No. 20-1199

IN THE
SUPREME COURT OF THE UNITED STATES

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORTOF RESPONDENT

SAMUEL P. GRONER
(*Counsel of Record*)
HARRISON D. POLANS
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000
samuel.groner@friedfrank.com

STEVEN M. FREEMAN
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
(212) 885-7700
sfreeman@adl.org

AMY FEINMAN
ANTI-DEFAMATION LEAGUE
40 Court Street
12th Floor
Boston, MA 02108
(617) 406-6303
afeinman@adl.org

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the respondent.[1]

Founded in 1913 in response to an escalating climate of antisemitism and bigotry, ADL's timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment to all. ADL continues to fight all forms of bigotry and hate with the same vigor and passion and is often the first call when acts of antisemitism occur. A recognized leader in exposing extremism, delivering anti-bias education, and fighting hate online, ADL's ultimate goal is a world in which no group or individual suffers from bias, discrimination, or hate.

ADL believes that each person in our country has the constitutional right to receive equal treatment under the law and to be treated as an individual, rather than simply as part of a racial, ethnic, religious, or other identity-based group. For this reason, ADL has often filed briefs *amicus curiae* in the U.S. Supreme Court and the U.S. Circuit

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

Courts of Appeals in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the Constitution and our nation's civil rights laws.[2]

With respect to consideration of race as one factor (among many) in hiring and university enrollment decisions, ADL has long wrestled with whether such considerations can be reconciled with

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013); *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014); and *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016).

its core mission — "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." *Anti-Defamation League 1913 Charter* (1913). And, while ADL has endorsed consideration of race in some circumstances in order to account for or remedy specific discrimination, it has consistently opposed the non-remedial use of race-based criteria, except under highly limited circumstances in the educational context where the government can identify a compelling interest to justify them and has narrowly tailored their use to meet those legitimate interests.

ADL has long maintained that when the government uses race as a decisive factor in hiring decisions, admissions or enrollment decisions, or in the allocation of benefits, it improperly classifies individuals on the basis of immutable identity characteristics that are, or should be, irrelevant in a truly equitable and just democratic society. As such, ADL's longstanding position has been that affirmative action programs are invalid when they impose quotas, use race as a determinative factor in making admissions decisions, or act in a manner that assigns persons to categories based on their race. ADL also believes, however, that those concerns are not implicated when a university considers race as just one factor among many others as part of a holistic review of applicants.

SUMMARY OF THE ARGUMENT

1. ADL agrees with respondent Harvard College ("Harvard") that diversity in higher education is a compelling government interest. Through its work in a variety of education-related settings, including its front-line experience on college campuses, ADL has found that diversity in higher education is critical, not only because a diverse faculty and student body bring different experiences and viewpoints to the campus, but also because diversity can help foster a just and inclusive society and mitigate against racial and ethnic discrimination and hate. For that reason, ADL believes that the Court should reject petitioner's contentions that diversity in higher education is not a compelling government interest and that *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overruled.

2. Concurrent with its commitment to diversity, ADL also believes that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. Accordingly, ADL has historically opposed racial classifications that impose quotas in affirmative action programs, arguing that they discriminate impermissibly on the basis of protected characteristics and thus violate this core value of equal protection. Nevertheless, consistent with *Grutter*, ADL believes that affirmative action programs can be structured in a way that does not violate the Equal Protection Clause. Here, ADL believes that Harvard's admissions practices pass muster because the extensive record developed at trial shows that Harvard does not use overt or covert quotas, and the voluminous discovery into all aspects

of Harvard's admissions practices and procedures did not uncover any evidence that Harvard's admissions practices are driven by, or rooted in, animus toward Asian Americans or that that they are designed to diminish Asian American admissions. Indeed, petitioner could not point to a single Asian American applicant who was overtly discriminated against or who was better qualified than an admitted white applicant when considering the full range of factors that Harvard values in its admissions process.

