No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE (HARVARD CORPORATION),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RICHARD SANDER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Interest of the Amicus Curiae[1]

Richard Sander is an economist and law professor at UCLA, and a leading scholar in the field of affirmative action. Without compensation, he provided advice to Students for Fair Admissions about *SFFA v. Harvard*, and had authorized access to data disclosed to SFFA under the district court's protective order. None of that confidential information is used or cited in this brief, which represents only his own views.

Summary of Argument

The Supreme Court has laid down many principles governing the boundaries of permissible racial preferences in university admissions, but has provided little guidance on how these principles apply to specific empirical contexts. The present case, and its rich factual and empirical record, provide a unique opportunity for the Court to makes its principles more tangible.

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[1] No counsel for a party wrote this brief in whole or in part, and no party, counsel for a party, or anyone else made a monetary contribution intended to fund the preparation of submission of this brief. Counsel of record for all parties received notice and gave consent to the filing of their brief at least 10 days prior to filing.

Argument

1. Introduction

In her dissent in *Gratz v. Bollinger*, Justice Ginsburg observed: "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."[2] Justice Ginsburg was right. The University of Michigan's undergraduate admissions policy awarded all "underrepresented minorities" a specific number of automatic points, in order to achieve representation in the admitted class roughly comparable to the racial makeup of applicants. The *Gratz* majority ruled this system unconstitutional on the grounds that it militated against an individualized consideration of each applicant's contribution to the school's diversity.[3] But on the same day, the majority in *Grutter v. Bollinger* held that the University of Michigan Law School's admissions process passed constitutional muster, because the Law School described its admissions process as a holistic one that did provide individualized consideration and did not elevate race above the many other facets of diversity.[4] In reality, as was known then and was later shown even more clearly, Michigan's law school used larger racial preferences than the undergraduate admissions

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[2] *Gratz v. Bollinger*, 539 U.S. 244, 305 (2003).

[3] *Id.* at 275—76.

[4] *Grutter v. Bollinger*, 539 U.S. 306, 337—43 (2003).

process and gave virtually no weight to other diversity characteristics.[5]

The practical effect of these two decisions was thus exactly what Justice Ginsburg feared: colleges and graduate schools removed transparency from their admissions systems and institutionalized procedures that amounted to "winks, nods, and disguises." By 2006, Michigan's undergraduate admissions system was using larger racial preferences than those thrown out in *Gratz*, as formulaic and mechanical in their effects, but described in "holistic" terms.[6] And a national study of admissions data from dozens of law schools found that their use of racial preferences had also grown larger and more mechanical in the wake of *Grutter*.[7]

A similar pattern had followed the Court's 1978 decision in *Regents of the University of California v. Bakke*. The Court there ruled that an explicit racial quota in admissions (in this case, utilized by a medical school) violated the constitution, but that a system which considered race among many other diversity factors, and was motivated by a desire to create a

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[5] See Ian Ayres and Sydney Foster, "Don't Tell, Don't Ask: Narrow Tailoring after *Grutter* and *Gratz*," 85 *Texas Law Review* 517 (2006); Richard Sander, "A Systemic Analysis of Affirmative Action in American Law Schools, 57 *Stanford L.Rev* 367 (2004).

[6] Richard Sander, "Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter," chapter 15 in Kevin T. McGuire, *New Directions in Judicial Politics* (2012), pp. 291-95.

[7] Id.

diverse educational environment, was permissible.[8] A few years later, a survey of law and medical school admissions officers found that most of them believed that their competitors were still using quotas, but that they themselves had reformed.[9] In aggregate numbers, however, the number of underrepresented minorities admitted remained stable or rose; there was no sign that *Bakke* had had any practical effect other than to proliferate "winks, nods, and disguises."

