

Nos. 20-1199 and 21-707

In The
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,

Respondents.

**On Writs Of Certiorari To The
United States Courts Of Appeals For
The First And Fourth Circuits**

**BRIEF *AMICUS CURIAE* OF THE
LOUIS D. BRANDEIS CENTER FOR HUMAN
RIGHTS UNDER LAW AND THE SILICON VALLEY
CHINESE ASSOCIATION FOUNDATION
IN SUPPORT OF PETITIONER**

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INTERESTS OF *AMICI CURIAE*¹

The Louis D. Brandeis Center for Human Rights Under Law (the “Center”) is an independent, non-partisan institution for public interest advocacy, research, and education. The Center’s mission is to advance the civil and human rights of the Jewish people and to promote justice for all. The Center’s education, research, and advocacy focus especially, but not exclusively, on the problem of anti-Semitism on college and university campuses.

The Silicon Valley Chinese Association Foundation is a nonprofit organization that advances better integration of Chinese communities in Silicon Valley and its neighboring areas by (1) providing education to Chinese communities on legal and political systems in California and the nation; (2) encouraging active civic engagement and political participation by Chinese communities; and (3) promoting the recognition of Chinese communities’ contributions.

Amici are concerned about Harvard’s use of racial preferences in its admissions process, which demand higher standards for Asian-American applicants on the basis of their race. Abusing the discretion extended to it in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Harvard has established a system in which the percentage

¹ The parties have consented to the filing of this brief in letters on file in the Clerk’s office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

of Asian-American applicants is reduced based on subjective factors that are examined through the lens of prejudicial assumptions and stereotypes, just as Harvard had done to Jewish applicants in the 1920s and 1930s.



SUMMARY OF ARGUMENT

“Those who cannot remember the past are condemned to repeat it.”

– George Santayana (1905)

In 1920, Harvard’s President, A. Lawrence Lowell, set in motion a reprehensible course of events when, out of a concern that Harvard had too many Jewish students, he inquired about the number of Jews and began to plot to reduce that number. Harvard’s freshman class was, at the time, over 20 percent Jewish, and, by 1925, it was over 28 percent Jewish. In 1926, Harvard began a discriminatory admissions process that targeted Jewish applicants, and the result was a freshman class that was 15 percent Jewish. Over time, Harvard has changed its admissions policies, but it has never changed its practice of engaging in intentional discrimination on the basis of race. Rather than remove the vestiges of its past discrimination, Harvard merely modifies its discriminatory policies and practices to target new and different racial groups. Today, Harvard discriminates against Asian Americans in admissions in the same manner in which it discriminated against Jews in the 1920s and 1930s.

Harvard discriminated against Jews in the 1920s and 1930s because it found the increasing presence of Jewish students on campus to be repulsive to wealthy Protestant families. Harvard was, thus, concerned that a large Jewish student population would discourage Protestant students from choosing Harvard over other comparable colleges, such as Yale and Princeton. Accordingly, Harvard endeavored to implement a quota on Jewish enrollment in order to address what President Lowell described as the “Jew problem.” Rather than use an explicit quota, Harvard went about it in a disguised manner. The admissions office limited the total enrollment of new students to 1,000, and, with a nod and a wink, it was directed to admit only those students of suitable “character and fitness.” Knowing that President Lowell considered Jews to lack character and other redeeming qualities, the admissions office got the hint. New methods of assessing applicants’ backgrounds were adopted, and, for decades, the percentage of Jewish students in the freshman class was reduced to 15 percent.

What happened to Jewish applicants in the 1920s and 1930s at Harvard is happening all over again to Asian-American applicants today. As with the Jewish applicants of that prior time period, the percentage of Asian-American applicants admitted to Harvard began to soar in the 1980s. Then, after Harvard altered its admissions process in order to attain student-body diversity, the percentage of Asian-American applicants admitted to Harvard decreased significantly in 1993 and stabilized at 17 percent year over year. As with the

Jewish students of the past, Asian-American students became too plentiful for Harvard.

