
16 alternative for Harvard to resort to using these clusters to
17 define its admissions policies in a race-neutral way?

18 **A.** Right. I see this as analogous to the Texas top
19 10 percent plan where there are -- the legislature knows in
20 advance that certain high schools are predominantly
21 African-Americans, certain ones might be predominantly
22 Latino, certain ones might be predominantly white. And that
23 is seen as a race-neutral plan because we don't look at the
24 individual race of the applicant. And so there are some
25 Asian-American applicants who come from a predominantly black

1 high school. There are some white applicants at those high
2 schools. It's not race per se. It's the racial
3 generalization about, in this case, a neighborhood or a high
4 school.

5 **Q.** Fair enough. Do you recall before lunch I asked you
6 about the hypothetical of the Chinese-American living in a
7 middle class community in the Midwest, right? Do you
8 remember that?

9 **A.** Yeah.

10 **Q.** For these clusters, what you're suggesting is, for
11 example, that Harvard cap the number of students it would
12 take from any one cluster at 50, correct?

13 **A.** So it's an allocation. Right.

14 **Q.** And what you're saying to us is if you were in cluster 58
15 and you capped it at 50, some of them might be Asian, some of
16 them might not be, correct?

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

18 **Q.** But the clusters that you are going to are defined in
19 large part by race, in the first instance, correct?

20 **A.** There's a racial element to -- socioeconomic element as
21 well. There are a number of things that factor into these.
22 Academic achievement -- there are a number of factors that go
23 into these.

24 **Q.** Are you familiar with an article written by Ron Unz in
25 December 2012?

1 **A.** Vaguely. Let me just -- if you can point me to it first.

2 **Q.** Tab 22. It's P218, which is --

3 **A.** Yes. I know this one.

4 **Q.** -- in evidence. You've reviewed the article before?

5 **A.** So I wouldn't say I reviewed it. At some point along the
6 way, I read this article, but it's been a number of years.

7 **Q.** Did you agree with its criticism of Jewish students and
8 their mathematical abilities?

9 **A.** No.

10 **Q.** Did you agree with its criticism of Jewish students and
11 their work ethic?

12 **A.** No.

13 **Q.** Did you agree with its criticism of Japanese-Americans
14 and their work ethic?

15 **A.** I don't remember that aspect of it, but I would not agree
16 with any criticism --

17 **Q.** Did you agree with its criticism of East Asians in their
18 intellectual capacities?

19 **A.** I don't agree.

20 **Q.** Did you agree with his criticism of African-American
21 students?

22 **A.** I wouldn't agree with that, no.

23 **Q.** Did you agree with his methodology of identifying people
24 by race and ethnicity simply by looking at their last names?

25 **A.** I think that would be problematic. This is an article I

1 reviewed many, many years ago, so I'm not remembering a lot
2 of this.

3 **Q.** You're giving us your best memory now, correct?

4 **A.** Yes.

5 **Q.** Okay. Let's move on to your simulations.

6 **A.** Okay.

7 **Q.** As you told us, you did not run the simulations yourself,
8 correct?

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

10 **Q.** You relied on Professor Arcidiacono, if I pronounced his
11 name correctly?

12 **A.** Arcidiacono is how I pronounced it.

13 **Q.** All right. We'll do it your way. It's probably closer
14 to right.

15 And you also reviewed simulations prepared by
16 Harvard's expert Dr. David Card, correct?

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

18 **Q.** Now, I want to focus on your simulations that you
19 requested from Dr. Arcidiacono. Okay?

20 **A.** Yes.

21 **Q.** You asked Dr. Arcidiacono to model the Harvard admissions
22 process -- withdrawn.

23 You asked him to model the admissions process
24 Harvard actually uses, correct?

25 **A.** That's correct.

1 **Q.** So when he modeled that process -- and I want you to keep
2 that phrase in mind, the process that Harvard actually uses.
3 Do you have that in mind?

4 **A.** Yes.

5 **Q.** So when he modeled that process, he included the personal
6 rating, correct?

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

8 **Q.** He did that to replicate the existing Harvard system as
9 closely as possible, correct?

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

11 **Q.** And you would agree that most people consider personal
12 characteristics as legitimate information and criteria for
13 admission, correct?

14 **A.** Correct.

15 **Q.** And you believe that they are legitimate criteria for
16 admissions decisions, correct?

17 **A.** Yes.

18 **Q.** Now, you also agree that considering socioeconomic status
19 is a legitimate consideration in admissions process?

20 **A.** Correct.

21 **Q.** In fact, you encourage it, correct?

22 **A.** Yes.

23 **Q.** And if I hear you correctly, what you're saying is you
24 wish Harvard would do more, correct?

25 **A.** I think Harvard could do more on that score, yes.

1 **Q.** Fair enough. You also agree that parents' occupation is
2 a legitimate consideration in the admissions process,
3 correct?

4 **A.** Yes.

5 **Q.** And you agree that parent's occupation provides you with
6 different information about the family and the background
7 than simply knowing someone's income, correct?

8 **A.** Yes. I mean, I should say, you know, if the information
9 is reliable, I think it should be included.

10 **Q.** And if it's reliable, it should be included if it's used
11 as part of the admissions process, correct?

12 **A.** That's correct.

13 **Q.** The simulations that he did for you included legacies,
14 correct?

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

16 **Q.** It included athletes, correct?

17 **A.** Correct.

18 **Q.** And as you told us earlier today, considering athletic
19 talent ability is a legitimate interest for American colleges
20 and universities today, correct?

21 **A.** That's correct.

22 **Q.** And I think you said eliminating preferences for athletes
23 would be too radical for our presently constituted
24 universities and colleges, correct?

25 **A.** That's correct.

1 **Q.** Now, for your simulations, you used only a single
2 admissions cycle, correct? You went year by year rather
3 than --

4 **A.** I see.

5 **Q.** I'm sorry. I may have been talking over you, so let me
6 withdraw it and state it again.

7 I'm focusing on your simulations. Do you have
8 those in mind?

9 **A.** Yes.

10 **Q.** The ones you wanted to replicate the Harvard admissions
11 program as much as possible, correct?

12 **A.** Corrects.

13 **Q.** You went year by year, admissions cycle by admissions
14 cycle, correct?

15 **A.** So it's my understanding that there was a disagreement
16 between Professor Arcidiacono and Professor Card on pooling
17 versus year by year. I think the important point is I used
18 both models. And because I'm relying on some of Professor
19 Card's model, some of Professor Arcidiacono's, I don't need
20 to make a judgment on that question.

21 **Q.** Did any of your simulations actually rely upon a model
22 that pooled data over several years?

23 **A.** So these are -- what I did was I instructed Professor
24 Arcidiacono to use the data as best he could to generate
25 race-neutral alternatives. And some of the technical

1 questions are ones I think would be better for him.

2 **Q.** To be precise, what you asked him to do was to try to
3 model what Harvard actually uses in its admissions process,
4 correct?

5 **A.** That's correct. We had to make manipulations to it, but
6 right.

7 **Q.** And your simulations go year by year. They don't pool
8 data, correct?

9 **A.** The results are presented year by year.

10 **Q.** Okay. Fair enough. So let's talk now about some of the
11 simulations. Now, to assist the Court, in your report you
12 numbered your simulations 2, 3, 4, 5, 6, and 7, correct?

13 **A.** That's correct.

14 **Q.** You didn't call them, A, B, C, and D as you did today,
15 correct?

16 **A.** So --

17 **Q.** I'm just going to set up basically an index so we can
18 translate them. That's all.

19 **A.** We were trying to be helpful.

20 **Q.** I understand. So Simulation A is Simulation Number 4 in
21 your report, correct?

22 **A.** Correct.

23 **Q.** Simulation B is Simulation 4 with a little bit of an
24 adjustment, correct?

25 **A.** No. Simulation B is the card 4X.

1 **Q.** Okay. We'll call it the card 4X.

2 Simulation C is your Simulation 6, correct?

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

4 **Q.** And Simulation D is your Simulation 7, correct?

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

6 **Q.** But in addition to these four, you also had Simulation 2,
7 correct?

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

9 **Q.** Simulation 3, correct?

10 **A.** Correct.

11 **Q.** And Simulation 5, correct?

12 **A.** That's correct.

13 **Q.** To move this along, I am going to ask you to focus upon
14 your simulations for the class year 2019.

15 **A.** Okay.

16 **Q.** Do you have that in mind?

17 **A.** Yes.

18 **Q.** I think, Mr. Kahlenberg, that's the last year that you
19 had data for, correct?

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

21 **Q.** And that's the year that you reported data for in the
22 appendix to your rebuttal report, correct? It's at Tab 10,
23 if you'd like to look at it, Appendix A.

24 **A.** That's correct.

25 **Q.** Do you have it?

1 **A.** I do.

2 **Q.** Now, first I'd like to talk about the class of 2019. For
3 that class, African-American representation was 13.6 percent
4 of the admitted class, correct?

5 **A.** So here we have it as rounded to 14 percent.

6 **Q.** Pardon?

7 **A.** Here we have it rounded to 14 percent.

8 **Q.** Under Simulation 1, which doesn't correspond to any of A,
9 B, C, or D, African-American representation under your model
10 would fall from 13.6 percent or 14 percent to 6.6 percent,
11 correct?

12 **A.** That's correct.

13 **Q.** As you told us today, that would be, in your view,
14 unacceptable, correct?

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

16 THE COURT: What page is this on in his report?

17 MR. LEE: I'm sorry. It's at Tab 1, Your Honor.

18 THE COURT: Sorry. I was at Tab 10.

19 MR. LEE: Tab 1, Appendix C. We can bring it up on
20 the screen right now.

21 BY MR. LEE:

22 **Q.** Are you with me, Mr. Kahlenberg?

23 **A.** I am.

24 **Q.** What I'm trying to go through is go through each of the
25 simulations, and I'm trying to report what the impact of the

1 class of 2019 would have been on African-Americans, okay?

2 **A.** Right.

3 **Q.** We looked at Simulation 1 and you agreed it dropped from
4 14 percent to about 6.6 percent, correct?

5 **A.** 6.6 percent.

6 **Q.** And as you said, that would be unacceptable?

7 **A.** Yeah. This is not one of the simulations that I thought
8 worked.

9 **Q.** Right. Simulation Number 2, which also doesn't have a
10 letter, would have African-American representation drop from
11 13.6 percent to approximately 8 percent, correct?

12 **A.** Correct.

13 **Q.** You consider that unacceptable as well, correct?

14 **A.** So the way that I look at race-neutral alternatives is to
15 try to examine the educational benefits of diversity which
16 derive from a number of different factors. So
17 African-American percent, Hispanic percent, percent low
18 income, geographic diversity. And then you also want to look
19 at the academic levels of preparedness. And so there are a
20 variety of factors. I don't kind of just look at one tiny
21 aspect of the bigger picture without considering all those
22 factors.

23 **Q.** I'm going to take you through a number of those factors,
24 but you just told me a few minutes ago that it dropped from
25 13.6 percent to 6 percent, which, as you said to

1 Mr. Strawbridge, was unacceptable?

2 **A.** Yes.

3 **Q.** Now we have to drop from 13.6 percent to 8 percent.
4 Acceptable, unacceptable, or you can't say without
5 considering these other factors?

6 **A.** I think you want to talk about all the factors. If you
7 recall earlier, unfortunately Harvard didn't tell us what
8 they want in terms of racial and ethnic diversity.

9 **Q.** I am going to come back to that, the RNA report, and ask
10 you about it in light of what *Fisher* says.

11 For now, what you're saying is if I say "workable"
12 or "unworkable" or "you need to discuss it," it's the last
13 category, correct?

14 **A.** I think this is one that one would want to discuss.
15 What's nice is there are other alternatives that are even
16 better.

17 **Q.** Let's talk about them.

18 **A.** Okay.

19 **Q.** Under Simulation Number 3, African-American
20 representation would fall from 13.6 percent to 7.7 percent,
21 correct?

22 **A.** That's the no SES boost.

23 **Q.** Do you see it?

24 **A.** The simulation is the half-athlete boost.

25 **Q.** Pardon?

1 **A.** This is confusing.

2 There's no SES boost, there's half-athlete boost,
3 and status quo. So the simulation is the second one, not the
4 first.

5 **Q.** Let's see if we can do it this way.

6 You do agree that Simulation Number 4 is the
7 Simulation A you presented to Her Honor, correct?

8 **A.** Yes.

9 **Q.** Simulation Number 4, which you said is a workable
10 alternative, African-American representation in the class
11 would drop from 14 percent to 8.4 percent, correct?

12 **A.** No.

13 **Q.** Do you see that? There are two scenarios, right? Your
14 Simulation A, which is Simulation Number 4 in your report,
15 there are two different scenarios, and one of them,
16 African-American representation, drops to 8.4 percent and
17 another drops to 10.1 percent, correct?

18 **A.** I'm not advocating the no SES boost.

19 **Q.** Mr. Kahlenberg, all I'm trying to do is get on the record
20 what the numbers are from the simulations you described this
21 morning as you described them in your expert report. Okay?
22 This is just to amplify the testimony you gave.

23 So for the report that you gave, your expert
24 report, you agree with me this is your report, correct?

25 **A.** It is.

1 **Q.** You agree with me this is your appendix, correct?

2 **A.** Correct.

3 **Q.** You agree with me that this is what you sponsored,
4 correct?

5 **A.** Correct.

6 **Q.** The data here shows that for Simulation A or 4, there are
7 two scenarios, and in one the African-American population
8 drops to 8.4 percent and in one to 10.1 percent. That's what
9 your data shows, correct?

10 **A.** Correct.

11 **Q.** All right. Now, Simulation Number 5 --

12 **A.** Can I clarify something? What I'm advocating is --

13 **Q.** Mr. Strawbridge is going to have you have a chance to ask
14 you questions. I've tried to let you answer broadly --

15 **A.** But it's the 10.1 --

16 **Q.** If you think it's important, go ahead.

17 **A.** What I'm advocating is the half-athlete boost. I don't
18 want to be confusing to people. So the half=athlete boost
19 takes it to 10.1 percent.

20 **Q.** If there's a half-athlete boost, the number of
21 African-American students on campus goes from 14 percent to
22 10 percent, correct?

23 **A.** Correct.

24 **Q.** The second scenario, which would take it from 14 percent
25 down to 8.4 percent, you wouldn't advocate that one, or you

1 have not advocated that one, have you?

2 **A.** Let me put it that way. I have not advocated. As we
3 know, I'm the SES boost guy. I'd rather have a half-athlete
4 boost than no SES boost.

5 **Q.** Simulation Number 5 is in your expert report, but it's
6 not one that you talked about today, correct?

7 **A.** Right.

8 **Q.** In your expert report for Simulation Number 5,
9 African-American representation on campus would drop from
10 14.to 8.1 percent in one scenario. Correct?

11 **A.** Again, I don't know why we're focusing on the no, yes,
12 yes boost, but --

13 **Q.** I'm going to just focus on the two scenarios. I'm going
14 to get them both into the record for us. There are two
15 scenarios for Simulation Number 5, correct?

16 **A.** Yes.

17 **Q.** In one of them, the number of African-Americans dropped
18 from 14 percent to approximately 8.1 percent, correct?

19 **A.** Right.

20 **Q.** In the other, the number of African-Americans dropped
21 from 14 percent to about 10.6 percent, correct?

22 **A.** Correct.

23 **Q.** You sponsored the alternative, which is that would result
24 in the drop to 10.6 percent, correct?

25 **A.** Correct.

1 **Q.** You don't sponsor the one that would result in the drop
2 to 8.1 percent, do you?