3. The lack of racial animus, intent to discriminate, or imposition of quotas, as well as the fact that Harvard's admissions practices today promote (rather than inhibit) diversity, all distinguish those practices from Harvard's admissions practices in the 1920s and 1930s, which were motivated by antisemitism, imposed a quota on Jews, and were explicitly designed to decrease Jewish enrollment. In light of those key distinctions, petitioner's attempt to draw a comparison between Harvard's discriminatory practices against Jews in the 1920s and 1930s and its current admissions practices is fundamentally flawed. Based on over a century of experience as a leading organization fighting hate, bigotry, and antisemitism, ADL is well-positioned to evaluate, compare, and contrast Harvard's discriminatory practices against Jews in the 1920s and 1930s with its current admissions practices. In ADL's view, it trivializes the tremendous hate, bigotry, and antisemitism faced by many Americans, including American Jews, in the 1920s and 1930s to suggest or imply that race-conscious admissions practices like those used by

Harvard today are akin to the odious practices that were rampant at Harvard and other institutions of higher learning a century ago.

ARGUMENT

I. ADL'S EXPERIENCE DEMONSTRATES THE IMPORTANCE OF DIVERSITY IN HIGHER EDUCATION

For over 100 years, *amicus* ADL has fought to eradicate racial, ethnic, religious, and other identity-based bias in our nation and to promote justice and fair treatment to all. ADL has vigorously supported the enactment and enforcement of our nation's major anti-discrimination laws. ADL is also a leader in producing educational materials and programs designed to fight hate, bias, and prejudice in K-12 schools and on college campuses, and ADL's education programming has reached hundreds of thousands of students and educators as part of its efforts both to promote diversity and pluralism and to eradicate bias and hate before it hardens.

ADL's real-world, front-line experience on college campuses, in particular, has demonstrated that efforts to further diversity bear educational fruit. For example, ADL's cross-campus Hate/Uncycled programming — which provides a framework for students, staff, faculty, administrators, and campus safety teams to work together to understand and challenge bias, work toward inclusive campus climate policies and practices, and to be prepared to respond effectively

to hate incidents if they occur — has reinforced ADL's belief that diversity enriches the educational experience. ADL has found that a diverse educational environment challenges all students to explore new ideas, perspectives, and experiences that they might not otherwise explore, to see issues from other points of view, to rethink their own assumptions and prejudices, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other or differing beliefs. It is not just ADL that has reached this conclusion: there is a persuasive body of literature demonstrating that "diverse student populations enhance educational outcomes in undergraduate and graduate higher education . . . ." *See* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 EDUC. POLICY, no. 3, 2001 at 452, 456.

In addition to aiding colleges and universities in achieving these educational goals, a diverse campus environment can also create opportunities for people from diverse backgrounds, with different life experiences, to come to know one another outside the classroom as more than passing acquaintances. As the American Council on Education has recognized: learning in a diverse educational environment promotes personal growth by challenging stereotyped preconceptions, encouraging critical thinking, and helping students communicate effectively with people of varied backgrounds, thereby preparing students to become engaged

members of an increasingly complex, pluralistic society.[3]

In short, ADL's experience demonstrates that exposure to a diverse academic community not only reduces prejudice, but also improves education, better prepares students for possible graduate education and career opportunities, and enhances the United States' ability to compete in a globalized economy. Embracing diversity and promoting a just and inclusive society are crucial not only to the struggle to defeat discrimination, but also to the continued vitality of our nation.

ADL accordingly agrees with the District Court's conclusion that, as the evidence at trial credited by the First Circuit overwhelmingly demonstrated, "a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126, 133 (D. Mass. 2019); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157, 186 (1st Cir. 2020) (explaining that the trial record "make[s] clear that Harvard's interest in diversity is not an interest in simple ethnic diversity

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[3] American Council on Education, *On the Importance of Diversity in Higher Education,* http://www.acenet.edu/news-room/Documents/BoardDiversityStatement-June2012.pdf (last visited July 26, 2022).

in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, but a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element") (citations and quotations omitted).

ADL's experience is also consistent with Supreme Court precedent, which the First Circuit faithfully applied in this case, recognizing that diversity in the context of higher education is a compelling government interest because it serves those ends. *See, e.g.*, *Students for Fair Admissions*, 980 F.3d at 185 (explaining that "[t]he Supreme Court has held that attaining student body diversity may be a compelling interest" and finding that "Harvard has sufficiently met the requirements of *Fisher I*, *Fisher II*, and earlier cases to show the specific goals it achieves from diversity and that its interest is compelling"); *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 381 (2016) (explaining that "a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity" because "enrolling a diverse student body promotes cross-racial understanding, helps to break down racial stereotypes, [] enables students to better understand persons of different races[,] . . . promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society") (citations and quotations omitted); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 308 (2013) ("The attainment of a diverse student body . . . serves values beyond race alone, including enhanced

classroom dialogue and the lessening of racial isolation and stereotypes.").

