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SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus

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In the ongoing litigation of Students for Fair Admissions v. Harvard College, Harvard faces allegations that its once-heralded admissions process discriminates against Asian Americans. Public discourse has revealed a dominant narrative: affirmative action is viewed as the presumptive cause of Harvard's alleged "Asian penalty." Yet this narrative misrepresents the plaintiff's own theory of discrimination. Rather than implicating affirmative action, the underlying allegations portray the phenomenon of "negative action"—that is, an admissions regime in which White applicants take the seats of their more qualified Asian-American counterparts. Nonetheless, we are witnessing a broad failure to see this case for what it is. This misperception invites an unnecessary and misplaced referendum on race-conscious admissions at Harvard and beyond.

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INTRODUCTION

On November 2, 2018, the *California Law Review* and the Henderson Center for Social Justice hosted a symposium titled "20 Years of 209: the Past, Present, and Future of Affirmative Action in Public Universities." As its name suggests, the symposium invited participants to reflect on Proposition 209, a 1996 ballot initiative that prompted the elimination of race-conscious admissions policies across California's public colleges and universities.[1]

That same day, on the other side of the country, attorneys made closing arguments in *Students for Fair Admissions v. Harvard College*, a lawsuit that targets Harvard's race-conscious admissions process.[2] Students for Fair Admissions ("SFFA"),[3] the named plaintiff, claims that Harvard unlawfully discriminates against Asian-American applicants and seeks to enjoin Harvard from considering—or even knowing—the race of its applicants.[4]

1. Proposition 209 was passed in November 1996 and took effect in August 1997. *See* Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997). Its text, now incorporated in the California Constitution, provides: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting." CAL. CONST. art. I, § 31(a).

2. *See* The Crimson News Staff, *Here's What Happened in The Harvard Admissions Trial Today*, HARVARD CRIMSON (Oct. 16, 2018), https://www.thecrimson.com/article/2018/10/16/what-happened-today [https://perma.cc/84R3-NLMT]. Because Harvard is a private entity that receives federal assistance, SFFA's allegations arise under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. Nonetheless, constitutional standards apply to claims arising under the Title VI statute. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

3. SFFA was founded by Edward Blum, a White anti-affirmative activist who has spearheaded multiple lawsuits challenging race-conscious admissions and voting rights protections across the country. *See* Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), https://nyti.ms/2jFMkOb [https://perma.cc/4CVT-L83J]; *see also* STUDENTS FOR FAIR ADMISSIONS, *About*, https://studentsforfairadmissions.org/about [https://perma.cc/9JRD-RZC6].

4. *See* Complaint at 119, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-14176 (D. Mass. Nov. 14, 2014) [hereinafter "Complaint"], http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2014/11/SFFA-v.-Harvard-Complaint.pdf [https://perma.cc/4GG6-YPMF] (seeking a "permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions . . . permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged

The serendipity of this timing was difficult to ignore. In Berkeley, attendees described—often through piercing personal testimony—Proposition 209's devastating effects on higher education in California.[5] In Boston, SFFA sought a ruling that has the potential to propagate a Proposition 209-like regime across the entire country.[6]

The Harvard litigation has garnered national attention and spurred fierce debate.[7] This is not surprising. SFFA's open and unapologetic agenda is to dismantle race-conscious admissions at Harvard and beyond.[8] Given the recent appointment of Justice Kavanaugh, who provides a fifth vote against such policies, this litigation presents a true threat to the future of affirmative action.[9] It is accordingly understandable that affirmative action's supporters have closed ranks around Harvard. It is also understandable that the public has come to view *SFFA v. Harvard* as a case that is all about affirmative action.

Even if understandable, conventional portrayals of this case fall prey to a critical misperception. Specifically, by viewing this as a case that is all about affirmative action, common accounts tend to conflate two discrete dimensions of SFFA's suit: (1) a rather generic attack on Harvard's affirmative action policy, and (2) the more specific claim that Harvard intentionally discriminates against

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in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission"). SFFA also seeks a declaratory judgment that any use of race in admissions violates Title VI of the Civil Rights Act of 1964 and the United States Constitution's Equal Protection Clause. *See id.* The district court rejected this claim because it contradicts established Supreme Court precedent. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *8 (D. Mass. Sept. 28, 2018).

5. Eric Brooks, for example, described his experience as the lone African-American student in Berkeley Law's Class of 2000.

6. Following a three week trial in the fall of 2018, on February 13, 2019, the district court heard oral argument concerning proposed findings of fact and conclusions of law. As of the date of this Article's publication, the district court had not yet ruled on the SFFA's remaining claims.

7. This fierce debate is partly reflected in a wave of amicus briefs filed in support of both parties on the eve of trial. *See* Colleen Walsh, *Hundreds of Experts, Scholars Back Harvard in Admissions Suit*, HARVARD GAZETTE (Aug. 31, 2018), https://news.harvard.edu/gazette/story/2018/08/hundreds-of-experts-scholars-back-harvard-in-admissions-suit [https://perma.cc/RMZ4-ZJG9].

8. *See supra* note 3. *See also* Nancy Leong, *Preliminary Thoughts on the Summary Judgment Motions in the Harvard Affirmative Action Lawsuit*, TAKE CARE BLOG (June 18, 2018), https://takecareblog.com/blog/preliminary-thoughts-on-the-summary-judgment-motions-in-the-harvard-affirmative-action-lawsuit [https://perma.cc/XGN2-CXH5] ("SFFA is essentially a vehicle for longtime affirmative action opponent Edward Blum.").

9. Although Justice Kavanaugh is known for hiring a high number of women and law clerks of color, he has repeatedly expressed skepticism about the legality of affirmative action. *See* Kadia Tubman, *Kavanaugh's Views on Affirmative Action Draw Scrutiny*, YAHOO NEWS (September 7, 2018), https://www.yahoo.com/news/kavanaughs-views-affirmative-action-draw-scrutiny-113120833.html [https://perma.cc/B3LL-ZBS3]. During his confirmation hearings, Justice Kavanaugh evaded directly answering questions about affirmative action but appeared to note a preference for race-neutral selection criteria. *See* Scott Jaschik, *Kavanaugh Evades Questions on Affirmative Action*, INSIDE HIGHER ED (September 14, 2018), https://www.insidehighered.com/quicktakes/2018/09/14/kavanaugh-evades-questions-affirmative-action [https://perma.cc/7E94-6LN3].

Asian Americans.[10] The first claim implicates affirmative action; the latter, which I refer to herein as Harvard's "Asian penalty," does not.[11]

For those committed to a future with affirmative action, this conflation should be resisted. To begin, it obscures the actual beneficiaries of Harvard's Asian penalty: Harvard's *White* students, who effectively reap a "White bonus" at the expense of their Asian-American counterparts.[12] This conflation also reproduces the fallacy that affirmative action pits Asian-American applicants against other students of color.[13] This framing, in turn, weakens the normative appeal for a set of practices that is already politically fraught and doctrinally insecure.[14] Moreover, it creates the illusion that one must choose between defending affirmative action and holding Harvard accountable for its alleged anti-Asian bias.

This Article seeks to disrupt this prevailing narrative and the conflation on which it rests. To do so, I build on commentary that has begun to decouple SFFA's assault on affirmative action from its narrower discrimination claim.[15] In Part I, as a point of departure, I explore the forces that have facilitated the dominant, yet misplaced, view that affirmative action is the source of Harvard's Asian penalty. These forces include longstanding myths about affirmative action and socially salient racial stereotypes concerning who does, and does not, belong in elite institutions of higher education. In Part II, I turn to SFFA's own theory of the case. Doing so exculpates affirmative action by exposing two key

10. SFFA's underlying complaint contains six distinct "counts." *See* Complaint, *supra* note 4, at 101–18. Counts II through VI effectively challenge Harvard's use of affirmative action. *See id*. at 104–18. Count I, in contrast, alleges that Harvard intentionally discriminates against Asians. *See id*. at 101. As I detail in this Article, this claim does not implicate Harvard's affirmative action policy. *See infra* Part II.

11. *See infra* Part II. My discussion of an Asian penalty and White bonus builds on recent scholarship that has used similar terms to interrogate how contemporary affirmative action critiques are being rehearsed through claims of Asian victimhood. *See* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590 (2017) (interrogating and exposing the fallacy that affirmative action confers a "Black bonus" and commensurate "Asian penalty").

12. *See infra* Part II.B (detailing SFFA's evidence of a White bonus).

13. *See* West-Faulcon, *supra* note 11, at 593 n.9 ("Justice Samuel Alito's dissenting opinion focused extensively on the unproven and empirically unsupported claim that Asian Americans who applied to the University of Texas at Austin (UT Austin) suffered racial discrimination in admissions that stemmed from racial affirmative action."); Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2216 (2016) (Fisher II) (Alito, J., dissenting).

14. *See generally* Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. (forthcoming 2019) (discussing the constitutional insecurity and political fragility of race-conscious admissions).

15. *See, e.g.*, Leong, *Preliminary Thoughts on Summary Judgment Motions*, *supra* note 8 (describing the need to decouple potential discrimination against Asian applicants from Harvard's express consideration of applicant race); Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, Is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018), https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case [https://perma.cc/D7LF-6T39] ("But to understand the stakes of the case, it is important not to conflate two separate concepts: the legal issue of affirmative action and the factual issue of whether Harvard discriminated against one particular racial group.").

components of Harvard's alleged Asian penalty: (1) it accrues to the benefit of White applicants, and (2) it is the product of a facially race-neutral dimension of Harvard's admissions regime. In Part III, I conclude with a thought experiment that asks what a meaningful remedy, responsive to SFFA's actual allegations, would entail. Contrary to SFFA's call for colorblindness, a more tailored and targeted remedy would involve more, not less, race-consciousness.

