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 26, 2018
7　PRESIDENT AND FELLOWS OF HARVARD
　　COLLEGE, et al.,　　　　　　　　　　 Pages 1 to 122

8
　　　　　　　　　　　Defendants.
9　_____

10

11
　　　　　　　　　TRANSCRIPT OF BENCH TRIAL – DAY 10
12　　　　　BEFORE THE HONORABLE ALLISON D. BURROUGHS
　　　　　　　　　UNITED STATES DISTRICT COURT
13　　　　　　 JOHN J. MOAKLEY U.S. COURTHOUSE
　　　　　　　　　　 ONE COURTHOUSE WAY
14　　　　　　　　　 BOSTON, MA　02210

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 1                    P R O C E E D I N G S

 2              (The following proceedings were held in open

 3    court before the Honorable Allison D. Burroughs, United

 4    States District Judge, United States District Court, District

 5    of Massachusetts, at the John J. Moakley United States

 6    Courthouse, One Courthouse Way, Boston, Massachusetts, on

 7    October 26, 2018.)

 8              DEPUTY CLERK:  Court is in session, please be

 9    seated.

10              THE COURT:  Give me one second here.

11              Talking about the status conference, do the first

12    status Monday at 9:15, that should be over by 9:30, and then

13    I have to take a slightly longer lunch break.  12:30 to 1:30

14    I think I said, right?

15              MR. HUGHES:  Right.

16              THE COURT:  And then I'll go as long as you need

17    to.  Okay?

18              MR. HUGHES:  I think you indicated 30-minute limits

19    for the direct.

20              THE COURT:  Yes.

21              MR. HUGHES:  If we could adhere to those time

22    frames, our crosses, if any, will be extraordinarily short.

23    I think Harvard has indicated that they may not ask questions

24    at all.  So the real hope -- we're both concerned about time.

25              THE COURT:  Okay.  And maybe the directs don't take
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1 30 minutes either.

2   MS. ELLSWORTH: We are definitely keeping them

3 within the 30 minutes and are trying to keep them below that.

4 We'll do our best.

5   THE COURT: So that's fine. So we will do that.

6 We will move the 4:00 to Tuesday. That's the final pretrial

7 in the next case, so I could use another day on that anyway.

8 All right?

9   MR. HUGHES: Thank you, Your Honor.

10   THE COURT: When you're ready, Mr. Lee.

11   MR. LEE: Thank you, Your Honor.

12   (PETER ARCIDIACONO, previously duly sworn by the

13 Deputy Clerk.)

14 CONT. EXAMINATION BY MR. LEE:

15 **Q.** Good morning, Professor Arcidiacono.

16 **A.** Good morning.

17 **Q.** When we left off yesterday, you and I had just begun to

18 discuss the concept of omitted variables, correct?

19 **A.** Correct.

20 **Q.** Omitted variable bias is a well-recognized concept in

21 your discipline, correct?

22 **A.** Correct.

23 **Q.** And it refers to the concept of a bias that might be

24 explained by another variable not in the data, correct?

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

1   **Q.** And you are familiar with the concept of omitted variable

2   bias, correct?

3   **A.** Yes.

4   **Q.** So let's talk a little bit more about your model, and I'm

5   going to focus on your baseline model to start, okay?

6   **A.** Okay.

7   **Q.** Now, you agree that one of your goals was to accurately

8   estimate the effect of race in the Harvard admissions

9   process, correct?

10   **A.** Correct.

11   **Q.** You also agree that to do that, it's important to account

12   for the relevant inputs to the admissions process, correct?

13   **A.** Correct to the extent that those variables are not

14   influenced by race, yes.

15   **Q.** Yes. Fair enough.

16   But you and Dr. Card disagree on whether certain

17   variables should be included in your models, correct?

18   **A.** Correct.

19   **Q.** So I'd like to explore the differences in judgment that

20   the two of you made, okay?

21   **A.** Okay.

22   **Q.** One of the differences in judgment was that you excluded

23   parental occupation from your model, correct?

24   **A.** Correct.

25   **Q.** Now, you agree that parental occupation could be

1 important to the admissions office, correct?

2 **A.** Correct.

3 **Q.** Apologies. I just dropped the top of my pen.

4   You agree that admission officers review

5 information about an applicant's parents' occupation,

6 correct?

7 **A.** Correct.

8 **Q.** They review that in the process of deciding whether to

9 admit the applicant, correct?

10 **A.** Correct.

11 **Q.** And you have reviewed the testimony of admission officers

12 that say parental occupation could be one factor that they

13 consider in determining whether an applicant is admitted,

14 correct?

15 **A.** Correct.

16 **Q.** Now, you would agree that parental occupation provides

17 some information beyond just income level, correct?

18 **A.** Correct.

19 **Q.** An admissions decisions can be made on parental

20 occupation in addition to socioeconomic information, correct?

21 **A.** Correct.

22 **Q.** You told us yesterday that you were here when

23 Dean Fitzsimmons testified last week?

24 **A.** That's correct.

25 **Q.** And you heard him testify that the admissions office

1   considers parental occupation?

2   **A.**   Yes, I did.

3   **Q.**   And you heard him testify that in certain circumstances,

4   for certain applicants, it can be a huge benefit to have that

5   information, correct?

6   **A.**   Correct.

7   **Q.**   Now, Dr. Card included parental occupation in his model,

8   correct?

9   **A.**   Included a version of the parental occupation, yes.

10   **Q.**   Fair enough. He included a version of parental

11   occupation, correct?

12   **A.**   Correct.

13   **Q.**   And you excluded it, correct?

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

15   **Q.**   Okay. Let's move to another place where you made

16   different judgments.

17   You excluded an applicant's intended career,

18   correct?

19   **A.**   Correct.

20   **Q.**   You know that the Harvard's admissions office considers

21   intended career in the application process, correct?

22   **A.**   Correct.

23   **Q.**   And in fact, in -- when you chaired the admissions

24   committee for the Duke economics department, the graduate

25   Department of Economics, you explored the intended career and

1 aspirations of the applicants as well, correct?

2 **A.** Correct.

3 **Q.** Because it was information that you thought would be

4 helpful in determining whether to accept an applicant to the

5 Duke Graduate School of Economics, correct?

6 **A.** Correct.

7 **Q.** Now, you said that you excluded parental occupation and

8 intended career because the variables varied by those

9 categories from year to year.

10   Did I hear that correctly?

11 **A.** That's part of it, yes.

12 **Q.** And that's one of the things you discussed with

13 Mr. McBride yesterday, correct?

14 **A.** Correct.

15 **Q.** Now, the intended career and parental occupation fields

16 are not the only ones that had values change or vary from

17 year to year, correct?

18 **A.** That's correct, but they had the most extreme variation.

19 **Q.** Right. And I'd like to ask you about some of the others

20 that had variation.

21   So, for instance, one of the categories you

22 considered was disadvantaged status, correct?

23 **A.** Correct.

24 **Q.** Disadvantaged status vary -- is included in your

25 preferred model, correct?

1 **A.** Correct.

2 **Q.** Disadvantaged status varied from year to year, correct?

3 **A.** Correct.

4 **Q.** Now I'd like to bring you back to Dr. Card's chart that

5 we looked at yesterday, and it's in volume 2 of the notebook,

6 Professor, and I'm going to draw your attention back to page

7 55, Exhibit 13. We looked at this briefly yesterday?

8 **A.** Yes, I got it here.

9 **Q.** And we agreed, I believe, that you don't challenge the

10 math or the computations that result in the numbers on the

11 right-hand side, correct?

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

13 **Q.** And you understand that this is the chart where Professor

14 Card takes your preferred model and tries to identify the

15 average marginal effects or the changes to the average

16 marginal effect that result from the different judgments that

17 you've made, correct?

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

19 **Q.** If you move down the chart to categories 5 and 6, do you

20 see them?

21 **A.** I do.

22 **Q.** Category 5 is parental occupation controls, correct?

23 **A.** Correct.

24 **Q.** Category 6 is both intended career and staff interview,

25 correct?

A. Correct.

Q. And what this chart reflects is Dr. Card's computation of the impact or the effect on the average marginal effect of Asian-American ethnicity from excluding these two categories, correct?

A. That's correct.

Q. Now, if you included intended career in your model, the negative effect of Asian-American ethnicity would have been less, correct?

A. Well, you have both intended career and staff rating.

Q. Fair enough.

A. I'm not sure which one is driving that.

Q. If you included both intended career and staff ratings in your model, which you did not, the impact upon the marginal effect of Asian-American ethnicity would have decreased, correct?

A. That's correct.

And I would like to clarify it's not actually a staff rating. It is whether you had a staff interview.

Q. Right. I'm going to ask you just about that now.

So let's talk about whether there were staff interviews. Okay? Are you with me?

A. Yes.

Q. And before we take this chart down, I want to be sure that we agree upon one other thing.

1   Yesterday I believe I asked you, but if you don't

2   remember, let's clarify it now. On the right-hand side

3   there's a column, "Average Marginal Effect of Asian-American

4   Ethnicity." Do you see that?

5   **A.** I do.

6   **Q.** And the asterisk, I think we agreed, but correct me if

7   I'm wrong, indicates that the result is statistically

8   significant from zero, correct?

9   **A.** At the 5 percent level, yeah -- or 95 percent.

10   **Q.** At the 5 percent confidence level?

11   **A.** Yes.

12   **Q.** Right. And at the 5 percent confidence level, a result

13   that would not be statistically -- withdrawn.

14   At the 5 percent confidence level, a result that is

15   not statistically significant would be the equivalent of

16   zero, correct?

17   **A.** I think that really depends. It depends on -- I mean,

18   you can't distinguish it from zero at that level.

19   **Q.** Fair enough. At that level --

20   **A.** So size and standard errors matter, you know, those

21   things.

22   **Q.** At that level you could not distinguish it from zero,

23   correct?

24   **A.** That's correct.

25   **Q.** And zero would mean there is no negative effect on

1   Asian-American ethnicity if it were zero, correct?

2   **A.** You can't distinguish it, correct.

3   **Q.** So if we understand this chart, if we just add in ALDC

4   applicants, we run year by year, and we add back in the

5   personal rating, which I'm going to come to, we get to

6   results in categories 5, 6, 7, 8 and 9, which don't have an

7   asterisk, correct?

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

9   **Q.** Which indicates that they're not statistically

10   significant from zero, correct?

11   **A.** At that level, yes.

12   **Q.** And you have no quarrel with the math and computation

13   that led to the absence of asterisks for categories 5, 6, 7,

14   8 and 9, correct?

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

16   **Q.** Now, I'm going back to the staff interviews, which you

17   mentioned, and I think you're correct that what you were

18   removing from your model was whether an applicant had a staff

19   interview or not, correct?

20   **A.** Correct.

21   **Q.** And as you told Mr. McBride yesterday, for some

22   applicants staff interviews are part of the admissions

23   process, correct?

24   **A.** Correct.

25   **Q.** And for those that receive a staff interview, that

1   information, the information that results from the interview,

2   becomes part of the application file, correct?

3   **A.**   Correct.

4   **Q.**   And it becomes part of the information that can be used

5   to make a decision, correct?

6   **A.**   Correct.

7   **Q.**   Now --

8   MR. LEE: Your Honor, yesterday you were given two

9   charts by Mr. McBride, I think in response to your questions.

10   THE COURT: Yes.

11   MR. LEE: And I think they haven't been marked or

12 identified yet, so I think I would ask Mr. McBride how he

13 wants to identify it.

14   MR. McBRIDE: We're going to identify them as just

15 being at the end of the sequence of Plaintiff's Demonstrative

16 38.   They will be slides number 46 and 47.   We will get

17 stamped copies for you once they're finished.

18   THE COURT: Which is going to be which?

19   MR. McBRIDE: I was afraid you were going to ask me

20 that.   I can confirm that right now.

21   The Asian-American applicants in admits in ALDC and

22 non-ALDC categories is slide 46.

23   And the Asian-American applicants interviewed by

24 ALDC and non-ALDC will be slide 47.

25   THE COURT: Thank you, Mr. McBride.

1 BY MR. McBRIDE:

2 **Q.** Professor, do you have those two charts?

3 **A.** I do.

4 **Q.** I'm going to turn your attention to the one that

5 Mr. McBride has just identified as number 47, PD38, slide 47.

6   Do you have that?

7 **A.** I do.

8 **Q.** And this concerns staff interviews, correct?

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

10 **Q.** And this is information you put together in response to

11 Her Honor's questions, correct?

12 **A.** Correct.

13 **Q.** Now, I want to take you down to the third set of rows

14 where it says, "Number Total Applications, Number Total

15 Applicants Interviewed." Do you see that?

16 **A.** I do.

17 **Q.** And there are two columns: One is Asian and one is

18 total, correct?

19 **A.** Correct.

20 **Q.** These are for staff interviews, correct?

21 **A.** Correct.

22 **Q.** Now, for Asians, the total number of applicants

23 interviewed from the dataset you reviewed was 494, correct?

24 **A.** Correct.

25 **Q.** The total number of folks, applicants interviewed of any

1　ethnicity was 3,043, correct?

2　**A.**　Correct.

3　**Q.**　Now, if my computations are correct, that means that the

4　Asians interviewed were about 16 percent of the applicants

5　interviewed, correct?

6　**A.**　I'd have to take your word for that.

7　　　　　THE COURT:　Can you ask that question again?

8　　　　　MR. LEE:　Sure.

9　**Q.**　I'm taking 494 Asian applicants interviewed, correct?

10　**A.**　Correct.

11　**Q.**　I'm dividing it by 3,043 which is the total number,

12　correct?

13　**A.**　Correct.

14　**Q.**　And I'll represent to you, at least by my calculator, it

15　says it's about 16 percent.　Does that seem right to you?

16　**A.**　Sure.

17　**Q.**　And 16 percent is very close to the percentage of the

18　application pool represented by Asian-Americans, correct?

19　**A.**　Yeah, I don't think that can be right because

20　Asian-Americans are less likely to be interviewed and -- if

21　they're ALDC, and they're less likely to be interviewed if

22　they're not ALDC.

23　**Q.**　I'm just taking your numbers from yesterday, and --

24　**A.**　I have the percent in my report about what fraction were

25　interviewed.

1   **Q.**   The chart that I'm giving you now says "Total number of

2   applicants interviewed, Asian 494," correct?

3   **A.**   Correct.

4   **Q.**   "Total interviewed 3,043," correct?

5   **A.**   Correct. One clarification. I just need a

6   clarification.

7   **Q.**   Sure.

8   **A.**   When you say the percent of the applicant pool, are you

9   referring to the domestic applicants or to the total

10   applicant pool?

11   **Q.**   I'm referring to the number that we looked at yesterday.

12   Do you remember it was about 17 percent of the

13   applicant pool was Asian?

14   **A.**   Is that when -- what I'm trying to recall is whether that

15   included foreign applicants or not.

16   **Q.**   Well, let me ask you this: Do you know?

17   **A.**   I can't recall at this moment, no.

