

No. 20-1199 & No. 21-707

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IN THE  
**Supreme Court of the United States**

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STUDENTS FOR FAIR ADMISSIONS, INC.,  
*Petitioner,*

v.

PRESIDENT AND FELLOWS OF HARVARD  
COLLEGE,  
*Respondent.*

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STUDENTS FOR FAIR ADMISSIONS, INC.,  
*Petitioner,*

v.

UNIVERSITY OF NORTH CAROLINA ET AL.,  
*Respondents.*

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*ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST AND FOURTH CIRCUITS*

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**BRIEF OF *AMICI CURIAE* ASIAN AMERICAN  
LEGAL DEFENSE AND EDUCATION FUND  
*ET AL.* IN SUPPORT OF RESPONDENTS**

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**INTERESTS OF THE AMICI CURIAE<sup>1</sup>**

The Asian American Legal Defense and Education Fund (“AALDEF”), headquartered in New York City and founded in 1974, is a national organization that promotes the civil rights of Asian Americans. Through litigation, advocacy, and education, AALDEF focuses on critical issues affecting Asian Americans, including equity in higher education and eliminating anti-Asian violence. AALDEF has an interest in this litigation because its work with community-based organizations across the country demonstrates that Asian American students benefit from individualized race-conscious admissions policies, as well as from racially diverse educational settings.

In this filing, AALDEF represents the 121 organizations and individuals listed in Appendix A hereto.

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<sup>1</sup> All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to its filing and responded with consent in writing. No counsel for a party authored this brief in whole or in part, nor has any counsel, party, or third person other than amici made any monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The notion that race-conscious admissions policies discriminate against Asian Americans relies on and perpetuates harmful stereotypes against Asian Americans. The Asian American community is vast and varied, including first-generation college students and children whose parents' professions secured their immigration; children of working-class refugees and multigenerational Americans; speakers of over 300 languages; aspiring entrepreneurs, artists, teachers, and more.

Students for Fair Admission ("SFFA") ignores this diversity entirely. Relying on manipulated data purportedly demonstrating that Asian Americans with high test scores are admitted at lower rates than other racial groups, SFFA argues that Asian Americans as a whole are discriminated against on the basis of their race. This argument perpetuates the "model minority" myth—reducing Asian Americans into one group defined by academic success alone—and ignores the reality of Asian Americans whose racial identity *helped* their applications.

Individualized admissions processes like those used by Harvard University and the University of North Carolina ("UNC") permit Asian Americans to present their whole selves in their college applications. Students who served as interpreters for a parent growing up or overcame racial prejudice in their community can present these experiences in their college applications.

Such stories demonstrate leadership qualities like resilience and perseverance that cannot be captured in standardized test scores or grades, and

indeed, sometimes accompany lower scores. Prestigious universities like Harvard and UNC value these attributes in addition to academic achievement, and consequently, their admissions policies permit applicants to share these stories. SFFA's suggestion that Asian American applicants would not have these stories to tell—implicit in SFFA's core theory that Asian Americans do not benefit from these schools' admissions policies—reduces the Asian American community to a single, gross caricature that serves SFFA's true goal of increasing white enrollment.

SFFA is not interested in the experience of Asian American students or in advocating for Asian American rights. SFFA's founder, Edward Blum, is a white anti-affirmative action strategist who has orchestrated dozens of lawsuits opposing laws and programs that increase the presence or prominence of racial minorities.<sup>2</sup> He has spent years crusading against affirmative action on behalf of white students, without success. *See, e.g., Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (*Fisher II*). Now, SFFA has switched tactics, using Asian American students as pawns in its political chess game and litigating under the guise of fighting for Asian Americans. But the absence of Asian American student testimony from SFFA's submission is glaring. SFFA has not identified a single instance in which Harvard or UNC denied a student admission because of their Asian American identity. And SFFA's "race-neutral alternatives" are specifically engineered to benefit white students; they

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<sup>2</sup> *See, e.g.,* Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking On Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html>.

muzzle, rather than help, Asian American applicants. SFFA does not elevate Asian American voices; it seeks to silence them.

On a record full of cherry-picked statistics and devoid of actual student experience, SFFA seeks the Court's declaration that diversity is no longer a compelling interest. Diversity is as crucial now as when *Grutter* was decided almost twenty years ago. Studies consistently demonstrate that racial diversity increases tolerance and empathy across racial lines. As the recent alarming rise in anti-Asian hate crimes and violence has shown, the need for diversity in education is more urgent than ever.

## **ARGUMENT**

### **I. Asian Americans Benefit from Race-Conscious Admissions Policies.**

Individualized race-conscious admissions programs like Harvard's and UNC's combat the harmful characterization of Asian Americans as a monolith. SFFA's arguments fail to account for the diversity within the Asian American community. Instead, they perpetuate the "model minority" stereotype and advance a cramped understanding of who deserves to attend prestigious universities that is inconsistent with the priorities of the institutions themselves and the variation within the Asian American applicant pool.

#### **A. The Asian American Community Is Not a Monolith.**

The term "Asian American" refers to a population of 24 million Americans that includes over

50 ethnic subgroups, who speak more than 300 languages and possess a broad range of socio-historical, cultural, religious, and political experiences.<sup>3</sup> Some Asian Americans are multi-generation Americans, some are from immigrant families, some are refugees, and some are adopted children of ethnically, culturally, or racially different parents. Asian Americans also face vastly differing socioeconomic and educational realities. As one scholar described:

Asian Americans range from fifth-generation Chinese Americans whose ancestors immigrated in the 1850s to first-generation Burmese Americans whose families settled in the United States as refugees, from workers who arrive with little formal education to those whose bachelor's and advanced degrees enable them to enter the United States on preferred H-1B visas, and from families

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<sup>3</sup> *Population by Race: 2010 and 2020*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/decennial/2020/data/redistricting-supplementary-tables/redistricting-supplementary-table-01.pdf> (last visited July 25, 2022).

surviving in poverty to  
those enjoying wealth.<sup>4</sup>

It is impossible to generalize a single “typical” Asian American experience.<sup>5</sup>

Asian immigration patterns often shape socioeconomic experience. While Filipinos first arrived during the 16th century, the first major wave of Asian immigration occurred in the 19th century with the arrival of Chinese and Japanese laborers.<sup>6</sup> Asian Americans have since endured government-sanctioned discrimination driven by anti-Asian racism.<sup>7</sup> Government policies severely restricted Asian immigration, and federal and state laws restricted Asian immigrants from rights like land ownership and citizenship.<sup>8</sup> Racism also limited

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<sup>4</sup> Michele S. Moses et al., *Racial Politics, Resentment, and Affirmative Action: Asian Americans as “Model” College Applicants*, 90 J. HIGHER ED. 1, 17-18 (2019).

<sup>5</sup> Mike Hoa Nguyen et al., *Beyond Compositional Diversity: Examining the Campus Climate Experiences of Asian American and Pacific Islander Students*, 11 J. DIVERSITY HIGHER EDUC. 484, 497 (2018); Robert T. Teranishi, ASIANS IN THE IVORY TOWER 26 (2010).

<sup>6</sup> Susan J. Paik et al., *Historical Perspectives on Diverse Asian American Communities: Immigration, Incorporation, and Education*, 116 TEACHERS COLL. REC., no. 8, 2014, at 1, 14; Kevin L. Nadal, *The Brown Asian American Movement: Advocating for South Asian, Southeast Asian, and Filipino American Communities*, 29 ASIAN AM. POL’Y REV. 2, 3 (2019).

<sup>7</sup> Paik et al., *supra* note 6, at 20.

<sup>8</sup> *Id.* at 20-21.

employment opportunities, making it difficult to thrive economically and socially.<sup>9</sup>

The Immigration and Nationality Act's passage in 1965 marked a shift in immigration policy,<sup>10</sup> by abolishing national origin quotas and giving preferences to professionals who "hold[] advanced degrees" or have "exceptional ability." 8 U.S.C. § 1153(b)(2). This new policy enabled some East Asians, South Asians, and Filipinos to immigrate as highly educated professionals, while others immigrated through diversity visas and the family reunification program.<sup>11</sup> Beginning in 1975, many Southeast Asians migrated to the United States as refugees from Cambodia, Laos, Vietnam, and Myanmar following war, instability, and genocide.<sup>12</sup> The experiences of the individuals within these groups, and the opportunities available to them, differed greatly.