3 **A.** So I want to be clear here. I'm not rejecting it based
4 on the fact that it's 8.1. I'm rejecting it on the fact that
5 there's no SES boost.

6 **Q.** So the answer is you reject it but not strictly on the
7 numbers, correct?

8 **A.** Right.

9 **Q.** Okay. Now, for Simulations 6 and 7, 6 is Simulation C in
10 what you provided to Her Honor today, correct?

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

12 **Q.** And Simulation 7 is D, correct?

13 **A.** That's correct.

14 **Q.** Do you have that before you?

15 **A.** I do.

16 **Q.** In each of those simulations, the number of
17 African-American students, according to you and Professor
18 Arcidiacono, would drop from 14 percent to 10 percent,
19 correct?

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

21 **Q.** Even in those cases, a 48 percent or so reduction,
22 correct?

23 **A.** It goes from 14 to 10.

24 **Q.** Did you have talk to a single student on the Harvard
25 campus to see what a reduction in the population of

1 African-American students by 40 percent would do to the
2 campus?

3 **A.** I don't think it's 40 percent. But as part of my
4 research, I did not talk with students, no.

5 **Q.** Did you talk to any Harvard faculty member about what the
6 impact would be on the Harvard campus if the number of
7 African-American students fell from 14 percent to 10 percent?

8 **A.** That was not part of my research.

9 **Q.** In every single one of your simulations, the racial group
10 that bears the burden of your race-neutral alternatives with
11 a decrease is African-American students, correct?

12 **A.** So let me return to the basic point that we did not have
13 access to wealth --

14 **Q.** Mr. Kahlenberg, can you answer my question?

15 In every single one of your seven simulations, the
16 racial group that bore the burden of your race-neutral
17 alternatives by decreasing representation on campus was
18 African-American students. Correct or not correct?

19 **A.** So that was correct with the data limitations that we
20 had.

21 **Q.** Thank you.

22 THE COURT: Mr. Lee, where is this page?

23 MR. LEE: It's in his rebuttal expert report, Your
24 Honor, and it's Appendix A. It's at Tab 1. If you go to
25 Tab 1, Tab 1 is his initial report and at the end are some of

1 appendixes we just looked at, and Tab 10 is his rebuttal
2 report. I think the one you're looking for Ms. Frazier tells
3 me is Tab 10, Your Honor.

4 THE COURT: I have it.

5 MR. LEE: It's Tab 10, Appendix A.

6 THE COURT: The very last page, right?

7 MR. LEE: Yes.

8 BY MR. LEE:

9 **Q.** Okay. Let me move you to this question of the
10 race-neutral alternative committees at Harvard. You talked
11 to Mr. Strawbridge about the Ryan committee, correct?

12 **A.** That's correct.

13 **Q.** The Ryan committee's charge was broader than the Smith
14 committee's charge, correct?

15 **A.** I'd have to go back and review the data.

16 **Q.** Let me ask you this way. You know that Harvard has 13
17 schools or units, correct?

18 **A.** That sounds about right.

19 **Q.** You went to two of them. You went to the college and you
20 went to the law school, correct?

21 **A.** Right.

22 **Q.** You understand that the Smith committee looked at
23 race-neutral alternatives for the college, correct?

24 **A.** Correct.

25 **Q.** Dean Ryan's committee, which had a broader group of

1 people, was looking at the concept of -- two concepts:
2 diversity and race-neutral alternatives across the entire
3 university, correct? Is that right?

4 **A.** I'd have to go back and double-check, but there's so
5 little information about the Ryan committee is the problem.

6 **Q.** Can you tell me whether that's true or not? Did the Ryan
7 committee have as its charge first looking at things across
8 the entire university?

9 **A.** It may have.

10 **Q.** Did the Ryan committee's charge also include looking at
11 the issue of diversity?

12 **A.** I believe that's true.

13 **Q.** And isn't it true that a separate committee at the
14 college looked at diversity? Correct?

15 **A.** Yes.

16 **Q.** Chaired by Dean Khurana, correct?

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

18 **Q.** And that committee picked up that portion of the Ryan
19 committee charge and carried it forward, correct?

20 **A.** Well, I know that they address the issue of diversity.

21 **Q.** And they issued a report?

22 **A.** Yes.

23 **Q.** Did you read it?

24 **A.** Yes.

25 **Q.** Okay. And ultimately the Smith committee picked up the

1 charge on RNAs for the college, correct?

2 **A.** Correct.

3 **Q.** It didn't pick up the charge for RNAs across the
4 university, correct?

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

6 **Q.** And in that chart you showed Her Honor, with several
7 people and faces, there are actually people on the Ryan
8 committee from across the university who had no association
9 with the college, correct?

10 **A.** Right. I mean, there were law professors who would have
11 lots of expertise on principles to apply to the college,
12 economists who would have relevant information for the
13 college, as well as other pieces of Harvard.

14 **Q.** As well as other units, correct?

15 **A.** Correct.

16 **Q.** Now, I think you told Mr. Strawbridge today that the work
17 of the Ryan committee was suspended shortly after this
18 lawsuit was filed, correct?

19 **A.** That's correct.

20 **Q.** And in June 2017, Harvard formed a committee to study
21 race-neutral alternatives at the college, correct?

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

23 **Q.** Dean Khurana was on the committee, correct?

24 **A.** That's correct.

25 **Q.** He's the dean of the college, correct?

1 **A.** Right.

2 **Q.** Dean Smith was the dean of the faculty of arts and
3 sciences, correct?

4 **A.** Correct.

5 **Q.** That's one of Harvard's 13 units, correct?

6 **A.** Correct.

7 **Q.** He was the chair of the committee, correct?

8 **A.** Correct.

9 **Q.** Now, and Dean Fitzsimmons was also on the committee,
10 correct?

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

12 **Q.** The dean of admissions, correct?

13 **A.** Correct.

14 **Q.** Now, you said to us earlier today that one of the
15 disappointments was that the Smith committee didn't -- you
16 phrase it for me. What was it precisely? The disappointment
17 was they didn't provide you enough information about
18 something.

19 **A.** So one of the key concepts in the Supreme Court decisions
20 on affirmative action is that universities bear the burden of
21 showing that race-neutral alternatives do not work. A piece
22 of that is, in order to figure out what doesn't work, one
23 needs a measure of success. And an element of that is what
24 levels of diversity constitute a critical mass.

25 **Q.** Can I have the *Fisher* decision, which I'm going to --

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

2 THE COURT: Yes.

3 BY MR. LEE:

4 Q. I'm going to hand you a copy. It's page 7 on the screen.
5 Mr. Kahlenberg, if you can turn to page 7. So I just want to
6 be sure that -- you've read this decision before, correct?

7 A. I have.

8 Q. And I'm going to turn you to the middle of the first full
9 paragraph. Do you see the sentence which reads, "A
10 university cannot impose a fixed quota or otherwise 'define
11 diversity as some specified percentage of a particular group
12 merely because of its race or ethnic origin.'"

13 A. That's correct.

14 Q. Do you have that in mind?

15 You agree with that, correct?

16 A. Yes.

17 Q. Okay. Now, the committee met seven times, correct?

18 A. Yes.

19 Q. It reviewed your expert reports, correct?

20 A. Correct.

21 Q. Now, I understand you disagree with some of their
22 conclusions, but it reviewed all the race-neutral
23 alternatives that you identified in this case, correct?

24 A. That's what they said in their report, yes.

25 Q. They also considered some race-neutral alternatives in

1 addition to the ones that you identified, correct?

2 **A.** I think they looked at what would happen if you
3 eliminated test scores. Right.

4 **Q.** They considered the possibility of eliminating
5 standardized test scores as a race-neutral alternative,
6 correct?

7 **A.** Correct.

8 **Q.** That's not one that you proposed, correct?

9 **A.** Correct.

10 **Q.** They also considered eliminating the admissions tip for
11 athletes, correct?

12 **A.** I believe that's true.

13 **Q.** And as you said, for reasons you've described, you didn't
14 think that was workable, correct?

15 **A.** Correct.

16 **Q.** And then the committee sat back and looked at the impact
17 of the race-neutral alternatives alone or in combination on
18 the backgrounds, experiences, and interests of its students,
19 correct?

20 **A.** Backgrounds, interests, and experience? I'm trying to
21 think through those terms, but that sounds right.

22 **Q.** Right. And what they did is they evaluated the impact
23 that any one of these race-neutral alternatives, alone or in
24 combination, would have on the Harvard student community and
25 the broader Harvard community, correct?

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

2 **Q.** And it evaluated whether any of those race-neutral
3 alternatives, alone or in combination, would be consistent
4 with Harvard's institutional commitments and goals, correct?

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

6 **Q.** And you agree that that's an appropriate consideration
7 for a university like Harvard, correct?

8 **A.** Yeah. Broadly speaking, yes.

9 **Q.** Broadly speaking, a university should identify its goals
10 and then determine whether in pursuing those goals what
11 impact you were having on your students, your faculty, your
12 staff, right?

13 **A.** I guess I say "broadly speaking" because, you know, if
14 a -- if a university said it's in our interests to have no
15 black students or something, you wouldn't just give a
16 university carte blanche on these issues.

17 **Q.** Harvard hasn't said that, has it?

18 **A.** No. But I wanted to make sure I was answering your
19 question accurately.

20 **Q.** I appreciate it. I just want to be sure that broadly, as
21 you've used the term, Harvard is considering the right
22 things. It's correct in considering its goals, correct?

23 **A.** Right.

24 **Q.** You're rightly suggesting that its goals are not subject
25 to its complete discretion. Someone needs to take a look at

1 them, correct?

2 **A.** Correct.

3 **Q.** It is doing the right thing in evaluating the pursuit of
4 its goals and the impact upon the community, including
5 students, faculty, and staff, correct?

6 **A.** Yes.

7 **Q.** And they have to do that evaluation fairly and squarely,
8 correct?

9 **A.** Correct.

10 **Q.** And evaluating race-neutral alternatives, the job of
11 people who are administrators like Dean Smith, like Dean
12 Khurana, like Dean Fitzsimmons is to do that evaluation and
13 to come to some conclusion as to whether the race-neutral
14 alternatives can achieve the university's goals, correct?

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

16 **Q.** Now, one of the goals that it's appropriate for a
17 university to have is maintaining its academic excellence, as
18 you said to Mr. Strawbridge, correct?

19 **A.** That's correct.

20 **Q.** And it's also a legitimate goal to maintain the diversity
21 in many different ways of its class, correct?

22 **A.** Correct.

23 **Q.** Now, would you agree that it was appropriate for the
24 committee to consider the impact of race-neutral alternatives
25 on the extracurricular achievement of the incoming class?

1 **A.** I think that's one factor that's fair to look at.

2 **Q.** I agree. Would you agree with me that it was appropriate
3 for the committee to consider the impact of race-neutral
4 alternatives on the academic excellence of the class?

5 **A.** Yes.

6 **Q.** You're familiar, as you told Mr. Strawbridge, with what
7 Harvard calls the academic rating, correct?

8 **A.** Yes.

9 **Q.** And you talked to him about academic ratings of 1s and
10 2s, correct?

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

12 **Q.** Now, Harvard uses the academic rating to evaluate the
13 academic potential of individual students, correct?

14 **A.** Correct.

15 **Q.** And you understand that the academic rating is not just a
16 formula based upon grades and board scores, correct?

17 **A.** Correct.

18 **Q.** It takes into account qualitative considerations like
19 intellectual capacity, creativity, intellectual curiosity,
20 correct?

21 **A.** That's correct.

22 **Q.** And you agree that it's appropriate for Harvard to
23 consider all of those things, correct?

24 **A.** That's correct.

25 **Q.** And it also might include faculty evaluation of the

1 student's work, correct?

2 **A.** Yes.

3 **Q.** Teacher recommendation?

4 **A.** Yes.

5 **Q.** The guidance counselor recommendation?

6 **A.** Appropriate, yes.

7 **Q.** All of those things, qualitative and quantitative, go
8 into the academic rating, correct?

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

10 **Q.** And it would be appropriate for the RNA committee, the
11 Smith committee, to look at the impact any of these
12 race-neutral alternatives would have on the academic rating
13 of the class, correct?

14 **A.** I think it's one of the factors they should look at, yes.

15 **Q.** Fair enough. One of the factors.

16 But clearly for an institution of higher learning,
17 academic excellence is at least an important factor, correct?

18 **A.** Yes.

19 **Q.** Now, I want to return to Simulation Number 6, which is
20 your Simulation C from your testimony earlier today. You
21 said that Simulation 6 was particularly viable because
22 Harvard could maintain its academic excellence while
23 promoting high levels of overall racial, ethnic, and
24 socioeconomic diversity, correct?

25 **A.** That's correct.

1 **Q.** So let's focus on that simulation, if we could. If it
2 helps you, let me turn you to Tab 24 in your notebook.

3 **A.** I'm there.

4 **Q.** Do you find the card "Rebuttal Report"?

5 **A.** I do.

6 **Q.** Which you've seen before, correct?

7 **A.** Yes.

8 **Q.** Turn to page 96, which is Exhibit 26. Do you have that
9 before you?

10 **A.** I do.

11 **Q.** I'm going to blow up the portion that is entitled
12 "Fraction With Profile Rating of 1 and 2."

13 Do you see that?

14 **A.** I do.

15 **Q.** Now, you correctly told us that a small fraction of the
16 applicant pool gets a 1, correct?

17 **A.** Correct.

18 **Q.** It's less than 100 people a year, correct?

19 **A.** That's right.

20 **Q.** But there are many people who are admitted who get a 2.
21 There have to be if there are only 100 1s, correct?

22 **A.** As I said 80 percent of the 2s are rejected, but some of
23 them get in.

24 **Q.** If there are only 100 1s and all the 1s don't get in,
25 there are an awful lot of 2s that are getting in, correct?

1 **A.** 2s, some 3's.

2 **Q.** Fair enough. I agree. Fair enough.

3 So do you see that we have the fraction of the
4 profile rating of 1 and 2 in lines 10, 11, 12, and 13? Do
5 you see the profile ratings?

6 **A.** I do.

7 **Q.** And for your Simulation Number 6 or your Simulation
8 Number C, the portion of the class receiving a 1 or 2 would
9 decrease from 76 percent, which I'll highlight now, to
10 61 percent.

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

12 **Q.** Correct?

13 **A.** Yes.

14 **Q.** And the RNA committee looked at those numbers from
15 Dr. Card's model and from your report, correct?

16 **A.** Yes.

17 **Q.** And they said that as an academic matter, decreasing the
18 number of people in the class by literally 20 percent, if you
19 go from 76 percent to 60 percent, a 20 percent decrease in
20 the number of people with 1s and 2s was not acceptable to
21 them, correct?

22 **A.** That's what they said. I disagree.

23 **Q.** Fair enough. You disagree.

24 But the RNA committee said that a decrease from
25 76 percent to 61 percent would be academically unacceptable

1 to them, correct?

2 **A.** So they couldn't point to SAT's because they are at the
3 98th percentile. So instead they talked about the 1s and 2s.

4 One thing I think they're missing here is that in
5 the rating system, the disadvantages that students face is
6 factored into some of these ratings but not into -- there's
7 nothing in the handbook about looking at obstacles overcome
8 in the academic rating. So I think these numbers have to be
9 considered in context.

10 **Q.** Let me ask you a couple of questions about that, then.

11 First, we can agree upon the numbers. There's a
12 decrease from 76 percent to 61 percent, correct?

13 **A.** Yes.

14 **Q.** Your simulations that you testified to Her Honor about
15 earlier today address the issue of academic excellence by
16 focusing on SAT scores, correct?

17 **A.** SATs and grades.

