

No. 20-1199

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

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

**JOINT APPENDIX
VOL. II OF IV (JA546–JA1100)**

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JA546

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 15, 2018

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TRANSCRIPT OF BENCH TRIAL -- DAY 1
BEFORE THE HONORABLE ALLISON D. BURROUGHS
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JA547

* * *

**OPENING STATEMENT OF STUDENTS FOR
FAIR ADMISSIONS BY MR. MORTARA**

[pp. 9:14-11:22]

The evidence in this trial will show that Harvard College discriminates against Asian-American applicants, specifically those applicants ineligible for Harvard's sizeable preferences for recruited athletes, the children of its alumni, major donors, and its faculty.

The evidence will show that senior officials at Harvard, including Dean William Fitzsimmons, have been aware of this discrimination since at least 2013. And in short, Harvard will deny both what its own internal research told it in February 2013 and what common sense should tell us all, that subjectively determining someone's personal qualities from a stack of paper without any guidance, without any warnings about using race, invites racial bias, explicit bias, implicit bias, racial stereotyping, and that here has added up to intentional discrimination in violation of Title VI.

This is particularly true in the case of Harvard's admissions process where the very first page of the very first document an admissions officer reads about how to read applications enjoins the admissions officer to focus on race.

Most of the evidence we will present in this trial goes to Count I, our claims of anti Asian-American discrimination because on this claim we have the least

disagreement with Harvard about the law. Harvard agrees it is against Title VI. It violates Title VI for Harvard to impose an Asian penalty in its admission process. We disagree about the facts.

As to the other counts, Your Honor, it's a bit of the converse. The facts are less in dispute. Harvard uses race in its admission process and says its purpose is diversity.

By Harvard's own admission, race is determinative in the admission of over half the African-Americans and about the third of the Hispanics on Harvard's campus in the college. That's not our report. That's Harvard's own report on race-neutral alternatives, Plaintiff's Exhibit 316.

And as Director McGrath testified and will testify, Harvard runs its preliminary admissions process and then checks the racial numbers from the previous year. If it sees a group that's far behind or significantly behind, an under-represented minority group, it explicitly goes back and re-reviews those applications, balances it out.

And of course, as Your Honor observed in the summary judgment ruling, Harvard did not convene or finish a committee or seriously consider race-neutral alternatives until nearly 15 years after the Supreme Court told Harvard it needed to in the *Grutter* decision.

Your Honor, the future of affirmative action in college admissions is not on trial here this next couple of weeks. The Supreme Court has held that race can be used in a narrowly tailored way in college admissions. Diversity and its benefits are not on trial here.

Students for Fair Admissions supports diversity on campus, and the Supreme Court has held that race can be used in a narrowly tailored way in a college admissions process to unlock the education at benefits of diversity.

This trial is about what Harvard has done and is doing to Asian-American applicants and how far Harvard has gone in its zeal to use race in its admissions process.

* * *

**OPENING STATEMENT OF PRESIDENT AND
FELLOWS OF HARVARD COLLEGE
BY MR. LEE**

[p. 77:4-13]

As I said in open court last week, the fact that Harvard restricted the number of Jewish students was not a proud moment in Harvard's history. Not a single Harvard witness will tell you that it was. Instead, they will tell you that they've devoted their careers to making sure that nothing like that ever happens again.

As I said in the pretrial conference, that policy occurred 50 years before the *Bakke* decision, 50 years before the Supreme Court said that the Harvard system was an illuminating example.

* * *

**WILLIAM FITZSIMMONS
DIRECT EXAMINATION BY MR. HUGHES**

[p. 132:19-25]

Q. Getting on the list is a good thing if you're a high school student who wants to go to Harvard, correct?

A. The fact that you are on the searched list would not make a difference in terms of the decision the committee might make, but it's a good thing for us to know in terms of whether or not our outreach through the search program is helpful.

* * *

[pp. 134:14-139:25]

Q. And whether a high school student receives this letter depends on whether they're on your list, right?

A. That's right.

Q. Now, Dean Fitzsimmons, I'd like to show you Plaintiff's Exhibit 2.

MR. HUGHES: Before we proceed, I'd like to offer Plaintiff's Exhibit 2 into evidence.

MR. LEE: Can we at least have the foundation as to whether he's seen it? Otherwise no objection.

BY MR. HUGHES:

Q. Dean Fitzsimmons, you've seen this document before. We showed it to you in your deposition, right?

A. Yes. I think I recall it.

JA551

MR. LEE: No objection, Your Honor.

THE COURT: Admitted.

(Plaintiff Exhibit No. 2 admitted.)

BY MR. HUGHES:

Q. What I'd like to focus on -- and I'll blow this up at the top here. PSAT is the basis for -- let me back up.

What this document, this Plaintiff's Exhibit 2, shows searches that are done in 2013 for the class of 2018, correct?

A. That's correct.

Q. It has data that about searches that occur in 2018, and it also has information about the preceding class year, 2017, correct?

A. Where would that be? I'm sorry. Oh, I see. Yes. Yes.

Q. Agreed?

A. Agreed.

Q. The PSAT is the source of, in 2017, 92,510 letters, correct?

A. That's correct.

Q. And in 2018, 95,119, correct?

A. That's correct.

Q. Let me show you the rest of the document. That is the majority of the total of the letters sent. I've got the totals here at the bottom, correct?

JA552

A. They sound right.

Q. The PSAT is the primary source of names for the list, correct?

A. Yes.

Q. Okay. So now I want to go back up and look at what we have for the PSAT.

So in the left-hand column we have, it says PSAT and we've got some different categories of people in that column, correct?

A. That's correct.

Q. I want to start with the first two, "High Scores Men" and "High Scores Women." Do you see that?

A. I do.

Q. And up at the top of the -- in the second column we've got an SAT score range. Do you see that?

A. I do.

Q. For men, that's 1380 to 1600, correct?

A. Correct.

Q. And for women, that's 1350 to 1600, direct?

A. Correct.

Q. These are some of the people that will be getting the search letter we just looked at, right?

A. That's correct.

JA553

Q. And the next column, that column is entitled “ETH/States.” Do you see that?

A. I do.

Q. ETH stands for ethnicity, correct?

A. That’s correct.

Q. And “States” stands for geographic states, correct?

A. Correct.

Q. And the ethnicity for high scores, men and women, is KOW. Do you see those codes there?

A. Yes.

Q. W stands for white, correct?

A. That’s correct.

Q. O stands for other, correct?

A. Probably. Because these things change. Probably.

Q. And K stands for unknown when you don’t fill it out?

A. I think it’s essentially everyone, when all is said and done.

Q. I’m sorry?

A. I think it would be everyone, it sounds like. In other words -- I’m not 100 percent sure, but just looking at this, it would be all high scores no matter, of all states and all ethnicities.

Q. Let’s look down the test data. Let me ask you this.

JA554

Who is Elizabeth Young?

A. She used to be our data person and computer interface person and research person.

Q. She'd be very familiar with this date, correct?

A. Yes.

Q. And she testified that K is unknown. It's when somebody doesn't fill it out on the common app. You'd have no reason to dispute that, right?

A. I would take her word for it.

Q. If she testified that O means "other" on the common app, you'd take her word for it, too, correct?

A. I would.

Q. Just to kind of clear things up, you said it might be referring to everyone. Here we have down here -- we'll come back to sparse country in a minute, but we've got these categories down here which are high scores Asian men, high scores Asian women, females, right?

A. Yes.

Q. And those are additional people who are getting letters, correct?

A. That's correct.

Q. They're not included in that KOW category, correct?

A. It's the same range, but that would be technically correct.

Q. They're different people, right?

JA555

A. Yeah.

Q. It's the same SAT range, correct?

A. Yes.

Q. And if we go down here to BCHNP. That's -- BCHNP stands for black, Chicano, Hispanic, Native American, and Puerto Rican, correct?

A. That's correct.

Q. All of the states, United States and Puerto Rico, those applicants are invited to apply if they have an SAT score of 1100 up to 1600, correct?

A. That's correct.

Q. So in Harvard's view, a student in this BCHNP category with the PSAT of 1100 could be admitted and succeed at Harvard, correct?

A. Just simply -- that isn't technically correct. It would simply be these are people who we hope would consider Harvard, in looking at that range.

Q. And you tell them in the letter that you send them that their SAT scores indicate that they could be a good candidate to apply to Harvard, right?

A. That's right. That they could be.

Q. And Harvard does not invite white or Asian students to apply unless they have a 1350 for women or a 1380 for men, correct?

A. That's correct.

Q. Even though you agree that an Asian student with an 1100, depending on the individual case, could be successful at Harvard, correct?

A. It's possible that any student could be.

* * *

[pp. 143:15-152:8]

Q. Now I want to focus on the last category here, Sparse Country, near and dear to my heart because that's where I'm from.

A. Which state?

Q. Montana, a great state.

Dean Fitzsimmons, we look at Sparse Country. In Sparse Country you get invited to apply if you get a score between a 1310 and a 1370, correct?

A. That's correct.

Q. And the people who are invited to apply from Sparse Country are the unknown, other, and white, correct?

A. Yes.

Q. Asians are not included in that list, correct?

A. Not in that particular list.

Q. Okay. And the score, again, is 1310 to 1370, correct?

A. That's right.

Q. Now, I want to see if you would help me build a map of Sparse Country. You'll probably need to turn to the

actual paper Exhibit 2 because I'm going to switch it off of the screen. Let me know when you're there.

A. It's P2?

Q. Yes.

A. Okay. I have it.

Q. I'm going to show you a map that your lawyers I think plan to use with you in your examination. I want to see if we can use it in mine. I've got that up on the screen. It's a map of the United States divided up by docket, correct?

A. That is correct.

Q. The we'll take a little detour here.

Dockets are the way you kind of break down the applicant pool in terms of your process in the admissions office, correct?

A. It's a beginning of the committee process.

Q. And the geographic breakdown, right?

A. More or less.

Q. So now if you've got P2 in front of you, I want to walk through the states and we'll mark them here on your map. Okay?

So the first one is AL. That's Alabama, right?

A. That is correct.

Q. And I've got an X on Alabama on the screen, correct?

JA558

A. Very good. Yes.

Q. The second one is Alaska, correct?

A. Yes.

Q. And now we've got an X on Alaska, correct?

A. That's correct.

Q. And we've got Arizona, and I've got that correct on the screen, right?

A. Yes.

Q. Arkansas?

A. Yes.

Q. Idaho?

A. Yes.

Q. Louisiana?

A. Yes.

Q. Maine?

A. Yes.

Q. Mississippi?

A. Yes.

Q. Montana?

A. Yes.

Q. Nebraska?

A. Yes.

Q. Nevada?

A. Yes.

Q. New Hampshire?

A. Yes.

Q. New Mexico?

A. Yes.

Q. North Dakota?

A. Yes.

Q. Oklahoma?

A. Yes.

Q. South Dakota?

A. Yes.

Q. Utah?

A. Correct.

Q. Did I get that right?

A. Yes.

Q. Vermont?

A. Yes.

Q. Kind of crowded up there.

West Virginia?

A. Yes.

JA560

Q. And Wyoming, right?

A. Yes.

Q. Okay. 20 states, right?

A. Correct.

Q. And there's some pretty big population centers in some of these states, like Las Vegas and Phoenix, New Orleans, Oklahoma City, all metropolitan areas with significant populations, correct?

A. There are certainly some large metropolitan areas within those states.

Q. And turning back to Exhibit 2, which I'll put back on the screen so everybody can see it, you invite -- so all of the BCHNP candidates are invited to apply in Sparse Country. Because every single state, anybody in that category that gets 1100 or above gets invited to apply out of the black, Chicano, Hispanic, Native American or Puerto Rican category, they get invited to apply in those states, correct?

A. That would be correct.

Q. The only distinctions you have for Sparse Country are white, other, and unknown. No Asians. We've already agreed on that, correct?

A. Yes. Obviously they're included in the other searches.

Q. My question to you is, what is Harvard's explanation for why in Sparse Country in 20 states, states that some of them have big population centers, a white applicant with a 1310 is invited to apply to

JA561

Harvard, but an Asian male who lives in any of those states with a 1370 is not? What are all the reasons Harvard does that?

A. Again, we're looking for candidates from all different kinds of backgrounds. In the Sparse Country states, there are -- certainly there are some cities, but there are lots of very rural areas. Again, we're trying to apply the same standards for the different kinds of searches that we have.

Q. You're not suggesting that there aren't significant Asian-American populations in Sparse Country, are you?

A. There are certainly some Asian-American populations in Sparse Country.

Q. And what you're doing is -- you could have kids in Las Vegas where there's a significant Asian-American population at the same school, white kid, 1310, gets a letter that says his scores qualify him to apply to Harvard. Asian kid sitting next to him in class gets a 1370, they're comparing notes. The Asian boy does not get invited to apply. The white student does.

What is the possible explanation for that?

A. Well, again, we're looking for a diverse student population, for all the reasons that was discussed in the opening statement this morning. And we simply want to make sure in those schools that we send encouraging messages to people along our normal search parameters.

Q. Is part of how you achieve the diversity that Mr. Lee discussed this morning is to put a thumb on the scale for white students who you invite to apply from Sparse Country?

A. The fact that a person applied from Sparse Country might be one of, again, many, many factors that could possibly go into a decision. But there are people who, let's say, for example, have only lived in the Sparse Country state for a year or two. Let's say that can happen. And then on the other hand there are people who have lived there for their entire lives under very different settings.

So what we're trying to make sure we do, in an even-handed way, is to reach out to what lots of people would say is the heartland of America. And many of these states that you have on your map are states where Harvard is not on anyone's radar scope at all.

And one of the things we love to do is to get students from any background, really, from those states who could bring something special to Harvard that would help educate fellow classmates.

One of my roommates was from Mitchell, South Dakota, home of, you probably know, the Corn Palace, which you may not know. But he was an amazing person. And the thing that he brought to me and to everybody in our dorm was a tremendous appreciation for what was happening in a state where we get very few people. So he was a great ambassador.

We also of course will visit all of these states every year. So we do everything we can to reach out to a

much broader range of people than certainly was the case at Harvard when I was an undergraduate.

Q. I want to just try to focus on what we've got before us. And that is in Sparse Country if you're an Asian male, you've got to score 1380 to get an invitation from Harvard, correct?

A. Yes. And we would hope that that student would apply.

Q. In Sparse Country if you're white, either gender, you are get invited to apply at 1310, correct?

A. That's correct.

Q. And all the stuff you just told me about some people have lived there longer and some people just arrived one or two years ago, you have no idea who that applies to at the time that you're sending out these letters, correct?

A. That's correct.

Q. You don't know whether the recipient of the letter is going to be like your roommate from South Dakota. You have none of that kind of information when you send out the letter, correct?

A. That's true. But people talk among themselves. So there are times when a search letter will go out to someone, say, with a lower search parameter. People start talking. People start considering whether or not they might consider Harvard. And that's one of the ways Harvard has changed, why it's changed so dramatically in terms of its geographic distribution over the past 35 or 40 years.

JA564

Q. So I get it. So when you have send a letter out to somebody to recruit them, part of what you're doing is sending a message, you said, with a lower search parameter. They might start talking and get other people interested in Harvard. Is that the gist of what you just said?

A. Yes. And that's exactly what has happened over the years.

Q. And is the flip side of that message to the Asian student from Sparse Country with a 1370 whose white pals tell him they got invited to apply at 1310 and he didn't, what's the message that student is supposed to receive?

A. I guess the general message would be, say within a high school class and sometimes -- you're from Montana, and I know there are large high schools in Montana, and there are some very, very small high schools in Montana.

But the idea is to try to break the cycle, to try to get people from a much broader array of states and backgrounds to think about Harvard. So the idea at least is to get Harvard on the map, just given the fact, remember, that most students will end up going to college within about one hour's drive of their home.

Q. Between the Asian student in Sparse Country with 1370 who doesn't get the letter and the white student with the 1310 who does, the only difference between those two students, the only different information that you have when you decide whether or not to send that letter is race. Correct?

JA565

A. In terms of that letter, yes.

Q. And that's race discrimination, plain and simple, isn't it, Dean Fitzsimmons?

A. It's reaching out to people who might be good applicants for Harvard and hoping that these applicants will again talk to their friends and think about whether or not Harvard could be an option.

* * *

JA566

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
) Plaintiff,)
)
) v.)
)
) PRESIDENT AND FELLOWS OF)
) HARVARD COLLEGE, et al.,)
)
) Defendants.)
)

Civil Action
No. 14-14176-ADB

October 16, 2018

Pages 1 to 92

TRANSCRIPT OF BENCH TRIAL -- DAY 2
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
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JA567

* * *

**WILLIAM FITZSIMMONS
DIRECT EXAMINATION (RESUMED)
BY MR. HUGHES**

[pp. 22:18-23:21]

Q. How does race factor into Harvard's admissions process?

A. For highly competitive applicants, it could be one factor among many that might lead our 40-person admissions committee to vote yes.

But race would never be seen in isolation, say relative to the rest of the application. It would be part of it. In some cases a person -- in many cases, in fact, would have been admitted anyway without any consideration of race.

But it is again one part of a person's life, and it's one part of a person's life that might lead that person to be a great educator of others about how to be a good citizen and citizen leader, not just at Harvard but later.

Q. Is race part of your holistic admissions process or your whole-person review?

A. It is certainly one part of the whole-person review.

Q. And you actually think it's impossible to abuse a holistic admissions process like Harvard's, correct?

A. To abuse?

Q. Yes, sir.

JA568

A. Could you repeat the question?

Q. You actually think it's impossible to abuse a holistic process like Harvard's, correct?

A. I do.

Q. In fact, you are not aware that the holistic admissions process at Harvard was instituted, in part, because of concerns about the number of Jewish students on Harvard's campus, correct?

A. That's certainly a part of history that I wasn't present for. I've certainly heard the charges.

* * *

[pp. 26:14-31:10]

Q. This was discussed last time you were under oath. So if an applicant provides their race or ethnicity in the common application, Harvard will have that information, correct?

A. That's correct.

Q. Okay. And then that applicant could choose to write about in an essay or a teacher could write about in a recommendation some experience in that applicant's life that relates to or has to do with their race or ethnicity, correct?

A. That's true. They could choose to do that. The teachers could choose to write about it.

Q. But even in circumstances where you have the applicant's racial or ethnic information but they don't write about whether that's important to them and the

teachers don't say anything about them, you still consider the race of the applicant in those situations as part of your whole-person review process, correct?

A. Yes. We would still know about it, and it would still be there. Whether or not the race of the applicant would lead someone to vote for that person really depends on all the other factors. Again, looking at people who are fully competitive.

Q. Let me just ask you, is Harvard's use of race as a factor in the admissions process limited only to those applicants who say in their application materials that race provided a particular experience or influenced some part of their background as they were growing up?

A. If I understand your question, there's no requirement that students would have to write about their background. That still might mean that even if they didn't write about their racial or cultural or ethnic background, that would still be in the application.

Q. And Harvard would still use race as a factor in the admissions process for those applicants, correct?

A. Again, race is never going to be used in isolation. So I'm not quite sure what the -- maybe I'm misunderstanding where you're going with it. We would know about it, but I am not sure exactly what you want me to answer, I guess.

Q. I'm just trying to see if we can get on the same page we were on in your deposition. I've got page 86, line 6 through 13 pulled up on the screen.

JA570

“QUESTION: Is Harvard’s use of race as a factor in the admissions process limited only to those applicants who say in their application materials that race provided a particular experience or influenced some part of their background as they were growing up?”

“ANSWER: No.”

That was your testimony at your deposition, correct?

A. Yes. And I’m still having a little trouble trying to think about it in juxtaposition of a single case. We would always know what the person’s race was if the person wanted to tell us about it.

Q. You’re not disagreeing with your testimony from your deposition, correct?

A. Could you just repeat again exactly what you’re -- is this the question --

Q. I’ve already asked the question word for word, and you can read it there.

A. Right.

Q. I’m just trying to see if we’re on the same page that as a general matter in the admissions process to Harvard you consider the race of an applicant -- your consideration of race of an applicant is not limited to applicants who write about their race or ethnicity?

A. Yes. I think I answered that question.

Q. That’s exactly consistent with what we’ve got on the screen, correct?

A. Yes.

Q. Now, why does Harvard consider race in its admissions process?

A. The major thing really is one of the best things about going to any college, including Harvard -- and as you know, Harvard is almost entirely residential -- is the opportunity to learn from fellow classmates. Mr. Lee talked in his opening remarks about how critical that kind of piece of education can be.

One of the things that was certainly a huge part of my education was learning from roommates, learning from people in dining halls, learning from people in extracurricular activities, in smaller classes, literally 24 hours a day, about who they were, what their backgrounds were.

I certainly think that in a country that is so divided along racial and ethnic lines as ours is and with demographics for the future that suggest an even more critical role for race and ethnicity in the United States that the opportunity for our undergraduates to learn from people from every possible background, including racial and ethnic backgrounds, is a critical part. Not just of making a difference to their own classmates during college, affecting perhaps even how they would use the college experience.

Maybe they -- as a result of getting to know people from different ethnic and racial backgrounds, they might decide to take different courses from the ones they might ordinarily have. Or they might also go to lectures or take part in activities of various kinds so

that they would learn a great deal more about what the country is really like.

That, in our view would make people much better citizens and citizen leaders, again not just during Harvard but we hope throughout the rest of their lives in a world that race and ethnicity certainly seems to be, perhaps will be even more important in the decades ahead as our students live out their lives.

Q. Thank you for that answer, Dean Fitzsimmons.

Just trying to get some shorthand, which I think many people have used both in the context of this case and outside the context much this case, one of the reasons Harvard is considering race in its admissions process is to achieve a racially diverse class, which you say results in all of the benefits that you just testified to, correct?

A. We do believe that diversity of all kinds is very important in terms of what our students learn over the four years and how they'll live their lives, we hope for the public good.

Q. Is there a way you can measure a particular level or quantity of racial diversity that Harvard thinks is needed to obtain all the benefits that you just described for us?

A. No. It's just like the admissions process. There are no formulas. There are no sort of numerical guidelines that would do justice to anything like that. It just isn't that simple.

* * *

[pp. 47:8-54:8]

Q. So I understand you say Harvard does not use race now when awarding the personal score.

My question is, when did Harvard admissions officers stop using race or ethnicity in awarding personal scores?

MR. LEE: I object to the predicate. There's been no demonstration of the predicate.

THE COURT: That's sustained.

MR. HUGHES: I'll rephrase.

BY MR. HUGHES:

Q. Since you've been dean, have Harvard admissions officers ever used race in awarding personal scores?

A. Not to my knowledge.

Q. Yesterday, you and I had a reasonably lengthy conversation about the OCR statement of findings.

Do you recall that?

A. Yes, I do.

Q. We had a back-and-forth. I just want to kind of refresh everybody's memory where you described that process.

It was a lengthy investigation. They set up shop in your office. They interviewed you and Director McGrath and a number of other admissions officers in the course of their investigation, correct?

A. That's correct.

Q. So -- and part of what the OCR did when it was conducting this investigation was it got an understanding of how your admissions process works, correct?

A. I think it did.

Q. And it did that in part based on the conversations with you and other people in the admissions office, correct?

A. In part, yes. Correct.

Q. I just want to look at parts of Plaintiff's Exhibit 555, which has already been admitted into evidence, which is the statement of findings from OCR. Okay?

A. Yes.

Q. So I'm looking, Dean Fitzsimmons, at page 6 of Plaintiff's Exhibit 555, the statement of findings. And I'll blow up this part of OCR's report. Here OCR is reporting what you and I have already discussed at length that there are four major criteria on which all candidates are assessed: academic achievement, extracurricular activities, athletics, and personal qualities.

That's part of what OCR learned when it was conducting this investigation, correct?

A. That's correct.

Q. OCR also as part of this investigation, since it had to do with claims of racial discrimination, they investigated how race was being used by the Harvard's

JA575

admissions office in the application process, correct?
That's part of what they looked at?

A. That's correct.

Q. Now I want to show you the part of the OCR's statement of findings that addresses that. Okay?

A. Sure.

Q. Now what I've got on the screen is the bottom of page 15 and the top of page 16 of the report, which is P555. And let me read that into the record, dean Fitzsimmons, and I'll ask you some questions.

This is OCR: "We found that the readers had several different views as to where and whether Asian-American ethnicity was given positive weight or a tip in the admissions process. Some readers explained that when ethnicity was deemed to be a significant factor in an application, it was reflected in the POR" --

And I'll pause right there.

POR is preliminary overall rating, correct?

A. Correct.

Q. -- "it was reflected in the POR and during discussions at subcommittee and committee meetings.

"Other readers indicated that ethnicity was a factor considered throughout the entire admissions process. They stated that it could be reflected in the four reader rating areas, as well as in the POR and during the subcommittee and committee meeting discussions.

JA576

“Still other readers stated that ethnicity was not a factor at all unless the effect of that ethnicity on the applicant was evident from the applicant’s file. They indicated that ethnicity was only considered a plus when the applicant wrote about or indicated the significance of his or her heritage, or when there was some other indicia in the file of the applicant’s involvement with ethnic community organizations or groups.”

That’s what OCR found, correct?

A. That’s one of their findings, yes.

Q. And you told me yesterday that you and Director McGrath and the other admissions officers that talked to OCR and Mr. Hibino were honest and accurate when they described how the process worked, correct?

A. I certainly believe that they were honest and accurate in terms of the information they received.

Q. And so the date of this is 1990, correct?

A. That’s correct.

Q. So at least in 1990, there was a group of Harvard admissions officers that stated that race or ethnicity could be reflected in the four reader rating areas, correct?

A. Yes. That’s what it said.

But I think, again, let’s give you an example. So let’s say someone who was from, let’s say, an African-American background had experienced discrimination of one sort or a set of hurdles for a

variety of reasons due to ethnicity in their home, in their high school, in their community. The fact that had overcome and surmounted those kinds of obstacles could, in fact, have illuminated the strength of the personal rating.

Now, that could happen to someone from any ethnic background. It depends, I think, on how you read that question. In other words, wasn't anyone from any ethnic background or, say, gender or religion could be, let's say, discriminated against. And then due to their background -- and so that is -- and that might illuminate the strength of their personal qualities. So it really depends a little bit on how you want to read that.

Q. Let's break this down, Dean Fitzsimmons. The four reader rating areas that I've got highlighted here, one of those is personal quality, correct?

A. That's correct.

Q. What you just testified to is that sometimes Harvard admissions officers might consider the fact that somebody's overcome discrimination as part of awarding their score, correct?

A. That's correct. And it could be someone from any kind of a background. It doesn't have to be connected to race or ethnicity.

Q. We're talking about race. And you're trying to interpret the sentences I have highlighted here and suggest that what that could really mean is that if the applicant provided Harvard information about

JA578

overcoming racial discrimination, then that could play a role in the scores, correct?

A. Yes. Except what I'm trying to say, it depends on how the phrase be reflected, could be read any number of ways.

But the rubric is that it per se would not affect the personal rating. It depends on the circumstance of the individual.

Q. What OCR found was that a group of readers indicated that ethnicity was a factor considered throughout the entire admissions process and could be reflected in the personal score. That's what they found, correct?

A. Yes. Just even on the first part of the sentence, though, is that again the readings take place, the subcommittee takes place, the full committee takes place. So race certainly could be discussed all the way along the line and be a factor, let's say, in the final vote.

Even if you take the first part of that sentence, you can see that the ethnicity can be a factor in individual cases all the way down to the final committee vote.

Q. And these readers told OCR that race could be reflected in the four reader areas, which includes the personal score, correct?

A. Again, I've tried, I think, to explain how the individual's background -- it could be religion, could be gender, could be anything, could -- and overcoming obstacles or prejudice or whatever it might be, that

could illuminate in that individual case the personal qualities rating.

Q. The Harvard admissions office would only know the information you just talked about if it was in the applicant's file, correct?

A. That would be correct, for individual circumstances.

Q. Do you agree that OCR drew a distinction between readers who consider ethnicity throughout the process and use it in awarding the reader ratings; and other readers, still other readers, stated that ethnicity was not a factor at all unless the effect of that ethnicity on the applicant was evident from the applicant's file? Do you agree OCR is drawing the distinction between those two types of readers?

A. Again, I wasn't part of the conversations that the readers at that time -- it was almost 30 years ago -- had with the OCR people. But I think, you know, depending on how the discussion took place with those readers, I think you -- and depending on the context of the particular case, I could see how you could interpret these things in a number of different ways.

Q. One way we can interpret what OCR found is that there were a group of readers in Harvard's admissions office in 1990 who were using race and awarding personal scores. That's one fair interpretation of this document, correct?

A. It's possible.

* * *

[p. 66:8-11]

Q. So do you agree that the way Harvard runs its admissions process in terms of how Harvard uses race as a factor in admissions is the same as it was in 1990 today?

A. I do.

* * *

[pp. 82:5-83:4]

Q. And then if we move on to personal rating, there we see that this relationship shifts where the white applicants to Harvard are more likely to receive a personal rating of 2 or greater than Asian-American applicants, correct?

A. That's correct.

Q. And based on your experience as the dean of Harvard admissions office, you don't think that Asian-Americans have fewer attractive personal qualities than whites or any other group, right?

A. I would certainly agree with that.

Q. And so based on your experience as the dean of the Harvard admissions office, do you have any explanation for why whites are more likely, according to Dr. Card, to get a personal score rating of 2 or greater than Asian-American applicants?

A. Well, as I said in my deposition, there's no way when you're looking at the whole person to know for certain, you know, to come up with a definitive answer.

JA581

But you know, the one thing we do know, for example -- and again speculation, but it's a fact that the strength of the teacher recommendations and the counselor recommendations for whites is somewhat stronger than those for Asian-Americans. That could be one factor. But again when an admission officer is going through an application, they're looking at everything.

* * *

JA582

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
) Plaintiff,)
)
) v.)
)
) PRESIDENT AND FELLOWS OF)
) HARVARD COLLEGE, et al.,)
)
) Defendants.)
)

Civil Action
No. 14-14176-ADB

October 17, 2018

Pages 1 to 230

TRANSCRIPT OF BENCH TRIAL - DAY 3
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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JA583

* * *

[p. 9:20-21]

MS. ELLSWORTH: Your Honor, the other two witnesses to whom Harvard objects in full is Ms. Pedrick and Ms. Lopez.

* * *

**WILLIAM FITZSIMMONS
DIRECT EXAMINATION (RESUMED)
BY MR. HUGHES**

[pp. 12:10-14:3]

Q. Let's go to a new topic. During each admission cycle, the admissions office maintains something called the dean's interest list, correct?

A. That's correct.

Q. The dean that's referred to on the dean's interest list is you, right?

A. It would be.

Q. And that is a list that you use to make sure that you are aware of what happens to particular applicants to Harvard, correct?

A. That's correct.

Q. And so if there's going to be an action up or down on one of the candidates on the dean's list, the people in your office are supposed to keep you in the loop on that, right?

A. Well, I'd be in the loop anyway. But I would want to know because I'm a member of the committee.

Q. And one category of applicants that get on the admission list or the dean's interest list are the children of donors, correct?

A. That's certainly some of the people on the list.

Q. Not only just children of donors but relatives of donors, other relatives of donors, correct?

A. It could be.

Q. And what is the Harvard development office?

A. The Harvard development office is a part of Harvard that tries to raise funds for the advancement of Harvard for all the research purposes and all the other -- and our world's scholarships, among other things.

Q. And sometimes the development office communicates with you about getting somebody on the dean's interest list, correct?

A. They'll communicate with me about individuals, and I will sometimes put them on the list.

Q. And sometimes you'll put them on the list if the development office asks you to, regardless of whether they are otherwise a strong candidate for admission, correct?

A. Until we actually look at the applications, we certainly don't know who will be a strong applicant, and they certainly don't.

JA585

Q. So does that mean you'll put candidates on the interest list even if you don't know whether they're a strong applicant?

A. It could be well in advance of any of the application deadlines.

* * *

[pp. 19:21-21:18]

Q. Dean Fitzsimmons, can you see on the screen P106?

A. I can.

Q. You see down below there's an email from -- it looks like it's from -- it's to Roger Cheever from Alessandra Bouchard.

Do you see that?

A. Yes.

Q. Who are those people?

A. Roger Cheever works in the development office, a development officer, and Alessandra used to be his assistant.

Q. What she's telling Roger, "One of the early non-lineage cases we've been trying, the Virginia, is that of" -- and then we've got a redacted name -- "is the grandson of who is married to" -- redacted -- "to the late" -- redacted -- "gave about \$8.7 million to Harvard in his lifetime. Dean Fitzsimmons would like to receive your insight when you're able to provide it of the relative standing of this case."

JA586

And then you get an email from Mr. Cheever on November 15, 2013, there at the top, correct?

A. Yes.

Q. Okay. And what Mr. Cheever tells you, he says, "Fitz" -- and there's a redacted name -- "was a devoted chair and a generous donor. His latter years were quite challenging based on having" -- redacted. Going forward, I don't see a significant opportunity for further major gifts. Had an art collection which conceivably could come our way, more probably will it will go to the," redacted, "museum. I will get Brad Voigt's perspective. For the moment, I would call it a 2. I'll know more tomorrow. Roger."

That's what Mr. Cheever said to you in that email, correct?

A. That's correct.

Q. And when Mr. Cheever says "I would call it a 2," a 2 is a number that would go on the dean's interest list, right?

A. That's correct.

Q. And what would that number reflect?

A. It would be a reasonably serious donor.

Q. So you keep track on the dean's interest list of whether somebody is a reasonably serious donor, right?

A. Yes. And also again whether this person was an important part of the Harvard community during his or her lifetime.

Q. And it's the same kind of scoring system, at least conceptually, as the 1 is a better score than a 2 is a better score than a 3 and so forth, right?

A. That's correct.

THE COURT: Did I miss this? Who is Mr. Cheever?

BY MR. HUGHES:

Q. Dean Fitzsimmons?

A. He's a development officer at Harvard.

* * *

[pp. 24:16-38:16]

Q. I want to shift topics now, Dean Fitzsimmons. I want to focus on a series of events that started towards the end of 2012.

You're familiar with an article published by Ron Unz in The American Conservative in December of 2012, correct?

A. I am.

Q. And among other things, he advanced an argument that Harvard was discriminating against Asian-American applicants, correct?

A. Correct.

Q. And the Unz article caught the attention of David Brooks at the New York Times. In fact, Mr. Brooks wrote an article published on Christmas Eve of 2012 recognizing the Unz article as one of the best magazine essays of the year, correct?

A. That's correct.

Q. And the article caught the attention of you and others at Harvard, correct?

A. That's correct.

Q. Both the Unz article and the magnified publicity it received after Mr. Brooks' article was published on Christmas Eve in the New York Times, correct?

A. That's correct.

Q. And the article also caught the attention of some Harvard donors, correct?

A. That's correct.

Q. I'd like to show you Plaintiff's Exhibit 227.

MR. HUGHES: Before we get started, I'd like to offer it into evidence.

MR. LEE: No objection. I'm sorry.

THE COURT: Admitted.

(Plaintiff Exhibit No. 227 admitted.)

BY MR. HUGHES:

Q. Dean Fitzsimmons, this -- let me back up. Here we go.

Start at the bottom. You're getting an email -- first of all, who is Olesia. With can you pronounce that last name for me? I'm afraid I'll get it wrong.

A. Olesia Pacholok, my staff assistant.

JA589

Q. And sometimes emails that are intended for you come through her first, correct?

A. Yes. She and I have the same email.

Q. You get an email and the subject of it is Ron Unz, correct?

A. That's correct.

Q. And the date of the email is December 27, 2012, correct?

A. That's correct.

Q. It says, "Bill. See letter to editor in New York Times."

Do you see that?

A. I do.

Q. And then you respond. You say, "Dear" -- and we've got the names redacted. "It was great to talk with you yesterday. We clearly share many of the same perspectives on Harvard and its history. Thanks for the follow up on the letters. They will be helpful as we go through the process of creating an institutional response. I made some progress on that front last night and today. Given the sensitivity of the issues, it will probably take some time to complete the deliberations, and I will keep you posted. Have a wonderful holiday."

Do you see that?

A. I do.

Q. And what you're talking about there is preparation of an institutional response within Harvard to the Unz article and the accusations against Harvard contained in that article, correct?

A. That's correct.

Q. You mentioned that the article caught your attention. It also caught the attention of the top leadership at Harvard, correct?

A. That's correct.

Q. And do you recall receiving numerous emails over the holidays concerning the Unz article?

A. Yes. I don't remember how many, but I get lots of emails on lots of subjects.

Q. I'd actually like to walk you through a number of emails that you received and just create a timeline of when you received them and who was on the email.

MR. HUGHES: I think the easiest way to do that is if I could use the privilege log that Harvard has provided to refresh his memory on when he received certain emails, which I think Your Honor ruled that we could do at the pretrial conference. We don't need necessarily to offer it into evidence, but I think it would be useful to use with the witness in that manner.

THE COURT: You can use anything you want to refresh recollection.

MR. HUGHES: Thank you, Your Honor. May I approach the witness?

THE COURT: Yes.

BY MR. HUGHES:

Q. So, Dean Fitzsimmons, I've got the privilege log in front of you, which is a document your lawyers provided us. I don't want to talk about the substance of what's contained in any of these emails because it's privileged, but I just want to walk through a number of emails that you were receiving on this topic.

If you look starting with on December 27, do you see I've got your name highlighted there?

A. Yes.

Q. So you received a couple of emails on December 27 from Robert Iuliano, correct?

A. It appears that I did.

Q. And the subject was the Unz article, correct?

A. Yes.

Q. And who is Robert Iuliano?

A. He is the general counsel of Harvard and is here today.

Q. And if you go down, you actually received four emails it looks like from him on the 27th, correct?

A. Just adding them up. It appears to be the case, yes.

Q. All of those relate to The American Conservative article or the Unz article, correct? That's in the subject line.

A. I'm not sure about Number 10, but I certainly -- yes.

JA592

Q. And then you received on the 27th three more emails from President Faust, correct?

A. Yes.

Q. And again, those relate to the subject line, American Conservative article, correct?

A. That's correct.

Q. And then, in fact, if you go to the next page there are three more emails from Mr. Iuliano to you, again on the 27th, concerning The American Conservative article, correct?

A. Yes.

Q. And then a couple more from President Faust to you on that same day, correct?

A. Yes.

Q. And then we get to the first time you send an email on this list, and that is on the 28th of December, correct?

A. That's correct.

Q. And you send an email to Erin Driver-Linn on the 28th of December, subject, Forward American Conservative article, correct?

A. That's correct.

Q. And if we switch to the next page, you send two additional emails on the 28th to Ms. Driver-Linn with the same subject heading, correct?

A. That would be correct.

JA593

Q. And then she responds with emails back to you. It looks like there are four in a row on the 29th, emailing back to you and others, correct?

A. That's correct.

Q. If you look at line 26, the first email that -- first of all, who is Ms. Driver-Linn?

A. She was the head of the office of institutional research. She now works at the School of Public Health at Harvard in the same sort of role.

Q. So at this time when she's sending these emails, she's the head of OIR, correct?

A. That's correct.

Q. On her first email, she copies Alan Garber. Do you see that?

A. I do.

Q. Who is Alan Garber?

A. He's the provost of Harvard.

Q. Who role does the provost have at Harvard?

A. It's really sort of an administrative oversight of the university, has a portfolio for all the different parts of the university.

Q. One of the top officials in the entire university, correct?

A. That's correct.

Q. And then her next email includes someone named Erica Bever, among others, correct?

A. Yes.

Q. Who is Erica Bever?

A. She then, if I am looking at the date, worked with -- in the office of institutional research. She now works in our office.

Q. So these are all emails that we've been talking about, 1, 2, 3, 4 coming from Driver-Linn to you and others on the 29th of December 2012, correct?

A. Yes.

Q. And then there's one email from Mr. Garber, Provost Garber, to Ms. Driver-Linn to you after the ones we've just discussed, also on the 29th of December, correct?

A. Yes.

Q. And then there are two more emails to Provost Garber and you later on that day, on the 29th of December, again with the title "American Conservative article," correct?

A. That's correct.

Q. And then there's yet another email from Provost Garber, later on at 6:39 p.m. on the 29th of December, to Ms. Driver-Linn, copying you again concerning The American Conservative article, correct?

A. I'm sorry. Which document number is that?

JA595

Q. We're looking at Number 29.

A. 29.

Q. At the very bottom of page 3. Do you see your name highlighted there?

A. It's not in the same order. I'm trying to find it.

Q. If you look at page 3, there's a --

A. Page 3. Okay.

Q. On the very bottom.

A. Okay. Yes.

Q. Do you see that? There's an email from Provost Garber to Ms. Driver-Linn and to you, correct?

A. That's correct.

Q. And then yet another email from the provost to Ms. Driver-Linn and you on the 29th, at the top of the next page, correct?

A. Yes.

Q. All right. Now, I want to fast-forward to after the new year. If you turn to page 5 of the document that you've got in front of you, starting kind of in the middle you can see there's an email on the 2nd of January from Ms. Driver-Linn at OIR to you and to the provost, again concerning The American Conservative article?

A. That's correct.

Q. What I've done is I've counted up -- and you can look and see. If you start with Number 31, that's what we

just talked about, that's correspondence between you and Ms. Driver-Linn on the 2nd of January. You go down, you get to the second piece of correspondence, again an email from Ms. Driver-Linn to you also on the 2nd of January. You drop down to what is Document Number 91, there's an email from you to Ms. Driver-Linn on the 3rd of January. That's three different pieces of correspondence, correct?

A. Yes.

Q. And then there are two emails from Provost Garber to you and Ms. Driver-Linn. And in fairness, those may be the same thing; they've got the time stamp. But at least that's additional communication between the provost, you, and Ms. Driver-Linn concerning The American Conservative article, correct?

A. That's correct.

Q. And then we've got the bottom of page 4, two more emails from Ms. Driver-Linn to you and Provost Garber, and also on the 3rd of January at 1:56.

A. I think you mean page 5, but I see them.

Q. Two at the bottom there from Ms. Driver-Linn to you and Provost Garber on the 3rd of January, correct?

A. That's correct.

Q. And then if we switch over -- we're almost finished with this -- to page 6, you see there are several emails. Starting with Number 33, there's three in a row there from Elizabeth Yong to you and Ms. Driver-Linn, among others, concerning demographic data, correct?

A. That's correct.

Q. Ms. Yong works in your office, correct?

A. She was our institutional researcher for our office.

Q. She doesn't work there still, but at that time she was the institutional researcher, correct?

A. That's correct.

Q. And then down at the bottom of page 6 we've got another from Ms. Yong to Ms. Driver-Linn -- or Dr. Driver-Linn, excuse me, and you, Dean Fitzsimmons, again on the 3rd of January, correct?

A. Yes.

Q. And two more emails from Dr. Driver-Linn, one to Ms. Yong and to you and one to Mr. Iuliano and you, correct?

A. That's correct.

Q. All of this, these exchanges are happening kind of right at the end of 2012 and right at the beginning of 2013, top leadership at Harvard exchanging emails concerning The American Conservative article, correct?

A. That's correct.

Q. I'd like to now show you Plaintiff's Exhibit 230.

MR. HUGHES: And I'd like to offer it into evidence.

MR. LEE: No objection, Your Honor.

THE COURT: Admitted.

JA598

MR. HUGHES: Thank you, Your Honor.

(Plaintiff Exhibit No. 230 admitted.)

BY MR. HUGHES:

Q. And at the top, Dean Fitzsimmons, you can see this is an email chain from Kaitlin Howrigan.

Do you see that?

A. I do.

Q. Who is she?

A. She worked in our office at the time and helped with the collection of data and research.

Q. And the date of the email is January 8, 2013, correct?

A. That's correct.

Q. And you're copied on the email?

A. Yes.

Q. If we go to the bottom, you can see the part that I've got highlighted.

Ms. Yong says, "Hi, Kaitlin. We need access to the RO data files for the last few years. Is it all right with you if I ask Eric to move that data into the ArchiveTwo share. We're in the middle of a study of Asian-Americans at Harvard. And rather than having to rerun all of the RO data, it will be much faster just to use the ones you've already created. Also there's a meetings at Mass Hall tomorrow at 2:00 p.m. that I would like to at least have some preliminary data for."

Do you see that?

A. I do.

Q. Do you agree that at this time, January 8, 2013, your office was in the middle of a study of Asian-Americans at Harvard?

A. Yes.

Q. And did you attend the meeting at Mass Hall that occurred, it looks like, on January 9, 2013, at 2:00 p.m.?

A. I don't remember exactly.

Q. Is Mass Hall where the president and provost offices are?

A. Yes.

Q. Now I'd like to show you Plaintiff's Exhibit 236.

MR. HUGHES: I'd like to offer it into evidence, Your Honor.

MR. LEE: No objection.

MR. HUGHES: Thank you, Mr. Lee.

THE COURT: Admitted.

(Plaintiff Exhibit No. 236 admitted.)

MR. HUGHES: Thank you, Your Honor.

BY MR. HUGHES:

Q. Dean Fitzsimmons, I've got Plaintiff's Exhibit 236 on the screen. This is another email from an alumni

JA600

concerned with Harvard's response to the Unz article. So let me just read the email.

On January 20, 2013, the alumni writes, "Dear Bill. Have I missed a printed response from Harvard to the errors and negative spin of these articles? If not, what other steps did Harvard take to correct the errors and seek retractions? E.g., was the public editor of the New York Times ever advised? Were the authors? Uncorrected, the impression is damaging to Harvard."

Do you see that?

A. I do.

Q. And the title of the email, the subject line that you can see above is "Ron Unz and the David Brooks articles," correct?

A. That's correct.

Q. You write back do this donor, "Dear" redacted. "There have been a number of meetings already to consider how Harvard should respond. Both the researchers and the public affairs staff are hard at work doing a variety of analysis. Our office has been involved in the deliberations, and we have provided data that will help to frame the decision. Obviously we stand ready to help in any way we can. Bill."

Do you see that?

A. I do.

Q. Was the information that you communicated in this email on January 20, 2013, accurate?

A. It appears accurate.

Q. Okay. So at this time you knew Harvard had already deployed its researchers to look into the issues raised in the Unz article, correct?

A. Yes.

Q. And those researchers would have been researchers at the Harvard office of institutional research, correct?

A. That's correct.

Q. And your office was cooperating at this time, January 20, 2013, into the Harvard office of institutional research analysis of the issues raised around the Unz article, correct?

A. That's correct.

Q. And again, the issue raised by the Unz article was potential discrimination by Harvard against Asian-Americans, correct?

A. Yes, among other things.

* * *

[pp. 58:25-59:4]

Q. So at least OIR uses academic index as a metric when it is evaluating the admissions chances for white and Asian applicants, correct?

A. Apparently they do. It's not something that we use in our office.

* * *

[pp. 63:13-85:1]

MR. HUGHES: Let's move on to Plaintiff's Exhibit 12. And this is a document entitled "Admissions and Final Aid At Harvard College," from the office of institutional research, dated February 13. I'd like to offer this exhibit into evidence.

MR. LEE: No objection.

THE COURT: It's admitted.

(Plaintiff Exhibit No. 12 admitted.)

BY MR. HUGHES:

Q. You were here on Monday for opening statements?

A. I was.

Q. And I think Mr. Lee said in his opening that this was a presentation that was shown to you. Is that -- did you, in fact, see this presentation back in 2013?

A. I did.

Q. And was this presentation shown to you at that February 25 meeting that you and Ms. Donahue agreed to attend with Dr. Driver-Linn from OIR?

A. I think so. That's right. Remember we're right in the middle of regular action at that point and we have lots of things going on, but I have a recollection of it.

Q. We saw that email earlier about February 25th.

A. Yeah.

JA603

Q. Do you remember who else was at that meeting besides Dr. Driver-Linn and Ms. Donahue?

A. I'm not sure exactly. I would speculate -- I can speculate if you want.

Q. I don't think we need speculation. Let's go ahead and look at page 3 of Plaintiff's Exhibit 12. Again, this is a document that was prepared by Harvard's office of institutional research, correct?

A. That's correct.

Q. And is this part of the work that your office was coordinating on with Harvard's office of institutional research at least in part related to the concerns about -- that came around the Unz article and discrimination against Asian-Americans?

A. That would certainly be part of it, to the best of my recollection.

Q. There are obviously other subjects identified and discussed in this document that don't relate to that, correct?

A. That's correct.

Q. So we have at the top here of this OIR document, "Recent admissions and financial aid questions raised."

Do you see that?

A. I do.

Q. And the first question is, "What is the effect on our applicant pool and yield of reintroducing early action?"

JA604

That was something OIR was working on at the time with your office?

A. That's correct.

Q. But that's one of the things that doesn't have anything to do to do with Unz and claims of discrimination, correct?

A. That's correct.

Q. Okay. And then the second thing is, "Is the shift and gender balance at Harvard College due to increased interest and recruitment for SEAS?"

Again, that's a topic that doesn't have to do with the discrimination issue, correct?

A. That would be correct.

Q. Okay. Then we have Number 3, "Does the admissions process disadvantage Asians?"

That's the third topic, correct?

A. That's correct.

Q. And that's a topic your office was working on with the office of institutional research at this time, correct?

A. Certainly one of the things, correct.

Q. Now, I want to look at the portion of this February 2013 presentation that relates to that question, the question of whether the process disadvantages Asians.

So let's look at page 31 of Plaintiff's Exhibit 12. I've got it up on the screen, Dean Fitzsimmons, but you're

JA605

welcome, of course, to follow along on paper or on the screen.

Here on the screen, page 31 of P12, we've got "Evaluating factors that play a role in Harvard College admission."

Do you see that?

A. I do.

Q. Then if we turn to page 32, the next page, at the top of the page it says, "Goal: Using various admissions ratings, how well can we approximate admit rates by race/ethnicity and the demographic composition of the admitted students pool?"

Do you see that?

A. I do.

Q. That was a goal of the analysis that OIR was working on in coordination with your office, correct?

A. Yes. That's the goal they were working with, and they had a variety of inputs, I'm sure.

Q. So then we've got strategy. The strategy here is to fit a series of basic logistic regression models using data from classes of 2007 to 2016.

Do you see that?

A. I do.

Q. That's ten years of data, correct?

A. Yes.

JA606

Q. And then it says, “Generate fitted probabilities of admission, given an applicant’s characteristics, how likely they are to be admitted?”

Do you see that?

A. I do.

Q. The basic goal is to try to build a model that predicts whether or not you’ll get in based on the different variables in the model, correct?

A. That’s correct.

Q. And then for each class, “Select the 2,100 applicants with the highest probability of admissions as our simulated admitted class.”

Do you see that?

A. I do.

Q. And then you examine the resulting demographics and admit rates by ethnicity. That was the strategy here for this analysis, correct?

A. That’s correct.

Q. And then on the notes on the bottom, just to be complete, students that didn’t have an academic index weren’t included, correct?

A. That’s correct.

Q. And this notes that the analysis was preliminary, bold underlined, and for discussion. Correct?

A. That’s correct.

JA607

Q. Now, if we go to the next page, we've got -- you remember we've already looked at that colorful bar graph, and there's four different bar graphs, right?

A. Maybe five.

Q. Actually, you're right. There's five.

A. Yeah.

Q. There's four different modeling choices, correct?

A. That's correct.

Q. And then the first one, academic only, the OIR starts with the academic index and the academic rating, correct?

A. Correct.

Q. And then in the second model, OIR adds in the preferences for legacies and athletes, correct?

A. That's correct.

Q. While keeping in academic index and academic rating, correct?

A. Correct.

Q. And then in the third model keeps in academic index, academic rating, legacy, athlete, and then adds in the personal rating and the extracurricular rating, correct?

A. Correct.

JA608

Q. And then in the fourth model keeps everything that was in the third model and adds gender and ethnicity, correct?

A. That's correct.

Q. And then if we look at page 34 of Plaintiff's Exhibit 12, I just want to walk through kind of what happens in each of those models. Okay?

A. Yes.

Q. Just to orient everybody who maybe hasn't seen this document, what we have on the screen, the first four bars going from left to right, those are the first -- those are the four models that you and I just discussed, correct?

A. That's correct.

Q. And then the fifth column is what the actual admitted class would look like, correct?

A. That's correct.

Q. And the way the different colors in the bars here represent different races or ethnicities, correct?

A. That's correct.

Q. And the bottom, which is I think the color black is for white applicants, correct?

A. That's correct.

Q. And then the second color, which I guess is olive-green or brown, whatever it is, that is for Asian applicants, correct?

JA609

A. Correct.

Q. What would you call that color?

A. I have no idea.

Q. I'm not the only one. Okay.

Then as we move up, we've got more of the maroon color, and that is for African-American applicants, correct?

A. You did unknown, right?

Q. I'm sorry. We've got unknown, which is a gray color, correct?

A. That's correct.

Q. Right above Asian applicants?

A. Yes.

Q. And then we go up and the next color, maroon, African-American applicants, correct?

A. That's correct.

Q. And then we've got going up, international, light gray; Hispanic, pinkish; and then Native American, light pink. Correct?

A. That's correct.

Q. Okay. The first I want to focus on what happens to these different demographic groups as we march through the models.

In the first model if Harvard -- according to OIR, if Harvard only considered academics, the model predicts

JA610

that Harvard's admitted class would be over 43 percent Asian-American, correct?

A. That's correct.

Q. And it predicts that the admitted class would be 38 percent white, correct?

A. That's correct.

Q. And .67 percent African-American, correct?

A. Correct.

Q. And 2.42 percent Hispanic, correct?

A. Correct.

Q. That's academics only. That's not what Harvard does in its admissions office, correct?

A. That's right. And as we said in the *Bakke* decision and in OCR and lots of other times.

Q. Then we move and we add in legacies and athletes. That's what's happening in Model 2, correct?

A. That's correct.

Q. And when we that happens, we see that the Asian-American applicants go from 43 percent down to 31.4 percent, correct?

A. That's correct.

Q. Those preferences for legacies and athletes don't help Asians as a group in terms of admission to Harvard, according to this model, correct?

A. According to the model, yes.

JA611

Q. The fact that the Asian-American admission rate goes down from Model 1 to Model 2 when we add in the legacies and athletes is consistent with what Harvard has told OCR about the effect of legacies and athletes on the relative admission rates between white and Asian-American applicants, correct?

A. Yes. Those are two important institutional factors.

Q. And then if we add in legacy and athlete preferences, African-American admissions predicted to go up to 1.83, and Hispanic stays basically the same, a little bump, to 2.62.

Do you see that?

A. I do.

Q. Those changes are consistent with what you know, based on your experience as dean, that the legacy and athlete preferences primarily -- at least at this time, and you've told me yesterday that's changing -- at least at this time primarily benefit white applicants, correct?

A. That's right. And you're right about "at this time."

Q. Then we move to Model 3 where we add in the extracurricular and personal ratings.

Do you see that?

A. I do.

Q. You've already told me yesterday that as a group Asian-Americans are awarded on average higher personal ratings -- I'm sorry -- higher extracurricular ratings than white applicants. That's correct, right?

JA612

A. Yes.

Q. So here we've got those two variables, extracurricular and personal. And so we see here when you add in those variables that the predicted Asian admission to Harvard goes from 31 percent to 26 percent, correct?

A. That's correct.

Q. And we know that Asian-Americans are doing better as a group on the extracurricular score, so what is likely doing the work here is lower personal ratings for Asian-Americans as a group, correct?

A. That sounds logical, yeah.

Q. And then we see that when you add in extracurricular and personal rating, African-Americans as a group, their projected admission goes from 1.83 up to 2.36, correct?

A. That's correct.

Q. And Hispanic applicants as a group go up from 2.62 to 4.07, correct?

A. That's correct.

Q. And the white applicants go from 48 percent up to 50 percent, correct?

A. That's correct.

Q. So of the four groups that the experts have focused on -- white applicants, Asian-American applicants, African-American, and Hispanic applicants -- only the

JA613

Asian-American applicants go down once you add in the extracurricular and personal rating, correct?

A. That's what this says, yes.

Q. That's what was communicated to you when you received and reviewed this document in February 2013, correct?

A. That's correct.

Q. The chance of Asian admission was going down when you consider extracurricular and personal scores, correct?

A. That's correct.

Q. Then we move to the last -- sorry, not the last, the fourth column. And we keep all the other variables in and then we add in ethnicity and gender, correct?

A. That's correct.

Q. And what happens when we do that is that Asian-American applicants, their chance of admission to Harvard comes down yet again, correct?

A. That's correct.

Q. It comes down -- it's highest in Model 1 and then it just comes down, down, down, correct?

A. That's correct.

Q. And in Model 4, once you add in demographic factors, the chance of Asian-Americans getting admitted to Harvard drops from 26 to 18 percent, correct?

JA614

A. That's correct.

Q. There's also a drop for white applicants from 51 to 44 percent, correct?

A. Correct.

Q. And there's a significant increase for African-American applicants from 2.36 to 11.12, correct?

A. That's correct.

Q. I want to correct something, Dean Fitzsimmons, that I was getting wrong here.

What we're looking at here is the share of each class by ethnicity, correct?

A. What was the other dimension you thought?

Q. I think I might have said "chance of admission."

But what we're at -- on a couple of questions. But what we're looking at from bar graph to bar graph is the first one, the share of Asian-Americans in the class would be 43 percent. Second one comes down to 31. Third one comes down to 26, right? That's what you understand this to show?

A. That's correct, yes.

Q. So if we look at, going back to the demographics, once you add in gender and race, again the share of the projected class for Asians comes from 26 to 18, correct?

A. Yes. And I knew that's what you meant before.

Q. Yes. Sometimes it's hard to keep all the language straight.

And again, the share of the class for white applicants goes from 51 to 44, correct?

A. That's correct.

THE COURT: What does gender mean in this? I'm going to leave it to you, Mr. Hughes to sort out, but what does gender mean in this category? I take it the ethnicity, we're talking about a tip one way or the other; is that right? But how does gender factor in?

MR. HUGHES: It's not reported in these bars. The way that we know that it was factored in is that if we look at page 33 in the fourth model, the two variables that are factored in are gender and ethnicity.

THE COURT: I see that. But can you see if he knows what it means to factor in gender on this?

MR. HUGHES: It's a variable in the model.

THE COURT: That cuts which way? On gender why would the number go up or down?

MR. HUGHES: I think that the experts will agree that it doesn't have a significant effect on way or the other.

MR. LEE: Whoa, whoa, whoa.

MR. HUGHES: But I'm not the master of that part of the case.

THE COURT: That's my bad.

JA616

If you can elicit it from this witness, I would appreciate the clarification. If you can't -- and I leave it to you whether you want to ask the question now or not. If it can't be elicited through this witness and you want to elicit it through someone later, but I am curious about whether -- which way -- most of these I understand how they cut. Right? You get a higher personal rating and it makes your chance of getting in -- the percentage of the class goes up. But the gender thing, I'm not sure what it means. If he can do it, fine; if he can't, we'll wait.

MR. HUGHES: I have an idea.

BY MR. HUGHES:

Q. Dean Fitzsimmons, does the Harvard admissions process provide a tip for applicants based on gender?

A. No.

Q. So pretty much gender doesn't make a difference per se one way or the other in terms of admission to Harvard?

A. That would be correct.

Q. And you can see that gender is a variable in this model.

Do you see that?

A. It is. It's a rough model. For some reason they decided not to give you more description of it. But it is in the model according to page 33, and then it doesn't show the effect obviously on 34.