Due in part to these different immigration experiences, income and poverty rates vary widely among Asian Americans, as do English proficiency, standardized test scores, and college graduation rates.<sup>13</sup> Income inequality amongst Asian Americans

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<sup>9</sup> *Id.* at 23.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 15-18.

<sup>12</sup> *Id.* at 16-17; see also Stacy M. Kula & Susan J. Paik, *A Historical Analysis of Southeast Asian Refugee Communities*, 11 J. SOUTHEAST ASIAN AM. EDUC. & ADVANCEMENT 1, 9-12 (2016); Isok Kim & Wooksoo Kim, *Post-Resettlement Challenges and Mental Health of Southeast Asian Refugees in the United States*, 10 BEST PRACTICES IN MENTAL HEALTH 63, 64 (2014).

<sup>13</sup> See Soo-yong Byun & Hyunjoon Park, *The Academic Success of East Asian American Youth: The Role of Shadow Education*, 85

is greater than any other racial group.<sup>14</sup> In 2019, the wealthiest Asian-origin group had a median household income of \$119,000 and poverty rate of 6%; the poorest had a median household income of \$44,400 and poverty rate of 25%.<sup>15</sup> English proficiency also ranged widely from 36% to 85% by origin group.<sup>16</sup> Sixty-six percent of Asian Americans spoke a language other than English at home,<sup>17</sup> meaning even U.S.-born Asian American children may have limited English skills when they begin school. This language barrier can affect both grades and test scores, which require advanced English proficiency.<sup>18</sup> Educational

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SOCIOL. EDUC. 40 (2012) (explaining that students with families from China, Japan, or Korea are more likely than other Asian Americans to take commercial test preparation courses for the SAT).

<sup>14</sup> Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/>.

<sup>15</sup> Abby Budiman & Neil G. Ruiz, *Key Facts about Asian Origin Groups in the U.S.*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-origin-groups-in-the-u-s/>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Academic Performance and Outcomes for English Learners: Performance on National Assessments and On-Time Graduation Rates*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/datastory/el-outcomes/index.html> (last visited July 25, 2022) (noting English learners consistently lag behind on exam proficiency and high school graduation rates). The effect of limited English proficiency on test scores is one reason standardized tests are imperfect gauges of intelligence. See Joni M. Lakin et al., *Investigating ESL Students' Performance on Outcomes*

attainment likewise varied dramatically, with those possessing at least a bachelor’s degree ranging from 15% to 75% depending on origin group.<sup>19</sup>

SFFA ignores these differences. It includes just one footnote asserting that Harvard’s use of the term “Asian American” is “incoherent” because it “sweeps in ‘wildly disparate national groups’ with little in common.” Pet.Br.15, n.1. This criticism is a non-starter, as universities utilize broad categories like “Asian” not by choice, but by federal mandate.<sup>20</sup> More fundamentally, the criticism reveals SFFA’s tone-deaf—and whitewashed—representation of the Asian American community. The term “Asian American” was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility.<sup>21</sup> SFFA’s characterization of Asian American applicants as a uniform group of high-achieving students further promotes the monolithic view of Asian Americans that

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*Assessments in Higher Education*, 72 EDUC. & PSCH. MEASUREMENT 734, 737 (2012).

<sup>19</sup> Budiman & Ruiz, *supra* note 15.

<sup>20</sup> See 34 C.F.R. § 668.14(b)(19); *Collecting Race and Ethnicity Data from Students and Staff Using the New Categories*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-collecting-data-for-reporting-purposes> (last visited July 26, 2022).

<sup>21</sup> Nadal, *supra* note 6, at 2; Cheryl Cheng, *The Asian American Studies Center’s Enduring Legacy*, UCLA MAG. (Mar. 15, 2021), <https://newsroom.ucla.edu/magazine/ucla-asian-american-studies-center>; Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 41 (2010).

SFFA purports to criticize.<sup>22</sup> Individualized admissions policies dispel this view. *See infra* Section I.B.

Indeed, despite paying lip service to the Asian American community’s diversity, SFFA erases that diversity by repeatedly invoking the “model minority” myth—the notion that Asian Americans have achieved universal success through hard work and adherence to Asian cultural norms<sup>23</sup>—and failing to distinguish among the varied academic and life experiences of different subgroups. SFFA has reduced Asian American students to mere statistics, failing to introduce even a single Asian American witness.

SFFA’s use of the model minority myth is unsurprising. Opponents of race-conscious policies have long relied on this racist stereotype of Asian Americans to argue that other communities of color “simply need to work harder to attain social and economic mobility.”<sup>24</sup> It is no coincidence that the

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<sup>22</sup> *See* Pet.Br.30 (noting Asian American applicants at Harvard, on average, receive higher academic scores than white applicants); *see also id.* at 72-73 (arguing Asian Americans should be admitted at a higher rate than whites because “they are substantially stronger . . . on nearly every measure of academic achievement”).

<sup>23</sup> Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 120 B.U. L. REV. 233, 248 (2022) (“Rather than acknowledging structural factors, the model minority attributes the success of Asian Americans to cultural upbringing and work ethic.”).

<sup>24</sup> *Id.* at 310; *see also* Samuel Museus & Peter Kiang, *Deconstructing the Model Minority Myth and How It Contributes to the Invisible Minority Reality in Higher Education Research*, 142 NEW DIRECTIONS INST. RSCH. 5, 6 (2009); Harpalani, *supra* note 23, at 310.

myth first gained widespread popularity during the civil rights movement to silence Black activists' claims of racial inequality.<sup>25</sup> For decades, America has simultaneously paraded Asian Americans as a model minority and excluded them from American society as perpetually foreign.<sup>26</sup> This racial triangulation of Asian Americans—below white Americans, above other communities of color, and yet ostracized from American society—exploits Asian Americans and other Americans of color alike.<sup>27</sup> And like other invocations of the myth throughout history, SFFA's goal—abolishing race-conscious admissions—will hurt Asian Americans and other communities of color while benefiting white students.<sup>28</sup>

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<sup>25</sup> Harpalani, *supra* note 23, at 310 n.455.

<sup>26</sup> Jun Xu & Jennifer C. Lee, *The Marginalized “Model” Minority: An Empirical Examination of the Racial Triangulation of Asian Americans*, 91 SOC. FORCES 1363, 1364 (2013).

<sup>27</sup> 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. RES. 469, 473-74 (2016).

<sup>28</sup> Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 709-10 (2019). Amici recognize SFFA has identified a handful of comments by Harvard officials that could reflect Asian American stereotypes, such as Dean Fitzsimmons's testimony implying Asian American applicants from rural communities must be recent transplants. *See* Pet.Br.21. While disappointing, these comments do not change that SFFA is using the Asian American community as a tool to further its own goals.

**B. Individualized Admissions Policies Mitigate the Fallacy of Consolidating All Asian Americans into One “Asian” Category.**

Individualized admissions programs like Harvard’s and UNC’s consider the vast differences within the Asian American community. Harvard’s admissions process aims to assess each applicant holistically, evaluating an applicant’s qualifications in the context of each applicant’s opportunities and obstacles. *See* Harv.JA.678, 1559. Race is just one of multiple variables, including standardized test scores, alumni interview evaluations, recommendation letters, essays, intended concentration, high school academic strength, community demographics, parental level of education, extracurricular activities, and optional submissions of specialized work. *See* Harv.JA.567; Harv.Pet.App.13-14, 277-79. Harvard’s goal “is to admit the best freshman class for Harvard College, not merely a class composed of the strongest applicants based solely on academic qualifications.” Harv.Pet.App.133. Harvard “holds a more expansive view of excellence”—one that includes students’ “intellectual imagination, strength of character, and their ability to exercise good judgment.” Harv.JA.1559.

UNC’s admissions program is similarly holistic. UNC evaluates applicants across 40 criteria, including academic performance; courses taken; standardized test scores; extracurricular activities; specialized music, drama, athletics, or writing talent; essays; family income; education history of family members; the impact of parents/guardians in the home; and other personal characteristics.