I.
THE PREVAILING NARRATIVE: IT'S ALL AFFIRMATIVE ACTION

Although not without exception, public debate has largely cohered around the view that the Harvard litigation is all about affirmative action.[16] This narrative invites the presumption that, to the extent Harvard discriminates against Asian Americans, affirmative action is to blame. What may be most interesting about this narrative is that it contradicts SFFA's own statements, which exculpate affirmative action as the source of Harvard's Asian penalty.[17]

So what's the deal? If affirmative action is not to blame, and the anti-affirmative action plaintiff concedes as much, why is that so hard to see?

To begin, both SFFA and Harvard benefit when the public conflates SFFA's discrimination claim with its broader assault on affirmative action. For SFFA's part, this makes sense; the organization's guiding mission is to eliminate race-conscious admissions nationwide.[18] It accordingly behooves SFFA to blur the normative and descriptive boundaries that separate its allegations of anti-Asian discrimination and Harvard's formal consideration of applicant race. Doing so weakens affirmative action's normative appeal and perpetuates

16. *See* Suk Gersen, *supra* note 15 ("The lawsuit, which will go to trial next week in federal district court in Boston, has been called 'the Harvard affirmative-action case,' and it has been spoken of as if it could end affirmative action at Harvard and elsewhere."). Historically, the term "affirmative action" has been employed to describe a range of race- and gender-conscious programs and policies intended to promote the inclusion of groups historically locked out of a given industry, domain, or institution. *See generally* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926 (1996) (describing five categories of affirmative action). For purposes of this Article, I generally employ the term "affirmative action," and the related term "race-conscious admissions," in a narrower sense. Specifically, I employ these terms to describe formal admissions policies that permit university officials to expressly consider an applicant's race as a positive factor within a holistic review of the candidate. This definition aligns with Harvard's description of the way in which race formally enters its own admissions process. *See* Memorandum in Support of Defendant's Motion for Summary Judgment on All Remaining Counts at 7, Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., No. 1:14-cv-14176-ADB (D. Mass. June 14, 2018) [hereinafter "Defendant's MSJ"] (explaining that its admissions policy permits admissions officers to consider an applicant's "race or ethnicity as one of many factors in its admissions process").

17. For example, in its motion for summary judgment, SFFA notes that "preferences for African-American and Hispanic applicants could not explain the disproportionately negative effect Harvard's admission system has on Asian Americans." Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment at 13, Students for Fair Admissions, Inc., v. President and Fellows of Harvard Coll., No. 1:14-cv-14176-ADB (D. Mass. June 15, 2018) [hereinafter "Plaintiff's MSJ"]. *See also infra* Part II.

18. SFFA is not shy about this goal. *See* STUDENTS FOR FAIR ADMISSIONS, *supra* note 3.

contestable lay theories that render race-conscious admissions vulnerable to unwarranted political critique and doctrinal scrutiny.[19]

Harvard, for its part, has done little to disentangle the claim that it discriminates against Asians from SFFA's broader assault against affirmative action.[20] There is logic to such an approach. By acquiescing to an affirmative action narrative, Harvard can present itself as the valiant defender of race-conscious admissions and, by extension, racial equality more broadly.[21] This, in turn, blunts the force of SFFA's more potent charge that Harvard intentionally suppresses Asian admission to preserve White market share—a decidedly "bad look" for an institution committed to racial equality.[22] It also deflects attention from other sites within Harvard's admissions regime that, although not challenged by SFFA, reproduce race and class privilege by conferring unearned benefits upon the wealthy and the connected.[23]

Given both parties' general acquiescence to an affirmative action narrative, one might excuse the public for viewing the entire litigation through the lens of a traditional affirmative action dispute. But this misperception is not solely the product of the parties' shared interest in a framing that tethers affirmative action

19. *See* Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 90, 92 (2016) ("So Asian Americans allow for a reframing of such opposition. That is, opposition to affirmative action seems less racist if affirmative action programs can be characterized as harmful to both white and Asian American people, rather than something that is good for everyone but white people."); John Yoo & James C. Phillips, *An End to Racial Preferences at Last*, NAT'L REV. (Dec. 4, 2018), https://www.nationalreview.com/2018/12/supreme-court-racial-preferences-affirmative-action [https://perma.cc/3DJL-PEXC] (conflating evidence of anti-Asian bias with affirmative action).

20. As reflected in its motion for summary judgment, Harvard has focused on the merits of its affirmative action program. *See, e.g.*, Defendant's MSJ, *supra* note 16, at 16, 35. Harvard has begin to do more to decouple SFFA's discrimination claim from its more generic attack on affirmative action. *See* Harvard's Response to SFFA's Proposed Findings of Fact and Conclusions of Law at 6-7, Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., No. 1:14-cv-14176-ADB (D. Mass. Jan. 23, 2019) ("But that argument ignores the distinction between Harvard's consideration of race in pursuit of a diverse student body—an element of the admissions process that Harvard regards as fundamental to its institutional mission—and SFFA's allegation that 'Harvard discriminates against Asian-American applicants *vis-à-vis white applicants*.'").

21. *See* Suk Gerson, *supra* note 15 ("It has served Harvard's interest for people to think that, unless it wins this case, affirmative action will be eliminated, and that Harvard's treatment of Asian-American applicants was necessary to attain an acceptable level of diversity among its undergraduates.").

22. *See* Jeannie Suk Gerson, *At Trial, Harvard's Asian Problem and a Preference for White Students from 'Sparse Country*,' NEW YORKER (Oct. 23, 2018), https://www.newyorker.com/news/our-columnists/at-trial-harvards-asian-problem-and-a-preference-for-white-students-from-sparse-country [https://perma.cc/Z6Q3-6CVE] ("Much of the evidence at trial may not create a good look for Harvard, but it also may not be enough to meet the operative legal definitions of discrimination."). This is not to suggest that Harvard's affirmative action defense is in bad faith. Rather, it is to mark that, in relevant respects, Harvard interests converge with those of SFFA. Specifically, Harvard benefits when the public views this as a case that is all about affirmative action—even if such a portrayal renders affirmative action more vulnerable to legal and political critique.

23. *See infra* Part III.A (discussing SFFA's own evidence that Harvard's use of legacy preferences disproportionately benefits White applicants to the detriment of all groups of color).

to allegations of Asian penalty. It is also facilitated by entrenched myths about affirmative action and related racial stereotypes that continue to inform presumptions about who belongs in elite institutions of higher education.

A. The Standard Affirmative Action Myth: Black v. White

For decades, racially-inflected narratives have structured public discourse about, and understandings of, affirmative action.[24] Pursuant to such narratives, affirmative action is often viewed as a rigid, zero sum device that confers racial "preferences" upon Black applicants to the detriment of their "innocent" White counterparts.[25] One could reduce this affirmative action "myth"[26] to the following equation, which I title "Affirmative Action 1.0"[27]:

"Affirmative Action 1.0"

Black Applicants v. White Applicants

(beneficiaries) ("victims")

On one side of the equation sit Black applicants, affirmative action's putative beneficiaries who receive racial "preferences"[28] that open doors that

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24. *See generally* Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 174, 186–88 (2016) (describing how racial stereotypes facilitate standard conceptions and critiques of affirmative action).

25. *See* Grutter v. Bollinger, 539 U.S. 306, 341 (2003) ("Even remedial race-based governmental action generally remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.") (internal quotation marks omitted).

26. I employ the term "myth" to mark that pervasive conceptions of affirmative action rest on contestable empirical assumptions and related racial stereotypes. *See, e.g.*, West-Faulcon, *supra* note 11 (contesting the "causation fallacy" and the "average-test-score-of-admitted-students" fallacy); Cheryl I. Harris, *Fisher's Foibles: From Race and Class to Class not Race*, 64 UCLA L. Rev. Disc. 648, 659 (2017) (suggesting that affirmative action critiques often trade on presumptions about black intellectual inferiority); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002) (describing the "the common yet mistaken notion that when white applicants . . . fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action").

27. To be clear, this equation should not be interpreted as an empirical or normative claim concerning the way in which affirmative action actually functions. Rather, I employ this stylized equation as a model that reflects a standard, albeit crude and empirically fraught, portrayal of affirmative action. In addition to the deficiencies noted in the accompanying footnotes, this one-dimensional equation fails to account for the ways in which a robust affirmative action policy could, in practice, promote more individualized review by uplifting the multidimensional and intersectional identities of a given candidate. Moreover, this equation casts affirmative action in purely Black and White terms. This framing elides the fact that Asian Americans have been, and continue to be, the direct beneficiaries of affirmative action. For a more textured set of schematics that better reflect the underlying mechanics of affirmative action, see Carbado et al., *supra* note 24, at 184–98.

28. For scholarship contesting the notion that affirmative action confers racial "preferences," see, e.g., Carbado et al., *supra* note 24 at 176; Jonathan Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. (forthcoming 2019) (reviewing empirical scholarship that reveals how facially neutral measures of merit will predictably and systematically *under*-measure the existing talent and potential of individuals from negatively stereotyped groups); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063 (2006) (employing behavioral realism and implicit social cognition research to discuss how implicit racial biases can

would otherwise remain shut. On the other side of the equation sit White applicants, affirmative action's ostensible "victims" who are denied the opportunity to compete on their "individual merit."[29]

"Affirmative Action 1.0," with its ostensible winners and losers, is laden with misperceptions concerning how race-conscious admissions actually function.[30] It is also predicated on contestable constructions of "merit" and racial stereotypes about the intellectual abilities of Black and White students.[31] Notwithstanding these deficiencies, I begin with "Affirmative Action 1.0" because it captures a common portrayal of affirmative action that has facilitated the prevailing narrative that *SFFA v. Harvard* is all about affirmative action.