In short, Supreme Court doctrine on the use of racial preferences in higher education suffers from an acute "form versus substance" problem: does the Court mean to actually restrict the use of race in admissions decisions, or does it simply want universities to hide the ball? The purpose of this brief is to show how the record in *SFFA v. Harvard* poses these questions squarely. In one area after another, the substance and effect of Harvard policies seems to run afoul of Supreme Court doctrine, though in form Harvard claims to hue closely to the Court's rules. It is possible to show this gap between "form" and "substance" because of *SFFA v. Harvard*'s uniquely empirical character; in no other case involving university racial preferences has the Court had before it such a rich factual record or such sophisticated and thorough expert reports. This record makes it possible not only to see the actual effects of Harvard's policies, but also

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[8] *See generally Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

[9] Susan Welch and John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* (1998).

to give empirical substance to the Court's standards for the permissible use of racial preferences.

2. *SFFA v. Harvard* provides four clear opportunities for the Court to bridge the "form versus substance" gap on the permissible use of race in higher education admissions.

A. What is a quota? In the 2012-13 admissions cycle, during which it admitted the "Class of 2017," Harvard received 28,606 domestic (i.e., non-international) applications for its freshman class, including 2,688 from Black applicants. When the dust settled, Harvard had admitted 1,665 non-Blacks, which was 6.4% of its 25,918 non-Black applicants. And it had admitted 172 Blacks, which was 6.4% of its 2,688 Black applicants. In other words, the success rate of Black and non-Black applicants was identical. Had Harvard admitted 171 Blacks, or 174 Blacks, the success rates of Blacks and non-Blacks would not have matched so closely.[10]

This was a striking coincidence if Harvard was not deliberately trying to achieve such a result. Even if we suppose that Harvard race-normed its admissions (which itself would be illegal – see below), creating race-based weights so that the average qualifications of applicants within each racial group were treated as equivalent, random fluctuation would make it unlikely that the Black/non-Black outcome would be so precisely proportional as Harvard's actual admissions for the

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[10] See generally the discussion in Expert Report of Peter S. Arcidiacono, pp. 27-30.

Class of 2017. A simple Chi-square calculation shows that even a race-normed admissions process, without further manipulation, would produce a match this exact only 4% of the time.

In admitting the Class of 2018, Harvard once again admitted nearly identical percentages of black and non-black applicants: 6.52% of its non-Black domestic applicants and 6.58% of its Black domestic applicants. Then it happened yet again: For the Class of 2019 (the most recent data disclosed in the litigation), Harvard admitted 6.08% of its non-Black domestic applicants and 6.06% of its Black applicants. Such precisely matching results are extraordinarily unlikely to occur by chance, even if in all three years Harvard was race-norming the credentials of its applicants, to achieve "on average" the same approximate proportions of admittees of different races.[11] The numbers alone are very powerful circumstantial evidence of a "floor" on Black admissions – in effect a target quota.

Moreover, it is easy to discern why Harvard would have instituted a floor at this particular time. In 2007, the federal Department of Education proposed changes in the way colleges reported the race of their students – changes that would have the effect of reducing

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[11] The plaintiff's expert, Dr. Arcidiacono, estimated that this outcome would happen randomly only 2 times in 1000, using a very conservative method of calculation. Expert Report of Arcidiacono, p. 9. A more reasonable estimate, obtained by calculating the joint probability of the three chi-square results for the three consecutive years, suggests the outcome would happen randomly only 1½ times out of 10,000 occurrences.

Harvard's apparent Black enrollment.[12] The proposed changes were eventually implemented, and, *starting with the Class of 2017*, Harvard changed the way that it reported race to federal authorities.[13] Quietly instituting a floor on Black admissions – by making sure that Blacks were admitted at least at the same rate as non-Blacks – would have been a way of making sure that the reporting change did not produce an unacceptable drop in Black admissions.

Of course, Harvard did not announce that it had such a floor, and its officers denied at trial that a quota existed. But the plaintiffs obtained evidence of day-to-day decisions over the admissions calendar that show Harvard's rate of admission for Blacks was below the rate of admission for non-blacks until the second half of each admissions cycle, when the Black rate rose and then remained in very close parity with the non-Black rate from March through the end of the admissions cycle.[14]

One could hardly have more compelling evidence of a quota, short of a formal articulation by Harvard of a quota policy. This suggests two key issues for the Court to consider: does the ban on quotas articulated in *Bakke* apply only to overt quotas – those announced

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[12] See IPEDS (the Integrated Postsecondary Education Data System) website, maintained by the Department of Education: https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-reporting-changes.