Q. Given that your testimony is that gender per se doesn't make a difference one way or the other, you wouldn't expect that to change things in the model?

A. Right. It would simply -- I think you should ask the experts on this, though, just for the definitive piece. But that's generally the case is that women and men get in at about the rate at which they apply. As with anything else, there are certainly variations from year to year because the individuals vary from year to year.

Q. Okay.

MR. HUGHES: Your Honor, did that address the question?

THE COURT: Yes. Thank you.

BY MR. HUGHES:

Q. So, Dean Fitzsimmons, let's keep talking here about page 34. We see that the share of the class that is Asian-Americans once we add in personal score and extracurricular goes down, goes down again once we add in demographics. We've reviewed that together, correct?

A. That's correct.

Q. Then when we compare the final model, Model 4, to the actual admitted class, we see that Model 4 comes pretty close to predicting the share of each ethnicity in the actual admitted class.

Do you see that?

A. I do. And it's very consistent with what we've talked about before, you know. It's not simply a matter of

looking at test scores and grades or academics alone. The more factors you add in to try to predict admission, the closer you will come to the class. As rough a model as this is, it was perfectly -- ultimately quite consistent with what the actual class was and what we have known over of the decades.

Q. So did the fact that Model 4 lined up pretty closely with the actual model and what you've known over the decades, did that -- that suggested that the model was reliable, right?

A. It certainly came up with a -- in a very rough way with a very small number of variables; for example, Professor Card looked at 200 variables. Here you've got obviously a very small number of variables. They're important variables, obviously, but again very consistent with what we've known in the past and very consistent with the actual class at the moment.

Q. Mr. Lee said on Monday that this analysis basically confirmed what you already knew and it wasn't a cause for concern.

Is that true, this analysis when it was presented to you and you saw the impact of personal score and demographics on Asian-American applicants, that wasn't a concern to you?

A. It's always a concern any time, you know, we have to turn anybody down. But I think if you were to go back even to the *Bakke* decision and also certainly to the OCR decision, that isn't simply how we do things. And the idea is that all of these factors are important factors.

JA619

Then of course there are many, many others identified by Professor Card.

But our job is just to make sure that these factors are applied in an evenhanded way to everybody who applies regardless of background. So that is quite consistent, when you get down to the end of this, obviously quite consistent with the actual Harvard class.

Q. At least as of the time that you got this analysis from OIR, you were aware that inclusion of the extracurricular and personal score would drive down the share of a class that was Asian-American and drive it up for white, African-American, and Hispanic applicants, correct?

A. Again just going back even to the *Bakke* decision, but certainly to OCR, this is very, very consistent. We've said to people constantly over the years that our process does include as factors legacy, athlete, extracurricular, personal, and various demographic factors.

So you know, there will be changes as you go through the models, but this is very consistent with what we have said all along and been found to be certainly not any indication of discrimination by OCR, among others.

Q. With respect, sir, my question had nothing to do with *Bakke* or OCR. It had to do with what the model shows.

I want to focus on the difference between Model 2 and Model 3. The things that are added in between

JA620

those two models, the things that drive all the change are extracurricular and personal score, correct?

A. They are certainly factors that made a difference, you're correct, as you went from 2 to 3.

Q. And what is being communicated to you here in February of 2013, an analysis by OIR, is that when you factor in the personal score and the extracurricular score, the share of Asian-Americans in the projected class goes down, and the other three groups that are being focused on here -- White applicants, African-American applicants, Hispanic applicants -- go up, correct?

A. Right. The numbers are what they are. But again, those are two very important factors in our process.

Q. And you knew at the time that Asian-Americans were doing better on the extracurricular rating. You've told me that, correct?

A. That's correct.

Q. And so did it concern you when you were provided this information that your admissions process might be penalizing Asian applicants because of the personal quality score? Was that a concern to you in February 2013?

A. Well, it's always a concern. But the personal quality factor, you know, has been a factor we have talked about consistently over time. And it certainly is a part of what we do.

Q. Let's continue to look at this document. Page 36 of Plaintiff's Exhibit 12 is entitled "What Have We Learned?" Correct?

A. That's correct.

Q. And what OIR says, "Once we account for ratings and demographic factors, we can closely predict what the admitted class will look like." Correct?

A. That's correct.

Q. "With current data, we explain a significant amount of the variation in admission, but further details (especially around the personal rating) may provide further insight."

That's what OIR says, correct?

A. That's correct.

Q. And you didn't follow up with OIR to figure out further details around the personal rating, correct?

A. That's correct. Because what we saw here was perfectly consistent with what we've seen for decades, as I said before.

Q. And then it ends saying, "There are a variety of factors that quantitative data is likely to miss or ratings do not capture. We'd like to understand exceptional talent, music, art, writing, the role of context cases, the role of personal statement/essay, measures of socioeconomic status," correct?

A. That's correct. Among other things.

JA622

Q. You didn't follow up with OIR to figure out how those things play a role after this, did you?

A. We certainly were interested and followed up on socioeconomic status, among other things.

But I think we've always had a very clear sense that, again with exceptional talent or the other factors, as -- I don't want to repeat myself. But yesterday we talked about how we really do look at everything when we go through. So we've known that these have long been factors in our process, and I think the world knows that.

Q. The one thing that you followed up with OCR -- with OIR, which we'll talk about in a minute, you did follow up and ask for more research on socioeconomic -- low-income issues, correct?

A. Yes. Not with OCR, but -- I'm just kidding. OIR, yep.

Q. Now, turning to page 37. "Next steps. Determining priorities, timing, and audiences."

Do you see that?

A. Yes.

Q. It says, "Should this work be shared with additional audiences (e.g., President Faust, Dean Smith, Dean Hammonds)? What are your priorities?"

Do you see that?

A. Yes, I do.

JA623

Q. This a presentation that OIR is presenting to you on February 25?

A. Yes. And obviously data that they have themselves now knowledge of.

Q. And you decided not to share the work with President Faust, Dean Smith, and Dean Hammonds, correct?

A. There's lots of information, as you indicated before, in this very lengthy report. But it was certainly good to have the information about early admission, for example, and what the effect was of bringing it back. And it was obviously good to have an understanding of what was going on with our new and very, very rapidly growing School of Engineering and Applied Sciences, especially as it relates to gender.

The third part of it, again, there was no preliminary study. It was very incomplete, as they said, and it literally took us right to where the actual class was, and again, very consistent with what we've always said over time. So it was good to have this information.

Q. It was good for you to have the information that we just looked at, but you didn't share that information with President Faust, Dean Smith --

A. Not immediately at that point. Of course, remember that we were sitting in the middle of the busiest time of the year in regular action looking at 40 -- no, at that time I guess it was more like 35,000 applicants.

Q. You didn't share it with your boss, Dean Smith, or the president -- or President Faust, right?

JA624

A. That's correct.

* * *

[pp. 95:19-96:4]

Q. You were actually -- based on some things that had been reported in the literature, you were actually looking into whether the Harvard admissions process could provide a tip for -- did provide a tip, in fact, for low-income applicants, correct?

A. Yes. We wanted empirical proof of it.

Q. And you asked OIR to get that empirical proof, correct?

A. That's correct.

Q. And that's what this is. This was empirical proof of that tip, correct?

A. Yes.

* * *

[pp. 100:1-102:2]

Q. So now let's take a look at the document. The second page, let's orient everybody to the date. We've got an email from Dr. Driver-Linn to Christine Heenan, and the date is Sunday, April 28, 2013, correct?

A. That's correct.

Q. And remember we just looked at those slides that provided that empirical evidence that Harvard was giving a tip to low-income students? Do you remember looking at Plaintiff's Exhibit 21 just a few minutes ago?

A. I do.

Q. And do you have in mind that the date of Plaintiff's Exhibit 21 was just a few days before? Plaintiff's Exhibit 21 was April 22. Do you have that in mind?

A. I do.

Q. Okay. So this is an email exchange that you're not on, but it concerns you, and it's occurring just a few days after OIR has sent you its empirical data that establishes that low-income students get a tip, correct?

A. Yes. That sounds right.

Q. Okay. And Dr. Driver-Linn works for OIR, correct?

MR. LEE: No, Your Honor. He's asked this question 20 times about Dr. Linn and OIR. And I'm getting a little worried about the time.

MR. HUGHES: We all know who Dr. Driver-Linn is.

BY MR. HUGHES:

Q. Who is Christine Heenan?

THE COURT: The objection took longer than the question would have. Go ahead.

BY MR. HUGHES:

Q. Who is Christine Heenan?

A. Christine Heenan was our vice president for public and community affairs, I think the title was at the time. I can't be exact.

Q. She's no longer with Harvard. But when she was, she was one of the top PR people at Harvard, correct?

A. That's correct.

Q. Was she the very top PR person or just one of a handful at the top?

A. I think you could say that. I'm not totally familiar with the organizational structure of public and community affairs, but she certainly -- you could make that case.

Q. Dr. Driver-Linn is communicating with Ms. Heenan a few days after you received the slides we just looked at.

And she says, "Hi, Christine. Hope all is well. Also would like to give you have a heads-up about some analysis and correspondence we've been having with Fitz. He's excited to share more broadly. I believe he is going to be in touch with Jeff Neal tomorrow, but I'd like to make sure you've had a chance to think through implications, not entirely straightforward."

Do you see that?

A. I do.

* * *

[pp. 107:9-126:23]

Q. We're going to look at that in one minute, but I reminded myself over the break we forgot to look at one page of Plaintiff's Exhibit 12. So we'll do that briefly. We'll go back to Plaintiff's Exhibit 12, page 34.

JA627

We spent a long time -- I've got it on the screen, Dean Fitzsimmons. We spent a long time talking about what these models and these bar graphs show. You recall that, correct?

A. That's correct.

Q. We're not going to revisit that discussion. The record is clear. What I wanted to show you was page 38. We looked at page 35 -- actually we skipped 35. We looked at 36 and 37 together. I meant to show you, I forgot, page 38. So just a few pages after the model. Page 38, Plaintiff's Exhibit 12. Next steps.

A. This is P12?

Q. Yes. I've got it on the screen. You're welcome to get it out from the binder. Just let me know when you're ready.

A. You're on page 38.

Q. Right. Of the slide. What OIR is saying on page 38, "Next steps. Addressing questions raised about admissions and financial aid."

Do you see that?

A. I do.

Q. And then we'll blow up the top of this document, and you see one of the research questions, Question Number 3 is, "Is there bias against Asians in college admissions?"

Do you see that?

A. I do.

JA628

Q. You said you were comfortable with what those bar graphs showed that we talked about for so long. But at least OIR is asking the question, "Is there bias against Asians in college admissions?" That's the question they're asking here, correct?

A. The question they asked is part of the report, their comprehensive report.

Q. And then next steps they have on the right, they have, "Who else should see this work?"

Do you see that?

A. I do.

Q. We've already agreed that this wasn't shared with others in the admissions office or Dean Smith or President Faust, correct, this part of the document, correct?

A. That's correct.

Q. Okay. And then it says, "To further address the question of bias, is there more data to elaborate our understanding of the role of the personal essay and other factors?"

Do you see that?

A. I do.

Q. And there was no follow-up between OIR and the admissions office on the personal essay issue, correct?

A. That's correct. Of course they are not admission officers and we are, and we know that the personal essay along with every other factor does play a role. So

that might have been sort of interesting to them because perhaps they didn't realize what we did with it.

Q. So they were raising the question, "Is there bias against Asians in college admissions?" But you thought you knew the answer at this time. Is that what you're saying?

A. Certainly their model and all the other things we looked at suggested that there was no bias.

Q. Let's go ahead and look at that May 1 memo, which is Plaintiff's Exhibit 26.

MR. HUGHES: And before I ask substantive questions, I'd like to offer Plaintiff's Exhibit 26 into evidence.

MR. LEE: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit No. 26 admitted.)

BY MR. HUGHES:

Q. Thank you, Your Honor. So, Dean Fitzsimmons, I've got the first page of Plaintiff's Exhibit 26 blown up on the screen.

Do you see that?

A. I do.

Q. And you recall receiving this email with the May 1 memo attached to it, correct?

A. I do.

JA630

Q. The email is from Ms. Bever on May 1, addressed to you, correct?

A. That's correct.

Q. Copying your assistant and Dr. Driver-Linn and Mark Hansen, correct?

A. That's correct.

Q. Subject, "Admissions memo," and the title of the attachment is "Low-Income Admissions Memo Final," date of May 1, 2013, correct?

A. That's correct.

Q. This is the final memo from OIR on the low-income admission issue that you asked them to look into, correct?

A. It looks like their final draft.

Q. And then Ms. Bever writes to you, "Dear Fitz. Attached is a memo describing our recent analysis of low-income admissions. In the memo we describe our approach and results. At your suggestion, we reviewed a small sample of literature to put this in context and realized our approach was consistent with what others have done. We'd appreciate any comments or suggestions you have."

I'll stop there. And I'll ask you, do you agree that you suggested to OIR to look into the literature to effectively validate their approach?

A. That's correct.

JA631

Q. And you agree that OIR did, in fact, do that and they described what they did in the memo, correct?

A. That's correct.

Q. And then the next paragraph goes on to say, "We thought based on our conversation last week that it would also make sense to share this with Jeff Neal, Christine Heenan, Nina Collins, and Sally Donahue. Does that make sense?"

Do you see that?

A. I do.

Q. Do you know whether you ultimately shared this memo with Jeff Neal or Christine Heenan?

A. I suspect that maybe they shared the memo, but we would certainly be open to having them share that information.

Q. Again, this is just a few days after the email exchange between Driver-Linn and Heenan on the Unz issue.

Were the conversations that Ms. Bever was referring to here conversations about the potential considerations in sharing this low-income information more broadly?

A. I think so. I'm not quite sure whether she was referring to a conversation she had with me or perhaps with others in her group.

Q. The email is addressed to you, right?

JA632

A. Yes. But I'm just talking -- I understand what you're saying.

Q. Okay. So we can go ahead, Dean Fitzsimmons, and look at the memo. This is where the actual attachment, the memo, starts, right?

A. That's correct.

Q. Let's walk through parts of it. We're not going to read the whole thing. On the first page, OIR says -- the memo is addressed to you and only to you, correct?

A. That's correct.

Q. And OIR says, "At your request, we undertook an analysis to determine if the chance of admission is any different for low-income students, holding all other admissions characteristics constant.

"Below we briefly describe the data used for our analysis and its limitations, our approach, and our findings. At the conclusion we outline some issues we believe are important to consider prior to public dissemination of this analysis."

That's part of the memo, correct?

A. That's correct.

Q. Again done at your request, correct?

A. That's correct.

Q. And then if we go to the second page, they describe in the memo the approach and the process that they took, correct, Dean Fitzsimmons?

A. That's correct.

Q. And I've got the second page of the memo, which is the third page of Plaintiff's Exhibit 26, up on the screen. And you can see I've highlighted a paragraph where OIR identifies some of the limitations associated with the approach they've taken, correct?

A. That's correct.

Q. Do you see that up on the screen?

A. I do.

Q. And then OIR goes on to say, "In spite of these limitations, the logistic regression model results are consistent with the descriptive analysis described above and shown in Exhibits 1 and 2. Exhibit 3 illustrates the difference between the predicted admission rate and actual admission rate for students at each income level."

Do you see that?

A. I do.

Q. They walk through the limitations and they say we compared the output of our model to some descriptive analysis. They match up. That's a measure of reliability.

Would you agree?

A. That's correct.

Q. So now I want to look at Exhibits 1, 2, and 3. I think they will look familiar. So here is Exhibit 1 to the May 1 memo. This was also an exhibit to Plaintiff's Exhibit

JA634

21, the slides that you received on April 22 that we looked at earlier. It's the same slide, correct?

A. Looks identical.

Q. And Exhibit 2, again, is the same thing we looked at that you got on April 22, correct?

A. That's correct.

Q. And Exhibit 3 is, again, the same thing that you got on April 22 in Plaintiff's Exhibit 21, correct?

A. That's correct.

Q. And again, this Exhibit 3 actually shows some of the results of the logistic regression model that was performed by OIR, correct?

A. That's correct.

Q. You agreed that that logistic regression model provided empirical evidence of that low-income students applying to Harvard were receiving a tip, correct?

A. That's correct.

Q. Okay. So now I want to go back to where we were on page 2 of the memo. The first paragraph describes Exhibits 1 and 2, agree? That I've got highlighted, culled out?

A. Yes.

Q. And then I want to go to the paragraph before, which says, "To get a sense of the size of the admissions advantage conferred to low-income applicants relative

JA635

to other groups of applicants, the so-called 'thumb on the scale,' we include low-income status in a second logistic regression model. The table below is sorted based on the effect size of each of the variables included in the model. The variables with the largest effects on the probability of admission are athletic rating, personal rating, and legacy status. Compared to athletes and legacies, the side of the advantage for low-income students is relatively small."

Do you see that?

A. I do.

Q. And you know from looking at this document before that the reports of that logistic regression model are reported -- the results of it are reported on the next page, correct?

A. Yes, and with their -- yes.

Q. But those results provide more empirical evidence about how Harvard's admissions process works, correct?

A. It gives you another way to look at it perhaps.

Q. It builds on the first logistic regression model that was in Slide 3 that we just looked at, right?

A. Right.

Q. And it provides more empirical evidence about how the Harvard admissions process works, correct?

A. Yes. In the sample that they used, yes.

Q. And then if we go to the third page, the next page, we've got the output of that logistic regression model, correct?

A. That's correct.

THE COURT: What does "constant" mean? Do you know what "constant" means?

THE WITNESS: I'm in over my head on this kind of stuff. These are always very hard to gauge, Your Honor. It's probably better to look at the actual chart that they created. But it comes out of, I guess, weightings in the equation. But I'm not quite sure what the "constant" is, to be honest.

MR. HUGHES: We'd probably be better have some other experts do that.

THE COURT: We'll get it tomorrow. Thank you.

BY MR. HUGHES:

Q. In any event, what OIR has described to you in this memo is that the higher the number here, the greater your chances are of getting into Harvard, correct?

A. Yes. But it's very hard for a non-statistical expert to figure out actually what these things mean.

Q. I just want to make sure we read what OIR told you, and I'll highlight it. We just went over this, but again, OIR is telling you that the variable with the largest effects on the probability of admission, and then it describes what those are and then it has the table, correct?

A. Yes.

Q. OIR is communicating to you what the basic meaning of these variables and the numbers associated with them are, right?

A. That's what they're trying to do.

Q. And then if we go to the next page and we see what OIR told you about the variables that are included, we see the athletic rating of 1, you've got a really good chance of admission to Harvard, correct? Highest number on the list?

A. I'm not sure that's exactly how to read that. It is a factor that can be very helpful. I think it's probably the way you look at it. Again, I'm not entirely sure what these numbers actually mean, and I would certainly defer to the statistical experts when the time comes.

Q. So you understood what Table 3 in Plaintiff's Exhibit 21 meant which was based on a version of this logistic regression model.

Are you saying that you don't understand that OIR is telling you the higher the number here the more likely chance of admission to Harvard?

A. I think, again, it's what the -- effect the factor would have. But how you calibrate that with a real candidate is a little bit unclear to me and I think to most people probably in the room.

But I understand what you're saying. And I think there's no question, for example, that if you have an athletic rating of 1, that would perhaps increase your chances of getting in.

JA638

Q. You would agree that having an athletic rating of 1 significantly increases your chances of getting into Harvard, correct?

A. Yes.

Q. And you also agree that having a high personal rating also increases your chances of getting into Harvard, correct?

A. That's correct.

Q. And you also agree that African-Americans receive a tip in the admissions process. We talked about that yesterday, correct?

A. That's correct.

Q. And you also agree that Hispanic applicants, we see down here, also get a tip in the admissions process at Harvard, correct?

A. That's true.

Q. Remember we looked at your report, Plaintiff's Exhibit 31, where you adopted Dr. Card's analysis, and it showed as a group African-Americans get more of a tip than Hispanic applicants to Harvard, correct?

A. Yes.

Q. And that relative relationship --

A. At least in terms of the way that worked out in that sample.

Q. And that relative relationship holds true in this report that you received from --

MR. LEE: I'm objecting to this now, having him draw conclusions on this chart. He said repeatedly he's not quite sure how it works. I don't have any problem with him going back to the charts that he testified about, but we're now -- he said four or five times he's not quite sure how these numbers work.

MR. HUGHES: Your Honor, he received this memo --

THE COURT: I don't understand the question even.

MR. HUGHES: I will withdraw that question.

THE COURT: All right.

BY MR. HUGHES:

Q. If we look down at the low income here is that self-reported income less than or equal to \$60,000, correct?

A. That's correct.

Q. That was the definition of low income in both these regression models, correct?

A. Yes.

Q. And that's positively associated with admission to Harvard, correct?

A. That's correct.

Q. And what we see down the next --

THE COURT: Hold on a second, Mr. Hughes.

JA640

MR. LEE: Your Honor, I object. The witness who prepared this chart is going to testify. She's on their witness list. She's going to come in. He said a number of times he's not the person to do it.

MR. HUGHES: Your Honor, he asked for this analysis. This is just showing the size of the tip for low income.

MR. LEE: It's --

THE COURT: Stop. I'm going to let him -- he's just going through the information in the chart. So we get down to the Asians so he can comment on that, I assume is the purpose of the exercise. It's not prejudicing you in any way. I'm going to overrule the objection.

MR. LEE: Can I say one more thing, Your Honor?

THE COURT: Yes.

MR. LEE: I understand where Your Honor is going. This doesn't say anything about the tip and how a tip correlates to any of this, which is the last question.

THE COURT: All right. He's right about that. So why don't you rephrase it without the word "tip."

BY MR. HUGHES:

Q. The variable self-reported income less than or equal to \$60,000 is positively associated with admission to Harvard, correct?

A. Again, it's not a cause and effect. It would be one factor among many, I think is the way to think about it with anything.

JA641

Q. You understand this is a refinement of the logistic regression model that you've told me 20 times provided empirical evidence that low-income applicants were getting a tip. You understand that, right?

A. I do.

Q. Now, the next variable I want to ask you about is Asian, and under Asian the number is negative, correct?

A. That's correct.

Q. The variable Asian is negatively associated with your chance of getting into Harvard. That's what you were told on May 1, 2013, correct?

A. That's -- again, I'm not quite sure what these numbers mean. You have to ask an expert, but I understand the drift of your question.

Q. Now, we're just going to March down the same page of Plaintiff's Exhibit 26, this memo that you requested and OIR delivered. I'll read it into the record.

“The relative sizes of the admissions advantage conferred on different groups can be seen by looking at the differences in actual admit rates as well. In Exhibit 4, we limit our analysis to students with high academic ratings, 1 or 2, and examine the differences between athletes and non-athletes, legacy students and others, Asian students and all other students, and low-income students and all other students.

“An athlete that is also an academic 1 or 2 has an admit rate of 83 percent compared against 16 percent for non-athletes with an academic 1 or 2. 55 percent of

JA642

legacies who are academic 1s and 2s are admitted compared with 15 percent of all other academic 1s and 2s. Asian applicants with an academic 1 or 2 are admitted 12 percent of the time compared against an admit rate of 18 percent for non-Asian applicants. By comparison, low-income applicants with an academic 1 or 2 have an admit rate of 24 percent compared against 15 percent for all other applicants.”

That’s what was reported to you in the May 1 memo, correct?

A. That’s correct.

Q. If we look at Slide 4, this is the bar graph that relates to that paragraph that we just read, correct?

A. That’s correct.

Q. And on the right-hand side, it shows that Asian-American applicants with an academic 1 or 2 are less likely to get into Harvard than everybody else who has an academic 1 or 2, correct?

A. Yes.

Q. And it also shows a low-income tip, correct?

A. That’s correct.

Q. Okay. Low-income tip that -- I’ll withdraw that question.

Let’s go back to the page we were just looking at. This is the last paragraph of text in the memo that OIR delivered to you on May 1.

JA643

“Issues to consider before sharing these results publicly. We imagine that sharing any analysis of admission weights will draw attention to the variety of factors that compete with one another in the admissions decision. To state the obvious, with only approximately 2,200 spaces for admitted students per year, implicit trade-offs are made between athletes and non-athletes, legacy admits and those without affiliation, low income, and other students.

“We know that many are interested in the analysis of the relative trade-offs. While we find that low-income students clearly receive a tip in the admissions process, our descriptive analysis and regression models also shows the tip for legacies and athletes is larger and there are demographic groups that have negative effects.”

That’s what OIR told you, correct?

A. That’s correct.

Q. And the only demographic group in the chart above that has a negative effect are Asians, correct?

A. Yeah. I think that’s right. Well, slight difference for unknown and other, but I see your --

Q. Asians have a negative effect, correct?

A. Then there’s unknown and other that apparently have a slight negative association.

Q. But no question Asians are included in the demographic groups that have negative effects, correct?

A. Correct.

Q. Do you recall once you got this memo discussing with Dr. Driver-Linn, Ms. Bever, Christine Heenan, whether it would be a -- the concerns about sharing the low-income information that you had told me earlier you thought was worth sharing, but the concern on the other hand that it might release information about negative effects on certain demographic groups like Asians?

A. You know, that, I'm not sure again. I wasn't in their minds, you know, for what set of concerns they might have had.

I was interested in something very straightforward, and that was to find out whether or not we actually gave a tip, because many didn't think we did, for people from low- and modest-income backgrounds. And so that's what I wanted. And I think that information was good for us to have in the event that the issue would come up either on the road or in other ways.

Q. So you asked OIR to look at the issue of whether low-income applicants get a tip. They provided you analysis, including a regression model, that showed a tip, and you thought that was reliable empirical evidence of a tip for low-income applicants, correct?

A. It certainly -- yes. Yup.

Q. When OIR refined that regression model and showed a negative effect on Asian-Americans, you didn't tell anyone in the admissions office about that, did you?

A. I'm not sure frankly exactly what we talked about as we talked about the findings. But again, the focus

was a simple one; and that is, whether or not we give a tip for people from low- and moderate-income backgrounds. So that as we were actually out on the road already recruiting for next year at that moment, because we do a lot of traveling, we visit 150 locations across the United States. Every year we do a chunk of those in May. So the idea that at least if someone were to ask, they would have this new information that we could corroborate.

Q. I'm going to put up page 427 of your deposition, line 14.

“QUESTION: Did you share the information about the effect of being Asian in this study with anyone else in the admissions office?”

“ANSWER: I don't recall sharing that specific finding or other findings.”

Were you asked that question? Did you give that answer?

A. I'm sure I did because it's here in the record. But again, I'm not sure exactly, you know, the complexity of the discussion that I eventually had with staff. But the idea was that we had this information about low- and moderate-income students, which was of the whole point of the exercise. But I don't remember when I did that sharing the complexity of apparently some concerns about other tips.

Q. You did share with your staff the information about low-income tips, correct?

JA646

A. Yes. To be honest, I'm not exactly sure, for example, the date or anything of that sort because we have lots of things going on. But the staff certainly knows that there is a tip.

Q. But you didn't share the information from this memo about the effect of being Asian with the admissions office, correct?

A. That would be correct, I think, but I don't honestly remember the complexity of the discussion.

* * *

[pp. 127:11-138:25]

Q. Dean Fitzsimmons, tell us what you did do to follow up on the May 1 memo.

A. One of the things that, again, the various concerns, including the one your just raised and the Ron Unz article and lots of concern in the world certainly over the past 30 years about Asian-American admissions, one of the things that I was concerned about when we looked at the findings that we just went through was that I wanted to make sure that if we give a tip for low-income background that we do it as we do everything else, in an evenhanded manner for students from all ethnic backgrounds.

Q. So, sir, are you telling me that after you got this May 1 memo, you asked OIR to dig into the issue of the effect of being Asian?

A. Yes. Relative, again, to what we were interested in, and that is the -- at this particular point was low-income and moderate-income applicants.

JA647

Q. You'd seen the negative impact of being Asian in Plaintiff's Exhibit 26, and so you went and you asked OIR to take another look at it. That's your testimony, correct?

A. That's what we ended up getting, yes.

Q. And you asked OIR to do that because you wanted them to dig deeper on the effect of being Asian in your process, correct?

A. That would be the best of my recollection. Again, we are always busy at that time of year. There's lots of things going on, but that's the best of my recollection.

Q. Same page back up on the screen, starting line 14.

"Did you share the information about the effect of being Asian in this study with anyone else in the admissions office?"

"ANSWER: I don't recall sharing that specific finding or other findings.

"QUESTION: Did you do anything to follow up on it?"

"ANSWER: No.

"QUESTION: Did you ask to dig into it and ask OIR to take another look at it?"

"ANSWER: Not that I recall."

Did you give that testimony?"

A. Yes. And I would -- again for that particular thing, no. I was concerned about if we have a tip for low- and

moderate-income students, I wanted to make sure that that tip applied to all ethnic groups in the same evenhanded manner.

Q. So, Dean Fitzsimmons, let's now talk about what you now remember. Let's look at Plaintiff's Exhibit 29.

MR. HUGHES: I offer this into evidence.

MR. LEE: What number are we?

MR. HUGHES: Plaintiff's Exhibit 29.

MR. LEE: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit No. 29 admitted.)

BY MR. HUGHES:

Q. Dean Fitzsimmons, is Plaintiff's Exhibit 29 the result of the follow-up that you say you asked for about whether Asian-Americans receive a low-income tip?

A. Again, to look at, make sure that it went across all ethnic groups.

Q. And do you remember -- we'll look at it together in a moment. I just want to test your memory. Do you remember what OIR found?

A. Is this a memory test?

Q. No. If you want to look at the document, if you prefer to do that, we'll do that. Would you prefer that?

A. Yeah. It might be good for the Court.

JA649

Q. So now we need to look at what I believe is the attachment or the link for this email which is Plaintiff's Exhibit 28. And I'll offer that into evidence.

MR. LEE: No objection, Your Honor.

THE COURT: Admitted.

(Plaintiff Exhibit No. 28 admitted.)

BY MR. HUGHES:

Q. Thank you, Your Honor. Is this, Dean Fitzsimmons -- looking at the first page here, is this the OIR information that you got as a result of the follow-up that you asked for?

A. It looks like the beginning of -- it's a draft, but it looks like the beginning of it. Sorry. My Boston accent again. Sorry.

Q. So now I want to look at page 8 of Plaintiff's Exhibit 28.

Do you see that? And I've got it on the screen, if it's easier.

A. Yeah. It's a little bit easier to read here.

Q. Here we have the coefficients for logistic regression modeling predicting probability of admissions, classes 2009-2016, includes interaction terms for all race/ethnicity and low income. Correct?

A. That's what it says, yes.

Q. Actually I want to go back to Plaintiff's Exhibit 29 for one minute and ask you a question.

A. Should I hold this?

Q. Just look at the screen Plaintiff's Exhibit 29.

A. All right. Thank you.

Q. What precisely did you ask OIR to do? Did you just give them a general request to look at the low income, or did you ask them to interact the variable low income with ethnicity?

A. Again, I don't remember the conversation exactly. But at first it was just the general, let's see if we give a tip.

And I don't remember exactly how I phrased it. It was a long time ago, but I did want to make sure -- we've talked yesterday and the day before about safeguards. We're always trying to be vigilant and always trying to make sure we are treating everybody in an evenhanded way. So I probably phrased it let's just make sure that we're looking at this across -- giving the same kind of tip across all ethnic backgrounds.

Q. So now we'll go back to where we were, Plaintiff's Exhibit 28, page 8. And we'd read everything down to the parenthetical, "Includes interaction terms for all race/ethnicity and low income."

Do you see that?

A. I do.

Q. Okay. And we've got three things that are in bold here, correct?

A. That is correct.

Q. We've got low income, Asian and low income, and Asian. Correct?

A. That's correct.

Q. Can you explain to us what OIR -- actually I withdraw that question.

Let's go to the very bottom, the lowest bolded thing. There we have Asian. Do you see that?

A. I do. Right next to an even stronger thing for African-American and low income.

Q. I want to ask you about that in a moment. But what we see here for Asian -- so that's Asian and not low income -- negative .418 coefficient, a negative chance of getting into Harvard by virtue of being Asian, correct?

A. That's correct.

Q. That's actually a lower coefficient, a worse chance of getting into Harvard than we saw in Plaintiff's Exhibit 26 where the coefficient was a negative .37, correct?

A. That's correct. But again, it's very hard for me to do this. This is a very kind of strange statistic that I don't fully understand. But especially if you just look at the African-American low income which has an even greater negative loading, I'm not sure how to interpret that. I really would prefer to have the experts.

Q. Okay. When you looked at Asian and low income, what was your reaction to that, or did you just not understand?

A. I don't think I fully understood it because a lot of non-statisticians don't quite know how this stuff works.

But if you look at the chart in this, it gives you a pretty clear sense. Obviously -- I guess you're the one asking the questions, but there's another chart here on page --

Q. I tried to read your mind and put the clarity on the screen.

A. Oh, you did it. There it is. Thank you.

Q. Here we've got low income in maroon and then not low income in gray, and we see that everybody gets some kind of a tip for being low income versus not, correct?

A. That's correct, yup. This is an easier way to understand it.

Q. I just want to show one last thing here. Again low income here is defined by an income of \$60,000 or less, correct?

A. That's correct.

Q. And this, page 4 of Plaintiff's Exhibit 28, has the percentages of the applicant pool for the different ethnicities that fall into that low-income category, correct?

A. Yes. Yeah, for that group of people they were studying.

Q. And for Asians, that's 18 percent, correct?

A. Yes.

Q. And after this, you didn't do any further follow-up on the Unz issue related to discrimination against Asian-Americans, correct?

A. We did not directly. Harvard didn't directly do that.

Q. Okay. And when you got this, did this satisfy you that Unz was wrong and that the negative penalty that we saw in the May 1 memo wasn't a concern? Did this put all your concerns to bed about potential discrimination against Asian-Americans when you got this?

A. I think we felt reassured that we were treating Asian-Americans in an evenhanded manner, giving of the same kind of tip that we gave for low-income students from all ethnic backgrounds.

Q. All right. So we've now looked at a number of documents from OIR. We looked at the admissions 2 document which you were less familiar with. We looked at the February 2013 presentation that was shown to you at the February 25 meeting. We looked at the May 1, 2013, memo that was shown to you.

All of those showed information that indicated at least the possibility of disadvantage of being Asian in terms of a chance of getting into Harvard, correct?

A. Again, I'm not sure I would phrase it that way, but I understand the thrust of your question.

Q. And you agreed that there's data points in those -- the 25th or the February 20 presentation raises concerns of bias. The admissions 2 shows a negative effect for being Asian. The May 1 memo we just looked at shows a negative coefficient for being Asian, gets even lower when we get to the P28, doesn't it?

MR. LEE: Your Honor, this is all compound.

THE COURT: Sustained.

BY MR. HUGHES:

Q. Did you ever share any of this information with Director McGrath?

A. I'm sorry. Which information?

Q. Any of the information OIR supplied to you concerning the effect of being Asian in the admissions process.

A. I am sure that she eventually learned, along with others on the staff, about the fact that we in fact do give a tip for people from poor and modest income backgrounds. I don't remember. She and I see each other all the time. Her office is right across from mine, so we share lots of information. It certainly wouldn't have been kept from her. That's for certain.

Q. After you got this information from OIR in 2013, you didn't change anything about your admissions process, correct?

A. Well, we certainly continued to be vigilant in all the ways I've talked about before and continued -- especially given the climate, legal issues and so on, continued to have the office of the general counsel meet with our staff every year. We certainly continued our strong training program for new people. And we remained especially vigilant in our committee process where the actual decisions were made.

Q. In response to the May 1 memo, did you make changes to your admissions process?

JA655

A. Not to the fundamental admissions process that we again have had in place for a very, very long time and has been studied in lots of different ways.

Q. And you didn't seek bias training for your admissions staff, correct?

A. Again, we certainly had lots of discussion in the staff and the training periods about making sure that every single person regardless of ethnic background was considered fairly and thoroughly.

Q. You didn't bring somebody in to give bias training, did you?

A. Not that I recall. But again, remember we've been dealing with this issue for three or four decades.

Q. You didn't bring in Cornerstone or Dr. Card to analyze your admissions process, correct?

A. Again, we had OIR, which we thought was very, very good.

Q. Okay. And you think your reaction to these OIR reports is consistent with your statement you gave me just now, that you are vigilant concerning claims of discrimination, correct?

A. Yes. I think your word "consistent" is just right because what you saw when we looked at the five, four models in the actual class, that was perfectly consistent with everything we've always said about our admissions process and everything that was said about our process in *Bakke* and coming out of the OCR review.

JA656

Q. And you think it was consistent with vigilance not to send any of this information to anyone else in the admissions office. Do you agree with that?

A. I'm not sure that's actually true.

Q. You think that you ultimately sent some of this information to people in the admissions office?

A. We certainly shared the idea that there is a tip for low- and modest-income-background students which was, I think, a vitally important thing for us to be able to say to a country that is in many ways less and less equal almost every year in terms of economic background.

Q. Do you think it was consistent with vigilance not to share the information concerning the negative effect on Asian-Americans with the admissions office?

A. Again, I think the materials that were viewed I think were vetted thoroughly.

Q. And do you think that it was consistent with the exercise of vigilance after you got this last report from OIR not to ask OIR to do further work on these reports?

A. Well, they did do some further work, obviously, and they had access to all the information.

Q. Sir, I'm asking you about the last document we looked at, P28 and P29. Do you think it was consistent with vigilance for you --

A. I'm sorry. I need to look at that. P28?

Q. This one. I've got it on the screen. Do you think it was consistent with the exercise of vigilance not to ask OIR to do further work on these reports?

A. I just want to make sure I've got the right one. Okay, this is the one on ethnicity.

I think again page 6 gave us the answer, I think, that we and others who -- you know, who would need the information would have, that we're giving a tip for low- and moderate-income-background students and we're doing it evenhandedly for everyone regardless of ethnicity.

Q. I'm not focused on the low-income tip.

Let me ask you again. Do you think it was consistent with vigilance for any allegation of discrimination against Asian-Americans not to ask the Office of Institutional Research to do further work on these reports?

A. Yes. I think we considered everything as carefully as we could.

MR. HUGHES: No further questions.

* * *

**WILLIAM FITZSIMMONS
CROSS EXAMINATION BY MR. LEE**

[pp. 165:1-168:6]

Q. I'm not going to repeat any of that, but I want to ask you this: There's a reference to the academic index, and Mr. Hughes asked you about the academic index?

A. Yes.

Q. What use does the admissions committee make of the academic index in its admissions decision making?

A. The only use, really, is for reporting purposes to the Ivy Athletic League literally.

Q. Is the academic index the same thing as the academic rating?

A. No, not at all.

Q. Turn, if you would, to page 33. On page 33, you see the list of the four models, correct?

A. Yes.

Q. And Mr. Hughes asked you about these in detail, so I'm not going to ask you about them again except this: The academic model is based upon the academic index and the academic rating, correct?

A. That's correct.

Q. Now turn, if you would, to Slide 34. Do you have that before you?

A. I do.

Q. And he asked you about that in some detail, correct?

A. He did.

Q. Now I'd like to ask about your reaction and your understanding of these models when you first saw it in 2013. Do you have that in mind?

A. I do.

JA659

Q. First, do you recall seeing these results in February of 2013?

A. I do.

Q. Did you see the four models plus the actual?

A. Yes. I saw the four models.

Q. And what was your reaction to the information provided in the four models plus the actuals?

A. Very much as I responded to Mr. Hughes. And that is that there are -- these are some of the factors certainly that go into our admissions process. It's never been test scores and grades alone, you know, going all the way back to the *Bakke* decision.

It's interesting, you know, with a small number of factors to see at the end after Model 4 that it was very close to the class size -- to what was actually true in the class itself. So it was certainly perfectly consistent, nothing new, perfectly consistent with everything we'd known before.

Q. Now I just want to ask you a couple of questions, not to go over ground that Mr. Hughes covered with you, but let me focus you just for a second on Model 1.

Model 1 suggested if you just went on the academic index and academic rating, you would have more Asian-Americans in the class, correct?

A. That's correct.

Q. Have you ever doubted that?

JA660

A. No. That was certainly part of everything we've talked about, Susie and I, and the OCR report. And again just going back even to the appendix in the *Bakke* decision, it was always the case that Harvard was never simply about looking at somebody's test scores and grades only.

Q. And of the four models, which is the model that actually takes into account the most factors?

A. Well, Model 4.

Q. If we flip back a page, how many factors does Model 4 take into account?

A. It really takes into account eight. Really seven, if you think about it, because it has academic as 1. But let's say seven or eight factors.

Q. Is this a comprehensive list of the factors used in Harvard's admissions process?

A. Not in the real world of actually doing admissions at all. Because in there, you're really looking at every single human talent.

Q. Go back to Slide 34. When you saw these results, I think you told Mr. Hughes they were consistent with what you had understood before, correct?

A. That's correct.

Q. In what way were the results consistent?

A. Well, in the sense that you ended up with -- they came fairly close to the shares in the actual class itself. So that's a pretty good start. But of course the reality is it's much more complicated than this.

JA661

* * *

[p. 172:11-21]

Q. Now, at this February 25, 2013, meeting, did anyone at OIR report to you that they had uncovered discrimination or bias against Asian-Americans?

A. Not at all.

Q. Did anybody tell you that this presentation showed discrimination or bias against Asian-Americans?

A. Not at all.

Q. If they had, would you have remembered?

A. I think so.

Q. And would you have done something about it?

A. Yes.

* * *

[pp. 174:11-176:8]

Q. Turn to Tab 21, which is P28.

A. Yes.

Q. Do you have those before you?

A. I do.

Q. Mr. Hughes discussed this with you. Turn to page 6, which is the chart.

A. Okay, yes.

JA662

Q. Did OIR specifically consider Asian-American applicants?

A. Yes, they did.

Q. What were the results of OIR's analysis on Asian -- low-income Asian-American applicants?

A. That low-income Asian-Americans were admitted at a 10 percent rate while other above \$60,000 income were admitted at 7 percent rate.

Q. How did the incremental tip, how did the higher admission rate for Asians compare to the tip or the higher admission rate given to any other ethnicity?

A. It was certainly among the highest. The Native American difference was slightly greater. That's a very, very small number in terms of individuals, so that can fluctuate quite a bit.

Q. So among the different ethnicities, the tip or the benefit given to Asian-Americans, low-income Asian-Americans, was among the highest given, correct?

A. That's correct.

Q. Now, what was your reaction to this chart when you received it?

A. I think this is the information that I wanted. Because again, we want to make sure that any criterion, any factor at that might affect admissions would be administered in an evenhanded way across ethnic groups.

JA663

Q. Now, Mr. Hughes asked you some questions about the information you received based upon OIR's models, the models you recall seeing.

Do you recall those?

A. Yes.

Q. He asked you whether you reported that information to President Faust, to Dean Smith, or to Dean Khurana.

Do you recall that?

A. I do.

Q. Based upon those models, was there anything to report?

A. There was absolutely nothing to report.

Q. Why?

A. Everything was absolutely consistent with everything else we already knew. And literally, even that very preliminary incomplete model came up with, you know, by the time they get through with the fourth model, it was really almost identical with the actual class. No news, nothing to report.

* * *

[pp. 182:4-183:7]

Q. And are you also looking for students who are exceptional in ways other than academically?

A. Yes. Really in every way that one could imagine, actually. And we're looking -- I think the whole idea of

having a great educational environment and having people who truly will educate each other and inspire each other we actually hope over the four years, that diversity really matters. And it's diversity in all its forms, not just simply ethnic diversity or economic diversity. Religious diversity, you name it. The more diverse the students are, the richer the education.

Q. You've gone to the second objective.

A. Yes.

Q. I think you've hit on some, but what are the types of diversity that you're looking for in a Harvard College class?

A. It really would go right down the line. The easy ones we've talked a lot about would be ethnic diversity and economic diversity. But we're also looking -- and to some extent certainly geographic diversity, things -- very standard things that people think about.

But it's much more than that. It's diversity of thinking. It's diversity of academic interests. I think one of the things we hope with all of our new students who are coming into the School of Engineering and Applied Science is we want them to live with and learn from humanities students and social science students and maybe take some of those courses themselves.

So it's diversity in every possible way you can think of it.

* * *

[p. 192:8-15]

Q. Now, given the academic success of the applicant pool as you've just described to us, what makes someone outstanding and unusual enough to get this tip from that very, very qualified applicant pool?

A. It's really the ones at the very tip-top who will get, for example, Harvard faculty reads that will say this is one of the most promising poets in this generation or one of the most promising mathematicians in this generation.

* * *

[pp. 201:21-202:14]

Q. The last tip listed here is geographic, ethnic, and economic factors. Do you have that in mind?

A. I do.

Q. Now, you've talked about geographic factors already, so I'm not going to ask you about those. Is the economic tip the socioeconomic or low-income tip that you've described before?

A. Yes. And I think it's one of the things in a country that is so segregated economically, and in some ways with our social classes even coming further apart, one from the other, I think it's more important than ever to have people from low- and modest-income backgrounds, from blue collar backgrounds, from first-generation backgrounds, to be at Harvard and to -- first of all, to have an opportunity to make a difference in the world with the education. But also, frankly, to make sure that their classmates understand what America is really like. And it will make their classmates better, and I

JA666

think it will make them better for mixing with people from all economic backgrounds.

* * *

[p. 203:19-22]

Q. And every applicant -- athlete, legacy, children of staff, children of faculty, dean's list, someone not on those lists -- they're going to go through this process, right?

A. Exactly the same process.

* * *

[pp. 209:16-210:14]

Q. In general terms, what goes into the academic rating?

A. It really is, the simple thing is the test scores and grades at the beginning. But then you read really carefully about what teachers and counselors have to say about things such as creativity, love of learning, things of that sort, how unusual in the context that person might be.

Then you would look at any outside academic evaluations, researchers and so on, and then perhaps faculty evaluation.

Q. Is the academic rating based upon a formula?

A. No, not at all.

Q. Are there factors that go into the academic rating that are not quantitative?

A. Many.

Q. And are some of them the examples that you just gave us?

A. Very much so. And also just because you are also -- it's not just looking at what the person has done so far. You're trying to project, I guess, future potential, growth. And that's a big piece of it. Love of learning, a person who's demonstrated an ability to grow and learn and make absolutely the most of academic opportunities. People who would love to talk to you for hours about their love of physics, for example. It's that kind of a thing that probably is going to produce that upward growth curve during college and beyond.

* * *

[pp. 212:2-213:1]

Q. Is there a formula for the extracurricular rating?

A. No, not at all.

Q. In general terms, what are the factors that are going into the extracurricular rating?

A. In conventional terms in this particular one, if your eyesight is working well you can -- this is a very good dancer, as an example. And also somebody who had been really a leader across the board. She's just an absolute dynamo, it appears. Anybody with a 1 extracurricular is really something special.

But it could be anything. There are any number of conventional extracurricular activities you could think of I think in any high school, but there are also other kinds of things. Suppose you were active say in your local temple or your local church or community

JA668

organization or had been active in some regional or national organization.

So extracurricular covers the -- I suppose you'd say the energy, drive, and commitment this person puts into nonacademic things. But it could be anything.

Q. Would it include commitment to community organizations, for instance, outside of school?

A. Absolutely.

Q. Now, the factors that go into this rating, are they qualitative as well as quantitative?

A. Yes.

* * *

[pp. 213:22-216:1]

Q. And Mr. Hughes asked you some questions about it, and because it's been a focus, I want to ask you about it. What is the personal rating?

A. Again, if you had read through this application and you had sort of tried to figure out what kind of a positive difference this person had made to others in her school, outside her school, to her family, across the board, what kind of a person is this as far as, I would say, maximizing the experiences of everyone around her.

That's kind of what you're looking for. There's no formula to it. It could be almost in any setting. I'll give you an example because I used to work dorm crew, so it's near and dear to my heart.

JA669

Probably the best recommendation, one of the best I've ever read was from the janitor at a high school because this person had worked in the school's work program to help pay tuition. And what this person said about how the student just lit up a room. At the end of the day, everybody's tired and they've got a lot of stuff to do to clean the school -- anyway, it was brief. But you said to yourself on a dismal day, this is the kind of person you want with you and the kind of person you'd want with you, as they say, in any tough situation.

Q. Is the information that goes into the personal ratings supplied in part by the student?

A. You can get a sense sometimes, yes, from -- first of all not just what the person says, for example, in the essay or essays, because that can help obviously. But also by what the person does and what the person has actually accomplished.

It's one thing to say what you're doing in an essay. It's another thing to look at what this person has accomplished just in terms of action. So it's a whole variety of different things.

Q. Is some of the information provided by school guidance counselors and teachers?

A. Very much so because they've usually spent a lot of time with the student. In some cases the teachers have taught the student for two or three, sometimes four classes. So they get to know the student very well on a day-to-day basis. And some of the counselors really go out of their way to get to know the students well.

JA670

And they also have, in a sense, a bit of a comparative perspective sometimes because they can calibrate again what kind of a difference -- how unusual this student is in this particular high school.

Q. And do you also consider information provided by other recommenders and other sources?

A. Very much so. We're in the information business. So whatever comes in, we're going to look at it. And that information, for example, the one from the janitor, can be really, really helpful. And again, part of it is corroborating all the pieces of the application.

So it's like anything else, no one thing is going to do it. But it's really in combination.

* * *

[p. 221:20-23]

Q. Are the other ratings summed or basically put into some formula that find their way into the preliminary overall rating?

A. Not at all.

* * *

[pp. 222:2-223:10]

Q. Do the ratings themselves dictate admissions decisions?

A. No. And they kind of fade into the background. Because remember, when people are actually looking at making decisions in subcommittee and full committee, every single piece of the application, common

JA671

application, recommendations, everything go up on a screen for all -- say in the subcommittee five to seven people, literally they're all going to read the application. Literally everybody reads the application with any new information in it. Then they'll discuss. Then they'll vote. And then you kind of go from there.

It's the same thing in the full committee. All 40 people get a chance to read the application and then to make a decision.

MR. LEE: One final question and then, if it's all right with Your Honor, it would be a good breaking point.

BY MR. LEE:

Q. In your experience, has an applicant with lower, meaning worse, preliminary ratings and profile ratings actually gotten admitted to Harvard while an applicant with higher or better profile ratings did not?

A. It happens all the time. Because again, unless the committee -- the committee is really looking at the materials when they're making a decision. The preliminary stuff gets left in the background. They can make up their own minds, for example, when they're looking at all the material whether or not that counselor report really was a 1 because they're going to see it.

They know that the reader suggested it was a 1, but they're actually going to look at the stuff.

Q. Do admissions officers from time to time simply disagree?

JA672

A. Disagree?

Q. Disagree on what a particular recommendation is?

A. Absolutely.

* * *

JA673

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 18, 2018

Pages 1 to 246

TRANSCRIPT OF BENCH TRIAL - DAY 4
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
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JA674

* * *

**WILLIAM FITZSIMMONS
CROSS EXAMINATION (RESUMED)
BY MR. LEE**

[pp. 12:1-13:7]

Q. Now, when an application is, in fact, discussed, is there information available to the subcommittee members in addition to the docket binder?

A. There's a great deal of information. We literally have -- of course it's all electronic. We have every single thing about the applicant available, at least what's come in up to that point.

Q. And I think you told Mr. Hughes that the information is projected on a screen, correct?

A. Yes. So all that information you would see literally starting with the common application all the way through the short story that was presented. There are some applications that will have well over 100 pages.

Q. What is the end product of the subcommittee meetings?

A. The end product is to come up with what we call initial recommendations. This is way oversimplified, but let's say -- remember we have to go out with about 2,000 admits.

So let's say, oversimplification, we'd ask the subcommittee to come in with 100 recommended admits. So they'd come in with 100 recommended

admits, we hope, after the five days after going through this.

They would have gradations of admits, some that looked stronger than others. They might circle some of those actions, saying that we need this whatever-it-was additional information.

They might also have circles around the wait-list, the rejects. We also have holds. We also have a thing called financial aid holds so that we can get more information to determine whether or not this person is, in fact, let's say, very low income.

Q. Are the decisions final decisions?

A. Hardly.

* * *

[pp. 48:25-50:6]

Q. In any of the ratings that we discussed, does indicating, self-identifying yourself as a certain race automatically result in a better rating?

A. No.

Q. Are there applicants of all races who are rejected because they're just not academically qualified?

A. That's correct.

Q. For those applicants, is race a factor in those decisions?

A. No.

JA676

Q. At what point in the process could race factor into the decision?

A. I think when you're in the situation of -- when you're talking about candidates who are very competitive in the subcommittee and then ultimately in the full committee, that's when that kind of thing could come into play. It's one factor among many for people choosing to vote or not.

Q. Is the fact that an applicant has self-identified their race considered in assigning any of the four profile ratings?

A. No.

Q. Is it considered or can it be considered in assigning the preliminary overall rating?

A. It can be.

Q. Must it be?

A. Not necessarily. Lots of people would be -- don't need anything like that, that extra little tip to get in. Many people are -- again in the real world, you're talking about people who are multidimensional across all these dimensions that we've talked about.

Q. Are there some applicants who will get in no matter what their race or ethnicity is?

A. Yes. Quite a few.

* * *

[pp. 52:15-53:1]

Q. Now, for the first four days of this trial we've been referring to Asian-Americans as a category. Do you have that in mind?

A. I do.

Q. In the admissions process, are there different groups and subgroups and sub-subgroups within the category of Asian-Americans?

A. Very much so.

Q. Are they different?

A. Very much so.

Q. Do you consider their differences?

A. Yes.

* * *

[p. 56:2-21]

Q. And what is the topic of Mr. Diep's personal essay?

A. It's really all about his adjustment to the United States and especially his language challenges, which is a problem -- we have loads of kids who arrive from other countries in our pool and end up at Harvard. His story is a familiar one.

Q. Does he discuss the challenge with his classmates of being Asian or Vietnamese?

A. Very much so.

JA678

Q. Turn, if you would, to page 26. Let me ask you this: You reviewed his file as part of the application process, correct?

A. Yes.

Q. You were in the room when he was voted to be admitted, correct?

A. Yes.

Q. Is this information that we're looking at now important to you in evaluating the personal qualities of this individual?

A. Yeah. Certainly I think for me and I think anyone who would read it.

* * *

[pp. 62:9-66:2]

Let's go back to the overall Harvard admissions process. I think you described it as a whole-person process?

A. Yes.

Q. Has that process been in place since you joined the office in 1972?

A. It has, yes.

Q. Turn, if you would, to Tab 8 in your notebook.

A. Yes.

Q. What do you find at Tab 8?

A. This is the *Bakke* opinion.

Q. Actually, Tab 8 is it the opinion or is it --

A. I'm sorry. Is it the friend of the Court brief?

Q. Yes.

A. Yes.

Q. Have you seen it before?

A. Yes. Not for a while.

Q. Turn, if you would, to page 47.

A. All right. I have it.

Q. At page 47, do you see something called "Appendix" and the title is "Harvard College Admissions Program"?

A. I see it.

MR. LEE: Your Honor, we would offer DX55.

MR. HUGHES: No objection, Your Honor.

THE COURT: Admitted.

(Defendant Exhibit No. DX55 admitted.)

BY MR. LEE:

Q. I want to focus you on the appendix. Do you see that?

A. I do.

Q. What does the appendix describe in general?

A. It really talks about how our admission process had worked for at least 30 years or so.

Q. Dean Fitzsimmons, were you one of the people who helped put the information together and draft this appendix?

A. I was. I had been in the office about five or six years. It was a team effort, obviously, but lots of us contributed to the information that was sent in.

Q. And in fact, was this appendix attached to the *Bakke* opinion itself?

A. Yes.

Q. Let's look a little bit about what the appendix to the Supreme Court opinions said. Turn, if you would, to the middle of the first paragraph of the appendix.

A. Uh-huh.

Q. Do you see the sentence that begins "The belief"?

A. Let's see. The belief, yes.

Q. Could you read that sentence for us, please.

A. Yes. "The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer."

Q. Was that true in 1977?

A. Absolutely.

Q. Is it still true today?

A. It is. Not just at Harvard but lots of places.

JA681

Q. And has it been true consistently for the time that you've been the dean?

A. It has.

Q. Turn, if you would, to page 48 of this appendix.

A. Okay.

Q. Do you see the sentence that begins "The belief"?

A. I do.

Q. Would you read that sentence for us?

A. "The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions."

Q. Was that true in 1977?

A. Yes.

Q. Is it true today?

A. It is.

Q. And has it been true consistently during your time as dean?

A. Yes.

Q. Would you read the last sentence on that page?

A. The last sentence begins, "The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them."

Q. Was that true then?

A. Yes.

Q. Is it still true today?

A. Yes.

Q. And has it been true consistently?

A. Yes.

Q. How was race used in the Harvard admissions process at the time that this appendix was submitted to the Supreme Court?

A. Very much the way we've described, as one factor among many.

Q. Did you tell the Supreme Court that in the appendix?

A. We did.

Q. Has the basic manner in which race is considered in the Harvard admissions process changed?

A. It has not.

* * *

[pp. 71:2-72:8]

Dean Fitzsimmons, do you know how much of the incoming class at Harvard approximately receives financial aid?

A. About 55 percent right now.

JA683

Q. How much of the incoming class has no parental contribution to tuition --

A. About 20 percent.

Q. You need to let me finish. She'll get mad at one of us.

A. Sorry about that.

Q. So the question is how much of the incoming class has no parental contribution to tuition, room, or board?

A. That's about 20 percent.

That's the group I mentioned, typically \$65,000 and under. All of our financial aid students, including this group, do not have to take out loans. All they have to do is work 10 or 12 hours a week.

And the other thing we do for that group under 65,000 is we give them for the first year what we call a start-up grant. So they're given a thousand dollars in August, another thousand dollars in the end of January. And the idea there is they can use that to really purchase some of the things that, frankly, most of the rest of their classmates have been able to purchase through their families. It's really in a sense to level the playing field right away.

Q. For the portion of the class that is receiving some financial aid, what is the average cost of attending Harvard?

A. \$12,000. And so that's for the 55 percent of the students who are on undergraduate financial aid. Remember also they do not have to take out loans.

Pretty much when you think about it, we call it the 0 to 10 percent plan. So from say, for example, a \$150,000-a-year family income, you pay only \$15,000 to send your son or daughter to Harvard.

* * *

[p. 73:1-24]

You were asked by Mr. Hughes yesterday about the dean's interest list.

A. Yes.

Q. I think you mentioned, too, that the list includes people that you meet on your travel, correct?

A. That would be true.

Q. Who else is included on the dean's interest list?

A. For example, if I hear about somebody who -- it may be from any kind of a source, someone who is supposed to be a really good applicant, I'll keep track of that.

I'll also keep track of if I hear about people who with have performed unusual service for Harvard, whether it's schools and scholarship committee service or Harvard Club -- schools and scholarship are the ones who help us recruit and interview and so on -- Harvard Club activities. But also those who have helped raise money or give money to Harvard.

Q. So let me ask you a few questions about the list. In any given year, how many names are on the list?

A. I'm not exactly sure, but I'd say a couple of hundred.

JA685

Q. Does everybody on the list get in?

A. Hardly.

Q. Does everybody on the list go through the same process that we've gone through this morning and yesterday afternoon?

A. Yes.

* * *

[p. 74:4-18]

Q. For any given cycle, how much of the dean's list is significant donors to Harvard?

A. Significant might be 15 or 20 people, something like that.

Q. 15 or 20 people in total?

A. Yeah. You used the word "significant." Yes.

Q. Of those 15 to 20 people, do some people get in?

A. Some get in.

Q. Some not?

A. Some not. And again, one of the things I'll do, not just with them but some of the others who'd been close to Harvard, is I might try to give them some advance warning. Or if I'm really good and we hear that they might be applying, I might -- if I find out enough about them, try to encourage them not to apply, to be honest.