18   **Q.**   Let me ask Ms. Frazier to give me the right tab number

19   and exhibit so I can refresh your recollection.

20   But while she's looking for it, let me ask you

21   this: You have no information that Harvard ever denied a

22   staff interview to an Asian-American applicant, correct?

23   **A.**   Accept for the very low rate in which they get them, yes.

24   **Q.**   You have no information that Harvard ever denied a staff

25   interview to an Asian-American applicant because of their

1   ethnicity, correct?

2   **A.**   Correct.

3   **Q.**   In fact, you don't know of anyone by name or identity who

4   has ever been denied a staff interview at Harvard, correct?

5   **A.**   Correct.

6   **Q.**   Now, you testified that the ALDC applicants are more

7   likely to get staff interviews than the non-ALDC applicants,

8   correct?

9   **A.**   Correct.

10 **Q.**   The fact of the matter is that more than half of the

11 staff interviews are with non-ALDC applicants, correct?

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

13 **Q.**   In fact, about 56 percent of the interviews are with

14 non-ALDC applicants, correct?

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

16 **Q.**   All right. So let's -- Professor, let's go back -- and

17 I'm going to keep taking you back to this, so if you can keep

18 it in front of you, it would be great -- to the Card chart

19 that we were looking at.

20 **A.**   Yeah.

21 **Q.**   It's at Tab 19 in volume 2. It's from his rebuttal

22 report at 55, Exhibit 13.

23 **A.**   Yeah, still there.

24 **Q.**   Okay. And I'm going to go to line 6, which is "Add

25 intended career and staff rating indicator," which you and I

1   talked about a little bit, correct?

2   **A.** Correct.

3   **Q.** And the staff rating indicator is simply whether there

4   was an interview or not. Okay?

5   **A.** Okay.

6   **Q.** Turn, if you would, to Tab 18 in the notebook before you.

7   Do you have that before you?

8   **A.** I do.

9   **Q.** You recognize it, do you not?

10   **A.** I recognize it.

11   **Q.** You reviewed it in preparing your opinions, correct?

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

13   **Q.** And you'll see that for Asian-Americans -- for instance,

14   for the class of 2016, do you see that?

15   Can I have the page that has Bates stamp number

16   32521.

17   And, Professor, at the bottom it says page 2 of 2.

18   Either of those numbers will get you there, and I'll ask

19   Mr. Lee to get us there.

20   **A.** I'm sorry, I'm --

21   THE COURT: You lost me, too.

22   MR. LEE: Yeah. So we're in Tab 18.

23   THE COURT: Yeah.

24   MR. LEE: P319. And then I'm going to go to the

25   Bates stamp number in the bottom right-hand corner.

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 1              THE COURT:  Can you hold on a second, Mr. Lee?
 2              MR. LEE:  Sure.
 3              THE COURT:  Hold on.  I'm still not on the right
 4    page.  Page 2 of 2?
 5              MR. LEE:  Your Honor, the Bates stamp number in the
 6    bottom right-hand corner would be HARV00032521.
 7              THE COURT:  And give him one second so we can get
 8    this going.
 9              MR. LEE:  Sure.
10              THE COURT:  Sorry about that.
11    BY MR. LEE:
12    Q.  Let me see if I can level-set us and I think I can
13    short-circuit this.  Okay.  First, before we left off, we
14    were looking at Dr. Card's chart of the effect of the
15    different judgments the two of you have made, correct?
16    A.  That's correct.
17    Q.  And category 6 was adding intended career and staff
18    rating indicator, correct?
19    A.  Correct.
20    Q.  And you and I had some discussion of the percentage of
21    Asian applicants who got interviews according to the chart
22    PD38, slide 47 yesterday, correct?
23    A.  Correct.
24    Q.  And it's approximately 16 percent, correct?
25    A.  Sorry?
```

Q. It's approximately 16 percent?

A. What was approximately 16 percent?

Q. The number of Asians by your chart receiving interviews compared to the total applicants was approximately 16 percent, correct?

A. Yes.

Q. Let's move on then because I asked you about the other document yesterday and Ms. Frazier reminded me I've already asked you, so I'll stand by that.

A. No. This needs to be clarified, though. Because the percent that you gave was using the IPEDS methodology and that gives a lower share for Asian-Americans. The share of Asian-Americans in the class of 2016 was in the old methodology, which is what's used in here, is over 20 percent.

Q. So it's 20 percent, and the approximate number of folks who got interviews is a little over 16 percent?

A. 20.4 percent versus little over 16.

Q. And you have no reason to assume that the difference between 16 and 20 percent is a result of anybody discriminating against Asian-Americans, do you?

A. No. The process for staff interviews is different for ALDC and versus non-ALDC, and that suggests that staff interviews means something different for ALDC applicants versus non-ALDC applications, which is not in the model.

1 **Q.** That wasn't my question. My question was --

2 **A.** I know.

3 **Q.** You have no reason to believe that any difference between

4 a 16 plus or minus a little bit percent and 20 percent is a

5 result of discrimination against any Asian-American

6 applicant, correct?

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

8 **Q.** Now let's move to the personal rating. You also excluded

9 the personal rating from your preferred model, correct?

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

11 **Q.** You're aware of no candidate ever admitted to Harvard who

12 did not receive a personal rating on the summary sheets,

13 correct?

14 **A.** Correct, and that's correct of the overall as well.

15 **Q.** And the personal rating takes into account a variety of

16 things, correct?

17 **A.** Correct.

18 **Q.** And as you told Mr. McBride, it could consider the

19 teacher recommendations, correct?

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

21 **Q.** And the college counselor recommendations, correct?

22 **A.** Correct.

23 **Q.** It could consider letters of recommendation, correct?

24 **A.** Correct.

25 **Q.** It could consider alumni interview reports, correct?

1 **A.** Correct.

2 **Q.** It could include faculty review, correct?

3 **A.** Correct.

4 **Q.** And it could include applicants personal statements,

5 correct?

6 **A.** Correct.

7 **Q.** So the information is coming in from a variety of

8 sources, teachers, guidance counselors, recommenders,

9 interviewers and the applicant itself, correct?

10 **A.** The information is coming from a variety of sources, but

11 the reader has to assign the rating.

12 **Q.** Someone's got to read the application, right?

13 **A.** And assign the rating, yes.

14 **Q.** And the information that's coming into the reader is

15 coming from a variety of sources, correct?

16 **A.** Correct.

17 **Q.** Just as when you're on the admissions committee at Duke

18 you get information from a variety of sources on your

19 applicants, correct?

20 **A.** Correct.

21 **Q.** And then the committee, when you were the chair, reviews

22 that information to try to make a decision on which

23 applicants should be interviewed and which should not,

24 correct?

25 **A.** Correct.

Q. Now, staying on the personal rating, you excluded the personal rating from your model correct?

A. From any preferred model, correct.

Q. Fair enough. From your preferred or baseline model, correct?

A. I don't know whether it's baseline. I'm happy to use that language.

Q. I'm just trying to use baseline because some of the slides you used yesterday with Mr. McBride referred to baseline.

A. Well, baseline is the dataset. I have models. I have my preferred model on the baseline dataset which excludes the personal rating, but I have my model with the baseline dataset that includes the personal rating.

Q. Your preferred model excludes the personal rating; yes or no?

A. That's correct.

Q. And if you go back to Dr. Card's chart, we'll put it back on the screen, the personal rating is category number 4, correct?

A. Correct.

Q. And by adding back in the personal rating, you reduce what you identify as the negative marginal effect of Asian-American ethnicity, correct?

A. Correct.

1 **Q.** And you have no quarrel with the math that leads to the

2 number that's on line 4, correct?

3 **A.** Correct.

4 **Q.** Now, yesterday you said that you excluded the personal

5 rating because in your view the rating is biased, correct?

6 **A.** Correct.

7 **Q.** You ran a series of models for the personal rating,

8 correct?

9 **A.** Correct.

10 **Q.** Those models showed, as you described yesterday, a

11 negative association with Asian-American ethnicity for the

12 personal rating, correct?

13 **A.** Correct.

14 **Q.** Now, you know that there are four different profile

15 ratings assigned, correct?

16 **A.** Correct.

17 **Q.** And there are additional ratings for the teacher

18 recommendations, correct?

19 **A.** Correct.

20 **Q.** The guidance counselor recommendations, correct?

21 **A.** Correct.

22 **Q.** The preliminary overall rating, correct?

23 **A.** Correct.

24 **Q.** And interview rating, correct?

25 **A.** Correct.

1   **Q.**   So there are eight different ratings that could be on the

2   summary sheet, correct?

3   **A.**   Correct.

4   **Q.**   Now I'm going to focus on the four profile ratings with

5   you. Do you have those in mind?

6   **A.**   I do.

7   **Q.**   When a first reader assigns them, it is the same first

8   reader who was assigning those four ratings, is it not?

9   **A.**   It is.

10   **Q.**   It's the same human being?

11   **A.**   Correct.

12   **Q.**   And you know from having read the depositions and having

13   been here during the course of the evidence that what happens

14   is the admissions officer reads everything in the file that's

15   available to them, correct?

16   **A.**   Correct.

17   **Q.**   They then provide those ratings, correct?

18   **A.**   Correct.

19   **Q.**   And that occurs all before there's a second read, if

20   there is a second read, correct?

21   **A.**   Correct.

22   **Q.**   That happens before a subcommittee discussion, correct?

23   **A.**   Correct.

24   **Q.**   It happens before a tentative decision is made whether to

25   send the applicant on or not to the full committee, correct?

1   **A.** Correct.

2   **Q.** And it certainly occurs before the full committee

3   meeting, correct?

4   **A.** Correct.

5   **Q.** Now, turn if you would to Tab 31 in volume 2. Do you

6   have it?

7   **A.** I do.

8   **Q.** And do you recognize it?

9   **A.** Yes.

10   **Q.** This is one of the applications that you reviewed,

11   correct?

12   **A.** Correct.

13   **Q.** And just to help level-set us, I want you to look at the

14   first page. Do you have that before you?

15   **A.** I do.

16   **Q.** And that's a summary sheet, correct?

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

18   **Q.** And each applicant is given an academic rating, correct?

19   **A.** Correct.

20   **Q.** And to remind us, I'm going to highlight the box so that

21   we can be sure we agree upon what the academic rating is.

22   THE COURT: You want this off the courtroom

23   monitors.

24   MR. LEE: If we could.

25   **Q.** So just to remind us, the highlighted box -- let's just

