

No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
PETITIONER,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

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

**BRIEF FOR STUDENTS AND ALUMNI OF
HARVARD COLLEGE AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST¹

Amici curiae are a racially diverse group of students and alumni who seek to protect Harvard College's freedom to consider race in admissions to the full extent allowed by law. The district court granted *amici* enhanced participation in the trial court in 2015, and they contributed to this case not only through briefing, but participating in the trial, including by presenting opening and closing statements and submitting post-trial findings of fact and conclusions of law. *Amici* also submitted a brief and presented oral argument in the First Circuit.

Acknowledging the uniquely valuable perspective that these *amici* offer, the district court permitted four of the student-*amici* to testify at trial about their experience with Harvard's admissions process and as students on Harvard's campus:

Thang Diep, who identifies as Vietnamese American, immigrated to the United States when he was eight. He grew up in Los Angeles in a low-income, predominantly Black and Latinx community. As a child, he was bullied because of his name, accent, and limited English, leading him to distance himself from his Vietnamese identity. Only in high school did he fully embrace his culture. Mr. Diep graduated as the valedictorian of his magnet high school and studied neurobiology as a member of Harvard's class of 2019. He is currently applying to medical school with the goal of becoming a pediatrician working in immigrant communities and communities of color.

¹ Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* or their counsel made such a monetary contribution. All parties have filed blanket consents to amicus briefs in this case.

Sarah Cole, who identifies as Black, experienced significant financial instability throughout her childhood in Kansas City, Missouri. She pushed herself to excel academically and earned a scholarship to an excellent private high school. She not only earned straight As; she helped develop a citywide initiative to decrease youth violence in Kansas City after losing a friend to gun violence. At Harvard, Ms. Cole developed her own major in Education and American Society and served as president of the Black Students Association. Since graduating in 2016, Ms. Cole received a degree from the Harvard Graduate School of Education and has served as a teacher, Equity Coordinator, and Assistant Principal at three public schools that enroll majority students of color.

Itzel Vasquez-Rodriguez, who identifies as Xicana (Mexican-American of Cora descent), grew up in a diverse community in southern California. She graduated in the top 1% of her high school class after pursuing a rigorous curriculum that included summer community college courses and ten Advanced Placement exams. At Harvard, Ms. Vasquez-Rodriguez belonged to several cross-racial student groups and helped lead a coalition that persuaded the college to approve an Ethnic Studies track. After graduating, she spent a year volunteering with indigenous-focused nonprofits in Peru, then served as a legislative aide in the California legislature, and currently leads community engagement work at the Office of Public Participation within California's State Water Board.

Sally Chen, who identifies as Chinese American, was raised in a working-class immigrant family in San Francisco. Growing up, she served as her parents' translator and advocate in many different settings. She served as the student body president of her high school and participated in a citywide youth leadership program. Ms. Chen studied history, literature, and women, gender, and sexuality studies as a member of Harvard's class of 2019, and

she remains dedicated to community advocacy work. Ms. Chen currently works on education equity issues at a civil rights organization in San Francisco.

These four students represent the broad range of interests and experiences of the full group of student and alumni *amici* who participated in this case. Other *amici* include Fadhal Moore, an African American student who graduated from Harvard College in 2015 and is working for the Washington, D.C. superintendent of education; Jang Lee, a Korean American student who graduated from Harvard College in 2019 and is currently pursuing a masters in public health and working on health equity issues; Caroline Zheng, a Chinese American student who graduated in 2019 and currently attends Harvard Business School to pursue her career interests in philanthropy and social impact strategy; and Emily Zhu, D.L., and A.Z., who differ in their immigration histories, college majors, and current endeavors but uniformly agree that diversity enriched their college education and better prepared them to excel and lead in today's pluralistic world.² *Amici* have a significant interest in ensuring that Harvard can continue to consider race in the admissions process in order to achieve its educational mission. Only by considering race alongside many other factors can Harvard recognize the full potential of many exceptional students, attract a truly diverse student body, and harness the many benefits that diversity produces on campus and beyond.

² *Amici* also include several individuals who were prospective applicants when the case went to trial in 2018.

SUMMARY OF THE ARGUMENT

Amici's testimony about their experiences and admissions files entered into evidence in this case vividly illustrate how *Bakke*, *Grutter*, and *Fisher* were correctly decided: racial diversity yields transformative benefits for students and society, and narrowly tailored race-conscious policies remain necessary at highly selective institutions like Harvard. Harvard's undergraduate admissions process is unquestionably consistent with the commands of this Court's sound precedents. And the First Circuit's decision upholding that process as necessary and narrowly tailored is corroborated by the full record, including *amici*'s trial testimony. If Harvard is banned from considering race as a factor in admissions, as Petitioner urges, it would miss out on extraordinary students like *amici* whose ethno-racial identities were central to their applications and who might have otherwise been overlooked.

I. This Court for many decades has recognized that universities have a compelling interest in attaining the substantial benefits that flow from a diverse student body. Petitioner's disparagement of those benefits ignores the extensive trial record, including *amici*'s testimony, establishing that racial and ethnic student diversity continues to yield numerous benefits for all students. *Amici* testified, for example, about the deep appreciation professors and classmates showed for their unique perspectives; about how the diverse community of students reduced their feelings of isolation; and about how on-campus diversity helped prepare them for working and living in this nation's pluralistic society. As *amici*'s uncontroverted testimony showed, Harvard could not possibly achieve these benefits under a race-blind policy; forbidding the consideration of race would deeply harm Harvard's student body as a whole.