In the 1920s and 1930s, Harvard's method of reducing its number of Jews was its "character and fitness" rationale. Harvard maintained that it simply sought students of sufficient character who demonstrated the fitness to be a Harvard student, and Jews generally did not meet that standard. Today, Harvard's method of reducing its number of Asian Americans is the "student-body diversity" rationale, and Harvard resorts to using a subjective "personal rating" to ensure that its freshman class is reduced to no more than a certain percentage of Asian Americans. The personal rating – which measures qualities such as "leadership," "self-confidence," "likeability," and "kindness" – subjects Asian-American applicants to prejudicial assumptions and stereotypes. Indeed, a federal investigation of Harvard revealed that Asian-American applicants were frequently described by admissions officers as "science/math oriented, quiet, shy, reserved, self-contained, and soft spoken." Different time period. Different ethnic/racial group. Same discrimination.

It was wrong then, and it is wrong now.



ARGUMENT

- I. **Harvard Uses the Diversity Interest Recognized in *Grutter* to Justify Its Discrimination Against Asian Americans in Admissions Just as It Previously Used the “Character and Fitness” Rationale to Discriminate Against Jews.**
 - A. **During the 1920s, Harvard revised its admissions policy for the sole purpose of reducing the number of Jewish students.**

In 1918, Harvard’s freshman class was 20 percent Jewish, which happened to be three times the percentage at Yale and six times the percentage at Princeton, the two schools to which Harvard was generally compared. Jerome Karabel, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON* 86 (2005) (“Karabel”). Concerned that Harvard had too many Jewish students, in 1920, Harvard’s President, A. Lawrence Lowell, inquired about the number of Jews at Harvard and began to plot to reduce that number. *Id.* at 88. Two years later, President Lowell wrote to a Harvard philosophy professor that the increasing number of Jewish students at Harvard will ruin the college because it will lead to students from wealthy Protestant families choosing Yale or Princeton over Harvard. *Id.* at 88 (citing Lowell to Hocking, May 19, 1922, Harvard University Archives (“HUA”). So began Harvard’s descent into “one of the most shameful episodes in the history of American higher education in general, and of Harvard College in

particular.” Alan Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *Cardozo L. Rev.* 379, 385 (1979). It is a descent from which Harvard has never fully returned.

While it is inconceivable today, there was once a time when Harvard did not have a very selective admissions policy. Prior to the 1920s, Harvard essentially admitted all of the students who passed its required entrance examination. Karabel at 128-29. Thus, admission into Harvard was, at that time, based solely on objective academic criteria. *Id.* A dogged determination by President Lowell to reduce Jewish enrollment would change that.

In his infamous letter to Professor Hocking in 1922, President Lowell asserted that Harvard should take steps to reduce Jewish enrollment and suggested that it could do so by “stat[ing] frankly that we thought we could do the most good by not admitting more than a certain proportion of men in a group that did not intermingle with the rest, and give our reasons for it to the public.” *Id.* at 88-89 (quoting Lowell to Hocking, May 19, 1922, HUA). President Lowell offered that “[e]xperience seems to place that proportion at about 15%.” *Id.* at 89 (quoting Lowell to Mack, March 29, 1922, HUA). By the Spring of 1922, the Jewish student population had reached 21.5 percent, and President Lowell warned that “the danger would seem to be imminent.” *Id.* (quoting Lowell to Tucker, May 20, 1922, HUA).

President Lowell, however, was concerned that such a straightforward approach would be met with opposition. Ultimately, he realized that his idea for a quota of Jewish students could best be implemented in a clandestine manner. Rather than announce an explicit quota on the admission of Jews to reduce Jewish enrollment, Harvard could instead, he reasoned, decline admission to a certain number of Jewish applicants who possessed the stereotypical characteristics of Jews:

[T]he Faculty, and probably the governing boards, would prefer to make a rule whose motive was less obvious on its face, by giving to the Committee on Admission authority to refuse admittance to persons who possessed qualities described with more or less distinctness and believed to be characteristic of the Jews. . . . [T]he Faculty should understand perfectly well what they are doing, and that any vote passed with the intent of limiting the number of Jews should not be supposed by anyone to be passed as a measurement of character really applicable to Jews and Gentiles alike.