```
 1   highlight the first box.  The first box highlighted under
 2   "Profile" is the academic rating, correct?
 3   A.   Correct.
 4   Q.   All right.  The academic rating includes both
 5   quantitative and qualitative information, correct?
 6   A.   Correct.
 7   Q.   For instance, it, too, could include information from the
 8   teacher recommendation, correct?
 9   A.   Correct.
10   Q.   It, too, could include information from the guidance
11   counselor recommendation, correct?
12   A.   Correct.
13   Q.   Now, each applicant is also given an extra-curricular
14   rating, correct?
15   A.   Correct.
16   Q.   That's the next box over here.  It's a 3+, correct?
17   A.   Correct.
18   Q.   Again, the extra-curricular rating includes quantitative
19   information?
20   A.   Correct.
21   Q.   And qualitative information, correct?
22   A.   Correct.
23   Q.   For example, the extra-curricular rating may include
24   commitment to community organizations, correct?
25   A.   Correct.
```

Q. That can't be quantified, correct?

A. Correct.

Q. And it could include -- well, withdrawn.

The fourth -- the third box is athletics, correct?

A. Correct.

Q. And we'll highlight it here. And then the fourth box is the personal rating, correct?

A. Correct.

Q. Now, as you told Mr. McBride yesterday, you ran a series of models for the academic ratings, correct?

A. Correct.

Q. And you ran a series of ratings, models, for the extra-curricular ratings, correct?

A. Correct.

Q. Now, for the academic rating, you found that Asian-American ethnicity had a statistically significant positive association with the academic rating, correct?

A. That's correct.

Q. So if I could have the summary sheet back on the screen. To be clear, the finding that you made about the academic rating was after you had controlled for all the variables in your model, correct?

A. All the variables there's definitely things it did not control for, like the AP tests, like winning the science competitions, didn't include those. Those were in the data

1 but not in the model.

2 **Q.** So for all the things you could control for, you

3 controlled, correct?

4 **A.** All the things -- I could have controlled for a lot more

5 things. I chose not to. But what's in the model I've

6 accounted for.

7 **Q.** And so bottom line was that you found a positive

8 association between Asian-American ethnicity and academic

9 rating, correct?

10 **A.** Yes, of a much smaller magnitude.

11 **Q.** If I could highlight the academic rating here, which is a

12 2-. Do you see that?

13 **A.** Yeah.

14 **Q.** Incidentally, when you ran your models, you didn't

15 include minuses and pluses, correct?

16 **A.** That's because that was not available in the data,

17 correct.

18 **Q.** And Dr. Card didn't include minuses and pluses, correct?

19 **A.** That's correct. Except for the overall rating models

20 that I did, I did use minuses and pluses because those were

21 available.

22 **Q.** But you basically dealt with the data and the absence of

23 pluses and minuses in the same way, correct?

24 **A.** Well, he doesn't really do anything with the ratings

25 models, but yes.

1   **Q.** Yes. Okay. I want you to focus on the -- so what we

2   have here is the academic rating in the box on the left,

3   correct?

4   **A.** Correct.

5   **Q.** The first reader has filled it out, correct?

6   **A.** Correct.

7   **Q.** And as you looked across the dataset that you identified,

8   you found that the result of those first reads were that

9   Asian-Americans were getting a positive association with the

10   academic rating from those readers, correct?

11   **A.** Correct. And there was no association for

12   African-Americans and slightly negative for Hispanic.

13   **Q.** I didn't ask you about African-American, but I'll come

14   back to it. I didn't ask you about Hispanics, but I'll come

15   back to it. I'm asking you about Asian-Americans.

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

17   **Q.** The result of your analysis was that when the first or

18   the second or third reader sat down and filled in the

19   academic rating, there was a positive association from their

20   ratings with Asian-American ethnicity, correct?

21   **A.** Correct.

22   **Q.** Now, the same reader moves one box to the right, and they

23   fill in extra-curricular ratings, correct?

24   **A.** Correct.

25   **Q.** And you found that Asian-American ethnicity had a

1 statistically significant positive association with the

2 extra-curricular rating, correct?

3 **A.** Correct.

4 **Q.** So the same reader has moved from box 1 to box 2,

5 correct?

6 **A.** Correct.

7 **Q.** Has given the Asian-American applicant a positive

8 association or a positive association with their ethnicity

9 for the academic rating, correct?

10 **A.** Correct.

11 **Q.** A positive association for their Asian-American ethnicity

12 for their extra-curricular rating, correct?

13 **A.** Correct.

14 **Q.** Now, did you conclude that Harvard was discriminating in

15 favor of Asian-Americans in setting the academic ratings?

16 **A.** No, I did not.

17 **Q.** Did you conclude that Harvard was discriminating in favor

18 of Asian-Americans in setting the extra-curricular ratings?

19 **A.** No, I did not.

20 **Q.** But you found a positive association, correct?

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

22 **Q.** And you explained yesterday, you attribute those positive

23 effects to what you characterize I think, if I've got to

24 right, as unobservable characteristics, correct?

25 **A.** Correct.

Q. And unobservable characteristic is something about an applicant that can't be captured in the dataset that you've analyzed, correct?

A. Correct.

Q. Would you agree with this: Generally, economists operate under the assumption that observables operate in a similar manner to unobservables?

A. Yes, I would.

Q. And that's what you were telling Mr. McBride yesterday, correct?

A. Correct.

Q. And in fact, what you told us yesterday was that if a group is stronger on an observable set of variables, you would expect them to be stronger on the unobservable measures as well, correct?

A. Correct.

Q. And where applicants are weaker on observable measures, you would expect them to be weaker on the non-observable measures, correct?

A. Correct.

Q. Now, it's your opinion that Asian-Americans are stronger than white applicants on observable measures of academic excellence, correct?

A. Correct.

Q. It's your opinion that Asian-Americans are stronger than

1 whites on observable measures of extra-curricular excellence,

2 correct?

3 **A.** Correct.

4 **Q.** And that is why you attribute, as you told Mr. McBride

5 yesterday, the positive association between Asian-American

6 ethnicity and those two ratings to unobserved factors,

7 correct?

8 **A.** Correct.

9 **Q.** Okay. Now, you agree that the personal rating is

10 difficult to measure, correct?

11 **A.** It -- I mean, my fit for the personal rating is actually

12 better than for the extra-curricular, but yes.

13 **Q.** Actually, if you were to rank them, the rating that might

14 have the most quantitative information is the academic

15 rating?

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

17 **Q.** And then the personal rating would probably follow that,

18 correct?

19 **A.** That sounds right.

20 **Q.** And the extra-curricular rating would come up in third or

21 fourth place in terms of the quantifiable information,

22 correct?

23 **A.** Well, if we used the additional data on the

24 extra-curricular hours, that coefficient goes down, but

25 that -- I wanted to use variables that were present in all

1 years.

2 **Q.** Right. Now, the personal rating, like the academic

3 rating, can reflect information in the teacher

4 recommendations, correct?

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

6 **Q.** Can reflect information the guidance counselor

7 recommendations, correct?

8 **A.** Correct.

9 **Q.** Now, those recommendations are observable factors, are

10 they not?

11 **A.** So those ratings are observable factors, yes.

12 **Q.** Fair enough. And among applicants with similar grades

13 and test scores, according to your analysis, Asian-American

14 applicants have weaker teacher ratings than white applicants,

15 do they not?

16 **A.** They do. We find a penalty in the school support

17 measures in our model.

18 **Q.** So let's take a look at your data, which I don't think

19 you reviewed yesterday. If you would turn to Tab 35 in

20 volume 2 of your notebook. Do you have that before you?

21 **A.** I do.

22 **Q.** And I'm going to go in your appendix C to table 5.5R.

23 And in particular the 12th page. Do you have it?

24 **A.** I do.

25 **Q.** Now, there is a lot of information on the page, but I'm

1 going to take you through some things specifically so that we

2 have them in the record. And this is in part your analysis

3 of teacher ratings for Asian-American and white applicants,

4 correct?

5 **A.** Correct.

6 **Q.** And you do it by academic decile, correct?

7 **A.** Correct.

8 **Q.** The same type of decile analysis that you described to

9 Mr. McBride yesterday, correct?

10 **A.** Correct.

11 **Q.** And you do it by race, correct?

12 **A.** Correct.

13 **Q.** And you're trying to identify the percentage of

14 applicants receiving top ratings of 1 or 2 on the guidance

15 counselor and teacher ratings, correct?

16 **A.** Correct.

17 **Q.** So let's look at the row for academic decile 10. Do you

18 see it?

19 **A.** I do.

20 **Q.** And we're highlighting it. Now, just to remind us,

21 academic decile 10 is the best decile, correct?

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

23 **Q.** It's the top 10 percent?

24 **A.** That's right.

25 **Q.** Okay. Now, for the first teacher recommendation, you see

1 that category?

2 **A.** Yes.

3 **Q.** And teacher 1 just means the first recommendation from a

4 teacher in the file?

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

6 **Q.** 50.17 percent of white applicants received a top teacher

7 rating compared to 46.64 percent of Asian-American

8 applicants, correct?

9 **A.** Correct.

10 **Q.** For the second teacher recommendation, if we move to the

11 right, do you see that?

12 **A.** Yes.

13 **Q.** And this just means the second recommendation in the

14 file, correct?

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

16 **Q.** For the top decile, 47.11 percent of white applicants

17 received the top teacher ratings compared to 41.9 percent of

18 Asian-American applicants, correct?

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

20 **Q.** Now let's go to the counselor rating. This is the

21 college counselor rating. Your analysis showed that the

22 white applicants received 44.63 percent compared to -- I'm

23 sorry, 38.34 percent, correct?

24 **A.** Correct.

25 **Q.** And your analysis also showed that from the counselor

1   ratings, African-Americans and Hispanics actually received

2   higher ratings, slightly higher ratings for Hispanics and yet

3   again a little higher for African-Americans, correct?

4   **A.**   Correct.

5   **Q.**   The five best academic deciles would be deciles 6, 7, 8,

6   9 and 10?

7   **A.**   Correct.

8   **Q.**   In this analysis, the white applicants receiving the top

9   ratings is always higher than the percentage of

10   Asian-Americans receiving the top ratings, correct?

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

12   **Q.**   And these are observable measures, which is why you

13   included them in your chart, correct?

14   **A.**   Correct.

15   **Q.**   And on these observable measures, on average, the white

16   applicants do a little bit better, correct?

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

18   **Q.**   Now, to be fair, they're just averages, are they not?

19   **A.**   Yes.

20   **Q.**   There are some really outstanding Asian-American

21   applicants in the pool, correct?

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

23   **Q.**   Who have gotten great personal ratings, correct?

24   **A.**   Yes.

25   **Q.**   Great teacher recommendations, correct?

1   **A.**   Correct.

2   **Q.**   Great guidance counselor recommendations, correct?

3   **A.**   Correct.

4   **Q.**   All right. And the average really wouldn't tell us much

5   about them, would it?

6   **A.**   I mean, it tells you the fraction people who are getting

7   those great ratings but --

8   **Q.**   Okay. And beyond that, it doesn't tell you much about

9   that applicant, correct?

10   **A.**   Correct.

11   **Q.**   Now, you ran five models for the personal rating,

12   correct?

13   **A.**   Correct.

14   **Q.**   Would you turn to Tab 2 in the first volume, which is

15   page 54 of your notebook.

16   And let me clarify one more thing on the past

17   chart. I don't think you need to put it back up. The

18   teacher ratings, guidance counselor ratings, and the

19   teacher -- withdrawn.

20   The guidance counselor ratings, the first teacher

21   recommendation, the second teacher recommendation ratings

22   that you were analyzing are the ones that go on the summary

23   sheet, correct?

24   **A.**   Right. They're assigned by the reader.

25   **Q.**   Right. So the same person who is giving slightly higher

1 academic ratings to Asian-Americans, slightly higher

2 extra-curricular ratings to Asian-Americans, are filling in

3 the boxes on the teacher recommendation, the guidance

4 counselor recommendations and second teacher recommendation,

5 correct?

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

7 **Q.** Same person?

8 **A.** Yes.

9 **Q.** Let's go to the five models that you ran for your

10 personal rating. Okay. And do you have page 54 of your

11 report before you?

12 **A.** Is this a figure you put up?

13 **Q.** It's on the screen now.

14 **A.** I can just look at it.

15 **Q.** It's page 54 I think of your of -- it's at Tab 2, which

16 is your report, page 54, figure 6.1. And just tell me when

17 you're there.

18 **A.** I'm there.

19 **Q.** Okay. You see figure 6.1?

20 **A.** I do.

21 **Q.** Now, your models were numbered 1 through 6, correct?

22 **A.** Correct.

23 **Q.** For each of the -- I'm going to focus you on models 1

24 through 5 right now, okay?

25 **A.** Okay.

1   **Q.** For each model, you added new variables, correct?

2   **A.** Correct.

3   **Q.** And in a simplistic way, the higher the number of the

4   model, the more variables there were, correct?

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

6   **Q.** And as you move, for instance, from model 3 to model 4,

7   you added contextual information about, for instance, the

8   applicant's high school, correct?

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

10 **Q.** And the applicant's neighborhood, correct?

11 **A.** Correct.

12 **Q.** And as you move from model 3 to 4, the negative

13 association between Asian-American ethnicity and the personal

14 rating decreases, correct?

15 **A.** Correct.

16 **Q.** Now, as you move from model 4 to 5 on your figure 6.1,

17 you add some other variables, correct?

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

19 **Q.** Teacher ratings, correct?

20 **A.** Correct.

21 **Q.** Guidance counselor rating, correct?

22 **A.** Correct.

23 **Q.** Alumni interview rating, correct?

24 **A.** Correct.

25 **Q.** And as you told me, all of these variables include

1   information that is considered in the application process,

2   correct?

3   **A.**   Correct.

4   **Q.**   And as you move from model 4 to 5 and you include all of

5   this additional information, the negative association between

6   Asian-American ethnicity and the personal rating decreases

7   again, correct?

8   **A.**   Yes, it decreases slightly.

9   **Q.**   Yeah.   And it's a fact, is it not, for each of the

10 models, the more factors that you add in that might replicate

11 the admissions process, the more that the negative

12 association with Asian-American ethnicity decreases?

13 **A.**   It depends on the order that you do them.   So I think

14 that that's not true if you go from 1 to 2, as an example.

15 **Q.**   Fair enough.

16 **A.**   The order does matter.

17 **Q.**   Let me be more specific.   If you go from 3 to 4, you add

18 more factors, correct?

19 **A.**   Correct.

20 **Q.**   4 to 5, you add more factors correct?

21 **A.**   Correct.

22 **Q.**   They're all factors considered in the application

23 process, correct?

24 **A.**   Correct.

25 **Q.**   And as you add more factors, the negative effect of

1 Asian-American ethnicity decreases, correct?

2 **A.** Correct.

3 **Q.** Now, you agree that individuals can have strengths in

4 different areas, correct?

5 **A.** Correct.

6 **Q.** You agree that there are some folks who are book smart,

7 correct?

8 **A.** Correct.

9 **Q.** And there are some people who may not be as book smart

10 but make up for their skills in other dimensions, correct?

11 **A.** Correct.

12 **Q.** And in fact, you've written on the topic, correct?

13 **A.** Correct.

14 **Q.** You've written on the topic that sometimes people who are

15 book smart are weaker in other areas, correct?

16 **A.** Correct.

17 **Q.** And people who may not be quite as book smart have

18 strengths in other areas, correct?

19 **A.** Correct.

20 **Q.** And you specifically looked at it in the context of MBAs,

21 correct?

22 **A.** Correct.

23 **Q.** Turn if you would to Tab 1 -- I'm sorry -- Tab 25 in

24 volume 2. Do you have it before you?

25 **A.** I do.

1   **Q.** This is an article that you wrote, correct?

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

3   **Q.** And it's DX 174.

4   **A.** Yes.

5   MR. LEE: Your Honor, we offer DX174.

6   MR. McBRIDE: No objection, Your Honor.

7   THE COURT: It's admitted.

8   (Defendant Exhibit DX174 admitted into evidence.)

9   BY MR. LEE:

10   **Q.** Professor, you are one of the authors of this article,

11 correct?

12   **A.** Correct.

13   **Q.** And one of the things that you found for MBAs -- this

14 concerns MBAs, correct?

15   **A.** Correct.

16   **Q.** There were some folks that were stronger in the book

17 smart area, correct?

18   **A.** In the context of MBAs outside of the top 25, yes. MBAs

19 inside the top 25, that was not the result. It went the

20 other way.

21   THE COURT: The top 25 what?

22   THE WITNESS: Top 25 MBA programs. So I think he's

23 going to get there, but -- I'll let you go. Sorry to cut you

24 off.

25   MR. LEE: Okay. Since you mentioned it, let me get

1 us there.

2 **Q.** So you're looking at programs outside of what you

3 identified in the article as a top 25 MBA programs?

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

5 **Q.** And you're looking, to be a little bit simplistic about

6 it, about folks who have book smarts and folks who might have

7 other skills, correct?

8 **A.** Sure.

9 **Q.** And what you found was that in the workplace there are

10 people who may not be as book smart but who may have better

11 social skills, better communication skills, other character

12 attributes that help explain their success, correct?

13 **A.** What we found is that people who went to MBA programs

14 outside of the 25 had the features you described relative to

15 people who did not get an MBA. We found the opposite result

16 for people inside the top 25 schools. And I think of Harvard

17 as being more of an elite top school than an MBA program

18 outside of the top 25.

19 **Q.** If you were looking at two candidates who comparable

20 academic qualifications, characteristics like communication

21 skills, social skills, trust, integrity could be important in

22 choosing which applicant you wanted to choose, correct?

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

24 **Q.** And that's precisely what you do at Duke as well,

25 correct?

1   **A.**   Right.

2   **Q.**   All right. Now, I'm going to go back to Tab 31, volume

3   2, the summary sheet from P117, the application. And again

4   I'm going to focus on the profile ratings. As you told me

5   yesterday, you know that SFFA claims that Harvard

6   intentionally discriminates, right?

7   **A.**   Yes.

8   **Q.**   But as you told me yesterday, your model doesn't provide

9   any information about intent one way or another, correct?

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

11   **Q.**   Now, just to be sure we understand, the first reader here

12   is R -- I'm sorry BJG. Do you see that?

13   **A.**   Yes.

