

“Race-blind admissions is an active erasure. To try to not see my race is to try to not see me.” Sarah Cole, Harvard Class of 2016, shared this sentiment, and Sarah was not alone. Eight Harvard students and graduates testified at trial. Four student amici—Thang Diep, Sally Chen, Itzel Vasquez-Rodriguez, and Sarah Cole—along with four organizational amici. All eight shared their ethnicity when applying because all eight felt it was an inextricable aspect of their identity. All eight shared that Harvard’s racial diversity transformed their education in immeasurable ways. They engaged in cross-racial conversations that were “mind-opening,” found other students of color who were their “saving grace,” and learned lessons that made them better physicians and policymakers.

While this trial has carried high stakes and heated emotions, there’s actually a substantial amount of agreement. SFFA did not dispute—and at points outright agreed—with our students’ that:

- Racial inequities persist,
- Racial identity matters for many applicants, and
- Racial diversity produces benefits on Harvard’s campus.

Instead of refuting these points, SFFA engaged in its own form of active erasure. SFFA never presented any students at trial. And its experts did not consult a single student to form their opinions. SFFA tries to erase the students’ stories by declaring statistics must dominate and by belittling the abundant evidence in the Students’ application files which show Harvard’s process is constitutional and critical for cultivating citizen leaders.

While SFFA has a singular goal—a blanket ban on considering race—they advance two separate legal theories. This court should continue to distinguish them because they impose different legal burdens and pose different factual questions.

Students focus first on SFFA's challenge to Harvard's race-conscious policy promoting diversity. The legal framework is straightforward: Harvard must show its consideration of race is both necessary and individualized.

Necessity is established by three facts which remain undisputed:

FACT ONE: Many applicants must reference their race, and have it appreciated, to fully convey their strengths and potential contributions in college.

This was true for Itzel who wrote her personal statement, entitled "Different" about growing up as a Latina in Southern California. She shared about feeling like an "ethnic outsider" because most other Latinos were placed in special education. Most people around her saw being "smart and being Latina as mutually exclusive." When she used advanced vocabulary, she was made fun of for "talking white," called a "coconut" brown on the outside but white on the inside. Her essay explained she initially rejected her ethno-racial identity: stopped learning Spanish, ignored her Latino heritage. Then she decided to "return to her roots." She embraced her Mayan first name. Relished her lunches of jicama and guava. Itzel discovered her ethnicity was a source of strength. Her encounters with prejudice made her "a better listener, a more empathetic person." It motivated her to fight for social justice. Her life's ambition became: to represent her heritage and inspire fellow Latinos. She found joy in defying the misconception that Latinos won't go to college. She promised to carry this love and pride to Harvard if admitted.

SFFA never says these strengths shouldn't be valued. But, their requested remedy would compel universities to blind themselves to any reference to race.

This would systematically undervalue the achievements and contributions of ethno-racial minority students like Itzel.

The harms would cut just as deep for Asian American students like Thang. In his essay, Thang shared about how he initially distanced himself from his Vietnamese, which felt "lost in

translation.” Classmates mocked him for his accent. Ridiculed him by calling him *Chink* and *Chineto*. Thang told Harvard about his transformative growth. How he improved his English by placing a pencil between his teeth while reading hundreds of books out loud; pushed himself linguistically by joining a humanities magnet program; and re-connected with his Vietnamese identity as source of pride rather than shame. These experiences contextualize Thang’s SAT score which was on the lower end of the Harvard average. Erasing Thang’s ethnicity provides an incomplete picture of his strengths.

SFFA has backtracked on the idea that race has no place in admissions. Their own expert, Mr. Kahlenberg conceded that admissions officers should be able to consider whether an applicant has overcome racial discrimination as a sign of resilience. SFFA’s more modest argument is that Harvard could treat race like religion. They don’t have to consider the checkbox marked by the applicant. SFFA should amend its complaint if it is now only taking issue with considering the checkbox. But even this is constitutional. Sarah wrote her personal essay on combatting gun violence in Kansas City, a city with the second highest homicide rate in the nation. She committed herself to this cause after a close acquaintance was killed because he was mistaken for somebody else. She joined the Kansas City Youth Board and presented the Mayor with six recommendations to “slow down the losing cycle” of youth violence. Sarah never mentioned her race in the essay. But she did check the box saying she was African American. This provides additional context for Sarah’s advocacy. Sarah agrees. She testified a race-blind admissions system would “not see me simply because...there has been no part of my life that has been untouched by race.”

