

Mobilizing Social Science Research to Inform Judicial Decision-Making: *SFFA v. Harvard*

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*In the fall of 2019, the United States District Court for the District of Massachusetts upheld the legality of Harvard's race-conscious admissions process in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. In his appeal of the ruling, *Students for Fair Admissions (SFFA)* President Edward Blum continued his efforts to eliminate the use of race as a factor in admissions at both private institutions, such as Harvard, and public colleges and universities in the United States. In the case, *SFFA* intentionally seeks to create divisions within the Asian American community and among communities of color while seeking to further entrench white access and entitlement to highly selective institutions.*

*In the spring of 2020, 678 social scientists and scholars, who extensively study education issues relating to Asian Americans, college access, and race in postsecondary institutions and society, filed an amicus brief with the First Circuit in support of Harvard's holistic admissions process. This brief is a collective effort to disentangle the dangerous, cavalier, and misleading claims that *SFFA* and its allies attempt to advance in their appeal. These social scientists' efforts provide empirical evidence as to how Asian Americans, in fact, benefit from race-conscious holistic review in college admissions. The brief, submitted to and subsequently cited by the First Circuit in its opinion, provides background and updated developments on the legal and social contexts of the case. In this Article, we argue that future judicial decision-making on this issue (and in particular by the U.S. Supreme Court) should be informed by the extensive and rigorous body of empirical research that supports the legality of Harvard's policy. Following this Article, the brief is reprinted in full as originally filed, and edited only to comport with the format of this journal.*

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2021]	<i>MOBILIZING SOCIAL SCIENCE RESEARCH</i>	5
INTRODUCTION.....		5
I. CASE BACKGROUND		7
II. THE DISTRICT COURT’S USE OF SOCIAL SCIENCE AND SFFA’S APPEAL.....		9
III. OUR INTERESTS AS SOCIAL SCIENTISTS		11
A. Harvard’s Whole-Person Review Is Narrowly Tailored to Meet a Compelling Interest		11
B. The District Court Correctly Found No Evidence of Discrimination Against Asian Americans		12
C. Race-Conscious Policies Prevent Harm to Asian American Applicants		14
IV. LOOKING TO THE FUTURE.....		15

INTRODUCTION

In the fall of 2019, the District of Massachusetts upheld the legality of Harvard’s race-conscious admissions process in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA v. Harvard)*, finding that the process did not violate equal protection under the Constitution.¹ More specifically, the decision stated that “there is no evidence of any racial animus whatsoever or any intentional discrimination on the part of Harvard beyond its use of a race conscious admissions policy, nor is there evidence that any particular admissions decision was negatively affected by Asian American identity.”² Students for Fair Admissions (SFFA) quickly appealed. And on November 12, 2020, the Court of Appeals for the First Circuit issued a decision upholding the legality of Harvard’s policy.³ In its opinion, which established an important foundation for the legal issues potentially moving to the U.S. Supreme Court, the court referenced the amicus brief and research that is the focus of this Article.⁴

SFFA is an organization created by conservative activist Edward Blum specifically to end affirmative action programs and race-conscious

1. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 397 F. Supp. 3d 126, 203–04 (D. Mass. 2019).

2. *Id.* at 201–02.

3. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 980 F.3d 157, 164 (1st Cir. 2020).

4. *Id.* at 201. (“One of Harvard’s amici expands on this point, citing research that Asian American students are more likely than white students to attend public high schools where overloaded teachers and guidance counselors may provide more perfunctory recommendations.”).

admissions practices.⁵ Mr. Blum has a long history of using legal challenges to dismantle policies that seek to advance racial equity.⁶ Prior to *SFFA v. Harvard*, Mr. Blum recruited Ms. Abigail Fisher, a white woman, to serve as his plaintiff in *Fisher v. University of Texas at Austin*, a case challenging the University of Texas at Austin's race-conscious admissions program.⁷ The Supreme Court, after initially remanding the case in *Fisher I*,⁸ upheld the university's admissions policies as constitutional in 2016's *Fisher II*.⁹ Given his loss before the Supreme Court in *Fisher II*, Mr. Blum changed his strategy and formed SFFA with the explicit purpose of recruiting Asian Americans for his lawsuit against Harvard.¹⁰ Mr. Blum is also pursuing this strategy in a case against the University of North Carolina, Chapel Hill,¹¹ which is still pending at the district court,¹² and, more recently, another lawsuit against the University of Texas at Austin.¹³