14   **Q.**   So we go to the profile ratings, and if we look at the

15   first category, the readers for Asian-American applicants are

16   actually providing those applicants with higher ratings than

17   the quantifiable data might predict, correct?

18   **A.**   Than the quantifiable data that I used, yes.

19   **Q.**   Okay. So the answer is yes, correct?

20   **A.**   Yes.

21   **Q.**   All right. And if I then move to the next box, same

22   reader, that reader is providing Asian-American applicants

23   with a higher rating than the data might suggest, correct?

24   **A.**   Correct.

25   **Q.**   Then you move over two box to the personal rating,

1 correct?

2 **A.** Correct.

3 **Q.** And you contend that that same reader is providing that

4 same applicant with a lower rating than the data would

5 suggest, correct?

6 **A.** Correct.

7 **Q.** And that that's what indicates discrimination, correct?

8 **A.** The evidence is much more than just about what's

9 happening with Asian-Americans.

10 **Q.** Right.

11 **A.** It's one of the pieces of evidence.

12 **Q.** Fair enough. It's one of the pieces of evidence. Now

13 yesterday we mentioned briefly an amicus brief that was filed

14 by a group of economists, correct?

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

16 **Q.** You've read that amicus brief, correct?

17 **A.** I have.

18 **Q.** And that brief actually specifically addresses just what

19 you and I went through, the question of whether it is logical

20 that the same reader would be bumping Asian-Americans up in

21 academics, bumping them up in extra-curriculars but then

22 downgrading them to discriminate against them in the personal

23 rating. Do you recall that in that brief?

24 **A.** That brief parroted the arguments in Card's report,

25 correct.

Q. Let's see what those folks said. You understand that the group included Janet Yellen, the former chair of the Federal Reserve?

A. Right, who did not do any research related to this top.

Q. It included Janet Yellen, the former --

A. That's correct.

Q. It included two Nobel Prize winners?

A. Again, who did nothing related to this topic. One is a macroeconomist. The other is a theorist.

Q. I'm not going to quarrel with you over their qualifications. Let's just see what they said.

A. Okay.

Q. They're economists, all three of them, correct?

A. All correct.

Q. And they filed a brief, correct?

A. Correct.

Q. And they specifically addressed this issue, correct?

A. Correct.

Q. All right. Turn if you would in volume 2 to Tab 28. Do you have it before you?

A. I do.

Q. And do you find the brief of professors of economists that you and I have just been referring to?

A. Yes.

Q. Now, I want to turn you to page 14. And the brief

1 specifically addresses this question of the logic of a single

2 reader bumping Asian-Americans up into categories and then

3 downgrading them in one subscore, correct?

4 **A.** That's correct. I don't view them as bumping them.

5 **Q.** Fair enough.

6 **A.** That's their characterization.

7 **Q.** Bumping is my word. It may be the wrong word. What they

8 are suggesting is that the logic of one reader giving

9 Asian-American applicants a benefit, right, in the academic

10 rating, then moving to the extra-curricular rating and giving

11 them a benefit, and then moving over to and saying now we're

12 going to punish you.

13 **A.** I agree with that logic because I don't think they're

14 giving them a benefit in the academic or extra-curricular

15 rating.

16 **Q.** Let's see what they say. At page 14, do you the see the

17 sentence that says "Dr. Arcidiacono's findings are

18 implausible because they would indicate that Harvard

19 discriminates against Asian-American applicants on one

20 subscore only to turn around and discriminate in their favor

21 on the other two."

22   Have I read that correctly?

23 **A.** You've read that correctly.

24 **Q.** And just to be sure that we know how you understand it,

25 what the professors are referring to is this: The two -- the

1   one subscore is a personal rating, correct?

2   **A.**   Correct.

3   **Q.**   The other two are the personal -- are the academic rating

4   and the extra-curricular rating, correct?

5   **A.**   Correct.

6   **Q.**   And their conclusion from this logic is the next

7   sentence.   "The better and more plausible explanation of

8   these findings is that Dr. Arcidiacono's regression models

9   are simply not reliable enough to measure all the applicants'

10   qualities that drive Harvard's assignment of those ratings."

11   Have I read that correctly?

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

13   **Q.**   Now, in fairness, you disagree?

14   **A.**   Yes.

15   **Q.**   Correct.   Dr. Card agrees with them, correct?

16   **A.**   I would say they agree with Dr. Card.

17   **Q.**   Okay.   Dr. Card and they agree with each other?

18   **A.**   Yes.

19   **Q.**   Okay.   And each of them has specifically addressed the

20   logic of having a single reader discriminate against an

21   applicant in one subscore and then turn around and

22   discriminate in their favor on two others, correct?

23   **A.**   Correct.

24   **Q.**   All right.   I want to ask you a couple more additional

25   questions on a separate topic, which is what's included in

1 your models.

2   We've agreed that the data that was available to

3 you and Dr. Card didn't have pluses and minuses from the

4 ratings, correct?

5 **A.** Correct, except in the overall rating.

6 **Q.** Now, the data I made available to you did have notes from

7 the readers in the files, correct?

8 **A.** On the full files, yes.

9 **Q.** But that information wasn't included in your dataset,

10 correct?

11 **A.** No. Correct.

12 **Q.** And your dataset doesn't reflect any discussions of the

13 candidates that occurred at the subcommittee meetings,

14 correct?

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

16 **Q.** And your dataset doesn't reflect any of the discussions

17 that occurred at the committee meetings, correct?

18 **A.** Correct.

19 **Q.** Have you done any work to compare the ratings across

20 these 200,000 applicants where the final decision is reached

21 after the full committee meeting?

22 **A.** All my -- the final decisions, that's what I'm modeling.

23 I guess I'm confused by the question.

24 **Q.** Right. But I'm asking you whether you have done anything

25 to compare the rates, the profile ratings set preliminary

1 with the final decisions after the full committee meeting?

2 **A.** Well, that's what my model was doing.

3 **Q.** That's what you think your models do?

4 **A.** Yes.

5 **Q.** Okay. Fair enough. Now, you know that 40 members

6 participate in that final vote, correct?

7 **A.** Correct.

8 **Q.** You know that that final vote is what determines whether

9 anybody gets in, correct?

10 **A.** Correct.

11 **Q.** And you have not identified for us a single applicant who

12 was discriminated against in that 40-person meeting, correct?

13 **A.** Well, the applicant we looked at, that was a pretty --

14 yeah. I mean --

15 **Q.** What do you know about the discussion that occurred at

16 the full committee meeting on that applicant?

17 **A.** I know nothing about that.

18 **Q.** What do you know about the vote on that applicant at the

19 meeting?

20 **A.** I know nothing about that.

21 **Q.** Do you know whether they got tentatively recommended at

22 any point in time?

23 **A.** Actually, I think we do know that information because

24 you've got the A stars and A dots and so on.

25 **Q.** So that applicant actually got tentatively recommended

1 and then went to a full discussion and then ultimately didn't

2 get in only after the full discussion, correct?

3 **A.** You don't get in when you're labeled standard strong,

4 ever. And you don't -- you virtually never get in without a

5 second reader. Given that neither of one of those events

6 occurred --

7 **Q.** Professor Arcidiacono, did that get recommended to the

8 full committee or not?

9 **A.** I actually don't know.

10 **Q.** Now, you talked a little bit about application files with

11 Mr. McBride, and you talked about one of the application

12 files, correct?

13 **A.** Correct.

14 **Q.** You reviewed a few application files in your expert

15 report, correct.

16 **A.** I reviewed lots of application files. I discussed a few

17 of them in my expert report.

18 **Q.** Fair enough. So you reviewed a lot of application files,

19 correct?

20 **A.** Correct.

21 **Q.** You discussed a few, correct?

22 **A.** Correct.

23 **Q.** Not a single one of them was an SFFA member, correct?

24 **A.** That's correct.

25 **Q.** Both categories, when you reviewed a lot of application

1   files not a single one of them was an SFFA --

2   **A.**   I did review --

3   **Q.**   I'm talking about this big group that you reviewed. I

4   think I know what you're saying to me. Let's look at the

5   broader group that you reviewed. That included SFFA standing

6   members, correct.

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

8   **Q.**   You didn't discuss any of those applications in your

9   expert report, correct?

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

11   **Q.**   You didn't discuss any of them during your testimony

12   yesterday, correct?

13   **A.**   I didn't discuss any of them, that's correct.

14   **Q.**   So even though you had the application files of the

15   standing members of SFFA, you offered no opinion or no

16   comment upon any of them in your expert reports, correct?

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

18   **Q.**   But you did comment upon some other application files,

19   did you not?

20   **A.**   Correct.

21   **Q.**   Turn if you would to Tab 30 in volume 2, which is P112.

22   MR. LEE: Your Honor, I think we'll have to have

23   the public monitor turned off.

24   **Q.**   This is one of the application files that you reviewed,

25   correct?

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

2   **Q.**   Now, in your report, what you did is you then compared

3   that admissions file to the admissions file of an

4   African-American applicant, correct?

5   **A.**   Correct.

6   **Q.**   Let's look at the African-American applicant's file.

7   It's P117 that's at Tab 31 of your notebook.

8   Do you have that before you?

9   **A.**   I do.

10   **Q.**   Now, you suggest in your expert report that this

11   African-American applicant was less deserving of admission to

12   Harvard than some others, correct?

13   **A.**   I am not sure I characterize it that way. I think I was

14   comparing how the applicant was rated relative to the

15   Asian-American applicant's scores.

16   **Q.**   Well, let's -- this applicant, this African-American

17   woman, was, in fact, accepted, correct?

18   **A.**   Correct.

19   **Q.**   Let's look at what her file says.

20   Now, you picked this file for comparison purposes,

21   correct?

22   **A.**   To compare how they were rated on particular measures,

23   correct.

24   **Q.**   Right. Well, I'm going to not just look at how they're

25   rated and measured but what the file says.

1   You agree that there's lots of information that

2   goes beyond just how they're rated in the files, correct?

3   **A.**   Correct.

4   **Q.**   Now, the applicant's SAT I scores were 800, 720 and 740,

5   correct?

6   **A.**   800, 720 and 750 -- because you take the highest score.

7   **Q.**   So it's more than 2200, correct?

8   **A.**   Correct.

9   THE COURT: Which one is this?   Is this the Asian

10   applicant or the African-American?

11   MR. LEE: It's the African-American applicant, Your

12   Honor.   This is P117.

13   THE COURT: I have this.   I just wasn't sure which

14   one you were talking about.

15   **Q.**   The applicant's intended career was in law, correct?

16   **A.**   Correct.

17   **Q.**   Her parents came from Jamaica, correct?

18   **A.**   Correct.

19   **Q.**   Her mother worked as a nurse, correct?

20   **A.**   Yes.

21   **Q.**   If you turn to the page at the bottom which reads 94619,

22   this is the teacher recommendation, correct?

23   Do you have it before you?

24   **A.**   I'm getting there.   Sorry.

25   **Q.**   It's okay.   Just tell me when you're there.

1   **A.**   You said 94619?

2   **Q.**   94619.

3   **A.**   Yes, I'm there.

4   **Q.**   In the second paragraph, the teacher -- her teacher

5   describes her as "Brilliant, driven, talented, organized,

6   popular, motivational, kind and modest, are all words that

7   describe this student," correct?

8   **A.**   Correct.

9   **Q.**   She goes on to say in the last sentence of that

10   paragraph, "She has a leadership ability that allows her to

11   recognize the value and contributions of her peers and rally

12   them to action."

13   Have I read it correctly?

14   **A.**   You have.

15   **Q.**   And then the next paragraph begins, "She," I'm

16   substituting she for her name, "is extremely respected and

17   liked by everyone. She is respected for her rare combination

18   of exceptional talent and modesty." Do you see that?

19   **A.**   I do.

20   **Q.**   And then in the last paragraph this teacher writes,

21   "She," I'm substituting for her name "is without question a

22   leader. Not only at her high school, but also within her

23   community. To say that she is a doer is an understatement.

24   She is a doorman. She opens doors to success for herself and

25   others. She will, without a doubt, open many more in the

1   future for herself, her community and all those who are

2   fortunate to know and work with her. Higher education would

3   provide a door for a young woman like this applicant to

4   develop and share her talents with others."

5   **A.**   And those are great statements --

6   **Q.**   Right.

7   **A.**   -- but she got marked down on every category by the

8   teacher. Got marked as excellent top 10 percent on all of

9   those things.

10   **Q.**   This is -- what you did is you took two candidates, one

11   Asian and one African-American, both of whom had

12   extraordinary records, correct?

13   **A.**   Correct.

14   **Q.**   Both of whom had extraordinary recommendations, correct?

15   **A.**   Correct.

16   **Q.**   One, the Asian-American applicant, had slightly stronger

17   academics. That's your -- correct?

18   **A.**   I think it was more than that, yeah, but correct.

19   **Q.**   Okay. And then if you compared the recommendations, one

20   of the questions raised for the Asian-American applicant was

21   what his interests were beyond academics, correct?

22   **A.**   I would have to go back and look at that one.

23   **Q.**   I don't want to take the time. If you don't remember,

24   we'll let the file stand for itself.

25   But in any event, they're two very strong

1 application files, correct?

2 **A.** Correct.

3 **Q.** With strong academics, correct?

4 **A.** Correct.

5 **Q.** With strong praise from teachers, correct?

6 **A.** Correct.

7 **Q.** Strong praise from guidance counselors, correct?

8 **A.** Correct.

9 **Q.** Comments upon their academic abilities, correct?

10 **A.** Correct.

11 **Q.** Comments upon their extra-curricular abilities, correct?

12 **A.** Correct.

13 **Q.** And comments upon their personal qualities, correct?

14 **A.** Correct.

15 **Q.** Deciding between candidates like that is hard work, isn't

16 it?

17 **A.** It is.

18 **Q.** And in this particular case, the case you picked, the

19 African-American woman got in, correct?

20 **A.** Correct.

21 **Q.** And the Asian-American applicant did not, correct?

22 **A.** He did not get a second read, correct.

23 **Q.** Now, let me just ask you a few questions so we're sure

24 we're level-set as we conclude.

25   To get to your opinion -- I want to ask you about

1   your opinion on the Asian penalty. Okay?

2   **A.** Okay.

3   MR. LEE: And could I have from PD --

4   MR. McBRIDE: PD38.

5   MR. LEE: PD38, slide 42 on the screen. Thank you.

6   MR. McBRIDE: You're welcome.

7   MR. LEE: And let's go a couple more slides to the

8   last slide -- a little further. Okay.

9   **Q.** Do you recall testifying about slide 45?

10   **A.** Yes.

11   **Q.** And what you said is if you take Dr. Card's preferred

12   model, and you remove ALDCs and you remove ALDCs in the

13   personal rating, you get to a statistically significant

14   negative penalty, correct?

15   **A.** Yes. And I also said that Card's own report shows that

16   you don't even have to take out the ALDCs. You just take out

17   the personal rating and you see that effect.

18   **Q.** So I just want to be sure that we're clear.

19   In the first box, which is "Remove ALDCs," that's

20   taking out of the model 30 percent of the people who get

21   admitted to Harvard, correct?

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

23   **Q.** It's taking out of that pool a group of people who are

24   Asian-Americans, have a higher admission rate than white

25   applicants, correct?

1 **A.** Correct.

2 **Q.** And if I move to the personal rating, taking out the

3 personal rating is taking out a rating which you have found a

4 negative association with Asian-American ethnicity, correct?

5 **A.** Correct.

6 **Q.** By the very same readers who are giving positive

7 associations for academics and extra-curriculars, correct?

8 **A.** Correct.

9 **Q.** So to accept your conclusions, you're going to have to

10 conclude that ALDCs should be out of the mix, correct?

11 **A.** No, because just removing the personal rating does the

12 trick.

13 **Q.** Okay. I hear you clearly.

14   So to accept your conclusion, you would have to

15 accept the proposition that the people who are filling in

16 these ratings give a positive association for academics, a

17 positive association for extra-curriculars, and then they

18 move over to the two columns and they give a negative

19 association for personal rating, correct?

20 **A.** Correct.

21 **Q.** And removing ALDCs, which is on your slide, would require

22 you to take out a group of folks who are a substantial

23 portion of the class and for whom Asian-American admission

24 rates are higher, correct?

25 **A.** Slightly higher, yes.

1   MR. LEE: Thank you. Nothing further, Your Honor.

2   MR. McBRIDE: Your Honor, if we could have a short

3   break to organize things and make sure we're as efficient as

4   possible.

5   THE COURT: All right. Ten minutes? What do you

6   want?

7   MR. McBRIDE: Ten minutes would be fabulous.

8   THE COURT: Ten minute-break.

9   (Recess taken 10:42 a.m.)

10   RE-EXAMINATION BY MR. McBRIDE:

11   MR. McBRIDE: May I proceed?

12   THE COURT: Ready when you are.

13   MR. McBRIDE: Thank you, Your Honor.

14   **Q.** Good morning, Professor.

15   **A.** Good morning.

16   **Q.** I want to start with some issues on ALDC, if I could.

17   And I want to be very clear and make sure there's no

18   uncertainty here.

19   Did you find any statistically significant tip for

20   Asian-American legacies in your admissions model?

21   **A.** No, I did not.

22   **Q.** So the model's result for Asian-American legacies

23   coefficient, is that distinguishable from zero from a

24   statistical perspective?

25   **A.** No, it is not.

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 1    Q.   We also heard questions about why one would expect -- or
 2    why would one expect Harvard to treat ALDC Asian applicants
 3    different from non-ALDC applicants.
 4              Do you recall that?
 5    A.   I recall that.
 6    Q.   And to be clear, do you have an understanding, are ALDC
 7    African-American applicants admitted at a higher rate than
 8    non-ALDC African-Americans?
 9    A.   They are admitted at a higher rate, yes, but at the same
10    time, the tip that they get for being ALDC, you don't get
11    both, effectively.
12    Q.   And just focusing on the ALDC applicant admission rate,
13    are ALDC Hispanic applicants, are they also admitted at a
14    higher rate than non-ALDC Hispanic applicants?
15    A.   Correct.
16    Q.   And are ALDC white applicants admitted at a higher rate
17    than non-ALDC white applicants?
18    A.   Correct.
19    Q.   You also had a discussion with Mr. Lee about the
20    variables he said were important to Harvard admissions
21    officers.  Do you recall that?
22    A.   I do.
23    Q.   Talking about parental occupation and intended career?
24    Do you recall that conversation?
25    A.   Correct, yes.
```

