

No. 20-1199

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

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

**BRIEF OF 1,241 SOCIAL SCIENTISTS
AND SCHOLARS ON COLLEGE ACCESS,
ASIAN AMERICAN STUDIES, AND RACE AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are 1,241 social scientists and scholars with doctoral degrees who have extensively studied education issues related to Asian Americans, college access, and race in postsecondary institutions and society.² *Amici* comprise researchers and scholars employed at 381 different colleges, universities, and other institutions and organizations across the United States. Their work extends across numerous fields and disciplines, including education, Asian American studies, sociology, anthropology, psychology, public policy, political science, and history. Many *amici* have been recognized with the highest national honors and awards in their field. Twenty-seven *amici* are members of the American Academy of Arts & Sciences, 32 are members of the National Academy of Education, 40 are fellows of the American Educational Research Association, and 70 are past or current presidents of national organizations, including the American Educational Research Association, the Association for the Study of Higher Education, and the Association for Asian American Studies.

Amici have a particular interest in providing the Court with social science research findings that address the educational judgments Harvard College considers in designing and implementing its whole-person review process. The brief draws on *amici's* original

¹ The parties have filed blanket consent for the filing of *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

² A list of *amici* is included in the Appendix.

research and their review of the literature, including the most extensive and up-to-date body of knowledge about how race-conscious admissions processes benefit Asian Americans. It is vital that the Court have the newest and most rigorous peer-reviewed research and statistical analyses when considering an issue that is so critical for the Nation's selective colleges and universities.

As scholars committed to policies and practices informed by research-based evidence, *amici* are deeply concerned by Petitioner's reliance on racial stereotypes and the myth of an Asian penalty; its excessive focus on limited measures of academic success that research has shown to be unreliable as isolated measures of merit; and specious manipulation of data to present an inaccurate and non-empirical argument. Ultimately, *amici* are concerned that the removal of race-conscious admissions will harm Asian American applicants.

SUMMARY OF ARGUMENT

Petitioner treats Asian Americans as a homogeneous population, barely pausing to acknowledge the immense diversity within that group or the benefits that applicants of *all* races enjoy from Harvard's whole-person review process. Instead, Petitioner's arguments rely on stereotypes about students of color and the myth of an Asian penalty. In fact, Petitioner's approach would harm Asian American and other racial-minority applicants, because it would deny them the right to present their full selves in their applications and prevent admissions officers from having information that is necessary to counterbalance the racial biases that affect the application materials themselves.

It is no surprise that Petitioner must rely on stereotypes of Asian Americans as well as manipulate its data, because as the district court correctly found after a lengthy trial, and the First Circuit correctly affirmed—relying in part on the research *amici* presented below—the data do not, in fact, evidence any racial discrimination. To the contrary, high-achieving Asian American applicants benefit from Harvard’s individualized whole-person review because it treats each applicant as an individual and inhibits the influence of racial biases and assumptions. Harvard’s approach is well-grounded in social science research, and the district court’s factual findings are consistent with the social science data.

Harvard College could fill every incoming class with students who have perfect test scores or high school GPAs. But that is not the educational environment Harvard seeks to create. Instead, Harvard strives to prepare its students as “future leaders” in “an increasingly pluralistic society,” “better educating its students through diversity” and “producing new knowledge stemming from diverse outlooks.” Pet. App. 31, 59. The First Circuit correctly affirmed the district court’s finding that Harvard’s holistic race-conscious approach to admissions does not subject Asian American applicants to race-based discrimination. Petitioner expresses views rejected by the vast majority of Asian Americans on whose behalf Petitioner purports to speak.

ARGUMENT**I. Petitioner Advocates For An Admissions Process That Would Actively Harm Asian American Applicants.**

Petitioner's arguments leverage racial stereotypes about Asian Americans as an undifferentiated whole, ignoring vast differences among the experiences of Asian American subgroups. In doing so, Petitioner's proposed alternative process would seriously harm Asian Americans who wish to attend selective colleges like Harvard.

Both courts below correctly found that Harvard does not discriminate against Asian Americans in its admissions policies. *See infra* pp. 21-27. Yet Petitioner continues to insist, without evidence, that Harvard does. That isn't just wrong, research shows that advocating such views creates groundless fears of racial discrimination in college admissions that, in addition to the harms described herein, inhibits identity development among Asian American students. *See Yi-Chen Wu, Admission Considerations in Higher Education Among Asian Americans*, Am. Psych. Ass'n (2012).³

A. Petitioner Promotes Racial Stereotypes About Asian Americans And Other Students Of Color.

Petitioner argues that Asian Americans "are substantially stronger" than other demographic groups "on nearly every measure of academic achievement, including SAT scores" and "GPA." Pet. Br. 72-73.

³ <https://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-admission>.

According to Petitioner, these “traits,” as Petitioner characterized below, *see* Pet. C.A. Br. 36, mean Asian Americans “should be admitted at a *higher* rate” than other groups, Pet. Br. 72.

That assertion fundamentally rests on a racial stereotype about Asian Americans as a so-called “model minority.” That stereotype advances the views that (1) Asian Americans are smarter and value education more than other groups and (2) other racial minorities do not value hard work and education. *See, e.g.*, OiYan Poon et al., *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 *Rev. Educ. Rsch.* 469, 473-76 (2016); Yoon K. Pak et al., *Asian Americans in Higher Education: Charting New Realities* 16-17, 39-40 (2014). The model-minority myth ignores the historical and social forces that drive Asian American academic achievement and reinforces negative stereotypes about other racial minorities.

i. Selective immigration policies, not innate ability, explain key academic differences between Asian American and other racial and ethnic groups.