Because amici in support of the plaintiffs in *SFFA v. Harvard* submitted a large quantity of misinformation and problematic "research" to the courts, it was imperative for us, as social scientists, to challenge the misinformation and to present the appellate court with the extensive body of rigorous research that supports the legality of Harvard's policy. With this important goal in mind, a small group of scholars across the country, with the assistance of our pro-bono attorney, drafted an amicus curiae brief on behalf of 678 social scientists and scholars who have extensively studied education issues relevant to Asian Americans, college access, and race in postsecondary institutions and society. The amicus brief built on a prior collective effort by the social science community in an amicus brief filed by 531 social scientists

5. More Perfect, *The Architect*, WNYC, at 22:00 (Dec. 7, 2017), <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/architect-edward-blum> [<https://perma.cc/N5SD-VC68>].

6. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013) (siding with Blum's argument that Section 4 of the Voting Rights Act was no longer constitutional); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (upholding University of Texas's race-conscious admissions policy in challenge brought by Blum's client).

7. Nina Totenberg, *Supreme Court Upholds Affirmative Action in College Admissions*, NPR (June 23, 2016), <https://www.npr.org/2016/06/23/483275212/supreme-court-upholds-affirmative-action-in-college-admissions> [<https://perma.cc/JHL7-9BN5>].

8. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 315 (2013).

9. 136 S. Ct. at 2207.

10. LILIANA M. GARCES & OIYAN POON, *ASIAN AMERICANS AND RACE-CONSCIOUS ADMISSIONS: UNDERSTANDING THE CONSERVATIVE OPPOSITION'S STRATEGY OF MISINFORMATION, INTIMIDATION & RACIAL DIVISION 4-5* (2018).

11. *Id.*

12. Kate Murphy, *Trial on UNC-Chapel Hill's Race-Related Admissions Ends, but Ruling Could Take Months*, THE NEWS & OBSERVER (Nov. 19, 2020), <https://www.newsobserver.com/news/local/education/article247284969.html> [<https://perma.cc/UQC4-NK8U>].

13. Raga Justin, *UT-Austin Faces a Third Lawsuit Claiming That White Students Were Unfairly Denied Admission Under Affirmative Action*, TEXAS TRIBUNE (July 22, 2020), <https://www.texastribune.org/2020/07/22/ut-austin-affirmative-action-lawsuit-white> [<https://perma.cc/3L3L-H8F9>].

before the lower court.¹⁴ In our brief for the court of appeals, amici comprised researchers and scholars employed at 253 different institutions and organizations, including more than 241 colleges and universities across the United States.¹⁵ Our work extends across numerous fields and disciplines, including education, Asian American Studies, sociology, anthropology, psychology, public policy, political science, and history.¹⁶ Many amici have been recognized with the highest national honors and awards in their field.¹⁷ Fifteen amici are members of the American Academy of Arts & Sciences, twenty are members of the National Academy of Education, and sixty-one are past or current presidents of national organizations, including the American Educational Research Association, the Association for the Study of Higher Education, and the Association for Asian American Studies.¹⁸

In this Article, we present a short background and updated developments on the legal and social context of the case, summarize the main arguments in the amicus brief, and discuss critical issues to consider in the future. We also provide a reprint of the amicus brief filed with the court of appeals in full, including the list of 678 signatories. We argue that the amicus brief provides empirical evidence that supports the legality of Harvard's policy and that judicial decisions regarding race-conscious admissions should be informed by this extensive and rigorous body of empirical research.