[13] Expert report of Peter Arcidiacono, p. 27.

[14] Expert report of Peter Arcidiacono, p. 30.

as policies -- or also to quotas followed as an unannounced practice? And if it does extend to quotas in practice, is there a way to articulate a standard that can be empirically applied to other universities and other admissions contexts? As the next section explains, it is easier to answer this question once one considers the related practice of racial balancing.

B. What is racial balancing? The Supreme Court has repeatedly held that "racial balancing" is "patently unconstitutional," [15] but it has never provided much guidance as to what this means in practice. Chief Justice Rehnquist, dissenting in *Grutter*, contended that the University of Michigan Law School was engaged in racial balancing because the percentage of underrepresented minorities varied within a relatively narrow band over six admissions cycles.[16] The plaintiffs in the present litigation follow a similar approach, pointing out that the percentage of admitted students who are URMs is similar from year to year, moving within a band of four percentage points over a six-year period.[17]

But these arguments, on their own terms, are unsatisfactory. If it were the case in a given year that the objective admissions attributes of underrepresented

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[15] *Fisher v. University of Texas Austin,* 570 U.S. 297, 311 (2013) ("*Fisher I*"); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J. concurring).

[16] *Grutter v. Bollinger*, 539 U.S. 306, 382-85 (Rehnquist, C.J., dissenting) (2003).

[17] SFFA Petition for Writ of Certiorari, p. 39-41.

minorities ("URMs") were sufficient to justify the admission of a class that was roughly 25% URMs, it would be reasonable to expect that, barring some important change in the composition of applicants, the URM percentage in subsequent years would fall into the same general ballpark. Broad similarities in admissions rates, or similarities in the racial composition of an admitted class across a number of years, do not by themselves seem sufficient to show illegal racial balancing. Something more seems necessary.

The example in the last section -- of Harvard's achievement of an exact black/non-black matching of admission rates for three years in a row -- has that "something more." Any quota, whether an overt quota maintained as an open policy, or an exact admissions ratio achieved between two racial groups that cannot be traced to entirely objective factors, and that would rarely occur through the operation of random variation, would seem necessarily to satisfy any operational test of "racial balancing."

In addition, the fact that the Court repeatedly uses language about racial balancing suggests that this concept applies to other situations that are not simply quotas. For example, Justice Kennedy wrote in *Fisher I*, "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' [quoting *Bakke*] 'That would amount to outright racial balancing, which is patently unconstitutional.' [quoting *Grutter*] 'Racial balancing is not transformed from "patently unconstitutional" to a compelling interest simply by

relabeling it "racial diversity." '[quoting *Parents Involved in Community Schools v. Seattle School District No. 1*]"[18]

The Court's refrains on racial balancing suggest it would be troubled by admissions practices that orchestrate distinct components of the admissions process to obtain a specific pattern of racial admissions. In particular, the Court might consider a university to engage in racial balancing when the importance assigned to race varies not on the basis of individual contributions to diversity, but on the importance of "balancing" the presence of various racial groups.

SFFA v. Harvard provides a rich factual record for considering what is meant by racial balancing. First, consider the report of Harvard's own expert, Professor David Card. On page 83 of his report, Card produced a diagram (reproduced below) in which he showed the relative influence of a series of factors on Harvard admissions outcomes.[19] The bars in the graphs showed the pseudo-R2 that resulted when Card predicted admissions outcomes using a variety of single factors.[20]