Karabel at 89.

As a first step toward a new admissions system that would reduce the number of Jewish students at Harvard, on June 2, 1922, the Harvard faculty left in place a prior decision to form a special committee “to consider principles and methods for more effectively sifting candidates for admission.” *Id.* at 93 (citation

omitted). The meeting's minutes reflect the statement from President Lowell that "there could be no doubt that the primary object in appointing a special Committee was to consider the question of Jews." Marcia Graham Synnott, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970* 58 (2010) ("Synnott") (citation omitted). In describing the faculty's decision to form a special committee, President Lowell stated that he had "attained by far the most important object, which was that of making substantially every member of the Faculty understand that we had before us a problem, and that that problem was a Jew problem and not something else." Karabel at 93 (quoting Lowell to Kittredge, June 3, 1922, HUA).

In hopeful anticipation of the coming changes to the admissions system that would address the "Jew problem," President Lowell directed Harvard to gather information about applicants in order to identify which applicants were Jewish. Starting in the Fall of 1922, applicants were required to answer questions on "Race and Color," "Religious Preference," "Maiden Name of Mother," and "Birthplace of Father," as well as the question, "What change, if any, has been made since birth in your own name or that of your father? (Explain fully.)" *Id.* at 94. In addition, Harvard asked high school principals and private school headmasters to fill out a form indicating the applicant's "religious preference so far as known" – Protestant, Roman Catholic, Hebrew, or Unknown. *Id.*

During this time, Harvard also created a Subcommittee to Gather Statistics tasked with ensuring the most accurate count of its currently enrolled Jewish students. *Id.* at 96. The committee classified Jewish students into one of four categories: J1, J2, J3, and other. *Id.* A J1 designation was assigned “when the evidence pointed conclusively to the fact that the student was Jewish.” *Id.* A J2 designation was assigned when a “preponderance of evidence” suggested the student was Jewish. *Id.* And a J3 designation was assigned when “the evidence suggested the possibility that the student might be Jewish.” *Id.*

Yet President Lowell’s desire to fix Harvard’s “Jew problem” faced another hurdle. On April 10, 1923, Harvard’s Committee on Methods of Sifting Candidates for Admission, which was the special committee that the faculty formed the prior year, expressed opposition to a cap on Jewish enrollment. Karabel at 100-01. The Committee described the idea of a quota on Jewish students as “an arbitrary limitation of the number of students to be admitted.” *Id.* at 101 (quoting “Report of the Committee Appointed ‘To Consider and Report to the Governing Boards Principles and Methods for More Effective Sifting of Candidates for Admission to the University,’” April 10, 1923, HUA).

Harvard did, however, adopt a “one-seventh plan,” which was a preference for students from regions of the country other than the Northeast. *Id.* at 101. The plan targeted for admission “a new group of men from the West and South” who graduated in the top seventh of their class. *Id.* While the one-seventh plan was facially

neutral with respect to Jewish admission, Harvard professor and future United States Supreme Court Justice Felix Frankfurter found the one-seventh plan to be a “thinly disguised attempt to lower the Jewish proportion of the student body by bringing in boys – some of them academically ill equipped for Harvard – from regions of the country where there were few Jews.” *Id.*

Undaunted, in June 1923, President Lowell commissioned a study to determine whether Harvard should limit to 1,000 the total number of students admitted into the school. *Id.* at 101-02. By limiting the class size, President Lowell surmised that Harvard could use certain non-academic factors to select among the academically qualified applicants to fill the smaller freshman class. *Id.* at 102. Ultimately, by the end of 1923, President Lowell found support in a report from the Committee on the Limitation of Students recommending that the freshman class be limited to 1,000 students and that Harvard use letters from teachers and personal interviews to shed light on the applicants’ “aptitude and character.” *Id.* (quoting “Report of the Committee on the Limitation of Students,” December 18, 1923, HUA).

While Harvard made no changes to the admissions system in 1923, the growing percentage of Jewish students at Harvard, together with the anti-immigration sentiment in the country and the pressure from alumni to do something about the “Jew problem,” were too much for President Lowell to ignore. *Id.* at 103-05.