FACT TWO: Racial diversity enriches the educational environment for all students.

All of the Students testified to this fact. Thang explained his interactions with racially diverse students gave him “a tool set to think about cultural sensitivity and cultural competency” which will make him a better doctor.

Racial diversity also matters for combatting racial hostility. While Harvard has taken steps to better support students of color, Latina students like Itzel still feel “stereotyped” by classmates who constantly questioned her: “were you born here? Are you a citizen?” As a Chinese American, Sally felt shaken when a Harvard staff member kicked her out of a student lounge on the presumption Sally was a trespassing tourist. A classmate called Cecilia Nunez, one of the organizational amici, and her friends “a bunch of wetbacks.” In these moments, the number of minority students matter. As Cecilia recounted, “we were able to laugh off the racial slur...because we were a large group of students.” But, she acknowledged they may have felt more threatened had their numbers been lower.

SFFA never questioned that students benefit from Harvard’s current levels of diversity. Instead, it suggests these benefits could be achieved without considering race. SFFA is wrong because of the third undisputed fact:

FACT THREE: Eliminating the consideration of race would sharply reduce the number of black, Hispanic and other minority students on campus.

SFFA’s expert estimated the number of Black and Hispanic students would fall by roughly 1,100. Harvard’s expert estimated their numbers would be cut in half.

SFFA’s expert says this would make white and Asian applicants the “winners” and Black and Hispanic applicants the “losers.” But the Students uniformly testified: there would be no winners. As Sarah shared, there would be “less learning” for all students because Black and Latinx students offer perspectives that “make classes ... much richer.” And Itzel explained the decline would be “fairly catastrophic” for all students because “a lot of the power and positive change at Harvard comes from student groups of color.” With fewer Black and Latinx students, “there are fewer people to do that work and that work becomes more exhausting.”

SFFA’s expert Mr. Kahlenberg tries to erase these harms by saying Harvard could achieve comparable benefits by adopting race-neutral alternatives. But his alternatives do not make up

for the losses. All of them reduce the share of Black students from 14-10%. That's a 30% reduction in numbers. Black students would experience irreparable harm, as students who are already marginalized on Harvard's . Sarah Cole needed a sufficient number of same-race peers to "lean on" when Harvard's newspaper published an article making the racially bigoted assertion "that admitting black students to Harvard was like teaching a blind person to be a pilot." This decline would also be harmful to all students because Black students lead improvements to the campus racial climate. As an Asian American, Thang testified the decline in Black students would "hurt my education dramatically" because black students' advocacy taught him how to "build coalitions" and better address the health needs of minority communities, including his own Vietnamese community.

Another shortcoming: Mr. Kahlenberg incorrectly presumes socioeconomic status can serve as a substitute for race. But the benefits of racial diversity are distinct. As Itzel stated: "ethnoracial diversity is more visibly salient" When she entered a classroom, she "took note mentally of the number of students of color." She intentionally sought out spaces with more nonwhite students because there could "finally breathe." There she could renew her energy to navigate Harvard's campus, where she felt judged for her Latina features, not for her wealth.

Kahlenberg himself admits that the most efficient method for cultivating racial diversity is considering race, not socioeconomic status.

Another major pitfall of Kahlenberg's race-neutral alternatives: it threatens to reduce the diversity within each racial group. For example, Asian Americans vary widely in their immigration histories, educational opportunities, and countless other characteristics. Thang testified: Southeast Asian representation is lacking at Harvard, with fewer Vietnamese and Cambodian students. This often makes Thang feel "marginalized" and "erased." Thang explained: race-conscious admissions allows Harvard to be sensitive to the experiences of lesser-represented sub-groups. It "allows my immigration history to be taken into account" and "I just personally really believe that I benefitted from affirmative action."