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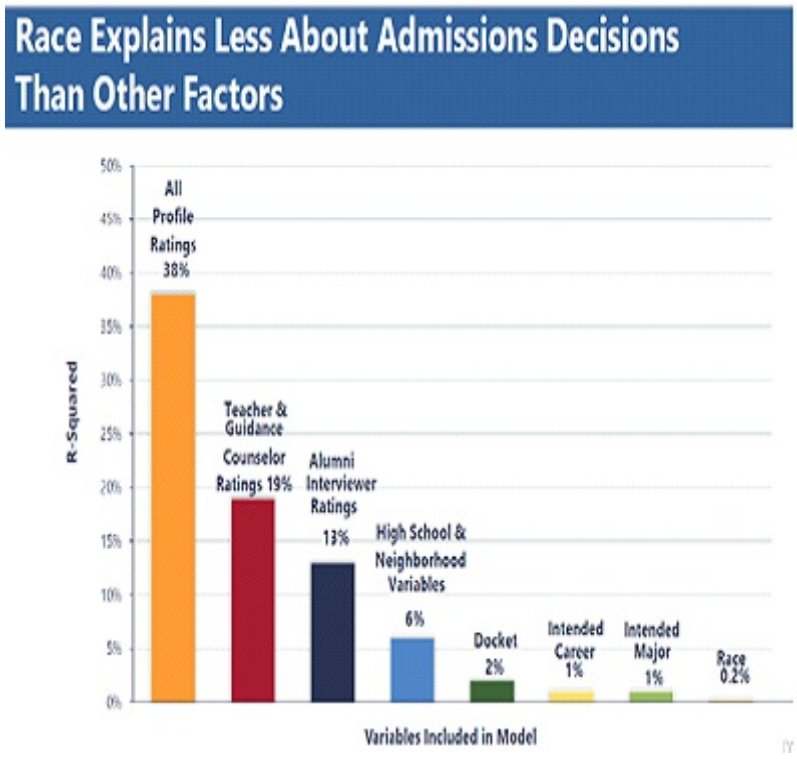
[18] *Fisher* I, 133 S. Ct. 2419.

[19] Report of David Card, p. 83.

[20] Note that the pseudo-R2 measure, which is used in logistic regressions predicting "either/or" outcomes like "admit/deny," is very different from the "R2" measure used in regressions predicting such "continuous" variables as GPA, height, and so on. A logistic model can have very high explanatory power and still have a relatively modest pseudo-R2. The key point here, however, is that a pseudo-R2 close to zero, like an R2 close to zero, means that the independent variable or variables are of little or no help



As Dr. Card's analysis shows, "profile ratings" generated by the admissions process predict admissions outcomes with a pseudo-R2 of .38 (a very high pseudo-R2). Alumni interview ratings have a pseudo-R2 of .13, and high school and neighborhood variables have a pseudo-R2 of .06. But "race" as a solo predictor of domestic admissions has an extraordinarily low pseudo-R2 of .002 – very nearly zero. Dr. Card argued that this very low value demonstrated that race was given relatively little weight in the Harvard

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in predicting the dependent variable.

admissions process. But Dr. Card's analysis is glaringly incomplete.

Note that Dr. Card's "race" regression is not examining the effect of race when controlling for other factors; all the parties agree that race is often a very significant predictor in such analyses, because Harvard admits to using racial preferences. Here, Dr. Card is using a regression that ***only*** includes race. Race would have no explanatory value in such a regression under not one, but ***two*** circumstances: (a) when race is uncorrelated with any other factor predicting admissions, including the admissions decision itself, or (b) when an admissions process carefully manipulates its admissions criteria in the aggregate to produce admission numbers for each race that are roughly proportional to the volume of applications from that race – what is often called "race-norming."

Scenario (a), where an applicant characteristic is so completely unrelated to admissions that it has no predictive value, is actually quite hard to find. Almost every important characteristic of applicants – their home state, their interest in athletics, their socioeconomic status, whether they attended a public or a private high school – has a significant correlation (either positive or negative) with admissions outcomes. Scenario (a) would occur only if we used a clearly extraneous independent variable to predict admissions, such as the "day of the week" on which each applicant was born. Presumably applicants born on Tuesdays have, on average, almost exactly the same characteristics as applicants born on any other day, so

"born on Tuesday" would have no correlation whatsoever with admissions outcomes.