I. CASE BACKGROUND

SFFA v. Harvard is one of the latest iterations of legal challenges to the use of race in postsecondary education admissions. In 2019, the trial court ruled in favor of Harvard, concluding that Harvard's use of race-conscious admissions is narrowly tailored to achieve a compelling interest in student body diversity, and that the school's use of race in admissions does not discriminate against Asian American applicants.¹⁹ Unlike previous legal challenges to affirmative action,²⁰ which focused on alleged discrimination against white applicants, this lawsuit focuses on alleged discrimination against Asian American students. Edward Blum created SFFA with the

14. OiYan A. Poon, et al., *Confronting Misinformation Through Social Science Research: SFFA v. Harvard*, 26 *ASIAN AM. L.J.* 4 (2019).

15. Amicus Curiae Brief for 678 Social Scientists and Scholars on College Access, Asian American Studies, and Race in Support of Defendant-Appellee at 1, *SFFA*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) [hereinafter Amicus Curiae Brief for 678 Social Scientists].

16. *Id.*

17. *Id.*

18. *Id.*

19. See *SFFA*, 397 F. Supp. 3d 126, 195 (D. Mass. 2019).

20. See *Fisher I*, 570 U.S. 297 (2013); *Fisher II*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

intentional goal of recruiting Asian Americans to serve as plaintiffs for his decades-long crusade to eliminate the use of race as a factor in college admissions.²¹ He specifically chose Harvard in part because the U.S. Supreme Court recognized Harvard as a model for the permissible consideration of race in college admissions in *Regents of the University of California v. Bakke*.²²

Blum's deliberate recruitment of Asian Americans to serve as anonymous members of SFFA utilizes and expands upon a previous strategy from the 1980s of using people of color to oppose affirmative action.²³ This strategy has serious implications, not only with respect to how courts may decide the case, but also because it intentionally attempts to create interracial and interethnic divisions between and within Asian Americans and other communities of color. As OiYan Poon and colleagues argue, this approach capitalizes on misinformation that media platforms have facilitated.²⁴ Thus, as social scientists, researchers, and scholars, we were concerned with how SFFA ignored social science research and misused data in its appeal.

Indeed, opponents of affirmative action and race-conscious admissions place Asian Americans at the heart of today's legal debate in an attempt to shift the narrative away from so-called "reverse discrimination" against white plaintiffs (e.g., *Fisher v. Texas*, *Grutter v. Bollinger*, and *Gratz v. Bollinger*) and from systemic racial disparities that students of color have and continue to face.²⁵ Instead, SFFA attempts to reframe its argument around the alleged discrimination against Asian Americans as a non-white group. By arguing that Asian Americans are disadvantaged by policies designed to increase racial diversity within student bodies, SFFA seeks to fuel intra-minority and within-group conflicts, while also presenting disinformation regarding Asian American educational experiences.²⁶

As an example of how SFFA's misrepresentations can influence the media is the misinformation around Harvard's "personal rating score." SFFA

21. GARCES & POON, *supra* note 10, at 4–5; Poon, et al., *supra* note 14, at 5.

22. See Julianne Hing, *Wanted: Disgruntled Asian-Americans to Attack Affirmative Action*, *Colorlines* (Apr. 25, 2014), <https://www.colorlines.com/articles/wanted-disgruntled-asian-americans-attack-affirmative-action> [<https://perma.cc/4WPZ-WBTJ>]; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) ("The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program . . .").

23. GARCES & POON, *supra* note 10, at 7–9; see also, DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* 33–38 (1992).

24. Poon et al. *supra* note 14, at 7–9; see also Marc P. Johnston-Guerrero & Kai Zhao, *Is Affirmative Action Interfering with the Chinese Dream in America? Exploring WeChat Users' Views on Affirmative Action in US College Admissions*, *RACE ETHNICITY & EDUC.* 1 (2020).

25. See Michele S. Moses et al., *Racial Politics Resentment, and Affirmative Action: Asian Americans as "Model" College Applicants*, 90 *J. HIGHER EDUC.* 1, 20–21 (2019).