UNC.JA.1414-15. An applicant's status as an underrepresented minority operates solely as a "plus" that an admissions counselor can choose to give an applicant who identifies as such. UNC.JA.1415-16. The term "underrepresented minority" includes races that constitute a smaller proportion of undergrads at UNC than within the population of North Carolina—thus including those "identifying themselves as African American or black; American Indian or Alaska Native; or Hispanic, Latino, or Latina." *Id.* Any student may also receive a "plus" for diversity if a committee member determines that they offer "an unusual or unique perspective, aptitude, achievement, or experience," meaning that UNC's "plus" factor could boost an Asian American student's application even though Asian Americans are not underrepresented minorities for purposes of UNC admissions. UNC.JA.1416.

Such individualized admissions programs guard against grouping Asian Americans into one monolithic "Asian" category and blurring the distinct realities faced by different subgroups. Amici Students in Support of Harvard elicited testimony illustrating how Harvard's admissions process considers the vast diversity within the Asian American community and enables applicants to describe how their race and ethnicity have shaped their life experiences. Sally Chen, a Harvard graduate and first-generation Chinese American, testified about how her racial and cultural identity shaped her admissions package. Harv.JA.967-69. Reflecting on the admissions committee's comments on her application, Ms. Chen testified:

I saw in my admissions file  
the way [my race] was seen.

That they recognized I was coming from a culturally Chinese home, and that I had a sense of responsibility to my communities. . . . [T]hey saw . . . that these kind of identities lent themselves to the sympathy and the understanding for the view of an outsider, contextualizing the leadership roles that I would take. I was, I think, very much seen and my story was heard in my admissions file. And concretely in their words, they saw that I could have a potential contribution to college life that would be truly unusual. And I think that there was no way in which flat numbers and a resume could have gotten across how much of a whole person that I am[.]

Harv.JA.972. As Ms. Chen's testimony demonstrates, individualized admissions policies allow an applicant to be seen as a member of a more specific Asian American subgroup whose unique background and upbringing will add to the educational experience.

**C. Eliminating Race-Conscious Admissions Policies Would Not Serve Asian American Students.**

Although SFFA claims to address discrimination against Asian American applicants, SFFA's proposed solution—eliminating race-conscious admissions policies—does not advance Asian Americans' interests. Asian Americans benefit from individualized, race-conscious policies that allow admissions officers to consider how race and ethnicity have shaped their experiences. In addition to transforming campus demographics, race-blind admissions would cripple many Asian American students' ability to articulate an important piece of their identities in their applications.

Race-blind admissions would prevent applicants from discussing many formative experiences. Minority applicants frequently write about how their racial identities shape their character. Harvard student Thang Diep explained that he “wrote about [his] Vietnamese identity on [his] application because . . . it was such a big part of [him]self.” Harv.JA.949. After years of feeling like his “identity ha[d] been erased,” Mr. Diep used his college essay to take “the power back” and reclaim his identity. *Id.* Harvard's admission committee noticed Mr. Diep's “strong sense of self,” specifically citing his “Vietnamese immigrant identity” as evidence of his fortitude and character. Harv.JA.951. Similarly, for Ms. Chen, the daughter of Chinese immigrants, race “was really fundamental to explaining who” she was—she did not “think there was any way [she] could authentically get across [her] motivations, [her] story, [her] inspirations, [her] academic . . . curiosities

without really explaining and talking about the significance of how [she] grew up.” Harv.JA.968-69. Harvard’s admissions committee valued the insight that Ms. Chen’s account provided into her character: the admissions counselor reviewing her file “wrote about how [Ms. Chen] understood and could sympathize with the experiences and the view of an outsider.” Harv.JA.969.

These experiences are not unique to Harvard. Thao Ho, a Tufts University graduate and New York University law student, reflected that nearly “all of the extracurricular activities that I listed on my college application were somehow linked to my cultural identity” as a Vietnamese American. Ho Aff. ¶ 5.<sup>29</sup> If the admissions committee could not consider those contributions, it “would have effectively gutted my hard work, achievements, and my personal identity,” she noted. *Id.* ¶ 6. “It is hard for me to imagine how the Tufts admissions officers could have gotten an understanding of who I was and what I could contribute to campus life without this information.” *Id.*

For many Asian Americans, race is not just central to their identity, but helps them demonstrate that the model minority myth does not reflect the Asian American experience. For example, Ocean Le, a native Hawaiian of Vietnamese descent, grew up as his parents’ translator.<sup>30</sup> He did his parents’ taxes at

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<sup>29</sup> Amici submit Affidavit of Thao Ho as Appendix B hereto.

<sup>30</sup> *Ocean Le: A Medical Condition Leaves His Family Vulnerable, but He Is Risking His Life to Feed His Family*, SOUTHEAST ASIAN RESOURCE ACTION CTR., <https://searac1.medium.com/ocean-le-a-medical-condition-leaves-his-father-vulnerable-but-he-is->

eight years old and “helped Vietnamese immigrants move into his Section 8 housing complex” in Hawaii.<sup>31</sup> Ms. Ho similarly helped her parents “by translating or interpreting for them.” Ho Aff. ¶ 3. She attended her parents’ medical appointments, managed family finances, and helped workers at her mother’s nail salon “overcome language barriers and resolve issues” with customers. *Id.* “In many ways,” she said, “because I was born the year after my parents arrived in the United States, my parents and I were learning how to navigate the United States simultaneously.” *Id.* For Jassyran Kim, a Cambodian American alumna of Davidson College in North Carolina, college exposed her to “somewhat of an ‘Asian hierarchy’” that separated “more affluent Asian students—who tended to be international students from Japan, China, and South Korea”—from less privileged students like herself. Kim Aff. ¶ 4.<sup>32</sup> This “hierarchy” meant that Ms. Kim struggled to “feel a connection” with the affluent Asian international students because their “experiences were different.” *Id.*

As these examples suggest, a nuanced view of race gives applicants the opportunity to share the experiences that have shaped their character. Individualized race-conscious admissions policies do not sort applicants based on race; they consider the ways race has shaped who an applicant will be on campus.

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risking-his-life-to-feed-his-626ac8f50dfa (last visited July 27, 2022).

<sup>31</sup> *Id.*

<sup>32</sup> Amici submit Affidavit of Jassyran Kim as Appendix C hereto.

Were race-conscious admissions prohibited, racial minority applicants would be forced to excise a pervasive component of their identity from their applications—to the extent that is even possible. *See, e.g.*, Harv.JA.932 (“[I]t would be nearly impossible for me to try to explain my academic journey, to try to explain my triumphs without implicating my race.”). Their accomplishments and the obstacles they overcame would be stripped of context, and admissions counselors would be hamstrung to fully understand many minority applicants’ achievements and ambitions.

Ending race-conscious admissions would also send minority applicants the injurious message that the colleges to which they apply do not value a core piece of their identities. Students at Harvard and UNC testified that they would not have applied to colleges that did not consider applicants’ race. Sarah Cole, a Black Harvard alumna, explained that if schools did not consider race, it would be an “erasure” of minority applicants’ identities: “To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race.” Harv.JA.932. Ms. Chen experienced an attempt to erase her identity when a guidance counselor advised her not to write her college essay about race. She chose to do so despite that advice, as she “could not see [her]self being part of an institution that didn’t value [her] and [her] experiences when [she] was fighting so hard to articulate them.” Harv.JA.972.

Race-conscious admissions policies allow all applicants to discuss experiences centered on race that have shaped who they are. For Asian American students in particular, race-conscious admissions

policies allow them to combat stereotypes and showcase the array of Asian American experiences and cultures. This contextualizes these students' goals, accomplishments, and obstacles and encourages them to bring their whole identities with them when they arrive to college. Admitting Asian American students with different backgrounds, personalities, and interests further helps to dispel the model minority myth, which is crucial for Asian American students who otherwise feel pressure to fit the stereotype, sometimes to devastating and deadly ends.<sup>33</sup> Forcing colleges to ignore artificially applicants' racial identities would disadvantage racial minority applicants and telegraph to incoming students that significant portions of their experiences are not valued or even welcome on campus.