A final problem with Kahlenberg's alternatives: it's likely the decline in diversity would be even greater than estimated. Itzel forthrightly stated she "probably would not have applied to Harvard if they didn't take race into account." Sarah said it would signal to minority students they were not welcome, and so fewer would apply and fewer would accept. Roger Banks explained Harvard relies on students of color for recruitment. This recruitment would be less effective with fewer students to do such work.

As these three facts demonstrate—racial considerations are necessary. The remaining question is whether Harvard's manner of considering it satisfies the standards of individualized review.

Three facts show this question should also be resolved in Harvard's favor.

- FACT ONE: Admitted Black and Hispanic students have stellar accomplishments and display a multitude of strengths, making them competitive irrespective of race.
- FACT TWO: Harvard considers all pertinent elements of diversity
- FACT THREE: Harvard flexibly applies its positive appreciation of race across students of all backgrounds. It never awards predetermined points. Race is never a negative factor.

Sarah Cole's file provides proof. Admissions officers don't comment on Sarah's race. Instead there are extensive notes and markups about how Sarah displays the many other attributes Harvard values.

Such as Sarah's extraordinary academic achievements.

- Her straight As. Her transcript shows straight As and A+s at Pembroke Hill School, the premier college prep school in Kansas City
- Noting her "warm school support," a letter which described Sarah as "academically virtually unparalleled" and praised her "scholastic prowess"

Notes about Sarah's extracurriculars:

- Her service on the Board of Engage KC, where she combatted gun violence
- Her “term time work.” Sarah spent 7-8 hours a week working at TJ Maxx
- Her participation in debate where she was vice president in 11th grade, and named best Novice Debater in 9th grade.

Notes about her character attributes:

- Her “determination, drive and admirable work ethic”
- Characteristics that are all reflected by the marked up sections of her glowing recommendation letters.
 - Harvard’s readers also underlined that Sarah exhibited leadership of a subtler, quieter type. A reminder that the term quiet is not always pejorative. It can be positive. And it’s not only applied to Asian American students.

Finally, notes showing Harvard’s readers appreciated the full range of attributes pertinent to diversity:

- They cared about Sarah’s socioeconomic status, noting she was possibly HFAI, Harvard’s Financial Aid Initiative
- They cared about her geographic ties: noting her love of and devotion to Kansas City
- They cared about her parents’ occupations. Her father worked at ADT security. Her mother worked for the IRS. A sign Harvard does consider this information, and Dr. Card’s model is stronger for considering it too.

Itzel’s application reflects a similar pattern. The comments focus on her stellar achievements: Her strong set of AP-or advanced placement—test scores. Itzel took 10. Her athletic success as a 2-season runner and captain. Her serving as editor of the paper. Comments on other contextual factors such as how her dad is unemployed and her high school only sends 25% of its graduating class to college. And more.

The Harvard reader did make two references to ethnicity: noting Itzel's connected with her heritage after a period of disconnect or personal essay.

When Harvard considers ethnicity, they're viewing it in context: tying it to what Itzel shared and listening to it.

To be clear: race may have played a limited role in Itzel and Sarah's admission. But it no more "defined" their admission than Sarah's ties to Kansas City, or Itzel's unemployed father, as Harvard also values geographic and socioeconomic diversity. It no more defines their admission that the overwhelming accolades they received with Straight As and strong AP test scores. SFFA's argument that race is the "predominant factor" for Black and Hispanic applicants is not only false—it unfairly erases the great weight of their accomplishments.

There is also nothing wrong with race playing some limited role in their admissions. This is not a situation where Harvard is stereotyping minorities by making presumptions about their contributions. Harvard is admitting minority students who are making concrete contributions to the college's educational goals.