* * *

[pp. 75:13-76:1]

Q. Now, what is your purpose for keeping the dean's interest list?

A. I think like any of us, we're trying to, we hope, get the best people from around the world that we can. And we also are really thinking about the long-term strength of Harvard, both in terms of its ability to generate, for example, cutting-edge research that might save lives or advance knowledge in a variety of ways.

The other is really to make sure that the gates of Harvard are open and remain open and we hope even wider for people from modest economic backgrounds. A huge part of my life has been devoted to helping and to worry about making sure there's enough financial aid for all the great students who need it.

* * *

[pp. 76:18-82:18]

Q. I want to be sure that the record is clear on what the one-pager is. Which page of this multipage exhibit is the one-pager?

A. It would be, I guess, in yours it would be 807, 16807.

Q. 00016807 is the one-pager, correct?

A. That's the one-pager.

Q. Now, I just want to ask you a couple questions.

JA687

Do you see the categories of information? And perhaps we could ask Mr. Lee to blow up as best he can the categories on the left-hand side of the page.

Do you see those?

A. I do.

Q. On the one-pagers, what information are you receiving?

A. This gives us a rough idea of what we've done so far in the process.

Q. It's broken down by category?

A. It is.

Q. And does that include gender?

A. It does.

Q. Geography?

A. Yes.

Q. Intended major career?

A. It does.

Q. If we can move a little further down, lineage?

A. Yes.

Q. Financial aid circumstances?

A. Yes.

Q. Athletes?

A. Yes.

JA688

Q. Disadvantaged staff fee waived?

A. Correct.

Q. Citizenship?

A. Yes.

Q. Race has three methodologies, correct?

A. That's correct.

Q. Could you explain to Her Honor why there are three different methodologies listed?

A. The first one is really just more historical, and we certainly probably don't need it at this point. But I think probably some of the older staff members probably find it useful as some sort of comparison.

The two that really are more helpful are the new methodology and then the IPEDS.

Q. And what is IPEDS?

A. This is the federal government Integrated Postsecondary Educational Data System, as I understand it.

Q. Now, do you receive the one-pagers?

A. Yes.

Q. And when do you receive them?

A. At various points in the process.

Q. What do you do with them?

JA689

A. It gives me a good sense perhaps of -- the real point of the exercise is to make certain we don't come in over 1,660 people because that's all the beds we have. So it's a good way for me to look at how the class is developing so that we could know what total number we should probably be thinking about this year.

There are lots of factors. We're trying to think about the yield. We even think about current news events, the current state of the economy, almost anything else you can imagine. But this information is pretty helpful because it has patterns that pertain from year to year.

Q. Would you remind us what's yield?

A. Yield would be the percentage of the students who we admit who then decide to come to Harvard. We admit about 2,000 people, and then about 1,660 will show up.

Q. And does the yield, in your experience, differ by category for the categories listed on the left-hand side of this one-pager?

A. Oh, absolutely.

Q. And why is it important for you to have that yield information by category?

A. So for example, if you were admitting a lot of engineers this year for whatever set of reasons. And over the past 10 years there has been a huge increase in the number of applications and admits from engineers and computer scientists. You would know that they're going to yield at a much lower rate than the rest of the students typically. Again, the

JA690

competition to so many other great places that do engineering and computer science.

So that would give you a confidence that you could admit more total people because you know that a whole bunch of those engineers and computer scientists will end up happily ever after at MIT or Caltech or wherever.

Q. Now, who gets the one-pagers in addition to you?

A. I get it and Marlyn McGrath Lewis, the director of admissions; and Sally Donahue, the director of financial aid. Now Jay Kaufman, who is the new director.

Q. Do you from time to time share information from the one-pagers with the full committee?

A. I will.

Q. Do you share the full one-pager with the committees?

A. No.

Q. Is there a reason you share information orally but not by giving them the one-pager?

A. The reason really just goes back to that memo that you had on here about the people in the last few days just focusing on the actual quality of the cases. Nothing to do with numbers, nothing to do with dockets. The whole idea is that you want this to be as far as possible from anything mechanistic or formulaic.

Q. Do the yield rates at Harvard differ by race?

A. The yield rates, yes.

Q. Can you give Her Honor an example or two of how the yield rates differ by race?

A. Yes. Just as an example, Asian-Americans yield at a very high rate, really the highest rate of any of the ethnic groups.

Latin X, or might say -- I'm not sure what they use on this particular one. I guess they say Hispanic-American. That again for a whole bunch of different reasons, part of them geography, those students would tend to yield at a lower rate.

Q. Now, of the three different categories of race, new methodology, old methodology, IPEDS, which one do you consider the most reliable?

A. I would consider the new methodology the most reliable.

Q. Because?

A. Well, because it allows the student to -- when the students fill out the common application, they can put down the ethnicities with which they identify. So it's really from them and how they identify themselves.

It seems to us, too, just based on what we've seen people do once they come to Harvard, for example, did they end up being involved in ethnic organizations of various kinds, of which there are many. Oftentimes it will relate back to what they said on their common app.

Q. Now, does the one-pager include information about the breakdown or the makeup of a past -- the past year's class?

A. Yes.

Q. And why is that information helpful to you in the admissions process?

A. It's really, I guess, just generally -- remember we've already started the recruiting year for the next year, and we'll be out on the road shortly doing joint travel.

One of the things we sort of say -- well, let's say, for example, we were for whatever set of reasons, and it happens, we're having a really bad year let's say in the Mountain States, for example. And there are some states -- remember we have no quotas of any kind. Some years there are some states where no one is admitted.

So it's good for the staff to have a sense of how well or how badly we're doing as they go back out and to think about whether or not there could be new recruiting approaches. It's a little bit of a report card to us, in a sense of, maybe what's happened this year.

We don't have control over a lot of these things. We know that there are different states, including New England, where there are declines in the number of 18-year-olds very steadily. There have been and there will be going forward.

* * *

[p. 108:3-11]

Q. In those meetings over that long period of time, have you observed racial bias from any members of the committee?

A. Never.

Q. Have you observed racial bias by any members of the committee in making decisions?

A. Never.

Q. Have you observed any bias or discrimination against Asian-Americans?

A. Never.

* * *

SIDEBAR

[pp. 139:16-142:11]

MS. HACKER: The last thing I'd say on that, Your Honor, given the low bar relevance, we do not plan on spending much time on this. Mr. Zuluaga's transcript is 10 minutes and Ms. Pedrick's is 20. Given the low bar relevance, and this directly contradicts what we've heard from Dean Fitzsimmons, we do think it should come in.

THE COURT: I know you think it should come in. That's why we're standing here.

MS. ELLSWORTH: It's not the timing to which we object.

THE COURT: I didn't read anything except what's objected to. You didn't object to everything.

MS. ELLSWORTH: We objected to it in its entirety.

THE COURT: I didn't read the whole testimony. Or did I? Let me see.

MS. ELLSWORTH: The ones we didn't object to related to actually topics of the 30(b)(6). The suggestion that Thomas Jefferson did not have enough black and Latino students. We think the entire designation and the entire deposition is irrelevant.

THE COURT: I'm going to exclude the testimony. I'm going to exclude the witness. What's next?

MS. HACKER: Was that related to Mr. Zuluaga?

THE COURT: Yes. Zuluaga is all the way out.

MS. HACKER: Casey Pedrick.

THE COURT: I just want to look at the last pages. This is -- what I was going to let in was, and we can discuss this again in light of Zuluaga, everything on page 2, everything on page 3, everything to "the most competitive high school in the country." I was going to let that in and I was going to stop right there. I was going to let in page 29 and stop at page 30.

MS. ELLSWORTH: Your Honor, we have the same scope objection. The subpoena was identical in terms of didn't ask for the admissions criterion or anything like that or statistics related to applicants to Harvard.

THE COURT: Once you're keeping out their subjective impressions of the Asian population, the rest

of it just becomes sort of irrelevant. If they were all applying to Harvard and none of them are getting in, that might be relevant. But until you know who is applying and who isn't and what percentage of them getting in, it's just kind of floating out there.

MS. PERRY: It seems to me just as an individual student might be an instructive example, an individual guidance counselor's impression and just as Dean Fitzsimmons's general impressions of how the system works. It's important to know whether the guidance counselor ratings are objectively different or whether they're being scored differently.

THE COURT: I completely agree that that would be admissible testimony. So if you want to put it in, get a guidance counselor on the stand and say this is the application that I did for a White person and this is the recommendation that I did for an Asian person, and I view them to be equally strong, and they got different ratings, that's a specific -- but this is like generally our Asian students are great. It doesn't get you to what Harvard -- You don't even know if all the Asian students she thinks are great, you don't know if any of them applied to Harvard. It's just not limited to their applicant pool in any way.

MS. PERRY: Although she does describe her role as a guidance counselor, and presumably she does know which set of students does apply to Harvard.

THE COURT: No recommendations were put in front of her, at least from what I have in front of me. So she could look at them and say this is an Asian student that I thought was fantastic and they didn't get in. And

JA696

this White student that I thought was significantly less qualified did. There's no way to glean any of that from this. So this one's out, too. Who's next?

* * *

CHRISTOPHER LOOBY
DIRECT EXAMINATION BY MR. MORTARA

[pp. 165:20-166:17]

Q. I want to talk to you about something I saw in the reader guidance, and it's over at page 12. Are you there, sir?

A. Yes.

Q. It's something about prose comments. It says, "When making prose comments, first readers" --

That's you, right?

A. That is, yes.

Q. -- "should note the important academic and extracurricular accomplishments that are particularly pertinent to the case. It is also helpful to reference teacher reports or other items that may be crucial to our evaluation. In addition to numerical ratings, readers should try to summarize the strengths and weaknesses of the folder in brief paragraphs or comments. Avoid slang and jargon and remember," all caps, "your comments may be open to public view at a later time."

Do you see that?

A. I do, yes.

JA697

Q. How do you take that instruction? What do you think it means?

A. Just be careful with what you write.

Q. Because somebody might look at it later, right?

A. Someone may look at it later.

* * *

[pp. 171:11-183:7]

Now I want to talk about the eight years you've been there reading applications. You've been there for eight years reading applications, and you have can't even remember anyone teaching you to use race in the admissions process. We talked about that, right?

A. I don't view it that way.

Q. You don't know if other admissions officers use race the way you do, do you?

A. I do know that others use race the way that I do.

Q. Please turn to page 49 of your deposition, sir.

Line 6, "Do you know if this is how other admissions officers use race in the admissions process?"

"ANSWER: I don't know."

That was your testimony 14 months ago to Mr. Connolly, my friend, correct?

A. That's correct.

Q. And a month later you did an errata sheet, a sworn errata sheet. You didn't change this either, did you?

JA698

A. No, I did not.

Q. And 14 months go by and you don't tell anybody you're going to change your testimony, do you?

A. That's correct.

Q. Now I need to stop again. You spent 15 hours preparing for your deposition with Harvard's lawyers; isn't that right?

A. Approximately.

Q. Do you want me to refresh your recollection with your deposition? Please look at page 6, lines 21 to 23. I'll leave it off the screen.

You spent 15 hours with Harvard's lawyers getting ready for your deposition 14 months ago, correct?

A. Yeah. Approximately.

Q. And then you spent some hours reviewing your transcript for the errata sheet we talked about several times. How many do you think that was?

A. I don't know.

Q. Two?

A. Approximately.

Q. Let's call that two. How many days were you meeting with Harvard's lawyers to get ready for your testimony in court today?

A. A number.

Q. How many?

JA699

A. Eight, ten.

Q. Eight or ten days with Harvard's lawyers. How many hours a day?

A. It's varied tremendously. It hasn't been a consistent number.

Q. Let's go through as best as you can recollect, sir. I want to get for the record how many hours you spent with Harvard's lawyers getting ready to testify here for about 30 minutes today.

How many hours on the first day?

A. I don't recall.

Q. You don't have any recollection of how many hours you spent? And who were the lawyers there?

A. The lawyers were represented over at this table here.

Q. Who are you identifying?

A. Danielle, Denise. I believe there were others back at the law firm.

Q. How many lawyers did you meet with on the first day when you can't remember how long you met with them?

A. I really don't recall.

Q. Was it more than two or three?

A. I believe so, yes.

JA700

Q. So you met with more than two or three lawyers for some undetermined number of hours on one day. Same for the next day. Do you remember how many hours that was?

A. I don't know.

Q. Did you meet yesterday with lawyers?

A. I did.

Q. How many lawyers did you meet with yesterday?

A. I believe three or four.

Q. For how many hours yesterday did you meet with lawyers?

A. About three, I believe.

Q. Was that about the same amount of time you met with them on the previous days?

A. No. I believe previous days was a bit longer.

Q. So let's call it conservatively three hours a day for conservatively eight days. By my count, that's 24 hours. So you've now spent over 40 hours thinking about your testimony in this case; is that right?

A. Yes. Well, I would say just thinking about this testimony far more than 40 hours.

Q. And you spent 39 hours with Harvard's lawyers, correct?

A. Yep.

JA701

Q. And you spent at least, probably more than 24 hours with groups of Harvard's lawyers before you came in here and changed about five or six different items in your deposition testimony we've already been through. Isn't that right?

A. I don't believe I've changed on all of these answers.

Q. Do you disagree that you answered things like "I don't know" in your deposition and you're coming in here and you're saying now you do know?

A. I believe I did not know at that time, yes.

Q. And between then and now, you spent 24 hours at least in rooms with Harvard -- multiple lawyers from Harvard getting ready to tell the truth under oath here, correct?

A. I have told the truth in my deposition as well.

Q. I want to talk to you about things related to the personal rating, but first I want to talk about the other ratings.

Do you see on Plaintiff's Exhibit 71 overall, academic, extracurricular, athletic, personal? Do you see all that? And then there's school support. You know those ratings?

A. I do.

Q. And you would give every student who had completed an application a score in one of those six categories, correct?

A. I would, yes.

Q. And when we talked to you before under oath, you told us that you didn't know any other document that would describe how an admissions officer would score candidates in these categories, did you?

A. I believe I did.

Q. The description in each of these categories aligns with how you would rate an applicant, correct?

A. Provides a solid framework, yes.

Q. It aligns with how you would rate an applicant in each of these categories, correct?

A. It could.

Q. You'd say generally speaking it does, right?

A. It could.

Q. Mr. Looby, please turn to your deposition, page 39.

“QUESTION: And after reviewing these pages, does the description in each of these categories align with how you would rate an applicant for each of these categories?”

Then your lawyer objected.

“ANSWER: Generally speaking, yes.”

Did you see that?

A. I do.

Q. Did you read your deposition before you came here today, sir?

A. I did.

JA703

Q. How many times?

A. I believe I read it when I signed this piece of paper.

Q. That was 14 months ago or about, right?

A. Yes.

Q. Did you read it in the last couple of weeks?

A. I did, yes.

Q. Did you discover that there were things that were wrong in it?

A. No.

Q. Mr. Looby, now let's talk about the scores again, and I want to ask you when you assign a score in any of these categories, you take race into account, don't you?

A. If we were to take race into account when rating any of these, it may very well be the overall.

Q. Please turn to your deposition, same page, 39, sir.

“QUESTION: When you would score students in these categories, would you take a student's race into account when assigning him a score in any of these categories?”

And your lawyer objected.

“ANSWER: It's one of my factors that I consider.

“QUESTION: For every category?

“ANSWER: I'm looking at the applicant as a whole.

JA704

Race is one of the factors you consider -- withdrawn.

That was your sworn testimony, sir, wasn't it?

A. It was indeed, yes.

Q. And race is one of the factors you consider when assigning an applicant a score in any of the categories, correct?

A. That would be, again, the overall.

Q. Sir, it doesn't say "overall" on your deposition, does it? It says any of these categories. That's what it says, right?

A. It does not say that exactly. It says when you would score students in these categories.

Q. Keep reading the question, sir.

A. Would you take a student's race into account when assigning him a score in any of these categories?

Q. "ANSWER: It's one of my factors that I consider."

When you were reading your deposition, did you discover that you maybe testified in error and wanted to say it was the overall score?

A. No. I answered the question as I heard it. That's not what I was trying to convey.

Q. You misheard the question but then you read it and you did the errata sheet. You didn't clarify your answer to this question, did you?

A. I answered the question as I heard it.

Q. Sir, when you did your errata sheet, you weren't listening to the deposition on an audio tape, were you?

A. No, I was not.

Q. You were reading it just like we're reading it right here in court. And you didn't fix it, did you?

A. I did not, no.

Q. You didn't tell my friend Mr. Connolly that you were going to change your testimony, did you, or that you misheard the question, did you?

A. I thought I understood the question. What I was trying to convey is that race is one factor of many when trying to assess the applicant as a whole. If you're trying to say that I use race when assigning any of the four components of the profile, that would not be accurate.

Q. We'll come back to that, sir.

Now I want to talk about the personal rating. And what I'm hoping to do is not have to use your deposition while I just ask you some simple questions that go into it.

MS. CONLEY: Objection, Your Honor. Argumentative.

THE COURT: Ask a question.

MR. MORTARA: Ms. Daly and I have organized a procedure. She's going to come over there by the flip chart, and I'm going to draw on it a few things. I'm going to take my outline and your deposition, and I

have Ms. Daly's permission to ask questions from over there, if I have the Court's.

THE COURT: Is there a microphone over there or are you going with him?

THE REPORTER: I'm going with him because there's no microphone there.

BY MR. MORTARA:

Q. So let's talk about the personal rating, Mr. Looby. Are you ready?

A. Yes.

Q. I understand when you assign a personal rating, you're looking at who that person is, correct?

A. Correct.

Q. So I'm going to make a title here, "Personal Rating." And the first thing I'm going to write is who that person is. And by that, you mean what a person brings to the community, right?

A. Could be.

Q. Positive contributions that you're looking for include an ability to work well with others and create meaningful relationships with peers, right?

A. Yes.

Q. And I'm writing those on the flip chart. I'll write "meaningful relationships" and "work well with others."

And I'm running out of room. Look at that.

JA707

You're looking for where others like to be around him or her. You'd say that?

A. I would, yes.

Q. Can we call that likability?

A. Sure.

Q. And you'd call that a positive personality, wouldn't you, positive personality characteristics?

A. All of those?

Q. No. Just generally. You're looking for a positive personality or like ability?

A. Could be.

Q. And I put that up there, too.

MR. MORTARA: Ms. Daly, we can go back.

BY MR. MORTARA:

Q. Is race a part of who someone is or who the that person is?

A. I don't think so necessarily, no.

Q. Race is not a part about who someone is, huh?

A. A person's race could inform us of characteristics that tell us a bit about their personality.

Q. And someone's race could also tell you something about what they're going to bring to the Harvard community, right?

A. Not necessarily.

JA708

Q. It doesn't tell you what they might bring to the Harvard community at all? Why is Harvard using race in admissions exactly? I'll withdraw the question.

Why is Harvard using race in the college admissions process?

A. Could you repeat that, please?

Q. Yeah. Why is Harvard College using race as part of its college admissions process?

A. Again, I think it goes back to the whole-person review. It allows us to get a good understanding of the applicant as a whole.

Q. And what is Harvard trying to get for itself from that? Trying to make a good and diverse community maybe?

A. Absolutely, yes.

Q. So does somebody's race tell you a little bit about what they're going to bring to the community?

A. I think it depends on the individual.

Q. But it can, right?

A. It could.

Q. And you take a student's race into account when assessing his or her personal qualities as one factor to consider. Isn't that right, Mr. Looby?

A. That is not right.

Q. Please turn to your deposition again, sir, at page 51. We're going to go to line 12 this time.

JA709

“QUESTION: Would you take a student’s race into account when assessing his or her personal qualities?”

“Just like with the academic rating, it’s one factor of my consider.”

That was your sworn testimony, right?

A. Correct.

Q. 15 hours with Harvard’s lawyers before you gave it, right?

A. Correct.

Q. A month went by afterwards, you spent at least two hours reading this, signed a sworn errata, didn’t change it. Right?

A. That’s correct.

Q. Since then in getting ready for trial you spent at least 24 hours with three or four, maybe even five, Harvard lawyers getting ready to come in here and testify when I asked you questions, right?

A. That’s correct.

MR. MORTARA: No more questions, Your Honor.

* * *

**CHRISTOPHER LOOBY
CROSS-EXAMINATION BY MS. CONLEY**

[p. 186:4-25]

Q. Now, Mr. Looby, at the time that you were deposed 14 months ago, did you, as an admissions officer,

JA710

consider race when assigning an applicant a personal rating?

A. No.

Q. And sitting here today as an admissions officer, do you consider race when assigning an applicant a personal rating?

A. No.

Q. Mr. Looby, what is the preliminary overall rating?

A. The preliminary overall rating would be a rating that is assigned by an admissions officer, and that would be an indication of how that officer views the strength of that particular application relative to the applicant pool.

Q. And would you consider an applicant's race when assigning an applicant a preliminary overall rating?

A. We certainly could.

Q. Under what circumstances might you consider an applicant's race when assigning the POR or preliminary overall rating?

A. So at that point we'd be looking at, you know, many, many very qualified applicants. And it may be that for a particular applicant it ultimately winds up being a tip that pushes him or her into the admitted applicant pool.

* * *

[pp. 196:21-197:15]

Q. Earlier you mentioned that you've worked as an admissions officer for about eight years. Is that right?

A. That's correct, yes.

Q. And in those eight years, approximately how many subcommittee meetings did you attend?

A. Probably close to 100.

Q. And in that same eight-year period, how many full committee meetings did you attend?

A. Probably close to 50.

Q. And in that time period, how many times have you seen an admissions officer show bias against an applicant because of the applicant's race?

A. Never.

Q. Mr. Looby, when you're determining whether to admit an applicant, is race ever used as a negative factor?

A. No.

Q. And in your eight years in the admissions office, have you ever seen any of your colleagues treat an applicant's race as a negative factor?

A. No.

* * *

JA712

**ERICA BEVER
DIRECT EXAMINATION BY MR. McBRIDE**

[pp. 222:3-226:20]

Q. So Plaintiff's Exhibit 25, is this an April 30 email from you, again to Ms. Driver-Linn, copying Mark Hansen?

A. It is.

Q. And again, this is another instance where you have sent around OIR analysis that relates to race and admissions, right?

A. I believe this memo was intended to address the issue of economics, socioeconomic status in admissions.

Q. We'll take a look at what you've got here in this email in a second.

What you wrote is, "Hi, Erin. Mark and I have updated the memo and exhibits based on your comments, including adding the new exhibit. Please let us know if you would suggest additional changes."

Do you see that?

A. I do.

Q. Again, all the files here have your naming convention with EB in your name?

A. The first file does. The second does not.

Q. Correct. I see that. So the analysis memo, that has your initials in the file name?

A. Yes.

Q. Now, if we go to the next page, this is the first page of the memo that you referenced. And this is a draft memo from you, Ms. Driver-Linn, and Mr. Hansen to Dean Fitzsimmons, right?

A. That's what it appears, yes.

Q. And it has as the subject line, "Harvard College admissions and low-income students." Do you see that?

A. Yes.

Q. I don't want to go through this in excruciating detail. We've seen versions of this previously.

But would you agree that this memo reflects the results of some logistic regressions that OIR ran for Dean Fitzsimmons relating to admissions and low-income status?

A. Yes, that's correct.

Q. And if you look on the last -- I'm sorry -- on the next page, which is the third page of the document altogether, I just want to look at the bottom paragraph there.

You wrote in this memo that you were sending to your boss at this time, this draft, "To get a sense of the size of the admissions advantage conferred to low-income applicants relative to other groups of applicants, the so-called thumb on the scale, we include low-income status in a second logistic regression model. The table below is sorted based on the effect size of each of the variables included in the model. The variables with the largest effects on the probability of admission are athletic rating, personal rating, and

JA714

legacy status. Compared to athletes and legacies, the size of the advantage for low-income students is relatively small.”

Do you see that?

A. I do.

Q. And the table with the results that the memo is describing here, those are on the next page; is that right?

A. Yes.

Q. And on the next page this table is a table titled “Logistic Regression Predicting Admission.”

Do you see that?

A. I do.

Q. And it’s a table with variables along the left, coefficient estimates in the middle, and P values on the right?

A. Yes.

Q. And the coefficient, that reflects the probability of a particular outcome, right?

A. It reflects the correlation between that variable and the outcome of interest.

Q. And by “correlation,” you mean how it affects the probability of that outcome occurring?

A. Yes.

JA715

Q. And a positive -- and the outcome here is probability of admission, to be complete?

A. I believe so, yes.

Q. And a positive coefficient means there is a positive relationship between that variable and admissions outcomes?

A. Yes.

Q. In other words, "positive" means makes it more likely you'll be admitted --

A. Yes.

Q. -- according to the model?

A. According to this model with a limited set of variables, yes.

Q. And a negative coefficient means there is a negative relationship between that variable and the possibility of admissions, right?

A. Between that particular variable, yes.

Q. And if you go down the chart, we see what the memo is describing, that the biggest effect is athletic rating 1 because it has the highest positive coefficient?

A. Yes. The biggest effect in this model.

Q. And the next biggest effect shown in this model is personal rating of 1 or 2?

A. Yes.

Q. And then legacy?

A. Yes.

Q. And so on. And if you go down the columns, what we see here is that near the very bottom we see Asian, and Asian has a negative coefficient, right?

A. It does.

Q. And the negative coefficient here means that the model says that being an Asian-American applicant has a negative effect on your probability of admission, according to this model?

A. According to this model with limited set of variables, it says that being Asian in this model is negatively correlated with the admission rate.

Q. And P value, that represents statistical significance, right?

A. It does.

Q. The P value of zero, that means it is statistically significant?

A. That's correct.

Q. And we see that for everything all the way down through Asian until the very last two variables, all of those values the model finds to be statistically significant?

A. Yes.

* * *

[pp. 229:14-232:1]

Q. If you take a look at what is in your binder, it's Plaintiff's Exhibit 23 as well as here on the screen. I just want to establish first this is a markup redline draft of the same memo we looked at before.

A. Yeah. It appears to have track changes.

Q. I'll represent to you that the metadata for this shows that it's titled "analysis memo_20130426_EB."

If you would accept that representation, you'd agree that this is from April 26 of 2013?

A. Yes.

Q. And that would be a few days before the April 30 memo we just saw?

A. Yes.

Q. I want to focus on the last page of this memo. If you look at the last page, first just confirm that this earlier memo here, it has the same chart of coefficients, albeit at the very end of the memo?

A. I think it does, yeah.

Q. And if we look up at the top, there's a final paragraph here. I just want to highlight some of the text here while we read it.

So what you write here in this draft from before April 30, the April 26 draft, it says, "While we find that low-income students clearly receive a tip in the admissions process, our model also shows that the tip for legacy athletes, etc., is larger.

“On the flip side, we see a negative effect of being Asian. These realities have also received intense scrutiny from critics like Bowen or more recently Unz, as we have discussed at length. To draw attention to the positive benefit that low-income students receive may also draw attention to the more controversial findings around Asians or the expected results around legacies and athletes.”

Do you see how you wrote that in that draft?

A. I see that that’s written here. I don’t recall writing it.

Q. I want to look at the final version of the memo that you then sent to Dean Fitzsimmons. So if you could, turn to Plaintiff’s Exhibit 26. I believe 26 is in evidence.

So this is an email from you to Dean Fitzsimmons on May 1, the day after the first memo draft that we looked at. Is that true?

A. Yes.

Q. And you copy his assistant as well as Ms. Driver-Linn and Mr. Hansen?

A. Yes.

Q. And you say, “Dear Fitz. Attached is a memo describing our recent analysis of low-income admissions. In the memo we describe our approach and results. At your suggestion, we reviewed a small sample of literature to put this in context and realized our approach was consistent with what others have done. We’d appreciate any comments or suggestions you have.”

JA719

Do you see how you wrote that?

A. Yes.

Q. And if you take a look, you would agree that if we page through the rest of the memo that it is very similar to both of the drafts that we saw before, more closely related to the April 30 draft obviously. Would you agree?

A. Yes.

Q. And it has the same chart of coefficients for Dean Fitzsimmons that we saw before?

A. Yes.

* * *

JA720

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 19, 2018

Pages 1 to 261

TRANSCRIPT OF BENCH TRIAL - DAY 5
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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JA721

* * *

**ERICA BEVER
EXAMINATION BY MS. ELLSWORTH**

[p. 31:4-7]

Q. In this memorandum that was sent to Dean Fitzsimmons, did OIR tell Dean Fitzsimmons that the analysis showed discrimination against Asian-Americans?

A. It did not.

* * *

[pp. 48:5-49:19]

Q. When you're assigning ratings to an application file, does race ever factor into an applicant's academic rating?

A. It does not.

Q. Does race ever factor into an applicant's extracurricular rating?

A. Not per se.

Q. Does race ever factor into an applicant's personal rating?

A. Not per se.

Q. When you say "not per se," what do you mean?

A. I mean not the fact that they are a particular race, but certainly students might write about their

JA722

background and things like that that would inform my personal rating or what I give in the personal rating.

Q. When a student writes about their background in a way that informs the personal rating, it's not their racial background that's informing the rating. Is that your testimony?

A. That's my testimony.

Q. Have you ever assigned an applicant a lower rating because of his or her race?

A. No.

Q. Have you -- withdrawn.

Can you please describe the preliminary overall rating?

A. So we use -- I -- I should speak for me.

I use the preliminary overall rating to give my assessment of how strong I think that particular applicant is. So it's intended to capture the whole, if one can, in a rating.

Q. And does the preliminary overall rating differ from the four profile ratings?

A. Yes.

Q. How so?

A. Again, it's trying to capture all of the pieces and give an overall assessment of how strong that applicant is.

Q. Does race ever factor into an applicant's preliminary overall rating?

A. Insofar as their race plays a role in how strongly I might view a case, then yes.

* * *

[p. 56:2-11]

Q. And why is this information that's taken into account in the admissions process?

A. Family background can play a role in sort of the choices you are able to make, what you're doing. She writes about her family in her essay in a way that helps us understand sort of what she has to do for them. I think she talks about translating for her family and her father working despite -- I think he had an injury. And all of that plays a role in sort of who she is and how strong, sort of all the things she's been able to accomplish.

* * *

[pp. 58:19-60:2]

Q. And what does the information on page 8 of Ms. Chen's application tell you about her extracurricular involvement?

A. So the first thing she lists is she was the first violinist, which is obviously an important role in the orchestra. She was also the Lowell student association president.

So she had a number of research roles -- or leadership roles. I'm sorry. She was doing research

mentoring. She had found some roles doing some research as -- or work as a web designer. She was radio producer. She had a lot of different interests. She was doing a lot of different things.

Q. Can you turn please to page 20 of Exhibit SA1, which is the guidance counselor recommendation.

A. Yes.

Q. Does this guidance -- are you there?

A. Yes.

Q. Does the guidance counselor's recommendation provide information relating to Ms. Chen's extracurricular involvement?

A. Yes.

Q. And what type of information?

A. So it talks about her internship at UCSF Mission Bay. It provides some -- it actually -- I think this letter wasn't the most helpful, but it does sort of describe some of the things Sally had already described in her application. So at least it reaffirmed her participation in some of these things.

Q. I'm sorry. I didn't catch the end of it.

A. It just reaffirmed her participation in some of these things.

Q. Did you factor that information into the extracurricular rating you assigned her?

A. Yes.

* * *

[pp. 62:11-64:18]

Q. Tell us why, please.

A. So my recollection of Sally is that we were in subcommittee and we were going through all of the applicants from Lowell High School. And my colleague Roger Banks stopped us and said, "Erica, you read this application quite strongly, but it doesn't look like you passed it" -- there would have been no 2 there. "Can we take a closer look?"

And so in subcommittee we went through it page by page, all of us reading it. And when I read it, she was missing an interview, which I was hoping would set her apart and help further set her apart.

And we all read it together and agreed that it came together quite nicely. And again, I think at that point the subcommittee made a preliminary recommendation to admit her, and she hung on.

So Christine went back in and would have put an overall. But since she read it in committee, she may not have put in all of the ratings.

Q. You mentioned that the interview information had not come in when you first read the file. Do I have that right?

A. Yes.

Q. Is that a common occurrence?

A. It very much depends on when your subcommittee is meeting and when you're doing readings. So it looks

JA726

like I read this on January 18, and that's pretty early in our process. Our interviewers probably had not read or interviewed most of our students at that point.

Q. When you're referring to the interviewer, you're referring to the alumni interviewer?

A. Yes.

Q. If you look at page 29 of SA1, is there an alumni interview report?

A. Hold on. Yes.

Q. And did the Harvard alumnus who met with Sally write a positive account of their interview?

A. They did. It was very helpful.

Q. And did you take that into account in the subcommittee process in discussing Ms. Chen's file?

A. We would have, yes.

Q. Did the subcommittee ultimately recommend Ms. Chen for admission?

A. Yes.

Q. And ultimately she was admitted, right, and attends Harvard?

A. She was, yes.

Q. Were you concerned that you had originally not passed Ms. Chen's file on to your docket chair?

JA727

A. I think I was. But you know, that's why we have the committee review process and we can all go through and see and have someone else catch it.

Q. Ms. Bever, in your time working in the admissions office, how many times have you seen another admissions officer demonstrate bias against an applicant because of the applicant's race?

A. I've never seen that happen.

Q. When considering whether to admit an applicant, is an applicant's race ever a negative factor?

A. No.

* * *

**ERIN DRIVER-LINN
EXAMINATION BY MS. ELLSWORTH**

[pp. 111:5-112:7]

Q. Were you involved in creating Exhibit P9?

A. No.

Q. Do you recall reviewing Exhibit P9 in or around January of 2013?

A. No.

Q. Have you reviewed it since then?

A. Yes.

Q. Have you reviewed it outside of the context of this case?

A. No.

Q. Was P9 ever shared outside of the office of institutional research?

A. Not to my knowledge.

Q. Did OIR ever show Exhibit P9 to Dean Fitzsimmons?

A. No.

Q. How do you know that?

A. I know that we showed P12 to him during that February 25 meeting, and there's just no record of P9 being shown to anyone outside of the office, and I have no memory of it.

Q. Are there other aspects of Exhibit P9 that contribute to your conclusion it was not shown outside of the office of institutional research?

A. Yes.

Q. And what are those?

A. It's just so preliminary in the formatting. It's the -- you know, the title is off. Some of these exhibits have the data flipped. There's pages that are blank. It seems to me to be a very -- like an internal document of people working out what they were looking at.

* * *

[pp. 134:20-135:10]

Q. When you first saw the models contained on Slides 33 and 34 of Exhibit P12 in 2013, did you interpret them to show evidence of bias or discrimination?

A. No.

Q. Did you tell Dean Fitzsimmons in 2013 that you thought the modeling exercise on Slides 33 and 34 showed evidence of bias or discrimination?

A. No.

Q. Do you interpret them today to show evidence of bias or discrimination?

A. No.

Q. Why not?

A. They weren't designed to look for evidence of bias or discrimination. They were trying to model in a highly simplified way the admissions process so that we could understand.

* * *

[p. 145:3-10]

Q. Did you believe in 2013 that the analysis in Exhibit P12 showed discrimination against Asian-Americans in the Harvard College admissions process?

A. No.

Q. Did you tell Dean Fitzsimmons in 2013 that you thought the modelling exercise in P12 showed discrimination against Asian-Americans?

A. No.

* * *

[pp. 149:24-150:4]

Q. In 2013, did you believe this analysis showed bias against Asian-American applicants?

A. No.

Q. Did you tell Dean Fitzsimmons that you thought this memorandum showed bias against Asian-American applicants?

A. No.

* * *

[pp. 151:10-154:5]

Q. Let's take a look, please, at Exhibit P28, which is Tab 6 in your binder. Is this the slide deck that was transmitted via P29?

A. Yes.

Q. Take a look at page 2, please, of P28.

And does page 2 of P28 contain the same general information as Ms. Bever had included in her email to Dean Fitzsimmons?

A. Generally, yes.

Q. Let's take a look at page 3 of P28, please. What does page 3 show?

A. It shows two pie charts. The first is all applicants by ethnicity for the classes of 2009 through 2016. And the second, applicants with incomes less than 60K by ethnicity.

JA731

Q. And what does page 3 show with respect to Asian-American applicants to Harvard during the years in question?

A. In the first with all applicants, Asians represent 23 percent of the total and in the second represent 31 percent of the total.

Q. And can we look, please, at slide -- I believe it's Slide 3 or 4 of P28 -- the next slide, sorry, 5 -- 6. Sorry.

Can we look at Slide 6, please, Mr. Lee? What does this slide show?

A. Admit rates by ethnicity and income broken -- these bar charts are broken down by low income and then income greater than 60K.

Q. And does this Slide 6 of Exhibit P28 show the admit rate for low-income Asian applicants as Dean Fitzsimmons had requested?

A. Yes.

Q. And is that admit rate higher for low-income Asian-American applicants than it is for non-low-income Asian Americans?

A. Yes.

Q. Was that the analysis Dean Fitzsimmons had requested?

A. Yes. He had, I think, not requested a specific analysis but us to be responsive to that general question.

JA732

Q. And these slides were sent to Dean Fitzsimmons in Exhibit P29, correct?

A. Correct.

Q. Ms. Driver-Linn, do you think that any of the OIR analyses that we've looked at today or that Ms. Hacker showed you showed discrimination or bias against Asian-Americans in the Harvard College admissions process?

A. No.

Q. Why not?

A. I don't believe that they -- I believe all of them are explorations and models that can't speak to the actual admissions process. They are trying to be informing, understanding, and all of them were very limited in the number of variables and factors that were used.

Q. Did you ever tell Dean Fitzsimmons in 2013 or any time after that you thought any of OIR's modelling analyses showed any sort of discrimination or bias against Asian-Americans in the admissions process?

A. No.

Q. Did Dean Fitzsimmons ever ask you to stop any analysis that you were conducting related to Harvard College admissions process?

A. No.

Q. Did anyone ever ask OIR to stop conducting any analysis relating to Harvard College admissions process?

A. No.

Q. If you thought that any OIR analysis showed evidence of discrimination or bias, what steps would you take?

A. I'm not sure exactly, but I would definitely go up the food chain and try to let people know.

Q. When you say "go up the food chain," what do you mean by that?

A. I mean talk with those who are higher than me in the hierarchy of the university.

* * *

MARLYN McGRATH
DIRECT EXAMINATION BY MR. MORTARA

[pp. 182:24-193:7]

Q. I want to talk more about your holistic admissions. And that word comes in part from Supreme Court opinions. You recognize the word, right, Director McGrath?

A. Yes.

Q. Harvard's been a part of making that word into our Supreme Court law, I think.

A. Yes. I do recognize the word.

Q. We've heard a lot -- I wish I wasn't going to say the word *Bakke* because I almost think I'm going to have a response to it, but we've heard a lot about *Bakke* and you've read *Bakke*, haven't you?

A. Yes.

Q. I understand you're not a lawyer. I'm not going to try to test your legal acumen, but you've also read the *Grutter* decision, right?

A. Yes.

Q. I want to just read you a sentence from *Grutter*, not to ask for legal view but to ask you if it reflects Harvard's college admissions. This is about the Michigan law school.

“The law school engages in a highly individualized holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”

Does Harvard consider all the ways an applicant might contribute to a diverse educational environment?

A. We consider all the ways that we're aware of in which that would be true.

Q. Right. Because of course something that somebody never tells you and is internal to them and you don't know, and they might contribute in some way you never expected, right?

A. That's right.

Q. One of the aspects of a person that you consider when you're looking at all the ways you can that an applicant might contribute to a diverse educational environment is that person's race or ethnicity, right?

A. Yes.

Q. Now, Director McGrath, you would agree with me that someone's religion can be as or even more important than their race, wouldn't you?

A. Important for what purpose?

Q. Important to them. Important to what they'll teach others. I'll get into a few examples in a second.

But you agree it can be as important to them, for example?

A. It certainly could, yes.

Q. For instance, I'm white, I'm of somewhat Italian extraction, but I'm also Roman Catholic. And it might be more important to me that I'm Roman Catholic than it is what my skin color is, right?

A. Yes.

Q. Now I want to talk about religious diversity. An applicant might not choose to mention their religious background in their essays, but it still might be something they would bring to Harvard's pluralistic community, right?

A. Yes. Right.

Q. I want to use an example based on me.

So imagine a young white gentleman from -- young man from Milwaukee. He goes to college where his best friends are a Muslim, Hindu, and a Catholic. You agree it's possible that both the identity of those three friends as well as their religious background could really add to this suburban Milwaukee boy's experience, don't you?

A. Yes. I would agree.

Q. And this would be true even though the three friends just checked boxes on their application and didn't mention their own ethnicity or their religious preferences anywhere, right?

A. Yes.

Q. And the Muslim fellow for instance could be a Pakistani or Arab, but maybe the most profound way in which he was an educator of the young boy from Milwaukee is that he was a Muslim. That's not implausible, is it?

A. No, it's not implausible.

Q. He's Pakistani, by the way.

The Catholic fellow could be Polish-American or Filipino, but maybe the most profound way in which he was an educator of me was that he was Catholic and my confirmation sponsor when I converted in college. Is that possible?

A. Yes, that's possible.

Q. He's Filipino.

So religion can be very important to who someone is and what they bring to the community and whether they'll be a great educator of others. Would you agree with that?

A. I would agree that that's possible.

Q. But Harvard does not track the religious identity of applicants, do you?

JA737

A. No, we do not track them.

Q. And your paper and online application systems do not allow you to even see the self-proclaimed religious identity of an applicant, correct?

A. Correct.

Q. That's the case even though there's a place on the common application for religion, self-proclaimed religion, correct?

A. Correct.

Q. There's a place for it on the application. Some applicants provide their religious information, and you choose to ignore it by not even having it transfer to your system, correct?

A. We have done that on the advice of counsel in Massachusetts. We are in Massachusetts.

Q. Are you suggesting to me that the reason that Harvard does not look at the religious persuasion of its applicants is because its lawyers told them it might be illegal to do so?

A. I did not say that Harvard does not look at the religious persuasion of our applicants.

Q. Harvard chooses to ignore the self-proclaimed religious affiliation of applicants who provide that information on the common application because that's the advice of counsel. Is that what you said?

A. I would not say that we ignore what we do know, which will not be the information on that box you're referring to.

JA738

We do take into account, as we say we do, everything we can learn about an applicant. We do not track or preserve the answer given to that opportunity to check a box.

Q. It's not just track or preserve, ma'am. You don't even allow it to transfer to your system. Your admissions officers don't see it.

MR. LEE: It's been asked and answered and she said it was on advice of counsel because of Massachusetts law.

BY MR. MORTARA:

Q. I just want to clear up one thing, which is that it's not just that you don't retain it. It's that you don't see it.

A. We don't see it.

MR. LEE: Right.

BY MR. MORTARA:

Q. How is that looking at the whole person if you can't see something that's as important as religion?

MR. LEE: Your Honor, on the checking the box, she said why they don't transfer the information. She just said three times they'll look at the information if they find it out otherwise. There's no foundation for this question.

THE COURT: That's what I understand she's saying. They don't transfer it from the common app. They don't track it from the common app. But if it appears elsewhere in the application, they --

MR. MORTARA: They can look at it. That's completely my understanding to that --

THE COURT: If you're trying to make that point, I've already got the point. If you're trying to make a different point, ask the question and then I'll decide whether or not it's going to be --

MR. MORTARA: All right. I'll try to make the point through a question rather than directly to Your Honor.

THE COURT: Perfect.

BY MR. MORTARA:

Q. Is this a significant obstruction in looking at whole applicants that you're not able to see their self-proclaimed religious identity in the box checking? Not in an essay. I understand if somebody writes "I'm a Catholic and it's really important to me," for instance, I would have written "I'm an atheist and maybe I'm going to meet somebody that's going to convert me to become a Roman Catholic" or whatever.

You can take into account what they're writing about themselves in their essays. You do that, right?

A. Yes.

Q. Okay. I'm just talking about the fact that you're not allowed to, for whatever reason, look at someone's self-identified religion, I am Roman Catholic, I am Muslim. I am Hindu. Just in the checking of a box or filling out of a form, that's the common app. You got that distinction in your head?

JA740

A. Yes. I want to be sure that I understand your question when it comes to, again --

Q. Do you consider that to be a significant obstacle in evaluating whole people, that you are not allowed to think about their self-proclaimed religious identity unless they've written about it elsewhere in their application?

A. We have not considered that to be a disadvantage.

Q. Would you consider it to be a disadvantage if you couldn't consider their race?

A. Would I consider it to be a disadvantage if we couldn't consider their race?

Q. It's the exact same question. So I just asked you about religion in the box and if you can't consider that is that an obstacle. And you said we haven't considered it a disadvantage.

A. We find it an advantage to be able to consider race.

Q. Right. But you said it's not a disadvantage that you can't do religion the same way, right?

MR. LEE: No.

A. I did say that.

MR. LEE: I object to "in the same way." What are we talking about? Checking the box or what's in the application now?

MR. MORTARA: Your Honor, that's not even an objection. I got instructed on this yesterday.

THE COURT: Yes. It's not an objection.

MR. LEE: I object. The question is vague and ambiguous because we don't know what he's talking about.

THE COURT: You can just rephrase the question.

BY MR. MORTARA:

Q. We'll keep working on this until we get it right.

MR. LEE: You know, Your Honor, there is a limit.

THE COURT: Skip the narrative. Ask the question.

BY MR. MORTARA:

Q. There is a box or there's a form on the common application where someone can say "I am Roman Catholic." Do you understand that?

A. Yes.

Q. Harvard doesn't look at that answer. They're not -- they don't do it, for whatever reason, right?

A. Correct.

Q. Forgetting about what people say on their essays and all that, I asked you do you find it to be a disadvantage that Harvard doesn't get that information about self-proclaimed religious identity from the common application. And you said we don't find it to be a disadvantage. Do you remember that?

A. Yes.

JA742

Q. My question is, would Harvard find it to be a disadvantage if they couldn't consider race?

A. I think we would.

Q. In the same way, on the box in the application. So it's different between religion and race. That's your testimony?

A. Yes.

Q. Why is it different?

A. Because we have, as you're aware, a practice of giving special consideration to ethnic identity as submitted on those check box materials.

Q. But you have that special practice of considering ethnic identity in order to get the educational benefits that flow from racial diversity, right?

A. That's correct.

Q. Are there educational benefits that flow from religious diversity?

A. Yes.

Q. So why isn't it a disadvantage that you can't consider the self-proclaimed religious identity of someone who puts that in on the common application?

A. When we know it as provided through the other aspects of the candidacy, we may well consider it.

Q. This is my point. You say it's not going to be a disadvantage that you don't get to see what someone puts in the box on religion, right?

JA743

A. Yes.

Q. But it is going to be a disadvantage if you can't see their race?

A. We have found it helpful to know what racial identity a student has given us.

Q. Would you find it helpful to know the religious identity a student give you?

A. When it is disclosed to us in the application, we often find it helpful.

Q. Would you find it helpful if you carried through the information from the common application, just like you carry through the information about race from the common application?

A. I can't tell you whether we would or not, but we don't.

Q. You could choose not to carry through the information about race on the common application, just like you've elected to not carry through the information about religion, right?

A. We have made that choice with the advice of counsel.

Q. I don't want to know why you made the choice.

My point is you could make the choice not to carry through that information about race, just like you've made the choice for whatever reason not to carry through that information about religion, correct?

A. Yes, that choice could be made.

JA744

* * *

[pp. 195:4-200:11]

Q. I want to shift focus now to other aspects of the admissions process.

Before the full committee, the docket subcommittees have already decided who to affirmatively bring up in full committee; is that right? Correct my language if I'm wrong.

A. Would you mind repeating the question?

Q. Sure. There's something called a docket subcommittee. Dean Fitzsimmons was here. There's something called a docket subcommittee.

A. Yes.

Q. They produce a list of candidates they want to bring up at full committee. Is that kind of the way to say it?

A. Yes.

Q. And before the full committee, those docket subcommittees have decided who they're going to bring up in the full committee, right?

A. Yes.

Q. Now, at the beginning of the full committee meeting, you discuss the relative breakdown of applicants by race, correct?

A. Yes.

Q. And at the same time, you and Dean Fitzsimmons actually know the racial makeup of not just the

applicant pool but also of those who have been passed out of the subcommittee, right?

A. Yes.

Q. And the reason you get that information is that it's interesting to you and Dean Fitzsimmons to see what the shape of the group appears to be as it's shaping up, right?

A. Yes.

Q. And if you or Dean Fitzsimmons saw the numbers coming out of subcommittee showed a particular racial group was underrepresented, you'd talk about it and give it attention, right?

A. Yes. But our typical practice is at that juncture and with that information in hand to give the entire committee an overview of the proportions, the shape of the class as it's shaping up along several dimensions, including race.

Q. Now, after the full committee has voted, there's some fine-tuning of the decisions because you'll still have too many admits, right?

A. Typically at the beginning of the full committee process, we have some number of applicants in various categories, physical sciences, geography, race and so on. And those are usually the total number and the total -- we're adding a lot of people, and we're also taking away a lot of people. So those are very preliminary numbers, and we typically end up at the end of the process with more people than we have total in front of you us in that one-pager.

Q. And so there's some fine-tuning that has to take place, right?

A. You can call it fine-tuning, yes.

Q. If there was a group that was surprisingly or notably underrepresented, you'd go back and look at those cases, whether it be engineers or whether it be a racial group, correct?

A. We might or might not. Depending on the strength of the cases and the area people's sense of their own cases that might not at that point have yet been admitted or proposed for admission.

Q. What's the sufficient level of specificity the office uses for what constitutes good representation of the class?

A. Well, we don't have a formula or numbers, and we don't have a formulaic way of describing that. We mostly want people to understand where we are then and to take a look at where we are going ahead. It doesn't necessarily change the proportions. It may.

Q. When you say where we're going then and where we're going ahead, that's last year's numbers were X and this year's numbers look like it's Y. Let's look carefully the these people?

A. No. What I meant is that people have a sense of where the class is headed at the moment in the context, often, of last year's numbers. And they're at this moment going back and preparing cases to present again or to strengthen, to confirm to keep in the class. It's a piece of information that may help area people.

And it also helps us as we fine-tune the final total target number. We do have one target number in our process which is the number of beds in the freshman class. And to yield that number we have to determine or project a total number of candidates to admit. And that chart may help us do that.

Q. And that clarity is the one-pagers that show all sorts of information, including race?

A. Yes.

Q. Now, your goal is to make sure that you're not having a dramatic drop-off in some group from a certain level that you had last year, right?

A. That's not really a goal. It's something we would like to be aware, but it's not a goal to prevent it.

Q. Could you look at your deposition at page 269, Director McGrath.

A. Yes.

Q. And at line 11 there's a question and quite a lengthy answer, and I will read the entire answer. I want to start with the question and the beginning part of the answer.

"Is there anything specific about last year's statistics that makes sense, or is the goal to simply ensure there is not too great a deviation from year to year?"

"ANSWER: The goal is to make sure -- the goal is -- a goal is to make sure that we're not having a dramatic drop-off in some group who we did at a certain level

with last year. And because the numbers I referred to tell you how many applicants that there are this year, if we're not, you know, underconsidering, as it were, applicants who seem to be admitted or at a higher level this year than we seem likely to do. We're looking at dramatic differences in a short period of time. Just as we think about hearing cases at the end, we're talking about this in the context of individual cases, just how members of" -- I think that should be "this" -- "his ethnic group are doing, is this a strong case or perhaps underweighted."

Do you see that?

A. Yes.

Q. And that was your sworn testimony?

MR. LEE: Actually, I think you misread it. It says "we're looking for dramatic differences."

MR. MORTARA: Thank you, Mr. Lee.

MR. LEE: And you missed the end of the answer which says "is this a strong case that was perhaps underweighted," and the rest is "or is it just not a very good case, period."

BY MR. MORTARA:

Q. And then the next question is, "The goal at the end of the day is to avoid a dramatic drop-off among minority representation within a particular class on any given year?"

“ANSWER: A goal would be to avoid it by inadvertence or lack of care. Some things can’t be avoided.”

Do you see that?

A. And that’s what I should have said in the first place to your question, your initial question, previous question.

Q. That’s no problem, Director McGrath.

* * *

[pp. 226:21-230:4]

Q. I’m going to shift focus now. I think you’ve told us about a lot of things that can go in the personal rating in your deposition, right? And I want to talk to you about some of those.

You weren’t here, Director McGrath, yesterday, where we had an episode where I had to walk across the courtroom, and I promised the court that I was going to use the computer because my handwriting was terrible. It was a big waste time in terms of the walking back and forth, at least.

I want to ask you if the following list of things are included in analysis of the personal rating. All right?

A. Sure.

Q. Is like likability something you look at for the personal rating?

A. That might be a factor.

JA750

Q. What about whether that person is a good person to be around?

A. That's possibly part of the consideration.

Q. You told us it was part of the consideration, right?

A. Yes.

Q. What about integrity?

A. Yes. Very important.

Q. And helpfulness?

A. Yes.

Q. What about courage?

A. Yes.

Q. And kindness?

A. Yes.

Q. And those are some of the things you told us were involved in the personal rating in your deposition, right?

A. Yes.

Q. Now, I know you told us that a person's race or ethnicity should not be included in one of the factors that would weigh into the personal rating, right?

A. Yes.

Q. Your words were "should not," right?

A. Should not in itself.

Q. You also told us that race or ethnic background is not supposed to be considered in assessing the scores in any of these areas, right?

A. Yes.

Q. Now I'm going to ask you to refer to Plaintiff's Exhibit 1.

MR. MORTARA: Your Honor, we're going to mark this as plaintiff's demonstrative 22. We're going to provide a copy just so it's a record of what I put up on the demonstrative.

THE WITNESS: I'm sorry. Which one are you directing me to?

BY MR. MORTARA:

Q. Plaintiff's Exhibit 1.

A. I got it.

Q. Right at the beginning.

A. Yes.

Q. This is your reading guidance, right?

A. That's what it's called. It's called "Reading Procedures." It really, in fact, is, as you will have seen, I think, a guide to coding. It's what you take from reading the application and make sure it gets put into the electronic records system. But it's called "Reading Procedures."

Q. And it's got a little bit more than that.

A. It does. But its fundamental thing is it's a how-to note.

Q. And also it's got some guidance on how to score things?

A. Yes, it does.

Q. And you're responsible for the content of this document ultimately?

A. Yes, I am. A group of us develop it every year, change it every year.

Q. Please go to the section of the personal rating that's on page 5.

A. Yes.

Q. Does it say anywhere in this document that race should not be used in assessing the personal rating?

A. I do not think so.

Q. Now I've got a broader question.

Does it say anywhere in the admissions office, in any written form, training material, memo, email, or any kind of writing down to a Post-it on the coffee maker, that race should not be used in the personal rating? Is it written anywhere?

A. In written form, no. It is the subject of a great deal of discussion and attention in our training process.

* * *

[pp. 240:20-241:9]

Q. You've been reading applications for nearly 40 years, right?

A. Yes.

Q. Going back to our list of things you told us go into the personal rating. In your experience do Asian-Americans as a group lack attractive personal characteristics compared to other applicants?

A. Not in my experience.

Q. And none of the characteristics that we've talked about have any correlation with race, do they?

A. No. Not per se. They may be revealed in a racial context, but they have nothing to do with race per se.

Q. None of these characteristics we've talked about have any correlation with race, do they?

A. No.

* * *

**MARLYN McGRATH
EXAMINATION BY MR. LEE**

[pp. 253:4-13]

Q. Let me ask you these questions. Does the applicant's race alone factor into the personal rating?

A. No, it should not.

Q. The does an applicant's race alone factor into any of the profile ratings?

JA754

A. No, it should not.

Q. Does an applicant's race alone factor into the preliminary overall rating?

A. It may be a factor, in a good case we may be adding that into our consideration in the overall rating, yes.

* * *

JA755

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 22, 2018

Pages 1 to 231

TRANSCRIPT OF BENCH TRIAL - DAY 6
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
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JA756

* * *

**RICHARD KAHLENBERG
EXAMINATION BY MR. STRAWBRIDGE**

[pp. 17:10-23:17]

Q. What is your assessment as to how well Harvard is doing in obtaining the educational benefits of racial diversity today?

A. I think Harvard is doing a very good job of getting the educational benefits of diversity. Certainly their levels of representation from various groups is impressive.

Q. What is your view with respect to their obtaining the benefits of other types of diversity?

A. I think there it's much more of a mixed bag, frankly. The socioeconomic diversity at Harvard, as I outlined in my report, is deeply lacking. Raj Chetty found that there are -- have been 23 times as many rich kids on campus as poor kids. I could cite a lot of statistics on that question.

And in terms of geographic diversity, they clearly are heavily weighted towards New England. Other parts of the country are underrepresented.

Q. Having reviewed the materials you are just described in this case, were you able to form an opinion about whether there were available race-neutral alternatives to Harvard's admissions process that would allow it to achieve the educational benefits of diversity?

A. I was.

Q. And what is that opinion?

A. In my opinion, there are a number of race-neutral alternatives available that would give Harvard the opportunity to achieve the educational benefits of diversity without compromising the excellence of the institution.

Q. So let's break that down a little bit.

When you went about forming your opinion, how did you determine what would constitute an acceptable level of diversity to reach Harvard's goals?

A. Well, that exercise was a little bit frustrating because I had hoped that particularly the Smith committee would articulate a standard of success. So if you're going to be judging an institution and saying are race-neutral alternatives available, it's good to have a sense of what they are seeking, what level of diversity they would like to achieve in order to get the educational benefits of diversity. And the Smith committee did not articulate a standard.

Implicitly, they suggested that some of my simulations were comparable. And so there's some implicit sense of where they think success is, but there wasn't a direct statement of what level of diversity is necessary to achieve the educational benefits of diversity.

Q. So how did you go about determining for yourself whether or not the alternatives available to Harvard were sufficient?

A. Right. So in the absence of Harvard's definition, there were a couple of guideposts that I looked to. One is the educational research that was cited by the U.S. Supreme Court in the *Grutter v. Bollinger* case, in which the Supreme Court held based on that research that a law school that was able to achieve African-American and Latino representation at 14.5 percent was achieving the benefits of diversity. So that was one guidepost for me.

Another was to look at Harvard's historic levels of racial diversity. Going back several decades, Harvard has suggested that diversity is the hallmark of a Harvard education. That was the mantra for many years. I think it's a good one.

And during those years, Harvard suggested -- Harvard had African-American representation at about 7 or 8 percent in the enrolled class. And so that was another benchmark for me of what Harvard had considered a level of success in the past.

And I guess my third benchmark was the existing levels of racial diversity at Harvard. I don't think those are necessarily dispositive, but that's another guideline to look to, in the absence of a clearly articulated standard by Harvard itself.

Q. How did you go about identifying the race-neutral strategies that you considered in determining that there were some available to Harvard as an alternative to its use of race in its admissions process?

A. So going back to about 1996, a number of states have been the subject of voter initiatives to ban race-based affirmative action. So over the last couple of

decades, there's been a fair amount of experience built up on what universities can do when they're not using race to produce the educational benefits of diversity.