18 **Q.** Right. And you know that Harvard doesn't admit students
19 just on the basis of SAT scores and grades, correct?

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

21 **Q.** All of the qualitative information that you and I
22 discussed that goes into the academic rating -- teacher
23 recommendations, guidance counselor recommendations, faculty
24 reviews, academic, demonstrated intellectual curiosity -- all
25 of those qualitative factors go into these ratings, correct?

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

2 **Q.** What the RNA committee said, and I understand you
3 disagree, was that for us, we think this would be
4 unacceptable. That's what they said, correct?

5 **A.** That's what they said, yes.

6 **Q.** Okay. So I want to ask you about this. And I'm getting
7 close to the end. You said you've read some of the
8 transcripts, correct?

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

10 **Q.** And have you read the criticism of the Smith committee as
11 something undertaken not in good faith and a sham?

12 **A.** I didn't use the word "sham" in my report.

13 **Q.** My question was, have you heard SFFA say those words in
14 this courtroom?

15 **A.** I haven't been here. I've reviewed the transcript. I
16 didn't see "sham."

17 **Q.** Now, you would agree with me that Dean Smith, Dean
18 Khurana, and Dean Fitzsimmons have more than 40 years of
19 experience as faculty members at Harvard, correct?

20 **A.** I think the issue isn't experience. It's more are you
21 grading yourself. I think that's what's --

22 **Q.** Mr. Kahlenberg, my question is, would you agree with me
23 that the three of them have 40 years of experience?

24 **A.** This is an experienced group.

25 **Q.** They have more than -- close to 50 years of experience as

1 administrators at a major private university, correct?

2 **A.** That sounds right.

3 **Q.** They met on seven occasions over nine months, correct?

4 **A.** Yes.

5 **Q.** They reviewed literature, like you, correct?

6 **A.** The report says that they reviewed literature.

7 **Q.** They reviewed expert reports, correct?

8 **A.** That's what their report says.

9 **Q.** They issued a 19-page report, correct?

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

11 **Q.** Which you described in your report as disingenuous. Do
12 you recall that word in your report?

13 **A.** I don't recall saying that, but it was --

14 **Q.** It's in your report.

15 **A.** It was a -- I think what bothered me was that we had this
16 Ryan committee --

17 **Q.** Mr. Kahlenberg, did you use that term or not?

18 **A.** I may have, but --

19 **Q.** Now, I just want to make sure that we got this right.

20 The work of these faculty members, these administrators over
21 nine months, reviewing all of this work is, according to you,
22 not to be relied upon, correct?

23 **A.** I did not find it convincing.

24 **Q.** But your opinion, which just happens to be identical to
25 the opinion you gave to Fox News the day after this complaint

1 was filed, is reliable. Is that your testimony?

2 **A.** I don't think my opinion is identical to the Fox News
3 opinion in any --

4 **Q.** Someone else will judge that. Your opinion is reliable
5 and their work is not. That's your best judgment, right,
6 sir?

7 **A.** I did not find their report convincing. I mean, there
8 was evidence --

9 **Q.** Mr. Kahlenberg, can you answer my question?

10 **A.** Yes.

11 **Q.** At the end of the day after all of this, your opinion --
12 and we'll make a judgment as to whether it's the same as that
13 in your Fox News interview or not.

14 Your opinion is to be relied upon, but all of their
15 work is not. That's your best judgment. Correct, sir?

16 **A.** My best judgment is that in looking at the data on the
17 results of the ability of Harvard to use race-neutral
18 alternatives is -- I mean, the evidence laid out in my
19 reports is far more persuasive than the committee's
20 renderings.

21 **Q.** So that would be a yes. That's your best judgment,
22 correct, sir?

23 **A.** Yes. That's my best judgment.

24 MR. LEE: Thank you. Nothing further, Your Honor.

25 MR. STRAWBRIDGE: No more questions, Your Honor.

1 THE COURT: You're excused.

2 THE WITNESS: Thank you.

3 MR. LEE: Your Honor, if we could have a minute.
4 Ms. McGrath is out there.

5 THE COURT: Absolutely. I'm happy to take a recess
6 if you want.

7 MR. LEE: Your Honor, we're working on a notebook
8 from last Friday.

9 THE COURT: I have it. Just to remind you, you're
10 under oath still.

11 THE WITNESS: Yes. Thank you.

12 (MARLYN MCGRATH previously sworn by the Deputy
13 Clerk.)

14 EXAMINATION (resumed)

15 BY MR. LEE:

16 Q. Good afternoon, Ms. McGrath.

17 A. Good afternoon.

18 Q. Welcome back is the best I can do.

19 A. Thank you.

20 Q. When we suspended last Friday, we were talking about
21 training materials. Do you recall that?

22 A. I do.

23 Q. And you were describing the training that new admissions
24 officers and old admissions officers go through at the
25 office. Do you recall that?

1 **A.** I do.

2 **Q.** And we were just about to start with written materials
3 that are provided to admissions officers. Do you remember
4 that?

5 **A.** Yes.

6 **Q.** So turn, if you would, in Tab 2 of your notebook to DX5.

7 **A.** I have two notebooks. I guess this is the one that says
8 "McGrath Exhibits" or "Direct Exhibits." I think it must be
9 the latter. Would you repeat the number again? I'm sorry.
10 I've already forgotten it. D2?

11 **Q.** Tab 2.

12 **A.** I have D25.

13 MR. LEE: Your Honor, may I approach?

14 THE COURT: Yes.

15 THE WITNESS: Thank you. I have that.

16 BY MR. LEE:

17 **Q.** Do you have DX5 before you?

18 **A.** Yes.

19 **Q.** What is it?

20 **A.** It is the interviewer handbook for 2013-2014.

21 **Q.** To whom is it provided?

22 **A.** It's provided fundamentally to the alumni interviewers
23 and other interviewers. It's chiefly alumni interviewers
24 around the world who interview -- whenever possible interview
25 candidates for admission. We use it as here in the training

1 materials for our regular new staff when they arrive and for
2 others who would find it helpful to have a somewhat detailed
3 account of what we hope interviewing will achieve and how to
4 achieve it, a guide to how to achieve it.

5 **Q.** Turn, if you would, to the page that has number .009 in
6 the bottom in the middle.

7 **A.** Yes.

8 **Q.** Do you see the category that refers to distinguishing
9 excellences?

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

11 **Q.** We've seen this before, so I am only going to ask you a
12 few questions.

13 What are distinguishing excellences in the Harvard
14 admissions process generally?

15 **A.** Generally distinguishing excellence or excellences are
16 the features of a candidacy, the aspects of a person who's
17 applying that would receive positive attention from our
18 committee, features of the case that would help that person,
19 him or her, stand out against a sea of very qualified
20 candidates.

21 **Q.** And in the pages that follow, are there factors that
22 might be used as tips in the process?

23 **A.** Yes.

24 **Q.** Now, we've gone through these with Dean Fitzsimmons, so
25 I'm not going to go through them individually.

1 But as director of admissions, I just want to ask
2 you this: Are the tips listed in the interviewer handbook
3 the only factors the admissions office gives tips for?

4 **A.** No. Generally it's an overview.

5 **Q.** Does any one tip guarantee admission?

6 **A.** No one tip guarantees admission.

7 **Q.** Can the presence of a tip make an important difference in
8 an admission decision?

9 **A.** Yes, it may.

10 **Q.** Do you see the last tip which is geographic, ethnic, or
11 economic factors?

12 **A.** Yes.

13 **Q.** Do some applicants receive a tip for race?

14 **A.** Yes, some do.

15 **Q.** As director of admissions, why do you believe it's
16 important that a tip be given for race?

17 **A.** Our applicant pool is very strong. The top half or top
18 portion of the applicant pool are quite easy to make a very
19 strong case for. And one of the factors, race, for example,
20 that can set a candidate apart can be very clarifying and
21 helpful to us. So that tip is to help us follow more
22 energetically otherwise very strong candidate through the
23 process. That tip of course may not, even if it's present
24 for a good candidate, may not be sufficient for admission,
25 but it will help us keep the attention at a high level.

1 **Q.** Is race ever a negative tip?

2 **A.** No. Race is never a negative tip.

3 **Q.** Turn to Tab 3 in your binder.

4 **A.** Yes.

5 **Q.** Do you find DX3?

6 **A.** Yes.

7 **Q.** What is DX3?

8 **A.** DX3 is a typical example of a new-staff training schedule
9 for people who have just joined the office as admissions
10 officers or as financial aid officers who will be carrying an
11 admissions load.

12 **Q.** And in the materials that follow in DX3, what are the
13 materials that are included behind the new-staff training
14 schedule?

15 **A.** There are further schedules, further lists of topics. A
16 good deal of administrative information about what various
17 members of the staff do and what their initials mean and what
18 their assignments are. And there are some more qualitative
19 memos also included. Generally speaking, what this is is the
20 stuff that we hand -- along with the interviewer handbook
21 that you mentioned earlier, the material that we hand new
22 people to work with for basically the first four weeks in the
23 office.

24 MR. LEE: Your Honor, we offer DX003.

25 MR. MORTARA: No objection, Your Honor.

1 THE COURT: Admitted.

2 (Defendant Exhibit No. DX003 admitted.)

3 BY MR. LEE:

4 Q. Turn, if you would, to page 0009 in the bottom center.

5 At the top it's dated January 2015.

6 A. Is this DX00 --

7 Q. I'm sorry. It's DX003.0009.

8 A. Yes. I can get there. Thank you.

9 Q. Let me know when you're there.

10 A. Yes. I'm there.

11 Q. And do you see it's dated January 2015?

12 A. Yes.

13 Q. What is this?

14 A. That is what I would describe as a tune-up schedule.

15 That's a schedule of meetings and events we expect new
16 members of the staff, the people who have typically begun in
17 the fall. We expect them to come to this because it's a help
18 to them. It's the week in which we teach them how to handle
19 regular action.

20 The first thing that happens to the new admissions
21 officer with respect to the cycle of selection is the early
22 action process which takes place in the fall. When we get to
23 this one, January 2015, that year, this is to help them
24 manage the adjustment -- frankly, the operational adjustment
25 of how far to handle the volume that comes to us in regular

1 action.

2 **Q.** Turn, if you would, to Tab 4 in your binder.

3 **A.** Yes. I am there.

4 **Q.** Do you find DX16?

5 **A.** Yes.

6 **Q.** What is DX16?

7 **A.** DX16 is a document called "Reading Procedures For the
8 Class of 2017."

9 May I comment that I've always thought that was a
10 somewhat unfortunately title? It isn't much of a guide to
11 reading. It's mostly a procedure for coding information, but
12 it does have some information about reading folders.

13 MR. LEE: Your Honor, we offer DX16.

14 MR. MORTARA: No objection.

15 THE COURT: Admitted.

16 (Defendant Exhibit No. DX16 admitted.)

17 BY MR. LEE:

18 **Q.** Turn, if you would, to Tab 5 in your binder.

19 **A.** I'm there.

20 **Q.** What is it?

21 **A.** That is a casebook, as we call it.

22 **Q.** And what is a casebook at the Harvard admissions office?

23 **A.** A casebook is a group, as always, of cases boiled down to
24 manageable size. They're actual people's cases redacted so,
25 we hope, that the identifiers are erased. But in every case,

1 each detail of that case is part of an actual case.

2 In other words, we don't put them together, though
3 it's tempting to do it. We use them for training. We use
4 them here for training for new admissions people.

5 We also use them for alumni when we're trying to
6 orient them better about how interviews and other factors of
7 admissions are used. We sometimes use them with school
8 personnel when they wish to understand our process better.
9 So it's a series of teaching devices.

10 MR. LEE: Your Honor, we offer DX2.

11 MR. MORTARA: No objection.

12 THE COURT: Admitted.

13 (Defendant Exhibit No. DX2 admitted.)

14 BY MR. LEE:

15 **Q.** Now, I know last Friday seems like a long time ago, but
16 when you and I were discussing written materials that are
17 used for training, is the casebook one of the written
18 materials that's used for training?

19 **A.** Yes, it is.

20 **Q.** As you use the casebook for training, is there a document
21 that is a guide to how the casebook is to be used for
22 training?

23 **A.** Yes. There's a document to assist the person running the
24 session in the discussion.

25 **Q.** So turn to Tab 6, if you would, and tell me when you're

1 there.

2 **A.** I am there.

3 **Q.** Do you find DX24?

4 **A.** Yes.

5 **Q.** And what is it?

6 **A.** That's the discussion guide to help the facilitator of
7 the casebook.

8 MR. LEE: Your Honor, we offer DX24.

9 MR. MORTARA: No objection.

10 THE COURT: Admitted.

11 (Defendant Exhibit No. DX24 admitted.)

12 BY MR. LEE:

13 **Q.** Director McGrath, I'd like you to help us just understand
14 how the cases are used to do the teaching and to put the two
15 exhibits together. Okay?

16 **A.** Yes.

17 **Q.** In the casebook and discussion guide, are there cases
18 where the applicant's race or ethnicity is listed?

19 **A.** Yes.

20 **Q.** Are there cases where it's listed as a plus factor?

21 **A.** Yes.

22 **Q.** Are there cases where the candidate's race or ethnicity
23 was the only factor leading to admission?

24 **A.** No.

25 **Q.** Have you heard of the concept of a pause factor?

1 **A.** Yes.

2 **Q.** What is a pause factor in the Harvard admissions process?

3 **A.** As far as I'm concerned -- and this process is used only
4 in these discussion guides -- they are questions that have
5 arisen in the reading and perhaps discussion of the case that
6 may, as we say, slow us down. They are questions that need
7 further information, further examination, or just further
8 discussion and consideration.

9 **Q.** For those candidates in the discussion -- I'm sorry.
10 Withdrawn.

11 For those candidates in the casebook who identified
12 race or ethnicity, were they all admitted?

13 **A.** No.

14 **Q.** So let's take two examples, and I'd like you to help the
15 Court understand how the case studies are used to train
16 admissions officers. Okay?

17 **A.** Yes.

18 **Q.** In Tab 5, turn, if you would, to page 89.

19 This is one of the cases used for training
20 purposes?

21 **A.** Yes. I have that here.

22 **Q.** Now, is the information presented on this page based upon
23 on actual applicant to Harvard?

24 **A.** Yes, it is.

25 **Q.** But it has been anonymized in a way so people can't

1 recognize precisely who she is, correct?

2 **A.** Yes. We hope not.

3 **Q.** What information was provided to the admission's
4 committee about Grace's ethnicity?

5 **A.** The school from -- Grace is the candidate's name. It
6 tells us what school she's from, and it tells us a little bit
7 about the school, day school, which grades, and so on, on the
8 West Coast. Good school. 100 percent of the students go to
9 university. It tells us her ethnicity, which she tells us is
10 Chinese and Afro-Caribbean.

11 **Q.** Let me pause you there.

12 So that's a self-identification of her ethnicity,
13 correct?

14 **A.** Yes.

15 **Q.** Now, I'm not going to go through everything here, but on
16 this page is there information presented in the case study on
17 the occupation of Grace's parents?

18 **A.** Yes.

19 **Q.** What does it say about the occupation of Grace's parents?

20 **A.** It says that her mother, who has a high school degree, is
21 a child care worker. And it says that her father, who is a
22 psychiatric aide, has some college education.

23 **Q.** Does Harvard consider parental occupation in evaluating
24 candidates?

25 **A.** In the context of a case, we often do.

1 **Q.** Staying with this page, is there information on Grace's
2 intended career?