Petitioner's argument that *Grutter* should be overruled is premised in part on the notion that the government's interest in diversity is "far from compelling." Pet. Br. at 2. ADL's extensive real-word experience demonstrates why the Court should continue to treat diversity in higher education as a compelling government interest and why it should not overrule *Grutter*.

II. RACE MUST NEVER BE USED AS A DETERMINATIVE FACTOR IN MAKING ADMISSIONS DECISIONS, AND HARVARD DOES NOT UTILIZE RACE IN THAT MANNER

ADL's staunch commitment to diversity has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, concurrent with its commitment to diversity, ADL has *opposed* racial classifications that impose quotas in affirmative action programs, arguing that they discriminate impermissibly on the basis of protected characteristics and thus violate this core value of equal protection.

For example, in *DeFunis*, ADL argued that the University of Washington Law School violated the Fourteenth Amendment by instituting a policy "that amounted to the establishment of a quota, no matter what 'cloak of language' was . . . used by the

Law School to disguise the fact from itself as well as from others."[4] Similarly, in *Bakke*, ADL took the position that the University of California was not entitled to "utilize race as the determinative factor in the admission and exclusion of candidates for its medical school at Davis."[5] Likewise, in *Grutter* itself, while ADL advocated in a brief submitted in support of neither party that "diversity in higher education is an appropriate and legitimate educational goal," it also argued that the University of Michigan's admissions systems "den[ied] to applicants who are not members of designated minority groups fundamental equal protection because those systems value persons for their race, not for relevant individual characteristics."[6]

Consistent with the Court's decision in *Grutter*, ADL also believes that affirmative action programs can be structured in a manner that will not violate equal protection principles, and that, when implemented properly, such programs can serve compelling government interests. As the former Chairman of ADL's National Law Committee explained (in a law review article that he wrote in his personal capacity), "[f]ew would argue against

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[4] Brief of Anti-Defamation League of B'nai B'rith as *Amicus Curiae* at 22, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

[5] Brief *Amici Curiae* of Anti-Defamation League of B'nai B'rith, et al. at 6, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[6] Brief *Amicus Curiae* of Anti-Defamation League in Support of Neither Party at 2, 4, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

the proposition that a diverse student body . . . is educationally enriching for those admitted to law school. The issue is not the desirability of a diverse student body but the means by which it is to be achieved." Larry M. Lavinsky, DeFunis v. Odegaard: *The 'Non-Decision' With a Message*, 75 COLUM. L. REV. 520, 524 n.20 (1975); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (noting the "dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means").

That is why ADL supported the position of the University of Texas in *Fisher I* and *Fisher II* even though it had opposed the positions of the universities in *DeFunis* and *Bakke*, respectively. Specifically, in *Fisher*, ADL argued that the university's consideration of race as part of the admissions process was consistent with equal protection principles because the record demonstrated that the university took an applicant's race into account only as part of a holistic review of applicants in which race was never a determinative factor in making an admissions decision.[7]

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[7] Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondents at 11, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013); Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondents at 11, *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016).

In sum, ADL has a considerable track record of supporting admissions programs that are narrowly tailored to achieve diversity in the context of higher education while opposing affirmative action programs when they impose quotas, use race as a determinative factor in making admissions decisions, or act in a manner that assigns persons to categories based on their race. Accordingly, Petitioner's assertion that "the commitment to diversity is not real," that "[n]o one believes in *Grutter* because *Grutter* is not worth believing in," and that "essentially no defenders of race-based [*sic*] admissions 'support the line'" drawn by this Court in *Grutter* (Pet. Br. at 59-60 (internal quotations and alteration omitted)) is plainly false when it comes to ADL. To be clear, ADL's commitment to diversity is real and longstanding, and ADL supports not only the Court's decision in *Grutter* but also the lines drawn by the Court in *Grutter*.