By 1924, the Jewish enrollment was 25 percent. *Id.* at 105.

In response to a letter from an alumnus who lamented to President Lowell that, upon attending a recent Harvard-Yale football game, “[t]here were Jews to the right of me, Jews to the left of me, in fact they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust of the present and grave doubts about the future of my Alma Mater,” *id.* at 105 (quoting Williams [pseudonym] to Lowell, December 17, 1925, HUA), President Lowell agreed that Harvard had a “Jew problem.” President Lowell responded that he “had foreseen the peril of having too large a number of an alien race and had tried to prevent it.” *Id.* at 106 (quoting Lowell to Williams [pseudonym], December 18, 1925, HUA). President Lowell appreciated the support of the alumnus, stating that he was “glad to see from your letter, as I have from many other signs, that the alumni are beginning to appreciate that I was not wholly wrong three years ago in trying to limit the proportion of Jews.” *Id.*

Emboldened by the support he was receiving from alumni and others, President Lowell wrote a letter to the chairman of the Committee on Methods of Sifting Candidates for Admission, in which he minced no words. President Lowell made clear that it was his desire to reduce the Jewish student population through a combination of limiting the total number of admitted students into the freshman class and selecting applicants based on their “character”:

To prevent a dangerous increase in the proportion of Jews, I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character on the part of the Admission authorities, based upon the probable value to the candidate, to the college and to the community of his admission. Now a selection of this kind can be carried out only in case the numbers are limited. If there is no limit, it is impossible to reject a candidate who passes the admission examinations without proof of defective character, which practically cannot be obtained. The only way to make a selection is to limit the numbers, accepting those who appear to be the best.

Id. at 107 (quoting Lowell to James, November 3, 1925, HUA).

Ultimately, the chairman of the Committee relented, stating that “such a discrimination would inevitably eliminate most of the Jewish element which is making trouble.” *Id.* at 108 (quoting James to Lowell, November 10, 1925, HUA). The Committee recommended that Harvard limit its freshman class to 1,000 total students and that the use of the one-seventh plan be discretionary in order to eliminate high schools whose graduates historically attended Harvard in disproportionate numbers. *Id.* at 108. Most importantly, the Committee also recommended that Harvard not fill its 1,000 seats in the freshman class on the basis of scholarship alone, determining that it was “neither feasible nor desirable to raise the standards of the

College so high that none but brilliant scholars can enter” and “the standards ought never to be too high for serious and ambitious students of average intelligence.” *Id.* (quoting “Report of the Special Committee Appointed to Consider the Limitation of Numbers.” January 11, 1926, HUA). Harvard would, thus, be compelled to assess non-academic factors.

The faculty adopted the Committee’s recommendations, and the new admissions system, which used President Lowell’s “character and fitness” rationale for admission as a pretext for excluding applicants with stereotypical characteristics of Jews, had the intended effect. The percentage of Jewish students in the freshman class fell from over 28 percent in 1925 to 15 percent in 1926. *Id.* at 172. In fact, for the next 20 years, the percentage of Jewish students remained at about 15 percent. *Id.* at 173.

B. Today, Harvard discriminates against Asian-American applicants, who, like the Jewish applicants of the 1920s and 1930s, are meeting Harvard’s admissions standards in increasingly high numbers.

Long before the Court decided *Grutter* and held that universities can use race in admissions to pursue student-body diversity, Harvard was intentionally discriminating against Asian-American applicants in admissions. In 1983, Margaret Chin, a Harvard undergraduate student who had worked in the

admissions office, co-authored a report entitled “Admissions: Impossible.” The report examined data from 25 universities, including Harvard, and found that while Asian-American applications were greatly increasing, the number of Asian-American students admitted was hardly rising, and the percentage of Asian Americans admitted was the lowest among all of the racial groups. See Margaret Chin & David Ho, *Admissions: Impossible*, BRIDGE, June 1, 1983, at 7 (“Chin”). The report also found that, among the Asian Americans who were admitted, applicants from inner cities or economically disadvantaged backgrounds had an even lower chance of admission. *Id.*