## **II. Asian Americans Benefit from the Diverse Campuses that Race-Conscious Admissions Policies Create.**

### **A. Racially Diverse Student Bodies Benefit Asian American Students in Particular.**

As Justice Kavanaugh acknowledged in 2018, “[t]he long march for racial equality is not over.” Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh, 115th Cong. 179 (2018). The solution to hastening this march, however, is not eliminating race-conscious admissions. Particularly

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<sup>33</sup> See Eliza Noh, *Terror as Usual: The Role of the Model Minority Myth in Asian American Women's Suicidality*, 41 WOMEN & THERAPY 316 (2018); Museus & Kiang, *supra* note 24, at 6.

during a period in which violence against Asian Americans is skyrocketing, the country must harness the potential of racially diverse institutions to educate the next generation of leaders about the perils of discrimination and to cultivate within them a sense of empathy for their racially diverse peers.

The Asian American community is keenly aware of the dangers that a lack of racial equality and empathy pose. Asian Americans have been the target of racialized violence since the 1850s.<sup>34</sup> And in the 21st century, Asian Americans have been the victims of a spike in racialized violence during the COVID-19 pandemic. According to the Center for the Study of Hate and Extremism, anti-Asian hate crimes increased by 339% between 2020 and 2021.<sup>35</sup> That surge is part of a disturbing trend: in 2020, hate crimes against Asian American in 26 of the nation's largest cities rose by 146%.<sup>36</sup> In a survey from the Pew Research Center, 90% of Asian Americans reported that they worry they could be threatened or attacked because of their race, and more than one-third of those respondents "altered their daily

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<sup>34</sup> Gillian Brockell, *The Long, Ugly History of Anti-Asian Racism and Violence in the U.S.*, WASH. POST (Mar. 18, 2021), <https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/>.

<sup>35</sup> Kimmy Yam, *Anti-Asian Hate Crimes Increased 339 Percent Nationwide Last Year, Report Says*, NBC NEWS (Jan. 31, 2022), <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-339-percent-nationwide-last-year-repo-rcna14282>.

<sup>36</sup> *Report to the Nation: Anti-Asian American Prejudice and Hate Crime*, CTR. FOR THE STUDY OF HATE & EXTREMISM, <https://tinyurl.com/4f67n93d> (last visited July 27, 2022).

schedule or routine in the past 12 months due to worries that they might be threatened or attacked.”<sup>37</sup>

College campuses are not immune to this violence. In February 2022, three Asian American students at New York University were assaulted in separate attacks near the school’s main campus.<sup>38</sup> And even when Asian American students are not themselves targets of racialized violence, the fear that family and friends may be victimized saddles Asian American students with a heavy psychological burden.<sup>39</sup>

Such racialized violence is the extreme presentation of a lack of understanding and tolerance. SFFA contends—without support—that race-conscious admissions stoke anti-Asian hate. Pet.Br.62-63. Scientific evidence, analyses at Harvard and UNC, and student testimony, however, demonstrate that diverse student bodies cultivated

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<sup>37</sup> Luis Noe-Bustamante et al., *About a Third of Asian Americans Say They Have Changed Their Daily Routine Due to Concerns Over Threats, Attacks*, PEW RSCH. CTR. (May 9, 2022), <https://www.pewresearch.org/fact-tank/2022/05/09/about-a-third-of-asian-americans-say-they-have-changed-their-daily-routine-due-to-concerns-over-threats-attacks/>.

<sup>38</sup> Sakshi Venkatraman, *Three Asian NYU Students Assaulted Around Campus in Last Month*, NBC NEWS (Mar. 4, 2022), <https://www.nbcnews.com/news/asian-america/several-asian-nyu-students-assaulted-campus-last-month-rcna18738>.

<sup>39</sup> See Elyssa Cherney, *Asian American University Students Fear for Elders After Spate of Racist Attacks, Urge Others to Speak Out: ‘It’s Up to Us As a Community,’* CHI. TRIB. (Apr. 2, 2021), <https://www.chicagotribune.com/news/ct-aapi-hate-crimes-young-asian-americans-20210402-xvy6heqblnaq5oio56pxbuvexi-story.html>.

through race-conscious admissions are instead vital tools to bridging racial divides.

Harvard and UNC have sought consciously to bring diverse students together to learn from one another as core elements of their missions. Harv.JA.1289-90; UNC.JA.1372. Both emphasize the critical role that racial diversity plays, including in developing a “capacity for empathy,” Harv.JA.2389, “foster[ing] vibrant classroom and campus environments,” “minimizing bias,” and contributing to “intellectual growth and the free exchange of ideas,” UNC.JA.1372. While Harvard and UNC strive for a world in which “negative life experiences attributable to differences in racial and ethnic heritage are far less common,” that is not yet today’s world. Colleges would “fail in a foundational aspect of [their] mission[s] if [they] disregarded that fact as [they] prepared . . . students for such a complex and heterogeneous society.” Harv.JA.1289-90.

Extensive scientific research vindicates Harvard’s and UNC’s abiding belief in the educational value of student diversity, and Asian Americans in particular reap the benefits of racially diverse student bodies. Exposure to diverse perspectives increases students’ “pluralistic orientation”—that is, their “ability to see the world from someone else’s perspective, tolerance of others with different beliefs, openness to having one’s views challenged, ability to work cooperatively with diverse people, and ability to discuss and negotiate controversial issues.”<sup>40</sup> A study on pluralistic orientation found that, “[w]hile the

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<sup>40</sup> Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College*, 82 J. HIGHER EDUC. 416, 417-18 (2011).

effects of intergroup learning on the pluralistic measure were significant for all other groups, Asian students seem to demonstrate the strongest benefit.”<sup>41</sup> A 2012 study independently reached the same conclusion and additionally found “Black and Latino/a students who interacted with students of different races actually had more favorable attitudes toward Asian Americans as college seniors.”<sup>42</sup> Such findings put the lie to SFFA’s contention that racial diversity in higher education is merely a cudgel of social justice designed to remediate past discrimination. Pet.Br.59-60. Rather, racially diverse student bodies make students more empathetic to students of different races. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415 (2022) (noting the “long constitutional tradition in which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society’” (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992))).

Peeling back SFFA’s acerbic rhetoric weaponizing race-conscious admissions, Harvard alumni testified powerfully about how they experienced the transformative education that racially diverse campuses produce. Mr. Diep, a Vietnamese American student, testified:

[I]n my interactions with  
my friends who are black  
and Latinx and who are

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<sup>41</sup> *Id.* at 434.

<sup>42</sup> Julie J. Park, *Asian Americans and the Benefits of Campus Diversity: What the Research Says*, at 2, NAT’L COMM’N ASIAN AM. & PACIFIC ISLANDER RSCH. EDUC., [http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian\\_am\\_diversity\\_D4.pdf](http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian_am_diversity_D4.pdf) (last visited July 25, 2022).

just different from me, I really learned how to work across differences and how to build meaningful connections and collaborations so that every single stakeholder[] [is] being accounted for and how you can like make the collaboration meaningful and that you're not working for someone but you're working with someone.

Harv.JA.958.

Ms. Chen testified that the presence of students of different races at Harvard enabled her to embrace her Chinese American identity more fully:

[Without racial diversity at Harvard,] there would be a kind of overwhelming pressure to buckle under that weight of assimilation, too, and I think that those different experiences would very much be pushed to the margins of those conversations and create [. . .] a very one-track kind of way of learning and thinking.

Harv.JA.971.

Ms. Kim recounts feeling pressure to assimilate while she was a student at Davidson because of a lack

of diversity on campus. As a Cambodian American, Ms. Kim was “frequently . . . the only Asian American woman” in her economics classes, which “made speaking up more difficult when [she] disagreed with others’ points of view.” *See* Kim Aff. ¶ 5. She recalls attempting to humanize the issue of deportation in an economics class about deportation, immigration, and gross domestic product by pointing out that “people affected by deportation were real people whose lives would be uprooted.” *Id.* ¶ 6. Her classmates, however, were not receptive to this point until she organized a panel of Asian American students to speak about the impact of deportation on Asian Americans. *See id.* ¶ 8. “I firmly believe that it would have been easier to have these difficult conversations and dig deeper—for instance, by looking beyond the numbers in economics courses—if more students of color were in my classes,” Ms. Kim reflected. *Id.* ¶ 9.