II. There is no substance supporting Petitioner’s contention that Harvard uses race as a “proxy” for students’ experiences and views. The record—including *amici*’s application files introduced into evidence at trial—overwhelmingly showed that Harvard faithfully adheres to the narrowly tailored framework established by this Court’s precedent. Harvard engages in individualized, holistic review of each applicant’s file; it does not treat race as the defining feature of an application; and its race-conscious policy ensures fair consideration of talented individuals who may be less likely to be admitted without a comprehensive understanding of their background.

III. The record conclusively refutes Petitioner’s claim that Harvard considers race in its admissions process to disadvantage Asian American students. Rather, *amici*’s application files, consistent with the full trial record, show that Harvard flexibly considers how Asian American students can contribute to and benefit from the educational benefits that flow from diversity. Files from Mr. Diep and Ms. Chen, for example, reflect that Harvard values each Asian American applicant’s unique lived experiences and understands that students’ racial and ethnic identities are often central to their experiences. By contrast, Petitioner offered no application files indicating discriminatory intent. And Petitioner’s defective statistical evidence cannot salvage its complete failure to prove discrimination at trial.

ARGUMENT

I. AMICI’S TRIAL TESTIMONY AND EXPERIENCES DEMONSTRATE THAT THE EDUCATIONAL BENEFITS OF DIVERSITY ARE SIGNIFICANT AND FLOW TO ALL STUDENTS

For more than forty years, this Court has recognized that universities have a compelling interest in attaining the “substantial, ... important and laudable” benefits that flow from a diverse student body. *Grutter v. Bollinger*,

539 U.S. 306, 330 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.). Petitioner disparages the notion that racial diversity in a university’s student body produces any appreciable educational benefits. See Pet. Br. 51-55, 61. But the district court here found on the basis of an extensive trial record, and the First Circuit agreed, that Harvard’s admissions policies advance compelling interests: “Harvard’s race-conscious admissions policy has a significant impact on the racial diversity of its class,” Pet. App. 209, and that diversity “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.” *Id.* at 107-08. Petitioner introduced no evidence to the contrary.

Amici’s testimony at trial powerfully corroborated the district court’s unrebutted factual findings, demonstrating that student body diversity, including racial diversity, continues to yield numerous benefits for Harvard’s student body, academic environments, and the nation.

A. *Amici* Brought Enriching Experiences and Perspectives to Harvard and, Like All Students, Benefited Greatly from Harvard’s Diversity

This Court has long recognized the far-reaching benefits of student body diversity, including racial diversity. A racially and ethnically diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381 (2016) (quoting *Grutter*, 539 U.S. at 330). It also facilitates “enhanced classroom dialogue and the lessening of racial isolation” on campus. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 308 (2013). And crucially, it helps “prepar[e] students for work and citizenship” in our extraordinarily diverse

society. *Grutter*, 539 U.S. at 331; see also *Bakke*, 438 U.S. at 313 (“[T]he nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” (internal quotation marks omitted)).

The record in this case confirms that the racial diversity cultivated by Harvard’s race-conscious admissions process produces substantial benefits that are “not theoretical but real.” *Grutter*, 539 U.S. at 330. As the district court noted, all of the students, alumni, Harvard admissions officers, and faculty who testified at trial affirmed the “wide-ranging benefits of diversity.” Pet. App. 108. These benefits flow to students of all racial and ethnic backgrounds. *Id.* at 31-35; JA1302 (campus survey showing that approximately two-thirds of seniors report Harvard’s diversity improved their ability to relate to people of different races, nations, and religions; these results are consistent across racial and ethnic groups).

Petitioner proffered no contrary evidence in the district court. Nevertheless, Petitioner now relies on farfetched assertions to urge the Court to cast aside *Grutter* and longstanding precedent that recognizes the compelling benefits of a diverse, racially integrated education. Petitioner contends that students of color like *amici* are mere “instruments” deployed “to provide educational benefits for other, mostly white students.” Pet. Br. 53-54. That is patronizing and wrong. True, research has long confirmed that white students benefit from racial diversity and exposure to the varied perspectives of classmates of color.³ As one recent white graduate shared, he

³ See, e.g., Josh Packard, *The Impact of Racial Diversity in the Classroom: Activating the Sociological Imagination*, 41 *Teaching Socio.* 144, 144 (2011); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 *Research Higher Educ.* 529, 530-31, 542, 545 (2004).

benefited from joining student groups with predominantly Black leadership and membership because it deepened his understanding of different issues and perspectives. JA1298. Another white alumnus explained that Harvard's racial diversity enriched his education by exposing him to more varied viewpoints that broadened his understanding in ways that "could not come from books, but could ... only come from direct experience with a diverse community." *Id.* at 1303. And as Ms. Cole testified: "I can't tell you how many times I've had professors email me thanking me for the contributions I've made in class or classmates stopping me outside of class thanking me for sharing my perspective ... as a black woman specifically." *Id.* at 928.

But *amici's* trial testimony also provided powerful evidence that diversity on Harvard's campus produces essential benefits for *all* students, including students of color. *Amici* themselves benefitted from being in an environment where they could learn with and from others with experiences both similar to and different from their own, and the presence of other students of color reduced their sense of isolation. For example, Mr. Diep learned "how to build coalition[s], how to collaborate with other communities of color, and how to be aware of class differences[.]" *Id.* at 956-57. Ms. Vasquez-Rodriguez explained that her "experiences and relationships with people from different ethnoracial groups [than her own] made [her] a much better listener, a more empathetic person, someone who is a more critical thinker," and whose "perspective of the world is more broad." *Id.* at 916.