Contrary to what the model-minority stereotype implies, key historical and policy mechanisms—not innate ability or inherent cultural attitudes—account for differences in GPA and test scores between Asian Americans and other racial groups. Building on decades of scholarship in Asian American Studies to illuminate the historical and social origins of the Asian American educational achievement advantage, sociologists Jennifer Lee and Min Zhou provide strong evidence from quantitative and other sources of empirical

data that Asian American academic achievement “cannot be explained by superior traits intrinsic to Asian culture or by the greater value that Asians place on education or success.” Jennifer Lee & Min Zhou, *The Asian American Achievement Paradox* 7 (2015).

Instead, a strong body of research shows that Asian Americans’ notable educational success (on average) is due to context, including immigration policies that select for highly educated immigrants from certain Asian countries. See, e.g., Jane Junn, *From Coolie to Model Minority: U.S. Immigration Policy and the Construction of Racial Identity*, 4 Du Bois Rev. 355, 362-65, 368 (2007). The “hyperselecti[on]” of immigrants from certain Asian countries explains why the typical immigrant admitted to the United States from China is much more likely to have a college degree than both the average U.S. resident *and* the average resident in China. *The Asian American Achievement Paradox*, *supra*, at 7, 20-30; Carlos Echeverria-Estrada & Jeanne Batalova, *Chinese Immigrants in the United States*, Migration Info. Source (Jan. 15, 2020).⁴ In contrast, the typical immigrant admitted to the United States from Mexico is *less* likely than the typical Mexican resident to hold a college degree. *The Asian American Achievement Paradox*, *supra*, at 29.

The selective immigration policies that contribute to Asian Americans’ educational achievement differences extend prior to the 1965 amendments to the Immigration and Nationality Act, which ended Asian exclusion and created two immigration priorities: highly valued skills and family reunification. Pub. L. No. 89-

⁴ <https://www.migrationpolicy.org/article/chinese-immigrants-united-states>.

236, 79 Stat. 911 (1965); *see also, e.g.*, Madeline Y. Hsu & Ellen D. Wu, “Smoke and Mirrors”: *Conditional Inclusion, Model Minorities, and the Pre-1965 Dismantling of Asian Exclusion*, *J. Am. Ethnic Hist.*, Summer 2015, at 43, 53-54; Jennifer Lee & Min Zhou, *From Unassimilable to Exceptional: The Rise of Asian Americans and “Stereotype Promise,”* 16 *New Diversities*, no. 1, 2014, at 7, 10-13. Around the turn of the 20th Century, the United States began to carve out limited exceptions to its widespread formal exclusion of Chinese immigrants for Chinese university students. *See* Madeline Y. Hsu, *The Good Immigrants: How the Yellow Peril Became the Model Minority* 47-48 (2015). After 1965, the United States started recruiting highly educated, skilled immigrants from Asia in greater numbers than ever before through employment-based preferences. Arun Peter Lobo & Joseph J. Salvo, *Changing U.S. Immigration Law and the Occupational Selectivity of Asian Immigrants*, 32 *Int’l Migration Rev.* 737, 757-58 (1998). The majority of Asian American adults (71%) are foreign-born,⁵ and the vast majority of current Asian immigrants (of all legal statuses) arrived after 1990,⁶ when the numbers of visas based on occupational skills and education increased

⁵ Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, Pew Rsch. Ctr. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/>.

⁶ Mary Hanna & Jeanne Batalova, *Immigrants from Asia to the United States*, Migration Pol’y Inst. Migration Info. Source (Mar. 10, 2021), <https://www.migrationpolicy.org/article/immigrants-asia-united-states-2020>.

over past years.⁷ In 2020, China and India alone accounted for more than 85% of all H1-B visa grantees,⁸ and of new legal permanent residents, those from Asia were the most likely to be granted permanent residence through employment-based preferences, *Immigrants from Asia to the United States, supra*, fig.8. Further, most international student visas now go to Asian immigrants. Neil G. Ruiz, Glob. Cities Initiative, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations* 10 (Aug. 2014). While family-based preferences remain the main pathway to U.S. entry for all immigrants, it is not difficult to see how the selective recruitment of Asian immigrants via visas reserved for those with high levels of education allows for those same immigrants to sponsor, through family-based immigration, relatives who likely share similar educational characteristics.

The United States' hyper-selective recruitment of certain Asian immigrants, particularly Chinese and Indians—the two largest Asian groups—challenges the stereotype that the success of Asian Americans in the United States is due to innate intellect or ingrained cultural characteristics. If that were true, we would expect to see the same kinds of educational achievement in Asia as in the United States. We do not. In 2015, more than 50% of Chinese immigrants in the United States had a bachelor's degree but only 4%

⁷ Muzaffar Chishti & Stephen Yale-Loehr, Migration Pol'y Inst., *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later* 2 (2016).

⁸ U.S. Citizenship & Immig. Servs., *Characteristics of H-1B Specialty Occupation Workers* 8 (2021), https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2020.pdf.

of adults in China did. Jennifer Lee, *From Undesirable to Marriageable: Hyper-Selectivity and the Racial Mobility of Asian Americans*, *Annals Am. Acad. Pol. & Soc. Sci.*, Nov. 2015, at 79, 82. Similarly, although approximately 70% of Indian immigrants in the United States have a bachelor's degree, less than 15% of college-aged adults in India enroll in college. Rema Nagarajan, *Only 10% of Students Have Access to Higher Education in Country*, *Times of India* (Jan. 5, 2014);⁹ Pew Rsch. Ctr., *The Rise of Asian Americans* 25 (Apr. 4, 2013). Asian Americans' educational achievement traces to U.S. immigration policies and other contextual factors, not to inherent qualities tied to race.

ii. The academic metrics Petitioner promotes are not the objective measures that Petitioner claims them to be.