Quotas are anathema to ADL just as they are anathema to the Court. One of the key reasons that ADL believes that Harvard's admissions practices pass muster is precisely because they do not operate as overt or covert quotas. Affirming the First Circuit's decision would not amount to an endorsement of quotas.[8]

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[8] Although this brief does not address in detail the companion case before the Court involving the University of North Carolina's admissions practices, ADL notes that, in that case, the District Court found, after an eight-day trial, that the same was true there as well. *See Students for Fair Admissions v. Univ. of N.C.*, 567 F. Supp. 3d 580, 659 (M.D.N.C. 2021)

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The Court has understood "quotas" to be "program[s] in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups,'" *Grutter*, 539 U.S. at 335 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989)). Here, the voluminous evidence demonstrates that "Harvard does not employ a race-based quota, set aside seats for minority students, or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin." *Students for Fair Admissions*, 397 F. Supp. 3d at 196 (citations and quotations omitted); *see also Students for Fair Admissions*, 980 F.3d at 189 ("The district court properly concluded that Harvard does not utilize quotas and does not engage in racial balancing.").[9] Indeed, the First Circuit found that "[t]he level of variation in the share of Asian American applicants is inconsistent with a quota. . . . This is also true for Hispanic and African American Applicants. It is the *opposite* of what one would expect if Harvard

("There is no evidence or claim that the University uses a quota system to racially balance its incoming class, nor is there any evidence that students are awarded points automatically or mechanically due to their race or ethnicity.").

[9] Stated differently, there was no evidence presented at trial suggesting that Harvard considers race in the "non-individualized, mechanical" manner that the law prohibits. *See Gratz v. Bollinger*, 539 U.S. 244, 280 (2003) (O'Connor, J., concurring) (rejecting admissions program that provided an automatic 20-point bonus to the numerical index score of underrepresented applicants where the "mechanized selection index score, by and large, automatically determine[d] the admissions decision").

imposed a quota." *Students for Fair Admissions*, 980 F.3d at 188-89 (emphasis added). Rather, Harvard's consideration of race in its admissions process is "employed to promote diversity" in the college's student body and "allows Harvard to achieve a level of robust diversity that would not otherwise be possible, at least at this time." *Students for Fair Admissions*, 397 F. Supp. 3d at 202 & n.62.

III. HARVARD'S CURRENT ADMISSIONS PRACTICES ARE NOT ANALOGOUS TO ITS HISTORIC DISCRIMINATORY PRACTICES USED TO EXCLUDE JEWISH APPLICANTS

Throughout the course of this litigation, petitioner has sought to draw comparisons between Harvard's historic discriminatory practices implemented by Harvard President Abbott Lawrence Lowell in the 1920s and 1930s and its current admissions practices, which petitioner contends discriminate against Asian Americans. *See, e.g.*, CAJA3600-01 (noting, during closing argument, Harvard's historical discriminatory practices against Jews and arguing "[i]t happened before, and it's happening again"); Br. for Appellant at 22, *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, No. 19-2005 (1st Cir. Feb. 20, 2020), ECF No. 34 ("Harvard today engages in the same kind of discrimination and stereotyping that it used to justify quotas on Jewish applicants in the 1920s and 1930s"). Petitioner makes this point repeatedly in the brief it submitted to this Court. *See*, *e.g.*, Pet. Br. at 62 ("Jewish students were the first victims of holistic admissions, and Asian Americans are the

main victims today"); *id.* at 58 (asserting that Harvard's "holistic admissions process itself was specifically designed to screen out disfavored minorities — first Jews, now Asian Americans"); *id.* at 75 (characterizing Harvard as a "recidivist" because it has "maintained the same admissions program despite its 'sordid history' of discriminating against Jews").

However, Lowell died more than 75 years ago. To evaluate whether "Harvard today engages in the same kind of discrimination and stereotyping" as it did in the 1920s (Br. for Appellant at 22, *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, No. 19-2005 (1st Cir. Feb. 20, 2020), ECF No. 34) and whether "it's happening again" (CAJA3600-01), a closer look at what was happening then versus now is warranted.