Indeed, Harvard's race-conscious policy not only cultivates diversity across racial groups, but also *within* racial groups ("*intra-racial*" diversity), including among Asian American students who vary widely in their ethnic, cultural, linguistic, socioeconomic, political, and religious backgrounds. And *amici's* testimony highlighted the

value of this diversity. Ms. Chen reflected that diversity within the Asian American community allowed her to “meet and talk to other Asian Americans who are different from [her] as kind of an impetus for [her] to learn more ... [and] demand an education that would discuss these differences[.]” *Id.* at 970. Ms. Chen “had never met an undocumented Asian American before coming to Harvard,” and she stated at trial that encountering students with those immigration histories was “really eye-opening for [her] to see how [issues of immigration and immigration reform] affect Asian Americans and what is defined as an Asian American issue.” *Ibid.*

Amici further described how having a diverse community of students not only broadened their horizons, but also reduced racial isolation by providing a lifeline when they experienced hostility. See *Fisher I*, 570 U.S. at 308. For example, Ms. Cole—who served as president of the Black Students Association and led student activism efforts—shared that while she was heavily involved in campus life, she still experienced alienation and racial hostility from fellow students. JA927-28. Other students of color helped to ease her isolation, in particular the Black Students Association, which was “a saving grace” and a place where students were able to “lean on each other.” *Ibid.* Ms. Vasquez-Rodriguez likewise experienced “stereotyp[ing]” and “alienat[ion]” during her time at Harvard, but “found [her] solace and relief in ... ethnoracial student groups, cultural groups.” *Id.* at 913. As she put it, finding other students of color made her feel that she “could finally breathe” and “really be [her]self.” *Ibid.* She felt that “these were groups of students” she “could vent to” and “they would be there to support [her].” *Ibid.*

Just as importantly, such groups do not promote “segregation” as SFFA suggests. See Pet. Br. 64-65. In fact, they do the opposite by giving students the confidence to engage in *more* cross-racial interactions. As Ms. Vasquez-

Rodriguez explained, “it was there that I got the strength to be able to get up and ... navigate through Harvard day after day.” JA913-14. Similarly, Mr. Diep recounted that racial diversity, and in particular the presence of other Vietnamese American students, helped ease the burden of “be[ing] the only one people turn to” in conversations about “the Vietnamese experience or ... the refugee experience because [he] had ... other classmates who can share different perspectives.” *Id.* at 953. Many of his experiences, he explained, “are ... traumatic and ... [he] do[es]n’t have to always be so emotionally drained in class to discuss these topics with my classmates.” *Ibid.*

Amici also specifically emphasized in their testimony that on-campus diversity helped them “prepar[e] ... for work and citizenship” in our diverse society. *Grutter*, 539 U.S. at 331. Mr. Diep recognized, for example, that as a future physician he will “be working with young people who all have very different living experiences.” JA958. Harvard’s diversity gave him the “cultural sensitivity and cultural competency” to thrive serving a broad patient population. *Ibid.* Ms. Cole has now served as a teacher and administrator for several years in public schools that predominantly serve low-income students of color. C.A. App. 2596. And Ms. Vasquez-Rodriguez, who after graduating volunteered with indigenous-focused nonprofits in Peru and then served as a legislative aide in California, recognized the importance of having “interact[ed] with people from a variety of ethnoracial backgrounds” other than her own. JA916. Thanks to that exposure, she testified, she is a “better policy maker” and “much better equipped for” her job in California’s legislature, given the state’s diversity and the need to serve diverse constituencies. *Ibid.*

As *amici*’s testimony makes clear, racial and ethnic diversity in the college community brings real benefits to all students. It is therefore unsurprising that Asian Americans—against whom Petitioner claims Harvard’s

admissions policies discriminate—overwhelmingly support race-conscious admissions. According to the 2022 Asian American Voter Survey, which included a national sample of 1,601 Asian American registered voters, 69% of Asian Americans supported affirmative action. See *2022 Asian American Voter Survey*, Asian & Pacific Islander American Vote, at 4, 68 (July 25, 2022), <https://bit.ly/3OKsE4z>.

B. Forbidding Consideration of Race Would Deeply Harm Students

As the trial evidence made clear, nonracial approaches would not achieve comparable benefits of diversity and would severely harm Harvard’s learning environment. Forbidding any consideration of race in the admissions process would cause a precipitous drop in the racial diversity of Harvard’s students. The share of Black students in the admitted class, for example, would decline from 14% to 6%, and the share of Latinx students would decline from 14% to 9%. C.A. App. 2293-94, 2329-30, 3062-65; Pet. App. 210. The result would be 1,100 fewer underrepresented students of color on campus over four years. C.A. App. 2329-30.

Amici’s trial testimony confirmed that such a drop would leave students of color “feel[ing] isolated or like spokespersons for their race,” *Grutter*, 539 U.S. at 319. See, e.g., JA912-13, 953-54, 971-72; C.A. App. 2612-13, 2672-73. Ms. Cole, for example, testified that building a community for students of color would “become[] more exhausting” with fewer such students on campus. C.A. App. 2612. And she and others testified about experiences with racism and isolation that they would have struggled to overcome without a community of students who could “support each other and remain steadfast in our confidence that we did deserve to be there.” JA927-28.