And over the years, there's essentially a menu of different options that a number of universities have employed. Socioeconomic preferences is one, to start with, that a number of universities have used.

Q. And have you generally been a supporter of socioeconomic preferences as an alternative to the use of race?

A. I have.

Q. How come?

A. I've been a longtime supporter of this approach, for a couple of reasons. First, as a matter of basic fairness, I think most people believe that if someone has overcome obstacles in life, then it's worth considering that in the application process. And furthermore, that those obstacles are most strongly associated with socioeconomic status. So for example, President Obama has said his own daughters did not deserve a preference in college admissions but that low-income and working-class people of all races do.

So I think there is that starting point. If we're trying to create a genuinely fair meritocracy, then we would want to look at obstacles, the economic obstacles that someone has had to overcome.

Anthony Carnevale, who I mentioned earlier, at Georgetown, found that the most advantaged student is expected to score 399 points higher on the SAT than

JA760

the least advantaged student economically. And so the students who have managed to overcome odds and do quite well despite the obstacles I think are truly impressive.

A second reason I've supported socioeconomic affirmative action has to do with the benefits of diversity, that an institution is stronger when students are -- some of the students include those who have been born on the so-called wrong side of the tracks and have faced some hardships, and that can educate all the students in an institution.

I guess a third reason I'd cite would have to do with the law. For a number of years, the U.S. Supreme Court has made clear that while the goal of racial diversity is compelling, narrow means should be used because there are costs to using race in deciding who gets ahead. There can be increased resentment that results. Stigma can be associated with the beneficiaries of racial preferences.

And so the law has long said if you can get the benefits of racial diversity without using race, that's to be the preferred method. And I've advocated socioeconomic preferences for that reason as well.

And the final thing I'll say is that I think it is relevant in a democracy to look at where the public is on these questions. And continually, poll after poll after poll has suggested that the vast majority of Americans are uncomfortable or opposed to the idea that race should be a factor in college admissions.

And by contrast, large majorities of Americans support the notion of providing a preference to economically disadvantaged students.

Maybe perhaps I went on for too long, but that's my sense of why I've been at this for 30 years.

Q. Besides increased socioeconomic preferences, are there other race-neutral alternatives that are available to a college like Harvard in considering its options as opposed to the use of race in the admissions process?

A. Yes. So again, highly selective universities who have faced the ban on race have used a number of other alternatives. They have sought to get more geographic diversity as a way of getting the benefits of geographic diversity but also indirectly increasing racial diversity.

A number of colleges have increased their recruitment efforts to reach out to more disadvantaged students. Some have looked at community college transfers. A number have tried to kind of pull down the impediments to diversity; that is, the unfair preferences that exist within the current system. So that would be things like legacy preferences. There are a number of universities that have removed that barrier to diversity as well.

Q. Are there any selective universities that have removed those types of barriers?

A. Yeah. Some of the world's greatest universities -- Oxford; Cambridge; Caltech; UC, Berkeley -- none of them use legacy preferences.

* * *

[pp. 32:20-47:18]

Q. Before we look at some of the simulations you ran, are there simulations that were conducted in this case that you rejected as race-neutral alternatives for Harvard?

A. Yes.

Q. Can you describe what those simulations were?

A. So Professor Card had one simulation in which he provided a very modest socioeconomic preference which resulted in a class where the African-American proportion dropped from 14 percent to 6 percent. And I think the evidence suggests that that is not an acceptable level of racial and ethnic diversity, so I rejected that one.

There was another simulation that Professor Card embraced -- or not embraced but articulated -- in which the focus would be on taking students from socioeconomically disadvantaged high schools. And that simulation resulted in a fairly dramatic drop in what's called the academic index, the combined measure of SAT and GPA, high school GPA, such that it was below what Harvard athletes currently have. And I thought that was too large a drop in academic preparedness and so rejected that simulation.

Q. All right. Have you prepared some slides that demonstrate the simulations that you thought were, in fact, workable and available to Harvard?

A. I have.

Q. Why don't we look at one of those. Is that what we're seeing on the screen here is what's labeled Simulation A?

A. It is.

Q. All right. Can you describe the inputs for Simulation A, starting with what its basis is?

THE COURT: Do you have any hard copies on these I can make notes on?

MR. STRAWBRIDGE: Yes, I do actually. One moment. May I approach?

THE COURT: Yes. Thanks. I'm trying to write it down, but if I can make notes on this, it would be easier.

BY MR. STRAWBRIDGE:

Q. Okay. So why don't we start at the top. What model is this simulation based upon?

A. So this is Professor Arcidiacono's model predicting the current system of admissions.

Q. Okay. And so the boxes on this chart explain the adjustments you made to that model?

A. That's correct.

Q. This may be obvious, but why did you eliminate the racial preference in the model in this simulation?

A. That would be kind of the definition of a race-neutral alternative.

JA764

Q. Okay. What was the next adjustment that was made?

A. So the next one was to eliminate the legacy preference. This is a preference which disproportionately benefits white students and affluent students. So in an effort to reduce that impediment to diversity, we eliminated the legacy preference.

Q. What is the next adjustment that was made to the model?

A. The next was to eliminate the preference for those who appear on the special dean or director's list that Dean Fitzsimmons has. And so we removed that preference as well, given that it disproportionately benefits white and wealthy students.

Q. Okay. What is the next adjustment that was made?

A. So Harvard currently has a system by which they preference the children of faculty and staff. Again, the data suggested that those preferences disproportionately benefit white and affluent students, and so we eliminated that preference.

Q. The next one refers to the athletic preference. What adjustment did you make there with respect to this simulation?

A. So in that case, we kept the athletic preference. It was my judgment that the athletic preference is basically bred into the culture of higher education in America, and it would be perceived as radical to eliminate that preference. So we kept that preference.

JA765

Of course, unlike the faculty staff preference, the legacy preference, athletic preference also has to do with the individual merit so someone can work harder to improve their athletic skills. They can't do anything to change their parents or for those other preferences.

Q. What is the next adjustment that is listed on this model?

A. Okay. So we provided a larger boost than Harvard currently provides to socioeconomically disadvantaged students. And these are the students who Harvard has identified or tagged in the application process as disadvantaged. And the size of the preference is roughly equal to half of what the athletes are currently given in terms of a preference under the Harvard system.

Overlaid on top of that to boost sociogeographic diversity, we relied on some information that Harvard gave us about where students lived and what sort of neighborhoods they lived in. Harvard gave us access to the College Board's materials on neighborhood clusters. So the College Board identifies 33 different types of neighborhoods in the United States. And Harvard didn't give us the ZIP Code data, but they did give us the code for where students line up among these 33 clusters. And so we used that data to take an equal number of the very top students from each of the clusters that the College Board -- these 33 clusters.

Q. And then the last simulation adjustment here refers to an early-action preference?

A. That's correct.

Q. What was the decision there?

A. So once again, as Harvard's own data suggests, early action is a method of admission that disproportionately benefits wealthy and white students. So they have access to the high school counselors who can advise them that there is a preference to applying early. And so in this simulation, although not in all the simulations, we eliminate the early-action preference.

Q. Okay. And did you prepare a slide that shows the results of the simulation?

THE COURT: When you say that you give socioeconomic status half the weight of an athletic preference, are you talking about percentage? Or you've been able to quantify how much of an advantage an athlete gets?

THE WITNESS: Yes. As part of Professor Arcidiacono's model, he is able to estimate the weights currently provided to various preferences. So athletic preference is a substantial one. There's legacy preference, racial preference. And so we're relying on his model which identifies the size of those -- the magnitude of those preferences.

THE COURT: Okay.

BY MR. STRAWBRIDGE:

Q. You did, in fact, prepare a slide that shows how this result compares to 2019?

A. I did.

JA767

Q. Is that what we're seeing on the screen here?

A. It is.

Q. Why don't you explain what the results of this simulation were and how they compared to 2019?

A. Okay. So the blue lines here are the results of the simulation. And to make it easy to compare to the status quo, you can see the dotted lines represent the status quo numbers in these simulations. So we can see that in terms of racial and ethnic diversity, the white applicants get roughly the same share of the class. Asian-Americans do a little bit better, there's a modest drop among African-American students, Hispanic students are roughly flat, and the total of the underrepresented minority students is 24 percent.

As I mentioned earlier, the Smith committee, the race-neutral committee, suggested that these numbers are comparable to Harvard's current levels of racial and ethnic diversity.

Q. Just in your own opinion, I want to talk about the decline in the African-American percentage particularly. How come that does not render, in your view, this simulation unworkable?

A. Well, I would say a couple of things. First is reference to the Smith committee, which said that these levels of diversity are comparable to existing levels of diversity.

In addition, you'll recall that I mentioned earlier Harvard had 7 to 8 percent representation in its

enrolled class in the past, and these are numbers that don't fall below that number.

In addition, it's important to point out that Harvard did not provide us access with all the information we needed to run simulations that would be completely fair to African-American and Latino students. And in particular, the absence of access to wealth data means that we cannot give, in this model, a preference to those who have low levels of wealth. The reason that's important is that wealth is, in the academic literature, known to be a key predictor of college-going and to life chances more generally. And so it would have been nice to have that information.

But in terms of the racial impact, this is particularly important. African-Americans on average have incomes that are 60 to 70 percent of white income levels. But the African-American wealth gap is much, much larger, so that African-Americans on average have 10 percent, just 10 percent of the wealth of the median white family.

And so the absence of the wealth data in our simulation doesn't tell us what -- it underestimates, in my view, the potential of race-neutral alternatives. Because if you used a wealth variable, it would better capture the history of slavery and segregation in this country, of redlining. Because all of that feeds into wealth, and that helps -- this past discrimination, current discrimination against African-Americans helps explain why the wealth gap is so much larger than the income gap.

So the 10 percent figure doesn't represent the full potential that Harvard has to produce higher levels of African-American and Hispanic representation.

Q. What does the simulation reveal with respect to the academic characteristics of the class under this race-neutral model?

A. So the academic characteristics remain superb. In the status quo, the SATs are at the 99th percentile. In the simulation, they're at the 98th percentile. High school GPA actually goes up a fraction of a point. So this is a highly prepared, highly academically prepared student body in the simulation.

Q. And what does the simulation indicate with respect to the effect on socioeconomic diversity?

A. Obviously socioeconomic diversity expands greatly under this model, perhaps not unexpected, since this is a socioeconomic preference. But you recall that about 18 percent of students were tagged as disadvantaged under the status quo, and now that rises to 54 percent disadvantaged, which I think could have a lot of benefits at a place where you have currently 23 times as many rich kids as poor kids. Now there would be a much more vibrant level of socioeconomic diversity and the educational benefits that would flow from that.

Q. Let's talk about the next simulation that you performed.

A. Okay.

Q. Or I should say that you are highlighting with respect to your opinion in this case.

A. Mm-hmm.

Q. Can you just describe briefly the basis for Simulation B.

A. Simulation B is Professor Card's model, and it's also Professor Card's simulation. So this is not something we adjusted in any respect. This is Professor Card's -- his work entirely.

Q. Why don't we highlight the differences with respect to this simulation performed by Professor Card and the first simulation that you conducted.

A. Okay. So Professor Card does many of the same things that Professor Arcidiacono and I did. But in addition, I guess to highlight the changes, he takes out the athletic preference, which I considered to be a radical thing to do. And he used a different definition of socioeconomic advantaged.

So rather than relying -- let me step back and say the size of the preference was basically the same as the one in Simulation A. So it's half an athlete preference.

But he used a different approach to the geographic question, the question what neighborhood students come from. So rather than taking equal numbers from various clusters, College Board clusters, Professor Card looks at the students who -- provides a preference to students would come from disadvantaged neighborhoods, which he defines as those which have a census-tracked income of below \$65,000.

And then the other change is Professor Card leaves the early-action preference in place.

Q. And what were the results of this simulation?

A. Those results were also positive, in my view.

Boy, I'd be worried about that slide.

Q. There we go. Sorry about that.

A. So this is Simulation B. Again, this is entirely Professor Card's model and simulation.

Q. What does the simulation show with respect to racial and ethnic diversity?

A. Strong levels of racial and ethnic diversity, again termed by the Smith committee to be comparable. 27 percent overall underrepresented minority shares compared to 28 percent, so virtually indistinguishable. We had the same results with respect to African-American admits. Even more positive results with respect to Hispanic and other admits. White admits go down, and Asian-American admits go up.

Q. And what were the academic characteristics reflected in this simulation?

A. Virtually identical to Simulation A. So again, we're getting very, very well-prepared students, those at the 98th percentile SATs. Grade point average is slightly higher.

Q. And again with respect to socioeconomic diversity, what were the results of this simulation?

A. A large jump in the socioeconomic diversity and therefore the educational benefits that go along with that.

Q. You did a third simulation performed in this case?

A. That's correct.

Q. That's Simulation C here?

A. That's correct.

Q. Why don't you explain what the differences were between Simulation C and Simulation B?

A. Okay. So Simulation C was conducted in conjunction with Professor Arcidiacono but based on Professor Card's model of how the current system works. Unlike the previous -- unlike Simulation B, Simulation C includes the athletic preference. It also makes some minor adjustments to Professor Card's low-income -- low socioeconomic definition.

So Professor Card was defining as disadvantaged those who were from -- had various family indicators of disadvantaged, but was also looking at neighborhood.

And I asked Professor Arcidiacono to add in a factor that looked at disadvantaged high schools that students attended. There's a large body of research to suggest that attending a high school in which most of your classmates or many of your classmates are low income provides an obstacle to high levels of achievement. And so I adjusted the model in that fashion.

We also expanded the definition of disadvantaged neighborhood, and in our case high school, to include additional factors that are included in the educational literature. So we know it's a disadvantage to grow up in a neighborhood where your neighbors are low income

on average. It's also a disadvantage to be in neighborhoods where there are low levels of education among those peers in the neighborhood and also where there are high levels of English not spoken as a first language. So we added those characteristics in as well.

In addition, I guess the final minor adjustment to mention is that we changed the threshold for what constitutes a disadvantaged neighborhood. Professor Card had used the \$65,000 cutoff, which I thought was too high and instead really wanted to focus on these amazing kids who have overcome disadvantages. So used the bottom third rather than the \$65,000 cutoff.

Q. Were these adjustments that you made to determine who should get the socioeconomic preference that was applied in this model?

A. That's correct.

Q. Did you adjust the size of the socioeconomic preference itself?

A. No.

THE COURT: Bottom third of what?

THE WITNESS: The bottom third. It's the composite figure that looks at income, education, and the language. Once you put all those in, it's the bottom third of neighborhoods by census tracked in the entire country.

BY MR. STRAWBRIDGE:

Q. Did you equally weight those three factors in order for identifying the bottom third?

A. Yes. And I was going to say the final change was in this model there's no early-action preference.

Q. Does this display the results of this simulation?

A. It does.

Q. Can you just explain what the results here are with respect to racial and ethnic diversity?

A. So overall racial and ethnic diversity, the underrepresented proportion, underrepresented minority proportion actually exceeds the status quo. Hispanic numbers rise again without that wealth data we saw some modest drop among the African-American admits. Asian-American admits do quite a bit better. White admits decline under this simulation.

Q. And what were the academic characteristics of the simulated class in this model?

A. They remain superb, at the 98th percentile, and SATs and high school GPA at the same level.

Q. What about socioeconomic diversity?

A. It's much more socioeconomically diverse than Harvard's current class.

Q. And there's one more model that we're discussing today that you used in forming your opinions?

A. Yes.

Q. That would be Simulation D shown here?

A. That's correct. This one is a little easier to explain in that the only distinction between C and D is that D

JA775

includes the early-action preference. We put that one back in.

Q. So the only difference between C and D is just whether or not there's any preference associated with early action?

A. That's correct.

Q. And what were the results of this simulation?

A. So once again you saw strong results in the underrepresented minority proportions, identical to the current -- the status quo or baseline class. Essentially the same results as we saw in Simulation D with some minor changes in terms of racial and ethnic diversity.

Q. And specifically what effect did putting early action back into the model have with respect to the racial and ethnic diversity?

A. It hurt Hispanics a little bit, about one percentage point.

Q. Academic characteristics under this model?

A. Academic characteristics remain superb.

Q. And what about socioeconomic diversity?

A. There's a great deal of socioeconomic diversity here as well.

Q. The simulations that we've just been reviewing now, in your view are they feasible to implement at Harvard?

A. Yes.

Q. And why do you say that?

A. Well, Harvard currently has a system of admissions that is holistic and based on various preferences that are weighted in different fashions. So this would essentially replicate that type of system with the major difference being what counts in admissions would shift. So Harvard already has a system of preferences and tips. We would just adjust them.

The other thing to point out is the data that are necessary to implement these simulations are all readily available to Harvard. It has access to all the information that we included in these simulations.

* * *

[pp. 52:2-58:25]

Q. What did the Smith committee say with respect to the disadvantages of the simulations that you performed in this case?

A. Well, they had a couple of concerns. The first had to do with the academic standing of the -- academic preparedness of the class.

Q. And is that the language that's highlighted on the screen right here?

A. Yes.

Q. This concern indicates that "The ultimate combination of race-neutral alternatives that Mr. Kahlenberg deems workable for Harvard would, if adopted, result in a 19 percent drop in the proportion

JA777

of admitted students with the highest academic ratings.” Is that right?

A. That’s correct.

Q. Do you agree with that criticism?

A. I do not.

Q. Why not?

A. Well, to begin with, the objective factors, those that look at SAT scores and GPA, which are kind of the standard in the literature on race-neutral alternatives, remain high. They’re at the 98th percentile.

In addition, in terms of the -- so when they talk about the proportion of admitted students with the highest academic ratings and they reference the 76 percent to 66 percent, you can connect that to the simulations and infer that they’re talking about the drops in the numbers of academic 1s and academic 2s combined.

And I just didn’t find this particularly persuasive. I mean, to begin with there, are very, very few academic 1s under Harvard’s system. And so this modest decline in the proportion of academic 1s involves really a handful of students. At the deposition, I noted it was less than 10.

So even if we were to adjust the model to make sure they don’t lose a single academic 1, it wouldn’t change the overall levels of racial, ethnic, and socioeconomic diversity.

JA778

In terms of the academic 2s -- I'm trying to think about how to say this politely. These are not must-have geniuses under the system. 80 percent of the academic 2s are rejected currently. So that, to me, was unpersuasive.

And I guess the other thing I would mention is the students who would replace these academic 1s and 2s presumably would include academic 3s, socioeconomically disadvantaged academic 3s. And it's my understanding there's going to be testimony given from students who received academic 3s and overcame incredible obstacles. And I think Harvard is enriched by having those students and would not see that as a negative in any sense.

Q. Did the Smith committee have any other critiques of your simulations, at least with respect to its report?

A. Yes. So another one of their complaints had to do with this concept that sometimes has been called diversity within diversity, where universities will raise the concern that under a socioeconomic preference system, a larger number of the underrepresented minority students will come from economically disadvantaged backgrounds. And for them, that raises a red flag.

Q. And is this the language you're referring to with respect to that concern?

A. Yes.

Q. Okay. This indicates that "Using socioeconomic status as a proxy for race would also, by definition, yield a student body in which many of the nonwhite

students would come from modest socioeconomic circumstances. Thus, even if socioeconomic status could be used to increase racial diversity, it would do so at the cost of other forms of diversity, undermining rather than advancing Harvard's diversity-related educational objectives."

Is that correct?

A. That's correct.

Q. Do you find this critique of the simulations compelling?

A. I don't.

Q. Why not?

MR. LEE: I object to the form of the question. He didn't say he agrees or disagrees. Whether it's compelling or not is --

THE COURT: That's fair.

MR. STRAWBRIDGE: I'll rephrase, Your Honor.

BY MR. STRAWBRIDGE:

Q. Do you agree with this critique of the simulations?

A. I do not.

Q. Why not?

A. Well, I guess to begin with, when I was talking about why I support socioeconomic preferences in the first place, I think the students who have overcome odds and manage to do quite well despite those obstacles are especially impressive.

JA780

And so if the underrepresented -- I guess the phrase here is nonwhite students who are admitted under the new system are more likely to be those who have overcome obstacles. I'm even more impressed by those students than those who are more advantaged.

Under the current system of admissions, some 70 percent of underrepresented minority students fall into the advantaged category. And if the point of having diversity within diversity is to give a sense of -- a genuine sense of the backgrounds of students in a college, then the simulation provides a much better approximation of the real world than does Harvard's current system, which is disproportionately benefiting advantaged nonwhite students.

Q. Were there other critiques that the Smith committee made of your simulations?

A. Yes.

Q. What critiques are you thinking of?

A. So the third major critique was that this would -- admitting more disadvantaged students would put financial pressure on Harvard University.

Q. Do you agree with that critique?

A. I do not.

Q. Why not?

A. Well, where to start. So to begin with, Harvard University is literally the richest university in the entire country. Its \$37 billion endowment is bigger than the gross domestic product of half the world's

countries. They recently raised \$9 billion in a campaign. And in The Chronicle of Higher Education, someone said this was like beating the 4-minute mile.

MR. LEE: Your Honor, The Chronicle of Higher Education, the capital campaign is neither in his report or relevant to the issues here.

THE COURT: Let's just leave it at Harvard is rich.

MR. LEE: We'll stipulate.

A. So that's to begin with. Looking at the enormous resources available to Harvard, I find it unpersuasive. In addition to that, it's not just kind of my view of this issue.

There is testimony in the depositions from Dean Fitzsimmons and Dean Donahue on this question of whether Harvard could afford to bring in more socioeconomically disadvantaged students and help provide them financial aid.

BY MR. STRAWBRIDGE:

Q. And did you rely on that testimony in forming your opinions?

A. I did.

Q. And is this some of the testimony on this demonstrative here that you relied upon there?

A. Yes.

Q. And what does this testimony indicate?

JA782

A. So this is Dean Fitzsimmons, who runs the admissions at Harvard, suggesting in answer to a question about the budget: We are not given a rigid limit on the amount of financial aid that -- essentially says we have to meet.

The question is, then: Is there any economic restraint on the number of HFAI students?

So HFAI is, as you know, Your Honor, the Harvard financial aid initiative.

The answer to that question, is there an economic restraint, is no.

Q. Did you also rely on the testimony from Sally Donahue?

A. That's correct.

Q. Who is Ms. Donahue?

A. Until recently, at least, she was the director of the financial aid department at Harvard University.

Q. And is this the testimony that you relied upon?

A. It is.

Q. And what did Ms. Donahue indicate in the testimony you relied upon in forming your opinion?

A. She was asked the question, "Would there be any problem if the number of HFAI awards doubled?"

And her answer was "No."

Q. Is this some additional testimony that you relied upon here?

A. It is.

Q. And does this inform your view with respect to the alleged concerns about the financial aid impediments to the simulations that you relied upon in this case?

A. It does. This is further evidence that the question is asked: Is there any restraint on Harvard's ability to increase the number of HFAI? Is it still your testimony that you don't think there's any restraint on Harvard's ability to increase the number of HFAI awards in a given admissions cycle?

The answer is clearly yes.

* * *

**RICHARD KHALENBERG
EXAMINATION BY MR. LEE**

[p. 120:4-5]

Q. And Simulation D is your Simulation 7, correct?

A. That's correct.

* * *

**MARLYN McGRATH
EXAMINATION (RESUMED) BY MR. LEE**

[pp. 148:13-149:2]

Q. Do some applicants receive a tip for race?

A. Yes, some do.

Q. As director of admissions, why do you believe it's important that a tip be given for race?

A. Our applicant pool is very strong. The top half or top portion of the applicant pool are quite easy to make a very strong case for. And one of the factors, race, for example, that can set a candidate apart can be very clarifying and helpful to us. So that tip is to help us follow more energetically otherwise very strong candidate through the process. That tip of course may not, even if it's present for a good candidate, may not be sufficient for admission, but it will help us keep the attention at a high level.

Q. Is race ever a negative tip?

A. No. Race is never a negative tip.

* * *

[pp. 175:2-16]

Q. You understand that SFFA has accused your admissions office of intentionally discriminating against Asian-Americans. Do you know that?

A. I understand that.

Q. Do you?

A. No.

Q. And how do you know?

A. My perspective on that question is the observation, the chance I've had to observe it at close range for all of these years. The work of the committee is in the doing of it. I watch people discuss candidates. I watch them -- I read what they write about them. I watch them vote. I watch them rank people. So by paying close

JA785

attention, which is my job, as to how the process works, I see no evidence of discrimination of that kind.

* * *

**RAKESH KHURANA
EXAMINATION BY MR. MORTARA**

[pp. 206:20-208:14]

Q. Now I want to briefly talk through one section of the report, and I will be brief, which is on page 5 of the report.

There's a section titled "Historical Context." Do you see that?

A. I see that.

Q. And I've highlighted on the screen a sentence from the middle, the lower middle of the second paragraph in this report. And it says, "Under the presidency of Abbott Lawrence Lowell, the Harvard administration restricted the numbers of Jewish students and barred the handful of African-American men at the college from residing in freshman dormitories."

Do you see that?

A. I see that sentence.

Q. I'm going to take it off the screen, Dean Khurana. You are aware that Harvard discriminated against people who identified as Jewish in that time period, correct?

A. Yes.

Q. And you know that, in part, from reading Jerome Karabel's book, "The Chosen," correct?

A. Yes, I know that.

MS. CONLEY: Objection, Your Honor. We have a judicial notice that Your Honor has granted on this issue, and Mr. Mortara said at the pretrial conference that he would not get into this with any of the witnesses.

THE COURT: I think what he said was that he would get into it to the extent that it had anything to do with credibility or sort of -- I think there were some limitations on it.

MR. MORTARA: There's just the one question coming up that I am going to ask and he's going to answer and then we're going to move on.

THE COURT: I'm going to give him the question. I'm aware of what we've taken judicial notice of. I don't think it foreclosed all reference of it, although I do think it foreclosed any extensive discussion of it.

He can have his question and then we'll move on.

BY MR. MORTARA:

Q. I'm not going to dwell on this, Dean Khurana, but you agree that one of the reasons that a holistic admissions process was adopted was to identify who was Jewish in the applicant pool, correct?

A. Yes. My understanding is that that was one of the reasons that contributed to that process.

* * *

[pp. 223:23-228:4]

Q. Now I want to talk about income and quality.

You've actually spoken a lot about income and equality in your role as dean and in your research, right?

A. I've done work in that area.

Q. You're working on a book about how globalization and class hierarchies reproduce income and other social inequalities, aren't you?

A. I am.

Q. You know that Harvard College's student body does not mirror the income distribution that we have here in the United States, right?

A. Yes.

Q. I mean, you're aware that the percentage of U.S. households that have an income above \$150,000 a year is around 4 percent?

A. I don't have the exact statistics at my fingers.

Q. Sounds right, though, doesn't it?

A. Approximately.

Q. So let's just take it -- let's take it as 5. We can make it 5. So top 5 percent of income in the U.S. make up 30 percent of Harvard's class?

A. Yes.

JA788

Q. Don't you actually think that Harvard's class should have a socioeconomic makeup that looks at lot more like America, provided the students were academically qualified to be at Harvard? Your personal opinion, sir?

A. I don't.

Q. Wouldn't it be helpful to address the very issues you're writing about in your book if Harvard had even greater socioeconomic diversity rather than 30 percent of the class coming from the top 5 percent of Americans by income?

A. The mission of the college is to educate the citizens and citizen leaders for our society, and that talent is everywhere. One of the things that I think we try to accomplish is we know that talent is everywhere, but opportunities are not. And we want that talent to be able to consider coming to a place like Harvard, and want to make sure that they have the financial ability to come to Harvard.

But we begin with the talent that's out there and then trying to get them to come to a place like Harvard College.

Q. And that's why I included the proviso qualified to be at Harvard. I want you to have in your mind what it means to be qualified to be at Harvard. All right? You studied that a little bit in connection with the report, right?

A. Yes.

Q. Great. Thang's qualified to be at Harvard, isn't he?

A. Yes.

JA789

Q. All right. Being rich has nothing to do with being at Harvard, does it?

A. One's socioeconomic status should not determine, whether you're rich or poor.

Q. Don't you actually think that Harvard's class should have a socioeconomic makeup that looked more like America than it currently does, provided everybody who was there was qualified to be at Harvard?

A. I can't engage in that hypothetical because I don't know how that actually would play out. What we're looking for are people who are committed also to the mission of the institution and to try to make it possible regardless of the circumstances of your birth to be able to come to a place like Harvard without having to worry about financial considerations.

Q. I guess now I'm confused.

Does it have anything to do with how committed a student can be to Harvard's mission how much money their mother or father makes?

A. Again, I would say that talent is everywhere. And again, students who are committed to that mission could be coming from well-off backgrounds. Students who are committed to that mission could be coming from middle class backgrounds.

Q. My question is they're not related. Your socioeconomic status isn't related to your ability to pursue the important mission of Harvard College, is it?

A. No.

Q. So now I'm going to come back again.

What is special about wealthy people that Harvard needs to have them overrepresented by a factor of six on its campus?

A. Again, all of our students are qualified to be there. And I would say again, like other colleges and universities, I think we are fortunate to have the resources to make sure students can come here regardless of their ability to pay.

But we're not trying to mirror the socioeconomic or income distribution of the United States. What we're trying to do is identify talent and make it possible for them to come to a place like Harvard.

Q. I'm going to have to leave you here because Her Honor has a hearing and I want to be respectful of the other participants in this courtroom. But I'm going to ask one more question right now. Are you ready?

What is it about having wealthy people at Harvard that perpetuates inequality in our society? You write about inequality, right, income inequality?

A. It's a subject that I've written about.

Q. Do you think having a third of the available spaces at Harvard for only the richest amongst us perpetuates inequality in America?

MS. CONLEY: Objection, Your Honor, asked and answered. I'm not sure of the relevance of this whole line of questioning.

THE COURT: He can have it.

JA791

A. It's not how the admissions --

THE COURT: Last question. I thought you only had one. Let him have it.

MR. MORTARA: Last question.

A. That's not how the admissions process works.

* * *

JA792

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 23, 2018

Pages 1 to 228

TRANSCRIPT OF BENCH TRIAL - DAY 7
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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JA793

* * *

**RAKESH KHURANA
EXAMINATION (RESUMED)
BY MR. MORTARA**

[pp. 9:23-14:3]

Q. Well, through your work on inequality and structures of privilege, do you know whether or not the minority populations at Harvard reflect the socioeconomic diversity of those minority populations?

Let me explain. I mean do the African-American students at Harvard reflect the socioeconomic diversity of African-Americans in the United States?

A. Again, diversity is one built on multiple dimensions. And so socioeconomic diversity is one of many dimensions that we consider when evaluating an individual.

Q. That's not my question, and I'll try to be clearer.

African-Americans at Harvard, like Harvard students generally, are richer than African-Americans in the United States. What I mean by that is you disproportionately have wealthy African-Americans at Harvard College versus their representation in the general African-American population. You know that, don't you?

A. I'll assume that that's true. I don't have the exact data.

Q. You did the race-neutral alternatives report, right?

A. Yes.

Q. That involved increasing socioeconomic diversity, right?

A. That was one of many factors that we considered.

Q. And one of the problems that you had with an increase of socioeconomic diversity was that it was going to increase the number of nonwhite students from disadvantaged backgrounds. Isn't that one of the problems you had?

A. One of the problems that we have is that we don't have any sort of single characteristic that we over-weight in that sense. What we're trying to do is look at the whole person that's made up of different characteristics, different backgrounds and experiences. And socioeconomic diversity is one of many characteristics that we consider in context of the individual.

Q. Let's look at what you said in the report. Please turn to page 14 of the report. You're on this committee, right, sir?

A. Yes.

Q. Let's look at what you said about the number of nonwhite students from modest socioeconomic circumstances. This is your report, your words, right?

A. This is our report.

Q. "Using socioeconomic status as a proxy for race in the admissions process would also, by definition, yield a student body in which many of the nonwhite students would come from modest socioeconomic circumstances."

Would you explain to the Court what is meant by that?

A. So one of the goals that we have is to bring a diverse student body together from different backgrounds and experiences. And while, you know, different groups have different characteristics, we also think about each individual. We wouldn't want students to think that, for example, students of color only come from modest socioeconomic backgrounds; that people from different backgrounds and experiences can come from families that are coming from upper backgrounds; or that we wouldn't want students to presume that just because somebody may be historically Caucasian that that means that they come from we well-off backgrounds. They could also be coming from very modest backgrounds.

So the goal there is to really overcome this notion of stereotypes in which we sort of assume if you know something about somebody's group characteristic, that tells you who they are as an individual or the complexity of their background.

Q. Virtually nothing of what you just said is reflected in this paragraph; isn't that right?

A. I think that's what the intent of this paragraph was meant to --

Q. So what you intended when you said that using socioeconomic status as a proxy for race in the admissions process would yield a student body in which many of the nonwhite students would come from modest socioeconomic circumstances is that you were worried that if relatively well-off African-Americans

and Hispanics weren't present on Harvard College's campus in greater numbers, it would reinforce a stereotype about racial minorities.

That's your testimony?

A. Yes.

Q. And you remember Thang again?

A. Yes.

Q. Do you remember the slide I showed you yesterday?

A. Yes.

Q. Do you remember that he comes from quite a modest socioeconomic background?

A. Yes.

Q. And so remember I talked about how he was an academic 3? That was in the earlier academic part of this discussion?

A. I remember you talking about that.

Q. I'm representing to you that he's an academic 3. So fewer 1s and 2s, more 3s, fewer wealthy minorities, more disadvantaged minorities.

And so what you're really saying is the problem that you have with the race-neutral alternative of boosting socioeconomic preferences is there would be more students who, like Thang, have academic 3s and come from very modest backgrounds?

A. Again, all of our students are academically qualified to being there. What we're looking at is the

JA797

backgrounds, the diversity of their backgrounds, things like their socioeconomic status but also other types of dimensions.

There's public spiritedness, their academic interests, their geographic background. All of this as a whole person, not reducing somebody to sort of category which I think is not the approach for our educational philosophy.

* * *

**RAKESH KHURANA
EXAMINATION BY MS. CONLEY**

[pp. 18:2-12]

Q. And Dean Khurana, why is it that the majority, the overwhelming majority of Harvard College students live on campus?

A. The Harvard College philosophy is that education is not only what happens in the classroom but it's also what happens in the sort of whole-student undergraduate experience. And so students by living together, participating in co-curricular activities together really learn from each other, discuss the different subjects that they're learning with each other, current events, participate in joint interests. And that's part of our educational philosophy.

* * *

[pp. 21:8-27:13]

Q. Now, Dean Khurana, yesterday in your testimony you referenced Harvard College's mission statement. Do you recall that?

A. Yes.

Q. When did Harvard College adopt its current mission statement?

A. The college has had a longstanding mission. But in its kind of current colloquial terms, around 2014.

Q. Can you turn to Tab 2 in your binder?

THE COURT: For identification do you have a number on this demonstrative?

MS. CONLEY: Oh, yes. Sorry, Your Honor. I believe it's DD 2.3.

BY MS. CONLEY:

Q. At Tab 2 you'll see Defendant's Exhibit 109. Do you recognize this document, Dean Khurana?

A. Yes.

Q. What is it?

A. It's the mission of Harvard College.

Q. Does the document accurately reflect the mission of Harvard College?

A. Yes, it does.

MS. CONLEY: Your Honor, I'd like to offer Defendant's Exhibit 109 into evidence.

MR. MORTARA: No objection, Your Honor.

THE COURT: It's admitted.

(Defendant Exhibit No. 109 admitted.)

BY MS. CONLEY:

Q. And what is the mission of Harvard College?

A. The mission of Harvard College has been for almost four centuries now to educate the citizens and citizen leaders for our society through the transformative power of a liberal arts and sciences education.

Q. And in your own words, what does that mean?

A. It consists of three components, what we call the intellectual transformation, which is new ways of knowing, new ways of understanding, all toward helping our students develop an open mind and independent mind.

Second, we embed that experience in a very diverse living and learning experience where students study alongside students who are different from them, who come from different walks of life, and have different identities, which we believe not only deepens the intellectual transformation but sets the conditions for social transformation, what their understanding of being in a community means, where they learn to see behind each other's eyes, to hear from another perspective.

And then through those experiences, we hope our students are on a journey of answering three questions for themselves: Who am I and who do I want to be?

JA800

How do I relate to others? And what can I learn from others? What are my gifts and talents, and how can I best use them to serve the world? So a personal transformation.

Q. And, Dean Khurana, how does Harvard College ultimately carry out that mission?

A. Through exposing our students to a diversity of subjects and fields that allow them to understand how they fit into the world in the role of history, the different perspectives, through a diversity of exposure to different types of students and backgrounds where students learn from each other who are studying different things, and then basically a diversity of personal experiences.

Q. Now, does the diversity of the student body play a role in allowing Harvard College to achieve its educational mission?

A. Yes.

Q. And how so?

A. Well, the essence of education is an exposure to diversity of perspectives and points of view where you decenter yourself, where you start seeing --

There's like an old parable in my family about seeing the elephant. What you do is you learn to step back, and you learn that you don't have a full picture that other people can see different parts, that the same thing can look different from somebody's background, their experience, their understanding of a text.

JA801

And that -- all of that comes together to sort of help people have perspective-taking and also that little bit of humility that they don't have kind of a monopoly on the truth.

Q. Dean Khurana, what times of diversity are important for Harvard fulfilling its educational mission?

A. Multiple forms of diversity. Diversity in academic interests, diversity in backgrounds, diversity in racial perspectives, diversity in belief systems, political points of view, geography, diversity of parental occupations.

All of those things come together, just really kind of the diversity of the human experience.

Q. And I want to focus in on racial diversity for a minute. Why is it that racial diversity, in particular, is important to allowing Harvard College to achieve its educational mission?

A. Racial diversity, like many of our other sort of identities, can shape our experience of ourselves. They connect to our traditions, our cultures. They also shape how others experience us. And as part of a kind of, you know, complexity of human identity, these are critical aspects because they shape our understanding and perspective on the world.

Q. And have your personal experiences informed your views on the benefits of diversity?

A. Yes.

Q. And how so?

JA802

A. Well, as a teacher and educator, I have a diverse classroom. I can give you a concrete example.

For example, in teaching a case study on a company making a decision about whether it should outsource some of its work or factory to a lower-cost area, a student might advocate, well, we should do that because we don't have a union in that other place and the cost will be lower.

And in that context of explanation, I'll have another student saying, well, both my parents were in unions, and unions helped elevate our family's wages, they gave us access to a better life, and I wouldn't be at Harvard if it wasn't for a union.

And at that moment as an educator, you can see all sorts of perspectives being changed. The students who were listening, the student who made the original comment, the student now who had made the second comment also appreciating the other student's perspective. And that's the kind of perspective-taking having that diversity allows.

Q. You talked a little bit about your personal experience with the benefits of diversity inside of the classroom.

During your time as dean, have you personally seen the benefits of diversity outside of the classroom at Harvard College?

A. Yes.

Q. And how so?

JA803

A. One of the great aspects of my job and life is as faculty dean at Cabot House. I live with the students. So we live with about 350 students. And in that context, each of our houses have their own dining hall and own libraries.

You see students coming together of different backgrounds and experiences who have otherwise not interacted with each other. You see them talking to each other about their classroom experiences, about current events at the dining hall. When something happens in our community that's difficult, we come together and share in the grief. When something amazing happens to one of our students, we share in that joy.

And I watch our students form friendships that not only just last at Harvard but last a lifetime. I watch them learn to see from each other's perspective. I watch them fall in love and later on become life partners. It's really a gift.

Q. Dean Khurana, did Harvard College's interest in assembling a diverse student body start when you became the dean?

A. No.

Q. And how long did the college's interest in diversity begin?

A. You know, it's always been something from since I joined Harvard that I've understood as part of its perspective. Again, diversity, perspectives, and points of view. And the student body has been -- at least in my recent years has always been of concern.

[pp. 27:22-43:20]

Q. Let's turn to DD 2.8. Now, looking at DD 2.8, Dean Khurana, when was the first formal assessment during your time as the dean of the college when you looked at the importance of diversity?

A. In the late spring of 2014.

Q. And was that the committee that you briefly touched on with Mr. Mortara yesterday, the Walton committee?

A. Yes. That was done in consultation with the interim dean. But it was the Walton committee to look at college diversity inclusion.

Q. Sorry. I referred to it as the Walton committee. It's the college group on diversity and inclusion?

A. Yes.

Q. What was the catalyst for that particular working group?

A. Well, there had been a lot of just general discussion about belonging and inclusion. But the specific catalyst was in a student kind of performance, a student film and writings on something called "I Too Am Harvard" in which students who have been from historical minority groups talked about how their presence at Harvard still often felt suspect to others, and they didn't feel a full sense of inclusion at the institution.

Q. In addition to the "I Too Am Harvard" movement you just described, were there any other incidents on

JA805

campus that sparked the formation of this particular committee?

A. Yes. As Harvard had made a commitment toward financial inclusion, students from different socioeconomic backgrounds, students from different, say, minority, political perspectives, students from historical sexual minorities, all talked about ways that we could strengthen the sense of inclusion and belonging. We wanted to take a very comprehensive look about how to do that in order to achieve our educational objectives.

Q. Who led the college working group on diversity and inclusion?

A. That would be Professor Jonathan Walton from Harvard Divinity School and who also was the Christian Plummer professor of Christian morals, the head of Memorial Church at the university.

Q. And is that why it's sometimes referred to as the Walton committee?

A. Yes.

Q. Did the Walton committee issue a report?

A. Yes.

Q. Stepping back, what was your personal role on the Walton committee?

A. Working with the interim dean, wrote the charge and the remit for the committee and then provided feedback on drafts of the committee's report.

Q. If you could, turn to defendant's Exhibit 13, which is Tab 3 in your binder, Dean Khurana. What is this document?

A. This document is the report of the college working group on diversity and inclusion.

Q. And when was the report issued?

A. In the late fall of 2015.

Q. And did you have a role in preparing the report?

A. Yes.

MS. CONLEY: Your Honor, I'd like to offer Defendant's Exhibit 13 into evidence.

MR. MORTARA: No objection, Your Honor.

THE COURT: It's admitted.

(Defendant Exhibit No. 13 admitted.)

BY MS. CONLEY:

Q. And if you could, turn to pages 13 and 14. Sorry. I believe it's actually pages 4 and 5 of this document, Dean Khurana.

A. Yes.

Q. Who are the individuals who appear on those pages?

A. These are faculty, students, and staff who were on the committee.

Q. And who are they?

A. Well, they're really a remarkable group of individuals. These are individuals who had a strong interest in strengthening, belonging and inclusion in our classroom experiences and our residential experiences and through our student co-curricular activities.

Q. And if you turn to page 6 of the report, you'll see a section entitled "The Mission of Harvard College." Do you see that?

A. Yes.

Q. Okay. And looking at the second paragraph in the second sentence there, it states that "Harvard fosters the ability to see the world through the eyes of others."

A. Yes.

Q. What did the committee mean by that?

A. At the core of a liberal arts and sciences education is the ability to see the world from somebody else's perspective; to develop a narrative imagination of what it's like to be someone else; to deepen the reservoirs of empathy so that one can deparochialize their centeredness in the world; and realize that they exist in context of a history and context of others.

Q. Let's turn to page 7. Look at the next page there.

Now, yesterday Mr. Mortara asked you questions about this particular section of the report and particularly examples of periods in Harvard's history where it operated contrary to its current mission of diversity and inclusion.

JA808

Do you recall those questions?

A. Yes.

Q. Why did the Walton committee reference those historical periods in this particular report?

A. If you don't know the mistakes you've made, if you don't contextualize it, you're likely to make those mistakes again, and so you have to constantly be aware of your own history.

Q. Now let's turn to page 9 and look at the section entitled "The Charge of the Working Group on Diversity and Inclusion."

Do you see that?

A. Yes.

Q. What was the Walton committee's charge?

A. To assess Harvard College's learning environment in order to ensure that all students benefit equally from its liberal arts and sciences mission and experience.

Q. And after the Walton committee completed its work, did it provide recommendations?

A. Yes.

Q. Let's turn to page 30. Looking at that second full paragraph, what are the categories of recommendations that the Walton committee offered?

A. We focused on both the short-term and long-term recommendations.

Q. And with respect to the short-term recommendations proposed by the Walton committee, can you provide an example of what one or two of those short-term recommendations were?

A. Yes. There were several. But just to take one concrete example, as we increased the socioeconomic diversity of our student body, we became aware of certain practices that could create a sense of just alienation or otherness.

Specifically, we provided students free tickets to student social events. But there was actually a separate line for students who were on financial aid to get those tickets. I don't know why that ever existed, but it shouldn't have been that way, and we very quickly corrected that, that everybody could be just in one line and you just pick up your ticket.

We also became aware that, you know, again, given Harvard's commitment to socioeconomic diversity, certain practices like closing the dining halls during spring break didn't work for everyone. Some people couldn't go away for spring break, and we wanted to make sure that meals were provided and activities during that time period. So those were the kinds of things we considered.

Q. And if we turn to page 35 of the report, looking at the recommendations for long-term interventions, did the college adopt any of the long-term recommendations that were proposed by the Walton committee?

A. Yes.

JA810

Q. And can you give an example of one of those?

A. Some of the long-term recommendations we said is that we need to consistently also be looking at our academic curriculum, making sure that continually it's updated, that it reflects the interests, but also the contemporary literature in a lot of areas. And so those were some of the types of things that we began to consider.

Q. And let's turn to page 38 of the report. What was the conclusion that was ultimately reached by the Walton committee?

A. The conclusion that we reached was that while we had made much progress as an institution in increasing the diversity of our student body, we hadn't yet created an environment where we were able to ensure that we were able to realize its full benefits.

Q. Now, separate and apart from the Walton committee, were you involved in any other studies or formal assessments of the importance of student body diversity to Harvard College?

A. Yes.

Q. And if we pull up DD 2.9. What other committee were you involved in?

A. The committee to study the importance of student body diversity.

Q. And you were the chair of that committee?

A. I was.

Q. So it's referred to as the Khurana committee?

A. Okay. That's fine.

Q. When was that committee formed?

A. That committee was formed in the early spring semester of 2015.

Q. And, Dean Khurana, why was the Khurana committee formed?

A. During the work that we had been doing at the college, I stayed in constant communication with Dean Smith and President Faust and continued to talk about the opportunities we had to strengthen our commitment to belonging and inclusion. And they asked me to chair this committee.

Q. Okay. And I believe that Mr. Mortara referred you to this document in his examination of you, but it's at Tab 4 of your binder, Plaintiff's Exhibit 302.

A. I have it.

Q. And that's the report of the Khurana committee; is that right?

A. Yes, I believe it is.

Q. Let's take a look at the last page of that report, page 22.

A. Yes.

Q. Who are the individuals listed at the bottom of the page?

A. These are faculty at Harvard University.

JA812

Q. And are those faculty the members of the Khurana committee?

A. Yes.

Q. Let's take a look at page 1 of the report. So looking at the first paragraph there under the introduction, what was the ultimate goal of this committee?

A. The goal of this committee was to underscore the importance that student body diversity plays in the achievement of our educational mission.

Q. Let's turn to page 4. If you look at the first indented paragraph there, there's a quote from former President Rudenstine regarding creating a community that includes "a collision of views."

What is that referring to?

A. Again, at the heart of an educational experience is that different perspectives and points of view and ideas competing with each other, in debate with each other, arguing with each other respectfully is how we get to a closer approximation of a true understanding of the world.

Q. And, Dean Khurana, did your committee make any findings regarding the benefits of diversity to the educational curriculum at Harvard College?

A. Yes.

Q. Let's take a look at page 7. Now, there's a section there on the general education curriculum at the college. What is the general education curriculum?

A. The general education curriculum is a set of core courses that we ask all our Harvard undergraduates to take. Its aim is to prepare our students to be responsible citizens and citizen leaders in our society.

Q. And looking at the last paragraph there, what did your committee find regarding the benefits of diversity to the general education curriculum at the college?

A. Well, what we found is that, you know, since we're preparing our students for a diverse society and a diverse and interconnected world, that our general education curriculum had to continually reflect that type of diversity and those different perspectives.

And so part of what we were suggesting is that our courses really step back and take advantage and reflect on how we're doing that in our current curriculum. And this subsequently led to revisions in the gen ed cores.

Q. If we take a look at page 8, the next page, there's also a section on the broader curriculum. What is the broader curriculum at Harvard College?

A. In addition to the required courses that we have, such as in the gen ed, our students also have majors or what we call concentrations and the elective courses that they take.

Q. What were the committee's findings regarding the impact of diversity to the broader curriculum at the college?

A. That diversity was key to kind of renewing and ensuring that our broader curriculum reflected the best knowledge of the date.

JA814

Q. So still on page 8, did the committee relay an example of how diversity has made an impact on the broader curriculum?

A. Yes.

Q. Can you explain what that example was?

A. So in this example, a professor made a comment in a class that upset one of the African-American students in the class.

And then that student sort of made certain assumptions about the nature of that information, why it was presented, and was upset.

But then another student who is also African-American actually agreed with the perspective that the professor had put forward, then causing the first student to kind of rethink their own point of view.

And then there's a third student who also had another point of view who also happened to have been of African-American descent.

Just something like that demonstrates that stereotypes are broken; that you can't assume that you know somebody just because of some shared group identity of how they think; and that learning is not only for the students within that, but it's the learnings for all students who are benefiting from those perspectives and realizing that our differences don't necessarily define us. And neither do our similarities tell you everything about us.

Q. Now, Dean Khurana, let's turn to page 11 of the report. There's a section there labeled "Residences and Extracurricular Activities."

A. Yes.

Q. Did the committee make findings regarding the importance of diversity outside of the classroom?

A. Yes.

Q. Looking at the section, if you scroll down a bit, labeled "Freshman Rooming and the Harvard House System."

A. Yes.

Q. How does Harvard's housing system with respect to freshman rooming and the overall housing system allow students to benefit from diversity outside of the classroom?

A. The entire college experience is curated around creating encounters with people different from you and different backgrounds and experiences.

In the case of freshmen, we don't let our students decide their own roommate. Rather, a student sends in a description about themselves. We also have family send in family letters. They're hand-by-hand, you know, resident deans and the proctors begin to create a microcosm of the college not only in the rooming situation but also the surrounding rooms so the students can benefit from the diversity of different backgrounds and experiences that are at the college.

Q. Let's turn to page -- the next page, page 14. There's a section that's labeled "Extracurricular Activities." Do you see that?

A. Yes.

Q. Did the committee make any specific findings regarding the importance of diversity in extracurricular activities at Harvard?

A. Yes.

Q. And could you provide just one example of how extracurricular activities allow students to benefit from diversity outside of the classroom?

A. So our students are very energetic. They belong to a lot of student organizations, so we have many, many student clubs across a variety of different interests.

In the case or the example here is a group called Kuumba which is a longstanding student group that celebrates the culture of black spiritual music. And it's open to every student. And when you go to a Kuumba performance -- and you will see many of them at Harvard -- you'll see students from all different backgrounds and experiences singing from different religious backgrounds -- racial, geographic, ethnic -- all working together and honoring a culture that for many people is important to them but also a culture that students may not have been familiar with and yet respecting and honoring that culture.

And I could give countless examples of this that happen at the college.

JA817

Q. Dean Khurana, let's move one more page forward to the athletics section of the report.

A. Yes.

Q. Did the committee make any specific findings regarding diversity for athletics at college?

A. Yes.

Q. How do athletics allow students to benefit from diversity outside of the classroom?

A. Being a student athlete is another form of background and diversity and interest. We saw three. One is that athletics created a strong sense of community identity for the college.

Just in a couple of weeks, for example, we're going to have the Harvard-Yale football game in which tens of thousands of alumni and students are coming together to celebrate and reacquaint themselves with the institution.

Athletes also, you have a diverse backgrounds and experiences on our athletic teams, and their students learn to work together toward a common goal.

Our athletes also benefit all of our students because they have to both balance a rigorous training schedule but also their academic work.

But many of our students have -- all of us as humans face challenges, but I would say that for our age group, many of our students haven't yet perhaps confronted all of the things that life sometimes brings you. And having athletes who have been injured, lost

games, and have to be resilient to recover from that also teaches all of our students about the importance of that capacity and that capability of being resilient.

Q. Now, Dean Khurana, does Harvard have any offices that are devoted to issues of diversity?

A. Yes.

Q. And what are those offices?

A. This is part of the work that all of us do, but we do have within the college an office of equity, diversity, and inclusion in which we work together. We have The Harvard Foundation all to strengthen a common culture around equity, diversity, and inclusion.

Q. Now, let's turn to pages 21 and 22, looking at the "Conclusion" section of the report.

What conclusion did the Khurana committee ultimately reach regarding the benefits of student body diversity?

A. That student body diversity in all of its dimensions, including racial diversity, is essential. It's the oxygen by which our institution progresses. It's how our research progresses. It's how our teaching progresses, and it's how ultimately we are able to do our part to contribute to society.

Q. And what happened after of the committee finalized its report?

A. This report was brought to the faculty council, which is an elected body within the faculty of arts and sciences.

Q. Did the faculty council vote on whether to endorse the committee's report?

A. Yes. The faculty council voted to endorse the committee's report and then it was brought to the full committee to vote as well. I believe that both votes were unanimous.

Q. Dean Khurana, in the two and a half years since this report was endorsed by the full faculty, has Harvard College achieved its goals for creating a diverse student body?

A. Not yet.

Q. How so or why not?

A. I feel we have more work to do. Given our society, I know talent is everywhere, but our opportunities are not. And we want that talent to feel like it has a place at Harvard.

Q. And is Harvard continuing to work toward creating a more diverse and inclusive educational environment?

A. Yes. We are engaged in multiple dialogues about this. We continue to invite students from different backgrounds and experiences, and we hope they'll consider Harvard as an option. When students are here, we're trying to create an environment in which they engage and encounter each other in a variety of different contexts. So yes.

* * *

[pp. 61:12-23]

THE COURT: Can I ask you a question? You talked about you want to avoid a token experience. How do you kind of measure what's enough?

THE WITNESS: I don't think there's like a quantitative number. What it is, is that when you have a lot of people who share different backgrounds and experiences and no one is more salient than others; that is, you have just a lot of ways that you have to understand each person as an individual, that you've had enough experiences where your notions of stereotypes are broken, I think that educational experience is what gets us do that point.

THE COURT: Okay.

* * *

**MICHAEL SMITH
EXAMINATION BY MR. WAXMAN**

[pp. 110:4-111:2]

Q. How does diversity relate to Harvard's educational mission?

A. Certainly. We are looking for, as I was mentioning before, all kinds of different kinds of diversity on our campus. It is clear from my experiences in the classroom that when students bring their own perspectives on a topic we may be discussing that we get a much richer interaction among our students.

It's one thing to read about something in a book. It's much more impactful and a better learning

environment if the students can debate it from their own perspectives, realize that there are multiple different perspectives and come out of that class much stronger than they would have been had we just discussed something in the abstract.

It also helps tremendously with the scholarship that our faculty and our students are trying to undertake. Many different perspectives with respect to how we might approach a problem. I'm an engineer by training. So I naturally gravitate to those sorts of societal issues. Having a better understanding of how different people in our society view issues that are confronting the United States, help us to think through what possibly we might do, where we can take our research, where we might publish some new scholarship. Those are just two examples.

* * *

[pp. 140:16-141:17]

Q. Is there a specific -- when you're thinking about the overall share of African-Americans, Hispanics, Pacific Islander, Native Americans, and otherwise, or the share in the Harvard admitted class of any one of those groups, is there a specific level of diversity that is required to achieve the educational benefits of diversity?

A. The committee had no specific number in mind.

Q. So how do you, one, think about -- in light of Harvard's educational mission, how does one -- how did the committee think about what an appropriate or acceptable level of racial and ethnic diversity would be?

A. Right. We had a number of different conversations along this. I can try to simplify it into a statement of we were certainly not looking to move backwards. We've made progress in some areas in terms of improving the racial diversity on our campus. We've seen what a positive impact that had. But through the kinds of conversations that are ongoing right now on campus, we know we still have more to do in that space.

So there was just a, first of all, look at are we moving backwards from where we are today knowing that this is also already an issue for us to be dealing with.

How do we get to the kinds of numbers that we have today, and what does that mean in terms of resources required or other trade-offs with respect to the aspects of the mission.

And then what benefits could we get if the diversity was actually increased in a particular category.

* * *

[pp. 151:14-152:3]

Q. And what was the committee's conclusion with respect to adopting a place-based preference that would admit an equal number of students from each of the 33 clusters?

A. All right. Again, as I was discussing earlier, we looked at, for example, the racial composition of the class. And though the overall nonwhite percentage of the class came back to similar to what we have in our

current class today, we were worried about the fact that the African-American representation in that simulated class was significantly lower than what we have today.

And given the discussion I had a little bit earlier, with respect to the things that we're learning through our Inclusion and Belonging committees and task forces, we weren't looking to go backwards for any particular racial group.

* * *

[pp. 155:15-156:7]

Q. What was the committee's concern about these kinds of drops in the share of the admitted class of African-American students at the present time given what's happening in the college and the world?

A. So this felt like, if you will, a bridge too far. We're going backwards from where we are today. We've learned a tremendous amount over the last couple of years as we've dug farther into issues of diversity, inclusion, belonging. There's already a sense as these committees have heard of alienation and isolation that's interfering with an individual's ability to pursue their academic studies on our campus. Those impacts are tremendously felt by individuals here.

We're not looking to make that worse. Certainly the African-Americans in this category that are interacting with other students are bringing important perspectives to our educational process, but we're also very worried about their own educational experience.

JA824

* * *

**ELIZABETH YONG
DIRECT EXAMINATION BY MS. HACKER**

[pp. 176:1-194:14]

So you see P163 in front of you. This is already in evidence.

And down here at the bottom we see an email from you, right?

A. That is correct.

Q. And you say, "Attached are stats for tomorrow's meetings."

Right?

A. That's what it says.

Q. So let's turn to page 2 together. And page 2 here includes these reports I was referring to. I've heard people refer to these as "one-pagers."

Is that what you would call this?

A. Yes.

Q. And just so there's no confusion, we'll see some documents today that include multiple pages, but when we hear the term "one-pager," it's this piece of paper that's being referred to; is that right?

A. It is.

Q. So let's start here on the top, and I'll zoom in a little bit more so we can get a good view of this. The

JA825

one-pager here lists the total number of applicants, right? That's the first column?

A. It is.

Q. And then we see the percentage of applicants that accounts for?

A. That's right.

Q. And then we see the number of admits?

A. Yes.

Q. Next to that we have the admit rate?

A. That's correct.

Q. And then we have the percentage that that accounts for in admits; is that right?

A. That is correct.

Q. We see a comparison of the prior year's class to the admissions cycle. Is that right?

A. It is.

Q. Then if we scroll down to the bottom of this one-pager, we have some different rows for races; is that right?

A. We do.

Q. But this only includes minorities, correct?

A. That's what it does, yes.

Q. It doesn't list white applicants or white admits?

JA826

A. It does not.

Q. So looking just at the statistics about minorities on the bottom of the one-pager doesn't give you information on how the full class is shaping up because the full class, of course, includes white applicants and admits, right?

A. The number is included in total, and the gender numbers and the geography numbers include all groups.

Q. So focusing us just on the statistics on the bottom about races and ethnicities, do you see I've put a square around that on your screen?