While the model-minority stereotype has serious documented downsides, the presumed academic competence it ascribes to Asian Americans may artificially boost the academic performance of many Asian American students, while doing the opposite for members of other racial minorities. *See Unassimilable to Exceptional, supra*, at 9, 16-19. Although all stereotypes are harmful, Asian Americans are the only group able to leverage a stereotype into “symbolic capital” when it comes to education: “The positive perceptions of Asian American students by their teachers, guidance counselors, and school administrators manifest as a form of symbolic capital that positively affects the grades they

⁹ <https://timesofindia.indiatimes.com/home/education/news/only-10-of-students-have-access-to-higher-education-in-country/articleshow/28420175.cms>.

receive, the extra help they are offered with their coursework, and the encouragement they receive when they apply to college.” *The Asian American Achievement Paradox, supra*, at 118. Asian Americans are more likely to be placed in AP classes and special programs for the gifted, which are “invaluable institutional resources that are not equally available to all students,” especially to Latinx and Black students. *Id.* at 116. In addition, “stereotype promise” can spur Asian American students to perform at higher levels than they would without the positive views and support of parents, relatives, and teachers. *Ibid.* Test scores and grades alone paper over these social and historical forces, disguising positive bias attributed to race as individual effort and merit.

Harvard’s academic rating is not the bias-free, “objective” score that Petitioner would have this Court believe. Pet. Br. 15. In fact, Petitioner’s own analysis shows that academic and extracurricular ratings that Harvard gives Asian American applicants are *stronger* than expected based on Petitioner’s model. Yet Petitioner “doesn’t think” this “*positive* correlation between Asian American identity and Harvard’s academic rating” is “because of race,” instead attributing the difference to “unobservable factors” without any empirical reason to do so, while at the same time insisting that any “*negative* correlation between Harvard’s personal rating and Asian American ethnicity” is necessarily the result of racial bias. Pet. App. 87-88 n.38 (quoting Petitioner’s expert; emphasis added). This is one reason Harvard’s admissions officers must be allowed to consider an applicant’s race: The academic ratings themselves—and the underlying

academic data—may reflect biases that align with the model-minority stereotype and “stereotype promise.”

Although grades and standardized test scores may appear more objective, a large body of research shows that neither is a fair and impartial measure of academic talent. Data from the organizations that sponsor standardized admissions tests show that scores are in large part a reflection of parental education and family income. Coll. Bd., *2017 SAT Suite of Assessments Annual Report, Total Group 3* (2017); Krista Mattern et al., ACT, Inc., *ACT Composite Score by Family Income 1* (2016); see also Greg J. Duncan & Richard J. Murnane, *Growing Income Inequality Threatens American Education*, Kappan Mag., Mar. 2014, at 8, 10. Asian Americans as a group do well on these measures because on average they are the ethnic group that exhibits the highest group levels for educational access, parental education, and income. *The Rise of Asian Americans, supra*, at 2. Although it is not true of all Asian American subgroups or all applicants within advantaged groups, Asian American applicant files, including teacher recommendations, may emphasize these students’ academic strengths and especially STEM intellectual interests, more so than for other applicants. See Brian Heseung Kim, *Applying Data Science Techniques To Promote Equity and Mobility in Education and Public Policy* 137 (May 2022) (Ph.D. dissertation, University of Virginia) (on file with author).

Perhaps acknowledging the flaws of tests like the SAT and ACT, more than 1,000 accredited institutions of higher education announced that they would not require standardized tests as part of their admissions practices, even before the height of the COVID-19

pandemic.¹⁰ That number has nearly doubled since.¹¹ This trend recognizes the limitations of such tests as measures of academic potential among prospective students. *See, e.g.,* Kelly Rosinger, *Toppling Testing? COVID-19, Test-Optional College Admissions, and Implications for Equity*, Third Way (Sept. 2, 2020).¹²

Teachers' assessments of students, too, are subject to racial biases, which affect GPAs. Scholarship on implicit bias shows that teachers have higher expectations for white and Asian American students than for Black and Latinx students. *See generally* Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers' Expectations Different for Racial Minority Than for European American students? A Meta-Analysis*, 99 *J. Educ. Psych.* 253 (2007). A study of more than 10,000 high school sophomores and their teachers found that math and English teachers dramatically underestimated the academic abilities of Black and Latinx students with similar test scores and homework completion as their white peers, and that those lower expectations affected student outcomes, including GPA. Hua-Yu Sebastian Cherng, *If They Think I Can: Teacher Bias and*

¹⁰ FairTest, *More Than 1080 Accredited Colleges and Universities That Do Not Use ACT/SAT Scores to Admit Substantial Numbers of Students into Bachelor-Degree Programs (Current as of Winter 2019 – 2020)*, <https://tinyurl.com/ywcf98mp> (archived link).

¹¹ FairTest, *1,835+ Accredited, 4-Year Colleges & Universities with ACT/SAT-Optional Testing Policies for Fall, 2022 Admissions (Current as of May 15, 2022)*, <https://www.fairtest.org/university/optional>.

¹² <https://www.thirdway.org/report/toppling-testing-covid-19-test-optional-college-admissions-and-implications-for-equity>.

Youth of Color Expectations and Achievement, 66 Soc. Sci. Rsch. 170, 179-80, 179 tbl.6 (2017).

iii. Petitioner leverages negative stereotypes about other students of color.

Importantly, by relying on positive stereotypes of Asian Americans' educational abilities and values, Petitioner leverages negative stereotypes about Black and Latinx students' educational abilities and values. By assuming that higher average standardized test scores and grades among Asian Americans result from unique cultural attitudes toward education, Petitioner implies that the lower average scores of other racial minorities reflect cultures that place a lower value on education. This implication capitalizes on documented racial stereotypes.