Petitioner argues that one of its proposed alternative admissions systems (“Simulation D”) could offset the

harms of reduced racial and ethnic diversity. Pet. Br. 33-34. But as the courts below held, Harvard legitimately concluded that Petitioner’s alternative system was “not workable” for multiple reasons, including that it would force Harvard to “make sacrifices on almost every dimension important to its admissions process, including one designed to measure a student’s academic excellence.” Pet. App. 73-74, 76. Regardless, according to Petitioner’s own simulations, Simulation D would reduce the proportion of Black students on campus from 14% to 10%. Pet. Br. 33-34. And multiple *amici* testified that even this decline in Black students would produce immediate, acute harms. See, e.g., JA914, 928 (testimony of Ms. Cole).

Amici’s testimony further explained that Petitioner’s models likely understate the impact that eliminating race-conscious admissions would have on Harvard’s ability to enroll a diverse student body. Multiple *amici* testified that they would have been less likely to apply to or would have had reservations about attending Harvard if it did not consider race in admissions. See JA909-10, 925-27. Ms. Vasquez-Rodriguez explained that she “initially did not plan to apply to Harvard.” *Id.* at 908. “I thought it was a school that was too white, that was too elite.” *Ibid.* “As someone who was [X]icana,” she explained, “I wanted to make sure that I would feel welcome at a school like that.” *Id.* at 909. She decided to apply only after viewing materials about Harvard’s commitment to diversity on its website, getting in contact with the minority recruitment program, and learning about Harvard’s race-conscious admissions program. *Ibid.*

Ms. Cole similarly explained, “If Harvard adopted race-blind admissions, that would signal to students of color that Harvard was disinterested in us So I couldn’t even submit an application, and so many other students of color would probably feel that way, too.” JA932-33; see also *id.* at 972 (Ms. Chen: “I could not see

myself being part of an institution that didn't value me and my experiences when I was fighting so hard to articulate them.”).

Uncontroverted testimony from *amici* aligned with the district court's finding that losses in racial diversity under all of Petitioner's proposed alternatives would not be offset by gains in socioeconomic diversity. Petitioner is simply wrong to suggest that Harvard can easily substitute one type of diversity for another. Socioeconomic diversity certainly “makes Harvard's campus a richer place,” *id.* at 929, but race plays a critical role in shaping personal identity that socioeconomic status alone cannot capture, *id.* at 915, 930-31. Ms. Cole, for example, described the racial discrimination that she and her family have experienced over the years, including being called the “N'-word,” and the difficulty her mother faced getting schools to “take ... seriously that her [B]lack daughter might be gifted.” *Id.* at 931. Ms. Cole's parents sometimes struggled with unemployment, but, she testified, “regardless of whether we were struggling financially or not, our race has always shaped our experience, and that is a part of what I'm able to offer and [B]lack students are able to offer to the learning environment.” *Ibid.*

Amici's testimony also confirmed that students of color are less likely to succeed and excel in environments that are not racially diverse and where they feel isolated. Ms. Vasquez-Rodriguez testified about the anxiety and self-doubt she often felt walking around campus and entering classrooms, only to find minimal racial diversity. *Id.* at 912. She explained that she would “take note mentally of the number of people of color” whenever she walked into a classroom and was far more nervous, and less likely to speak up, when her fellow students were less diverse. *Id.* at 912-13.

Amici's testimony about the harm of reduced racial diversity on campus—and the benefits of such diversity

for all students—fully accords with *Brown v. Board of Education*, 347 U.S. 483 (1954), which emphasized the importance of non-segregated education. Petitioner’s attempt to co-opt *Brown* in support of its absolutist vision of “neutrality” misreads the Court’s decision. Pet. Br. 2. *Brown* did not require colleges to ignore race no matter the consequences for students and public life. To the contrary, this Court found it crucial to “look ... to the *effect* of segregation itself” on education, and to consider “education in the light of its full development and its present place in American life throughout the Nation.” 347 U.S. at 492-93 (emphasis added). The evil of segregation was not that schools “considered” race. Rather, it was that schools deployed race to subjugate Black students. That separation “deprive[d] the children of the minority group of equal educational opportunities.” *Id.* at 493. The enforced “separation” that *Brown* condemned is precisely what would result from the relief Petitioner seeks from this Court—namely, forbidding colleges from adopting policies that enable them to admit diverse classes.

II. AMICUS APPLICATION FILES DEMONSTRATE THAT HARVARD DOES NOT TREAT RACE AS A “PROXY” FOR STUDENTS’ EXPERIENCES AND VIEWS

Petitioner contends that Harvard uses race as a “proxy” for students’ experiences and views in its admissions process. See Pet. Br. 52-53. But that ill-supported assertion directly contradicts the evidence introduced at trial and the district court’s findings. The record overwhelmingly shows that Harvard is faithfully adhering to the narrowly tailored framework established by *Bakke*, *Grutter*, and *Fisher*. Harvard “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment”; gives the same “individualized consideration ... to applicants of all races”; and “ensures that all factors that may

contribute to student body diversity are meaningfully considered alongside race in admissions decisions.” Pet. App. 242 (internal quotation marks omitted). Harvard does not employ quotas, use separate admission tracks, or treat race as the defining feature of an application. *Id.* at 248, 253. Crucially, Harvard’s race-conscious policy ensures that talented individuals who may be less likely to be admitted without a comprehensive understanding of their background do not go unnoticed. Amici’s application files corroborate those conclusions.