In 1987, Ling-chi Wang, an Associate Professor at the University of California at Berkeley, was quoted in *The New York Times* as saying that, since 1983, selective universities have been treating Asian-American applicants in the same way that Harvard treated Jewish applicants in the 1920s and 1930s: “As soon as admissions of Asian students began reaching 10 or 12 percent, suddenly a red light went on. . . . [A]dmission of Asian-Americans has either stabilized or gone down.” Robert Lindsey, *Colleges Accused of Bias to Stem Asians’ Gains*, THE NEW YORK TIMES, January 19, 1987, at A10. “I think all of the elite universities in America suddenly realized they had what used to be called a ‘Jewish problem’ before World War II, and they began to look for ways of slowing down the admissions of Asians.” *Id.*

Then, in July 1988, the Office for Civil Rights (“OCR”) in the U.S. Department of Education

commenced an investigation into the treatment of Asian-American applicants at Harvard to examine Harvard's compliance with Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. As the recipient of millions of dollars in federal grant funds and federal student aid, Harvard was subject to, and remains subject to, Title VI.

Not coincidentally, during the course of the two-year investigation by OCR, Harvard dramatically increased its enrollment of Asian Americans. Indeed, by 1990, the percentage of Asian Americans admitted to Harvard had risen from 10.8 percent in 1988 to 16.1 percent in 1991. OCR found that Asian Americans had been admitted at a significantly lower rate than white applicants between 1979 and 1988 even though Asian Americans, as a group, were similarly qualified as white applicants. *Civil Rights Issues Facing Asian Americans in the 1990s*, U.S. Commission on Civil Rights, February 1992, at 122 n.97 ("USCCR") (citing U.S. Department of Education, Office for Civil Rights, *Harvard Discriminant, Logistic Regression, and Odds Ratio Analyses*, May 10, 1990, at 8-12).

Yet OCR attributed the disparity to legacy and athletic preferences, rather than to racial discrimination: "Over the last ten years Asian American applicants have been admitted at a significantly lower rate than white applicants; however . . . [w]e determined that the primary cause of the disparity was the preference given to children of alumni and recruited

athletes . . . and that [the preferences] were legitimate and not a pretext for discrimination.’” USCCR at 120 (quoting U.S. Department of Education, *Harvard Cleared of Asian-American Discrimination Charges*, Press Release, October 5, 1990). Not everyone was persuaded by OCR’s exoneration of Harvard. See Philip P. Pan, *Ed. Department Clears Harvard: Government Accepts Harvard’s ‘Legacy-Athlete’ Explanation*, THE HARVARD CRIMSON, October 6, 1990 (“[Asian Americans] clearly get a big whack – not a tip – in the direction against them,” said [Harvard Professor Alan] Dershowitz. “Harvard wants a student body that possesses a certain racial balance. I think the report was sloppy,” Dershowitz added. “I have absolutely no faith in the Harvard system of admissions.”).

The Harvard community and the public had good reason to be skeptical of OCR’s conclusion. After all, OCR found that Asian-American applicants were “quite often” and “in a number of cases” described by Harvard admissions officers as “science/math oriented, quiet, shy, reserved, self-contained, and soft spoken.” USCCR at 126 (quoting U.S. Department of Education, Office for Civil Rights, *Statement of Findings (for Compliance Review No. 01-88-6009 on Harvard University)*, October 4, 1990, at 24). One admissions officer stated, “[The applicant’s] scores and application seem so typical of other Asian applications I’ve read: extraordinarily gifted in math with the opposite extreme in English.” *Id.* at 126. “These comments suggest that Harvard’s admissions staff may have been influenced by the stereotype of Asian Americans as achieving

academic excellence at the expense of a balanced overall personal development.” *Id.*