Race, however, is obviously not like "day of the week." Each of the major racial groups has characteristics that have strong positive or negative correlations with many of the factors considered in admissions. Blacks have disproportionately low test scores; Asian-Americans have disproportionately low athletic achievement; Hispanics have disproportionately high socioeconomic disadvantage. Moreover, Harvard concedes that it uses significant racial preferences. Given the manifold relationships between race and admissions, we would never expect all these effects to "cancel out" and produce no aggregate effect on admissions, unless the process were deliberately manipulated to achieve that outcome. If Harvard used quotas not just for Black admissions but for all racial groups (e.g., admitted 6% of applicants from each racial group), then the pseudo R2 in Professor Card's equation would be exactly 0. The fact that Dr. Card obtains a pseudo R2 for race of .002 means that Harvard is doing something that comes close in its effects to a quota – i.e., something that looks like racial balancing.

To understand how Harvard achieves this balancing, it is helpful to examine more closely the "academic" and "personal" ratings generated at Harvard. A major focus of SFFA has been the allegedly discriminatory way that Harvard assigns personal ratings to Asian-Americans. The evidence of such discrimination is indeed extensive and powerful. But on the question of racial balancing, it is helpful to look

at a broad pattern affecting all four of the major racial groups in Harvard's applicant pool.

To begin, average academic ratings at Harvard vary substantially across racial lines. The proportion of applicants who receive a "1" or a "2" academic rating (Harvard's highest) is 60% for Asian-Americans, 46% for whites, 17% for Hispanics, and 9% for Blacks.[21] This is not surprising – it mirrors patterns in SAT scores and high school grades that can be documented in any number of sources. What is striking, by comparison, is the pattern of "personal ratings" by race. For applicants in the 10th (top) academic decile, the percentage of applicants with high personal ratings was 49% for Blacks, 36% for Hispanics, 31% for whites, and 23% for Asian-Americans.[22] This racial hierarchy is repeated in *every* academic decile; for example, among students in the 7th academic decile the share of students receiving high personal ratings is 41% for Blacks, 31% for Hispanics, 24% for whites, and 18% for Asian-Americans. In the 4th academic decile, high personal ratings are obtained by 30% of Blacks, 21% of Hispanics, 20% of whites, and 15% of Asian-Americans.[23]

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[21] Expert Report of Peter S. Arcidiacono, Table B.4.1R (using Arcidiacono's "expanded sample").

[22] Expert Report of Peter S. Arcidiacono, Table B.5.5, (page 118 of pdf). The table is labeled "baseline" sample, but Arcidiacono makes clear in the text of his report (at p. 41) that this table describes the full applicant pool.

[23] Id.

There are two key points here. First, the racial hierarchy of "personal ratings" is the mirror image of the "academic ratings" pattern: Blacks first, Hispanics second, Whites third, Asians fourth. This is exactly the pattern Harvard would want to achieve if it sought to "racially balance" the effect of the academic ratings. Second, the strong association between "race" and "personal ratings," and the consistent racial hierarchy, is inconsistent with all available evidence on the actual predictors of personal ratings.

--Harvard's own "extracurricular" ratings, which are more objective and formulaic than its personal ratings, show no particular racial pattern, but a strong association between academic achievement and extracurricular achievement.[24] For example, among applicants in the 10th (top) academic index decile, the percentage of students with high extracurricular ratings is 38% for Blacks, 35% for Asian-Americans, 32% for whites, and 29% for Hispanics; among applicants in the seventh academic decile, high extracurricular ratings were held by 28% of Asian-Americans, 27% of Hispanics, 26% of whites, and 26% of Blacks. There is a marked "academic" pattern but no "racial" pattern.

--UCLA has publicly disclosed detailed data on its admissions practices during several admissions cycles when it was not permitted to use racial preferences. Here, too, there was a strong association between

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[24] Id. at Table 5.4, p. 47. The personal ratings as measured by Harvard alumni (as opposed to admissions staff) show some racial pattern, but one that is quite muted, and much more strongly associated with academic performance.

academic achievement and personal ratings, but no particular association between race and personal ratings. At UCLA, the share of applicants in the top academic decile with high personal ratings, for the Classes of 2008 through 2010, were 28% for Asian-Americans, 26% for Blacks, 25% for whites, and 23% for Hispanics. No racial group in the next-to-top academic decile had average personal ratings as high as any of the racial groups in the top decile-- students who excel academically also tend to make exceptional contributions to their schools and their communities, regardless of their race. For UCLA applicants in the 8th academic decile, the personal ratings of all races are again lower: 16% of whites, 15% of Blacks, 14% of Asian-Americans, and 13% of Hispanics score high personal ratings.[25] Here again, there is a marked academic pattern but no "racial" pattern.