A. Harvard’s Admissions Officers Employ a “Whole Person” Application Review Process That Allows Applicants to Share Their Unique Backgrounds, Experiences, And Perspectives

Amici’s application files uniformly show that, in line with Harvard’s “whole-person” admissions philosophy, Harvard’s admissions officers engage in a highly nuanced assessment of each applicant’s background and qualifications, and never treat race as the “defining feature” of any applicant’s file.

First, *amici*’s files demonstrate that Harvard’s process allows applicants to portray themselves fully and authentically and contextualize their experiences—including by drawing on their racial and ethnic identities.

Ms. Vasquez-Rodriguez, for instance, wrote about her “experiences as a young [X]icana in southern California,” where she often felt like an “ethnic outsider.” JA904; C.A. Sealed Supplemental Appendix (SA) 577. She described attending schools where Latina students were often placed in special education and where many viewed being “Latina and being smart as mutually exclusive.” SA577; C.A. App. 2544. Ms. Vasquez-Rodriguez explained that her culture ultimately “gave [her] the motivation to succeed and inspire others.” SA577.

Harvard's admissions officers noted her connection to her Latina heritage, *id.* at 565-66, but never reduced Ms. Vasquez-Rodriguez to her race. Many of the markups on her file focus on Ms. Vasquez-Rodriguez's extraordinary achievements across multiple domains, including her top-tier class rank, strong Advanced Placement scores, athletic success, and work as a newspaper editor and volunteer. *Id.* at 565-66, 586, 603. Other notations make clear that her success is all the more impressive in light of the fact that her father was unemployed, that she lived between two homes for years, and that only a quarter of students at her school attend four-year colleges. *Id.* at 565-66. Altogether, Ms. Vasquez-Rodriguez's file reflects how Harvard's admissions process employs a "highly individualized, holistic review" that flexibly considers "all pertinent elements of diversity." *Grutter*, 539 U.S. at 337 (citation omitted).

Second, *amici's* application files belie Petitioner's contention that Harvard is "obsessed with race" and relies on race as the predominant determinative in admission decisions. Pet. Br. 78-80. *Amici's* files demonstrate strong evidence to the contrary: "every applicant is evaluated as a unique individual" based on a complete picture of the applicant's potential. Pet. App. 113-14. Not one of those files reveals that the applicant was admitted because of their race or that Harvard officials focused excessively on race. For example, the admissions officers reviewing Ms. Cole's file commented on her "scholastic prowess," leadership roles, part-time employment, and impressive personal qualities, which were evident from her recommendation letters and transcripts. SA615, 643-44. Admissions officers did not mention that Ms. Cole is Black. *Ibid.* Race may or may not have played any role in admissions decisions for Ms. Cole and others who, as their application files demonstrate, are exceptional across all the dimensions Harvard considers in its admission process.

Petitioner suggests that admissions decisions should myopically focus on academic achievement—which it prefers to measure using standardized test scores and grades—and contends that Harvard uses race to take supposedly noncompetitive Black and Latinx applicants and make them competitive. See Pet. Br. 72-75; Pet. App. 81-83. But as *amici*'s application files and the record more generally demonstrate, academic talent and potential involves more than bare test scores and grades, and every student admitted to Harvard demonstrates multiple strengths. As the district court found, “[e]very student Harvard admits is academically prepared for [its] educational challenges” and possesses a “similar level of academic potential.” Pet. App. 255.

Petitioner’s arguments to the contrary largely rest on its expert’s manipulation of the data to separate students into academic “deciles”—based only on average combined grades and test scores—by race. See Pet. Br. 24. But many Harvard applicants have high academic scores; consequently, many students within relatively “lower” academic deciles are still academically exceptional. For example, Mr. Diep fell in a mid-range academic decile that Petitioner disparaged below as “noncompetitive,” C.A. Appellant’s Br. 52, but, in fact, Mr. Diep displayed great academic potential, graduating as valedictorian of his high school. C.A. App. 2681; SA552.

Moreover, academic scores are subject to their own racial biases and are poor predictors of college success. As trial testimony confirmed, Black and Latinx students have more limited access to advanced course offerings and standardized test preparation. JA924-25, 950-51, 961.⁴

⁴ See also U.S. Dep’t of Educ., Office for Civil Rights, *2013-2014 Civil Rights Data Collection: A First Look* 6-7 (rev. Oct. 2016); Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of*

College admissions exams such as the SATs also frequently underpredict the talents of Black, Latinx, and other historically marginalized groups due to a variety of factors, including cultural biases in testing questions.⁵ In addition, many elementary and secondary school educators tend to view Black and Latinx students as having less academic potential irrespective of their qualifications and abilities. *Id.* at 950-51.⁶ A substantial body of social science research, moreover, has revealed the consequences of “stereotype threat,” where the existence of pervasive negative stereotypes about members of certain underrepresented racial groups can cause those individuals to face undue pressure that, in turn, deflates their academic scores.⁷ Because these factors may depress the grades and test scores of talented Black and Latinx students, academic metrics alone systematically underpredict these students’ true potential.

California, U.C. Berkeley CSHE Rsch. & Occasional Papers Series, Dec. 2017, at 1, 3-6.