3 **A.** She tells us that she wants to study engineering. And
4 there's a little more information on that because she tells
5 us that she has absolute certain commitment to that. We ask
6 people to rate that 1 to 5. She's a 1. She also tells us
7 that she wishes to pursue a career in government and
8 politics, and that she is committed to that at a level of 2.

9 **Q.** Now, an intended career is something that you may
10 consider in the admissions process, correct?

11 **A.** We may.

12 **Q.** Turn, if you would, to pages 92 and 93 of the case
13 notebook. Let me go back to the page you were just on and
14 highlight the SAT scores.

15 **A.** Her SAT scores were 720, 700, 690, verbal, math, and
16 writing.

17 **Q.** So good but not perfect, correct?

18 **A.** No. Not perfect.

19 **Q.** Let's go to page 92 to 93. What do you find at page 92
20 to 93 of the casebook?

21 **A.** Yes.

22 **Q.** Are you at pages 92 and 93 of the casebook?

23 **A.** Yes.

24 **Q.** Let me turn you to the -- these are pages from the
25 secondary school report, correct?

1 **A.** Yes.

2 **Q.** Turn, if you would, to 93.

3 In the case study based upon the actual student,
4 let's look at the last paragraph on 93 and see what the
5 secondary school report says about her personal qualities.

6 Could I have Mr. Lee highlight the portion that
7 begins "Extremely compassionate, gentle, warm nature" and the
8 sentence that follows.

9 "Grace is a person of the highest integrity who is
10 not afraid to defend her values and to speak out against
11 injustice and wrongdoing at any forum, whether it is an
12 assembly or public meeting. Her delivery is always gracious,
13 forthright, and sincere."

14 Two questions. Is this the kind of information
15 that you use in assessing the personal qualities of an
16 applicant?

17 **A.** Yes, it is.

18 **Q.** Is this guidance counselor recommendation the type of
19 document you use to train your admissions officers on what to
20 be looking for?

21 **A.** Yes. This is an example of something we hope to get from
22 a school.

23 **Q.** Turn, if you would, to page 94 and to the teacher
24 recommendation.

25 **A.** Yes.

1 **Q.** I'll ask Mr. Lee to blow up the first paragraph.

2 Do you see the sentence which reads, "Her strength
3 of character has inspired me to more frequently take a
4 stand"?

5 **A.** Yes.

6 **Q.** It goes on to say, "Grace challenges me to be the best
7 person I can be."

8 **A.** Yes.

9 **Q.** Is that the type of information you use in evaluating the
10 personal qualities of an applicant?

11 **A.** Yes.

12 **Q.** Is it the type of information you use to train your
13 admissions officers on what's important to the personal
14 qualities of an applicant?

15 **A.** Yes.

16 **Q.** Turn, if you would, to page 96. Is this the second
17 teacher recommendation?

18 **A.** Yes.

19 **Q.** And go down to the second paragraph.

20 **A.** Yes.

21 **Q.** Actually third paragraph. Do you see the sentence that
22 reads, "She has a larger-than-life personality, strong moral
23 character, and natural charisma that have made her an
24 exemplary leader"?

25 **A.** Yes.

1 **Q.** Again same questions. Are those the type of qualities
2 you're looking for, personal qualities, in an applicant to
3 Harvard?

4 **A.** Yes.

5 **Q.** Is this one of the cases you use to train people on what
6 you're looking for?

7 **A.** Yes.

8 **Q.** Now, Director McGrath, are there written guidelines on
9 how you're supposed to precisely judge strong moral
10 character?

11 **A.** No. We do not have written guidelines for that.

12 **Q.** Are there written guidelines on how you gauge natural
13 charisma?

14 **A.** No.

15 **Q.** Or likability?

16 **A.** No.

17 **Q.** Or courage?

18 **A.** No.

19 **Q.** Or integrity?

20 **A.** No.

21 **Q.** Now, turn, if you would, to Tab 6. I want to go to now
22 what the discussion guide tells the trainer on what he or she
23 should be teaching the admissions officer. Do you have that?

24 **A.** Yes.

25 **Q.** And if we turn to page 12, can you tell Her Honor what's

1 on page 12?

2 **A.** This is the discussion guide. And these are the points
3 that ideally a good discussion would be used for
4 conversational purposes, for assessment purposes by the
5 committee that you're trying to teach, the mock committee
6 that you're trying to teach, whether it's new admissions
7 officers or guidance counselors or people who interview for
8 us. So these are the points that we would like not to leave
9 the room without making.

10 **Q.** And so I won't go through them all, but under "Appeal,"
11 these are positive factors that someone should find in the
12 file, correct?

13 **A.** Yes.

14 **Q.** And one of them was, "Unusually appealing personal
15 qualities echoed throughout the entire application."
16 Correct?

17 **A.** Yeah.

18 **Q.** And a third was, "From a very modest socioeconomic and
19 ethnic background that we also don't see often in our student
20 body. She would bring a unique life experience to Harvard,
21 and she seems eager to share her story and learn about others
22 in the process."

23 **A.** Yes.

24 **Q.** Now, under "Pause Factors," you told me pause factors are
25 things that you should consider that might cause you to

1 pause, correct?

2 **A.** Yes.

3 **Q.** And one of the pause factors was her test scores,
4 correct?

5 **A.** Yes.

6 **Q.** And then under "Other Information For Your Committee,"
7 the first sentence reads, "This case, unlike most in the
8 casebook, is a clear admit." Correct?

9 **A.** Yes.

10 **Q.** And is that what you have tried to teach your admissions
11 officers?

12 **A.** Yes. We've tried to give them a model of something
13 that's undeniably very strong, comparatively.

14 **Q.** And in fact, was Grace admitted?

15 **A.** She was.

16 **Q.** Whoever Grace is.

17 **A.** She was.

18 **Q.** Let's turn to another example of someone was not
19 admitted. Turn, if you would, back to Tab 5 to DX2, and I'm
20 going to go to page 0101.

21 Do you have that before you?

22 **A.** Yes.

23 **Q.** The name is Peter Duran, a name made up for the teaching
24 guide, correct?

25 **A.** Yes.

1 **Q.** Did he identify ethnicity?

2 **A.** He did.

3 **Q.** What did he identify?

4 **A.** He identified Hispanic from Guatemala and Caucasian.

5 **Q.** Now, if we go down to his class rank and SATs, could you
6 describe his academic -- his quantitative academic
7 qualifications?

8 **A.** His grades are very good. He's in the top 95 percent of
9 his class of 700 people. His scores, his SAT 1 scores are
10 800, 760, and 800. And in addition to that, he has three
11 800's on subject tests, SAT IIs, and a 780 in physics.

12 **Q.** So by comparison to Grace, his scores were actually
13 stronger, correct?

14 **A.** He has higher scores.

15 **Q.** Now, let's go a little bit further down the page and look
16 at extracurricular activities. The first two are university
17 IWSST and first robotics team captain. Do you see that?

18 **A.** I do.

19 **Q.** And if we turn over one page to page 0102 --

20 **A.** Yes.

21 **Q.** -- there is a section called "Activities Most
22 Meaningful."

23 **A.** Yes.

24 **Q.** And what does Peter write about?

25 **A.** He writes about his robotics team. He was the captain or

1 leader of this team, and they did very well in a regional
2 competition. He's clearly very excited about doing the work
3 and also, I think, about the teamwork aspect of it. He tells
4 us about it in that little paragraph.

5 **Q.** Now, let's turn to the discussion guide to see what the
6 teaching guide says about how you use this case study.

7 **A.** Yes.

8 **Q.** It would be at Tab 6, DX24, page 13.

9 **A.** Yes.

10 **Q.** Do you have that before you?

11 **A.** I do.

12 **Q.** Now, there is a section called "Appeal," correct?

13 **A.** Yes.

14 **Q.** Is there a note made about his ethnicity under one of the
15 factors that is an appealing factor for this candidate?

16 **A.** Yes.

17 **Q.** What does it say?

18 **A.** "Peter's mixed race background is underrepresented at
19 elite colleges and is a growing demographic in the United
20 States."

21 **Q.** Now, under "Pause Factors" there are a couple.

22 **A.** Yes.

23 **Q.** What does the first pause factor say about his academic
24 performance?

25 **A.** It says that he's a strong student but that it's hard to

1 distinguish him from other strong students, of whom we have
2 many. He would not be called what we call a 1 academic; that
3 is, somebody who is truly quite unique, relatively rare in
4 our process.

5 **Q.** And for extracurriculars?

6 **A.** And those look modest compared to lots of other people's
7 activities. They themselves may not be a plus in the case.

8 **Q.** And if we go down to "Action," Peter was discussed at
9 subcommittee, correct?

10 **A.** Yes.

11 **Q.** Discussed at the full committee, correct?

12 **A.** Yes.

13 **Q.** But ultimately what was the decision?

14 **A.** He was not admitted.

15 **Q.** And we've looked at a couple of cases now, both of which
16 self-identify race or ethnicity.

17 Are these studies the way that you teach your
18 admissions officers and others how to evaluate personal
19 qualities, race, ethnicity, all of the factors that are
20 described in a file?

21 **A.** Yes. This is a principal way we do that. Intensive
22 conversation, attention to cases. Whether their case is
23 under discussion or cases as this used for teaching, that is
24 how we teach people to reckon with these factors.

25 **Q.** So I'd like to take you back now to an actual applicant's

1 file. Turn, if you would, to Tab 1, which is DX276.

2 MR. LEE: And Your Honor, I'm going to do the same
3 thing we did with Dean Fitzsimmons, which is not put it on
4 the big screen, and take Director McGrath through in a way it
5 doesn't identify personal information.

6 THE COURT: That's fine.

7 BY MR. LEE:

8 Q. Do you have it before you?

9 A. I do.

10 Q. This is an actual application file, correct?

11 A. That is, yes.

12 Q. It's DX276?

13 A. Yes.

14 MR. LEE: We offer it, Your Honor.

15 MR. MORTARA: No objection, Your Honor.

16 THE COURT: Admitted.

17 (Defendant Exhibit No. DX276 admitted.)

18 BY MR. LEE:

19 Q. Now, Director McGrath, we're going to put it on your
20 screen. You'll have the hard copy. To protect the privacy
21 of the applicant, we're not going to display it on the other
22 screens.

23 A. Thank you.

24 Q. I would like you to answer my questions in a way that
25 doesn't disclose any information that will identify the

1 candidate.

2 **A.** Good. I'll try to do that.

3 **Q.** I'll try to ask my questions precisely.

4 **A.** Thanks.

5 **Q.** Have the profile ratings been completed on this
6 application?

7 **A.** Yes.

8 **Q.** Was there a first reader?

9 **A.** Yes.

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

11 **A.** Yes.

12 **Q.** Who was the second reader?

13 **A.** I was the second reader.

14 **Q.** Are the initials MEM, you?

15 **A.** Yes.

16 **Q.** On what date did you read the file?

17 **A.** On December 25.

18 **Q.** Turn, if you would, to page 2 of the application.

19 **A.** Yes.

20 **Q.** I'm going to draw your attention to the box MEM on the
21 lower portion of the page. Do you have that?

22 **A.** I do.

23 **Q.** Are those your comments?

24 **A.** Yes, they are.

25 **Q.** Now, I think you can read these comments literally

1 without disclosing any information. So would you?

2 **A.** Yes. "Application," it stands for. "App is moving and
3 offers an appealing sense of him personally. Plenty of
4 talent and a record of using it effectively."

5 **Q.** Turn now, if you would, to page .0009. Do you have that
6 before you?

7 **A.** I do.

8 **Q.** What is it?

9 **A.** It is his personal essay.

10 **Q.** Now, again, I don't want you to reveal any details. But
11 is there information in the personal essay that would be
12 relevant to the personal qualities or personal rating of the
13 applicant?

14 **A.** Yes, there is.

15 **Q.** Could you describe them for us generally?

16 **A.** I think I can. This is an essay. Stop me if I'm
17 divulging anything. It's hard to do it separate from the
18 actual.

19 He writes an essay about his memories of a space in
20 the family's residence, in the family's living, that reminds
21 him whenever he's there of the death of his brother who he
22 was very close to. And he remembers the accident that took
23 his brother's life.

24 And you get by reading this a couple of things,
25 several things. You get a good, wonderful sense of his

1 ability to recall emotion, and the emotion he felt is
2 expressed. He writes beautifully, which is something we
3 don't see elsewhere in this application so much.

4 **Q.** Turn, if you would, to page 14. Do you have that before
5 you?

6 **A.** I do.

7 **Q.** What is this?

8 **A.** It is his optional essay.

9 **Q.** Did this also provide information about his personal
10 qualities?

11 **A.** It does.

12 **Q.** And again in general terms, what does it tell us?

13 **A.** Well, it tells us something we knew already. It reminds
14 us that he is a person who loves books and loves reading and
15 loves ideas. We get that throughout the application and from
16 other people.

17 This second essay gives us as something of a new
18 twist on this. He created essentially a book club. He calls
19 it the Ulysses Club because they started off by reading James
20 Joyce.

21 What I remember surprised us in the discussion of
22 this case was his enthusiasm for talking about this book with
23 other students. So as I think of this case, it's our first
24 sense of how he is with other people, at least in a school
25 and intellectual sense, and it added a dimension. I think I

1 would call that a personal quality. Perhaps I'd also call
2 that an academic quality.

3 **Q.** Turn, if you would, to page 16.

4 **A.** Yes.

5 **Q.** What is this page?

6 **A.** This is his secondary school report.

7 **Q.** And if you turn to the bottom of the page, is there
8 information that would be relevant to the personal rating?

9 **A.** There is a chart which is part of that form where the
10 person filling it out, the guidance counselor, for example,
11 is invited to comment on -- to rate academic achievement,
12 extracurricular accomplishments, and personal qualities and
13 character and then overall. And in each of those cases the
14 person filling this out checked top few, 1 percent, for
15 example.

16 **Q.** And for personal qualities and character, in particular,
17 rated in the top 1 percent?

18 **A.** Yes.

19 **Q.** Turn to the next page, which is page 17.

20 **A.** Yes.

21 **Q.** Is this a continuation of the school report?

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

23 **Q.** Is there information on this page that would be relevant
24 to the personal rating?

25 **A.** Yes. At the very top of that page it asks about

1 disciplinary history. There is no school discipline as
2 reported by the counselor. No criminal history as reported
3 by the counselor.

4 **Q.** Do you see the portion under descriptors. Brilliant,
5 kind, kind-hearted, intellectually curious, strong, brave,
6 responsive, mature?

7 **A.** Yes.

8 **Q.** Are those important personal qualities to Harvard?

9 **A.** Yes.

10 **Q.** Are there written -- explicit written directions about
11 how to evaluate these qualitative factors?

12 **A.** You mean to my staff?

13 **Q.** Yes.

14 **A.** No. This is the kind of thing we consider in the context
15 of a case, in the context of discussion.

16 **Q.** Turn, if you would, to page 22 in the file. What do you
17 find?

18 **A.** What we find there is the so-called school letter, the
19 counselor letter of a person who had been the adviser of this
20 student before he left and went to another school.

21 **Q.** And in the third paragraph, do you see the sentence which
22 reads, "He is one of the kindest students I've met, but his
23 life has been shaped by great tragedy."

24 **A.** Yes.

25 **Q.** Is that the kind of information you consider in

1 evaluating the personal qualities of an applicant?

2 **A.** Yes, it is.

3 **Q.** Turn to page 26.

4 **A.** Yes.

5 **Q.** Is this a teacher recommendation?

6 **A.** Yes.

7 **Q.** Again, does it provide information to you in assessing
8 the personal qualities of the student?

9 **A.** Yes.

10 **Q.** Now, let me get you to the right place.