A. Yes.

Q. And just focusing on those statistics about races and ethnicities, we can't see how the full class is shaping up, right, because this, of course, doesn't include the full class?

A. Other numbers do, yes.

Q. I'm sorry?

A. But the other numbers do include the full class.

Q. I understand you're talking about the other numbers. What I'd like to focus on is just the numbers of these races and ethnicities at the bottom.

Do you see that?

A. Yes.

JA827

Q. So focusing just on those numbers, those don't give us a full indication of how the class is shaping up because, of course, it doesn't include the full class?

A. Not for those numbers.

Q. And then if we look down here at the bottom, all of the one-pagers are dated, correct?

A. That is correct.

Q. Like the example we're looking at, the one-pagers would always compare the current admissions cycle to the previous year?

A. That is correct.

Q. They would always include this breakdown of minorities that we're looking at?

A. It included all of those. It's a template that has all those fields, and this is generated every time one was requested.

Q. It was Dean Fitzsimmons himself who requested that you generate these reports, right?

A. I believe, yes.

Q. In fact, you never prepared these reports for Dean Fitzsimmons's predecessor Fred Jewett?

A. There wasn't the technology to do that for Dean Jewett because we had an old key punch system. And so it was harder to create these reports.

Q. But Dean Jewett never requested that you prepare any type of report like this, right?

JA828

A. Dean Jewett didn't really trust the database. He did his counting by hand.

Q. But Dean Fitzsimmons did trust the database?

A. Yes.

Q. Let's turn now to P147. Do you recognize this as an email that Ms. Howrigan sent to you here at the bottom on March 19, 2013?

A. I do.

MS. HACKER: SFFA offers P149, Your Honor.

MS. CONLEY: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit No. P149 admitted.)

BY MS. HACKER:

Q. Just so we know who Ms. Howrigan is, she was the database administrator at this time, right?

A. No. Actually I was. She had stepped down from that position and was a full-time admissions officer.

Q. So Ms. Howrigan worked in the admissions office?

A. Yes, she did.

Q. This email was sent on March 19. So this was around the time of the full committee meetings, right?

A. I'd have to see a calendar to fully confirm that. But it's March; so it could have been.

Q. March is around the time when the full committee meets?

A. Yes.

Q. And the full committee meeting is where the entire admissions committee comes together to discuss and review applicants?

A. It is.

Q. Now, Ms. Howrigan in this email says to you, "We just finished up our first pass, and WRF was hoping he could get a one-pager and his ethnic stats."

Do you see that?

A. I do.

Q. "WRF" is Dean Fitzsimmons, right?

A. He is.

Q. And at the end of this email Ms. Howrigan says, "It looks like we need to take 28 more right now from the lop mes."

The reference to the lop mes is a reference to the group of provisionally admitted students that get suggested, some get removed or lopped, right?

A. They are the group of admits that are the most vulnerable, yes.

Q. So from this email it looks like the full committee has gone through the applicants once and has a provisional group of students, right?

A. It does.

JA830

Q. But before adjusting that group, Dean Fitzsimmons wants to see his ethnic stats?

A. He wants to see the one-pager, yes.

Q. You would run these one-pagers throughout the admissions cycle to provide to Dean Fitzsimmons, right?

A. I would run them whenever it was requested.

Q. And it was requested throughout the admissions cycle?

A. It was requested whenever Dean Fitzsimmons needed them. I can't tell you when.

Q. It was your responsibility to prepare those one-pagers, right?

A. It was.

Q. Let's see how often Dean Fitzsimmons needed those one-pagers. I'd like to start by taking a look at P68. And this is an admissions calendar you referenced just a minute ago.

Do you recognize this as the admissions calendar from 2013 to 2014?

A. It is.

MS. HACKER: Your Honor, I offer P68.

MS. CONLEY: No objection, Your Honor.

THE COURT: Admitted.

(Plaintiff Exhibit No. P68 admitted.)

BY MS. HACKER;

Q. So, Ms. Yong, what I'm going to do is put up what I've marked as PD20. And what I've done here is taken that admissions calendar that we looked at and put it onto a timeline so that we can build out together exactly how many one-pagers we see in an admissions cycle.

To do that, in your binder in front of it you, you have the hard copies of all of the exhibits. I'd like you to start by turning to P148.

You see that P148 is an email that you sent to Dean Fitzsimmons; is that right?

A. It is.

Q. It's dated November 5, 2013?

A. It is.

Q. And in that email you say, "The first one-pager of the season is attached," right?

A. I do.

Q. So let's put that on our calendar as the first one-pager of the season. I've put a little P148 icon so that we can see that.

And if you turn to the second page of P148, we see the one-pager, right?

A. We do.

JA832

Q. Like the one-pager we looked at on the screen together, we see a comparison of the class of 2017 to the class of 2018?

A. For early-action applicants, yes.

Q. And then down at the bottom we see a comparison of the racial or ethnic breakdown of the applicant pool for the class of 2017 versus the class of 2018?

A. In addition to the other elements of the template, yes.

Q. And like the example we looked at, the ethnic or racial breakdown at the bottom of the one-pager only shows the percentage of each minority, right?

A. It does.

Q. It doesn't list the percentage of white students for either the class of 2017 or the class of 2018?

A. It does not.

Q. And that last column shows us the change between the racial makeup of those minorities in the applicant pool for the class of 2017 to the class of 2018?

A. It does.

Q. Next I'd like you to turn to P150 in your binder. There's a few sheets of statistics in this one. What I want to turn your attention to is the fourth page in. If you see the small number in the bottom right-hand corner, it says, "HARV4232."

Do you see that, Ms. Yong?

JA833

A. I do.

Q. That one-pager was created on November 24, 2013?

A. I did create this, yes.

Q. And you created it on November 24, 2013?

A. I did. But I did not put that check mark on the page. So this is not my report, but I did create the template.

Q. Great. So we'll add that to our calendar on November 24, 2013.

And if we look at the calendar, taking a step back, this is the day before the beginning of the early-action full committee meetings, right?

A. I need to go back and check.

Q. The timeline we have on the screen in front of you if that helps.

A. It is.

Q. So at this point the subcommittees have chosen the people to admit in the early-action cycle, right?

A. They have.

Q. In your binder if you'll turn back to P149, and I promise that's the last one we'll go out of order, P149 you see is a one-pager that was prepared a few days later?

A. It is.

Q. And that one is dated 11/26/2013?

A. Yes.

JA834

Q. So we'll add that to our timeline. That was the second day of the early-action full committee meetings, right?

A. Again, yes.

Q. So these statistics would show how things changed based on the first day of the early-action full committee meeting?

A. That's what they reflect, yes.

Q. Now, let's flip to P152. This is a one-pager you actually emailed to Dean Fitzsimmons instead of printing out, right?

A. Yes.

Q. You emailed this on December 2, 2013?

A. I did.

Q. So we'll add that to our timeline as well. That was also during the early-action full committee meetings?

A. Let me just go back. December 2, yes.

Q. So, again, we're seeing the changes of the percentage of minorities in the class day to day based on the committee's discussions?

A. In addition to the breakdowns by gender and geographic region and concentration, yes.

Q. Flip with me to P153. That's our next one-pager. This one is dated a few days later, December 5, 2013, right?

A. It is.

JA835

Q. We'll put that in our timeline. And we see that was the day before the end of the early-action full committee meetings?

A. Yes.

Q. P154 is next. That is a one-pager that was created the very next day, December 6, 2013, right?

A. Yes.

Q. So we'll add that to our timeline, and we see that that was the day of the -- that was the last day of the early-action full committee meeting?

A. According to the calendar, yes.

Q. P155 is our next one-pager. That one was created on December 10, 2013?

A. Yes.

Q. So we'll add that. This is now a few days after the full committee meetings were complete, right?

A. Yes.

Q. P156 is next. That was a one-pager again created just a few days later on December 13, 2013, right?

A. Yes.

Q. We'll add that one as well. And that takes us through the end of 2013.

So flip to P157 next. Can you see that as a one-pager that was prepared on January 2, 2014, right?

JA836

A. Yes. But I did not put the slash marks on that. So I don't know whose this is.

Q. But you prepared the one-pager itself. You just didn't write the "X" mark on it?

A. That's correct.

Q. And the one-pager itself was created on January 2, 2014?

A. It was.

Q. Let's add that one to our timeline. And we can see that now we finished up early action, right?

A. Yes.

Q. This is moving on to regular decision applicants?

A. It is.

Q. This one-pager was created the day after the regular application deadline; is that right?

A. It was.

Q. Similar to the one-pager we saw after the early-action deadline, this one, again, shows us the breakdown of the minorities in the applicant pool between the classes of 2017 versus 2018?

A. In addition to the information about gender, geography, area of study, financial aid status, yes.

Q. But nothing yet about the breakdown of admits because, of course, we're just at the beginning of the regular action cycle?

JA837

A. That is correct.

Q. Flip to P158. That one-pager comes a few days later on January 5, 2014, right?

A. It does.

Q. So we'll add that one. And then P159 is next. This is an email that you sent on January 7, 2014, right?

A. That's what it says.

Q. We'll add that to our timeline as well. But this one's a little bit different. This is a one-pager you sent to Roger Banks, correct?

A. It is.

Q. This was in preparation for an ABAFAOILSS meeting?

A. It was.

Q. Just so we all understand, ABAFAOILSS is an organization, the letters stand for the Association of Black Admissions Financial Aid Officers of the Ivy League and Sister Schools, right?

A. Actually "seven sisters."

Q. Seven sisters?

A. Yes.

Q. It's a group that a number of colleges participate in that they get together to try to help historically under-represented minorities, right?

JA838

A. I've never been to an ABAFAOILSS meeting; so I can't comment.

Q. Is that your understanding of what ABAFAOILSS is?

A. I know it's a group of people who meet. I don't know why they meet or what they discuss. I've never been to a meeting.

Q. You just know that Mr. Banks requests these one-pagers with all of the statistics on Harvard's applicants and admits before he goes to ABAFAOILSS meetings?

A. The admits are of the class that's already set and finished, yes.

Q. And on page 2 you see the attachment to your email to Mr. Banks includes the one-pager, right?

A. It does.

Q. It's just like all the other one-pagers we've seen?

A. It is.

Q. So flip with me to P161. That's our next one-pager. That one was created on January 13, 2014, right?

A. It was.

Q. So if we add that to the timeline, we see it's just about a week before the subcommittees are going to start meeting, right?

A. Thereabouts, yes.

JA839

Q. And then P163 is our next one-pager. Again, this one is attached to an email, right?

A. It is.

Q. And it's dated March 2, 2014?

A. It is.

Q. So if we add that to the timeline, we see that this is the full committee -- this is when the full committee for regular action was just about to start to meet, right?

A. It is.

Q. P164 is our next one-pager, and this one was created during the full committee meetings, right?

A. Yes.

Q. That one is dated March 14, 2014?

A. It is.

Q. So we'll add that one as well.

P165 is our next one-pager. This is an email that you sent to Dean Fitzsimmons, Director McGrath, and Sally Donahue, right?

A. It is.

Q. This is dated March 17, 2014?

A. It was.

Q. If we put that on our timeline, we see that that's the day that the final review process began, right?

A. It's the start of final review, yes.

JA840

Q. And final review is when the committees might have to lop students to make sure Harvard doesn't admit too many people, right?

A. To make sure that we come in on the target, yes.

Q. P 167 is our next one-pager. And it's dated the very next day, March 18, 2014, right?

A. It is.

Q. When we add that to our timeline, we see that's the second day of the final review or lopping process, right?

A. Yes.

Q. So now we're getting towards the very end of the regular decision part of the admissions cycle, right?

A. Yes.

Q. After this decision letters are sent to applicants?

A. A week or so later, yes.

Q. But that's not the end of the full admissions cycle, right?

A. It is not.

Q. The admissions office still has to deal with the wait-list process at some point?

A. It does.

Q. And you continued to prepare one-pagers throughout that process, too?

A. I did.

JA841

Q. So turn with me to P168. This is another email that you sent to Roger Banks.

Do you see that?

A. I do.

Q. That you sent on May 5, 2014?

A. Yes.

Q. And again it attaches a one-pager?

A. That reflects the number of matriculants, yes.

Q. So we'll add that to our timeline as well.

Would this have been around the time of year of the second ABAFAOILSS meeting, or do you not know?

A. I think it might have been, yes.

Q. P169 is our next one-pager. That one was prepared just a few days later on May 7, 2014, right?

A. It is.

Q. When we add that to our calendar, we see this is leading up to the wait-list meetings, correct?

A. That is correct.

Q. P170 is our next one-pager. That one was prepared on May 21, 2014, right?

A. Yes.

Q. So now we're in the middle of the wait-list review process?

JA842

A. Middle or start. I would have to see a calendar for that to be exactly sure.

Q. This one-pager was created during the wait-list process, right?

A. Possibly or it could have been the start. I don't know if it was middle or start.

Q. So P171 is our next one-pager. And that one appears on the second page of the document.

Do you see that?

A. I do.

Q. That was created on June 27, 2014?

A. It was.

Q. We'll add that to our timeline as well. Now we're still in the wait-list process, right?

A. Yes.

Q. But this is towards the end of the wait-list process?

A. According to the calendar, yes.

Q. The part of the process where the last few spots may be being filled with people from the wait-list?

A. Yes.

Q. P172, I believe, takes us to our last one-pager of the year. Do you see that one?

A. I do.

Q. And that one is dated August 27, 2014, right?

A. Yes.

Q. We'll add that final one to our calendar. That is right before the start of the fall semester, isn't it?

A. It is.

Q. So this one-pager would be pretty close to what the actual admitted class looks like, right?

A. It is.

Q. And it shows us the percentage of each minority group in the class of 2018 compared to the class of 2017?

A. In addition to all the other fields, yes.

Q. Looking back to the timeline now that we've filled it out, by my count during the admissions cycle we found 21 different one-pagers that you prepared; is that right?

A. Looks like it, yes.

Q. And you recognize all the documents we just flipped through together as the one-pagers you were responsible for while you worked at Harvard?

A. I did.

* * *

[p. 204:1-4]

Q. In the applications that you read at Harvard, did you find that Asian-American applicants had worse personal qualities than other races or ethnicities?

JA844

A. I did not.

* * *

**ELIZABETH YONG
EXAMINATION BY MS. CONLEY**

[pp. 218:23-219:5]

Q. Ms. Yong, you said you worked in the Harvard admissions office for 33 years?

A. I did.

Q. During those 33 years, how many times have you seen an admissions officer or anyone in the admissions office demonstrate a bias against an applicant because of his or her race?

A. I have never seen that.

* * *

JA845

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 24, 2018

Pages 1 to 245

TRANSCRIPT OF BENCH TRIAL - DAY 8
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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JA846

* * *

**MARK HANSEN
EXAMINATION BY MR. HUGHES**

[pp. 46:19-47:11]

You would describe P9 as providing evidence that Asians were disadvantaged in the admissions process, but you were not sure whether it was intentional, correct?

A. It could provide evidence that Asians are disadvantaged in the admissions process. However, it's not necessarily a comprehensive look at all the factors considered in admissions.

Q. And, in fact, you cannot eliminate the possibility that bias against Asians explained the fact that being Asian is negatively associated with being admitted to Harvard, correct?

A. I'm sorry. Could you repeat the question?

Q. You cannot eliminate the possibility that bias against Asians explained the fact that being Asian is negatively associated with being admitted to Harvard, correct?

A. I can't. However, these models don't establish causal relationships between any of these inputs on the left-hand side and in admissions outcome.

* * *

JA847

**MARK HANSEN
EXAMINATION BY MS. ELLSWORTH**

[pp. 64:1-66:4]

Q. Does Plaintiff's Exhibit 12 evaluate whether there is discrimination or bias in Harvard College admissions?

A. They'd have no way of doing that. That implies a causal relationship between any of the inputs and an actual admissions decision, which is not something, as far as I know, any of these techniques can actually get at.

THE COURT: Tell me again what these models do show then.

THE WITNESS: They'd essentially give you hypothetical admitted student pools if you considered different factors, if you had admissions regimes that use different factors in making a decision.

THE COURT: I hear you saying that it shows -- that it shows hypothetical admitted students and that has some meaning, but then I hear you say that because the input and the output are the same that it doesn't have any meaning. Can you parse that for me?

THE WITNESS: Sorry, Your Honor. I'm just thinking through.

I think -- I'm not sure I'd argue it has no meaning. It's sort of when you're looking at -- so if you're looking at race/ethnicity as predictors -- if you're looking at the demographic composition of a pool using race/ethnicity as predictors, that's a little less useful. But if you're

looking at the demographic composition of a pool where race and ethnicity are not factors or legacy and athlete are not factors, or pick whichever one you'd like to remove, that is potentially useful.

THE COURT: Useful how?

THE WITNESS: You can get a sense of what an admitted class might look like if you're to use only a handful of factors. I mean, subject to the fact that this is just a small number of potential inputs.

MS. ELLSWORTH: Can I proceed?

Q. Mr. Hansen, you discussed with Mr. Hughes the fact that you showed some of the work product to Dean Fitzsimmons that we've discussed today. Do you recall that?

A. I do, yes.

Q. And you recall showing the models in Plaintiff's Exhibit 12 to Dean Fitzsimmons; is that right?

A. In some form, yes.

Q. Did you tell Dean Fitzsimmons that models 1 through 4 showed bias or discrimination against Asian-American applicants?

A. No. I wouldn't make that claim.

Q. Did you tell anyone at OIR that models 1 through 4 showed bias or discrimination against Asian-American applicants?

A. No.

JA849

Q. Did you tell anyone at all that models 1 through 4 showed bias or discrimination against Asian-American applicants?

A. No.

Q. Why not?

A. It's not a conclusion that this type of analysis could support.

* * *

**ROGER BANKS
EXAMINATION BY MR. CONNOLLY**

[pp. 82:16-83:16]

Q. So by the time full committee meetings start, all the applicants will have a tentative designation, correct?

A. Yes.

Q. And the full committee meeting is the meeting where you have 40 admissions officers and Dean Fitzsimmons is running the meeting, correct?

A. He chairs that meeting, yes.

Q. And the purpose of the full committee meetings is to make final decisions on these applicants, correct?

A. As final as we can get them before mailing deadlines, yes.

Q. And during the full committee meeting, Dean Fitzsimmons typically will give the full committee a sense of how far you had over-admitted the class and,

JA850

therefore, how many students need to be taken out of the class; is that correct?

A. That is correct.

Q. And at the full committee meetings, what do you recall Dean Fitzsimmons saying about race?

A. Well, typically what he would do is give us a sense of where we were along a variety of planes, academic, extracurricular, geographic, in addition to race, ethnicity, gender breakdowns, sort of a scattergram of the class as it was admitted at that point in time.

Q. Sure. And to be clear, typically he would give you a breakdown of admitted students by race and ethnicity?

A. In addition to other indicia, yes.

* * *

**ROGER BANKS
EXAMINATION BY MS. ELLSWORTH**

[pp. 107:7-108:6]

Q. Mr. Banks, moving on to another recruitment program, you also mentioned that you were a codirector of the Harvard College Connection; is that right?

A. Yes.

Q. When was the Harvard College Connection formed?

A. In 2014.

Q. What is the Harvard College Connection?

A. It actually is kind of an extension of the Harvard financial aid initiative. The objective of the program was to try to reach low- and middle-income students using social media as a means of communication versus traditional emails, direct mail, telephones, etc.

MS. ELLSWORTH: And, Mr. Lee, could we have DD 4.5, please. Sorry, I gave you the wrong slide number.

BY MS. ELLSWORTH:

Q. Is the Harvard College Connection still focused on lower-income students?

A. Yes. But I think it's grabbed the attention of a lot of other students who are very deep into social media and make inquiries anyway.

Q. And do current students participate in recruiting efforts through the Harvard College Connection?

A. Yes. Again, the model is to have current undergraduate staff these programs because they're the most effective representatives of the college.

* * *

[pp. 121:21-122:8]

Q. And to the extent that an applicant's race serves as a tip in the process for one individual applicant, in what rating that you assign to the application file might that be reflected?

A. For me, based on my experience, I would put that -- I would kind of insert that into the overall rating because that suggests something about further

discussion, the need for further discussion and further consideration based on all those factors together, not in isolation.

Q. Do you consider race when assigning any of the four profile ratings -- the academic, extracurricular, academic, or personal -- to an application file?

A. No. Never.

* * *

[pp. 123:11-14]

Q. In those 30-plus years, how many times have you seen another admissions officer demonstrate bias against an applicant because of the applicant's race?

A. Never.

* * *

[p. 129:1-25]

Q. And the race of the applicants would also be known to the admissions officer during the discussions of the full committee, correct?

A. That is correct. If it's on the application materials, it would be available to all members of the admissions committee.

Q. And indeed, during the full committee meeting, Dean Fitzsimmons will provide information that includes the racial breakdown of the admitted class to that point in time; is that correct?

A. I'm sorry. Can you repeat that?

Q. Yes. During the full committee meetings, in your experience, Dean Fitzsimmons will sometimes provide information that includes the racial breakdown of the admitted class to date; is that correct?

A. Yes. So in -- during a few of the years that I've been on the admissions committee -- I don't know if it's been all of the years -- during a time before we go into kind of the final committee meetings, Dean Fitzsimmons has kind of verbally given us an overview of the class as it is looking at the time. So just general demographic information, the gender breakdown, the racial and ethnic breakdown, the number of students who would qualify for our highest amount of financial aid, and also a kind of geographic breakdown of Mid-Atlantic, West Coast, things like that.

* * *

**CHARLENE KIM
EXAMINATION BY MR. STRAWBRIDGE**

[pp. 131:12-132:1]

There's a form that's filled out with respect to each docket's lops or proposed lops?

A. Yes. There's a lop list for the full committee lop process.

Q. And the lop list includes some information about the applicants who are being placed on the lop list?

A. It does have information on the applicants, yes.

Q. One of the pieces of information that goes on the lop list is the race or ethnicity of the applicant, correct?

A. That's correct. I think there are four or five columns on it, and that is one of the columns in addition to the HFAI status, I think the athletic rating, the lineage status. There might have been gender in actually some years.

Q. By "lineage," you mean whether they're a legacy or not?

A. Right.

* * *

[pp.137:20-138:23]

Q. I want to talk a little bit about how you assign the score for personal qualities.

A. Okay.

Q. You're familiar with that rating, one of the four profile ratings, correct?

A. I am familiar with it, yes.

Q. And when considering the personal score, you also think about how the applicant will add to the community, correct?

A. Yes. Because I think that their personal qualities are a part of the way that they would add to the community, much in -- you know, and in an academic way or extracurricular way or any other way.

Q. And you would agree, right, that a student's race or ethnicity is part of how they can add to the community?

A. Yes. I think all of a student's experiences and identities are ways that they can add to a community.

Q. And in terms of the personal qualities that you are looking for, you would agree that Asian-Americans as a group do not have worse personal qualities, as Harvard views them, than the other groups of applicants who apply to Harvard, correct?

A. No, they do not.

Q. And so you would have no explanation if Asian-Americans were to receive year after year lower personal scores than white applicants, for example, correct?

A. Yep. That's not what I see as a member of the committee.

Q. That has not been your experience during your nine years on the admissions committee, has it?

A. It has not.

* * *

**CHARLENE KIM
EXAMINATION BY MS. GERSHENGORN**

[pp. 140:6-25]

Q. Is race a factor that you consider when you're assigning the academic rating?

A. No.

Q. Is it a factor that you consider when you're assigning an extracurricular rating?

A. No.

Q. Is it a factor that you consider when you're assigning the athletic rating?

A. No.

Q. Is race a factor that you consider when you're assigning the personal rating?

A. No.

Q. What about the preliminary overall rating? Is race a factor that you may consider when you're assigning the preliminary overall rating?

A. So I would say that sometimes it is, along with other things that I'm looking at, whether an applicant is from a lower socioeconomic background or a rural applicant. Things like that are things that may be captured in the overall rating.

* * *

[pp. 143:2-10]

Q. And then finally with respect to your three hats, what does your role as director of the first-generation program entail?

A. So the Harvard first-generation program is an outreach -- it has two kind of arms. It's on the one hand an outreach and support program for first-generation -- prospective first-generation college students. And then on the other side is support and community building for the first-generation students that we have on campus.

JA857

* * *

[pp. 173:12-23]

Q. And fair to say that you've discussed thousands of applications in subcommittee or full committee?

A. Yes, I would say so.

Q. Have you ever seen another admissions officer demonstrate bias against an applicant because of the applicant's race?

A. I have not.

Q. Have you ever seen another admissions officer demonstrate bias against an Asian-American applicant?

A. I have not.

Q. Have you ever yourself acted in a biased way against an applicant because of their race?

A. No.

* * *

[pp. 175:7-23]

Q. And are you familiar with the fact that one of those allegations is that the Harvard College admissions office where you work is discriminating against Asian-Americans?

A. I am aware of that.

Q. What is your reaction to that allegation?

A. So I think initially it was a surprise. You know, I think now just concern. It's not what I know our office to be. It's not who I am. And I'm -- you know, I would never be part of a process that would discriminate against anybody, let alone people that looked like me, like my family, like my friends, like my daughter.

And so I'm actually really grateful to be able to be here to share my little bit of my experience on the admissions committee. Because, you know -- yeah, I'm not here to say that it's perfect, but I know that we don't discriminate against anyone. I know that we are thoughtful people, and that we're doing the best that we can do.

* * *

TIA RAY
EXAMINATION BY MS. HACKER

[p. 188:17-25]

Q. You'd agree that it's not just black students, though, who are impacted by explicit and implicit bias, right?

A. Correct.

Q. For example, Asian-American students are also impacted by explicit bias?

A. Yes.

Q. And Asian-American students are also impacted by implicit bias?

A. Yes, as we're discussing broader sociological issues.

* * *

[pp. 189:6-191:14]

Q. Let's talk through those ratings, starting with academic. In assigning a student an academic rating, you look at those students' qualifications, right?

A. Correct.

Q. You don't take race into account when you assign an academic rating?

A. Correct.

Q. You've never noticed that Asian-Americans on average have worse academic qualifications than other races or ethnicities?

A. Correct.

Q. In assigning an applicant an extracurricular score, you look at things like involvement in activities at their high school or in their community?

A. Correct.

Q. You don't take race into account when you assign an applicant an extracurricular rating?

A. That's also correct.

Q. And you've never noticed that Asian-Americans on average are less involved in activities at their high schools or in their communities?

A. Correct.

Q. In assigning an applicant an athletic score, you look at their involvement in athletic activities, right?

JA860

A. Yes.

Q. You don't take race into account when assigning someone an athletic rating?

A. We do not.

Q. You haven't noticed that Asian-Americans are less involved in athletic activities than other races or ethnicities?

A. Correct.

Q. In giving an applicant a personal rating, you're looking at their personal qualities and character, right?

A. Yes.

Q. You're generally looking for is this person a good person?

A. That's one type of question we may ask, yes.

Q. Another type of question you may ask -- I think we've heard this from some other people -- is what the applicant could add to the community at Harvard?

A. In terms of their personality, yes.

Q. You're looking at all sorts of things that go into what someone could add to the community at Harvard, right?

A. Yes.

Q. You don't take a student's race into account, though, when determining an applicant's personal rating, right?

JA861

A. Correct.

Q. The last rating I'd like to talk through is the school support ratings. You calculate those by reading the recommendation letters and assessing the strength of the school report based on those, right?

A. Yes.

Q. You don't take a student's race into account when determining their school support rating?

A. Can you repeat your question?

Q. Sure. You don't take race into account when determining those school support ratings, right?

A. Correct.

* * *

[p. 196:1-14]

Q. Then just like at the beginning, when you get to the end of the full committee meeting, someone announces the racial composition of the admitted students; is that right?

A. Sometimes, yes.

Q. To be clear, you have learned the information about the demographic and racial composition of the admitted students at the end of the full committee process, right?

A. Yes.

Q. After the full committee process ends, then the next step is the lopping process, right?

JA862

A. Yes.

Q. At that point, you have to decide which students to remove from the tentatively admitted class?

A. Correct.

* * *

**TIA RAY
EXAMINATION BY MS. CONLEY**

[pp. 206:15-207:14]

Q. And then she showed you your deposition testimony in which you said that there was no written guidance at the time of your deposition?

A. Correct.

Q. Now, what were you referring to today when you told Ms. Hacker that she was incorrect?

A. I was referring to reading procedures for the class of two thousand and -- recent reading procedures that reinforced what we had already been doing in practice but were created after the day of my deposition.

Q. So were you referring to reading procedures that were issued this year?

A. Yes, I was.

Q. And did those reading procedures that were issued this year reflect any changes to the admissions policy?

A. Absolutely not. It was just a reinforcement of what we had already been doing in practice.

Q. So when you answered at your deposition that there were no written procedures on the use of race, you were talking about at that particular time, correct?

A. Correct.

Q. But sitting here today when you said that there were reading procedures, you were talking about reading procedures that had been issued after your deposition; is that right?

A. That is correct.

* * *

[pp. 219:3-220:17]

Q. And you mentioned Visitas. What is Visitas?

A. Visitas is our weekend for all admitted students when we welcome them to campus to showcase what it's really like for undergraduate students. So they'll learn about living in our residence halls, about student life, and have opportunities to see campus and ask lots and lots of questions.

Q. How does UMRP use Visitas to recruit admitted students of color?

A. In a few different ways. So during Visitas, we run a specific hosting program through the UMRP. So we ask admitted students if they'd like to be hosted through the UMRP by an undergraduate student who is volunteering through our program.

And we also have a few items of programming during our visiting weekend. So we have a reception for all admitted students of color, and we also have a panel

discussion where our coordinators discuss life as a student of color at Harvard.

Q. And for Visitas, how does UMRP match admitted students of color to a student host?

A. So our undergraduate coordinators work very hard to make hand matches between our prospective students and our undergraduate volunteers. So they take into consideration things like the way each student may identify racially or ethnically as one item.

But they also look for things like a shared hometown, similar academic interest, or maybe overlap in extracurricular activity interest as well.

Q. And why is shared racial identity a consideration in connecting prospective students with current Harvard College students during Visitas?

A. From my own experience and from what I've seen and heard, that can be one point of connection that undergraduates and prospective students can use to really see what its like as a student of color at Harvard.

They may have similar questions about what it's like to be a person of color on Harvard's campus, and that can then be one point of connection that will lead them to having discussions about other aspects of life at Harvard, in the classroom, in our dorms, and in other activities as well.

* * *

[pp. 227:12-230:10]

Q. And let's look at the very first note that Ms. Hacker also referenced during her examination of you.

Looking at that note, can you explain why you and Ms. Ortiz decided to give these presentations to the admissions office staff?

A. From my understanding, these presentations were designed to give context more generally about the experiences of communities of color and students of color in the United States at large. And hopefully this could help admissions officers understand the broad context that students in our applicant pool or on our campus may be facing.

Q. Can you talk a little bit more about how these particular presentations provided context for admissions officers about applicants of color to Harvard?

A. Sure. So for example, in our first presentation we discussed generally Native American populations. And having an admissions officer have a general understanding of the demography of the United States at large could help an admissions officer in understanding the particular context that a student who may, say, be from a reservation in a rural area may be coming from.

So if a student communicates something about those experiences, having some background knowledge about it may be useful for an admissions officer to situate a certain experience.

Q. Let's turn back to the 2014 presentation that we were just looking at, which is at Tab 4.

THE COURT: Did you move for the admission of this one?

MS. CONLEY: I believe that Ms. Hacker did.

THE COURT: Sorry.

MS. CONLEY: Thank you.

BY MS. CONLEY:

Q. If you turn back to Tab 4 and take a look at page 18, Ms. Ray, what does this slide show?

A. This slide shows information about different Asian-American ethnicities.

Q. A little small for me to read from here, but what exactly does it show? Are these national statistics?

A. Yes. Sorry. So these are national statistics that show information about the numbers of Asian-Americans within given ethnic populations.

Q. And why was this particular slide included in this presentation that you gave?

A. We thought it was important to really highlight and discuss the wide diversity that exists within Asian-America or those who may identify as Asian-American.

Q. Let's turn to the next slide on page 19. And what was the purpose of including this particular slide in the presentation?

A. This slide helped to provide further context for other items that we would be discussing about the fact that, given that students and populations of people who identify as Asian-American are so diverse, we wanted to really highlight the fact that there's a lot of diversity within that population in terms of country of origin, cultural identity, and other items as well.

Q. And can you give an example of how this information can provide more context for an admissions officer who was evaluating an Asian-American applicant for admission?

A. Mm-hmm. Understanding the complexities of identity can really help to situate an applicant more broadly.

So for example, if a Cambodian student who lives in the South is writing about the experience of growing up in an immigrant family while also writing about how much they value growing up in Mississippi and love sweet tea, understanding more broadly the complexities of identity can really help to situate someone who's discussing any aspect of that, but certainly the ways that different experiences may impact their own perception of identity or just experiences more generally.

Q. And did you give this particular portion of the presentation to the admissions staff?

A. Yes, I did.

* * *

JA868

[pp. 241:4-7]

Q. In your six years at the admissions office, how many times have you seen an admissions officer show bias against an applicant because of his or her race?

A. Absolutely never.

* * *

JA869

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 25, 2018

Pages 1 to 250

TRANSCRIPT OF BENCH TRIAL - DAY 9
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

JOAN M. DALY, RMR, CRR
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JA870

* * *

**PETER ARCIDIACONO
EXAMINATION BY MR. McBRIDE**

[pp. 13:18-21]

Q. What issues are you addressing with your testimony?

A. Today I'll be addressing whether there's discrimination against Asian-Americans in Harvard's admissions process as well as the magnitude of racial preferences.

* * *

[pp. 28:14-30:7]

Q. You've mentioned that the significantly higher admission rates is one of the issues that you've had with the ALDC applicants?

A. That's correct.

Q. Did you prepare a slide showing what you saw in that respect?

A. I did.

Q. I'm going to turn to Plaintiff's Demonstrative 38, second slide. What's the data that you put on this slide?

A. This is the data from all the domestic applicants once we've made some of these basic cuts. And here what you can see that the admission rates are dramatically different across these groups.

JA871

Q. Let's take a look. Here on the left-hand side you're representing categories athlete, not athlete.

In going across, what did you see with respect to the difference in the admission rate for athletes versus non-athletes?

A. The differences are enormous. Athletes have an admit rate of 86 percent compared to 26 percent of non-athletes.

Q. And legacies?

A. Legacies, again very high admit probabilities, obviously not as high as athletes but almost 34 percent compared to less than 6 percent for non-legacies.

Q. And just moving down for the remaining categories, child of faculty or staff or dean or director's interest list, what was the discrepancy in admission rates for members of that group versus others?

A. For both those groups, the admit rates are over 40 percent compared to something in the 6s for the other groups.

Q. What was of the significance to you of this difference in admit rates between members of these preferred groups and non-members?

A. It's clear that they're given an enormous tip, and that makes you suspicious that the way the process works might be very differently for them. And when you're constructing a model, you're trying to get it so that, you know, how things like the academic rating, how those things are going to be treated. You want them to be treated the same across these groups.

JA872

And so as a good starting point, you should take them out of the model, given that we see that there's something different going on with them.

* * *

[pp. 41:10-43:10]

Q. The next step you said after you create the data set is you look for patterns in the applicant data?

A. I did.

Q. Did you look at the basic qualifications of the applicants?

A. Yes.

Q. And prepared a slide with that data?

A. Yes.

Q. So I'm going to Slide 4, applicant summary statistics. What data did you look at for the applicants?

A. Well, here we're looking at the AP scores -- AP scores are only available in the last few years of the data -- as well as data on the academic index, which is a weighted average of high school grades, and the various SAT scores.

Then we're looking at how that's broken out by race.

Now, one of the things we have here for the academic index and all the variables down there is we put in the Z-score which basically allows you to compare it to the average applicant. So everything here if you see a positive number on the Z-score, that means

JA873

the group on average is better than the average applicant, a negative number worse on that measure.

Q. Just as an example, on the academic index you see the .42 for Asian-Americans. What does that represent?

A. That represents that Asian-Americans are .42 standard deviations stronger than the average applicant.

Q. And when you looked at the objective qualifications along these metrics for the different racial groups, what did you see?

A. Asian-Americans are clearly the strongest on these measures, followed by whites, then Hispanics, then African-Americans. This holds true really for all the measures except for SAT verbal where Asian-American and whites have the same score.

Q. Now, did you specifically isolate and compare Asian-American and white applicants on these metrics?

A. Yes.

Q. I'm going to go to PD38, Slide 5.

What did you find when you looked at just white versus Asian-American applicants on these objective qualifications?

A. So the way this table is constructed, we take the number for Asian-Americans and subtract off the number for whites.

And the way the bars work is that the further to the right the bar is, that indicates Asian-Americans being stronger and how much stronger. If the bar went to the

left, that would indicate whites being stronger on that measure.

So what you see is that across all these measures Asian-Americans are substantially stronger than whites, again with the exception of the SAT verbal where they're the same.

* * *

[pp. 49:17-53:13]

Q. So if you look through these first three ratings, we'll just look at the overall, the academic, and the extracurricular first.

If you focus on the highest ratings, 1s and 2s, what did you identify about the distribution of these high ratings as between Asian-American applicants and white applicants?

A. So on the overall rating, Asian-Americans are slightly stronger than whites. When you look at the academic rating, they are substantially stronger. They are almost 15 percentage points higher in terms of the share getting those top academic ratings. Then you also see that they're a bit stronger, too, on the extracurricular rating, having a higher share of applicants in those top two ratings.

THE COURT: Are these added together? Like is two 1 plus 2, or is 2 just 2?

THE WITNESS: 2 is just 2. So we would add them together.

BY MR. McBRIDE:

Q. If you look at the athletic rating, what did you see there about the distribution as between whites and Asian-Americans?

A. Well, here Asian-Americans are scored much worse. I want to point out that there's no 1 here because 1 would refer to a recruited athlete. They are scored much worse in terms of getting 2s. But there are reasons to believe that this rating is not as significant in the admissions process. It matters but just not near as much as the other ones.

Q. Did you do any analysis on this issue of the significance of the athletic rating to admission?

A. I did.

Q. Going to go to Slide 10, PD38. Is that the information in this slide?

A. It is.

Q. And in terms of the columns, I see you have the ratings. I guess we have the first academic, extracurricular, athletic, and personal rating down the left side?

A. That's correct.

Q. Now, in terms of those two sets of columns here where it says "Share of Applicants" and "Share of Admitted," is this broken out by race?

A. No. This is for all the applicants there in the baseline.

JA876

Q. So what is the information in the box here with respect to share of applicants on the academic rating?

A. So what this shows is that 42 percent of applicants get a 1 or a 2 on the academic rating, 40.6 percent get a 3, and 17 percent get a 4 or worse.

Q. Then when we go to the share of admitted, what does the information in this box represent?

A. This gives you the share of the admitted class. That's a subset of the applicants that are actually admitted. Any time you see a number that's much higher there, that tells you that that characteristic had to be valid in admissions. So here you see the 82 percent of the admitted class has a 1 or a 2 on the academic rating.

Q. And so what is your conclusion about the significance of the academic rating in getting high academic ratings for purposes of being admitted to Harvard?

A. It's very important. You can see that both because the share who get a 1 or a 2 is very high. But you can also see it in if you just look at getting ratings of 4 or worse. There, 17 percent of the applicant pool gets a 4 or worse, and yet virtually no one's admitted with that sort of rating.

Q. So what does that tell you? If virtually no one is admitted with a 4 or worse academic rating, what is the significance of that?

A. That means the academic rating is very important to having a shot at admissions. You've got to score well

JA877

on that or at least above a particular level to be admitted.

Q. And the same question about the extracurricular rating.

If we look at the distribution of high scores 1s and 2s between the total pool and the admitted pool as well as the share in the receiving a 4 or worse, what pattern did you see there and what was its significance?

A. Well, you see a similar pattern where getting a 1 or a 2, those guys represent a much higher share of the admitted pool than they do in the applicant pool. And it's again difficult to be admitted if you score poorly on the extracurricular rating. Less than 1 percent of admitted students score that poorly.

Q. And if we move down to the athletic rating and look at the percentages receiving a 2 -- and I understand we don't have the 1s, as you said, because those are the excluded recruited athletes. But we look at the significance of a 2 and the share receiving the 4 or worse, what does that tell you?

A. I think there are two reasons why what this data tells you that the athletic rating is not as important.

The first is not as many people get a 2 on that athletic rating. While you do see the share of admits is higher over there, it's not a large group, and it's not a particularly big increase. The real place for it is basically doing very poorly on extracurriculars or academics is just about a deal breaker, but that's not true for athletics. You can see that 39 percent got a score of 4 or higher on the athletic rating.

JA878

* * *

[pp. 54:13-55:22]

Q. Let's go back to our Slide 9, which was the share of applicants broken out by race. When we go now to the personal score and we look at the distribution of ratings on the personal score as between whites and Asians -- and again white applicants are on the left, Asian applicants are on the right of this blowup -- what did you see there?

A. Whites are rated higher on the personal rating. And in fact, Asian-Americans not only are lower than whites, they're lower than all the other groups.

Q. I'll blow that up, if I can, please, just to make sure we see what you're talking about.

If you look at personal rating distributions across all of the four racial groups, what did you see?

A. That Asian-Americans had the smallest share of getting a 2 or higher.

Q. And just to wrap up the data that you have here, at the bottom I see you've got the remaining ratings, the school support and alumni ratings?

A. That's correct.

Q. Without having to go through each and every one, what did you see in the distribution of high ratings between whites and Asians in the remaining Harvard ratings?

A. The shares are fairly similar. They're all within 1 percent, with the exception of the alumni overall

rating, where there you see that Asian-Americans are scoring higher.

Q. Just looking at these Harvard ratings and their distributions on average, how would you describe the comparison in terms of that distribution as between whites and Asians overall?

A. On many ratings, they're fairly similar. But Asian-Americans are stronger on the academic, extracurricular rating, and the alumni overall rating. But on the athletic rating, which as I said is not as important for admissions, they're scored significantly worse, and they're significantly worse on the personal rating.

* * *

[pp. 61:16-67:21]

Q. What about the overall rating? Did you similarly analyze that?

A. I did.

Q. Going to Demonstrative Slide 15, when you looked at the distribution of high overall ratings broken down by academic decile across the entire applicant pool, what did you see?

A. Well, here it's clearly quite positively correlated as well. There are very few people who get those coveted top ratings. So even in the top decile, it's 14.7 percent. But it's also the case that if you're in one of those bottom deciles, you're out of luck.

THE COURT: What's this slide showing?

JA880

THE WITNESS: This is showing the probability of receiving a 1 or a 2 on the overall rating.

THE COURT: The overall rating. Okay.

THE WITNESS: And you can see at that bottom decile it's zero, and it goes up with each academic decile.

BY MR. McBRIDE:

Q. So just speaking broadly across the entire applicant pool, as you have a higher academic index, what does the data show you about your likelihood of receiving a high overall rating?

A. It substantially increases it. The two are positively correlated.

Q. And did you also break this up by race?

A. I did.

Q. So just to be clear, on this slide what is the data that you're showing?

A. The percentage of applicants receiving a 1 or a 2 on the overall rating by race and ethnicity for the top four academic index deciles.

Q. And again, is the ordering the same as we've seen before with the white, Asian-American, African-American, Hispanic, going left to right?

A. It is.

Q. I'm just going to blow up one here to make it a little more visible on the screen.

When you look at the distribution of overall ratings of 1 or 2 as broken down by race within a given decile, what did you see?

A. Wide disparities. You can see that African-Americans have a 45 percent chance of receiving a 1 or a 2 in that 9th decile. And that Hispanics, while substantially lower than African-Americans, are still a lot higher than the other two groups at almost 20 percent. And then whites are at 11 percent and Asian-Americans bring up the rear at 7.6 percent.

Q. And how does this compare with what you saw in the academic and the extracurricular rating?

A. It's very different. It's just distorted.

Q. And if you look across the deciles going from 10 to 9 to 8 to 7, did you notice anything?

A. Well, this pattern is systematic. In all the deciles you see this clear rating, clear ordering with African-Americans seeing the highest probabilities of getting a 1 or 2 in every decile followed by Hispanics, followed by whites, followed by Asian-Americans. And this is so strong that African-Americans in the 7th decile have well over double the chances of getting a 1 or 2 on that overall rating than Asian-Americans in the top decile.

Q. What does the pattern you see about the distribution of high overall ratings by race within a decile suggest to you?

A. It suggests that race has clearly played a role in this rating.

Q. And what about with respect to Asian-American applicants?

A. That it looks like a penalty here.

Q. And is there anything about the racial preferences you see in the data patterns that is consistent with what you understand Harvard's stated use of race in admissions to be?

A. Yes. Harvard's acknowledged that they use race in the overall rating to the benefit of African-Americans and Hispanics.

Q. And that's reflected how here?

A. In the fact that African-Americans have such a substantially higher probability of getting a 2 or better in every decile, and similarly for Hispanics.

Q. And did you do a similar analysis with the personal rating?

THE COURT: Can I ask you a question? The differences between whites and Asians on these charts, are those sort of statistically significant?

THE WITNESS: They are statistically significant, but I don't report that in my reports. I know that they look small because they're next to these big gaps, but those are real.

BY MR. McBRIDE:

Q. Did you also look at the personal rating?

A. I did.

JA883

Q. I'm going to Plaintiff's Demonstrative Slide 17 in PD38.

Just again to be clear, what's the data that's on this slide?

A. The percentage of applicants receiving a 1 or 2 on the personal rating by academic decile.

Q. And as you go from low to high academic deciles, what happens to the probability of receiving a high personal rating from Harvard?

A. Well, it looks a lot like the extracurricular rating where you still have a shot at the lowest decile, but your probability of getting one of these high ratings increases with each academic decile. This again shows that the personal rating's positively correlated to this academic index.

Q. Did you break these out by race as well?

A. I did.

Q. So I'm going to Slide 18 of Plaintiff's Demonstrative 38.

And when you look at the pattern of the personal score assignments of high personal rating assignments across the races, what did you see?

A. Well, a pattern that looks an awful like the pattern we saw for the overall rating.

Q. And how is that?

A. Well, within each decile, focusing decile 9 here, we've got 40 percent of African-Americans receiving a

JA884

2 or higher on the personal rating. That's the highest group by far. Followed by Hispanic applicants, followed by Asian-Americans -- sorry -- followed by whites and then, bringing up the rear, Asian-Americans.

Q. Did you look at the overall and personal distributions together?

A. I did.

Q. I'm going to Slide 19. Is that the overall rating distribution we saw before there at the top?

A. It is.

Q. And the personal rating here at the bottom?

A. It is.

Q. What are the similarities that you see between the distribution of the ratings across the different racial groups as for the overall and the personal rating?

A. Well, the shape is identical. You see the same systematic patterns with African-Americans scoring the highest within each decile followed by Hispanics, then whites, then Asian-Americans. And on that personal rating, Asian-Americans at the 10th decile, only 22 percent of them get a 1 or a 2. That's actually lower than the African-American share at the 3rd decile.

Q. That being decile 7, you mean?

A. Yes.

Q. When you compare the overall rating where racial preferences are admitted to be utilized with the

distribution you see with the personal rating, what does that suggest to you?

A. It suggests that race is influencing the personal rating just like it is with the overall rating.

Q. And what does this suggest to you with respect to what's happening to Asian-Americans in the assignment of the personal and the overall rating?

A. That they're receiving a penalty in it.

Q. Now, what about the other ratings like the school support ratings? Did you do something similar with them?

A. I did.

Q. And what did you see in those distributions?

A. There was some evidence of patterns that looked like the patterns we see here, but it was much more muted. You didn't have this thing where African-Americans -- where Asian-Americans were being scored worse than somebody at much lower deciles the way you do -- you do here.

* * *

[pp. 68:10-69:1]

Q. When you looked at the average admission rates per year across white, Asian-American, African-American, and Hispanic, what did you see?

A. We see that African-Americans are always the highest and significantly higher than Asian-Americans. And that whites and Asian-Americans track fairly

closely with the exception of 2019 where whites are significantly lower.

Q. Was there any statistically significant difference in the average admit rates for Whites and Asians in these years 2014 to 2019?

A. Yes. In 2019.

Q. Only in 2019?

A. Only in 2019.

Q. Is there any significance to the year 2019?

A. That's the year after the lawsuit.

Q. This lawsuit?

A. Yes.

* * *

[pp. 91:11-92:11]

Q. Now why did you do models on all of these different Harvard ratings?

A. I wanted a sense for how race was influencing all of the ratings to see -- the extent to which race effects the ratings themselves after controlling for hundreds of variables.

Q. Now, if you found that there were significant racial preferences or penalties in any of the Harvard ratings, what should you do with respect to their use in your final admissions decisions model?

A. Well, if it's especially egregious, then you're going to want to remove those variables from the model.

Professor Card and I agree with that. That's why neither one of us includes the overall rating in our admissions model because we both know that it's affected by race.

Q. And just very briefly, why do you not want to include those in the model if they're severely affected by race?

A. Well, this is -- because that's one of the paths that discrimination could take place. Say, well, we're not discriminating against Asian-Americans, they're just not likeable. Well, if the reason we're scoring them low on the personal rating is because they're getting a penalty, we've just masked the penalty.

Q. By including a personal rating in the model?

A. That's correct.

* * *

[pp. 95:20-96:11]

Q. So for Asian-American applicants, the coefficients that you saw in all the different categories, they were negative?

A. That's correct.

Q. And what do the negative coefficients that you saw for Asian-American applicants on the personal rating model mean to you with respect to the likelihood that the Asian-Americans would receive a high personal rating?

A. The likelihood was lower of receiving a high personal rating if you were Asian-American.

Q. Looking at the overall pattern of the personal rating model coefficients, what did this show you about the likelihood that the personal rating was significantly influenced by race?

A. I think it clearly is. We see the exact same pattern that we saw with the overall rating and what we saw with the descriptive analysis of both the overall and personal ratings.

* * *

[pp. 101:17-102:17]

Q. Professor Arcidiacono, I want to turn to the other ratings models. We've talked about the overall and the personal rating model. You examined and did analysis with other ratings models as well, specifically on school support and the alumni measures?

A. That's correct.

Q. What did you find with respect to the teacher, the counselor, and alumni personal rating?

A. That there was a negative penalty against Asian-Americans and some boost for African-Americans, but that was much smaller than what we were seeing in the overall and personal rating.

Q. So why is it that you didn't take those out of the model as well?

A. For those variables I was effectively being conservative, to the extent that there is a penalty.

That's going to work to lower the estimate, lower the estimated penalty in the model. And I also have a version of the model where I take out all the ratings as well.

Q. What do you mean that keeping them in the model, that that would have acted to reduce any admissions penalty?

A. Well, it's similar to the arguments with the personal score, that if there is a penalty being imposed on Asian-Americans through the teacher ratings, it would falsely conclude that it was through -- they just had the bad teacher ratings, not because of race itself.

* * *

[pp. 114:6-118:10]

Q. So I want to look now at the models, the final models that you did specific to the probability of admission now that you've identified what variables you're going to use in the model.

And just to be clear again, this is a logistic regression model like you had already discussed?

A. That's correct.

Q. And personal and the overall score, they're in your preferred Model 5?

A. No, they are not.

Q. Did you prepare a slide with the results for the coefficients from your admissions model?

A. I did.

JA890

Q. I'm going to Slide 34 of Plaintiff's Demonstrative 38.

Does this give the results for the coefficients from your admissions Models 4 and 5?

A. That's correct.

Q. These groups here, are these the same groups you talked about previously?

A. They are.

Q. What did you find with respect to the coefficients from your admissions Model 4 and 5 for the different racial groups you looked at?

A. It's very consistent with the theme that we've had throughout. Namely, African-Americans receive a large tip. That tip is substantially smaller for disadvantaged students.

Similarly Hispanics receive a large tip, but it's smaller for disadvantaged students.

And then we see a penalty for Asian-Americans. And all those penalties are statistically significant except the female disadvantaged one there.

Q. The female disadvantage in which model?

A. Model 5.

Q. And just to be clear -- let me blow this up here. With respect to the coefficient for Asian-American applicants in your Models 4 and 5 for male not disadvantaged, you show a negative coefficient of negative .378 in Model 4 and negative .466 in model 5?

A. That's correct.

Q. What do these coefficients mean about the effect of race on the probability of admission for Asian-American applicants in both models?

A. Well, that despite control for over 300 variables, we still see this significant penalty against Asian-Americans. And this is also surprising given that Asian-Americans, if you look at admissions, are also stronger on the observables associated with admissions.

Q. We heard testimony about the idea that low-income Asian-American applicants get a tip in the admissions process. Have you heard that?

A. I have.

Q. But I see, however, that with respect to the disadvantaged applicants, there is a negative coefficient; is that correct?

A. Yeah. I think it's the next ones down.

Q. I'm sorry. Thank you. Did I highlight those correctly here, Professor?

A. That's correct.

Q. So this negative coefficient here, is that a tip?

A. Well, it all hinges on who we're comparing. So for this what we're comparing is a male and a disadvantaged Asian-American to a male disadvantaged white student. They're not getting a tip relative to that student. What they may getting a tip to is a non-disadvantaged white student.

JA892

Q. And what about for the female disadvantaged?
Same analysis?

A. Same analysis, yes.

Q. Now, can you use these coefficients to determine the marginal effect of race on the chances of admission for the different racial groups?

A. Yes.

Q. And did you do that?

A. I did.

Q. I'm going to Slide 35. This looks familiar from your personal score slide earlier. Is it the same basic analysis for marginal effect?

A. It's the same basic structure, yes.

Q. Looking at the Asian-American population -- and just to be clear, does this incorporate the coefficients for all the different subgroups we looked at on the previous page?

A. It does.

Q. And does this include all the variables that you have in your model that lead to those coefficients?

A. That's right.

Q. So what did you find was the marginal effect on the probability of admission for Asian-Americans based on that negative coefficient for race?

A. That admit rates are 1 percentage point lower as a result of the penalty against them. That may seem

small, but the base is very small. So that's an over 16 percent decrease in their admissions chances as a result of the Asian-American penalty.

Q. And what about for African-American and Hispanic applicants? What was the marginal effect of their race on the probability of admission?

A. Well, it's quite substantial. Absent racial preferences, the admit rate here would be 2.3 percent for African-Americans. And you're seeing it go up by 7 percentage points, which is a 324 percent increase.

For Hispanics, the numbers are smaller, but nonetheless quite large. We're still talking about more than doubling the admit rate. We're starting off at about 3 percent and going to 7 percent, which is a 141 percent increase.

* * *

[pp. 128:22-129:8]

Q. So I want to go back to Slide 35 in your Plaintiff's demonstrative 38, which is your marginal effect of race on the probability of admission.

Did your determination of the marginal effect of race provide any sense or indication to you of how important of a role race plays in determining admissions?

A. Yes. It's quite substantial for African-Americans and Hispanics.

Q. And how does this show that?

A. Well, you've got a 324 percent increase in your admissions probability for African-Americans and 141 percent increase for Hispanics.

* * *

[pp. 149:1-15]

Q. And what do economists in your field consider to be a good pseudo R-squared for a logit model like the ones you did?

A. The premier person in this area is Dan McFadden. And what he says is that pseudo R-squared between .2 and .4 actually provides an excellent fit to the data. And he really highlights the fact that there's another measure called the R-squared which is used in another context, that you cannot compare those two because you get much lower values when you do the pseudo R-squared.

Q. And what was the pseudo R-squared for your personal ratings model?

A. .28.

Q. Does that fall within the range of excellent fit?

A. It did.

* * *

[pp. 155:15-156:17]

Q. I'm going to Slide 45. Is that this analysis?

A. That's correct.

Q. What did you find when you took Dr. Card's model and added back in -- I'm sorry -- removed the ALDC applicants and removed the personal rating?

A. If you just removed the ALDC applicants, it's negative but not statistically significant. If you also remove the personal rating, you're getting a fairly big effect of negative .56 percent, and it's statistically significant.

Actually in Card's opening report, he shows what the effect of removing the personal rating even with just -- keeping the ALDC applicants in there, and there you also see a negative and significant penalty against Asian-Americans.

Q. And what specifically is the penalty for being Asian-American on the probability of admission when you correct Dr. Card's model for ALDC and personal rating?

A. Negative .56 percent penalty.

Q. Taking a step back. Given these results with the correction of Dr. Card's model as well as the results of your own model, what is your ultimate conclusion about the presence of a penalty against Asian-Americans in the admissions process?

A. I think the evidence is quite compelling. That there is a penalty against Asian-American applicants, and these results are stuff that I would fully expect that could be published.

Q. Thank you.

MR. McBRIDE: No further questions.

JA896

* * *

**PETER ARCIDIACONO
EXAMINATION BY MR. LEE**

[pp. 200:1-17]

Q. Now, a large number of applicants to Harvard will be rejected without race ever becoming a factor, correct?

A. That's correct.

Q. There are also a group of students who are so talented and so qualified they'll be admitted without regard to their race?

A. There are very few of those; but, yes.

Q. Then there's a competitive pool of applicants for which race can make a difference, correct?

A. Correct.

Q. Now, that competitive pool is defined by a variety of variables and factors, correct?

A. Correct.

Q. And there are variables or factors other than race that determine whether a candidate is competitive or not, correct?

A. Yes. Other variables are important to the admissions process.

* * *

[pp. 202:9-203:1]

Q. You had a portion of your expert report that provided a limited opinion on racial balancing, correct?

A. Correct.

Q. It was based upon IPEDS data, correct?

A. Correct.

Q. I tried to listen carefully when you were testifying earlier today, but I didn't hear you testify about those opinions to Her Honor at all today, correct?

A. Not so far. Correct.

Q. I'm not going to ask you about them because you didn't testify about them on your direct, and so I'm not going to talk to you about them on cross.

But the opinion that you did give in your reports was one based upon IPEDS data, correct?

A. Correct.

Q. And we can agree you didn't give that opinion today, correct?

A. Correct.

* * *

[pp. 203:19-204:4]

Q. You understand that the academic index is something that each Ivy League institution prepares, correct?

A. Correct.

JA898

Q. It prepares the academic index so that it can exchange that information with other institutions, correct?

A. Correct.

Q. And you understand that one of the reasons they've done it historically is to be sure that as Ivy League institutions admit athletes, they're doing it on sort of a fair and square, even-handed basis, correct?

A. Correct.

* * *

JA899

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 26, 2018

Pages 1 to 122

TRANSCRIPT OF BENCH TRIAL - DAY 10
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

JOAN M. DALY, RMR, CRR
KELLY MORTELLITE, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 5507
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JA900

* * *

**PETER ARCIDIACONO
CONT. EXAMINATION BY MR. LEE**

[p. 7:17-25]

Q. When we left off yesterday, you and I had just begun to discuss the concept of omitted variables, correct?

A. Correct.

Q. Omitted variable bias is a well-recognized concept in your discipline, correct?

A. Correct.

Q. And it refers to the concept of a bias that might be explained by another variable not in the data, correct?

A. That's correct.

* * *

**LUCERITO ORTIZ
DEPOSITION READ IN COURT**

[pp. 91:13-92:1]

Q. Did you ever review an application of a Latino student who did not discuss his or her race or ethnic background in his application?

A. Yes.

Q. Would you take that student's race into account when deciding whether he or she should be admitted into Harvard?

JA901

A. Yes.

Q. Why would you do that?

A. Because race was one of many factors I considered in evaluating applicants.

Q. Even if the student made no mention of it in his personal essay or anywhere in his applications, you would still take race into account?