To the contrary, research shows that a larger percentage of Latinx and Black students than their white peers believe a college degree is necessary for success. Renee Stepler, *Hispanic, Black Parents See College Degree as Key for Children's Success*, Pew Rsch. Ctr. (Feb. 2016);¹³ Ronald Brownstein, *White People Are Skeptical About the Value of a College Degree*, Atlantic (Nov. 7, 2013).¹⁴ Indeed, according to a survey of Americans ages 18 and older, Black respondents (41%) were more likely than Asian respondents (36%) to "strongly agree" that an education beyond high school offers a good return on investment. Rachel Fishman et al.,

¹³ <https://www.pewresearch.org/fact-tank/2016/02/24/hispanic-black-parents-see-college-degree-as-key-for-childrens-success/>.

¹⁴ <https://www.theatlantic.com/education/archive/2013/11/white-people-are-skeptical-about-the-value-of-a-college-degree/281238/>.

New Am., *Varying Degrees 2020, Explore the Data, Value*.¹⁵ Nevertheless, racial biases that attribute a lack of individual effort, rather than structural racial inequality, as the reason for Black and Latinx individuals' disadvantage, persist. Race-conscious admissions policies are critical for overcoming those entrenched biases. *See infra* pp. 18-21.

Even were it the case that the academic measures Petitioner emphasizes were free from bias—and they are not—Petitioner argues that the greater an applicant's past academic success (assessed by limited metrics), the greater their chance of admission to Harvard *should be*. But that argument assumes that *Petitioner's* view of which individual qualities Harvard should value in the admissions process should prevail over *Harvard's* view. Harvard, however, seeks “to educate the citizenry and citizen leaders” of tomorrow, Pet. App. 29-31, and it seeks to do so by choosing *among the thousands of academically qualified applicants* to build a diverse community of individuals who will learn from and challenge each other, *id.* at 131-32.

B. Petitioner's Excessive Focus On Numerical Measures Ignores Vast Differences In Experiences Of Asian American Applicants.

Petitioner unduly emphasizes the fact that, on average, Asian Americans exhibit higher academic scores than other racial groups. But mean scores conceal variation, including vast differences in test score

¹⁵ <https://www.newamerica.org/education-policy/reports/varying-degrees-2020/explore-the-data/> (last updated June 24, 2020) (select “Race” in “Show breakdown by demographic” dropdown menu).

averages among ethnic subgroups, let alone between individuals. “Asian Americans come from all walks of life. Some are doctors or lawyers; others work in restaurants or nail salons.” Asian Am. Ctr. for Advancing Just., *A Community of Contrasts: Asian Americans in the United States: 2011*, at 2; see also AAPI Data, *State of Asian Americans, Native Hawaiians, and Pacific Islanders in the United States* (June 2022). Although “[m]any were born in the United States; most are immigrants from many countries, including Bangladesh, Burma, Cambodia, China, India, Indonesia, Japan, Korea, Laos, Malaysia, Nepal, Pakistan, the Philippines, Sri Lanka, Taiwan, Thailand, and Vietnam.” *Community of Contrasts*, *supra*, at 2.

Petitioner’s assertion that Harvard’s whole-person review discriminates against “Asians” fails to acknowledge that many Asian American subgroups do not demonstrate the high academic ratings assumed by such a claim. As a recent demographic report makes clear, while 56% of Chinese, 75% of Indian, and 80% of Taiwanese adults in the U.S. over age 25 hold at least a Bachelor’s degree, less than 25% of Asian Americans over 25 of Cambodian, Burmese, Hmong, and Bhutanese origin have completed college. *State of Asian Americans, Native Hawaiians, and Pacific Islanders in the United States*, *supra*, at 49 fig.23. Even among Asian Americans who do attend college, a large proportion (47.3%) attend community colleges, contrary to the common racial stereotype suggesting that Asian Americans primarily attend elite private colleges. Julie J. Park & Amanda E. Assalone, *Over 40%: Asian Americans and the Road(s) to Community Colleges*, 47 Cmty. Coll. Rev. 274, 275 (2019). Asian Americans who do not fit Petitioner’s stereotype of the model minority

benefit from holistic review that allows them to tell their whole story, including how their personal experiences differ from others in the varied Asian American community.

Asian Americans not only differ greatly with regard to educational attainment, they are also “the most economically divided racial or ethnic group in the [United States],” displaying the largest degree of within-group income inequality. Rakesh Kochhar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America’s Racial and Ethnic Groups*, Pew Rsch. Ctr. (July 12, 2018).¹⁶ A natural consequence of such a wide range of family income levels is an equally large disparity in educational opportunities and achievement. Studies show, for example, that many Asian Americans who have roots in Southeast Asia (*i.e.*, Cambodians, Hmong, Laotians, and Vietnamese) and who trace their family’s arrival in the United States to wartime displacement have comparatively low rates of college entry and completion. *State of Asian Americans, Native Hawaiians, and Pacific Islanders in the United States*, *supra*, at 49 fig.23. Hmong American students in particular continue to experience one of the lowest education-attainment rates among Asian Americans. See Rican Vue, *Trauma and Resilience in the Lives and Education of Hmong American Students: Forging Pedagogies of Remembrance with Critical Refugee Discourse*, 24 *Race Ethnicity & Educ.* 282, 283 (2021). Hmong students, the research shows, experience invisibility when Asian

¹⁶ <https://www.pewresearch.org/fact-tank/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups/>.

Americans are assumed to be a homogenous group, as Petitioner's arguments presuppose. Rican Vue, *Visibility, Voice, and Place: Hmong American College Student-Initiated Organizing as Creative Praxis*, 62 J. Coll. Student Dev. 276, 276-90 (2021). These educational experiences stand in stark contrast to the educational achievement rates of Asian Americans with roots in China and India, who display relatively high rates of college entry and completion. *State of Asian Americans, Native Hawaiians, and Pacific Islanders in the United States*, *supra*, at 49 fig.23.