A. In the 1920s and 1930s, Harvard Intentionally Discriminated Against Jewish Applicants by Design and Through Quotas

Harvard's history of discriminating against Jewish applicants in the 1920s and 1930s, including its *de facto* imposition of quotas to limit the number of Jewish students at the college, is well-documented and undisputed in this litigation.[10] In its post-trial

[10] Harvard was not alone in adopting discriminatory admissions practices at that time. Like Harvard, other elite universities, including Yale, Princeton, Columbia, and Dartmouth (among others), implemented admissions policies in the 1920s and 1930s designed to reduce the number of

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opinion, the District Court acknowledged "Harvard's own history of discriminating against Jewish applicants beginning in the 1920s" (*Students for Fair Admissions*, 397 F. Supp. 3d at 156), and Harvard's witnesses conceded the existence of historic discrimination against Jewish applicants (*see, e.g.*, JA567-68, JA785-86, JA1095, CAJA3370-75). Similarly, Harvard's 2015 Report of the College Working Group on Diversity and Inclusion at Harvard recognized that "[u]nder the presidency of Abbott Lawrence Lowell (1909-1933), the Harvard administration restricted the numbers of Jewish students. . . ." *See* JA1570. A fuller understanding of the intent behind those practices and how they

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admitted Jewish students. *See, e.g.*, Jerome Karabel, *The Chosen: The History of Admission and Exclusion at Harvard, Yale, and Princeton* 2-3 (2005); Gerald Sorin, *Tradition Transformed: The Jewish Experience in America* 184 (1997) ("Between 1920 and 1922, New York University and Columbia University, whose Jewish enrollments had reached nearly 40 percent, instituted quotas."); Jeffrey S. Gurock, *Jews in Gotham: New York Jews in a Changing City, 1920-2010* 45 (2012) ("Informal and formal quota systems severely limited the numbers of Jews who attended the nation's elite schools. The paltry and declining numbers of Jewish admissions to Ivy League colleges in the 1920s–1930s chilled the dreams of many high school valedictorians."); W. Honan, *Dartmouth Reveals Anti-Semitic Past*, N.Y. Times, Nov. 11, 1997, at A16 (in response to a letter from an alumnus who was concerned that "the campus seems more Jewish each time I arrive in Hanover" and that "unfortunately many of them . . . seem to be the 'kike' type," Dartmouth's director of admissions responded that he was "glad to have your comments on the Jewish problem," that he "shall appreciate your help along this line in the future," and that "[i]f we go beyond the 5 percent or 6 percent in the Class of 1938, I shall be grieved beyond words").

were executed demonstrates how incomparable they are to Harvard's current admissions practices.

In 1922, in the face of rising national antisemitism and questions about the increasing number of Jews at Harvard, at President Lowell's direction, Harvard began to evaluate whether to revise its admissions policies. *See* Marcia A. Synnott, *The Half-Opened Door: Discrimination and Admission at Harvard, Yale, and Princeton, 1900-1970* 58-59, 61 (1979); *see also* Oliver B. Pollak, *Antisemitism, the Harvard Plan, and the Roots of Reverse Discrimination*, 45 JEWISH SOC. STUDS. 2 114 (1983) (noting that the percentage of Jewish students at Harvard increased from 6% in 1908 to 22% in 1922). Lowell "came to the conclusion that Harvard had a Jewish problem" and was "convinced that the only way to reduce anti-Semitism within the Harvard community, as within the nation, was to limit the number of Jews allowed to associate with Gentiles." Synnott, *supra*, at 59. In a series of faculty meetings in May and June 1922, the faculty evaluated certain resolutions that proposed changes to Harvard's admission policies, including a proposal that expressly sought to impose a quota by limiting the proportional size of certain groups (including Jews) in the college's student body. *See id.* at 64-68. While the proposed quota ultimately was voted down in the face of public backlash, the faculty resolved to form a special committee "to consider principles and methods for more effectively sifting candidates for admission," which was understood to be coded language for "consider[ing] the question of the Jews." *Id.* at 69, 73-74.

The special committee's report, which it issued in April 1923, disclaimed the formal adoption of a Jewish quota, but paved the way for reducing the proportion of Jewish students by passing a recommendation that Harvard automatically admit all students who graduated in the top seventh of their class. *See id.* at 105-06. The top-seventh plan was designed to recruit students from previously underrepresented regions of the country, such as the South and West, where there were comparatively fewer Jews, and the plan was viewed by some as "a thinly disguised attempt to lower the Jewish proportion of the student body by bringing in boys — some of them academically ill-equipped for Harvard — from regions of the country where there were few Jews." Karabel, *supra*, at 101. Thus, by "focusing on geographic representation, while ignoring blatant racial and religious characteristics, the plan obliquely discriminated against Jews." Pollak, *supra*, at 119.[11]

When the percentage of Jewish enrollment did not dramatically decrease in the ensuing years, in 1926, at Lowell's guidance, Harvard implemented additional measures designed to reduce the number of Jewish students at the college. First, Harvard "limited the size of the freshman class to 1,000