SFFA is probably right that Harvard's personal ratings have a strong discriminatory effect upon Asian Americans. The broader point here, however, is that Harvard manipulates the subjective components of the personal rating to achieve an extremely implausible hierarchy of races that directly offsets disparities in objective academic rankings. As elaborated below, Harvard also uses (and concedes that is uses) racial preferences to foster diversity. These preferences also have the same symmetrical pattern as the personal ratings: Blacks receive the largest racial preferences, then Hispanics, with Whites in some middle range, with Asian-Americans disfavored relative to whites.

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[25] Analysis of publicly-available UCLA admissions data by amicus, available on request.

These patterns at Harvard suggest a simple, twofold test for illegal racial balancing: (1) rates of admission across racial groups that are markedly more similar than can be justified by objective criteria, and (2) the use of subjective criteria that produce sharply different average evaluations across otherwise similar applicants from different racial groups and have the effect of erasing or substantially reducing disparities in objective qualifications. Strong evidence of this second component of the test exists when (a) the subjective inputs into an important criterion (like Harvard's personal rating) produce very different results on a race-by-race basis than the objective inputs, and (b) these subjective criteria produce a "hierarchy" across races that is the direct inverse of the average differences across races on objective criteria.

A test of this type helps to distinguish situations where fair and race-neutral criteria nonetheless produce a relatively stable racial pattern of admissions over several years – which the Court presumably does not consider racial balancing – from a situation where either racial preferences themselves, or subjective criteria that appear to be heavily influenced by race (or both, as at Harvard), are used to "balance" objective criteria and produce outcomes across racial groups that are more harmonized than can be explained with objective criteria.

Having greater clarity about "racial balancing" can also help to clarify a legal standard for a "quota." The essence of a quota is the combination of *some* evidence of racial balancing, sufficient to make a balancing agenda plausible, combined with the achievement of

such precise racial results (such as the Black/non-Black results discussed above) as would be very unlikely to occur by chance.

C. What does it mean to treat race as the "defining feature" of an application? In *Grutter*, Justice O'Connor observed that "[w]hen using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individual consideration in the context of a race-conscious admissions program is paramount."[26] In *Fisher* I, Justice Kennedy emphasized this point: "the University must prove that the means chosen to attain diversity are narrowly tailored to that goal. On this point the University receives no deference.…It remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[27] In other words, the question of when race becomes the "defining feature" of an application, rather than a "plus" factor (or, in Harvard's terminology, a "tip"), is a very central test in the Court's evaluation of permissible preferences.

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[26] 539 U.S. at 337.

[27] 133 S.Ct. 2411, 2420 (2013).

Here again, the rich facts in *SFFA v. Harvard* can assist the Court in giving quantitative substance to its very subjective standard. Harvard does not concede that racial considerations are factored into its personal ratings of applicants, but Harvard does concede that (entirely apart from the personal ratings), it gives consideration to race. There are a variety of methods used by the parties to demonstrate and quantify those preferences. To really understand the effects of these preferences – and the disagreements about those effects – an examination of Table 7.1 of Dr. Arcidiacono's expert report is very helpful.[28] The table summarizes analyses Dr. Arcidiacono conducted that modeled the Harvard admissions process and measured the characteristics of an Asian-American applicant that would produce a 25% chance of admission. Arcidiacono then varied specific characteristics of that applicant to show how they changed admissions chances across racial lines.