The foregoing conception of affirmative action has also long informed the Supreme Court's hostility toward race-conscious remedies.[32] Doctrinally, this has translated to an equal protection regime that subjects all racial classifications—whether invidious or benign—to strict scrutiny.[33] Contemporary equal protection doctrine, in turn, has not been kind to affirmative action.[34] The past forty years have seen the piecemeal crippling of race-conscious remedies across sectors of American life.[35]

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compromise even shallow commitments to meritocracy and colorblindness); Luke Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 24 (1994).

29. *See supra* note 26; Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) ("[The Supreme Court's affirmative action jurisprudence] has invited claims . . . that nonsinners—white workers 'innocent' of their bosses' or union leadership's past discrimination—should not pay for 'the sins of others of their own race,' nor should nonvictims benefit from their sacrifice.").

30. *See supra* notes 26–29.

31. *See* Carbado et al., *supra* note 24, at 177 ("Black intellectual inferiority has long been an important part of the social transcript of American life.").

32. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) ("Moreover, there are serious problems of justice connected with the idea of preference itself. . . . [T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.").

33. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that racial classifications designed to benefit minority contractors, like those that disadvantaged minorities, "are constitutional only if they are narrowly tailored measures that further compelling governmental interests"). This contrasts with facially neutral state action, which triggers only rational basis review absent evidence of discriminatory intent. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274–80 (1979); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265, 270–71 (1977); Washington v. Davis, 426 U.S. 229, 245–46 (1976).

34. The Supreme Court has sustained challenges to voluntary race-conscious remedies in a range of domains. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (striking down race-conscious selection process in primary education); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (striking down university's race-conscious admissions process); *Adarand*, 515 U.S. 200, 237–39 (1995) (striking down race-conscious set asides in public contracting).

35. Many of these rulings have come in the form of constitutional equal protection challenges. *See Parents Involved*, 551 U.S. at 748; *Adarand*, 515 U.S. at 237–39; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989). Others have arisen in litigation brought under statutory schemes such as Title VII. *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 583 (1984).

One notable exception comes in the domain of higher education, where the Supreme Court has embraced student body diversity as a compelling interest that justifies narrowly tailored race-conscious admissions policies.[36] The diversity rationale, in turn, constitutes a constitutional defense unavailable to defendants outside of the university admissions context.[37] Armed with this defense, universities have successfully defended affirmative action policies on two separate occasions over the past fifteen years. I refer to *Fisher v. Texas* (*Fisher II*),[38] and *Grutter v. Bollinger*,[39] both of which involved race-conscious admissions policies that survived with slim Supreme Court majorities.

Beyond the common outcomes, a second key variable unites *Fisher II* and *Grutter*. Both cases involved White plaintiffs.[40] This fact should not be surprising, as affirmative action challenges have featured White plaintiffs for the past forty years.[41] Thus, *Grutter* and *Fisher II* are noteworthy not because they rehearsed well-worn scripts, but because the underlying affirmative action challenges failed. These arguably surprising[42] endings revealed that, at least in the context of higher education, there may be a limit to the normative appeal and

36. *See Fisher II*, 136 S. Ct. at 2210 ("[A] university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"). The Supreme Court has yet to extend the diversity rationale beyond the confines of higher education. To the extent diversity functions to promote the equality interests of individuals within a given domain, there are reasons to think that the diversity rationale should transcend this context. *See supra* note 14 (introducing the concept of "equal university membership").

37. This is not to suggest that the Supreme Court has upheld all race-conscious admissions policies. The Supreme Court has struck down such policies on two occasions on the basis that the relevant policy was not narrowly tailored to promote student body diversity. *See Bakke*, 438 U.S. at 320; *Gratz*, 539 U.S. at 270.

38. *Fisher II*, 136 S. Ct. at 2214–15. The *Fisher* litigation went up to the Supreme Court on two occasions. In the first instance, the Supreme Court vacated the decision and remanded the case to the Fifth Circuit, which had not applied the correct standard for strict scrutiny. *See* Fisher v. University of Texas, 570 U.S. 297, 315 (2013) (*Fisher I*). In the second instance, the Supreme Court affirmed the Fifth Circuit's decision that the University of Texas's admissions program comported with the 14th Amendment. *See Fisher II*, 136 S. Ct. at 2214.

39. 539 U.S. 306, 343–44 (2003).

40. *See Fisher II*, 136 S. Ct. at 2207; *Grutter*, 539 U.S. at 316.

41. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 247 n.5 (Stevens, J., dissenting). White women are often imagined as the victim of affirmative action. This narrative is notable given the degree to which White women, as a group, have benefitted from gender-conscious affirmative action in the domains of education and employment. *See* Victoria Massie, *White Women Benefit Most from Affirmative Action—and Are Among its Fiercest Opponents*, VOX (June 23, 2016), https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action [https://perma.cc/Y7AJ-Y5Q2].

42. In anticipation of *Grutter* and *Fisher*, scholars forecasted the potential end for affirmative action in higher education. *See* Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 283–84 (2015) ("Based on the Court's opinion in [*Fisher I*] . . . we may not have to wait until 2028 for a new determination on the efficacy of affirmative action."); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1120 (2001) ("[T]he diversity rationale for affirmative action may soon be rejected or curtailed by the Supreme Court.")

doctrinal utility of affirmative action challenges predicated on a narrative of White victimhood.[43]

B. Changing the Affirmative Action Frame: Black v. Asian

For affirmative action's critics, defeats in *Grutter* and *Fisher II* invited the following question: might there be a more compelling affirmative action plaintiff—one able to rally public support and conjure judicial sympathy where a White plaintiff could not?

This inquiry appears to have informed SFFA's current litigation strategy. Even before the Supreme Court ruled in *Fisher II*, anti-affirmative action activist Edward Blum, who financed the *Fisher* litigation and founded SFFA, began openly recruiting Asian-American plaintiffs for a potential suit against Harvard.[44] Blum's aim was clear: identify Asian-American plaintiffs who could replace Whites as the face of affirmative action's ostensible victims.[45]

This strategy was, in many respects, predictable.[46] For decades, Asian Americans have occupied an in-between position in American race relations.[47] Asian Americans have faced, and continue to face, formal and informal exclusion, discrimination, and subordination.[48] At the same time, Asian Americans have come to equal, and even surpass, other racial groups (including

43. I do not mean to overstate this point. Even in the context of higher education, the challenged policies in *Grutter* and *Fisher* survived by a single vote in opinions authored by Justices no longer on the Supreme Court. *See Fisher II*, 136 S. Ct. at 2215; *Grutter*, 539 U.S. at 344.

44. *See* Leong, *Preliminary Thoughts on Summary Judgment Motions*, *supra* note 8.

45. *See* Colleen Walsh, *Court to Receive Motions in Admissions Lawsuit*, HARVARD GAZETTE (June 14, 2018), https://news.harvard.edu/gazette/story/2018/06/court-to-receive-motions-in-harvard-admissions-lawsuit [https://perma.cc/5D7E-K2V8]; Defendant's MSJ, *supra* note 16, at 10 (quoting Edward Blum) ("I needed plaintiffs; I needed Asian plaintiffs . . . so I started . . . HarvardNotFair.org."). Multiple Harvard alumni associations and legal organizations have condemned Blum for employing Asian identity as a "racial mascot" designed to further an anti-egalitarian agenda designed to further White interests. *See* Leong, *Preliminary Thoughts on Summary Judgment Motions*, *supra* note 8.

46. Indeed, it was predicted. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and A Theory of Racial Redemption*, 40 B.C. L. REV. 73, 169–70 (1998) ("The adoption of a racial group, or even an individual of color by a white political figure or constituency—a practice I refer to as mascotting—is necessary to deflect charges of racism and preserve the redeemed status of whiteness. Indeed, is it possible to imagine a winning campaign by the anti-affirmative action movement absent the conservative deployment of racial mascots? It hasn't happened yet."); Mari Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 79, 80 (1993) ("When Asian-Americans manage to do well, their success is used against others. Internally, it is used to erase the continuing poverty and social dislocation within Asian-American communities. The media is full of stories of Asian-American whiz kids. Their successes are used to erase our problems and to disavow any responsibility for them.").

47. *See* Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward A Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 131 (1996) (pointing out that Asian Pacific Americans have experienced both racial discrimination and upward mobility); Matsuda, *supra* note 46, at 80.

48. This has occurred across domains spanning immigration, education, housing, and employment. *See* Chin et al., *supra* note 47, at 143–58. Japanese internment during World War II and broad anti-Asian immigration restrictions, including the Chinese Exclusion Act, offer notable examples. *See id.*; *see also* Jerry Kang, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993).

Whites) across certain metrics of success.[49] This relative success has fueled the rise and entrenchment of the "model minority" myth, which constructs Asians as a monolithic block of "superminorities" whose success is rooted in a culture that prioritizes hard work and education.[50]

The model minority myth does powerful work. To begin, it obscures the robust heterogeneity that defines the Asian-American community.[51] It is true that certain Asian ethnic groups, in the aggregate, have found relative success as measured by metrics such as household income and educational attainment.[52] This success has not, however, translated to commensurate levels of representation in positions of privilege and prestige.[53] Moreover, other Asian subgroups, particularly those from southeast Asia with distinct stories of colonization and more recent histories of immigration, continue to face noteworthy levels of poverty and remain underrepresented across higher education.[54]

In addition to masking this intra-racial diversity, the model minority myth facilitates countervailing negative stereotypes about other groups of color.[55] In

49. *See id.* at 149–50. It is important to note that such measures tend to elide meaningful distinction across ethnic groups often conflated within the broader category of Asian American. *See id*. at 156 n.143.