11 Let me ask Mr. Lee to highlight the first sentence
12 of the third paragraph. I'm sorry. Wrong page. 26. My
13 fault. "I watched."

14 Now, there's been some suggestion in this case that
15 the word "quiet" is somehow a stereotype that leads
16 applicants getting rejected.

17 Do you see the sentence that reads here, "I watched
18 student grow from a shy, precocious student who had not found
19 his place in discussion into a confident, quiet leader whose
20 insight and persistent curiosity steered the class at his
21 every turn"?

22 **A.** Yes.

23 **Q.** Is that information about his quiet leadership the kind
24 of information that you would consider in the application
25 process?

1 **A.** Yes. And it was very important in this case.

2 **Q.** Now turn back to page 2, and I'm going to refer you to
3 the box at the top of the page that says MEM.

4 **A.** Yes.

5 **Q.** What is the comment that you made in that box?

6 **A.** I said, "A bright all-rounder who could do lots here and
7 if interview is positive might have the chance. Faculty
8 perspective might help."

9 **Q.** And you provided your second reader ratings before an
10 alumni interview?

11 **A.** I did.

12 **Q.** Before any faculty review?

13 **A.** Both of those ratings were provided --

14 THE COURT: While we're on page 2, what is H-U-M,
15 hum?

16 THE WITNESS: Humanities.

17 THE COURT: Thank you.

18 BY MR. LEE:

19 **Q.** Now, if I go back to the first page, the personal rating
20 that you gave to the applicant, let me ask you this: When
21 you left ratings blank, what did it mean?

22 **A.** When the chair leaves ratings blank, it means that
23 chairman would not change the ratings given by the first
24 reader. That's a confirmation, an agreement.

25 **Q.** The personal here is 3+?

1 **A.** That was what we thought at the time.

2 **Q.** As you've given personal ratings over the years, do you
3 consider 3+ a strong personal rating?

4 **A.** Yes. That's a good personal rating, very good personal
5 rating.

6 **Q.** Now, after you reviewed the application, after you
7 provided the ratings, was there, in fact, an alumni
8 interview?

9 **A.** There was.

10 **Q.** Turn, if you would, back to page 29.

11 **A.** Yes. I have that.

12 **Q.** Is that the report of the alumni interview?

13 **A.** Yes.

14 **Q.** If I could, there's a section of the alumni interview
15 called "Personal Qualities."

16 **A.** Yes.

17 **Q.** Do you see the description, "Strong personal appeal and
18 character, openness to new ideas and new people. Rating:
19 Truly unusual."

20 **A.** Yes.

21 **Q.** Important information to you in the evaluation process?

22 **A.** Yes. It was helpful.

23 **Q.** And was there also, in fact, a faculty review of this
24 application?

25 **A.** Yes, there was.

1 **Q.** Turn, if you would, to page 41. Is this redacted
2 document a report of the faculty review of this student's
3 application?

4 **A.** Yes, it is.

5 **Q.** And the faculty member reports, "A rare ability to
6 transmit his enthusiasm by sparking interest in others."

7 **A.** Yes.

8 **Q.** Important to the personal rating?

9 **A.** Yes. Important to the personal rating as well as to the
10 academic rating.

11 **Q.** To both?

12 **A.** Yes.

13 **Q.** Now, how was the admissions decision made for this
14 applicant ultimately?

15 **A.** It was made with a lot of discussion. The interview
16 report did help us as well.

17 **Q.** What was the ultimate decision on this candidate?

18 **A.** The decision was to admit.

19 **Q.** Now, just a few more questions, Director McGrath.

20 You've reviewed tens of thousands of applications
21 over the years?

22 **A.** That's right.

23 **Q.** How many subcommittee meetings have you attended?

24 **A.** Hundreds.

25 **Q.** How many full committee meetings have you attended?

1 **A.** Many hundreds.

2 **Q.** You understand that SFFA has accused your admissions
3 office of intentionally discriminating against
4 Asian-Americans. Do you know that?

5 **A.** I understand that.

6 **Q.** Do you?

7 **A.** No.

8 **Q.** And how do you know?

9 **A.** My perspective on that question is the observation, the
10 chance I've had to observe it at close range for all of these
11 years. The work of the committee is in the doing of it. I
12 watch people discuss candidates. I watch them -- I read what
13 they write about them. I watch them vote. I watch them rank
14 people. So by paying close attention, which is my job, as to
15 how the process works, I see no evidence of discrimination of
16 that kind.

17 **Q.** Director McGrath, during your 31 years in the admissions
18 office, has the demographic face of Harvard changed?

19 **A.** Yes, it has.

20 **Q.** Has the diversity of Harvard College changed under the
21 leadership of Dean Fitzsimmons and you?

22 **A.** Yes, it has.

23 **Q.** Have the decisions you made on admissions contributed to
24 that change?

25 **A.** Yes.

1 Q. Has the racial diversity of Harvard, in particular,
2 changed?

3 A. Yes.

4 Q. Do you view that as a good thing?

5 A. We do.

6 Q. Is Harvard a more robust and inclusive place because of
7 the increased diversity?

8 A. We have learned that that has been true, yes.

9 Q. Are you proud of your work?

10 A. We're proud of the team, alumni and staff and supporters,
11 who have made this possible.

12 Q. Thank you.

13 MR. LEE: Nothing further, Your Honor.

14 MR. MORTARA: Just a few minutes to set up, Your
15 Honor.

16 THE COURT: Whenever you're ready.

17 FURTHER EXAMINATION

18 BY MR. MORTARA:

19 Q. Hello again, Director McGrath.

20 A. Hello.

21 Q. Did you have a good weekend?

22 A. Yes. Thank you.

23 Q. I want to talk to you about a few of the things that
24 Mr. Lee was talking to you about with respect to training.
25 And he showed you the casebook and the instruction guide to

1 the casebook. I'm sure you remember that. We were just
2 talking about it, right?

3 **A.** Yes.

4 **Q.** Put up on the screen defendant's Exhibit 24, which is the
5 guidance to the casebook. And you talked about how one of
6 the things that is going on with the casebook is your readers
7 are being instructed how to -- I think you said use race in
8 dealing with the applications, right?

9 **A.** Yes. How to consider race.

10 **Q.** Yeah. And one of the things that you talked about was a
11 couple of specific examples where race came up in the
12 casebook, right?

13 **A.** Yes.

14 **Q.** I wanted to go to one of the ones you talked about. We
15 can choose Grace or Peter. It's really up to you. We'll
16 start with Peter.

17 You talked about Peter Duran with Mr. Lee, right?

18 **A.** Yes.

19 **Q.** I noticed something about the casebook instructions when
20 I was looking at it as Mr. Lee was talking to you about it,
21 and I was hoping you could illuminate for the Court.

22 What do these numbers mean up here?

23 **A.** Those numbers are the numbers on the profile. It might
24 be more clear just to look at them in the context of the last
25 case we talked about, which is an actual case with format.

1 They rate the committees, the readers' assessment of four
2 factors of a candidate's candidacy.

3 **Q.** And those four factors, if I remember correctly, are
4 academic, extracurricular, athletic, and personal, right?

5 **A.** Right, yes.

6 **Q.** Those are the four ratings when you're training people
7 using the casebook. I guess you discuss the application in
8 the context of these four ratings, right?

9 **A.** We provide them because that's what the committee
10 considering this actual case at the time gave so that they
11 know where the committee was when they considered the case as
12 candidate.

13 **Q.** I think you're getting to the help I needed.

14 Is there a discussion when you're using the
15 casebook of the committee and the ratings that were given?

16 **A.** Really, in my experience in casebooks, it's a discussion
17 of all of those aspects of the case. I don't remember
18 anybody really talking about the profile itself. It's just
19 there as a kind of guide. But yes, one could.

20 **Q.** I want to just go on what actually happens. If you don't
21 remember people discussing the profile, that's fine.

22 As far as you can remember in the use of the
23 casebook, is the applicant's race and its relation to these
24 profile ratings ever discussed?

25 **A.** Not in relation to the profile ratings.

1 **Q.** And I noticed also that one rating doesn't appear in the
2 series of four that I've seen here, and it was on your review
3 of the application that Mr. Lee showed you. And that's the
4 overall rating, right?

5 **A.** Yes. It's absent from these I see, yes.

6 **Q.** So there's no discussion during the casebook review of
7 how the overall ratings should be given with respect to race,
8 is there?

9 **A.** The main topic of the discussion that the mock committee
10 or the group using this discussion guide has is what is the
11 overall assessment, competitive assessment of the candidate.

12 So in a sense, it's all about the judgment that
13 goes into calling it a 2- or a 3+. So that's not there
14 because it's kind of the answer. It's the sort of place that
15 you hope you will lead that committee to decide.

16 **Q.** So I think what I'm hearing, and correct me if I'm wrong,
17 is that the casebook use is kind of a mock full committee.
18 The ratings are already provided, and you're talking about
19 the case as you would discuss it in full committee. Is that
20 right?

21 **A.** Yes.

22 **Q.** So it's not an instruction about how to assign the
23 ratings themselves per se. Is that fair?

24 **A.** It is instruction about how one might. And often
25 actually subcommittees disagree on some of these points.

1 That's why it can be a lively discussion, why it's helpful
2 for training.

3 **Q.** Interesting. And with respect to race, there's no
4 explicit discussion of how race should or should not impact
5 the profile ratings, is that right?

6 **A.** In the course of a discussion of a candidate, there might
7 well be some attention to that.

8 **Q.** Okay. Now I want to talk a little bit about the training
9 that you spoke about with Mr. Lee. I think first I want to
10 talk about that application, though, that you were looking
11 at.

12 MR. MORTARA: If we could turn off the gallery,
13 please?

14 THE CLERK: Yes.

15 BY MR. MORTARA:

16 **Q.** This is Defendant's 276, if you want to get the
17 application back out, Director McGrath. There were some
18 things that you were shown and you were talking about how you
19 go through an application. I have some questions. I think
20 you're probably the single person who knows the most about
21 the admissions process. Would you say that's probably right?

22 **A.** I know a fair amount. I've been doing it for a long
23 time.

24 **Q.** I have some questions to ask you. They're not
25 necessarily all directly related to this application, but

1 since you were talking about how this application was scored,
2 I thought I'd use it as a bouncing off point.

3 I notice that the applicant got an athletic rating
4 of 4.

5 **A.** Yes.

6 **Q.** I think you can review the application, but it seems like
7 maybe there wasn't much indication of interest or
8 participation of athletics in the application.

9 **A.** That's right.

10 **Q.** My daughter, who is eight, is a figure skater. And I
11 wanted to know how you look at figure skating. Just out of
12 curiosity, a nationally ranked figure skater, would they get
13 an athletic rating of 4?

14 **A.** They might not get an athletic rating since we don't have
15 a figure skating team. They would certainly get pretty heavy
16 credit for it in the course of the discussion, in the course
17 of the evaluation.

18 **Q.** Wait. This is interesting. You only get an athletic
19 rating if you're participating in a sport that Harvard has a
20 team with, or is that meant to be a rating about your
21 athletics generally? I'm confused.

22 **A.** Traditionally that third part of the profile has done two
23 things at once for us. Its original purpose, as I understand
24 it, before my time was to indicate those cases in which an
25 applicant was recruited by a varsity team. In other words,

1 something we report to the Ivy League and ultimately to the
2 NCAA. So it was a way of making it easy to flag in our data.

3 We also, though, try to record other nuance. For
4 example, a 2 athletic person might be a captain of a team,
5 someone who might even see himself or herself as a walk-on to
6 our teams. So it's a little bit team oriented.

7 I will say that in the course of the discussion of
8 the past few years that we've had about what could make our
9 rating process better -- we've always been trying to improve
10 it -- there are members of my staff who would think that it's
11 not fair to indicate -- for example, your daughter, were she
12 a candidate and so on and she were still a figure skating
13 champion, we would probably want to record that in some way
14 in that box.

15 Others of us would make her a 1 or a 2+ or
16 something in the extracurricular box, regarding it as an
17 extracurricular activities. To be honest, there's some
18 flexibility about that.

19 **Q.** It doesn't go unnoticed, though, just so I can report
20 back home.

21 **A.** It does not. It does not go even noticed.

22 **Q.** Thank you. I'm glad we cleared that up.

23 **A.** We'll be glad to see that when the time comes.

24 **Q.** Thank you for that, Dr. McGrath. Thank you for that.

25 THE COURT: You owe her a consulting fee for that

1 five minutes.

2 BY MR. MORTARA:

3 **Q.** I noticed you talked to Mr. Lee about some ratings that
4 were given in connection with one of the school support
5 items, and I've got it up on the screen.

6 Do you remember that?

7 **A.** Yes. Thank you.

8 **Q.** If you skip ahead, I think it's 11 pages to 27, you'll
9 see another version of the similar thing in a teacher
10 evaluation.

11 **A.** Yes.

12 **Q.** And again, these are all things that Harvard considers to
13 be important when they're looking at teacher recommendations
14 and things of that nature, correct?

15 **A.** You mean the items in the characteristics and the rating?

16 **Q.** Yes.

17 **A.** Yes. That's part of the common application. We look at
18 those.

19 **Q.** I notice this applicant got a bunch of excellents, top
20 10 percent, and on this particular teacher recommendation got
21 a couple of "the top few's." Do you see that?

22 **A.** Yes.

23 **Q.** I don't mean to try to mechanize how the teacher support
24 ratings are computed, but if somebody had a lot of those "top
25 few's," they're more likely to get a higher teacher support

1 rating. Is that fair?

2 **A.** Yes. The prose is usually -- I think we all find that
3 the prose is more helpful. This is a way of rating the
4 prose. This is a way of gauging the prose.

5 If, for example, the letter said this was the best
6 student I ever had, I love her, and then it was checked sort
7 of in the middle or on the left, we would wonder how serious
8 the report was. Those two things together are more helpful
9 and neither one of them is separately.

10 **Q.** I'm just going to put Plaintiff's Exhibit 1 on the screen
11 and turn the screen off.

12 MR. MORTARA: Karen, you can reactivate the
13 gallery.

14 BY MR. MORTARA:

15 **Q.** I'm not going to ask you about Plaintiff's Exhibit 1. I
16 want to talk to you about a competition for candidates and
17 this question about Harvard's use of something called -- I
18 think it's early action. Harvard has early -- is it called
19 early action?

20 **A.** Yes, it's called early action.

21 **Q.** Early action is when you apply but you're not committing
22 if you get in; is that right?

23 **A.** That's correct.

24 **Q.** And Harvard went through a period where it didn't have
25 early action and then brought it back; is that right?

1 **A.** Yes.

2 **Q.** What were the reasons that Harvard brought back early
3 action?

4 **A.** Over time, we thought we were losing some candidates who
5 no matter what we did would not wait. The reason we went
6 into this hiatus was that we were hoping to encourage other
7 colleges to think that it was viable not to have an early
8 program, to get all students encouraged to think that it was
9 normal to way until one single period.

10 We noticed that we had lost the attention of a good
11 number of people who we would have wished to have in the
12 pool. And our faculty asked us to review the question
13 seriously, whether it was good going forward for us, and we
14 concluded it might not be. And we returned to what many
15 other colleges still did, which was early action.

16 Sorry for the long answer, but it was a complicated
17 question.

18 **Q.** I'm just a little curious about sort of the thinking
19 behind it. I can intuit that maybe the thinking behind it
20 was you get all these applications in the fall -- and you
21 spoke with Mr. Lee about how sometimes you get material that
22 comes in later -- maybe if we move everybody to regular
23 action, we'll have more complete files in the first place?

24 **A.** That was certainly one consideration we might have
25 thought. We do a pretty good job with completeness early,

1 but we always thought more was better and later was better.