The undeniable thread is that racially diverse classrooms generate learning experiences that enrich the quality of debate and of the graduates who can bring those experiences to bear as leaders. As is clear from both the scientific research and the experiences of students, race-conscious admissions play a vital and irreplaceable role in education. The *Fisher* decisions protect a university’s “academic judgment” to pursue these “educational benefits that flow from student body diversity,” *Fisher II*, 579 U.S. at 376, as “a special concern of the First Amendment,” *Fisher v. Univ. of Tex.*, 570 U.S. 297, 308 (2013). Out of respect for this special concern, the Court has deferred to universities that demonstrate racial diversity is not a buzzword but a compelling interest. *Fisher II*, 579 U.S. at 376-77.

**B. Eliminating Race-Conscious Admissions Would Not Advance Asian Americans' March Toward Equality.**

Asian Americans' fight for equality is far from over, and the community continues to struggle against potent and dehumanizing stereotypes. But there is little evidence that ending race-conscious admissions will be a panacea for the inequality Asian Americans face. In the *Grutter* era, Asian Americans have enrolled in higher education in record numbers, and they have increasingly assumed positions of prominence in fields like politics and business. These trends suggest race-conscious admissions have not held Asian Americans back and, indeed, may have contributed to their strides toward equality.

Asian American enrollment in higher education has steadily increased in recent years. While increased enrollment is attributable to numerous factors—including the growth of the Asian American population<sup>43</sup>—Asian American enrollment in higher education has reached record heights during the era of race-conscious admissions, and Asian Americans have a higher rate of college enrollment than whites, Blacks, and Latinxs.<sup>44</sup> The attendance rate of college students who identify as Asian or Asian American has

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<sup>43</sup> Kimmy Yam & Sakshi Venkatraman, *Asians in the U.S. Are the Fastest Growing Racial Group. What's Behind the Rise*, NBC NEWS (Aug. 13, 2021), <https://www.nbcnews.com/news/asian-america/asians-us-are-fastest-growing-racial-group-rise-rcna1680>.

<sup>44</sup> *Factsheets: Asian American and Pacific Islander Students*, POSTSECONDARY NAT'L POL'Y INST. (May 11, 2021), <https://pnpi.org/asian-americans-and-pacific-islanders/>.

steadily increased by 4.4% year over year and has increased by 22.4% since 2010,<sup>45</sup> outstripping Asian American population growth.<sup>46</sup> In an analysis of enrollment at ten elite colleges (including Harvard and UNC), the demographics of elite colleges that consider race in admissions tracked that trend. The study found that, between 2006 and 2015, the Asian American “undergraduate student population ha[d] grown steadily . . . at eight of the ten elite public and private schools studied.”<sup>47</sup> The only schools at which the population of Asian American students declined were the University of California, Los Angeles and the University of California, Berkeley, both of which do “not include[] race or ethnicity in admissions decisions.”<sup>48</sup> Meanwhile, the percentage of Harvard students identifying as Asian American increased from 15.5% of students in 2006 to 19% of students in 2015, and the percentage of UNC students identifying as Asian American increased from 6.8% of students in

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<sup>45</sup> Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE, <https://educationdata.org/college-enrollment-statistics> (last updated July 25, 2022).

<sup>46</sup> See *Percentage of Population Change by Race: 2010 and 2020*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/decennial/2020/data/redistricting-supplementary-tables/redistricting-supplementary-table-02.pdf> (last visited July 25, 2022).

<sup>47</sup> Jason Fong, *Asian American Student Population Growth at Ten Schools from 2006-2015*, AAPI DATA: DATA BITS (Oct. 7, 2016), <http://aapidata.com/blog/asian-american-student-population-growth-at-ten-schools-from-2006-2015/>.

<sup>48</sup> *Id.*

2006 to 10% in 2015.<sup>49</sup> Those numbers are even more striking today: 25.9% of Harvard’s admitted class in 2021 identifies as Asian American,<sup>50</sup> and 21% of UNC’s admitted class in 2021 identifies as Asian American.<sup>51</sup> These data suggest race-conscious admissions have likely helped, rather than harmed, Asian American applicants. In fact, they suggest that Harvard’s and UNC’s individualized, holistic review of an applicant, including their race, are working to create multicultural campus communities. *Grutter* is very much still “necessary to further th[is] interest.” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Record enrollment in higher education has correlated with profound success for Asian Americans in leadership positions. For example, Congress has the highest ever number of Asian American members,<sup>52</sup> and Vice President Kamala Harris is the first Asian American vice president.<sup>53</sup> In the judicial branch, Presidents Obama and Trump appointed a combined 35 Asian American judges—jumpstarting a

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<sup>49</sup> *Id.*

<sup>50</sup> *Admissions Statistics*, HARV. COLL. ADMISSIONS & FINANCIAL AID, <https://college.harvard.edu/admissions/admissions-statistics> (last visited July 25, 2022).

<sup>51</sup> *Meet Carolina’s Newest Class*, UNC UNDERGRADUATE ADMISSIONS, <https://admissions.unc.edu/explore/our-newest-class/> (last visited July 25, 2022).

<sup>52</sup> Sarah Mucha, *Asian American Representation in Congress at Record High*, AXIOS (Mar. 17, 2021), <https://www.axios.com/2021/03/18/asian-american-congress-representation>.

<sup>53</sup> *Kamala Harris Becomes First Female, First Black and First Asian-American VP*, BBC (Jan. 20, 2021), <https://www.bbc.com/news/world-us-canada-55738741>.

significant increase in Asian American representation on the bench that President Biden has continued.<sup>54</sup> And beyond the political arena, the number of Asian American CEOs of Fortune 500 companies has “more than tripled” since 2004, “increasing from 12 to 40 over the same period.”<sup>55</sup>

These statistics, of course, provide just one small piece of the picture of the Asian American community, and amici are deeply committed to achieving equity that extends beyond cultivating robust Asian American presence in leadership roles. But the strides the community has made in the *Grutter* era suggest that race-conscious admissions policies are not responsible for holding Asian Americans back—and that something other than Asian American equality is driving SFFA’s crusade here.<sup>56</sup>

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<sup>54</sup> See *Article III Asian-American Judges by President*, MINORITY CORP. COUNS. ASS’N (May 7, 2020), <https://mcca.com/resources/reports/federal-judiciary/asian-american-judges-by-president/>; *Fact Sheet: Biden-Harris Administration Advances Equity and Opportunity for Asian American, Native Hawaiian, and Pacific Islander Communities Across the Country*, THE WHITE HOUSE (Jan. 20, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/20/fact-sheet-biden-harris-administration-advances-equity-and-opportunity-for-asian-american-native-hawaiian-and-pacific-islander-communities-across-the-country/> (listing 16 Asian Americans the Biden Administration has nominated, “which represents 18 percent of all federal judicial nominees” the Biden Administration has made).

<sup>55</sup> Daniel Kurt, *Corporate Leadership by Race*, INVESTOPEDIA (Feb. 28, 2022), <https://www.investopedia.com/corporate-leadership-by-race-5114494>.

<sup>56</sup> See, e.g., Vinay Harpalani, *Racial Triangulation, Interest-Convergence, and the Double-Consciousness of Asian Americans*,

### **III. Overturning *Grutter* Would Benefit Only White Applicants.**

The Court should make no mistake: SFFA has not brought this case to achieve equity for Asian Americans. SFFA has brought this case to make it easier for white students to get into the college of their choice, and this lawsuit is a transparent effort to cling to the advantages that whites have maintained since the nation's inception. This theme pervades SFFA's arguments: founded and led by crusaders against racial equality, SFFA deploys harmful stereotypes of the Asian American community in service of eliminating policies that benefit Asian Americans and proposes a "race-neutral" admissions policy that ultimately benefits white applicants. If the Court uses this lawsuit to overturn *Grutter*, it cannot do so under the pretext of advancing Asian American interests.

#### **A. SFFA Is the Project of White Anti-Affirmative Action Activists.**

SFFA claims to have "sued on behalf of its members, including Asian-American students who were denied admission to Harvard." Pet.Br.17. That description obscures the omnipresence of SFFA's founder and the architect of this lawsuit, Edward Blum. *See* Harv.Pet.App.10. Mr. Blum is no stranger to this Court: he has hand-selected the litigants who

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37 GA. ST. U.L. REV. 1361, 1377-83 (2021) (noting affirmative-action opponents "began linking race-conscious admissions policies to . . . allegations of discrimination against Asian Americans in university admissions" to "capitalize[] on Asian Americans' concerns").

challenged policies that benefitted racial minorities in *Shelby County v. Holder* and *Fisher v. University of Texas at Austin*.<sup>57</sup> The other directors of SFFA—Abigail Fisher and Richard Fisher—are also familiar faces, having lost their bid before this Court to dismantle the University of Texas’s admissions program in 2013 and 2016.<sup>58</sup> The Fishers are back again, this time hoping that acting as puppeteer rather than plaintiff will convince the Court to tack a different course.