A. Yes.

* * *

**KAITLIN HOWRIGAN
DEPOSITION READ IN COURT**

[pp. 104:22-106:4]

Q. Let's start with -- do you recall Dean Fitzsimmons telling the full committee how many students had been preliminarily admitted up to that point?

A. Yes.

Q. Do you ever recall Dean Fitzsimmons breaking down that number by race?

A. Yes.

Q. When do you recall hearing that?

A. At various times during the committee process.

Q. So would you have heard it at the beginning of the full committee?

A. We may have heard it throughout the application cycle, prior to committee even beginning.

JA902

Q. During full committee, did you ever hear the number of students that had been admitted the prior year?

A. Yes.

Q. During full committee, did you ever hear those numbers from prior year broken down by race?

A. In terms of those numbers, I'm not sure what you are referring to.

Q. Of students that had been admitted the prior year.

A. Those numbers being the percentages or those numbers being --

Q. The percentages from prior year.

A. Yes.

Q. When would you hear those types of numbers from year prior?

A. Those types of numbers being applications numbers or admit numbers?

Q. Admit numbers broken down by race.

A. The question was when?

Q. Yes.

A. At various junctures throughout the process.

* * *

JA903

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
Plaintiff,)
)
v.)
)
PRESIDENT AND FELLOWS OF)
HARVARD COLLEGE, et al.,)
)
Defendants.)

Civil Action
No. 14-14176-ADB

October 29, 2018

Pages 1 to 217

TRANSCRIPT OF BENCH TRIAL - DAY 11
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

JOAN M. DALY, RMR, CRR
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JA904

* * *

**ITZEL LIBERTAD VASQUEZ-RODRIGUEZ
EXAMINATION BY MS. TORRES**

[pp. 10:12-23:23]

Q. And how did these experiences impact the perspectives that you developed prior to college?

A. Yeah. So these experiences helped me to become a better listener, a more empathetic person, someone who was more open-minded and who has a more expanded world view.

Q. How did it impact the issues that you were interested in?

A. So, again, growing up as a Chicana, I understood injustice first-hand at a really young age, and I was able to see inequalities in my communities, again, from a really young age, and that made me want to fight for social justice.

Q. And did you share an ethnracial identity when you applied to Harvard?

A. Yes. I actually had a whole essay titled "Different" that was about my experiences as a young Chicana in southern California.

Q. And so before you, you'll see that there's a document that's been marked SA3. And you can go ahead and flip through it.

And do you recognize that document?

A. Yes.

JA905

Q. What is it?

A. This is my admissions file from the Harvard admissions office.

Q. When did you first see this file?

A. I first saw this file my senior year of undergraduate -- or of Harvard. Admitted applicants and admitted students are able to see their files while at Harvard.

Q. And could I have you turn back to page 8 and flip through to page 12.

Is this a copy of the common application that you submitted to Harvard?

A. Yes.

Q. Turning to page 10, you'll see that there's a section called "Academics" that has a variety of information about your GPA, class rank.

How would you describe the rigor of your academic course load in high school?

A. So I took advantage of every academic opportunity that was available to me both at my high school and outside of my high school. So for example, I took 10 AP tests in high school, which was the majority of the classes that were offered. I received a score of five on seven of those exams and a score of four on three of those exams. Five being the highest score. When I applied to Harvard, I had taken six AP courses. I had received a five on all but one of those tests.

I graduated from high school with a 4.5 GPA and I was ranked first in my class of about 500 students from

JA906

grades ten to 12. I also, during the summers, took community college courses. So I received a grade of an A in each of those courses as well.

Q. Thank you.

Can I have you turn to page 13?

THE COURT: Are you moving to admit this?

MS. TORRES: I think it's already admitted.

THE COURT: Is this one already in? Okay. Thank you.

BY MS. TORRES:

Q. And you'll see that it says "Different" at the top.

Is this the essay that you were referencing?

A. Yes.

Q. Why did you choose to discuss your Latina identity in this essay?

A. For me, at the time and both then and now, being Chicana was such a core piece of who I am, and I felt like my ethnoracial identity had impacted every decision I had made, every experience that I had had, and I wanted to write about it because I felt like it was something important and something of value that I could bring to a school like Harvard.

Q. And can you look at the third paragraph, the sentence starts, "Here, I discovered."

Can you read that sentence out loud?

A. “Here, I discovered my life’s ambition. I want to represent my heritage and inspire my fellow Latinos to embrace our culture.”

Q. How could you have fully shared about your ambitions without any reference to your ethnoraical identity?

A. I could not have done that. All of my life’s ambitions revolve around communities of color and my ethnoraical identity.

Q. I’m going to have you look at the last paragraph and the last lines, and can you read out loud starting at “I had realized,” to the end of the paragraph?

THE COURT: We’re working on it.

THE WITNESS: Thank you. I keep touching it.

THE COURT: We’re working on it.

THE WITNESS: “I had realized that my background was unique and I was glad that I had a culture to celebrate and represent. I took this love and pride with me to high school and I will undoubtedly carry it with me to college.”

BY MS. TORRES:

Q. What did you mean by you would carry it with you to college?

A. I meant that the pride and love that I have of my ethnoraical identity was something that I felt was important to bring with me to a school like Harvard. I wanted to make sure that other students also felt open and willing to also share their pride and their love of

JA908

their respective ethnoracial identities. I was also very interested in joining cultural groups and different multi-ethnoracial groups on campus.

Q. How would you have shared about your potential contributions to Harvard without any reference to your ethnicity?

A. I would not have been able to do that.

Q. And we talked about your essay. Did your ethnoracial identity show up anywhere else in your application?

A. Yes. I, in high school, was also a part of multiple cultural groups and different ethnoracial students' groups. I was secretary of my high school's Latino club for three years. I was president of my high school Spanish club for two years and I was a member of that club for, I believe, six years. And I also had a letter of recommendation that referenced my volunteer work with Latinas in native communities.

Q. Do you recall when you first became interested in applying to Harvard?

A. Yeah. So I initially did not plan to apply to Harvard. I thought it was a school that was too white, that was too elite, that was too expensive, that was too far. And it wasn't until my junior year that I started to seriously consider applying because mainly, someone had recommended it to me.

Q. And what aspects of Harvard appealed to you?

A. I was interested in going to a school where I would be challenged academically and I felt like Harvard had

JA909

an academic caliber that I was interested in. I wanted to learn amongst the best and brightest students in the world and I wanted to learn from the best professors; and upon looking at Harvard's website, I saw that they also seemed to value diversity and ethnicity and race, which was also something that spoke to me. As someone who was Chicana who comes from a pretty diverse area in southern California, I wanted to make sure that I would feel welcome at a school like that.

Q. Did you have any conversations with anybody at Harvard before you attended?

A. Yes. I had some e-mail correspondence with the undergraduate minority recruitment program at some point during my application process. And they were helpful in giving me sort of a sense of what the school culture would be like.

Q. When you applied, what was your understanding of whether Harvard considered race in its admissions process?

A. So I was under the impression that Harvard took race, along with a number of different factors, under consideration as like part of a holistic admissions process.

Q. Did that matter to you?

A. Yes.

Q. Why?

A. I felt like so much of my experience and so much of my perspective and world view has been colored by my ethn racial identity and I wanted a school that took

JA910

that into consideration and that valued that -- that part of myself. And I also wanted to make sure that there would be other students who were people of color like my myself who would be at that school so that I could have a more safe environment, a more welcoming environment and a better, like, learning environment.

Q. If Harvard had not considered race in admissions, how would that have impacted your interest in Harvard?

A. Honestly, I probably would not have applied to Harvard if they didn't take race into account. Again, I was coming from a pretty diverse area in southern California and I wanted to go to a school that reflected the diversity of the U.S. population and of the world population.

Q. I'm going to turn now to your experience at Harvard. While there, did you interact with students of racially diverse backgrounds?

A. Yes.

Q. And how did that impact your education?

A. Yeah. So being around students from different ethnoracial backgrounds made me a more critical thinker and a more independent thinker. So I actually learned a lot about the Israeli/Palestinian conflict from a student group on campus that was, like, Palestinian student focused, and they would hold events and attend different Latinx groups, group meetings or different native group meetings and draw parallels between the situations of what was happening in the Gaza Strip and experiences of Latinxes and natives in the U.S. and

that, for me, was really mind-opening and I became more and more curious about this topic and ended up learning a lot more about it, mainly because of parallels that they drew.

Q. To what extent did you encounter diversity within a given racial group?

A. Yeah. I encountered a good amount of diversity between ethnoracial groups at Harvard. So for example, I met a number of Afro-Latinx students at Harvard and I -- again, being from southern California, that wasn't a group of people that I had known much about before coming to college and it was these students and having conversations with them and attending meetings that they were holding about their experiences in the U.S. as being both black and Latinx was also really mind-opening for me and a big learning experience. And I began to understand the African diaspora in Latin America and I feel like I became a better advocate for the Latinx community and was also better able to identify classism, and racism, and colorism within my own community.

Q. What cross-racial efforts did you engage in?

A. So I was a part of a number of cross-racial, cross-ethnic groups. For example, one that comes to mind is my work with the Ethnic Studies Coalition. So my sophomore year of undergrad, myself and two Asian-American students began meeting. We were all interested in pushing for more ethnic studies resources at the college. We started creating petitions, we started meeting with different stakeholders like deans, administrators, different student groups of color and

JA912

different professors. And in a short amount of time we were able to form a really powerful coalition.

My senior year of college, we actually had an ethnic studies track approved, which was a huge accomplishment for us. And in part, I think, our movement was so powerful because we were a cross-racial multiethnic coalition and we had so many different perspectives and world views and we were all coming together to fight for a common cause, and I think that's what made our work worthwhile and, in the end, very powerful.

Q. Now, while you were at Harvard, did you feel like there was adequate representation of students of color?

A. No, absolutely not.

Q. Why?

A. I think students of color were a huge minority in almost every space. So for example, I would walk around campus and see a lot of white faces. I would go into classrooms and buildings that were named after mainly old white men and see portraits on the walls of mainly old white men, and over time that really started to wear on me and made me sort of question, "Well, what am I doing here? Why are none of these portraits reflective of me or people that I know in my community?" And it also affected sort of the way that I interacted in the class.

So whenever I would walk into a classroom, I would take note mentally of the number of people of color that I could see and if it was a majority white class, I would become very nervous and I didn't want to speak in

those classes. I didn't want to be seen or stereotyped as someone who, you know, is just talking about communities of color because that's where I came from. And it was a very uncomfortable experience.

And I think on top of that, I was just -- when I would walk around campus, again, I was constantly stereotyped. I would have people come up to me and ask me questions like "Oh, Itzel, like, where are you really from? Where is your family from? Were you born here? Are you a citizen?" And that -- those types of questions are very alienating.

Q. Were there spaces that helped you ease that sense of nervousness and alienation?

A. Yes. I found my solace and relief in student groups on campus and -- and groups that were focused on students of color, or like ethnoracial student groups, cultural groups. So I was a part of a number of Latinx organizations, Native American organizations, multi-ethnoracial coalitions on campus.

Q. And how did the existence of those spaces impact your participation in majority white spaces?

A. I felt like in these groups, I could finally breathe. I could really be myself. I felt like these were groups of students that I could vent to and that they would be there to support me. These groups are where I met some of my closest friends on campus. And it was going to these group meetings and to these events where I felt like I gained the confidence and the sense of self to be able to confront going to majority white classes the next day. I felt like it was a safe place for me and for people like me. And it was there that I got the strength

JA914

to be able to get up and -- and navigate through Harvard day after day.

Q. Now, there is a question in this case about a reduction in the number of black and Latinx students on campus.

If there were a 50 percent reduction in the number of black and Latinx students on Harvard's campus, how would that have impacted your experience?

A. I think that type of reduction would have been, frankly, catastrophic for a student like me. I think that there are so few students of color and under-represented minority groups at Harvard as it is that any sort of reduction in any of those groups would be really detrimental to the community at Harvard, both for students of color, but also just for students in general.

I think, in particular, like a reduction in the number of black students at Harvard would be really problematic because black student groups on campus tend to be more established, more well established within the university. And for example, there were many, like, Latinx student events or student meetings that were loosely based off of events and meetings that were held in the black community, and I think losing any part of that -- that cohort would have been really problematic and I think that a lot of the power and positive change at Harvard comes from student groups of color. And I think, again, having a reduction in any of those groups is -- is awful.

Q. Now, we talked about your ethnic identity.

Do you also identify with a particular socioeconomic background?

A. Yes. I consider myself to be low-income.

Q. And during your time at Harvard, were there benefits to greater socioeconomic diversity in the classroom?

A. Yeah. I think having greater socioeconomic diversity in a classroom was helpful, but I think that the benefits that come from socioeconomic diversity are different than the benefits that come from having ethnoracial diversity in a classroom.

Q. How are they different?

A. At least in my experience, ethnoracial diversity is something that's more visibly salient. So for example, like when I was walking around campus, I didn't feel judged or discriminated against because of my socioeconomic status. I felt discriminated against because of my ethnoracial identity.

Q. And, Itzel, you graduated in 2017. What have you pursued since that time?

A. So after graduation, I spent a year volunteering with two different nonprofit organizations in Peru. Both of those nonprofits were focused on indigenous groups within the country. And this year, I am starting the California Assembly Fellowship, where I'll be working as a legislative aide in Sacramento.

Q. And has Harvard's racial diversity prepared you for this work?

A. Yes. I think having had experiences and relationships with people from different ethnoracial groups made me a much better listener, a more empathetic person, someone who is a more critical thinker, and whose, like, perspective of the world is more broad. And so I think with my work in Peru, it was really important that I had an understanding of the diversity within the Latinx or the Latin American experience because I was working with indigenous people in Peru who have a very different history and relationship with their country.

And I think now, with my work in California, working in a state that is so diverse and that is only becoming more ethnoracially diverse, it was important for me to have had experience and to have had interactions with people from a variety of ethnoracial backgrounds. And I think, again, like having had those experiences made me a better policy maker, a better policy thinker and much better equipped for this fellowship.

* * *

**MARGARET CHEN
EXAMINATION BY MS. FASULO**

[pp. 49:10-56:15]

Q. Good morning, Dr. Chen. I'm Meg. We haven't met before. I have a little bit of a cold, so please bear with me. I'd like to start by talking with you today about an article that you wrote with David Ho called "Admissions Impossible."

You helped co-write this article; is that correct?

JA917

A. Yes. Yes, it is. Yes, I did.

Q. Okay. Let's take a look at some of the things that you helped write in this article.

This article says that you surveyed 25 universities; is that correct?

A. That's correct.

Q. And in doing this, you talked to some admissions officers?

A. No, we didn't.

Q. Okay. One of the things that you wrote about here is the selection process; is that right?

A. Yes, we did.

Q. Great. Let's turn to the second page of the article and see what you wrote about the selection process. I have highlighted here that you wrote, "A student profile is created for each applicant, combining an academic rating and a personal rating." Do you see that?

A. Mm-hmm. Yes, I do.

Q. And you also wrote that, "The academic rating is fairly objective since academic credentials are difficult to misjudge."

A. Yes, we wrote that.

Q. And then you also wrote about the personal rating. You wrote, "A personal rating is based on a personality assessment, recommendations, essays, interviews,

extra-curricular activities, community involvement, et cetera.” Is that right?

A. Yes, that’s right.

Q. And then you wrote, “The personal rating often hinges on the subjective evaluation of a particular admissions officer.”

A. Yes, that’s right.

Q. And then you give an example. You wrote, “In other words, a soft-spoken applicant could be judged quietly confident by one admissions officer, an introverted or painfully shy by another.”

A. Yes, that’s in there.

Q. And then you say, “It is this subjective rating that is the downfall of many Asian-American applicants.”

Those are your words, correct?

A. Yes, it’s our words by consensus, 25 schools.

Q. Understood. And then in your article, you go on to talk about myths that exist, and what you wrote is, “We feel that many admissions officers believe in stereotypes that work against Asian-American applicants.” Is that correct?

A. Yes, that’s correct, but you should put this in the context of the historical period. This was written in 1983.

Q. Exactly. I’m -- we’re talking about the words that you wrote in this article -- that you helped write in this article in 1983.

A. That's correct.

Q. Okay.

A. And in 1983, Asian-Americans in particular, just started to -- the children of immigrants just started applying to colleges. So there are very few on college campuses.

Q. Okay. And then you say that there are stereotypes that are most prevalent and they fall into four categories?

A. Mm-hmm.

Q. Great. So let's see what you wrote about those stereotypes. The first stereotype that you wrote about is over-representation.

A. That's right.

Q. So you quote from one Johns Hopkins admissions officer who says, "They, Asian-Americans, are not necessarily under-populated here." Do you see that?

A. Yes, I see that.

Q. And then you quote from the New York Times, which says, "At the Berkeley campus of the University of California, more than 20 percent of the undergraduates these days are Asian, even though they make up only 5.3 percent of the state's population. At major graduate schools of business, such as Harvard and Stanford, there has also been a disproportionate representation of Asian students for almost a decade."

A. Yes, I see that. Can I go back and talk about the Johns Hopkins University admissions officer?

JA920

Q. We're just going to keep going.

A. One of the students who worked for Johns Hopkins quoted that to us to put in that article.

Q. Excellent. Thank you.

You've then write, "We believe this attitude prevails among admissions officers and is reinforced by the news media. We feel there is no rationale in limiting the percentage of Asian-American students in schools to the same ratios reflected in the general population."

Those -- that's what you wrote, correct?

A. That's correct.

Q. Great.

A. And Harvard does not limit the students to the general population.

Q. Okay. The second stereotype that you wrote about is narrow career interests; is that correct?

A. That's correct.

Q. Here, you quote a Harvard admissions officer who says, "It is the diversity element that hurts most of the Asian applicants because many who apply are pre-medical, science, technical types." Is that correct?

A. That's correct. We've heard that said.

Q. Then you go on to say, "We feel admissions officers fail to understand the cultural and historical reasons that Asian-Americans turn to these fields." Is that right?

A. That's correct.

Q. And you've then write, "We feel admissions officers must learn to understand the cultural and historical reasons behind many" -- or "behind the career choices of many Asian-Americans and stop viewing these choices as symptoms of some type of cultural deficiency." Is that correct?

A. That's correct?

Q. Great. Let's go now --

A. So Asian-Americans at that point, as I said before, were just beginning to come on campus. So the only thing that admissions officers learned about some of these students were things that they've seen and read in the media. So we wrote this to educate the admissions officers.

Q. Okay. Let's talk about the third category of stereotypes that you talked about. You wrote about the stereotype of passive personalities, which I have on the screen now. And you say, "We feel that some admissions officers think all Asian-Americans are passive or should be. So they penalize those who do not conform to their racist stereotypes."

That's what you wrote in 1983; is that correct?

A. That's what the 25 of us agreed to, yes.

Q. Okay.

A. But this may not be in particular about Harvard.

Q. I absolutely understand that, yes.

A. Okay.

Q. Yes. We are very clear. Thank you.

A. Okay.

Q. And then finally, the fourth stereotype that you wrote about is the model minority myth.

A. Yes.

Q. To be clear, the model minority myth is the myth that Asian-American students are the most hardworking, disciplined students, driven people imaginable. That's -- that's the myth, correct?

And what you wrote about the myth is, "This model minority myth has long been perpetuated to pit third world student groups against us. Both we and they are held up to an impossible ideal image. At the same time, this myth is also used to whitewash the fact that we as a group have not made it. It is a myth difficult to reconcile with the realities of discrimination, poverty, poor housing, cultural repression and the like that still exist."

So these were the four stereotypes that you wrote about, and you go on to say that, "Admissions officers must acknowledge their responsibility to ensure that the exclusion of Asian-American" -- "Asian-Americans into higher education does not continue."

A. Yes, that's correct. And it has that Asian-American admissions has improved since 1983.

Q. Great. So what I'd like to talk to you now about is the brief that was filed in the case that you're -- for the organizations that you are here to represent.

A. Mm-hmm.

Q. This is the that brief; is that correct?

A. Yes, that's correct.

Q. Okay. So let's take a look at it. On page 29, do you see the brief says, "Asian-Americans have a long and tragic history of racial discrimination in the United States."

Do you see that?

A. Yes, I do. I haven't read this since it was filed. I'm sorry.

Q. No. No need to apologize. We'll just look at a couple of passages together.

If we look down further on that same page, the brief says, "Vestiges of this history remains. Today, Asian-Americans continue to face racial bias and are often falsely stereotyped as timid, exotic, perpetual foreigners or model minorities. These views translate into barriers in the workplace, where Asian-Americans are the group least likely to be promoted to management even in industries where they are employed in high numbers, such as the tech industry."

Do you see that?

A. Yes, I see that. And that's the reason why we have to recognize these conditions.

JA924

Q. And you agree with this statement; that's correct?

A. Yes.

* * *

**SARAH COLE
EXAMINATION BY MS. DINAN**

[pp. 66:1-67:5]

Q. The first entry describes the Duke University Talent Identification Program.

Can you tell me what that is and how you were involved with it?

A. Sure. So through the Next Generation Venture Fund I was able to go to Duke TIP, the Talent Identification Program. And the Next Generation Venture Fund was a scholarship program for lower income/higher achieving students of color that allowed us to go to different summer camps. I went to -- over the course of a few years, Duke a couple of times, Davidson College and even was able to travel to China to take a course there.

But even more importantly, I really credit this program with being able to go to Harvard because they provided us with so much support during the college application process. I received a coach for my essay, my application essay, and they also paid for ACT and SAT test prep. The SAT test prep increased my scores by about 200 points, which was a lot, and this is obviously something that was very great for me, but it was also, on the other hand, frustrating for me because I knew my friends at Center High School, which is high school

I would have attended, did not have access to be able to pay for a test like -- pay for test prep like that or even knew about test prep like that. Whereas my friends at Pembroke had been taking it since their sophomore year of high school.

So it was just another example to me of the differences and access to opportunities to be able to, like, really cultivate and curate a strong college application process depending on where you're from.

* * *

[pp. 68:21-70:21]

Q. Why did you apply to Harvard?

A. My college counselor told me to. He felt like I had a chance. At -- at Pembroke we had, actually, a college counseling suite with several college counselors, and I was assigned one of them. And he felt like I would have a very good chance of getting in Harvard, which, again, this is another example of something that was really great for me to have a college counselor that took the time to get to know me and actually believed in me. But when I think of my friends at Center, the school I would have gone to, in conversations I had with them just learning about how they had to fight to be able to get a chance to see their college -- not their college counselor -- their school counselor, their guidance counselor to get advice on the college application process. And then when they would finally get to see her, she would often discourage them from even applying to college at all. And this was just another example of students, because of where they're from, because of what they look like, not having someone

believe in them, whereas, because I was at a school that had the resources to have counselors actually get the time to get to know me, I had just a different experience.

Q. What was your reaction when you were admitted to Harvard?

A. I cried. I felt like my acceptance to Harvard validated all of the hard work that I had put in my entire life, validated the sacrifices my family had made, and yet I had zero desire to go to Harvard. I saw Harvard as a, like, stage two of my high school. A school -- I saw Harvard as a school that was made for wealthy white people and where I would be, again, in the minority and where I would, again, have to constantly deal with casual racism, constantly try to teach my peers and superiors how to be less racially biased, and I didn't want to have to go through another four years of that. So I didn't have any interest in attending Harvard.

Q. Why did you decide to attend Harvard?

A. So I had the chance to visit Harvard and that visit completely changed my mind about it. The undergraduate recruitment minority -- the undergraduate minority recruitment program connected me with a young black woman who was a student there at the time, and she and I are still friends. So I was able to stay with her and she introduced me to her group of friends.

And I can just remember sitting in Annenberg Hall eating dinner at a table full of young black people and we were laughing together and talking about politics

and pop culture and academia and having this, like, huge wide breadth of conversation, and I just enjoyed it so much. I was like “Oh, wait. I actually can see myself here, and I feel like I could fit in here, and I feel like I could have community here in ways that I just never imagined I could have.” And that made me want to go there.

* * *

[pp. 72:24-73:24]

Q. Were there other significant events during your freshman year that impacted your impression of the racial diversity climate at Harvard?

A. Yes. And in, I think it was November of my freshman year, a Harvard student published an article in Harvard’s newspaper about affirmative action. And in that article she said that admitting black students to Harvard was like teaching a blind person how to be a pilot.

Q. How did this impact you?

A. I was outraged. Up to that point no one had suggested to me, not anyone from back home, not anyone at Harvard had suggested to me that I did not deserve to be at Harvard because of my race. And then it wasn’t even just me. It was an entire race of people. The suggestion that an entire race of people could never actually deserve to be at Harvard was ridiculous to me.

But I will say that the Black Students Association was a saving grace at that time. I was able to really

find community, and we were able to really lean on each other. And even though we were outraged that someone had the audacity to assert that despite our accolades and our achievements and all the challenges we had overcome we weren't deserving of being at Harvard, we were able to support each other and remain steadfast in our confidence that we did deserve to be there, and we did deserve the opportunity to be at Harvard.

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[pp. 78:25-84:20]

And then in terms of academics, there is so much value that black students offer academically. They make classes -- the class and learning experiences so much richer. I can't tell you how many times I've had professors email me thanking me for the contributions I've made in class or classmates stopping me outside of class thanking me for sharing my perspective. I remember once I had shared my perspective on an issue as a black woman specifically, and the woman stopped me after class and thanked me for sharing my perspective. That's just me. I'm only one person. I'm sure that that's happened, even if people aren't communicating it to so many of the black students on Harvard's campus. So the learning would be less. There would be less learning if there were fewer black students.

Q. Now, we've focused on your racial identity and related experience for some time. Do you also identify with a particular socioeconomic status?

A. Yes. Working class.

JA929

Q. How is your perspective shaped by your socioeconomic identity?

A. As I touched on earlier, my experiences as a working-class black person motivate me to be able to make the sacrifices and hard work of my parents worthwhile. I also think that my experiences lead me to really feel in solidarity with lower-income people and lead me to feel a strong commitment to fighting for a world where people don't have to endure the hardships of poverty, and this is a big reason why I teach.

Q. To what extent does your perspective differ in any way from others of the same socioeconomic status because of your ethnicity?

A. It just does differ. The experiences of a black working-class person are different from the experiences of a white working-class person and are different from the experiences of an Asian or Latino working-class person. The particular prejudices and stigmas and barriers that I face as a black working-class woman are simply different than those other groups.

Q. What benefits does socioeconomic diversity produce on Harvard's campus?

A. I think it definitely produces both social and learning benefits. It makes Harvard's campus a richer place, and it's one of many parts of students' identities that adds benefits to Harvard's campus, including like the racial diversity, how that also adds benefits to Harvard's campus.

JA930

Q. What differences are there in the academic benefits flowing from socioeconomic diversity compared to those flowing from racial diversity?

A. They're different. The perspectives and experiences that low-income students bring to Harvard's campus to make it a richer campus are different than the perspectives and experiences that students of color bring, and those are different than the perspectives and experiences that lie at the intersection of low-income students of color. And so because they're different, like, we get different benefits from them.

Q. Do you have any personal experience on that, on the difference between those?

A. Yeah. So when I think about the students who were most likely to advocate for Harvard to do better by students of color, oftentimes it was the low-income students of color because they were more impacted by the racial barriers at Harvard, and we have -- like, all students of color experience them, but it was often most impacting lower-income students of color.

Then when I think about my own family and my own family's history of financial instability, I can see where there's like that difference in experience and perspective that comes from being a person of color in addition to experiencing financial instability. So I imagine a white working-class father being laid off from his job and maybe even struggling to find work, but he doesn't have to face the disadvantages and discrimination that my black father had to face when he was laid off from his job and unable to find work.

But on the on the other hand, even when we were doing well financially and we were able to take vacations, we couldn't fully enjoy those vacations because when we entered white spaces, we were being called the "N" word. I have memories of that from what I was eight years old; or when my mother didn't have to work because my father was making enough income and she could be more involved in our education, she was often pretty ridiculously mistreated by my teachers because they didn't want to take her claim seriously that her black daughter might be gifted and that her black daughter might be deserving of a more rigorous education.

And so regardless of whether we were struggling financially or not, our race has always shaped our experience, and that is a part of what I'm able to offer and black students are able to offer to the learning environment, because we have those particular experiences.

Q. What do you think Harvard needs to do to attend to its student community?

A. It needs to be honest about the experience of students of color. And it needs to be willing to listen to the students of color. It needs to really take seriously the need to cultivate a culture of basic respect where I am not cursed at or physically assaulted just because I'm marching through campus saying that black lives matter.

There should probably be a high-level administrator who is specifically dedicated to the work of making sure Harvard's campus is a welcoming campus for students

JA932

of color. They need to be willing to invest in adequate racial diversity training for their professors so that the professors are able to teach black and brown students but also model for all of their students what it looks like to be a leader in a diverse world, because all of their students are looking to them as mentors in that way.

Harvard needs to be more proactive about attracting and placing on tenure professors of color, not only because professors of color are often -- students of color more readily see professors of color as mentors because also because the research of your professors is often, at least in what I experience, shaped by their identity. And right now Harvard has a social responsibility to support professors that are doing research that affect communities of color, to name a few things.

Q. Based on your experience, what do you think would happen if Harvard invested less in or got rid of race-conscious admissions and focused more on supporting students of color on campus?

A. I think, first of all, fewer students of color would apply. If Harvard adopted race-blind admissions, that would signal to students of color that Harvard was disinterested in us. Race-blind admissions is an active erasure. To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race. And because of that, it would be nearly impossible for me to try to explain my academic journey, to try to explain my triumphs without implicating my race. So I couldn't even submit an

JA933

application, and so many other students of color would probably feel that way, too.

And if there are fewer students of color applying to Harvard, that means there are a fewer students of color accepting the chance to go to Harvard, and there would be fewer students of color there, which means there would be fewer students of color able to create that support system that I talked about earlier. So it would actually be pretty counterintuitive to try to make Harvard a more supportive place for students of color if you adopted race-blind admissions.

It's really important to value representation on campus in addition to finding ways to provide greater institutional support. Representation and institutional support are equally important.

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CATHERINE HO
EXAMINATION BY MS. McCLELLAN

[pp. 85:24-90:3]

Q. How would you describe your racial or ethnic background?

A. I identify as Asian-American, more specifically Vietnamese-American.

Q. And when did your family emigrate from Vietnam?

A. So my parents came in the early '90s. My parents were both refugees because of the war, and my dad came over in I believe '91, and my mom came over in '94. And in that time they maintained communication

JA934

through writing letters to each other, which I still have now.

Q. What do your parents do for a living?

A. My mom is a small business owner and my dad is an artist and blows glass.

Q. Have your parents' experiences as refugees from Vietnam impacted you in any way?

A. Definitely. So besides the fact that I'm a first-generation American, like, bridging that divide between what I experience at home and what I experience, like, outside of the house, also, the fact that they weren't able to obtain a higher education because of the war and because of their status as refugees has informed how I think about education as a privilege and, like, how privileged I am to be able to go to college at Harvard.

Q. Where did you grow up?

A. I grew up in Louisville, Kentucky.

Q. And where did you attend high school?

A. I went to duPont Manual High School.

Q. What kind of high school is that?

A. It's a public magnet school, so we had five magnets, and everyone who was at the school had to apply in some way.

Q. I want to talk a bit about your experience applying to Harvard. First of all, when you applied to Harvard, what was your GPA or class ranking?

JA935

A. I believe I was seventh out of the class of 400 plus, and my GPA was weighted at the end of graduation, 4.48.

Q. Did you take the ACT?

A. Yes.

Q. Would you be willing to share your ACT scores?

A. Yes. It was a 35 composite.

Q. And when you applied to Harvard, did you submit an essay?

A. Yes. I submitted three.

Q. Okay. Can you tell us about your first essay?

A. Yeah. So the one on the common app was about the Vietnamese language, so Vietnamese doesn't have the conjugations that other languages might have. So how we talk about the past, the present and the future are all the same conjugation. So I wrote about that and how that's kind of reflective of my parents' experience coming to America. And even though obviously they did not ask for the war, they did not ask to have to move and leave everything they knew behind, they just kept rolling on, like, this is life, we have to deal with it, and how that has informed how I feel about my life. And yes, life will throw difficulties your way, but you just got to keep going sometimes.

Q. Tell us about your second essay.

A. My second essay that was also on the common app was about working in the refugee center that my mom utilized when they first went to Louisville. So she went

JA936

to this community center, and that's where she learned English and, like, how to be an American, how to live in America. And the community center still exists today, and when I was in high school, I volunteered there, and how I felt like it was coming full circle and how my identity and how my mother's experience had encouraged me to pursue these opportunities.

Q. Tell us about your third essay.

A. Yes. So this was the one that Harvard -- the supplemental one for Harvard. And it was about going to Vietnam and seeing how different the world there is and how different the lived experience there is and having a better appreciation for everything that my parents had to go through and, like, the divide they really had to bridge. And also it impacted me in the way that I view, like, the world, and we're all connected and how, even if I don't necessarily impact Vietnam, there's things that I can do in Louisville or in Cambridge and Boston that can impact my direct community.

Q. All three of your essays indicated that you are Vietnamese?

A. Yes.

Q. Was it important to you to be able speak about your race and ethnicity in your application to Harvard?

A. Definitely.

Q. Why?

A. Because for me race has influenced all of these factors of my life, like the idea of intersectionality,

which is the idea that facets of our identity are not concrete, like the fact that they all influence each other, and I can identify more with the fact I'm Vietnamese-American or a woman or college student or my age or whatever, the amount to which these different things affect me differs from room to room and from time to time. And these factors are not static. They, like, all influence each other.

So if race were to have been removed and I couldn't have talked about that, I don't know what I would have written about because all of my experiences are informed by the fact that I am Vietnamese-American.

Q. Could speaking about your socioeconomic status have allowed you to present your whole self if you could not discuss race?

A. No.

Q. Why not?

A. Because going back to the idea that all of these factors influence each other, part of coming from my socioeconomic background is because my parents are refugees, and, like, that is part of the story. So if you remove this critical part, the story is not complete. The story can't really even be told, really.

* * *

[pp. 96:16-97:4]

Q. Now, does this flier indicate that the event was open to students who don't identify as Asian-American?

A. Yes. It says all genders and identities welcome.

JA938

Q. Why did you include this description?

A. Because for AAWA, it's always been all gender and identities welcome. Even if it's not explicitly on our publication material, it's on the emails we send out. And it's really important for us as an organization to express that it's just not for people who identify with the experiences of Asian-American womanhood. If you're interested in learning more about who we are as an organization or about what we as individuals care about, we want you to be able to feel like you can talk to us and not just this exclusive space.

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[pp. 109:1-111:10]

Q. Are you familiar with concerns about the potential impact on black and Latinx students' admissions if race were eliminated from Harvard's admissions process?

A. I'm aware of those concerns.

Q. What are those concerns?

A. I think it's the fear that if race were to be removed from the admissions process, the number and the presence of Latinx, black, indigenous students on campus would be definitely decreased.

Q. Would a decrease of black and Latinx students impact your experience?

A. Without a doubt.

Q. How so?

JA939

A. From the perspective being the co-president of AAWA, as I mentioned before, AAWA does do a lot of events with other organizations of color. And obviously, if those organizations of color have fewer members and the organization itself is not as strong, doesn't have as many -- doesn't have as many opportunities to cohost events, obviously that's going to be detrimental to AAWA.

But also, as an individual student, we learn from other people, and we learn from listening to their stories, listening to their perspectives. And if their perspectives and stories aren't present on campus or aren't as present on campus, who are we supposed to be learning from? I definitely think my educational experience, like I talked about before, would definitely have been worse off if there were fewer -- like, if I couldn't have these conversations.

Q. And you mentioned that it was affirming to be able to have these conversations with your Latinx roommate in the face of weird occurrences on campus.

A. Yes.

Q. Can you explain what in particular do you mean when weird occurrences happen?

A. Yeah. So I think that there are jokes made about, like, certain races that I think students, like, don't think of, as the person making them may not think that they're like harmful, but as students of color we, like, definitely felt that was weird, like, they shouldn't have said that.

Q. Are these in particular racially-insensitive comments?

A. Yes. And I think that, like, if I were the only one who maybe thought that was weird, maybe I would have brushed it off as like, oh, I made it up, or they didn't mean that. But being able to have someone to affirm like, no, that was weird, that was wrong, I think that is super important in that we can -- we have to first recognize that there's a problem before we can fix it.

Q. And you mentioned that it would be difficult for AAWA to host as many events if there was a decrease in black and Latinx students. Could you give us an example of what you mean by that?

A. Yes. For example, like Wok Tales. Every year, obviously the organization sends people but also the organizations contribute money. And if the money comes from dues or from funding from the school, that depends on the number of students who are in the organization. If the organization is smaller, they just can't contribute, like, the members can't come, there are fewer members that can come, and also they can't contribute monetarily. So we would definitely have more difficulty having these events.

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JA941

**CECILIA NUNEZ
EXAMINATION BY MS. HOLMES**

[pp. 122:18-124:15]

Q. If Harvard had a color-blind admissions process, would that have impacted your decision to attend?

A. I think that I probably still would have filled out the application, but I think certainly it would have jumped out to me as something strange. And I think I would have questioned maybe the motives of the school and if the school was really that dedicated to diversity and to its students of color if it was failing to recognize them from the get-go, so I think it certainly would have affected my thinking in some way.

Q. I'd like to ask you about your current Harvard experience.

Do you think Harvard is -- the Harvard student body is racially and ethnically diverse?

A. I think that it's certainly more diverse than other schools I've come into contact with. I'm sure there might be other schools in the community that are more diverse. But in my experience, I think it's a pretty diverse place.

Q. How does the diversity compare to schools that you've previously attended?

A. So I -- in my high school experience and my middle school experience, most students identified as Latinx or Asian American just because that was the makeup of my hometown.

But I think Harvard's diversity in terms of percentages is more diverse than the schools I came from in terms of just the percentages of minority students. But even I think that within those racial groups, there's a lot more diversity of ethnic background or family experience than I'm used to.

Q. What do you mean that within those racial groups there's more diversity? Can you give an example?

A. I'm very involved in the Latinx organizations and life on campus. So I think often in the places where I'm from, that usually only means people who identify as Mexican-American. But I think that Harvard encompasses a lot of students from Central America, the Caribbean, South America. So I think that in that way it's a much more diverse group of students.

Q. And how has Harvard's diverse environment affected your college experience?

A. I think that for me it's been really rewarding to be on a campus where there are other students of color, who I think can kind of connect to my own issues and my own identity, that I can have meaningful conversations with. And I think it's also been very powerful to interact with students who don't share my ethnic identity per se, and therefore I think we can have various conversations about what the differences are and what kind of the cultural experiences there have been like.

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[p. 129:4-18]

There's been examples of more overt racism. For example, me and some students from Fuerza Latina last year went out to celebrate Mexican independence day. And someone, who we believed to be another student at Harvard, called us a bunch of wetbacks and essentially told us to stop being out and being happy that night. So I think that for us, that was a pretty clear example of a student committing a racist act.

Q. And what was your reaction to being called that racial slur?

A. I think that we were able to kind of laugh it off and keep going on with our night because we were a large group of students. I think at that moment we didn't necessarily feel threatened by that student, but I think we also talked about how if it had just been one of us or he had been a part of a larger group, it could have felt a lot more like a threat.

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[pp. 132:5-133:20]

Q. Turning to Exhibit 28, Fuerza's mission statement says that the organization strives "to promote awareness of issues that affect the Latino community both at Harvard and in the Greater Boston area."

How does Fuerza do that?

A. I think that we try to do that by using our meeting space as a place to talk critically about issues that may be affecting the community at any given time and making a space for students where they feel like they

JA944

can talk about those issues in a serious way without being judged for that.

Q. And in that space where students can talk about those issues, is that a space for students from different backgrounds or just Latinx backgrounds?

A. I think it probably will depend conversation to conversation. So we do have some talks that are kind of focused more within our general meeting space, and therefore usually the attendees of those events are Latinx students who like having a space where they feel like they can talk about things without being judged.

But we also have a lot of events that we pub out to the larger kind of Harvard community, and therefore I think those are more tailored to letting other people know about these issues.

Q. “Pub out,” does that mean publish to the broader community?

A. Yes. Sorry.

Q. I know there’s a lot of Harvard slang.

A. Yes. I’m sorry.

Q. Turning back to the exhibit, Fuerza’s mission statement says that the organization “wishes to provide a nurturing and caring environment for all Latinos.”

How does Fuerza do that?

A. I think we do at that by creating a space where people feel like they can be comfortable in their identity and making it feel like they can have friendships with

people in the community where they can talk seriously about any issues that they might be going through.

So I think using our general meeting space and kind of the relationships we make outside of that space as a place to make students feel welcome both in our community and on campus.

* * *

[pp. 135:5-136:25]

Q. Does Fuerza collaborate with other cultural organizations on campus?

A. We do. So I think it obviously depends event to event, but especially when we're talking about maybe aspects of identity that might be relevant to other students on campus, we often partner with different cultural orgs.

Q. Can you give an example of one of those events?

A. So every year we have the celebration of Afro-Latinidad, which is mean to be kind of an event celebrating people who identify as Afro-Latinx, and we often collaborate on that event with the Black Students Association and the Harvard Caribbean Club.

Q. And what's the purpose of hosting celebration of Afro-Latinidad?

A. I think that we try to use it as a space for students to feel validated in that identity and as a space for students to discuss that identity both with people in the Latinx community who maybe don't identify that way and don't know a lot about it, but also people who

JA946

maybe identify as other things and have simply never heard of that experience.

Q. So is there an educational component?

A. There is. It is usually kind of a dual part of a meeting. So we usually use the first half as kind of a discussion space and people to talk about their experiences, and we use the second half for more fun and kind of cultural activities.

Q. Does Fuerza collaborate with Asian American student organizations?

A. We have. So in the past we've done a few social spaces that we've collaborated with with the Asian American students association or the Asian American Association and the Chinese students association. So in the past we've had parties together. We've also worked together a lot on this case and the talks that have happened in terms of affirmative action around this case. So we often collaborate with BSA and AAA for those discussions.

Q. Is AAA the Asian American Association?

A. Yes.

Q. At those events where you collaborate with any other student organization, what is the racial makeup of the students who attend?

A. I think that for our larger events they're more open to the public in that way. They often are attended by a much more diverse population of the student body. So in that way, I think that our events are often seen as very welcoming spaces for other students as well.

JA947

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**THANG DIEP
EXAMINATION BY MS. TORRES**

[pp. 140:7-144:18]

Q. Do you identify with a particular race or ethnicity?

A. Vietnamese.

Q. And can you share about your family's history?

A. Yeah. I immigrated to the U.S. when I was eight, I moved with my family so we can have like a better opportunity. And I moved to San Fernando Valley, which is a region of Los Angeles.

Q. Can you share about the demographic makeup of the community where you grew up?

A. Yeah. It was predominantly black and Latinx.

Q. What about the socioeconomic demographics?

A. Low income.

Q. And how did your ethnicity impact your experiences growing up?

A. Yeah. When I first moved here, I didn't really speak English that well. And so I had an accent. And I think of kids like my friends who make fun of my accent and call me names like Chink and Chineto, which didn't really make sense to me because I'm Vietnamese and those terms refer to Chinese people. People also made fun of my name. And I think like to those experiences I really ended up distancing myself away from --

JA948

Q. Would it help to take one moment and just take a sip of water?

A. I'm good. Yeah.

And I think after those experiences it really, you know, pushed me to distance myself away from my Vietnamese identity. And I didn't really partake in any, like, cultural activities. And I stopped -- like my parents at home would tell me, oh, you should like learn Vietnamese. And I didn't really listen to them.

I was frustrated because I really wanted to get rid of my accent. And I didn't talk with any other Vietnamese students in my high school because I was, like, those students didn't speak English at school. And I was like why can't they just speak English as well just like me in high school.

And so I think those things, like my experiences growing up really forced me to like as a kid like view the things that were so core to me as foreign and as something I need to erase in order for me to fit in, in order for me to do certain things that would allow me to be successful.

Q. Did your relationship with your Vietnamese identity change over time?

A. Yeah. It changed dramatically in high school because I enrolled myself in the humanities magnet program which I think my -- one of my motivations was to really improve my English, since the program was very intensive in like reading, writing, and speaking. And so I wanted to work on areas that I needed to work on.

JA949

And the other thing is the program focused a lot on addressing -- or like looking at the academics through a social justice lens. And so in going through the program, I learned a lot about like the languages and the concepts that explained why I was feeling the way I felt as a kid and why I, you know, like hated that part of myself.

And by high school, grappling with my identity at the end of junior year and beginning of senior year, I really felt this connection to my Vietnamese identity and the connection to my culture. It became such a huge part of who I was. And that journey itself of understanding my identity was really like crucial to who I am today.

Q. And was it crucial to when you applied to college?

A. Yeah. Definitely. When I applied to college, I felt like in order for me to express myself authentically and really like show me as a full person, I needed -- I wrote about my Vietnamese identity on 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 feeling like my identity has been erased. And so I took like the power back and wrote about that on my college essay.

Q. And we are going to jump into that application.

Before we do that, do you identify with a particular socioeconomic background?

A. Low income.

JA950

Q. And you mentioned that your neighborhood was predominantly black and Latinx students. Do you think that children of different races who are low income are treated the same?

A. No, they're not treated the same.

Q. How did you see them being treated differently?

A. Growing up there was a lot of assumptions around my black and Latinx friends being dangerous. The same assumptions were not made about me.

Q. Can you provide an example about that?

A. Yeah. In middle school when there was a stabbing on campus, teachers and students immediately assumed it was either a black or Latinx student. And no one assumed or thought it could have been someone who looked like me.

Q. How do you think that impacted your education?

A. I think in the classroom when you look at teachers and they don't see you as, like, dangerous, you just feel automatically more comfortable. I felt automatically more comfortable in school and the classroom, and so that really pushed me to -- I think that created an environment where I was able to excel academically.

Q. Were there other ways that you saw that your schooling was racialized?

A. Yeah. The same friends who went to my -- black and Latinx friends who went to my middle school were not tapped for the same humanities magnet program that

JA951

I ended up enrolling in, even though they were just as smart and talented.

Q. And do you think that you also had to overcome racial prejudice as a Vietnamese immigrant?

A. Yes.

Q. And how would you compare that experience to what you saw your peers who were black and Latinx?

A. I think feeling like I'm foreign and having people look at me as like a foreigner, I think it's very different from my black and Latinx friends being perceived as dangerous.

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[pp. 147:18-149:2]

Q. And there were lots of comments throughout your application file. Which comments resonated with you the most?

A. The comment that I had shown a strong sense of self, and it also said -- mentioned my Vietnamese immigrant identity.

Q. And briefly why did that matter to you?

A. I think because I felt that part of myself, again just being invisible, I think it was really nice to feel like that part was valued and noticed by someone.

Q. I'm going to turn now to your time at Harvard.

How would you describe the level of Asian American representation on Harvard's campus?

A. I think as a group, Asian Americans have a fairly like strong representations as compared to black and Latinx groups.

Q. How would you describe the level of diversity within the Asian American community?

A. There are more East Asian students who are Chinese and Korean than Southeast Asian students like Vietnamese, Cambodian, Laotian.

Q. How has the lower representation of Southeast Asian students made you feel?

A. I think it just really sucked if you're in spaces on campus where it is like an Asian space, but I don't think I -- you know when you don't see yourself represented, I think it's just like a sucky feeling to have. And I think like right after me being like, yeah, my Vietnamese identity means so much to me and then going to spaces where I don't see that represented, I think it sucks.

Q. Can you use one other word besides "sucks" just in case this goes up on appeal?

A. Yeah. I felt marginalized and I felt -- I think I felt -- I felt erased again. And I think it's -- yeah, I think "marginalized" and "erased" are two words I would use.

Q. They're all great, great words.

* * *

[pp. 150:17-157:3]

Q. Are there spaces where you have felt that there is a greater voice for Southeast Asian students?

JA953

A. Yeah. I just think in spaces where there's a higher representation of Southeast Asian students.

For example, in the Phillips Brooks House Association, which is a nonprofit, but like a public service group, we work with a lot of students in a lot of communities in Boston. One of them is the Vietnamese community.

So when there are higher representation of Southeast Asian students in PBHA, I don't feel the burden of having to translate or communicate with parents who don't speak English all the time. I don't feel that burden of having to navigate like identity and cultures all the time because it's tiring.

Another example would be like in my Asian American literature class where we talk about different Asian identities. I don't have to be the only one people turn to or expect -- or turn to when we talk about the Vietnamese experience or like the refugee experience because I had like other classmates who can share different perspectives.

I can't represent every single Vietnamese person in this world and in this country. So I can only represent what I know and a piece of that, and there's only so much I can say.

And when there are other students who look like me and who have similar experiences, I don't have to be the only one talking, even like, you know, because many of my experiences are like traumatic and like, I don't have to always be so emotionally drained in class to discuss these topics with my classmates.

JA954

Can I add one more thing?

Q. Yes.

A. Also this happened this year when I was in my Asian American graphic novel class. One of my professors was Vietnamese and she pronounced my name correctly. And that was the first time in 13 years throughout my whole education that a teacher and a professor at Harvard pronounced my name correctly.

So I think that's just like I think to show how validating it is to have people who can understand your experiences, even if it comes down to understanding like pronouncing your name correctly.

And yes, I said you can say Thang because I think that's a form of survival because I'm not going to spend every day telling people the correct way to pronounce it.

I think it's very validating.

Q. Than you. Has AAA gotten involved in this lawsuit since it's been filed?

A. Yeah. I think because the conversations on campus have been like -- there's just more conversations. AAA signed onto the LDF brief. And I think the climate on campus has changed because conversations and -- there's definitely been more effort to engage students of different background and different experiences in the case. And I think my involvement in this case as a Vietnamese immigrant shows that.

Q. Thank you. So we're going to move on from the Asian American community.

JA955

Have you had interactions with classmates of color from different racial backgrounds while at Harvard?

A. Yes.

Q. And how have those interactions impacted your education?

A. I think they were very beneficial in the sense that we all have different life experiences. So when I interact with students who are black and Latinx, I gain new perspectives. New perspectives on how to look at different issues.

Q. Can you provide an example of that?

A. In my public health class, one of the students raised a point that a lot of scientific research about health revolves around the white population.

What that means is the health needs of different communities of color or other communities are not being addressed -- are not addressed -- yeah, are not being addressed because there is no research about that population.

And I think that was like a point that I have not really thought fully about before. And I think in really reflecting on the comment that my classmate said, I was able to think about my own experiences in the scientific community and how when we look at ethical practices and how to design scientific studies, how can we be more inclusive and encompassing of all communities so that all communities' health needs are being addressed.

JA956

Q. How has that perspective impacted your conversations about public health issues up to this point?

A. Yeah. When I talk to my friends about it, I think the perspective allowed me to challenge a -- so for example, in one of the labs I'm in, there is research being done on immigrant populations in Boston. But the lab has no research participants who are Vietnamese immigrants.

And so it allowed me to reflect on my own identity and experiences and also, you know, like that perspective pushed me to challenge why is it that the research doesn't include Vietnamese immigrants and really grapple with that with my friends.

Q. And can you remind us of the racial background of the classmate who made that comment?

A. A black classmate.

Q. There's an issue in this case about the reduction of students of color on campus.

Can I ask you specifically how would a 30 percent reduction in the number of black students, African American students on campus impact your education?

A. I think it would hurt my education dramatically, not just education in the classroom but also outside the classroom.

Q. Why?

A. Being Vietnamese and already underrepresented on campus, I think I've learned a lot about how to build coalition, how to collaborate with other communities of

JA957

color, and how to be aware of class differences because of efforts made by my black friends and black students from organizations.

And like, for instance, when there was an arrest of -- an unfair arrest of a black college student on campus, I think all the like black student organizations worked together to push and advocate and create -- created for space -- created spaces where students can come and grapple with what happened and really understand, like, yeah, understand what happened.

And I think they were very open to like members outside the communities. And I think in doing so, it improved the campus climate because I was able to learn more about issues and like understand a bit better about issues affecting a different community.

But I also think that that allowed me to understand how my own -- the issues affecting my own communities are like inherently tied to issues affecting other communities of color. And then how can we work together to advocate and to build power together so that you can really create systematic change.

Q. Thang, when do you graduate?

A. May 2019.

Q. And have you thought about what you want to pursue after college?

A. I hope to become a pediatrician working in an immigrant community and communities of color.

Q. How has Harvard's racial diversity prepared you for this work?

JA958

A. Yeah. I think in my interactions with my friends who are black and Latinx and who are just different from me, I really learned how to work across differences and how to build meaningful connections and collaborations so that every single stakeholders are being accounted for and how you can like make the collaboration meaningful and that you're not working for someone but you're working with someone.

And I think the other thing is my interactions really gave me a tool set to think about cultural sensitivity and cultural competency.

And so when I become a doctor, I'll be working with young people who all have very different living experiences. Like someone who experienced trauma from fleeing a war or leaving the country or being separated from their family is very different from someone who was born in the U.S.

And I think how can you look at young people in a way that is very holistic and take into account like full consideration of their backgrounds so that you can provide a really good, like an informed healthcare so that they can have a normal development trajectory and so that they can grow up and have the same opportunities and like have like the health to fulfill whatever they need to fulfill.

So I think like my interactions with my friends who are just different from me just opened my eyes to things like just seeing people as people and not just as a single identity or aspect of them.

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JA959

**THANG DIEP
EXAMINATION BY MS. PERRY**

[pp. 160:18-161:24]

Q. Okay. Great. I'd also like to talk with you about bias against Asian American students.

The student amici submitted a brief during the summary judgment phase of this case. This is that brief, yes?

A. Yes.

Q. And if you go to page 9, the brief refers to "the reality of a society where certain ethnoracial minorities, Asian Americans among them, encounter structural racism and implicit bias because of their identity."

Did I read that right?

A. Sorry. Did you say page 9?

Q. Page 9 --

A. Oh, oh. At the top.

Q. Yes. Page 1 of the main brief.

A. Okay.

Q. They described "the reality of a society where certain ethnoracial minorities, Asian Americans among them, encounter structural racism and implicit bias because of their identity."

A. Sorry. I'm just trying to identify that on this page.

JA960

Q. I have it up on the screen as well, but it's towards the bottom of the top paragraph, I believe.

A. Towards the bottom. Okay.

Q. All I'd like to know is if you would agree with the description that Asian Americans are among the groups that might encounter structural racism and implicit bias because of their identity?

A. So I think Asian American students are students of color, so yes. And I think we should also think about in the Asian American community the different ethnic groups who might just experience that differently as well.

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**MADISON TRICE
EXAMINATION BY MS. McCLELLAN**

[pp. 167:14-168:19]

Q. Where did you attend high school?

A. I attended high school -- I spent one year in Maryland, half of a year in D.C., and the rest of my high school years were spent in Houston, Texas.

Q. And when you were in Houston, Texas, where you spent most of your high school years, what type of high school did you attend?

A. I attended a private predominantly white, pretty wealthy high school.

Q. What would you say was the racial makeup of your high school?

A. It was about 70 percent white, 20 percent Asian American, and maybe somewhere between 7 and 8 percent black, like 1 percent Latinx and maybe 2 percent of mixed race.

Q. What was it like in your classes racially? What was the racial makeup of your classes?

A. The racial makeup of my classes was definitely predominantly white. I also found that it varied depending on the course. So for upper-level classes at that school also it was kind of -- I was more likely to be one of the only black students in the room.

Q. And what was it like to be one of the only black students in your classes?

A. It was difficult. It was pretty isolating at times. There were times where you felt like a representative for your entire race, where someone would say something offensive and you'd have to be able to discuss it in a very logical and calm manner. But there was nobody else to back up what you were saying, so you were kind of alone -- nobody else who had experienced it to back up what you were saying, so you were kind of alone in doing so.

* * *

[pp. 176:9-179:16]

Q. How does your experience with Harvard's racial diversity compare to your experience in high school?

A. It's so different.

Q. How so?

JA962

A. I have friends from all different backgrounds. I get to celebrate within -- it's different being involved in black community organizations. I was involved in a black community organization in high school, but there are so many of us that we're able to have a number of different organizations, so every niche of black identity is celebrated and has a space on campus. And if there isn't one, it can be created and other people will come, you can celebrate your culture that way.

Microaggressions happen a lot less frequently. So I'm able to really devote myself to academics, extracurriculars, and friendships without having to worry as much about the feeling of being represented or being distracted by the types of discrimination that I faced in high school. And I feel like my identity is really embraced and supported.

Q. When you say microaggressions happen less are frequently, do you feel that that's related to the amount of diversity on campus?

A. Yes.

Q. Why?

A. I think that when you have -- I think that's true for a number of reasons. I think when you're interacting with a critical mass of minorities, it's harder to have stereotypes about them. It's also harder to express those without somebody saying, hey, that's not okay, as opposed to having one minority in a room and, if there are five people who want to say something that might be offensive to that person, there's only one person who can respond.

JA963

And I think that because there's already a committed value to diversity, it's kind of expressed that discrimination and microaggressions are not something that the broader community would tolerate.

Q. Now that you are a student at Harvard, how are you doing academically?

A. I'm doing pretty well.

Q. What grades have you received? What's your average?

A. My GPA is a 3.66 right now.

Q. Now, you mentioned learning about the Black Students Association during your visit at Visitas.

Do you participate in the Black Students Association or BSA now that you're on campus?

A. Yes. I am a member of the BSA.

Q. What is the BSA?

A. The BSA is the Black Students Association. Its mission is to create a space for black students to have community and support and professional development and to share in those things together and to create kind of a home within a home for black students and also to facilitate engagement with a broader community.

Q. When was the BSA founded, if you know?

A. 1970.

Q. And approximately how many members or participants are there in BSA?

JA964

A. I would say about 400 to 500.

Q. Is there diversity within the BSA?

A. Yes.

Q. And are there other affinity groups that serve black students specifically?

A. Yes. I would say there are somewhere between 10 and 15 organizations on campus that serve black students.

Q. Is the diversity within BSA important?

A. Yes.

Q. Why?

A. I think that for us to be able to learn from each other, for us to be able to learn about the different shapes that blackness can take, and to be able to learn about the different ways that people are impacted by being black or by racism or by classism and to be able to be good leaders for the broader community, it's important to be able to have that diversity reflect -- that is in the nation reflected in our community.

I think also it's important for the broader Harvard community to be able to interact with a number of different black people who have very different experiences, whether that's in terms of religion or class or politics or national origin, and to be able to see that black people are not a monolith. And I think that the diversity of BSA does a really good job of making those things possible.

* * *

[pp. 191:11-193:7]

Q. Are you familiar with concerns about the impact on the admissions of black and Latinx students if race were eliminated from Harvard's admissions process?

A. Yes.

Q. What are those concerns?

A. That the black and Latinx population at Harvard would decrease by at least 50 percent.

Q. Would the decrease of black students affect BSA?

A. Yes.

Q. How so?

A. BSA is really bolstered and made full and vibrant because of the diversity of our members, because of the critical mass of our members. The ideas that we have in our events that we put on and our ability to put them on is related to the numbers that we have. And I think a loss of any of that diversity, a loss of that mass would be a huge loss for BSA's ability to put together programming and also for us to learn and grow together.