26. GARCES & POON, *supra* note 10, at 2–3; Poon et al., *supra* note 14, at 8–9.

relies on its expert, Dr. Peter Arcidiacono,²⁷ to support its argument that Harvard discriminates against Asian American applicants when determining personal rating scores, one of the categories Harvard uses in its review of applicants. Yet, the personal rating does not take race into account and is primarily determined from an applicant's admissions essay, teacher and guidance counselor recommendations, accomplishments, and alumni interviews.²⁸ In describing this rating, SFFA and its allies intentionally employed the term "personality" instead of "personal" to spread disinformation that Harvard finds Asian American applicants are "not likeable and don't have good personalities."²⁹ Several major news outlets incorrectly used "personality" instead of "personal" which conveys and affirms SFFA's false charges.³⁰ For example, a *New York Times* headline claimed that "Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says"³¹ and *The Hill* wrote that "Harvard gives Asian-Americans lower personality ratings than other races, lawsuit claims."³² Given the media's outsized role in shaping public opinion and informing the national political landscape, their inaccurate reporting misinforms the general public on an already complex and controversial policy.

II. THE DISTRICT COURT'S USE OF SOCIAL SCIENCE AND SFFA'S APPEAL

Despite SFFA's strategic efforts and media reports that circulated its message, the district court's ruling rejected SFFA's arguments, specifically holding that Harvard's admissions policies do not discriminate against Asian Americans.³³ The ruling relied heavily on social science research regarding the educational benefits of diversity.³⁴ The district court concluded that Harvard's race-conscious holistic admissions practices are necessary for the

27. Expert Report of Peter S. Arcidiacono, *SFFA*, 397 F. Supp. 3d 126 (D. Mass 2017) (No. 415-1), 2017 WL 10442564.

28. See *SFFA*, 397 F. Supp. 3d at 141.

29. Morning Edition, *Does Harvard Treat Asian-American Applicants Unfairly? The Case Goes to Trial*, NPR, at 01:10 (Oct. 15, 2018), <https://www.npr.org/2018/10/15/656974751/does-harvard-treat-asian-american-applicants-unfairly-the-case-goes-to-trial> [<https://perma.cc/M4Z4-R8AK>].

30. See Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html> [<https://perma.cc/9YLU-YEC7>].

31. *Id.*

32. Justin Wise, *Harvard Gives Asian-Americans Lower Personality Ratings than Other Races, Lawsuit Claims*, THE HILL (June 15, 2018), <https://thehill.com/homenews/392478-harvard-gives-asian-americans-lower-personality-traits-than-other-races-lawsuit> [<https://perma.cc/WX45-MSYR>].

33. See *SFFA*, 397 F. Supp. 3d at 204.

34. *Id.* at 133–34.

university to further its compelling interest in student body diversity and that it remains a strong example of a legal race-conscious admissions policy.³⁵

In its appeal, SFFA continued to repeat many of the same arguments it used in the lower court. SFFA argued that Harvard did not offer sufficient evidence to prove that its admissions program is “narrowly tailored.”³⁶ SFFA further argued that the district court failed to fully consider evidence of the alleged discrimination by way of its expert’s statistical analysis on the personal rating and internal Harvard communications that alluded to potential anti-Asian bias.³⁷ SFFA also continued to advance the same argument that Harvard engages in impermissible “racial balancing” by presenting enrollment projections that rely on problematic assumptions that prioritize admissions metrics that do not reflect Harvard’s values.³⁸ This argument was also presented in the amicus brief filed by the U.S. Department of Justice (DOJ) under the former Trump Administration, which likewise claimed that this alleged racial balancing process comes at a direct cost to Asian Americans through increased admission of Latinx and African American applicants.³⁹ This dangerous framing by SFFA and the Trump Administration’s DOJ creates divisions between Asian Americans and other communities of color and has been a continued tactic deployed through several decades by various conservative parties in pursuit of dismantling race-conscious admissions.⁴⁰

Finally, SFFA disagreed with the district court’s assessment of the evidence in the case, and, in particular, with the statistical model used, which generated findings that supported the legality of Harvard’s race-conscious admissions process.⁴¹ Much of SFFA’s argument relied on the omission of variables within Arcidiacono’s model as it relates to the personal rating.⁴² The personal rating, which is one of five ratings in Harvard’s process (academic, extracurricular, athletic, and overall are the other four), is an area of great dispute.⁴³ SFFA argues that the reported lower average scores in the personal rating category for Asian Americans represent a clear and distinct bias and discriminatory effort by Harvard⁴⁴—an issue that our brief addresses. Thus, the primary objective of our amicus brief was to challenge

35. *Id.* at 189–95.