This trio has piloted a well-funded machine to attack race-conscious admissions across the country.<sup>59</sup> SFFA has also sued Yale University<sup>60</sup> and the University of Texas<sup>61</sup> over their admissions policies. And the organization has signaled its next challenge to race-conscious admissions policies by subpoenaing information from elite high schools like the Boston Latin School and Thomas Jefferson High School for

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<sup>57</sup> Hartocollis, *supra* note 2.

<sup>58</sup> See Cameron Langford, *Abigail Fisher Renews Push Against Affirmative Action Before the Fifth Circuit*, COURTHOUSE NEWS SERVICE (Apr. 5, 2022), <https://www.courthousenews.com/abigail-fisher-renews-push-against-affirmative-action-before-the-fifth-circuit/>; see also Harv.Pet.Cert.App.10.

<sup>59</sup> Camille G. Caldera & Sahar M. Mohammadzadeh, *Public Filings Reveal SFFA Mostly Funded by Conservative Trusts Searle Freedom Trust and DonorsTrust*, HARV. CRIMSON (Feb. 7, 2019), <https://www.thecrimson.com/article/2019/2/7/sffa-finance/>.

<sup>60</sup> *Students for Fair Admissions, Inc. v. Yale Univ.*, 3:21-cv-2241-OAW (D. Conn. Feb 25, 2021).

<sup>61</sup> *Students for Fair Admissions, Inc. v. Univ. of Tex.*, 1:20-cv-763-RP (W.D Tex. July 20, 2020).

Science and Technology, purportedly in service of these lawsuits.<sup>62</sup>

The Asian American community, however, is glaringly absent from SFFA's governing body and funding sources. SFFA is concerned with litigation strategies that will succeed where its prior cases have failed, not fighting for policies that serve Asian Americans and value the diversity within the Asian American community.

### **B. SFFA Is Exploiting the Asian American Community as a Wedge.**

In Mr. Blum's and the Fishers' prior attempt to end race-conscious admissions policies, they were candid that they were challenging the University of Texas's policy because Fisher, a white applicant, had been denied admission. See Pet.Br.4, *Fisher v Univ. of Tex. at Austin*, No. 14-981 (Sept. 3, 2015) (arguing "UT discriminated against Ms. Fisher" and asking the Court to "vindicate her equal protection rights"). Now, seeking a more politically palatable entrée to ending race-conscious admissions, Mr. Blum and the Fishers, through SFFA, have resorted to a familiar trope of conscripting Asian Americans to advance white interests.<sup>63</sup>

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<sup>62</sup> William S. Flanagan & Michael E. Xie, *Boston Latin School Subpoenaed in Admissions Lawsuit*, HARV. CRIMSON (Apr. 14, 2017), <https://www.thecrimson.com/article/2017/4/14/bls-quashes-subpoena/>; *In re: Subpoena to Testify at a Deposition in a Civil Action Issued to Thomas Jefferson Sch. for Sci. & Tech.*, No. 1:17-mc-7 (E.D. Va. Mar. 23, 2017).

<sup>63</sup> See, e.g., Jeff Guo, *The Real Reasons the U.S. Became Less Racist Toward Asian Americans*, WASH. POST (Nov. 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/29/the>

SFFA’s manipulation of the Asian American community as a wedge involves two steps. In the first step, SFFA relies on the stereotype of Asian Americans as a model minority to set Asian Americans apart from other minorities as more deserving of admission to elite institutions. *See, e.g.*, Pet.Br.30. In the second step, SFFA claims Harvard admissions counselors rely on stereotypes about Asian Americans—particularly the “perpetual foreigner” myth<sup>64</sup> and the stereotype of Asian Americans as passive bookworms—to destroy Asian American applicants’ subjective scores. *See, e.g., id.* at 25-26. SFFA is executing an old playbook that “link[s] race-conscious admissions to . . . allegations of discrimination against Asian American university admissions,” which, at least at face value, “seem[] credible to Asian Americans given the historic and ongoing xenophobia they face[].”<sup>65</sup> SFFA thereby “translat[es] legitimate anger at ceilings on Asian admissions into unthinking opposition to affirmative action floors needed to fight racism.”<sup>66</sup>

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-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them/ (tracing the history of whites aligning with Asian Americans for strategic positioning).

<sup>64</sup> The “perpetual foreigner myth” refers to the perception that Asian Americans are “more loyal to their ancestral nations than to the United States” and resist assimilation. *See Harpalani, supra* note 23, at 250.

<sup>65</sup> *See Harpalani, supra* note 56, at 1380.

<sup>66</sup> Mari Matsuda, *We Will Not Be Used: Voices of the Community*, 1 UCLA ASIAN AM. PACIFIC IS. L.J. 79, 81 (1993); *see also* Julie J. Park & Amy Liu, *Interest Convergence or Divergence? A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. HIGHER EDUC. 36 (2014).

The two-step approach obscures how Asian Americans benefit from racially diverse colleges, *see supra* Section II.A, and opens the door to race-neutral alternatives that harm Asian Americans, particularly those who do not fit into the model minority myth, *see infra* Section III.C.

### C. Class-Based Affirmative Action Is Not a Substitute for Race-Conscious Admissions.

It is not merely SFFA's provenance and strategy that reveal its true aim to boost white admissions. A crucial piece of SFFA's proposal focuses on Harvard increasing its preference for low-income students, Pet.Br.81, a practice known as "class-based affirmative action."<sup>67</sup> Class-based affirmative action, however, ultimately provides the greatest lift to white applicants—not racial minority applicants—and does not account for the pernicious double discrimination that poor minorities face.<sup>68</sup>

In a race-blind class-based system, the majority of low-income applicants considered and admitted would be white. "Although a higher percentage of blacks than whites are 'poor'[,] . . . there are a greater number of poor whites than poor blacks at every

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<sup>67</sup> Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 231 (1997).

<sup>68</sup> *See, e.g.*, Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1101 (2017).

income level.”<sup>69</sup> Class-based affirmative action would increase white enrollment without increasing minority enrollment because “whites still constitute the majority of families” with low socioeconomic status.<sup>70</sup> Emerging data from the University of California system, which does not consider race in admissions but does give “special attention to low-income students,” confirms this.<sup>71</sup> Although Asian American admissions have increased, whites are the most over-represented race at the flagship campuses in Los Angeles and Berkeley.<sup>72</sup>

Class-based affirmative action also ignores the fact that low-income students of different races have vastly different life experiences. Impoverished white students must overcome significant barriers, but they are insulated from the racial discrimination that impoverished minority students face. For example, a poor white student might struggle to focus on academics while fearing contracting COVID-19, but a

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<sup>69</sup> Yin, *supra* note 67, at 231; *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND., <https://tinyurl.com/yc8bz3wa> (last visited July 25, 2022).

<sup>70</sup> Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION (Richard D. Kahlenberg ed., 2004), <https://production-tcf.imgix.net/app/uploads/2016/03/09173953/tcf-carnrose.pdf>.

<sup>71</sup> William C. Kidder & Patricia Gándara, EDUC. TESTING SERV., TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA’S RACE-NEUTRAL EFFORTS 27 (2015), [https://www.ets.org/Media/Research/pdf/kidder\\_paper.pdf](https://www.ets.org/Media/Research/pdf/kidder_paper.pdf).

<sup>72</sup> *Id.* at 33 (comparing high school enrollment to enrollment at the University of California at Los Angeles and Berkeley).

poor Asian American student must figure out how to focus on academics amidst not just a fear of contracting COVID-19, but also a fear that fellow citizens will blame them for causing the COVID-19 pandemic.<sup>73</sup> In fact, “1 in 5 Americans believe[s] that Asian Americans are at least partly responsible for COVID-19,” which has correlated to recent surges in anti-Asian violence.<sup>74</sup> SFFA’s crusade for race-blind admissions would invalidate these experiences and force Asian Americans and colleges to ignore racial burdens.