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[11] Ironically, despite Harvard's intention to reduce Jewish enrollment by implementing the top-seventh plan, the plan had the opposite effect, as it "was in fact admitting more Jews from the Middle Atlantic States and New England." Karabel, *supra*, at 105 (explaining that 42% of students admitted under the top-seventh plan in 1925 were Jewish).

students." Synnott, *supra*, at 106. Lowell recognized that "a ceiling on the size of the class . . . was the necessary precondition for addressing the 'Jewish problem,'" because "as long as Harvard had an absolute standard of admission, a discretionary selection policy using nonacademic as well as academic criteria would not be possible." Karabel, *supra*, at 102.

Second, Harvard added precisely such a subjective component to its admissions criteria, directing that "the rules for the admission of candidates be amended to lay greater emphasis on selection based on character and fitness and the promise of greater usefulness in the future as a result of a Harvard education." JA1107. While Lowell "insisted that he was not proposing discrimination against the Jews but rather 'discrimination against individuals in accordance with the probable value of a college education to themselves, to the University, and the community,'" he noted in correspondence with the chairman of a faculty committee relating to the university's adoption of more subjective admissions policies that "*a very large proportion of the less desirable . . . are at the present Jews*," which prompted agreement from the chair of the committee that "*such a discrimination would inevitably eliminate most of the Jewish element that was making trouble*." Karabel, *supra*, at 107-08 (emphases added).

Third, Harvard made the top-seventh rule "discretionary" in order to "make it possible to eliminate schools that sent too many Jews to Harvard." *Id.* at 108. Finally, Lowell installed

individuals on the Admissions Committee who "shared his views" regarding Jews at Harvard, including appointing a leader of an anti-immigration group in addition to the four pre-existing members of the committee who had voted in favor of installing formal quotas in 1922. *See id.* at 109.

Thus, "[b]y the mid 1920s, Harvard had yielded to a selective system of admissions, which, with no apologies, aimed at reducing the percentage of Jews in the college." Synnott, *supra*, at 110. As a result of these changes to its admission policies, "the best available evidence shows that discrimination was widespread and systematic. On the basis of the quota that Lowell had quietly put into effect, the record leaves little doubt that [Harvard] continued to set a ceiling on Jewish enrollment for at least a decade," and the proportion of Jews in the freshman class declined from 28% in 1925 to just 12% by 1933. Karabel, *supra*, at 172. That proportion remained around 15% over the ensuing years and did not rise to 25% again until 1952. *See id.* at 196.

B. Petitioner's Comparison Between Harvard's Historic and Current Admissions Practices Is Fundamentally Flawed

Petitioner maintains that "Harvard today engages in the same kind of discrimination and stereotyping that it used to justify quotas on Jewish applicants in the 1920s and 1930s." Br. for Appellant at 22, *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, No. 19-2005 (1st Cir. Feb. 20, 2020), ECF No. 34. In the 1920s

and 1930s, Harvard's admissions practices were driven by, and rooted in, animus toward Jews. In contrast, today, Harvard's admissions practices are demonstrably not driven by, nor rooted in, animus toward Asian Americans, as the District Court's meticulous and dispositive findings of fact based on a full trial record, including both non-statistical and statistical evidence, conclusively and overwhelmingly demonstrate. *See Students for Fair Admissions*, 980 F.3d at 203 (finding there to be "ample . . . evidence that Harvard's admissions officers did not engage in any racial stereotyping" and "no credible evidence" that "corroborates the intentional discrimination" against Asian Americans alleged by petitioner) (internal quotations omitted).

The very authority on which petitioner relies to provide the historic support for its analogy between Harvard's former and current admissions practices (Pet. Br. at 13, citing Karabel, *supra*) is replete with evidence revealing the invidiousness and intentionality of Harvard's past discrimination against Jews in its admissions practices. For example:

- In seeking to revise Harvard's admissions policies, "Lowell's personal preference was 'to state frankly that we thought we could do the most good by not admitting more than a certain proportion of men in a group that did not intermingle with the rest, and to give our reasons for it to the public.' But he also anticipated quite presciently that 'the Faculty, and

probably the Governing Boards, would prefer to make a rule whose motive was less obvious on its face, by giving to the Committee on Admission authority to refuse admittance to persons who possessed qualities described with more or less distinctness and believed to be characteristic of the Jews.' For Lowell, however, it was crucial that 'the Faculty should understand perfectly well what they are doing, and that any vote passed with the intent of limiting the number of Jews should not be supposed by anyone to be passed as a measurement of character really applicable to Jews and Gentiles alike.'"