36. See Brief of Appellant Students for Fair Admissions at 38, *SFFA*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) [hereinafter Brief of Appellant SFFA].

37. *Id.* at 13–15.

38. See *id.* at 46–47.

39. Brief for the United States as Amicus Curiae Supporting Appellant and Urging Reversal at 24, *SFFA*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) [hereinafter Brief for the United States].

40. See GARCES & POON, *supra* note 10, at 2.

41. Brief of Appellant SFFA, *supra* note 36, at 23–26.

42. See *id.*

43. See *id.* at 5.

44. *Id.* at 6–7.

flawed conclusions and to summarize the extensive and rigorous body of social science research that refutes SFFA's arguments.

III. OUR INTERESTS AS SOCIAL SCIENTISTS

As social scientists with expertise in education issues relating to Asian Americans, college access, and race in postsecondary education institutions, we were deeply concerned with SFFA's inaccurate and misguided arguments in its appeal. Toward this effort, we believed it was our duty as experts to present evidence that, based on our review and that of the many nationally renowned scholars who signed the brief, supported the legality of Harvard's admissions policy. As was the case at the district court, we believed that it was imperative for the First Circuit to base its decision on rigorous and empirical evidence, rather than disinformation and untested claims the plaintiffs presented. In doing so, the arguments in our brief are organized into three interconnected areas: (1) Harvard's Whole-Person Review is Narrowly Tailored to Meet a Compelling Interest; (2) the District Court Correctly Found No Evidence of Discrimination against Asian Americans; and (3) Race-Conscious Policies Prevent Harm to Asian American applicants.

A. Harvard's Whole-Person Review Is Narrowly Tailored to Meet a Compelling Interest

Whole-person review permits students to demonstrate the *full range* of contributions each applicant can make to Harvard's educational environment by considering more than a few narrow metrics of academic achievement, like high school grades and test scores. This process also includes teacher and counselor recommendations, submitted student work, the relative academic strength of an applicant's high school, the types of classes an applicant took in high school, and academic and career interests, among other factors. The use of whole-person review, which considers an applicant's academic, extracurricular, athletic, and personal qualifications, allows Harvard to achieve its mission of admitting the best freshman class and creating a diverse learning environment that fosters intellectual transformation and growth.⁴⁵ Indeed, relying solely on narrow academic metrics, such as test scores—as SFFA and its expert have done⁴⁶—provides only a limited and restricted view of an applicant, and does not account for the entirety of an individual's experiences and accomplishments. Furthermore, social science research demonstrates that assessing an applicant's individual characteristics in light of societal contextual factors such as socioeconomic status, gender, school, and race provides a full

45. Amicus Curiae Brief for 678 Social Scientists, *supra* note 15, at 4–11.

46. Brief of Appellant SFFA, *supra* note 36, at 32–35.

portrait for the university to understand a student's academic and extracurricular achievements.⁴⁷ Thus, the district court was correct in concluding that Harvard's whole-person review furthers its compelling interest in assembling a diverse body of students who will learn from and challenge each other while creating a pluralistic and diverse learning environment.

Through the holistic review process, Asian Americans benefit with respect to admission rates and their proportion within an admitted class. For example, holistic review helps prevent admissions professionals from evaluating Asian Americans as a homogenous block and to more accurately and realistically understand them as a highly diverse racial group. Not only are Asian Americans comprised of a diverse set of ethnicities (e.g., Cambodian, Hmong, Indian, Korean, Taiwanese, Vietnamese, etc.) with dramatically different socioeconomic backgrounds, but they also confront unique experiences in educational and economic opportunity, history and immigration, social and familial circumstances, and personal experiences of discrimination.⁴⁸ Thus, the whole-person review process allows Harvard to view each applicant's talents, achievements, experiences, perspectives, and potential within the context of the applicant's broader life experiences and to more accurately assess the contributions each applicant would likely make to its campus' greater educational community.