SFFA’s arguments by design do not serve Asian Americans; instead, they render them invisible. Asian Americans benefit from Harvard’s and UNC’s admissions policies that value the importance of racial diversity to prepare students for a multicultural world, reduce race-based violence, and educate the next generation of leaders. Overturning *Grutter* would be harmful to Asian Americans and the broader community.

## CONCLUSION

For the foregoing reasons, the Court should affirm the rulings below and reaffirm *Grutter*.

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<sup>73</sup> Hannah Tessler et al., *The Anxiety of Being Asian American: Hate Crimes and Negative Biases During the COVID-19 Pandemic*, 45 AM. J. CRIM. JUSTICE 636 (2020).

<sup>74</sup> See, e.g., Jennifer Lee, *Confronting the Invisibility of Anti-Asian Racism*, BROOKINGS INST. (May 18, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/05/18/confronting-the-invisibility-of-anti-asian-racism/>.

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August 1, 2022

## APPENDIX

**LIST OF AMICI**

**ORGANIZATIONS REPRESENTED BY AALDEF**

1. 18 Million Rising
2. Amherst Asian Students Association
3. Asian American Federation
4. Asian American Lawyers Association of  
Massachusetts
5. Asian American Psychological Association
6. Asian American Resource Workshop
7. Asian American Students in Action  
(AASiA)
8. Asian American/Asian Research Institute  
(CUNY)
9. Asian Americans United
10. Asian Community Development  
Corporation
11. Asian Pacific American Bar Association of  
Pennsylvania
12. Asian Pacific American Labor Alliance,  
AFL-CIO
13. Asian Pacific American Law Student  
Association (APALSA) at Arizona State  
University Law
14. The Asian Pacific American Law Students  
Association at Columbia Law School
15. The Asian Pacific American Law Students  
Association at Harvard Law School

16. Asian Pacific American Law Student Association at Northeastern University School of Law
17. Asian Pacific American Law Student Association (APALSA) at New York University School of Law
18. Asian Pacific American Law Student Association, Quinnipiac University School of Law
19. Asian Pacific American Lawyers Association of New Jersey (APALA-NJ)
20. Asian/Pacific/American Institute at New York University
21. Center for Asian American Studies at University of Massachusetts Lowell
22. Chinese for Affirmative Action
23. Coalition for Asian American Children and Families (CACF)
24. Chinese Progressive Association - Boston
25. DRUM - Desis Rising Up & Moving
26. East Coast Asian American Student Union (ECAASU)
27. Filipino American Lawyers Association of New York
28. Fred T. Korematsu Center for Law and Equality
29. GAPIMNY - Empowering Queer & Trans Asian Pacific Islanders
30. Greater Boston Legal Services, Inc.

31. Greater Malden Asian American Community Coalition
32. "I Have A Dream" Foundation
33. Japanese American Citizens League Philadelphia Chapter
34. Korean American Family Service Center
35. Leadership Education for Asian Pacifics (LEAP)
36. Massachusetts Asian American Educators Association
37. Mekong NYC
38. MinKwon Center for Community Action
39. Minnesota 8
40. NASPA Asian Pacific Islander Knowledge Community
41. National Coalition for Asian Pacific American Community Development (CAPACD)
42. National Korean American Service & Education Consortium (NAKASEC)
43. National Queer Asian Pacific Islander Alliance (NQAPIA)
44. North American South Asian Law Students Association
45. OCA Asian Pacific American Advocates of Greater Seattle
46. OCA Asian Pacific American Advocates
47. OCA Asian Pacific Islander American Advocates Utah Chapter
48. OCA Greater Chicago

49. OCA Greater Houston
50. Providence Youth Student Movement
51. South Asian Americans Leading Together (SAALT)
52. South Asian Bar Association of North America
53. Southeast Asia Resource Action Center
54. Southeast Asian Defense Project
55. Southeast Asian Freedom Network
56. VietLead
57. Vietnam Agent Orange Relief & Responsibility Campaign
58. Xin Sheng Project

**INDIVIDUALS REPRESENTED BY AALDEF\***

59. Beena Ahmad, Acting Co-Director, Lawyering Program, City University School of Law
60. Nermeen Arastu, Associate Professor of Law, CUNY School of Law
61. Sabrineh Ardalan, Clinical Professor, Harvard Law School
62. Rob Buscher, Lecturer, University of Pennsylvania Asian American Studies Program
63. Stewart Chang, Professor of Law, William S. Boyd School of Law at University of Nevada, Las Vegas
64. Robert S. Chang, Professor of Law and Executive Director, Fred T. Korematsu Center for Law and Equality, Seattle University School of Law
65. Asima Chaudhary, Assistant Professor, CUNY School of Law
66. Carolyn Chen, Associate Professor of Ethnic Studies, University of California, Berkeley
67. Vichet Chhuon, Associate Professor of Curriculum and Instruction, College of Education and Human Development, University of Minnesota

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71. Meera E Deo, The Honorable Vaino Spencer Professor of Law, Southwestern Law School
72. Harvey Dong, Continuing Lecturer, Asian American & Asian Diaspora Studies, University of California, Berkeley
73. Kecia Fong, Lecturer, University of Pennsylvania
74. Evyn Lê Espiritu Gandhi, Assistant Professor of Asian American Studies, University of California, Los Angeles
75. Margaret Hahn-Dupont, Teaching Professor, Northeastern University School of Law
76. Kimberly Holst, Clinical Professor of Law, Arizona State University, Sandra Day O'Connor College of Law
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79. Marina Hsieh, Senior Fellow, Santa Clara University School of Law
80. Vox Jo Hsu, Assistant Professor of Rhetoric & Writing, University of Texas at Austin
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102. Diana Pan, Associate Professor, CUNY - Brooklyn College and The Graduate Center
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105. Seema N. Patel, Lecturer in Residence, University of California, Berkeley School of Law
106. Rupa Pillai, Senior Lecturer, Asian American Studies, University of Pennsylvania
107. Kim D. Ricardo, Professor of Law, University of Illinois, Chicago School of Law
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109. Courtney Sato, Mellon Assistant Professor, Department of Race, Colonialism, and Diaspora, Tufts University
110. Ragini Shah, Clinical Professor of Law, Suffolk University Law School
111. Connie So, Teaching Professor, University of Washington
112. Cynthia Soohoo, Professor of Law, CUNY School of Law

113. Celina Su, Marilyn J. Gittell Chair in Urban Studies and Professor of Political Science, City University of New York
114. Elizabeth S. Tanaka, Visiting Assistant Professor of Law, Quinnipiac University School of Law
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120. Margaret Woo, Professor of Law, Northeastern University
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**AFFIDAVIT OF THAO HO**

1. My name is Thao Ho, I am 24 and will be a second-year student at New York University School of Law this coming fall. I graduated from Tufts University in 2020 and received a Bachelor of Arts in American Studies & Community Health.
2. I was born in Boston, MA and grew up in the neighborhood of Dorchester. I was raised by my Vietnamese parents. Growing up in Dorchester, a neighborhood known for its large and tight knit Vietnamese population (as well as people from other underrepresented groups), allowed me to build a strong connection to my culture from an early age. Because my mom's extended family immigrated to Boston from Vietnam around the same time as my parents, I was also fortunate to have a lot of family around to reinforce my Vietnamese culture and heritage throughout my childhood.
3. English is not my parents' first language and when they first immigrated to this country, they were not familiar with U.S. institutions. I started helping them, by translating or interpreting for them, at a young age. For instance, I went to my parents' medical appointments after school and helped them communicate with their healthcare providers. I also learned how to manage their finances and pay their bills when I was in elementary

school. In addition, I would frequently assist at my mom's nail salon. If workers and customers had problems, I would interpret to try to help people overcome language barriers and resolve issues. In many ways, because I was born the year after my parents arrived in the United States, my parents and I were learning how to navigate the United States simultaneously.