Several studies that examined admissions data following *Grutter* confirm that Harvard uses the student-body diversity rationale to continue to discriminate against Asian-American students in admissions. See, e.g., Peter Arcidiacono, et al., *Asian American Discrimination in Harvard Admissions*, NATIONAL BUREAU OF ECONOMIC RESEARCH, April 2020, at 34 (“The perception that Asian Americans are discriminated against in elite college admissions has led college consultants to ‘make them less Asian when they apply.’ Using data made public from the *SFFA v. Harvard* case, we show that this perception is justified for almost all Asian American applicants.”) (citation omitted); Ron Unz, *The Myth of American Meritocracy*, AMERICAN SPECTATOR, December 2012, at 18 (“Unz”) (finding that, after a steady increase in Asian-American admissions through the 1980s and into the 1990s at Harvard, in 1993, “Asian numbers went into reverse, generally stagnating in the two decades that followed, with the official 2011 figure being 17.2 percent”).

Harvard, itself, conducted a study that confirmed the disparity between Asian Americans and other racial groups to a statistically significant degree. In February 2013, Harvard’s Office of Institutional Research (“OIR”) issued a report that found the admissions rates of Asian Americans progressively declined as factors were added to each of the four models it examined. Under Model 1, which only examined academics, the Asian-American admissions rate was by far the

highest of any racial group. As factors were added – legacy and athletics (Model 2), extracurricular activities and personal rating (Model 3), and demographics (Model 4) – the Asian American admissions rate fell steadily. By Model 4, the Asian-American admissions rate was the lowest of all the racial groups, and the Model 4 figures closely aligned with the admissions rate for Asian Americans. JA. 3790-3801.

On May 1, 2013, OIR sent a memorandum to William Fitzsimmons, Harvard’s Dean of Admissions, with statistical evidence of the disparity, cautioning him not to share the results publicly because “we see a negative effect for Asian applicants.” JA. 3953. The results to which OIR referred were data showing with statistical significance that being Asian American is negatively correlated with admission. Indeed, Asian Americans were the only demographic group with “negative effects.” Pet. App. 148. On May 30, 2013, in a follow-up report from OIR, it again found a negative chance of getting into Harvard for Asian Americans. The size of the negative association for being Asian American indicated that low-income Asian-Americans were ultimately admitted at a lower rate than similarly situated white applicants. Pet. App. 148-49.

Harvard’s admissions data corroborates that Harvard is not only discriminating against Asian-American applicants, but also engaging in racial balancing to a statistically significant degree. The racial demographics of Harvard’s admitted class have remained stable across all racial groups for many years. Petition for Writ of Certiorari at 8-11.

The similarities between increased Jewish admissions being reduced in the 1920s and 1930s and increased Asian-American admissions being reduced since the 1990s are unmistakable. As Ron Unz noted with respect to the Asian-American admissions patterns, “[T]his exactly replicates the historical pattern . . . in which Jewish enrollment rose very rapidly, leading to the imposition of an informal quota system, after which the numbers fell substantially, and thereafter remained roughly constant for decades.” Unz at 18.

II. Harvard Employs the Same Subjective Methods in the Admissions Process to Intentionally Discriminate Against Asian-American Applicants That It Used to Intentionally Discriminate Against Jews.

A. Harvard used various methods in the admissions process to detect the stereotypical characteristics of Jews with the intention of reducing the admissions of Jewish applicants.

With the faculty’s vote to approve the recommendation of the Committee on Methods of Sifting Candidates for Admission to limit the freshman class to 1,000 students and to consider non-academic factors for admissions, the work began for Harvard’s admissions office to devise and employ the methods necessary to reduce the number of Jewish applicants. Under the guise of seeking out applicants of sufficient “character and fitness,” the admissions office created

methods that were intended to detect the stereotypical characteristics of Jews. Karabel at 108.

As an initial measure, the faculty directed the admissions committee to interview as many applicants as possible in order to gather information on the applicant's "character and fitness and the promise of the greatest usefulness in the future as a result of a Harvard education." *Id.* The interview, which was generally conducted by the office of admissions or a trusted alumnus, was an early opportunity to discover stereotypical indicators of an applicant's ethnic background, including the applicant's physical features, attire, and mannerisms. In addition to the applicant interview, Harvard began to require a passport-sized photo "as an essential part of the application for admissions." *Id.* Other subjective measures used to identify and disadvantage Jewish applicants included legacy preferences, longer applications that required demographic information, a personal essay, a detailed description of extracurricular activities, and letters of recommendation. Synnott at 110.