- Itzel vowed in her application to "carry her Latina pride and joy with er to college." She made good on this promise at Harvard, co-leading a cross-coalitional effort to create an ethnic studies track.
- The recommendation letter from Sarah's school counselor included Sarah's response from a prior school survey that her most significant contribution in high school was providing an "example of an African American who does not come from a financially stable family, but [who] still strives for academic excellence...help[ing to] loosen the stronghold of stereotypes placed on African Americans."
- Sarah continued to dismantle stereotypes at Harvard. Professors and classmates frequently thanks her for her contributions in class, at least once after specifically sharing her perspective as a black woman. Sarah also co-authored a diversity report. She served as the president of the Black Students Association. And when the campus

was shaken by the deaths of Michael Brown, Eric Garner and the slew of police shootings that followed, Sarah led the rest of the campus—white and Latino, students and administrators--in finding a path forward to mourn and make meaning of the fact that “Black Lives Matter” and how to be better allies.

This contribution drew from Sarah’s prior experience as an advocate against gun violence AND as a Black American—Harvard’s holistic review rightly valued both aspects of Sarah’s identity.

It is clear on this record that Harvard’s process is both necessary and highly individualized. It is constitutional and crucial for fulfilling Grutter’s promise that colleges “be inclusive of talented and qualified individuals of every race and ethnicity”

Turning to SFFA’s second legal theory of intentional discrimination, the Students offer three observations.

First: SFFA cannot evade its burden of proving intent.

This court must reject SFFA’s argument that strict scrutiny applies. There is a meaningful distinction between the two legal theories, which SFFA may not erase:

- For decades Harvard has embraced the practice of considering race to increase underrepresented minority viewpoints on campus. It is this open embrace that gets you straight to strict scrutiny.
- In contrast, Harvard has vehemently denied having a policy that systematically favors white applicants over Asian Americans. SFFA, therefore, can not skip straight to strict scrutiny. Ruling otherwise would make it practically impossible for most colleges to adopt such a policy. They would have to affirmatively defend against an infinite number of legal theories. Title VI does not compel such a cost-prohibitive outcome for a policy that the Supreme Court has repeatedly endorsed.

- SFFA must carry its burden of persuading this Court that Harvard harbors discriminatory intent against Asian Americans.

Second: The application files of the Asian American student amici corroborate the testimony of Harvard's witnesses: if Asian American ethnicity is taken into account, it's always seen in a positive light.

- The reviewer who noted Thang's Vietnamese identity and use of "pencils as tools" to improve his English, also favorably praised Thang for "pushing himself academically and personally"
- For Sally, the only references to her Chinese heritage were positive and always tied to context. Sally's interviewer praised her academic potential by noting her experiences with "Taiwanese-speaking parents" meant she related "to the plight of outsiders" in literature. Sally's upbringing in a "culturally Chinese home," where Sally served as her parent's translator, also shed light on her positive personal attributes by demonstrating her commitment to others.

SFFA cannot erase entirely the significance of these examples. They are among the only files in the record that show how Harvard is actually treating Asian American applicants. There's no sign that Harvard's race-consciousness policy is penalizing Asian Americans; in some cases, it's helping them.

Third: While SFFA outwardly claims to combat racial stereotyping, its method of proof reinforces racial stereotypes and inequities.

SFFA's claim is not that Asian Americans are getting in at a lower rate than white applicants. Rather, it's that Asian Americans should be getting in at higher rates than white, African American, and Hispanic applicants because they—as a racial group—are superstars particularly when it comes to academics. It's all on page 10 of their post-trial papers:

- SFFA admits: “From...2014 to 2018, whites and Asian Americans were admitted at about the same rate every year.” But, they say Asian Americans should earn more admission spots because they have higher academic index scores.
- The resonance with the model minority myth cannot be missed. Our students reject SFFA’s monolithic view of Asian Americans who they believe exhibit a similar diversity of talents and, therefore, would be expected to have a similar overall admissions rate.

Of course, like all plaintiffs, SFFA is entitled to make its case that prejudice exists. But the way SFFA goes about doing it reinforces other racial prejudices: it overemphasizes academic metrics and selectively ignores some racial associations but not others.