Numbers on a test or summarized in a GPA cannot fully capture the experience of an individual, nor their potential to contribute to an educational community. Within the large group of academically qualified applicants, Harvard is entitled to ask, for example, whether a student with a 4.2 GPA who searched for opportunities to take advanced math at a community college might have more to contribute to the Harvard community than a student with a 4.5 GPA who did not. Many Asian American applicants with less than perfect test scores or high school GPAs often appear more likely to make important contributions to the campus community than those who have higher academic numbers. These applicants benefit from holistic-review processes like Harvard's. Select quantifiable measures alone do not offer full, reliable, or valid measures of the diversity of achievements among the myriad talented applicants to Harvard.

Petitioner errs in treating Asian American applicants to Harvard as a homogeneous block of high academic achievers from similar socioeconomic circumstances. Although it disclaims doing so, Petitioner's laser focus on statistical analyses that combine all Asian

American subgroups together fails to account for the varying rates of admission among them. A whole-person review process like Harvard's allows a school to account for the diverse range of unique experiences—including how race shaped a person's experience—among Americans of all races and backgrounds. There is no sound reason to ignore the equally diverse range of experiences *within* the group of Asian American applicants that Petitioner purports to speak for. *Compare infra* pp. 33-34 (most Asian Americans support admissions practices like Harvard's). Differences in educational and economic opportunity, in social and familial circumstances, and in personal experiences of discrimination all inform a complete understanding of an individual applicant's academic and nonacademic achievements. By employing a system that accounts for such differences on an individual level, Harvard is able to view each applicant's talents, achievements, experiences, perspectives, and potential within the context of the applicant's broader life experience—and to more accurately assess the contributions each applicant would likely make to the undergraduate population and experience.

C. Failing To Consider Race As One Of Many Factors In Admissions Would Harm Asian American Applicants.

“Removing considerations of race and ethnicity from Harvard's admissions process entirely,” the district court found, “would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of

their background.” Pet. App. 246. Such a restriction would limit the ability of colleges and universities to build a truly diverse class of students and “to pursue the educational benefits that flow from student body diversity.” *Fisher v. Univ. of Tex.*, 579 U.S. 365, 376 (2016) (quotation marks omitted).

Petitioner’s contention that the *only* way to mitigate such biases is to remove race as a consideration from Harvard’s admissions process defies logic. Eliminating any awareness of race in admissions would only *perpetuate* the biases described above. See Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-Level Administrators Understand a Prohibition on Race-Conscious Postsecondary Admissions Policies*, 52 Am. Educ. Rsch. J. 828, 849-55 (2015); Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. Pa. J. Const. L. 781, 781-83, 790-803 (2015); Jeffrey F. Milem et al., *Making Diversity Work on Campus: A Research-Based Perspective* iv (2005).¹⁷

Petitioner’s presumption is clearly incorrect—removing any consideration of race would not result in more Asian American students being admitted across the board. Rather, doing so would result in displacing Asian American students at a higher rate than non-Asian American students who have lower median test scores. Research shows that by practicing admissions using Petitioner’s preferred approach, “certain students currently attending the most selective colleges would not have been admitted: 21 percent of Asian

¹⁷ https://web.stanford.edu/group/siher/AntonioMilemChang_makingdiversitywork.pdf.

American students as well as 39 percent of non-Asian American students would be displaced and their seats would be given to students who had higher test scores.” Anthony Carnevale & Michael C. Quinn, Georgetown Univ., *Selective Bias* 23 (2021).¹⁸ And on average, according to this study, “the Asian American students who would be displaced have higher median test scores than non-Asian American students who would be displaced.” *Ibid.*

Perhaps more insidious, though, removing Harvard’s limited consideration of race as one of many factors would deny Harvard’s admissions officers the ability to account for structural racial biases in schooling. Social science research—and common sense—overwhelmingly indicates that few aspects of any child’s educational journey remain untouched by racial biases, which are all too common and can have devastating effects. Brian Kim, for example, found that teachers’ letters of recommendation contain more positive sentences when written for white applicants than for Black and Asian American applicants. *Applying Data Science Techniques To Promote Equity and Mobility in Education and Public Policy*, *supra*, at 137-39. Those content differences seem to be largely influenced by students’ access to, and involvement in, specific activities, coursework, and opportunities from other parts of the educational pipeline. *See generally ibid.* Supposedly neutral recommendation letters seem to reify other disparities in education, which are themselves affected by racial biases and race-linked opportunities

¹⁸ <https://repository.library.georgetown.edu/bitstream/handle/10822/1062947/cew-selective-bias-fr.pdf?sequence=1&isAllowed=y>.

from preschool onward. Unless admissions officers are aware of this and thus able to effectively account for it in reviewing applicant files, the file materials are poised to magnify the effects of race-based disparities that affect an applicant's submissions.

II. The First Circuit Correctly Affirmed The District Court's Finding That There Is No Evidence Of Discrimination Against Asian Americans.

Magnifying Petitioner's reliance on the harmful stereotypes outlined above, Petitioner also relies on misleading characterizations of Harvard's use of a "personal rating" as a tool for enabling discrimination. In fact, the data do not support that conclusion, and Petitioner refuses to recognize that the purpose of the personal rating is to take account of the full range of assets a student may contribute to the campus community. Although news outlets have mischaracterized the personal rating as a "personality" rating, *see, e.g.*, Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. Times, June 16, 2018, at A1—something Petitioner's counsel has also done in this case—it is not an assessment of how sparkling or drab an applicant's personality is. Far from it.

A. There Are Nondiscriminatory Reasons For Differences Among Average Personal Ratings.

Petitioner relies on an observed negative statistical correlation between Asian American identification and assigned personal ratings, arguing that the only possible explanation for that correlation is intentional anti-Asian discrimination by Harvard's 40-member

admissions committee. Pet. Br. 73. Petitioner’s conclusion has no basis in logic, to say nothing of social science research or data, which offer explanations for differences among average personal ratings across different racial groups. Relying on that research, which *amici* presented to the court below, the First Circuit correctly affirmed the district court’s intensely factual finding that “when controlling for a number of other factors, race” is merely “*correlated* with the personal rating,” but does not necessarily “*influence*[] the personal rating.” Pet. App. 87-89.

i. Asian Americans are more likely to attend public high schools, where larger workloads can prevent staff from writing strong recommendation letters.