2 **Q.** You talked about missing out on some candidates. Was it
3 one of the factors that Harvard was missing out on some
4 really talented minority candidates because they were some of
5 the people that wouldn't wait?

6 **A.** I don't remember that as a special consideration, but
7 certainly we were losing out on a number of candidates who
8 were strong.

9 **Q.** Director McGrath, I wanted to talk to you about the
10 applicant pool. I know you only read in certain dockets, but
11 do you think you have a pretty good sense of the applicant
12 pool as a whole in all the years you've been doing this?

13 **A.** Yes.

14 **Q.** I wanted to talk to you a little bit about some of the
15 distributions with respect to race in the applicant pool.

16 **A.** I didn't hear you. Which distributions?

17 **Q.** Some of the distributions with respect to race.

18 I'm sorry. I'm talking quietly. My team asked me
19 to be a little quieter, actually, if you want to believe
20 that.

21 Are there a lot -- I think it's true that there's
22 many, many, many applicants to Harvard that have stupendous
23 SATs and grades, near-perfect board scores, very highly
24 ranked in the high school class. Is that right?

25 **A.** Yes.

1 **Q.** I wanted to talk to you about differences there might be
2 in the applicant pool based on race on that subject.

3 Would you agree with me that there are many, many
4 more Asian applicants to Harvard that have incredibly high
5 SAT scores and are close to number 1 in the class than there
6 are under-represented minorities such as blacks and
7 Hispanics?

8 **A.** You know, I don't have the numbers in front of me, so I'd
9 hate to vouch for that. My impression is that we have many
10 very highly academically qualified Asian-American applicants
11 by those measures too.

12 **Q.** Do you think there are more than there are, say,
13 African-American or Hispanic applicants?

14 **A.** Well, there are large -- there are more people in that
15 pool.

16 **Q.** So there's just more of them?

17 **A.** Yes, that's correct.

18 **Q.** And I want to ask you about your readers and whether you
19 think they're sensitive to certain things.

20 Do you think your readers are sensitive to the fact
21 that African-American applicants, for example, may have faced
22 certain disadvantages in test prep or other things so that
23 when you see an African-American applicant with incredibly
24 high SATs and near perfect grades, they're sensitive to what
25 may have been overcome in reaching that point?

1 **A.** In a given case, yes. Not as a -- I wouldn't say that
2 the general matter is the question. In a given case they may
3 be alert to that possibility.

4 **Q.** I guess what I'm asking is are your readers alert to what
5 may be lying behind the performance or are they obstacles
6 that may have been placed in somebody before they make those
7 superstar achievements on something like SATs or grades?

8 **A.** We hope and expect that in every case they will do that.

9 **Q.** Now I want to finish up talking about the training again.
10 You went through an application that you even
11 reviewed on Christmas. It looked like that was the one that
12 was on the screen a little while ago, right?

13 **A.** Yes.

14 **Q.** I got the impression from your discussion with Mr. Lee
15 and your discussion with me on Friday that you take your job
16 extremely very seriously.

17 **A.** Yes, I think so.

18 **Q.** Some of your readers, I think, review application numbers
19 into the thousand or even 1,400 range in a given cycle?

20 **A.** Yes.

21 **Q.** Is it possible to spend even 30 minutes or an hour on
22 each application?

23 **A.** It is, yes, depending on the application.

24 **Q.** Do your readers do that? Do you think they spend an hour
25 or 30 minutes looking at every one, or do you think there's

1 some that they can deal with in a more cursory fashion?

2 **A.** Some require more time, some less time. I remember
3 calculating when I was new in the office that it took me
4 45 minutes on average to read my first-round folders.
5 Infers. One gets a little better at it, and some of them
6 don't take that long at all.

7 **Q.** So now, coming full circle back to some of the training
8 that was discussed, you talked about the casebook and the
9 casebook guidance with Mr. Lee, and you talked about how
10 there was discussions of race in connection with those cases,
11 right?

12 **A.** Yes.

13 **Q.** And we talked last Friday about a series of people who
14 were on the committee in spring 2011. Do you remember that?

15 **A.** I do.

16 **Q.** And there are a couple of names. One name that was on
17 there that I want to ask you about.

18 Lucerito Ortiz. How long did she work in your
19 office?

20 **A.** I can't tell you how many years. Something like five or
21 six years, although previous to that she had been a student
22 worker for us. I actually don't know how many. I shouldn't
23 speculate. Quite a while --

24 **Q.** She worked there quite a while. She would have sat on
25 these casebook reviews, right?

1 **A.** Yes.

2 **Q.** And Grace Chung. Is it Grace Chung?

3 **A.** Grace Cheng.

4 **Q.** I'm sorry. Just to explain, I speak Chinese -- I did as
5 a kid -- C-H-E-N-G in the Romanization of Chinese is
6 pronounced Chung, so I apologize for mispronouncing her name.

7 **A.** I'm picking up her pronunciation. I'm not familiar with
8 the language.

9 **Q.** Grace Cheng. Sorry.

10 How long did she work in your office?

11 **A.** She worked in our office on more than one stint. She
12 worked in our office for several years. I don't want to
13 guess because I'll get it wrong. And then she left to pursue
14 another professional opportunity and returned to our office
15 after what I think had been three years and worked with us
16 for another two or three years and then left. I don't know
17 how many that totals to, and I don't know how many the first
18 stint was. For quite a number of years. Relatively on the
19 long ER side for a young staff member.

20 **Q.** Would it surprise you if Ms. Ortiz and Ms. Cheng told
21 this Court that neither one of them could remember ever being
22 trained how to use race in the reading of applications?

23 **A.** I would be surprised if they weren't able to remember
24 that it had occurred, but I can't comment beyond that.

25 MR. MORTARA: Thank you, Director McGrath. It's

1 opinion a real pleasure.

2 MR. LEE: Nothing further, Your Honor.

3 THE COURT: You're excused.

4 THE WITNESS: Thank you.

5 MR. MORTARA: Your Honor, the plaintiffs call
6 Rakesh Khurana.

7 MR. LEE: Your Honor.

8 THE COURT: Do you want to take a ten minute break?

9 MR. LEE: A ten minute break would be great.

10 THE COURT: Okay. Ten minute break. See you at
11 3:00.

12 (Court recessed at 2:51 p.m.)

13 MR. MORTARA: Your Honor, again, the plaintiffs
14 call Rakesh Khurana.

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

16 (RAKESH KHURANA duly sworn by the Deputy Clerk.)

17 THE CLERK: Thank you. You may be seated.

18 Can you please state your name and spell your last
19 name for the record.

20 THE WITNESS: Rakesh Khurana, K-H-U-R-A-N-A.

21 MR. MORTARA: Good afternoon, Dean Khurana. Before
22 I get started with you, I actually have a question for the
23 Court.

24 When are we quitting work today, Your Honor?

25 THE COURT: You mean in the courtroom?

1 MR. MORTARA: Yes.

2 THE COURT: I have something else scheduled at
3 3:30, but I'm happy to have them wait for 15 minutes. We can
4 go to quarter of 4:00.

5 MR. MORTARA: I'm almost certain to be done by a
6 quarter of 4:00 and then I think maybe we'll get a chance to
7 get done with Dean Khurana today, but probably not.

8 EXAMINATION

9 BY MR. MORTARA:

10 Q. I'll do my best, Dean Khurana, to get you through with me
11 so you don't have to see me anymore.

12 Hi. I'm Adam Mortara. It's really nice to met
13 you. Before we get started, I wanted to give you a chance to
14 introduce yourself to the Court a little bit.

15 I know you're the dean of Harvard College, correct?

16 A. Yes.

17 Q. Could you tell the Court a little bit about your
18 education and summarize your career leading up to that point.

19 A. I went to Cornell University as an undergraduate, and
20 then I attended graduate school at Harvard in the joint
21 program between Harvard Business School and the Graduate
22 School of Arts and Sciences where I did my Ph.D. in
23 organizational behavior.

24 Q. You actually transferred to Cornell, didn't you?

25 A. I did.

1 **Q.** Where from?

2 **A.** SUNY Binghamton.

3 **Q.** Would you be comfortable discussing the reasons you
4 transferred from SUNY Binghamton to Cornell?

5 **A.** Sure. I had a professor who took an interest in me when
6 I was there and suggested that I transfer.

7 **Q.** You mentioned your thesis was on organizational behavior;
8 is that right?

9 **A.** That's my degree.

10 **Q.** What's the thesis on?

11 **A.** It was on executive labor markets.

12 **Q.** Do you remember your acknowledgments in your thesis, what
13 you wrote in there?

14 **A.** I hope I partially dedicated it to my wife.

15 **Q.** You did. You wrote something about your parents. I
16 wonder if you remember what you wrote. Do you in any way?

17 **A.** Yes.

18 **Q.** Could you tell the Court what you wrote about your
19 parents in the acknowledgments in your thesis?

20 **A.** I thanked my parents for their dedication and devotion to
21 my education.

22 **Q.** And something about crossing oceans and continents for a
23 dream or something of that nature; is that right?

24 **A.** Yes.

25 **Q.** And what dream were you referring to?

1 **A.** That my parents left their home in India to come to take
2 their children to a place where they hoped there would be
3 more opportunity for them.

4 **Q.** And that's proven to be true, right?

5 **A.** Yes.

6 **Q.** For you and your two brothers, correct?

7 **A.** Yes.

8 **Q.** Excellent. Now, let's talk about your job. You're the
9 dean of Harvard College, correct?

10 **A.** Yes.

11 **Q.** And that makes you a pretty senior official as senior
12 officials go at Harvard?

13 **A.** Yes.

14 **Q.** You're also an academic, right?

15 **A.** Yes.

16 **Q.** I have just an early question.

17 Do you feel comfortable sitting here today as the
18 dean of Harvard College being critical of Harvard if your
19 oath that you just took compels you to do so?

20 **A.** Yes.

21 **Q.** Great. You understand this case is about Harvard
22 admissions, right?

23 **A.** Yes.

24 **Q.** And I'm going to start and end our substantive time
25 together on the same subject, sort of bookend it.

1 THE COURT: I see you're leaning forward to get to
2 the microphone. The whole thing moves. It's easier if you
3 pull it towards you to save some wear and tear on your neck.

4 BY MR. MORTARA:

5 Q. You understand this is a case about Harvard admissions?

6 A. Yes.

7 Q. I'm going to bookend our time together with this
8 question: In 2017, you did not know whether Harvard
9 College's admissions process disadvantaged Asians or not, did
10 you?

11 A. I don't believe that Harvard College's admissions process
12 disadvantages Asians.

13 Q. I understand that's what you think today. I'm asking you
14 what you believed in 2017.

15 In 2017, you did not know whether Harvard College's
16 admissions process disadvantaged Asians or not, did you?

17 A. I don't believe it disadvantaged Asians, but I'm not sure
18 I understand the question.

19 Q. I'm going to try to help you. Let me try to help you.

20 You gave a deposition under oath earlier in this
21 case, right?

22 A. Yes.

23 Q. And you did it with my friend Mr. Strawbridge, who is
24 sitting right there, right?

25 A. Yes.

1 **Q.** And you testified in 2017, correct?

2 **A.** Yes.

3 **Q.** And in 2017, you did not know whether Harvard College's
4 admissions process disadvantaged Asians, correct?

5 **A.** I don't believe Harvard College's admissions process
6 disadvantaged Asians.

7 MR. MORTARA: Your Honor, may I approach the
8 witness?

9 THE COURT: You may.

10 BY MR. MORTARA:

11 **Q.** Dean Khurana, would you please turn to page 260 of your
12 deposition. And at line 10, Mr. Strawbridge asked you, "Do
13 you think that the Harvard admissions process disadvantages
14 Asian-Americans?"

15 "ANSWER: I don't know.

16 "QUESTION: You don't know?

17 "ANSWER: I don't know."

18 Was that your sworn testimony in 2017?

19 **A.** Yes.

20 **Q.** We'll come back to this. I want to make sure I get this
21 right though. You're not directly responsible for the
22 policies of the admissions office, are you?

23 **A.** I'm not.

24 **Q.** And what I mean by that is that you don't have an active
25 role with respect to the admissions office, correct?

1 **A.** I don't.

2 **Q.** Part of Harvard College's mission and your responsibility
3 as dean, though, is to expose students to a diverse range of
4 perspective and viewpoints and experiences. You agree with
5 that, right?

6 **A.** Yes.

7 **Q.** In fact, you're pretty passionate about it, I'd say?

8 **A.** Yes.

9 **Q.** And that's, in part, because it helps contribute to
10 Harvard's efforts to educate the citizens and citizen leaders
11 of society, right?

12 **A.** Yes.

13 **Q.** I want to focus first on the leaders piece of this. Do
14 you think people make better decisions when they're exposed
15 to a variety of perspectives on that decision?

16 **A.** Typically, yes.

17 **Q.** The reason I ask is I think it's actually one of your
18 areas of research interests is how groups make decisions,
19 right, like a company board of directors?

20 **A.** Yes.

21 **Q.** And you've implemented your knowledge of group dynamics
22 in how to have productive discussions in your work as dean of
23 Harvard College?

24 **A.** Yes.

25 **Q.** And I think someone told me you start out every meeting

1 by reading the mission of Harvard College; is that right?

2 **A.** Yes. Typically.

3 **Q.** Because you think that's an effective way to focus people
4 on what it is that we're actually trying to accomplish?

5 **A.** Yes.

6 **Q.** Which in your job is the mission of Harvard College,
7 right?

8 **A.** Yes. My job is to steward the mission.

9 **Q.** Now, in your work as dean of the college and in your
10 experience, can the size of a group of people trying to come
11 to a decision impact whether diverse and opposing views are
12 expressed.

13 **A.** What matters is the different perspectives and points of
14 view. So I don't think size is always a good indicator.

15 **Q.** In your research, for instance, have you ever found that
16 size of a group is known to be correlated with whether
17 dissenting views are heard or not?

18 **A.** It's one of many different factors that can contribute to
19 the effectiveness of a group's decision-making abilities.

20 **Q.** Can you just tell me how?

21 **A.** The more diverse the perspectives and points of view are,
22 the less likely a group is to fall into groupthink, the more
23 a group is open to considering alternatives they would not
24 have otherwise imagined, and that typically leads to more
25 creative and effective decision-making.

1 **Q.** And that correlates a little bit with the size of the
2 group. Although if you get, I guess, 50 people who all think
3 exactly the same thing, you're not going to get a better
4 result, right?

5 **A.** Yes. That's why the heterogeneity of the backgrounds and
6 experiences of people matter a lot. It's important to look
7 beneath the surface of what a group is.

8 **Q.** For people like me, "heterogeneity" means lots of
9 different people, right?

10 **A.** "Heterogeneity" means lots of different backgrounds and
11 experiences and perspectives and in an environment in which
12 those can be articulated.

13 **Q.** And way down at the other end, if I'm making a decision
14 say for my family and I have just one person, I only consult
15 myself, I cannot consult my daughter or my wife, there aren't
16 likely to be diverse perspectives, except the ones that I
17 bring to the table, right?

18 **A.** Some people are thoughtful and can be reflective and
19 consider different perspectives, but I wouldn't consider a
20 person of one a group.

21 **Q.** I appreciate the possibility that I'm thoughtful and
22 reflective.

23 I want to talk about your work on various
24 committees now. You've been on a lot of committees, haven't
25 you?

1 **A.** Yes.

2 **Q.** First I need to talk about a committee you didn't work
3 with but you needed to learn something about.

4 Importantly for this case, as I think you know, you
5 were on something called the Smith committee, which is the
6 committee to study race-neutral alternatives to Harvard's
7 current admissions system, right?