⁵ See generally Roy O. Freedle, *Correcting SAT’s Ethnic and Social Class Bias: A Method for Reestimating SAT Scores*, 73 *Harv. Educ. Rev.* 1 (2003); Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 *Harv. Educ. Rev.* 106, 126 (2010).

⁶ See also Amanda E. Lewis & John B. Diamond, *Despite the Best Intentions: How Racial Inequality Thrives in Good Schools* 166–68 (2015); Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers’ Expectations Different for Racial Minority Than for European American Students?: A Meta-Analysis*, 99 *J. Educ. Psych.* 253, 261 (2007).

⁷ Brief of Experimental Psychologists as Amici Curiae in Support of Respondents at 11-22, *Fisher v. University of Texas*, 579 U.S. 365 (No. 11-345) (collecting studies and scholarship); see also Gregory M. Walton et al., *Affirmative Meritocracy*, 7 *Soc. Issues & Pol’y Rev.* 1, 2-3, 11 (2013).

Unsurprisingly, therefore, the credentials that students may accumulate prior to college are inextricably linked to race. And that cannot be explained away by socioeconomic disparities alone. A study by the Stanford Center for Education Policy shows that “even in states where the racial socioeconomic disparities are near zero (typically states with small [B]lack or Hispanic populations), achievement gaps [by race] are still present.”⁸

Race-conscious admissions allows Harvard and other selective colleges to better assess applicants’ academic potential by accounting for racial disparities and unequal opportunities. This included *amici* who ranged in their strong, incoming academic credentials, see SA488-659, but all flourished once admitted to Harvard and upon graduation, see pp. 1-3, *supra*.

B. Harvard’s Limited and Nuanced Consideration of Race Is Crucial for Admissions Officers to Holistically and Effectively Evaluate Applicants of Color

In the United States today, race still matters. Race has significant impacts on people’s experiences and outcomes, including when controlling for other factors like socioeconomic status. As a result, race is important—and in some cases may be crucial—to colleges and universities’ ability to fully understand students’ backgrounds and potential in a way that socioeconomic status and other factors cannot completely contextualize. As the district court found: “it is vital that Asian Americans and other racial minorities be able to discuss their racial identities in their applications. As the Court has seen and heard, race can

⁸ Stanford Center for Education Policy Analysis, *Racial and Ethnic Achievement Gaps* (2011), <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race>.

profoundly influence applicants' sense of self and outward perspective." Pet. App. 246.

Amici described in their trial testimony how their ethno-racial background is integral to their identity and the impact it has had on their lives. Ms. Vasquez-Rodriguez testified that "being [X]icana" is "a core piece" of who she is and that her "ethnoracial identity ha[s] impacted every decision" she has made and "every experience" she has had. JA906. Her ethno-racial background is so intertwined with her identity that she would not have been able to explain her "potential contributions to Harvard without any reference to [her] ethnicity." *Id.* at 908.

For Ms. Chen, being the child of Chinese immigrants "was really fundamental to explaining who" she is. *Id.* at 968-69. And Mr. Diep testified that he needed to write his personal statement about his Vietnamese background in order "to express [him]self authentically" given that his "Vietnamese identity ... was such a big part of [him]self" and was "crucial to who [he is] today." *Id.* at 949.

Even *amici* who did not write about their ethno-racial background in their application essays testified that it was important to be able to check the box indicating their race. As Ms. Cole testified, to fully understand her personal statement about her experience with gun violence in her hometown required at least recognition of "the particular problems [faced by] communities of color." C.A. App. 2604-06. She further testified, "To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race." JA932. She explained that "[t]he particular prejudices and stigmas and barriers that [she] face[s] as a [B]lack working-class woman are simply different" than the experiences of lower-income people with other ethno-racial backgrounds. *Id.* at 929.

Prohibiting Harvard from considering race in admissions would therefore not only hinder reviewers' ability to evaluate candidates' potential but would also hamstring applicants' ability to fully present their candidacy and share their whole selves. Indeed, the district court concluded, after a careful review of the testimony and evidence, that "[r]emoving considerations of race and ethnicity from Harvard's admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background." Pet. App. 246.

Petitioner's arguments to the contrary are unpersuasive. Petitioner suggests Harvard can simply decide it wants to "admit students with certain experiences (say, overcoming discrimination)" and then "evaluate whether individual applicants have that experience." Pet. Br. 52.⁹ But Petitioner's reductionist approach ignores the fact

⁹ Petitioner concedes that a university's holistic admissions process could lawfully include evaluating a student's racialized experiences. Pet. Br. 52. To the extent that Petitioner's *amici* suggest that evaluating racialized experiences—or the mere awareness of race—violates the Fourteenth Amendment, the Court should not reach that question because SFFA did not present this issue in its petition for certiorari, opening brief, or briefs below. See *Berkemer v. McCarty*, 468 U.S. 420, 443, n.38 (1984); see also *Parke v. Raley*, 506 U.S. 20, 28 (1992). Petitioner did not advance the argument for good reason: wholesale censorship of race would be unworkable and constitute affirmative discrimination against applicants of color by interfering with their ability to present their candidacy. See SA575 (Vasquez-Rodriguez application) (list of extracurricular activities and academic distinctions includes references to her race, such as having been recognized as a National Hispanic Recognition Program Scholar and serving as Secretary of the Latino Club); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Calif. L. Rev. 1139, 1162 (2008).

that race and ethnicity can shape experiences in myriad ways, including by being a *positive* force in students' lives. Ms. Vasquez-Rodriguez, for example, wrote in her admissions essay about her “pride and love ... of [her] ethnoraacial identity” and about her “life’s ambition ... to represent [her] heritage and inspire ... fellow Latinos to embrace our culture.” JA907. Harvard is entitled to determine that it wants students who are proud of their heritage like Ms. Vasquez-Rodriguez on campus, and race-conscious admissions is critical to that goal. Moreover, telling applicants like *amici* that they can talk about—and allowing Harvard to consider—“discrimination” but no other aspects of their racial background would prevent Harvard from ensuring that its undergraduate classes have a broad range of experiences, including among students of color.