50. *See id.* at 148, 149, 151 ("A racial stereotype since the 1960s, the model minority myth portrays APAs as superminorities. According to the myth, APAs are racial minorities that have succeeded through education and hard work and whose income and wealth match or exceed that of White Americans. The model minority myth emphasizes the success of APAs, especially as compared to other people of color.") (internal citation omitted). Others have noted how the stereotypes that underlie the "model minority" myth create vulnerabilities for Asian Americans in certain contexts. *See Jerry Kang et al., Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 892 (2010).

51. *See, e.g.*, Casey Quinlan, *How the Data on Asian Students Changes Completely When You Look at the Details*, THINK PROGRESS (Sept. 23, 2015), http://thinkprogress.org/education/2015/09/23/3703777/asian-students-data-differences [https://perma.cc/62SC-ZAW5]; Filipinos Are Underrepresented at Most Selective of UC Campuses, REAPPROPRIATE (Dec. 8, 2014), http://reappropriate.co/2014/12/filipinos-are-underrepresented-at-most-competitive-of-uc-campuses-blockblum-iamnotyourwedge [https://perma.cc/8HWE-W9JF].

52. *See Racial Wealth Snapshot: Asian Americans*, PROSPERITY NOW (May 10, 2018), https://prosperitynow.org/blog/racial-wealth-snapshot-asian-americans [https://perma.cc/3MQ9-233W].

53. This also masks how Asian Americans remain underrepresented in other domains. *See, e.g.*, Greg Braxton, *Asian Americans and Pacific Islanders Remain Underrepresented on Television, Study Finds*, L.A. TIMES (Sept. 12, 2017), https://www.latimes.com/entertainment/tv/la-et-st-asians-on-television-study-20170913-story.html [https://perma.cc/RHX5-DP2K].

54. Leong, *Misuse of Asian Americans*, *supra* note 19, at 94 ("Cambodian, Vietnamese, Thai, Lao, Burmese, Filipino, Native Hawaiian, and Pacific Islander students, among others, are underrepresented at many or most colleges and universities."); *see also* Wealth Snapshot, *supra* note 52 (noting that Asian Americans have an overall poverty rate higher than White Americans, and that certain ethnic groups—including Hmong, Cambodian, and Laotion—experience much higher poverty rates).

55. *See* Chin et al., *supra* note 47, at 151 ("From its introduction, the model minority myth has been used to chastise other minorities, to tell them that they are inferior to APAs in genes or culture. When the model minority image was introduced, the sociologist who described Japanese Americans sympathetically did so, he explained, to contrast them with 'what might be termed, "problem minorities."' More recently, Richard Herrnstein and Charles Murray asserted in *The Bell Curve* that

the context of higher education, presumptions about Asian work ethic and intellectual ability operate as a counterpoint to negative stereotypes about Black and Brown cultural deficiencies and intellectual inferiority—which in turn function to "rationalize" the relative underrepresentation of Black and Brown students in higher education.[56]

Collectively, these mutually reinforcing tropes perpetuate existing "racial lay theories"[57] about who does, and does not, belong in elite institutions of higher education.[58] Situated within contemporary debates over race-conscious admissions, these racial lay theories render Asian Americans a natural replacement for Whites as affirmative action's ostensible victims.[59] Building on "Affirmative Action 1.0," one could depict this emerging portrayal of affirmative action—which builds on the standard affirmative action myth—with the following equation, which I title "Affirmative Action 2.0"[60]:

"Affirmative Action 2.0"

Black Applicants v. Asian Applicants

(beneficiaries) ("victims")

Consistent with "Affirmative Action 1.0," Black applicants constitute the putative beneficiary of race-conscious admissions. The one change is that Asian-American applicants, absent from the first model, now occupy the role of victim historically held by Whites. White applicants, as a result, have been effectively excised from the affirmative action equation.

This twist on our standard affirmative action myth has come to structure debate about the Harvard litigation.[61] Much public commentary has, in turn, come to assume that Harvard's affirmative action policy pits Black and Brown applicants against their Asian-American counterparts. This framing benefits SFFA's broader campaign against race-conscious admissions. By positioning a

APAs and Whites were inherently more intelligent than African Americans, while Dinesh D'Souza argued in *The End of Racism* that APAs and Whites had cultures superior to that of African Americans.").

56. *See id*.

57. Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 153 (2014).

58. *See* Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open, What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1707–10 (2018) (describing how an "Elite Student Paradigm" centers whiteness and imagines students of color—particularly Black students—as perpetual university outsiders).

59. *See* Chin et al., *supra* note 47, at 148–49.

60. In addition to trading on aspects of the "model minority" myth just described, "Affirmative Action 2.0" reproduces many of the faulty presumptions laden in "Affirmative Action 1.0." *See supra* notes 26–29.

61. Consider, for instance, how this framing entered a defense of affirmative action in a recent New York Times Op-Ed: "A group of Asian-American students have accused Harvard of discriminating against Asian-American applicants by rejecting them despite their higher numerical scores in favor of African-American and Latino students." Robert Rhew, Opinion, *I'm an Asian-American Harvard Alumnus. Affirmative Action Works.*, N.Y. TIMES (Oct. 16, 2018), https://nyti.ms/2AcQFOD [https://perma.cc/RPF8-AW5Q].

minority group of color as affirmative action's victim, SFFA can weaken the normative appeal and doctrinal security of an already fragile set of policies.

It is also important to note how this emerging narrative effectively erases White applicants from the admissions competition. White applicants are, in effect, rendered disinterested witnesses and third-party bystanders to a policy that presumptively pits different groups of color against one other. Exculpated from the affirmative action debate, Harvard's White students (and applicants) are reinscribed as natural features of the Harvard landscape—presumed members of a university community admitted on their individual "merit."

This elision is critical to the conflation identified at the outset of this Article. With White applicants extracted from the perceived affirmative action equation, we become more prone to overlook the myriad ways in which Harvard's admissions regime confers racial benefits on White applicants.[62] This, in turn, distracts public scrutiny from a key component of SFFA's discrimination claim: Harvard's Asian penalty accrues to the benefit of Harvard's White applicants. Thus, even as SFFA repeatedly and explicitly details how Harvard's Asian penalty produces a White bonus, the dominant affirmative action narrative masks this core aspect of SFFA's theory of discrimination.

II.
WHAT AFFIRMATIVE ACTION MYTHS MASK: NEGATIVE ACTION

"Affirmative Action 2.0" has become the dominant frame through which the public views the Harvard litigation. Even if predictable, this frame is neither

62. This includes, for instance, a student's "legacy status, parents' employment at Harvard, recruited athlete status, or inclusion on the Dean's or Director's interest list." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *7 (D. Mass. Sept. 28, 2018). Building on prior research, Harvard economist Michael Hurwitz observed that the children of alumni at 30 elite institutions were 45 percent more likely to be admitted than their non-legacy counterparts. *See* Michael Hurwitz, *The Impact of Legacy Status on Undergraduate Admissions at Elite Colleges and Universities*, 30 ECON. EDU. REV. 480, 487 (2011). For Harvard's entering classes between 2014 and 2019, the legacy admission rate was 33 percent—as compared to an overall acceptance rate that hovers around 5 percent. *See* Expert Report of Peter S. Arcidiacono at 21, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB (D. Mass. June 15, 2018); *see also* Evan J. Mandery, End College Legacy Preferences, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/opinion/end-college-legacy-preferences.html. [https://perma.cc/MR4&-TRZP]. Even if formally "colorblind," legacy policies confer racial preferences on Whites, who remain overrepresented as the alumni from elite institutions. *See* Delano R. Franklin & Samuel W. Zwickel, *Legacy Admit Rate Five Times That of Non-Legacies, Court Docs Show*, HARVARD CRIMSON (June 20, 2018), https://www.thecrimson.com/article/2018/6/20/admissions-docs-legacy [https://perma.cc/4JSC-83E2] (describing SFFA's findings that around 21.5 percent of Harvard's white admits are "legacy admits" as compared to 6.96 percent for Hispanic admits, 6.63 percent for Asian-American admits, and 4.79 percent for African American admits respectively); M. Megalli, *So Your Dad Went to Harvard: Now What About the Lower Board Scores of White Legacies?*, 7 J. BLACKS IN HIGHER EDU. 71, 72 (1995) (detailing that as of 1994, 96 percent of Ivy Leagues alumni were White). Notwithstanding its negative impact on Asian-American applicants, a point made by SFFA's own experts, SFFA has elected not to challenge Harvard's use of legacy preferences. *See infra* note 125.

inevitable nor accurate. As noted above, SFFA concedes that affirmative action is not the source of Harvard's Asian penalty.[63] To better appreciate why, this next section unpacks SFFA's theory of discrimination, which involves two critical elements: (1) the Asian penalty produces a White bonus; (2) the Asian penalty arises from a facially race-neutral dimension of Harvard's admissions process.

A. Harvard's Admissions Process[64]

Whatever a student's credentials, getting into Harvard is not easy.[65] For the class of 2019, Harvard received over 37,000 undergraduate applications, 26,000 of which came from domestic applicants.[66] Of those, 8,000 domestic applicants had perfect converted GPAs and over 5,000 had a perfect math or verbal SAT score.[67] In total, Harvard offered admission to 2,003 students (roughly 5.4% of all applicants).[68]

Application review occurs over multiple stages. For the initial review, applications are divided across approximately twenty "dockets."[69] A subcommittee of admissions officials is responsible for the initial evaluation of each candidate within each docket.[70] To initiate the evaluation, a "first reader" reviews a subset of applications within her docket. The first reader assigns scores across five primary categories: (1) academic, (2) extracurricular, (3) athletic, (4) personal, and (5) overall. These scores often fall between 1 to 4, with 1 being the best.[71]

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63. *See supra* note 17.

64. The district court's summary judgment motion provides a more comprehensive overview of Harvard's admissions process. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB2, 2018 WL 4688308, at *2 (D. Mass. Sept. 28, 2018). My review is limited to those aspects of Harvard's admissions process most relevant to SFFA's claim that Harvard intentionally discriminates against Asian Americans.