Q. If BSA were not able to put on the same amount of programming, how would that impact the larger Harvard community?

A. The larger Harvard community could suffer a loss as well as the black community, whether it was the minority career fair, which is for all minorities, that would be a loss. Or rush hour, which is one of the most inclusive events that you can attend as a freshman.

JA966

Seeing that loss or losses of things like black convocation which sparked other events. There are so many ways that BSA touches other communities that I think the general community would lose out.

Q. How would a reduction in the amount of black students on campus impact Harvard more broadly, aside from BSA?

A. I think there are so many things that we bring to the table. We bring our experiences with racism and with social justice and with our culture, and we are the only people in classrooms who can speak to our own unique experiences.

Every year there are remarkable theses that are put together by black seniors that are to some degree framed by their experiences.

Our contributions to spirituality and advocacy and arts and athletics on campus are also really deep, alongside our contributions academically.

Without any of those things, I think that the richness of Harvard and Harvard's ability to create leaders who are really knowledgeable about the world and about different experiences and are really empathetic would be lost.

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JA967

**SALLY CHEN
EXAMINATION BY MS. DINAN**

[p. 199:4-201:13]

Do you recognize this document?

A. Yes. It is my admissions file.

Q. When did you first see this document?

A. I viewed my admissions file in the summer after my sophomore year, which would have been 2017.

Q. Why did you review your admissions file?

A. I think I was really curious to see the kinds of I think -- I really wanted to see the kinds of information and the process overall of Harvard's fairly opaque admissions process, and I think I also really wanted to see how my own application, my own experiences were viewed by the admissions readers and by Harvard.

Q. Can you share with the Court how you identify in terms of your race or ethnicity?

A. Yes. So I am a Chinese-American. My parents emigrated to the United States from China in the 1980s. They were warehouse and factory workers in China before they came to the United States.

Q. To what extent did your race or ethnicity shape your application materials in any way?

A. It really fundamentally shaped my application materials. I wrote very directly about how being the daughter of Chinese immigrants and being a kind of translator and advocate for them across barriers of

cultural and linguistic difference in different settings, whether that's with our landlord, with helping my dad get his driver's license, in all these different settings, how far that really shaped my views on social responsibility, on my dedication to being an advocate for communities that -- for different communities.

Q. Please turn to page 9.

Is this the personal statement to which you were referring when you said you wrote about being the child of Chinese immigrants?

A. Yes, it is.

Q. What advice did you receive on what to write about in your personal statement?

A. So when I was preparing my personal statement for college, I had a counselor in my high school who was telling Asian American students, including myself, that writing a -- and he said this fairly reductively -- that writing an Asian immigrant story was overdone; that it was not compelling, not interesting, and would ultimately hurt our admissions, our applications.

And as someone who as the daughter of Chinese immigrants wanted to write, I think, very candidly about my background and my story, I found this very, I think, difficult to navigate.

Q. Why did you choose to write about being a child of immigrants from China despite that?

A. I think that it was really fundamental to explaining who I am. And I don't think there was any way I could authentically get across my motivations, my story, my

JA969

inspirations, my academic kind of curiosities without really explaining and talking about the significance of how I grew up.

Being Chinese-American, being the daughter of Chinese immigrants and how -- as I kind of discussed, how I navigated being a translator and advocate. That was so fundamental to my background and my story, my identity, that I don't think I could have left it out.

* * *

[p. 202:1-11]

Q. When you reviewed your admissions file, did anything stand out to you?

A. Yes. I really, I think, appreciated the ways in which my admissions reader saw what I was trying to say when I was talking about the significance of growing up in a culturally Chinese home, of the kinds of work and responsibility that I took on from that.

I think in addition to that, tying that directly to my, I think, other experiences and the significance of it, they spoke -- they wrote about how I understood and could sympathize with the experiences and the view of an outsider.

* * *

[pp. 209:12-212:17]

Q. How did you benefit from racial diversity at Harvard?

JA970

A. So I think that in large part it was really critically changing, I think, for me to I think meet Asian Americans who are different from me.

I think that a concrete example of that was that I had -- in the spaces beyond, I think, Asian American studies classes, it was so important to meet and talk to other Asian Americans who are different from me as kind of an impetus for me to learn more, for me to demand an education that would discuss these differences that I would have in these one-on-one encounters.

So as a concrete example of that, I had never met an undocumented Asian American before coming to Harvard. Despite the fact that Asian immigrants are the fastest growing immigrant population in the United States, a lot of the public media around immigration and immigration reform is often centered around Latinx communities.

But this was really eye-opening for me to see how these issues affect Asian Americans and what is defined as an Asian American issue and the things that we should be learning really need to be reoriented and re-kind of centered.

So it's really, I think, critical to have these different perspectives and have these -- have a student body, an Asian American -- have an Asian American population that is also racially and ethnically diverse as well as socioeconomically diverse to really dispel these kinds of overarching myths about what it means to be Asian American.

JA971

Q. If Harvard's race-conscious admissions process were to be dismantled, how do you think that might impact your college experience?

A. I think dismantling the race-conscious admissions policy would really rob students of that critical part of education where you learn from and with people who are different from you and have different experiences from you.

I think that my experience at college would be reflective of some of the worst aspects of my high school experience in being altogether too comfortable with being in a room of people who have similar experiences and are already being validated for these kinds of experiences.

I think that there would be a kind of overwhelming pressure to buckle under that weight of assimilation, too, and I think that those different experiences would very much be pushed to the margins of those conversations and create being a very one-track kind of way of learning and thinking.

Q. If race were not considered in the admissions process, how would that have affected you?

A. I don't think I would be here. I think that as someone who during -- during my admissions process when my counselor said that a story like mine would be overdone, not compelling, despite that I decided to write about being Chinese-American and being from a working-class immigrant family, precisely because I felt like stories like mine were fading under this model minority myth.

And how I could not -- I could not see myself being part of an institution that didn't value me and my experiences when I was fighting so hard to articulate them. So I really do think that I don't think that I could be in a space like this.

Q. Based on your review of your admissions file, how do you think writing about your race impacted Harvard's review of your application?

A. So when I wrote about my experiences growing up Chinese-American, from a low-income, working-class kind of immigrant family and made significance of that, talking about being a translator and advocate, I think that I saw in my admissions file the way that that was seen. That they recognized I was coming from a culturally Chinese home, and that I had a sense of responsibility to my communities, kind of going back to what they saw in the fact that these kind of identities lent themselves to the sympathy and the understanding for the view of an outsider, contextualizing the leadership roles that I would take.

I was, I think, very much seen and my story was heard in my admissions file. And concretely in their words, they saw that I could have a potential contribution to college life that would be truly unusual. And I think that there was no way in which flat numbers and a resume could have gotten across how much of a whole person that I am, and I think that it's truly incredible to have been seen and been heard for who I am and valued for it.

* * *

JA973

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 30, 2018

Pages 1 to 185

TRANSCRIPT OF BENCH TRIAL - DAY 12
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
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JA974

* * *

**RUTH SIMMONS
EXAMINATION BY MR. WAXMAN**

[pp. 6:19-55:15]

Q. Good morning, President Simmons.

A. Good morning.

Q. What is your current position and title?

A. I'm currently president of Prairie View A&M University in Texas.

Q. Have you been asked by Harvard to testify as an expert in this matter?

A. I have.

Q. Are you being compensated for your time and expertise in this case?

A. I am not.

Q. Did Harvard offer to compensate you?

A. Yes, they did.

Q. Before we discuss the questions that you were asked to address, could you please tell us something about your family background and where you grew up?

A. I was born the last of 12 children in Grapeland, Texas. I was born in a sharecropper's shack on a plantation. I lived there with my family until I was seven years old, after which my family moved to Houston.

We lived in Houston in the notorious Fifth Ward, sometimes called “Bloody Fifth Ward,” a segregated community in the shadow of downtown Houston. I went to elementary school, middle school, and high school in the Fifth Ward in a completely segregated environment.

Q. Did you attend college?

A. I did.

Q. Where?

A. I went to Dillard University in New Orleans.

Q. And did you spend all four years at Dillard?

A. No. I went to Wellesley college my junior year, with a junior year exchange program between Dillard and Wellesley.

Q. Let me ask you a few questions about Dillard and then Wellesley.

Tell us about your educational experience at Dillard.

A. Well, in the early ‘60s, mid-‘60s, higher education was still relatively segregated in the South. Dillard was an African-American institution, formed just after slavery and supported by the Methodist church. So all the students were African-American.

However, many faculty, white faculty from the North, interested in doing something to address the inequities in education, either retired from their positions in the universities in the North or decided to come South to work in historically black universities.

JA976

And so for the first time in my life, I was exposed to different races, mostly because of the white faculty who had come to Dillard to teach. And this had a profound experience on me because for the most part, during my time at Dillard, these were the faculty who nurtured me and who gave me inspiration to do the things that I had done.

Q. At the time that you were at Dillard, did you have the opportunity to become exposed to other cultures?

A. Certainly not through experiences with my peers, but because of the faculty putting in front of me opportunities to learn more about other cultures, I was inspired to go to Mexico to study Spanish.

So at the end of my first year, I got on a bus and went to Mexico to live with a Mexican family and to study -- and to study Spanish. It was a -- the French have a term, *bouverse* (ph), completely overturned my world having the opportunity to encounter this very different culture.

Q. Was Mexico a segregated -- were you living in a segregated environment in Mexico?

A. Well, I wouldn't call it segregated.

Q. I know, they were all Mexicans but --

A. Yes.

Q. Were you segregated?

A. I don't even think that Mexico, at the time, thought in terms of segregation. Segregation at the time was a uniquely American construct, I would say. And so there

JA977

were certainly many different people who were in Saltillo, some of them as tourists, some of them as students and so forth. So there were other students, white students in the Spanish program that I was a part of, but I was living fundamentally with a Mexican family.

Q. So you mentioned that you spent your junior year at Wellesley. How did that come about?

A. Well, I'm not sure whether or not Dillard wanted to get rid of me, but at one point the president called me to the president's house and told me that I had been designated as the Dillard student to go to Wellesley that year. And he asked me if I would be willing to do that. And he was a very imposing figure, this president, and so of course I said yes. Being terrified, nonetheless.

So I went to Wellesley and obviously for the first time in this country, I was exposed to peers who were white and it was a -- quite an experience for me.

Q. Did you form relationships with your peers at Wellesley?

A. I did. I was the only African-American student on my hallway. Nevertheless, the students welcomed me quite warmly, and I became very close to a number of the students on the hallway. All of whom I would say were white but who came from different parts of the country.

One student in particular was from a farming community in Connecticut, and she took me home with her when we had long weekends or holidays. I formed a relationship with a Jewish girl from Philadelphia,

JA978

and she took me home with her to Philadelphia during holidays.

So it was a wonderful experience in that regard.

Q. Did you continue your education after graduating from Dillard?

A. I did. I received a Fulbright fellowship and went to study in France at the University of Beaune.

Q. What were you studying?

A. I was reading Proust, which couldn't have been farther afield from my background, actually. Reading Proust.

Q. When you completed Swann's Way or the entire cycle, what did you do then?

A. I came back to -- actually, I was in France during the student riots and though it was very hard to get back, I managed to get to Geneva and take a flight home.

I came back and I was married that summer that I returned. And my husband had intended a career in the foreign service and wanted to be part of a program at U.S.I.A. So we went to Washington where he was part of that program, and I took a job as an interpreter at the U.S. Department of State and I enrolled in classes at George Washington University.

Q. Did you come to obtain a Ph.D.?

A. I did.

Q. Where did you earn your Ph.D.?

A. I earned my Ph.D from Harvard in the Romance languages and literatures department.

Q. Why did you decide to study Romance languages, other than having a year reading Proust?

A. It's very hard to convey at this distance what it was like to grow up in a deeply segregated environment in Texas. But one of the things I can say is that that environment shaped my thinking about the possibilities in life that awaited me. It shaped my thinking about what I was worth as a person. It shaped my thinking about what whites were, and what their motives were in regard to me and my family.

And I somehow knew that one of the things that I needed to do was to escape from the thinking that had been imposed upon me by virtue of this trenchant segregation. And once I started studying language, and certainly once I went to Mexico and saw that there was a different people there who made no presumptions about me, I came to the conclusion that my own view for the world was very narrow and one way for me to resolve some of the presumptions that I had was to study language.

And as -- the more I got -- more deeply I got into the study of language, I found that it was extremely beneficial to exploiting the assumptions that I grew up with. And so I thought, well, why not do that for the rest of my life and impart that to other young people.

So that's how I came to be in the career that I'm in.

Q. Let's turn now to your work in the field of higher education.

JA980

Would you please turn to Tab 1 of your book, which is Defense Exhibit 134?

A. Yes.

Q. What is this document?

A. I believe that's an abbreviated CV.

Q. Okay. And Mr. Lee, could we have page 2 of the CV on the screen.

President Simmons, I'm directing you now to the part of your CV that describes your experience in the field of higher education. Does this fairly represent your professional positions with universities?

A. Yes, it does.

Q. Now let's focus -- let's go through these one by one.

So with starting your work at Radcliffe, what did you do there and for how long?

A. Well, while I was a graduate student at Harvard, I was surprised to be asked to serve as an admissions officer at Radcliffe; and I agreed to do that, and so I worked for two years in the Radcliffe admissions office.

Q. And then going down under employment history to Princeton, looking at your first role at Princeton, what did you do and for how long?

A. I was director of studies at Butler College, a residential college at Princeton University, and I did that for two years.

Q. And what did you do next?

JA981

A. I was asked to direct the Afro-American studies program at Princeton, actually to build it. And so I took that on from 1985 to '87, and then was asked to become assistant dean of the faculty at Princeton and then associate dean of the faculty.

Q. And after Princeton, what happened?

A. Well, I decided that it might be useful for me to take my experience to a minority-serving institution, and so I left Princeton to go to Spelman College, where I became provost.

Q. And can you just describe the characteristics of Spelman College?

A. Spelman College is an African-American college for women. It is a liberal arts college, very small college.

Q. And what were your duties there?

A. Essentially to oversee academic affairs at the college.

Q. And we're working our way up your employment history. I see that you then went -- you then returned to Princeton.

A. Yes.

Q. And what were your duties in the role of vice-provost?

A. I was asked to return to Princeton, to become vice-provost because of a change in the administrative structure of the university, and I fulfilled that role as deputy to the provost.

JA982

Q. What did you do next?

A. I was asked to become president of Smith College.

Q. And I see here that you served for six years at Smith, from 1995 to 2001?

A. I did. Yes.

Q. Prior to your appointment, had Smith College ever had an African-American president?

A. No.

Q. Let's go next up the line. How did you get to Brown?

A. How did I get to Brown?

Q. I know, by Interstate 90, but --

A. I wasn't going to say that, but it's clever.

I was asked to -- I was invited by the board of trustees of Brown to serve as president of Brown.

Q. And prior to your appointment, had Brown ever had a permanent female president?

A. No.

Q. Prior to your appointment, had Brown ever had an African-American president?

A. No.

Q. Prior to your appointment, had any Ivy league university ever had an African-American president?

A. No.

JA983

Q. And I see that you served as president of Brown for 11 years, if my math is right?

A. Yes.

Q. And then there's a gap. What did you do next? An uncharacteristic gap.

A. I retired, very happily.

Q. And what did you do in retirement? Other than simply all that Providence has to offer.

A. Well, I actually went back to Houston and became involved in some of the programs that were familiar to me as a young person. I started first with supporting a preschool program for African-American children in a housing project in the Fifth Ward. And then I became involved with the community center in my old neighborhood, and then I took on the leadership of a new effort to support the improvement of public schools in Houston.

Q. So that sounds lovely. How did you then come to leave retirement and become president of Prairie View A&M? How and why?

A. Quite unexpectedly. The chancellor of the Texas A&M system called me up and asked to meet with me to discuss becoming interim president of Prairie View because the president was leaving. And I thought, of course, that this was a foolish idea and -- but nevertheless assured him that I would give it some thought.

I did for some period of time and then concluded that, again, it was my responsibility, given all of the

help that I received as a young person, that it would be appropriate for me to try to help the students at Prairie View today, and so I agreed to take on the interim position.

Q. And how did your interim status turn into a non-interim status?

A. They asked me to continue and I agreed to do so.

Q. Looking back at the three institutions that you served as president, Smith, Brown and Prairie View, do those institutions have different educational missions?

A. Distinctly so.

Q. How so?

A. Well, I mean, I suppose any institution is founded first and continues on the basis of the mission that helped to create it.

In the case of Prairie View, two ex-slaves, during Reconstruction, put through legislation in the state -- in the Texas legislature to create a school for black youth. The truth is African-Americans were not permitted to be educated, as you know, during slavery in the South. And the only way to assure that freed slaves would now have an opportunity to be educated was to create schools for them, which is how most HBCUs came into being.

At the same time, the legislature created a school for white youth to ensure that never the twain shall meet.

So Prairie View was formed in that context and for many, many years was the principal way for African-Americans in Texas to gain a higher level education.

Q. And how, if at all, has that manifested, that history manifested in the mission of Prairie View today?

A. It continues to prize that legacy and to believe that its mission is to continue to make opportunities available for African-American youth and others who come from non-privileged backgrounds, let's say. Over 80 percent of the students at Prairie View are Pell-eligible students. And so it is very proud of that tradition and continues to enforce that today.

Q. And what percentage of the current undergraduate population at Prairie View is African-American?

A. Over 80 percent.

Q. What about Smith?

A. Well, Smith was formed at a time when people routinely said that women were incapable of higher order intellection. In fact, I remember reading that people argued that serious intellectual study would somehow affect the reproductive organs of women, and therefore it would be dangerous for women to study at university because, I suppose, the species would disappear, ultimately.

And so at a particular time in history, these institutions were created not just so that women could be educated but Smith was specifically created so that

JA986

women could be educated on a par with men in the best universities in the country.

And so that was the origin of the college, and it continued after that to insist on equality for women, the ability of women, the proof, in a sense, that women had the ability to do any order of thinking that a man could do.

And, in fact, when I was there as president, one of the things that I did was to create a program for a -- a program for women in engineering because of the problem that women were having in gaining access to engineering degrees.

So it continues to have the same essential mission today, to provide a place for women to be educated well.

Q. Let's turn to Brown, which was created during the Colonial era, and I'm willing to -- I'm ready to hear you say that it is not rigidly continuing its original mission.

But leaving aside my asides, what about Brown?

A. Well, it was created as the Baptist university for the country at the time. It has evolved, as other Colonial universities have, to be a broad-ranging university that has still as its aim to prepare students for leadership roles.

At the time that the country was formed, there were many people very concerned about whether or not in this nascent country there were people sufficiently fit to lead this nation. That, too, was part of what Brown leaders were thinking at the time; that there was a desperate need for leaders who had the breadth of

JA987

education and the leadership ability to provide for this nation a future that was secure.

And so Brown continues to do that today, to educate young people for leadership positions, and in the broadest liberal arts context.

Q. Let's turn now to the questions that we asked you to address.

And Mr. Lee, could we pull up Demonstrative 9.2.

What questions were you asked to testify about?

A. I was asked to testify to, one, the question of what benefits flow to students, institutions, and society from a diverse undergraduate student body; and second, do certain criticized admissions practices serve legitimate institutional interests?

Q. And we're going to go through these, each one of them, separately in some detail. But as to question number one, do you have an opinion?

A. I do.

Q. And what is your opinion?

A. My opinion is that benefits definitely flow to students, institutions, and society from a diverse undergraduate student body.

Q. And turning to now question two, do you have an opinion on the second question?

A. My opinion on the second question, based on my decades of experience and my first-hand observations

of students and alumni, that the criticized admissions practices serve legitimate institutional interests.

Q. Mr. Lee, please pull up the next demonstrative.

And President Simmons, could you just explain to the court which admissions practices you will be offering, you've discussed in your reports and will be discussing today?

A. Yes. These practices include legacy status, contributions to the university, children of faculty or staff, athletic achievement, and early action.

Q. And what is your opinion regarding those practices?

A. My opinion, based on my experience, is that all of them play a legitimate role in the admission process.

MR. WAXMAN: Your Honor, I've been given a note to remind me that I forgot to offer into evidence Defense Exhibit 134, which is her CV.

MR. CONNOLLY: No objection.

THE COURT: It's admitted.

(Defendant Exhibit 134 admitted into evidence.)

Q. In forming your opinions you'll be expressing today, did you review the statement of Harvard's educational mission?

A. Yes, I did.

Q. Would you please turn to Tab 2 in your binder, which is Defense Exhibit 109, I believe, in evidence. And I want to ask you to focus on the sentence that Mr.

JA989

Lee is going to be highlighting and ask you what that says.

A. “The mission of Harvard College is to educate the citizens and citizen-leaders for our society.”

Q. What do you understand that to mean?

A. Well, it’s very much as I said in regard to what John Adams expressed on his way to the Constitutional Convention; and that is, what are the needs of societies and how can institutions like Harvard prepare its students to play the roles they need to play to maintain our way of life as a country.

So educating citizens who will play important roles in all manner of endeavors, and especially leaders in our country.

Q. And did you conduct your analysis with that mission statement in mind?

A. I certainly did.

Q. Let’s turn to the next demonstrative, which is Demonstrative 9.6, and look back at the first question.

Did you analyze the benefits that flow from diversity?

A. I did.

Q. And looking at -- now at Demonstrative 9.7, can you explain the categories of people in institutions who, in your view, benefit from having a diverse undergraduate student body?

JA990

A. Those categories are students, institutions, and society.

Q. Let's focus on individuals, students first.

A. Okay.

Q. How do individual students benefit from a diverse university environment?

A. Our greatest concern as educators is always for the depth of learning that students have access to. It is not enough at our universities for students to come to sit in class, to observe what they're told, and to leave with -- impoverished, without having been deeply engaged in their learning.

Diversity provides an opportunity to deepen that learning, to give students first-hand experience with difference. And we know that difference is one of the primary means for students to test themselves, to test their background, to test their ideas, to challenge assumptions. And in that context, it is in coming in contact with difference that we tend to deepen our learning.

Q. So in referring to the benefits to students that you've just described, are you limiting those -- do you limit those benefits -- do your prior comments relate to the, quote-unquote, diverse students who attend an institution, say, the African-American, Hispanic and other underrepresented minority students, or do your opinions apply more broadly?

A. They apply to both.

So first of all, in challenging our assumptions, I don't mean picking up different books that have dialectic around a particular subject. I mean in every possible respect coming in contact with difference. And that certainly applies to having different faculty, having different students live on your hallway, encountering different students who come from backgrounds that are so different from yours that you have no choice but to learn about the complexity of the world that you're going into when you graduate.

Q. Can you think of an example from your own undergraduate experience that illustrates the point that you were just addressing?

A. Yes. I use the example of my being in a classical philosophy class at Wellesley at a time when apartheid was probably the most important social, political issue around the world; and naturally it came upon us to discuss apartheid and the ethics surrounding that system. And, of course, I was quite passionate about the evil of apartheid and how it needed to be overturned.

I was pleased to discover that most of the students in class, all of whom were white, shared -- seemed to share my view about apartheid, except there was one young woman who toward the end of the discussion raised her hand and identified herself as a South African. I don't know if there was an audible gasp in the room, but I certainly was surprised. And she then began a spirited defense of apartheid from the perspective of a white South African.

JA992

I had never encountered anything like that before and it threw me into a state, but here is what I garnered from that experience; that I was forced to listen to a different opinion about South Africa, one that I never, under ordinary circumstances, would have heard.

Today, I can remember no one in that class but I can remember her. She had such an impact on me. And I would say I often think that the person that I became as a scholar and as a leader prized that interaction because I learned to listen to difference. And I don't think I could have done what I've done in my life, been the person I've been to my students, if I had not had that experience.

Q. President Simmons, have you familiarized yourself with Harvard's experience with diversity and inclusion sufficient to express an opinion about how -- whether Harvard students benefit from diversity?

A. I think I have.

Q. How do you know that?

A. Well, I've read many documents describing the way that Harvard puts its students in touch with diversity. It's very thoughtful. It's very deliberate, the way that students are assigned to housing, which is quite something when you think about it. The idea that when you go off to college you have no control, really, over your living circumstances; that you're put into an environment where you are challenged to adjust. It's a powerful thing.

JA993

In the first year, students have no choice about their living arrangements. Thereafter, they are assigned to houses also. It's also the case that there are committees that are responsible for intentionally creating an environment in which students can learn from diverse others. So I think -- I think that the university does a very good job.

And by the way, I should say these actions are fairly typical of what we have come to understand in university life as being important to do so that our students get that depth of learning that we're seeking.

Q. Let's turn to the next category that you identify, the benefits flowing from diversity to institutions.

How do institutions like universities benefit from having a diverse student population?

A. Well, one of the things that won't surprise you about universities like Harvard and Brown is that we often think that we are all-knowing. And so without the inputs of a lot of different people over time, with different backgrounds and different perspectives, we'd hardly change, I think, as institutions.

But because we are open to difference and because we have inputs that vary over time, our institutions change and I believe change for the better. We make new discoveries. We teach new courses. We create new fields.

And more than that, because we do all of those things, our students all come to understand, in the course of their lives, the great benefit that they have had by coming to our institutions. And so that is why

JA994

we can't get rid of them. They come to our institutions and they stay on as alumni forever, which is to our delight.

The standing that we enjoy around the world is surely due to our diversity. Imagine Harvard's footprint around the world. It's hard to imagine an institution that is more prominent around the world than Harvard. Oxford might say they're equally so, Cambridge might say. But I don't know. I rather think that Harvard has a bit of the edge when it comes to that because of the way they've admitted students over time and because of the fields that -- in which they have excelled.

So our stature as institutions depends on the fact that we have systematically over time brought many different types of people to our institutions. They have gone back to regions around the world and established a bigger footprint for us.

Q. So does having a diverse student body, I'm asking you now based on your experience, long experience as a professor and a leader of institutions with professors, in your experience, does having a diverse, engaged, safe environment for students have an effect on the faculty of an institution?

A. Well, I would say it has an effect on the learning that takes place in and out of the classroom. I can tell you as a professor that having a homogeneous group of learners sitting around a seminar table is not as catalytic as having students with different backgrounds and different opinions sitting around the seminar table. The discussion is more robust. The depth of learning,

JA995

as I said before, is more significant. And the teacher probably gets better over time by having all of these different scholars, students, available to them.

Q. So I think you mentioned earlier, I tried to write this down, that having a diverse student body affects the research agenda or the research questions.

Could you explain to Her Honor what you mean by that?

A. Well, one of the -- one of the things that faculty believe in American universities is that they have academic freedom, and what that often suggests to them is that they're free to pursue a course of research that is of interest to them. And naturally, what that means is that if you have a diversity of scholars, you also have a diversity of interests and those interests will lead you to pursue different scholarship.

And so you have only to look at the vastly different scholarship that exists today as a consequence of women coming more into the center of academic life and as a result of minorities coming into the center of academic life.

When I was at Smith, I created a journal called "Meridians," and it is a journal to highlight the research being done on women of color. That would never exist, of course, in the academic world if you didn't have people who were varied and who were interested in the status of women in India or the status of women in this country and so forth.

JA996

Q. So in sum, is it your opinion that Harvard could accomplish its educational mission without the diversity that you described?

A. It could accomplish a mission, but it would be an impoverished mission that does not provide for its students the kind of education that prepares them to live in the world that we now have.

Q. Let's turn to the third category in your demonstrative.

How does society benefit from having diversity in university education?

A. Well, I would say that we are bedevilled in society by enduring schisms, schisms based on differences, political differences, cultural differences, religious differences. And those schisms sometimes break out and we're faced with tragic circumstances.

Sorry. I'm thinking about the shooting in Philadelphia -- in Pittsburgh. So -- so here is the thing. What are you going to do in a society that is riven by conflicts of all kinds? How are you going to mediate them if you don't have people capable of doing that?

When we go back to our enclaves, enclaves of sameness, how are we going to get to the point where we can mediate these conflicts and have a peaceful society that advances?

I don't know a way to do that if we don't prepare people who can lead in such a society. And in my view, places like Harvard, bringing people into the center of learning, learning about difference, I don't know how

JA997

we do that unless we prepare them well and send them out to do just that.

Q. Let me switch topics slightly and ask you whether you are familiar with the whole person admissions process?

A. I am.

Q. What is it?

A. It is an admission process in which instead of doing a kind of automatic admission based on test scores and GPA and rank in class, that you consider every aspect of what a person brings to a college. You consider their life experience. You consider their cultural origins or their racial origins. You consider what they've done up to that point. You consider what their aspirations are. And you consider whether or not they are intent on contributing something to society. You consider everything.

Q. At the time that Radcliffe employed you as an admissions officer, did it employ a whole person admissions process?

A. It did.

Q. And in your opinion, does this whole person individualized approach to admissions facilitate assembly of a diverse student body?

A. It did.

Q. Let's talk about once students are admitted to the college.

JA998

Did you examine whether Harvard has practices that facilitate diverse interactions on campus?

A. Yes. My opinion is that they do.

Q. Can we have, Mr. Lee, can we have Demonstrative 9.11?

At a high level, what did you find?

A. Well, at a high level, I found that in numerous ways Harvard has an intentional process of facilitating interaction among different students.

Q. And what do these -- what do these segments of the circle on the demonstrative reflect?

A. In extracurriculars, for example, students participate not just in varsity sports but in club sports and other extracurriculars; like theater or dance or any number of different areas. And when they are doing that, they have the opportunity to spend time with different students from different backgrounds in a common project.

I find that in housing, again, the way that housing is assigned is intentionally designed to make sure that students have the best chance of being in a living environment in which they're exposed to difference.

And so as I said, the first year they are assigned housing with a roommate not of their choice. After that they are randomly assigned to houses to make sure that that mixture continues. And, again, in terms of faculty and staff, the intentionality extends there where students are given the opportunity to interact

JA999

with many faculty and staff who come from different backgrounds.

Q. I must confess, I hope that I'm not imagining this, but did you, in your report, give an example of a particular student housing arrangement, a freshman housing arrangement between a particular white student and a particular African-American?

A. I think the only mention that I made was with Mark Zuckerberg --

Q. I didn't imagine it, okay.

A. -- and his roommate who happened to be a Haitian Olympian, Samyr -- I can't remember his last name, but yes.

Q. Did you review Dean Khurana's testimony in this court?

A. I did.

Q. And is his testimony regarding the practices that Harvard employs to facilitate diversity consistent with your analysis?

A. It is consistent with my analysis.

Q. Do you recall Her Honor's question to Dean Khurana about how to measure when there's enough diversity?

A. I remember that.

Q. And what is your response to that question?

JA1000

A. My response is that wouldn't it be marvelous if we had the capacity to know when enough diversity is enough diversity.

I have been doing this work for decades, and I have never seen a moment when we are certain of that. We are constantly striving to make sure that we have the appropriate mix of students. But I don't think there is any university in the country that has decided that it has the key to that.

So here is what we do know. We know, because we've been told over the decades by students who have experienced it, that sometimes there are insufficient numbers of a -- of particular groups on the campus for them to feel safe and comfortable and for the learning that they have access to to be equal to that of others on the campus.

So we're immensely sensitive to the fact that we can have too few students in a particular group.

We also know, from what we've been told by different groups, that our assumptions about diversity are often too unsophisticated. And so we might think that because we have a black student that that's diversity. Whereas, many students will say that you don't have enough black students from a particular socioeconomic class or you don't have enough students, black students, who are wealthy, or you don't have enough black students who come from outside the country.

So within different groups, their definition of diversity is somewhat different from ours sometimes,

JA1001

and we've learned over time to be much more variegated in the way that we think about diversity.

Q. President Simmons, we heard yesterday, all day yesterday, from students and alumni of Harvard.

Did you manage to hear any of that testimony?

A. I heard some of the testimony.

Q. And do you recall some of the students expressing concerns about inclusion?

A. I do.

Q. How do the concerns expressed by the students affect your analysis?

A. They're very much, as I have heard over the years, and very much in keeping with my thinking about this -- about these questions.

Q. Are those concerns that we heard expressed yesterday an indication that efforts to have diverse learning environments are failing?

A. Not at all.

Q. Let's turn now to the --

A. May I say a little more about that?

Q. Yes. You've got the floor -- chair.

A. One of the things that I wrestle with as a university president is trying to impart to my students the difference between what they are experiencing now and what people experienced decades ago.

JA1002

I want to say that part of what I hear from the students is all too familiar because, of course, I've heard it for so long over the decades. Nevertheless, the fact that they are smarter about it, more aware of it, and in a sense dealing with it so amazingly is, to me, a sign of progress, frankly. And so I just wanted to put that context on it.

Q. Thank you. Let's turn now to the second of the two questions that Harvard asked you to address.

And Mr. Lee, yes, thank you. Demonstrative 9.12.

Let's focus on whether the admissions practices that you identified at the outset of your testimony in your opinion serve legitimate institutional interests. And let's start by turning to Demonstrative 9.13.

And this, again, if you'd just remind us, these are the practices that you have considered and expressed an opinion about?

A. Yes.

Q. Do you agree that Harvard should cease providing what it calls an admissions, quote, tip, to legacies, to applicants whose parents have contributed to Harvard, to children of Harvard faculty and athletes?

A. I do not.

Q. And do you agree that Harvard should end early action?

A. I do not.

Q. Let's start with legacies. Look at Demonstrative 9.14.

JA1003

What institutional interests are served by considering legacy status?

A. Our institutions are venerable, I think that's the right word, because they are revered over many, many years by a succession of alumni who come to love our universities and what they provide. It is entirely appropriate for them to believe that it would be wonderful if their children could also enjoy the same benefits that they enjoyed as students.

At the same time, because they are so involved with our universities, and do so much for us -- and parenthetically let me say, I do firmly believe that Harvard today would not be Harvard without that involvement: Alumni who are advising Harvard, alumni who are giving to Harvard, alumni who are challenging the university at all times to be better. Without that, Harvard would not be Harvard.

And so one of the distinct advantages that we enjoy as institutions is that we've been made stronger by benefit of that involvement. And one of the ways that we signal to alumni how important that is for us is that we consider their children in the context of our admission process never, never to admit them if they are not qualified on the same basis as other students. It's very important to say that.

And also, let me say, I hope it's a given that people understand as educators one would never admit students that you think cannot thrive at your institution. It would be considered highly unethical to do so.

JA1004

And so in the admission process, when we're thinking about students and comparing students, our final question is whether or not that student will thrive because they're perfectly capable of doing the work at a high level.

And so in that regard, we believe that it is appropriate to give a tip to legacies, and that it is in keeping with the tradition that we have as institutions where there is strong identity of alumni with our institutions.

Q. Thank you.

Let's turn now to item number two. And looking at that, can you explain to the court what institutional interests are served by giving consideration to applicants whose families make a contribution to the university?

A. Well, first of all, let me say, you'd never, ever admit a student because their family promises a contribution. That would be a quid pro quo. It would be, again, completely inappropriate to do that.

Nevertheless, there are occasions when individuals who are prominent, who have expertise, who have all manner of things that they can do to assist the university, might have children apply and, in that regard, if it is possible that their children are highly able and at the same time their parents could make a difference for the institution, I don't believe that it is problematic to admit those students. The number is infinitesimally small. I couldn't even count on one hand the times that I've seen this apply at Brown. But it is certainly possible that there are students who come

JA1005

along whose families can do incredible things for an institution. We are, after all, private institutions.

How do we survive from generation to generation, to be 400 years old? I mean, how does one comprehend that? A private institution from era to era that not just survives but becomes stronger in every era. How does that happen? It doesn't happen because we sit on our hands and do nothing. It happens because we are constantly looking for help, from as many different corners as we can find it.

Q. I just have one clarifying question. You've spoken eloquently about the different types of contributions that parents or family of an applicant might make. Can I assume that you're including, among that panoply, very significant financial contributions? Not a quid pro quo, but either a history of generosity with the university or the prospect that perhaps there will be significant generosity.

A. If there has been a history of contributions to the university from someone, of course. I can say that at Brown, for example, in a couple of instances people who had made very generous donations to the university who had children apply, not -- not at the same time, we gave special consideration to their children because they were, after all, highly qualified on the basis of the rest of the pool.

Q. Let me turn to item 3 on the demonstratives.

What institutions are served by considering whether the applicant is the child of faculty or staff at the university?

JA1006

A. Well, there are a lot of different ways to think about the resources available to universities and every university. I'm in a public university right now. Every university has access to different kinds of resources. One resource that we have is the admission of children of faculty or staff if they're highly qualified. Now, it also must be said that the single most important factor in the quality of a university is faculty quality.

The second most important factor in the quality of an institution is faculty quality. I could go on ad infinitum. Faculty are the determination of the standing of a university. They are at the heart of the learning of students also. But the representation of a university depends mightily on what the faculty output is.

And so anything we can do to retain the most outstanding faculty, certainly we would have to do. It is our competitive advantage. There is a fierce, fierce battle in this country for faculty, and trying to keep them is very important to us.

And so I think it's perfectly legitimate if a child is highly able to admit a faculty child or a senior person staff person's child. Let me say this is very rare. I think that it happens. It's not a significant number in any given class.

Q. Let me ask you to turn next to athletic achievement.

What institutional interests are served by giving what Harvard calls a tip, and I'm going to divide athletes into two categories, first to recruited athletes?

A. Well, we're in an athletic league. How are we going to field teams to play each other if we don't admit athletes for those teams? You know, there are a lot of people outside the Ivy League that believe -- who believe that we're not serious when it comes to athletics. That's because they've never sat around a table of Ivy League presidents fighting about athletics. We are very serious about athletics.

And so, again, one of the defining elements of Harvard is actually, is actually its athletic program and what it does for the campus in terms of building school spirit, what it does when Harvard beats Yale, you know. And when Brown beat Harvard, it was -- it was a holiday, okay? So these are serious matters. They are taken absolutely seriously.

And then the other thing that seems to me very important is that the Council of Ivy League Presidents exists for one purpose, and that is to monitor athletics, to make sure there's no funny business when it comes to admitting athletes. And so it is the most regulated athletic competition, in a sense, in the country. Forget the NCAA.

Presidents sit on the council to determine whether or not they're following all the guidelines. And importantly, at particular times, the presidents will decide to ratchet up the requirements for athletes.

And I know during my time as president of Brown, one of the things that I did was to cut back on the number of recruited athletes in order to make more room for other students in admission. I believe that Harvard did the same thing, actually.

JA1008

So we take athletics seriously, but we believe that it should be very strictly controlled.

Q. Let me ask you: You've spoken eloquently about the ability and necessity of recruited athletes to allow, for example, Harvard consistently to defeat Yale and Brown -- as a Harvardian I will say surprisingly in somewhat a demoralizing way to beat Harvard. Do talented athletes like this bring value to the campus more generally than just bringing glory?

A. Of course. Of course they do. I mean, none of us should be cited as unidimensional individuals just because we have a particular talent. And so a cellist, even at the highest level, is not just a cellist. Nor is an athlete just an athlete.

And so there have been famous examples of Ivy League athletes who have been incredible leaders, who have been CEOs, who have been in every sense of the word the citizen leaders that Harvard has identified in its mission.

Q. Let me ask you now about the non-recruited athletes.

Do university communities benefit from having avid, skilled, non-recruited athletes on campus?

A. Absolutely.

Q. In what way?

A. And in so many ways. First of all, the average student can find their way to a sport that they love. And as you know, that experience with sport can often lead to a lifetime of enjoyment. And so -- and I was

JA1009

visited recently in my office by the rugby team on my campus, and it was glorious. These -- the men's rugby team, although I had women's rugby also at Smith, games that I couldn't watch. It was too painful to watch them -- but the men's rugby team. And to see them interact as athletes, doing it for the love of it, was exhilarating.

They are working alongside individuals to accomplish wins. They're learning about people. They're becoming more disciplined in their lives because, as you know, as educators, we always say that athletes are much better students during the season than outside the season because it lends more discipline to their total endeavors when they do that.

So there are a lot of different things that athletes contribute, non-varsity athletes contribute in the environment. And sometimes it's just as much fun watching a club sport as it is a huge varsity athletic event.

Q. Let's turn finally to early action and the --

THE COURT: May I interrupt you for a second?

MR. WAXMAN: Sure.

THE COURT: I just have a couple of things I've been thinking about and there's really been no one to ask but here you are. We'll see how relevant these things are.

But I have been told that these things that we've just discussed, legacy, contributions, children of faculty and staff and athletic achievement, are about 30

percent of each class. And it seems to me, and you can correct me if I'm wrong, that that can be a way to tamp down diversity, right? Like, if all of your legacies are white and all of your donors are white, then the larger that pool is, the less diverse your school population becomes in some ways, right?

And I hear you saying that contributors and faculty kids are a small percentages, or should be small percentages, but I haven't seen a breakdown of that. But if you take those things together that I think can be a way of limiting diversity, is there some number that's too much?

THE WITNESS: I actually don't think of it that way. And here is why. I've always been involved in my career in the continuum of education. A lot of people focus on one institution, one admission cycle. I didn't, I didn't go to Harvard. I'm not --

THE COURT: Neither did I, as has been recently published in the --

THE WITNESS: So we can commiserate.

THE COURT: That's not the adjective I'd use.

THE WITNESS: So here I am, you know, I went to a liberal arts college, 900 black students, and then I became president of an Ivy League university over mostly white students.

So the first thing I would say is that one institution does not drive our opportunities, and that's important to remember. Because, as I say, I left to go to Spelman because I thought Spelman had wonderful things to

JA1011

offer. I'm now at Prairie View because Prairie View has wonderful things to offer.

So getting back to your question. I believe, truly believe, that the uniqueness of our institutions is actually created by all these factors. It is -- it is a series of things that makes people want to be a part of us. But now people want us to abandon them because it may be inconvenient to have them, or that might be their assessment.

I believe that the thing that makes this country, especially higher education in this country, so phenomenal is the fluidity. And so I can go to a 900-student black college that is nowhere on the radar screen for anybody and then end up in a Ph.D. program at Harvard.

And so what I used to tell students when I was interviewing them for Harvard, I used to say, you know, you know you can ultimately go to Harvard from lots of different routes. You don't have to be an undergraduate at Harvard. Okay? In fact, it's not always a good idea to go to Harvard as an undergraduate if you're in this field, if you're in that field.

So I think our country has become besotted with the idea of getting into a narrow number of institutions. But the great thing that they miss is that our educational opportunities are so much richer than that.

And so that's the way I think of it.

THE COURT: All right. Another one that might be more unanswerable that I've been sort of wrestling

with, and I throw it out there to you because you seem to be the most knowledgeable person I've seen on these subjects, is -- you know, I'm sure that the Supreme Court says you can't have quotas and you can't have floors. So if you're talking about a place -- and I'm going to use Harvard because here we are -- that accepts 2,000 kids a year, looking for 1,600 -- I mean, those two numbers are pretty fixed.

THE WITNESS: Yes.

THE COURT: Then if we can agree that one black student on campus is not enough and five black students on campus is not enough, if you're trying to get to a number that's enough to meet the goals that you talked about, like a group feeling safe and represented, how do you avoid a floor?

THE WITNESS: Well, I think that's because of the selectivity that you have access to.

When I was working at Radcliffe, there was a plentiful supply of highly-able students. That's not always true for every university, but it's certainly true for Harvard. And so one of the things, as you look at what you're trying to achieve across the entire university that you're more concerned about, is that if you were to admit a certain number of students, that the whole -- one whole part of your campus would be devoid of any difference. And so it isn't so much a floor as it is an effort to make sure there's sufficient numbers of students in your campus so that the students who need that deep learning are exposed to it. And if it is too small, you'll get the feedback.

JA1013

And one of the reasons that I say that that feedback is important and we've had it over the decades, is that when we first started this process, we had no idea what we were doing. So there were many tokens admitted into programs like this.

So, for example, I was a token at Wellesley. And so Wellesley was not admitting African-American students in any significant numbers, and what they did was to go to the South to black colleges and invite black students from black colleges to come to Wellesley. But even when they did that, it didn't make much of a difference because there were so few on the campus.

So I think one of the things we've learned over the years, because we've heard the feedback from our students, this is what it feels like when it's like this. And every time we get the feedback, we tend to make adjustments.

And so I wrote a report at Princeton, for example, about the consequences of having the -- either the wrong mixture or the wrong policies, and we made adjustments to that.

So universities are always trying to make adjustments. I don't ever see this as a fixed point, where we're utterly satisfied that as a nation, we have figured this out. I don't see that happening because we are changing constantly, different demographics are taking place.

And so how many of us are floored by what's happening in the country today? I know I am. I didn't expect to see it again. But here we are. And so we'll take that in and we'll make our adjustments and we'll

try to improve. And that's the way it's always going to be because when you have so many different people involved, you cannot predict what they are going to do in the future. You can only look at where you are now and try to come up with the best solution.

THE COURT: Thank you.

MR. WAXMAN: Can I ask one follow-up question to Your Honor's questions?

THE COURT: You may.

Q. I'll be perhaps a little more pointed than the Court was.

When you were president of Brown and when you were president of Smith, did those institutions make a concerted effort to value diversity and try and promote a diverse, including racially diverse, learning environment in those institutions?

A. Of course.

Q. Did those institutions, do you feel, that in order to evaluate whether you have provided such an institution that it is useful, necessary, or appropriate to identify a particular percentage, like we need to have, I don't know, 20 percent African-American?

A. No, never.

Q. So how does --

MR. WAXMAN: I don't know whether I'm channeling Your Honor's questions but --

THE COURT: I'm not sure there's an answer.

JA1015

A. See, that's the problem. I have seen institutions with a very different mix of ratios do it successfully, and I've seen institutions with a much larger proportion of certain groups and it's been difficult, if not disastrous.

So here is what I tell my students, and this is what I say to all the groups that I speak to scores of times every year. And I always say, Never expect -- Never tell your campuses that there will be a point at which they will be satisfied that we've achieved the right mix of diversity. Never, never issue that promise because you will fail every time.

It is not scientific. It just isn't. And so I think what I advise is that you don't pay attention to that point. Here is what you pay attention to. You pay attention to the striving. That's what you pay attention to. In every year in every way, you're still striving to learn about difference. It's the striving that matters. And as long as you're doing that institutionally, and individually, you're making progress undeniably. But if you try to set these false expectations, that there is a magic point at which it's now functioning best, you'll be disappointed.

THE COURT: That's the ceiling. What about the floor?

THE WITNESS: The floor, again, I don't think of it in terms of a floor. I just don't. I've seen so many circumstances in which small numbers have worked, and I've seen circumstances in which they are alleged not to have worked.

JA1016

You know, we are mired in a situation where all of this is subject to interpretation and reaction and the reaction of many different people. And in such a circumstance, it is impossible to come up with a formula that we're going to be satisfied with.

And so I think we'll never get there in terms of that floor. I don't think we'll get there in terms of any ceiling. And I think that this whole idea of keeping ourselves honest by narrowly interpreting what we are doing and consistently doing that is a pretty good way of doing it.

I can only say that over a lifetime of trying to do this in lots of different settings, I've never been in a setting where people were satisfied that they were doing it exactly the right way. And that's been a vast array of settings.

U.S.C. was right on the edge of the black community, one of those venerated institutions. And when the riots occurred in Los Angeles, the riots went right up to U.S.C. and stopped. And it had nothing to do with the diversity of U.S.C. in terms of numbers. It had to do with the fact that that community respected U.S.C. because of the way U.S.C. had respected its athletes.

So there are so many different ways of looking at this.

MR. WAXMAN: Over to me?

Q. Let's turn finally, President Simmons, to number five on the slide, which is the proposal that Harvard eliminate early action.

JA1017

Could you please summarize your opinion about the consequences to private universities like Harvard of eliminating the criticized early action program?

A. Well, I would say that when Harvard decided not to use this competitive advantage, we were very happy at Brown. Because any advantage we can enjoy in terms of recruiting students, we want that advantage.

Early action provides a competitive advantage when it comes to the most sought-after students. And if you -- if you abandon that and don't have access to those students, there are consequences for it.

And so as a practical matter, I would say any university that is competing at that top level for the very best students will want to maintain that advantage, and early action is such an advantage.

Q. I was going to ask you about your experience at Brown and Princeton, but I think you've testified about the consideration at Brown.

Did Princeton -- does Princeton offer early action?

A. It does. It abandoned it for a time and went back to it. And, again, there is a cluster of institutions that compete fiercely.

I remember when I was at Princeton, I remember a time at Princeton when Princeton was very annoyed, that they didn't feel they were getting their fair share of the top students who were applying to Princeton, Yale, and Harvard. And they went to work to try to figure out how to overcome what they saw as a deficit.

JA1018

But in regard to early action, they restored early action because those institutions that did abandon it realized that they were giving up a substantial competitive advantage by giving it up.

Q. President Simmons, did you review Mr. Kahlenberg's contention that early action programs disproportionately benefit white and wealthy students?

A. Yes.

Q. Do you agree with him?

A. Well, I looked at the process by which Harvard reaches out to all income groups, to minorities, and so forth. And perhaps people don't understand this very well, but if you're in a household in my old neighborhood, Bloody Fifth Ward in Houston, Texas, and you are a high-performing student, you're getting information from Harvard in your junior year telling you, "Here are your options for applying." That's how extensive the marketing has become. It wasn't always so.

But today, the outreach is aggressive and virtually omnipresent, and so typically students of all incomes will be aware of what their options are.

That's not to say that a student who has modest scores and is in the middle of their class will get that. They won't. Because there are lists that are circulated of the highest achieving students, and universities concentrate on those lists and they go after those students.

JA1019

Q. Would an average student who is acquitting herself in the middle of the class likely be an appropriate candidate for early action in the institution --

A. Would never be admitted.

Q. Let's turn to Demonstrative 9.19.

And, President Simmons, can you please summarize your opinion about the consequences to private universities like Harvard of eliminating the criticized admissions practices that we have discussed?

A. I believe that eliminating the criticized admission practices would undermine the ability of Harvard to continue on its path of outperforming other universities. These practices have been responsible in, I think, large measure for the success that Harvard enjoys today. And if you really admire that success, then undermining it by eliminating these provisions would not make much sense to me.

Q. In looking at number one on the demonstrative, what is your bottom line on the importance of diversity at Harvard?

A. It's very hard for me to overstate my conviction about the benefits that flow to all of these areas from a diverse undergraduate student body.

I know something about the lack of diversity in one's education. I know what it was like to live in a society where that was the bedrock approach to education. I know what it was like to walk down the streets where random people attacked us or issued slurs because they didn't understand what my

JA1020

community was all about. I understand what it was like for African-Americans in this country not to have access to professions.

My father was a janitor, my mother was a maid. They had been sharecroppers, they had few opportunities. I lived through that. I remember it.

So to me, the benefits that flow to students is they get a better education, a deeper education, a truer education to deal with what they're going to have to deal with in life.

To the institution, it makes for not just an enhanced learning environment but for the opportunity to be unparalleled in their standing because they offer something that is so indispensable for society.

And for society, my goodness, I've spoken about the conflicts in society, how deeply they run, how they resurface from time to time. How can we imagine a world in which we are not creating leaders and citizens who have the capacity to mediate those differences? I cannot imagine it. And so it's with great conviction that I say that we must continue to offer diverse undergraduate education to our young people to save our nation.

* * *

DAVID CARD
EXAMINATION BY MR. WAXMAN

[p. 84:3-6]

Q. Approximately how many fields of data did you analyze from Harvard's database?

A. Well, certainly I would say over 200 because there's 200 variables used in most of my models.

* * *

[pp. 101:16-102:2]

A. So just like Professor Arcidiacono, I used a multivariate logistic regression model.

Q. What is a regression?

A. So a regression is a statistical technique, widely used in economics and other fields, where you try to statistically describe the relationship between a series of inputs or factors, sometimes called. So those would be -- in the context of the admissions case, those would be things like gender of a student or where they're from, characteristics of their high school, their transcript, and so on, and relate those to an output. In this case the output would be are you admitted or not.

* * *

[p. 109:14-24]

Q. We've heard about this at least once, but could you explain what that means?

A. Yes. So if you have a sample of data and you estimate a model, the particular estimate that you get can vary a little bit from sample to sample. And you might have a situation where there's truly no effect, where there really is no effect of salary on retirement. But in some particular sample you would have an estimate that might be a positive or a negative. And so the statistical significance gives an indication of how

likely the estimate you got could have occurred by chance when the true answer was zero.

* * *

[p. 123:1-17]

Q. Looking at these variables, Dr. Card, does your model capture everything about the Harvard admissions process?

A. Certainly not, no.

Q. What kinds of data does it not include?

A. Well, it excludes a lot of information that would be directly observed by the admissions officers, information coming from, for example, essay or a personal statement that a student submits, information coming from the letters that are written on behalf of a student by the two teachers and the guidance counselor, information that's summarized in the reports from the alumni interviewer.

And my understanding is that many, many files these days have multiple additional letters from community members and things like that.

So that kind of qualitative information is completely missing from the database, and that's an important limitation of what I can do with the data.

* * *

[pp. 177:8-178:4]

Q. Now, you mentioned earlier when you were talking about should I or should I not retire, since I'm on the bubble, that omitting factors can cause bias.

Can you just remind us what that concern is?

A. Yes. The concern is that there's some characteristic of one group of students relative to another that's somewhat different and that that characteristic is evaluated or valid in the admissions process.

And if you don't take account of the difference in that characteristic, then it will become part of the unobserved component of the model. And the model, not knowing what's going on, will essentially assign that difference as part of the average marginal effect between the two groups.

Q. And is omitted-variable bias a concern with the variables that Dr. Arcidiacono has omitted from his model?

A. Yes. In each case I believe that there's a substantial concern with omitting each of these variables because each of them is, in fact, part of the admissions process and has some power in the statistical model of the admissions process. And each of them differs somewhat between Asian and white students.

* * *

JA1024

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

October 31, 2018

Pages 1 to 206

TRANSCRIPT OF BENCH TRIAL - DAY 13
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
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JA1025

* * *

**DAVID CARD
EXAMINATION BY MR. WAXMAN**

[pp. 40:15-44:21]

And we may have to take a little bit of a deep breath here because I'm noticing a concept that I may have forgotten to ask you about in the retirement hypothetical.

But let me just ask you at a general level, what is this showing?

A. Yes. So this is showing the concept of each of these different models that's somewhat important in understanding the model. And that is on the vertical axis, there's a scale between zero and 100 percent, and the -- that representation of what's called -- and I apologize for the jargon, it's called an R-squared or even a pseudo R-squared. And it's a summary representation between zero and 100 percent of the fraction of the variation from student to student in the particular thing we're looking at.

So, for example, in the first column we're looking at the academic rating. And so this is a summary of the variation from student to student and whether they're assigned a 1, or a 2, or a 3, or a 4 academically that can be explained by the factors included in Professor Arcidiacono's model. So that would be the yellow components. So in the case of academic rating it's 57 percent.

And then, of course, the other balance of the 100 percent, or 43 percent in this case, is attributed to factors outside the model. So that would be the components like national competitions, like the evaluation in context, like variables that Professor Arcidiacono has not included in his models, parental occupation or something like that that could potentially be informing the determination of the rating but are not in the data as he used it.

THE COURT: This is just the qualitative versus the quantitative?

THE WITNESS: Yes, that's one way to think about it. It's the part of the qualitative that's not quantifiable in the data, yes.

THE COURT: And how do you come up with that percentage?

THE WITNESS: So the result of the estimation, it's one of the things that comes out when you run -- estimate one of these models. It actually tells you this number. Or it's possible to calculate it very straightforwardly.

So loosely speaking, it's taking the predictions from the model and comparing them to who actually got what actual score, actual rating, trying to make an assessment of how often it got -- how closely it was able to reproduce the right answer.

Q. Let me ask a question just to make sure I'm fully understanding this.

JA1027

So with respect to the academic rating regression, is this R-squared statistic, tell me if I'm wrong, the R-squared statistic shows that of the data that is captured in Dr. Arcidiacono's model, it will explain 57 percent of the actual rating that an applicant receives by the reader?

A. I would state it slightly differently. I think it would be helpful to get this straight.

Q. Fine.

A. So think of -- there's lots of different students. There's 150,000 students here in this -- he's pooling the six years. And so there's an enormous range of variation as we emphasized in the individual variation in the ratings. And this is saying, okay, think of a way to summarize -- think of a quantitative summary statistic that you could develop of how much variation there is from student to student on this 1 to 4 scale. And now what fraction of that student-to-student variation is explainable by the factors in the model.

Q. And what do we see with respect to the personal rating regression and the extracurricular rating regression?

A. Well, one can see a very important difference.

The quantifiable factors in the model are strongest or most richest with respect to academic variables. When we get to the personal rating regression, the factors in Professor Arcidiacono's model can only explain about 29 percent of the overall student-to-student variation. And when we get to the extracurricular, it only explains 13 percent.

So there's a much wider range of these unobserved factors -- unquantifiable qualitative factors that Your Honor was talking about. And so that's 71 percent of the personal rating and 87 percent of the extracurricular rating.

Q. Would it be fair to say, maybe not, that what the R-squared calculation is -- is measuring is the explanatory power of the model, how much of the observed outcome the model can explain?

A. That would be absolutely, precisely correct. And oftentimes when someone says, you know -- an economist says to another economist, what's the explanatory power of your model, I would respond what the R-squared was.

Q. Why is it important to think about the magnitude of the unexplained variance?

A. Yes. So this is getting back to a question that Your Honor asked yesterday.

When the unexplained component is larger, it means that more of the variation from student to student is being determined by unobserved factors, as far as my model is concerned. It doesn't mean that the application officers -- admissions officers don't see them. They see this amazing range of material that I don't see.

So it means that more and more the variation is being determined by factors outside of my particular data, or our particular data. Professor Arcidiacono and I have access to the same data. But, and that opens up more and more of a possibility that those unobserved

factors are leading to inadvertent omitted variable biases in the model. Because now with 71 percent of the variation unexplained, there's just a lot more possibilities for things that we're not measuring driving any difference that we're seeing attributed to variables inside the model; for example, the difference between Asian-American and white students.

* * *

[pp. 54:6-58:16]

Q. May we have the Demonstrative 67, please.

What does this show?

A. So now I'm going to focus on three very important variables that we've discussed in some aspects before in my testimony and also other people have talked about. Excuse me. And that is the teacher 1 recommendation, the teacher 2 recommendation rating, and the guidance counselor recommendation.

So these are the three ratings which together Harvard calls the school support ratings. So each applicant gets a letter of recommendation from two teachers and from a guidance counselor, and so this is the summary of the ratings that are assigned to those three letters.

Q. And do those ratings inform the personal rating?

A. Yes, I think that's very clear they do, yes.

Q. Let's look at the next Defense Demonstrative, 68.

What does this show?

A. Excuse me.

So this shows the -- for each groups of students classified by their academic rating of having a 1, so that's the two columns on the left, or having an academic rating of 2, that's the two columns in the middle, or groups of students that have academic rating of 3, on the right, I'm showing within each of those groups the fraction of white students and Asian-American students for whom the sum of these three school support ratings -- excuse me.

Q. Take your time.

A. Excuse me. I'm not used to talking this long.

Q. Your lectures may be shorter than my oral arguments.

A. Yes.

So this is showing the sum of those school support ratings. So to remind you, each of the ratings is from 1 to 4. And 1 is good -- 1 is outstanding, 2 is quite good, 3 is kind of, pretty good, and 4 is not so good.

And so a student that got, for example, on the three ratings, got three 2s would get a 6, and that would be a quite a strong rating. A student who got, of course, three 1s would be a 3. That would be almost unheard of. But a student who got, say, two 2s and a 3, they would get 7.