III. AMICI’S APPLICATION FILES CORROBORATE THAT HARVARD DOES NOT DISCRIMINATE AGAINST ASIAN AMERICAN STUDENTS

As Harvard explains, Petitioner has proffered no persuasive support in the record for its claim that Harvard considers race in its admissions process to disadvantage Asian American students. That was not for lack of trying: Petitioner took extensive discovery in this case, including 24 depositions, and it reviewed Harvard’s production of more than 97,000 pages of documents, including 480 anonymized application files and detailed anonymized database information about more than 200,000 individual applicants. Dist. Ct. Dkt. 418 at 10; Pet. App. 169; C.A. App. 2186-87.

In addition to the evidentiary shortcomings detailed by Harvard, see Resp. Br. 11-15, Petitioner did not identify a single application file—of the nearly 500 it reviewed—that evidenced “any discriminatory animus [against Asian Americans], or even an application of an Asian American who it contended should have or would

have been admitted absent an unfairly deflated personal rating.” Pet. App. 246. To the contrary, as evinced by *Amici*’s application files and other parts of the record, Harvard flexibly considers how Asian American students can contribute to diversity based on experiences tied to race and ethnicity.

1. *Amici*’s application files, like Mr. Diep’s and Ms. Chen’s, reflect how Harvard values the diversity of Asian American applicants’ experiences and understands that students’ racial and ethnic identities are often central to their experiences and their contributions to their communities. In his application, Mr. Diep—responding to an invitation to share “a background or story that is so central to [his] identity that [he] believe[d] [his] application would be incomplete without it”—wrote about his experiences as a Vietnamese immigrant. SA538. Mr. Diep explained that his name and accent caused him to be bullied as a child, but also motivated him to succeed. *Ibid.* He recalled perfecting his pronunciation by reading with “pencil[s] between [his] teeth,” pursuing a rigorous linguistics curriculum, and learning to embrace his identity. *Ibid.* His file also illustrates how race and identity can help contextualize other aspects of a student’s application. In Mr. Diep’s case, his discussion of the language barriers he faced growing up as a Vietnamese immigrant likely helped contextualize his SAT score, which was “on the lower end of the Harvard average.” *Id.* at 557.

Mr. Diep’s application file reflects the many factors that Harvard considers in its admissions process and no discrimination against or stereotyping of Asian American applicants. One admissions reader noted that Mr. Diep’s essay described his “Vietnamese identity” and his use of pencils to practice English, and also commented on his “intellect, work ethic, and leadership on campus” and the fact that he came from a “a modest background.” SA530. A second reader described Mr. Diep’s “thoughtful

application” and noted that recommenders described him as an “unusually caring individual.” *Ibid.*

Ms. Chen’s application similarly emphasized the centrality of her experience as a first-generation Chinese immigrant to her identity and her sense of purpose, citing, for example, that she had to translate and speak for her parents. *Id.* at 496. Ms. Chen described how her commitment to her communities, including the Asian American immigrant community, motivated her to serve as her high school’s student body president for three years. *Ibid.* The admissions officer reviewing her application specifically noted Ms. Chen’s leadership at school, including her role as president and the “significant fundraising” efforts she led, as well as her extracurricular scientific research at the University of California San Francisco. *Id.* at 489, 527. There is not a shred of evidence in Ms. Chen’s file that any admissions officer viewed her Asian American heritage as anything but a positive factor in her application.

As these examples also demonstrate, precluding consideration of race or ethnicity would harm applicants of all racial backgrounds, including many Asian American students. Racial and ethnic identity can be an inextricable part of students’ lived experiences that shapes their lives. Upon reviewing her admissions file, Ms. Chen “really ... appreciated the ways in which [the] admissions reader saw what [she] was trying to say when [she] was talking about the significance of growing up in a culturally Chinese home, of the kinds of work and responsibility that [she] took on from that.” JA969.

Mr. Diep’s testimony likewise underscored the importance of being able to draw upon his racial and ethnic identity in his college applications. He explained, “to express myself authentically and ... show [myself] as a full person, I needed [to write] about my Vietnamese identity on my application because ... it was such a big part of myself.” *Id.* at 949. Mr. Diep further pointed out that “in

allowing the admission process to take into account race and ethnicity, it allows [his] immigration history to be taken into account,” which made him feel seen and heard by Harvard. C.A. App. 2692.

A ban on race-conscious admissions would deny all students, including Asian American students, the ability to draw on their background and heritage to fully demonstrate their talents and potential. It would also reduce diversity within Harvard’s Asian American community, by preventing admissions officers from accounting for the rich diversity of experiences across Asian American sub-communities, including differences in ethnicity, immigration and refugee backgrounds, and linguistic diversity. As the district court aptly observed: ending race-conscious admissions would restrict access for Asian American students “from disproportionately less advantaged backgrounds who tell compelling stories about their personal identities that require an understanding of their race.” Pet. App. 210 n.51.