1   **Q.**   There are other important variables to Harvard's

2   admissions officers as well; is that right?

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

4   **Q.**   For example, is the overall rating important to Harvard

5   admissions officers?

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

7   **Q.**   How important is it, do you believe?

8   **A.**   I think it's very important. It determines whether you

9   advance to the next stage, or is one of the big determiners

10   about whether you're going to get something like a third

11   reader.

12   **Q.**   Is the overall rating in either yours or Dr. Card's

13   admissions models?

14   **A.**   It is not.

15   **Q.**   So is it fair to say that some variables, even when

16   extremely important to Harvard's admissions process and its

17   admissions officers, are properly excluded?

18   MR. LEE: Your Honor, I'm going to object to the

19   leading. This is their expert. I don't think we can lead

20   him this way.

21   THE COURT: Sustained.

22   **Q.**   I'm going to put one of the demonstratives that Mr. Lee

23   used with you on the board here. This is Plaintiff's

24   Demonstrative 38, slide 47.

25   Do you recall these questions that were being asked

1   about, I believe he said it was 16 percent of Asian

2   applicants who were ALDC were interviewed? I think it was

3   this number down here, 494?

4   **A.** Yes.

5   **Q.** I'd like to show you another piece of evidence that was

6   admitted, P619, which is a summary exhibit that was admitted,

7   which is the basis for some of the data here, and see if we

8   can shed some light on what Mr. Lee was asking. So this is

9   XP619.

10   Did you help prepare this summary exhibit?

11   **A.** I did.

12   **Q.** I just want to focus your attention here on the second

13   column, "Asian-American Applicants." Could you please tell

14   us, what does this chart indicate to you about the relative

15   rate at which Asian-American ALDC applicants and non-ALDC

16   applicants are given staff interviews?

17   **A.** Well, the ALDC applicants are much more likely to get

18   staff interviews; 17 percent of the time versus the non-ALDC

19   applicants being interviewed .87 percent of the time. And in

20   both cases, that 17.12 percent and the .87 percent are the

21   lowest of those four groups.

22   **Q.** Let me highlight across the row here. I'll simply

23   highlight right here.

24   Relative to white African-American and Hispanic

25   applicants, how would you characterize the rate at which

Asian-American ALDC applicants get staff interviews?

A. It's the lowest of the four.

Q. Do you recall Mr. Lee was also asking you yesterday about how the tip for being an ALDC or for a legacy, how that operates?

A. I do.

Q. And you recall that you were answering him that the legacy tip operates differently for different groups?

A. Correct.

Q. And I think it was on page 227 when Mr. Lee said, asked about how tips may operate differently for a different applicant, correct?

And you answered that "A legacy tip may operate more for people who have low academic ratings than for people who have high academic ratings." Do you recall that?

A. I do.

Q. Can you explain what you meant by that?

MR. LEE: I object. Your Honor, this is an opinion that was not disclosed in his opening report or his rebuttal report. It actually was disclosed in some form for the first time in a declaration on a summary judgment motion. It's not something that we could ask him about at his deposition because it had happened months before.

In fact, they had slides which they sent to us the other night. We objected on the basis it's undisclosed

1 opinion, and they withdrew them. They can't get it in now.

2   MR. McBRIDE: Your Honor, Mr. Lee opened the door

3 with his questions.

4   THE COURT: Yeah. Isn't it a fair response because

5 I remember the questions as well.

6   MR. LEE: Your Honor, the questions I asked did not

7 go to this new opinion at all. I was very careful about it

8 since we had tried to avoid -- since we had objected the

9 evening before, and this new opinion, which wasn't in his

10 opening report, wasn't in his rebuttal report, is a new

11 explanation that he hadn't provided before. We never had a

12 chance to --

13   MR. McBRIDE: Your Honor, I'd just respond a couple

14 of things.

15   One, they obviously knew about the opinion because

16 it was part of a declaration that he submitted months ago.

17   Secondly, just to be clear from the transcript,

18 Mr. Lee was repeatedly asking about the tips that were being

19 offered to legacies. And on page 224, 227 and 240, Professor

20 Arcidiacono was attempting to respond to the question and

21 using the exact language.

22   THE COURT: Are you talking about pages of the

23 transcript from yesterday?

24   MR. McBRIDE: Sure. This is --

25   THE COURT: I know you all have these transcripts,

1   but I don't actually have them.

2   MR. McBRIDE: I can put it up on the screen if

3   you'd like.

4   THE COURT: No. That's all right.

5   I think that this question is fair because he's

6   going to be able to explain what he meant by an answer

7   yesterday. He's expanding on an answer from yesterday.

8   We'll take it question by question, but he's not

9   going to offer a new and an undisclosed opinion, but he can

10 clarify what happened yesterday. And we'll take it question

11 by question and see where we end up.

12   MR. McBRIDE: Thank you, Your Honor.

13 **Q.** So to be clear, Professor, when you answered, "A legacy

14 tip may operate more for people who have low academic ratings

15 than for people who have high academic ratings," what did you

16 mean by that?

17 **A.** Well, this information is actually in both my rebuttal

18 and opening report, I just didn't talk about it, which is how

19 the addition to ALDC applicants changes the coefficients of

20 the model.

21   So if you look at the results in my model, it's

22 clear that the academic factors and the extra-curricular

23 factors shrink towards zero when ALDC applicants are

24 included.

25   Now, why would they shrink by adding these

1 applicants in? And that's because the ALDC applicants, those

2 characteristics, are not as important for them.

3   MR. LEE: Your Honor, this is precisely the

4 concern.

5   The questions I asked yesterday, Professor

6 Arcidiacono tried to inject this in. That's why I kept

7 coming back and being precise.

8   This opinion you just heard, if you compare the

9 transcript to their August declaration, I believe, they're

10 virtually identical. It's a new opinion not disclosed. And

11 I agree with Mr. McBride, it is in the declaration filed on

12 the summary judgment motion, but that can't be enough since

13 the reports that occurred in deposition had occurred all

14 months before.

15   MR. McBRIDE: I'll move on from there, Your Honor.

16   THE COURT: Okay. So you can move on. He said

17 it's reflected in his model that's in the report, the

18 rebuttal report? Not --

19   MR. McBRIDE: Yes.

20   THE COURT: -- not the declaration. So that answer

21 is fine.

22   MR. McBRIDE: I will move on, Your Honor.

23   THE COURT: Great.

24   MR. McBRIDE: Thank you.

25 **Q.** Plaintiff's Demonstrative 38, slide 46.

1   Do you recall you were asked some questions by the

2   judge yesterday on this demonstrative?

3   **A.**   I do.

4   **Q.**   And do you recall the judge had noted that within the

5   small sample when you compare the ALDC admit rates as a whole

6   to the Asian ALDC admit rates, they had a higher average

7   admit rate, at least within this smaller sample?

8   **A.**   I do.

9   **Q.**   Now, within these ALDC groups, do you know whether

10 Asian-Americans also have higher qualifications and

11 observable factors than the other members of those groups?

12 **A.**   I suspect that they do, just because the penalty does not

13 significantly control for the characteristics in the model,

14 but I'm not 100 percent sure.

15 **Q.**   Now, if that's correct, that they have higher

16 qualifications than observables, the Asian-Americans in the

17 sample, would that explain in part why you see this slight

18 difference in the admit rates?

19   MR. LEE: I object. He said he didn't know.

20   THE COURT: Sustained.

21 **Q.**   Do you recall the questions from Mr. Lee about the school

22 support measures?

23 **A.**   I do.

24 **Q.**   And the differences that he was pointing to in terms of

25 the deciles for African-Americans, Asian-Americans, whites

1 and Hispanics?

2 **A.** I do.

3 **Q.** And how he was indicating that that might contribute in

4 some way to the differences in the personal rating as between

5 white and Asian-American applicants?

6 **A.** I do.

7 **Q.** First question, to be clear, did your admissions model

8 and your personal rating model -- and let's focus on the

9 personal rating model -- did your personal rating model

10 include controls that accounted for those school support

11 measures?

12 **A.** They did.

13 **Q.** So does your personal rating model control for any

14 differences in school support measures like teacher

15 recommendations and counselor ratings?

16 **A.** It does.

17 **Q.** So if that does, if that is in fact the case, can you

18 explain whether or how any differences in school support

19 measures noted in the descriptive statistics could play a

20 role in the Asian penalty in the personal rating?

21 **A.** I can't.

22 **Q.** Are there also other variables than school support

23 indicators in that model, other observables?

24 **A.** Yes, many other observables.

25 **Q.** How many?

1   **A.** Well, I think roughly 300 variables are included in that

2   model.

3   **Q.** And when you looked at those other observables in your

4   personal ratings model, how did Asian-American applicants do

5   on average versus other applicants?

6   **A.** Oh, they're the top group.

7   THE COURT: Tell me again what you mean by "they're

8   controlled for."

9   THE WITNESS: So within our model, we account for

10 the fact that -- basically whenever you're running one of

11 these models, you're trying to put in all the factors that

12 matter here, subject to them not being directly affected by

13 race. And so what this is saying when we say there's a

14 penalty, it's all else equal. So given the same level of

15 school support measures, given the same level --

16   THE COURT: You're putting in those numbers.

17   THE WITNESS: Yes, those numbers are in --

18   THE COURT: Those ratings are a teacher and the

19 support.

20   THE WITNESS: That's right. They're all in my

21 model of the personal rating. They're also in my model of

22 the admissions, yes.

23   THE COURT: So if your model were to compare two

24 applicants like an Asian applicant and a white applicant or a

25 African-American, if you were going to compare apples to

1 apples, you would be comparing a white applicant that had the

2 same teacher and support scores as the Asian-American

3 applicant or the African-American applicant?

4   THE WITNESS: That's right. And that would be the

5 teacher and support scores, the disadvantages, everything.

6   THE COURT: Are you seeing if the personal ratings

7 correlate to those scores?

8   THE WITNESS: Yes. The teacher support scores do

9 matter for the personal rating.

10   And then if you look at all the things that matter

11 for the personal rating, Asian-American applicants, at least

12 non-ALDC ones, are just as strong as their non-ALDC white

13 counterparts.

14   It gets harder to think about the ALDC because you

15 get a tip for being a legacy and things like that in the

16 personal rating.

17   THE COURT: Go ahead, Mr. McBride.

18   MR. McBRIDE: Thank you, Your Honor.

19 BY MR. McBRIDE:

20 **Q.** You also did -- looked at the school support measure

21 separately in your own model or models of those ratings as

22 well?

23 **A.** I did.

24 **Q.** And who assigns the teacher support ratings on the

25 applications?

1 **A.** The reader of the file.

2 **Q.** So a Harvard admissions officer?

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

4 **Q.** And in your models for the teacher recommendations, I

5 think it's Teacher 1, Teacher 2 and Guidance Counselor, what

6 did you find with respect to the coefficients for

7 Asian-American applicants?

8 **A.** There was a small penalty, despite the fact that on the

9 observable measures associated with higher teacher ratings,

10 Asian-Americans were stronger.

11 **Q.** So what did your model determine about the possibility of

12 an Asian-American penalty in the school support measures

13 themselves?

14 **A.** Well, that would suggest a potential penalty there. And

15 I kept it in because -- for this to be conservative

16 effectively.

17 **Q.** I want to move on. You talked about early action with

18 Mr. Lee. Do you recall that?

19 **A.** I do.

20 **Q.** And he was asking you about the change between your

21 opening and your rebuttal report where you included it in the

22 opening but not in the rebuttal?

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

24 **Q.** I'd like to talk about another difference between your

25 opening and your rebuttal report, if I could.

1   Did you include the overall rating in your opening

2   report?

3   **A.**   So in my opening report, my preferred model had neither

4   the overall or personal, but I showed in using that model

5   that when you add the personal overall, that I still saw a

6   penalty.

7   **Q.**   So you had a -- what model was it in your admissions

8   models in your opening report that had included the overall

9   rating as a check?

10   **A.**   Model 6.

11   **Q.**   That was your model 6.

12   And in your rebuttal report, did you include the

13   overall rating in your model 6?

14   **A.**   I did not because at that point we had an agreement --

15   Professor Card agreed that that overall rating shouldn't be

16   in the model because it was influenced by race.

17   **Q.**   So I want to direct you to your opening report, if you

18   could, please. It's in front of you. I'm going to put it up

19   on the screen.

20   This is your opening report, and it's on the 134th

21   page as one of your tables. And I've tried to find a

22   magnifying glass, but I could not. So I'm just going to blow

23   it up on the screen for you and for Her Honor because I'm

24   assuming that she can't read this either.