B. The District Court Correctly Found No Evidence of Discrimination Against Asian Americans

Much of SFFA's argument regarding discrimination focused on the personal rating, which the plaintiff falsely claims is an intentional anti-Asian discriminatory effort by Harvard's forty-member admissions committee. The district court noted that there were limited differences in personal rating scores and correctly concluded that there was no evidence of discrimination against Asian American applicants in this category.⁴⁹

Furthermore, social science research and data offer at least two key explanations for these limited differences among the average personal ratings across different racial groups. First, Asian Americans are more likely to attend public high schools, where larger workloads can prevent staff from

47. See Michael N. Bastedo et al., *Information Dashboards and Selective College Admissions: A Field Experiment* 3–4 (2017) (noting that their results, from their field experiment, demonstrate another promising indicator that high-quality contextual information has the potential to substantially increase the proportion of low-income students who are admitted to selective colleges that use holistic review).

48. See Shirley Hune, *Demographics and Diversity of Asian American College Students*, 2002 NEW DIRECTIONS FOR STUDENT SERVICES (SPECIAL ISSUE) 11; ROBERT TERANISHI ET AL., EDUC. TESTING SERV., ICOUNT: A DATA QUALITY MOVEMENT FOR ASIAN AMERICANS AND PACIFIC ISLANDERS IN HIGHER EDUCATION 5–10 (2013).

49. *SFFA*, 397 F. Supp. 3d 126, 194 (D. Mass 2019).

writing strong recommendation letters.⁵⁰ Because counselors and teachers at large public high schools have heavier workloads than their counterparts at private high schools,⁵¹ they have less time to offer in-depth letters of recommendation for each student.⁵² In turn, higher quality letters from private schools make it more likely that private school students, who are less likely to be Asian American and more likely to be white,⁵³ will receive higher personal ratings. Because these school support ratings and the quality of recommendation letters by high school counselors are key to Harvard's assignment of personal ratings, it is possible that the limited differences among the average personal ratings for white and Asian American applicants are explained by these structural opportunities rather than the individual bias of admissions officers.⁵⁴ The bottom line is that Asian Americans are less likely to attend private schools and to reap the benefits of a well-funded staff who have the time and resources to write the highest-quality letters for even mediocre students. If such a disparity is driving differences in letter quality between Asian Americans and white applicants, this is a function of white students' higher attendance at private high schools, not a function of Harvard's admissions process nor evidence of intentional discrimination against Asian Americans. Race-conscious admissions practices can allow admissions professionals to review letters of recommendation within their proper context for Asian Americans and other students, and thereby limit the negative impact of this K-12 educational disparity at the point of admissions review.

Second, Asian Americans are more likely to apply to highly selective colleges like Harvard than other racial and ethnic groups.⁵⁵ Research on application patterns by race suggests that Asian Americans may be more likely than other students to fill out an application to Harvard even if the university may not be the best fit, and that the cross-section of Asian American students who apply to Harvard is likely to be materially different, in respect to their test scores and class rank, from the cross-section of applicants of other ethnicities.⁵⁶ Because a disproportionately larger number

50. Julie J. Park & Sooji Kim, *Harvard's Personal Rating: The Impact of Private High School Attendance*, 30 ASIAN AM. POL'Y REV. 2, 3 (2020).

51. See MELISSA CLINEDINST, & ANNA MARIA KORANTENG, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, STATE OF COLLEGE ADMISSION, 23–26 (2017).

52. See Park & Kim, *supra* note 50, at 3.

53. *Id.* at 2 (explaining that “56 percent of White students whose first-choice college was Harvard or a [similar school] . . . attended public high schools” while nearly 75 percent of Asian students with similar goals attended public school).

54. See *id.*

55. See Brian P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 SOC. SCI. RSCH. 310, 317 (2010) (“The average probability of an Asian American student applying to a selective college, conditional on applying, is 7.9 percentage points higher than the average probability of a white student.”).