From the beginning through the end of the admissions process, Harvard's emphasis was on identifying applicants of sufficient "character and fitness," which President Lowell repeatedly made clear to his subordinates was a trait largely lacking in Jewish applicants but prevalent among wealthy Protestant applicants. The resulting admissions numbers reflected a self-fulfilling prophecy: Harvard's preconceived belief that Jews lacked character and fitness resulted in significantly reduced admissions on the basis that Jewish

applicants lacked character and fitness. Harvard rejected claims that it had a quota on the percentage of Jewish admissions, but its methods to evaluate applicants for sufficient “character and fitness” were pretexts for intentional discrimination against Jewish applicants.

B. Today, Harvard’s “personal rating” in the admissions process is used to evaluate Asian-American applicants based on prejudicial assumptions and stereotypical characteristics with the intention of reducing the admissions of Asian-Americans.

Harvard uses a “personal rating” in the admissions process today that examines, among other characteristics, an applicant’s “leadership,” “self-confidence,” “likeability,” and “kindness” as evidenced by the applicant’s interview, essays, extracurricular activities, letters of recommendation, and anything else in the application. JA. 776. Harvard denies using race in connection with how it scores applicants on the personal rating, but the data reveal that the low personal ratings for Asian Americans, as a group, reduce their admissions to a statistically significant degree. African-American applicants, as a group, routinely receive the highest personal ratings, followed by Hispanics, then whites, and then Asian Americans at the bottom. For example, in the highest academic decile, 46.97% of African Americans receive a 1 or 2 score on the personal rating, 34.21% of Hispanics, 29.62% of Whites,

and 22.20% of Asian Americans. Petition for Writ of Certiorari at 16. The data from the *overall* rating of applicants, for which Harvard concedes it considers race, not so coincidentally follow the same hierarchical pattern. *Id.*

There is, of course, no evidence that Asian-American applicants actually have less desirable personal characteristics than applicants in other racial groups. Indeed, Harvard provided no explanation for the disparity. Even the district court, which ruled in Harvard's favor at trial, admitted it could not "clearly say what accounts for" it and could not rule out "overt discrimination or implicit bias" as the cause. Pet. App. 245, 265. While Harvard concedes the data show that removing the personal rating from consideration would increase Asian-American admissions to a statistically significant degree, Harvard steadfastly refuses to do so.

The personal rating is an extremely subjective part of the admissions process, and, in light of Harvard's well-documented history of discrimination against Jews through the use of similar subjective criteria, the legitimacy of the personal rating is clearly suspect. After all, a federal investigation by OCR uncovered anti-Asian prejudicial assumptions and stereotyping within Harvard's admissions office, and Harvard's own internal reports revealed anti-Asian penalties in the admissions process. *See Chin* at 8 ("The personal rating often hinges on the subjective evaluation of a particular admissions officer. In other words, a soft-spoken applicant could be judged 'quietly

confident' by one admissions officer and 'introverted or painfully shy' by another. It is this subjective rating that is the downfall of many Asian American applicants. . . . We feel that many admissions officers believe in stereotypes that work against Asian American applicants.”).

Harvard's personal rating is well known as the means by which Harvard discriminates against Asian-American applicants. The personal rating is so well known as a method for injecting bias into the admissions process that Asian-American applicants are attempting to hide their identities and to highlight characteristics that do not fall prey to prejudicial assumptions and stereotypes. According to a leading guide on college admissions, since selective colleges do not want too many Asian Americans on campus, students must carefully think about how they present themselves in their applications:

Many Asian Americans have been extraordinarily successful academically, to the point where some colleges now worry that there are “too many” Asian Americans on their campuses. Being an Asian American can now actually be a distinct disadvantage in the admissions processes at some of the most selective schools in the country.

Increasingly, the standard for affirmative action isn't minority status, but under-represented minority status. Since Asian American populations at many colleges exceed the proportion of Asian Americans to the population of the

state or country as a whole, Asian Americans are a minority, but not an under-represented minority, at those colleges.