8 **A.** Yes.

9 **Q.** And that was a committee composed of you, Dean Smith, and
10 Bill Fitzsimmons, right, dean of admissions?

11 **A.** Yes.

12 **Q.** And why are we calling it the Smith committee? Do you
13 call it the Smith committee?

14 **A.** I called it race-neutral alternatives committee.

15 **Q.** Let's do that. We'll call it the race-neutral
16 alternatives committee.

17 In compiling your report on the race-neutral
18 alternatives committee, you referred to something else called
19 the Ryan committee, right?

20 **A.** Yes.

21 **Q.** That's actually in your report. If you turn to your
22 binder that I've placed in front of you, there's Plaintiff's
23 Exhibit 316.

24 THE COURT: Do I have one of these?

25 MR. MORTARA: No, Your Honor. We don't. The real

1 problem here -- I'm going to give you have my copy.

2 THE COURT: I'm happy to work off the screen.

3 MR. MORTARA: I'm going to give you my copy because
4 when they're placed upside down in the box what's happening
5 is a lot of papers are falling out and I'd like to make sure
6 you get a full set. I don't need them. So here you go.

7 BY MR. MORTARA:

8 Q. Do you have that, Dean Khurana?

9 A. Yes. Yes.

10 Q. You see it's titled "Report of the Committee to Study
11 Race-Neutral Alternatives," so we'll stick to that name.

12 On the second page, there is discussion of this
13 universitywide committee chaired by James Ryan. Do you see
14 that?

15 A. I see that paragraph.

16 Q. And you familiarized yourself a little bit with the Ryan
17 committee in order to write up the report of this committee
18 that you were on, correct?

19 A. We were in touch with Dean Ryan as part of this
20 committee's work.

21 Q. And in fact, as I understand it, you were asked actually
22 by the university to suggest some student members to be on
23 the Ryan committee; isn't that right?

24 A. I can't recall that.

25 Q. Let me see if I can refresh your recollection.

1 MR. MORTARA: May I approach, Your Honor?

2 THE COURT: You may.

3 BY MR. MORTARA:

4 Q. Just take a look at the email I handed you, Dean Khurana,
5 I'm not going to put it up on the screen. Just look at the
6 email on the bottom dated 6/10/14 from you to someone called
7 Allen. Do you see that?

8 A. Yes.

9 Q. I understood this email to be a reference for a request
10 from the university for you to suggest some student members
11 for the Ryan committee. Do I have that wrong?

12 A. That's what this email says.

13 Q. So am I right in that now you recall that the university
14 actually asked you to suggest some members, some student
15 members of the Ryan committee?

16 A. Yes.

17 Q. Now, as far as you know, you would agree there was some
18 very serious people on the Ryan committee, serious scholars?

19 A. I don't know the entire composition of the Ryan
20 committee.

21 Q. My point is only you knew some of the people on the Ryan
22 committee. You know James Ryan, right?

23 A. Yes.

24 Q. You regard James Ryan as a serious education scholar,
25 correct?

1 **A.** I do.

2 **Q.** And the Ryan committee included faculty, students, and
3 staff, correct?

4 **A.** I don't know the composition, but I imagine it did.

5 **Q.** Well, we know at least the university was looking for
6 students to get on the Ryan committee. We just established
7 that, right?

8 **A.** Yes.

9 **Q.** And there were faculty, correct?

10 **A.** I imagine there were.

11 **Q.** Well, James Ryan was faculty, right?

12 **A.** And the dean of the graduate school of education.

13 **Q.** Does that make him staff, too, or is he still faculty
14 when he's -- you're faculty, right? Is that right?

15 **A.** Yes.

16 **Q.** And there may have been staff. What's the basketball
17 coach? Is he faculty, student -- he's not student. Is he
18 faculty or staff?

19 **A.** He would be regarded as staff.

20 **Q.** Does it sounds right to you that the Ryan committee had
21 between 20 and 30 members?

22 **A.** I can't tell you the details of that. I don't remember.

23 **Q.** No problem. Let's skip to things you were really
24 involved with.

25 You were involved in the creation, formation, and

1 execution of the college working group on diversity and
2 inclusion, right?

3 **A.** Yes.

4 **Q.** And you helped recruit the members of the college working
5 group on diversity and inclusion?

6 **A.** Yes.

7 **Q.** And the membership of that committee was drawn from
8 faculty, students, and staff, right?

9 **A.** Yes.

10 **Q.** And you wanted to have a diverse set of perspectives and
11 backgrounds and experiences for the people serving on that
12 committee, correct?

13 **A.** Yes.

14 **Q.** You read the final report of the college working group on
15 diversity and inclusion, right?

16 **A.** Yes.

17 **Q.** You commented on the draft of the report, correct?

18 **A.** Yes.

19 **Q.** You submitted proposed revisions to that report?

20 **A.** Yes.

21 **Q.** I'm going to -- the report is actually in your binder at
22 Plaintiff's Exhibit 301. If you wouldn't mind turning to it,
23 I'll get it up on the screen in a second.

24 I want to ask you do you consider yourself sort of
25 the -- withdrawn.

1 This report is a direct result of your deanship,
2 correct?

3 **A.** It's a report that was put together in consultation with
4 the interim dean. We formed this committee.

5 **Q.** You yourself are very responsible for the creation of
6 this working group. And while you weren't a part of the
7 group yourself, this report might not be here were it not for
8 you, is what I'm trying to say.

9 **A.** I would say that, yes.

10 **Q.** Great. Let's take a look at the report.

11 THE COURT: Mr. Mortara, I'm missing the first 20
12 pages and the tab.

13 MR. MORTARA: I'm so sorry, Your Honor.

14 THE COURT: You're being so nice today, I hate to
15 even have to tell you that. I'm just missing the first 20
16 pages and the tab.

17 MR. MORTARA: I've got it right here. I'm going to
18 hand you up the complete copy of the document from another
19 binder.

20 THE COURT: You can trade with him, Karen.

21 MR. MORTARA: And hopefully this is the only time
22 this happens.

23 THE COURT: Is this the first tab in the book?

24 MR. MORTARA: It's just the one document. I'm
25 hoping the other documents are okay.

1 THE COURT: Is this the first one in the notebook?

2 MR. MORTARA: I believe it may be. Yes, it is.

3 THE COURT: It should be fine then. Thank you.

4 MR. MORTARA: Sorry, Your Honor.

5 BY MR. MORTARA:

6 Q. And more importantly, sorry to you, Dean Khurana. I
7 don't want to keep you here any longer than you have to be,
8 and it's my fault.

9 Let's take a look at the report. Do you have it in
10 front of you?

11 A. Yes.

12 Q. At least your binder hasn't lost pages, Dean Khurana.
13 First let's look at the first couple of pages, the
14 composition of the members of the committee. Do you see
15 these names? You're familiar with them, some of them, right?

16 A. Yes.

17 Q. And I think I counted a total of 17 people on the
18 committee; is that right?

19 A. Yes.

20 Q. Now I want to briefly talk through one section of the
21 report, and I will be brief, which is on page 5 of the
22 report.

23 There's a section titled "Historical Context." Do
24 you see that?

25 A. I see that.

1 **Q.** And I've highlighted on the screen a sentence from the
2 middle, the lower middle of the second paragraph in this
3 report. And it says, "Under the presidency of Abbott
4 Lawrence Lowell, the Harvard administration restricted the
5 numbers of Jewish students and barred the handful of
6 African-American men at the college from residing in freshman
7 dormitories."

8 Do you see that?

9 **A.** I see that sentence.

10 **Q.** I'm going to take it off the screen, Dean Khurana. You
11 are aware that Harvard discriminated against people who
12 identified as Jewish in that time period, correct?

13 **A.** Yes.

14 **Q.** And you know that, in part, from reading Jerome Karabel's
15 book, "The Chosen," correct?

16 **A.** Yes, I know that.

17 MS. CONLEY: Objection, Your Honor. We have a
18 judicial notice that Your Honor has granted on this issue,
19 and Mr. Mortara said at the pretrial conference that he would
20 not get into this with any of the witnesses.

21 THE COURT: I think what he said was that he would
22 get into it to the extent that it had anything to do with
23 credibility or sort of -- I think there were some limitations
24 on it.

25 MR. MORTARA: There's just the one question coming

1 up that I am going to ask and he's going to answer and then
2 we're going to move on.

3 THE COURT: I'm going to give him the question.
4 I'm aware of what we've taken judicial notice of. I don't
5 think it foreclosed all reference of it, although I do think
6 it foreclosed any extensive discussion of it.

7 He can have his question and then we'll move on.

8 BY MR. MORTARA:

9 Q. I'm not going to dwell on this, Dean Khurana, but you
10 agree that one of the reasons that a holistic admissions
11 process was adopted was to identify who was Jewish in the
12 applicant pool, correct?

13 A. Yes. My understanding is that that was one of the
14 reasons that contributed to that process.

15 Q. Let's finish with that and go back to the report on the
16 college working group on diversity and inclusion.

17 This report mentions unconscious or implicit bias.
18 Do you remember the references to that in this report?

19 A. I can't recall specifically where it is in the report.

20 Q. You're familiar with the phrases unconscious or implicit
21 bias, right?

22 A. Yes.

23 Q. One example of implicit bias could be where a person
24 makes assumptions about a minority student based on racial
25 stereotypes, correct?

1 **A.** Yes.

2 **Q.** It can also be implicit bias when someone is more likely
3 to credit what has been said about a minority student because
4 it confirms to a racial stereotype, right?

5 **A.** Yes. That's one aspect of implicit bias.

6 **Q.** Based on your experience working as dean of Harvard
7 College, can people be reinforcing or responding to racial
8 stereotypes and still be able to deny that they are
9 discriminating on the basis of race?

10 **A.** I'm sorry. Could you repeat the question?

11 **Q.** Based on your experience working as dean of Harvard
12 College -- you work with students, right?

13 **A.** I do.

14 **Q.** Can the students be reinforcing or responding to racial
15 stereotypes even while they're sitting there telling you I'm
16 not racist, I'm not discriminating on the basis of race?

17 **A.** I think implicit bias works in a variety of several
18 ways. The way you tackle it is by making people
19 conscientious and having diverse perspectives around, which
20 reduces its likelihood.

21 **Q.** One of the kind of pernicious aspects of implicit bias is
22 the person who is biased, himself or herself, may believe
23 that they are not?

24 **A.** Or may be acting in a biased way, yes.

25 **Q.** And may believe they're not even acting in a biased way,

1 right?

2 **A.** Sometimes.

3 **Q.** And this is something that you confront as dean of
4 Harvard College, correct? Or someone on your staff does when
5 there's a bias reporting incident?

6 **A.** When we encounter bias, we definitely take a great deal
7 of concern in any type of report around bias.

8 **Q.** And that includes both -- I'm sure all colleges are alike
9 in some way. I'm sure there's some actual express bias,
10 negative incidents that go on on campus where it's not
11 remotely a question that it has been express bias, right?

12 **A.** We've had occasions where we've experienced bias on
13 campus.

14 **Q.** Hopefully they're rare.

15 **A.** Yes. We hope so.

16 **Q.** And there are also occasions where charges of are -- in
17 fact, true issues of implicit or conscious bias have occurred
18 on campus, correct?

19 **A.** Yes.

20 **Q.** And you would take each of those equally seriously,
21 express bias and unconscious or implicit bias, right?

22 **A.** We take all reports of bias very seriously.

23 **Q.** Now, another committee that you were involved in was the
24 committee to study the importance of student body diversity,
25 right?

1 **A.** Yes.

2 **Q.** And you were actually the chair of that committee, right?

3 **A.** Yes.

4 **Q.** If we're following the naming conventions, we call that
5 one the Khurana committee, but you had a role in suggesting
6 members of the committee to study the importance of
7 student-body diversity, right?

8 **A.** Yes. In consultation with the dean of faculty of arts
9 and sciences and the president.

10 **Q.** You left out one group, right, because lawyers were
11 involved in the selection of the members of that committee,
12 too, right?

13 **A.** I don't believe they chose members of that committee.

14 **Q.** Would you say they were involved?

15 **A.** Yes. And counsel is often involved in many committees at
16 Harvard.

17 **Q.** So again with this 2015 committee to study the importance
18 of student-body diversity, you were trying to assemble a
19 diverse group of people with different perspectives to be a
20 part of that committee, right?

21 **A.** Yes.

22 **Q.** And that's P302 in your binder. Why don't we take a look
23 at it. Let me know when you're there, sir.

24 **A.** I'm there.

25 **Q.** How many people were on this committee?

1 **A.** I believe there were six.

2 **Q.** I just want to keep track of where we are. You said you
3 didn't know how many people were on the Ryan committee. I'm
4 going to represent to you it was at least 29.

5 Then we get to the college working group on
6 diversity and inclusion, and there's 17 people on that
7 committee.

8 And now we're down to the committee to study the
9 importance of student-body diversity, where the lawyers were
10 involved, and there's six people on the committee, correct?

11 **A.** Yes.

12 **Q.** Now let's get to the committee to study race-neutral
13 alternatives, which is P316. I think I already asked you
14 this, but how many people were on this committee?

15 **A.** There were three of us.

16 **Q.** Now, this report analyzed proposed race-neutral
17 alternatives to Harvard's current admissions policy, right?

18 **A.** Yes.

19 **Q.** And you understood that the Court is here to determine
20 whether Harvard did its best to consider race-neutral
21 alternatives, right?

22 **A.** Yes.

23 **Q.** Should the Court draw any conclusion between the very
24 large number of people that I've told you were on the Ryan
25 committee, the somewhat smaller but still quite large number

1 of people on the college working group on diversity, and the
2 relatively small number of people that are on the Smith
3 committee?

4 **A.** No. The Ryan committee was a university committee, which
5 is to look at the entire university which consists of
6 multiple schools and tens of thousands of students.

7 You basically put a committee together based on the
8 goal and the function of what you're trying to accomplish.
9 You don't use size alone. You really try to think through
10 how can you best create an effective working group that can
11 deliver on the remit or the charge for the committee.

12 **Q.** Right. Could you explain to the Court why it is that the
13 optimal group size for the college working group on diversity
14 and inclusion was around 17 people but for this important
15 mission you only needed three?

16 **A.** Sure. For the college working group committee, the
17 charge that we gave was to bring together students, faculty,
18 and staff to consider how we could strengthen the environment
19 for inclusion on campus.

20 We also asked them to look into the work of going
21 to peer schools. We also asked them to engage with alumni
22 with surveys. So it was a very large task that we asked them
23 to do that had to be done with subcommittees involved. And
24 so you wanted to both have a variety of stakeholders in that
25 committee, but also you had a very large number of tasks that

1 that committee was charged with.

2 **Q.** You didn't think the committee to study race-neutral
3 alternatives had a large number of tasks or could have looked
4 at peer institutions or involve the alumni community?

5 **A.** So as I understood the race-neutral alternatives
6 committee, we spent time, first of all, familiarizing
7 ourselves with the literature around this topic. We also had
8 benefit of the expert reports that were being done that had
9 suggested a variety of ways to consider race-neutral
10 alternatives as well as our own work and background.

11 And so we brought that to bear in terms of looking
12 at these issues.

13 **Q.** Now -- thank you, Dean Khurana.

14 In the report, just to refresh your memory, you
15 rejected as an alternative to Harvard's current explicit use
16 of race and admissions increased socioeconomic preferences
17 and an elimination of some of Harvard's other practices,
18 including legacy preferences, correct?

19 **A.** We considered a variety of different practices and
20 debated them and to understand their impact on the diversity
21 of the student body and, in context, other Harvard goals.