56. JULIE J. PARK, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA 84–87 (2018).

of Asian American students apply to Harvard every year, it is no surprise that many of them—like many high achieving students of all races and ethnicities—will not be accepted, given that Harvard rejects over 95% of its applicants every year.⁵⁷ Therefore, these applicants will not receive the highest possible scores, including for the personal rating.

Plaintiffs based their arguments on harmful racial stereotypes, that Asian Americans are “model minorities” who are smarter and value education more than other groups, and that other racial minorities do not value hard work or education.⁵⁸ This myth assumes that Asian Americans are monolithic and have achieved unparalleled success and dismisses the complexity and diversity within Asian American communities.⁵⁹ Indeed, SFFA attempts to capitalize off of this inaccurate and highly problematic stereotype, which ignores the historical and social forces that drive academic achievement for some Asian Americans while reinforcing negative stereotypes about other racial minorities.⁶⁰

C. Race-Conscious Policies Prevent Harm to Asian American Applicants

The district court concluded that race-conscious policies preserve the right of Asian Americans to advocate for the value of their unique backgrounds, heritage, and perspectives. This right allows Harvard to accept exceptional students who would otherwise be less likely to be admitted without a complete and full understanding of their backgrounds. By removing the consideration of race, more harm would be inflicted upon Asian Americans.⁶¹ In other words, eliminating any awareness of race in admissions would perpetuate the previously mentioned biases and ignore the many aspects of a person’s educational journey that are touched by racial biases.⁶²

57. Admissions Statistics, HARVARD.EDU, <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/BTB5-7TTQ>] (last visited June 28, 2021).

58. Amicus Curiae Brief for 678 Social Scientists, *supra*, note 15, at 20–24.

59. OiYan A. Poon et al., *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 REV. OF EDUC. RSCH. 469, 469–71 (2016) (reviewing scholarly research that counters the model minority myth); YOON K. PAK ET AL., ASIAN AMERICANS IN HIGHER EDUCATION: CHARTING NEW REALITIES 22–26 (2014).

60. See Johnston-Guerrero & Zhao, *supra* note 24, at 12–14; OiYan A. Poon et al., *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 REV. EDUC. RSCH. 469, 468–71 (2016) (reviewing scholarly research that counters the model minority myth).

61. See, e.g., Liliana M. Garces, *Lessons from Social Science for Kennedy’s Doctrinal Inquiry in Fisher v. University of Texas II*, 64 UCLA L. REV. DISC. 18, 25–39 (2016) (outlining the myriad harms of not considering race as a factor in admissions, including declines in student body racial diversity and a less welcoming campus climate for students of color).

62. See JEFFREY F. MILEM ET AL., MAKING DIVERSITY WORK ON CAMPUS: A RESEARCH-BASED PERSPECTIVE 4–5 (2005), <https://www.aacu.org/sites/default/files/files/mei/MakingDiversityWork.pdf> [<https://perma.cc/9JSE-JEHK>] (outlining the educational benefits of diversity that can be realized if race is considered in admissions); TIFFANY JONES & ANDREW HOWARD NICHOLS, THE EDUC. TR., HARD TRUTHS: WHY ONLY RACE-CONSCIOUS POLICIES CAN FIX RACISM IN HIGHER EDUCATION 5 (2020),

Asian Americans' wide support of race-conscious policies also runs counter to SFFA's arguments that Asian Americans oppose Harvard's limited consideration of race in admissions. In multiple surveys conducted between 2001–2016, a majority of Asian Americans reported support for race-conscious admissions policies and strong opposition to ending affirmative action programs.⁶³ This support likely reflects the benefits that Asian Americans reap from processes that evaluate them as individuals. Even some Asian American opponents of race-conscious admissions policies support principles of whole-person review like the one at Harvard.⁶⁴ SFFA's false narrative does not reflect concerns and positions actually held by the majority Asian Americans.