* * *

If you are an Asian American – or even if you simply have an Asian or Asian-sounding surname – you need to be careful about what you do and don't say in your application.

The Princeton Review, *CRACKING COLLEGE ADMISSIONS* at 173-75 (2004). Specifically, Asian-American applicants are advised to avoid painting a picture for the admissions committee of the stereotypical Asian-American – “very high math SAT score, a low or mediocre verbal SAT score, high math- or science-related SAT II scores, high math and science grades, few credits in the humanities, few extracurricular activities, an intended major in math or the sciences, and an ambition to be a doctor, an engineer, or a research scientist.” *Id.* Otherwise, the applicant will end up competing against other stereotypical Asian-American applicants, if not rejected outright, for the few slots that are made available to Asian Americans. *Id.*

Asian-American applicants are routinely advised by college counselors and advisors to follow certain guidelines in order to make themselves appear to be less like the stereotypical Asian-American applicant. The prevailing view is that, if they are successful in following these guidelines, then they may be able to increase their personal ratings with selective colleges like Harvard: (1) avoid attaching your photograph if it

is not required; (2) refrain from answering any optional questions about ethnic background; (3) improve your verbal SAT score; (4) take literature and history courses; (5) get involved in activities other than math club, chess club, and computer club; (6) refrain from writing your application essay about the importance of your family or the positive/negative aspects of living in two cultures; and (7) refrain from stating that you want to major in math or the sciences and want to be a doctor. *Id.*

Just as Harvard used methods in the 1920s and 1930s to identify applicants of sufficient “character and fitness” as a pretext to discriminate against Jews, Harvard’s current use of the “personal rating” to pursue student-body diversity is a pretext to discriminate against Asian Americans. Just as before, the resulting admissions numbers reflect a self-fulfilling prophecy: Harvard’s belief that Asian Americans lack “leadership,” “self-confidence,” “likeability,” and “kindness” influences the way in which it evaluates Asian-American applicants under its personal rating.

Not surprisingly, large numbers of otherwise qualified Asian-American applicants are denied admission each year for having low personal ratings. Harvard denies that it singles out Asian Americans and has a quota on the percentage of Asian-American admissions, but the data indicate that Harvard’s personal rating is a pretext to discriminate against Asian Americans on the basis of their race.



CONCLUSION

We must not forget the prejudicial assumptions and stereotypes that Harvard used in the 1920s and 1930s to justify its invidious discrimination against Jewish applicants in admissions. We must not forget that Harvard devalued the hard work and sound character of deserving Jewish students on account of their ethnic background. And we must not let Harvard do it all over again to new generations of college applicants – Asian-American applicants – who, too, deserve an equal opportunity to be considered without regard to their race. For these and other reasons, the Court should reverse the court of appeals.²

² Harvard is hardly alone among selective universities in its discriminatory use of race in admissions. Indeed, the leading academic volume on the history of racial discrimination in higher education admissions is subtitled “*The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton.*” Karabel at 1. In fact, on October 6, 2020, the United States sued Yale University under Title VI alleging that “Yale’s race discrimination includes imposing undue and unlawful penalties on racially-disfavored applicants, including in particular most Asian, and White applicants.” Complaint, *United States v. Yale University*, No. 3:20-cv-01534 (D. Conn. Oct. 6, 2020). In addition, in 2008, OCR commenced an investigation of Princeton University’s alleged discriminatory use of race in admissions. Documents obtained from the investigation pursuant to a request made under the Freedom of Information Act revealed stereotyping of Asian-American applicants. Molly Hensley-Clancy, *Asians With “Very Familiar Profiles”: How Princeton’s Admissions Officers Talk About Race*, Federal investigators highlighted comments “associated with Asian stereotypes” as part of a probe into allegations of racial bias at the Ivy League school, BUZZFEED NEWS (May 19, 2017, 1:20 p.m.), <https://www.buzzfeednews.com/article/mollyhensleyclancy/asians-very-familiar-profiles-princeton>.

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