25   THE COURT: What tab is the report in? Is it 1, 2?

1   MR. McBRIDE: That's a good question.

2   MR. LEE: Your Honor, I think it's Tab 2 of our

3   notebook.

4   THE COURT: Yes, Tab 2. What page are you on,

5   Mr. McBride?

6   MR. McBRIDE: It is the 134th page. Unfortunately,

7   it is not numbered that far back. That's why I'm putting it

8   on the screen for you. Is the screen fine, Your Honor?

9   Otherwise I can make it --

10   THE COURT: No, the screen is fine.

11   **Q.**   What is this table, B.7.1?

12   **A.**   These show the logit models I estimated in my opening

13   report. This is for the baseline dataset. Model 6 has both

14   the overall and the personal rating in it. It is true that

15   there are some other changes to the model as a result of

16   going through the process, but this is my models from my

17   opening report.

18   **Q.**   I just want to note two coefficients if we could, please.

19   First, in this model 6 for your baseline dataset that

20   included both the personal rating and the overall rating,

21   what did you see for a coefficient on Asian-American

22   applicants?

23   **A.**   That it was negative and significant. You do have to

24   take into account the different interactions, but this would

25   give you the effect for Asian-American males who were not

1   disadvantaged. I believe if you look at the other

2   coefficients, you'll still see that for all the groups it's

3   going to be negative.

4   **Q.** And the negative coefficient again means what?

5   **A.** A penalty against Asian-Americans.

6   **Q.** I want to scroll down in model 6, which is the

7   right-hand- most column. And it's a very long column.

8   Do you see here along the side, you have variables

9   for overall rating?

10   **A.** I do.

11   **Q.** What does that mean, to have these variables in your

12   admissions model?

13   **A.** Well, these overall ratings are relative to an omitted

14   category here, which is going to be the highest category in

15   this case. And what you see is that relative to the highest

16   category, you know, those negative values mean people who

17   have worse overall ratings are going to be less likely to be

18   admitted.

19   **Q.** What do these coefficients that you see for the overall

20   rating help us answer the question we talked about earlier,

21   as to what is the significance of the overall rating for

22   admissions to Harvard?

23   **A.** Oh, it definitely matters. It is a significant predictor

24   of Harvard's admissions decisions.

25   **Q.** Go to the next page, page 135. It has an even smaller

1 type column.

2   MR. McBRIDE: That did not help. Try it one

3 more time. There we go.

4 **Q.** What is table B.7.2?

5 **A.** So these are the estimates from my opening report for the

6 different models, but now we're including the ALDC

7 applicants.

8 **Q.** So this expanded dataset includes all the ALDC applicants

9 as well?

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

11 **Q.** Even athletes here, right?

12 **A.** Even the athletes, yes.

13 **Q.** And model 6, again, that includes the personal and the

14 overall rating?

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

16 **Q.** And in this model 6, what did you see with respect to a

17 penalty for Asian-American applicants?

18 **A.** You see penalty against Asian-American applicants, and,

19 again, you'd have to do the various interactions, but

20 fundamentally, that's not going to change the results for the

21 non-ALDC.

22 **Q.** And just to square this off here. When you look at the

23 overall rating, in your expanded dataset, what does that tell

24 you about the significance of the overall rating even within

25 this model?

1   **A.** It's, again, very important to the admissions decisions.

2   **Q.** So if you go to Plaintiff's Demonstrative 38, slide 29,

3   which we saw yesterday, when you looked at the overall rating

4   itself, and whether or not there was a penalty for being

5   Asian-American in the assignment of high overall ratings,

6   what did you find?

7   **A.** Well, we found a significant penalty against all groups

8   except for female disadvantaged applicants.

9   MR. McBRIDE: I have no further questions.

10   THE COURT: Go ahead, Mr. Lee, when you're ready.

11   MR. LEE: Thank you, Your Honor.

12   RE-EXAMINATION BY MR. LEE:

13   **Q.** Professor Arcidiacono, just a few questions. Two topics,

14   a few questions, okay?

15   On this last set of questions, you were talking

16   about the preliminary overall rating, correct?

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

18   **Q.** It's included in your model 6, correct?

19   **A.** Correct.

20   **Q.** When you filed your opening report in this case, model 6

21   was not your preferred model, correct?

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

23   **Q.** You took out the preliminary overall rating, correct?

24   **A.** I took it out for the preferred model.

25   **Q.** Yes.

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

2   **Q.** So just to be clear, the discussion we just had for five

3   or ten minutes about the preliminary overall rating has

4   nothing to do with your preferred model, correct?

5   **A.** Correct.

6   **Q.** Okay. Now, separate topic, different set of questions.

7   Mr. McBride asked you about the statistical

8   significance of the fact -- withdrawn.

9   He discussed with you the fact that Asian-Americans

10   have a higher admission rate for legacies than do whites.

11   Do you recall that?

12   **A.** I do.

13   **Q.** And he asked you whether it was statistically

14   significant. Do you recall that?

15   **A.** I do.

16   **Q.** Let's see what you said at your deposition. Turn, if you

17   would, to Tab 1 in your notebook, volume 1. Do you have that

18   before you?

19   **A.** I do.

20   **Q.** And I'm going to take you to page 110.

21   MR. McBRIDE: Your Honor, I object. If he'd like

22   to impeach him, he's welcome to impeach him, but I don't

23   think reading from his deposition is appropriate.

24   MR. LEE: I'm impeaching what he said to

25   Mr. McBride.

1   THE COURT: What lines are you aiming for?

2   MR. LEE: I'm going to use the bottom of 110, line

3 25, on to page 111, lines 11 and 12.

4   THE COURT: Yes, you can have that.

5 **Q.** All right. Do you have that before you, bottom of page

6 110?

7 **A.** Yes.

8 **Q.** Line 25?

9 **A.** Yes.

10 **Q.** "Question: That positive number would suggest that there

11 is -- that the estimated effect for Asian-American ethnicity

12 for legacies is positive, correct?"

13   And your answer is?

14 **A.** "Correct."

15 **Q.** "Question: That Asian-American applicants are being

16 admitted at a higher rate than similarly qualified white

17 applicants, correct?"

18   And your answer was?

19 **A.** "Correct," yes.

20 **Q.** It was correct, right?

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

22 **Q.** And then you went on to say, "Though I haven't calculated

23 the significance level of that yet" -- "of that, but, yes,

24 correct?"

25 **A.** "Correct."

1   **Q.**   That was your answer at the time of your deposition,

2   correct?

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

4   **Q.**   It was true, correct?

5   **A.**   It was true at the time of my deposition, correct.

6   **Q.**   You had not computed the statistical significance level

7   as of that time, correct?

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

9   **Q.**   It was not included in your opening report, correct?

10   **A.**   Correct.

11   **Q.**   It was not included in your rebuttal report, correct?

12   **A.**   Correct.

13   **Q.**   And you never corrected this portion of your testimony,

14   correct?

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

16   MR. LEE: All right. Nothing further, Your Honor.

17   THE COURT: You're excused.

18   THE WITNESS: Yes.

19   THE COURT: Why is that everyone's reaction?

20   MS. FASULO: Your Honor, SFFA calls Lucerito Ortiz

21   by deposition.

22   THE COURT: Yes, go ahead.

23   MS. FASULO: We'll just one need one moment to get

24   set up.

25   THE COURT: While we're waiting, the two deposition

         1   designations that you gave me last night I actually just

         2   completely forgot about. So I can do them during lunch, but

         3   I see there's a lot of yellow in here.

         4   Are you objecting to them in their entirety or are

         5   you --

         6   MS. ELLSWORTH: We're objecting in full to both

         7   Dean Fitzgerald and Erin Driver-Lynn on the grounds of

         8   cumulativeness. Both witnesses were here. Dean Fitzsimmons

         9   was on the stand over six hours.

        10   And then to the extent that those objections are

        11   overruled, we also have a variety of outside-the-scope

        12   objections for the most part on the 30(b)(6) designations for

        13   both.

        14   THE COURT: Okay. I'll do these during lunch.

        15   You're not going to get to these two before lunch, right?

        16   MS. HACKER: No. We can get to the others, and I

        17   believe, Your Honor, to make it just a little bit easier over

        18   lunch, the notebook has updated versions of the Dean

        19   Fitzsimmons and Erin Driver-Linn designations. We trimmed

        20   them down a little bit more yesterday evening to make sure we

        21   weren't doing anything cumulative and to get everything done

        22   today.

        23   THE COURT: Are those highlighted or no?

        24   MS. HACKER: They are still highlighted for the

        25   objections.

1	MS. FASULO: May I proceed?
2	THE COURT: Yes.
3	THE FOLLOWING DEPOSITION TESTIMONY
4	OF LUCERITO ORTIZ WAS READ INTO THE RECORD:
5	**Q.** Could you please state your name and business address?
6	**A.** Lucerito Ortiz, Los Angeles, California.
7	**Q.** Okay. After you graduate from Harvard College, where did
8	you begin working?
9	**A.** Harvard College Office of Admissions.
10	**Q.** Okay. How long did you work there, approximately?
11	**A.** In what capacity?
12	**Q.** How long did you work in the admissions office?
13	**A.** In what capacity?
14	**Q.** In any capacity.
15	**A.** I was employed by the Harvard College Office of
16	Admissions in some capacity for approximately nine years.
17	**Q.** Okay. From which dates?
18	**A.** I don't recall specifically.
19	**Q.** If I represented to you that your LinkedIn page says
20	approximately 2007 to 2015, would that sound about right to
21	you?
22	**A.** Yes.
23	**Q.** When you were a Harvard admissions officer, did you
24	review application files?
25	**A.** Can you clarify?

1   **Q.**   What is confusing about that question?

2   **A.**   Can you clarify what you mean by "review applications

3   files"?

4   **Q.**   When an application file came in, did you look over the

5   file and assign ratings to the student's application file?

6   **A.**   I was responsible for reading application files.

7   **Q.**   Do you know approximately how many you did a year?

8   **A.**   It would vary.

9   **Q.**   If I represented to you that your LinkedIn page said that

10   you read and evaluated over 1600 applications per year, does

11   that sound about right?

12   **A.**   Yes.

13   **Q.**   Okay.

14   THE COURT: Do me a favor and pull that microphone

15   closer to your mouth. Yeah. Thanks.

16   THE READER: Sorry.

17   **Q.**   Okay. Would you also give a student who you were

18   reviewing a, quote, overall rating?

19   **A.**   Yes.

20   **Q.**   Okay. Would you take a student's race into account when

21   deciding that student's overall rating?

22   **A.**   Race was one of many factors taken into account.

23   **Q.**   Was it always taken into account?

24   **A.**   It would depend on the student.

25   **Q.**   Have you ever reviewed a student where you did not take

```
 1    his or her race into account when deciding his or her overall

 2    rating?

 3    A.   I don't recall specific applications.

 4              MS. FASULO:  SFFA offers P181 which was marked

 5    as Ortiz Exhibit 1 in the deposition.

 6         MS. ELLSWORTH:  No objection.

 7         THE COURT:  Admitted.

 8         (Plaintiff's Exhibit P181 admitted into evidence.)

 9         MS. ELLSWORTH:  I thought we did that already.

10    Q.   Please take your time to skim through this and let me

11    know when you're ready.

12         Do you recognize this document?

13    A.   I don't recall --

14    Q.   In general -- sorry.

15    A.   I don't recall these specific documents.

16    Q.   In general, do you have any idea what this is?

17    A.   Yes.

18              MS. FASULO:  SFFA offers P81, Ortiz Exhibit 2.

19         MS. ELLSWORTH:  No objection.

20         THE COURT:  Admitted.

21         (Plaintiff Exhibit P81 admitted into evidence.)

22    Q.   I believe this will be Exhibit 2.  Just take some time to

23    read it.

24         Do you recognize this email?

25    A.   Yes.
```

1   **Q.**   And who was it sent to?

2   **A.**   Marlyn McGrath.

3   **Q.**   And is this from you, correct?

4   **A.**   Yes.

5   **Q.**   Okay. What is the training session that you are

6   referencing in this email?

7   **A.**   I believe it was a training session we provided at a

8   staff retreat.

9   **Q.**   Was the retreat on Harvard's campus?

10   **A.**   Yes.

11   **Q.**   I'm sorry. What made it a retreat? Did you go anywhere?

12   **A.**   I don't know why it was called a staff retreat. We had

13   one, as I recall, every year.

14   **Q.**   Okay. And what was the substance of this training

15   session that you were giving?

16   **A.**   I don't recall specifically what we said. Generally I

17   recall covering topics around demographic information and

18   information about specific racial groups.

19   **Q.**   Did you give this presentation with anyone else?

20   **A.**   Yes.

21   **Q.**   Who else?

22   **A.**   Tia Ray.

23   **Q.**   Okay. In your presentation, did you discuss how an

24   admissions officer should use race in evaluating application

25   files?

A. Not that I recall.

Q. In your time as an admissions officer, did anyone ever teach you how to use race as part of your review of an applicant's file?

A. Can you clarify?

Q. What should I clarify?

A. What did you mean by "did anyone ever teach me"?

Q. Did anyone ever instruct you as to how to use race in the admissions process?

A. Not that I recall.

Q. Then how did you know how to do it?

A. I was given general training on how to review applications. I received feedback on a set number of applications, and I sought feedback additionally to help in developing my approach to evaluating applicants.

Q. Do you recall receiving any written documentation about how you should use race in the admissions process?

A. I don't recall.

Q. But you do recall receiving oral training as to how to use race in the admissions process; is that correct?

A. I recall receiving oral training on how to evaluate applicants. I don't recall the specific substance of that training, and I don't recall a specific substance of my training.

Q. Did you ever ask anyone advice on how to use race in the

1 admissions process?

2 **A.**   I don't recall.

3 **Q.**   Is it safe to say that either you or Tia Ray wrote this;

4 is that correct?

5 **A.**   Yes.

6 **Q.**   Okay. Did you ever receive questions about when to take

7 race into account in the admissions process?

8 **A.**   I don't recall.

9 **Q.**   Did you ever receive questions about how to take race

10 into the process, race into account in the admissions

11 process?

12 **A.**   I don't recall.

13 **Q.**   Did you ever review an application of a Latino student

14 who did not discuss his or her race or ethnic background in

15 his application?

16 **A.**   Yes.

17 **Q.**   Would you take that student's race into account when

18 deciding whether he or she should be admitted into Harvard?

19 **A.**   Yes.

20 **Q.**   Why would you do that?

21 **A.**   Because race was one of many factors I considered in

22 evaluating applicants.

23 **Q.**   Even if the student made no mention of it in his personal

24 essay or anywhere in his applications, you would still take

25 race into account?

1 **A.** Yes.

2   MS. FASULO: Your Honor, SFFA now calls Grace Cheng

3 by deposition.

4   THE COURT: Go ahead.

5   THE FOLLOWING DEPOSITION TESTIMONY

6   OF GRACE CHENG WAS READ INTO THE RECORD:

7 **Q.** Could you please state your name and address for the

8 record.