- "In a letter to Julian Mack, a member of Harvard's Board of Overseers and a federal judge, Lowell made explicit some of the cultural assumptions behind his commitment to a Jewish quota: 'It is the duty of Harvard to receive just as many boys who have come, or whose parents have come, to this country without our background as it can effectively educate: including in education the imparting, not only of book knowledge, but of the ideas and traditions of our people. Experiences seem to place that proportion at about 15%.'"

- In a letter summarizing a June 2, 1922 faculty meeting wherein the possibility

of imposing a quota on Jewish applicants was considered, Lowell wrote, "'[w]e . . . attained by far the most important object, which was that of making substantially every member of the Faculty understand that we had before us a problem, and that the problem was a Jew problem and not something else. *We had also brought the Faculty to the point of being ready to accept a limitation on the number of Jews*. . . .'" (emphasis added).

- In confidential correspondence advocating for the adoption of discretionary admissions criteria, Lowell wrote that, "[t]o prevent a dangerous increase in the proportion of Jews, I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character on the part of the Admission authorities, based upon the probable value to the candidate, to the college and to the community of his admission. Now a selection of this kind can be carried out only in case the numbers are limited. If there is no limit, it is impossible to reject a candidate who passes the admission examinations without proof of defective character, which practically cannot be obtained. The only way to make a selection is to

limit the numbers, accepting only those who appear to be the best."

- The Dean of Yale College characterized the admissions policies ultimately adopted by Harvard as designed to "reduce their 25% Hebrew total to 15% or less simply by rejecting with-out detailed explanation. They are giving no details to any candidate any longer."

- In 1925, a Harvard alumnus who had recently attended a Harvard-Yale football game wrote to President Lowell that, "[n]aturally, after twenty-five years, one expects to find many changes but to find that one's University had become so Hebrewized was a feaful [sic] shock. There were Jews to the right of me, Jews to the left of me, in fact that they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust of the present and grave doubts about the future of my Alma Mater." He further bemoaned that "I was ushered to my seat at the game by a Jew and another of the same 'breed' followed me to my seat and required me to sign my ticket. And not one of these appeared to be of the same class as the few Jews that were in college in my day but distinctly of the class usually denominated 'Kikes.'"

> In response, Lowell did not condemn this example of blatant and odious antisemitism. Rather, he lamented that "he 'had foreseen the peril of having too large a number of an alien race and had tried to prevent it' but that 'not one of the alumni ventured to defend the policy publicly'" and stated that "he was 'glad to see from your letter, as I have from many other signs, that the alumni are beginning to appreciate that I was not wholly wrong three years ago in trying to limit the proportion of Jews.'"

See Karabel, *supra*, at 88-89, 93-94, 105-07, 109. Indeed, the fact that Lowell noted in correspondence to the chair of the faculty committee relating to the college's adoption of more subjective admissions policies that "a very large proportion of the less desirable . . . are at the present Jews," and that the chairman's response was that "such a discrimination would inevitably eliminate most of the Jewish element that was making trouble" (*id.* at 107-08), makes clear what Harvard's intentions were — to "eliminate most of the Jewish element." *Id.* at 108.

Here, in contrast, the evidence adduced at trial about Harvard's current admissions practices in no way resembles the evidence of Harvard's odious practices in the 1920s and 1930s. The District Court expressly found that "[t]hroughout the trial and after a careful review of all exhibits and written submissions, there is no evidence of any racial

animus whatsoever or intentional discrimination on the part of Harvard beyond its use of a race conscious admissions policy." *Students for Fair Admissions*, 397 F. Supp. 3d at 201-02. After a thorough evaluation of the record, the First Circuit agreed, finding that "[t]he district court did not clearly err in finding that Harvard did not intentionally discriminate against Asian Americans," and crediting, among other things, the District Court's finding that "[t]he testimony of the admissions officers that there was no discrimination against Asian American applicants with respect to the admissions process as a whole and the personal ratings in particular, was consistent, unambiguous, and convincing." *Students for Fair Admissions*, 980 F.3d at 203, 197.