The district court found that “[a]t least a partial cause of the disparity in personal ratings between Asian Americans and white applicants appears to be teacher and guidance counselor recommendations, with white applicants tending to score slightly stronger than Asian Americans on the school support ratings.” Pet. App. 173; *id.* at 188-89. The court explained that “teacher and guidance counselor recommendation letters are among the most significant inputs for the personal rating”—and that “apparent race-related or race-correlated difference[s] in the strength of guidance counselor and teacher recommendations” are “significant” in understanding any observed disparity in personal-rating trends. *Id.* at 192-93. The First Circuit correctly held that “the district court did not clearly err,” in part because Petitioner’s statistical expert did not “control[] for” “factors

external to Harvard” that “correlate with race” and “affect the personal rating.” *Id.* at 89-90.

Amici’s data show that racial differences in high school enrollment patterns can help explain the difference in recommendations and in average personal ratings. “Among Ivy League applicants, Asian Americans are more likely to attend public schools where the counselor to student ratios are usually quite large, possibly resulting in less personalized or enthusiastic recommendations from counselors.” Julie J. Park & Sooji Kim, *Harvard’s Personal Rating: The Impact of Private High School Attendance*, 30 *Asian Am. Pol’y Rev.*, Oct. 2020.¹⁹ Although only 56% of white applicants to hyper-selective universities like Harvard attended public high schools, 75% of Asian Americans with elite university aspirations did. *Ibid.*

Because counselors and teachers at large public high schools have heavier workloads than their counterparts at private high schools, they have less time to offer in-depth letters of recommendation for each student. Robert T. Teranishi, *Asians in the Ivory Tower: Dilemmas of Racial Inequality in American Higher Education* 78-79 (2010); Ashley B. Clayton, *Helping Students Navigate the College Choice Process: The Experiences and Practices of College Advising Professionals in Public High Schools*, 42 *Rev. Higher Educ.* 1401, 1404-05 (2019). In private high schools, the student-to-teacher ratio is 11.9 to 1; in public schools, it is 16.2 to 1. Ke Wang et al., U.S. Dep’t of Educ., *School Choice in the United States: 2019*, at 20 (2019).²⁰ And as the

¹⁹ <https://aapr.hkspublications.org/2020/10/04/harvards-personal-rating-the-impact-of-private-high-school-attendance/>.

²⁰ <https://nces.ed.gov/pubs2019/2019106.pdf>.

National Association for College Admissions Counseling stated in 2019, “48 percent of private schools reported that they employed at least one counselor (full- or part-time) whose sole responsibility was to provide college counseling for students, compared to only 29 percent of public schools.” Melissa Clinedinst, Nat’l Ass’n for Coll. Admission Counseling, *2019 State of College Admission 19* (2019).²¹ The “counseling staff at private schools spent an average of 31 percent of their time on college counseling, while counselors at public schools spent only 19 percent of their time on that task.” *Ibid.*

The smaller average workload for teachers and counselors at private schools allows them to spend more time drafting letters of recommendation with greater depth than their counterparts in public schools. In turn, higher quality letters from private schools make it more likely that private school students—who are less likely to be Asian American—will receive higher school support ratings, which are key to Harvard’s assignment of personal ratings. *See* Pet. App. 173, 189-92.

None of this accounts for the likelihood that even unintentional racial bias, too, likely affects how teachers and counselors write the recommendations. The “district court’s reasoning does not itself imply that teachers and guidance counselors are racially biased and,” the First Circuit concluded, “should not be so understood.” Pet. App. 92 n.41. Research shows however that Asian American students “are slightly less likely than” otherwise similarly situated white students “to

²¹ https://www.nacacnet.org/globalassets/documents/publications/research/2018_soca/soca2019_all.pdf.

have positive statements about them in their letters.” *Applying Data Science Techniques To Promote Equity and Mobility in Education and Public Policy, supra*, at 139. In fact, Asian American students “receive less positive letters than [w]hite students do from *the same teacher*, even conditional on having the same observable characteristics,” indicating that “the differences in letter positivity ... observe[d] for Asian students are *primarily* happening at the individual teacher level, rather than the result of sorting to different teachers.” *Id.* at 140. The potential for implicit bias is yet an additional reason why it is critical that admissions officers at Harvard be able to consider an applicant’s race. *See supra* pp. 18-21.

ii. Asian Americans are more likely to apply to highly selective colleges like Harvard.

Differences in application patterns can also explain the marginal differences in personal ratings. Asian American students are more likely than students of other racial and ethnic groups to apply to highly selective universities. Brian P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 Soc. Sci. Rsch. 310, 317 (2010); *see* Pet. App. 207-08. Asian American students, particularly those from high- and middle-income families, are more likely to apply to more colleges than the national population. *See* Mitchell J. Chang et al., *Beyond Myths: The Growth and Diversity of Asian American College Freshman, 1971-2005*, at 16 (2007). And recent research shows that over 60% of Asian American college applicants’ “first-choice college was a highly selective, four-year institution, which was 1.6 times higher than that of white students, about 2.6

times higher than [Black] students, and about twice as high as Latinx students.” Michael Bastedo & Sooji Kim, *Who Gets Their First Choice? Race and Class Differences in College Admissions Outcomes* 4 (2020).²² Among those Asian American applicants, aspirations of attending highly selective four-year institutions differ by ethnicity: Among the students surveyed in the High School Longitudinal Study in 2009, over 71% of Chinese Americans and over 66% of South Asian Americans applied to highly selective four-year institutions as their first choice, while less than 50% of Filipino Americans and about 37% of Southeast Asian Americans did so. *Id.* at 3, 12 tbl.11.