IV. LOOKING TO THE FUTURE

The amicus brief reprinted here summarizes the extensive and rigorous body of social science research that supports the legality of Harvard's race-conscious admissions process and represents a critical effort, by a broad and robust coalition of social scientists, to have legal decision-making be based on fact. We were pleased that the court of appeals considered the empirical evidence and rejected the erroneous claims that undergird SFFA's arguments, based, in part, on research presented in our amicus brief.⁶⁵

The First Circuit's decision establishes an important foundation as the Supreme Court considers SFFA's petition for *certiorari*.⁶⁶ Although the Supreme Court has used social science research in previous cases to reaffirm the use of race-conscious admissions in higher education (see Justice O'Connor majority opinion in *Grutter v. Bollinger*),⁶⁷ some justices have also relied upon less-than-rigorous analysis to inform their dissents (see Justice Alito's dissent in *Fisher II*).⁶⁸

<https://files.eric.ed.gov/fulltext/ED603265.pdf> [<https://perma.cc/6WWT-7G95>] (noting that policies that rely on substitutions (or proxies) for race, such as income, have not closed gaps in opportunity and outcomes for students of color).

63. PEI T. LIEN ET AL., *THE POLITICS OF ASIAN AMERICANS: DIVERSITY AND COMMUNITY* 17 (2004); KARTHICK RAMAKRISHNAN, *AAPI DATA, AN AGENDA FOR JUSTICE CONTOURS OF PUBLIC OPINION AMONG ASIAN AMERICANS* 8–9 (2014), <http://aapidata.com/wp-content/uploads/2014/11/APV-AAJC-issues-nov7.pdf> [<https://perma.cc/4JHV-7ERK>]; AAPI DATA ET AL., *INCLUSION, NOT EXCLUSION: SPRING 2016 ASIAN AMERICAN VOTER SURVEY* app. 25 (2016), <http://aapidata.com/wp-content/uploads/2016/05/Inclusion-2016-AAVS-may23web.pdf> [<https://perma.cc/NQF8-CMMZ>].

64. OiYan Poon et al., *Asian Americans, Affirmative Action, and the Political Economy of Racism: A Multidimensional Model of Raceclass Frames*, 89 HARVARD EDUC. REV. 201, 218 (2019).

65. *SFFA*, 980 F.3d 157, 164 n.2 (1st Cir. 2020).

66. Petition for Writ of Certiorari, *SFFA*, No 20-1199 (U.S. Feb. 25, 2021).

67. *Grutter*, 539 U.S. 306, 330 (2003) (citing multiple research studies that addressed the educational benefits of racial and ethnic diversity to support the Court's conclusion that institutions of higher education have a compelling interest in the educational benefits of a diverse student body).

68. See *Fisher II*, 136 S. Ct. 2198, 2219 n.1, 2224–27 (2016) (Alito, J. dissenting) (citing to news articles and demographic data to support conclusions that the University of Texas at Austin's admissions policy was unconstitutional); Liliana M. Garces, et al., *The U.S. Supreme Court's Use of Non-Legal*

We fully expect opponents of race-conscious admissions to aggressively continue their campaign of disinformation to advance their political agenda. To combat this effort, new research agendas must confront and empirically test claims used in these debates.⁶⁹ The social science community must continue to address misinformation by presenting rigorous research on affirmative action in legal briefs, op-eds, and other media formats in order to inform legal decision making and to educate the public at large.⁷⁰ Doing so will preserve race-conscious admissions for current and future generations.

Sources and Amicus Curiae Briefs in Fisher v. University of Texas, 43 J. C. & U. L. 167, 187 (2017) (analyzing how justices treated non-legal sources in their respective opinions in *Fisher I* and *Fisher II*, including those that addressed allegations of discrimination against Asian Americans).

69. For an example of social science research that empirically tests claims made in the debate over affirmative action policy, see Mike Hoa Nguyen et al., *Asian Americans, Admissions, and College Choice: An Empirical Test of Claims of Harm Used in Federal Investigations*, 19 EDUC. RESEARCHER 579. (2020).

70. See Liliana M. Garces et al., *Arguing Race in Higher Education Admissions: Examining Amici's Use of Extra-Legal Sources in Fisher*, 14 J. DIVERSITY HIGHER EDUC. 278, 279–80, 285–87, (2021) (examining how amici used research and other types of extra-legal sources to support their arguments in *Fisher II* and finding a strategy by amici who challenge affirmative action to rely on news media sources that have been shown to offer little research-based information on the topic).