Thus, when one considers an Asian-American male applicant who is not "disadvantaged" under Harvard's classification, and has characteristics and evaluations that would produce a 25% change of admission, those admission chances rise to 34% if one changes the applicant's race to "white," 74% if one changes the applicant's race to "Hispanic," and 93% if one changes the applicant's race to "African American." For non-disadvantaged female applicants, the corresponding percentages are 25% for Asian-Americans, 30% for whites, 70% for Hispanics, and 92% for African-

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[28] Expert report of Peter S. Arcidiacono, p. 69.

Americans.[29] In other words, the effect of Harvard's use of race is to change an applicant from one with a modest but reasonable shot at admission to one who is a nearly-certain admit. For these Asian and Black applicants, it is hard to see how race is not the "defining feature" of their application. If the Court's language in *Fisher* and *Grutter* means something else, this case is a valuable vehicle through which to clarify what the standard does mean.

Table 7.1 repays careful study, because it also allows the reader to understand the effect of the various datasets and definitions used by SFFA and Harvard. For example, Arcidiacono argued that certain categories of applicants (e.g., athletes, legacy admits, and children of faculty) should be excluded from the principal analyses, because they were admitted under very different procedures from the "regular" applicants.[30] Table 7.1 allows one to see how admission probabilities are affected by race for both the full ("expanded") and limited ("baseline") datasets (in general, these probabilities only shift a few points under either scenario). Arcidiacono also argued that Harvard's "overall" and "personal" ratings should be excluded in measuring racial preferences, because those ratings were themselves substantially influenced by racial considerations. He may be right, but in any

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[29] Id. Note that 88% of Harvard applicants are not "disadvantaged", so these percentages for non-disadvantaged males and females cover the vast majority of Harvard applicants. Id. at p. 93 (Table A.7).

[30] Expert Report of Peter S. Ancidiacono, pp. 20-23.

case Table 7.1 allows one to compare how admissions probabilities change under either procedure.

D. What does the Court mean by "diversity?" It is well understood that the Court only permits universities to use racial admissions preferences when they have determined "race-neutral alternatives" cannot achieve levels of diversity sufficient to meet the school's educational objectives. SFFA has pointed out the inadequacy of both the timing and substance of Harvard's search for "race-neutral alternatives." The question we consider here is what counts in the search for diversity. Is "diversity" a codeword for "racial diversity," or is race simply one component of a much broader concept?

The rich empiricism in the *SFFA v. Harvard* helps us to understand the issue vividly. The expert report of Richard Kahlenberg points out that Harvard's student body is notably lacking in socioeconomic diversity. He quotes from Professor Raj Chetty's finding that "approximately 3% of children at Harvard in the 1980-82 birth cohorts [i.e., students in the Classes of 2002 to 2004] come from the lowest quintile of families, compared with more than 70% from the top quintile."[31] One way of putting this statistic in context is through a measure of underrepresentation; if roughly 20% of children come from the bottom income quintile,[32] but only 3% of Harvard students do, then

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[31] Expert Report of Richard Kahlenberg, p. 20; other examples are discussed there.

[32] The true number would be somewhat higher, since children are disproportionately clustered in poor households.

this group has a representation of .15 (.03/.20) – i.e,. about 85% less than parity.

Tables 1 and 2, below, compare the representation of the two largest "underrepresented" racial groups (Blacks and Hispanics) with that of what Harvard calls "disadvantaged" students (who are drawn from roughly the lowest two-thirds of U.S. households in terms of income or educational background). The tables illustrate two things: currently, Harvard excels in its representation of Blacks and Hispanics, but fares very poorly in its representation of the socioeconomically "disadvantaged." Under a typical Kahlenberg simulation of a race-neutral admissions policy (this one drawn from p. 49 of his report), representation of Blacks drops slightly while representation of Hispanics improves and representation of the disadvantaged improves very dramatically. If "diversity" includes both socioeconomic and racial factors, it is hard not to see the Kahlenberg simulation as producing a more diverse class.

Table 1. Representation of racial and socioeconomic minorities at Harvard[33]

Group	% Presence Nationally (among young adults w/high school diploma) (a)	% of Harvard Freshmen Class of 2019 (b)	Representation (b/a)
Black	13%	13.6%	1.05
Hispanic	14%	12.9%	.93
"Disadvantaged"	66%	17.4%	.26

[33] Data in column (a) comes from author's analysis of American Community Survey data (for race) and Expert Report of Richard Kahlenberg. Data in column (b) comes from the Kahlenberg report, p. 49.