Moreover, research shows that Asian American applicants, especially those who identify as East Asian, are more likely than white applicants to prefer being a lower-performing student in a higher-status university than to be a higher-performing student in a lower-status university. See Kaidi Wu et al., *Frogs, Ponds, and Culture: Variations in Entry Decisions*, 9 Soc. Psych. & Personality Sci. 99, 101 (2018). Asian Americans may also be more likely than other students to fill out an application to Harvard even if Harvard may not be the best fit—the cross-section of Asian American students who apply to Harvard is likely to be materially different from the cross-section of applicants of other ethnicities. See Julie J. Park, *Race on Campus: Debunking Myths with Data* 90-91 (2018). Because a materially disproportionate number of Asian American students apply to Harvard every year, it is no surprise that many of them—like many high

²² <http://www-personal.umich.edu/~bastedo/papers/BastedoKim.AERA2020.pdf>.

achieving students of all races and ethnicities—do not receive the highest possible personal rating at Harvard, which rejects more than 95% of applicants every year.

B. The Personal Rating Benefits All Students By Capturing The Diversity Of Their Experiences.

Consistent with the research and data, the district court credited trial evidence that Harvard admissions officers do not consider race when assigning a personal rating, and the First Circuit correctly concluded that the district court did not clearly err in so finding. *See* Pet. App. 89. Admissions committee members review applicant files containing myriad data—including personal statements, teacher and counselor recommendation letters, and notes from interviews—to assign a personal rating that acknowledges an applicant’s perspectives, interests, and talents that are not fully represented in other ratings. The personal rating reflects a range of qualities that are vital in determining an applicant’s potential to succeed and contribute while at Harvard and beyond—such as persistence in overcoming adversities, personal commitment to community, and potential for future growth. The personal rating also allows Harvard’s admissions committee to account for the diversity of students’ academic and career interests. *See, e.g., id.* at 125, 190-91; JA1419; JA668-70.

Trial testimony illustrated how Asian American applicants benefit from Harvard’s approach to the personal rating. Harvard students Thang Diep and Sally Chen both testified and placed their Harvard applications into evidence. C.A. J.A. 2673-92, 2729-46. Each

demonstrated academic qualification and highlighted their Asian American identities. *Id.* at 2676-77, 2679-80, 2733-37. Thang opened his personal statement by explaining that he was “no longer ashamed of [his] Vietnamese identity” because his high school “program allowed [him] to embrace it.” *Id.* at 2679. Thang’s identity, experiences, and leadership in confronting racism as a low-income Vietnamese American immigrant were central to his successful application, even though his SAT score was “on the lower end of the Harvard average.” *Id.* at 2679-81. Sally Chen similarly did not have test scores stellar enough for her high school counsellor to encourage her to apply to Harvard—but her admissions file noted that her Chinese American cultural background and engagements *contributed* to her sense of “responsibility to advoca[te]” and “speak[] up,” and bolstered her “Personal Qualities Rating.” *Id.* at 2736-38. She testified that she “appreciated the ways in which [her] admissions reader saw what [she] was trying to say when [she] was talking about the significance of growing up in a culturally Chinese home.” *Ibid.* Petitioner would have this Court deprive Asian American students like Thang and Sally of the opportunity to attend a college like Harvard, by proscribing admissions officers from considering at all the racialized experiences that contextualize their application materials.

III. The First Circuit Correctly Concluded That Harvard’s Whole-Person Review Is Narrowly Tailored To Meet A Compelling Interest.

Every year, the number of academically qualified applicants who seek admission to Harvard’s freshman class exceeds by tens of thousands the number of available slots. As the district court found after a lengthy

trial, Harvard, in choosing among that vast pool of well-qualified applicants, “engages in a highly individualized, holistic review of each applicant’s file,” and “its ‘race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.” Pet. App. 242 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)); see *id.* at 68 (First Circuit holding that district court’s fact-finding “supported” its conclusion).

In doing so, Harvard treats “each applicant as an individual, and not simply as a member of a particular racial group.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007). The entire Harvard community benefits from that whole-person approach to admissions—including Asian American students and applicants.

A. Harvard’s Whole-Person Review Furthers Its Compelling Educational Mission.

The First Circuit correctly held that Harvard’s holistic review process furthers its compelling interest in assembling a diverse student body that will learn from and challenge each other while creating a pluralistic environment in which “to educate the citizens and citizen-leaders for our society.” Harvard Coll., Mission, Vision, & History;²³ see Pet. App. 29-30. Critical to that mission is providing students with “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,” so that

²³ <https://college.harvard.edu/about/mission-vision-history> (last visited July 29, 2022).

students may “deepen[]” their “intellectual transformation” and “create[]” “conditions for social transformation.” Mission, Vision, & History, *supra*.

In service of its mission, Harvard employs a robust process of whole-person review that permits students, including individual Asian Americans, to demonstrate the *full range* of contributions each applicant can make to Harvard’s educational environment. Even when assessing an applicant’s academic potential, Harvard does not limit itself to considering narrow metrics of academic achievement like high school grades and test scores. Harvard also considers teacher and counselor recommendations, submitted student work, the relative academic strength of an applicant’s high school, the types of classes an applicant took in high school, and academic and career interests, among other factors. Pet. App. 13-14, 17-19.

Because previous academic achievement alone is a necessary, but insufficient, requisite for admission to further Harvard’s mission, Harvard also considers an applicant’s personal and family history, non-academic achievements, personal goals, and any other available information that would inform a full assessment of how each applicant can contribute to the Harvard community. Pet. App. 17-20.