65. It is, however, much easier if you have a parent who attended Harvard. *See supra* note 62 (discussing the magnitude of legacy preferences at elite institutions including Harvard).

66. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *2 (D. Mass. Sept. 28, 2018). Completed applications typically include the following components: (a) An applicant's demographic information, including race (if provided); (b) Family information; (c) Standardized test scores; (d) High school transcripts and GPA; (e) Information about the applicant's high school; (f) One or more essays; (g) A letter from a guidance counselor; (h) At least two letters of recommendation; (i) A detailed, multi-page evaluation from a Harvard alumni interviewer; (j) Answers from the applicant concerning intended academic concentration, extracurricular and athletic activities, and post-college career. *See id.*

67. *Id.* To calculate "converted GPA," Harvard employs a GPA index that creates a standardized metric across all high schools." *See* Local Rule 56.1 Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment on All Remaining Counts at 2, Students for Fair Admissions, Inc., v. Presidents & Fellows of Harv. Coll., No. 14-CV-14176-ADB (D. Mass. June 15, 2018)

68. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *2 (D. Mass. Sept. 28, 2018).

69. *Id.*

70. *Id.*

71. *Id.*

For purposes of SFFA's discrimination claim, the personal and overall ratings are most relevant. I accordingly focus on those categories. As described by Harvard, the personal rating "summarizes the applicant's personal qualities based on all aspects of the application, including essays, letters of recommendation, the alumni interview report, personal and family hardship, and any other relevant information in the application," and admissions officers assign the personal rating based on their assessment of the applicant's "humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities."[72] SFFA further describes the personal rating as a "'subjective' assessment of such traits as whether the student has a 'positive personality' and 'others like to be around him or her,' has 'character traits' such as 'likeability . . . helpfulness, courage, [and] kindness,' is an 'attractive person to be with,' is 'widely respected,' is a 'good person,' and has good 'human qualities.'"[73]

The overall rating, in turn, is "intended to summarize the strength of the application as a whole, although it is not determined by a formula and does not involve adding up the other ratings."[74] Pursuant to Harvard's formal policy, admissions officials may consider race when determining the overall rating.[75] Admissions officials are not, however, supposed to consider race when assigning ratings to the other primary categories—including personal rating.[76]

After every candidate has been evaluated by a first reader, subcommittees convene, discuss the applicants, and collectively determine whether to recommend that a candidate be admitted, wait-listed, or rejected.[77] After the subcommittees complete their respective reviews, the full admissions committee convenes to make final decisions respecting each candidate.[78] In both subcommittee and full-committee meetings, each admissions officer has one vote, and a majority vote controls for each admissions decision.[79] The subcommittee and full-committee members can potentially consider race as a factor in deciding which candidates to recommend or vote to admit, waitlist, or reject.[80]

B. Who Benefits from the Asian Penalty: White Applicants

SFFA alleges that Harvard intentionally penalizes Asian-American candidates because of their race.[81] In many respects, this is a standard disparate

72. *Id.*
73. Plaintiff's MSJ, *supra* note 17, at 7–8.
74. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *4 (D. Mass. Sept. 28, 2018).
75. *Id.*
76. *Id.*
77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.*
81. *See* Plaintiff's MSJ, *supra* note 17, at 27 ("At bottom, SFFA's claim is that Harvard penalizes Asian-American applicants who are not legacies or recruited athletes.").

treatment claim: Harvard's admissions officials purportedly treat individual Asian-American applicants worse than other applicants. For purposes of disentangling this discrimination claim from SFFA's broader assault on affirmative action, it is critical to mark who SFFA identifies as the beneficiary of this disparate treatment: Harvard's *White* applicants. In other words, SFFA anchors its discrimination claim to what we might think of as a "White bonus"—an unearned racial preference conferred upon White applicants to the detriment of their Asian-American counterparts.

To advance this claim, SFFA relies heavily on its expert's empirical analyses of six years of admissions data.[82] As described by SFFA, these analyses reveal the myriad ways in which Harvard penalizes Asians to the benefit of White applicants.[83] Specifically, SFFA contends that Asian-American applicants suffer disparate treatment relative to similarly situated Whites in three sites within the admissions process: (a) the personal rating; (b) the overall score; and (c) selection for admissions.[84]

1. The Personal Rating

According to SFFA's expert, "Harvard's admissions officials assign Asian Americans the lowest score of any racial group on the personal rating."[85] In the context of the personal rating, SFFA calculates the relationship between the Asian penalty and White bonus as follows: whereas Asian-American applicants receive a "personal rating of 2 or better 22% of the time only in the top academic-index decile, . . . white applicants receive a personal rating of 2 or better 22% of the time in each of the top five deciles."[86] In other words, according to SFFA's expert, outside of the top academic-index decile, White applicants are more likely than Asian applicants to receive a personal rating of 2 or better.

SFFA contends that this difference is unexplainable on grounds other than disparate treatment. SFFA's expert estimates that "[i]f Asian-American

82. *See id*. at 5–32.

83. SFFA's claim of a White bonus is not tangential to its discrimination claim. To the contrary, it is a focal point of SFFA's theory of an Asian penalty. *See* Appendix A (quoting numerous instances in which SFFA identifies a White bonus in its motion for summary judgment).

84. In this sense, SFFA's discrimination claim is predicated on a theory of disparate treatment. Under constitutional and statutory regimes, "disparate treatment" claims require evidence of conscious intent to discriminate. *See* Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (noting that "discriminatory motive" is an element of Title VII disparate treatment claims); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (supporting the proposition that it is unconstitutional for the state to *intentionally* employ facially race-neutral criteria in a racially discriminatory manner).

85. Plaintiff's MSJ, *supra* note 17, at 7. SFFA contends that in contrast to Harvard's admissions officials, "alumni interviewers (who actually meet the applicants) rate Asian Americans, on average, at the top with respect to the personal ratings—comparable to White applicants and higher than African-American and Hispanic applicants." *Id*. at 8.

86. *Id.* at 8. SFFA explains that "Harvard assigns each applicant an academic index, which is an objective measure of the applicant's academic qualifications." *Id.* at 8 n.2. To organize the data, SFFA's expert "sorted the applicants by their academic indexing and then divided them into deciles, or ten-percent increments." *Id.*

applicants were treated like White applicants, their chances of receiving a 2 or better on the personal rating would increase by 21%."[87]

2. The Overall Score

SFFA alleges that Asian-American applicants receive worse treatment than similarly-situated Whites in the overall score. As described by SFFA, "Asian-American applicants receive overall scores lower than White applicants in every decile. Indeed, Asian-Americans receive overall scores similar to white applicants that are one academic decile lower."[88]

Overall, SFFA's expert concludes that if Asian-American applicants were treated like White applicants, "their chances of receiving a 2 or better on Harvard's overall score would increase by 8%."[89] According to SFFA, this change in overall score matters: "The probability of admission (for all racial groups) increases by over 50% when an applicant's overall score moves from 3+ to 2."[90]

3. Selection

Lastly, SFFA contends that Asian-American applicants are less likely to be selected for admission as compared to White applicants with the "same overall score."[91] SFFA's expert reports that "even taking 'Harvard's scoring of applicants at face value, Harvard imposes a penalty against Asian Americans as compared to whites' that 'has a significant effect on Asian-American applicant's probability of admission.'"[92] According to SFFA's expert:

> An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white—even including the biased personal rating. Excluding the biased personal rating . . . an Asian-American applicant's change would increase to 34.7% if he were white. . . . If they had been treated like white applicants, an average of approximately 44 more Asian Americans per year would have been admitted to Harvard.[93]

The foregoing allegations of individual disparate treatment are troubling. It portrays an admissions regime in which Asian Americans suffer a racial penalty and their White counterparts reap a corresponding racial bonus. Yet even when central to SFFA's theory of discrimination, this dynamic—specifically the

87. *Id.* at 10 (emphasis added).
88. *Id.* at 9.
89. *Id.* at 10 (emphasis added).
90. *Id.*
91. *Id.* ("Even among those applicants with the same overall score, Asian Americans are less likely to be admitted than any other racial group.").
92. *Id.*
93. *Id.* SFFA also draws on an internal Harvard investigation that, according to SFFA, determined that "white applicants were admitted at a higher rate than their Asian-American counterparts at every level of academic-index." *Id.* at 13.

presence of a White bonus—is obscured when this litigation is perceived as all about affirmative action.

SFFA's own allegations, accordingly, expose how "Affirmative Action 2.0" misrepresents even the basic mechanics of SFFA's discrimination claim. A more appropriate model, which juxtaposes Asian penalty against White bonus, is reflected in the following equation, which I title "Negative Action"[94]:

Negative Action

White Applicants v. Asian Applicants

(accrue racial bonus) (suffer racial penalty)

On one side of the equation sit Harvard's White applicants, who receive an unearned racial bonus. On the other side sit Asian-American applicants, who suffer a commensurate racial penalty. Similar to the prior equations, this model is stylized and reductionist.[95] Nonetheless, it offers a more accurate portrayal of SFFA's theory of discrimination. And critically, by foregrounding the relationship between Asian penalty and White bonus, this model disrupts the narrative that affirmative action is the antagonist in this discrimination tale. Rather than implicating affirmative action, Harvard's Asian penalty reflects a manifestation of "negative action," a term Jerry Kang introduced two decades ago to describe an admissions process in which White applicants are admitted over their more qualified Asian counterparts.[96]

It is worth noting that SFFA also contends that Harvard treats Asian-American applicants, on average, differently than Black and Latino applicants. Given that Harvard openly employs affirmative action, the fact that Harvard considers the race of underrepresented students of color is neither surprising nor indicting. As Kimberly West-Faulcon recently explained, "[e]vidence that Harvard . . . admissions officials were race-conscious in implementing their racial affirmative action policies would only prove something the universit[y] likely already openly admit[s] and [is] willing to defend as constitutional—that [it] practice[s] racial affirmative action."[97]

In other words, such evidence does little more than reinforce that Harvard employs affirmative action—a fact that is not in dispute. What is far more revealing, and a point to which I now turn, is that even as SFFA attacks Harvard's formal consideration of applicant race, SFFA acknowledges that affirmative action is not the source of the alleged Asian penalty.