Table 2. Representation of racial and socioeconomic minorities at Harvard under a Kahlenberg simulation.

Group	% Presence Nationally (among young adults w/high school diploma) (a)	% of Harvard Freshmen Class of 2019 (b)	Under-repre-sentation (b/a)
Black	13%	10.1%	.78
Hispanic	14%	13.5%	.96
"Disadvan-taged"	66%	54.3%	.82

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What does the Supreme Court mean by universities' "diversity" interest? In *Bakke*, Justice Powell famously cited Harvard's description of its admissions program, and observed, "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to

promote beneficial educational pluralism. Such qualities could include exceptional personal talents, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity . . ., and *to place them on the same footing for consideration*, although not necessarily according them the same weight [emphasis added]."[34]

In *Grutter*, the majority specifically endorsed Justice Powell's view of diversity. As Justice O'Connor approvingly wrote, "Justice Powell was . . . careful to emphasize that in his view race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.' For Justice Powell, 'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,' that can justify the use of race. Rather, 'the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'"[35]

In marked contrast, the District Court below clearly believed that "diversity" and "racial diversity" are one and the same. Throughout its discussion of race-neutral alternatives, the Court never weighs one type

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[34] *Bakke* 317.

[35] *Grutter* 324-25.

of diversity against another, but focuses exclusively on whether any alternative policy would reduce Harvard's racial diversity. It observes, for example, that "Harvard could adopt a more significant tip for economically disadvantaged students, but every such proposal presented to the Court would result in a significant decline in African American representation. Achieving even roughly comparable levels of combined African American and Hispanic representation to those Harvard presently achieves would require Harvard to sacrifice the academic strength of its class and forgo other admissions policies….and *still be less diverse* than it is currently [emphasis added]."[36] By all indications, the Court attached zero weight to socioeconomic diversity.

The same, exclusive focus on racial diversity comes through in the First Circuit opinion. All discussions of race-neutral alternatives focus entirely on their effects upon racial diversity; there is no acknowledgement of, nor concern about, the great underrepresentation of students from economically disadvantaged backgrounds.[37] Throughout the opinion, the court treats "diversity goals" as equivalent to "racial diversity goals."

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[36] P. 122 of released District Court opinion, reported at 397 F.Supp. 3d 126 (2019).

[37] *SFFA v. Harvard*, 980 F.3d 157 (2020); in text version, pp. 37-43 (discussing the Smith Committee); pp. 77-83 (holding that the District Court did not err in finding no workable race-neutral alternatives).

The rich facts of *SFFA v. Harvard* create an opportunity to clarify the meaning of the diversity rationale. Mr. Kahlenberg's report amply documents that socioeconomic diversity is at least equal to racial diversity in fostering a community with a wide range of experiences and beliefs. It also demonstrates that Harvard can not only eliminate racial preferences, but also remedy its dramatic lack of socioeconomic diversity, with modest (and, for Hispanics, beneficial) effects on racial diversity. Is race entitled to "sui generis" consideration? And if so, is the Court's call for "race-neutral alternatives" purely a call for developing algorithms that can find clever substitutes for race that produce identical racial results?

3. Conclusion

Amicus has sought in this brief to highlight both the ambiguities of current Court doctrine and the opportunities created by *SFFA v. Harvard* to bring greater clarity. Declining certiorari for this case would be tantamount to endorsing the belief that universities may make use of racial preferences and penalties as they like, so long as they avoid certain forbidden words in describing their practices. Granting certiorari provides a unique opportunity for the Court to show the failings of current doctrine, and to either clarify how current standards should be applied in practice, or articulate new broad principles that will have substance as well as form. In either case, it is important to break with the past practice of appearing to articulate principles while leaving them toothless. This approach has fostered a culture of dishonesty about racial practices in higher education that is deeply

unhealthy and leaves all groups feeling manipulated and resentful.

Respectfully submitted,

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