4. My family, especially my grandfather, instilled a strong sense of pride in my Vietnamese identity that I have carried with me throughout my life. For example, my grandfather taught me how to write in Vietnamese using accents, which helped me succeed when I attended Vietnamese language school.
5. My strong ties to my cultural identity prompted me to get involved in helping people with similar backgrounds when I was in high school. In fact, aside from an internship at Tufts Medical Center and an executive board position in my high school's Red Cross chapter, all of the extracurricular activities that I listed on my college application were somehow linked to my cultural identity. Specifically, I was the Co-President of my high school's Vietnamese Student Society and worked at the Asian Task Force Against Domestic Violence, in addition to volunteering at VietAID as a youth teaching assistant during summers and afterschool.

6. I cannot imagine what I would have done if I was unable to reference extracurricular activities or issues related to my race or ethnicity on my college application. This would have effectively gutted my hard work, achievements, and my personal identity. Without being able to reference my extracurricular activities, it seems unlikely that I would have had the opportunity to attend Tufts University, which would have prevented me from becoming the person I am today. It is hard for me to imagine how the Tufts admissions officers could have gotten an understanding of who I was and what I could contribute to campus life without this information.
7. When I first arrived at Tufts, I was surprised that the campus did not seem as diverse as the community in Dorchester that helped raise me. This lack of diversity felt particularly true in the courses I took as a pre-med major. It felt isolating to be in a learning environment like that, particularly as I was just beginning to navigate my college experience.
8. Because of my first-year experience, I decided to transition out of the pre-med program and, during my second year at Tufts, I enrolled in a course called Asian America. Before this course, I had always thought of myself as Vietnamese, but not Asian American in a political sense. Taking this class helped me situate my own family's experiences within the broader Asian American community. My

professor explained that my new clarity from taking an ethnic studies class was like wearing glasses for the first time.

9. I ended up majoring in American Studies and enrolled in other courses taught by faculty in the Asian American Studies department. These classes allowed me to connect with a diverse group of people that I still consider my friends today. Being in these classes was the first time I felt seen in the classroom on campus. These courses gave me and other students the chance to reflect on our own lived experiences.
10. I learned about what it meant for people to live abroad and immigrate to the U.S. for college and met people who showed me what it was like to grow up with few resources in other areas of the world. Learning from people who did not grow up in the United States, who explained what it meant to be racialized for the first time while living in this country, was eye opening. Hearing these different perspectives allowed me to construct and reconstruct the ways I thought about the world I lived in. I had grown up in a diverse part of Boston, but everyone was from Boston and lived in Boston. It felt like we were living distinct variations of the same life. However, in the Asian American Studies courses, I was meeting people who showed me completely different lived experiences, something I would have missed out on were it not for these

classes—and the range of students who participated.

11. When I was at Tufts, one of my closest friends was from Hong Kong. She attended international school when she was growing up and had exposure to diverse people, but in a different context. She also had very different views, because she grew up more socioeconomically privileged than I did, and we learned a lot from each other. One of my other close friends was from Kenya and, when he was growing up, the term “People of Color” did not exist. He was learning what it meant to be Black in America and found the concept and experience challenging.
12. I also had several friends from the West Coast and Midwest who identified as Asian American. For many of them, Tufts was the most diverse educational setting they had ever been in, whereas for me it was the least diverse. Including me, only one or two other Southeast Asians were in my classes, so students from other Asian American backgrounds helped me learn about a very different version of Asian American history than the one I had heard about growing up when I listened to stories about my grandfather’s experiences in the Vietnam War. For me, hearing from many other students and the variety in their experiences growing up challenged this one notion I had of what it means to be Asian American.

13. After graduating from college, I came to appreciate that the way I grew up – in such a supportive and representative community – was unique, which made me want to focus on helping Southeast Asians and Vietnamese people. I joined the Asian Outreach Unit (AOU) at Greater Boston Legal Services, with the goal of helping Asian American community members have the conversations I had in college earlier on in life. I grew up trying to appreciate living in the United States because of my family's immigration experience, but without acknowledging how difficult it can be to grow up here. Being at AOU showed me how to have difficult conversations in my community by not only embracing a diversity of experiences, but also using these perspectives as a tool to foster a larger sense of community within the Asian American population.

I, Thao Ho, do hereby declare under the pains and penalties of perjury that the foregoing is true and accurate to the best of my knowledge and belief.



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Signature

07/28/2022

Date

**AFFIDAVIT OF JASSYRAN KIM**

1. My name is Jassyran Kim. I am currently a Management Consultant at Accenture in Boston. I graduated from Davidson College in 2020 and received a Bachelor's Degree in Economics, with a minor in Chinese Studies.
2. I was born and raised in Lynn, MA. I am Asian American, specifically a member of the Cambodian community, and am half-white.
3. From fifth to twelfth grade, I attended a Knowledge is Power Program (KIPP) public charter school in my hometown. While enrolled at KIPP, I was the only Asian American female in my class of less than eighty students. While Lynn itself is a diverse city with a large Cambodian population, KIPP's demographics were different. I was not white enough to be accepted by the few white students in my class. And while my friends were mainly Black or Dominican while growing up, as we became older, my Cambodian culture was too dissimilar from most of my peers to allow me to fully connect with these students either. Oftentimes, I was left with no one to speak to about my cultural identity outside of my family.
4. I also initially found defining my cultural identity difficult at Davidson College, a predominantly white institution. Within the limited number of Asian American students on campus, I noticed somewhat of an "Asian

hierarchy” where more affluent Asian students—who tended to be international students from Japan, China, and South Korea—would view themselves differently than less socioeconomically privileged Asian American students, such as myself. While non-Asian students tended to group me in with the affluent Asian international students, our experiences were different and I did not feel a connection. I became friends with primarily African American and Latinx students.

5. When taking courses related to my Economics major, I frequently found I was the only Asian American woman in these classrooms, which were filled primarily with white men. Early on, this isolation made speaking up more difficult when I disagreed with others’ points of view, because I did not want to be labeled as “that girl” who kept “causing problems” by pushing my classmates and professors to recognize their respective privileges and the ways that their actions impact underrepresented people like me.
6. For example, one day, when discussing the intersection between deportation and immigration and gross domestic product (GDP) in one of my courses, certain students were advocating that deportation was beneficial to a country’s overall GDP. I decided to speak up and voice my concern that that my classmates were so focused on talking about people as numbers that they neglected to

consider how people affected by deportation were real people whose lives would be uprooted if deported. When I raised these problems, students tended to either briefly reflect on the problem and quickly dismiss it or not consider the issues at all. I believe these reactions stemmed from the fact that most of these students did not know anyone who had been personally impacted by immigration or deportation.

7. Other courses I took, including for my Chinese minor and religion classes, were much more diverse. The environment in these courses, often created by the professor and the diversity of students in the class, allowed for more opportunity to understand different experiences.
8. It was not until my third year in college that I gathered the courage to tell people about how my family and I were negatively impacted by immigration and deportation policies. I organized a panel of Asian students on campus who were in similar positions to speak about their experiences. My goal, in part, was to show the students who tended to believe that these policies did not impact Asian American students or communities were relying on a false premise. After the panel, various students came up to me asking me why I did not disclose my family's story sooner. I explained I was worried that they were going to look at me differently. I also challenged them to consider why they were

only changing their views on immigration and deportation issues after discovering my personal connection to the issue, when I had presented them with facts about the devastating human consequences of these policies long before the panel took place.

9. Based on these experiences, among other things, I firmly believe that it would have been easier to have these difficult conversations and dig deeper—for instance, by looking beyond the numbers in economics courses—if more students of color were in my classes. Different demographics in these classrooms would also have allowed me to feel more comfortable opening up earlier on in my college career.
10. My college experience as an Asian American woman taught me that white students usually have the opportunity to focus solely on their education in college, while students like me find ourselves having to not only learn, but also constantly advocate for ourselves. I have frequently discussed with my friends from underrepresented backgrounds what a privilege it would be to show up with only the expectation of learning, rather than the added pressure to a leader, activist, or representative of my race or cultural identity.
11. College life also prepared me for the level of discomfort inherent in being a woman of color in a corporate setting, a reality that will likely continue throughout my career. I strongly

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believe learning this uncomfortable lesson would not be as necessary if the nation's colleges and courses were filled with more diverse students who felt emboldened sharing their viewpoints and expressing themselves. But we are not there yet.

I, Jassyran Kim, do hereby declare under the pains and penalties of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

July 22, 2022

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Date

Signature

A handwritten signature in blue ink, appearing to read 'J Kim', is written over a horizontal line. The signature is stylized and cursive.