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94. The term "negative action" is taken from Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) ("By negative action, I mean unfavorable treatment based on race, using the treatment of Whites as a basis for comparison. In functional terms, negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted had that person been White.").

95. *See supra* notes 26–31, 51–60, and accompanying text.

96. *See* Kang, *Negative Action*, *supra* note 96, at 3.

97. West-Faulcon, *supra* note 11, at 627.

C. What Causes the Asian Penalty: Facially Neutral Conduct

An integral component of Kang's theoretical contribution was to mark that a university could employ affirmative action while simultaneously engaging in negative action against Asian Americans (to the benefit of Whites).[98] At the time of his piece, negative action existed more as abstract concept than concrete diagnosis. In an ironic twist, SFFA—by examining and exposing elements of Harvard's admissions process—appears to have advanced Kang's theoretical project.[99]

Specifically, SFFA builds its discrimination claim around the proposition that Harvard's affirmative action policy is not the source of Harvard's negative treatment of Asian Americans. According to SFFA's own expert, Harvard's "preferences for African-American and Hispanic applicants could not explain the disproportionately negative effect Harvard's admission system has on Asian Americans."[100] To translate, affirmative action (which SFFA characterizes as racial "preferences") cannot explain the alleged Asian penalty.[101] A different mechanism within Harvard's admission process—separate and apart from the university's formal consideration of applicant race—is to blame. In the context of SFFA's overriding antagonism toward affirmative action, this concession is remarkable.

The concession also explains SFFA's heavy reliance on statistical and anecdotal evidence to establish "intentional discrimination."[102] In the context of discrimination claims arising under Title VI and the Equal Protection Clause, the Supreme Court distinguishes between conduct that is facially race-*conscious* and that which is facially race-*neutral*.[103] Facially race-conscious conduct—such as Harvard's affirmative action policy—is presumptively unlawful and must satisfy strict scrutiny; no additional showing of discriminatory "intent" or "purpose" is

98. *See* Kang, *Negative Action*, *supra* note 96, at 4. Kang also recognized that a university could implement negative action through rigid numerical quotas or through a "'soft,' unquantified, gestalt admissions calculation." *See id.*

99. The Harvard litigation arguably offers the most compelling case of negative action to receive judicial review. This is ironic because, contrary to SFFA's organizational objectives, Kang introduced negative action within a broader defense of affirmative action. *See id.* Moreover, Harvard's alleged negative action calls for more, not less, race consciousness. *See infra* Part III.B (discussing how evidence of discrimination against Asians invites a race-conscious remedy).

100. Plaintiff's MSJ, *supra* note 17, at 13.

101. *See* Complaint, *supra* note 4, at 101–19.

102. The majority of SFFA's motion for summary judgment is dedicated to its section titled: "Harvard intentionally discriminates against Asian Americans." Plaintiff's MSJ, *supra* note 17, at 5–33.

103. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995),

necessary.[104] Facially race-neutral conduct, in contrast, is presumptively lawful and will fall only upon a showing of intentional discrimination.[105]

Accordingly, were affirmative action the source of the alleged Asian penalty, SFFA would have no need to establish intentional discrimination.[106] Yet as both parties and the district court recognize,[107] affirmative action is not the source of disparate treatment against Asians—that honor falls to a facially race-neutral component of Harvard's admissions process. SFFA's discrimination claim, in turn, is governed by precedent concerning facially neutral conduct, not the Supreme Court's affirmative action jurisprudence.[108] Thus, as the district court has noted, to prevail on its discrimination claim, SFFA must prove that Harvard acted with an "invidious discriminatory purpose."[109] This is a point that SFFA makes explicit:

> On its face, Harvard's "holistic" admission policy does not discriminate against Asian Americans. But facial neutrality will not save a policy when the "intent" is "to accord disparate treatment on the basis of racial

104. *See Adarand*, 515 U.S. at 227; Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.") (quotation marks and citation omitted).

105. *See* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("What we said in *Alexander v. Choate*, 469 U.S. 287, 293 (1985), is true today: 'Title VI itself directly reach[es] only instances of intentional discrimination.'"); *Feeney*, 442 U.S. at 274.

106. One can contrast SFFA's focus on intentional discrimination with Abigail Fisher's arguments in *Fisher v. Texas*, 136 S. Ct. 2198 (2016). Whereas SFFA dedicates two thirds of its summary judgment motion to proving "intentional discrimination," that phrase did not appear once within Abigail Fisher's brief to the Supreme Court. *See* Brief for Petitioner, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 5261568. This dissonance makes sense. Given that Fisher identified Texas's race-conscious admissions policy—a "racial classification"—as the source of her injury, strict scrutiny automatically applied; she had no separate burden to establish that Texas had acted with a discriminatory purpose.

107. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *12 (D. Mass. Sept. 28, 2018) ("In reviewing a uniformly applied facially neutral policy, '[d]etermining whether invidious discriminatory purpose was a motivating factor [in its adoption] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"). *See also* Defendant's MSJ, *supra* note 16, at 35 ("To prove [that Harvard intentionally discriminates against Asian American applicants in violation of Title VI], SFFA must show that Harvard 'discriminated on the basis of race, the discrimination was intentional, and the discrimination was a substantial or motivating factor for [Harvard's] action.").

108. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 242–46 (1976). One can think of three basic categories of "intentional discrimination": (a) racial classifications, *see* Gratz v. Bollinger, 539 U.S. 244, 253 (2003); (b) facially neutral laws intentionally applied in a discriminatory manner, *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886); and (c) facially neutral policies adopted because of their racially disparate impact, *see Arlington Heights*, 429 U.S. 252 (1977). SFFA's theory of discrimination sounds in the second category, which can be understood as a form of "covert intentional discrimination." *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657–59 (2015).

109. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *12 (D. Mass. Sept. 28, 2018). Though as Kimberly West-Faulcon recently noted, Title VI regulations also prohibit disparate impact. *See* West-Faulcon, *supra* note 11, at 615 n.100 (discussing the disparate impact provisions within Title VI regulations).

considerations." A violation therefore may be shown through proof that "the facially neutral policies is applied in a discriminatory manner."[110]

The foregoing statement deserves note, in part, because SFFA quotes decisions involving facially race-*neutral* state action.[111] Were affirmative action (a racial classification) the source of Harvard's alleged Asian penalty, such precedent—including such well-known cases as *Yick Wo v. Hopkins*[112]—would offer an odd citation. Yet when situated within SFFA's discrimination claim, which does not target Harvard's formal consideration of applicant race, the precedent is certainly appropriate. In relevant respects, SFFA's theory of negative action tracks the misconduct for which *Yick Wo* is remembered—that is, a facially neutral policy applied in a racially discriminatory manner.[113]

Harvard, unsurprisingly, challenges the veracity and methodology of SFFA's statistical analysis and the relevance of its anecdotal accounts.[114] Harvard further contends that SFFA's evidence of discrimination, statistical and otherwise, would be insufficient to establish "intentional discrimination" even if proven to be true.[115]

As a descriptive matter, Harvard is correct that "courts are reluctant to find intentional discrimination on the basis of statistics alone."[116] Notwithstanding its empirical analyses, SFFA has an uphill battle to prevail on its discrimination claim.[117] This, in many respects, is an underlying irony of this litigation. In a

110. Plaintiff's MSJ, *supra* note 17, at 5 (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484–85 (1982), and Anderson ex rel. Dowd v. City of Boston, 375 F.3d 71, 82 (1st Cir. 2004) (citing *Yick Wo*, 18 U.S. at 373–74 (1886))).

111. *See id.*

112. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1360 (2008) (describing *Yick Wo* as "[a] staple of constitutional law textbooks . . . understood to hold that 'the selective enforcement of a facially neutral statute may violate the Equal Protection Clause of the Fourteenth Amendment'").

113. *Yick Wo* is often cited for the proposition that the Constitution prohibits facially neutral conduct that is applied in racially discriminatory manner. *See, e.g.*, Anderson ex rel. Dowd v. City of Boston, 375 F.3d 71, 82 (1st Cir. 2004) ("Although plaintiffs may also invoke strict scrutiny review by showing that the facially neutral policy is applied in a discriminatory manner, *Yick Wo*, 118 U.S. 356, 373–74 (1886)."). In recent years, some scholars have challenged this standard. *See, e.g.*, Chin, *supra* note 112, at 1376 (arguing that *Yick Wo* was "not a race case at all"); Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 355 (1995) ("[T]he Chinese rights jurisprudence culminating in *Yick Wo* was possible only because the interests of Chinese aliens in fighting state discrimination converged with the interests of the federal judiciary in extending the Fourteenth Amendment to protect economic interests from state interference. The anachronistic reading of *Yick Wo* as a harbinger of the civil rights movement threatens to obscure from the American conscience a long and ugly era of racial hatred. The legal discrimination produced by this hatred was tempered only by self-interest and not by a desire for brotherhood.").

114. *See* Defendant's MSJ, *supra* note 16, at 36.