Despite years of litigation, including extensive document discovery, depositions, and a three-week trial, petitioner did not uncover a scintilla of evidence that Harvard's admissions practices are driven by, or rooted in, animus toward Asian Americans, that they are designed to diminish Asian American admissions, or that any quota has been overtly or covertly imposed by Harvard. Although Harvard provided extensive discovery into all aspects of its current admissions practices and procedures,[12] that discovery revealed nothing even

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[12] *See Students for Fair Admissions*, 397 F. Supp. 3d at 159 (explaining that "Harvard provided applicant-by-applicant admissions data for more than 150,000 domestic applicants to Harvard's classes of 2014 through 2019"); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.)*, No. 1:14-cv-14176-ADB (D. Mass.), ECF Nos.

(Continued…)

remotely suggesting that anyone at Harvard was engaging in any intentional discrimination.[13] Rather, the record at trial reflected that race was and is only one factor that Harvard considers "in a contextual manner as part of Harvard's holistic evaluation of each applicant" (*Students for Fair Admissions*, 397 F. Supp. 3d at 198), a conclusion that the First Circuit found was "supported by the evidence." *Students for Fair Admissions*, 980 F.3d at 190; *see also id.* ("Harvard's undergraduate admissions program considers race as part of a holistic review process").

The lack of racial animus, intent to discriminate, or imposition of quotas, as well as the fact that Harvard's admissions practices today promote (rather than inhibit) diversity, distinguish those practices from Harvard's admissions practices

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110, 121, 181 (demonstrating that Harvard produced documents from 24 custodians, which included detailed information relating to its undergraduate admissions policies and procedures, such as training manuals and reader instructions and general information relating to its alumni interview program).

[13] Despite the fact that some Asian American applicants to Harvard had received lower personal ratings relative to their white counterparts who appeared to be "similarly situated," there was no evidence presented at trial that this was due to intentional discrimination. *See Students for Fair Admissions*, 397 F. Supp. 3d at 202. Far to the contrary, the First Circuit endorsed the District Court's finding that petitioner could not point to "a single Asian American applicant who was overtly discriminated against or who was better qualified than an admitted white applicant." *Students for Fair Admissions*, 980 F.3d at 197 n.36 (citation and quotations omitted).

in the 1920s and 1930s, which were motivated by antisemitism, imposed a quota on Jews, and were explicitly designed to decrease Jewish enrollment. Indeed, the author of the book cited by petitioner in support of its argument about historical discrimination against Jews at Harvard has himself rebutted that comparison, explaining that "the analogy between Jews and Asians that frames the current case against Harvard obscures more than it illuminates" because "[u]nlike quotas, which substantially reduced Jewish enrollments, affirmative action has proved compatible with both an increase in Asian-American enrollments and expanded opportunities for African-Americans and Latinos."[14] *See also* JA1769 (evidence presented at trial showing that the percentage of Asian Americans in Harvard's student body increased between 2009 and 2018).

In sum, there is no basis in the voluminous record to equate Harvard's blatantly antisemitic admissions practices in the 1920s and 1930s with its current admissions practices, which promote, rather than seek to limit, student body diversity. It trivializes the tremendous hate, bigotry, and antisemitism faced by many Americans, including American Jews, in the 1920s and 1930s to suggest or imply that race-conscious admissions practices used

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[14] *See* Jerome Karabel, *No, Affirmative Action Has Not Made Asian-Americans The 'New Jews'*, The Huffington Post (Oct. 11, 2018 5:45 AM, updated Oct. 13, 2018), https://www.huffpost.com/entry/opinion-harvard-affirmative-action-lawsuit_n_5bbe62b8e4b0c8fa1367c1c1.

by colleges and universities today are akin to the odious practices that were rampant at Harvard and other institutions of higher learning a century ago. Rather than learning the lessons of that historical discrimination, petitioner's attempt to create such a false equivalency misappropriates that history.

* * *

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

SAMUEL P. GRONER
(*Counsel of Record*)
HARRISON D. POLANS
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000
samuel.groner@friedfrank.com

STEVEN M. FREEMAN
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
(212) 885-7700
sfreeman@adl.org

AMY FEINMAN
ANTI-DEFAMATION LEAGUE
40 Court Street
12th Floor
Boston, MA 02108
(617) 406-6303
afeinman@adl.org

Attorneys for *Amicus Curiae*
Anti-Defamation League

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