22 **Q.** And one of the things that you rejected, broadly
23 speaking, was a boost in preferences for people from lower
24 socioeconomic backgrounds coupled with an elimination of some
25 of Harvard's preferences for, for instance, legacies?

1 **A.** We did consider those alternatives.

2 **Q.** And I want to talk to you why you rejected that premise.
3 Would you please turn to page 13 of the document. It's under
4 a bullet. It says, "Increased weight for socioeconomic
5 background."

6 Do you see that?

7 **A.** I do.

8 **Q.** It says "The simulations," and that refers to simulations
9 on some models that Harvard's expert had, right?

10 **A.** Yes.

11 **Q.** "The simulations show that Harvard could not both achieve
12 its diversity interests and achieve other equally important
13 educational objectives such as academic excellence."

14 Do you see that?

15 **A.** I see that sentence.

16 **Q.** Let's go to the next page and we'll get into the
17 discussion there. I want to talk to you about the first full
18 paragraph on that page. Do you see it?

19 **A.** Yes.

20 **Q.** Here it says that the course, which is referring to
21 increased socioeconomic preferences, would overwhelm other
22 considerations in the admissions process and that would lead
23 to significant changes. Do you see that?

24 **A.** I see that.

25 **Q.** I want to talk about the changes. Next full paragraph.

1 "For example, if Harvard afforded weight sufficient
2 to produce a combined proportion of African-American,
3 Hispanic, and other students comparable to that of current
4 classes, the proportion of admitted students with the highest
5 academic ratings as assigned by admissions officers would be
6 expected to drop from 76 to 66 percent," right?

7 Do you see that?

8 **A.** I do.

9 **Q.** This refers to people who get academic 1s and 2s, right?

10 **A.** I think it refers to the highest academic ratings, yes.

11 **Q.** And that refers to people who get academic ratings of 1s
12 and 2s from the admissions office, right?

13 **A.** I believe that was the way it was done.

14 **Q.** Who told you that Harvard cared about the proportion of
15 admitted students with high academic ratings as given by
16 admissions officers?

17 **A.** Well, we consider a number of different dimensions in
18 admitting our students. First of all, all of our students
19 are academically qualified to be there. And then we look in
20 context of that academic with respect to other aspects of,
21 you know, how they can contribute to the community and what
22 they're bringing to the community.

23 A lot of our goals are really to bring students of
24 very different perspectives and points of view. And
25 different people bring different strengths and talents, and

1 that's really the goal of our process. And so admissions has
2 to be understood in context with other aspects of what a
3 whole person brings to the community.

4 **Q.** Fantastic. Let's focus on what's in the document, which
5 is talking about people with academic ratings, right? That's
6 the sentence I've highlighted. Just focus there.

7 You're talking about the proportion of admitted
8 students with the highest academic ratings as assigned by
9 admissions officers would drop.

10 Do you see that?

11 **A.** Yes.

12 **Q.** Who told you that the proportion of admitted students
13 with high academic ratings was really important to Harvard?
14 Was it Bill Fitzsimmons?

15 MS. CONLEY: Objection, Your Honor. Hearsay.

16 THE COURT: Hold on a second. It's overruled.

17 **A.** This is our committee's judgment. The committee
18 consisted of Dean Fitzsimmons, who is responsible for the
19 admissions; Dean Smith, who is a faculty member also in the
20 engineering and computer science department, one of the great
21 quantitative analysts; myself, who is responsible for the
22 mission of the college.

23 And we along with others really are responsible for
24 carrying that mission forward, of which academics is one of
25 the very important qualities that defines the college's

1 character and culture.

2 BY MR. MORTARA:

3 **Q.** Let's just focus on who is on the committee.

4 Which one of the three of you came up with the idea
5 that the academic rating as assigned by admissions officers
6 was an important thing to focus on? Was that Dean
7 Fitzsimmons?

8 **A.** Again, I would say that all of us believe that the
9 academic rating is really important but also in context with
10 other aspects of our students.

11 **Q.** Sure. I just want to stay with the highlighted stuff for
12 now, which is talk about the academic rating.

13 Isn't it correct that these profile ratings, as
14 they're called are not, in fact, important to the ultimate
15 admission decision and that they fade into the background
16 when the admissions committee meets? Isn't that right?

17 **A.** I'm not on the admissions committee. I can't speak to
18 that.

19 **Q.** Dean Fitzsimmons never told you that these ratings, in
20 fact, fade into the background when the full committee meets?

21 **A.** I can't recall him saying anything like that.

22 **Q.** You were here for my opening statement, right?

23 **A.** Yes.

24 **Q.** Do you remember a little bit about it?

25 **A.** Yes.

1 **Q.** There were some other openings, too, including from some
2 amicus groups. Those are friends of the Court, right?

3 **A.** Yes.

4 **Q.** Do you remember them talking about some current Harvard
5 students?

6 **A.** Yes.

7 **Q.** Including one called Thang, right?

8 **A.** Yes.

9 **Q.** And do you remember the slide that was used to introduce
10 Thang to the Court?

11 **A.** At a very high level, but I can't remember the details.

12 **Q.** Let me refresh your memory.

13 Do you remember this slide?

14 **A.** Yes.

15 **Q.** Do you know Thang?

16 **A.** I do know Thang at a -- like a way that a dean might know
17 their students, at a distance.

18 **Q.** I don't think I knew my dean of the college when I went
19 to college. But great. Let's take that off.

20 Do you know that Thang got an academic 3?

21 **A.** I didn't know that.

22 **Q.** I want to talk to you about what you believe on the
23 subject of socioeconomic preferences, not what's in the
24 report. I want to talk to you about what you believe. Do
25 you understand, Dean Khurana?

1 **A.** Yes.

2 **Q.** You believe what we know from sociology that a typical
3 student in an elite college includes that admission to elite
4 schools is highly correlated with parents' socioeconomic
5 standing, parents' educational attainment, and systematic
6 preferences for alumni children.

7 That's what you believe, right?

8 **A.** I believe that our current educational system and
9 admissions to college very much favors, in one sense, people
10 who have advantages, are advantaged.

11 **Q.** I don't mean to quibble here with what I -- is what you
12 just said the same thing as what I just said?

13 **A.** I think people who have -- are fortunate enough to have
14 some of the advantages you described are better positioned to
15 be able to go to a selective school.

16 **Q.** I'm just going to try to refresh your memory, Dean
17 Khurana.

18 MR. MORTARA: Your Honor, may I approach?

19 THE COURT: Sure.

20 BY MR. MORTARA:

21 **Q.** Dean Khurana, I am not going to put this up on the
22 screen, But I just want you to be focused on an email that
23 you wrote that's at the bottom half of this.

24 Do you see it?

25 **A.** Yes.

1 **Q.** I'm just going to ask you again. You believe from what
2 we know from sociology about the typical student in an elite
3 college includes that admission to elite schools is high
4 correlated with parent's socioeconomic standing, parents'
5 educational attainment, and systematic preferences for alumni
6 children, right?

7 **A.** I believe, yes, that's true.

8 **Q.** You can put that down, Dean Khurana. You also believe
9 there are several mechanisms for what we just described. But
10 the one that seems to be at work is that affluent parents
11 translate their privileges into educational opportunities for
12 their children which subsequently produce the academic
13 achievement that is rewarded by selective colleges and
14 universities. Right?

15 **A.** It's a very general statement. But on average, again, in
16 our country because of the way our educational system is set
17 up, people who are advantaged are better able to transmit
18 those advantages to their children.

19 **Q.** Dean Khurana, could you just look back at the email I
20 just showed you. I think it's the very next sentence. Could
21 I just get a yes here?

22 You also believe that there are several mechanisms
23 for this, but the one that seems to be at work is that
24 affluent parents translate their privileges into educational
25 opportunities for their children, which subsequently produce

1 the academic achievement that is awarded by selective
2 colleges and universities.

3 You agree with that, right?

4 **A.** Yes.

5 **Q.** I want to go back to the committee on diversity and
6 inclusion report and what it says about Harvard financial
7 aid. That's P301.

8 It's the one Your Honor got in loose form, and it's
9 the beginning of your binder, sir. Let me know when you're
10 there. I'm going to page 8, sir.

11 **A.** I'm there.

12 **Q.** Great. You see there's a discussion of "Underscoring its
13 commit to diversity that includes both racial and
14 socioeconomic background."

15 Do you see that?

16 **A.** No, I'm afraid I don't.

17 **Q.** At the bottom -- it's page 6. I misread you the page,
18 sir. It's page 6. I'm so sorry.

19 **A.** I see that paragraph.

20 **Q.** Great. And you see the middle sentence that says,
21 "Around 70 percent of Harvard students receive financial
22 assistance and over 20 percent pay no tuition at all."

23 Do you see that?

24 **A.** I see that sentence.

25 **Q.** Pretty proud of that, right? That's pretty good, right?

1 **A.** Yes.

2 **Q.** If you just read the prior sentence, what that means is
3 about 30 percent of Harvard College comes from household
4 where the household income is above \$150,000 a year. That's
5 what this all means when you put it together, right?

6 **A.** I don't have the income distribution, but that would
7 be -- you can infer that.

8 **Q.** Just take a look. Students from household earning less
9 than \$65,000 per year pay nothing toward room and board. Do
10 you see that?

11 **A.** Yes.

12 **Q.** And students from households earning 65,000 to 150,000
13 pay 10 percent or less of their yearly incomes. Do you see
14 that?

15 **A.** Yes.

16 **Q.** And then the next sentence follows. "Around 70 percent
17 receive financial assistance." Do you see that?

18 **A.** Yes.

19 **Q.** So it follows that around 30 percent of Harvard's
20 students come from families whose household income receives
21 \$150,000, right?

22 **A.** Yes.

23 **Q.** Now I want to talk about income and quality.

24 You've actually spoken a lot about income and
25 equality in your role as dean and in your research, right?

1 **A.** I've done work in that area.

2 **Q.** You're working on a book about how globalization and
3 class hierarchies reproduce income and other social
4 inequalities, aren't you?

5 **A.** I am.

6 **Q.** You know that Harvard College's student body does not
7 mirror the income distribution that we have here in the
8 United States, right?

9 **A.** Yes.

10 **Q.** I mean, you're aware that the percentage of U.S.
11 households that have an income above \$150,000 a year is
12 around 4 percent?

13 **A.** I don't have the exact statistics at my fingers.

14 **Q.** Sounds right, though, doesn't it?

15 **A.** Approximately.

16 **Q.** So let's just take it -- let's take it as 5. We can make
17 it 5. So top 5 percent of income in the U.S. make up
18 30 percent of Harvard's class?

19 **A.** Yes.

20 **Q.** Don't you actually think that Harvard's class should have
21 a socioeconomic makeup that looks a lot more like America,
22 provided the students were academically qualified to be at
23 Harvard? Your personal opinion, sir?

24 **A.** I don't.

25 **Q.** Wouldn't it be helpful to address the very issues you're

1 writing about in your book if Harvard had even greater
2 socioeconomic diversity rather than 30 percent of the class
3 coming from the top 5 percent of Americans by income?

4 **A.** The mission of the college is to educate the citizens and
5 citizen leaders for our society, and that talent is
6 everywhere. One of the things that I think we try to
7 accomplish is we know that talent is everywhere, but
8 opportunities are not. And we want that talent to be able to
9 consider coming to a place like Harvard, and want to make
10 sure that they have the financial ability to come to Harvard.

11 But we begin with the talent that's out there and
12 then trying to get them to come to a place like Harvard
13 College.

14 **Q.** And that's why I included the proviso qualified to be at
15 Harvard. I want you to have in your mind what it means to be
16 qualified to be at Harvard. All right? You studied that a
17 little bit in connection with the report, right?

18 **A.** Yes.

19 **Q.** Great. Thang's qualified to be at Harvard, isn't he?

20 **A.** Yes.

21 **Q.** All right. Being rich has nothing to do with being at
22 Harvard, does it?

23 **A.** One's socioeconomic status should not determine, whether
24 you're rich or poor.

25 **Q.** Don't you actually think that Harvard's class should have

1 a socioeconomic makeup that looked more like America than it
2 currently does, provided everybody who was there was
3 qualified to be at Harvard?

4 **A.** I can't engage in that hypothetical because I don't know
5 how that actually would play out. What we're looking for are
6 people who are committed also to the mission of the
7 institution and to try to make it possible regardless of the
8 circumstances of your birth to be able to come to a place
9 like Harvard without having to worry about financial
10 considerations.

11 **Q.** I guess now I'm confused.

12 Does it have anything to do with how committed a
13 student can be to Harvard's mission how much money their
14 mother or father makes?

15 **A.** Again, I would say that talent is everywhere. And again,
16 students who are committed to that mission could be coming
17 from well-off backgrounds. Students who are committed to
18 that mission could be coming from middle class backgrounds.

19 **Q.** My question is they're not related. Your socioeconomic
20 status isn't related to your ability to pursue the important
21 mission of Harvard College, is it?

22 **A.** No.

23 **Q.** So now I'm going to come back again.

24 What is special about wealthy people that Harvard
25 needs to have them overrepresented by a factor of six on its

1 campus?

2 **A.** Again, all of our students are qualified to be there.
3 And I would say again, like other colleges and universities,
4 I think we are fortunate to have the resources to make sure
5 students can come here regardless of their ability to pay.

6 But we're not trying to mirror the socioeconomic or
7 income distribution of the United States. What we're trying
8 to do is identify talent and make it possible for them to
9 come to a place like Harvard.

10 **Q.** I'm going to have to leave you here because Her Honor has
11 a hearing and I want to be respectful of the other
12 participants in this courtroom. But I'm going to ask one
13 more question right now. Are you ready?

14 What is it about having wealthy people at Harvard
15 that perpetuates inequality in our society? You write about
16 inequality, right, income inequality?

17 **A.** It's a subject that I've written about.

18 **Q.** Do you think having a third of the available spaces at
19 Harvard for only the richest amongst us perpetuates
20 inequality in America?

21 **MS. CONLEY:** Objection, Your Honor, asked and
22 answered. I'm not sure of the relevance of this whole line
23 of questioning.

24 **THE COURT:** He can have it.

25 **A.** It's not how the admissions --

1 THE COURT: Last question. I thought you only had
2 one. Let him have it.

3 MR. MORTARA: Last question.

4 **A.** That's not how the admissions process works.

5 BY MR. MORTARA:

6 **Q.** Respectfully, sir, that wasn't my question. So that's
7 where we'll start tomorrow.

8 THE COURT: All right. Do you all want to start at
9 9:30 again tomorrow or do you want to push it until 10:00?
10 Whatever you want to do.

11 MR. MORTARA: 9:30.

12 THE COURT: Can I see counsel at sidebar for a
13 minute before we recess.

14 [Sidebar redacted.]

15 (Court recessed at 4:48 p.m.)
16
17
18
19
20
21
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 22, 2018

Joan M. Daly, RMR, CRR
Official Court Reporter

Date

INDEX OF WITNESSES

WITNESSPAGE

RICHARD KAHLENBERG

Examination By Mr. Strawbridge..... 7

Examination By Mr. Lee..... 59

MARLYN MCGRATH

Examination (Resumed) By Mr. Lee..... 145

Further Examination By Mr. Mortara..... 176

RAKESH KHURANA

Examination By Mr. Mortara..... 192

E X H I B I T S

Defendant ExhibitReceived

DX2	.....	152
DX003	.....	150
DX16	.....	151
DX24	.....	153
DX119	.....	98
DX139	.....	111
DX276	.....	165

Plaintiff
ExhibitReceived

P288	102
------	-------	-----