115. *See id.*

116. *Id.*

117. To buttress its case for intentional discrimination, SFFA claims that Harvard failed to act on multiple internal investigations that revealed anti-Asian bias within Harvard's admissions regime. *See* Plaintiff's MSJ, *supra* note 17, at 11–19. Even when coupled with the empirical analysis, it is unlikely that a court would view this evidence as sufficient to establish discriminatory intent. *See* Pers. Adm'r of

case that ostensibly centers Asian vulnerability and victimhood, the one piece of SFFA's complaint that confronts anti-Asian bias runs up against steep doctrinal hurdles.[118]

It is, of course, possible that SFFA ultimately prevails on its discrimination claim. This prospect, in turn, begs the following question: Were one to take seriously SFFA's theory of discrimination, what would a responsive remedy entail? I take up this inquiry in the final section below.

III.
A RE-DEFINED REMEDY

A. SFFA's Recommendation: Eliminate Affirmative Action

As described in the underlying complaint, SFFA requests the following relief:

> (a) a declaratory judgment that "any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Acts of 1964,"
>
> (b) a permanent injunction "prohibiting Harvard from using race as a factor in future undergraduate admissions decisions," and,
>
> (c) a permanent injunction "requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission."[119]

The foregoing request is neither surprising nor remarkable. Since before the litigation commenced, SFFA's objective has been clear: eliminate race-

Mass. v. Feeney, 442 U.S. 256, 274 (1979) (holding that in the context of facially neutral state action, a plaintiff must prove that the defendant engaged in the challenged conduct *because of its* disparate impact, not merely *in spite of* it). SFFA also analogizes Harvard's contemporary admissions scheme to the university's legacy of discrimination against Jews in the early twentieth century. Plaintiff's MSJ, *supra* note 17, at 23–25. From SFFA's perspective, this analogy situates Harvard's current admissions regime within an indefensible period of the university's history. Yet if one takes seriously the analogy and locates it alongside SFFA's evidence of a "White bonus," it reinforces the basic insight that affirmative action is not the antagonist in this discrimination story. As SFFA recounts, Harvard intentionally discriminated against Jews to preserve seats for White applicants. And as SFFA's expert reports, Harvard now penalizes Asian-American applicants to the same end.

118. *See* Suk Gerson, *supra* note 15 ("While a 'smoking gun' in a civil-rights case is not needed, proof of intentional discrimination is always a steep uphill climb."). This reality, in many respects, reflects the challenge posed by legal doctrines that require evidence of discriminatory intent, even as empirical scholarship on implicit biases and social cognition continues to reveal that disparate treatment often occurs in the absence of conscious intent. *See* Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 629 (2015) (discussing evidence that implicit biases lead to unintentional disparate treatment); Anthony Greenwald & Thomas Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOL. 669 (2014) (describing the prevalence of ingroup favoritism). *See also* Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. CIV. RTS. L.J. 1, 7–9 (2015) (surveying implicit bias within legal scholarship).

119. *See* Complaint, *supra* note 4, at 119.

conscious admissions at Harvard and beyond. It is accordingly predictable that SFFA requests just that.

But in the context of SFFA's core discrimination claim, this request is remarkable. Specifically, SFFA asks the court to eliminate a dimension of Harvard's admissions regime (affirmative action) that is not the source of the alleged Asian penalty (negative action). There is, accordingly, little reason to believe that the requested relief, if granted, would redress the identified injury.[120]

Equally curious is the fact that SFFA, in a lawsuit predicated on exposing and remedying anti-Asian bias, elects not to target Harvard's use of legacy preferences—even as SFFA notes that this practice disproportionately benefits White applicants.[121] Given histories of formal and informal anti-Asian discrimination at Harvard and beyond, it is not surprising that Asians are underrepresented in Harvard's alumni base, which remains predominately White.[122] In fact, SFFA details the preference accorded Harvard's White legacy applicants vis-à-vis Asian Americans.[123] SFFA's expert contends, for example, that an "Asian male who is not disadvantaged with a 25% chance of admission . . . would see his probability of admission rise to 79% if he was a white legacy and 87% if he was a white double legacy."[124]

Notwithstanding this additional evidence of a White bonus, SFFA expressly disclaims any interest in disrupting Harvard's existing legacy preferences.[125] In so doing, SFFA reaffirms that its mission has never been about eliminating the vulnerabilities that Asian Americans experience within Harvard's admissions regime.

An alternative, more generous, reading is that SFFA's decision not to target legacy preference was a strategic decision. Given that legacy preferences are facially race-neutral, SFFA would have to prove that Harvard employs them *because of* their disparate impact—a tall task.[126] This explanation, even if plausible, is dissatisfying for at least three reasons.

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120. Although beyond the scope of this Article, the disconnect between the identified harm and the requested relief raises potential questions about constitutional standing, which requires that a favorable decision would redress the identified injury. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). It is true that in the context of challenges to racial classifications, the Supreme Court has held that the mere presence of the racial classification satisfies standing requirements. *See* Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *Bakke*, 438 U.S. at 280 n.14. But with respect to SFFA's discrimination claim, SFFA is not challenging a racial classification. For this reason, there is reason to question whether the reasoning expounded in *Northeast Florida* and *Bakke* would extend to SFFA's discrimination claim.

121. *See, e.g.*, Plaintiff's MSJ, *supra* note 17, at 14.

122. *See supra* note 62.

123. *See* Plaintiff's MSJ, *supra* note 17, at 12-14.

124. Expert Report of Peter S. Arcidiacono at 66, Students for Fair Admissions v. Harvard, No. 14-cv-14176-ADB (D. Mass. June 15, 2018).

125. *See* Plaintiff's MSJ, *supra* note 17, at 27.

126. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (describing how the Supreme Court's discriminatory purpose standard effectively inoculates facially neutral state action from judicial review).

First, as noted above, SFFA already faces the high burden of proving discriminatory because Harvard's alleged Asian penalty arises out of a facially race-neutral dimension of Harvard's admissions process. It is accordingly unclear why the prospect of that same burden would dissuade SFFA from also challenging Harvard's use of legacy preferences. Second, legacy preferences—which predominantly benefit White applicants—align with SFFA's underlying theory of an Asian penalty and White bonus. Eliminating legacy preferences would, in turn, reduce race and class privilege that disproportionately benefits White applicants. Third, SFFA shows no signs of avoiding unfavorable precedent. To the contrary, SFFA's core request that the court prohibit universities from considering race would require a radical departure from existing doctrine.[127]

Beyond failing to remedy the underlying injury, SFFA's request for total colorblindness would, in fact, harm the many Asian Americans who cannot tell a comprehensive and fully textured self-narrative without invoking race.[128] Such a result appears particularly ill-suited within litigation that exposes how Asian Americans continue to face identity-contingent hurdles because of their race.[129] In this sense, by advocating for colorblindness, SFFA commits the sin for which it faults Harvard: reducing all Asian-American applicants to an undifferentiated and monolithic block. A race-conscious admissions regime, in contrast, enables Harvard to better navigate, appreciate, and account for the varied and nuanced talents, backgrounds, and experiences that define its many Asian-American applicants.[130]

At a more practical level, SFFA's request that admissions officers never know the race of applicants raises significant logistical questions. It is difficult to see how an institution could effectuate such a requirement. Harvard would have to abandon all existing practices that have the potential to reveal an applicant's race—a change that would fundamentally alter its admissions process. Harvard could no longer, for instance, permit alumni interviews (which often reveal, or at least suggest, race as a function of interviewee appearance).[131]

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127. *See Fisher II*, 136 S. Ct. at 2210. In light of *Fisher II*, the district court granted judgment for Harvard on SFFA's count alleging that any consideration of race is inconsistent with Title VI and the Equal Protection Clause. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-CV-14176-ADB, 2018 WL 4688308, at *8 (D. Mass. Sept. 28, 2018). Should this case reach the Supreme Court, SFFA will likely reassert this claim.

128. *See* Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISC. 64, 67 (2016). Even SFFA recognizes that, in some instances, Asian-American applicants benefit from Harvard's affirmative action policy. *See* Plaintiff's MSJ, *supra* note 17, at 20 ("Their race is rarely seen as a positive factor in the chances of admissions.').

129. *See* Devon Carbado & Cheryl Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1174–86 (2008) (describing the challenges that Justice Thomas would encounter if forced to tell a personal narrative without being able to speak to race).

130. Of course, the fact that a university employs race-conscious admissions does not, in itself, ensure that the university does so in a way that does not burden applicants with stereotypical judgments.

131. The number of sites across an applicant file that might reveal race illustrates the degree to which racial identity often informs an individual's life. *See* Carbado & Harris, *supra* note 129, at 1174.

Nor could it permit admissions officers to know any element of an applicant's profile that signals, directly or indirectly, the applicant's race.[132] In many cases, this would require scrubbing an applicant's name, leadership positions, honors, personal anecdotes, and organizational memberships.[133] For many applicants, this act of erasure would leave little with which to articulate a comprehensive and individualized personal narrative.

In short, complete colorblindness in admissions would harm individual Asian Americans, pose administrative hurdles, and reshape the admissions file and experience of many applicants. Moreover, it would deprive Harvard from access to information necessary to attain a holistic understanding of any individual student. Beyond constituting bad policy, barring Harvard from this information would undermine the Supreme Court's command that selection processes allow for the individualized review of each candidate.[134]

B. A Responsive Remedy: Target Negative Action

1. More, not Less, Race-Consciousness

To recap, SFFA alleges that Harvard intentionally penalizes Asian Americans to the benefit of their White counterparts. This alleged misconduct tracks a centuries-long tradition of anti-Asian "over-parity discrimination"—that is, the imposition of race-dependent barriers to curtail perceived Asian over-representation that threatens White market share.[135] The discriminatory policy challenged in *Yick Wo*, which tracked rising anti-Chinese sentiment in California and across the country, offers a poignant historical example.[136]

SFFA's discrimination claim accordingly reflects the contemporary manifestation of anti-Asian prejudice within the highest echelons of American society. If proven, this race-specific injury calls for race-consciousness relief. Thus, although in direct opposition to SFFA's organizational goals, evidence of intentional discrimination would invite an obvious remedy: race-conscious affirmative action. Such relief is consistent with established constitutional doctrine and would track a tradition of judicially imposed race-conscious remedies following findings of intentional discrimination.[137]

It also reveals the fragility of the proposition that race does not enter the selection process until the moment in which an institutional formally considers an applicant's race.