2. It was Petitioner’s burden to prove its claim—that Harvard intentionally discriminated against Asian American applicants vis-à-vis white applicants—by a preponderance of evidence. See *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). This claim is legally and factually distinct from Petitioner’s other claims in the case. Petitioner’s claims alleging racial balancing, using race as more than a “plus” factor, and failing to consider available race-neutral alternatives all challenge the implementation of a policy that Harvard openly acknowledges considers race to realize diversity’s benefits.

Petitioner’s intentional discrimination claim is entirely different. It accuses Harvard of a separate practice that Harvard has *never* admitted (because it does not exist), and for which there is no proof: using race to intentionally disadvantage Asian American applicants vis-à-vis

white students—a practice that would *not* promote diversity. Petitioner cannot sidestep its burden on this claim. The fact that Harvard considers race to promote diversity does not presumptively demonstrate that Harvard purposefully discriminates between Asian American applicants and white applicants. Petitioner seeks to shift the burden to Harvard on the intentional discrimination claim, suggesting that strict scrutiny applies to any and all challenges to Harvard’s admissions process because *some* aspects of Harvard’s process involve the consideration of race. Pet. Br. 74. If Petitioner’s logic were correct, a rejected applicant could challenge any component of Harvard’s admissions policy as racially discriminatory—say, its use of legacy-based preferences—and obtain the benefit of strict scrutiny without ever having to show discriminatory intent. Such a rule would result in endless litigation and deter colleges from adopting lawful admissions policies that harness diversity’s substantial benefits as permitted by this Court.

Nevertheless, the district court found that Harvard’s admissions practices survive strict scrutiny. After exhaustively reviewing the record, the district court found *no* evidence that Harvard’s race-conscious admissions policy intentionally disadvantages Asian American applicants. Thus, under any standard, Petitioner’s intentional discrimination claim fails.

Petitioner asserts that its expert found a statistically significant difference in the personal ratings and admission rates of Asian American applicants (once the personal rating was removed). Pet. Br. 73-74. But the district court and the First Circuit rejected this evidence. The district court found Harvard’s model more accurately reflected the actual admissions process and showed that Asian American identity had no statistically significant effect on the probability of admission. *Id.* at 197-204. Petitioner’s competing model was based on unsubstantiated

assumptions: Petitioner offered no evidence that race “influences” the personal rating, but nevertheless removed it from the model. *Id.* at 87, 89, 203. Even under Petitioner’s model, the district court found Asian American ethnicity had a nearly “undetectable” effect “on a year-by-year basis.” *Id.* at 96.

Setting aside the defects in Petitioner’s statistical modeling, the lower courts were correct that any alleged correlation between race and the personal rating is insufficient to establish intentional discrimination. See *Washington v. Davis*, 426 U.S. 229, 242 (1976). Significant statistical disparities can, of course, be an “important starting point” in assessing whether officials were motivated by a discriminatory purpose. *Arlington Heights*, 429 U.S. at 266. In the equal protection context, however, such disparities on their own—even if shown—“rare[ly]” support an inference of discriminatory intent and generally require corroborating evidence. *Ibid.* The evidence of disparate impact must reveal “a clear pattern, unexplainable on grounds other than race.” *Ibid.* Petitioner fell far short of this demanding standard. First, Petitioner’s statistical evidence was weak and based on dubious, unsupported assumptions. Resp. Br. 43-46. Second, there was no corroborating, non-statistical evidence presented at trial supporting the other *Arlington Heights* factors. Pet. App. 264.

Nor can Petitioner’s unsubstantiated references to “implicit bias,” Pet. Br. 25, 35, overcome the lawfulness of Harvard’s policy. Even in cases where parties offered reliable statistical models—unlike Petitioner here—this Court has never permitted a plaintiff to make its case by merely noting statistical disparities and alleging, as opposed to proving, that implicit bias is at work. Here, Petitioner introduced no evidence at trial (either fact or expert) explaining the nature of implicit bias or the way it might be operating in Harvard’s admissions process. In

the district court's words, the allegation that admissions officers harbored implicit bias was "unsupported by any direct evidence before the Court." Pet. App. 194. Indeed, research negates Petitioner's position: eliminating any awareness of race would perpetuate racial biases in admissions, not eliminate them.¹⁰ It is Petitioner who proffers an admissions regime that would exacerbate biases faced by students of color, including Asian American students.

Petitioner must face the same standards as any other plaintiff bringing an intentional discrimination claim. It would defy the spirit, purpose, and plain text of Title VI to make plaintiffs suing colleges with lawful race-conscious admissions programs uniquely exempt from the general rule requiring proof of intentional discrimination. Moreover, Petitioner's anemic evidence and distorted version of equal protection law may not override the wisdom of this Court's long line of cases permitting narrowly tailored admissions programs that pave the way for "effective participation by members of all racial and ethnic groups in the civic life of our nation," *Grutter*, 539 U.S. at 332.

¹⁰ Mica Pollock, *Colormute: Race Talk Dilemmas in an American School* 4-5 (2004); see also Evan P. Apfelbaum et al., *Racial Color Blindness: Emergence, Practice, and Implications*, 21 *Current Directions in Psychol. Sci.* 205, 206 (2012); Evan P. Apfelbaum et al., *In Blind Pursuit of Racial Equality?*, 21 *Psychol. Sci.* 1587, 1591 (2010).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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