So I'm going to classify as having two 2s and a 3 or better. And that's what this shows. So the fraction -- amongst students who get an academic rating of 2, the fraction of white students in that bucket who have the

JA1031

sum of the school support ratings, these three ratings that's less than 7, is around 43 percent, and the fraction of Asian students in that category is -- who have that sum of ratings less than 7 is around 37 percent.

Q. And does that relationship, the relative percentage of the white applicants versus Asian-American applicants also hold for those applicants who got an academic rating of 1 and an academic rating of 3?

A. Yes, you can see that in the graph quite clearly.

Q. And what do you conclude from those results?

A. Well, it's important to classify the students by academic rating.

Q. And why is that?

A. Well, the reason why is because, remember, as we talked about a moment ago, the teacher -- the rating that's assigned to the teacher letter is a single rating, but the teacher letter is containing information about academic and non-academic factors.

So what I'm trying to do by classifying conditional academic rating of 2, for example, focusing on the middle panel, I'm saying, well, imagine that the teacher has -- excuse me -- the admissions officer has pulled out of that teacher letter the academic information in that letter and putting that together with other information has decided that this student is an academic 2, then the other components of what's left after we hold constant to that is informing these non-academic qualities.

JA1032

So the non-academic qualities for students who are assigned an academic 2 are obviously higher for white students than for Asian students.

Q. Now, I see in your next demonstrative that we have a little shading around academic rating 2. Can you tell us why or what you're going to do with that?

A. I can, yes.

Q. Why, and what are you going to do with it?

A. Well, one might be concerned that I've somehow fixed -- chosen the 7 number strategically. And so what I'm going to do is I'm going to take the students that are assigned an academic rating of 2, and I'm going to show the full distribution of the sum of the school support scores.

Q. All right. May we have the next demonstrative, please, 68 -- or 69.

So what is this showing?

A. So recall, the school support, the 3 ratings could be 3 for unbelievably outstanding student. They could be 4 if you got two 1s and a 2 all the way up to 7, as I mentioned before, which would be two 2s and a 3.

And we can see in each of these sort of better ratings buckets white students are overrepresented relative to Asian students who are more likely to be in that set of categories amongst the students who have an academic rating of 2.

Q. And what does the next demonstrative show?

JA1033

A. So it shows that that preponderance of white students in the better side of the distribution is offset or balanced out by a preponderance of Asian students on the lower side.

So Asian students are, in particular, much more represented in the 9 category, which would be three 3s, which would still be quite a good category but not nearly as good as the others.

Q. Did you conduct the same analysis for students with an academic rating of 1 and an academic rating of 3?

A. Yes.

Q. And what did you find?

A. I found that the pictures look very, very similar.

Q. And are those results reflected in Defense Exhibit 692 in evidence?

A. Yes, they are.

* * *

[p. 63:20-23]

If we add in the interaction variables that Professor Arcidiacono often uses in his specifications, you can see it really doesn't make that much difference to that specification.

* * *

[pp. 68:16-71:21]

To be clear, in addressing the court's question, are you saying that the difference in the ratings that are

JA1034

quantified in the data explains the average differences across race in the personal rating?

A. No.

Q. Do you believe that the effect of Asian-American ethnicity on the personal rating that's estimated by Dr. Arcidiacono's model reflects a genuine effect of race or rather the effects of factors outside of the data?

A. I believe it reflects factors outside of the data.

Q. And so what do you learn from the factors in the data like ratings about those factors outside the data?

A. So what we're trying to do is follow this logic of a pattern which is often true; that the observable factors inside the data that most inform the personal rating, which are as shown in this slide here, those school support and alumni interview ratings, those factors are stronger for white students than for Asian students when we hold constant academic factors.

Q. Did you also compare Asian-American and white applicants on other factors besides the five that we've already talked about, on other factors that inform the personal rating?

A. Yes, I did. I actually took Professor Arcidiacono's model 5 and added some additional contextual-type variables, parental occupation and so on, and showed that those variables also lead to an increase in explanatory power.

Q. Did you conduct an analysis that looks at all of the non-academic measures in the data?

A. Oh, yes, I did.

Q. And why is it relevant to look at non-academic factors in general?

A. Well, as we've been talking about, I think, extensively, there's obviously differences across candidates on average. So Asian-American students are stronger in academic factors, white students are stronger on non-academic factors, and so trying to understand differences, particularly as they inform the personal rating. What I've shown here is that personal rating is representing mostly non-academic factors, and so what I did was I took my overall admissions model and I isolated all the factors in that model that are non-academic components. And I used just those components to rank the students by their strength. So this would be some combination of all the factors in my model except the academic variables.

Q. And then if we may have Defense Demonstrative 10.77, please.

What is this showing?

A. So this shows when I look at this total combination of all non-academic factors that white students are substantially more highly represented in the top three deciles.

Q. And to be clear, these are the top three deciles of the non-academic index?

A. Yes. So these -- as I said, the personal rating is largely informed by these non-academic factors. So in understanding how the observable features differ

between whites and Asians, I use this construct of the total summary of their non-academic strengths. And one can see very clearly that the white students are stronger on these non-academic dimensions.

Q. Now, does your analysis -- in creating the non-academic index, did you also include the personal factor as a non-academic factor?

A. The personal rating, yes.

Q. Yes.

And did you also include the ALDC attributes as non-academic factors?

A. I did, yes.

Q. What happens if you remove the ALDC attributes and the personal rating as factors?

A. So I did that exercise as shown on the next slide.

Q. Can we have Demonstrative 78, please.

And what is this showing?

A. It shows the same pattern still persists. So even when you take all these non-academic factors but turn off any preference given to the As or Ls or Ds or Cs, so that that's no longer part of any difference, and completely throw out the personal rating, which I believe is an overly extreme assumption, but do that, it's still the case, and on the remaining non-academic dimensions white students are more highly represented in the top deciles than Asian students.

* * *

[p. 74:7-23]

Q. And so to sum up, Professor Card, what is your view about the relative strength of white and Asian-American applicants on factors in the data that inform the personal rating?

A. My assessment is that they are stronger. The white students are stronger than Asian-American students on the factors that are most relevant for informing the personal rating, the observable factors.

Q. And why is that important?

A. Well, as I said, economists often argue that if the observed factors inside the data that inform a particular variable are in one direction, then the unobserved factors may well be in that same direction.

Q. And is that, in fact, the reasoning that Dr. Arcidiacono uses in his interpretation of the positive average marginal effect for Asian-American ethnicity that he observed in modeling the academic rating and the extracurricular rating?

A. Yes, precisely.

* * *

[pp. 78:9-81:11]

Q. Let's turn to Defense Demonstrative DD 10.80. And let's focus on the last personal rating conclusion.

And let me ask you to assume now, contrary to the conclusion that you've expressed, that race really does influence the ratings in ways estimated by Dr. Arcidiacono's models.

JA1038

And let me ask you first, would that justify throwing the ratings out?

A. No. I don't think that would be the right thing to do at all.

Q. What would -- why wouldn't you throw the ratings out?

A. Well, because the ratings include all of this information and they capture some of the information that I can't quantify. And so if one was concerned about that, it wouldn't make sense to throw them out entirely.

Q. And so what did you do?

A. So instead of throwing them out entirely, what I did was I took Professor Arcidiacono's models for these three ratings variables, and they all have a component -- an Asian-American effect, and I turned off that effect.

Q. So let's see the next demonstrative, if we could.

And what is this -- is this -- this is showing the effects, the estimated average marginal effect of Asian-American ethnicity on the three ratings that Dr. Arcidiacono modeled?

A. Right. So just to remind you, for instance, the extracurricular effect here is representing the fact that controlling for all of the observed variables in the model that Professor Arcidiacono, his model 5, his most complete model, richest model for the extracurricular rating, there is still a large, or relatively large unexplained Asian-American effect. So they're getting

higher extracurricular ratings than can be explained by factors in the data. Similar for the academic rating and similar for the personal rating.

Q. What does the next slide show?

A. The next slide visually illustrates that I turned them off. So I take those three components, but only the race components of the three variables, the three ratings variables, and I turn off that, but leave in all the other components in his prediction models.

Q. Would you please turn to Tab 18 in your volume?

A. Yes.

Q. And what is -- this is document Defense Exhibit 694.

What is it?

A. So it's average marginal effect of Asian-American ethnicity in my models with profile ratings adjusted to remove what Professor Arcidiacono claims to be racial effects.

Q. Does this reflect the analysis you just described?

A. Yes.

MR. WAXMAN: Your Honor, we'd offer Defense Exhibit 694.

MR. MORTARA: No objection.

THE COURT: It's admitted.

(Defendant Exhibit 694 admitted into evidence.)

Q. Mr. Lee, if we can have Demonstrative 83, please.

So what is this showing?

A. So this shows if I take Professor Arcidiacono's models, turn off these race components for the ratings, the three ratings variables, and then predict each person's ratings from his models with what's left after taking out these potential effects of race, then include those variables as the ratings in the model, so these would be ratings that are in some sense purged of any unexplained racial differences.

When I do that analysis, I get average marginal effects from year to year that look quite similar to the estimates I had before. None of them are individually significant. Some are positive, some are negative. The average marginal effect across all the years is minus .011. So eleven one-hundredths of a percentage point. Not statistically significantly different from zero.

So my conclusion is from that that if one believed that the right thing to do was to turn off the race component on the ratings, to imagine that there's some kind of racial bias that's generating these phenomena, then I would get -- in fact, after taking off the race component of the three ratings, I would get more or less the same results as I get from my main specifications.

* * *

[pp. 99:3-103:12]

Q. Well, let's start with the first analysis. How did you analyze the extent to which race alone can predict admission outcomes?

A. What I did was along the same lines of some of the exercises we've seen before. I looked at the overall explanatory power of race alone in explaining student-to-student admissions decisions relative to the overall explanatory power of other types of factors in explaining student-to-student admissions outcomes.

Q. And would you turn to your -- in your binder to Tab 34.

A. Yes.

Q. What is Defense Exhibit 715?

A. It's pseudo R-squared values of various admissions models -- of admission models containing various controls.

MR. WAXMAN: We offer Defense Exhibit 715 into evidence.

MR. MORTARA: No objection.

THE COURT: Admitted.

(Defendant Exhibit 715 admitted into evidence.)

Q. Please turn, Professor Card, to Tab 35.

A. Yes.

Q. Do you find Defense Exhibit 716?

A. I do, yes.

Q. And what is that?

A. It's changes in explanatory power of my model of admissions when the effects of different variables are removed.

MR. WAXMAN: Your Honor, we offer Defense Exhibit 716 into evidence.

MR. MORTARA: No objection.

THE COURT: Admitted.

(Defendant Exhibit 716 admitted into evidence.)

Q. Mr. Lee, let's please display 10.93 on the screen.

And Professor Card, what does this show?

A. So this is the graphical illustration of this first exercise I did to assess the magnitude or importance of race in the admissions decision.

So each of these is the R-squared -- each of these bars represents the R-squared or the fraction of explained variability from student to student in the yes-no decision of whether a student is admitted.

So starting on the left, I show what fraction of that would be explained if one only used the four profile ratings, nothing else. So none of the other contextual variables, no race information, nothing else. And one can see that those four variables alone would explain about 38 percent of the overall differences from student to student in probability of admission.

JA1043

The next bar shows the teacher and guidance counselor ratings alone. So these are just the three school support ratings variables, and those variables alone, you can see, have a fairly high explanatory power. So those three variables alone explain about 19 percent of the outcome.

The alumni interviewer ratings, the next bar, explain about 13 percent.

The next bar shows explanatory power of a set of contextual factors from the college board data on characteristics of high schools and neighborhoods. Those variables explain about 6 percent.

And this is individually, I emphasize. So in each case I'm using these variables alone in my model, nothing else.

So when I get -- docket explains about 2 percent, so there's these domestic dockets we've talked about.

Intended career one of the variables we talked about explains about 1 percent, that in itself. Intended major explains about 1 percent. And by comparison, race by itself explains 0.2 percent. So relative to all these other factors, race per se is a very, very small component of explanatory power.

Q. So does that mean that race has no effect on admissions?

A. No, not at all.

Q. How so?

JA1044

A. Well, this is an example of the fact that any individual factor in the admissions process can be important but only for students who are highly competitive, exactly the kind of point I was making in my hypothetical example where I looked at the S-curve relationship for retirement and pointed out, for example, that presence of a spouse at home, for instance, would not necessarily have much effect on retirement except for people who are in kind of the bubble range. And for that group of people, there can be an effect, even though on average the effect across everyone is relatively small, or that variable doesn't explain very much of the outcome.

Q. And the bubble range for purposes of this case is what?

A. For purposes of this case, the bubble range is going to be for students who have at least, I would argue, one strength and possibly two strengths, are in the upper group of the entire admissions pool in terms of their combination of strengths.

Q. So when we talk about the upper range, are we talking about applicants who are highly competitive on many dimensions?

A. We are, yes.

Q. So turning to the second analysis that you mentioned, comparing race to other factors for competitive applicants, how did you determine which applicants were the most competitive?

A. So I used my admissions model and I constructed -- or I thought about it in terms of exactly the same kind

of framework as we're thinking about in this hypothetical with retirement.

So I used my admissions model, and I looked at the overall strength of an applicant, taking account of all of their different features. So there's the school support, their profile ratings, the contextual factors and all of that additional information, and then I tried to -- but in the case of race, what I would do is I would ignore or turn off any impact of race in that evaluation. So I'd rank all the students by that characteristic and then proceed.

* * *

[pp. 103:25-114:17]

Q. Turning now, Mr. Lee, to Defense Demonstrative 94.

What is this showing?

A. So this is showing, based on the -- exactly the previous document that just went into evidence, this is showing the predicted probability of admission for students when I use the procedure I was describing of ranking students by their strength.

And one can see that it's got the same kind of S-curve relationship or logistical curve relationship as we saw in my simple hypothetical.

So for something like the bottom two-thirds of the admissions pool, their predicted probability of admissions is essentially zero. So that group of students is out of the money. There's no combination --

JA1046

there's no single variable that can have any effect on their admissions probability. So that's the first group.

The next group of students -- we can see that contrary to my retirement example, there really aren't any students who have extraordinarily high probabilities. There's like a couple of students who are in the 90s.

Q. We're now talking about the right hand?

A. The right hand, yes. So we can say there's a group of students who I would say are on the bubble, and that's starting around the 75th percentile of academic strength. So when I take all the applicants and order them by their strength, I get to the 75th percentile.

And the point that's important to take away from this graph is, while it's the case that for students with low probabilities of admission, some feature like one more strength or going to a single type of strength or being from sparse country or being of a particular racial group, for those students with low probabilities of admission, we have essentially a negligible effect.

But when we get to the bubble range, now when I take a student, for example, at around, say, the 90th percentile -- remember, only seven percent of all students are going to get in. So the 90 percentile group on average is not too good. They're only the tenth percent -- they're out of the money.

But for that group students at the 90th percentile, if I could give them one more factor that would push them up from the 90th percentile to the 93rd or 94th

JA1047

percentile, one can see that could have a very large effect on the probability of admission.

And so this is an extremely important point: That once a student has some combination of strengths, then one more can really make a big marginal difference. So that one additional strength can have a very large effect relative to the set of previous strengths that they had.

Now, importantly, which of those strengths -- so suppose a student has -- I talked about this before. But suppose a student has three strengths and I move them to four. Which of the ones is the one that caused them to have the high probability is entirely unclear because it's one of many.

So this kind of illustrates this concept of when students are highly competitive and in the bubble range, it's really due to a combination of strengths, and it's -- the isolating effect of any one of many has to be put in that context.

Q. Would you please turn to Tab 36 in your binder.

A. Yes.

Q. What is Defense Exhibit 718?

A. So it's average marginal effects of various factors by admissions index decile.

Q. Is this a summary of the analysis you just described?

A. In part.

JA1048

MR. WAXMAN: Your Honor, we offer Defense Exhibit 718 into evidence.

MR. MORTARA: No objection.

THE COURT: It's admitted.

(Defendant Exhibit 718 admitted into evidence.)

Q. Turn, please, Mr. Lee, to Demonstrative 97.

What is this showing?

A. So now what I'm going to do is I'm going to focus on the marginal effect of African-American or Hispanic or other ethnicity. And I apologize, I'm going to say Hispanic sometimes when I mean Hispanic or other. So in my analysis and Professor Arcidiacono's analysis, the Hispanic group includes some other people of other ethnicities, Hawaiian, Alaskan-American and stuff like that. So that's the group we're talking about.

And so what I've done on the axis, as before, I've ranked all the students in the application pool, all the students, not just African-American students, but all the students in the application pool, including the African-American students, by their strength of admission and from 1 to 10 deciles but not using any tip for race.

So when we get to the sixth or seventh decile, we're into a range wherein students are getting to be having some combination of strengths already. And one can see when one gets -- first of all, when one is in the bottom half of the distribution, when a student is in the bottom half of the distribution, there really is no effect of race on the additional probability of admission.

JA1049

But when one gets to, say, like the eighth decile, now one is well into the bubble range, independent of any tip associated with race. So now a student would probably have, say, two or even three strengths.

And now one of those in that case, having that base of strength, being in addition an African-American applicant would increase the probability of admission by an additional 25 percent. Being a Hispanic would increase their probability of admission by 8 or 9 percent.

And similarly, if one goes now to the ninth decile, now one is into the very steep part of the S-curve.

Q. Just to be clear, the ninth decile is from -- is the 80th to the 89th percent highest group of applicants?

A. Yes. 89.999 percent, yes.

Q. Sorry. We lawyers are not good with decimal points, but I take your point.

A. Yes. But it goes all the way up but does not touch.

Q. So the tenth decile is the decile between 90 and 100?

A. Yes, yes.

Q. Okay.

A. So if we focus on students -- now we're ranking all the students -- I want to emphasize very clearly that I'm ranking all the students by all of their strengths except race. So there's some 200 factors in this model. So all 200 are in there except any effect of race.

I'm putting these into these different groups. And now in the ninth decile, this is the group of students who are at the very steepest part of the S-curve. For that group of students, if at that point I turn on the effect of being African-American, then I'm going to increase their probability of admission by about 50 percentage points. And if I take an Hispanic student, for those students in the ninth decile with these very strong combination of skills, then I'm going to increase their probability of admission by around 21 or 22 percentage points.

Q. And is this result that we're seeing here consistent with what you would expect?

A. Yes, it's driven by this important feature of the S-curve that I talked about yesterday in regard to the retirement hypothetical.

So it's driven by the fact that, first of all, very, very many students are out of the money. And when one gets to the upper deciles, in particular the upper two or three deciles, those are the students that have a combination of strengths. And then with that base of, say, good academics and a good extracurricular, then one additional factor could make a substantial difference.

And that's exactly I believe how the admissions process works.

Q. And these -- what we're showing here are marginal effects, correct, not coefficients?

A. Yes. Again, these are average marginal effects across all the students in that decile.

Q. And can you just remind us again of the difference between the two?

A. Yes. So I want to emphasize that the average effect does not mean that this is an effect for any given individual. So, for example, in the ninth decile or eighth decile, there's going to be students who get in and students who don't get in. So the individual is always much different than the average.

Q. What's termed --

THE COURT: I'm sorry, Mr. Waxman. Did you do this analysis for Asians?

THE WITNESS: No, Your Honor, because there's no tip for Asians in my model. It's minus .05, yeah.

THE COURT: Okay.

BY MR. WAXMAN:

Q. Mr. Lee, can we please have Demonstrative 98.

What is this showing?

A. This is a set of graphs very similar in setup meant to contextualize or help interpret the bumps or boosts that we see for African-American and Hispanic students in different deciles compared to other important attributes of students.

So, for example, focusing on the lineage case in the middle upper panel, what I've done is taken all the students in the admissions pool from my admissions model and I've turned off lineage. I said, I'm going to ignore lineage and rank them by all other strengths.

Then for students in the eighth or ninth decile, by that overall measure of combination of strengths, I'm going to look at what would be the increase in admissions probability if, say, starting in the ninth decile in this very sharp S-curve part of the relationship, what would be the effect of being a lineage student and, similarly, what would be the effect of different ratings combinations.

Now, in the case of the ratings combinations, what I've done is I've taken a student, for example, with an academic rating of 1. I've taken all of those students and I've turned them down to a 3, which is kind of the base group for academics. Similarly for extracurricular or similarly for personal.

So taking all the students but turning down the academic 1s to an academic 3, re-rank them into the groups, and now turn on their academic 1. And so this is the result showing the average marginal effect, for instance, if a student with -- who would otherwise be an academic 1, but I've put them into, say, the eighth decile by turning off their academic 1, and then I turn on their academic 1, it's going to increase their probability of admission if they're in the eighth decile with all these other strengths up to around 65 percent or so.

Q. And, again, why do any of these factors have such a large marginal effect for competitive applicants when the process considers so many, many different factors?

A. Well, as I tried to emphasize, once one gets into the bubble range, those are going to be students that have

JA1053

a combination of strengths. So they're going to have two, three, four strengths.

So when you're in that range, first of all, there's a base of strength -- thank you -- and so you're starting, let's say, around the 90th percentile. So one more factor that pushes you up a relatively small amount in terms of going, say, from the 90th to the 93rd percentile can have quite a large effect on your probability of admission. So that's a characteristic.

It's a combination of the fact that it's a multiple dimensional admissions procedure. So there's multiple factors, any one of which, if it was considered the marginal one, could have a big positive effect.

Q. Can we go back to the previous demonstrative, 98, and let's focus, and use, for example, the lineage applicants. Let's consider a lineage applicant in decile 9. This would be the applicants in the decile between 80 percent probability of admission and 89 if I have you right, .999 percent?

A. Yes.

Q. What is roughly the average marginal effect of lineage status for that applicant?

A. Reading off the graph, it's around 31 or 32 percentage points.

Q. Does that mean that the applicant is likely to be admitted?

A. It means that I don't, off the top of my head, know the average -- the underlying average probability of admission. It would mean that the probability of

admission is far below 1. So any given individual, even in that group and even with the lineage turned on, would not be assured admission.

Q. And so is lineage -- would this mean, this increase in their probability of admission mean that lineage status is decisive for that applicant?

A. No, not at all because you recall to get to the ninth decile they would have to have a combination of these other strengths. So if I took a student who, say, is an academic 2, an extracurricular 2 and an athletic 2, got them into the ninth decile and then turned on their lineage, then I would see an effect like a 30 percent point.

But if I gave them the lineage and the academic 2 and the extracurricular 2 and turn on the athletic 2, I would see a similar boost. So any one of those four factors would have this large marginal effect because I'm starting with a base of three other factors that are strong.

Q. Consider an African-American applicant in decile 9. What is, roughly, the average marginal effect of race for that applicant?

A. It's just over 50 percentage points.

Q. And does that mean that race is decisive for that applicant?

A. No, not at all. Because there are other factors that are contributing to getting them to the ninth decile and at that point, on average, it's true that there's an increase in probability, big increase in the probability

of admission for that group, but that's on top of this other base.

And even accounting for that increase in probability, there is still uncertainty as to whether they're going to get in or not.

Q. Is it possible to think of these graphs as showing the magnitude of the various, quote, tips for highly competitive applicants?

A. Yes. This is showing that the magnitude of any specific tip taken individually, one at a time, can appear to be quite large in a process which values many dimensions of strength when one gets into the bubble range.

* * *

[pp. 122:7-124:6]

Q. Did you look at any other data on these issues?

A. Yes, I looked at a broader perspective on the actual levels of the shares of each of the race groups over time.

Q. Can you please turn to Tab 33 in your book and tell me when you've found Defense Exhibit 713.

A. Yes.

Q. What does that show?

A. It's two exhibits, the Asian-American, African-American and Hispanic shares of applicants to the class of 2018 [sic] to 2019, and the shares admitted to the class of 2018 [sic] to 2019.

Q. When you said it's two exhibits, I think what you meant to say is it's two pages to the exhibit.

A. Two pages, sorry.

MR. WAXMAN: Your Honor, we offer Defense 713 into evidence.

MR. MORTARA: No objection.

THE COURT: Admitted.

(Defendant Exhibit 713 admitted into evidence.)

Q. Let's turn to slide 102, please, Mr. Lee. What is this showing?

A. Okay. So this is showing the share -- the applicant pool. So this is the share of all the students who apply to Harvard who are in different racial groups between 1970 and 2019. And this is the share overall, including in the denominator, international students. So slightly different than some of the shares that we've talked about before or things we've talked about before.

Q. Let's turn now to Defense Demonstrative 10.103.

And what is this showing?

A. This is showing the share of admitted -- the share -- the different race groups in the admitted class from 1980 to 2019.

Q. Now, Mr. Lee, if you can display slide 104. I think we'll see the two graphs together on one page.

Looking particularly at the years in question in this case, which chart shows more year-to-year variation?

A. To me it seems clear that, for instance, looking at Hispanic and African-American, you can see wide swings from year to year, particularly in the Hispanic share, but also the African-American share of admitted students, whereas the shares of applicants are a little bit more stable. So this is the opposite pattern than one would expect to see if Harvard was trying to stabilize the admitted students relative to the students who apply.

So if they were really trying to stabilize the shares of admitted students, then they would take kind of a noisy share of applicants and create a smooth or constant share of admitted students. And the pattern is actually completely contrary to that.

* * *

[pp. 127:1-129:2]

Q. If Harvard were to continue with all of those efforts but then eliminate all consideration of race, would the racial composition of its class change?

A. Yes, I think so.

Q. How did you calculate that?

A. So what I did was I -- for today's purposes, I'm going to focus on the class of 2019, which is the last of the six years in the data set that we've analyzed.

Q. May I interrupt you? Is that also the class that Mr. Kahlenberg identified and focused on?

A. Yes.

Q. Okay.

A. So what I did is I took my model for that class, and I used the exact model that I developed earlier and we've talked about extensively, and I took that model and effectively turned off all of the preference or whatever effects associated with race and then, using that analysis, recalculated the probabilities of admission for each student without any race tips or whatever. And then considered through simulation methods the characteristics of the class that would result in that case.

Q. All right. If we could have Slide 107, please.

What is this showing?

A. So this is showing two charts. The left chart is the racial composition of the actual admitted class for the class of 2019. And I'm showing the five racial categories that we've been using throughout the analysis and is employed in all of my statistical models and so on. So that class was 40 percent white, 24 percent Asian-American, 14 Hispanic or other, 14 percent African-American, and 8 percent of those students had race missing.

And the second bar --

Q. Thank you.

A. -- is my estimate. I should say this is an estimate under the assumptions that the set of students who actually apply to Harvard stayed the same in 2019, but the procedures and admissions were changed to remove consideration of race. So that class would be 48 percent white, 27 percent Asian, 9 percent Hispanic, 6 percent African-American, and 10 percent missing race.

JA1059

Q. Now, what data did you use for this analysis? This is again the class of 2019.

A. Yes. I'm using the NEVO database for the actual characteristics of the students who applied to the class, merged with the College Board data on information on the characteristics of schools and neighborhoods.

Q. Did you do a similar analysis for the class years in this case other than 2019?

A. Yes, I did. I did an analysis for all of the other years.

Q. And were the results similar?

A. Yes. Broadly similar, yes.

* * *

[p. 172:1-5]

at Harvard. For students who are highly qualified on other dimensions, race can be one of the many factors that are associated with a higher probability of admission, comparable in size to other favorable tips that Harvard awards in the admissions process.

* * *

JA1060

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB

November 1, 2018

Pages 1 to 261

TRANSCRIPT OF BENCH TRIAL - DAY 14
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
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JA1061

* * *

**DAVID CARD
EXAMINATION BY MR. MORTARA**

[pp. 7:1-10:3]

Q. You used this slide in your direct examination. It's DD 10.35, right?

A. Yes.

Q. Do you remember the conversation you had, actually two separate conversations with the court, and the court was asking about both the order and the magnitude of the effects on this slide. Do you remember that?

A. Yes.

Q. And do you remember at one point I stood up and I said I really wanted to know about what would happen if you just took your model and removed the personal rating. Do you remember I said that?

A. Yes.

Q. And Mr. Waxman said you were going to get to that. Remember?

A. Yes.

Q. You actually mentioned it yesterday in your direct testimony?

A. Yes.

Q. You did that calculation in your opening report, correct?

A. Yes.

Q. And you didn't show it, though, did you?

A. Not that I recall.

Q. If you would turn in your opening report, please, to page 72. Are you there, sir?

And I have it on the screen. This is a calculation of your logit model of admissions removing the personal rating, correct?

A. Yes.

Q. And it concludes --

THE COURT: What page of his report?

MR. MORTARA: Sorry, Your Honor. It is 72 of the opening report. May I proceed, Your Honor?

A. Yes.

Q. And you see that the overall marginal effect you calculated was minus .34 percent and it was statistically significant, correct?

A. Yes.

Q. And for the record, for the year 2014, the effect was minus .76, correct?

A. Yes.

Q. And the effect for 2015 was minus .37, correct?

A. Yes, not statistically significant.

Q. And the effect for 2016 is minus .45, correct?

JA1063

A. Yes, again, not statistically significant.

Q. And the effect for 2017 is positive 0.05, correct?

A. Yes.

Q. And the effect for 2018 is minus .68, and that is statistically significant on its own, correct?

A. Yes, that's the only individual year that is, yes.

Q. At the effect for 2019 is positive .14, correct?

A. Yes.

Q. Now, this is your model with all the ALDCs in it, correct?

A. Yes. The model is slightly different in my rebuttal report, but yes, this is my model.

Q. We'll get to that in just a second. But this is your model with all the ALDCs in it, correct?

A. Yes.

Q. This is your model with intended career and staff interview indicator, correct?

A. Yes.

Q. This is your model with parental occupation, correct?

A. Yes.

Q. This is a yearly model, not a pooled model, correct?

A. Yes.

Q. So if you do all of the things that you talked about, your differences with Professor Arcidiacono, and you just remove the personal rating, your preferred model shows a statistically significant Asian penalty just like it does right here in Exhibit 21 from your opening report, right?

A. Yes, on average, although only one year is statistically significant, yes.

Q. You said you had a slightly updated model, correct?

A. Yes.

Q. But that's true of the slightly updated model, too, isn't it?

A. I believe so, yes.

* * *

[pp. 80:19-81:13]

Q. In preparing your reports in this case, you relied on Dean Fitzsimmons and a personal phone call you had with him for your view that race was not influencing the personal rating, correct?

A. Among other materials, yes.

Q. And as of your deposition, you did nothing to verify what Dean Fitzsimmons told you, correct?

A. Correct, yes.

Q. Now, we showed earlier the results of your model from Exhibit 21 of your opening report, if you remove the personal rating. And what you told me was, the

JA1065

overall average marginal effect is statistically significant and negative. Correct?

A. Yes.

Q. If the personal rating may be influenced by race, per se, whatever way that you think it applies to the overall rating, then removing it from your model results in the finding of a statistically significant Asian penalty, correct?

A. Yes, excluding it entirely, which I don't think it would be the right thing to do, but, yes.

* * *

**MARLYN McGRATH
EXAMINATION BY MR. MORTARA**

[pp. 121:11-124:21]

Q. Nice to see you again, Director McGrath.

A. Good to see you.

Q. How are you today?

A. Fine, thank you.

Q. I'm putting on the screen and in your binder in front of you on your left is Plaintiff's Exhibit 1, the reading procedures for the class of 2018.

You're responsible for the content of the reading procedures and a group of you develop and change it every year, correct?

A. Yes, that is correct.

JA1066

Q. Please go to the section on personal rating that is on page 5.

A. I just want to be certain I'm looking at the right thing. This is P1 is the tab?

Q. P1.

A. This is not paginated, but I can count.

Q. Just go until personal appears at the bottom.

A. Yes.

Q. It does not say anywhere in this document that race should not be used in the personal rating, correct?

A. I think that's correct.

Q. I've got a broader question.

Does it say anywhere in the admissions office in any written form, training material, memo, email, or any kind of writing down to a Post-it on the coffee maker that race should not be used in the personal rating? Is it written anywhere?

A. For this document?

Q. I'll read the question again.

A. Yes. Thank you.

Q. It's a broader question.

Does it say anywhere in the admissions office in any written form, training material, memo, email, or any kind of writing, down to a Post-it on the coffee maker,

JA1067

that race should not be used in the personal rating? Is it written anywhere?

A. It has been written in more recent reading instructions.

Q. Could you please turn to the binder on your right. And your trial testimony is there. It's open to Tab 5 already. And if you turn to page 231.

A. Yes.

Q. And this is when you and I were talking about things just a couple of weeks ago on Friday, October 18, correct?

A. Yes.

Q. And I asked you, at line 15, 231: "Now I've got a broader question. Does it say anywhere in the admissions office in any written form, training material, memo, email, or any kind of writing, down to a Post-it on the coffee maker, that race should not be used in the personal rating? Is it written anywhere?"

And you answered: "In written form, no. It is the subject of a great deal of discussion and attention in our training process."

Was that your sworn testimony?

A. That was my sworn testimony. And I had --

Q. Go ahead.

A. Sorry. Go ahead.

JA1068

Q. I'm going to run through some basic facts and then I'm going to give you an opportunity to fully explain in as much detail as you like the discrepancy that we've just gone through.

At least as of September 12, 2018, you have had brand-new draft reading procedures that included an instruction not to use race in the personal rating that you had seen, correct?

A. Yes. We had in the 2018 September version, yes.

Q. And at least as of September 19, 2018, your office issued new reading procedures for the class of 2023 to all admissions officers that included an instruction not to use race in the personal rating, correct?

A. Yes.

Q. Then revised new reading procedures again issued on October 5, 2018, that still included an instruction not to use race in the personal rating, correct?

A. Yes.

Q. And on October 18, nearly two weeks after those last procedures formally issued and nearly a month after the first draft of the class of 2023 reading procedures, you told me there was no written document at the admissions office that said race should not be used in the personal rating. That's what you said, right?

A. I said that because I had in mind the preparation materials and what I had understood to be the focus of this trial for the classes of 2014 to 2019. I was not, in

JA1069

my answer to you, referring to anything more current than that.

* * *

[pp. 138:9-154:21]

(Plaintiff Exhibit No. 767 admitted.)

BY MR. MORTARA:

Q. Your response in here says, “Good to have.” Correct?

A. Yes.

Q. Please turn -- this is September 7. Please turn to Plaintiff’s Exhibit 749.

A. Yes.

Q. And Plaintiff’s Exhibit 749 appears to be a hard-copy document. There are the initials CJM and the date September 11 in the upper right-hand corner.

Who is CJ -- CGM?

A. That’s Christine Mascolo.

MR. MORTARA: We offer Plaintiff’s 749.

MR. LEE: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit No. 749 admitted.)

BY MR. MORTARA:

Q. There are some handwritten edits in several areas of this document. I want to focus on why we’re here. If

JA1070

you go to page 3, there's some highlighted language I'd like you to take a look at surrounding the overall rating. Let me know when you're ready.

A. Yes. I'm ready.

Q. In the first highlighting we see some changes in the discussion of race, and it says, "However, readers should have not be taking an applicant's race or ethnicity into account in making any of the ratings other than the overall rating, as discussed further below."

Do you see that?

A. Yes.

Q. That's a change, isn't it, an explicit written instruction?

A. Yes.

Q. And the next highlighting says, "The consideration of race or ethnicity may be considered only as one factor among many."

Do you see that?

A. Yes.

Q. And it goes on and it says, "In addition, the consideration of race or ethnicity should be in connection with the application's discussion of the effect an applicant's race or ethnicity has had on the applicant, not simply the fact alone that an applicant has identified as a member of a particular race or ethnicity."

JA1071

Did I read that correctly?

A. You did. I see that here in this draft.

Q. I want to now revisit a discussion we had the last time you were here.

Remember we had a discussion about Harvard's use or not use of religion in evaluating applicants? Do you remember that?

A. I do.

Q. And you said that while there's a box on the form on the common application where someone can say "I am Roman Catholic," Harvard doesn't look at that answer.

Do you remember that?

A. I do.

Q. But you did say Harvard would take into account religion if an applicant mentioned that in their writing about themselves in their essays, for example?

A. That we might, yes.

Q. And then you said that it wasn't a disadvantage to Harvard to not be able to consider someone's self-proclaimed religious identity unless they've written about it in one of their essays, right?

A. Would you mind repeating that?

Q. You said you didn't consider it to be a disadvantage that Harvard didn't get the information from the box on the common application and they didn't consider --

JA1072

you didn't consider religion unless an applicant had written about it himself, right?

A. Yes.

Q. That's exactly the instruction that's being given here in the draft guidance we just read out. "Consider race only if the applicant discussed the effect of race or ethnicity on the applicant and not when they just checked the box," correct?

A. This is a draft. That was an incorrect instruction. It does not reflect our practice.

Q. This is what the instruction said, correct?

A. That is what the instruction says in this draft, yes, you're correct.

Q. And please go to the personal rating.

A. Yes.

Q. And comparing this to the previous year's version, class of 2022, would you characterize this as moderate or significant changes?

A. I would say moderate.

Q. And there's including things like, "Think about what kind of contribution would the person make to the dining hall conversation."

That's new, isn't it?

A. As a recommendation, it's new, yes.

JA1073

Q. And the last sentence says, “As noted above, though, an applicant’s race or ethnicity should not be considered in assigning the personal rating.”

Do you see that?

A. Yes.

Q. Now, this is the first time in any draft that you’ve seen in chronological order that we have an express statement not to use race in the personal rating; is that right?

A. I think that’s correct, yes.

Q. And this would be the first time you’ve seen that written down in your 30 years in the Harvard’s admissions office, correct?

A. I can’t say that I’ve never seen that sentence before somewhere.

Q. But as far as you can remember, this is the first time you’ve seen an express written instruction not to use race in the personal rating, correct?

A. This is the first time I remember seeing it explicitly written that way in the reading instructions. Yes, that’s correct.

Q. In any document?

A. I can’t say that honestly.

Q. Do you remember any specific document saying it?

A. No.

JA1074

Q. And this document is dated September 11, just about a month before this trial, right?

A. Yes.

Q. Let's go forward to September 12, Plaintiff's 659. Are you there?

A. Yes.

Q. Plaintiff's 659 is an email from Ms. Mascolo to you, Dean Fitzsimmons, and Ms. Gershengorn. Subject line is "Reading instructions."

And then it says, "Hi, everyone. Input from all previous drafts is captured in this document. The only new line everyone should look at is on page 5 in red."

And its attachment is Plaintiff's 660. We would offer them both.

MR. LEE: No objection, Your Honor.

THE COURT: They're admitted.

MR. MORTARA: Thank you, Your Honor. Sorry.

(Plaintiff Exhibit Nos. 659 and 660 admitted.)

BY MR. MORTARA:

Q. You received this draft on September 12, 2018, correct?

A. Yes.

Q. Did you review it?

A. I think I did not.

JA1075

Q. You did not review the draft?

A. I may not have. I was delegating until we had something final. I don't remember whether I did. I think I may not have.

Q. Let's go look at the change that Ms. Mascolo was talking about, over on page 5. First let's go to page 3. Sorry.

Let's just confirm the language we talked about from the September 11 draft is still there. "Don't take race into account in any of the ratings other than the overall rating, and only consider race when someone mentions it on their application, not just because they self-identify."

Those two instructions we saw in the September 11 draft are still in there?

A. In this draft they are still here, yes.

Q. Now going to the red text Ms. Mascolo asked everyone to read.

It says, and it's added to the previous version, "It is important to keep in mind that characteristics not always synonymous with extroversion are similarly valued. Applicants who seem to be particularly reflective, insightful, and/or dedicated should receive higher personal ratings as well."

Do you see that?

A. I do.

Q. What's your definition of "extroverted"?

JA1076

A. I don't think I have a ready definition. I think it's a person who is -- there are lots of adjectives that you could use in connection: vivacious, outgoing. Different people would -- you asked me for mine. Those are two.

Q. Do you agree with me that some racial stereotypes that are deployed against Asian-Americans is that they're quiet, withdrawn, or one-dimensional?

A. I think that's true, yes.

Q. Do you think extroverted and quiet are the same thing or perhaps more on opposite sides?

A. I don't think they're the same thing, they're not exactly opposites, but they're very different.

Q. You're also using the word "reflective" here in contradistinction to "extroverted."

Do you think "reflective" has a meaning closer to "quiet" or "introverted"?

A. I would not find it in contrast to extroversion. It can accompany an outgoing personality. I think it's a different aspect of personality, myself, my opinion.

Q. Director McGrath, could a reasonable person looking at this come to the view that this language was designed to make sure that your admissions officers did not fall prey to implicit bias or racial stereotyping about Asians?

A. It's the kind of thing we always try to remind our staff about when they're considering applications or people. I guess the most important thing I see about it is that it captures a longstanding practice that was not

JA1077

included in these terms in the reading instructions before this.

Q. And it's in red here, the language Ms. Mascolo asked you to look at, right?

A. Yes. Because it was an addition.

Q. And my question, and I'll ask it again: Could a reasonable person looking at this believe that this instruction was designed to help ensure that your admissions officers did not fall prey to implicit bias or racial stereotyping against Asians?

MR. LEE: Objection, Your Honor.

A. That would be a reasonable --

THE COURT: Sustained.

BY MR. MORTARA:

MR. MORTARA: I'll ask again in a different way.

BY MR. MORTARA:

Q. Director McGrath, is it your view that this instruction is designed to make sure that your admissions officers do not fall prey to implicit bias or racial stereotyping about Asians, in part?

A. It would have that effect, and that would be desirable. I don't think it's a new idea. As I say, it memorializes a long tradition of our office to work very hard to get beyond stereotypes.

Q. But this is the first time this kind of instruction has ever appeared in writing anywhere, correct?

JA1078

A. I can't say ever anywhere, but it's the first time in those words it appeared, to my knowledge, in the reading instructions.

Q. Just to be clear, to your knowledge, this is the first time there's ever been any written guidance that's in red here in the admissions office. You can't remember any other time?

MR. LEE: I object. Asked and answered.

THE COURT: He can have the question. It has been asked and answered, but --

A. I would add that you may have seen in previous exhibits part of what we call the packet for new members of the staff, the training packet.

One text that we use for discussion is an essay written by a Professor Helen Vendler on the subject of student's interests and the range of personalities that may do well at Harvard. It includes a number of these ideas and is not unfamiliar to our committee. I can't tell you -- because I don't think they she used exactly these words, but it's not a new idea.

BY MR. MORTARA:

Q. You subsequently thanked Ms. Mascolo for this draft, correct?

A. I did.

Q. And that's Plaintiff's Exhibit 741, an email, September 2, from you to Ms. Mascolo, Dean Fitzsimmons, and Ms. Gershengorn.

MR. MORTARA: We'd offer Plaintiff's 741.

JA1079

MR. LEE: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit No. 741 admitted.)

BY MR. MORTARA:

Q. You sent this from your iPhone, correct? You said “Thank you”?

A. Yes.

Q. But you’re not sure you reviewed the draft she sent or the language in red; is that right?

A. That’s right.

Q. Let’s move forward to Plaintiff’s 720 and 721.

A. Yes.

Q. Plaintiff’s 720 is an email from Ms. Mascolo to an email list, admfao_officers-list@lists.fas.harvard.edu. Subject, “Reading instructions.”

Do you see that?

A. I do.

Q. Sent on September 19. Who is on that email list?

A. Admissions and financial aid officers.

Q. Does it include you?

A. It does.

Q. Does it include Dean Fitzsimmons?

A. It does.

JA1080

Q. Does it include Ms. Gershengorn?

A. I don't think so. That list does not.

MR. MORTARA: We offer Plaintiff's Exhibit 720 and its attachment, 721.

MR. LEE: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit Nos. 720 and 721 admitted.)

BY MR. MORTARA:

Q. The email says, "Hi, everyone. Attached please find the updated reading instructions for the year. The middle of the document is taken directly from the Ivy League annual memo which will not come out for another week or so, so you can skip pages 8 to 14."

After the parenthetical it says, "That said, please make sure you read the rest of the document thoroughly as there are several updates/additions. Many thanks to all of you who helped in the editing process."

Do you see that?

A. Yes.

Q. And Ms. Mascolo has bolded thoroughly, correct?

A. Yes.

Q. Did you read the document when it was sent on September 19?

A. I think I did not.

JA1081

Q. Let's take a look at the attachment. Again starting with the overall rating section that we've been through before, I just want to point out to you on page 3 it has the same language we've been through before.

Don't use race in the ratings other than the overall rating and don't use race unless the applicant brings it up on his application in discussing it. Don't use race just when the applicant self-identifies as a member of a particular race or ethnicity.

Those are the instructions before and they're still here in the September 19 version, correct?

A. Yes. In this draft, they are still here.

Q. Just to be clear, Charlene Kim would have gotten this email?

A. Yes.

Q. Erica Bever would have gotten this email?

A. Yes.

Q. Chris Looby would have gotten this email?

A. Yes.

Q. Roger Banks would have gotten this email?

A. Yes.

Q. Moving forward to the personal rating, this version also has the language that was in red on the draft, correct?

A. Yes.

Q. The red language which in the previous draft said, “It is important to keep in mind the characteristics not always synonymous with extroversion are similarly valued. Applicants who seem to be particularly reflective, insightful, and/or dedicated should receive higher personal ratings as well.”

A. Yes.

Q. After the guidance was distributed on September 19, they were released again on October 5 with a change, correct?

A. Yes.

Q. That’s Plaintiff’s 722.

A. Yes.

Q. Again an email from Ms. Mascolo to this list. Same list as before, correct?

A. Yes. Same list.

Q. Dated October 5, 2018, 7:00 p.m.?

MR. MORTARA: We offer Plaintiff’s 722 and its attachment, Plaintiff’s 723.

MR. LEE: No objection.

THE COURT: Admitted.

(Plaintiff Exhibit Nos. 722 and 723 admitted.)

BY MR. MORTARA:

Q. The text from Ms. Mascolo says, “Attached. Please use this version and disregard all previous versions,” right?

A. Yes.

Q. This version was operative when you testified, talked to me and we asked those questions that we went over at the beginning, correct?

A. It was operative for our current work, yes, that’s correct.

Q. Let’s talk about the big change that was made or a change that was made, again in the overall section.

It says still “Readers should not take an applicant’s race or ethnicity into account in making any of the ratings other than the overall rating.”

But down below the instruction to only consider race when an applicant brings it up as opposed to self-identifying has disappeared, correct?

A. That’s correct.

Q. And I’ve now got the earlier version on the top of the screen with the restriction that we talked about.

Do you see that?

A. I do.

Q. And that restriction is a restriction to only consider race when an applicant brings it up and talks about it

JA1084

and not just when the applicant checks the box, correct?

A. That was incorrect advice, and that's correct.

Q. It's correct that the restriction was there on September 19, September 12, and September 11, correct?

A. Yes.

Q. And the restriction is gone from the reading guidance issued on October 5, correct?

A. Yes.

Q. Where did the idea come from to eliminate the restriction we saw earlier? Who suggested it?

A. I don't know where the idea came from in the first place, that proposal, which is now gone.

I have always regarded it as improper advice, not reflecting our practice. And I don't know at what point in the process, we know the dates that it was between, it was caught and eliminated.

Q. Who suggested its elimination?

A. I don't know.

Q. Is it possible that the person who suggested its elimination was a lawyer?

MR. LEE: Your Honor, I object. It's possible I'll believe 7 foot 2 tomorrow, and it's not relevant.

THE COURT: It is?

MR. LEE: I won't be.

THE COURT: The objection is sustained. You can withdraw the question. In any event, she's not going to answer it.

BY MR. MORTARA:

Q. How did you find out that this language had been removed? Who told you?

A. I think I found out when I took up the looking at this text and I noticed that it was gone, which is what was appropriate. I don't remember exactly.

Q. So, Director McGrath, you just testified that you looked at the text and noticed the restriction was gone. That means at some point you had noticed the restriction, correct?

A. Yes. I noticed the restriction at some point, but it may not been very long before October because I actually don't remember when.

Q. Did you write anybody an email saying the restriction was wrong?

A. I don't think so.

Q. Did you tell anybody the restriction was wrong?

A. I don't remember because I don't remember what group conversations I was in.

Q. At some point you did read the restriction. And as far as you can remember, you didn't write anybody or tell anybody you thought it was wrong, correct?

JA1086

A. I don't remember whether I did. I think I may not have. We had a system for reviewing this, and when it reached the final stage, which I did see, I saw that it seemed to be correct.

* * *

**MARLYN McGRATH
EXAMINATION BY MR. LEE**

[p. 168:11-15]

Q. Now, how often does the admissions office update the reading procedures?

A. Annually.

Q. Every year?

A. Every year.

* * *

[pp. 175:21-177:24]

Q. Let me draw your attention to the last paragraph of that section. Could you read those two sentences to us, please.

A. "In assigning the overall rating, readers may consider whether a student's background, including his or her race or ethnicity, may contribute to the educational benefits of diversity at Harvard College. The consideration of race or ethnicity may be considered only as one factor among many."

JA1087

Q. Is that paragraph consistent with how the Harvard admissions office has considered race in the admissions process?

A. Yes.

Q. For how long a period of time?

A. For many years, certainly throughout my tenure.

Q. And is it consistent with the description you provided to Her Honor when you have testified a couple of weeks ago?

A. Yes.

Q. Turn, if you would, to page HARV 0097940.

Do you see the section titled "Personal"?

A. Yes.

Q. Were there updates to this section of the reading procedures for the class of 2023?

A. Yes.

Q. Were there updates to other sections for the other profile ratings also?

A. Yes.

Q. Let me direct your attention to the sentence at the end of the first paragraph under personal. It begins, "It is important."

Do you see it?

A. Yes.

JA1088

Q. Mr. Mortara asked you about this. I want to go through it a little bit more slowly. Would you read the two sentences to us, please.

A. “It is important to keep in mind that characteristics not always synonymous with extroversion are similarly valued. Applicants who seem to be particularly reflective, insightful, and/or dedicated should receive higher personal ratings as well.”

Q. Does what you just read represent a change in Harvard’s admissions policy?

A. Not -- no, it does not.

Q. How long has it been Harvard’s admissions policy?

A. That has been our approach throughout my tenure also.

Q. And is it consistent with your description of the policy that you provided to Her Honor two weeks ago?

A. Yes, it is.

Q. Would you read the next sentence which begins “As noted above.”

A. “As noted above, though, an applicant’s race or ethnicity should not be considered in assigning the personal rating.”

Q. And how does that compare to what you told Her Honor two weeks ago about how race is considered in the admissions office?

A. That is the same message.

JA1089

* * *

**DREW FAUST
EXAMINATION BY MR. LEE**

[pp. 191:10-195:2]

Q. And under the mission, would you read for us the first two sentences of the mission of Harvard College?

A. “The mission of Harvard College is to educate the citizens and citizen-leaders for our society. We do this through our commitment to the transformative power of a liberal arts and sciences education.”

Q. Was that the mission of Harvard College during your tenure as president?

A. It was.

Q. Turn, if you would, to the second sentence of the next paragraph. And I’ll ask Mr. Lee to highlight it. Could you read that sentence for us?

A. “Through a diverse living environment, where students live with people who are studying different topics, who come from different walks of life and have evolving identities, intellectual transformation is deepened and conditions for social transformation are created.”

Q. Do you agree with that statement?

A. I do.

Q. While you were president, was diversity important to fulfilling Harvard’s mission?

JA1090

A. Diversity was a central element of fulfilling Harvard's mission.

Q. Why was it a central element of fulfilling Harvard's mission?

A. We are a residential college, at Harvard College, and that means that we bring people together from a wide range of places and backgrounds to educate one another as well as to benefit from the formal education that they may receive from our faculty and staff. And so having people who are able to educate one another about differences, bring different elements to that community, is an essential part of the experience of Harvard College.

Q. What types of diversity are important to fulfilling Harvard College's mission?

A. There are a wide range of types of diversity that matter to us. We look for geographic diversity, diversity of ethnicity, of race, of religion, of intellectual focus. We want students who will pursue different fields and have -- engaged with different questions intellectually before they come. We look for people with a variety of talents across a spectrum of areas.

Q. And racial diversity is one of the types of diversity that you seek?

A. Yes, it is.

Q. Why is racial diversity important to achieving the college's mission?

A. Racial diversity is important because race is an element in our society of importance, and it also can be

JA1091

a defining element in how our students understand themselves and how they understand the experiences of their lives and what they bring to the Harvard College community.

Q. During your 11 years as president, did the diversity of the Harvard College class change?

A. It did.

Q. In what ways?

A. It became more diverse in a variety of dimensions. Socioeconomic diversity was a very important one because of our expansions of financial aid, and that, in part, enabled a more diverse class overall.

Q. And did it change in terms of racial diversity?

A. It did.

Q. Geographic diversity?

A. Yes, it did.

Q. And in other ways?

A. Yes, it did.

Q. And as someone who was the president and who walked across the campus on a daily basis for 11 years, did that changed diversity change the campus and the community?

A. It did. It was a campus in which we saw students bringing different elements of their own experiences to share with their fellow students.

We saw, for example, in the arts, which was a real interest and focus of mine, the kinds of diversity that different ethnic and racial backgrounds enabled students to represent through their artistic performances. South Asian dance or festival and so forth was just a symbol of the kind of cultural differences that flourished on the campus as we had more representation from more different groups, geographic groups and ethnic groups and racial groups.

Q. Is it your experience as an educator that students learn from each other as well as from the faculty?

A. Absolutely. That's a fundamental assumption of our educational model.

Q. Is the diversity of the student body important to that portion of the learning model?

A. It absolutely is.

Q. Now, has Harvard College ever evaluated the importance of student body diversity?

A. Yes, it has.

Q. Has it made public its views on the importance of diversity?

A. Yes, it has.

* * *

[pp. 200:11-202:12]

Q. I'd like to ask you a little bit more about the developments in the financial aid program.

JA1093

Before you became the president, did Harvard take any steps to expand financial aid?

A. This has been a theme at Harvard for quite some time, actually. Right after World War II, the then president James Conant created a national scholar system because he recognized that it was important that Harvard reach out beyond its usual population and bring in a more economically diverse body of students.

But in more recent times -- and we've had over the years a need-blind admissions policy of financial aid.

But in 2004, we made significant advances before my presidency with the introduction of a Harvard financial aid program that we now call HFAI for the lowest income group and then expanded on that in 2007 when I became president.

Q. When the program was expanded when you became president in 2007, what were the elements of the program?

A. The elements of the program were, first of all, we had no loans. There were to be no loans for families that made below a certain income. And we've tweaked it a little bit since then. I'll describe it as it currently is formulated.

Families below \$65,000 a year in income paid no parental contribution. For families up to about \$150,000, the rubric was that the family would pay no more than 10 percent of income for tuition and room and board.

And then we have financial aid going up further in the income level, dependent on family need and family resources. So students well into the middle class could have assistance from Harvard financial aid to make education affordable.

Q. So to give us just an idea of the magnitude of the financial aid program, let me ask you this: Before your presidency, how much was Harvard spending annually, each year, on financial aid for the college?

A. At the beginning of my presidency it was about \$90 million a year in the college.

Q. At the end of your presidency this June, how much was Harvard spending on financial aid at the college?

A. It's close to 200 million.

Q. Why did you expand financial aid so substantially during your presidency?

A. It seemed to me and to others in leadership roles and throughout the university that this was an absolutely essential act in order to be able to commit ourselves to our fundamental purposes, those being attracting people of talent regardless of their financial circumstances, attracting people across a wide range of origins and identities and ethnicities and races, making sure that people understood they should not see financial impediments to being able to be part of this community and to bring their extraordinary talents to it.

* * *

[p. 223:7-25]

Q. Now, President Faust, I want to ask you a few questions about issues that have come up during the course of the litigation.

At the pretrial conference, there was a suggestion that you denied the fact that Harvard discriminated against Jewish applicants in the 1920's. Is that true?

A. No.

Q. Have you ever denied that?

A. I have never denied that.

Q. Was it a proud chapter in Harvard's history?

A. It was not a proud chapter in Harvard's history.

Q. And have you taken steps during your tenure to ensure it would not happen again?

A. I feel that my tenure has been committed in considerable part to expanding openness, access to Harvard, to making sure that every individual who can thrive in our community has the opportunity to apply and be included, welcomed, and to flourish in our community. There's no place for discrimination of any kind at Harvard.

* * *

JA1096

**BROCK WALSH
DEPOSITION READ IN COURT**

[p. 254:1-10]

Q. Would you ever take a student's race into account when deciding whether the student should be lopped?

A. No.

Q. Why not?

A. The deliberations of the lop discussion were no different from any other discussion. We discussed the whole candidate no matter -- no one matter is more important than the other. We tell their story. You advocate for them as best you can as their area admissions person, and then you put it to a vote.

* * *

JA1097

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE, et al.,)
)
 Defendants.)

Civil Action
No. 14-14176-ADB
November 2, 2018
Pages 1 to 155

TRANSCRIPT OF BENCH TRIAL - DAY 15
CLOSING ARGUMENTS
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

JOAN M. DALY, RMR, CRR
KELLY MORTELLITE, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 5507
Boston, MA 02210
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PLAINTIFF CLOSING ARGUMENT

[pp. 42:8-43:12]

So here we have OIR communicating about the Asian penalty. And what happened next? What happens next is that Dean Fitzsimmons asked for a follow-up to see whether or not there was a tip for low-income Asian-American applicants. And that gets into P28. And I think, Your Honor, something in my mind pretty incredible that happened here at trial is that Mr. Lee, in opening and then again when he was examining Dean Fitzsimmons, they both represented to this court that P28 shows a boost, a benefit, a tip for low-income Asian applicants to Harvard. And there are some ways to read that document which suggests that that could be true.

But what the document also definitively unquestionably shows from the same regression analysis performed by OIR is that for 82 percent of the Asian applicants to Harvard who are not low income -- and I've got the demographic data right from that exhibit -- for those 82 percent in the same document where they say low-income Asian applicants get a tip, it shows that the 82 percent that apply get hammered with a penalty.

And there's no way they can have it both ways. So they knew there was a penalty. They did nothing about it, and that is alone sufficient for us to carry our burden and have proof of intentional discrimination, especially in the face of the reaction where no one in the admissions office was told, not Director McGrath,

not anybody, no further steps were taken to look into this and dig into it deeper. After this, it was just business as usual.

So the OIR evidence shows there's a real possibility of bias in the system, a statistically significant penalty for Asian-Americans. Harvard ignores it.

* * *

DEFENDANT CLOSING ARGUMENT

[pp. 64:5-65:2]

If we were to accept SFFA's proposition that race be eliminated from consideration, the number of African-Americans would decrease by 150 a class or 600 over four-year classes. If we were to accept their analysis, the number of Hispanics would decrease by 125 per class or about 500. To accept their analysis, the number of African-American and Hispanic students of color would be reduced by 1,000 on Harvard's campus.

How does SFFA address this? What it says is in their analysis, and I'm now quoting from Dr. Arcidiacono, the winners are the Asian-Americans and whites, and the losers are the African-Americans and Hispanics.

Your Honor, he could not be more wrong.

If that is the circumstance, we all lose, every single one of us loses.

Now, before we turn to each of SFFA's claims, let me address why diversity, including racial diversity, is

JA1100

so critical to the educational experience at Harvard and other colleges and universities.

The plaintiff suggested in its opening that diversity and its benefits is not on trial here. But as that chart I just showed you indicates it is. If you accept their proposition, it couldn't be more on trial.

* * *