132. *See id*.

133. *See id*.

134. *See* Grutter v. Bollinger, 539 U.S. 306, 333–43 (2003).

135. *See* Gabriel J. Chin et. al., *Rethinking Racial Divides-Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 221 (1998).

136. *See* Joo, *supra* note 113, at 358 ("Anti-Chinese sentiment was largely economically motivated; this is reflected in the Exclusion Acts, which were directed specifically at Chinese laborers.").

137. *See* United States v. Paradise, 480 U.S. 149, 167 (1987) ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor."); *see also* Oppenheimer, *supra* note 16, at 934 ("In the case of judicially-approved remedies, a court may approve a settlement in a race discrimination case that includes an affirmative action remedy utilizing race-

For public and private actors bound by the Constitution and federal civil rights statutes, few justifications remain available to impose or voluntarily implement race-conscious remedies.[138] In the context of university admissions, the conversation almost inevitably bends toward diversity, which the Supreme Court has reaffirmed as a compelling state interest sufficient to justify the formal consideration of applicant race. But just as a focus on affirmative action masks White bonus, it also distracts from a separate—and arguably more relevant—rationale that could justify a race-conscious remedy in this instance. Even in a deeply divided Supreme Court, a majority of Justices—including those who are generally hostile to affirmative action—continue to condone race-conscious remedies designed to remedy identifiable "past or present racial discrimination" for which the defendant is responsible.[139] This consensus is predicated, in part, on the recognition that eliminating the discriminatory practice alone is insufficient to correct and eliminate the present effects of the underlying misconduct.[140]

Given this backdrop, SFFA's requested relief stands in direct opposition to the most natural and ambitious cure for intentional discrimination against Asian Americans. Rather than colorblindness, a responsive remedy would necessitate the implementation of a race-conscious policy capable of redressing the specific harm of negative action underlying SFFA's discrimination claim.

2. Targeted Racial Cloaking

SFFA requests total racial cloaking throughout the entire admissions process, such that Harvard cannot know the race of any applicant. For the reasons noted above, evidence of negative action invites a race-conscious remedy. This conclusion does not, however, necessarily foreclose the possibility that targeted racial cloaking could foster a more equitable admissions process by mitigating

conscious decisionmaking when there is a strong basis in evidence to believe that the defendant has engaged in illegal discrimination.").

138. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

139. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 301 (1978) ("[Racial classifications] also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination."); *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (Roberts, CJ., majority opinion) ("[I]t suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination.")..In contrast, "societal discrimination" does not constitute a compelling interest sufficient to justify the use of racial classifications. *See Croson*, 488 U.S. at 505 ("[N]one of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group.").

140. *See* Freeman v. Pitts, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.").

moments of potential anti-Asian bias. That said, to reduce negative action against Asians, a responsive and tailored cloaking strategy must account for and target the sites where Asian-American applicants face disparate treatment. SFFA identifies disparate treatment in the following components of Harvard's admissions process: the personal rating, the overall score, and Harvard's ultimate selection decisions.

SFFA's request, which is not limited to sites of identified disparate treatment, is overbroad in two key respects. First, it would extend to all parts of the admissions process—even those moments in which negative treatment of Asian Americans is not a concern. Second, it would preclude Harvard from engaging in affirmative action, even though affirmative action is not the source of harm and comports with existing statutory and constitutional standards. Given SFFA's broader campaign against affirmative action, SFFA would no doubt welcome this latter result. But whatever SFFA's organizational priorities, this result would unnecessarily trample Harvard's ability to engage in a practice that is consistent with the Constitution and federal law.

Nonetheless, if one took seriously the potential benefits of strategic racial cloaking, one could imagine a more tailored approach that targets the sites of disparate treatment and, critically, the beneficiaries of that disparate treatment. Thus, rather than adopt a policy of absolute colorblindness, Harvard could employ a more limited version of racial-cloaking designed to avoid negative action as manifest in Harvard's current admission regime.[141] In practice, this could entail a policy whereby Harvard, at moments in the evaluation process where Asian Americans face specific vulnerabilities of racial bias, subsumes all White and Asian candidates into a single racial category. The appeal of such a strategy is straightforward. Unable to distinguish between the race of Asian and White applicants, Harvard's admissions officials would be unable to penalize Asian applicants to the benefit of their White counterparts. This narrower intervention would attend to the underlying harm (that is, Asian penalty) and its corresponding beneficiaries (that is, White students) without compromising Harvard's ability to continue engaging in affirmative action.

To be clear, I am not suggesting that the foregoing strategy of partial racial cloaking is free of practical limitations or normative concerns. To the contrary, it is considerably fraught. Such a policy would entail the multiple complications associated with colorblindness generally—including implementation problems and the potential to burden applicants (whether Asian American or White) who cannot articulate a comprehensive and intelligible self-narrative without

141. This, in turn, responds to anxieties from Justices about race-conscious remedies that do not appear narrowly tailored to the identified harm. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) ("Because the Federal Government has a compelling interest in remedying past and present discrimination by the Department, the District Court unquestionably had the authority to fashion a remedy designed to end the Department's egregious history of discrimination. In doing so, however, the District Court was obligated to fashion a remedy that was narrowly tailored to accomplish this purpose.").

invoking race. For these reasons and others, a practice of targeted racial cloaking—even if feasible—would necessitate tremendous care and attention before any actual implementation. Failure to do so could invite perverse and unintended consequences without actually remedying the underlying harm. Thus, I offer this idea less as a concrete suggestion, and more as a thought experiment to reinforce the dissonance between SFFA's discrimination claim (which implicates negative action) and the relief it requests (which targets affirmative action).

CONCLUSION

The Harvard litigation appears destined for a Supreme Court with five Justices hostile to affirmative action. In this Article, I have argued that the greatest threat to affirmative action arises not from SFFA's factual allegations, but rather from a pervasive failure to decouple SFFA's assault on affirmative action from its claims of anti-Asian bias. As noted throughout, this conflation renders affirmative action susceptible to unwarranted critique and elides the racial preferences that Harvard's alleged Asian penalty bestows upon White applicants.

It is accordingly incumbent upon affirmative action's defenders—including Harvard—to disrupt conventional wisdom. Even if counterintuitive, the strongest case for affirmative action may necessitate uplifting—rather than diminishing and deflecting—SFFA's specific evidence of discrimination against Asians. Doing so exposes that negative action, not affirmative action, is the antagonist in this discrimination tale.

APPENDIX A: FROM ASIAN PENALTY TO WHITE BONUS

SFFA's theory of an Asian penalty is predicated, in part, on a corresponding White bonus. The following statements are illustrative:

- "Incontrovertible evidence shows that Harvard's admissions policy has a disproportionately negative impact on Asian Americans *vis-a-vis similarly situated white applicants* that cannot be explained on non-discriminatory grounds."[142]
- "Asian-American applicants are given a personal rating of 2 or better 22% of the time only in the top academic-index decile. *By comparison, white applicants* receive a personal rating of 2 or better 22% of the time in each of the top five deciles."[143]
- "Professor Arcidiacono found discrimination in the overall score, which, like the personal rating, is subjective. Asian-American applicants receive overall scores *lower than white applicants in every decile*. Indeed, Asian-Americans receive

142. *See* Plaintiff's MSJ, *supra* note 17, at 1 (emphasis added).
143. *Id.* at 8 (emphasis added) (internal citation omitted).

overall scores *similar to white applicants that are one academic decile lower*."[144]

- "[E]ven taking 'Harvard's scoring of applicants at face value, Harvard *imposes a penalty against Asian Americans as compared to whites*' that 'has a significant effect on an Asian-American applicant's probability of admission.'"[145]
- "If Asian-American applicants were *treated like white applicants*, their chances of receiving a 2 or better on the personal rating would *increase by 21%*."[146]
- "An Asian-American male applicant with a 25% chance of admission would see his chance *increase to 31.7% if he were white*—even including the biased personal rating."[147]
- "Looking at the number of Asian Americans denied admission because of the bias against them underscores the magnitude of the penalty. *If they had been treated like white applicants*, an average of approximately 44 more Asian Americans per year would have been admitted to Harvard over the six-year period the experts analyzed."[148]
- "OIR found that Asian-American admit rates were *lower than white admit rates* every year over a ten-year period even though . . . white applicants materially outperformed Asian-American applicants only in the personal rating. Indeed, OIR found that the *white applicants were admitted at a higher rate than their Asian-American* counterparts at every level of academic-index level."[149]
- "Stuyvesant [High School] is considered one of the top high schools in the country. What makes Stuyvesant especially relevant here, however, is that over 70% of its students are Asian American and it is considered a Harvard feeder school, routinely sending over ten students per year to Harvard—but generally less than half of whom are Asian American. Therefore, the fact the Stuyvesant's *white students have a far better chance of being admitted* to Harvard than their Asian-American peers is deeply troubling."[150]

144. *Id.* at 9 (emphasis added) (internal citations omitted).
145. *Id.* at 10 (emphasis added) (internal citation omitted).
146. *Id.* (emphasis added) (internal citation omitted).
147. *Id.* (emphasis added) (internal citation omitted).
148. *Id.* (emphasis added) (internal citation omitted).
149. *Id.* at 13 (emphasis added) (internal citations omitted).
150. *Id.* at 30 (emphasis added) (internal citations omitted).