9 **A.** Grace Cheng, Watertown, Massachusetts.

10 **Q.** Could you please break down the time spent at Harvard

11 again, employment-wise?

12 **A.** I started as an admissions officer in 2002. I believe I

13 was promoted to a senior admissions officer in 2006 or '7.

14 Then I was a senior admissions officer when I left in 2009.

15 **Q.** Okay. So now you've left Taipei. Can you tell me how

16 you came -- how you came to come back to Harvard and what

17 your position was when you returned?

18 **A.** I applied for the associate director of admissions for

19 staff development position.

20 **Q.** And I take it you got that position; is that right?

21 **A.** Yes.

22 **Q.** And you were in that role until I think you said 2015?

23 **A.** Yes.

24 **Q.** Okay. And then what happened in 2015?

25 **A.** I applied for the director of admissions job at Wellesley

1 College.

2 **Q.** Okay. What were your duties as the associate director of

3 admissions?

4 **A.** I was responsible for training new admissions officers

5 and on-boarding new officers.

6 **Q.** Are those separate things, training and on-boarding?

7 **A.** Yes.

8 **Q.** Can you explain what each of those is?

9 **A.** On-boarding is literally the logistical arrangements to

10 welcome a new staff member.

11   Training was only for people who were going to read

12 admissions files.

13 **Q.** And so what did the training and reading procedures of

14 application files entail?

15 **A.** Using old real admissions cases to acclimate readers as

16 to what an application looked like, the different sections of

17 a file and how to evaluate each file.

18 **Q.** Is there training about the use of race in the

19 application file?

20 **A.** No.

21 **Q.** Is there any discussion about an applicant's race in the

22 training of new readers?

23 **A.** Yes.

24 **Q.** Can you tell me what is discussed about race in the

25 training of new readers?

1   **A.**   It is one data point that is self-reported by the

2   applicant that a reader may receive and is part of a holistic

3   evaluation.

4   **Q.**   Is that documented anywhere?

5   **A.**   Yes.

6   **Q.**   Where?

7   **A.**   The "Reading Procedures Document."

8   **Q.**   Did new readers ever ask questions about how to use race

9   in considering application files?

10   **A.**   Not that I remember.

11   MS. FASULO: SFFA offers P579 marked as Cheng

12   Exhibit 2.

13   MS. ELLSWORTH: No objection.

14   THE COURT: It's admitted.

15   (Plaintiff Exhibit P579 admitted into evidence.)

16   **Q.**   I will ask the reporter to mark as Exhibit 2 an email

17   Bates-labeled HARV32540.   It is a one-page email.   Just let

18   me know when you've had a chance to review the email.

19   THE COURT: Do you want to blow that up for me,

20   please.

21   MS. FASULO: Absolutely.

22   **Q.**   Have you had a chance to review the document?

23   **A.**   Yes.

24   **Q.**   Do you recognize this document?

25   **A.**   I do not.

1   MS. FASULO: SFFA offers P268 marked as Cheng

2   Exhibit 10.

3   MS. ELLSWORTH: No objection.

4   THE COURT: It's admitted.

5   (Plaintiff Exhibit P268 admitted into evidence.)

6   **Q.** It is an email chain between Katie Clagett to Grace Cheng

7   dated February 11th, 2014. Have you had a chance to review

8   the document?

9   **A.** Yes.

10   **Q.** Do you remember this email exchange?

11   **A.** I do not.

12   THE COURT: Do I have copies of these documents? I

13   think you just gave me Ortiz, right?

14   MS. FASULO: I apologize, Your Honor. May I

15   approach?

16   THE COURT: Yes, of course.

17   **Q.** Well, there's two. You're only on the top one. I guess

18   my question is, what's your understanding of why -- strike

19   that.

20   My question is, what's your memory of what Katie is

21   sending to you?

22   **A.** I don't remember this particular exchange.

23   **Q.** Okay. Does reading it refresh your recollection?

24   **A.** No.

25   MS. FASULO: SFFA offers P580, Cheng Exhibit 11.

1   MS. ELLSWORTH: No objection.

2   THE COURT: Admitted.

3   (Plaintiff Exhibit P580 admitted into evidence.)

4   **Q.** Have you had a chance to review this email?

5   **A.** Yes.

6   MS. FASULO: SFFA offers P282, Cheng Exhibit 12.

7   MS. ELLSWORTH: No objection. For this one and the

8   next one, can we just turn off the public monitor screen?

9   THE COURT: Which exhibit?

10   MS. FASULO: P282.

11   (Plaintiff Exhibit P282 admitted into evidence.)

12   THE COURT: Why were you --

13   MS. ELLSWORTH: It's the bottom part of the email

14   that has a bunch of identifying information about individuals

15   corresponding. So if that's going to blown up, it's probably

16   fine.

17   THE COURT: Okay. Let's leave it then.

18   **Q.** Have you had a chance to review the document?

19   **A.** Yes.

20   MS. FASULO: SFFA offers Exhibit P581, Cheng

21   Exhibit 17.

22   MS. ELLSWORTH: No objection. This is a discussion

23   about an applicant. I'd ask for the screen to be turned off.

24   THE COURT: Yes.

25   (Plaintiff Exhibit P581 admitted into evidence.)

1 **Q.** Have you had a chance to review this document?

2 **A.** Yes.

3 **Q.** Do you remember this email exchange?

4 **A.** I do not.

5   MS. FASULO: SFFA offers Exhibit P219, Cheng

6 Exhibit 18.

7   MS. ELLSWORTH: No objection. Same request on the

8 public gallery screens. It's a discussion of applicants.

9   THE COURT: Yes, that's fine.

10   (Plaintiff Exhibit P219 admitted into evidence.)

11 **Q.** Do you recognize this email exchange?

12 **A.** I do not.

13   MS. FASULO: Thank you. At this time SFFA calls

14 Caroline Weaver by deposition. May I approach, Your Honor?

15   THE COURT: Yes.

16   THE FOLLOWING DEPOSITION TESTIMONY OF

17   CAROLINE WEAVER WAS READ INTO THE RECORD:

18 **Q.** How long were you employed at the Harvard Admissions

19 Office?

20 **A.** Two years.

21 **Q.** From when to when?

22 **A.** I worked there from August 2013 until August 2015.

23 **Q.** And did you attend Harvard University?

24 **A.** Yes.

25 **Q.** Did you graduate?

1   **A.**   I graduated in May of 2013.

2   **Q.**   When you receive an applicant's folder, it sets forth the

3   applicant's race, correct?

4   **A.**   When submitting a common application or the universal

5   application, the student has the option to select their race

6   or ethnicity.

7   **Q.**   If that option was selected, would that information be

8   included within the applicant's folder?

9   **A.**   Yes, along with many, many other things.

10   **Q.**   Is there ever a time during the application review

11   process in which the first reader is not aware of the

12   applicant's race?

13   **A.**   Yes.

14   **Q.**   When?

15   **A.**   It depends completely on the application and the

16   individual applying.

17   **Q.**   How does the applicant's race factor into the overall

18   score?

19   **A.**   I wouldn't say that it factors in directly.

20   **Q.**   But it does factor in indirectly in instances?

21   **A.**   An applicant's race becomes important in cases where the

22   applicant makes that an important part of their folder; if

23   it's an important part of their identity and the way they

24   express themselves in their application.

25   **Q.**   How do you determine whether an applicant's identity or

1   race is an important part of that applicant?

2   **A.**   An applicant may write their essay about their personal

3   identity or background.

4   **Q.**   Anything else?

5   **A.**   I can remember cases where a student was very involved in

6   activism surrounding their background or ethnicity.

7   **Q.**   And in those cases, would those instances concerning race

8   factor into your overall score of the applicant?

9   **A.**   It depends completely on the applicant and the individual

10   application.

11   **Q.**   But it could?

12   **A.**   If a student was -- made it a very important part of

13   their identity and said that that's the way that they wanted

14   to get involved with activities on campus, that could be an

15   example in where race was a part of the folder that impacted

16   an admissions decision.

17   **Q.**   And which could factor into the overall score?

18   **A.**   I don't agree with the statement that the race is

19   factored into the overall score.

20   **Q.**   I believe you testified earlier that race could

21   indirectly influence the overall score. Is that accurate?

22   **A.**   In a very indirect sense. A certain race would not boost

23   an overall score. If the racial identity of an applicant was

24   something the applicant made really important about their

25   application, and then it made that application compelling and

1 strong in terms of their extra-curriculars, then all of the

2 factors that are combined in the evaluation of a folder,

3 including academics and all of the other pieces, if all of

4 those things were positive, it could mean that an admissions

5 officer felt strongly about the case.

6 **Q.** What were you told from others in the admissions office

7 about the way in which race factored into your decision as a

8 first reader?

9 **A.** I wasn't given any formal instructions about how race

10 should factor into a student's score.

11 **Q.** Were you given any instruction, including informal

12 instruction, as to how race should factor into a score as a

13 first reader?

14 **A.** Again, race is just one small component of many that were

15 considered when reviewing a student's application.

16 **Q.** I appreciate that, but the question was, were you told

17 from anyone else within the admissions office, either

18 formally or informally, how -- instruction on how race should

19 factor into a score?

20 **A.** I'm interested --

21 **Q.** I'm interested --

22   MS. FASULO: Oh, I'm sorry.

23   MS. HACKER: That's you. Sorry.

24 **Q.** I'm interested in what others may have told you about how

25 race should factor into the score.

A. I don't recall being given any instructions.

Q. At all?

A. As it relates to giving a student extra points for a particular race or ethnicity.

Q. I'll rephrase it from the beginning.

Were you ever expected or told to elevate or give additional consideration to candidates from underrepresented groups?

A. I don't recall being told that, no.

Q. Were you expected to elevate such candidates at any time?

A. A student would not have been, to use your words, not mine, "elevated" strictly because of their race or ethnicity. Again, that's just one factor.

Q. That wasn't my question.

My question was, was there ever a time during -- during your -- during the time you were an admissions officer at Harvard where anyone else in the admissions office told you that there was an underrepresented group which needed additional consideration going forward?

A. Not that I can recall.

MS. FASULO: SFFA offers P280 and P340 which were marked as Weaver Exhibits 13 and 14 respectively.

MS. ELLSWORTH: No objection.

THE COURT: They're both admitted.

(Plaintiff Exhibits 280 and 340 admitted into

1 evidence.)

2 **Q.** Can you take a moment to review the email string which

3 has been marked as Exhibit 13.

4   Let me know when you're done.

5 **A.** I've reviewed Exhibit 13.

6 **Q.** If you look at the bottom of this page, the bottom of the

7 email string, do you agree that this shows that as listserv

8 sent to your work email account, an article from the

9 Chronicle of Higher Education?

10 **A.** It appears that I received this email in my work account

11 in 2014 as did everybody, every admissions and financial aid

12 officer on the list.

13 **Q.** Is the exhibit which has been marked as Exhibit 14 the

14 article which was linked to Mr. Smith's email?

15 **A.** The title of the link and the title of the article appear

16 to be the same.

17 **Q.** Do you agree that he was sending an article from the

18 Chronicle of Higher Education?

19 **A.** In his email he wrote, "The following is an article in

20 the Chronicle of Higher Education."

21 **Q.** And you agree the title to the article that was marked as

22 Exhibit 14 is "Affirmative Action Foe Plans Campaigns Against

23 3 Universities"?

24 **A.** Yes, you read that correctly.

25 **Q.** And then it appears that you forwarded Mr. Smith's email

1   and the link to the article to two email addresses on the

2   next day, April 8 of 2014, correct?

3   **A.**   It appears so. I don't remember sending this email,

4   though.

5   **Q.**   Do you recall who you sent this article to?

6   **A.**   I'm not sure, no.

7   **Q.**   Was it fellow admissions officers?

8   **A.**   I believe I sent this to my parents, but I don't actually

9   know for sure.

10   **Q.**   What makes you think you sent it to your parents?

11   **A.**   I'm looking at the redacted emails, and I know that one

12   of my parents has a .net and the other has a .com.

13   **Q.**   Was it common practice, for sensitive issues, to ask

14   others to respond to your Gmail account?

15   **A.**   No.

16   MS. FASULO: SFFA calls Ms. Howrigan by

17   designation.

18   THE FOLLOWING DEPOSITION OF

19   KAITLIN HOWRIGAN WAS READ INTO THE RECORD:

20   **Q.**   Can you please state your name and your business address.

21   **A.**   Caitlin A. Howrigan. Current business address?

22   **Q.**   Sure.

23   **A.**   Bronx, New York.

24   **Q.**   And where did you start working after you graduated?

25   **A.**   I began working at this office of admissions upon

1   graduation.

2   **Q.**   And just roughly, how long were you there?

3   **A.**   I worked there for approximately 11 years.

4   **Q.**   Do you know the years?

5   **A.**   Well, I also worked there as an undergraduate student

6   employee as a work study -- on a work-study basis, so I

7   actually began employment on a part-time basis in the fall of

8   2001 and worked there until last June.

9   **Q.**   Approximately how many years did you review applications

10 at Harvard?

11 **A.**   Ten years.

12   MS. FASULO: SFFA offer Plaintiff's Exhibit P95,

13 what is Exhibit 1 in Ms. Halligan's deposition.

14   MS. ELLSWORTH: No objection.

15   THE COURT: It's admitted.

16   (Plaintiff Exhibit P95 admitted into evidence.)

17 **Q.**   Please take some time to read through these and let me

18 know when you are finished.

19 **A.**   Okay.

20 **Q.**   Do you recognize this document?

21 **A.**   Now that I'm seeing it, it appears to be notes that I

22 took.

23 **Q.**   Let's start with -- do you recall Dean Fitzsimmons

24 telling the full committee how many students had been

25 preliminarily admitted up to that point?

1   **A.**   Yes.

2   **Q.**   Do you ever recall Dean Fitzsimmons breaking down that

3   number by race?

4   **A.**   Yes.

5   **Q.**   When do you recall hearing that?

6   **A.**   At various times during the committee process.

7   **Q.**   So would you have heard it at the beginning of the full

8   committee?

9   **A.**   We may have heard it throughout the application cycle,

10   prior to committee even beginning.

11   **Q.**   During full committee, did you ever hear the number of

12   students that had been admitted the prior year?

13   **A.**   Yes.

14   **Q.**   During full committee, did you ever hear those numbers

15   from prior year broken down by race?

16   **A.**   In terms of those numbers, I'm not sure what you are

17   referring to.

18   **Q.**   Of students that had been admitted the prior year.

19   **A.**   Those numbers being the percentages or those numbers

20   being --

21   **Q.**   The percentages from prior year.

22   **A.**   Yes.

23   **Q.**   When would you hear those types of numbers from year

24   prior?

25   **A.**   Those types of numbers being applications numbers or

1 admit numbers?

2 **Q.** Admit numbers broken down by race.

3 **A.** The question was when?