SFFA’s expert finds discrimination by throwing out the personal score. He says it’s influenced by race. He bases his conclusion on two flawed analyses. First, he arranges students by “academic index”—a score based entirely on SATs and grades—and he observes there’s some racial variance in the share of applicants receiving higher personal scores. But this does not show racial bias. It just shows that the academic index is not strongly related to the personal score. And those with mid-range scores are more than academically qualified. Take our students.

Among the four, Thang had the lowest academic index at 220.0 probably because of his “lower end SAT score.” SFFA has derisively referred to this as a “middle of the pack score.” But, Thang was more than academically qualified: he had straight As in high school, graduated first in his prestigious magnet program, and was a National AP scholar with distinction. And Thang’s mid-range score had very little to do with the attributes sought by the personal rating such as “reaction to setbacks” and “concern for others.” Here, Thang excelled. He overcame language barriers and his school recommendation stressed he was an “unusually caring individual” with an “infectiously happy personality.”

There's also nothing suspicious about the variation by race. The academic index is highly driven by standardized test scores which track privilege more than talent. Test scores are racially skewed in large part because of racial variation in wealth which impacts who has access to expensive test prep programs. Sarah Cole received a scholarship to take an SAT prep class which immediately improved her score by 200 points. Most students with fewer resources can't take these test prep programs to improve their scores. Grades and coursework can be just racially skewed: several student Amici testified teachers were less likely to identify black and Latino students for gifted coursework or accelerated magnet programs. The racial variation by academic index does not prove discrimination. In large part, its driven by the racial inequities that pervade our K-12 system.

Dr. Arcidiacono also justifies throwing out the personal rating based on his regression analysis. But there was no good reason for treating the personal rating differently than the academic and extracurricular ratings:

- 1) All three of the ratings showed associations with race.
- 2) All three of the rating regressions had low explanatory power. The personal score could only explain 29% of student-to-student variation.

Dr. Arcidiacono says the personal rating is more suspect because the "observables" run in the opposite direction. But this is not persuasive. These are his observables. A large number are academic which, as Thang showed, may not run in the same direction as personal attributes. And most of the others don't have an obvious relationship with qualities such as "leadership" and "courage." The racial associations in the personal rating are not more or less suspicious than those in the academic or extracurricular ratings which disfavor Black and Hispanic applicants. They should be treated consistently. Dr. Card did this. He adjusted his model for racial associations across all the ratings. He found no sign of discrimination.

Students acknowledge Harvard's admissions system is not perfect. To be clear: Asian Americans are equally likely to face setbacks, display courage, and make great leaders. But because of

biases in the K-12 system, such attributes may show up in students' application files at varying rates. Teachers and counselors may offer effusive praise of Asian Americans, but this praise may focus more on Asian Americans' academic strengths and less on their reaction to setbacks. Think of Sally Chen: her college counselor told her not to write about her family's Asian Immigrant story because it was "overdone." Fortunately, Sally did not heed this advice. She wrote about it, received a high personal score, and got in. But, imagine if the counselor had convinced Sally. And, these are the very counselors who write recommendations for evaluating students like Sally.

Banning race-conscious admissions will not end racial biases that impact what a teacher shares or who has access to SAT prep courses. In fact, race-conscious admissions is one of the most important tools for counterbalancing such biases. Harvard should continue to refine its system to promote greater equity. And it should—and legally may—use race-conscious admissions as one of these tools.

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In sum, SFFA can not erase our students stories from the record and they are not entitled to erase race from Harvard's application process. Thang reminds us that the erasure sought by SFFA would be just as harmful to Asian Americans as he:

"Wrote about my Vietnamese identity in my application because I think it was such a big part of myself. And I was also just feeling really tired of erasing my identity for so long . . . And so I took like the power back and wrote about that on my college essay."

Students sincerely thank this Court for the opportunity to "take the power back" by taking the stand. The Students trust that this Court's holistic review of the evidence--much like Harvard's holistic, race-conscious review--will honor their stories and preserve the diversity on Harvard's campus that cultivates citizen-leaders to serve in our stunningly diverse world.