Research demonstrates the benefits of Harvard’s holistic approach, which assesses an applicant’s individual characteristics in light of “environmental factors such as socioeconomic background, racial identity, and school and family context that have shaped a student’s academic and extracurricular achievements.” Michael N. Bastedo et al., *What Are We Talking About When We Talk About Holistic Review? Selective College*

Admissions and Its Effects on Low-SES Students, 89 J. Higher Educ. 782, 793 (2018). Such a contextual consideration of each applicant’s achievements permits admissions officers to “contemplate[] how applicants maximize available educational offerings and push themselves academically within their unique contexts.” *Ibid.* As one admissions officer who participated in that research explained, “it is impossible to understand the achievements of a student without also understanding the various external influences—school setting, socioeconomic status, ethnic background, geographic background, and family background—that have contributed to his or her journey.” *Ibid.* Petitioner’s approach “over emphasizes grades and test scores and undervalues other less quantifiable qualities and characteristics that are valued by Harvard and important to the admissions process.” Pet. App. 69 (quoting Pet. App. 181).

B. Harvard’s Whole-Person Review Benefits Asian American Applicants Given Their Extremely Diverse Experiences.

Research shows that Asian Americans greatly benefit from Harvard’s whole-person review, even when (wrongly) treating Asian Americans as a monolith as Petitioner does. Holistic-review practices like Harvard’s can increase the odds of admission for Asian Americans at elite universities, while also maintaining high academic metrics of achievement, as well as socioeconomic and racial diversity, within an admitted class. Michael N. Bastedo et al., *Information*

Dashboards and Selective College Admissions: A Field Experiment 3 (2017).²⁴

Harvard's statistics confirm those social science findings. Even among the subset of applicants Petitioner focuses on—non-ALDC (athletics, lineage, dean/director lists, and children of faculty/staff) applicants—for the years under review in this case, Asian American applicants were admitted at a higher rate (5.15%) than white applicants (4.91%). Dist. Ct. Doc. 419-33 ¶¶ 70-71 & Ex. 7; Dist. Ct. Doc. 420 ¶ 229; Dist. Ct. Doc. 414-2 ¶ 638. And the proportion of Asian Americans in each admitted class at Harvard increased by 29% in the decade leading up to the years under review. Dist. Ct. Doc. 420 ¶ 113; *see also* Pet. App. 207-08. Petitioner's allegation of intentional discrimination against Asian Americans—who are 6% of the U.S. population, over 25% of students admitted to Harvard's incoming class, and nearly 30% of enrolled students—lacks a basis in common sense as well as evidentiary support. U.S. Census Bureau, Quick Facts, Population Estimates (2021);²⁵ Harvard Coll., Admissions Statistics;²⁶ *see also* Pet. App. 113, 207-08, 264. Those statistics and research indicate that Asian American applicants benefit from Harvard's whole-person review. The fact that Asian American applicants benefit from Harvard's whole-person review is no surprise—because individual Asian America

²⁴ <http://www-personal.umich.edu/~bastedo/papers/ASHE2017.paper.pdf>.

²⁵ <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last visited July 29, 2022).

²⁶ <https://college.harvard.edu/admissions/admissions-statistics> (last visited July 29, 2022).

applicants come from a diverse set of backgrounds and experiences. *See supra* pp. 14-18.

C. A Large Majority Of Asian Americans Support Race-Conscious Admissions Policies.

Although Petitioner purports to speak for Asian Americans, its position misrepresents and subverts the views of Asian Americans.

Multiple surveys conducted between 2001 and 2020 of Asian American adults in at least five different national-origin groups have asked whether race-conscious admissions measures are good or bad for Asian Americans or whether the respondents support such programs. And each of those surveys has revealed strong support for such programs among Asian Americans—support ranging from 61% to 70%. Jennifer Lee et al., *Asian American Support for Affirmative Action Increased Since 2016*, AAPI Data (Feb. 4, 2021); AAPI Data, *Inclusion, Not Exclusion: Spring 2016 Asian American Voter Survey A25*; AAPI Data, *An Agenda for Justice: Contours of Public Opinion Among Asian Americans* 8-9 (2014); Nat'l Asian Am. Survey, *Where Do Asian Americans Stand on Affirmative Action?* (June 24, 2013);²⁷ Pei-te Lien et al., *The Politics of Asian Americans: Diversity and Community* 17, 191 (2004). Even Asian American opponents of race-conscious admissions policies support principles of whole-person review. OiYan A. Poon et al., *Asian Americans, Affirmative Action, and the Political Economy of*

²⁷ <http://naasurvey.com/where-do-asian-americans-stand-on-affirmative-action/>.

Racism: A Multidimensional Model of Racial Ideologies, 89 Harv. Educ. Rev. 201, 223 (2019).

That support likely reflects the benefits that Asian American applicants reap from processes that evaluate them as individuals. Even when they are not accepted into their first-choice colleges, Asian Americans are not harmed. Findings show that an overwhelming majority are greatly benefiting from their college experiences, even if they were not admitted to their first-choice school. Mike Hoa Nguyen et al., *Asian Americans, Admissions, and College Choice: An Empirical Test of Claims of Harm Used in Federal Investigations*, 49 Educ. Researcher 579, 587-88 (2020). Petitioner’s narrative in this case does not reflect concerns that are actually held by Asian Americans. It is therefore no surprise that at no point below was Petitioner able to “present a single admissions file that reflected any discriminatory animus, or even an application of an Asian American who it contended should have or would have been admitted absent an unfairly deflated personal rating.” Pet. App. 246.

* * *

Amici have studied and documented the pernicious effects of racial discrimination against Asian American communities. *Amici* would be the first to sound the alarm if that were happening in Harvard’s admissions practices. But it is not. Instead, a powerful tool that benefits Asian Americans—a tool that is necessary to counteract the racial biases that infect a prospective Asian American student’s application materials—is threatened by false charges of anti-Asian discrimination that hurt us all.

CONCLUSION

Harvard's admissions practices are well-grounded in social science research and benefit Asian American applicants. This Court should affirm.

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