4 **Q.** Yes.

5 **A.** At various junctures throughout the process.

6 **Q.** Would you ever hear those numbers before full committees

7 ever?

8 **A.** I don't recall ever hearing them prior to full committee.

9 **Q.** Do you ever recall hearing them in full committee?

10 **A.** Yes.

11 **Q.** Do you know why you would hear those types of numbers?

12 **A.** I'm not sure why they were shared.

13 **Q.** Do you know who would typically share those with you?

14 **A.** The only person I ever heard share those numbers was

15 Dean Fitzsimmons.

16   MS. FASULO: SFFA offers Plaintiff's Exhibit 96,

17 what is Exhibit 4 in the deposition.

18   MS. ELLSWORTH: No objection.

19   THE COURT: It's admitted.

20   (Plaintiff Exhibit P96 admitted into evidence.)

21 **Q.** Do you recognize this document?

22 **A.** These appear to be notes that I took.

23 **Q.** Do you know when generally you would have taken these?

24 **A.** I'm not sure, based on what is listed here.

25 **Q.** If the student included his or her race, would you

1   consider that piece of information when deciding whether to

2   admit him or her?

3   **A.**   We were instructed to consider all of the information

4   provided by the student and those they had asked to write on

5   their behalf as part of the admissions process.

6   **Q.**   Did you ever know a student's race but not consider it

7   when making your decision?

8   **A.**   We were always instructed to take into consideration

9   every piece of information the student shared with us.

10   **Q.**   So how would you take the student's race into account if

11   all you had was a single piece of information?

12   **A.**   It's just one piece of information among the hundreds of

13   other pieces of information you are using to build an

14   understanding of a student and their experiences.

15   **Q.**   Right. But what conclusions would you draw about a

16   student from race alone?

17   **A.**   Only that, at that moment in time they had indicated that

18   that is how they self-identified.

19   **Q.**   If at the end of the admissions cycle the class was 45

20   percent Asian, 45 percent white and 10 percent students of

21   other races, would that be problematic?

22   **A.**   If those were the strongest students that we had

23   determined were in that given applicant pool at that time and

24   brought the most educational benefit to their peers, no.

25   **Q.**   If at the end of the admissions cycle there were only 1

percent African-Americans admitted to Harvard, would that be

problematic?

A. I'm not sure what you mean by "problematic."

Q. Would you be concerned with whether students would

receive the educational benefits of diversity?

A. If the committee had concluded a careful review and taken

into consideration all factors and those were deemed to be

the strongest applicants in that given pool, then that is the

class that should be seated.

          MS. PERRY: SFFA calls Brock Walsh by deposition.

        THE FOLLOWING DEPOSITION TESTIMONY OF

        BROCK WALSH WAS READ INTO THE RECORD:

Q. So you started your employment at Harvard in August 2012.

Do I have that right?

A. Yes.

Q. And how long were you there for?

A. For just under three years.

Q. Can you describe to me generally the work you did as an

admissions officer while at Harvard?

A. My duties include reviewing applications as a first

reader from three geographical regions, evaluating them,

recommending them or not; meeting with prospective applicants

in the office, conducting information sessions, going on

joint travel; and later in my tenure, acting in a capacity as

a liaison with other alumni interviewers.

1   And I believe the language is, "and any duties seen

2   fit by the Dean" according to my employment contract.

3   **Q.**   When you joined the Harvard Admissions Office, did you

4   receive training for how to read and score applications?

5   **A.**   Yes.

6   **Q.**   How did you receive that training?

7   **A.**   Day one through day five, I think it was, I was joined by

8   my other first years and given training instruction from two

9   colleagues at the admissions office.

10   **Q.**   Did you ever receive any additional training besides that

11   initial training that you just described?

12   **A.**   Perhaps. I can't remember specifically being trained in

13   something else, but it was mostly trial by fire.

14   MS. PERRY: Your Honor, may I approach?

15   THE COURT: Yes.

16   MS. PERRY: Thank you. SFFA offers Plaintiff's

17   Exhibit 72, which is Exhibit 2 in the Walsh deposition.

18   MS. ELLSWORTH: No objection.

19   (Plaintiff Exhibit P72 admitted into evidence.)

20   **Q.**   When you were an admissions officer and you would review

21   a student's file, would you assign a student a score in the

22   personal category?

23   **A.**   Yes.

24   **Q.**   How would you calculate that score?

25   **A.**   I would like to take into consideration whatever relevant

1 information I had, were that his essay, her essay, her

2 interview and the opinions about that applicant as expressed

3 by others.

4 **Q.** And what were you ultimately trying to decide when

5 assigning a personal rating?

6 **A.** Whether that student would contribute to the class,

7 classroom, roommate group, to the class as a whole, their

8 human qualities.

9 **Q.** Can you give me some examples of some types of things you

10 would see in an application that might help you make that

11 determination?

12 **A.** Comments from counselors and/or teachers and/or

13 principals that alluded to the applicant's quality as a

14 friend, as a mollifying addition to their existing high

15 schools. It is a little hard to talk about in general, but

16 sort of add it all up and get a feeling.

17   MS. HACKER: Your Honor, I believe that's all the

18 designations we have so far, so we'll just have Dean

19 Fitzsimmons and Erin Driver-Linn left after lunch.

20   THE COURT: If you give me -- if you give me -- I'm

21 done with Linn, if you want to do that one.

22   Do you have it in front of you?

23   MS. HACKER: I do.

24   MS. ELLSWORTH: Your Honor, before we begin, I just

25 want to renew our objection in full.

1   THE COURT: Well, I'm going to let them have it.
2   The objections on the first page are overruled. The
3   objections on the second page are overruled.
4   You can have the question -- on page 3, you can
5   have the question at line 19.
6   I'm sorry. They're sustained from line 19 down
7   through line 9, and you can have the last question at line
8   10.
9   What you can't have is on the third page, line 19
10   to line -- basically line 9.
11   MS. PERRY: May I approach?
12   THE COURT: Yes.
13   MS. PERRY: SFFA calls Erin Driver-Linn by
14   designation.
15   THE FOLLOWING DEPOSITION TESTIMONY OF
16   ERIN DRIVER-LINN WAS READ INTO THE RECORD:
17   **Q.** Is that the -- is that the meeting that you're inviting
18   -- sorry.
19   Is that the meeting that you're inviting him to in
20   this email?
21   **A.** I don't think so.
22   Oh, it could be. It could be February 25th, but I
23   was -- I don't remember the COHFE discussion.
24   **Q.** Well, his reply to you says, "Perhaps we could meet on
25   the 25th about COFHE and the other issues as well."

1   Did I read that correctly?

2 **A.** You did.

3 **Q.** And so do the other issues include those issues that came

4 up around the Unz discussion?

5 **A.** Presumably he's referring back to my email.

6 **Q.** Did OIR, in fact, meet with Dean Fitzsimmons on February

7 25th, 2013?

8 **A.** My best understanding in preparation for this deposition

9 is that we did.

10 **Q.** And who else was at that meeting?

11 **A.** I'm not sure.

12 **Q.** Do you have any idea who else was at that meeting?

13 **A.** I think, based on the preparation, that it would have

14 been Mark Hansen, Erica Bever, potentially Elizabeth Yong,

15 potentially Sally Donahue, but I'm not sure.

16 **Q.** And Dean Fitzsimmons?

17 **A.** And Dean Fitzsimmons.

18 **Q.** Anybody else?

19 **A.** I don't think so.

20 **Q.** And you were prepared to share his work product with

21 Dean Fitzsimmons?

22 **A.** We did share it to the best that I can reconstruct in

23 preparation; and I would say in general, we felt that showing

24 preliminary work to Dean Fitzsimmons was fine. He loved to

25 talk about statistics, presumably still does, and so I didn't

1   perceive him to be the same kind of audience as other groups.

2   **Q.** You were more comfortable sharing work product with

3   Dean Fitzsimmons than other people outside the office?

4   **A.** More comfortable sharing preliminary work product than

5   other people.

6   MS. PERRY: SFFA offers Plaintiff's Exhibit 34,

7   which is marked as Exhibit 15 in the deposition.

8   MS. ELLSWORTH: No objection.

9   THE COURT: It's admitted.

10   (Plaintiff Exhibit P34 admitted into evidence.)

11   **Q.** Do you recognize this document?

12   **A.** I'm not sure if I saw it in preparation for today. I

13   might have.

14   **Q.** Do you recall attending a meeting on September 9th, 2013

15   regarding Fisher v. The University of Texas?

16   **A.** Not specifically.

17   **Q.** Do you have any reason to doubt that such a meeting took

18   place?

19   **A.** No.

20   **Q.** Do you know what was discussed at this meeting?

21   **A.** No.

22   THE COURT: All right. We'll have to take the

23   lunch break because the Fitzsimmons objections are mostly

24   about scope, and I need to know what the 30(b)(6) notice was

25   for.

1   MS. ELLSWORTH: Do you need a copy, Your Honor.

2   THE COURT: Well, do you want to just come up, and

3 we'll let everyone else go and we can discuss it.

4   THE COURT: All right. So why don't we come back

5 at -- what are we doing this afternoon?

6   MS. ELLSWORTH: Mr. Hughes?

7   MR. HUGHES: Sorry, Your Honor.

8   THE COURT: Mr. Hughes, what are we doing this

9 afternoon?

10   MR. HUGHES: I didn't hear the question.

11   THE COURT: What are we doing this afternoon?

12   MR. HUGHES: This afternoon we'll do whatever we

13 have for Dean Fitzsimmons, which is a video. So once we get

14 your rulings, we'll make quick modifications to that, we can

15 play that.

16   Then I would like to do an offer -- I would like to

17 offer the exhibits related to something we talked about at

18 sidebar last week, which is the email exchange between

19 Dean Fitzsimmons and Mr. Hibino. I'd like to offer those

20 into evidence and be heard on an offer of proof along those

21 lines.

22   And then I think we're -- we'll be able to end

23 early and move to the Amici on Monday.

24   I don't think we want to rest our case, given the

25 issues that we discussed at sidebar yesterday morning. I

think Your Honor probably understands --

        THE COURT: Is this a very polite request that we not, actually, do anything this afternoon?

        MR. HUGHES: Well, I would like to get Dean Fitzsimmons played, and I would like to be -- I do need to be heard on this Mr. Hibino/Dean Fitzsimmons email exchange.

        It's as good a time as any, from my perspective, but if you'd prefer to do that another day, of course --

        THE COURT: Well, not that I'm -- we don't have a full afternoon in store today.

        MR. HUGHES: You are right, and hopefully we're not in the doghouse for that.

        THE COURT: No. That's fine. You guys have done a very good job of sticking to the schedule. It took like four questions to --

        MR. HUGHES: I took the red pen to the depositions last night and hacked them and hacked them and hacked them, so --

        THE COURT: It just took a lot of questioning to get to the answer.

        MR. HUGHES: Sorry.

        MS. ELLSWORTH: He didn't want to be in the doghouse.

        MR. LEE: I'll represent him at the next

1   deposition.

2   THE COURT: Yeah, that's fine. So we'll figure out

3   the Fitzsimmons. Now we'll take a lunch break. Since it's

4   going to be a short afternoon, why don't we come back at

5   1:00.

6   MR. HUGHES: Sounds great, Your Honor. Thank you,

7   Your Honor. (Recessed, 11:55 a.m.)

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**** AFTERNOON SESSION ****

THE COURT: All right. I ruled on the deposition designations for Mr. Fitzsimmons before we went to lunch. So let me just quickly put those on the record. The objections on page 1 are sustained. Page 2 are sustained up until the middle of page 3. The objection that begins at 142 is overruled. You're going to be allowed to play through the middle of page 4 up through line 143.

The objection on page 153 is sustained. That keeps out the rest of that page and the first half of page 5. The objection on page 180 is overruled. The objection on page 213 at the bottom of page 6 is sustained, which keeps out all of page 7 and three-quarters of page 8. The objection at line 260 is overruled, so they can play that.

They can play all of page 9, all of page 10, all of page 11, all of page 14, 15, 16, 17, 18, the top of page 19. The objection at page 451, line 23 is sustained, and that knocks out the rest of page 19, page 20, and 21. I know that was quick, but you all had that already. That was just for the record.

MS. HACKER: With that, Your Honor, SFFA calls Dean Fitzsimmons by deposition designation and offers Exhibits P177 and P324 which are referred to -- I'll hand up a copy if I may approach, Your Honor.

THE COURT: 177 and 134?

1   MS. HACKER: P177 which is referred to as

2   deposition Exhibit 5 in the video and P324 which was marked

3   as deposition Exhibit 8.

4   THE COURT: Okay. Thank you.

5   [Video deposition played.]

6   MR. HUGHES: Your Honor, that's the end of the

7   deposition testimony. I think the remaining item, for our

8   side at least, is the issue we talked about right before

9   lunch.

10   THE COURT: We'll do that at sidebar. I'm

11   presuming that's your preference, sidebar?

12   MR. HUGHES: That's fine with us.

13   MR. LEE: That's fine.

14   THE COURT: We are otherwise recessed for the day,

15   correct?

16   MR. HUGHES: Yes.

17   MR. LEE: Can I bring up one thing before we go to

18   the sidebar? We talked yesterday about 1006 exhibits and the

19   question about whether the underlying video comes in. We

20   have a very quick memo.

21   THE COURT: I'll take your memo, but I'll tell you

22   we did our own research on it last night, and I'm inclined to

23   keep it out. If anyone is going to do a memo, it might want

24   to be you people. But I'll take yours, too.

25   MR. HUGHES: I'll let Mr. McBride go.

1   THE COURT: We're going to recess for the day but

2   for the sidebar. We'll resume at 9:30 on Monday. We

3   actually have a quick status conference in here at 9:15 which

4   we will not do at your tables. We'll do it out back or

5   someplace so you can all get set up.

6   Monday is going to basically be Amici day. They

7   are eight witnesses limited to a half hour of direct each.

8   You all both have the opportunity to cross-examine to the

9   extent that you want to. I'm hoping those direct

10   examinations will be done by younger lawyers, but we'll see

11   how that plays out.

12   Then I assume given some of the rulings yesterday,

13   we'll have some other issues to discuss before you rest.

14   Assuming you do rest or we work out some other arrangement,

15   you all will begin your presentation on Tuesday. Does that

16   seem right?

17   MR. LEE: That seems right.

18   MR. HUGHES: Sounds like it to us, too, Your Honor.

19   THE COURT: Okay. Excellent. The case is recessed

20   for the day but for sidebar.

21   [Sidebar sealed and redacted.]

22   (Court recessed at 1:50 p.m.)

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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 26, 2018

_____   _____

Joan M. Daly, RMR, CRR   Date
Official Court Reporter

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   THE FOLLOWING DEPOSITION TRANSCRIPTS WERE READ INTO THE
   RECORD:

   Lucerito Ortiz
   Grace Cheng
   Caroline Weaver
   Kaitlin Howrigan
   Brock Walsh
   Erin Driver-Linn
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